

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2003 SPECIAL 301 REPORT

# SOUTH AFRICA

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

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South Africa should be placed on the Priority Watch List. Perhaps no country in the world has had a greater increase in audiovisual piracy levels in the last year than South Africa. Imports of pirated copies of motion picture DVDs, often of movies which have not even been released anywhere in the world, flood the South African market. Devotion of adequate resources to fight piracy remains lacking. In addition, the motion picture industry has found that corruption exists within South African Customs, which needs to be addressed immediately.

South Africa was placed on the Watch List in 1998 in recognition of certain copyright problems, particularly for the software industry, and was retained there in 1999. In late 1999, as the result of a health initiative related to pharmaceutical patents, USTR decided to remove South Africa from the Special 301 lists. It has been off all lists since that time.

The invasion of pirate DVDs started in November 2001 and shows no signs of stopping. Meanwhile, piracy of other IIPA members' product in South Africa continues to cost the country jobs, tax revenues, and the possibility of developing its creative community. Pirated videogames and illegally photocopied books continue to flood the market. The courts continue to give low priority to copyright infringement cases, and although prosecutors are becoming more active and more cases have proceeded to court, the number of convictions remains low, and penalties remain non-deterrent. The business software industry continues to receive some good cooperation from the police in 2002 in achieving raids, accompanied by some self-help measures.

Required actions for 2003:

#### Enforcement Coordination

- Continue coordinating enforcement through the special IPR enforcement unit, and step up enforcement efforts against piracy by all agencies in South Africa.
- Invigorate South African Customs to seize pirated goods as they enter the country.
- Crack down on the issue of corruption to guarantee that all officers and officials are operating in an ethical manner.
- Implement and enforce the Counterfeit Goods Act against commercial piracy (including passage of needed technical amendments to facilitate better enforcement).
- Ensure the effectiveness of the judicial system either by allowing for quicker dispositions or by creating a separate commercial court to handle intellectual property cases.
- Foster the imposition of deterrent sentences by the courts in copyright cases.

#### Legislative Challenges

- Provide TRIPS-compatible evidentiary presumptions in the law, including clear presumptions of copyright subsistence and ownership.

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

- Provide that *ex parte* civil search (Anton Piller) orders are easier to obtain and enforce in line with TRIPS Articles 41 and 50.
- Ensure the passage of amendments to bring the copyright law into compliance with TRIPS (including by providing stronger legal deterrents to copyright infringement, criminalizing corporate end-user piracy, providing for pre-established civil damages, etc.).
- Extend copyright protection to the digital environment through ratification and implementation of the WIPO "Internet" treaties.

**SOUTH AFRICA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>2</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures <sup>3</sup>	30.0	30%	12.0	15%	12.0	10%	12.0	10%	12.0	16%
Records & Music	NA	25%	NA	NA	11.0	13%	NA	NA	12.0	40%
Business Software Applications <sup>4</sup>	NA	35%	32.7	38%	44.2	45%	68.4	47%	74.9	49%
Entertainment Software	NA	NA	26.1	57%	22.4	70%	NA	NA	22.2	NA
Books <sup>5</sup>	14.0	NA	19.0	NA	21.0	NA	20.0	NA	21.0	NA
<b>TOTALS<sup>6</sup></b>	<b>44.0</b>		<b>89.8</b>		<b>110.6</b>		<b>100.4</b>		<b>142.1</b>	

## COPYRIGHT PIRACY IN SOUTH AFRICA

South Africa became one of the world's largest breeding grounds for DVD retail piracy in 2002. The piracy level for optical discs grew to command a whopping 35-40% of the market, when in the past audio-visual piracy had remained relatively stable at approximately 10-15%. The alarming losses in legitimate revenues, plus the obvious growth in pirate resellers importing the pirated materials from Asia and elsewhere, demand an immediate response. The following

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>3</sup> The piracy level reported in 2002 is a composite rate. The videocassette piracy rate was 15% of the market in 2002, and the optical disc piracy rate grew to 35-40% in 2002.

<sup>4</sup> BSA's estimated piracy losses for 2002 are not available, and the estimated piracy level for 2002 is preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, the preliminary losses and levels due to piracy of business software for 2001 were reported as \$67.5 million and 55%, respectively; those figures were finalized in mid-2002, and are reflected above. BSA's trade loss estimates reported in the chart represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study, which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>5</sup> In 2001, total piracy of published materials has gone up in South Africa, but losses appear lower due to devaluation of the South African Rand at that time.

<sup>6</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in South Africa were \$124.6 million. Because of the adjustment to reflect BSA's final 2001 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in South Africa in 2001 are adjusted to \$89.8 million.

snapshot describes the types of piracy causing the most egregious harm to U.S. companies trying to do business in South Africa:

- **Optical Disc Retail Piracy, Imported from South and Southeast Asia:** As noted, the retail markets are now flooded with professionally pressed pirate DVDs,<sup>7</sup> often of films not yet released in theaters or video stores.<sup>8</sup> The amount of profits that can be realized by pirates through counterfeit DVDs is high. As a result, DVD piracy attracts very serious and dangerous criminals. In addition, the retail markets for business software, sound recordings, CD-ROMs of published materials, and movies in other formats (mainly VCD), remain largely pirate.<sup>9</sup> Much of the pirate product continues to be imported from countries in Asia including Thailand and Malaysia.<sup>10</sup> Increasingly, couriers from Pakistan bring into South Africa what are thought to be Pakistani-produced optical discs of music and movies. Most pirate product is distributed through flea markets and street vendors, who are becoming increasingly organized and violent.<sup>11</sup> For the entertainment software industry, much of the pirated product is being distributed through flea markets, kiosks and other informal traders. Other than Game Boy entertainment software, which continues to be shipped out of China, virtually all pirated videogame product is being shipped from Malaysia. There are small CD-R “burning” operations in South Africa but the market is still largely overrun by imported silver discs
- **Book Piracy:** Book publishers continue to experience piracy of their materials in South Africa. Photocopy piracy of whole books/high-priced reference books on university and *technikon* campuses occurs in South Africa, but indications are that this phenomenon has declined slightly in the past two years, and that educational institutions are becoming more copyright-conscious. Some “India-only” reprints, as well as commercial offset copies, from India or Pakistan, continue to surface in South Africa.
- **Corporate End-User Piracy of Business Software:** A large number of South African companies use unlicensed computer software. In one campaign, the Business Software Alliance learned that 600 companies with over 60,000 computers were using unlicensed software. To its credit, the South African government has been helpful in offering its

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<sup>7</sup> In 2001, SAFACT (the local anti-piracy organization acting on behalf of the Motion Picture Association and others) seized approximately 6,000 pirate DVDs. However, in 2002, SAFACT seized 81,321 pirate DVDs, representing an increase of over 1200%. SAFACT currently estimates that over 50,000 pirate DVDs entered the country every month in 2002.

<sup>8</sup> Good-quality pirate DVD copies of the movie, *Men in Black II*, were seized at Johannesburg airport on June 26, 2002. The movie was not due for release in the United States until July 3, 2002, and it was not scheduled for release in South Africa until the beginning of August. Obviously, this kind of piracy not only impacts the home entertainment sector, but also directly harms the theatrical market in South Africa.

<sup>9</sup> For example, it is estimated that 80% of the console-based videogame market is pirate, while 60% of the personal computer CD-ROM videogame market is pirate. Last year, SAFACT seized over 40,000 pirate video games in different formats.

<sup>10</sup> In 2002, the majority of pirate discs came into the country in passenger luggage.

<sup>11</sup> SAFACT has identified several highly organized distribution rings that are responsible for spreading pirate product throughout South Africa. These networks are prepared to use violence, and are sworn to secrecy regarding those in charge of the operation. The result is that even if a street vendor is caught, it is virtually impossible to get cooperation in terms of information needed by the authorities in order to capture organized criminals behind these pirate importation/distribution networks. Because of the dire nature of the situation, even legal retail stores are reportedly considering stocking pirate DVDs in order to stay in business. Approximately 10% of previously “clean” retail stores have now begun to stock pirate DVDs. SAFACT states that this is a response by retailers in competition with the pirates. More stores are threatening to also carry pirate product if the situation is not controlled.

assistance in support of BSA's efforts to legalize software usage. Many government municipalities have participated in the "BSA Truce Campaign," started in January 2002, a program during which a company can legalize its software without fear of legal action. As a result, several companies audited their offices and legalized their software in 2002.

- **Internet Piracy:** There has been a marked increase in Internet piracy over the past three years in South Africa. As Internet penetration increases, the problem of Internet piracy increases as well. Internet piracy encountered thus far is mostly through advertisement or online auction sites of pirate goods that are then sold and mailed through physical mail. This includes sales of pirate VCDs, DVDs, and CD-ROMs. Streaming and downloadable media is less of an option at this time in South Africa as connections consist mostly of 56kbps modems, and it still takes too long and is too cumbersome a procedure to download larger files in South Africa.
- **Audiocassette Piracy of Music:** The recording and music industries continue to be hampered by pirate imported audiocassettes from nearby countries such as Mozambique, Tanzania and Malawi.

## COPYRIGHT ENFORCEMENT IN SOUTH AFRICA

### CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS <sup>12</sup>
Number of Raids conducted	8	231
Number of cases commenced	2	17
Number of defendants convicted (including guilty pleas)	1	10
Acquittals and Dismissals		3
Number of Cases Pending		4
Total number of cases resulting in jail time	0	0
Suspended Prison Terms		2
Maximum 6 months		2
Over 6 months		
Over 1 year		
Total Suspended Prison Terms		2
Prison Terms Served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total Prison Terms Served (not suspended)		
Number of cases resulting in criminal fines	1	6
Up to \$1,000	1 (\$250)	6
\$1,000 to \$5,000		
Over \$5,000		
Total amount of fines levied	\$250	\$1700

<sup>12</sup> The vast majority of raids against sound recording piracy are carried out on street vendors who trade in pirate audiocassettes. When dealing with offenders trading in counterfeit CDs (including CD-R), criminal charges are laid. As a consequence of the backlog of cases that prosecutors have to face, however, they are more inclined to take cases in which they can obtain a guilty plea, so they do not have to take a case to trial. In this regard, sentencing is determined by the Criminal Procedure Act, which provides for a small maximum fine of R1,500 (US\$179) per offense, whereas the copyright law provides for a R5,000 (US\$595) maximum fine per article.

### CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES <sup>13</sup>	SOUND RECORDINGS
Number of Raids conducted	1	90 (67)	177
Number of cases commenced	1	88 (56)	18
Number of defendants convicted (including guilty pleas)		9 (7)	13
Acquittals and Dismissals		1 (1)	1
Number of Cases Pending		222 (92)	4
Total number of cases resulting in jail time		0	0
Suspended Prison Terms		0	0
Maximum 6 months		0	
Over 6 months		0	
Over 1 year		0	
Total Suspended Prison Terms		0	
Prison Terms Served (not suspended)		0	
Maximum 6 months		0	
Over 6 months		0	
Over 1 year		0	
Total Prison Terms Served (not suspended)		0	
Number of cases resulting in criminal fines		10	13
Up to \$1,000		10	13
\$1,000 to \$5,000			
Over \$5,000			
Total amount of fines levied			\$1280

### CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES <sup>14</sup>
Number of Raids conducted	9	92 (41)
Number of cases commenced	2	85 (45)
Number of defendants convicted (including guilty pleas)		6 (12)
Acquittals and Dismissals		15 (6)
Number of Cases Pending	3	286 (119)
Total number of cases resulting in jail time		0
Suspended Prison Terms		0
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total Suspended Prison Terms		0
Prison Terms Served (not suspended)		0
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total Prison Terms Served (not suspended)		0
Number of cases resulting in criminal fines		18
Up to \$1,000		18
\$1,000 to \$5,000		0
Over \$5,000		0
Total amount of fines levied		

<sup>13</sup> For motion picture industry statistics, the figures in parentheses relate to raids, cases, etc., against piracy of console-based videogames.

<sup>14</sup> Id.

## SOUTH AFRICA CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of raids conducted	117(84)	16 +1
Number of cases commenced	103(44)	2
Number of defendants convicted (including guilty pleas)	5(5)	
Acquittals and dismissals	41(9)	
Number of cases Pending	504	3
Total number of cases resulting in jail time	0	
Suspended prison terms		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total suspended prison terms		
Prison terms served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total prison terms served (not suspended)		
Number of cases resulting in criminal fines		
Up to \$1,000	8	
\$1,000 to \$5,000	2	
Over \$5,000		
Total amount of fines levied (in US\$)		

## SOUTH AFRICA CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES
Number of civil raids conducted	N/A
Post-search action	134
Cases pending	87
Cases dropped	
Cases settled or adjudicated	21
Value of loss as determined by right holder (\$USD)	
Settlement/judgment amount (\$USD)	

Enforcement in South Africa is generally under the purview of the Department of Trade and Industry, the South African Police Services (SAPS), and South African Customs, with other agencies supplementing enforcement efforts.<sup>15</sup> For example, the Inland Revenue Services is now informed of all raids on private homes in order to raise more funds for government efforts, and the South African Publications Board works to keep unauthorized parallel imports of motion pictures off the streets.<sup>16</sup> The Department of Trade and Industry, to its credit, has established a

<sup>15</sup> The special unit attached to the Department of Justice, which enforces the Proceeds of Crimes Act, is an example of a South African government agency that could contribute to the fight against piracy. This unit focuses on criminal syndicates and is empowered to attach all assets owned by syndicate members, unless those members can prove that the property was accumulated through legal means. These cases are usually reserved for very high profile matters but there was talk in 2002 of including intellectual property offenses. IIPA would welcome this additional tool in the fight against piracy in South Africa, which has become an increasingly organized criminal endeavor.

<sup>16</sup> Unauthorized parallel imports arrive in South Africa well in advance of video release and, at times, of theatrical release. Pirate product sourced from these materials appears in street markets. There is no direct protection for local

special IPR investigative unit that now works with a special unit of SAPS called the “Scorpions,” as well as with Customs officials. Unfortunately, enforcement remains marred by the inadequate allocation of resources to get the DTI special enforcement unit running effectively, occasional lack of expertise among SAPS (mostly due to attrition of well-qualified officers), corruption among some Customs officials, an overburdened criminal court system (with inadequate understanding among prosecutors and judges of the severity of the crime of piracy), and some remaining structural problems.

## **Government and Self-Help Groups Carry Out Some Raids in 2002, But...**

While enforcement agencies in South Africa are faced with severe personnel shortages (some of them self-inflicted because of attrition of well-trained and well-placed police officers),<sup>17</sup> liaison with the Police Services remained generally satisfactory in 2002. The establishment of a special investigation unit in the Department of Trade and Industry will hopefully ensure better enforcement in 2003. Nonetheless, raids remained relatively sparse in South Africa, and post-raid results were exceedingly slow to come by.<sup>18</sup> For example, in 2001, an Internet piracy syndicate (importing personal computer CD-ROM games from Malaysia and advertising them for sale on their website) was referred to the SAPS special investigative unit (the “Scorpions”). Unfortunately, this case has been pending for over two years and is still pending. BSA has been somewhat successful in resolving some cases taken against retail pirates. There were two actions of importance. The first involved a hard disk loading case, which was settled post raid. Fifty-six unauthorized products were found at the raid, worth more than US\$10,000. Sales generated through the use of the illegal products were not calculated. The second case involved an action against a retail seller of pirate product. The reseller advertised over the Internet some 97 products for sale, with a value estimated at over \$74,000. During the raid, 43 unauthorized products were found, worth an estimated value of over \$21,000. This case has progressed to a higher court. At present, the case is moving smoothly and efficiently through the court. It is worth noting that the prosecutor handling this case has had specialized training in copyright enforcement cases. Unfortunately, the Scorpions are generally reserved for investigations of the most serious cases, particularly those involving corruption and organized crime. As such they are typically unavailable to assist in the majority of anti-piracy activities.

Overwhelmed by high rates of violent crime, the South African authorities have committed only limited resources to the fight against piracy. As a result, the motion picture,

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distributors under the copyright law, so the motion picture industry has had to employ the publication certification process to seek relief. Through that process, the South African Publications Board (SAPB), acting under the Film and Publications Act, can seize and impose administrative fines on those who place product on the market without required certification. Fraudulent documentation is, however, an enforcement challenge for the SAPB. Local industry has managed to secure amendments to the Film and Publications Act making it compulsory to prove distribution rights to the Publications Board, which could be helpful.

<sup>17</sup> A significant problem is that many police officers have been newly assigned to the detective branches and lack experience and training in copyright issues. They have nonetheless been receptive to regular training sessions given by industry.

<sup>18</sup> In one of the more impressive raids in 2002, SAPS seized counterfeit DVDs and pornographic material from stalls at the “Montana Traders” flea market north of Pretoria. A total of 985 counterfeit DVDs and 50 pornographic DVDs were reportedly seized. The raid also yielded 249 counterfeit PlayStation® cartridges. Two arrests were made as a result of this case. This particular market was raided multiple times in 2002 and there were several arrests as a result. Unfortunately the slow criminal justice system has meant that many of these cases are still floundering on the court docket with no resolution in sight.

music, and entertainment software industries have had to resort to privately-funded bodies to assist them in training government enforcers and fighting piracy themselves. The South African Federation Against Copyright Theft (SAFACT) was given special powers by the South African government to pursue video piracy cases and performs most of the preparatory work for official investigations and police actions. The entertainment software industry also works with SAFACT to bring some criminal prosecutions against pirates of videogame product.<sup>19</sup> The recording industry has established a local program to conduct training and assist in enforcement. Two enforcement actions in late 2002 indicate at once the dire nature of the piracy situation in South Africa, particularly DVD piracy which is wiping out the legitimate market, and also the unfortunate reliance on private industry to enforce copyright.<sup>20</sup>

### **... Some Structural Barriers Deny Enforcement to Right Holders**

The damaging growth of DVD piracy in 2002 demands an invigorated response from South Africa's Customs service, in the form of mass seizures of pirate/unauthorized imports at the borders. Unfortunately, IIPA is becoming increasingly concerned by documented accounts of Customs officers allowing counterfeit product into the country after a pirate pays duties. IIPA understands that Customs officers only seized pirate DVD product in 2002 when armed airport police officers were present at the arrivals terminal. Such actual and potential for corruption among Customs officers is a major problem and is greatly inhibiting border enforcement efforts. The issue of corruption is one for which every law enforcement authority in South Africa should have concern, since it means good and upstanding officers' efforts within Customs are tarnished, while good enforcement cooperation among other agencies is rendered meaningless in the face of corrupt practices by some Customs officers. The South African government should make every effort to crack down on corrupt enforcement officials and to ensure that its law enforcement authorities operate only in a lawful manner. By contrast, an entertainment software company reports satisfactory cooperation with South African Customs. The Customs authorities have reportedly been helpful to that company's efforts at intercepting infringing videogame products before they are released into the market.

The most astonishing example of Customs corruption occurred in June 2002, when SAFACT received information about two individuals arriving in Johannesburg Airport with

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<sup>19</sup> In 2002, SAFACT took part in 184 raids, of which at least 63% related to the motion picture industry. Reported seizures include 8,496 pirate videocassettes, 3,170 pirate VCDs, 81,323 pirate DVDs, as well as 41,939 counterfeit PlayStation® games. Unfortunately, there are still reports of clearly pirated goods being returned to the infringers in certain instances.

<sup>20</sup> International norms require the government of South Africa to provide a system that has procedures in place that are adequate and effective to fight piracy (of all kinds of copyrighted works, not just those for which an industry concerned has come forward to provide self-help), and remedies that provide a deterrent to further infringements. On November 11, 2002, SAFACT, working with local narcotics and commercial police officers, conducted a raid on a private home, seizing 10,300 pirate DVDs. The house was being used as a storage warehouse by one of South Africa's biggest known pirate networks. Also seized in the raid were computers and business documents. The man arrested claimed he was a "manager" but he was in fact renting the home from the owner, a well-known pirate raided numerous times by SAFACT in the past. Also found in the raid were 1,500 pirate copies of PlayStation games, the films *XXX*, *Minority Report*, and *K-19: The Widowmaker*. All of the discs seized in the raid were sourced from Asia. In September 2002, couriers from Pakistan regularly attempting to bring in counterfeit product as a springboard to distributing elsewhere in Southern Africa were caught by the recording industry working with Customs Anti-Smuggling Team at Johannesburg International Airport, leading to the seizure of 12,000 CDs, DVDs, and VCDs. The discs were packed in suitcases which themselves were packed in a second larger suitcase. Collaboration with various airlines is being established, and links are being found to transshipped goods found in countries like Mozambique. All shipments thus far have included as-yet unreleased titles in South Africa. The recording industry trained Customs officials in Johannesburg and Capetown in 2002, who are now reportedly checking shipments carefully.

approximately 4,000 pirate DVDs. This information was communicated to Customs, including the names of the suspected pirates (who were well-known to SAFACT from previous incidents), the flight number, and estimated arrival time. Airport police were also called in to watch the proceedings. The Customs officer stopped the individuals and found over 3,000 pirate DVDs. The officers then requested that the individuals pay the tax on the items and then let the pirates leave the terminal with the pirate DVDs. Numerous complaints were filed with the Customs Office after this incident including signed statements from the police officer that witnessed the event, yet nothing was done to correct the situation. Such blatant malfeasance undermines any credibility the government of South Africa has to fighting piracy.

## **Court System Remains Overburdened, and Courts Mete Out Non-Deterrent Sentences**

South African prosecutors, magistrates and criminal courts continue to give low priority to copyright infringement cases. It is difficult to move cases along at a reasonable pace, as magistrates are reluctant to hear matters and are therefore likely to grant postponements, increasing costs of litigation, risking harm to the evidence, and generally leaving pirates to engage in illegal activities. 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 three years or even longer.<sup>21</sup> Part of the problem seems to be a lack of experience with copyright related cases, so IIPA member companies redoubled efforts in 2002 to offer training to prosecutors in an effort to address these issues. This inability to prosecute and finalize criminal cases has the effect of fostering recidivism, because, as criminal cases move along at a glacial pace, offenders keep getting caught (sometimes three or four times) for the same offense before the first case gets anywhere near a court.<sup>22</sup> If and when the first offence is prosecuted, the justice system appears totally ineffective at deterring piracy, resulting in paltry fines that do not 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. IIPA fears that little will change unless prosecutors and judges accept that piracy is a serious crime that deserves deterrent sentences.

One positive proposal over the past couple of years has been the establishment of specialized intellectual property courts to deal only with commercial crimes; such courts might be helpful in ensuring swifter judicial enforcement and harsher remedies being meted out to

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<sup>21</sup> The entertainment software industry has brought several cases in the past few years. In one case commenced in 1999, after the raid, the prosecutor set the "Admission of Guilt" fine at US\$50,000 so the defendant would not plead out, but the defendant got out on bail and kept selling pirated goods. Waiting for a court date, the defendant was raided twice more, and eventually brought harassment lawsuits against the copyright-owner company and the Police (stating the raids were unlawful and the goods seized were not pirated). The Police decided not to defend the harassment action, and returned the goods to the defendant and closed the file. In the other raids, no prosecutions have ensued.

<sup>22</sup> One bright spot in 2001 involved increased cooperation/communication with prosecutors, and as a result, a slight increase in the number of cases going to court. The business software industry reported a case of two pirates arrested by SAPS while trying to sell pirated CD-ROM games and pirate DVDs of motion pictures. After investigation of the case, the accused were both found guilty and sentenced to a suspended prison sentence and a fine of R10,000 (US\$1,190). However, the number of convictions is low, at least in part because defendants (non-South African nationals) leave the country before the cases are heard. Also, police became less interested in pursuing intellectual property cases in 2002 because their efforts did not result in convictions or deterrent sentences by the courts (the means by which their job performance is evaluated). A pirate who has been raided and charged goes back to his activities the next month.

commercial pirates. A specialized court with specially-trained judges and prosecutors would ensure that they are familiar with technologies being used by and the *modus operandi* of pirates. IIPA understands that a special commercial crimes court has now been established in Pretoria, although this court only hears criminal cases, and has heard very few cases thus far.

## **Counterfeit Goods Act Working Better Than in Previous Years; Still, No Deterrent Penalties**

The Counterfeit Goods Act (CGA), which provides for fairly hefty penalties for dealing in counterfeit goods (defined broadly to include many pirated copies of copyrighted materials), entered into force in 1999.<sup>23</sup> The first complaint under this Act was lodged in late 2001, and the government has begun the process of implementing the Act by appointing 22 inspectors and setting aside ten depots to store the goods seized under the CGA (an improvement over the three depots set aside in 2001). At present, the only geographic location lacking a storage depot is East London. Another centralized depot would be beneficial to anti-piracy efforts. Amendments to the CGA passed in October 2001 reportedly removed the requirement of having to apply to the High Court for confirmation of raids carried out under the authority of a search warrant. The government has been made aware of the industry's desire for swift implementation of the amendment.<sup>24</sup> For the motion picture industry, most enforcement actions taken in 2002 were under the CGA.<sup>25</sup> However, very few cases have actually been decided under the Act, and the few cases that have been resolved have resulted in only minimum fines and penalties. At the end of 2002, SAFACT received its first conviction under the Act, although, unfortunately, the fine was ridiculously low and thus failed to have any deterrent effect. Reportedly, the Cape Town Attorney General has been forthcoming in his willingness to cooperate regarding prosecutions under the CGA, although little practical assistance has been given to right holders by his office to date.

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

South Africa made no progress in addressing several other procedural hurdles to copyright enforcement in 2002.

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>26</sup> These problems force plaintiffs to spend inordinate

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<sup>23</sup> Under the Counterfeit Goods Act, copyright pirates charged with trading in counterfeit goods face penalties of R5,000 (US\$595) per infringing item or, alternatively, a prison term of up to three years per infringing article.

<sup>24</sup> Inspectors appointed under the auspices of the Legal Services unit of the SAPS enlisted industry to conduct in 2000 (one training session in October), 2001 (in six major cities during April, May, and June 2001), and November 2002 (30 officials). Training was geared toward the Department of Trade and Industry inspectors, as well as the vast majority of SAPS commercial crime branch officers, prosecutors, customs officials and depot managers. Over 500 officials in total attended the trainings.

<sup>25</sup> In a case that is both hopeful and somewhat disturbing, a man was arrested in August 2002 under the Counterfeit Goods Act by members of the SAPS commercial branch at Johannesburg International Airport, for smuggling 2,490 counterfeit DVD films, believed to be destined for local flea markets from Singapore. Disturbingly, the defendant was released on R6,000 (US\$714) bail and his case is still pending. During this time he has remained out on bail. See *Alleged DVD Piracy, Man To Appear*, South African Press Association (SAPA), Sept. 10 2002.

<sup>26</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.

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 defend such unfounded challenges at great expense. The lack of presumptions continues to be a major impediment in the ability of right holders to effectively protect their rights in South Africa. 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 (also a TRIPS violation, 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. 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. For example, an *ex parte* raid in Italy tends to cost about US\$10,000 to \$15,000. Raids in Greece cost approximately US\$5,000. Until Anton Piller orders are more reasonably granted in South Africa (consistent with Articles 50 and 41 of TRIPS), right holders have few prospects for effective civil prosecution against end-user piracy. On one positive note, Section 11 of the Counterfeit Goods Act created a statutory Anton Piller order to be used under that Act. IIPA is hopeful that the courts will grant Anton Pillers more readily under Section 11 of the Act.

The Counterfeit Goods Act requires that the complaining party pay for storage of seized goods in the depots. This has placed an extreme financial burden on the anti-piracy organizations. The complaining party must not only pay rather high fees for the use of the depots, but they also must pay a fee each time the defendant wishes to view the evidence. Several defense attorneys have latched onto this issue as a means of increasing the cost of the investigation. In addition, the storage costs continue to accumulate while the case is languishing in the court system. Private parties have to pay for space in the depots on cases that are taking more than two years to decide.

## **Enforcement Against End-User Piracy**

End-user piracy (unauthorized use of software in a business) causes the greatest damage of any form of piracy to business software companies, and in 2002, the business software industry continued its fight against this detrimental form of piracy in South Africa.<sup>27</sup> In 2002, the Business Software Alliance reached settlements with 14 pirate end-users, a positive indication that businesses are beginning to realize they may not use unlicensed software. In 2002, the BSA conducted a campaign (which is ongoing) to encourage legal use of software in

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<sup>27</sup> For example, in 2001, the business software industry conducted a "Truth or Dare" campaign, in which it learned of over 600 companies having over 60,000 desktops that used unauthorized business software.

the business community, sending 27,000 letters to businesses, and launching a television advertising campaign (starting in September 2002 and running several hundred times) encouraging businesses to contact BSA for assistance in legalizing their software usage.<sup>28</sup> BSA plans to visit 2,000 companies in 2003, to ensure that legal software is being used and to advise on software asset management (SAM) policies.

## **Government Software Management**

Ensuring government use of only licensed software is also a major priority of the business software industry, since governments set important examples for the community at large – both as enforcers of copyright, but also as proper users of copyrighted materials in the digital age. If governments do not use technology properly, the private sector is unlikely to feel obligated to do so. The South African government made some important steps forward in tackling end-user piracy in the government in 2002. In particular, many South African municipalities took a leadership role by licensing their own use of computer software. In the “Municipalities Truce Campaign 2002,” over 90 government municipalities registered and sought advice regarding software licensing. To date, eight of the municipalities have legalized their software usage entirely and many more are in the process of becoming licensed.

However, progress remains piecemeal, with no official support from the central South African government. The South African government, on a national basis, needs to swiftly implement a systematic software asset management (SAM) plan for monitoring use and acquisition of software government-wide to ensure that the current and future use of software is adequately licensed throughout all branches of government. IIPA encourages the State Information Technology Agency (SITA) to implement policies to ensure that there is proper allocation for legal software in all information technology infrastructure contracts. As an agency responsible for technology growth and use within the South African government, SITA of any agency should understand the impact of government on technology use and management throughout society.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **IIPA Pleased with Passage of “Electronic Communications and Transactions Act No. 25 (2002)”**

IIPA commends the South African government for passage of the “Electronic Communications and Transactions Act No. 25 (2002). The Act accomplishes important goals for the digital age, namely:

- The Act includes broad cyber-crime provisions that, by their terms, would appear to protect copyright owners against the circumvention of technological measures used by them to protect “data” (defined broadly as “electronic representations of information in any form,” which appears to include works) from unauthorized access and/or unauthorized exercise of exclusive rights under copyright. Some adjustments IIPA proposed in comments submitted

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<sup>28</sup> See *Developers Take Steps to Eradicate Piracy*, Business Day/All Africa Global Media via COMTEX (Johannesburg), Sept. 12, 2002 (discussing launch of campaign against “firms using software without licenses”).

to the government of South Africa were taken, for which we are greatly appreciative.<sup>29</sup> Some other proposed adjustments were not taken, however, that would have brought these provisions closer to full compliance with the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), which require countries to prohibit the circumvention of technological protection measures used by right holders to protect their works from unauthorized access or exercise of rights.<sup>30</sup>

- IIPA also notes that, while not required in order to implement the WIPO treaties, the government of South Africa enacted provisions relating to the liability of service providers. IIPA is heartened that the Act provides incentives for service providers to cooperate with right holders in combating illegal activities occurring over their services, including the provision of a notification process for certain services provided by an ISP (“hosting” or “caching”) leading to quick removal of the infringing content, and apparent injunctive relief. IIPA proposed two chief changes,<sup>31</sup> and IIPA is heartened that the government of South Africa accepted IIPA’s proposed change so that right holders are not asked to “indemnify service providers” for actions taken by them under the statute (including the removal of infringing materials as enacted of third parties upon the notification of a right holder).<sup>32</sup> As IIPA suggested, the Act provides that service providers are not liable for wrongful takedown in response to a notification of unlawful activity made,<sup>33</sup> and deters wrongful takedowns by imposing potential liability on those giving notices.<sup>34</sup>

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<sup>29</sup> For example, in IIPA’s “Comments Regarding the Draft Electronic Communications and Transactions Bill (2002),” submitted to the South African government on May 7, 2002, IIPA noted that “components of circumvention devices or component code (i.e., algorithms) of circumvention computer programs do not appear to be expressly covered.” The South African government took IIPA’s suggestion, adding to final Section 86(3) the words “or a component” to ensure that the prohibition on circumvention devices goes to the component level.

<sup>30</sup> For example, the standard for determining whether a device etc. falls under the statute is whether it “is designed primarily” for a circumvention purpose. In order to meet the WIPO treaties’ requirement that protection be adequate and effective, indirect methods of proof should be included in addition to the purpose of the design. IIPA proposed allowing other methods of proof such as “*whether a device etc. has only a limited commercially significant purpose other than to circumvent, or whether the device etc. is marketed in such a way as to reveal its circumvention purpose.*” In addition, IIPA noted the importance of civil and administrative relief, in addition to the criminal relief provided by the Act as finalized. In particular, injunctive relief is essential to stop circumvention when and where it occurs, especially in the fast-moving world of electronic commerce. Finally, IIPA made some comments regarding the requisite *mens rea* for the offense of circumvention, but no changes were made, leaving in place an apparent “actual knowledge” test for the act of circumvention in Section 86(1).

<sup>31</sup> One concern involved the description of “mere conduit,” of which the language “providing access to or for operating facilities for information systems or storage of data messages” appeared to us to potentially cover certain acts of hosting, albeit unintentionally. The government of South Africa did not take IIPA’s suggested changes to ensure the narrow scope of the limitation. IIPA seeks clarification that the “mere conduit” limitation is not intended to absolve an ISP that stores or hosts “data,” whether its own or that of a third party. The second concern involved the requirement in the Bill that right holders “indemnify service providers” for actions taken by them under the statute (including the removal of infringing materials of third parties upon the notification of a right holder). See *infra*.

<sup>32</sup> Electronic Communications and Transactions Bill (2002), § 81(i).

<sup>33</sup> This change promotes cooperation between right holders and ISPs in that it ensures that service providers will act promptly in response to notifications, as they will not fear liability.

<sup>34</sup> This change is the best way to ensure that the notification and takedown system operates efficiently and effectively, and specifically deters wrongful takedowns by imposing potential liability on those giving notices. By contrast, the draft requirement that right holders indemnify ISPs, a blanket indemnification of service providers, does nothing to further these goals.

In the IIPA's comments to the government of South Africa in May 2002, IIPA also commented on the new "Domain Name Authority" authorized under the Act. IIPA noted two key issues of interest to the copyright community: 1) the availability of basic registrant data, including correct contact information, so that copyright owners (and, to the extent they cooperate in investigations, service providers) can investigate illegal activities and rightfully exercise their rights in the online environment; and 2) the availability of an international dispute resolution process. Unfortunately, neither issue was addressed, leaving it unclear (and generally within the power of the Minister of Communications to decide) whether registrars are required to supply key registrant data (like "WHOIS" data in regard to global top-level domains), and whether the Uniform Dispute Resolution Procedures (UDRP) will be adopted to settle disputes arising out of competing claims to domain names. IIPA looks forward to reviewing draft regulations from the Minister, and recommends unfettered access to WHOIS-type data as well as adoption of UDRP-like dispute settlement provisions (or preferably, the adoption of the UDRP for the domain .za).

## South Africa's Law Still Violates TRIPS

The South African Copyright Act (No. 98 of 1978) remains TRIPS-deficient in several respects.<sup>35</sup> A bill released in 2000 proposed a number of important improvements, particularly: criminal sanctions for end-user piracy; statutory damages; TRIPS-compatible presumptions relating to copyright subsistence and ownership; narrower fair dealing provisions; and other important changes. That Bill was apparently taken off the table, and it is unclear at this time what the government's intentions are with respect to legislative amendments. The government of South Africa should immediately press for passage of necessary amendments to comply with TRIPS, by enacting legislation mirroring that which was introduced in June 2000. In addition, the government of South Africa should include provisions necessary to fully implement the WCT and WPPT, so that it may proceed to ratify those treaties.

Among the TRIPS-incompatibilities in the current Act that must be addressed in the upcoming amendments are the following:

- TRIPS-incompatible presumption of subsistence (of copyright) and ownership (TRIPS Article 9.1).<sup>36</sup>
- Failure to expressly criminalize end-user piracy (i.e., unauthorized use of copyrighted works in a business setting) (TRIPS Article 61).<sup>37</sup>

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<sup>35</sup> Under South Africa's WTO membership, it is obligated to comply with the copyright provisions of TRIPS, both substantive (Articles 9-14) and enforcement (Articles 41-61) (both on the books and in practice), which incorporates Articles 1-21 of the Paris (1971) text of the Berne Convention. Thus it is anomalous that South Africa currently adheres to Articles 1-21 of the Brussels (1948) text of Berne, and South Africa should adopt the Paris text. In addition, South Africa should be encouraged to join the Geneva (phonograms) Convention.

<sup>36</sup> Legal presumptions on the subsistence of copyright are essential to the effective enforcement of copyright and related rights. The Copyright Act includes no presumption of subsistence of copyright or ownership, and thereby places unreasonable evidentiary burdens on right holders to demonstrate both subsistence of copyright and ownership. Sections 17-20 and 139 of Ireland's copyright law provide for the subsistence of copyright, and provide a good model for amendments to the South African Copyright Act.

<sup>37</sup> "End-use" software piracy usually involves: 1) the purchase of licenses to use original copies of software packages; and 2) the installation of copies on additional computers or the distribution to large numbers of employees over network servers without obtaining further licenses. It enables management to avoid paying for needed software tools,

- Some overly broad exceptions to protection (TRIPS Articles 9.1, 13).<sup>38</sup>
- The principle of national treatment is not currently the basis for the distribution of levies for private copying (TRIPS Article 3).

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 (*cf.* TRIPS Article 50). In addition, the measure of civil damages available under the Copyright Act, which is an amount equal to a “reasonable royalty,” may not constitute a deterrent to further infringement (TRIPS Article 45, Article 41). Statutory damages would be a welcomed addition to the panoply of remedies available, given the inadequacy of current civil damage awards, and the difficulty in proving damages in many copyright cases in South Africa. Finally, many IIPA members report that criminal penalties imposed in copyright infringement cases have been inadequate to deter piracy (TRIPS Article 61). 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.

## **IIPA Notes Passage of the Copyright Amendment Act 2002 and the Performers’ Protection Amendment Act 2002**

Two laws went into force in 2002: the “Copyright Amendment Act 2002”; and the “Performers’ Protection Amendment Act 2002.” The Copyright Amendment Act provides for new rights to producers of phonograms, including a “broadcasting” right, a right of “transmi[ssion] in a diffusion service” (which is broadly defined in the Copyright Act and could include some Internet transmissions), and a “right to play the sound recording in public.” However, a new Section 9A was passed that provides, “[i]n the absence of an agreement to the contrary,” a right of remuneration is to be paid by the person doing the “broadcasting,” “diffus[ing],” or “play[ing] in public,” which is to be freely negotiated (proposed Section 9A(1)(b)), or in the absence of agreement, to be determined by the Copyright Tribunal [proposed Section 9A(1)(c)]. This could essentially amount in practice to a compulsory license as to broadcasts, diffusions, and public “play[ing]” of a sound recording (since it does not appear to permit the producer of sound recordings to freely negotiate individually in the absence of an agreement), and would be inconsistent with Article 14 of the WIPO Performances and Phonograms Treaty if broadcasts, diffusions, and public “play[ing]” of a sound recording were interpreted to include webcasting or other communications effected through wires (including in particular on demand transmissions

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thereby damaging the domestic South African software industry. Companies and managers that engage in or tolerate end-user piracy are subject to criminal penalties in virtually every major country in the world, including the United Kingdom, the United States, and every country of the European Union. The South African Copyright Act should be amended so that it expressly criminalizes end-user piracy. Ireland passed legislation in 2000 (the “Copyright and Related Rights Act 2000”) which criminalizes end-user piracy (under Section 140), liable on conviction to a fine up to £1,500 (approximately US\$1,905) and/or imprisonment for up to one year.

<sup>38</sup> Particularly damaging to the book publishing industry, exceptions to protection include old Regulations enacted in response to the academic boycott during the apartheid era. These Regulations offered the possibility of extensive photocopying under a literal reading, and they are in conflict with the provisions of the Act, which prohibit any act under the guise of fair dealing that would substitute for or undermine the legitimate exploitation of the work by right holders. Clearly such copying undermines the legitimate exploitation of the work by right holders. Now university departments have developed the habit of providing students with extensive course packs of photocopied extracts without permission. Such anachronistic exceptions, which are also clearly out of line with South Africa’s TRIPS obligations, should be appropriately narrowed.

through computer networks). The Performers' Protection Amendment Bill provides analogous provisions as to performers' rights.

The government of South Africa must clarify that these provisions provide producers of phonograms and performers adequate legal rights to control the principal means of transmission, including the making available to individual members of the public. It should also be noted that the licensing of transmissions, rather than the sale of physical products, is likely to be the principal source of revenue for record companies and performers in the future. Subjecting such transmissions to compulsory licenses, or establishing mere rights of remuneration for transmissions, would be inadequate. It is an issue of the foremost importance that right holders in sound recordings enjoy exclusive rights with respect to all communications, and in particular digital transmissions, regardless of whether these are "on-demand" or "non-demand." In the digital world, there are no meaningful distinctions between "on-demand" and "non-demand" communications, since even non-demand communications are searchable, and hence programmable. It would violate the WPPT to apply a compulsory license to on-demand communications.

## **Copyright and Regional Trade Negotiations**

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Southern Africa Customs Union (SACU) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global one. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in any FTA with South Africa or with SACU should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should:

- Be TRIPS-plus;
- Include and clarify, on a technologically neutral basis, the obligations in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT); and
- Include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities.

South Africa currently fails to comply with the TRIPS enforcement obligations, both on their face (i.e., in the legislation) and in practice, and many of the changes discussed in this report will be the basis for changes required in South Africa's law to implement any FTA with the United States. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.

## **Generalized System of Preferences**

South Africa currently participates in the Generalized System of Preferences program, a U.S. trade program that offers 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 \$490.3 million of products into the United States without duty during the first 11 months of 2002 (representing 12.8% of its total imports into the U.S.).<sup>39</sup> 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.

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<sup>39</sup> In 2001, \$506 million worth of South Africa's imports to the United States benefited from the GSP program, accounting for 11.4% of its total imports to the U.S.