

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

SPECIAL MENTION

SOUTH AFRICA

EXECUTIVE SUMMARY

IIPA specially mentions South Africa in this year's Special 301 filing, because of domestic piracy concerns, especially the proliferation of Internet download-to-burn (i.e., CD-Rs and DVD-Rs), straight CD-R and DVD-R "burning," end-user software piracy, and book piracy, among other concerns. Further, a court ruling handed down by Senior Magistrate Wessels in the Pretoria Commercial Crime Court that removed the Police's powers of arrest under the Counterfeit Goods Act seriously curtails South African authorities' abilities to effectively enforce copyright. Industry reports that piracy levels are getting worse largely as a result of the perception amongst consumers that piracy is a victimless crime. The impact of piracy in South Africa is devastating for legitimate right holders, legitimate distributors, and retail businesses (sale as well as rental), so much so that local copyright owners are mobilizing to take a stand against piracy.¹ Legitimate distributors have reduced employment levels, some rental outlets have reported year-on-year decreases in business in the region of 30%, and many rental outlets have actually closed.

PRIORITY ACTIONS FOR 2007

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

¹ See *First Anti-Piracy Concert to Kick Off in Joburg*, at <http://www.bizcommunity.com/Article/196/40/12012.html> (describing October 20, 2006 concert to kick off "Operation *Dudula*" – meaning "eradicate in isiZulu – spearheaded by "People's Poet" Mzwakhe Mbuli, to protest against the large number of pirate cassettes, CDs and DVDs flooding the local market; "[t]he vision behind these concerts is to create a crime-free society," explains Mbuli, who continued, "[i]f members of the public do not buy fake goods, they will render piracy unworkable, and artists will not be ripped off when they have worked so hard for their earnings"; other performers included Rebecca, Soul Brothers, Avante and Lundi).

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

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

SOUTH AFRICA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2002-2006²										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software³	119.0	35%	116.0	36%	107.0	37%	87.0	36%	35.6	34%
Motion Pictures	NA	NA	NA	NA	35.0	40%	35.0	40%	30.0	30%
Records & Music	NA	NA	8.5	70%	8.0	65%	3.0	55%	NA	25%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	3.0	NA	2.0	NA	2.0	NA	2.5	NA	14.0	NA
TOTALS	122.0		126.5		152.0		127.5		79.6	

PIRACY UPDATE IN SOUTH AFRICA

Local Optical Disc Production/“Burning” (Link to Internet Piracy): Local and international law enforcement actions have resulted in a noticeable decrease in the availability of imported pressed discs in South Africa.⁴ The net result of this reduction in imports of pressed discs from Pakistan and Malaysia is the proliferation of home operators involved in burning pirated copyright materials (including films on DVD-Rs) from “masters” downloaded from the Internet or received from Malaysia in the post.⁵ With the increasing availability of broadband through fixed and mobile applications, downloading to burn and sell is becoming more common and will continue to increase unless efforts to stop such activities are commenced forthwith. The proliferation of this type of piracy has been dramatic and quite sudden and presents new challenges to enforcement efforts. It should be noted that while there appears to have been a decline in the imports for some industries, pirated entertainment software products continue to be imported from Southeast Asia, particularly Malaysia.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Kuwait under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

³ BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in South Africa, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

⁴ Flea markets continue to be a problem in South Africa, but increased law enforcement actions, public awareness campaigns and, in some cases, a willingness by landlords to evict tenants found to be trading in pirate copyright materials, are beginning to have a positive impact in this area.

⁵ Local “burning” is carried out by stores and individuals owning a computer or by those who can afford a stack burner (that can make multiple copies of a disc in one run). Sales of pirated copies of TV series discs have proliferated according to the motion picture industry.

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

Internet Piracy, Including Misuse of Corporate Bandwidth: Internet piracy is a growing concern in South Africa, although the Internet is still largely used to advertise burn-to-order services due to lack of bandwidth in general.⁶ Internet piracy at present is generally comprised of illegal copies downloaded from other countries and not from websites or servers based in South Africa.⁷ There is a general lack of cooperation from ISPs in taking action against pirate download sites even where the right holder provides proof of infringement (although one industry sector reports that cooperation from auction sites is very good). IIPA also notes for the first time significant problems with abuse of bandwidth by employees at offices. Companies should be warned not to permit their employees to engage in such infringements in the workplace, and, if necessary, should be charged for contributing to infringement.

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

Book Piracy: The U.S. publishing industry suffers harm from illegal commercial photocopying in South Africa. Photocopy shops in and around university campuses, as well as facilities being abused in libraries and similar on-campus venues, are harming the market for educational publishers. These illegally copied books are also being disseminated to students in neighboring countries, especially where those students are enrolled in distance education courses with South African universities. Business publishers also experience widespread copying of their books by businesses/commercial end-users.

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

Organized Crime Linkage: There is increasing evidence of a linkage between piracy activities and other organized crimes.⁸ The South African Police Service (SAPS) has taken on three specific cases in respect to organized groups involved in pirating of films, human

⁶ There are reportedly two legal music download service providers for but they are not performing well economically in part due to relative lack of broadband connectivity. Bandwidth is being liberalized but costs are still inhibiting rapid growth.

⁷ On the occasion industry learns of a website selling pirate music, they have usually been able to quickly establish a physical address and take it down.

⁸ See June 2006 IFPI Enforcement Bulletin, <http://www.ifpi.org/site-content/library/enforcement-bulletin-30.pdf> (describing the local record industry group-coordinated raids in 2006 which revealed thousands of pirate discs and cassettes, etc., including South African as well as Western artists, but which also revealed refugee application forms which were in the process of being falsified, and various legal warrants issued in some of the names mentioned in the application forms; in a separate raid in January 2006, death threats were made against a music artist and members of the local record industry group which requested backup of the South Africa Police Services when traders in counterfeit product became aggressive during an incident at a stall at the Montana Traders Square). One raid described occurred in China City, resulting in significant seizures. A criminal prosecution was launched and resulted in a conviction with a R300,000 fine or three years imprisonment, suspended for a period of five years, provided the accused is not found guilty of the same offense during the period of suspension.

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

ENFORCEMENT UPDATE IN SOUTH AFRICA

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

Greater Numbers of Arrests and Criminal Convictions in 2006, But Problems Remain with Courts: Notwithstanding this negative ruling by the Pretoria Commercial Crime Court, there was an overall increased commitment by law enforcement agencies to act against those trading in pirate copyright materials in 2006, as the number of arrests in 2006 was almost double that of 2005 and the number of criminal prosecutions has exceeded administrative fines ("admissions of guilt") when compared with 2005. Instances of bail being denied have become ever more common as well as a significant increase in plea bargains (which have to be approved by the complainant). Greater attention is being paid to piracy in 2006, and one high profile case involving two local South African films highlights the damaging nature of piracy to the South African economy, society, and people.⁹

Unfortunately, the criminal court system in South Africa remains overburdened, and it is difficult to move cases along at a reasonable pace and without unreasonable burdens and costs placed on the right holders. Prosecutors and judges in the non-specialized courts fail to view piracy as a serious crime (although this is being gradually offset with an increasing number of cases being referred to either the High Courts or the Specialized Commercial Crime Courts that have been established in Johannesburg, Pretoria, Durban and Port Elizabeth, Cape Town and Bloemfontein). A presumption of copyright subsistence remains lacking, and in some cases, defendants have been able to reverse the burden of proving ownership simply by placing ownership in issue during the proceedings. The entertainment software industry again reports that problems remain with respect to enforcement of judgments. Even after winning a case and being awarded costs, the chances of collecting from a defendant are almost none. Defendants all too often have already disposed of or transferred their assets and have left the country, thus leaving the right holder without recourse as to collecting the damages awarded in a judgment.¹⁰

⁹ Operations by the police assisted by SAFACT led to the discovery of massive numbers of pirate copies of the local movies "Mama Jack" and "Tsotsi" and revealed the original pirate operation to have been an "inside job" by workers at the post-production houses for those movies. Considerable media exposure has been given to the pirating of these two films, as well as the broader issue of film and copyright piracy. The pirating of films has also been raised in the National Parliament, and the Gauteng and Western Cape Provincial Legislatures. The original discovery has led to many actions against street vendors, flea markets, and home operators found to be trading in pirated copies of the two films.

¹⁰ 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.

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

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

Customs Issues: Industry has developed good relationships with South African Customs officials, but the blanket indemnity they require is considered a problem for right holders. Customs authorities in South Africa are intercepting transit consignments at airports but uncertainty exists as to seaborne consignments. There have been past reports forensically linking optical disc plants in Singapore to pirate product seized in South Africa. Unfortunately, South African Customs has not been willing to seize this in-transit pirate product.¹¹ The entertainment software industry reports that imports of pirated optical disc products from Southeast Asia (particularly Malaysia) continue to be highly problematic. While Customs has improved in terms of its ability at stopping pirated products destined for the country, the forfeiture and destruction procedures have been less than adequate, and there continues to be a lack of transparency as to what becomes of the seized products.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in South Africa is provided under the South African Copyright Act (No. 98 of 1978) as amended. Unfortunately, the law retains several provisions that either run afoul of South Africa's international obligations, or seriously undermine right holders' abilities to properly protect their rights.¹² These include:

- **End-User Piracy of Business Software Not a Crime:** End-user piracy is not a criminal offense in South Africa. South African law currently provides that the sale of infringing software is a criminal offence, but there is no criminal penalty in the end-user context, giving rise to questions about South Africa's TRIPS compliance under Article 61 (which requires criminalization of at least all copyright piracy on a commercial scale).
- **Civil Damages Non-Deterrent:** IIPA understands that infringing end-users have been ordered to pay civil damages that are less than the infringer would have paid for licensed software. If this is what is meant by "reasonable royalty" in the Copyright Act, it certainly does not constitute a deterrent to further infringements as required by TRIPS, and given recovery prospects like this, it is hardly surprising that plaintiffs often choose to settle rather than await judgments like this.

¹¹ One shipment (1.7 million optical discs) was released by South African Customs and subsequently stopped in Benin. It was destined for Nigeria. While we understand that the Singapore Attorney General's Chambers is currently still investigating this link, it is incumbent upon South Africa's Customs authorities to be vigilant in interdicting pirate shipments into, or being transshipped through, South Africa.

¹² Other issues in the current law exacerbate the piracy problem. For example, unauthorized imports (parallel imports) of products prior to local release dates simply ruin the market for the legitimate distributors, and since the shipments can often be mixed with pirate discs, the law should be amended to afford an exclusive importation right.

- **Presumptions Not Provided in Practice:** IIPA has long advocated the adoption of a Berne-compatible presumption of ownership and a presumption that copyright subsists, such that subsistence is presumed and ownership by the claimant is presumed unless the person seeking to challenge the presumptions asserts facts which serve to place doubt on the correctness of the relevant averments made by the plaintiff or the State. Too often, defendants in South Africa have been able to reverse the burden of proving ownership by simply placing it in issue with the court. This is not how the Berne presumption was intended to operate. Expressing in the law a presumption of ownership is needed satisfy South Africa's international obligations and a presumption of subsistence of copyright will greatly reduce the procedural burden on rights holders in proving their cases.
- **Re-Evaluation of Exceptions/Fair Use:** Finally, IIPA understands that the Government of South Africa is considering legislative provisions liberalizing aspects of fair use. IIPA requests that the government allow sufficient time for review and comment by affected parties and industries before finalizing any copyright proposals related to this (or other matter), and notes that in the digital environment, exceptions which may have passed muster before must be re-examined so that they do not run afoul of the time-tested Berne three part test and TRIPS Article 13.

The Government of South Africa should amend its law to comply with the provisions of the WIPO "Internet" Treaties,¹³ the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, and should accede to these treaties as soon as possible.

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

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

Trade and Investment Cooperation Agreement (TICA): With the SACU Free Trade Agreement talks suspended indefinitely,¹⁴ USTR has commenced consideration of a "Trade and

¹³ 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>.

¹⁴ On April 18, 2006, USTR officially announced that SACU negotiations were on hold. Specifically, USTR noted "The United States and SACU have had differences on some core issues in the FTA. These issues will require detailed

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

TRAINING/TECHNICAL ASSISTANCE

The industries have established MOUs or informal understandings with enforcement authorities in South Africa, and the latter are generally quite receptive to training and receiving technical assistance (and have been for at least six years, with the last couple of years focused more on prosecutors). SAFACT, a local industry-driven enforcement group, is in almost daily contact with the various law enforcement agencies involved in combating the pirating of copyright materials and provides support capacity and guidance.¹⁵ The record industry group similarly conducts training and provides technical assistance as well. The scope of such training/technical assistance includes training to Prosecutors, Customs Officials and Police Officers to assist in acquiring necessary investigative skills to seek practical application of the Copyright Act and Counterfeit goods Act,¹⁶ plus procedures for successful convictions from raids through arrests, forensics, bail and trial. Technical assistance in 2006 included funding the new Commercial Crime Courts in Cape Town and Bloemfontein. SAFACT also participated in a UNESCO training for magistrates from the Southern Africa region.

MARKET ACCESS

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

Foreign Ownership Restriction: Foreign ownership in a broadcaster is presently capped at a maximum of 20%. This level is being reviewed, and may be increased to allow 33% foreign ownership in line with World Trade Organization (WTO) recommendations. Foreign investment restrictions are discriminatory, limit competition and inhibit the potential growth of the television industry. They should be abolished.

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

¹⁵ SAFACT views its mission as putting together project motivations based on own intelligence to Police for establishment of projects aimed at significant criminal groups that assist the Police in obtaining resources necessary to effect prosecution.

¹⁶ In 2006, product identification training (i.e., between pirate and genuine) was presented to all law enforcement agencies including municipal law enforcement personnel in order to address the problems caused by street vendors.