

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.¹ 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-payment of VAT and other taxes, and the aforementioned Counterfeit Goods Act in the

¹ 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.

near future²). 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.³ 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.⁴ 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.⁵ 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.⁶

² A Counterfeit Goods bill is apparently being given positive consideration by the Kenyan Government's Cabinet.

³ 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.

⁴ 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.

⁵ 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.

⁶ 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.