



July 19, 2000

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW, Room 122
Washington, DC 20508

Re: Public Comments on Determining Country
Eligibility for Benefits Under the African Growth and
Opportunity Act (AGOA), Title I of the Trade and
Development Act of 2000, 65 Fed. Reg. 38021 (June
19, 2000)

Dear Ms. Blue:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the June 19 request for public comments circulated by the African Growth and Opportunity Act Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the U.S. Trade Representative.

These comments outline our views on the intellectual property rights eligibility criteria which the President must consider when designating these sub-Saharan African countries as eligible beneficiary countries under the new African Growth and Opportunity Act (AGOA).

DESCRIPTION OF THE IIPA AND ITS MEMBERS

The International Intellectual Property Alliance (the "IIPA" or "Alliance") is a coalition formed in 1984 consisting of seven trade associations, each of which represents a significant segment of the copyright industry in the United States. The IIPA consists of AFMA (formerly the American Film Marketing Association), the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

The IIPA represents more than 1,450 U.S. companies producing and distributing works protected by copyright laws throughout the world: all types of computer software, including business software and

entertainment software (such as videogame CD-ROMs and cartridges, personal computer CD-ROMs, and multimedia products); motion pictures, television programs and home videocassettes, video CDs and DVDs; music; records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in electronic and print media).

The U.S. copyright-based companies are the leading edge of the world's high technology, entertainment, and publishing industries. According to Copyright Industries in the U.S. Economy: The 1999 Report, prepared for IIPA by Economists, Inc., the core copyright industries accounted for \$348.4 billion in value added to the U.S. economy, or approximately 4.3% of the Gross Domestic Product (GDP) in 1997 (the last year for which complete data is available). In 1997, the total copyright industries¹ accounted for \$529.3 billion in value added, or approximately 6.53% of GDP.

The U.S. copyright industries are also among the nation's most dynamic and fast-growing economic sectors. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1997 (6.3% vs. 2.7%). Employment in the core copyright industries grew three times the rate of national employment growth between 1977 and 1997 (4.8% vs. 1.6%). More than 6.9 million workers were employed by the total copyright industries, about 5.3% of the total U.S. work force, in 1997. The core copyright industries generated an estimated \$66.85 billion in foreign sales and exports in 1997, an 11.1% gain over 1996 and larger than the foreign sales and exports of the food, tobacco, apparel, textile, and aircraft industries combined. Preliminary estimates for foreign sales and exports for 1998 are \$71.0 billion. For more detailed information on the IIPA and its members, visit www.iipa.com.

THE INTELLECTUAL PROPERTY RIGHTS CRITERIA IN THE AGOA

Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-Saharan African countries.² Specifically, the African Growth and Opportunity Act (AGOA) amends the Generalized System of Preferences (GSP) program³ to authorize the President to designate sub-Saharan African countries as eligible for additional preferential tariff treatment for certain articles.

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 new specific AGOA criterion for intellectual property is found in Section 104 (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--

¹ The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The "core" copyright industries are those which create copyrighted materials as their primary product.

² Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

³ Generalized System of Preferences program, Title V of the Trade Act of 1974, as amended, 19 USC 2461 et seq.

- (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 (now the new Section 506A of the GSP statute) provides as follows:

SEC. 506A. DESIGNATION OF SUB-SAHARAN AFRICAN COUNTRIES FOR CERTAIN BENEFITS.

(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)

Reading the new Section 104 of AGOA together with the new 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. Section 502(c) and (c)(5) provide 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;”** (emphasis added).

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 new program adopted at the same time as AGOA – the Caribbean Basin Trade Partnership Act (CBTPA)⁴ – Congress specifically defined the intellectual property criteria in that Act (similar to the GSP Act criteria) to require “TRIPS or greater” protection and enforcement.⁵ 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.”⁶ In conclusion, 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. The Internet fundamentally transforms copyright piracy from a mostly

⁴ 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).

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

⁶ 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.

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 this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. Many of these legal changes are contemplated by the two so-called "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. As USTR notes, these treaties "provide the essential legal framework for the continued spectacular growth of e-commerce in coming years by ensuring that valuable content is fully protected from piracy on the Internet."⁷ A number of countries in Africa are actively considering ratifying and implementing these treaties. For example, Burkina Faso has ratified them and both it, Tanzania and Botswana have passed legislation that at least partially implements these treaties. A level of protection that contemplates piracy over the Internet is part of the overall framework of "adequate and effective" protection in today's world.

COPYRIGHT PROTECTION IN SUB-SAHARAN AFRICA

None of the countries in sub-Saharan Africa meet even the TRIPS-mandated levels of protection at the present time when both these countries' statutory and enforcement regimes are considered. This must be taken into account in determining whether to admit these countries as beneficiaries of AGOA. The U.S.G. needs to make these countries immediately aware that this IPR criteria is not met at this time and give the countries time to bring their regimes into compliance before providing these unilateral trade benefits.

In the Appendix to these comments, we concentrate specifically on two markets in the region, South Africa and Nigeria, neither of which is as yet in compliance with their TRIPS obligations, even though the TRIPS Agreement, in the area of copyright, became fully effective on January 1, 2000. For this reason, IIPA recommends that the AGOA Implementation Subcommittee not designate South Africa and Nigeria as AGOA-eligible countries at this time.

CONCLUSION

IIPA appreciates this opportunity to provide the Subcommittee with our views on the AGOA and the intellectual property rights criteria which must be considered as the countries in sub-Saharan Africa are considered for designation as beneficiaries. We look forward to working with the Subcommittee to foster improved copyright protection in this region.

Sincerely,

Eric H. Smith
President
International Intellectual Property Alliance

⁷ Press Release 00-30, Office of the U.S. Trade Representative, "USTR Releases Super 301, Special 301 and Title VII Reports," May 1, 2000, at page 10.

APPENDIX

SOUTH AFRICA

Recommendation:

IIPA recommends that the AGOA Implementation Subcommittee not designate South Africa as an AGOA-eligible country at this time. Below is a slightly revised excerpt on South Africa from IIPA's February 18, 2000 Special 301 submission to USTR.

Summary of Copyright Problems in South Africa:

In 1999, the business software industry continued to suffer losses due to disturbingly high rates of piracy in South Africa. South Africa has now become a destination point for pirated optical media products from Asia and the United States, including high-quality counterfeit software and pirate video product. Procedural problems, including the lack of evidentiary presumptions of ownership in copyright infringement cases, continue to subject copyright owners to overly costly and burdensome procedural hurdles.

On the legislative front, the 1997 Counterfeit Goods Act has still not yet been fully implemented, and South Africa's Copyright Law is not consistent with its TRIPS obligations. The need to include provisions affording statutory damages and evidentiary presumptions is high. According to the Business Software Alliance, estimated U.S. trade losses due to piracy of business software alone in 1999 were \$68.4 million. Piracy levels for business software remained fairly constant at 47%.

Copyright Piracy of Business Software

Software theft in South Africa persists at unacceptably high levels. The greatest proportion of losses to the software industry remains in the unlicensed use of software by small, medium and large institutions as well as by South Africa government institutions (although losses are also attributable to retail piracy and hard-disk-loading piracy). There has been no change in the past year to remedy the three most significant obstacles to reducing end-user piracy: 1) the fact that end-user piracy is not a criminal offense in South Africa; 2) the significant cost and complexity of obtaining civil search orders against end-users; and 3) inadequate civil damages against end-user pirates.

ENFORCEMENT STATISTICS FOR THE BUSINESS SOFTWARE INDUSTRY IN SOUTH AFRICA, 1999

CRIMINAL ACTIONS IN SOUTH AFRICA	1999 BSA	CIVIL ACTIONS IN SOUTH AFRICA	1999 BSA	ADMINISTRATIVE ACTIONS IN SOUTH AFRICA	1999 BSA
Number of raids conducted	8	Number of civil raids conducted	1	Number of raids conducted	0
Number of indictments	2	Post- Search action		Number of cases brought	0
Number of defendants	1	Cases dropped		Number of defendants	0

convicted (including guilty pleas)				convicted (including guilty pleas)	
Ratio of convictions to the number of raids conducted	N/A	Cases settled	1	Ratio of convictions to the number of raids conducted	N/A
Ratio of convictions to the number of indictments	N/A	Cases adjudicated		Ratio of convictions to the number of cases brought	N/A
Total number of cases resulting in jail time	0	Value of loss as determined by Court (\$USD)		Number of cases resulting in administrative fines	0
1 to 12 months		Judgment amount (\$USD)		Total amount of fines levied	0
13 to 24 months		Settlement amount (\$USD)	21,666	Total amount of restitution ordered	0
25 to 36 months					
37 to 60 months					
Over 61 months					
Number of cases resulting in criminal fines	1				
Total amount of fines levied	US\$250				
Total amount of restitution ordered	0				

End-User Piracy Needs To Be Criminalized

At present, end-user piracy is not a crime in South Africa, in violation of South Africa's obligations under TRIPS Article 61. Criminalizing end-user piracy would involve a simple amendment to the copyright law. Such an amendment must be followed by aggressive enforcement against the most egregious end-user pirates (e.g., known large enterprises that flout the copyright law by licensing little if any legal software for their businesses). In BSA's experience, the prospect of criminal liability, rather than civil damages payable by the company, motivates senior business managers to ensure more rigorous enforcement of anti-copying and software use policies, while also establishing adequate budgets for software purchases within their organizations. Regrettably, the government rejected an amendment that would have provided criminal liability for end-user piracy in drafting the 1997 Counterfeit Goods Act.

Without a criminal remedy against end-user piracy, right holders must rely solely on civil infringement actions. Unfortunately, the cost and complexity of obtaining a civil *ex parte* search order (an "Anton Piller" order) makes it difficult for right holders to effectively pursue civil copyright infringement cases. Such orders are essential to preserve evidence of illegal copying of software and therefore to successful pursuit of civil infringement cases. To obtain an Anton Piller order in South Africa, the right holder must provide a detailed affidavit signed by a current or recent employee of the target with direct information about infringement. Naturally, "whistle-blowers" are reluctant to provide signed statements, making it difficult for the right holder to satisfy the evidentiary threshold for a civil order.

Further, obtaining and enforcing an Anton Piller order typically costs about \$15,000 (the equivalent procedure in most European countries, with much higher legal fees markets, costs far less). Until Anton Piller orders are more reasonably granted (consistent with Article 50 and Article 41 of TRIPS), right holders have few prospects for effective civil prosecution against end-user piracy in South Africa. The need to prepare and file exhaustive pleadings on the issues of subsistence and ownership of copyright, as well as the marshaling of extremely comprehensive evidence of infringement, adds to the costs of civil litigation, making it impossible for all but the largest right holders to pursue civil cases against end-users.

In addition, the measure of civil damages available under South African copyright law, either actual damages or the slightly more generous "reasonable royalty" standard, neither compensates the right holder for the injury suffered nor constitutes a deterrent to further infringement as required under TRIPS Articles 41 and 45. Under the current system, plaintiffs must prove actual damages, while contending with spurious arguments by defendants that the right holder should only be able to recover the profit margin lost on the pirated product. Alternatively, plaintiffs may seek a so-called "reasonable royalty" or license fee, although it is unclear how a court would interpret this measure of damages. Given recovery prospects like this, it is hardly surprising that plaintiffs often choose to settle rather than await judgment through trial of needlessly complex issues.

Statutory Damages

In order to ensure that damage awards in civil cases adequately compensate the right holder for the damage suffered to its rights, the South African government should be urged to adopt a system whereby plaintiffs can elect to seek an award of pre-established (or statutory) damages, in lieu of regular compensatory damages. A statutory damages regime requires enactment of a fixed range of monetary amounts that a court can award the plaintiff for each infringing copy of a work. This effective and speedy method of determining damages is also simple and inexpensive for courts to administer. Such a damages scheme would reduce the financial incentive to pirate software by ensuring that substantial monetary damages are awarded to copyright holders, while also reducing the cost and uncertainty right holders currently face when enforcing their rights. The copyright industries' experience in other countries has shown that statutory damages provisions not only deter illegal infringement but also create a foundation for parties to resolve their copyright disputes with a minimal drain on scarce public resources.

Government Software Management

Members of the Business Software Alliance (BSA) and the local software industry estimate the piracy level in the public sector to be as high as 40-50%. The BSA has been working with the South African government to establish a program to support and educate government officials in software management. Recently, the government appears to have begun to take steps to investigate and address its under-licensing problem. However, given the delays that have dogged this process, we would urge the South African government to implement a systematic software asset management plan for monitoring use and acquisition of software to ensure that the government's current and future use of software is adequately licensed.

BSA hopes that the State Information Technology Agency (SITA) will implement policies designed to ensure that there is a proper allocation for legal software in all information technology infrastructure deals.

Lack of Evidentiary Presumptions

South Africa has taken no action in the past year to amend its law to provide clear presumptions of copyright subsistence and ownership, as required under the Berne Convention and TRIPS. As a result of the South African government's inaction, the enforcement of individual copyright claims by the software industry remains unnecessarily complicated by the lack of evidentiary presumptions in the law. In most cases, the burden of proving copyright ownership remains quite onerous and expensive. Whereas in certain other former Commonwealth countries, ownership by the plaintiff is presumed unless proof to the contrary is introduced, in South Africa, mere denial by the defendant shifts the burden to prove ownership to the plaintiff. As a result, the defendant in a copyright infringement case can and often does, without any supporting evidence, call into question the subsistence of copyright in a work, as well as the plaintiff's ownership of that copyright. In numerous cases, BSA members have been forced to defend such unfounded challenges at great expense.

In one currently pending case, should BSA reject a settlement of less than one-third the amount of damages, senior officials from right holder companies will be asked to travel to South Africa in order to testify simply on the question of authorship based on the spurious tactical challenge of the defendant, wasting time and precious resources. Knowing that they can force right holders to go to great lengths and exorbitant expense to defend matters that are not seriously in dispute provides pirates with the incentive and ability to drag out litigation even where they have clearly infringed the works in question. By the same token, it severely limits the ability of most right holders to protect their works unless they are prepared to spend far more in resources than may be at stake in a particular case. South Africa needs to amend its copyright law to address this problem to provide Berne-compatible presumptions and provide reasonably available remedies for obvious violations of copyright as required by Article 41 of TRIPS.

Retail Piracy/Hard-Disk-Loading Piracy

Like end-user piracy, reseller software piracy remains a great problem in South Africa. The business software industry has little hope of combating this problem effectively until the South African Police Services (SAPS) becomes engaged in aggressively fighting it. Recently there has been some limited success with SAPS; however, South Africa still does not devote sufficient resources to the enforcement of copyright. While the police are faced with severe personnel shortages, liaison with SAPS remains generally satisfactory, due largely to extensive efforts by right holders to build relationships with SAPS officers. A significant problem is that many police members are newly assigned to the detective branches and lack experience and training in copyright protection. They have nonetheless been receptive to regular training sessions given to individual police units throughout the country.

SAPS has the power to make search and seizures and arrests on copyright infringement under the Criminal Procedure Act 51/1977. However, obtaining the warrant is exceedingly difficult and the scope to confiscate products is very narrow.

There are also difficulties due to SAPS reluctance to take action or move cases forward promptly. There have been disturbing instances in which SAPS has refused to act against counterfeiters, even when BSA members have assembled evidence of large-scale CD-ROM piracy, prepared all the necessary affidavits, and offered their assistance and expertise to the Commercial Crime Unit (CCU) of SAPS. Specific recent obstacles included: 1) the CCU giving prior warning to alleged infringers before raids; 2) the CCU informing copyright owners that they will not take actions on the basis of the Copyright Act; and 3) the CCU informing right holders that infringing CDs seized that were more than one month old would not serve as sufficient proof that the alleged infringers were still committing the offense.

A recent raid of an Internet pirate demonstrates recurring problems. SAPS, due to lack of IPR knowledge and no clear directives from senior officials, was unwilling to arrest a suspect during the raid (at which counterfeit products were seized) and referred the matter to the Prosecutors' office for decision. This resulted in an enormous time delay, as the Prosecutor is either unable to prepare the case to an indictment level, or the docket disappears in the wave of serious violent crimes. The result of these delays is that very few criminal cases ever reach a court date. It is critical that a suspect be charged, arrested and tried. This would not eliminate the problem of inexperience, but would at least allow for some precedents to be set.

In another example of a different sort of problem, in November 1998, SAPS raided a CD-ROM manufacturer. Despite reliable evidence that the manufacturer was producing pirate CD-ROMs, the raid uncovered no illegal software, strongly suggesting that the target had been tipped off in advance. In addition, contrary to the terms of the warrant, the police did not permit BSA counsel to look at business documents on the target's premises.

The business software industry has met with slightly more success in its dealings with South African Customs officials. Customs authorities have made efforts to stem the flow of counterfeit product into South Africa. Unfortunately, these authorities are limited in their ability to combat piracy and, as a general matter, have pursued only charges of fraudulent misrepresentation against importers of counterfeit product. The industry has asked SAPS to follow shipments of illegal software upon the shipment's release from Customs, but they have refused to take any such actions in this area, citing the fact that the South African government has yet to establish storage depots to hold seized product as planned under the Counterfeit Goods Act (see discussion of this problem below).

Unfortunately, there is no practicable copyright basis on which to proceed if the product or copyright work's name(s) happen to have been removed, so registration becomes a necessity. The registration system may rise to a Berne/TRIPS violation (effectively requiring formalities to initiate claims). In any event, since it hinders the exclusive rights of copyright owners, it imposes undue burden and expense in violation of the Berne Convention (Article 5[2]) and TRIPS (Article 41).

The new Counterfeit Goods Act has entered into force, but, as described below, enforcement under the act has been very limited to date, due to several practical issues (e.g., which State entity is responsible for storing the seized materials) that have yet to be resolved by ministerial decree, and due to police reluctance to take action based on the Counterfeit Goods Act. Under the act, pirates that are charged with trading in counterfeit goods, or counterfeiting a trademark, face penalties of R5,000 (approximately US\$ 833) per infringing item or, alternatively, a prison term to be set by the court.

Copyright Act; Counterfeit Goods Act

Copyright protection in South Africa is based on the Copyright Act, 1978 (as amended), and generally affords a good basis of protection. Two laws were passed in 1997 in South Africa affecting copyright protection and enforcement: the Intellectual Property Laws Amendment Act (promulgated on October 1, 1997), which amended the Copyright Act (1978), and the Counterfeit Goods Act (which became effective on January 1, 1998). Under the Counterfeit Goods Act, copyright pirates can be charged with trading in counterfeit goods, or counterfeiting a trademark, with penalties of up to R5,000 (approximately US \$833) per infringing item or, alternatively, a prison term to be set by the court. The act also gives police the power to seize counterfeit goods after obtaining a search order, a power they did not wield previously.

Police have been hesitant to use their powers under the act. The Counterfeit Goods Act was intended to replace the Merchandise Marks Act with respect to trademarks in that it provides that counterfeiting of a trademark is a criminal offense. The Merchandise Marks Act was then simultaneously changed to remove its applicability to counterfeit. Consequently, in matters involving trademark infringement, the SAPS are only entitled to act in terms of the Counterfeit Goods Act. However, to date, they have refused to take action under the Counterfeit Goods Act and are instead still acting in terms of the Merchandise Marks Act. It is possible that the actions they do take will not be upheld by the courts. Consequently, rights holders may find that they are unable to use the criminal law to enforce their trademarks against counterfeiters, as the police will not use the Counterfeit Goods Act and the Merchandise Marks Act is no longer applicable.

In addition, the act has not yet been fully implemented, which has created practical difficulties for industry. Specifically, the act requires the Minister of Trade and Industries to designate "depots" (secured storage facilities for good). Despite numerous requests to the Minister, and specific promises made to industry and to the World Customs Organization, this designation still has not taken place. The result has been that in several instances, police have refused to track and seize counterfeit software, arguing that the government has yet to establish the storage depots. This situation has become extremely frustrating. Certain prosecutors have been willing to charge offenders under the Counterfeit Goods Act for seizures carried out under other offenses,

but this approach is ad hoc and cannot replace full implementation of the act. There were no convictions under the act in 1998, and only two convictions in 1999 (both uncontested). IIPA urges the South African government to take urgent steps to fully implement the Counterfeit Goods Act.

Non-compliance with TRIPS and Other Deficiencies

As a result of the Intellectual Property Laws Amendment Act, South African law has been brought into closer conformance with TRIPS obligations. However, the Copyright Act still fails to rectify certain incompatibilities with TRIPS standards, and fails to modernize the statute to provide sufficiently strong copyright protection in South Africa. The South African government has been promising further copyright law reform for several years. The Law Advisory Committee, whose responsibilities included drafting new copyright legislation, was not reappointed by the government in 1998. As the Committee has ceased to exist for the last two years, it was not able to move the draft legislation forward for submission to Parliament. We have been informed that these responsibilities have been taken over at the ministerial level. However, to date, IIPA is unaware of any progress on this draft legislation since the Committee was disbanded, other than the government's seeking the views of stakeholders.

Further examples of continued deficiencies, including TRIPS deficiencies, in addition to those noted above, include the following:

- Statutory damages are not one of the remedies under the Copyright Act.
- The principle of national treatment is not currently the basis for the distribution of levies for private copying.
- Exceptions to protection are overly broad (and must be amended to comply with the standards of TRIPS).
- The possession of infringing goods in the course of doing business is not now subject to criminal penalties.

As a matter of priority, as discussed above, South Africa must criminalize end user piracy. It must also make civil ex parte searches ("Anton Piller" civil search orders) easier to obtain. To obtain an ex parte (Anton Piller) civil search order in South Africa, a right holder must prove the following: 1) copyright ownership in the work being infringed; 2) actual infringement; and 3) that evidence would likely be destroyed if the right holder cannot obtain a civil ex parte search order. The complexity and cost of such proof means that Anton Piller orders are barely viable as enforcement remedies. As discussed above, the process of obtaining such orders is made onerous by the lack of an evidentiary presumption of copyright ownership in the copyright law.

As discussed above, the measure of civil damages available under the Copyright Act, either actual damages or a so-called "reasonable royalty," neither compensates right holders for the injury suffered nor constitutes a deterrent to further infringement. Statutory damages should be adopted to deter illegal infringement and create a foundation for parties to resolve their copyright disputes with minimum drain on scarce public resources. Finally, many IIPA members report that criminal penalties imposed in copyright infringement cases have been inadequate to deter medium- and large-scale pirates.

WIPO Treaties

South Africa currently adheres to the Brussels (1948) text of the Berne Convention (Articles 1-21), and thus still should adopt Articles 1-21 of the Paris (1971) text of Berne. South Africa is a signatory to the two "digital" treaties adopted by the World Intellectual Property Organization (WIPO), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and should be encouraged to take swift action to ratify and implement the obligations of the WCT and the WPPT. In November 1998, WIPO held the Afro-Arab Regional Seminar on Copyright and Related Rights, in which nearly 30 countries (including South Africa) adopted resolutions calling for countries in the region to pass swiftly amendments to cure TRIPS deficiencies and come into compliance with the Berne Convention and other international treaties (including the WCT and WPPT) and to join those international treaties (including the WCT and WPPT) if they had not already done so. In March 1999, and again in June, 2000, South Africa participated in meetings in Windhoek, Namibia which included discussion of the WCT and WPPT, and stated they would seek to implement the treaties in the year 2000.

* * *

NIGERIA

Recommendation:

IIPA recommends that the AGOA Implementation Subcommittee should not designate Nigeria as an AGOA-eligible country at this time. Nigeria must take further steps to improve copyright protection and enforcement.

Copyright Piracy:

Nigeria suffers from widespread cable and broadcast piracy throughout the country. MPA's member companies are currently active, or are willing to become active, in the Nigeria TV market.

The Motion Picture Association (MPA) reports that cable systems in Nigeria are relatively highly developed. Cable operators have businesses in the cities of Port Harcourt, Kano, Kaduna, Abuja and the surrounding regions, as well as business in several other cities. One fully legal TV service operates in the cities of Lagos, Kano, Kaduna, Abuja and Port Harcourt. Cable piracy in Nigeria is a wide spread problem. For example, in Lagos, a cable TV system carries 12 channels of pirated material and has between 10,000-15,000 subscribers. Most cable TV systems in Nigeria carry approximately 3-6 pirated channels.

Cable piracy in Nigeria takes several forms. Firstly, via a pirate decoder, cable systems retransmit signals from a legitimate pay satellite operator in many of the major metropolitan areas. For example, these stations illegally broadcast SKY one, SKY Movies, SKY Sports, the National Geographic Channel, many of the Turner channels, Fox Kids, Living, and UK Gold, whose rights are owned by the legitimate cable TV service.

Secondly, many pirate cable systems install 6-meter satellite dishes and subscribe to direct to home satellite services in the UK. These signals are then rebroadcast over their cable system. In a problem similar to the issue facing the U.S. industry in the Eastern Caribbean, many of these U.K.-based channels in Nigeria cannot be legitimately licensed for distribution in Nigeria, since the UK channel operators lack licenses from the copyright owners of the programming carried on these channels to distribute it outside of Western Europe. However, many of the pirate cable operators in Nigeria feel that because the UK satellite footprint covers West Africa, they should have the right to rebroadcast those signals.

Lastly, many cable systems broadcast movies recently released in US theatres using pirate video cassettes, DVDs, and VCDs.

In comparison to cable theft, broadcast piracy appears to be diminishing in the major metropolitan areas of Nigeria. Free-over the air, terrestrial TV stations broadcast on UHF or VHF signals and are not scrambled. Satellite signal theft has diminished in those areas where a legitimate cable system operates. However, in other, more remote regions, direct satellite television is still pirated and rebroadcast by local stations. Most free-over the air TV channels show pirate copies (videos, VCDs or DVDs) of movies recently released in US, without authorization or payment to the copyright owners. In Lagos, these stations broadcast to a TV population of approximately 8 million people, with a reach of 40% to a maximum of 80%.

It is MPA's understanding that the following model represents the television makeup of the majority of Nigerian states. In the state (?) of Lagos, there are approximately 5 free-over the air TV channels, 2 channels owned by the government of Nigeria, and one channel owned by the state of Lagos. Local governments own approximately 2 or 3 channels in each Nigerian state. These channels are also guilty of re-broadcasting pirate movies; however, it must be noted that government broadcasters appear to be making concerted efforts to clean up this problem.

According to recently released statistics by the Business Software Alliance (BSA), the estimated level of business software piracy in Nigeria was 62% in 1999, with an estimated trade loss due to piracy of U.S. materials of \$2.35 million.

The Nigerian Copyright Law was recently amended with the intention to bring it up to TRIPS standards. IIPA and its members have not yet had the opportunity to review this law to verify whether it is TRIPS-compliant.