

KUWAIT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kuwait remain on the Watch List in 2013.¹

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. The market remained relatively small for creative industries, but recent movement places Kuwait in an important position in the launching of legitimate distribution services for music in the Gulf region. Piracy problems remain, and non-deterrence in the courts remains a key hurdle to limiting piracy in Kuwait. IIPA makes this filing to seek to address those problems as well as to highlight 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 implements 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, accession to the WCT and WPPT, and other important changes highlighted below to improve copyright protection and reduce piracy.

PRIORITY ACTIONS REQUESTED IN 2013

Legislative

- Amend the Copyright Law to increase minimum and maximum fines and prison sentences, make them mandatory, 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.

Enforcement

- Investigate and where appropriate prosecute cases involving enterprise end-user piracy of software, as well as cases involving pirate software resellers and hard-disk loading of pirate 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 rules. At present, enforcement is not even-handed and pirates effectively enjoy a state-enforced monopoly to sell illegal materials on the streets or over the Internet, given the lack of action under copyright or other grounds.

COPYRIGHT LAW AND RELATED ISSUES

New Draft Law Takes Positive Steps and Should be Enacted with Some Additional Changes: Copyright protection in Kuwait is governed by the Copyright Law, Decree No. 64/1999 (effective February 9, 2000).² 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

¹For more details on Kuwait's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²Originally, 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.



filings.³ Kuwait, an original member of the WTO, has joined neither the Berne Convention (although the substantive portions of the Berne Convention are incorporated by reference into the TRIPS Agreement so Kuwait is bound by those) nor the Phonograms Convention. Kuwait should join those treaties as well as the WCT and WPPT. The Kuwaiti government has been stuck in a lengthy copyright law reform process since the early 2000s, with a new draft law emerging in 2012 apparently intended to meet TRIPS requirements and make other important changes. IIPA understands the new draft contains several important improvements over the current Decree and supports its immediate passage with some important changes.⁴ The following are some comments based on IIPA's understanding of the draft law, and should be viewed as non-exhaustive and preliminary.

- **Clarifications Sought on New Technological Protection Measures (TPMs) Provisions:** The draft law apparently contains a new criminal remedy with respect to technological protection measures (TPMs). The law could be most effective and ensure full coverage under the WCT and WPPT if:
 - “TPMs” are defined as “any technology, device or component that, in the normal course of operation, controls access to, works or objects of related rights or restricts the exercise of an exclusive right provided in this Law”;
 - all acts of trafficking are covered, including “manufacture, assembly, selling, renting, putting into circulation, import, or export” and should not be limited to such acts undertaken with a commercial purpose as is apparently the case in the current draft;
 - there is coverage of any technology, equipment, device, component or instrument promoted, advertised or marketed for the purpose of, or designed, adapted, performed or prepared principally to, circumvent TPMs, or providing any service related thereto; and
 - civil and administrative remedies are provided against the acts defined in the draft law.
- **Clarifications Sought on Communication to the Public Right:** The draft law apparently partially implements the WCT and WPPT, for example, by helpfully confirming protection of reproductions regardless of their duration. The draft law could better implement the WCT and WPPT by ensuring that the definition of “communication to the public” includes “the making available of the work or object of related rights in such a way that members of the public may access it from a place and at a time individually chosen by them” and ensuring that this interactive right applies to performances as well as phonograms.
- **Omission of Provisions on Internet Service Provider Responsibility:** The draft law apparently 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), and should 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.
- **Omission of Enumerated Exclusive Rights in Works:** The draft law apparently contains no specific enumeration of exclusive rights. This should be rectified.⁵

³See, e.g., International Intellectual Property Alliance, Kuwait, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.

⁴Among other improvements, the draft law would: 1) significantly increase the penalty structure; 2) protect technological protection measures (TPMs) and otherwise implements the WCT and WPPT, although certain clarifying changes to the language on TPMs should be made to ensure full coverage of access controls and all forms of trafficking including circumvention services; 3) criminalize end-user software piracy; 4) fix point of attachment issues in the current Decree; 5) narrow exceptions from a previous draft; 6) provide a Berne-compatible presumption of ownership for works, but not a presumption of ownership as to related rights, and no presumption of subsistence of copyright, which should be added.

⁵For example, in a previous draft IIPA has been privy to, the following exclusive rights were specifically enumerated: 1) “the right to reproduce the work directly or indirectly in any manner...”; 2) “the rights to translate his work into another language, modify, summarize, elaborate, and adapt the work in any other form”; 3) “the right to convey his work to the public through public performance, theatrical acting, broadcast through wire or wireless transmission, including transmission that allows any member of the public to view the work at the time and place of the public’s choosing, such as making available his work in electronic sites upon request”; 4) “distribute the original or copy of the work to the public through sale or any other action which transfers ownership”; and 5) “rental for commercial

- **Confirm Presumption of Ownership, Including as to Related Rights, and Presumption of Subsistence of Copyright:** The draft law apparently provides a Berne-compatible presumption of authorship. The draft law could be greatly improved by ensuring a presumption of ownership, including as to related rights, and a presumption of subsistence of copyright.⁶
- **Confirm Availability of *Ex Parte* Civil Searches as Required by TRIPS:** The draft law contains injunctive relief, but apparently does not contain an express provision for *ex parte* orders. The drafters should confirm expressly that such court orders are available on an *ex parte* basis in line with TRIPS.
- **Provide for Adequate Civil Remedies as Required by TRIPS:** 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 apparently contains no discussion of civil remedies, but should be amended to provide for compensatory damages, profits, statutory damages, and attorney fees and costs, as contemplated by TRIPS.
- **Draft Law Must Provide TRIPS-Compatible Remedy as to "Materials and Implements":** Article 42 of the current Law authorizes the court of urgent matters to confiscate all materials used for the illegal publication on "condition that these materials be fit only for republishing said work, performance, phonogram or broadcast program." making it incompatible with TRIPS which requires the seizure of materials and implements "the predominant use of which" has been in the infringement. The TRIPS language is clear and Kuwait must provide a TRIPS-compatible remedy.
- **"Registry" for Actions Taken May Violate TRIPS:** The draft law apparently includes a new "registry" for actions taken with respect to economic rights for works, performances, phonograms, and broadcasts. Assuming this amounts to copyright registration and is voluntary, it may be acceptable. As drafted, the provision apparently raises questions about whether both the registry as a prerequisite for "actions taken" and the costs involved with it, amount to an impermissible formality to protection which would be a blatant violation of TRIPS (and the Berne Convention).
- **Draft Law Should Ensure Exceptions 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. The draft law, for example, apparently limits personal copying, which is positive, but should also not permit copies made "in the form of reprography of the whole or of a substantial part of a book or of a musical work in the form of notation."
- **Proposed Compulsory License May Not Be Permitted in Kuwait:** The current Decree contains, and apparently the draft law proposes, a compulsory license which is not permissible in Kuwait. The draft law apparently provides for anyone to apply for a license for the reproduction or translation of any work to meet "educational needs" or the "needs of public libraries or archive institutes." While apparently the draft requires "fair compensation" and is not permissible if it otherwise conflicts with the Berne three-step test (i.e., if it conflicts with the normal exploitation of the work or causes unreasonable prejudice to the legitimate interests of the right holder) it otherwise does not meet the stringent requirements of the Berne Appendix. There is a legitimate question as to whether the Berne Appendix, expressly reserved for "developing" countries, is available to Kuwait.
- **Moral Rights Provisions Should be Narrowed:** The moral rights provisions in the draft law could be further narrowed by 1) ensuring that the right to "publish" is in fact a right of first divulgation (apparently the word "first" is

purposes of the original or copied work fixed in a sound recording or from a cinematographic work or computer program," except that "the exclusive right in a computer program shall not be applied unless the program itself was the essential subject of the rental."

⁶There should be a 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.

missing); 2) ensuring that the protection against modifications does not collide with the exclusive adaptation right of an author, i.e., prohibiting only those modifications or distortions which would “be prejudicial to the author’s honor or reputation,” and ensuring that any translation undertaken may only be done “with authorization”; and 3) removing any article allowing the author to “withdraw” a work from circulation, or allowing an author to make substantial changes after the economic rights have been transferred, since this would surely collide with economic rights as enumerated in TRIPS and Berne.

- **Draft Law Should Not Create Unreasonable Restrictions on Ability to Contract, or Divest a Joint Work Author of Its Rights Upon Death:** The draft law apparently restricts the ability of a joint work author to exploit the work without the authorization of the other, unless otherwise provided. Whether or not the contribution made by each of them can be separated from that of the other, joint work authors should be permitted to use the work, subject to an accounting, as is the global standard practice. Thus, the presumption should be reversed in the draft law. In addition, apparently the draft law divests the joint work author who dies first of its rights, devolving to the remaining authors. This should be deleted and the rights in such a work should devolve to the author’s heirs.
- **Definition of “Work” Should Not Be Tied to “Innovativeness”:** While this is undoubtedly in part a translation issue, the definition of “work” in Article 1 apparently still requires proof of an “innovative” character. The law should cover any literary, artistic, or scientific work, regardless of its type, form of expression, significance, or purpose, and can refer to the enumerated list of works as examples.
- **There is No Coverage of Rights Management Information (RMI):** To ensure full implementation of the WCT and WPPT, the draft law should cover rights management information, defining it properly, and prohibiting the unlawful tampering with or trafficking in RMI or works or objects of related rights which voluntarily employ RMI.
- **Current Laws Do Not Mandate or Foster Government Legalization of Software and Other Copyright Works and Sound Recordings:** The Kuwaiti government should clearly mandate that all government agencies use legitimate software and other copyright materials (works and sound recordings) and adopt software asset management best practices. If such implementation exists in other laws, regulations or decrees that we are not aware of, the Kuwaiti government should share this information.
- **Law Should Provide Protection for Encrypted Programs:** 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 encrypted programs without the authorization of the right holder; or willfully to receive or further distribute an encrypted program knowing that it has been decoded without the authorization of the right holder. In addition to criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.
- **Draft Law Should Extend Terms of Protection:** The Kuwaitis should take the opportunity presented by the draft law 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.
- **Law Does Not Provide Parallel Import Protection:** In addition to its apparent failure to enumerate exclusive rights, the draft law does not, but should, provide an exclusive right to control the importation into Kuwait of copies of works, phonograms and performances (i.e., including parallel import protection).

PIRACY AND MARKET-RELATED ISSUES IN KUWAIT

Piracy and some market-related issues (e.g., censorship practices which result in banning and, on occasion, confiscating legitimate product from legitimate stores) remain difficult problems in Kuwait, hindering legitimate businesses from taking hold and driving others out of Kuwait.⁷ Piracy in Kuwait today consists of: 1) software piracy issues, including enterprise end-user piracy of software, by which small- and medium-sized enterprises in Kuwait, which are otherwise legitimate businesses, and the preloading of PCs with unlicensed or pirated software (so-called hard disk loading);⁸ 2) pirate sales in the retail markets;⁹ and 3) Internet or mobile (or mobile device) piracy. Right holders report some continued limited cooperation from the Ministry of Commerce and some results in the courts, although these are non-deterrent, largely due to the small numbers of cases being prosecuted and the extremely low criminal penalties achieved in such cases. With legitimate digital services launching in Kuwait (along with phone offerings such as the iPhone5), it is incumbent upon the Kuwaiti government to ensure an adequate legal and enforcement framework exists to deal with piracy.¹⁰ In particular, it is critical that the Kuwaiti government be urged to swiftly pass the draft copyright law (discussed above) which will immediately impose much higher, more deterrent, minimum mandatory sentences and maximum penalties.

⁷For example, in our 2011 filing, we noted that 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 (including recorded music, but also an estimated 25% of its inventory was books) was openly available on the streets in pirated copies as well as over the Internet through pirate sites. The product was considered too “subversive” for the legitimate store shelves but was allowed to be made available through illegal means, while no similar enforcement action was taken in this respect. The situation in 2012 only worsened. According to publishing industry reports, Virgin Megastore, whose inventory included 20-25% books, has now completely shut down operations in Kuwait due, in part, to restrictions on selling certain CDs, DVDs, and other copyrighted content stemming from increasingly strict censorship. A local story posted in April 2012 provides further details <http://www.arabianbusiness.com/virgin-megastore-pulls-kuwait-operations-store-close-end-feb-444522.html>.

⁸BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Kuwait was 59%, representing a commercial value of unlicensed software of US\$72 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

⁹Much 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 very few retail raids in the past couple of years. In addition, for those raids which are run, greater speed and transparency are warranted in order to maximize their effectiveness.

¹⁰Noelle Manalastas, *Apple Opens iTunes Store in Middle East, Unveils iPhone 5 Release Date*, Al Arabiya News, December 5, 2012, at <http://english.alarabiya.net/articles/2012/12/06/253621.html>.