

KUWAIT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kuwait remain on the Watch List in 2011.¹

Executive Summary: Over the past five years, copyright protection in Kuwait has improved for most industries due to cooperation with the Kuwaiti Ministry of Commerce (MOC), which has taken the primary role in enforcing copyright in the country.² Piracy problems remain, and non-deterrence in the courts remains a key hurdle to limiting piracy in Kuwait. IIPA also highlights the copyright law reform process ongoing in Kuwait. The Kuwaiti Government is considering a draft which appears intended to bring the current Copyright Law 1999 into compliance with TRIPS, create a more deterrent criminal penalties structure, and implement and join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA recommends immediate passage of the draft Law, with changes including those outlined below to ensure full TRIPS compliance and compatibility with the WCT and WPPT, and other important changes to improve copyright protection and reduce piracy.

Priority Actions Requested In 2011:

Enforcement

- Investigate and where appropriate prosecute cases involving end-user piracy of business software, as well as cases involving pirate software resellers and hard-disk loading of pirate business software onto computers being sold in the market.
- Once the Copyright Law is amended to provide mandatory deterrent fines and prison sentences, these penalties must be imposed by the courts in criminal cases to drive piracy levels down and defeat recidivism.
- Enforcement and Internet takedowns by Kuwaiti authorities should be applied against pirate vendors who sell or advertise products which are prohibited by marketing restrictions (such as religious requirements) and censorship rules. At present, enforcement is not even-handed and pirates effectively enjoy a state-enforced monopoly to sell restricted/banned materials on the streets or over the Internet, given the lack of action taken against them under copyright or other marketing/censorship grounds.

Legislation

- Amend the Copyright Law to provide mandatory deterrent fines and mandatory minimum prison sentences and confirm that end-user piracy of business software is considered a crime.
- Ensure the law provides incentives for ISPs to cooperate with right holders against online piracy.
- Amend and otherwise modernize the Copyright Law to meet the requirements of the TRIPS Agreement, implement (and join) the WCT and the WPPT and update the law to effectively address online piracy.

PIRACY AND ENFORCEMENT UPDATES IN KUWAIT

Business Software End-User Piracy: The business software industry continues to be harmed by business software end-user piracy. According to preliminary data, the PC software piracy rate in 2010 was 59% (a slight decrease from 60% in 2009), corresponding to a commercial value of US\$39 million for pirated U.S.-vendor software

¹ For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Other agencies previously involved include the Kuwaiti Ministry of Information (MOI), Kuwaiti Customs, and the Kuwaiti Ministry of the Interior (Police). In 2010, for internal political reasons, copyright enforcement moved jurisdictionally from the MOI to the MOC. It should be noted that this move, made after 14 years of working with MOI, represents a shift in enforcement, since the MOC only deals with trademark infringements, until they can build capacity and train staff for copyright offenses. In the meantime, copyright owners are being required to provide trademark registrations and other information about common law trademarks in order to continue to receive seamless enforcement of their rights in Kuwait. IIPA asks the U.S. Government to watch this development closely to ensure that 1) the failure to provide a trademark registration does not pose a bar to enforcement in Kuwait, and 2) the MOC's capacity and training is sufficient so they can continue the tradition of good enforcement built up in the MOI over the years.



(up from \$37 million in 2009).³ Many mainly small- and medium-sized enterprises in Kuwait, which are otherwise legitimate businesses, have failed to adequately license and pay for their software. Failure to address the problem of end-user piracy affects the ability of legitimate software businesses to operate in Kuwait and harms the development of the local IT industry. While cooperation with the Ministry of Commerce has improved significantly for the software industry, there has been no concerted effort to reduce the end-user software piracy rate through investigations, raiding where warranted, and criminal prosecutions. There were no end-user piracy raids in 2010.

More Enforcement Needed Regarding Hard-Disk Loading and Pirate Resellers: Two other major problems facing the software industry are the preloading of PCs with unlicensed or pirated software (so-called hard-disk loading) and pirate sales in the retail markets. Much of this activity takes place in Hawalli, Bin Khaldoun street, and the Al Fahahil area. Industry regularly brings enforcement leads to the Ministry of Commerce in Kuwait. The industry reports only three raids against pirate resellers in 2010. Industry would like to see more raids focused on pirate resellers of software and hard-disk loading in 2011. In addition, for those raids which are run, greater speed and transparency are warranted in order to maximize their effectiveness. Right holders cannot assist the authorities if they do not know about impending or past raiding activities.

Courts Hampered by Non-Deterrent Maximum Penalties: Piracy levels in Kuwait cannot significantly decrease until courts are empowered to administer deterrent penalties, including mandatory minimum fines and mandatory minimum prison sentences, as well as deterrent maximum fines and prison sentences. IIPA calls for the immediate passage of a new copyright law with minimum mandatory sentences and much higher maximum penalties, and penalties that include both fines *and* imprisonment for maximum deterrent effect.

Lack of Even-Handed Enforcement Against Piracy Versus Enforcement of Marketing Requirements and Censorship Regulations: The recording industry reports that the Kuwaiti authorities are very diligent about enforcing censorship regulations and banning legitimate product from legal stores for this reason. For example, the Virgin Megastore in Kuwait City was closed for three months due to restrictive marketing requirements and censorship. Meanwhile, the same product for which the Virgin Megastore was closed was openly available on the streets in pirated copies as well as over the Internet through pirate sites. The product is considered too “subversive” for the legitimate store shelves but is allowed to be made available through illegal means, while no similar enforcement action is taken in this respect.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Current Law (1999 Decree) Remains TRIPS-Incompatible and Contains Ambiguities; Draft Law Would Mark a Major Improvement With Some Additional Changes: Copyright protection in Kuwait is governed by the Copyright Law, Decree No. 64/1999 (effective February 9, 2000).⁴ The Law has never been interpreted through implementing regulations. The law fails to comply with TRIPS in certain important respects and contains other problems and ambiguities, all of which have been recounted in previous IIPA filings.⁵ Kuwait, an original member of the WTO, has joined neither the Berne Convention (the substantive portions of the Berne Convention are incorporated by reference into the TRIPS Agreement) nor the Geneva (phonograms) Convention. Kuwait should join

³ BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Kuwait. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

⁴ Originally, the Copyright Law was passed as Decree Law No.5/1999 Relating to Intellectual Property Rights, published in the official *Gazette*, issue no. 414 in June, 1999. When a new National Assembly was elected in October 1999, it revoked all decrees including the Copyright Law, but in December 1999, the National Assembly voted again to reissue the code as Decree No. 64/1999, which was ratified by the Amir on December 25, 1999. Decree No. 64/1999, was published in the official *Gazette*, issue 445 on Jan. 9, 2000.

⁵ See, e.g., International Intellectual Property Alliance, *Kuwait*, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.

those treaties as well as the WCT and WPPT. The Government of Kuwait is currently undergoing a copyright law reform process, with a new draft intended to meet TRIPS requirements and make other important changes. IIPA has preliminarily reviewed an informal translation of the draft Law and, based on this preliminary reading, supports its immediate passage with some important changes including those noted below.⁶ The following should be viewed as non-exhaustive and preliminary comments on the draft Law.

- **Draft Would Improve Penalty Structure:** The criminal provisions in the current Law provide for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,775) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half][sic] for recidivists”). These penalties are not “sufficient to provide a deterrent” as required by the TRIPS Agreement. This is the most important element of the law which must be remedied. The draft Law provides two levels of criminal penalties. For copyright infringement (including express mention of “making available” works “through computer systems,” on the “internet” or by “other means” for a minimum two month prison sentence and/or a fine of KD250 (US\$888) to KD50,000 (US\$177,600). Recidivists apparently receive both a minimum six month prison sentence and a fine of KD1,000 (US\$3,550) to KD100,000 (US\$355,000). For violations involving technological protection measures or end-user piracy (uploading or storing on a computer any copy of computer programs, applications or databases without a license from the author, the neighboring right holder or their successor), the penalty is a minimum three month prison sentence and/or a fine of KD1,000 (US\$3,550) to KD100,000 (US\$355,000). Recidivists apparently receive both a minimum nine month prison sentence and a fine of KD5,000 (US\$17,760) to KD200,000 (US\$710,400). IIPA supports this amendment, although it would still be preferable if on first offense a mandatory sentence included both imprisonment and a fine for deterrent effect.
- **Draft Would Implement WCT and WPPT But Clarifications Sought on Technological Protection Measures (TPMs):** The current Law does not implement the WCT and WPPT. The draft Law would confirm protection of reproductions regardless of their duration (i.e., temporary copies) and appears in the definition to provide a “communication to the public” right which includes an interactive right, includes exclusive rights of “transmission via information or communication networks” for works and an express “making available” right (“in any way” or “other means”) for related rights.
 - **TPMs:** With respect to technological protection measures (TPMs), the draft Law would make it a crime (with strict criminal penalties, especially as to recidivists) to “manufacture, import, or export” ... “any equipment, devices or instruments designed or prepared specifically to circumvent the protection technology,” as well as the act of “disabling or impairing” a TPM. There are shortcomings in the TPMs provision, including the apparent limitation on the types of circumvention devices covered (“designed or prepared specifically to circumvent”). It is also unclear from the syntax (in translation) whether the trafficking needs to be proved to be “for the purpose of sale, rental, circulation or transmission.” Proof of this purpose should not be required, as proof of the way in which devices, technologies, or services are marketed should be sufficient. Civil damages should be provided for violations involving circumvention of TPMs. Finally, IIPA is concerned about the “Explanatory Memo for Law No. () of 2011 Regarding Copyright and Neighboring Rights” which appears to say that “the relevant parties to whom the exceptions contained in Articles 44 and 45 apply” shall be permitted to “contravene or disable” TPMs “in order to benefit from such exceptions.” The draft Law does not so indicate so it would not appear that TPMs can be broken for such purposes. IIPA cautions that the WCT and WPPT requirement that TPMs protection be “adequate and effective” cannot be met unless any exceptions considered are narrowly tailored (i.e., not entirely co-extensive with all copyright exceptions).
- **Draft Would Provide Adequate Term of Protection for Computer Programs and Compilations of Data:** The current Law fails to provide computer programs and compilations of data with at least a TRIPS-compatible term of protection. The draft Law remedies this problem. The Kuwaitis take the opportunity presented by the draft Law

⁶ We note we only have access to a very informal and unofficial translation, so our comments herein are limited to the extent we cannot verify the complete accuracy of the translation we possess.

and follow the modern trend (more than 80 countries have greater than TRIPS minimum terms) to protect works for life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.

- Draft Would Provide Rental Right for Sound Recordings and Computer Programs: There is no express rental right for sound recordings and computer programs in the current Law. The draft Law would remedy this.
- Draft Would Provide Border Measures: The current Law contains no border measures as required by TRIPS Articles 51-59. The draft Law would provide border measures.
- Draft Would Fix Point of Attachment Issues: The current Law contained ambiguities with respect to point of attachment, e.g., for performers. The draft Law would remedy this issue.
- Draft Would Vest Appropriate Rights in Producers of Audiovisual Works: The panoply of exclusive rights for producers of audiovisual works according to Article 25 of the current Law is unclear. The draft Law would provide appropriate exploitation rights in producers of audiovisual works.

There remain some issues which should either be clarified or amended prior to passage of the draft Law.

- Availability of *Ex Parte* Civil Searches Should be Confirmed: The current Law does not expressly provide for civil *ex parte* search orders, as required by TRIPS Article 50. The draft Law does not contain an express provision for *ex parte* orders, although draft Article 52 seems to provide for provisional measures, including issuing an order to seize pirate copies, as well as materials, tools and implements used in the infringement. It should be confirmed that this order is to be granted on an *ex parte* basis in line with TRIPS.
- Presumptions of Ownership and Subsistence of Copyright Should be Confirmed: The Berne Convention requires a presumption as to authorship of works (Berne Article 15(1)) and to cinematographic works (Berne Article 15(2)). The Kuwaiti law should be amended to provide appropriate presumptions of ownership and should also provide for presumptions as to subsistence of copyright for works, performances and sound recordings.⁷ The draft Law provides the Berne authorship presumption in Article 1(3), but there remains no presumption of subsistence and no provision expressly applying the presumptions to related rights.
- Provision for Adequate Civil Compensation, Including Statutory Damages, Attorney Fees, and Costs Missing: The current law only contains rudimentary discussion of compensatory damages, and there is no structure in place for statutory damages, attorneys fees or costs. The draft Law does not appear to fix this deficiency.
- Proposed 'Developing Country' Compulsory License Should be Reconsidered, Must be Made (Berne- and) TRIPS-Compatible: Article 14 of the current Law amounts to an unacceptable compulsory license that is TRIPS- (and Berne-) incompatible. The draft Law provides in Article 43 for any person to "request the ministry to grant him a personal license for the reproduction, translation, or both together" ... "in order to meet educational needs of all types and levels." The terms of Article 43 require "fair compensation" and expressly require that steps two and three of the three-step test be met. Article 43 also provides for the license to be limited to a particular "time frame and place." These are helpful narrowing provisions, but implementing regulations must ensure (Berne- and) TRIPS-compatibility including meeting all the strict requirements of the Appendix. Also, the Berne Appendix is expressly reserved for "developing" countries, so we question whether Kuwait, having the eighth highest per-capita GDP in the world, should be able to enact such a compulsory scheme.

⁷ The law should be amended to include the presumption that, in the absence of proof to the contrary, the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance or phonogram in the usual manner, is the designated right holder in such work, performance or phonogram, and that, in the absence of proof to the contrary, the copyright or neighboring right subsists in such subject matter.

- Ensure Exceptions (Including Software “Adaptation” Exception) are Appropriately Narrow and Meet International Treaties’ Test: Any exceptions adopted in Kuwait must meet international standards and the three-step test of the Berne Convention and incorporated into the TRIPS Agreement. For example, the draft Law provides for a “single” back-up of a computer program, but also allows a “single” copy “in order to adapt the program, even if such adaptation exceeds the scope necessary for using such program.” Such copy or adaptation, in order to meet the international treaties’ test, must be limited to what is necessary as an “essential step” to use the computer program in conjunction with a particular machine, and subject to the proviso that such copy or adaptation would be destroyed when the machine is no longer being used. The draft Law provides that the “original or adapted copy must be destroyed upon the expiration of the holder’s title.”
- Law Must Provide TRIPS-Compatible Remedy as to “Materials and Implements”: Article 42 of the current Law authorizes the Court “to confiscate all tools used for the illegal publication—if they are suitable exclusively for such publication . . . ,” making it incompatible with TRIPS Article 61, which requires criminal remedies to include “the seizure, forfeiture and destruction of . . . any materials and implements the predominant use of which has been in the commission of the offence.” The draft Law does not remedy this deficiency, since Article 52 provides for “seizure of the materials used in republishing or reproducing this work, performance, phonogram or broadcast program, on condition that these materials be fit only for republishing said work, performance, phonogram or broadcast program.” The TRIPS language is clear and Kuwait must provide a TRIPS-compatible remedy.
- Moral Rights Provisions Must Avoid Impingement With the Exclusive Adaptation Right: The moral rights provisions in the current Law exceed what is provided for in Article 6*bis* of the Berne Convention, and could collide with the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1. The draft Law contains modified rights which come closer to the Berne requirements, and the request to “withdraw” a work from circulation could occur only “should serious reasons arise,” and requires “payment in advance” of “fair compensation,” although it remains worrisome that “substantial changes” can be ordered by a Court of First Instance.

Some needed reforms are not covered at all in the current Law or the draft Law.

- Law Fails to Provide for Internet Service Provider Responsibility and Foster Cooperation, Through Statutory Notice and Takedown and Policy to Deal With Repeat Infringers: The current Law contains nothing regarding how service providers should cooperate with right holders to address online piracy. The draft Law does not but should include principles of liability to hold those who facilitate infringement on the Internet accountable, and should include specific provisions related to service providers, including notice and takedown (including in the P2P context). It should also ensure that the law provides incentives for ISPs to cooperate with right holders against online piracy, including having in place effective and fair policies to deal effectively with repeat infringers.
- Current Laws Do Not Mandate or Foster Government Legalization of Software and Other Copyright Works and Sound Recordings: The Kuwaiti Government should address the need to provide that all government agencies use legitimate software and other copyright materials (works and sound recordings) and adequately manage government software usage. If such implementation exists in other laws, regulations or decrees that we are not aware of, the Kuwaiti Government should share this information.
- Law Does Not Provide Protection for Encrypted Program-Carrying Satellite Signals: The Kuwaiti law should be amended to make it a criminal offense to manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal without the

authorization of the lawful distributor of such signal; or willfully to receive or further distribute an encrypted program-carrying satellite signal knowing that it has been decoded without the authorization of the lawful distributor of the signal. In addition to criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities. The draft Law does not cover such acts.

- Law Does Not Provide Parallel Import Protection: The Kuwaiti law should be amended to provide an exclusive right to authorize or prohibit the importation into Kuwait of copies of works, sound recordings, and performances fixed in sound recordings, including where such copies were made with the authorization of the author, performer, or producer of the phonogram (i.e., parallel import protection). The draft Law does not expressly cover parallel imports.