

KUWAIT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kuwait remain on the Watch List in 2014.¹

Executive Summary: There is an urgent need to address copyright protection and enforcement in Kuwait which has been lagging for several years. Without effective protection in Kuwait including against pirate resellers and enterprises that engage in end-user software piracy, and in the face of severe market barriers for the music industry, legitimate commerce in copyright materials cannot flourish and piracy cannot effectively be countered. IIPA calls upon the Government of Kuwait to eliminate burdensome restrictions on the ability to engage in the music business, and in particular to modify the operation of its onerous content review processes that effectively prevent the development of a legitimate music market. Legitimate streaming service Deezer is operating in Kuwait, but faces many obstacles in trying to expand its operations. The service currently offers only a limited catalog due to content review uncertainties. Content review in Kuwait affects only legitimate actors and does not in any way affect the availability of the same content uncensored via pirate services. The Kuwaiti Government is considering a new draft Copyright Law to replace the current law from 1999. This new draft will hopefully bring the law into compliance with the WTO TRIPS Agreement, create a more deterrent criminal penalties structure, and implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA recommends immediate passage of the draft Law, with changes to ensure full TRIPS compliance and compatibility with the WCT and WPPT, and thus create a legal framework that is more conducive to reducing piracy in all its forms.

IIPA recommends that the U.S. Government should, at the next meeting under the U.S.-Kuwait Trade and Investment Framework Agreement, firmly encourage the Government of Kuwait to take stronger measures in enforcement and to bring its IPR legal framework up to date and into compliance with its international obligations.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement

- Have Kuwaiti authorities re-commence raiding activity which ceased since January 2012.
- Investigate and prosecute cases of unauthorized use of software in enterprises, pirate software resellers, and hard disk loading of software onto computers being sold in the market.
- Impose maximum penalties in criminal cases to drive piracy levels down and defeat recidivism.
- Enforce against pirate vendors who sell or advertise illegal products on websites or e-commerce platforms.
- Eliminate marketing restriction prohibitions (such as religious requirements), or at least implement them in an even-handed manner so that pirates do not enjoy a state-enforced monopoly to sell illegal materials.
- Create specialized IP courts.

Legislative

- Enact Copyright Law amendments to significantly increase minimum and maximum criminal penalties and mandate both fines and prison sentences.
- Further modernize the Copyright Law to meet the requirements of the TRIPS Agreement, implement the WCT and the WPPT, and update the law to more effectively address online piracy.
- Issue an Emiri decree to address enforcement pending the enactment of the new Copyright Law.

¹For more details on Kuwait's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Kuwait's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Eliminate burdensome and inefficient barriers to the distribution of legitimate music, in particular by addressing the operation of the current outdated content review regime.

PIRACY, ENFORCEMENT, AND MARKET ACCESS UPDATES IN KUWAIT

Piracy and some market-related issues remain difficult problems in Kuwait, hindering legitimate businesses from taking hold and driving others out of the market.² Piracy in Kuwait today consists of: 1) software piracy, including unauthorized use of software by enterprises (in 2011, the software piracy rate in Kuwait was 59%, representing a commercial value of unlicensed software of US\$72 million), and hard disk loading;³ 2) pirate sales in the retail markets;⁴ and 3) Internet and mobile (smart phone, tablet, etc.) piracy. Websites apparently targeting Kuwait for infringement include *myegy.com* (the 35th most accessed site in Kuwait, with a tagline “Download the latest and the most beautiful films of Arab and foreign Sweeter games, programs and songs and more services”); *subscene.com* (36th, with the tagline “Passionate about good subtitles this community-driven site aims to disperse and produce quality subtitles for media content including Films, TV-Series, Music Videos, and Online Video”).⁵

The Copyright Department is no longer accepting any new complaints for Copyright cases. The Kuwaiti Emir has signed the agreement to transfer the Copyright Department of the Ministry of Commerce and Industry to the National Council for Culture, Arts and Letters (NCCAL). Unfortunately it is not clear when copyright raids will start happening under this agency. Right holders report no enforcement actions since January 2012. Court results arising from prior raids have been non-deterrent, largely because so few cases were prosecuted, and even in those brought forward, extremely low criminal penalties were imposed (given the low maximum penalties in the Copyright Law). The Kuwaiti Government should immediately re-commence raiding, and investigate and prosecute cases of unauthorized use of software in enterprises, pirate software resellers, and hard disk loading of software onto computers being sold in the market. With legitimate digital services having launched in Kuwait, it is also incumbent upon the Kuwaiti Government to ensure an adequate legal and enforcement framework to deal with piracy, including much higher and deterrent minimum mandatory sentences and maximum penalties. Included in such enforcement should be the imposition of Internet takedowns against pirate vendors who sell or advertise illegal products. ISPs have a good understanding of the issues, but the laws have not kept up to provide proper incentives to encourage cooperation between ISPs and right holders.

Censorship practices, which result in banning and on occasion confiscating legitimate product from legitimate stores, continue to inhibit effective access to the Kuwaiti market. Such burdensome and inefficient barriers to the distribution of legitimate music embodied in the current outdated content review regime should be eliminated. If marketing prohibitions (such as those based on religious requirements) are retained, they should be implemented in an even-handed manner so that pirates do not enjoy a state-enforced monopoly to sell illegal materials on the streets or over the Internet, while leaving legitimate right holders with no outlet for distribution of legal materials. Problems with existing censorship processes threaten to undermine the very ability of legal music platforms to operate in Kuwait.

²For example, in previous filings, we noted that the Virgin Megastore in Kuwait City was closed for three months due to restrictive marketing requirements and censorship. Meanwhile, the same products which the Virgin Megastore would have sold (books as well as recorded music) were openly available on the streets in pirated copies, as well as over the Internet through pirate sites.

³Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

⁴Much of this activity takes place in Hawalli, Bin Khaldoun street, and the Al Fahahil area.

⁵Several notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top 100 sites accessed in Kuwait.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law in Need of Reform: Copyright protection in Kuwait is governed by the Copyright Law, Decree No. 64/1999 (effective February 9, 2000). Implementing regulations have never been issued. The law fails to comply with the TRIPS Agreement in certain respects and contains other problems and ambiguities, all of which have been recounted in previous IIPA filings.⁶ Kuwait, an original member of the WTO, has not joined the Berne Convention (although Berne is incorporated by reference into the TRIPS Agreement), the Phonograms Convention, the WCT or WPPT. IIPA has reviewed several drafts, all of which apparently intend to bring Kuwait closer into compliance with the TRIPS Agreement and make other changes, such as strengthening the penalty structure, providing rudimentary protections of technological protection measures (TPMs), making other changes to implement the WCT and WPPT, and fixing point of attachment issues in the current Decree. IIPA supports passage of a strong law taking into consideration the following, among other things:

- **TPMs:** The law should confirm full coverage under the WCT and WPPT by: 1) ensuring TPMs are defined to include access controls and controls on the exercise of exclusive rights; 2) ensuring trafficking in circumvention technologies, software devices, components, and services is prohibited; and 3) providing civil, administrative, and criminal relief.
- **Communication to the Public Right:** The law should ensure 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 ensure this interactive right applies to related rights. In addition, it is critical for the traditional broadcast and public performance of sound recordings to require compensation to performers and record companies as contemplated in Article 15 of the WPPT.
- **Internet Service Provider (ISP) Cooperation:** The law should include: principles of liability to hold accountable those who facilitate infringement on the Internet; specific provisions related to ISPs, including notice and takedown, and incentives for ISPs to cooperate with right holders against online piracy, including effective and fair policies to deal with repeat infringers and access to non-hosted infringements.
- **Enumeration of Exclusive Rights in Works:** The law should enumerate exclusive rights, as is the international best practice.
- **Presumptions of Ownership and Subsistence of Copyright:** The law should confirm a presumption of ownership, including for related rights, and a presumption of subsistence of copyright.
- **Availability of *Ex Parte* Civil Searches as Required by TRIPS:** The law should confirm expressly that civil *ex parte* searches are available in line with TRIPS.
- **Effective Civil Remedies:** The current Law contains rudimentary discussion of compensatory damages, but should also provide for the possibility of statutory damages, to be elected by the right holder, and recovery of lost profits, attorneys’ fees, and costs.
- **TRIPS-Compatible Remedy for “Materials and Implements”:** Article 42 of the current Law authorizes the Court of Urgent Matters to confiscate all materials used for illegal publications on “condition that these materials be fit only for republishing said work, performance, phonogram or broadcast program.” This narrow authority does not satisfy the clear language of TRIPS.
- **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, and adopt software asset management best practices.
- **Protection for Encrypted Programs:** The law should be amended to provide a remedy against trafficking in a device or system used to decode encrypted program-carrying signals without authorization of the right holder.
- **Term 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 years for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.

⁶See, e.g., International Intellectual Property Alliance, *Kuwait*, IIPA 2009 Special 301 Report, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.

- **Narrow Exceptions:** Any exceptions adopted in Kuwait must meet international standards and the three-step test of the Berne Convention (incorporated into TRIPS). The prior draft law limited personal copying, which was positive, but the law must not in any case permit reprographic copies of entire books or musical works. The proposal should also require that a backup copy of software must be destroyed if there is no longer lawful ownership or license of the original.
- **Moral Rights Provisions Should be Narrowed:** The moral rights provisions should: 1) ensure that any moral right to “publish” amounts to a right of first divulcation only; 2) ensure that protection against modification does not collide with the exclusive adaptation right of an author and ensure that any translation undertaken may only be done “with authorization”; and 3) restrict the author from withdrawing a work from circulation, or allowing the author to make substantial changes after the economic rights have been transferred, since this would collide with Berne/TRIPS economic rights.
- **Rights Management Information (RMI):** To ensure full implementation of the WCT and WPPT, the 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.