Chapter 5

Post-TRIPS

and the Enforcement Dichotomy
5.1 Introduction

Having the requisite intellectual property laws, even if they are not fully TRIPS-compliant, is one thing; being able to effectively enforce them and achieve the desired outcomes is another matter. The most challenging element of the post-TRIPS period, as perceived by both the GCC states themselves and the developed industrial countries, is the regional enforcement of the states’ intellectual property protection obligations consistent with the standards enshrined in TRIPS, the TRIPS-plus treaties and bilateral agreements to which the states have acceded. Notwithstanding the presence of comprehensive sets of laws and treaty commitments, there exists a dichotomy between the principle of intellectual property protection as enshrined in the various legislative regimes, and its practical application as exemplified by the degree of success of effective enforcement action. On the one hand, the states now enjoy comprehensive statutory regimes and are progressively initiating the consequential structural, judicial, and institutional reforms; on the other hand the effectiveness of enforcement actions against infringing activities, particularly in respect of piracy and counterfeit goods, the nature and frequency of judicial actions and the severity of penalties available have yet to reach the standards required by the developed nations - particularly the United States.

The barriers to the elimination of intellectual property infringements, which lie at the heart of this dichotomy, do not rest solely in the domain of the enforcement authorities or the judiciary; entrenched local societal, cultural and commercial attitudes are also major contributing factors.

The enforcement obligations of TRIPS are addressed in Section III of the Agreement, and apply equally to all areas of intellectual property rights covered in Section II. The principal features of the Section III enforcement regime are the existence of adequate norms and minimum standards
for the protection of intellectual property, the effective enforcement of those norms and standards, both domestically and at state borders, and an effective dispute resolution settlement mechanism to ensure that member states comply with their obligations to provide adequate norms and standards for their effective enforcement.1

TRIPS Section III requires WTO members to provide under their domestic laws a comprehensive regime that ensures that the intellectual property rights established in TRIPS Part II can be effectively enforced, both by their own nationals and by foreign right holders. As part of that regime, members are required to make provision for:

- fair and equitable civil and administrative procedures;
- independent judicial review of final administrative decisions on appeal;
- provisional measures;
- border control measures on application and ex-officio;
- damages and indemnification;
- criminal procedures and remedies.

The GCC states have achieved only partial success in meeting the TRIPS Section III requirements. They have generally succeeded in establishing the necessary legislative regimes and judicial frameworks that address the above TRIPS requirements (although not exclusively within intellectual property frameworks). However, they have not been as successful in creating and bringing to a state of operational effectiveness the essential infrastructural and

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1 The enforcement regime is primarily self-contained, but also based in part on the Paris and Berne Conventions. The Berne Convention provides reference in respect of the right to enforce protected works (art 15), seizure of infringing copies (art 16), and application of the convention (art 36), and the Paris Convention includes articles in respect of seizures (arts 9 and 10) and appropriate remedies (art 10ter), but they do not have the detail contained in the enforcement obligations of Part III of TRIPS. Neither the Rome Convention nor the Washington Treaty contain any enforcement or sanction provisions.
administrative strategies and processes. All states now allow for matters relating to intellectual property rights to be pursued in civil and criminal jurisdictions. They also enable aggrieved right holders to seek provisional measures against actual or potential infringements. In some states and in some laws, enforcement provisions have been strengthened by increases in the nature and scale of sanctions, and by the introduction of sanctions which provide for seizure of infringing goods and material, closures of infringing premises, compensation, and increased penalties for repeat offences. In respect of the issue of independent judicial review, the few remaining pre-TRIPS intellectual property laws still tend to allow discretionary decision-making to reside in the hands of government officials. However, the post-2000 laws have moved to reduce such discretion by transferring much of the officials’ discretionary powers and functions to the civil courts or by requiring administrative decision-making to be subject to at least semi-independent, quasi-judicial appeal, or final judicial review.

The majority of the intellectual property laws of the GCC states have benefited from an extensive input into their creative development and legislative drafting by WIPO through its International Bureau, and have also been subject to frequent exchanges of views and borrowings from within the states themselves. It is not surprising, therefore, that in most cases the laws generally conform with the thrust of the TRIPS enforcement obligations.
5.2 TRIPS Enforcement Obligations and the Response of the GCC States

5.2.1 General Obligations and Civil and Administrative Procedures (TRIPS Articles 41-49)

TRIPS Article 41 requires members to have in place enforcement procedures which permit effective action against infringements, and to have available remedies that constitute an effective deterrent to further infringing activity. The enforcement procedures must be equitable and fair; they must not be unnecessarily complicated or costly or involve unreasonable time-limits or unwarranted delays. Nor must their application create a barrier to legitimate trade. However, a member is not obliged to put in place a special judicial system for intellectual property rights enforcement distinct from that for the enforcement of law in general; nor is a member required to make a preferential allocation of resources to intellectual property enforcement at the expense of the law in general. TRIPS Article 41.4 requires members to make provision for parties to a proceeding to have opportunity for judicial review of final administrative decisions and, subject to jurisdictional provisions in a member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions.

Members are required to make civil judicial procedures available to rights holders to enforce their intellectual property rights established by TRIPS. Parties are entitled to procedures that will provide:

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2 The following summaries of the salient features of the requirements of TRIPS Section III are taken from the WTO website description of the TRIPS. Parts I - III, available online at www.wto.int/english/tratop_e/trips_e/intel2_e.htm last accessed 1 December 2005.
2. timely and detailed written notice of the basis of any claims;

3. representation by independent legal counsel;

4. the right to present evidence and to substantiate their claims;

5. protection from “overly burdensome requirements concerning mandatory personal appearances”;

6. protection of confidential information, unless contrary to constitutional requirements.

Judicial authorities must be given the authority to order parties in control of evidence which may substantiate another party’s claim to produce such evidence. Where a party refuses or otherwise does not do so, judicial authorities must be empowered to make any preliminary and final determinations, affirmative or negative on the basis of the information presented to them, provided that all parties have had the opportunity to be heard on the allegations and the evidence. Discretion is granted to members to authorize judicial authorities to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution. The exercise of such authority must not be ‘out of proportion to the seriousness of the infringement’, although no guidance is provided as to the benchmarks for ‘proportion’ or ‘seriousness’.

To militate against the frivolous or abusive use of enforcement provisions, judicial authorities are to have the authority to order a party who has abused enforcement procedures to provide ‘adequate compensation for the injury suffered because of such abuse’ to a party wrongfully enjoined or restrained. This provision also extends to public officers and government officials,
whose exemption from liability to appropriate remedial measures exists only to the extent that their “actions are taken or intended in good faith in the course of administration of that law.”

The provisions within the GCC states for civil and administrative processes in relation to the enforcement of intellectual property rights as required by TRIPS, tend to be prescribed in statutes other than the states’ intellectual property laws. All states possess longstanding statutes relating to civil and commercial procedures, the judiciary and judicial procedures, and penal codes which include extensive provisions on the conduct of criminal investigation, evidence and prosecution. The longstanding existence of Islamic jurisprudence, which enjoys a complexity and sophistication that compares favourably with western legal systems, together with a comprehensive codification of the states’ civil and judicial structures and processes, ensured that the states already had in place well established civil and administrative procedures in judicial proceedings prior to TRIPS-related intellectual property laws coming into effect. An element that was conspicuous in the earlier intellectual property laws, and which has been given some attention in the TRIPS-related intellectual property laws, was the degree of discretionary administrative final decision-making. This has been progressively curtailed by the inclusion of

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7 Ibid, art 48.2
8 Some of the major codifications relating to the GCC legal and judicial systems and procedures, and which address in part the above requirements of TRIPS, include the following:


**Kuwait:** Law No. 19 of 1959, the Judiciary Law, as amended by Law No. 19 of 1990; Law No. 16 of 1960, the Penal Code; Law No. 17 of 1960, the Criminal Procedure Code; Law No. 38 of 1980, the Code of Civil Procedure, as amended by Law No. 47 of 1994; Law No. 67 of 1980, the Civil Code; Law No. 68 of 1980, the Commercial Code, as amended by Law No. 45 of 1989.

**Oman:** Law No. 7/1974, the Penal Code; Commercial Code (1990); Royal Decree 90/99 the Judicial Structure of Oman; Royal Decree No. 91/1999 establishing the Administrative Court; Royal Decree No. 92/1999 establishing the Public Prosecution Authority; Royal Decree No. 93 of 1999 establishing the Supreme Judicial Council.

**Qatar:** Law No. 14 of 1972, the Criminal Code; Law No. 16 of 1971, the Civil and Commercial Code; Law No. 6 of 1999, the Law of the Judiciary.

**Saudi Arabia:** Royal Decree No. M/64 of 1395 AH (1975), regulating the Judiciary; Ministerial Ordinance No. 109 of 1332 AH (1959), the Administrative Rules of Procedure of Judicial Bodies.

provisions for judicial authority to have the powers to review such decision-making, although such inclusions are still not uniform across the states’ intellectual property laws.

Where the exceptions arise because of the absence or inadequacy of such provision, they generally appear as curious variations to the norm, and it would seem that their occurrence are more likely to be due to continuing adherence to the conservative position or oversight, rather than a deliberate stratagem. Some of the more recent laws introduce into the appeal process an additional level of administrative authority through the creation of quasi-judicial appeals committees. While the committees generally enjoy a degree of independence, they are still appointed by the Minister in whose portfolio that particular area of intellectual property resides. This additional process has two benefits – firstly, by acting somewhat as a filter, it works against the clogging up of an already overburdened judicial system with largely trivial or procedural matters; secondly, it retains the decision-making in the area in which the main expertise in the practical issues relating to intellectual property rights is likely to reside. Where the appeals committee strategy falls short of the standard required by TRIPS is that the effective source of higher authority still rests with the Minister concerned. While the committee may in certain instances contain external or independent members, it still falls largely within the gift of the Minister concerned to make or recommend the appointment of its members. However, it must be stressed that, notwithstanding the role of the appeals committee and the Minister, further provision still exists in some laws in some states for final appeal to an independent judicial authority through the civil courts.

Bahrain’s industrial property laws (that is, the laws encompassing trademarks, patents and industrial designs) each provide in identical language that any interested party may directly petition the Minister of Commerce and Industry in respect of any final administrative decision
issued in accordance with each of the laws. The petitioner may subsequently appeal the
Minister’s decision to the high civil court.

All but one of Oman’s intellectual property laws provide for appeal to independent judicial
authority. In respect of trademarks, the right of appeal against a decision by the Registrar of
Trademarks relating to the registration of a mark may be made direct to the civil court. However, the laws relating to patents and industrial designs, geographical indications, and
layout-designs of integrated circuits, each require appeals to first pass through the ministerial
committee process (the decision of which is subject to confirmation by the responsible
minister). Again, they further provide that the decision of the committee in each case may be
further appealed before the civil court. However, Bahrain’s rather brief geographical
indications law, and Oman’s equally brief new plant varieties law, do not include such provision,
nor provide for any other avenue of appeal against administrative decisions.

Saudi Arabia’s industrial property laws provide that appeals against administrative decisions
may be made to the Board of Grievances. In respect of trademarks, the Board serves as the first
and only forum for appeal against administrative decisions. In respect of patents and industrial
models, a standing committee, composed of five members three with legal background and two

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9 Bahrain, Law No. 10 of 1991 (trademark law), art 32; Law No. 1 of 2004 (patent and utility model law), art 36.
Curiously, the minister is required to notify the petitioner within 30 days of his decision on the petition, but only
if the petition is accepted, it appears. If the petitioner is not notified of a decision within 60 days of the date of
submission, then the petition is to be deemed as having been rejected.

10 Being the Omani Commercial Court, a specialised court with jurisdiction over commercial disputes between
private sector parties, government departments or authorities and general establishments. The Court consists of a
President and judges appointed by Royal Decree, and include primary circuits as well as an appellate circuit. All
decisions of government departments or authorities affecting international trade, taxation and labour disputes,
may be appealed to the Court. The Court replaces an earlier body, the Authority for Settlement of Commercial
Disputes, and will itself eventually be replaced by an Administrative Court when the new tri-level civil court
structure introduced by four new laws in 1999 (Royal Decrees Nos. 90/1999, 91/1999, 92/1999, and 93/1999), is
fully operational. These four decrees greatly simplify the judicial system and consolidate the former special
courts into one regular and integrated system.

11 Oman, Royal Decree No. 82/2000 (patents), art 5; Royal Decree No. 40/2000, (geographical indications), art 8;
Royal Decree No. 41/2000, (integrated circuits), art 3.
with technical expertise, is vested with the power to initially hear all disputes and contests of administrative decisions. An appeal against the decision of the committee can be made to the Board of Grievances.

Like Kuwait, Oman, and Qatar, the UAE also provides for the ministerial appeals committee process, but goes to some lengths to emphasise the committee’s independence. In respect of patent and industrial designs and models, the committee is “headed by a judge nominated by the Minister of Justice and Islamic Affairs and Awqaf and two persons with experience in relation to industrial property rights regulated by this Law from outside the Department...” 12 The corresponding trademark law provides for a committee, again appointed by the Minister of Economy and Commerce but which comprises the Ministry Under-Secretary as Chairman, two representatives of the Ministry and one representative of each Emirate chosen by the competent authority. Decisions of both committees may subsequently be appealed to the civil court in accordance with the Civil Procedures Code.

The GCC Unified Patent Regulations, which have been recognised de jure or at least de facto by all GCC states, as constituting or complementing their domestic patent laws, provide for the establishment by the GCC Ministerial Council of a ‘Grievance Committee’ to consider appeals against decisions of the GCC Patents Office. 13 However, the GCC also acknowledges that the final authority in respect of appeals must still rest with the respective GCC member states themselves, by providing for the final appeal to be made in accordance the laws of the GCC state which has jurisdiction for the matter under appeal.” 14

12 UAE, Law No. 17 of 2002, art 66.
Although the copyright laws do not provide the same scope as the industrial property laws for discretionary administrative decision-making, some provision still exists in limited instances - notably in respect of the granting of local licences for the translation into Arabic of foreign works. The Kuwaiti and Saudi laws allow appeals against administrative decision-making to be made directly to the courts of first instance (Kuwait) or the equivalent Board of Grievances (Saudi Arabia). No specific provision exists in the copyright laws of Bahrain, Qatar, Oman or the UAE for appeal to independent judicial authority against decisions of administrative bodies or the responsible Minister.

5.2.2 Provisional Relief (TRIPS Article 50)

TRIPS Article 50 requires WTO members to provide their judicial authorities with authority to:

7. prevent an infringement of an intellectual property right from occurring or to stop an infringement in progress;
8. preserve relevant evidence in regard to an alleged infringement; and
9. in particular prevent goods, including imported goods, from entering the commercial market;

15 Kuwait, Law No. 64 of 1999 (copyright), arts 14, 18, 36-38; Saudi Arabia, Royal Decree No. M/41 of 1424 AH (2003) (copyright), arts 16, 23. The Saudi Board of Grievances was established in 1955 by Royal Decree No. 17/13/8759 of 1374 AH, the Regulation Governing the Grievances Board, as a quasi-judicial review body for government and administrative decision-making. Its president reported directly to the King. It has been restructured a number of times over the years, to now become an independent entity directly responsible to the Saudi Council of Ministers. The Board consists of a president with the rank of minister, deputy president and two directors, legal advisers on shariah law and other legal matters, and an unspecified number of magistrates according to specific need. Members of the Board are statutory appointments; the president is appointed by the King on the recommendation of the Council of Ministers. Included amongst its divisions are commercial, criminal and shariah branches. See S H Amin, Law of Intellectual and Industrial Property in Developing Countries: Muslim World (1993), 102-111, for a description of the structure and procedures governing the Board.
by the ordering of injunctive relief. The measures may be adopted *inaudita altera parte*, particularly where any delay is likely to cause irreparable harm to the right holder or poses a demonstrable risk of evidence being destroyed. The judicial authorities can require an applicant for *ex parte* orders to provide any reasonable evidence in order to establish that an infringement has occurred or is imminent, and to supply other information necessary for the identification of the goods concerned to assist the authority which will enforce the provisional measure. The judicial authorities must also be authorized to require, at their discretion, that the applicant provide a security or equivalent assurance sufficient to protect the defendant and to counter abuse of provisional measures. Where provisional measures have been adopted *inaudita altera parte*, notice must be provided to the affected parties ‘without delay after the execution of the measures at the latest’. If proceedings have not been initiated within a reasonable period, the defendant may request the provisional measures be revoked or cease to have effect. Where provisional measures are revoked or lapse, or where no infringement is subsequently found, the judicial authorities may order the applicant upon request of the defendant to compensate the defendant for any injury caused by the provisional measures.

Common to the intellectual property laws of all GCC states, are provisions for a range of precautionary measures and provisional relief against threatened or actual infringements of a right-holder’s intellectual property rights. There are some instances, as mentioned below, where the precautionary measure provisions of individual laws fall somewhat short of the standard required by TRIPS Article 50. Where these deficient laws are significantly disparate from the provisions enshrined in other domestic intellectual property laws, it would appear that the deficiency lies more with the legislative drafting or translation than the deliberate intention of

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16 TRIPS, art 50.1.
17 Ibid, art 50.2.
18 Ibid, art 50.3.
19 Ibid, art 50.4.
20 Ibid, art 50.6 and 50.7.
the primary lawmakers. Notwithstanding these few instances, the intentions at least of the
prescribed measures are generally very similar across all states and across all areas of intellectual
property law. Arguably the most comprehensive statement of protective measures is that
incorporated in Oman’s copyright law, which stipulates that a court may order the following
conservative measures:

“(a) put an end to the infringement of any right protected under this law.
(b) seize the infringing copies of the work and material used to make those copies.
(c) prove the existence of a public performance in case of execution, representation or public
recitation of a work, and discontinue or prevent the display of the show.
(d) designate an official receiver for the work under conflict, who shall be responsible for the
republication, presentation, manufacturing or making of copies of the work; the resulting
proceeds shall be deposited with the Court Treasury. Such receivership shall cease by agreement
between the concerned parties or by a court decision.
(e) designate an expert to assess the proceeds of such publication or presentation, where necessary,
and seize the income in all cases.” 21

The other GCC states, and indeed Oman in its other intellectual property laws, do not see the
need to be so comprehensive. Oman’s law on new plant varieties, by way of contrast, lacks any
authority for the award of provisional measures, or prescription of what such measures
constitute, instead merely stipulating that “anyone requesting precautionary measures should
deposit a bond, as estimated by the court, prior to announcing the order”, without elucidating
what those precautionary measures may or may not constitute. 22

Saudi Arabia, for example, makes provision in its law on patents, industrial models, layout
designs of integrated circuits and new plant varieties, for the relevant Grievance Committee to
take such emergency action as it deems appropriate in respect of an actual or threatened

22 Oman, Royal Decree No. 92/2000, art 5.
infringement. However, the law does not provide any prescription or make any specific mention of provisional measures per se or the consequent warranty and succeeding substantive action, deferring such detail to the subordinate implementing regulations. The law provides simply that “... the Committee may take the necessary prompt measures it deems necessary to prevent the damages resulting from the infringement.” Similarly, the Saudi copyright law simply stipulates that “It [the committee] may take any temporary measure it finds necessary to protect the copyright till a final decision is reached regarding the complaint or grievance.” By contrast, the Saudi trademark law includes much greater detail along the lines of the Omani copyright law concerning the nature and objective of provisional orders and the obligations upon the right holder.

The laws generally provide for conditions governing precautionary measures which mirror the conditions stipulated in TRIPS Article 50. They provide for the measures to be granted by a civil court, or by a chief judge of the court. The measures are in essence the local equivalent of the UK Anton Piller orders, in that they may be taken as conservatory measures where delay may prejudice the right holder beyond compensation or where there is an established risk that material which constitutes evidence related to the infringement will be lost. The measures may be taken without prior notification to the defendant, although the defendant must be notified of the measures as soon as they are implemented. The defendant may appeal the orders within a prescribed period of time after notification or implementation, and the court may confirm, amend or withdraw the measures at its discretion.

23 Saudi Arabia, Royal Decree No. M/27 of 1425 AH (2004) art 35. The relevant Saudi committee in this case being a committee established by the King AbdulAziz City of Science and Technology, as the statutory authority responsible for the oversight of patents, trademarks and related areas of intellectual property. See also Section 5.3.6 and n 154 following.
24 Ibid, art 34.
As a countermeasure against abuse of the availability of provisional measures, or frivolous complaints of alleged infringement, most laws require applications for relief to be accompanied by a surety as determined by the court, and which must be lodged with the court. The issuance of any orders must be followed within a stipulated and limited period of time – ranging from eight days (in Oman and UAE) to fifteen days (in Bahrain generally, Qatar copyright and Saudi Arabia) – by a substantive action brought before the court. Failure to do so causes the orders to cease to have effect, and leaves the complainant liable to claims for compensation by the party against whom the orders were sought. Saudi Arabia requires lodgement of a surety only in respect of its trademark law; Kuwait & Oman (with the one exception being Oman’s new plant varieties law), however, do not require lodgement of a surety.

5.2.3 Special Requirements Relating to Border Measures (TRIPS Section 4, Articles 51 – 60)

The special requirements relating to border measures constitute a significant proportion of the TRIPS enforcement obligations. They establish a scheme for suspension of the release into circulation of suspected counterfeit trademark or pirated copyright goods, either on application by a right holder or by ex officio action by border authorities.26

The strategy of utilizing border seizure to control the trade in infringing goods is foreshadowed in the Paris Convention, which provides that ‘all goods unlawfully bearing a trademark or trade

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26 TRIPS, art 51. As a footnote to this TRIPS article, the term ‘counterfeit trademark goods’ is defined to mean ‘any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation’. The term ‘pirated copyright goods’ is defined to mean ‘any goods which are copies made without consent of the rights holder in the country of production and which are made directly or indirectly from any article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation’.
name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to protection.\textsuperscript{27} Members are required to make provision for the holder of an intellectual property right to make application to administrative or judicial authorities for customs authorities to suspend the release of goods into free circulation where grounds exist for suspecting that the importation of counterfeit trademark or pirated goods may occur.\textsuperscript{28} Such provision need not apply in respect of goods in transit, or where a particular border is subject of a customs union between two members. Members may permit the competent authorities to act upon their own initiative in suspending the release of goods where \textit{prima facie} evidence exists that an intellectual property right is being infringed. Members may order the destruction or disposal of infringing goods outside the channels of commerce. They shall not allow the re-exportation of counterfeit goods in an unaltered state or subject them to a different custom procedure, other than in exceptional circumstances.\textsuperscript{29}

The right holder may be required to lodge a bond or surety in order to protect the defendant and the competent authorities, and to prevent abuse.\textsuperscript{30} Payment of such surety shall not prejudice any other remedy available to the right holder. The surety shall be released if the right holder fails to pursue the right of action within the prescribed period of time.

Suspended goods must be released if, within the prescribed period since the applicant was served with notice of the suspension of the goods, the customs authorities have not been informed that provisional measures have been ordered prolonging the period of suspension or that proceedings have been initiated.\textsuperscript{31} Where suspension of the release of goods is carried out or continued in accordance with a provisional measure, the suspension shall be revoked or cease to have effect if

\textsuperscript{27} Paris Convention, art 9(1).
\textsuperscript{28} TRIPS, art 51.
\textsuperscript{29} Ibid, art 59.
\textsuperscript{30} Ibid, art 55.
\textsuperscript{31} Ibid, art 55.
proceedings are not initiated within the prescribed period, or such period as determined by judicial authority. Authorities shall be empowered, where an importer has suffered injury because of the wrongful detention of goods, or where the goods are released because the right holder does not initiate an action within the prescribed period, to order the right holder to pay compensation to the importer, consignee and owner of the detained goods for any injury suffered.\textsuperscript{32}

The attention given by the GCC states in their intellectual property laws to the special border control requirements of TRIPS, is slight to say the least. This can be in part attributed to the eventual establishment of the customs union between the GCC states in January 2003, after a very long gestation period. A footnote to TRIPS Section 4 allows that a member shall not be required to apply the provisions of Section 4 at borders with other members with which it has formed a custom union and amongst which all controls over movement of goods across these borders have been substantially dismantled. However, reliance on this provision ignores the fact that the amount of intra-GCC trade represents a small percentage of the total trade of each state.

In any case, the GCC states would argue, as Oman has done before the Council of TRIPS\textsuperscript{33}, that the provisions relating infringements of an intellectual property right and to the remedies and provisional relief apply equally to infringing imported and export goods. They would also argue that a right holder can obtain orders on the suspension of customs clearance of allegedly counterfeit goods, and that these provisions by and large correspond to TRIPS Articles 51-60. Customs have the legal authority to act \textit{ex-officio} to detain and/or seize suspected goods at ports

\textsuperscript{32} Ibid, art 56.

of entry, to confiscate and destroy infringing goods, and to suspend the release of imported counterfeit and pirated goods, as required by TRIPS.  

In any of the region’s intellectual property laws, the UAE arguably comes closest to addressing the border measure obligations enshrined in TRIPS Articles 51-60, with a copyright law which provides that:

"The customs authorities may order, by a decision supported with reasons in response to an application by the author, the holder of the right or their successors, suspension of customs release for a maximum period of twenty days of any forged items contradicting the provisions of this Law. The implementing regulations specify the conditions, restrictions and procedures of non-release application, along with the documents to be enclosed and the financial value of bond the applicant must deposit, to confirm authenticity of the application. The application must be decided within three working days from the day of its proper presentation, the applicant should be notified with the decision as soon as it is issued.

The customs authorities in all cases must not prohibit the concerned parties from examining the items held by the customs in accordance with the restrictions defined by the implementing regulations."  

But even this provision falls far short of addressing the range of specific conditions and requirements as detailed in TRIPS Articles 51-60. However, in yet another example of the dichotomy between principle and practice, the implementing regulations to which the above Article 36 refers, and which in particular are essential for establishing conditions for the application of the non-release strategy, have yet to materialise some three years since the law was gazetted.

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34 Ibid, 25.
35 UAE, Federal Law No. 7 of 2002, art 36.
5.2.4 Damages, Indemnification and Other Remedies (TRIPS Articles 45-46)

TRIPS Articles 45 and 46 require members to accord to their judicial authorities the authority to award damages adequate to compensate for any injury suffered because of the infringement, as well as expenses and legal costs. Recovery of profits and/or payment of pre-established damages may be ordered, even where the infringer did not knowingly engage in the infringing activity. Judicial authorities must have authority to order infringing goods to be destroyed or otherwise disposed outside the channels of commerce without any compensation to the infringer and in such manner as to avoid any harm to the right holder. To ensure that the risk of further acts of infringement is minimised, the authority extends to orders for the disposal in similar fashion of materials and implements that have been used predominantly in the creation of the infringing goods, again without compensation to the infringer. However, account must be taken of proper proportion between the seriousness of the infringement and the remedies ordered, as well as the interests of third parties. In the case of counterfeit trademarks, the simple removal of the unlawfully affixed trademark will not normally be sufficient to enable them to be released back into channels of commerce.

As is the case with the availability of provisional measures, the statutory provision for judicial authority in respect the award of damages and the application of other remedies is similarly inconsistent – both across the GCC states and within the respective intellectual property laws of the individual states. In particular, since the common convention throughout the region, in civil cases at least, is for either party to bear their own legal costs, the states’ legislation is singularly quiet on the issue of authority to award costs.
All states except Oman make some provision in at least some of their intellectual property laws for offending goods, and any tools, machinery and equipment used in the commission of the infringement, to be confiscated, destroyed or otherwise disposed of in such other way, as the court may deem appropriate. Some states, such as Bahrain and the UAE, also provide for judicial discretion to order such confiscation, and destruction or disposal even in the case of an acquittal. Bahrain includes both seizure and destruction provisions in its longstanding copyright law and its recent patents, geographical indications and trade secrets laws, but makes no such provision in its older trademark law. The longstanding copyright law alone makes provision for the award of both compensation and costs, neither of which are provided for in the other laws. None of the laws allow for closure of the infringing establishment except as one of the options available in respect of repeat offences.

Kuwait’s copyright, trademark and patent laws all authorise the court upon the request of the author or right holder to order the destruction of the infringing work or goods and the materials and equipment used. However, the copyright law makes provision for an exception to this requirement where the author’s economic rights expire within two years from the date of issue of the judgement. Instead, the court may rule for confirmation of the precautionary attachment to fulfill any compensation awarded in favour of the right holder. This exception necessarily includes the case of a work unlawfully translated into Arabic, on the basis that this violation is

56 Bahrain, Law No. 1 of 2004 (patents), art 41; UAE, Federal Law No. 17 of 2002 (patents), art 63; UAE Federal Law No. 8 of 2002 (trademarks), art 43.
57 Bahrain, Law 10 of 1993 (copyright), arts 38 and 40; Law No. 1 of 2004 (patents), art 41; Law No. 16 of 2004 (geographical indications), art 12; Law No. 17 of 2004 (trade secrets), art 7.
58 Bahrain, Law No. 10 of 1993, art 40.
59 Kuwait, Law No. 1 of 2001 (trademarks), art 95; Law No. 4 of 1999 (patents), art 48; Law No. 64 of 1999 (copyright), art 42.
60 Kuwait, Law No. 64 of 1999, art 38.
not so serious as to warrant a judgement for destruction. No provision exists in the copyright and trademark laws for compensation, and all three laws are quiet on the question of costs.

Oman’s intellectual property laws contain a number of apparent inconsistencies in respect the availability of provisions for seizure and destruction of infringing goods and equipment and award of damages and compensation. This would appear to indicate that the so-called ‘minor’ laws have not received the same level of scrutiny from the Omani government or from their advisers on TRIPS as have the major laws governing patents, trademarks and copyright and neighbouring rights. The copyright, trademarks, patents, and unfair competition and trade secrets laws include seizure and destruction provisions, while the industrial designs, geographical indications, and integrated circuits laws do not make any such provision. The new plant varieties law allows for the destruction of any offending propagation and/or elements, but does not provide for destruction of tools or equipment used in the infringement. Again, no provision exists for compensation or award of costs.

Qatar’s copyright and trademark laws allow for seizure and destruction, closure of the infringing establishment, and for payment of compensation to the aggrieved right holder. There are no references to the payment of costs.

The UAE courts may also order offending goods to be confiscated, destroyed or otherwise disposed of in such other way as they deem appropriate, as may the tools, machinery and

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41 Kuwait, Explanatory Memorandum Accompanying Law No. 64 of 1999, art 38.
42 Oman, Royal Decree No. 37/2000 (copyright), art 31; Royal Decree No. 38/2000 (trademarks and trade secrets), art 38; Royal Decree No. 82/2000 (patents), art 24.
43 Oman, Royal Decree No. 92/2000, art 6.
44 Qatar, Law No. 7 of 2002 (copyright), art 52; Law No. 9 of 2002 (trademarks), art 52.
equipment used as part of the infringing activity. Infringing premises may be closed for a period of up to 6 months in respect of copyright and trademark infringements, but not in the case of patents and industrial design infringements. Neither the copyright law nor patents law makes provision for compensation, while the trademark law retains such provision from its predecessor law of 1992.

5.2.5 Criminal Procedures and Sanctions (TRIPS Article 61)

TRIPS Article 61 requires WTO members to make provision for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies, which shall include imprisonment and/or fines, must be sufficient to provide a deterrent and must be consistent with penalties applied for crimes of corresponding gravity. Remedies may also include seizure, forfeiture and destruction of the offending goods and any materials, tools or equipment predominantly used in the commission of the infringement. Since these are minimum requirements, members may provide criminal procedures and penalties for other cases of intellectual property right infringement.

Notwithstanding the existence of a fair degree of common ground between the various types of national intellectual property laws in respect of the nature of infringements, the penalties that infringements attract still vary markedly between the states, and even between the intellectual property laws in each state. The one exception is Oman, which as applied the same sanctions

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45 UAE, Federal Law No. 7 of 2002 (copyright), art 40; Federal Law No. 8 of 2002 (trademarks), art 40; Federal Law No. 17 of 2002 (patents), art 63.
46 UAE, Federal Law No. 7 of 2002 (copyright), arts 38 and 40; Federal Law No. 8 of 2002 (trademarks), art 39.
47 UAE, Federal Law No. 8 of 2002 (trademarks), art 41.2
and scale of penalties across all its intellectual property laws. The marked differences have left some states open to accusation from some developed countries that the perceived inadequate levels of sanctions still engender an environment which is tantamount to fostering unchecked piracy and counterfeiting and which is providing safe haven for illegal importers, traders and manufacturers.48

Bahrain’s longstanding trademark law of 1991 provides for a maximum fine of only BD100, the lowest financial penalty of any GCC intellectual property law by a wide margin, and/or imprisonment for up to one year.49 Its slightly later copyright law of 1993 provides for a maximum fine of BD1,000 and/or up to one year imprisonment.50 Its new round of intellectual property laws enacted over the last year or so (that is, in respect of patents, geographical indications, and trade secrets) carry common and significantly increased penalties, providing for imprisonment for up to two years and/or a fine of up to BD3,000.51 These new laws appear to represent the new benchmark in respect of sanctions for the other intellectual property laws which are due to follow in the near future (notably copyright and trademarks). However, it is still uncertain what impact the intellectual property provisions of Bahrain’s recently completed Free Trade Agreement (FTA) with the United States may have on further increasing the level of sanctions in Bahrain’s proposed new copyright and trademarks laws. What is certain is that the

48 See the respective country reports in the USTR Annual Special 301 Reports, 1997 - 2005. These reports are discussed at greater length in Chapter 6.
50 One Bahraini dinar, one Kuwaiti dinar or one Omani rial is worth just under ten Qatari riyals, Saudi riyals or Emirati dirhams. The currencies of all the GCC states are now linked, formally or effectively, to the US dollar. The current exchange rates (as at 31/12/05) are as follows:

<table>
<thead>
<tr>
<th>Currency</th>
<th>Exchange Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>BD = Bahraini dinar</td>
<td>BD1.00 = US$2.65</td>
</tr>
<tr>
<td>KD = Kuwaiti dinar</td>
<td>KD1.00 = US$2.95</td>
</tr>
<tr>
<td>OR = Omani rial</td>
<td>OR1.00 = US$2.58</td>
</tr>
<tr>
<td>QR = Qatari riyal</td>
<td>QR1.00 = US$0.276</td>
</tr>
<tr>
<td>SR = Saudi riyal</td>
<td>SR1.00 = US$0.268</td>
</tr>
<tr>
<td>AED = UAE dirham</td>
<td>AED1.00 = US$0.273</td>
</tr>
</tbody>
</table>

51 Bahrain, Law No. 1 of 2004 (patents), art 41; Law No. 16 of 2004 (geographical indications), art 6; Law No. 7 of 2003 (trade secrets), art 7.
FTA requires Bahrain to “provide strong deterrence against piracy and counterfeiting.” It may also be more than coincidental that these proposed key laws, which have been in circulation in draft form since 2001 and were initially due to be enacted in the first half of 2002, have still yet to be issued.

Kuwait is not quite as inconsistent as Bahrain, even if the fact that its trademark, patent and copyright laws all underwent amendment between 1999 and 2001 is taken into account. Its copyright law carries a maximum fine of only KD500 and/or up to one year’s imprisonment. Its trademark law penalties are only marginally higher, retaining from its much earlier law of 1980 a very simple scale of an unspecified term of imprisonment and/or a fine of up to KD600 for counterfeiting or improper use of a registered mark; but it does not impose a penalty for use of a sign or mark excluded from registrability. In contrast, its patent law carries penalties of up to KD5000 and one year’s imprisonment, essentially a tenfold increase over the penalties provided by the trademark and copyright laws.

Qatar’s penalties are already substantial by regional standards, even though they remain largely unchanged from earlier legislation. They range up to QR100,000 and imprisonment for up to 12 months for copyright infringement acts, but QR20,000 and 2 years for trademark and industrial design infringements. However, rather curiously, acts relating to manufacture or import of electronic deactivation or satellite decoding devices, or their illegal modification or removal, do not have a monetary penalty specified, but may carry a maximum term of imprisonment of only

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54 Kuwait, Law No. 64 of 1999, art 42.

55 Kuwait, Law No. 68 of 1980, art 92.

56 Kuwait, Law No. 3 of 2001, art 46.

57 Qatar, Law No. 7 of 2002 (copyright), arts 50-51; Law No. 9 of 2002 (trademarks), arts 47-48.
one year. Since it does not have its own patent laws, and the GCC Unified Patent Regulation on which it relies for the provision of patent protection does not contain any sanction provisions, Qatar does not have available any sanctions for patent infringements.

The UAE’s laws are also internally inconsistent, but at least high standards have been set in some laws. The patents and industrial designs law now carry maximum penalties of up to AED100,000 and 2 years imprisonment for patents and design infringements; but the copyright law has provision for penalties up to an impressive AED500,000 and an unspecified maximum period of imprisonment. Penalties for manufacturing or importing means to commit a technological fraud, to delay or discredit technological anti-fraud or anti-copy software, or to load or store computer programmes and databases without authorization – for which no provision existed in the earlier copyright law - are now recognised as the most serious of copyright violations and accordingly may attract the above maximum penalties. But in stark contrast, and at the other end of the spectrum, penalties for trademark infringements, such as use of a counterfeit trademark or improper use of a registered trademark may attract a penalty of up to 12 months imprisonment and a fine of between AED5,000 and AED10,000. However, the fine for fraudulent use of a trademark has in effect been lessened in impact by being altered from a previously uncapped minimum to a capped maximum amount.

Saudi Arabia has established the new regional benchmark in terms of the deterrence value of its sanctions, by increasing them dramatically from their previous levels, and by applying them across all intellectual property laws. In particular, harsher penalties for infringements in respect of information technology based intellectual property and for repeat offences are introduced.

58 Qatar, Law No. 7 of 2002, art 51.
60 UAE, Federal Law No. 8 of 2002, arts 37-38.
These penalties stand in stark contrast to those extant in neighbours Bahrain, Kuwait and Oman. But the penalties also illustrate the impact of the greater degree of critical scrutiny and pressure that Saudi Arabia is receiving from the United States and from international business and intellectual property watchdog organizations as part of its drive for WTO membership and the consequent necessity to demonstrate its commitment to TRIPS minimum standards. Accordingly, any unlawful act of exploitation of a patented subject matter carries a financial penalty of up to SR100,000, while violation of any provision of the copyright law may be subject to a fine of up to SR250,000, a dramatic increase on the maximum fine of SR10,000 (without any imprisonment provision) available under its 1989 law. Fraudulent use of a registered trademark has attracted the most dramatic increases in financial penalty, with the fine having increased from a maximum of SR 50,000 under the 1984 equivalent law to one of between SR50,000 and SR1,000,000. The maximum term of imprisonment remains unchanged at 12 months in respect of patents and trademark violations, but has been reduced from 12 months to 6 months in respect of copyright and neighbouring rights infringements.

Oman has taken an entirely different approach to the other states. It has attempted to introduce a degree of consistency by adopting a common scale of penalties across the full suite of seven intellectual property laws introduced during the year 2000, providing for imprisonment for up to two years and/or a fine of up to OR2,000 or both. Hence the maximum allowable penalties for counterfeiting or a trademark infringement are the same as those for trade secret or new plant variety infringements. The general severity of the sanctions is little changed from Oman’s first intellectual property law of 1987, which provided for a maximum fine of only OR500, but

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62 Saudi Arabia, Royal Decree No. 21 of 1423 AH (2002), art 43.
imprisonment for up to three years.\(^\text{63}\) The Omani strategy has attracted criticism from some quarters, notably the United States, on the grounds that its sanctions are too lenient and are not in accordance with the TRIPS Article 61 requirement that sanctions should be sufficiently effectively to act as a deterrent.\(^\text{64}\) Indeed, the United States, on more than one occasion, has accused Oman of being a haven for copyright piracy in the region because of the apparent laxity and softness of its sanctions in its copyright law.\(^\text{65}\) Oman's response has been that the sanctions is sufficiently severe to meet the deterrence objective of TRIPS Article 61, particularly the term of imprisonment. One Omani senior government official wryly described life in an Omani prison: "there are no single cells, weekly linen changes, basketball games or movies in an Omani prison."\(^\text{66}\) A similar statement could be made about prison conditions in the other GCC states.

All but one state include the requirement that notice of verdicts against an infringing party and the penalties imposed are to be published in the local Arabic daily press and/or the Official Gazette - with the costs of such publication to be borne by the infringing party. The UAE included this provision in its 1992 copyright law, but subsequently removed it from all three intellectual property laws issued or amended in 2002.

National attitudes towards recidivism also vary amongst the GCC states, and are reflected in their respective laws. Bahrain generally provides for the maximum penalties for a first offence to be mandatory if re-offending occurs within three years of the first offence, but this would appear to presuppose that the maximum penalties would not be imposed in respect of the first

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\(^{63}\) Oman, Royal Decree No. 68/1987 (trademarks), arts 32 and 34, provided for penalties of imprisonment for up to three years and/or a fine of OR500, plus possible seizure of the infringing goods, material and equipment and closure of the offending establishment for up to three months. The copyright law, Royal Decree No. 47/1996, art 16 provided for a doubling of the maximum penalties in the case of repeat offending.

\(^{64}\) Interview conducted by the author with officials of the Oman Ministry of Commerce and Industry, January 2003, and December 2004.

\(^{65}\) Ibid.

\(^{66}\) Ibid.
offence. It would also seem to presume that a third offence will not occur within the three year
time-frame. Kuwait generally allows for a 50% increase in the maximum penalties to be
imposed if the recurrence occurs within 5 years of the first offence, while Qatar and Saudi
Arabia generally allow for a doubling of penalties for repeat offences without time limitations
from the initial offence. The UAE generally does not make any provision for increasing
penalties for repeat offences, except in the case of copyright infringements where a repeat
offence attracts a minimum fine of between AED30,000 and AED200,000 and imprisonment
for at least 9 months, the level of penalty depending on the nature of the repeated offence.\(^{67}\)

Oman has gone against the trend of the other GCC states by deleting or not including in all but
one of its current intellectual property laws a provision that existed in its earlier copyright law\(^{68}\)
for the doubling of penalties for repeat offences. The one exception is the law on the protection
of new plant varieties, which permits a doubling of penalties for repeat offending.\(^{69}\)

The following table summarises the damages, remedies and sanctions available under the
respective intellectual property laws of the GCC states. To place them into a meaningful
perspective, and to facilitate comparison between the GCC states and between their respective
laws, the monetary penalties have been listed in both the local currencies and in US dollars. The
table highlights the differences between the states in respect of the range and nature of the
various elements of their available sanctions. It also illustrates the concerted effort by Oman in
particular to standardise its enforcement provisions across all its intellectual property laws, in
contrast to the other states which have introduced levels of sanctions that are largely reactive to
external pressures.

\(^{67}\) UAE, Federal Law No. 7 of 2002, arts 37.2, 38, 39.
\(^{68}\) Oman, Royal Decree No. 47/1996, art 16.
\(^{69}\) Oman, Royal Decree No. 92/2000, art 6.
However, what stands out most markedly is the significant spread in the range of financial penalties now extant across the GCC states, ranging from the equivalent of a pitiful US$265 (Bahrain, in respect of trademark infringements) to an impressive US$268,096 (Saudi Arabia, in respect of trademark infringements), and a lowly US$1716 (Kuwait, copyright) to an almost equally impressive US$136,836 (UAE, copyright). Of the GCC states, Saudi Arabia and the UAE have been under the greatest pressure from developed countries, and especially the United States, to introduce sanctions that will serve as effective deterrents, and the table illustrates the success of that concerted pressure. Saudi Arabia across the board, and the UAE and Qatar in some instances, now provide for financial penalties which are severe by local economic standards, and which are arguably well within the scope of being effective deterrents. What is surprising is that Bahrain in particular, and also the UAE, have both managed to evade relatively unscathed from US pressure in respect of their very lowly penalties for trademark infringements. But this clearly illustrates that copyright infringements through counterfeiting and piracy, and patent infringements, particularly in respect of pharmaceutical products, are the key concerns for the United States in terms of intellectual property rights protection in the UAE. The other GCC states - Oman and Kuwait - will no doubt continue to attract criticism for the perceived inadequacy of their financial penalties. Kuwait has reportedly initiated steps to double the maximum fines and jail sentences for copyright infringements, but the increases have yet to be put into effect, and the maximum fines would still only be the equivalent of US$3,430 – hardly at a level to satisfy the US government.70

70 The proposed increased penalties were first reported in The Peninsula (Qatar), on 24 August 2004, but some fifteen months later, amendments to the Kuwaiti copyright law have yet to appear.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisional Relief</th>
<th>Maximum Sanctions</th>
<th>Seizure of goods etc</th>
<th>Closures (maximum)</th>
<th>Compensation</th>
<th>Sanctions for recidivism</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Fine</td>
<td></td>
<td>Jail</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Bahrain</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Copyright 10/93</td>
<td>yes</td>
<td>1000 ($265)</td>
<td>1 year</td>
<td>yes</td>
<td>yes</td>
<td>Nil</td>
</tr>
<tr>
<td>Trademarks 10/91</td>
<td></td>
<td>100 ($265)</td>
<td>1 year</td>
<td>no</td>
<td>no</td>
<td>min. penalties increased</td>
</tr>
<tr>
<td>Patents 1/04</td>
<td></td>
<td>3000 ($7959)</td>
<td>2 years</td>
<td>yes</td>
<td></td>
<td>6 months closure</td>
</tr>
<tr>
<td>G.I.’s 16/04</td>
<td></td>
<td>500000 ($17162)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secrets 7/03</td>
<td></td>
<td>500 ($1716)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Kuwait</strong></td>
<td></td>
<td>500 ($1716)</td>
<td>1 year</td>
<td>yes</td>
<td>yes</td>
<td>50% increase 6 months closure</td>
</tr>
<tr>
<td>Copyright 64/99</td>
<td>yes</td>
<td>600 ($2059)</td>
<td>unspecified</td>
<td>no</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trademarks &amp; G.I.’s 1/01</td>
<td></td>
<td>500 ($17162)</td>
<td>1 year</td>
<td>no</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Patents 3/01</td>
<td></td>
<td>2000 ($3222)</td>
<td>2 years</td>
<td>no</td>
<td>No</td>
<td>Nil</td>
</tr>
<tr>
<td><strong>Oman</strong></td>
<td></td>
<td>2000 ($3222)</td>
<td>2 years</td>
<td>yes</td>
<td>No</td>
<td>both doubled</td>
</tr>
<tr>
<td>Copyright 37/00</td>
<td>yes</td>
<td>100,000 ($27624)</td>
<td>1 year</td>
<td>3 years</td>
<td>Yes</td>
<td>both doubled</td>
</tr>
<tr>
<td>Trademarks 38/00</td>
<td></td>
<td>20,000 ($5524)</td>
<td>2 years</td>
<td>6 months</td>
<td>Yes</td>
<td>both doubled</td>
</tr>
<tr>
<td>Patents 82/00</td>
<td></td>
<td>250,000 ($67024)</td>
<td>6 months</td>
<td>2 months</td>
<td>Yes</td>
<td>both doubled &amp; 6 months closure</td>
</tr>
<tr>
<td>Designs 39/00</td>
<td></td>
<td>1,000,000 ($268096)</td>
<td>1 year</td>
<td>no</td>
<td>No</td>
<td>fine only doubled</td>
</tr>
<tr>
<td>Circuits 41/00</td>
<td></td>
<td>100,000 ($268099)</td>
<td>unspecified</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>G.I.’s 40/00</td>
<td></td>
<td>500,000 ($136836)</td>
<td>unspecified</td>
<td>6 months</td>
<td>No</td>
<td>min 9 months jail min 200,000 fine</td>
</tr>
<tr>
<td>Plant Varieties 92/00</td>
<td></td>
<td>10,000 ($2736)</td>
<td>1 year</td>
<td>Yes</td>
<td>Yes</td>
<td>Nil</td>
</tr>
<tr>
<td><strong>Qatar</strong></td>
<td></td>
<td>100,000 ($27367)</td>
<td>unspecified</td>
<td>no</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Copyright 7/02</td>
<td>yes</td>
<td>250,000 ($67024)</td>
<td>6 months</td>
<td>2 months</td>
<td>Yes</td>
<td>both doubled</td>
</tr>
<tr>
<td>Trademarks 7/02</td>
<td></td>
<td>1,000,000 ($268096)</td>
<td>1 year</td>
<td>no</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Patents, Designs, Circuits, Plant Varieties 27/04</td>
<td>yes</td>
<td>100,000 ($268099)</td>
<td>unspecified</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Saudi Arabia</strong></td>
<td></td>
<td>500,000 ($136836)</td>
<td>unspecified</td>
<td>6 months</td>
<td>No</td>
<td>Nil</td>
</tr>
<tr>
<td>Copyright 7/02</td>
<td>yes</td>
<td>10,000 ($2736)</td>
<td>1 year</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Trademarks 8/02</td>
<td></td>
<td>100,000 ($27367)</td>
<td>unspecified</td>
<td>no</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Patents, Ind. Designs 17/02</td>
<td></td>
<td>500,000 ($136836)</td>
<td>unspecified</td>
<td>6 months</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td><strong>UAE</strong></td>
<td></td>
<td>100,000 ($27367)</td>
<td>unspecified</td>
<td>no</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

Source: compiled by the author
5.3 The Challenges for Effective Enforcement

5.3.1 The Enforcement Dichotomy

In all GCC states, the most challenging element of TRIPS, as perceived by both the states themselves and the developed countries with established commercial interests in the region, has been that of the enforcement of the states' intellectual property protection obligations consistent with the standards enshrined in TRIPS Sections II and III. Notwithstanding the fact that all states have taken significant strides in recent years in setting in place comprehensive legislative regimes for the protection of intellectual property rights, and most already have laws that are largely TRIPS-compliant, there nevertheless exists a dichotomy between the principle of enforcement as enshrined in the various legislative regimes, and the practice as exemplified by the degree of effective action. In all states, the practical application of compliance obligations through effective enforcement has been, and continues to be, the most difficult area with which to contend.

According to a recent WIPO survey on counterfeiting and piracy, the ineffectiveness of enforcement systems can be attributed, in many cases, to:

- legislation not being drafted effectively or extensively;
- lack of human resources, funding and practical experience in the enforcement of intellectual property rights;
- insufficient knowledge on the part of right holders and the general public, concerning their rights and remedies;
- a general lack of training of enforcement officials, including the judiciary; and
- systemic problems resulting from insufficient national and international coordination,
  including a lack of transparency.\textsuperscript{71}

These shortcomings are not necessarily the exclusive confine of Arab countries, or even
developing countries only. But they do apply to, and are a succinct exposition of, the challenges
facing the GCC states with respect to their enforcement obligations.\textsuperscript{72} To the above list,
however, should be added the challenges posed by the clash of alien cultural and economic
mores with entrenched local societal attitudes.

With most of the GCC states, the principal barriers to the elimination of infringement of
intellectual property rights do not subsist so much in the substantive law, as in the practical
application of the remedies and sanctions available (or not available, as the case may be) to deter
counterfeiting and piracy and other infringements. In those states which still have pre-TRIPS
laws in force, the negative impact of the barriers are exacerbated by the presence of sanctions
which are both inadequate and incomplete in scope and scale. But, irrespective of these
inadequacies of scope and scale in a few older laws, the sanctions available to the authorities
across the broad spectrum of the region’s intellectual property laws are not being fully exploited.
The reasons do not rest solely with the enforcement authorities or the judiciary; entrenched local
societal, cultural and commercial attitudes also contribute to the development of this
enforcement dichotomy.

\textsuperscript{71} As enunciated in a survey conducted in 2002 by WIPO amongst its member states, and reported in WIPO
Document WIPO/CME/3, 4-5. The Report is discussed at greater length in Michael Blakeney, “Enforcement of
Intellectual Property rights: Challenges, Remedies and Public Awareness”, WIPO National Seminar on
Intellectual Property for Faculty Members of Ajman University, Ajman, May 2004, 25; WIPO Document
WIPO/IP/UNI/DUB/04/7.

\textsuperscript{72} The survey was addressed to all WIPO member countries, including the six GCC states. None of the GCC states,
or any other Arab country, responded to the WIPO survey, which in itself can be construed as an indicator of
deep-seated systemic deficiencies and infrastructural shortcomings in intellectual property enforcement in the
Gulf. It also illustrates the difficulty that any researcher experiences in obtaining reliable, periodic and
comparative data for any of the GCC states on intellectual property enforcement practices and performance.
5.3.2 Societal Attitudes - “An honest Trade?”

The leaderships of the GCC states generally recognise that being part of the world trading community through membership of the WTO and adherence to its terms of membership through the adoption and implementation of its multilateral agreements, such as TRIPS, is of crucial importance for their respective economic growth and health. Accordingly, they also recognize that the obligations that accompany such membership must be enforced domestically. By contrast, there is still exists throughout the states a widespread lack of public awareness of the western concept of intellectual property rights - what they mean, what constitutes an infringement, and the wider implications of infringing activity. This lack of public awareness is particularly prevalent amongst the older generations, amongst whom the everyday use of the English language with its subtle complexities is still not widespread; the lack of public awareness is shared by local merchants, as well as some small-scale infringers and end-users of infringing material.

Even where an awareness or understanding of intellectual property rights does exist, there nevertheless also still prevails a conservatism that questions the desirability and necessity to comply with international and national intellectual property protection obligations, which may seem so removed and irrelevant, at the local community level or in the local souk (marketplace).

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73 The Saudi Minister of Commerce and Industry, Hashim Bin Abdullah Yamani, when interviewed on Saudi Arabia’s recent admission to the WTO, suggested that the Kingdom had little choice: “The idea of seeing Saudi Arabia outside the WTO, isolated from the developments in international trade, would result in it being unable to compete internationally ... if Saudi Arabia did not join the WTO it would lose any chance to defend its important economic and trade interests” (as quoted in the Gulf News, 30 October 2005, available at www.gulf-news.com/articles/articleid=189356, last accessed 1 November 2005.

Commonplace is a deep-rooted societal attitude that holds that ownership of a good confers an unlimited right of use and disposal, including copying and resale, while imitation is deemed to be legitimate practice. No harm is held to have been done to the owner of the original good if the resale is on a reasonable scale and if it is conducted in a different— in either a geographic or economic sense—market. The sale of counterfeit versions of luxury western goods in the local souk at a fraction of the genuine products’ retail price is not perceived as disadvantaging the owner of the luxury goods, since the buyer would not purchase the genuine product if the counterfeit versions were no longer available. The claim of “genuine imitation” frequently offered in the souks and on the street stalls as an unwritten assurance as to the quality and value of the counterfeit and pirated goods on offer, is still asserted with candour and with a certain degree of conviction that such claim is still a positive marketing ploy. Hence external attempts to fetter this laissez faire and perceived non-competing micro-economy are neither welcome nor fully comprehended. This common sentiment, as expressed by an illegal trader in response to a raid on his shop by government officials, is that anti-piracy measures are “not fair”. “We pay money for these [discs] and we sell them. This is an honest trade”, the trader protested.

Also widespread is the perception that the protection of intellectual property rights, particularly in respect of copyright in the software and audiovisual fields, trademarks in consumer goods carrying foreign trademarks, and pharmaceutical patents, represents a protection of western (and particularly US and European) commercial interests at the expense of technology transfer and industrial development for the benefit of the local markets and communities. This perception is reinforced by the cynical view that western countries, formerly imperial overlords in living memory, are now continuing their exploitation as political and commercial bullies. Trade with

75 S H Amin, Law of Intellectual and Industrial Property in Developing Countries: Muslim World (1993) 1-2.
76 Times of Oman, above n 74, 27 August, 2002.
western countries is desired, but the perceived imposition of a new western-style commercial colonialism, bolstered by western intellectual property protection regimes may well be an unpalatable consequence. Hence, attempts by western companies to wean locals away from counterfeit or pirated products by a positive reinforcement strategy can sometimes produce an unexpected and negative result. In an attempt to steer consumers and end-users away from pirated versions of its major computer systems, a leading global operating systems and software manufacturer offered to educational institutions and students in some of the GCC states discounts of up to 90% off the normal retail price of some of their leading products. In some quarters, the reaction to the offer was a cynical one – along the lines that the normal pricing structure of the software to members of the public must be exorbitant to allow such a generous discount to educational institutions and students; acceptance of the discount offer was legitimizing the original pricing structure and endorsing the commercial practices of a major foreign yet global company that was still over-exploiting the local markets.

Further contributing to an environment of enforcement less rigorous than that sought by western countries is a perception by the more conservative sections of the populations of the GCC states that the Middle East is being subject to an ongoing cultural penetration by western countries that contributes to an erosion of Islamic beliefs, values and local culture at every turn. Western culture is seen as immoral and corrupt, and so the enforcement of intellectual property rights for goods and services that are largely western in origin constitutes governmental and religious sanction of these immoral and corrupting influences. Enforcement of intellectual property protection by the governments of the GCC states on behalf of predominantly western rights-

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79 Gulf News, 16 July 1998, 3. The author was working in a higher education institution of a GCC state at the time that the Microsoft offers were made. The reaction to the Microsoft offers reported above is based on the author’s own observations and impressions gained from local suppliers of institutional computer hardware and software, staff and students of his own institution and other educational institutions in the state with which he had contact.
80 Carroll, above n 78, 596-7.
holders not only reinforces these corrupting influences but also provides the governments with powerful tools for controlling cultural content and eliminating of the ‘informal’ but commonplace and socially acceptable cultural distribution mechanisms that have long been in place (in other words, the uncontrolled copying and duplication that the west would describe as counterfeiting and piracy). This cynicism and resentment toward the west in respect of the latter’s protected goods is reinforced by some local attitudes towards the western expatriate populations, who in most states represent a significant proportion of the population and who lead a very visible, comfortable, and often culturally insensitive, lifestyle.

There also prevails a cultural dilemma in the local populations of some states insofar as the necessity to resort to public judicial processes for the resolution of a dispute, as distinct from the utilization of informal and private mediation, is perceived by many as a negative reflection on both parties. One characteristic of an Arab community is the confidential treatment of local disputes. Public disclosure of those disputes through court proceedings, particularly those relating to family companies, is liable to prejudice the personal and professional standing of the family, the family company, and the traditions of the immediate community of which the family is a part. Accordingly, there appears to be a widespread disinclination to pursue a dispute or infringement through the judicial system, other than as a last resort. The paramount consideration for all parties is to achieve a mutually satisfactory resolution in which the acknowledged direct commercial losses of the aggrieved party are compensated, while still allowing for some saving of “face” by both sides. Punishment of the infringing party by the imposition of the financial or custodial sanctions available in legislation may stop the infringing act, but does not necessarily benefit the aggrieved party; in fact, imprisonment of a family

81 Ibid, 594.
breadwinner may simply create a burden for the local community. Hence, where a local complaint concerning infringement of intellectual property rights is formally raised with the local authorities or the responsible ministry, common practice throughout the GCC states is for local officials or ministry officials to act as mediator between complainant and infringing party to attempt to engineer a solution satisfactory to both parties. The solution may include an “appropriate gesture” to the complainant. The nature of the “appropriate gesture” depends on the circumstances and extent of the alleged offence, but may consist of a financial payment by way of compensation and cessation of the offending activities. Hence what may appear to western eyes as inaction in the face of infringing activity actually constitutes an alternative dispute resolution that locals would argue is more effective in achieving a better possible outcome than that which might achieved by following the slow and tortuous path of civil and/or criminal litigation.\(^{83}\)

The issue of transparency arises in this context. Many of the leading business organizations in the region are close-knit, family-run enterprises whose principals, by virtue of being members of either the extended royal families or the societal and commercial elite, also hold considerable political and economic influence. There can exist a reluctance to comply either with public disclosure of commercial and financial information customarily required under western laws, or with laws of western origin which counteract the profit-making imperative of past, unrestricted practices. The continued lack of transparency springs from some political and government practices that are still beyond successful attempts at legal reform.\(^{84}\)

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\(^{83}\) These semi-official processes of alternative dispute resolution (ADR) may often result in satisfactory outcomes, but little other than the outcome is recorded. Use of the ADR approach is officially supported, with all states having mediation and arbitration legislation in place. The UAE for example, requires all civil cases to be offered the arbitration and mediation process associated with the courts before the cases come before the courts.

To offset these conservative values, there is emerging in all of the GCC states a pro-western youth culture which is fuelled by a domestic population that is predominately under the age of 25, and an expatriate population which constitutes the majority of the population in all but two GCC states. Accordingly, the rate of regional internet connectivity and growth in computer hardware and software market penetration is dramatic, and the regional market for pirated western goods and particularly western music, Hollywood and Bollywood movies, and computer software, continues to grow.85

Complicating, or rather reinforcing, the societal attitude towards non-compliance with enhanced standards of protection, is the existence of a large and dynamic expatriate population, which in most GCC states can contribute to an environment of evasion rather than compliance.86 The combination of government enforcement strategies which still target end-sellers rather than consumers, and the existence in all states of lengthy court lists that can result in delays of years for both civil and criminal cases, means that the likelihood of expatriates who knowingly and willingly participate in illegal activities being caught and prosecuted are remote. Hence participation in counterfeiting or piracy activities and possible prosecution are worth the risk when weighed against the financial savings that counterfeit or pirated goods or services can provide over their genuine counterparts. Government officials in some GCC states complain

85 The impact of the youth culture and expatriate populations have generally been overlooked by the few commentators on intellectual property in the Gulf region, but are worth further study, unfortunately beyond the scope of this thesis. However three points of significance need to be borne in mind. All the Gulf states have very young populations with more than half of the indigenous population in each state being under 21 years of age. Further, except for Saudi Arabia and Oman, the expatriates make up the majority of the total populations, comprising over 80% thereof in the case of the UAE. In Oman and Saudi Arabia the expatriate numbers are considerably lower, but still comprise 20 - 25% of the total population (see www.gre.ae, and search on GCC country profiles). Expatriates are predominately at either end of the socio-economic spectrum - the lower end comprising low paid workers from the Indian and Asian sub-continents, and the upper end mainly comprising very well-paid (certainly by local indigenous standards) western expatriates from the developed countries. Caught between these two groups are the local youth - amongst whom high unemployment is endemic - being unwilling to undertake the menial, lowly paid jobs carried out by the former expatriate group, and unable to secure the highly paid executive contracts enjoyed by the latter expatriate group. These three elements create a regional environment in which the demand for “best price” latest fashion consumer goods and cheapest entertainment through pirated audio and video items is high, and the market for illegal goods flourishes.

86 Interview conducted by the author with officials in the Bahrain Ministry of Cabinet Affairs and Information, December 2004.
that the expatriate participation in infringing activity is particularly prevalent in respect of computer software and illegal reception of TV cable and satellite transmission.\textsuperscript{87}

5.3.3 Regional Piracy and the Enforcement Response

The challenges for the effective enforcement of intellectual property rights throughout the region are exacerbated by the fact that counterfeiting and piracy, particularly of software, video and music, are still widespread and lucrative businesses. In all states there is always available a ready supply of illegal vendors, mainly lowly-paid expatriate workers from the Indian subcontinent and East Asia, for whom the chance of quick reward far outweighs the risks of seizure and possible deportation. There is also a constant demand for access to pirated goods which are much cheaper, more easily available, and often more up-to-date than their legitimate equivalents.

The nature and modus operandi of an end-selling operation at the grass roots level, is well-described in the following report from the Kuwaiti News Agency (KUNA) on the operation of a typical small-scale but prevalent activity involving the sale of counterfeit DVD’s and videos on the streets of Kuwait City.\textsuperscript{88} The KUNA report also makes pointed reference to what would appear to be a well-organised infrastructure for producing the counterfeit goods, with links that would appear to reach high into Kuwaiti society. It also helps to illustrate the dimension of the problem in combating counterfeit material, and the concern and the response of manufacturers and distributors to the problem. The report comes after years of reports in KUNA of action by

\textsuperscript{87} Ibid. See also “Shadowy Traders, Shady Deals ... the piracy business continues”, Bahrain Tribune, 16 October 2003, 2; available at www.bahraintribune.com/archives, last accessed 16 October 2003.

government officials in conducting raids, confiscating infringing material and closing infringing establishments for violations of Kuwait’s intellectual property laws. While the report is confined to the situation in Kuwait, the picture that it paints is similar to scenes that can be found on the streets, outside the shipping malls, and in the *souks* (markets) of cities in the other GCC states.\(^9\)

“Nowadays, one Kuwaiti dinar buys the latest bootlegged Hollywood movie, pirated software, or even ripped music albums from street vendors who transform entrances to shopping malls and supermarkets into mobile stores. Albeit responsible authorities maintain that they are committed to protecting intellectual property rights and the ministries of interior and information and Kuwait’s municipality persistence in seeking out violators, infringements did not abate, in fact they may have augmented ... copyrights violations dominate, and range from the illegal extensions of satellite TV subscriptions to non-subscribers, illegal publishing and selling of copyrighted books - especially children books, sale of ripped music, sale of pirated software, and the revenue generating sale of bootlegged movies, TV shows, and taped local theatre shows. Vendors selling bootlegged merchandise can be seen on the corners of many shopping malls.”

“A young man lays his rug on the pavement in front of a shopping mall ... and lays out more than 50 video tapes of movies on the rug ... several of the movies are still in theatres while others are not released yet. He says he constantly worries about authorities confiscating his merchandise. The ... stock he carries belongs to his ambiguous ‘boss’, who pays [the young man] 100 fils for each item he sells\(^9\). He ... has no information pertaining to the center of operations or who supplies him, he meets his boss in a public place, settles accounts and leaves, and the next delivery is scheduled over the phone.”

“Selling bootlegged (video) tapes in Kuwait is a business that generates incredible revenues for its owners; four or five individuals in all of Kuwait ... the ‘business’ is, in essence, an oligopoly operated by several individuals through an ambiguous yet intricate network of production, warehousing, and distribution ... all one needs to pull-off a similar operation is 12 video recorders and one video player, costing no more than 450 Kuwaiti Dinars all together ... the cost of video tapes range from 100 to 120 fils per tape, mounting the total production cost for a single video tape of the latest Hollywood movie to around 250 fils which then sells for one kuwaiti dinar. The utilities are stored in

\(^9\) See also the *Bahrain Tribune* report on a similar illicit street operation in the Bahraini capital, above n 87 1-2.
\(^9\) 1000 fils = 1 Kuwaiti dinar (= US$2.91).
a secure secret place, known only to one person, trusted by the owner, and most of the persons who work at the copy-production centers are women. Once the women copy the tapes, the owner transports them to the head distributor, who on his part transports the merchandise to several other distributors who then supply the vendors."

In 2004, some three years after the above media report appeared, the local media was continuing to report that Kuwait still carried a proliferation of pirated material which was available from street vendors, within the souks, and from merchants within the numerous shopping malls. Hence, it is not surprising that Kuwait’s performance in curbing copyright piracy continues to come under particular attack from the USTR and the industry lobby organizations which have input into the USTR reporting process. Although the USTR reports need to be read with some reservation because of their obvious bias in favour of promoting the self-interest of US business, they still illustrate why the USTR argues that it has good reason to continue to be concerned the Kuwaiti lack of apparent success with its enforcement effort. In early 2005, the International Intellectual Property Alliance (IIPA) was complaining to the USTR that:

“Piracy continues to thrive in Kuwait, as hundreds of thousands of pirate optical discs (DVDs, VCDs, CDs, CD-ROMs, “burned” CD-Rs, and, increasingly, DVD-Rs) of movies, music, business software, and entertainment software are openly sold in retail stores, on the streets, and in the souqs each month ... Distributors operate with impunity, supplying retail stores and street vendors alike. Increasingly, domestic piracy ventures are “burning-to-order” at storefronts, or “burning” content onto recordable discs and distributing those to street vendors. Retail stores continue to maintain large stocks of pirate product ... large numbers of street vendors openly display and sell pirate discs (“burned” CD-Rs and, increasingly, burned DVD-Rs) ... Pirates even blatantly use entertainment software publisher brands and trademarks in their advertising."

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Regional media abound with frequent reports of raids and confiscations, with pirated software, video and audio material, printed material, brand-name sportswear, cigarettes and cosmetic lines being the more common targets. The raids are generally targeted at small-scale participants towards the end of the distribution line – wholesalers, resellers, street and souk (market) traders, and end-user businesses (although reports occasionally appear of raids in the UAE in particular on importers and distributors involving large scale confiscations). The raids are often conducted on a regular basis, and often with prior public warning, when they are also meant to serve as part of a public awareness campaign on intellectual property rights. According to Omani government officials, and generally confirmed by their Bahraini counterparts, the following strategy is commonplace in respect of raids and inspections, and can also be observed in the other GCC states.93

"The IIPA is a private-sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is composed of seven member associations: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA). These associations represent approximately 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

IIPA works closely with the U.S. Trade Representative in the annual "Special 301" reviews on whether acts, policies, or practices of any foreign country deny adequate and effective protection of intellectual property rights or fair and equitable market access for U.S. persons relying on intellectual property protection. In addition, U.S. trade laws such as the Generalized System of Preferences (GSP) ... permit duty-free concessionary benefits to be denied to countries which condone piracy or impose other market access barriers to U.S. copyrighted products. In the multilateral arena, IIPA is involved with the implementation of the WTO TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement. IIPA works on IPR developments in bilateral initiatives such as free trade agreement (FTA) negotiations. IIPA also participates in policy developments in copyright and enforcement issues in regional initiatives. IIPA is a non-governmental organization participating in certain copyright-related discussions at the World Intellectual Property Organization (WIPO)."

93 Interview conducted by the author with officials, Oman Ministry of Commerce and Industry, Industrial Property Department, January 2003.
- pre-raid: businesses in a certain shopping district or area are given warning of the impending raid, and are warned to dispose of or surrender any possible infringing product;
- first infringement: usually confiscation of the offending goods and a formal warning against re-offending; a future inspection is listed to check against any re-offending. Notice is generally given of an impending follow-up inspection;
- second infringement: further confiscation and fine imposed by the ministry; premises may be closed for at least a few days, or until the fine is paid, or even longer;
- third infringement: further confiscation, fines, and longer closure of the premises;
- fourth infringement: formal criminal prosecution is launched; possible permanent closure of the premises.

More often than not, raids serve as both an enforcement action and as part of a public awareness/education strategy. Hence local press and electronic media frequently form an integral part of a police/ministry raiding party, and the detail and success of the raid is reported at length. Presence of the media is also useful for displaying to regional watchdog bodies and to the key authorities in western countries, such as the USTR, that the local authorities are sincere and active in their attempts to stamp out piracy and counterfeiting. Also present on appropriate occasions are representatives of the right holder or the regional watchdog body. Hence the nexus between enforcement authorities and media is a deliberate one; it is noticeable, for example, that the intensity of the reporting in the local press of enforcement activities increases immediately prior to or after the introduction of a new intellectual property law, only to ease soon thereafter.
Nevertheless, the raids can, and do, occur without prior warning particularly when a large scale operation, such as a major international company or the regional office of an influential industry watchdog organization, such as the Business Software Alliance (BSA), is the right holder or initiator of the formal complaint. The infringements are then likely to be referred to the public prosecutor’s office for initiation of a criminal action. However, since the court lists in most GCC states are very full, it may be a matter of years before the case is listed and then heard.

A commonly repeated accusation from government officials in the GCC states is that counterfeiting, piracy and the associated smuggling of counterfeit goods, are not conducted by locals but instead mainly by expatriates, notably from the Asian and Indian subcontinents, in collaboration with foreign importers who are their fellow countrymen. And this subtle ethnic distinction is often highlighted in the media reports of raids. A recent report in the Saudi press on the seizure of over 200,000 imported pirate optical disks asserted that vast majority of the discs originated from Indonesia, and that more than 75%, or over 150,000, were ‘hand carried’ by couriers. As part of the public awareness promotion for Qatar’s new trademarks and copyright laws in mid 2002, the Qatari Chamber of Commerce blamed foreign merchants for the existence of imported counterfeit products circulating in Qatar, and claimed that such acts as importation of pirated goods “are new and peculiar to Qatari business community”. In view of

94 Interview conducted by the author with officials, Oman Ministry of Commerce and Industry, Industrial Property Department, January 2003, and Qatar Ministry of Economy and Trade, Directorate of Commercial Affairs, December 2004. See also Maren Hansen, above n 74, 14; Arab News, above n 91.
95 See, for example, Times of Oman, 5 October 2005, 1, in which it was reported that a number of Asian nationals were arrested in a raid in which thousands of pirated classified arts and pornographic CDs were confiscated. The report mentioned more than once that the ‘culprits’ were Asian nationals. A subsequent report of further raids in which those arrested were all expatriates appeared in the Times of Oman, 5 December 2005. Available at www.timesofoman.com/newsdetails.asp?newsid=15491, accessed 5 December 2005.
97 The President of the Qatari Chamber of Commerce claimed that “a number of traders ... have imported and distributed pirated products in the domestic markets ... the perpetrators are few in number and have never represented Qatari businessmen ... Such acts are new and peculiar to the Qatari business community, and hence it is necessary that the culprits should be duly prosecuted to protect the image and reputation of Qatari businessmen.” The report continued that QR250,000 of counterfeit products were seized and destroyed in a recent campaign in Doha (the Qatari capital); The Peninsula, (Qatar) 27 July 2002, 3.
the fact that all GCC states still require foreign merchants to have a local partner or commercial agent, and in light of the general commercial astuteness of local businessmen and traders, the accusations do not stand up to scrutiny. This is borne out by the above-quoted Kuwaiti media report which clearly points to local involvement at the highest levels, and by the following reports on enforcement activity which indicate counterfeiting and piracy on a scale of such magnitude that would not seem feasible without active local involvement:

- seizures by Ministry of Commerce officials in June 2004 of more than 1.7 million fake watches in Jeddah, Saudi Arabia, in June 2004. The watches, which had come by road from Dubai, had already allocated for distribution to 37 regional retail outlets, were during January – March 2002, of more than 200,000 imported pirated optical discs.98

- seizure by Dubai Police in January 2002, of more than 120 million counterfeit cigarettes, including 90 million counterfeit Marlboro cigarettes, having a reported street value of 27 million Dirham (USD$7.5 million) and representing one of the largest seizures of its kind anywhere in the world at the time.99

- raids on three warehouses in Jeddah, Saudi Arabia, in January and February 2003 resulting in the seizure and confiscation of more than 1.2 million pirated Playstation CDs, reportedly worth more than SR26 million, one of the biggest hauls of pirated games in a single operation.100

The above reports illustrate that the counterfeiting and piracy operations which surface in the GCC states are becoming increasingly international in character, are growing in their level of sophistication and are occurring on a much greater scale. As some states already acknowledge,


it would appear that organized crime is becoming increasingly involved in the production, distribution and marketing of counterfeit and pirated goods.\textsuperscript{101} The Saudi Ministry of Commerce and Industry recently moved to establish a national investigation group responsible for large-scale piracy, the role of which will include research into the nature of organised crime activities and intelligence gathering, as well as specialised enforcement.\textsuperscript{102}

### 5.3.4 Judicial Processes

The UK Commission on Intellectual Property Rights and Development Policy argues that the “private” nature of intellectual property rights suggests the importance of disputes between parties being resolved either out of court or under civil law, rather than through the criminal justice system.\textsuperscript{103} It further argues that, since state enforcement of intellectual property rights is a resource-intensive activity, there is a strong case for developing countries to adopt intellectual property legislation that emphasizes enforcement through a civil rather than a criminal justice system.\textsuperscript{104} This would reduce the enforcement burden on the government in the case of counterfeiting on a large scale, although the state enforcement agencies would still be required to intervene. The Commission notes that developing countries have come under pressure from industry which advocates enforcement regimes based on state initiatives for the prosecution of infringements.\textsuperscript{105} It suggests that such pressures should be resisted, and that right holders should

\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid.
\textsuperscript{105} Ibid.
assume the initiative and costs of enforcing their rights.\footnote{Ibid.} Intellectual property rights are essentially private rights, and, as with any other kind of private right, the enforcement of these rights is primarily a matter for the individual owners of these rights.

However, Blakeney and others rightly argue that enforcement of intellectual property rights often cannot be done in any meaningful or effective way in developing states without the support of governmental authorities,\footnote{Michael Blakeney, “Enforcement of Intellectual Property Rights: Challenges, Remedies and Public Awareness”, WIPO National Seminar on Intellectual Property for Faculty Members and Students of Ajman University, May 2004, 32; WIPO Document WIPO/IP/UNI/DUB/04/7. See also Alastair Hirst, “The Role of the Government Authorities in the Enforcement of Intellectual Property Rights”, WIPO Workshop on the Enforcement of Intellectual Property Rights for Judges, Beirut, December 1999, 3; WIPO Document WIPO/IPR/JU/BEGY/99/5B.} and this is particularly the case in the GCC states. Where there is significant intellectual property infringement at street level, as occurs in the GCC states, the government must take the initiative through the public prosecutor to bring criminal cases and thereby commit its authority to the elimination of widespread infringement. Without such support, it is difficult for private rights holders, using civil remedies alone, to bring the situation under control. More will be gained for rights holders by well-publicised raids on suspected premises, convictions of individuals and their punishment with meaningful levels of fines or imprisonment, destruction of infringing goods and the equipment used to produce them, and the closure of premises, than would be gained by proceedings with the object of obtaining for the rights holders compensation for the loss and expense suffered by them as result of the infringement.\footnote{Alastair Hirst, “The Role of the Government Authorities in the Enforcement of Intellectual Property Rights”, WIPO Workshop on the Enforcement of Intellectual Property Rights for Judges, Beirut, December 1999, 3; WIPO Document WIPO/IPR/JU/BEGY/99/5B.} It is only when street-level piracy has been largely eliminated, and intellectual property has become widely recognized as a permanent feature of the state’s legal order, that civil litigation, as opposed to criminal prosecutions, can become the norm in intellectual property matters.\footnote{Ibid.}
The UK Commission and the Blakeney approaches are not necessarily mutually exclusive. The GCC states have tended to follow elements of both approaches in their judicial aspects of intellectual property enforcement. Hence one can find instances of the resolution of disputes between parties being achieved outside the court system, of civil and criminal actions proceeding both jointly and separately, and of numerous reports of well-publicised raids accompanied by seizure and destruction of infringing goods and business closures. However, while reports of raids against infringing individuals and establishments for copyright piracy or trademark infringements are numerous, it is very difficult to assess the extent to which the outcomes of these raids are being pursued within the judicial system, and it is this perceived lack of connectivity and continuity between policing actions and judicial proceedings that generate much of the criticism from developed countries on the intellectual property enforcement climate in the GCC states. It may also create the impression to the casual observer (or indeed, the not-so-casual observer such as the IIPA) that courts in the GCC states are doing little to enforce intellectual property rights. The IIPA has argued, in respect of Saudi Arabia’s current performance in this regard, that:

“due to lack of transparency (or we fear, lack of action), no case information has been provided and there is no way to track cases brought, including sentencing. In the rare cases in which industry was able to learn about the results of cases, fines imposed were non-deterrent, and there were no sentences of imprisonment, to IIPA’s knowledge, meted out in 2004.”

The IIPA has been even more critical of what it holds as Kuwait’s ineffectual efforts to mete out justice against intellectual property infringers. In respect of Kuwait’s reaction to copyright piracy, IIPA has complained that:

110 See also the discussion in Section 5.3.2 above.
"the rare cases that have been brought to court have not gone particularly well ... [there was] one conviction for copyright piracy in 2002, but the fine was a paltry 500 Kuwait Dinars\textsuperscript{112}, and no imprisonment was imposed ... The Kuwaiti courts did not sentence any violator to prison nor close any shop or company dealing with illicit software in 2003."\textsuperscript{113}

Some states, notably Oman, Qatar and the UAE, have drastically overhauled and restructured their judicial systems in recent years, as part and parcel of their constitutional, political and administrative reforms.\textsuperscript{114} These overhauls, while crucial to the establishment of effective and modern judicial systems have impacted negatively on the enforcement of the intellectual property regime in the medium term. The necessary changes and the rate of change have largely

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
\textbf{Kuwait Criminal Copyright Enforcement Statistics for 2002} & \textbf{Motion Pictures} & \textbf{Entertainment and Software} \\
\hline
\textbf{Number of cases conducted} & 4 & 1 \\
\textbf{Number of cases commenced} & & \\
\textbf{Number of defendants convicted (including guilty pleas)} & & \\
\textbf{Acquittals} & many & Many \\
\textbf{Number of cases pending} & & \\
\textbf{Total number of cases resulting in a jail term} & 0 & 0 \\
\textbf{Suspended prison term} & 0 & 0 \\
\textbf{Maximum 6 months} & 0 & 0 \\
\textbf{Over 6 months} & 0 & 0 \\
\textbf{Total suspended prison terms} & 0 & 0 \\
\textbf{Prison terms served} & 0 & 0 \\
\textbf{over 6 months} & 0 & 0 \\
\textbf{over 1 year} & 0 & 0 \\
\textbf{Total prison terms served (not suspended)} & 0 & 0 \\
\textbf{Number of cases resulting in criminal fines} & & \\
\textbf{up to $1,000} & unknown & Unknown \\
\textbf{$1,000 to $5,000} & unknown & Unknown \\
\textbf{over $5,000} & unknown & Unknown \\
\textbf{Total amount of fines levied} & unknown & Unknown \\
\hline
\end{tabular}
\end{table}

\textsuperscript{112} which, it should be noted is the maximum financial penalty permitted under Kuwait’s copyright law, Law No. 64 of 1999, art 42.

\textsuperscript{113} IIPA, Submission on Kuwait to the USTR for the USTR 2004 Special 301 Report, 3-4; available at \url{www.iipa.com/bc/2004/2004special301Kuwait.pdf}, last accessed 10 December 2005. The report continues that "one case against one of the largest commercial groups in Kuwait for unlicensed software usage remains pending after three years ... the MOI [Ministry of Information] ... sent 79 cases for prosecution [since 2001], but the results for these cases were quite disappointing, with four acquittals, four non-deterrent fines, only seven cases in which materials were confiscated in addition to a fine, and an overwhelming 64 cases still being considered by the prosecutor or awaiting decision or sentencing."

The same report included the following table, taken from the Ministry’s own annual report, from on the performance of the Kuwaiti authorities in the pursuit of criminal prosecutions for counterfeiting infringements:

\textsuperscript{114} Qatar, Law No. 6 of 1999 and Law No. 10 of 2003, the Law of Judicial Authority; see Al-Tamimi, above n 95, Issue 165, December 2004, 18.
outstripped the capacity of the system to integrate them, and the community’s capacity and willingness to understand, adopt, and respond properly to them.

Contributing to the negative impact of the legislative changes and judicial reforms is the unfamiliar nature in a jurisprudential sense of some of the legal concepts enshrined in the new laws. According to Hirst, some of the TRIPS enforcement procedural concepts and mechanisms, for example, have no natural place in a civil law system, and their terminology has no natural counterpart in the lexicon of modern legal Arabic. For example, the new enforcement standards provide judicial authorities with the authority to make provisional orders so as to prevent the occurrence of infringement even when it is merely threatened and to preserve relevant evidence in regard to the alleged infringement. It has been suggested that judges in the GCC states are usually unwilling to make such an order so early in a case. The evidence would need to be very compelling to convince them that the damages threatened by infringement could not be made good by monetary compensation. Also unfamiliar to local judges and officials is the nature of intellectual property itself, as may be the nature of the adversarial legal process as envisaged in TRIPS. Hence it is not uncommon to find that prosecutions of actions that constitute an infringement against a right of an intellectual property nature may proceed under other laws, such as the commercial agency or criminal/penal codes, with which the judiciary are more familiar. The Omani media recently reported that charges against a number of Asian nationals arrested for counterfeiting “classified arts” and pornographic CDs would be laid under

115 Hirst, above n 108, 2.
117 Ibid.
118 Ibid.
the much older Royal Decree 65/1987, the Control of Artistic Works Law, rather than Oman’s more recent copyright law of 2000.\textsuperscript{119}

The common law principle of \textit{stare decisis} is not recognized in Islamic states. As discussed earlier, the guiding source for legal judgement is shariah law or statute law, depending on the particular jurisdiction.\textsuperscript{120} Insertion of an opinion from a secular judge as a legal precedent would be to deny the authority of the \textit{Shariah}, and to place the opinion of a judge above Islamic law. The extent to which previous judicial decisions might at least be taken into account or even consulted varies from states to state, and will in part depend on the degree of Islamic conservatism within that state. Hence in Saudi Arabia, adherence will be strictly to the \textit{Shariah}, whereas in the UAE, decisions of a superior court, while not binding on the lower courts, might at least be persuasive.\textsuperscript{121} However, a consequence of the absence of the principle of \textit{stare decisis} in the judicial system is that one imperative for the explanation and careful recording of legal argument, and explanation of the basis for judicial decision-making is absent. The quality of records of judicial proceedings and judgements across the GCC states varies markedly, but in any case, do not approach the standard assumed in western countries. Legal practitioners complain that court records are often incomplete, or even missing.\textsuperscript{122} Judgements often record the decision without reference to any reasoning or argument, are not always publicly available and at best published haphazardly. In Bahrain, for example, only judgements made by the Court of Cassation are publicly available and then only in the Official Gazette and, of course, only in Arabic, while \textit{Shariah} court judgements are not (officially, at least) publicly available.\textsuperscript{123}


\textsuperscript{120} See also the discussion on the \textit{Shariah} and the Judicature in Chapter 2.3 above.


\textsuperscript{122} Ibid.

In Kuwait, court proceedings and judgements may be made publicly available, but then only at the discretion of the courts.\textsuperscript{124} However, it must be remembered that almost all intellectual property laws (with the exception of those of the UAE) provide for the court’s judgment to be published in a local Arabic daily paper, at the expense of the guilty party, and this publication, albeit incomplete and non-authoritative, forms a public record of sorts. This practice, which is often followed, can also serve as a form of public awareness-raising of the nature offence and public admonition of the guilty party.

Because of the very full court lists from which all GCC states currently suffer, alternative dispute resolution procedures take on increasing importance and play a greater role than they would otherwise in resolving disputes. Accordingly, government officials of a number of GCC states would argue that on-the-spot confiscation of infringing goods and equipment, financial penalties which are realistic in light of the economic circumstances of the infringing parties, and closure of the infringing premises are both very effective, and even arguably more effective than the threat of possible prison sentence after a lengthy process of litigation.\textsuperscript{125} If, however, organized crime continues to encroach into the territory of the petty infringer, as suggested earlier\textsuperscript{126}, then the customary methods of control and enforcement which target the tail of the supply chain and the end-seller will become totally ineffective.

All GCC states make extensive use of alternative dispute resolution strategies, both within and outside the judicial structure, and all have in place formal processes for the utilisation of experience with the Omani judicial system, the court record on a case generally constitutes the decision handed down by the court, without any other detail.


\textsuperscript{125} Interviews conducted by the author with officials in the Bahrain Commerce, Qatar Ministry of Economy and Trade, and Oman Ministry of Commerce and Industry, December 2004.

\textsuperscript{126} See also the discussion in Section 5.3.2 above.
alternative dispute resolution and mediation processes and reconciliation committees.\footnote{UAE Federal Law No. 4 of 2001 provides for the appointment by the Minister of Justice of one or more reconciliation committees at the federal courts of first instance. This law is not applicable in Dubai or Ras Al Khaimah.} The purpose of the committees is to encourage and facilitate the amicable settlement of commercial and civil disputes of whatever value, and, if possible to obviate the necessity for the matter to proceed to formal litigation. A party to a dispute is not obliged to defer to the alternative dispute resolution process, but the courts generally may not hear a case unless the matter has been before the relevant reconciliation committee or a party has been given the opportunity to utilise the process but has expressed its prerogative not to so proceed. The reconciliation committees do not have authority over summary matters or matters at which the attendance of the public prosecutor may be required, that is, in respect of criminal cases. These alternative dispute resolution processes, which occur within the context of legislative authority and an extra-judicial framework, reinforce the informal mediation processes undertaken proactively by local authority and ministry officials\footnote{See also the discussion in Section 5.3.2 above.}.

Omani government officials freely acknowledge that very few cases involving the infringement of intellectual property rights ever reach the courts, notwithstanding the legislative provisions and the number of raids that are undertaken, particularly in respect of copyright and trademark infringements.\footnote{Interviews conducted by the author with officials in the Oman Ministry of Commerce and Industry, Directorate of Commerce, December 2004.} But this scenario, they would submit, is as much due to the widespread practice of alternative dispute resolution options that are available, as due to any shortcomings in judicial structures and processes. In the opinion of the officials, the notion that the law and its penalties should be used as a first resort to punish the wrongdoer is inconsistent with Omani (and Muslim) values and commercial practices. Accordingly, the officials would assert that the fact that only a few civil cases, and no criminal cases, on intellectual property rights
infringements have come before the Omani courts is not necessarily a negative reflection on the judicial system; instead it is an indicator that the mediation processes are working effectively.\textsuperscript{130} Where a case, mainly involving a foreign rights holder, goes to court, the court tends to play a similar role as the government officials, namely, that of a mediator to reaching a settlement acceptable to all parties, albeit within the parameters of the legislation under which the dispute is proceeding. On occasion, the ministry official who may have attempted (unsuccessfully) to resolve the dispute that has become the subject of the court hearing will appear before the court as an expert in the case.\textsuperscript{131}

Those GCC states that are committed to reducing the incidence of intellectual property infringements to internationally accepted levels – and the UAE is the leading state in this respect – place a greater reliance on, and utilisation of, the criminal justice system. As the most active and vigorous of the states in enforcing intellectual property rights, by this strategy, the UAE has experienced the most dramatic decreases in copyright piracy and trademark violations for the GCC region, and has also established a number of precedents for the region in terms of judicial determinations.\textsuperscript{132}

In a recent case, for example, the Dubai Court of First Instance convicted a dealer for illegally copying satellite pay-television smart cards, which permitted access without subscription payment to encrypted pay-television. The court fined the dealer AED50,000, sentenced him to one month’s imprisonment, and ordered that he be subsequently deported. The court further ordered that the offending material and equipment used in its manufacture be confiscated. This

\textsuperscript{130} Ibid. See also \textit{The Economist Intelligence Unit}, Viewswire, 15 June 2004, at www.proquest.umi.com.ae, last accessed 11 February 2005.

\textsuperscript{131} Interviews conducted by the author with officials in the Oman Ministry of Commerce and Industry, Directorate of Commerce, December 2004.

particular case has been heralded as a landmark case in the UAE in respect of its subject matter and the perceived severity of penalty imposed, thereby illustrating the seriousness with which the UAE holds intellectual property infringement matters. However, it is interesting to note that the convicted dealer, by virtue of the deportation order, was not an Emirati national.

However, to illustrate the inconsistency that can exist across the UAE in the application of enforcement action against intellectual property infringements, a local court in Ajman, the neighbouring Emirate, subsequently considered a similar case against the owner of a local satellite receiver and electronics shop, but merely fined the owner and his salesman AED10,000 each and ordered confiscation of the infringing material. No reference was made in the court’s judgement to closure of the premises or of any other sanctions being imposed.

The combination of weak measures of criminal and civil damages and the inability to recover the costs of enforcement can actually serve to encourage infringement and discourage civil enforcement by right holders. These weak measures, often based on a formulation of lost profit to the right holder, encourage infringers to anticipate that the damages recoverable through civil litigation would amount to only a fraction of the wholesale price for resale, and an even smaller fraction of the retail price for commercial or personal use. Under such circumstances,

133 Dubai Court of First Instance Judgement No. 6106 of 26 February 2001; discussed in Al-Tamimi, above n 96, Issue No. 120, March 2001.
134 Al-Tamimi, above n 96, Issue No. 134, April 2002. In both the Dubai case and the Ajman case, penalties were reportedly imposed pursuant to UAE Federal Law No. 40 of 1992, the Copyright Law, Article 42, which provides:
   “Any establishment responsible for the distribution, sale or reproduction of copies of a work may not proceed with such sale or reproduction without a written authorization from the author who is the owner of the work or his agent. The owner of the establishment who contravenes the foregoing shall be punishable by imprisonment or a fine not less than Dhs. 50,000 or both.”
and Article 43, which provides that:
   “In all cases mentioned in this chapter, the court shall order an injunction for the confiscation of the copying of works which are the subject of an offence, and the court may also decide to close the establishment”.
infringement becomes a calculated business risk that can still leave an infringer with a handsome profit from the proceeds of his infringing activity, even if caught and punished\textsuperscript{136}. This is best illustrated by examining the deterrent capability of Kuwait’s copyright law. The law, which has a statutory maximum fine of KD500 (or US$1716) and imprisonment for up to one year, has the most lenient sanctions of all the GCC states. The application of the law by the courts is even more lenient, with the courts reportedly imposing fines of only KD 100 (or US$343), a token financial penalty even by local and regional standards.\textsuperscript{137}

But even the UAE, which the BSA describes as “the touchstone for the other countries in the region to aim for ... with one of the best regulatory structures as well as the enforcement record”\textsuperscript{138}, still errs too much on the side of leniency according to some local legal practitioners. It is claimed that, as a general rule, financial penalties commonly tend to be towards the bottom rather than the top of the statutory range, and the imposition of prison terms is infrequent - notwithstanding the substantial penalties available under its main intellectual property laws, and the very occasional and heralded court case in which the maximum available penalties are applied.\textsuperscript{139}

In a recent case before the Abu Dhabi Court of Appeal (Criminal Division)\textsuperscript{140}, the court reduced the sentences imposed by the primary court upon a merchant for the unauthorized copying and installation of computer software on a number of computers that he was offering for sale.

\textsuperscript{137} Reported in Al-Tamimi, above n 96, Issue No. 163, October 2004, 22. See also IIPA 2005 submission to the USTR, above n 106.
\textsuperscript{139} Interview conducted by the author at Al-Tamimi & Co, Legal Advocates, Dubai, UAE, December 2004
\textsuperscript{140} Abu Dhabi Court of Appeal, Case No. 874/2004, 6 June 2004; discussed in Al-Tamimi, above n 96, No. 162, September 2004, 20-21.
A software company and the Public Prosecutor had separately brought actions against a local merchant for illegally copying the company’s software and installing it on a number of computers. The merchant admitted the offence and entered into a restitution settlement with the software company, which withdrew its complaint as a consequence. However, the Public Prosecutor continued with the criminal charges. On the basis of the admission, the primary court sentenced the merchant to 3 months imprisonment and fined him AED50,000 on one charge, and AED10,000 in respect of a second charge. The court also ordered that the infringing software and the computers on which it was loaded be confiscated, that the merchant’s establishment be closed for one month, and that the court’s decision be published in a local daily newspaper at the merchant’s expense. The court also ordered a stay of execution for 3 years on the jail sentence on the grounds that the merchant and the software company had entered into a restitution settlement prior to the matter coming before the court.

The merchant appealed the lower court’s judgement, seeking annulment of the lesser fine and all other orders. The appellate court held that the lower court had erred in imposing two separate penalties when the charges originated from one and the same intention and were indivisibly linked such that they would attract the penalty prescribed for the more serious offence. Accordingly, the appellate court cancelled the lesser fine of AED 10,000. It also confirmed the lower court’s order regarding the stay of execution but extended it to include both the prison sentence and the greater fine, in accordance with the provisions of Article 83 of the Penal Code in light of the restitution settlement. The court further held that the lower court’s orders directing the confiscation of the computers carrying the duplicate software was without basis, since Article 40 of the UAE copyright law (2002) stipulated that confiscation may only be directed against machinery specifically designed and used for the purpose of infringement. This

141 UAE Federal Law No. 3 of 1987, the Penal Code. Article 83 allows a court to stay the execution of a jail sentence and a non-proportional fine.
description did not apply to the seized computers even when they carried unauthorized software since the computers could be used for legitimate purposes after the software was removed. In respect of the merchant’s request for cancellation of the lower court’s order for closure of the business, the court held that closure was a mandatory provision under Article 40 of the copyright law 2002, and was not a penalty for which execution could be stayed. However, it reduced the period of closure to one week from the original one month imposed by the lower court.

In the final analysis, the convicted merchant was merely required to close his business establishment for just one week.

5.3.5 Structural and Legislative Processes

When described in layman’s terms, the fundamental elements of the various areas of intellectual property protection encompassed by TRIPS may appear relatively easy to comprehend. But the translation of the layman’s description into national legislation is a different matter, since TRIPS itself and its related international conventions set requirements and standards which are very complex and sophisticated. The reality, as asserted by the UK Commission on Intellectual Property, is that in developing countries, intellectual property is a relatively new and specialist area of public policy.\textsuperscript{142} Accordingly, the developing countries lack experienced and well-qualified officials to provide expertise, and therefore have a considerable dependence on technical assistance provided by WIPO and other bodies. The problem can be particularly acute in the case of intellectual property since there are few people who possess both the specialized

\textsuperscript{142} UK Commission on Intellectual Property Rights, above n 103, 138-9.
technical skills of legislative drafting as well as expertise in intellectual property law.\textsuperscript{143} Hirst adds another dimension to the problem. He suggests that from a technical perspective, it can be difficult to incorporate into the national laws the very specific requirements of TRIPS Part III relating to enforcement.\textsuperscript{144} As mentioned above, some of the procedural concepts and mechanisms provided for in TRIPS Part III are of Anglo-American common law origin: they have no natural place in a civil law system, and their terminology has no natural counterpart in the lexicon of modern legal Arabic.\textsuperscript{145}

The legislative drafting, therefore, requires expertise, skill and care in law and language. In some respects, the GCC states have endeavoured to address the difficulties identified by the UK Commission and Hirst by virtue of the technical assistance they have sought and received from WIPO in the form of legislative advice, drafting assistance and expert commentary in the creation of their intellectual property laws. These endeavours have not been entirely successful, since a number of incongruities and structural inconsistencies still exist in the laws (and upon which comment has already been made in the previous chapter).\textsuperscript{146} However, the challenge re-emerges at the domestic secondary level, as the states tackle the task of drafting procedural statutes and regulations which create the necessary implementation mechanisms and processes and yet are still comprehensible to both the administrators and the general public.

An inherent weakness in the legal structures of the GCC states is the inadequacy and at times absence of procedural laws and subordinate regulations to give practical effect to a substantive law. This is particularly the case in respect of the timeliness of the production of enabling regulations following the enactment of a substantive intellectual property law. The substantive

\textsuperscript{143} Ibid, 139
\textsuperscript{144} Hirst, above n 108, 2.
\textsuperscript{145} Ibid.
\textsuperscript{146} See also discussion in Chapter 4, sections 4.3 to 4.10, above.
law generally comes into effect either on its publication in the Official Gazette, or a specified
period of time thereafter (commonly 30 or 90 days) or upon issuance of the subordinate
implementing regulations.

Almost all intellectual property laws require the drafting, approval and introduction of the
corresponding subordinate implementing regulations before they can come into practical effect.
Implementing regulations address a broad range of issues, not least amongst them being scales of
registration fees and other charges, administrative structures, registration requirements,
composition of review committees, authorizations and delegations - without which any
implementation of the substantive laws in question cannot proceed. While some intellectual
property laws establish the authority for ministry officials to carry out enforcement activities, the
implementing regulations generally define the bounds of that authority.\textsuperscript{147} An inordinate period
of time, sometimes measured in years, can, and often does, exist between gazettal of the
substantive law and issuance of the necessary implementing regulations to bring the laws into
effect, thereby creates an imponderable impediment to effective enforcement. This may not be a
matter of great import in areas of little or no local activity, such as protection of new plant
varieties or integrated circuits, but it can have significant ramifications in respect of the daily
administration of copyrights, trademarks and patents. Oman, for example, issued its new suite of
intellectual property laws between May and October 2000, but five years later, only some of the
corresponding implementing regulations have just started to emerge.\textsuperscript{148} The reasons offered for
the delay in issuing the other implementing regulations include delays by WIPO in its preparation
of the regulations, delays by the other GCC states which Oman feels obliged to consult on the

\textsuperscript{147} See, for example, Kuwait, Law No. 64 of 1999 (copyright), art 45; Oman, Royal Decree No. 38/2000
(trademarks), art 44; Qatar, Law No. 7 of 2002 (copyright), art 55; Saudi Arabia, Royal Decree No. M/41 of 1424
(copyright), art 24; UAE Federal Law No. 17 of 2002 (patents), art 65.

\textsuperscript{148} The first implementing regulations to appear were those for Royal Decree No. 92/2000, the Law on the
Protection of New Plant Varieties, which were issued in May 2004. The implementing regulations for Royal
Decree No. 38/2000, the Law on Trade Marks, Indications and Secrets and Protection from Unfair competition,
nature and content of the regulations as part of its GCC membership, or obstacles thrown up by other government departments who are a obligatory part of the regulation issuance process. Similarly, Kuwait's original 1962 patents law of 1962, as amended in 1995 and 1999, is still current, pending the issuance of Implementing Regulations to give effect to its new law enacted in 2001. Qatar is still awaiting implementing regulations for its trademarks and copyright laws enacted in 2002. Article 53 of Qatar's trademark law of 2002 requires the implementing regulations to be issued within three months of the law coming into effect (which occurs on publication in the Official Gazette), but some three years later the implementing regulations have yet to appear. The common practice in such circumstances is to continue to use the implementing regulations for the now repealed prior law, thus exacerbating the confusion and uncertainty in the minds of the administrators and the public as to which law is in force. Some GCC states in recent times have been in the situation of having repealed an intellectual property law without it ever having been brought into effect.149

Consequently, uncertainty can and does exist as to the extant validity of a particular law and the extent to which it should or can be enforced. In such circumstances, the common reaction is to do nothing, or at best act conservatively. In May 2004, for example, the Directorate of Industrial Property at the Bahrain Ministry of Commerce publicly announced that it would cease accepting patent applications for filing because the implementing regulations for its new patent law that had been enacted in January 2004 had not yet been issued.159 The announcement advised that the cessation would stay in place until such time as the implementing regulations, which were to stipulate the required lodgement processes and fees structure, were issued. By the end of 2005,

149 However, this is not to say that, on occasion, the issuance of laws and subordinate regulation can’t be effectively coordinated, and occur in rapid succession. Saudi Arabia, for example, issued implementing regulations for its new law on Patents, Layout Designs of Integrated Circuits, Plant Varieties and Industrial Models on 26 December 2004, within the prescribed three month period since the law’s promulgation and within two months of the law coming into effect.

the implementing regulations had yet to appear. However, since the former patent law was rescinded immediately upon the new law being issued and published, the Directorate technically has not been able to accept any applications under the old law either. A saving grace in this confusion is the fact that, up to mid 2005, the Directorate had not received any patent applications of local origin for filing or examination. The future will decide whether Bahrain’s recent accession to the Patent Cooperation Treaty, which will allow for filing direct with WIPO, will alleviate or further compound this confusion.

By contrast, its sister government agency responsible for copyright protection, the Directorate of Publications and Press in the Ministry of Information is reportedly already conducting raids, seizing alleged counterfeit or pirated material, instituting fines, ordering closures, and initiating prosecutions for infringements in accordance with the provisions of the proposed new copyright law, even though the law has not yet been enacted. This Directorate believes that retrospective application of the new law, which it anticipates will be in force by the time the prosecutions come to court, should not be a major issue for either the public prosecutor or the judiciary.

However, sometimes the issuance of the implementing regulation can have a different effect to that intended. Qatar’s recently issued ministerial regulation, substantially increasing the scale of fees for trademark registrations, is an example at hand. The regulation increased the fees by at least 100%, and even twelve-fold for the registration of a licencing agreement, leading to a reported ‘scandalous upheaval in the IP community’ and a downturn in registration activity.

151 Interviews conducted by the author with the Bahrain Ministry of Commerce, Directorate of Industrial Property, December 2004, and subsequent personal correspondence, June 2005.
153 Ibid.
5.3.6 Administrative Structures

Across the GCC states there exists a number of common elements in respect of the institutional structures that have been established in recent times for the administration and enforcement of intellectual property rights, although each state retains its own individual organizational differences to best suit its own particular needs. The more common model is for responsibility to be vested across at least four ministries (if one includes police and security forces involved in conducting raids), although in some states, their administration and enforcement may require the involvement of agencies across five discrete government ministries. Typically, responsibility for the administration of industrial property rights encompassing trademarks and patents (and notionally other areas such as geographical indications, trade secrets, unfair competition, and new plant varieties) resides within a ministry whose terms of reference may include some or all of commerce, finance, industry or trade. Copyright and neighbouring rights resides within a ministry whose description and terms of reference may encompass some of cabinet affairs, national heritage and culture, and information - the latter in some respects being a logical extension of the earlier censorship function and control of publications and publishing houses. Customs and border control matters relating to the movement of goods generally lie within the purview of a ministry for trade, while internal enforcement involving police force actions require the authority of the ministry of internal affairs or internal security.

The following table illustrates the organizational structures and division of primary responsibilities for industrial property protection and copyright protection across the GCC member states:
Qatar offers the simplest and most integrated organizational structure. It incorporates all responsibility for the implementation and administration of intellectual property within the portfolio of the Ministry of Finance, Economy and Commerce. The Ministry’s Directorate of Commercial Affairs supervises both the Trade Marks Office, which also addresses patent matters, and the Office for the Protection of Copyright Affairs.
Bahrain and Kuwait share very similar structures. In each case, responsibility for intellectual property enforcement has evolved across three ministries, namely a commerce ministry for industrial property matters (trademarks, patents, industrial designs etc), an information ministry for copyright and related rights, and a further ministry for customs, police and border controls.

In Kuwait, the Ministry of Information, in which responsibility for copyright and neighbouring rights is vested, also monitors the government press and the radio and television broadcasting stations. All literature, audio, video and any other media material coming into Kuwait from abroad must still pass through the Censorship Department of the Ministry of Information for approval.

Saudi Arabia and the UAE have a “four-ministry” model for the administration of intellectual property rights, in structures that are both undergoing change and development, namely in each case:

- a commerce ministry - primarily responsible for implementing the trademarks law, but also responsible for ensuring compliance with national standards in respect of products and goods that come within the purview of the trademark, patent, and copyright laws;

10. an information and culture, which is primarily responsible for implementing the copyright law, but which also administers the printing and publications laws;

11. a finance and economy ministry, which supervises the respective customs authority which is charged with implementing the customs laws.
in the case of Saudi Arabia, a pseudo-ministry, the King Abdulaziz City for Science and Technology (KACST), which is primarily responsible for implementing the patents law, and the proposed industrial designs law;\textsuperscript{155}

12. in the case of the UAE, a finance and industry ministry which, like the KACST, is responsible for patents administration;

Oman’s structures are somewhat more sophisticated. Within the Ministry of Commerce and Industry resides the Directorate of Industrial Property, which is responsible for managing registers for patents, trademarks, and geographical indications (when introduced in the near future). The Directorate is also responsible for the maintenance of the register of copyright works and the administration of the copyright law, but, rather incongruously, not its enforcement. The Ministry of Heritage and Culture, on the other hand, plays a much more active role in respect of copyright infringements, particularly in respect of counterfeit software and piracy, and it is this Ministry which conducts enforcement actions in conjunction with the Royal Oman Police. It is most likely, according to local speculation, that the copyright protection functions of the units in the two ministries will be rationalized in the foreseeable future. Oman increases the complexity of the administration of its intellectual property regime by vesting in the Ministry of Agriculture responsibility for the new plant varieties law and the maintenance of registers on new plant varieties.

\textsuperscript{155} According to its own website (www.kacst.edu.sa/en/about.asp), the King Abdulaziz City for Science & Technology (KACST) is an independent scientific organization of the Saudi Arabian Government, established in 1977 as the Saudi Arabian National Center for Science & Technology (SANCST) and later in 1985 renamed as 'King Abdulaziz City for Science & Technology (KACST)'. KACST is governed by a Supreme Committee, which is chaired by the Prime Minister (the King) and is composed of the ministers of the major ministries to which science and technology are of greatest relevance, namely Deputy Prime Minister (Vice Chairman), Minister of Defense & Aviation & Inspector General, Minister of the Interior, Minister of Higher Education, Minister of Agriculture & Water, Minister of Industry & Electricity, Minister of Petroleum & Mineral Resources, Minister of Planning, Minister of Finance & National Economy, Head of General Intelligence, and the President of KACST, and three other members nominated by the Prime Minister. The KACST is responsible for promoting the developmental sciences and technology in the Kingdom.
Perhaps “work in progress” is the most apt description of the organizational infrastructures responsible for intellectual property governance and administration amongst the GCC member states, particularly as the structures of government is constantly changing and developing. By the GCC states’ own admissions, effective enforcement of intellectual property rights is hampered by a shortage in the ministries, enforcement agencies and the judicial system of personnel expert in the understanding, interpretation and understanding of intellectual property legislation and trained in enforcement strategies and practice. Oman, for example, indicated to the WTO just prior to its accession in 2000 that it would take a full transitional period of five years to effectively implement the minimum standards of TRIPS, and particularly its enforcement provisions, because the country did not have appropriate and effective enforcement laws, procedural laws, the institutional machinery for enforcement, or the trained and experienced personnel to implement them.\textsuperscript{156}

The divisions of authorities and responsibilities in the respective GCC states for the national management of intellectual property, as outlined in the table above, are viewed with some dissatisfaction by those developed countries with commercial interests or ambitions in the GCC states. The involvement of multiple ministries in the management and enforcement structures is perceived as a fundamental cause for inadequate enforcement performances by the states. Developed states have been prompted to pressure some of the GCC states to legislate for a single comprehensive intellectual property rights enforcement law, and to establish a single administration, monitoring, and enforcement agency under the supervision of one government.

ministry. The pressure has been resisted to date by all states, although some states have established inter-ministry co-ordination agencies – not always with complete success, it appears. According to the IIPA, the story of Kuwait’s recent copyright enforcement performance is a tale of three ministries (or more). Industry continues to receive good cooperation from the Ministry of Finance’s Department of Customs intercepting pirated shipments at the borders, while the Ministry of Commerce and Industry stepped up efforts in late November/early December 2004 with some impressive raids. On the other hand, the Ministry of Information enforcement unit remains sorely lacking in its ability and perhaps its will to stamp out piracy, taking only sparse enforcement actions in 2004. The Ministry of Interior, which is responsible for the Kuwaiti police forces, and even Customs remain unable to take ex officio action necessary to defeat piracy in Kuwait. The IIPA argues that Kuwait should establish a specialized IPR unit within the police force in order to have a permanently operational law enforcement body with trained officers that can carry out immediate raids as and when information about piracy becomes available. It has also been very critical of the performance of a much vaunted Kuwaiti inter-ministry task force established in 2000 between the ministries of commerce, the interior, customs, and the public prosecutor, suggesting that the task force was “mired in red tape and bureaucracy and may in fact be hindering enforcement in Kuwait.”

While the governmental structures that the various GCC states have adopted, or have allowed to evolve, have contributed to some of the coordination and performance problems that they experienced, they are not the key issues. As has already been mentioned in respect of the

157 UK Commission on Intellectual Property Rights, above n 103, 151-2. See also Mart Leest and Tom Pengelly, “Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement”, UK Commission on Intellectual Property Rights Study Paper 9, 32-4. The developed countries have also suggested to some GCC states on occasion that specialist intellectual property courts should be established for the civil and criminal prosecution of intellectual property rights infringements. All suggestions have so far been resisted by the GCC states concerned.
158 IIPA, above n 92.
159 Ibid.
judicial system, the key problems confronting the respective ministerial departments involved in intellectual property management and enforcement has been the lack of expert human resources and institutional capacity.

While processes for the registration and administration of trademarks are generally well-established, having been in operation for a number of years, the same cannot be said of patents. While all states maintain patent offices, they generally serve as filing offices only, with none of the states (nor the GCC patent office) carrying out searches and substantive and technical examinations. The UAE recently entered into an agreement with the Austrian Patent Offices for the conduct of technical examination, and the GCC Patents Office has used the European Patent Office and IP Australia for the training of examiners. By the same token, the registration of works of copyright has been well-established under the former publication and printing control legislation.

5.4 Conclusion

It is well nigh impossible to obtain reliable longitudinal data from authoritative sources within and between the GCC states on the states’ and region’s performances in enforcing their intellectual property laws and protecting individual rights. It is also extremely difficult to obtain reliable data on the success of raids and judicial activity in controlling the prevalence of counterfeiting and piracy and other forms of illegal intellectual property activity in the Gulf. There are four fundamental reasons for this situation, namely:

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161 See Section 5.3.4 above.
the absence of reliable and independent data collection structures and processes in and across the GCC states, and the absence of public access to such data if and where it is collected;

- laxity or uncertainty in procedures and practices in the secure control, monitoring and destruction of infringing goods and equipment, thereby allowing confiscated illegal and counterfeit goods to remain in or return to the market place (and in a sense be subject to double-counting by being on occasion the subject of subsequent seizures);

- where raids are publicly reported, they are invariably linked to another political agenda or strategic objective process, and are thus often presented in a manner best suited for that particular agenda or initiative; an example of such an agenda might be the issuance of a new intellectual property law and a consequent public awareness campaign;

- competition between ministries for resources and status; governmental departmental reports, which are often on restricted circulation, concentrate on the positives, and do not always portray the global picture.

Where information does appear, it is often second-hand, anecdotal, and lacking any consistency or format that easily allows comparative analysis across sectors or years. Hence such reports that do appear need to be read in the context of the political environment in which they appear. This is not so say that they should be discarded; rather that recognition should on occasion be given to a symbiotic association between local colour and hard facts. It has also been suggested that there is another, more sinister, explanation for the inherent difficulty in obtaining reliable statistics, namely the ‘clandestine and mobile nature of the facilities used to manufacture pirate and counterfeit goods, and of the persons involved in producing and distributing such goods’, the apparent implication being that such persons are likely to be ‘well-connected’.162

162 Saba & Co, above n 101, April 2005.
However, it should not be assumed that, in the absence of authoritative and verifiable reports and statistical data, the GCC states are not making progress in their fights against counterfeiting, piracy and other intellectual property rights enforcement. Saudi Arabia and Bahrain, being the largest and the smallest respectively of the GCC states in terms of population, area, are the states with the largest and smallest intellectual property infringement problem and enforcement activity. Hence they provide both contrast and comparison. The following are extracts from a local Saudi legal profession newsletter of recent enforcement activity by the Saudi authorities during the first half of 2005:

April: the Saudi Ministry of Commerce and Industry seized 1,000 tons of counterfeit products, and destroyed 8 million items in 2004. 1600 cases, mainly related to food products and auto parts, were currently being investigated;

April: the Commercial Anti-Fraud Department of the Ministry of Commerce and Industry reported that it had imposed fines totaling SR4 million (US$1.07 million) during February 2005 on businesses for marketing "fraudulent" and counterfeit consumer goods. At the same time the department reported that 371 cases of counterfeiting were reported during 2003 and 2004, resulting in fines of SR12 million being imposed;

May: The Arab Federation of Software Producers advised that the national software piracy rate in Saudi Arabia had dropped from 73 percent\(^{163}\) in 2000 to 25 percent in 2004 (although the following BSA Global Study on

\(^{163}\) "Percent" in these extracts, and in the following BSA Study, refers to the total national business software market for the state in question.
Software Piracy figures for Saudi Arabia for the same period are 59 percent to 52 percent);

June: the Ministry of Culture and Information recently destroyed over 3 million counterfeit copyright items, including CD and video tapes, computer software and Playstations;

June: during 2004, the Ministry of Culture and Information's Ministerial Committee responsible for dealing with copyright infringements, considered 400 cases, made final determinations on 353 of the cases, and handed down the following penalties:

- closed down 31 businesses and revoked their trading licences;
- made orders for compensation totaling SR118,000 (US$31,000) to various right holders;
- forced 900 out of 1500 companies identified as using counterfeit software to replace their illegal software with licenced software.\(^\text{164}\)

July: over 600,000 pirated CD's seized at King AbdulAziz International Airport, Riyadh were recently destroyed by the Ministry of Culture and Information;

While the *Bahrain Tribune* reported over a four month period between August and November 2005, on the following enforcement activities undertaken by the Directorate of Press and Publications in the Ministry of Information:

4 August over the last six months the Directorate carried out 493 inspections of

\(^\text{164}\) Saba & Co, above n 101, June 2005.
business establishments, during which 62,000 pirated and illegally-copied audio, video, print and electronic products were found and confiscated;

7 September: the Directorate recently destroyed 9,385 pirated movies confiscated over the last three months. It also reported an 85% drop in the rate of pirate movies in Bahrain, bringing it down to 10-15 percent of the total movie market in Bahrain;

9 November: the Directorate reported that software piracy in the Kingdom is now 30-35 percent, and less than 20 percent for movies.

The GCC states have attracted praise from some sectors for the progress made to date, in what has been a remarkably short period of time by international standards. If the USTR’s Annual Special 301 Report is any measure, then the GCC states have made commendable progress. Ten years ago, in its 1995 Report, the USTR placed all GCC countries on either its Priority Watch List or its Watch List. By contrast, a decade later the corresponding Report retained only Kuwait on its Priority Watch List, and Saudi Arabia on its Watch List. In the author’s view, the retention of Kuwait on the Priority Watch List may be justifiable in light of its outmoded intellectual property laws which are still in essence of a pre-TRIPS standard, and its less than committed enforcement performance. However, the retention of Saudi Arabia on the Watch List and the USTR’s planned out-of-cycle review in late 2005/early 2006 of its intellectual property regime, was more part of a US strategy to maintain pressure upon the Saudi government to extract the maximum trade and commercial concessions in the final round of political negotiations prior to formalization of Saudi Arabia’s WTO membership in November 2005.

\footnote{The USTR Annual Special 301 Reports are discussed in greater detail in Chapter 6.3 following}
The latest benchmarking BSA Global Study on software piracy, conducted in May 2005 for the previous year, reveals that local enforcement strategies have led to an ongoing decline amongst the GCC states in software piracy. BSA claims to be the leading global computer software protection lobby organization, and asserts that its annual Global Study arguably the premier survey on international software piracy. The 2005 Study reports that, in 2004, piracy rates increased in 36 countries, remained unchanged in 18 countries, and decreased in 39 countries. Although the average world piracy rate went down a single percentage point, the median is still above 60 percent. In more than half the countries studied, piracy was above 60 percent, while in 24 countries the piracy rate exceeded 75 percent. Only a third of the countries studied had a piracy rate under 50 percent.

The Business Software Alliance (BSA) is an international organization representing the leading software and e-commerce developers in 65 countries around the world. Established in 1988, BSA has offices in the United States, Europe and Asia. Promoting itself as the voice of the international software industry, BSA interacts with governments and consumers on the promotion of the role of software in global development, and in relation to its fight against software piracy and internet theft. The following description of the BSA is taken directly from its own website, at www.bsa.org/about, last accessed 20 October 2005:

"The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include: 4D, Adobe, Affix-Monotype, Apple, Autodesk, Avid, Bentley Systems, Borland, BVRP Software, Centennial, Cisco Systems, CNC Software/Mastercam, Grupo SP, Entrust, HIT Internet Technologies, HP, IBM, Inventery, Intel, Intergraph, Internet Security Systems, Intuit, LMS International, Macromedia, Magix, Mamut, McAfee, Microsoft, Microstar, Nemetschek, O&O Software, OWG, Panda Software, Realviz, RSA Security, SIA, SolidWorks, Staff & Line, Sybase, Symantec, TeamSystem, Trend Micro, UGS PLM Solutions, VERITAS Software, Visma, WRQ."

Since 1995, the Business Software Alliance (BSA) has commissioned an annual study on global trends in computer software piracy, encompassing some 93 countries in the 2005 study. The 2004 and 2005 studies were conducted by International Data Corporation (IDC), on behalf of BSA. The 2005 study advises that IDC used proprietary statistics for software and hardware shipments, conducted more than 7,000 interviews in 23 countries to confirm software piracy trends (adding to 5,600 surveys conducted in 15 countries last year), and enlisted IDC analysts in over 50 countries to review local market conditions. IDC and previous studies conducted for BSA used the following basic research architecture to measure piracy rates and dollar losses:

- determine how much packaged software was put into use in 2004,
- determine how much packaged software has been paid for during the year,
- then subtract one from the other to get the amount of pirated software.

Once the amount of pirated software is known, the piracy rate is determined as the percentage of total software installed that was pirated.

The BSA is also a member of the International Intellectual Property Alliance (IIPA). (see above n 92 for a description of the IIPA and its functions.)

"See n 163 above in respect of the meaning of "percent" in this context."
The Gulf region has improved from 89 percent in 1994 to 57 percent in 2004, mainly due to the performance of the UAE, which achieved a fifty point decrease, from an 86 percent piracy rate in 1994 to 34 percent for 2004. This achievement places the UAE on a par with Japan, South Africa and Western Europe overall, and according to the Gulf regional office of BSA explains why the UAE has become the IT hub of the region. Not far behind the UAE is Saudi Arabia, which has managed to reduce its piracy rate to 52 percent, but which still has not managed to remove itself from the Special 301 Listing. None of the GCC states are included in the BSA’s list of the twenty top countries with the worst piracy rates (Qatar and Bahrain appeared on the list in 2003), while the UAE is listed at number fourteen amongst the top twenty best-performing countries with the lowest piracy rates — outperforming Canada, South Africa and Ireland, and just behind Australia. According to the Study, the UAE’s achievement is attributable to deliberate attempts by the UAE government to adopt stronger intellectual property protections during the 1990s, when a new generation of policymakers came into power and began luring foreign investments.

Qatar showed the least improvement in the region, decreasing only fifteen points from 91 to 76 percent since the Report’s inception, while Bahrain was hardly better, dropping only sixteen points from 92 to 76 percent.

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Table 13: 2005 BSA PIRACY STUDY RESULTS - Gulf Region Piracy Rate

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</tr>
</thead>
<tbody>
<tr>
<td>Bahrain</td>
<td>92%</td>
<td>90%</td>
<td>89%</td>
<td>89%</td>
<td>82%</td>
<td>80%</td>
<td>77%</td>
<td>76%</td>
<td>64%</td>
<td>62%</td>
</tr>
<tr>
<td>Kuwait</td>
<td>91%</td>
<td>89%</td>
<td>88%</td>
<td>88%</td>
<td>81%</td>
<td>80%</td>
<td>76%</td>
<td>73%</td>
<td>68%</td>
<td>68%</td>
</tr>
<tr>
<td>Oman</td>
<td>96%</td>
<td>95%</td>
<td>93%</td>
<td>93%</td>
<td>88%</td>
<td>78%</td>
<td>77%</td>
<td>70%</td>
<td>65%</td>
<td>64%</td>
</tr>
<tr>
<td>Qatar</td>
<td>91%</td>
<td>89%</td>
<td>87%</td>
<td>87%</td>
<td>80%</td>
<td>81%</td>
<td>78%</td>
<td>76%</td>
<td>63%</td>
<td>62%</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>77%</td>
<td>79%</td>
<td>74%</td>
<td>73%</td>
<td>64%</td>
<td>59%</td>
<td>52%</td>
<td>50%</td>
<td>54%</td>
<td>52%</td>
</tr>
<tr>
<td>UAE</td>
<td>86%</td>
<td>50%</td>
<td>50%</td>
<td>49%</td>
<td>47%</td>
<td>44%</td>
<td>41%</td>
<td>36%</td>
<td>34%</td>
<td>34%</td>
</tr>
<tr>
<td>Gulf Total</td>
<td>88.8%</td>
<td>80.3%</td>
<td>80.2%</td>
<td>79.8%</td>
<td>73.7%</td>
<td>70.3%</td>
<td>66.8%</td>
<td>63.5%</td>
<td>58%</td>
<td>57%</td>
</tr>
<tr>
<td>Western Europe Total</td>
<td>49%</td>
<td>43%</td>
<td>39%</td>
<td>36%</td>
<td>34%</td>
<td>34%</td>
<td>37%</td>
<td>35%</td>
<td>37%</td>
<td>35%</td>
</tr>
<tr>
<td>Eastern Europe Total</td>
<td>83%</td>
<td>80%</td>
<td>77%</td>
<td>76%</td>
<td>70%</td>
<td>63%</td>
<td>67%</td>
<td>71%</td>
<td>61%</td>
<td>61%</td>
</tr>
<tr>
<td>North America Total</td>
<td>27%</td>
<td>28%</td>
<td>28%</td>
<td>26%</td>
<td>26%</td>
<td>25%</td>
<td>26%</td>
<td>24%</td>
<td>23%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Source: BSA 2005 Annual Global Piracy Study

The revenue losses arising from piracy have experienced a similar decline for the GCC states, notwithstanding the dramatic growth in the regional and domestic technology markets and the consequent significant increase in computer hardware and software usage. Despite annual fluctuations, revenue losses have more than halved between 1994 and 2002, declining from US$78.4 million to US$35.9 million. Saudi Arabia has shown the most dramatic improvement, with a two-thirds reduction in revenue losses. However, in the last two surveys, all Gulf countries except Saudi Arabia and the UAE have experienced actual slight increases in revenue losses despite continuing marginal piracy rate reductions, a situation which is more a reflection on rapidly expanding markets than increased levels of piracy.

This is in contrast to the situation in the United States and the United Kingdom. Although the United States has the lowest global piracy rate, its revenue loss remains the highest due to the
volume of computer sales. Similarly, piracy in the United Kingdom has declined by 16% over the last five years, but revenue loss due to piracy has almost doubled.

There is no doubt that the GCC states have yet more work to do in the construction of their intellectual property protection regimes. Enforcement and infrastructure issues will continue to require attention in the mainstream areas of trade marks, copyright and patents as mainly external forces continue to pressure the GCC states to conform to the emerging international TRIPS-plus standards. The UAE and Saudi Arabia constitute the largest of the GCC economies, and the states with the greatest profile in terms of intellectual property activity and need for effective enforcement strategies and performance. However, they are arguably the two states which have been the most successful in curbing infringing activity. Bahrain, Oman and Qatar represent the middle position, both in respect of activity and performance. Kuwait, on the other hand, is the least compliant state and will continue to attract critical attention and pressure to improve on its performance.

But instead of coming from within the TRIPS-context, pressures have been generated by the United States for the GCC states to move to TRIPS-plus levels of intellectual property protection. The strategy operates through adherence to a web of international conventions and commitment to bilateral trade agreements which contain a comprehensive compendium of requirements for enhanced levels of intellectual property protection that far exceed the TRIPS-required standards – as the next chapter discusses.