

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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October 19, 2009

VIA REGULATIONS.GOV (Docket No. USTR-2009-0034)

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, 74 Fed. Reg. 48622-23 (September 23, 2009)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the September 23, 2009 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 appreciate that the Subcommittee has discussed AGOA countries' copyright laws and enforcement in its previous reports,¹ and we would strongly encourage the Subcommittee to draw upon recent reports (such as those prepared by the IIPA in its annual Special 301 process) to enrich the record in future reports. It is important to indicate steps the beneficiary countries are taking to ensure that the AGOA IPR criteria for eligibility are being met, but where piracy problems persist or get worse, it is important to note instances in which the AGOA criteria may not be being met at present.

IIPA also takes the opportunity in this year's filing to note that many of the AGOA-eligible countries lack sufficient capacity to meaningfully protect copyright, both for their own nationals and for U.S. copyright owners. IIPA suggests that the U.S. Trade Representative, in

¹ For example, the May 2008 USTR report very briefly mentioned intellectual property rights in Benin, Burkina Faso, Burundi, Cameroon, the Central African Republic, Comoros, Congo (Democratic Republic of), the Gambia, Ghana, Kenya, Madagascar, Mali, Namibia, Nigeria, Senegal, and Sierra Leone, and South Africa. See United States Trade Representative, "2008 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act," May 2008, at http://www.ustr.gov/assets/Trade_Development/Preference_Programs/AGOA/asset_upload_file203_14905.



conjunction with the U.S. Patent and Trademark Office, the U.S. Department of Commerce, the U.S. Department of State, and the U.S. Copyright Office, undertake a review of conditions in some of the AGOA beneficiary countries to determine whether U.S. assistance in capacity building could be valuable in creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law.

A. 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. 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 contributed an estimated 6.44% of the U.S. gross domestic product (GDP) in 2007.³

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. Recent statistics indicate that global copyright piracy cost the U.S. economy at least \$58 billion in total output in 2006, cost American workers 373,375 jobs and \$16.3 billion in earnings, and cost federal, state, and local governments \$2.6 billion in tax revenue.⁴ IIPA's goals in foreign countries include the establishment of legal and enforcement regimes for copyright that deter piracy, thus creating an adequate framework for trade in IIPA members' creative products, as well as fostering technological and cultural development, thus encouraging investment and employment in the creative industries.

² IIPA's members are: [Association of American Publishers \(AAP\)](#), [Business Software Alliance \(BSA\)](#), [Entertainment Software Association \(ESA\)](#), [Independent Film & Television Alliance \(IFTA\)](#), [Motion Picture Association of America \(MPAA\)](#), [National Music Publishers' Association \(NMPA\)](#), and [Recording Industry Association of America \(RIAA\)](#).

³ See the 2009 economic report prepared for the IIPA by Stephen Siwek of Economists Inc., *Copyright Industries in the U.S. Economy: the 2003 - 2007 Report*, available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>.

⁴ In 2007, for the first time, data became available which allowed economist Stephen Siwek, who also authors the IIPA economic studies, to measure the losses to the U.S. economy from global piracy. That recent study was completed for the Institute for Policy Innovation (IPI). See Institute for Policy Innovation, IPI Center for Technology Freedom, *The True Cost of Copyright Piracy to the U.S. Economy*, at [http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/02DA0B4B44F2AE9286257369005ACB57/\\$File/CopyrightPiracy.pdf?OpenElement](http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/02DA0B4B44F2AE9286257369005ACB57/$File/CopyrightPiracy.pdf?OpenElement).



B. 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.⁵ Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-Saharan African countries.⁶ At present, 40 African countries are beneficiary countries eligible for AGOA benefits.⁷ Eight sub-Saharan countries are not presently eligible.⁸

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 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)) provides:

(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

⁵ See Generalized System of Preferences, Title V of the Trade Act of 1974, as amended, 19 USC 2461 *et seq.*

⁶ 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.*

⁷ The following 40 sub-Saharan African countries were designated as beneficiary sub-Saharan African countries as of October 2009: Angola; Republic of Benin; Republic of Botswana; Burkina Faso; Burundi; Republic of Cape Verde; Republic of Cameroon; Union of the Comoros (which was designated eligible on July 1, 2008); 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 Liberia; 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 Togo; Republic of Uganda; and Republic of Zambia.

⁸ Countries not eligible for AGOA benefits include: Central African Republic; Republic of Cote d'Ivoire; Republic of Equatorial Guinea; State of Eritrea; Islamic Republic of Mauritania (which was previously eligible but was designated ineligible as of January 1, 2009); Somalia; Republic of Sudan; and Republic of Zimbabwe.



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

Second, Section 111 of the AGOA (also 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)).

C. “ADEQUATE AND EFFECTIVE” IN LIGHT OF TRIPS AND THE WCT AND WPPT

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)⁹ – Congress specifically defined the intellectual property criteria

⁹ 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).



in that Act (similar to the GSP Act criteria) to require “TRIPS or greater” protection and enforcement.¹⁰ In defining what might be meant by “greater” protection, Congress noted in the Conference Report that such protection rises to the level of that provided in the U.S.’ “bilateral intellectual property agreements.”¹¹ **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 the Internet or other networks. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a global problem. It makes it cheaper and easier than ever 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, nine countries in Africa (excluding North Africa) have deposited their instruments to join the WCT: **Benin, Botswana, Burkina Faso, Gabon, Ghana, Guinea, Mali, Senegal and Togo.** In addition, eight of the nine countries have deposited their instruments to join the WPPT: **Benin, Botswana, Burkina Faso, Gabon, Guinea, Mali, Senegal and Togo.** Ghana passed legislation to accede to the WPPT as well on August 25, 2004, and deposited the legislation with WIPO on August 18, 2006).¹² A number of other countries in Africa are actively considering ratifying the treaties, and many more have already taken steps to implement them.

¹⁰ Section 213(b)(5)(B)(ii) of the United States-Caribbean Basin Trade Partnership Act, 19 U.S.C. §2703(b)(5)(B)(ii).

¹¹ 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.

¹² Thus, while we believe the effective date of accession to the WPPT for Ghana is November 18, 2006, the WIPO website does not yet reflect this accession.



D. REQUEST FOR REVIEW OF CONDITIONS FOR ASSISTANCE AND CAPACITY BUILDING IN SUB-SAHARAN AFRICA

IIPA notes that few of the countries in sub-Saharan Africa come close to meeting the TRIPS-mandated levels of protection, particularly in the enforcement area, but also notes that many of the AGOA-eligible countries lack sufficient capacity to meaningfully protect copyright, both for their own nationals and for U.S. copyright owners. IIPA suggests that the U.S. Trade Representative, in conjunction with the U.S. Patent and Trademark Office, the U.S. Department of Commerce, the U.S. Department of State, and the U.S. Copyright Office, undertake a review of conditions in some of the AGOA beneficiary countries to determine whether U.S. assistance in capacity building could be valuable in creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law. Such reviews and resulting assistance would be in advance of determining whether to keep these countries designated as beneficiaries of AGOA, and whether to designate more countries.

Copyright Legislation in Sub-Saharan Africa

The U.S. government should, for example, make these countries aware that the AGOA IPR criteria are not met at this time and indicate that they should 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 exchange 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.

For example, several countries have either enacted legislation or are considering the implementation of the WIPO treaties.

- **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 some reasonably good provisions on service provider liability, although this was not copyright-specific legislation.

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 2008 and 2009 Special 301 submissions, we reported on copyright-related developments in **Nigeria**, as well as Egypt in North Africa.¹³ Trade losses are not readily available for all industries, but the Business Software Alliance estimates U.S. trade losses in selected sub-Saharan African countries for the software sector alone to exceed **\$331 million** (with Nigeria accounting for \$63 million). The Special 301 process has not resulted in inclusion of any (non-North) 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.

E. CONCLUSION

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with its views on the AGOA. It is essential that the intellectual property rights criteria be considered as these countries are evaluated to maintain their current AGOA eligibility and others considered for designation as new beneficiaries. It is also essential to take stock of the lack of sufficient capacity to meaningfully protect copyright in AGOA countries, and to undertake reviews of the conditions in such countries to determine if capacity building assistance can make a difference. We look forward to working with you to foster improved copyright protection in this region.

Respectfully submitted,

Michael Schlesinger
International Intellectual Property Alliance

Attachments

¹³ The IIPA's 2008 Special 301 country reports are available at http://www.iipa.com/2008_SPEC301_TOC.htm. The IIPA's 2009 Special 301 country reports are available at http://www.iipa.com/2009_SPEC301_TOC.htm. The business software industry estimated trade losses in these countries that amounted to at least **\$148 million in 2008**.

NIGERIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA submits this Special Mention report on Nigeria to highlight piracy challenges, including high quality counterfeit product, indicating a level of criminal organization not previously detected.

Executive Summary: The piracy situation in Nigeria once again worsened in 2008, with high quality counterfeit/pirated optical discs being sourced either to plants in the country or to imports, in either case indicative of a highly-organized criminal operation. Trade losses and levels of piracy in Nigeria have traditionally been very high. Evidence suggests that Chinese and Southeast Asian pirate gangs have infiltrated Nigeria and set up more than a dozen optical disc operations, some reported to have mastering facilities. The music industry has long been an easy target, devastating local Nigerian and international music markets. Now the pirates have advanced, counterfeiting sophisticated and expensive software packages that include hacks or cracks to authenticate the products on users' machines. Illegal use of publications continues at universities and libraries. Add to these problems the nascent but growing Internet presence and a toxic brew of mainly physical, but some digital, piracy has collectively destroyed the legitimate market in Nigeria for copyright. U.S. right holders feel the damage, but Nigerian creators feel it much more emphatically, as summed up in a quote by Eddie Ugbomeh, Nigerian actor and film producer, upon the enactment of the Copyright (Optical Disc Plants) Regulation 2006,

I no longer release videos or DVDs into the Nigerian market ... The last time I released VCDs to video rental outlets across the country, they never gave me any returns. In Port Harcourt, Rivers state, these rental operators even threaten to kill me if I come for my money. Same thing at Warri, Delta state. So I've made up my mind not to release VCDs in the present circumstances.¹

The relative success of Nollywood, Nigeria's home video industry, and local music market through all of this is a testament to their staying power and totally despite the piracy situation. In fact, piracy has caused the local film and music producers to suffer huge losses, meaning that, for example, musicians still depend heavily on concerts and "road shows" to capitalize on their popularity and make up for truly meager amounts they can collect in royalties from CD sales.

The United States and Nigeria signed a Trade and Investment Framework Agreement in 2000, and now the government of Nigeria must make good on its international commitments, and as the Preamble of that TIFA notes, recognize "the importance of providing adequate and effective protection and enforcement of intellectual property rights."²

Priority Actions Requested in 2009: IIPA requests that the government of Nigeria take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

- Strictly enforce the Copyright (Optical Disc Plants) Regulation 2006, shutting down pirate plants and bringing to justice those who have taken advantage of previous lax enforcement to create a piracy haven for production.
- Enforce the Copyright Law through Nigerian Copyright Commission *ex officio* actions to sweep the markets clear of pirate product as well as duplicating and photocopy equipment, and stop the unauthorized use of business software.
- Have the Nigerian Customs Service stop pirate imports from coming in at the ports, and stop those coming to Nigeria to pick up pirate exports.
- Ensure adequate funding to universities and libraries in Nigeria to purchase books and journals.
- Bring copyright piracy cases to trial, hopefully resulting in deterrent judgments with penalties actually imposed.
- Enact an amendment to prohibit unauthorized (parallel) and pirate imports, and limit any personal baggage importation exception to one legal copy of a work by a physical person for his own personal purposes.

¹ See Miebi Senge, *AAGM: NCC's Copyright Regulation 2006 Seeks to STRAP Pirates Out of Business*, Vanguard (Nigeria), April 11, 2007.

² *Agreement Between the Government of the United States of America and the Government of the Federal Republic of Nigeria Concerning the Development of Trade and Investment Relations*, February 16, 2000, at http://www.ustr.gov/assets/Trade_Agreements/TIFA/asset_upload_file172_7727.pdf.



NIGERIA										
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS)										
AND LEVELS OF PIRACY: 2004-2008 ³										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	NA	55.0	95%	52.0	95%	52.0	95%	50.0	99%
Business Software	67.0	81%	63.0	82%	56.0	82%	46.0	82%	30.0	84%
Books	NA	NA	NA	NA	8.0	NA	6.0	NA	4.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	67.0		118.0		116.0		104.0		84.0	

PIRACY CHALLENGES IN NIGERIA

Pirate Optical Disc Production: There are reported to be more than a dozen optical disc production plants operational in Nigeria, some of which have migrated to Nigeria from Southeast Asia and operate to supply Central and West Africa. The plants themselves have many dozens of production lines, including DVD-compatible lines, and reportedly several mastering facilities, which create the glass masters and metalized stampers used to mass-produce CDs and DVDs. In all, IIPA believes the plants are capable of producing hundreds of millions of discs per year. 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, and were raided again in 2006. However, no cases against these plants' owners or workers have been concluded.⁴ The massive production overcapacity is not only used 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.

Retail Piracy: Nigeria remains a country overrun with pirate materials, stunting the growth of any legitimate industry. Pirate CD-Rs containing copyright materials, for example, compilations of up to 300 songs by local and international artists, or popular business software titles, sell for less than the equivalent of US\$1 in the local market. Notwithstanding the increased production capacity in the market, an influx of imported pirate CDs from unknown locations in Asia continues to harm the market in Nigeria's main cities, including Lagos (which IIPA understands is a major transshipment site for pirated product to enter Nigeria and nearby countries), Port Harcourt, Aba and Abuja.

Business Software Piracy: Software piracy has significantly worsened in the past twelve months due to a lack of enforcement. Disturbingly, perfect counterfeits, including counterfeit authenticity seals/holograms of popular business software packages have appeared in Nigeria, providing further evidence of highly sophisticated syndicate activity in the country. There are some indications that these counterfeits may come from outside Nigeria and that the criminal piracy ring involved is international in its scope. Unauthorized use of business software by businesses – so-called end-user piracy – also exists in Nigeria, causing a significant loss of income to software copyright owners. Hard disk loading also occurs, whereby thousands of dollars worth of pirate business software is loaded onto a computer hard drive prior to its sale to the public, or as an after-sales service. Finally, right holders are noting that some courier companies are involved in the importation of counterfeit software, necessitating greater involvement by Nigerian Customs.

Book Piracy: Book piracy continues to be a serious problem, due in part to the Nigerian government's decision in 2003 to cut funding for university and library purchases. This decision has created a climate fostering illegal photocopying, which plagues the academic market. Furthermore, Nigeria has for years been a destination for pirate book imports, primarily from Asia (China and Malaysia). Customs authorities should increase vigilance in seizing pirate product before it has a chance to saturate the local market.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Nigeria. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Nigeria's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

⁴ There are even unsubstantiated claims that the evidence related to the Nasinma plant has been destroyed to thwart attempts to prosecute those responsible for piracy at that plant.

Internet Usage Up in Nigeria, Leading to More Downloading: Hard goods piracy dominates the market in Nigeria, but Nigeria's tremendous growth in Internet usage can no longer be ignored. The latest statistics indicate 10 million Nigerians, or 7.2% of the population, now use the Internet. Users download illegal content (like music) from Internet websites, but IIPA has also become aware of IT consultants installing illegal software or other materials onto computers. Investigators and prosecutors in Nigeria have shown little knowledge of techniques to detect or investigate Internet piracy and capacity building is needed. The courts, which once employed arcane rules regarding admissibility of computer generated evidence, now have established principles for admissibility of such documents.

Organized Crime/Violence Associated with Piracy: There are disturbing trends in terms of the level of violence associated with piratical activities in Nigeria. In June 2006, Nigerian police raided the Alaba International market in Lagos, during which pirates shot two police officers, burned a police vehicle, and threw stones and bottles, injuring the industry coordinator when he was struck on the head by a stone.⁵ Tear gas had to be used to quell the violence. Several thousand pirate CDs and VCDs were seized and four men were arrested. This raid demonstrates the serious criminal nature of pirate enterprise in Nigeria and that a coordinated approach focused on criminal enforcement must be mounted.

ENFORCEMENT CHALLENGES IN NIGERIA

Industry faces numerous enforcement challenges in Nigeria, notwithstanding some well-intentioned officials and officers of: the Nigerian Copyright Commission (NCC), which reports to the Ministry of Justice and has responsibility in Nigeria for anti-piracy activities; the Nigerian Police; the Economic and Financial Crimes Commission (EFCC), which has teamed up with the NCC to fight optical disc piracy; and the National Customs Service (NCS), the nation's gateway police, which also has a significant role to play in anti-piracy enforcement (although NCS has never to IIPA's knowledge seized product on its own initiative). NCC's effectiveness is hampered by a lack of funding and insufficient manpower. IIPA members report the police lack overall will, and EFCC generally considers copyright as a secondary issue in their mandate and would rather assist the NCC to carry out its mandate than take the lead. Another problem in Nigeria involves the willingness of authorities to take actions on an *ex officio* basis, since traditionally complaints have been required, although industry reports that both the Nigerian Police and EFCC are now willing to take actions on an *ex officio* basis. The courts in Nigeria provide no sure relief, as bringing civil claims continues to be an expensive and risky remedy for right holders, and we are unaware of criminal proceedings to combat copyright piracy, including any arising from the more recent raids highlighted below. Lack of transparency in the enforcement system means right holders are generally in the dark about ongoing investigations and cases.

Enforcement Efforts Commence in 2007, But Slow in 2008: The Nigerian government, in cooperation with industry, commenced enforcement against piracy in 2007. The NCC teamed up with the EFCC and the private sector to form a collaborative campaign called the Strategic Action Against Piracy (STRAP). Two major raids were carried out targeting optical disc piracy in 2007. In one, on April 13, 2007, in reportedly the first raid to implement the 2006 optical disc statute, NCC, EFCC, the Nigerian Police Mobile Force, and industry representatives raided two large-scale replicating plants, Magnet Integrated Ventures Company Limited, in Ajah, and Akina Music International Company Limited, in Ikeja, impounding two truck loads of suspected pirated products estimated at N32 million (approximately US\$215,000),⁶ and the arrest of the Managing Director of Akina Music, and five employees of Magnet. IIPA understands that two managers of Magnet were arraigned in court in February 2008 by the NCC, but unfortunately, while the Commission sealed the premises of Magnet pending the conclusion of post-raid investigations, and indictments were brought, Magnet unilaterally opened its premises again for operation later in 2007. IIPA has no further information on the disposition of the case or any of the defendants. In the second raid, on July 25, 2007, 16 EFCC operatives and 20 armed police officers, with assistance of record and motion picture industry representatives, raided CVL Technology Ltd., a plant with five production lines, resulting in the seizure of 714 stampers containing international music repertoire and Hollywood movies, 5,000 copies of the 'Respect 2' album, by popular Nigerian Artist K1, and 8,000 other pirate CDs and VCDs. The EFCC also recovered documents showing orders for and production of several local and foreign works including 'Grass 2 Grace' album from

⁵ IFPI Enforcement Bulletin, September 2006 (on file with IIPA). Fortunately all those wounded recovered.

⁶ See NCC, *EFCC Raid Two Piracy Coys*, All Africa, April 30, 2007. Currency exchange rate is according to OANDA, as of January 30, 2008. See <http://www.oanda.com/convert/classic>.

2Face.⁷ The EFCC arrested the company's head of marketing and an investigation was launched. IIPA has no further information on the disposition of this case or the defendant.

IIPA has little information on sustained enforcement activity in 2008. The software industry reports of exactly one raid on a counterfeit software distributor. Another case was transferred from investigators to prosecutors. One press report indicates that in another raid in 2008, based on a tip-off, pirate local and foreign music CDs and VCDs worth over N15 million (approximately US\$100,000) were confiscated by the Standards Organisation of Nigeria (SON), the Copyright Commission, and the Performing Musicians Association of Nigeria (PMAN) in Lagos.⁸ IIPA welcomes the initial efforts of STRAP in 2007, and seeks more information on further activity in 2008, but notes that continued close monitoring of replicating plants in the country is essential as is follow up prosecutions to ensure the offenders involved receive deterrent sentences.

Judicial System Slow: The judicial system is reportedly very slow and many of the judges in the Federal High Court which has exclusive jurisdiction on IP issues are not that knowledgeable on copyright matters. It is hoped that the new Rules of the Court, which became effective in January 2009, will facilitate quicker dispositions of cases.

COPYRIGHT LAW AND RELATED ISSUES

Copyright Law: Copyright protection in Nigeria is governed by the Copyright Act (Cap 68 Laws of the Federation of Nigeria, 1990) as amended. The law, while by no means perfect, provides a solid basis for enforcing copyright and combating piracy. However, an amendment to the Copyright Act to provide stiffer penalties to serve as a deterrent to pirates is long overdue.

Copyright (Optical Disc Plants) Regulation 2006: IIPA welcomed the government issuance of the Copyright (Optical Disc Plants) Regulation 2006. The law establishes a specific enforcement mechanism that include:

- A competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary.
- A registration system for commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing), i.e., burning of copyrighted materials onto recordable optical discs undertaken in back rooms of traditional optical disc manufacturing plants or outside of such plants (the latter which is fast becoming a major problem).
- The requirement to use source identification (SID) Codes to trace pirate discs to their source of production.
- Licensee record-keeping requirements in the application process and after a license is granted, to provide governments with the means to judge whether an applicant qualifies for a license, and to provide maximum transparency after a license is granted (e.g., exemplars will be provided from each plant for every disc produced, allowing for transparent accounting of licensed production and forensic evidence should such be needed). CD-R burning registration also entails record-keeping of orders.
- The ability to inspect plants (in addition to traditional search and seizure) and burning facilities, including nighttime inspections, to ensure that plants/facilities are engaging in legal activities.
- Government record-keeping of all plants/facilities and all actions taken with respect to them (e.g., inspections, searches).
- Adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.

⁷ Among the wide variety of foreign artists whose works were found were R. Kelly, Wyclef, Luther Vandross, Celine Dion, Phil Collins, Westlife, Toni Braxton, Boys II Men, 50 Cent, Backstreet Boys, Akon, 2Pac, Beyonce, Kent Village, Lucky Dube and Whitney Houston. The works were mostly titled 'Platinum' or 'Best of' indicating that they contained selected songs from each artist. The foreign films on the recovered VCDs and stampers included *Love Don't Cost, Blood Diamond, Spiderman 3, Desperado 3, Contractor, Black Snake, Naked Weapon, The Big Boss, 300, Passion of Christ, Power House, The Marine, Final Contract*, and *Cyborg*.

⁸ IIPA also received unsubstantiated reports that the Solicitor General of Nigeria, the Commissioner of Police, and the NCC Director General presided over a destruction event at the Kaduna State Trade fair complex ground involving over N150 million (approximately US\$1 million) worth of pirate CDs, DVDs, videocassettes, books and implements used to infringe.

- Controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content (an automatic license is one common approach).

The Regulation also imposes the requirement of a permit for the importation of discs into Nigeria (Section 2(1)). The U.S. copyright industries do not endorse this provision, since a permit requirement on the importation of legitimate optical discs may be a GATT-incompatible restriction on trade.

GENERALIZED SYSTEM OF PREFERENCES AND 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 substantially all imports to the United States from beneficiary countries.⁹ Nigeria is a beneficiary country eligible for AGOA benefits. In order to qualify for benefits under the AGOA statute, Nigeria must demonstrate that it has made “continual progress toward establishing” the “protection of intellectual property.” The statute also conditions a country’s designation as a beneficiary by the President if the country otherwise meets the criteria for GSP beneficiaries, namely, if it provides “adequate and effective protection of intellectual property rights.” Thus, AGOA and GSP are essentially related in terms of eligibility criteria. Nigeria has already been deemed a beneficiary country under the GSP program. As a result of its AGOA and GSP status, Nigeria enjoyed more than \$30.1 billion in duty-free imports to the United States under these programs (almost all under AGOA) (only \$1 million under GSP) in 2007, and more than \$35.4 billion in duty-free imports to the U.S. in 2008 (only \$1.3 million under GSP). Nigeria must meet the discretionary criteria in these U.S. laws to maintain such favorable treatment at these levels.

TRAINING

As was the case in 2007, IIPA members, the U.S. government, and international and other non-governmental organizations continued to provide avenues for training in 2008. The software industry was particularly active, conducting a training program for EFCC officials on software piracy, its detection, and investigation techniques. Another training was conducted for computer companies and end-users jointly organized by Microsoft and EFCC. In August 2008, a “Chief Technology Officer” business and technology summit was held in Lagos, organized by the U.S. Mission to Nigeria and sponsored by leading technology organizations, including the Business Software Alliance. The summit usefully brought perspectives from the U.S. government, U.S. private sector, and Nigerian government on ways to combat the piracy situation on the ground.¹⁰ A gap that can be usefully filled in 2009 would be to provide greater training and capacity building for prosecutors and judges of the Federal High Court.

⁹ See Generalized System of Preferences, Title V of the Trade Act of 1974, as amended, 19 USC 2461 *et seq.* See discussion at United States Trade Representative, *African Growth and Opportunity Act*, at http://www.ustr.gov/Trade_Development/Preference_Programs/AGO/Section_Index.html.

¹⁰ Michael Dibie, *Nigeria: Piracy - Robber of Intellectual Property*, at www.allafrica.com/stories/200808270286.html.