

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# SOUTH AFRICA

### EXECUTIVE SUMMARY<sup>1</sup>

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IIPA recommends that South Africa be placed on the Watch List, to express its concerns over the failure of South African authorities to take actions under the Counterfeit Goods Act and to register unhappiness with the government's failure to pass amendments to fix TRIPS deficiencies in the Copyright Act and make other much-needed improvements to the law.

In the nearly one-and-a-half years since South Africa and the United States came to a written "Understanding" regarding the importance of intellectual property rights protection (including South Africa's reaffirmation of its commitment to comply with the TRIPS Agreement), the South African government has done precious little to demonstrate its commitment to protect copyright in a TRIPS-compatible way. Disturbingly, it has been more than three years since the effective date of the Counterfeit Goods Act (January 1, 1998), and to this day, no pirate has ever been charged with trading in counterfeit goods or counterfeiting a trademark and no pirate has ever been penalized under the Act (with penalties of up to R5,000, or U.S.\$833), per infringing item or a prison term to be set by the court). IIPA understands that finally, the Minister of Trade and Industry has designated "depots" for secured storage of pirated goods seized. IIPA urges the South African government immediately to take actions under the Act to prosecute known copyright pirates. In the absence of effective enforcement, piracy levels in South Africa remain disturbingly high for some industries, and South Africa continues to be a destination point for pirated optical media products from Asia, including, for example, high-quality counterfeit software produced in the United States and the Far East, and pirate masters of movies not yet released in South Africa.

IIPA is also disheartened by South Africa's failure to pass amendments to bring its law into compliance with TRIPS. A set of amendments had been put forward for consideration in 2000, but those amendments were removed from consideration and subsequent developments have been non-transparent, leading to concern that a future draft may not make changes necessary for South Africa to comply with its international obligations. The 2000 amendments included some positive changes, including the criminalization of end-user piracy, the possibility of statutory damages, and a fix to the current TRIPS-deficient provision on presumption of subsistence and ownership of copyright. If any action in the past year-and-a-half demonstrated South Africa's non-committal attitude to compliance with the TRIPS Agreement, it was the government's withdrawal of these proposed amendments. The amendments are back and are with the Cabinet.

Total estimated U.S. trade losses due to piracy in South Africa \$129.0 million in 2000.

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<sup>1</sup>For more details on South Africa's Special 301 history, see IIPA's "History" Appendix to filing.

**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1995 - 2000**

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	10%	12.0	10%	12.0	16%	12.0	10%	12.0	12%	11.0	12%
Sound Recordings / Musical Compositions	11.0	13%	NA	NA	12.0	40%	3.0	20%	3.0	20%	NA	NA
Business Software Applications <sup>2</sup>	62.6	47%	68.4	47%	74.9	49%	54.8	48%	40.2	49%	65.5	58%
Entertainment Software <sup>3</sup>	22.4	70%	NA	NA	22.2	NA	15.3	NA	NA	NA	NA	NA
Books	21.0	NA	20.0	NA	21.0	NA	20.0	NA	22.0	NA	20.0	NA
<b>TOTALS</b>	<b>129.0</b>		<b>100.4</b>		<b>142.1</b>		<b>105.1</b>		<b>77.2</b>		<b>96.5</b>	

## **COPYRIGHT PIRACY AND ENFORCEMENT IN SOUTH AFRICA**

### **Piracy Phenomena in South Africa**

All of the copyright industries suffer varying levels of piracy in South Africa of their staple products. Among the serious problems that exist in South Africa today are the following piracy phenomena:

- While there is no evidence in the increase of commercial piracy of hardbound books, there is wholesale copying of whole books by students in copy shops. Most textbooks are available in lower priced student editions, but students still copy those they need. Pirate photocopying and commercial piracy in the Eastern Cape area remain major problems for the publishing industry. Import of cheap reprints intended only for the market in India as well as India-pirated copies fill the retail markets in South Africa. While the book market has expanded in the past 10 years since the end of apartheid, funding for educational materials has not. In recognition of limited financial funds of students, international publishers heavily discount books. Nonetheless, it is estimated that at least 30-50% of texts used countrywide are pirate photocopies. There are reports that some universities that used to buy reference books for its faculty members now buy only one copy, and photocopy the book for other faculty members internally.
- The retail markets for entertainment software (including all formats, like console-based videogames on CD, personal computer games, and cartridge-based videogames), sound recordings, business software and publishing CD-ROMs, are largely pirate. For example, it

<sup>2</sup> BSA loss numbers for 2000 are preliminary. In IIPA's 2000 Special 301 report, reported piracy levels for business software were 50% for 1998 and 50% for 1996. These piracy levels have been adjusted downward (to 49% for each year) in this year's chart to reflect the final reported piracy levels.

<sup>3</sup> IDSA estimates for 2000 are preliminary.

is estimated that 60% of the console-based videogame market is pirate, while 75% of the personal computer CD-ROM videogame market is pirate, with much of the pirate product being imported from countries in Asia including Thailand, Hong Kong and Malaysia.

- The recording and music industries are hampered by pirate imported audiocassettes from nearby countries such as Mozambique, Tanzania and Malawi, at least some of which are transshipped through the Gulf region from points in Southeast Asia.
- Video piracy exists in South Africa, albeit in low levels (roughly 10%), particularly in the greater Johannesburg region. Most pirate videos are sourced from pirate VCDs and parallel imported Zone 1 DVDs (DVDs programmed for playback and distribution in North America only), with much of the duplication taking place in private homes. Natal Province is the entry point for large quantities of pre-video and pre-theatrical release VCDs that are imported from Malaysia and Singapore. There has also been an increase in the number of pirate optical discs coming in through Johannesburg, with smaller quantities slipping through Customs in Cape Town. These materials - of fairly good quality - are used as "masters" for local illegal duplication labs, which in turn supply networks of distributors. Pirate videocassette labs are generally small in size (no more than a half a dozen machines), but are well organized and active (part of the "syndicate") throughout the Western Cape and Durban. "Home dealers" in the Cape Flats and Kwa-Zulu Natal border also prey on major revenue centers, disrupting legitimate business and inhibiting market expansion. Flea market pirates (many of them foreign nationals) sell VCD, DVD and video titles, mainly in Johannesburg. Counterfeit VCDs can be readily found in hardware stores together with VCD players that have been dumped in South Africa.
- There has been a marked increase in Internet piracy over the past couple of years, with an estimated 20% of the videogame market now being lost to pirate downloading of "warez" (pirate) copies of games.

## **Some Hope of Implementation of the Counterfeit Goods Act**

As noted above, it has been more than three years since the effective date of the Counterfeit Goods Act (CGA) (January 1, 1998), and still, no pirate has been charged with violating the Act or penalized under the Act (with penalties of up to R5,000 (approximately US \$833) per infringing item or a prison term of up to three years). Meanwhile, much pirate product flows through South Africa Customs points undetected, and in many instances when pirate product is detected, it is simply handed back to the pirate importer (in some instances, Customs officials are intimidated by threats of legal action by the importers). Corruption may play a part at the points of entry, in particular at the Johannesburg International Airport. IIPA has reports that indicate that in early February 2000, police arrested numerous Customs officials on charges of corruption and have seized products from some of the officials' houses.

IIPA understands that finally, the Minister of Trade and Industry has gazetted the "depots" (warehouses) that will store goods to be seized by Customs and other authorities under the CGA, and in addition, the Minister has appointed the inspectors who will operate under the CGA. These inspectors, under the auspices of the Legal Services unit of the South African Police force, have enlisted industry to conduct several trainings. One of these occurred in October 2000, and more will occur in six major cities during April and May 2001. Nonetheless, the copyright industries

have waited for more than three years for enforcement under the CGA and are still waiting. IIPA urges the South African government immediately to take actions under the Act to prosecute known copyright pirates. It is particularly disheartening that Customs posts in South Africa have now been reduced to 19. The government must adequately resource enforcement efforts against piracy.

Another related hurdle in South Africa is right owners' inability to make use of the defunct trademark registration system to enforce their rights against pirates and counterfeiters. Right holders could use the CGA based on counterfeits of their trademarks, were the system operating as it should. During the course of the year 2000, the state of the Trade Marks Registry in South Africa approached an all-time low, with delays of in excess of three years in the examination of trademark applications, and trademark searching facilities for the public being largely suspended by the Registrar. Some interested parties have made strong representations to the government, even threatening litigation to compel the Minister of Trade to comply with his obligations in regard to intellectual property. These overtures led to assurances by the Minister that the state of affairs would be dramatically improved.

## **Judicial System that Fails to Deter and Fosters Recidivism**

South African prosecutors, magistrates and criminal courts continue to give low priority to copyright infringement cases. Public prosecutors accept admissions of guilt and impose police fines in some cases, but other cases brought under the Copyright Act languish in the courts, sometimes for upwards of two years or more. This inability to prosecute and finalize criminal cases has the effect of fostering recidivism, because as the criminal cases move along at a glacial pace, offenders keep getting caught (sometimes three or four times) for the same offence before the first case gets anywhere near a court. If and when the first case is prosecuted, the justice system appears totally ineffective at deterring piracy, resulting in paltry fines that don't even amount to a cost of doing business for the pirate. The system needs to be streamlined in order to prevent the repeat offenders, or at least have a first conviction in place before the culprit is caught again, enabling the courts to impose heavier fines or imprisonment for second or third offenses. One proposal over the past couple of years has been the establishment of specialized intellectual property courts to deal only with commercial crimes; such a court might be helpful in ensuring swifter judicial enforcement and harsher remedies being meted out to commercial pirates.

## **Burdensome Procedures Hinder Enforcement in South Africa**

Procedural problems, including the lack of evidentiary presumptions of subsistence and ownership in copyright infringement cases continue to subject copyright owners to overly costly and burdensome procedural hurdles.<sup>4</sup> These problems force plaintiffs to spend inordinate amounts of time and resources simply proving subsistence of copyright and ownership, and place South Africa squarely in violation of its TRIPS obligations. 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, plaintiffs have been forced to

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<sup>4</sup> South Africa provides these presumptions for motion pictures and videogames through a title registration system, but that system is impractical, unnecessarily complex and expensive.

defend such unfounded challenges at great expense. South Africa must amend the Copyright Act to provide TRIPS-compatible presumptions.

The business software industry continues to report how difficult it is to obtain and enforce an *ex parte* civil search order (an Anton Piller order). Without a criminal remedy against end-user piracy (see discussion below), right holders must rely solely on civil infringement actions, and *ex parte* civil searches are essential to preserve evidence of illegal copying of software and therefore to the successful pursuit of civil infringement cases in South Africa. 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. Also, the cost is unreasonably high, arguably placing South Africa in violation of its TRIPS obligations. Obtaining these orders in South Africa typically costs about \$20,000, while the equivalent procedure in most European countries that charge much higher legal fees costs far less. Until Anton Piller orders are more reasonably granted in South Africa (consistent with Article 50 and Article 41 of TRIPS), right holders have few prospects for effective civil prosecution against end-user piracy (unauthorized copying or use of software by a business). Section 11 of the CGA (discussed above) created a statutory Anton Piller order. With the depots in place to receive seized items under the CGA, IIPA is hopeful that the courts will grant Anton Pillers under Section 11 of that Act. Similar problems in obtaining search warrants in the criminal arena have been reported by some industries, particularly with respect to the narrow scope of such warrants, and the judiciary's penchant to return seized items to an infringer.

## **Failure of the Police to Combat Piracy Effectively**

The copyright industries have little hope of combating piracy effectively unless the South African Police Services (SAPS) become engaged in aggressively fighting it. Some of the industries report improving relations with officers (in part due to regular training sessions given to individual police units throughout the country), and as a result, better enforcement in 2000. Overall, however, some serious problems remain. First, the police are faced with severe personnel shortages; more resources must be devoted to the Police. Second, many newly assigned officers lack the experience and training needed to carry out copyright enforcement. Difficulties also arise when SAPS officers refuse to act against known pirates, even with extensive evidence of piracy and all the necessary affidavits.

One bright spot on the horizon is increased cooperation and action from the Commercial Crime Unit (CCU) of SAPS. In particular, the CCU have begun acting against counterfeit and illegal software; the Pretoria CCU has been particularly cooperative, conducting several raids in early 2001. These units need more training and resources, but early signs in 2001 are at least encouraging.

## **Some Enforcement Gains in the Fight Against Video and Software Piracy**

Both the motion picture industry and the videogame software industry have had to resort to privately-funded bodies to assist them in fighting piracy, with some success. The South African Federation Against Copyright Theft (SAFACT) has actually been given special powers to pursue video piracy cases and must perform most of the preparatory work for official investigations and

police actions. The entertainment software industry works with the South Africa Film, Video Security Office (SAVSO) to bring some criminal prosecutions against entertainment software pirates.

In addition, the motion picture industry makes use of some other statutes to try to obtain good enforcement. For example, the Proceeds of Crimes Act started being enforced this year by a special unit attached to the Department of Justice, specifically targeting organized piracy syndicates. The Act empowers the unit to attach all assets owned by syndicate members, unless they can prove that the property was accumulated through legal means. In order to raise more funds for government efforts, Inland Revenue Service (IRS) inspectors are also now being informed of all raids on private pirate homes. In the first half of 2000, 846 Zone 1 DVDs, 3209 VCDs, and 23 VCRs were seized, all of which would, but for the seizure, have been used by syndicate labs to produce pirate videocassettes. A further 4,836 videocassettes and 16,566 pirated interactive games discs were seized during this period by the special unit.

## **Government Software Management**

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 has agreed to begin to investigate and manage its licensing in certain government agencies. 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 government-wide to ensure that the current and future use of software is adequately licensed. IIPA hopes that the State Information Technology Agency (SITA) will implement policies to ensure that there is proper allocation for legal software in all information technology infrastructure deals.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **Failure to Enact Amendments to Comply with TRIPS, WIPO "Internet" Treaties in 2000**

IIPA is disappointed that the South African government failed in 2000 to enact amendments to cure remaining TRIPS-deficiencies in the South African Copyright Act (No. 98 of 1978). As noted above, a set of amendments had been put forward for consideration and went through a public comment period, but those amendments were removed from consideration in September 2000. The amendments included, among other things, criminal sanctions for end-user piracy, statutory damages, and a fix for the current TRIPS-deficient provision on presumptions relating to copyright subsistence and ownership. The amendments also included clarifying language to the concept of fair dealing (parts of which IIPA has some misgivings about). IIPA hopes that the government will consider amending the Copyright Act to bring it into compliance with TRIPS, and that the government will at least address the following:

- **Berne-Compatible Presumption of Subsistence and Ownership.** The draft amendment introduced a presumption of subsistence and ownership of copyright, 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." IIPA applauds the drafters and

supports this amendment, which would fix a Berne/TRIPS deficiency in the South African law.

- **Statutory Damages.** The draft amendment included the possibility of the court assessing additional statutory damages of R10,000 (US\$1285) “for each article to which the infringement relates.” IIPA is pleased that the draft contemplates per copy, pre-established damages. However, it is increasingly important, given new technologies and methods of distribution, that a statutory damages provision also encompass separate infringing acts. The term “article” appears to encompass copies, whether permanent or temporary, so would apply to a case in which multiple copies were made on a computer, but might not apply to separate multiple infringing acts of distribution. Therefore, to resolve any doubts, IIPA recommends that the provision be amended by adding “or infringing act” after the word “article.” Also, IIPA would like to see the statutory damages provision made electable by the plaintiff (as opposed to court-assessed).
- **Criminalizing End-User Piracy.** The draft amendment made it a crime to possess or have under one’s control in the course of business “with a view to committing any act infringing the copyright . . . articles which [one] knows or has reason to suspect are to be infringing copies of the work.” IIPA supports this addition, which would provide criminal sanctions for end-user piracy in a business
- **End-User Infringement.** The draft amendment made it an infringement of copyright to possess or control an article “in the course of business” if “to [one’s] knowledge the making of that article constituted an infringement of that copyright or would have constituted an infringement if the article had been made in” South Africa. IIPA supports this addition, which was intended to deem acts of end-user piracy in a business as infringements. It would be particularly helpful in this regard if the government confirms that included in the current term “reproduction” under the South African Copyright Act are temporary copies, including copies stored in RAM on a computer. If this point is unclear, then an amendment so clarifying would be highly preferable. Further, the law should be amended, if necessary, to ensure that this provision will apply to one who “reasonably should have known” that the making of the article constituted an infringement, etc.
- **Narrowing of Exceptions.** Exceptions to protection in the Copyright Act are overly broad (and must be amended to comply with the standards of TRIPS). An attempt was made to clarify the meaning of the concept of “fair dealing” in the draft amendment. For the most part, the drafters simply adopted the “fair use” factors from the U.S. Copyright Law. Without commenting further on any specific proposal at this time (since the proposal was withdrawn), IIPA simply notes its approval of the purpose of the amendment, namely, to clarify and tighten up the definition of “fair practice.” IIPA also reserves at this time any discussion of specific exceptions, but notes that in past submissions, overly broad exceptions to protection have been raised.
- The principle of national treatment is not currently the basis for the distribution of levies for private copying.

In addition to these “on their face” deficiencies in the Copyright Act of South Africa, IIPA would also like to emphasize that, in practice, South Africa must make civil *ex parte* searches

("Anton Piller" orders) easier to obtain. The measure of civil damages available under the Copyright Act, actual damages or an amount equal to a "reasonable royalty", does not constitute a deterrent to further infringement. It is unclear that the "reasonable royalty" measure of damages could be interpreted to provide an effective deterrent to further infringements, as required by TRIPS. 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 (as discussed above) would be a welcomed addition to the panoply of remedies available. Finally, many IIPA members report that criminal penalties imposed in copyright infringement cases have been inadequate to deter piracy.

South Africa additionally needs to include protection against unauthorized parallel imports. South Africa does have some legislation in place to protect the local market against parallel imports, but this is related to publication certification rather than copyright. The unauthorized parallel importation of Zone 1 DVD (DVDs programmed for playback and distribution in North America only) hardware and software from the U.S. is harming the motion picture industry in South Africa. This material arrives in South Africa well in advance of video release and, at times, the South African theatrical release. Pirate product sourced from these materials is also beginning to appear in the street markets. Local distributors do not have direct protection against such product under the Copyright Act. The product, however, is being placed on the market without the required certification of the South African Publications Board under the Film and Publications Act. Products violating the Film and Publications Act are subject to seizure and administrative fines. Local industry has managed to secure amendments to this legislation making it compulsory to prove distribution rights to the Publications Board. While this sounds effective in theory, the Board cannot always verify the legitimacy of contracts provided by importers. SAFACT, the local anti-piracy organization, assists the Board where major studio product is concerned. Nonetheless, an amendment to address this problem in the Copyright Act would be desirable.

## **WIPO Treaties**

IIPA also looked to the South African government to implement the WIPO "Internet" Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), in the latest round of amendments, and was disappointed that the government did not include provisions necessary to implement the WCT and WPPT in the 2000 draft amendments. The WIPO Treaties require, among other things, effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft and mutilation. This legal framework that permits content owners to provide for the security of their property online is essential for successful electronic commerce. South Africa is a signatory to the WIPO Treaties, and IIPA encourages the government of South Africa to take swift action to implement the obligations of the WCT and the WPPT, paving the way for ratification of the Treaties.

## **Other Treaties**

South Africa currently adheres to the Brussels (1948) text of the Berne Convention (Articles 1-21), and thus should be strongly encouraged to adopt Articles 1-21 of the Paris (1971) text of the Berne Convention. In addition, South Africa should be encouraged to join the Geneva (Phonograms) Convention.

## **Generalized System of Preferences**

South Africa currently participates in the U.S. GSP program offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that South Africa meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” At the same time that South Africa caused losses to the U.S. due to piracy and kept its law in violation of international treaty obligations, South Africa imported (during the first eleven months of 2000) \$534.0 million of products into the United States without duty (13.7% of its total imports into the U.S.). South Africa should not continue to expect such favorable treatment at this level if it continues to fail to meet the discretionary criteria in this U.S. law.