

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# SOUTH AFRICA

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

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IIPA recommends that South Africa be placed on the Watch List.

Piracy in South Africa continues to cost the country jobs, tax revenues, and the possibility of developing its creative community.<sup>2</sup> Pirated videogames and illegally photocopied books decimate the market, destroying the chances for the software companies and publishers to prosper. The courts continue to give low priority to copyright infringement cases, and although prosecutors are becoming somewhat more active, and more cases have proceeded to court, the number of convictions remains low, and penalties remain non-deterrent. The proof regarding the overall inadequacy of the enforcement system in South Africa is contained in the high piracy losses and levels in the publishing and software sectors. The inadequacies come notwithstanding some successful campaigns against piracy by the business software and motion picture industries. Both industries report relatively good cooperation with the police in achieving raids, accompanied by some self-help measures.<sup>3</sup>

The government of South Africa has proposed several legislative amendments, two of which may run afoul the WIPO Performances and Phonograms Treaty. Another bill expected out shortly will deal with the liability of Internet service providers, and IIPA is hopeful that the government of South Africa has taken a vertical approach to copyright infringements, providing incentives for cooperation between right holders and service providers in fighting piracy online; such an approach is necessary in order for South Africa to meet its international obligations. Finally, a fourth bill expected in 2002 will hopefully close gaps in South Africa's copyright regime that currently leave it short of meeting its TRIPS obligations.

In 2002, the government of South Africa needs to do the following:

- Create a special IPR enforcement unit under a high-level department (such as the Department of Trade and Industry) to coordinate copyright enforcement throughout South Africa.
- Step up enforcement efforts by the Police Services (with decreased turnover of these forces) and prosecutors against commercial book and entertainment software pirates, in addition to continued cooperation with the recording, business software, and motion picture industries (including

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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.

<sup>2</sup> Anti-piracy work in South Africa has also led to tangible improvements for the country. For example, proceeds from anti-piracy funds collected on behalf of the software company Microsoft, have been used to establish a "digital village" in Rabie Ridge near Alexandra in Johannesburg, and plans are afoot to launch further "digital villages" in Khayelitsha and Paarl in the Western Cape. "14,770 Jobs Lost Due To Software Piracy – Microsoft," Asia Intelligence Wire, Woza Internet, Jan. 3, 2001.

<sup>3</sup> For example, in 2001, the business software industry conducted a "Truth or Dare" campaign, in which they learned of over 600 companies having over 60,000 desktops that used unauthorized business software. Also, significant case preparation work was done in 2001 by the motion picture industry's investigatory group.

stepped-up activity against the age-old problem of informal operators trading from illegal video outlets in private residences).

- Invigorate South African Customs to seize pirated copyrighted goods at the borders.
- More strongly enforce the Counterfeit Goods Act against commercial piracy (including passage of needed technical amendments to facilitate better enforcement).
- Provide TRIPS-compatible evidentiary presumptions in the law, including clear presumptions of copyright subsistence and ownership.
- Provide that *ex parte* civil search (Anton Piller) orders are easier to obtain and enforce in line with TRIPS Articles 41 and 50.
- Pass amendments to bring the copyright law into compliance with TRIPS (including by providing stronger legal deterrents to copyright infringement, criminalization of corporate end-user piracy, pre-established civil damages, etc.), and to take into account new norms at the international level, including those in the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Reform the judicial system either to allow for quicker dispositions or create a separate commercial court to handle intellectual property cases.

Total estimated losses due to piracy of U.S. copyrighted works in South Africa rose to \$124.6 million in 2001.

**SOUTH AFRICA ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1996 - 2001**

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	15%	12.0	10%	12.0	10%	12.0	16%	12.0	10%	12.0	12%
Sound Recordings / Musical Compositions	NA	NA	11.0	13%	NA	NA	12.0	40%	3.0	20%	3.0	20%
Business Software Applications <sup>4</sup>	67.5	55%	44.2	45%	68.4	47%	74.9	49%	54.8	48%	40.2	49%
Entertainment Software	26.1	57%	22.4	70%	NA	NA	22.2	NA	15.3	NA	NA	NA
Books <sup>5</sup>	19.0	NA	21.0	NA	20.0	NA	21.0	NA	20.0	NA	22.0	NA
<b>TOTALS<sup>6</sup></b>	<b>124.6</b>		<b>110.6</b>		<b>100.4</b>		<b>142.1</b>		<b>105.1</b>		<b>77.2</b>	

## COPYRIGHT PIRACY IN SOUTH AFRICA

Serious copyright piracy of videogames and books harm the entertainment software and book-publishing industries in South Africa, and while some enforcement efforts have been forthcoming in the area of business software piracy, that industry continues to suffer the greatest losses of any copyright industry sector. Piracy phenomena include the following:

- **Book Piracy.** Book publishers continue to experience rampant (and increasing) piracy of their materials in South Africa. Photocopy piracy of whole books and chapters and high priced reference books on university campuses in South Africa is endemic.<sup>7</sup> Many pirated versions of books, both “India-only” reprints, as well as commercial offset copies, from India or Pakistan arrive in South Africa via Mauritius. It is estimated that 30-40% of the market is supplied by pirated product, while about 50% of academic textbooks are illegally photocopied. Rampant photocopying still exists in educational institutions. There are reports that some universities that used to buy reference books for its faculty members now buy only one copy, and photocopy the book for other faculty members internally.
- **Retail Piracy.** The retail markets for entertainment software (including all formats, like console-based videogames on CD, personal computer games, and cartridge-based videogames), business software, sound recordings, and CD-ROMs of published materials, remain largely

<sup>4</sup> BSA loss numbers for 2001 are preliminary. In IIPA’s 2001 Special 301 report, the preliminary losses and levels due to piracy of business software for 2000 were reported as \$62.6 million and 47%, respectively. These levels were finalized in mid-2001, and are reflected in the chart above.

<sup>5</sup> Total piracy of published materials has gone up in South Africa, but losses were reduced to US\$19 million due to devaluation of the South African Rand.

<sup>6</sup> In IIPA’s 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in South Africa were \$129.0 million. Because of the adjustment to reflect BSA’s final 2000 statistics (see footnote 4), estimated total losses to the U.S. copyright-based industries in South Africa in 2000 are adjusted to \$110.6 million.

<sup>7</sup> Funding for universities is lower in absolute terms, as the South African Rand lost about 40% of its value in 2001.

pirate. 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, with much of the pirate product being imported from countries in Asia including Thailand, Hong Kong, and Malaysia. In 2001, video piracy in the retail sector of South Africa shows only slight increases (roughly 15%, compared with 10% in 2000), particularly in the greater Johannesburg region. Most pirate videos are sourced from pirate VCDs and DVDs which come into South Africa at the Johannesburg International Airport with much of the duplication taking place in private homes. These materials – of fairly good quality – are used as “masters” for local illegal duplication labs, which in turn supply networks of distributors. Pirate videocassette labs are generally small (no more than half a dozen machines), but are well organized and active (part of the “syndicate”) throughout the Western Cape and Durban. Flea market pirates (many of them foreign nationals) sell VCD, DVD and video titles, mainly in Johannesburg. Counterfeit VCDs can be readily found in hardware stores, together with VCD players that have been dumped in South Africa. Flea market piracy one of the largest problems, with the majority of offenders being citizens of South Africa who realize that there will be no criminal or civil consequences for their actions.

- **Internet Piracy.** There has been a marked increase in Internet piracy over the past three years, with an estimated 20% of the videogame market now being lost to pirate downloading of “warez” (pirate) copies of games. The Internet as a mechanism for the spread of piracy is slowly being accepted by the South African public. The piracy encountered thus far is all hard goods sales of VCDs, DVDs, and CD-ROMs. The product is being sold via online auction sites as well as advertising sites (i.e., hard goods advertised for sale on the Internet). Streaming and downloadable media is not an option at this time in South Africa as only 56k modems are being utilized, and it still takes too long and is too cumbersome a procedure to download films in South Africa.
- **Pirating-at-Home.** One of the biggest piracy problems in South Africa involves informal operators trading from illegal video outlets in private residences. These “home dealers” in the Cape Flats and Kwa-Zulu Natal border prey on major revenue centers, disrupting legitimate business and inhibiting market expansion. These informal video outlets carry between 100 to 500 videos in stock, usually all back-to-back copies. They affect the legitimate retailers in the surrounding areas.
- **Music/Sound Recording Piracy.** The recording and music industries are hampered by pirate imported audiocassettes from nearby countries such as Mozambique, Tanzania and Malawi, at least some of which are transshipped through the Gulf region from points in Southeast Asia.

# COPYRIGHT ENFORCEMENT IN SOUTH AFRICA

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## CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS <sup>8</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

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<sup>8</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 paltry maximum fine of R1,500 (approximately US\$130) per offence, whereas, the copyright law provides for a R5,000 (approximately US\$435) maximum fine per article.

**CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000**

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES <sup>9</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

<sup>9</sup> For motion picture industry statistics, the figures in parentheses relate to raids, cases, etc., against piracy of console-based videogames.

## CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES <sup>10</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		

In 2002, the South African government should focus on its international enforcement obligations, and look to the creation of a special IPR enforcement unit under a high-level department (such as the Department of Trade and Industry) as a first step in devising a coordinated response to piracy. Such a body will oversee, for example, the provision of greater resources in the way of staffing and funding of, as well as stepped up enforcement efforts by, the Police Services (SAPS), ensure that specially-trained officers are not lost to attrition, and ensure that prosecutors increase activities against piracy. The increasing problem of pirated and unauthorized imports at the borders demands an invigorated response from South Africa's Customs service, and results in the way of mass seizures of imports of pirated and unauthorized copyrighted goods at the borders must be forthcoming. Stronger enforcement of the existing laws, including the Counterfeit Goods Act (with needed technical amendments), will send a signal to pirates that they must clean up their act or face the consequences.

### Some Raiding, But Few Deterrent Results

While the police are faced with severe personnel shortages, liaison with the Police Services remains generally satisfactory for both the motion picture and business software industries. In 2001, some raids were taken against piracy of motion pictures, with some positive results.<sup>11</sup> Some

<sup>10</sup> For motion picture industry statistics, the figures in parentheses relate to raids, cases, etc., against piracy of console-based videogames.

<sup>11</sup> For example, the motion picture industry's anti-piracy organization in South Africa, SAFACT, obtained the largest DVD seizure in its history on Nov. 26, 2001 at Johannesburg International Airport, with the assistance of Customs (3,200 pirate DVDs on a flight from Malaysia, valued at US\$32,000.). The importer, is under investigation. Interestingly, regarding the modus operandi of the pirate, the shipments were separated into discs and labels, and the labels were all in English but contained typographical errors, e.g., on the label for "America's Sweetheart," the logo for Columbia appears but the name listed is "Twentieth Century Fox," the star of "The Mummy Returns" is listed as "Brendan Eraser," etc.

raids, including by the Commercial Crime Unit (CCU) of the Police, against street vendors have resulted in some seizures, but usually, the results are extremely short-lived: in most cases, the hawkers are back out within days of the raid, selling pirated product again with impunity. The CCU is the only police unit authorized to conduct these kinds of raids and they are vastly understaffed. In addition, the National Commissioner of the unit has stated that counterfeiting crimes are not a priority for them.

Both the motion picture and entertainment software industries have had to resort to a privately-funded body to assist them in fighting piracy, often training the enforcers themselves, with some degree of success.<sup>12</sup> The South African Federation Against Copyright Theft (SAFACT) has actually been given special powers to pursue video piracy cases and must perform most of the preparatory work for official investigations and police actions. The entertainment software industry also works with SAFACT to bring some criminal prosecutions against entertainment software pirates.<sup>13</sup>

In addition, the motion picture industry is attempting to use other statutes to protect its rights, including the Proceeds of Crimes Act and the tax laws. The Proceeds of Crimes Act, which the Department of Justice recently began enforcing, can be employed to go after criminal syndicates, as it empowers special units under DOJ to “attach” all assets owned by syndicate members, unless they can prove the property attached was accumulated through legal means. While these cases are usually reserved for very high profile matters, and have not included any offenders of intellectual property rights, there is a test case pending under this Act which involves a cooperative effort between SAFACT and a major business software publisher. Inland Revenue Service (IRS) inspectors are also now being informed of all raids on private pirate homes, in order to raise more funds for government efforts.<sup>14</sup>

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

South African prosecutors, magistrates and criminal courts continue to give low priority to copyright infringement cases. Public prosecutors accept admissions of guilt and impose police fines in some cases, but other cases brought under the Copyright Act languish in the courts, sometimes for upward of three years or more.<sup>15</sup> This inability to prosecute and finalize criminal cases has the effect of fostering recidivism, because as the criminal cases move along at a glacial

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<sup>12</sup> Some IIPA members provided training sessions and workshops given to individual police units in 2001 throughout the country, and the copyright industries remain ready to provide assistance to police forces and Customs.

<sup>13</sup> In 2001, SAFACT took part in 133 raids, of which at least 60% related to the entertainment software industry. Reported seizures include 7,380 pirate videocassettes, 5,469 pirate VCDs, 6,741 pirate DVDs, as well as 62,747 counterfeit PlayStation® games. Unfortunately, there are still reports of clearly pirated goods being returned to the infringers in certain instances.

<sup>14</sup> In 2001, an Internet piracy syndicate was referred to the Special Investigative Unit. The police and the Special Investigation Unit are working closely together on the matter. It appears that the syndicate was importing personal computer CD-ROM games from Malaysia and advertising them for sale on their website.

<sup>15</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 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.

pace, offenders keep getting caught (sometimes three or four times) for the same offence before the first case gets anywhere near a court. If and when the first case is prosecuted, the justice system appears totally ineffective at deterring piracy, resulting in paltry fines that don't even amount to a cost of doing business for the pirate. The system needs to be streamlined in order to prevent the repeat offenders, or at least have a first conviction in place before the culprit is caught again, enabling the courts to impose heavier fines or imprisonment for second or third offenses.

One proposal over the past couple of years has been the establishment of specialized intellectual property courts to deal only with commercial crimes; such a court might be helpful in ensuring swifter judicial enforcement and harsher remedies being meted out to commercial pirates. 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. This court hears intellectual property matters as well as other commercially related crimes, and that some of the prosecutors have attended the training that was held concerning the implementation of the Counterfeit Goods Act. This is a positive development.

One bright spot in 2001 involves increased cooperation/communication with prosecutors, and as a result, a slight increase in the number of cases going to court.<sup>16</sup> 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 2001 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. IIPA remains optimistic that its cooperation with the Cape Town Attorney General, for example, concerning prosecutions under the Counterfeit Goods Act, will act to set valuable precedents for actions under the Act, once the practical impediments to the Act's implementation can be remedied through technical amendments (see discussion below).

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

Procedural problems, including the lack of evidentiary presumptions of subsistence and ownership in copyright infringement cases, continue to subject copyright owners to overly costly and burdensome procedural hurdles.<sup>17</sup> These problems force plaintiffs to spend inordinate amounts of time and resources simply proving subsistence of copyright and ownership, and place South Africa squarely in violation of its TRIPS obligations. Whereas in certain other former Commonwealth countries, ownership by the plaintiff is presumed unless proof to the contrary is introduced, in South Africa mere denial by the defendant shifts the burden to prove ownership to the plaintiff. As a result, the defendant in a copyright infringement case can and often does, without any supporting evidence, call into question the subsistence of copyright in a work, as well as the plaintiff's ownership of that copyright. In numerous cases, plaintiffs have been forced to

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<sup>16</sup> The business software industry reports 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 (approximately US\$870).

<sup>17</sup> South Africa provides these presumptions for motion pictures and videogames through a title registration system, but that system is impractical, unnecessarily complex and expensive.

defend such unfounded challenges at great expense. 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. 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. IIPA is hopeful that the courts will grant Anton Pillers under Section 11 of that Act.

## **End-User Piracy and Government Software Management**

Two issues particularly important to the software industry involve tackling end-user piracy (unauthorized use of software in a business) and ensuring that governments take adequate steps to implement adequate software management in their own agencies. The business software industry has continued its fight against corporate end-user software piracy, reaching a number of positive results in 2001.<sup>18</sup> However, deficiencies in the copyright law make court litigation a slow and expensive process, and it is uncertain whether court-awarded damages will be sufficiently high to constitute a real deterrent. Until this situation is rectified, the fight against end-user piracy will not be won.

There have been some positive developments in 2001 regarding government software management. In 2001, the business software industry arranged for an audit of one national government department to take place. That department agreed to enter into a software asset management policy and undertook to use legal software going forward. Further progress is anticipated on a local level, as the business software industry is currently allowing local government municipalities across South Africa a "truce period" within which they can legalize their software without fear of legal action. The municipalities will be encouraged to implement software asset management policies to ensure continued use of legal software. However, progress remains piecemeal, with no formal support from the South African government. The South African government, on a national basis, needs to swiftly implement a systematic software asset management plan for monitoring use and acquisition of software government-wide to ensure that the current and future use of software is adequately licensed throughout all branches of government. IIPA also hopes that the State Information Technology Agency (SITA) will implement

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<sup>18</sup> In addition, the industry reports that a good number of settlements with infringers were reached in 2001.

policies to ensure that there is proper allocation for legal software in all information technology infrastructure deals.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **Forthcoming Amendments Hopefully Will Bring the Copyright Act Closer to Compliance with TRIPS**

The South African Copyright Act (No. 98 of 1978) remains TRIPS-deficient in several respects.<sup>19</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. However, the Copyright Amendment Bill presented to parliament in April 2001 did not include any of these amendments. The business software industry made written and oral submissions before Parliament bringing these omissions to the attention of the Portfolio Committee on Trade and Industry. The Department of Trade and Industry has indicated that the amendments which were not included previously will be included in a separate bill and should be tabled before Parliament in April 2002. While this is encouraging news, such indications have been made on many previous occasions but have not been followed through by government.

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>20</sup>
- Failure to expressly criminalize end-user piracy (i.e., unauthorized use of copyrighted works in a business setting) (TRIPS Article 61).<sup>21</sup>

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<sup>19</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>20</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>21</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 licences. It enables management to avoid paying for needed software tools, 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\$1,665) and/or imprisonment for up to one year.

- Some overly broad exceptions to protection (TRIPS Articles 9.1, 13).<sup>22</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.

## **Two Bills Introduced in 2001 Would Run Afoul the Requirements of the WIPO Performances and Phonograms Treaty**

In addition to the forthcoming amendments to the Copyright Act (which will be intended to bring South Africa’s law into compliance with TRIPS), in April 2001, two separate Bills, the “Copyright Amendment Bill” B73-2001, Government Gazette No. 22249 (24 April 2001), and the “Performers’ Protection Amendment Bill” B74-2001, Government Gazette No 22249 (24 April 2001), were published in the official gazette. The Copyright Amendment Bill 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 Internet transmissions), and a “right to play the sound recording in public.” B73-2001, § 2 (amending Section 9 of the Act). However, a new Section 9A has been proposed, that would provide, “[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 amounts in practice to a compulsory license as to broadcasts, diffusions, and public “play[ing]” of a sound recording, and is inconsistent with Article 14 of the WIPO Performances and Phonograms Treaty, at least to the extent “diffusion” includes making available a sound recording to the public as that phrase is understood in the WPPT. The Performers’ Protection Amendment Bill provides analogous provisions.

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<sup>22</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.

The government of South Africa must modify this provision to ensure that it provides neighboring rights owners with 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, such as are proposed in the South African legislation, is simply inadequate. It is an issue of the foremost importance that rightholders 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. It would violate common sense and fairness to apply such a regime to non-demand communications that are equally adept at delivering recorded music in programmable form. Given that interactivity can be achieved at either the transmitting or receiving end of communications, it is irrational to distinguish between services on the basis of how the functionality is achieved. Simply put, modern legislation must ensure that record companies and performers have the exclusive right to control all digital transmissions.

### **Forthcoming “Electronic Communications and Transactions Bill” Will Deal with Internet Service Provider Liability, and May Attempt to Implement Certain Requirements of Most Recent WIPO Treaties**

IIPA understands from the Department of Trade and Industry that it plans to submit the “Electronic Communications and Transactions Bill,”<sup>23</sup> that will deal with the issue of Internet service provider (ISP) liability, and may also attempt to implement certain aspects of the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The WIPO treaties require, among other things, effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft and mutilation. This legal framework will permit content owners to provide for the security of their property online, essential for successful electronic commerce. South Africa is a signatory to the WIPO treaties, and IIPA looks forward to reviewing legislation intended to implement the obligations of the WCT and the WPPT, paving the way for ratification of the treaties. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly, so the requirements of the treaties constitute new international norms. While many of its neighbors have already partially implemented the treaties, South Africa’s implementation and ratification of the WCT and WPPT are welcomed and necessary events to the greater awareness and emphasis on these recent norms throughout sub-

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<sup>23</sup> *Bill on Internet Due Soon*, Business Day/All Africa Global Media, October 4, 2001 (in which Dillo Lihlokoe, Department of Communications’ Director of E-Commerce said that the “Electronic Communications and Transactions Bill” was due to be tabled in Parliament within weeks).

Saharan Africa. In preparation for the upcoming legislation, a Green Paper on Electronic Commerce was released by the Department of Communications in November 2000.<sup>24</sup>

Regarding the “Electronic Communications and Transactions Bill,” IIPA is concerned by statements in the press indicating that the Bill contains a proposal limiting the liability of Internet service providers for “content carried on their networks.” The press article indicates, however, that “[t]here is no clarity on their liability if a subscriber transmits material like pornography or defamatory statements” (the article is silent on liability standards in cases of copyright infringements over the Internet). IIPA reiterates points made in its commentary to the Green Paper regarding copyright infringement and how to approach the issue of Internet service provider liability. It should be noted at the outset that the WIPO treaties themselves do not specifically require national legislation to address the topic of ISP liability. If South Africa legislates on this topic, the enforcement provisions of TRIPS, specifically, Article 41, provide a roadmap for dealing with the issue of ISP liability. Under Article 41 of TRIPS, South Africa must provide “enforcement procedures . . . so as to permit effective action against any act of infringement of intellectual property rights covered by this agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.” The WIPO treaties contain virtually identical provisions requiring effective enforcement procedures against infringements of the rights provided therein. In the emerging digitally networked environment, it is self-evident that, in order to fulfill these international obligations, South African laws must extend to the activities of Internet and online service providers through which copyright infringements are carried out.

Today, a single infringer can and does employ the networks and services of service providers to reproduce, make available, and communicate to the public copyrighted materials without authorization. Similarly, in the course of these activities, service providers themselves may engage in widespread acts of unauthorized reproduction, making available, and communication to the public. There will be many instances in which the party initiating this chain of infringements is anonymous, and his location and identity may be unknown to the right holder and to enforcement authorities. Furthermore, even a party who is located outside of South Africa may employ the resources of South African service providers to enable widespread infringements within South Africa. Under these circumstances, unless the right holder has at his disposal effective means to encourage (or, if necessary, to compel) a service provider to cooperate in the detection and resolution of instances of online infringement, it cannot be said that “effective”, “expeditious”, and “deterrent” procedures are available, as required by TRIPS.

Accordingly, South Africa must have in place a legal and enforcement regime that gives incentives for cooperation between right holders and service providers in order to meet its international obligations. Both the U.S. implementing legislation of the WIPO treaties as well as

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<sup>24</sup> IIPA submitted its comments to the Green Paper in March 2001, noting that: South Africa must bring its Copyright Act into compliance with TRIPS and improve its enforcement system to meet its obligations under the enforcement provisions of that Agreement; South Africa should not miss the opportunity to introduce amendments to implement the WIPO “Internet” treaties, the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”), followed by swift ratification of the treaties; and if South Africa decides to deal with the issue of service provider liability, it must adopt a balanced system that gives incentives to service providers to establish good business practices, including cooperation with right holders, with respect to protecting against copyright infringements over their facilities. IIPA also directly responded to certain questions raised in the Green Paper regarding the importance of protecting temporary copies under the reproduction right, and the need to ensure that necessary changes are made to exceptions to protection so that they will continue to satisfy the “tripartite” test of the Berne Convention and TRIPS Agreements, even when applied in the digital world.

the European Union E-Commerce Directive identify certain functions performed by service providers – including carriage, caching and hosting – in the course of which they may commit, or become responsible for, infringing activities. It specifies the circumstances under which service providers may avoid monetary liability for these infringements, but preserves the authority of national courts to issue injunctions against service providers to terminate or prevent infringements.

The press reports on the forthcoming Bill also state that it covers issues like “copyright,” and IIPA looks forward to reviewing and commenting on those proposals (IIPA understands that once the Bill is tabled, the public will be given another opportunity to comment).

## **Counterfeit Goods Act Slowly Being Implemented**

The Counterfeit Goods Act (CGA) entered into force in 1999, but as of February 2002, there has not been a single prosecution or case filed using the Act. The government has begun the process of implementing the Act by appointing 22 inspectors and setting aside three depots to store the goods seized under the CGA. (The three depots are in Johannesburg, Durban, and Port Elizabeth, while Cape Town still does not have a depot.) Amendments passed in October 2001 reportedly removed the requirement of having to apply to the High Court for confirmation of raids which were done under the authority of a search warrant. The government has been made aware of the industry’s desire for swift implementation.<sup>25</sup> Under the Act, copyright pirates charged with trading in counterfeit goods face penalties of R5,000 (US\$435) per infringing item or, alternatively, a prison term of up to three years per infringing article.

## **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 during the first eleven months of 2001 \$475.8 million of products into the United States without duty (representing 11.4% of its total imports into the U.S.).<sup>26</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>25</sup> The inspectors appointed under the auspices of the Legal Services unit of the South African Police force have enlisted industry to conduct several trainings. One of these occurred in October 2000, and more occurred in six major cities during April and May 2001. Not only were the Department of Trade and Industry inspectors trained, but also the vast majority of the SAPs commercial crime branch (the police), certain prosecutors, customs officials and depot managers. Over 500 officials in total attended the trainings.

<sup>26</sup> By contrast, in 2000, South Africa imported \$583.2 million of products into the United States without duty (13.9% of its total imports into the U.S.).