

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the United Arab Emirates be placed back on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** After many years off the Special 301 lists, the situation in the United Arab Emirates warrants placement back onto the Watch List. For many years, IIPA members experienced exemplary enforcement efforts on the part of the UAE enforcement authorities, including the Dubai Police, the Telecommunications Regulatory Authority (TRA), the Ministry of Information and Culture (MOIC) (when it was responsible for copyright), and until two years ago, the Ministry of Economy (MOE). They also received deterrent court judgments enforcement results which achieved reductions in piracy levels, making the UAE a model for the Gulf region. With an emerging digital marketplace, including legitimate digital services launching in the region (along with phone offerings such as the iPhone5), the UAE government must once again step up as a role model for the Gulf region and indeed the entire Middle East.<sup>2</sup> Great hopes now lie with the UAE government to ensure that continued progress to create a favorable environment for IPR protection can deliver economic and cultural benefits for the UAE and the Middle East region.

Unfortunately, some serious concerns must be expressed. First is the inability of the recording industry to begin collecting in the UAE the royalties they are legally entitled to collect under the UAE Copyright Law. The result of there being no established mechanism to collect is that U.S. and other right holders are losing millions of dollars per year in uncollected royalties. Piracy and counterfeiting also continue, particularly in the Dubai trading zone. Internet-based piracy and violations involving the circumvention of technological protection measures (TPMs) have grown significantly in recent years, especially after the MOE ceased instructing TRA to take enforcement action against the many notorious sites and sites geared to the UAE market. Unlicensed software use by enterprises (enterprise end-user software piracy) continues to be a problem and accounts for significant losses to the software industry. The software piracy rate is nearly 40% with a commercial value of unlicensed software of over \$200 million.<sup>3</sup> Industry experts also report that pay-TV piracy in the Middle East/North Africa region cost operators US\$500 million in revenue every year, at least some of which is attributable to the UAE.<sup>4</sup> The legal framework in the UAE is relatively sound, although MOE claims it needs changes to the law in order to resume Internet enforcement activities (through TRA), and in the amendment process, the government should take other steps to fully modernize the Law. With more content industries seeking to open or expand commercial activity in the Emirates,<sup>5</sup> it is of critical importance that all the deficiencies outlined herein be addressed with urgency.

<sup>1</sup>For more details on United Arab Emirates' Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Previous years' reports on the UAE are not available electronically, but are on file with IIPA (and part of the public record submitted to USTR).

<sup>2</sup>Noelle 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>.

<sup>3</sup>BSA | 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 the UAE was 37%, representing a commercial value of unlicensed software of US\$208 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>.

<sup>4</sup>Marie-Louise Olson, *New Copyright Laws to Curb Film and Music Pirates*, December 13, 2011, at <http://www.thenational.ae/news/uae-news/technology/new-copyright-laws-to-curb-film-and-music-pirates#ixzz2HjbyoKWD> (citing David Butorac, chief executive of OSN Network, the cable and satellite operator).

<sup>5</sup>In the past couple of years, IIPA members have shown greater interest and concern over developments in UAE. The launch of iTunes in UAE on December 14th is an important development, signaling the belief by a major music distributor that the market holds growth potential. Right holders have cemented deals with a variety of digital platforms, major artists are touring and selling out venues (e.g., Madonna, Enrique Iglesias, JLO, Katy Perry have all had sold-out tours), and the success of the Voice of Arabia has incentivized greater investment in local talent.



## **PRIORITY ACTIONS REQUESTED IN 2013**

- Have the MOE issue rules so that collecting societies can begin collecting in the UAE the royalties to which they are legally entitled under the UAE Copyright Law.
- Have the MOE once again take more proactive steps in addressing copyright violations on the Internet, including properly instructing the TRA with respect to Internet sites involved in the distribution of infringing copyright materials and circumvention tools.
- Modernize Federal Law No. 7 of 2002 Concerning Copyrights and Neighboring Rights to ensure adequate legal protections and remedies against circumvention of technological protection measures (TPMs), and the trafficking of or servicing in technologies, devices, or components principally made, promoted, or marketed to circumvent TPMs.

## **PIRACY AND ENFORCEMENT ISSUES IN UAE**

**Allow Legitimate Collection of Royalties for Uses of Phonograms:** Broadcasting and the public performance are increasingly important uses of recorded music. The types of commercial establishments that use recorded music for this purpose include radio stations, hotels, restaurants, shops, discos, bars, dance schools, airlines, etc. The UAE Copyright Law provides the relevant rights. Specifically, Article 18 of the UAE Copyright Law states that producers of phonograms enjoy rights to any exploitation (including copying, renting, broadcasting, re-broadcasting, disseminating by wire, wireless, computer or other means, or making available to the public via computer or other media) of their phonograms. Article 37 of the Law provides that anyone who engages in such exploitation without permission from the right holder infringes copyright and is made subject to criminal penalties and civil remedies.

Due to the nature of these rights in phonograms, licensing of the use of phonograms has become an increasingly important part of the overall revenue stream for performers, producers of phonograms, songwriters, composers, and music publishers throughout the world.<sup>6</sup> Section 16 of the Law enables the creation of collecting societies and provides for the undertaking of collective rights administration. Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighbouring Rights established the basis on which licenses permitting collective management activities would be granted by the Ministry. Based on the Law and Ministerial Decision, in 2004, the recording industry took steps to establish Emirates Music Rights Society (“EMRS”) in the UAE to serve as a collecting society. Nearly nine years later, after ongoing requests from the industry and the U.S. government, considerable efforts on the part of both to comply with numerous meeting and information requests from MOE, MOE has not yet promulgated regulations that would permit the approval of a collecting society.<sup>7</sup> This refusal to approve collecting societies has come despite many assurances from MOE (and its predecessor the Ministry of Information and Culture) that a decision was imminent. In the absence of government approval for a collecting society, there is no practical way for right holders to enforce their rights, leading to millions of dollars each year in lost revenues to U.S. and other foreign right holders.

**Internet Piracy and Lack of Responsiveness from MOE:** According to the International Telecommunications Union (ITU), Internet broadband penetration in the UAE has skyrocketed, to almost 867,000

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<sup>6</sup>Globally, the most effective, efficient and user-friendly way for right holders to license their catalogues to commercial establishments that use recorded music in the operation of their businesses is through collecting societies. For each individual right holder to license its catalogue directly to each and every user in a given territory is impossible from a practical standpoint. The same applies to individual users, for whom it would be impossible to obtain licenses for playing recorded music from all right holders involved. Therefore, it is an internationally accepted practice that collecting societies are an essential element for the efficient licensing of the relevant rights granted under national copyright laws.

<sup>7</sup>As an example, in 2008, MOE Under-Secretary Mohammed Ahmed Bin Abdul Aziz requested and received from the recording industry information on how collecting societies work in other countries. Several requests and meetings later, including a meeting in December 2008 in UAE with MOE official, Mr. Fawzi Al Jaber, who stated that his Ministry was awaiting further guidance from WIPO. We understand WIPO has offered assistance on this matter. However, more than four years later, MOE still has not acted to legalize collection in UAE.

and nearly 11% of all Internet users, more than doubling since 2006 and more than a ten-fold increase since 2003.<sup>8</sup> The TRA pegs Internet penetration in the UAE at 27.7% and broadband penetration at 11.5%.<sup>9</sup> Mobile phone penetration has long exceeded 100% and by 2011, stood at 148.6% or more than 11.7 million subscriptions throughout the Emirates.<sup>10</sup> A significantly high number (71%) of mobile users access the Internet through their mobile phones, according to a 2011 survey.<sup>11</sup>

As a result, online piracy in the UAE has proliferated, harming all the content industries.<sup>12</sup> Based on download statistics of pirated titles of Sony PS3, UAE is the second worst offender of copyright online in the Middle East, second only to Saudi Arabia. Internet piracy needs to be immediately addressed within the UAE. Hundreds of websites, mostly hosted on servers located outside the Emirates, have been brought to the attention of MOE. The websites being accessed in the UAE, making available pre-release music, movies, television content, software, games, and publications, reference books, online journals, and trade books of top publishers, include some of the most notorious online piracy sites in the world, and include sites clearly intended to market to those in the region including in the UAE.<sup>13</sup> In 2010, relying on the current UAE Copyright Law, the TRA had taken actions with respect to over 100 websites, including online piracy sites but also those making available circumvention devices for console-based videogames.<sup>14</sup> In addition, there were over 100 server addresses engaged in signal theft piracy for which TRA took action based on an MOE directive. Six criminal cases were apparently launched back in 2010.

Unfortunately, when MOE stopped issuing such directives, enforcement ceased, and piracy and illegal circumvention activities online anecdotally increased.<sup>15</sup> MOE should now issue clear directives to TRA to take steps as they did in the past to ensure infringing copyright content is not available to users within the UAE. In addition, MOE needs to resume working with TRA with respect to the sale of hard goods piracy or circumvention technologies or devices over the Internet. Unfortunately, notwithstanding significant industry preparatory activities, including test purchases of circumvention devices, MOE has not provided proper instructions to TRA.<sup>16</sup> In the meantime, in the face of MOE having ceased to inform TRA on significant piracy and circumvention services, significant numbers of users in the UAE are now downloading illegal content, namely, pirate content and circumvention tools.<sup>17</sup> The industry has

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<sup>8</sup>International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 12, 2013.

<sup>9</sup>United Arab Emirates Telecommunications Regulatory Board (TRA), at [http://www.tra.gov.ae/latest\\_statistics.php](http://www.tra.gov.ae/latest_statistics.php).

<sup>10</sup>International Telecommunication Union, *Mobile Cellular Phone Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Mobile-cellular2000-2011.xls>, accessed on January 12, 2013.

<sup>11</sup>*Half of Users Access Internet via Mobile in UAE*, Emirates 24/7, Feb. 2, 2011, at <http://www.emirates247.com/business/technology/half-of-users-access-internet-via-mobile-in-uae-2011-02-02-1.350716>.

<sup>12</sup>The music industry is one of the hardest hit industries by Internet piracy. Local record producer Joshua Williams, who runs the JFW Music & Sound recording studio in Al Quoz in Dubai, was recently quoted saying, "Illegal downloading has completely changed the music scene and makes it impossible for people like myself to survive." See Marie-Louise Olson, *supra* note 4.

<sup>13</sup>For example, USTR continues to list *thepiratebay* in its Notorious Markets Report, since, "[d]espite the criminal conviction of its founders, Sweden-based PirateBay continues to facilitate the download of unauthorized content." USTR also listed *Kat.ph* (formerly *kickasstorrents*) as "notable for its commercial look and feel" and as being "ranked by Alexa.com among the top 135 most visited sites in the world, and within the top 40 sites visited in the Philippines, Pakistan and Sri Lanka." See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA, in its Notorious Markets filing to USTR, listed *Isophunt* which has been notified to MOE. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf). Other sites notified to MOE have titles like "dvd4arab," "tvboxarabia," "3arabtv," indicating they clearly are targeted toward an Arabic language audience. Other sites notified as being available in UAE either have "torrent" in their title, indicating a connection with the bittorrent technology for rapid file sharing, "warez" or other indicators of involvement in unauthorized content.

<sup>14</sup>Representatives working on behalf of the entertainment software industry have reported takedowns of hundreds of auction sites including *souq.com* (which provided illegal movies, TV series, pay-TV programs and bouquets, and games) and *dubizzle.com* which were suspected of selling "Jailbreak" circumvention technologies/devices.

<sup>15</sup>The position of MOE is apparently that the UAE Copyright Law needs to be amended in order to address Internet piracy before MOE can issue further directives, and that draft amendments to the Law would accomplish what is needed for such directives to recommence. In the meantime, anecdotally, an entertainment software company noticed that circumvention activities online trended upward since enforcement ceased, and the number of downloads also increased significantly in the absence of enforcement until it began taking counter-measures.

<sup>16</sup>Several anecdotal instances indicate that TRA is ready to resume its activities of working with right holders to ensure pirated materials or illegal circumvention tools or technologies are not available in the UAE. The ball seems to be in MOE's court at present.

<sup>17</sup>In the absence of MOE cooperation on Internet piracy and the sale of pirated merchandise or circumvention tools over the Internet, the Dubai Police Department has apparently been helpful, for which they should be commended. Industry representatives have also approached the Emirates Intellectual Property Association, the Office of the Public Prosecutor, the Abu Dhabi Police and the TRA for guidance.

tried to fill the void with notifications to some of the sites to demand that they cease distributing pirated content, and similarly, we understand the MOE has sent their own notifications to cease distributing copyrighted content without authorization. Instances remain up, however.

**Enforcement Efforts Otherwise Excel in the UAE:** The UAE has for many years enjoyed a status as a model for the Gulf region, given the exemplary enforcement efforts on the part of the UAE enforcement authorities, good court judgments, and deterrent enforcement results, resulting in significant reductions in piracy levels. Notwithstanding difficulties in Internet enforcement experienced with the MOE, other departments have excelled in combating piracy. For example, the UAE Police have systematically raided sources of physical piracy, and also established a specialized unit (the Economic Crimes Section) to routinely deal with all IPR infringement issues. In addition, the UAE Police force has established within it a computer cybercrime unit to deal specifically with Internet violations and have effected numerous raids against servers involved in copyright piracy activities within the country. The judiciary remains a strong point in the UAE system for the protection of IP infringements, routinely issuing judgments including prison sentences against serious copyright violations. Finally, the various municipalities have officers that regularly arrest and seize unlicensed pirate optical disc sales, driving such activities underground.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in the UAE is provided by virtue of Federal Law No. 7 (2002) Concerning Copyrights and Neighboring Rights (effective July 1, 2002). The UAE became a member of the WTO on April 10, 1996 and thus is bound to abide by the TRIPS agreement. The UAE acceded to the Berne Convention and the WIPO Copyright Treaty (WCT) effective July 14, 2004 (but the UAE must also join the WIPO Performances and Phonograms Treaty, the WPPT). Reportedly, the Ministry of Economy plans to enact amendments to the Copyright Law to make certain needed changes, following a study by the Abu Dhabi Technology Development Committee which was to be released in early 2012.<sup>18</sup> The plans reportedly include tougher policing and the establishment of specialized intellectual piracy courts. The current Law contains only rudimentary protections against the unauthorized act of circumvention of technological protection measures (TPMs) and against the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs.<sup>19</sup>

A few areas remain of concern, including some potentially unreasonable restrictions on the ability to freely contract,<sup>20</sup> the compulsory license provisions which require implementing regulations to ensure they are in conformity with the Berne Appendix,<sup>21</sup> and restrictions on the ability of joint authors to use joint works without permission of the other joint author (Article 25). It also must be confirmed that TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches. In addition, the UAE should take the opportunity of amendments to 1) provide for statutory (pre-established) damages, 2) add a presumption of subsistence of copyright, 3) extend terms of protection to life plus 70 for natural authors and 95 years for works of corporate authors, 4) confirm that costs and attorney fees are available, 5) provide protection against unauthorized decryption of program-carrying signals and the manufacture of decryption devices (and provision of decryption services), 6) raise minimum and maximum fines for copyright

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<sup>18</sup>Marie-Louise Olson, *supra* note 4.

<sup>19</sup>It should be made clear that both 1) the act of circumvention of technological protection measures that effectively control access to copyrighted materials or materials, and the circumvention of TPMs that effectively control the exercise of exclusive rights, and 2) trafficking in devices, technologies, components, and services that facilitate the circumvention of both access control TPMs (independent of the existence of any infringement) and copy-control TPMs, are covered. It should also be confirmed that access control TPMs are covered (at present, Article 38(1) covers a TPM "for preservation of specific standard of quality of the copies," which does not seem to cover all access control TPMs). Violations involving TPMs should be subject to both civil and criminal remedies which appears to be the case except TPMs violations are described in Article 38 which is a criminal penalty provision.

<sup>20</sup>For example, Articles 11 (right of transferor to return to court for reconsideration) and 15 (making invalid "any action" with respect to "more than five" of an author's works) are unreasonable restrictions, and should be left in general to marketplace solutions rather than be restricted as there are here by statute.

<sup>21</sup>Article 21 of the law provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See Berne Convention Members, World Intellectual Property Organization, at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing the licenses, which are disfavored by copyright owners, the government of the UAE must ensure that strict adherence to the rules of the Appendix are followed.

infringement (Article 37), among other desirable improvements, and 7) confirm full retroactive protection.<sup>22</sup> In addition, there are at present no provisions specifically related to Internet infringements, namely, the extent to which Internet service providers should be held accountable for online infringements, including notice and takedown, as well as mechanisms to deal with non-hosted infringements, including fair and effective measures to deal with repeat infringers. In addition, the UAE government should ensure that it takes proper steps to legalize its use of software and other copyrighted materials, and ensure public computers and networks are not used in conjunction with copyright infringement activities.

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<sup>22</sup>The current fine structure is from 10,000 Dirhams (US\$2,700) to 50,000 Dirhams (US\$13,600). The minimum is definitely believed to be too low to constitute a deterrent to further infringements as required by the TRIPS Agreement.