

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
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SPECIAL MENTION

SOUTH AFRICA

PIRACY AND ENFORCEMENT UPDATE IN SOUTH AFRICA

Book Piracy: The U.S. publishing industry suffers harm from illegal commercial photocopying in South Africa. Photocopy shops in and around university campuses, as well as facilities being abused in libraries and similar on-campus venues, are decimating the market for educational publishers. Business publishers also experience widespread copying of their books by businesses/commercial end-users.

End-User Piracy of Business Software: The business software industry reports high levels of piracy – particularly commercial end-user piracy.

Customs Issues: There are some reports linking five plants in Singapore that have been forensically linked to pirate product seized in South Africa in 2003. Unfortunately, South African Customs was not (and generally has not been) willing to seize this in-transit pirate product.¹ One shipment (1.7 million optical discs) was released by South African Customs and subsequently stopped in Benin. It was destined for Nigeria. While we understand that the Singapore Attorney General's Chambers is currently still investigating this link, it is incumbent upon South Africa's Customs authorities to be vigilant in interdicting pirate shipments into, or being transhipped through, South Africa. The entertainment software industry reports that imports of pirated optical disc products from Asia (particularly Malaysia) continue to be highly problematic. While Customs has improved in terms of its ability at stopping pirated products destined for the country, the forfeiture and destruction procedures have been less than adequate. Pirate syndicates are involved in the importation and distribution of pirated entertainment software products into the country as well as the export of such products into neighboring countries.

Internet Piracy (Advertising Sites): Internet piracy is a concern, though it is largely used to advertise burn-to-order services. There is a lack of cooperation from ISPs in taking action against such sites even where the right holder provides proof of infringement.

Difficulties in Court Proceedings: The court system remains slow and cumbersome, and imposes undue costs and burdens upon the right holder pursuing an infringement case. A presumption of copyright subsistence is lacking, and in some cases, defendants have been able to reverse the presumption of ownership by simply placing it in issue during the proceedings. The entertainment software industry also reports that problems exist with respect to enforcement of judgments. Even after winning a case and being awarded costs, the chances of collecting from a defendant is almost nil. Defendants all too often have already disposed of or

¹ A recent judgment ruled in-transit pirate goods to another country as not having entered South Africa, and as such not subject to damages in South Africa under the Trade Marks Act.

transferred their assets, and left the country, thus leaving the right holder without recourse as to collecting the damages awarded in a judgment.²

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in South Africa is provided under the South African Copyright Act (No. 98 of 1978) as amended. Unfortunately, the law retains several provisions that either run afoul of South Africa's international obligations, or seriously undermine right holders' abilities to properly protect their rights. These include:

- **End-User Piracy of Business Software Is Not a Crime:** End-user piracy is not a criminal offense in South Africa. South African law currently provides that the sale of infringing software is a criminal offence, but there is no criminal penalty in the end-user context, violating South Africa's TRIPS obligations under Article 61 (to criminalize at least all copyright piracy on a commercial scale).
- **Civil Damages Are Non-Deterrent:** IIPA understands that infringing end-users have been ordered to pay civil damages that are less than the infringer would have paid for licensed software. If this is what is meant by "reasonable royalty" in the Copyright Act, it certainly does not constitute a deterrent to further infringements as required by TRIPS, and given recovery prospects like this, it is hardly surprising that plaintiffs often choose to settle rather than await judgments like this.
- **Presumptions Not Provided in Practice:** IIPA has long advocated the adoption of a Berne-compatible presumption of ownership and a presumption that copyright subsists, such that subsistence is presumed and ownership by the claimant is presumed unless the person seeking to challenge the presumptions asserts facts which serve to place doubt on the correctness of the relevant averments made by the Plaintiff or the State. Too often, defendants in South Africa have been able to reverse the burden of proving ownership by simply placing it in issue with the court. This is not how the Berne presumption was intended to operate. Thus, expressing in the law a presumption of ownership is needed satisfy South Africa's international obligations and a presumption of subsistence of copyright will greatly reduce the procedural burden on rights holders in proving their cases.
- **Re-Evaluation of Exceptions/Fair Use:** Finally, IIPA understands that the Government of South Africa is considering legislative provisions liberalizing aspects of fair use. IIPA requests that the government allow sufficient time for review and comment by affected parties and industries before finalizing any copyright proposals related to this (or other matter), and notes that in the digital environment, exceptions which may have passed muster before must be re-examined so that they do not run afoul of the time-tested Berne three part test and TRIPS Article 13.

Finally, the Government of South Africa should amend its law to comply with the provisions of the WIPO "Internet" Treaties,³ the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and should accede to these treaties as soon as possible.

² In some instances, a defendant will transfer the "business" assets to a family member and continue the business. The right holder has no alternative but to continue incurring litigation expenses to pursue the defendant. The law needs to be amended to provide for measures by which a right holder may obtain and enforce judgments expeditiously as well as measures by which a defendant may be barred from disposing of assets related to the infringing activity.

³ IIPA notes that a recent survey of broadband penetration found that South Africa had among the highest percentage growth in the third quarter of 2005, at 30% growth (along with Turkey and Morocco). See Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Rel. at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>.