



October 20, 2006

Via Email: FR0629@ustr.eop.gov

Ms. Gloria Blue
Executive Secretary, Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, NW, Room F516
Washington, DC 20508

Re: African Growth and Opportunity Act
Implementation Subcommittee of the Trade Policy
Staff Committee; Public Comments on Annual
Review of Country Eligibility for Benefits Under
the African Growth and Opportunity Act, 71 Fed.
Reg. 58016 (Oct. 2, 2006)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the October 2, 2006 request for public comments circulated by the African Growth and Opportunity Act (AGOA) Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the U.S. Trade Representative, in connection with the annual review of the eligibility of sub-Saharan African countries for AGOA benefits.

This submission explains IIPA's views on the importance of the Administration examining countries' copyright laws and enforcement practices under the AGOA's intellectual property rights (IPR) eligibility criteria. We ask that the Subcommittee include more detailed discussion of AGOA countries' copyright laws in its upcoming report.¹ It is important to ensure that the AGOA IPR criteria for eligibility are being continuously met by the beneficiary countries.

DESCRIPTION OF THE IIPA AND ITS MEMBERS

The International Intellectual Property Alliance (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 comprised of seven trade associations,² each representing a significant segment of the U.S. copyright community. These member associations represent 1,900 U.S.

¹ The May 2006 USTR report very briefly mentioned IPR developments in Sierra Leone, Guinea, The Gambia, Ethiopia, Democratic Republic of the Congo, Cape Verde, as well as IPR discussions in the context of the SACU negotiations (which have since been suspended). See USTR, "2006 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act; the Sixth of Eight Annual Reports," May 2006, posted at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file236_9455.pdf.

² IIPA's members are: 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).

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). The core U.S. copyright industries contribute to nearly 6% of the gross domestic product to the total U.S. economy.³

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy. Inexpensive and accessible reproduction technologies, however, make it easy for copyrighted materials to be stolen – pirated -- in other countries. Losses due to piracy of U.S. copyrighted materials around the world are conservatively estimated to reach \$25-\$30 billion annually (not including internet piracy). IIPA's goal in foreign countries is to establish legal and enforcement regimes for copyright that not only deters piracy, but that also fosters technological and cultural development in these countries, thus encouraging local investment and employment.

THE INTELLECTUAL PROPERTY RIGHTS CRITERIA IN THE AGOA

The African Growth Opportunity Act amended the U.S. trade law in 2000 to authorize the President to designate sub-Saharan African countries as eligible for duty-free tariff treatment for certain products under the Generalized System of Preferences (GSP) trade program.⁴ Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-Saharan African countries.² At present, 37 African countries are beneficiary countries eligible for AGOA benefits.⁶ Eleven sub-Saharan countries are not presently eligible.⁷

Country eligibility criteria under the AGOA are found in two places – Section 104 of the Trade and Development Act of 2000 (which appears in Subtitle A containing the provisions of AGOA itself) and in Section 111 of that Act (which appears in Subtitle B – in effect amendments to the GSP Act adding AGOA to GSP through adding a new Section 506A).

First, the specific AGOA criterion for intellectual property is found in Section 104 (a)(1)(C)(ii) (19 USC 3703(a)(1)(C)(ii)) which provides:

³ See the 2004 economic report prepared for the IIPA by Stephen Siwek of Economists Inc., [Copyright Industries in the U.S. Economy: the 2004 Report](http://www.iipa.com/pdf/2004_SIWEK_FULLL.pdf), available at http://www.iipa.com/pdf/2004_SIWEK_FULLL.pdf. IIPA will be releasing a new economic study later this fall.

⁴ See Generalized System of Preferences, Title V of the Trade Act of 1974, as amended, 19 USC 2461 *et seq.*

⁵ See Trade and Development Act of 2000, Title I of the Trade and Development Act of 2000, Pub. L. 106-200, 19 USC 3721 *et seq.*

⁶ The following sub-Saharan African countries were designated as beneficiary sub-Saharan African countries in 2006: Angola; Republic of Benin; Republic of Botswana; Burkina Faso; Burundi; Republic of Cape Verde; Republic of Cameroon; Republic of Chad; Republic of Congo; Democratic Republic of Congo; Republic of Djibouti; Ethiopia; Gabonese Republic; The Gambia; Republic of Ghana; Republic of Guinea; Republic of Guinea-Bissau; Republic of Kenya; Kingdom of Lesotho; Republic of Madagascar; Republic of Malawi; Republic of Mali; Republic of Mauritius; Republic of Mozambique; Republic of Namibia; Republic of Niger; Federal Republic of Nigeria; Republic of Rwanda; Sao Tome & Principe; Republic of Senegal; Republic of Seychelles; Republic of Sierra Leone; Republic of South Africa; Kingdom of Swaziland; United Republic of Tanzania; Republic of Uganda; and Republic of Zambia.

⁷ Countries not eligible for AGOA benefits include: Central African Republic; Federal Islamic Republic of Comoros; Republic of Cote d'Ivoire; Republic of Equatorial Guinea; State of Eritrea; Republic of Liberia; Republic of Mauritania; Somalia; Republic of Togo; Republic of Sudan; and Republic of Zimbabwe.

(a) In General.— **The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country —**

(1) has established, or is making continual progress toward establishing—

[...]

(C) The elimination of barriers to United States trade and investment, including by—

(i) The provision of national treatment and measures to create an environment conducive to domestic and foreign investment;

(ii) The protection of intellectual property; and

(iii) The resolution of bilateral trade and investment disputes; *(emphasis added)*.

Second, Section 111 of the AGOA (also the new Section 506A of the GSP statute, 19 USC 2466a)) provides the following regarding eligibility designation:

(a) Authority to Designate.—

(1) In general.— Notwithstanding any other provision of law, the President is authorized to designate a country listed in section 107 of the African Growth and Opportunity Act as a beneficiary sub-Saharan African country eligible for the benefits described in subsection (b)—

(A) if the President determines that the country meeting the eligibility requirements set forth in section 104 of that Act [*which contains the above quoted intellectual property eligibility criterion*], as such requirements are in effect on the date of enactment of that Act; and

(B) subject to the authority granted to the President under subsections (a), (d), and (e) of section 502, **if the country otherwise meets the eligibility criteria set forth in section 502.** *(emphasis added)*

Thus, reading together the two provisions above (Section 104 of the AGOA and Section 506A of the GSP Act), **it seems clear that countries that do not meet the GSP criteria in Section 502 cannot become beneficiaries under AGOA.** As this committee already knows, Section 502(c)(5) of the GSP program provides that the President “shall take into account” in “determining whether to designate” a country under GSP, “the extent to which such country is providing adequate and effective protection of intellectual property rights” (see 19 USC 2462(c)(5)).

Furthermore, Section 506A of the GSP Act provides that if the President determines that a beneficiary country is not making “continual progress” in meeting the eligibility requirements, he must terminate that country’s AGOA designation (see 19 USC 2466a(a)(3)).

“Adequate and Effective” in Light of TRIPS and the WIPO Internet Treaties

This criterion requiring the provision of “adequate and effective” protection of intellectual property rights, including copyright protection and enforcement, is a flexible one that changes over time. For example, in the program adopted at the same time as AGOA – the Caribbean Basin Trade Partnership Act (CBTPA)⁸ – Congress specifically defined the intellectual property criteria in that Act (similar to the GSP Act criteria) to require “TRIPS or greater” protection and enforcement.⁹ In defining what might be meant by “greater” protection, Congress noted in the Conference Report that such protection rises to the level of

⁸ Title II, Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000) (also known as the United States-Caribbean Basin Trade Partnership Act).

⁹ Section 213(b)(5)(B)(ii) of the United States-Caribbean Basin Trade Partnership Act, 19 U.S.C. §2703(b)(5)(B)(ii).

that provided in the U.S.’ “bilateral intellectual property agreements.”¹⁰ **Therefore, sub-Saharan African countries that wish to become eligible for the enhanced benefits under AGOA must at least meet TRIPS requirements for both copyright protection and enforcement.**

While the TRIPS Agreement represents the floor of protection that must exist under AGOA and other U.S. preferential trade programs, **TRIPS alone is not sufficient given the flexible standard embodied in the “adequate and effective” standard in Section 502 of the GSP statute.** One of the copyright industries’ biggest challenges in the area of substantive copyright law reform is to elevate the levels of protection to account for changes in the digital environment, not only in fighting optical media piracy but piracy that occurs over digital networks. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a potential global plague. It makes it cheaper and easier than ever for thieves to distribute unauthorized copies of copyrighted materials around the globe.

Modern copyright laws must respond to the changes in the internet distribution of unauthorized copies of copyrighted materials by providing that creators have the basic right to control distribution of copies of their creations. Many of these legal changes are contemplated by the two “internet” treaties of the World Intellectual Property Organization (WIPO): the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, the U.S. government has worked at all levels to encourage countries to sign, ratify and implement these two treaties. These treaties provide the essential legal framework for the continued growth of e-commerce in coming years by ensuring that valuable content is protected from piracy on the Internet.

So far, eight countries in Africa have deposited their instruments to join both these digital treaties: **Benin, Botswana, Burkina Faso, Gabon, Guinea, Mali, Senegal and Togo.** In addition, **Ghana** has adhered only to the WCT so far. A number of other countries in Africa are actively considering ratifying and implementing these treaties. Several other countries (as discussed below) have passed legislation that partially implements their WIPO “Internet” treaties.

COPYRIGHT PROTECTION AND ENFORCEMENT IN SUB-SAHARAN AFRICA

Few of the countries in sub-Saharan Africa come close to meeting the TRIPS-mandated levels of protection, particularly in the enforcement area. This fact must be taken into account in determining whether to keep those countries so designated as beneficiaries of AGOA, and whether to so designate more countries.

Copyright Legislation in Sub-Saharan Africa

The U.S. government needs to make these countries immediately aware that these IPR criteria are not met at this time and give the countries time to bring their regimes into compliance before determining whether to change the designation. IIPA encourages the U.S. government to work through the embassies in the region to provide detailed accounts of what these governments are doing, in the legislative area as well as in the area of enforcement of copyright, to meet their AGOA eligibility criteria as discussed above.

For example, several countries have either enacted legislation or are considering the same to implement these more complex provisions of the WIPO treaties.

¹⁰ See Conference Report of the House of Representatives on the Trade and Development Act of 2000 [to accompany H.R. 434], Joint Explanatory Statement of the Committee of Conference on Subtitle B—Trade Benefits for Caribbean Basin Countries.

- **Botswana** enacted legislation (the Copyright and Neighboring Rights Law (2000)), which seeks to implement these provisions in the WIPO treaties (though not entirely successfully, in our view).
- **Namibia** enacted the Copyright Act, 2002, and this Bill contains measures intended to implement the WIPO treaties.
- While legislation to bring South Africa's copyright law closer into line with TRIPS stalled in 2000, in 2002, the government of **South Africa** enacted the Electronic Communications and Transactions Act, 2002 (No. 25 of 2002), which contains reasonably good provisions on service provider liability. It also contains anti-hacking provisions against the unauthorized access to data, or the unlawful manufacture of devices that circumvent technological protection measures on a specific computer system to protect data; this is not, however, enough protection to satisfy the WCT/WPPT requirement as to technological protection measures. While the overall progress on copyright legislation is highly disappointing, the ECT Act does at least demonstrate that South Africa is quite familiar with these issues and with electronic commerce.

As part of the annual review process, we suggest that USTR request that the eligible AGOA countries provide a brief update on the status of their current copyright legislation as well as their plans, if any, to amend their copyright legislation. Such information would be most useful at this stage of the review, before the final report is issued.

Trade Policy and Copyright Enforcement in Sub-Saharan Africa

In IIPA's 2006 Special 301 submission, we reported on copyright-related developments in four African countries: **South Africa, Kenya, Morocco and Nigeria** (reports attached).¹¹ Some IIPA members have been able to provide estimated trade losses in these four countries, which in the aggregate, conservatively amounts to **\$288 million in 2005 alone** (chart attached).¹²

USTR, in its annual Special 301 review of countries' intellectual property practices, again noted the importance of enforcement in the Administration's trade policy approach:

In this year's review, USTR devotes special attention to the need for significantly improved enforcement against counterfeiting and piracy. The United States places particular emphasis on the ongoing campaign to reduce production of unauthorized copies of optical media products such as compact discs (CDs), video compact discs (VCDs), digital versatile discs (DVDs), and compact disc read-only memory (CD-ROMs), as well as reducing the counterfeiting of trademarked goods.

...

Over the past year, many developing countries and newly acceding WTO members have made progress toward implementing their TRIPS Agreement obligations. Nevertheless, full implementation of TRIPS Agreement obligations has yet to be achieved in certain countries, particularly with respect to the TRIPS Agreement's enforcement provisions. Levels of piracy and counterfeiting remain unacceptably high in these countries. The annual Special 301 review

¹¹ The IIPA's 2006 Special 301 country reports for these four countries are posted and available at <http://www.iipa.com/countryreports.html>.

¹² IIPA's 2005 statistical data for these four countries is available on the IIPA website at <http://www.iipa.com/pdf/IIPA%202006%20Table%20of%20Estimated%20Trade%20Losses%20and%20Piracy%20Levels%20for%202005%20ME-AFRICA%20FINAL%20091806.pdf>.

provides an opportunity to assess these issues, and the Special 301 Report sends a necessary message to the governments of countries where serious IPR-related problems exist.¹³

The Special 301 process itself has not lent itself to include any African countries on the current USTR lists. Nevertheless, widespread copyright piracy remains a very serious problem among all African countries. As a result, it may be the case that many copyright-based sectors and companies are still reluctant to invest in these smaller markets where piracy is, in effect, uncontrollable

CONCLUSION

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with our views on the AGOA and the intellectual property rights criteria that must be considered as these countries are evaluated to maintain their current AGOA eligibility and others considered for designation as new beneficiaries. We look forward to working with you to foster improved copyright protection in this region.

Respectfully submitted,



Maria Strong
On behalf of the
International Intellectual Property Alliance

Attachments

¹³ Office of the U.S. Trade Representative, "Executive Summary of the 2006 Special 301 Decisions," at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file180_9335.pdf (April 28, 2006).

USTR 2006 "SPECIAL 301" Decisions

IIPA 2004-2005 ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(in millions of U.S. dollars)
and 2004-2005 ESTIMATED LEVELS OF COPYRIGHT PIRACY

MIDDLE EAST/AFRICA

	Business Software ¹				Records & Music				Motion Pictures ²				Entertainment Software ³				Books		Totals ⁴	
	Losses		Levels		Losses		Levels		Losses		Levels		Losses		Levels		Loss	Loss	Loss	Loss
	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004	2005	2004
PRIORITY WATCH LIST																				
Egypt	45.0	28.0	64%	65%	9.0	7.5	60%	40%	NA	NA	NA	NA	14.3	NA	85%	90%	30.0	30.0	98.3	65.5
Israel	39.0	30.0	32%	33%	28.0	34.0	35%	40%	NA	30.0	NA	40%	NA	12.4	95%	88%	1.0	1.0	68.0	107.4
Lebanon (GSP)	20.0	15.0	73%	75%	3.2	3.0	75%	70%	NA	10.0	NA	80%	NA	NA	NA	75%	4.0	3.0	27.2	31.0
Turkey	157.0	107.0	65%	66%	18.0	15.0	80%	70%	NA	50.0	NA	45%	NA	NA	NA	NA	23.0	23.0	198.0	195.0
WATCH LIST																				
Kuwait	35.0	26.0	66%	68%	8.5	8.0	70%	65%	NA	12.0	NA	95%	NA	NA	91%	NA	0.5	1.0	44.0	47.0
Saudi Arabia (OCR)	105.0	73.0	52%	52%	20.0	15.0	50%	35%	NA	20.0	NA	40%	NA	NA	95%	68%	10.0	14.0	135.0	122.0
TOTALS	401.0	279.0			86.7	82.5			NA	122.0			14.3	12.4			68.5	72.0	570.5	567.9
Countries IIPA included in its 2006 301 Report, but which are not on USTR's 2006 301 list																				
Kenya	12.0	NA	81.0%	NA	13.0	NA	97%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	25.0	NA
Morocco	31.0	NA	68.0%	NA	10.0	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	41.0	NA
Nigeria	46.0	NA	82.0%	NA	52.0	NA	95%	NA	NA	NA	NA	NA	NA	NA	NA	NA	6.0	NA	104.0	NA
South Africa	116.0	NA	36.0%	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	2.0	NA	118.0	NA
ESTIMATED REGIONAL TOTALS	606.0	279.0			161.7	82.5			NA	122.0			14.3	12.4			76.5	72.0	858.5	567.9

Endnotes:

¹BSA's 2005 statistics are final. They represent the U.S. publishers' share of software piracy losses in each country, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

²MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. MPAA reported additional loss numbers and piracy levels after the 301 decisions were made and these appear on this chart and at www.iipa.com.

³ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of IIPA's 2006 Special 301 report.

⁴For many countries, the "total" loss figure does not include losses for one or more industry sectors where figures are unavailable (NA). Consequently, the totals for these countries are even more conservative.

"GSP" means that the U.S. government is reviewing this country's IPR practices under the Generalized System of Preferences trade program.

"OCR" means out-of-cycle review to be conducted by USTR.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

KENYA

Kenya is specially mentioned in the 2006 report because of rampant piracy for all sectors, and a Kenyan Government system that is unwilling to address the problem.

Priority Actions for 2006:

- **Activate the Kenyan Copyright Board and Provide Dedicated Staff for Board:** The Copyright Act calls for staff, including inspectors, to be assigned to copyright under the Copyright Board. Despite having been established in 2003, there are still no offices and no staff.
- **Shut Down Street Vendors and “Exhibition Stalls” Selling Pirate Goods:** Street vendors and exhibition stalls sell nothing but pirate product in Kenya. The people who run these pirate sales points are not registered and do not pay value-added-tax (VAT) and should be shut down. No licenses should ever be issued to them to sell pre-recorded music and films. They may sell other goods – just not pirate copyright goods.
- **Ban Importation of Copyright Goods Except from Right Holders:** Pirate imports have been flooding the Kenyan market from Pakistan (although this may decrease due to enforcement there in 2005), Uganda, and Tanzania (including Zanzibar). Legitimate right holders have very few legal representatives.¹⁴ Customs should not allow product in that is not legitimate and can easily ascertain in most instances whether the imports are coming from a legitimate source or are authorized.
- **Seize and Destroy All Pirate Product Within the Country:** Market sweeps should be run and pirate product seized and destroyed. If the products found do not show country of origin, or manufacturer, as required under the Trade Descriptions Act, or are not properly labeled, as required under the Standards Act, they should be presumed pirate pending a showing of proof to the contrary. There are no licensed VCDs in Kenya of U.S. content, nor are there licensed compressed formats (e.g., five films on one disc), thus any and all such discs should be seized and destroyed.
- **Enforce Against Duplicating Facilities and Internet Cafés Using Unlicensed Product or Providing Piracy Services:** There are numerous back street duplicating facilities, not to mention the proliferating number of Internet cafés, offering to reproduce pre-recorded music (and films) as a commercial business. This is illegal under the Copyright Act but in addition, the majority of these locations do not pay VAT or the Standards Levy.
- **Introduce, Pass and Aggressively Implement a New Counterfeit Goods Act.**
- **Combine Offenses in Criminal Charges:** Persons dealing in piracy should be charged with all offenses (Copyright Act, Trade Descriptions Act, Standards Act, the Trademarks Act, non-

¹⁴ For example, there are four global record companies: Sony-BMG, EMI, Universal and Warner, which are represented by three companies in Kenya, while smaller international or foreign record companies are either (i) represented by one of these same three Kenyan companies (ii) represented by another Kenyan company, of which there are only one or two, or (iii) not represented in Kenya. In the case where a foreign record company has no representative, an invoice from the manufacturer to the owner should be sufficient evidence to allow importation. There is only one Kenyan company with rights to import major motion pictures in video or disc formats, while there are only two or three Kenyan companies licensed for theatrical.

payment of VAT and other taxes, and the aforementioned Counterfeit Goods Act in the near future¹⁵). This would indicate to the judge the seriousness of the offense and, hopefully, result in larger fines, which would in turn make this illegal business less attractive to those engaged in it. The Government should also direct the Kenyan judiciary about the seriousness of piracy as a crime to ensure it is not treated as a petty crime and so that maximum penalties are applied.

Piracy Update: As noted in previous years, piracy ranges from 83% for business software to well over 90% for music cassettes and CDs, and virtually 100% for video and DVD. Cable piracy remains a significant problem in Kenya. Local Kenyan music is pirated in Uganda and Tanzania and imported into Kenya (the Tanzanian product being the higher quality of the two), while it is believed that pirate international repertoire has come in from Uganda, Tanzania, and Pakistan.¹⁶ Kenya has been noted by the Business Software Alliance as the country in Africa with the highest piracy level, for hard disk loading and unauthorized use of software in businesses.

Enforcement Update: Enforcement is a major challenge in Kenya. The Kenya Copyright Board was established in 2003, but has to date not been able to fulfill its mandate for various reasons, including an endemic lack of funding.¹⁷ The Board's current term ends in April or May 2006 and a new board will have to be appointed and gazetted. However, there are still no offices and no staff. The Trade Descriptions Act is the only Act that has been used with any effectiveness in Kenya, but the penalties under the act in the past do not provide a deterrent. However, recent amendments have increased the level of fines to KShs. 2 million (US\$28,070) and/or a term of up to 3 years. Raids in Kenya are marred by loss of evidence/seized goods. Court cases drag on and in some infamous instances, are then decided in favor of pirate defendants under bizarre circumstances.¹⁸ There are also legal issues such as presumption of ownership, which are misapplied by courts (e.g., a defendant has been able to put ownership into question with demands to see agreements between the performing artist and the Kenyan company in various court cases). The courts also fail to use sampling to prove pirate volume, instead, in some cases demanding a list of each title seized (in some cases requiring a list from right holders of 17,000 titles!). We understand that the Kenyan Government is reviewing the Copyright Act, possibly to provide for presumptions of copyright ownership. The Copyright Act currently provides for the Copyright Board to verify contracts for the purchase of banderole.¹⁹

¹⁵ A Counterfeit Goods bill is apparently being given positive consideration by the Kenyan Government's Cabinet.

¹⁶ It is believed that two companies in Uganda and one in Zanzibar, Tanzania reproduce millions of pirated cassettes of both Kenyan and international artists and smuggle them into Kenya, flooding the market.

¹⁷ The new board, once it is operative, is to oversee the administration and enforcement of copyright and related rights in Kenya, implement international laws, raise public awareness of copyright issues and prosecute copyright cases. It will also cooperate with other law enforcement agencies and carry out raids of suspected premises. Importers will obtain the board's approval before bringing new products into Kenya.

¹⁸ In one incomprehensible decision, a convicted defendant appealed his case, and the judge ruled that his conviction be set aside and pirate cassettes returned to him, on the grounds that, because the complainant right holders were business rivals, the defendant lacked awareness he was infringing anybody's copyright.

¹⁹ IIPA members do not generally support adoption of banderole systems out of concern that the banderoles themselves can be counterfeited. In this case, the existence of the requirement in the law, coupled with the failure of the government to implement it has resulted in an inability to enforce against pirate product and the courts' failure to apply a presumption of illegality due to the absence of a sticker.

**INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2006 SPECIAL 301
SPECIAL MENTION**

SOUTH AFRICA

PIRACY AND ENFORCEMENT UPDATE IN SOUTH AFRICA

Book Piracy: The U.S. publishing industry suffers harm from illegal commercial photocopying in South Africa. Photocopy shops in and around university campuses, as well as facilities being abused in libraries and similar on-campus venues, are decimating the market for educational publishers. Business publishers also experience widespread copying of their books by businesses/commercial end-users.

End-User Piracy of Business Software: The business software industry reports high levels of piracy – particularly commercial end-user piracy.

Customs Issues: There are some reports linking five plants in Singapore that have been forensically linked to pirate product seized in South Africa in 2003. Unfortunately, South African Customs was not (and generally has not been) willing to seize this in-transit pirate product.²⁰ One shipment (1.7 million optical discs) was released by South African Customs and subsequently stopped in Benin. It was destined for Nigeria. While we understand that the Singapore Attorney General's Chambers is currently still investigating this link, it is incumbent upon South Africa's Customs authorities to be vigilant in interdicting pirate shipments into, or being transshipped through, South Africa. The entertainment software industry reports that imports of pirated optical disc products from Asia (particularly Malaysia) continue to be highly problematic. While Customs has improved in terms of its ability at stopping pirated products destined for the country, the forfeiture and destruction procedures have been less than adequate. Pirate syndicates are involved in the importation and distribution of pirated entertainment software products into the country as well as the export of such products into neighboring countries.

Internet Piracy (Advertising Sites): Internet piracy is a concern, though it is largely used to advertise burn-to-order services. There is a lack of cooperation from ISPs in taking action against such sites even where the right holder provides proof of infringement.

Difficulties in Court Proceedings: The court system remains slow and cumbersome, and imposes undue costs and burdens upon the right holder pursuing an infringement case. A presumption of copyright subsistence is lacking, and in some cases, defendants have been able to reverse the presumption of ownership by simply placing it in issue during the proceedings. The entertainment software industry also reports that problems exist with respect to enforcement of judgments. Even after winning a case and being awarded costs, the chances of collecting from a defendant is almost nil. Defendants all too often have already disposed of or transferred their

²⁰ A recent judgment ruled in-transit pirate goods to another country as not having entered South Africa, and as such not subject to damages in South Africa under the Trade Marks Act.

assets, and left the country, thus leaving the right holder without recourse as to collecting the damages awarded in a judgment.²¹

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in South Africa is provided under the South African Copyright Act (No. 98 of 1978) as amended. Unfortunately, the law retains several provisions that either run afoul of South Africa's international obligations, or seriously undermine right holders' abilities to properly protect their rights. These include:

- **End-User Piracy of Business Software Is Not a Crime:** End-user piracy is not a criminal offense in South Africa. South African law currently provides that the sale of infringing software is a criminal offence, but there is no criminal penalty in the end-user context, violating South Africa's TRIPS obligations under Article 61 (to criminalize at least all copyright piracy on a commercial scale).
- **Civil Damages Are Non-Deterrent:** IIPA understands that infringing end-users have been ordered to pay civil damages that are less than the infringer would have paid for licensed software. If this is what is meant by "reasonable royalty" in the Copyright Act, it certainly does not constitute a deterrent to further infringements as required by TRIPS, and given recovery prospects like this, it is hardly surprising that plaintiffs often choose to settle rather than await judgments like this.
- **Presumptions Not Provided in Practice:** IIPA has long advocated the adoption of a Berne-compatible presumption of ownership and a presumption that copyright subsists, such that subsistence is presumed and ownership by the claimant is presumed unless the person seeking to challenge the presumptions asserts facts which serve to place doubt on the correctness of the relevant averments made by the Plaintiff or the State. Too often, defendants in South Africa have been able to reverse the burden of proving ownership by simply placing it in issue with the court. This is not how the Berne presumption was intended to operate. Thus, expressing in the law a presumption of ownership is needed satisfy South Africa's international obligations and a presumption of subsistence of copyright will greatly reduce the procedural burden on rights holders in proving their cases.
- **Re-Evaluation of Exceptions/Fair Use:** Finally, IIPA understands that the Government of South Africa is considering legislative provisions liberalizing aspects of fair use. IIPA requests that the government allow sufficient time for review and comment by affected parties and industries before finalizing any copyright proposals related to this (or other matter), and notes that in the digital environment, exceptions which may have passed muster before must be re-examined so that they do not run afoul of the time-tested Berne three part test and TRIPS Article 13.

Finally, the Government of South Africa should amend its law to comply with the provisions of the WIPO "Internet" Treaties,²² the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and should accede to these treaties as soon as possible.

²¹ In some instances, a defendant will transfer the "business" assets to a family member and continue the business. The right holder has no alternative but to continue incurring litigation expenses to pursue the defendant. The law needs to be amended to provide for measures by which a right holder may obtain and enforce judgments expeditiously as well as measures by which a defendant may be barred from disposing of assets related to the infringing activity.

²² IIPA notes that a recent survey of broadband penetration found that South Africa had among the highest percentage growth in the third quarter of 2005, at 30% growth (along with Turkey and Morocco). See Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2006 SPECIAL 301
SPECIAL MENTION
MOROCCO

IIPA is specially mentioning Morocco in the 2006 report to highlight the great successes achieved through the negotiation of the U.S.-Morocco Free Trade Agreement in the IPR Chapter of that Agreement and to invite the Moroccan Government to immediately begin to make good on the enforcement promises made in the Agreement. The Moroccan Government just passed one of the most modern copyright laws in the world, including key protections for the digital age, and enforcement mechanisms to account for the changing nature of commercial copyright piracy. Now, the Government should commence forthwith enforcement actions against piracy, including market sweeps to clean the market of blatant and open piracy in the streets, warehouses, and locations where duplication is occurring.

Piracy: The recording industry noted that Morocco has the dubious distinction of being in first place in the Middle East and North Africa region in terms of music piracy. The recording industry estimated the music piracy rate in Morocco at virtually 100% in 2004. After a number of highly publicized market enforcement actions that followed a high-level IPR Conference in March 2005, the music piracy level gradually dropped to around 95%. Legitimate sales of recorded music are still absolutely minimal, especially for a country that prides itself for its rich cultural sector, and due to the excessively high level of piracy the majority of local music performers are incapable of surviving from the income of their artistic work. Foreign companies are, as a result, still very reluctant to invest in the creative sector in Morocco. The Government must take actions to address this blemish on its record of copyright protection.

In addition, Morocco has emerged as one of the fastest growing broadband Internet markets in the world, growing at a rate of 200% by adding a total of 135,000 DSL lines in the first three quarters of 2005, for a total installed base of 179,000 lines.²³ Given such a development, it is appropriate that the Government has added needed protections for copyright in the Internet environment, but now the Government must be vigilant to the possibility of increasing numbers of illegal downloads of copyright materials over the Internet, and act swiftly against any illegal P2P services that emerge.

²³ Point-Topic, *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

SPECIAL MENTION

NIGERIA

IIPA specially mentions Nigeria in the 2006 report to highlight the alarming growth in optical disc production capacity, continuing rampant piracy concerns in several sectors, and an enforcement system which is ineffective in tackling these problems. In 2006, IIPA would like to see the following:

- Enactment of draft optical disc regulations to require the 15 known optical disc plants and two mastering facilities to come forward and be licensed, and to require the plants' use of SID codes (mastering LBR code and mould code) on all discs produced and sold in Nigeria.
- A campaign by the Nigerian Copyright Commission (NCC), including *ex officio* actions (traditionally complaints have been required), to sweep the markets clear of piracy, as well as duplicators, photocopy equipment, other equipment and tools used to pirate, and to inspect businesses to ensure they are not engaged in unauthorized use of business software.
- An enforcement campaign by Nigeria Customs Service (NCS) to interdict pirate imports coming in at the ports as well as those coming to Nigeria to pick up pirate exports.
- Reinstate funding to universities and libraries to purchase books.
- More prosecutorial attention to copyright cases, ensuring that cases go to trial and result in judgment with deterrent penalties actually imposed.
- Enactment of an amendment to prohibit unauthorized (parallel) and pirate imports, and to limit any exception to import of "a legal copy of a work by a physical person for his own personal purposes."

Piracy and Enforcement: There are 15 optical disc plants in Nigeria, some of which have migrated to Nigeria from Asia and operate to supply Central and West Africa. Many of the plants are not licensed to produce any kind of copyright content. Two of these plants (Akina and Nasinma) were raided in June and July 2004. However, to date there has been no outcome with respect to actions against these plants. This massive over-capacity, plus pirate imports, results in pirate production not only for domestic consumption but also for export (or "take out" as it is called, as people come from all over West Africa to buy pirated discs from the Alaba International Market in Lagos). Pirated product from Nigeria has been found in Algeria, Senegal, Ghana, Zambia and South Africa. In addition, Nigeria is itself a very large potential market, but the country is domestically overrun with pirated materials. Pirated CD-Rs are being sold for less than the equivalent of US\$1 in the local market containing compilations of up to 300 tracks of songs by local and international artists. There has also been a recent influx of imported pirated CDs from unknown locations in Asia. Book piracy continues to be a serious problem, due in part to the Government's decision in 2003 to cut all funding for university and library purchases and illegal photocopying that plagues the academic market. Some U.S. publishers indicate that the presence of legitimate publishers in the market is increasing, accounting for modest increases in sales during 2005, but the market is essentially still a piracy haven. For the business software

industry, hard-disk loading of pirate software and unauthorized use of software in businesses remain significant problems. Piracy levels are nearly 85% or above for all industry sectors with estimates (and is a staggering 98% for international music repertoire), among the highest in the world.²⁴

Though a copyright law was enacted in 1990,²⁵ there is little enforcement activity,²⁶ and cooperation between government agencies to implement and enforce the law, including law enforcement, is sparse and erratic. The NCC has responsibility in Nigeria for anti-piracy activities, and the NCS, as the nation's gateway police, has a significant role to play in anti-piracy enforcement, although Customs has never, to our knowledge, seized any product on their own initiative. There needs to be better coordination between these two enforcement entities. The NCC's Director General was suspended in November 2005 over the de-certification of one of Nigeria's music collecting societies, the Musical Copyright Society of Nigeria.²⁷ In addition to these problems, NCC's effectiveness is hampered by a lack of funding. We understand that consideration is being given to transferring the NCC functions to the Ministry of Justice. Lastly, civil claims in court continue to be an expensive and risky remedy.

²⁴ The record industry reports 98% piracy rates (for international repertoire), while the Business Software Alliance reports an 84% piracy rate and losses due to piracy of between US\$47 million and \$54 million.

²⁵ Copyright Act (Cap 68 Laws of the Federation of Nigeria, 1990) as amended.

²⁶ The port of Lagos is inadequately policed against piracy and has become a major transshipment site for pirated product to enter Nigeria and nearby countries.

²⁷ Nigeria suffers from over-zealous collecting societies, and must ensure that these voluntary organizations do not abuse their positions by claiming rights in artists/catalogs which they do not have. The other collecting society, which remains certified by the government, is the Performing and Mechanical Rights Society of Nigeria (PMRS), which was approved by the first NCC Chair, Moses Ekpo, back in the 1980s. See Ozolua Uhakheme and Richard Eghaghe, *NCC Declares MCSN Illegal, Nullifies Adewopo's Approval*, Daily Independent, November 25, 2005, at <http://www.independentng.com/life/lsnov250501.htm>.