



October 22, 2007

**VIA ELECTRONIC MAIL ([FR0720@ustr.eop.gov](mailto:FR0720@ustr.eop.gov))**

Ms. Gloria Blue  
Executive Secretary, Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
600 17<sup>th</sup> 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, 72 Fed. Reg. 54951  
(September 27, 2007)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the September 27, 2007 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 discussed, if briefly, AGOA countries' copyright situations (laws and in some cases enforcement) in its May 2007 report, but encourage the Subcommittee to draw upon existing reports (such as those prepared by the IIPA in its annual Special 301 process) to enrich the record in future reports.<sup>1</sup> It is important to reflect steps the beneficiary countries are taking to ensure that the AGOA IPR criteria for eligibility are being met. Conversely, 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.

<sup>1</sup> The May 2007 USTR report very briefly mentioned IPR developments in Botswana, Burundi, Cameroon, the Central African Republic, Comoros, Congo (Democratic Republic of), the Gambia, Ghana, Guinea, Kenya, Nigeria, Senegal, and Sierra Leone, and IPR trainings in Nigeria, Virginia (U.S. Patent and Trademark Office), Uganda, Senegal, and Namibia. See United States Trade Representative, "2007 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act," May 2007, at [http://www.ustr.gov/assets/Trade\\_Development/Preference\\_Programs/AGOA/asset\\_upload\\_file762\\_11294.pdf](http://www.ustr.gov/assets/Trade_Development/Preference_Programs/AGOA/asset_upload_file762_11294.pdf).



## **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,<sup>2</sup> 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 6.56% of the U.S. gross domestic product (GDP) in 2005.<sup>3</sup>

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. The most recent statistics indicate that global copyright piracy cost the U.S. economy at least \$58 billion in total output in 2006, costs American workers 373,375 jobs and \$16.3 billion in earnings, and costs federal, state, and local governments \$2.6 billion in tax revenue.<sup>4</sup> 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.

## **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.<sup>5</sup> Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-

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<sup>2</sup> 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).

<sup>3</sup> See the 2006 economic report prepared for the IIPA by Stephen Siwek of Economists Inc., Copyright Industries in the U.S. Economy: the 2006 Report, available at [http://www.iipa.com/pdf/2006\\_siwek\\_full.pdf](http://www.iipa.com/pdf/2006_siwek_full.pdf).

<sup>4</sup> In 2007, for the first time, data became available which allowed Steve Siwek, who also authors the IIPA economic studies, to measure the loss 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).

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



Saharan African countries.<sup>2</sup> At present, 39 African countries are beneficiary countries eligible for AGOA benefits.<sup>7</sup> Nine sub-Saharan countries are not presently eligible.<sup>8</sup>

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:

(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:

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<sup>6</sup> See Trade and Development Act of 2000, Title 1 of the Trade and Development Act of 2000, Pub. L. 106-200, 19 USC 3721 *et seq.*

<sup>7</sup> 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 Liberia; Republic of Madagascar; Republic of Malawi; Republic of Mali; Republic of Mauritius; Islamic Republic of Mauritania; 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.

<sup>8</sup> 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; Somalia; Republic of Togo; Republic of Sudan; and Republic of Zimbabwe.



(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)<sup>9</sup> – Congress specifically defined the intellectual property criteria in that Act (similar to the GSP Act criteria) to require “TRIPS or greater” protection and enforcement.<sup>10</sup> 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

<sup>9</sup> 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).

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



intellectual property agreements.”<sup>11</sup> **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 (excluding North 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 to the WCT but no yet to the WPPT (IIPA understands that the government of Ghana intends to deposit the WPPT soon). A number of other countries in Africa are actively considering ratifying the treaties, and many more have already taken steps to implement them.

## **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.

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<sup>11</sup> 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.



### **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 provide 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 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 same to implement these more complex provisions 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 2007 Special 301 submission, we reported on copyright-related developments in **Nigeria** and **South Africa** (reports attached), as well as Egypt and Morocco in North Africa.<sup>12</sup> Some IIPA members have been able to provide estimated trade losses in these countries, which in the aggregate, conservatively amounts to at least **\$367 million in 2006 alone**.<sup>13</sup>

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<sup>12</sup> The IIPA's 2007 Special 301 country reports for these four countries are posted and available at <http://www.iipa.com/countryreports.html>.

<sup>13</sup> IIPA's 2006 statistical data for these four countries is available on the IIPA website at <http://www.iipa.com/pdf/IIPA2007TableofEstimatedTradeLossesandPiracyLevelsfor2006ME-AFRICA060607.pdf>.



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. In addition, USTR continues to focus on other critically important issues, including Internet piracy, counterfeit pharmaceuticals, transshipment of pirated and counterfeit goods, requiring authorized use of legal software by government ministries, proper implementation of the TRIPS Agreement by developed and developing country WTO members, and full implementation of TRIPS Agreement standards by new WTO members at the time of their accession.<sup>14</sup>

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.

## **CONCLUSION**

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with its 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,

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International Intellectual Property Alliance

## Attachments

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<sup>14</sup> Office of the U.S. Trade Representative, "Executive Summary of the 2007 Special 301 Decisions," at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_Special\\_301\\_Review/asset\\_upload\\_file36\\_11121.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file36_11121.pdf) (April 30, 2007).

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### NIGERIA

**Special 301 Recommendation:** Nigeria should be placed on the Watch List.

#### **EXECUTIVE SUMMARY**

Piracy is so bad in Nigeria that the local music industry has actually called for a ban on the importation of music CDs.<sup>15</sup> But Nigeria's problems are sadly just taking root in a more serious way, as Nigeria exports pirate product to other parts of Africa. In particular, IIPA knows of 15 optical disc factories that have been operational in Nigeria, having at least 52 lines, capable of producing at least 182 million discs (a conservative estimate). Some of these plants are owned by Asian companies displaced by enforcement against them in Asia. Reports from neighboring countries suggest that large quantities of pirate discs are being exported from these plants in Nigeria across the region. As such, Nigeria has unfortunately earned the dubious distinction of becoming an optical disc piracy hotspot, and IIPA calls upon the U.S. government to urge the Nigerian government to deal with this problem as an urgent matter. Namely, it is imperative that the Nigerian government swiftly implement regulations to control the illegal production of optical discs, including a licensing (and revocation/renewal system), with source identification code requirements for discs, stampers, and masters, license of import of raw materials and equipment, inspection authority, and sanctions for plants violating the law. IIPA understands that the Minister of Justice has signed new Optical Disc Regulations into law, and that these regulations will be published in the Government Gazette soon (we further understand the Nigerian Copyright Commission is working on this). Then, the Nigerian government must take urgent steps to stamp out pirate optical disc production in the country. Other piracy problems must be dealt with as well through strong enforcement by the Nigerian Copyright Commission (NCC) and Nigerian Customs, and use of publications (as well as other copyright materials) by universities and libraries must be legalized.

#### **ACTIONS TO BE TAKEN IN 2007**

- Enactment of draft optical disc regulations to require the 15 known optical disc plants and two mastering facilities to come forward and be licensed, to require the plants' use of SID codes (mastering LBR code and mould code) on all discs produced and sold in Nigeria, and to empower the government authorities to inspect plants and take deterrent action against any plants found to operating outside the law.

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<sup>15</sup> All Africa Lagos, *NARI Advocates Ban On Importation of Recorded Music*, March 13, 2006 (noting that with an 85% piracy level for music/records, the chairman of the Nigerian Association of Recording Industries (NARI), Toju Ejueyitchie, called for the ban on the importation of prerecorded music or film carriers into Nigeria). In the article, the chair of NARI also admitted to the existence of "about 15 optical disc factories, and the number increasing by the day," and posited that virtually 100% of works imported were pirated. The press conference also announced the seizure of 1.7 million CDs in Cotonou, and raids on suspected IP pirates Akina and Nassinma. The head of NARI also called for a serious purge of the Alaba International Market, which he described as a "notorious haven for pirates, and their nefarious activities."

- 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.”

For more details on Nigeria’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

<b>NIGERIA</b> <b>ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY</b> <b>(IN MILLIONS OF U.S. DOLLARS)</b> <b>AND LEVELS OF PIRACY: 2002-2006<sup>16</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	52.0	95%	52.0	95%	50.0	99%	NA	NA	NA	NA
Business Software <sup>17</sup>	59.0	82%	46.0	82%	30.0	84%	29.0	84%	4.3	67%
Books	8.0	NA	6.0	NA	4.0	NA	NA	NA	NA	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
<b>TOTALS</b>	<b>119.0</b>		<b>104.0</b>		<b>84.0</b>		<b>29.0</b>		<b>4.3</b>	

## PIRACY UPDATES IN NIGERIA

**Pirate Optical Disc Plant Production:** As noted, there are a reported 15 optical disc plants that have been in operation in Nigeria, some of which have migrated to Nigeria from Asia and operate to supply Central and West Africa. IIPA is aware of at least 52 production lines capable of producing at least 182 million discs per year. Many of the plants are not licensed to

<sup>16</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Israel under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>17</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Nigeria, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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.

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, 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.

**Retail Piracy:** Nigeria is a very large potential market, but the country is overrun with pirate materials domestically. Pirated CD-Rs containing copyright materials, for example, compilations of up to 300 songs by local and international artists, are being sold for less than the equivalent of US\$1 in the local market. There has also been a recent influx of imported pirate CDs from unknown locations in Asia.

**Book Piracy:** Book piracy continues to be a serious problem, due in part to the Nigerian government’s decision in 2003 to cut all 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.

**Business Software Piracy:** For the business software industry, hard-disk loading of pirate software and unauthorized use of software in businesses remain significant problems. The piracy rate, at 82%, is unacceptably high.

**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.<sup>18</sup> Tear gas had to be used to quell the violence. Several thousand pirate CDs and VCDs were seized and four men were arrested.<sup>19</sup> 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 UPDATES IN NIGERIA**

There is little enforcement activity in Nigeria,<sup>20</sup> and cooperation between government agencies to implement and enforce the law, including law enforcement, is sparse and erratic.<sup>21</sup>

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<sup>18</sup> IFPI Enforcement Bulletin, September 2006 (on file with IIPA). Fortunately all those wounded have recovered.

<sup>19</sup> The raid was led by the Director of Special Operations of the National Copyright Commission (NCC) and an industry representative. More than 100 anti-riot policemen surrounded the market while 10 armed officers took up positions on the rooftops. They supported the 12 Copyright Inspectors and 15 packers who went into the Alaba market to inspect suspect merchandise.

<sup>20</sup> 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.

<sup>21</sup> For example, we understand the National Copyright Commission (NCC) launched a Strategic Action Against Piracy (‘STRAP’) campaign during 2005, and that while the goal of STRAP was to curb piracy and restore an environment conducive to a credible copyright system, very few actions were taken. We also understand that NCC accepts “Copyright Notifications,” a scheme designed to enable creators of copyright works or persons who have acquired rights in copyright works to give notice of their copyright. This system is largely ineffective, however, in combating piracy.

The Nigerian Copyright Commission (NCC) has responsibility in Nigeria for anti-piracy activities, and the National Customs Service (NCS), as the nation's gateway police, has a significant role to play in anti-piracy enforcement, although NCS has never to our knowledge seized any product on its own initiative. There needs to be better coordination between these two enforcement entities. The NCC's Director General was suspended in November 2005 for several months over the de-certification of one of Nigeria's music collecting societies, the Musical Copyright Society of Nigeria,<sup>22</sup> but has since been reinstated. 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. Meanwhile, the courts provide no sure relief, as bringing civil claims continues to be an expensive and risky remedy for right holders.

## **COPYRIGHT LAW AND RELATED ISSUES**

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. Unfortunately, there is apparently a new broadcast compulsory license being proposed that would curtail the ability of U.S. channels to freely contract to show sporting events.<sup>23</sup> This should not be imposed in Nigeria.

As the government has come to recognize the severity of the optical disc piracy problem,<sup>24</sup> it is positive that it has issued an optical disc regulation. Effective prevention of optical disc piracy can only be achieved through targeted legislation and by the establishment of specific enforcement mechanisms. While IIPA has not reviewed the legislation, we note that essential provisions for an effective optical disc regulatory scheme include:

- The establishment of 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. In addition, commercial CD-R/DVD-R "burning" (i.e., for the purpose of sale, distribution, or other commercial dealing) of copyrighted materials onto recordable optical discs undertaken by traditional optical disc manufacturing plants or outside of such plants (the

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<sup>22</sup> 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>.

<sup>23</sup> IIPA understands that the Nigerian National Broadcasting Commission (NBC), under the supervision of the Federal Ministry of Information and National Orientation, resolved during August 2006 that NBC would not recognise exclusivity in sports transmission. Section 1.16.1 of the Code provides,

In Nigeria, the coverage of Sporting and Major National Events shall not be Exclusive to any Station. Such Programme shall be made available to other Operators on Mutually negotiated terms.

Section 1.16.2 of the Code further states that

Where the Commission needs to arbitrate its decision shall be final and binding on all parties.

<sup>24</sup> See Ruby Rabi, at <http://allafrica.com/stories/200611290465.html>, Daily Trust (Abuja), November 28, 2006 (reporting that NCC admitted there are "14 replicating plants in Lagos used to manufacture pirated CDs, DVDs and books," and noting that ten years ago, Nigeria had just two replicating plants). The NCC indicated that it intends to re-introduce the "hologram" as a means to determine authenticity. IIPA is skeptical that a hologram purchase program will achieve anything other than foster fraudulent holograms and increase costs to right holders.

latter which is fast becoming a major problem) should be subject to registration to ensure that unregistered commercial conduct is punishable.

- The requirement to use source identification (SID) Codes to trace pirate discs to their source of production.
- The establishment of 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 should also entail 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).
- The establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure.
- To put into place 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).

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

# SOUTH AFRICA

## EXECUTIVE SUMMARY

IIPA specially mentions South Africa in this year's Special 301 filing, because of domestic piracy concerns, especially the proliferation of Internet download-to-burn (i.e., CD-Rs and DVD-Rs), straight CD-R and DVD-R "burning," end-user software piracy, and book piracy, among other concerns. Further, a court ruling handed down by Senior Magistrate Wessels in the Pretoria Commercial Crime Court that removed the Police's powers of arrest under the Counterfeit Goods Act seriously curtails South African authorities' abilities to effectively enforce copyright. Industry reports that piracy levels are getting worse largely as a result of the perception amongst consumers that piracy is a victimless crime. The impact of piracy in South Africa is devastating for legitimate right holders, legitimate distributors, and retail businesses (sale as well as rental), so much so that local copyright owners are mobilizing to take a stand against piracy.<sup>25</sup> Legitimate distributors have reduced employment levels, some rental outlets have reported year-on-year decreases in business in the region of 30%, and many rental outlets have actually closed.

## PRIORITY ACTIONS FOR 2007

- **Reinstate Police Powers Under Counterfeit Goods Act:** The Counterfeit Goods Act (CGA) should also be amended to clarify and simplify Police procedures, ease time limits, reinstate powers of arrest, and include complainant's right to submit evidence of economic damage for consideration in sentencing.
- **Run *Ex Officio* Raids, Leading to Prosecutions for Piracy (Not On-the-Spot Raids That Amount to a Cost of Doing Business)**
- **Pass Modern Copyright Legislation, and Join the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty:** The government of South Africa was at one time considering copyright legislation that would have improved the enforcement landscape and brought the law fully into compliance with the TRIPS Agreement. Unfortunately, that legislation was not enacted. Such measures should be adopted, in addition to other modernizing measures including adequate protection of copyright materials on the Internet, notice and takedown (i.e., for ISPs to cooperate in fighting infringement).

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<sup>25</sup> See *First Anti-Piracy Concert to Kick Off in Joburg*, at <http://www.bizcommunity.com/Article/196/40/12012.html> (describing October 20, 2006 concert to kick off "Operation *Dudula*" – meaning "eradicate in isiZulu – spearheaded by "People's Poet" Mzwakhe Mbuli, to protest against the large number of pirate cassettes, CDs and DVDs flooding the local market; "[t]he vision behind these concerts is to create a crime-free society," explains Mbuli, who continued, "[i]f members of the public do not buy fake goods, they will render piracy unworkable, and artists will not be ripped off when they have worked so hard for their earnings"; other performers included Rebecca, Soul Brothers, Avante and Lundi).

- **Develop Joint IPR Enforcement Public Awareness Campaign:** The South African government needs to work with the copyright industries to devise a joint IPR enforcement public awareness campaign, including information on the detrimental effects of illegal downloading on South Africa’s domestic creative community.

For more details on South Africa’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

<b>SOUTH AFRICA</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2002-2006<sup>26</sup></b>										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Business Software<sup>27</sup></b>	119.0	35%	116.0	36%	107.0	37%	87.0	36%	35.6	34%
<b>Motion Pictures</b>	NA	NA	NA	NA	35.0	40%	35.0	40%	30.0	30%
<b>Records &amp; Music</b>	NA	NA	8.5	70%	8.0	65%	3.0	55%	NA	25%
<b>Entertainment Software</b>	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
<b>Books</b>	3.0	NA	2.0	NA	2.0	NA	2.5	NA	14.0	NA
<b>TOTALS</b>	<b>122.0</b>		<b>126.5</b>		<b>152.0</b>		<b>127.5</b>		<b>79.6</b>	

## **PIRACY UPDATE IN SOUTH AFRICA**

**Local Optical Disc Production/“Burning” (Link to Internet Piracy):** Local and international law enforcement actions have resulted in a noticeable decrease in the availability of imported pressed discs in South Africa.<sup>28</sup> The net result of this reduction in imports of pressed discs from Pakistan and Malaysia is the proliferation of home operators involved in burning pirated copyright materials (including films on DVD-Rs) from “masters” downloaded from the Internet or received from Malaysia in the post.<sup>29</sup> With the increasing availability of broadband through fixed and mobile applications, downloading to burn and sell is becoming more common and will continue to increase unless efforts to stop such activities are commenced forthwith. The proliferation of this type of piracy has been dramatic and quite sudden and presents new challenges to enforcement efforts. It should be noted that while there appears to have been a decline in the imports for some industries, pirated entertainment software products continue to be imported from Southeast Asia, particularly Malaysia.

<sup>26</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). For information on the history of Kuwait under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>27</sup> BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in South Africa, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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.

<sup>28</sup> Flea markets continue to be a problem in South Africa, but increased law enforcement actions, public awareness campaigns and, in some cases, a willingness by landlords to evict tenants found to be trading in pirate copyright materials, are beginning to have a positive impact in this area.

<sup>29</sup> Local “burning” is carried out by stores and individuals owning a computer or by those who can afford a stack burner (that can make multiple copies of a disc in one run). Sales of pirated copies of TV series discs have proliferated according to the motion picture industry.

**Music Cassette Piracy:** In addition to optical disc piracy of music, cassette piracy remains probably the most devastating to the music and record industries in South Africa, as cassettes provide all kinds of music on a very cheap medium affordable to all. IIPA understands from industry that cassette players are sold by the same organized pirates providing the infringing music in cassette format (the warehouses discovered appear to provide proof of this).

**Internet Piracy, Including Misuse of Corporate Bandwidth:** Internet piracy is a growing concern in South Africa, although the Internet is still largely used to advertise burn-to-order services due to lack of bandwidth in general.<sup>30</sup> Internet piracy at present is generally comprised of illegal copies downloaded from other countries and not from websites or servers based in South Africa.<sup>31</sup> There is a general lack of cooperation from ISPs in taking action against pirate download sites even where the right holder provides proof of infringement (although one industry sector reports that cooperation from auction sites is very good). IIPA also notes for the first time significant problems with abuse of bandwidth by employees at offices. Companies should be warned not to permit their employees to engage in such infringements in the workplace, and, if necessary, should be charged for contributing to infringement.

**Exports and Transshipment:** South Africa's expansive and porous borders also continue to hamper efforts to stem the flow of pirated products between the countries that make up the Southern Africa Customs Union, namely South Africa, Botswana, Lesotho, Namibia and Swaziland. South African Customs authorities remain unwilling in many instances to stop pirate products in transit through its territory.

**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 harming the market for educational publishers. These illegally copied books are also being disseminated to students in neighboring countries, especially where those students are enrolled in distance education courses with South African universities. 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.

**Organized Crime Linkage:** There is increasing evidence of a linkage between piracy activities and other organized crimes.<sup>32</sup> The South African Police Service (SAPS) has taken on three specific cases in respect to organized groups involved in pirating of films, human trafficking,

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<sup>30</sup> There are reportedly two legal music download service providers for but they are not performing well economically in part due to relative lack of broadband connectivity. Bandwidth is being liberalized but costs are still inhibiting rapid growth.

<sup>31</sup> On the occasion industry learns of a website selling pirate music, they have usually been able to quickly establish a physical address and take it down.

<sup>32</sup> See June 2006 IFPI Enforcement Bulletin, <http://www.ifpi.org/site-content/library/enforcement-bulletin-30.pdf> (describing the local record industry group-coordinated raids in 2006 which revealed thousands of pirate discs and cassettes, etc., including South African as well as Western artists, but which also revealed refugee application forms which were in the process of being falsified, and various legal warrants issued in some of the names mentioned in the application forms; in a separate raid in January 2006, death threats were made against a music artist and members of the local record industry group which requested backup of the South Africa Police Services when traders in counterfeit product became aggressive during an incident at a stall at the Montana Traders Square). One raid described occurred in China City, resulting in significant seizures. A criminal prosecution was launched and resulted in a conviction with a R300,000 fine or three years imprisonment, suspended for a period of five years, provided the accused is not found guilty of the same offense during the period of suspension.

money laundering, tax evasion, and counterfeit bank notes. All organized groups identified concentrate on bringing people into South Africa and servicing the local market. Major groups are of Pakistani and Chinese origin.

## **ENFORCEMENT UPDATE IN SOUTH AFRICA**

**Court Case Sets Back Enforcement in South Africa:** Unfortunately, in 2006, a ruling handed down by Senior Magistrate Wessels in the Pretoria Commercial Crime Court dealt a serious blow to enforcement of copyright in South Africa. The decision essentially stripped the Police's powers of arrest under the Counterfeit Goods Act. This decision was handed down at the bail applications of 14 persons (illegal immigrants from Pakistan) arrested by the police under the Counterfeit Goods Act following a complaint by the anti-piracy and anti-counterfeiting organization, SAFACT. The Police and Prosecution Services have taken the ruling on appeal to the High Court and a decision is expected during the first quarter of 2007.

**Greater Numbers of Arrests and Criminal Convictions in 2006, But Problems Remain with Courts:** Notwithstanding this negative ruling by the Pretoria Commercial Crime Court, there was an overall increased commitment by law enforcement agencies to act against those trading in pirate copyright materials in 2006, as the number of arrests in 2006 was almost double that of 2005 and the number of criminal prosecutions has exceeded administrative fines ("admissions of guilt") when compared with 2005. Instances of bail being denied have become ever more common as well as a significant increase in plea bargains (which have to be approved by the complainant). Greater attention is being paid to piracy in 2006, and one high profile case involving two local South African films highlights the damaging nature of piracy to the South African economy, society, and people.<sup>33</sup>

Unfortunately, the criminal court system in South Africa remains overburdened, and it is difficult to move cases along at a reasonable pace and without unreasonable burdens and costs placed on the right holders. Prosecutors and judges in the non-specialized courts fail to view piracy as a serious crime (although this is being gradually offset with an increasing number of cases being referred to either the High Courts or the Specialized Commercial Crime Courts that have been established in Johannesburg, Pretoria, Durban and Port Elizabeth, Cape Town and Bloemfontein). A presumption of copyright subsistence remains lacking, and in some cases, defendants have been able to reverse the burden of proving ownership simply by placing ownership in issue during the proceedings. The entertainment software industry again reports that problems remain with respect to enforcement of judgments. Even after winning a case and being awarded costs, the chances of collecting from a defendant are almost none. Defendants all too often have already disposed of or transferred their assets and have left the country, thus leaving the right holder without recourse as to collecting the damages awarded in a judgment.<sup>34</sup>

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<sup>33</sup> Operations by the police assisted by SAFACT led to the discovery of massive numbers of pirate copies of the local movies "Mama Jack" and "Tsotsi" and revealed the original pirate operation to have been an "inside job" by workers at the post-production houses for those movies. Considerable media exposure has been given to the pirating of these two films, as well as the broader issue of film and copyright piracy. The pirating of films has also been raised in the National Parliament, and the Gauteng and Western Cape Provincial Legislatures. The original discovery has led to many actions against street vendors, flea markets, and home operators found to be trading in pirated copies of the two films.

<sup>34</sup> 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

Thus, while theoretically, the award of damages might serve as a deterrent, as judgments remain unenforced (and uncollected), they serve as no deterrent at all.

**Special IP Prosecutors:** The appointment of two senior State Prosecutors with specific responsibility for prosecution of IP offences which will operate within the specialized Commercial Crime Court, is a positive development. This additional capacity will enable criminal cases involving pirating of copyright materials to be expedited, and will hopefully lead to an increased willingness of prosecutors to build more cases against repeat offenders to culminate in deterrent sentences that include imposition of prison sentences.

**Customs Issues:** Industry has developed good relationships with South African Customs officials, but the blanket indemnity they require is considered a problem for right holders. Customs authorities in South Africa are intercepting transit consignments at airports but uncertainty exists as to seaborne consignments. There have been past reports forensically linking optical disc plants in Singapore to pirate product seized in South Africa. Unfortunately, South African Customs has not been willing to seize this in-transit pirate product.<sup>35</sup> The entertainment software industry reports that imports of pirated optical disc products from Southeast 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, and there continues to be a lack of transparency as to what becomes of the seized products.

## **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.<sup>36</sup> These include:

- **End-User Piracy of Business Software 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, giving rise to questions about South Africa's TRIPS compliance under Article 61 (which requires criminalization of at least all copyright piracy on a commercial scale).
- **Civil Damages 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.

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enforce judgments expeditiously as well as measures by which a defendant may be barred from disposing of assets related to the infringing activity.

<sup>35</sup> 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.

<sup>36</sup> Other issues in the current law exacerbate the piracy problem. For example, unauthorized imports (parallel imports) of products prior to local release dates simply ruin the market for the legitimate distributors, and since the shipments can often be mixed with pirate discs, the law should be amended to afford an exclusive importation right.

- **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. 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.

The Government of South Africa should amend its law to comply with the provisions of the WIPO "Internet" Treaties,<sup>37</sup> the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and should accede to these treaties as soon as possible.

**Counterfeit Goods Act:** Amendments to the Counterfeit Goods Act have long been in the works (they were drafted in 2004 to clarify and simplify procedures required to be followed by the Police, result in less onerous time limits, reinstate powers of arrest, and include a complainant's right to submit for consideration in sentencing evidence of economic damage caused by this crime). These proposals have been submitted to the Department of Trade and Industry without response. Further problems identified with the CGA include the fact that it provides for certain procedures to be followed within time frames that are too short for the cases reasonable to be able to be prepared for the courts. The procedures of the CGA are often not known to South African enforcement agencies or to public prosecutors, so they are unable to competently deal with matters under the law.

**Regulations on Harmful Business Practices and Proposed Amendment to Films and Publications Act, May Harm Right Holders:** Regulations are reportedly being promulgated under the Harmful Business Practices Act requiring specific notices to consumers to be displayed in respect to parallel imports by retailers. Further, proposed amendments to the Films and Publications Act impose registration and classification requirements on authorized distributors that do not apply to parallel imports or Internet downloads. These legislative acts should not be concluded precipitously without considering fully the potential negative impact they will have on legitimate right holders.

**Trade and Investment Cooperation Agreement (TICA):** With the SACU Free Trade Agreement talks suspended indefinitely,<sup>38</sup> USTR has commenced consideration of a "Trade and

<sup>37</sup> 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>.

<sup>38</sup> On April 18, 2006, USTR officially announced that SACU negotiations were on hold. Specifically, USTR noted "The United States and SACU have had differences on some core issues in the FTA. These issues will

Investment Cooperation Agreement (TICA)” with SACU members, including South Africa. IIPA has weighed in as part of a private sector working group as part of the “TICA.” IPR (specifically, copyright) should be addressed, including a detailed text if possible, but barring that, at least a commitment to fight piracy, including Internet, optical disc, book, and end-user software piracy, and a commitment to join and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

## **TRAINING/TECHNICAL ASSISTANCE**

The industries have established MOUs or informal understandings with enforcement authorities in South Africa, and the latter are generally quite receptive to training and receiving technical assistance (and have been for at least six years, with the last couple of years focused more on prosecutors). SAFACT, a local industry-driven enforcement group, is in almost daily contact with the various law enforcement agencies involved in combating the pirating of copyright materials and provides support capacity and guidance.<sup>39</sup> The record industry group similarly conducts training and provides technical assistance as well. The scope of such training/technical assistance includes training to Prosecutors, Customs Officials and Police Officers to assist in acquiring necessary investigative skills to seek practical application of the Copyright Act and Counterfeit goods Act,<sup>40</sup> plus procedures for successful convictions from raids through arrests, forensics, bail and trial. Technical assistance in 2006 included funding the new Commercial Crime Courts in Cape Town and Bloemfontein. SAFACT also participated in a UNESCO training for magistrates from the Southern Africa region.

## **MARKET ACCESS**

**Broadcast Quota:** In 2001-2002, the Independent Communications Authority of South Africa (ICASA), although acknowledging that South African broadcasters had overwhelmingly exceeded their quotas, tightened local content obligations by up to 15%, thus increasing overall content quotas for public broadcasters and private broadcasters to 55% and 35% respectively (and raised from 8% to 10% for Pay-TV services in 2006). Those quotas, upheld in a 2006 review of the rule, are articulated on the basis of service type (public, commercial, subscription channels) and program genre (South African drama, children’s programming, etc.). The quotas, which apply to terrestrial, cable and satellite broadcasters licensed in South Africa, may be reviewed in 2009, three years after their coming into force (January 2006). IIPA believes market forces should determine programming allocation rather than discriminatory quota regimes.

**Foreign Ownership Restriction:** Foreign ownership in a broadcaster is presently capped at a maximum of 20%. This level is being reviewed, and may be increased to allow 33% foreign ownership in line with World Trade Organization (WTO) recommendations. Foreign investment

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require detailed examinations over the longer term.” While an FTA remains a stated long-term goal, the U.S. is launching a new joint work program on trade and investment issues with the SACU countries – a “framework [to] establish a basis and building blocks for pursuing the FTA over the longer term.” Given the realities involved with TPA set to expire mid-next year, conclusion of an FTA is not possible.

<sup>39</sup> SAFACT views its mission as putting together project motivations based on own intelligence to Police for establishment of projects aimed at significant criminal groups that assist the Police in obtaining resources necessary to effect prosecution.

<sup>40</sup> In 2006, product identification training (i.e., between pirate and genuine) was presented to all law enforcement agencies including municipal law enforcement personnel in order to address the problems caused by street vendors.

restrictions are discriminatory, limit competition and inhibit the potential growth of the television industry. They should be abolished.