# 2018 Special 301 Report's "Watch-List": An Analysis of the inclusion of Saudi Arabia and the UAE

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Special 301 Report (the "Report") is a United States congressional mandated document that reflects the U.S. Administration's views on the protection and enforcement of U.S. intellectual property (IP) rights globally. The Report is compiled by the U.S. Trade Representative (USTR) and is published annually. It purports to "*call out foreign countries and expose the laws, policies, and practices that fail to provide adequate and effective IP protection and enforcement for U.S. inventors, creators, brands, manufacturers, and service providers*".

The 2018 Report lists thirty-seven states under two separate categories – a "Priority Watch List" and a "Watch List". The Priority Watch List i.e. classifies those states, which have major shortcomings and drawbacks on IP protection and therefore require further attention, cautioning and improvement of their IP enforcement and laws. The Priority Watch List, in the 2018 Report currently hosts twelve states. In contrast, the Watch List classifies those countries, which are facing certain deficiencies in the enforcement of IP rights as identified in the Report. The Watch List in the 2018 Report currently hosts 25 states, including Saudi Arabia and the UAE – for the first time. Kuwait is a long-serving veteran of the Priority Watch List, while Egypt is similarly a well-seasoned attendee of the Watch List.

**What the Report says**

The Report covers a wide range of issues, which, in the view of the USTR, must be addressed to ensure that U.S. persons and entities, who rely on IP protection, gain "fair and equitable market access" in the countries in question.

**Saudi Arabia**

Some of the issues raised by the Report include:

- the lack of enforcement against the use of unlicensed software;
- deterioration in protection for pharmaceutical products;

- concerns regarding IP enforcement are increasing, including concerns related to difficulty in obtaining information on the status of enforcement actions and investigations; and
- lack of seizure and destruction of counterfeit goods.

Primarily, the Report includes Saudi Arabia due to an alleged deterioration in IP protection for pharmaceutical products. The Report details that in recent years, Saudi Arabia has granted marketing approvals for domestic companies to produce generic versions of pharmaceutical products, which are under patent protection either in Saudi Arabia or in the GCC. Allegedly, these market approvals were granted, despite innovators' data being protected under Saudi Arabia's laws against unfair commercial use. The Report suggests that these approvals, conflict with Saudi Arabia's domestic laws and raise significant questions about the transparency of marketing approvals and predictability of patent protection in Saudi Arabia. A further concern raised in the Report was the alleged continued use of licensed software by the Saudi government.

**United Arab Emirates**

For the UAE, the Report's main points for concern include:

- recent policy changes that may weaken IP protection for pharmaceutical products;
- lack of a mechanism to allow copyright licensing and royalty payments; and
- high trademark filing fees that are cost-prohibitive.

The Report recognises that some UAE enforcement authorities (i.e. Dubai) seize and destroy counterfeit goods, however it highlights that significant copyright piracy and trademark infringement concerns remain.

Much like in the case of Saudi Arabia, the Report calls out the UAE for allowing the domestic manufacture of generic versions of pharmaceutical products, which are still under patent protection in the U.S. In this regard, the U.S. relies on the Decree 404 system that recognises the country of origin patent protection for pharmaceutical products. The Report alleges that the UAE no longer views the measures adopted through this decree as valid.

Other concerns raised with regards to the UAE include the lack of IP infringement prosecutions; a lack of permanent staff solely dedicated to counterfeit enforcement; a lack of enforcement action without specific, written complaints from the right holders; and a lack of transparency and available information related to raids and seizures of pirated and counterfeit goods. Moreover, the report notes that despite the existence of implementing regulations, the UAE has yet to grant the necessary operating licenses to establish Collective Management Organisations (CMOs) to allow copyright licensing and royalty payments. Finally, the report raises concerns over the high trademark filing fees in the UAE, which are the highest in the world and considered cost-prohibitive to protecting trademarks in the UAE.

**The Missing Narrative**

The Electronic Frontier Foundation (EFF), an international non-profit digital rights group based in San Francisco, claims that the Report is the result of an opaque process that directly manifests the desires of private industry behemoths, like Hollywood and the pharmaceutical industry. EFF view the Report as a bullying tactic used by the U.S. administration to push countries into adopting stronger IP laws, regardless of whether such laws are in the best interest of the citizens of that country.

The EFF noted that the Report does not differentiate between IP policies that suit highly industrialised nations from those that suit lesser-developed states. Indeed, the appropriate levels of IP protection vary depending on a country's level of development – less industrialised states can experience exacerbated harms from restrictive IP laws, especially when they impede innovation, creativity, access to knowledge and industrial growth.

Even highly industrialised countries like Canada, who are year-on-year included on the Report's Priority Watch-List for allegedly not addressing issues in relation to piracy over the internet, are now tired of the annual shaming of the Report. Indeed in 2017 Canada issued a rebuttal in which it considered "*the Special 301 process and the Report to be invalid and analytically flawed because the process relies primarily on U.S. industry allegations rather than empirical evidence and objective analysis*".

As a general comment, Saudi Arabia (84 years old) and the UAE (47 years old), are new states in comparison with the U.S (242 years old). Considering the short time spans of both countries' legal regimes, IP protection has developed at a much more rapid rate in those jurisdictions, in comparison to that of the U.S' legal regime. Moreover, as a highly industrialised nation and a net exporter of IP, the U.S. evidently has different interests and agendas that may not always compliment those of the UAE and Saudi Arabia. As importers of IP, Saudi Arabia and the UAE understandably are entitled to pursue varying forms of IP policies, which do not necessarily have to follow suit with those of the U.S. This does not negate, however, from Saudi Arabia and the UAE's ongoing pursuit of better IP protection regimes. Both countries recognise that there is always room for improvement and are progressing in terms of their IP policies.

Indeed, the EFF's Special 404 Report that was compiled in response to the Report, urges governments around the world to be sceptical when considering the recommendations of the Report. The EFF Report recommends to those governments that they prioritise access to culture, economic stimulation and fairness when adopting and enforcing IP laws. That is not to say, however, that one should disregard or dismiss the recommendations in the Report, but rather that fairness and economic stimulation should be taken into considerationwhen implementing IP laws. Below we analyse the Report's claims in connection with Saudi Arabia and the UAE.

**Conclusion: Analysis of the Report's findings**

Both Saudi Arabia and the UAE can improve their enforcement initiatives against trademark counterfeiting and are taking steps to do so. In Saudi Arabia, trademark enforcement and raid actions are under the jurisdiction of the Anti-Commercial Fraud Department (ACFD) at the Ministry of Commerce and Industry and the officials there have gone to great measures to improve their enforcement practices. However, due to certain structural and organisation changes, the ACFD is now taking longer periods to study complaints and organise raids. The ACFD has also on some occasions rejected 3D trademark infringement complaints arguing that the trademark in question is, in their view, an industrial model. On such occasions, the ACFD referred the matter to a committee, leading to delay before action was taken.

In the UAE, each Emirate has its own Department of Economic Development (DED) with which a brand owner, or their representative, must submit administrative trademark infringement complaints for raid actions to take place. Each Emirate is at a different level of development in terms of the services offered at their DED. The Dubai DED will accept the submission of complaints and payment of the associated fees online, and inspectors are quick to review complaints. The entire process from filing the complaint to conducting a raid action (if the complaint is accepted) does not usually exceed two business days. The Dubai DED has had huge success in 2017, confiscating 26,199,467 pieces of counterfeit goods with an estimated value of AED 1.2 bn. In that respect, Dubai is leading other Emirates in terms of brand enforcement actions. For example, in Ajman, the DED only accepts complaints and payment physically, and this process can be time consuming. Other problems of organisation and lack of training on brand awareness exist in many DED departments within the UAE. Addressing such problems is of outmost importance in order for UAE IP protection to improve.

While the Report is somewhat one-sided and politicised it would be remiss for the UAE and Saudi Arabia not to take heed of some the Report's concerns. However, the approach to IP policy making should stem from principles of fairness and equity while supplementing competing interests of economic growth and access to knowledge. In that respect, the Report falls short of applying those principles and considering such interests.