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South Africa's Movie Piracy Challenges

Keywords

Piracy, Copyright, Copyright protection, International Intellectual Property Alliance ("IIPA")

South Africa's Move Piracy Challenge

By Matilda Bilstein¹

South Africa faces many challenges in the areas of copyright protection and enforcement, especially in combating movie piracy. According to the International Intellectual Property Alliance (“IIPA”),² South Africa fails to reach the mandated levels of copyright protection under the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) of the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”)³, especially regarding enforcement.⁴ South Africa is a lucrative market for counterfeit goods due to several key factors: its relatively high per-capita GDP compared to other countries in the region; its high levels of imported western media, technology, and lifestyles; its under-resourced law enforcement agencies; and its high unemployment rate.⁵ In 2006, pirated movie sales accounted for 60% percent of South Africa’s DVD market.⁶ This cost the South African film industry an

annual R500 million, approximately \$65 million.⁷ The South African film industry loses approximately R50 (\$6.20) in local currency for every fake DVD sold on the street.⁸ While South Africa’s local movie industries suffer great revenue losses due to piracy, initiatives by private organizations in conjunction with law enforcement officials for stronger enforcement of intellectual property protection will provide great benefits to both the foreign and domestic film industries. Part I of this article will discuss South Africa’s current levels of and societal views on piracy. Part II will discuss South Africa’s awareness, enforcement and remedial initiatives. Part III will discuss current changes in legislation. Lastly, Part IV will discuss the benefits of strong copyright enforcement for the South African film industry.

I. South Africa’s Piracy Levels and Societal Views

The current invasion of pirated DVDs, especially of movies not legitimately available on DVDs or in theaters anywhere else in the world, accounted for over 50% of the pirated South African market in 2005.⁹ Before 2001, pirated DVDs accounted for 10% of the pirated South African market.¹⁰ According to the South African Federation Against Copyright Theft (SAFACT),

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2. IIPA is a private sector coalition of trade associations representing United States based copyright industries working to improve international protection and enforcement of copyrighted materials.

3. From 1948 to 1994, the General Agreement on Tariffs and Trade (GATT) regulated world trade and presided over periods that saw some of the highest growth rates in international commerce. The Uruguay Round of GATT led to various international agreements, including the TRIPS agreement, and created the World Trade Organization. See World Trade Organization, *Roots: From Havana to Marrakesh*, available at http://www.wto.org/trade_resources/history/wto/roots.htm.

4. International Intellectual Property Alliance, *Filing of the International Intellectual Property Alliance (IIPA) Re: African Growth and Opportunity Act Implementation Subcommittee of the Trade Policy Staff Committee; Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act*, 74 Fed. Reg. 48622-23, at 5 (Oct. 22, 2007), <http://www.iipa.com/pdf/IIPAAGOAFilingtoUSTRfinal10222007.pdf>.

5. South African Federation Against Copyright Theft, *Piracy in South Africa*, http://www.safact.co.za/piracy_facts.htm (last visited Sept. 7, 2009).

6. Bhavna Sookha, “Piracy costing SA industries R50m annually,” Daily News (November 22, 2006); http://www.iol.co.za/index.php?art_id=vn20061122095246188C185140&click_id=13&set_id=1; accessed September 7, 2009.

7. SouthAfrica.info, *Fighting Fake DVDs – with Fakes*, May 19, 2006, http://www.southafrica.info/ess_info/sa_glance/media/dvd-piracy-190506.htm. See also Bhavna Sookha, *Piracy Costing SA Industries R50m Annually*, Daily News, Nov. 22, 2006, http://www.iol.co.za/index.php?art_id=vn20061122095246188C185140&click_id=13&set_id=1 (discussing how legitimate video and DVD rental stores, overwhelmed by the amount of piracy, are now being accused of dealing in pirated products).

8. Tonight, *DVD Piracy ‘is not cool’*, June 10, 2009, <http://www.tonight.co.za/index.php?fSectionId=347&fArticleId=5029544>. See also Joe Karaganis, Program Director, Media, Technology and Culture, Social Science Research Council in *Beyond TRIPS: The Evolving Law of International Enforcement of Intellectual Property*, Panel 2 – American Efforts to Strengthen International IP Enforcement, available at <http://www.wcl.american.edu/pijip/go/events/beyond-trips> (discussing the disagreement on whether losses can be measured and the problems regarding the delegitimation of some industries and much of the research concerning losses is unnecessarily proprietary).

9. South African Federation Against Copyright Theft, *Piracy in South Africa*, http://www.safact.co.za/piracy_facts.htm (last visited September 7, 2009).

10. *Id.*

a local industry-driven enforcement group, this level of piracy equates to a loss of approximately 3 million unit sales.¹¹ In 2004, South Africa had an estimated trade loss of \$35 million due to motion film copyright piracy alone.¹²

South African film distributors and cinemas are not the only businesses feeling the effects of pirated movies.¹³ Video shop owners complain about how they cannot keep “customers happy if customers can easily get a movie title that has not even appeared in cinemas, for R100 (\$16.59), across the road.”¹⁴ According to SAFACT Chairperson Fay Amaral, despite that 50% of DVDs in South Africa were pirated in 2005, there were only 76 convictions.¹⁵ While enforcement raids have increased and almost half a million pirated DVDs have been taken off the streets, this figure represents only 10% of the illegal products actually in circulation.¹⁶ Involvement with the pirated movie business remains lucrative, with insubstantial risk of any repercussions.¹⁷ Since South Africans generally do not understand what intellectual property rights entail, people seem to disregard the fact that it is wrong to buy counterfeit movies and “feel they would rather see a man selling pirate DVDs on the street than breaking into their houses.”¹⁸

SAFACT emphasizes that pirating of movies causes considerable damage to the viability and sustainability of thousands of jobs in South Africa at a time when there is increased pressure on businesses due to the economic slowdown.¹⁹ For example, “in the US, it only takes six rentals for a video shop, with the same customer base . . . to get back the money it’s been

purchased with. But it takes . . . 40 times in South Africa.”²⁰ But some vendors, desperate for a job, did “not think it would be a problem selling pirated DVDs because they are making money for food and supporting their families.”²¹

II. Implementing Awareness, Enforcement, and Remedial Initiatives

SAFACT is in almost daily contact with various law enforcement agencies involved in combating piracy.²² The organization is currently implementing awareness campaigns to reduce the demand for pirated movies and increase the involvement of the general population in combating this crime.²³ In 2006, following the success of the 2005 “Stop Piracy, Stop Crime” television and radio campaign, SAFACT launched smaller targeted campaigns.²⁴ These initiatives include: (1) the distribution of anti-piracy material at major areas where street vendors selling pirated products proliferated; (2) the launch of the “Fake Fakes” campaign, involving the sale of DVDs containing anti-piracy messages disguised as newly released films, with the proceeds donated to the Anti-Piracy Foundation; and (3) the establishment of Local Anti-Piracy forums, which brought together parties like video rental and retail outlets, cinemas and the police on a regular basis to discuss piracy problems in their immediate areas.²⁵

Video piracy’s devastating effect on South Africa’s economy has led local copyright owners to mobilize and take a stand against piracy.²⁶ For example, producers of the recent domestic film *White Wedding* created a

20. Mzolisi Witbooi, *Pirate DVDs Dealing a Huge Blow to Cinemas*, *The Cape Argus*, Jan. 14, 2005, http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20050114110948303C405481.

21. Janine du Plessis, *Pirated DVD Sellers Dealt Crushing Blow*, *The Pretoria News*, Oct. 6, 2006, <http://www.thestar.co.za/index.php?fSectionId=&fArticleId=vn20061006042719185C235907>.

22. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 520 (Feb. 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf>.

23. South African Federation Against Copyright Theft, *Awareness Campaigns*, http://www.safact.co.za/media_awareness.htm (last visited Sept. 7, 2009).

24. *Id.*

25. *Id.* See also SouthAfrica.info, *Fighting Fake DVDs – with Fakes*, May 19, 2006, http://www.southafrica.info/ess_info/sa_glance/media/dvd-piracy-190506.htm (describing how the “Fake Fakes” campaign combats the problem of copyright theft, disrupts the piracy market, and educates consumers about piracy).

26. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 520 (Feb. 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf> (citing *First Anti-Piracy Concert to Kick Off in Joburg*, at <http://www.bizcommunity.com/Article/196/40/12012.html>).

11. *Id.*

12. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 521 (Feb. 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf>.

13. Mzolisi Witbooi, *Pirate DVDs Dealing a Huge Blow to Cinemas*, *The Cape Argus*, Jan. 14, 2005, http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20050114110948303C405481.

14. *Id.*

15. Barbara Cole, *DVD Piracy Hard to Stop*, *The Daily News*, June 22, 2005, http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20050622092440567C697461.

16. See *id.*, (discussing a special initiative, Business Action to Stop Counterfeit and Piracy (BASCAP), launched by the International Chamber of Commerce to fight movie piracy, which is costing companies around the world \$600 billion a year).

17. *Id.*

18. *Id.*

19. South African Federation Against Copyright Theft, *Consumers Getting Ripped off Twice with Fake Mr. Bones 2*, Dec. 12, 2008, http://www.safact.co.za/press/PR_20081212.htm.

series of public service announcements against movie piracy.²⁷ In the announcements, the co-writers and co-stars of *White Wedding*, Kenneth Nkosi and Rapulana Seiphemo, announced that people buying pirated DVDs were effectively stealing from them and harming not only their business but also the local film industry.²⁸

Moreover, on December 15, 2005, the National Prosecuting Authority (South Africa's Specialized Commercial Crime Courts) and SAFACT signed a Memorandum of Understanding, which established relationships with local law enforcement agencies to create judicial capacity for the effective prosecution of piracy offenses, particularly films.²⁹ In order to fulfill this objective, SAFACT is currently training state employees to engage in intellectual property protection.³⁰ Specific training included: (1) product identification workshops to differentiate between genuine and pirated versions of film for members of the police force and the prosecution service; (2) training for customs officials at points of entry to help recognize counterfeit products; and (3) in-depth legal workshops for South African prosecutors, held in conjunction with the Department of Trade and Industry and the National Prosecuting Authority.³¹ Because South Africans purchase pirated DVDs off the street,³² the South African Police Service ("SAPS") and the South African Revenue Service ("SARS") have joined SAFACT in conducting raids, inspections, and search and seizure operations of markets selling and distributing pirated products.³³ In 2007 alone, there were 609 raids, which resulted in the confiscation of 219,926 DVDs and DVD-Rs.³⁴ In 2008, approximately 175,699 DVDs and DVD-Rs were confiscated by the first half of the

year.³⁵ Between June 2008 and February 2009, the total number of pirated films seized was over 550,000, with a value of over R27.5 million (\$2,768,563.22), which deprived legitimate business of R49 million (\$4,933,076.28).³⁶

Although seizures of pirated films have increased, with a greater number of arrests and criminal convictions due to the increased commitment by law enforcement agencies, enforcement problems remain in South African courts.³⁷ While an increasing number of cases are being referred to either the High Courts or the Specialized Commercial Crime Courts that have been established to combat white-collar crimes³⁸, prosecutors and judges in the non-specialized courts fail to view piracy as a serious crime.³⁹ Under the Berne Convention, existence of a copyright and copyright ownership by the claimant is presumed unless the defendant alleges facts, which place doubt on the claimant's ownership.⁴⁰ In South Africa, defendants have been able to reverse the burden of proving copyright ownership simply by bringing up the issue of ownership in judicial proceedings, which is not in line with the Berne Convention presumption.⁴¹

Another major issue with enforcing copyright is that monetary remedies are insufficient to deter infringement.⁴² South Africa's "copyright laws should provide (and courts should routinely award) financial remedies that make piracy too financially risky" because remedies that merely deprive the pirate of profits or even

35. South African Federation Against Copyright Theft, *Content Seizure Analysis Q1 & Q2 2008*, http://www.safact.co.za/images/Content_Seizure_Analysis_Q2_2008.pdf.

36. South African Federation Against Copyright Theft, *Multi Million Rand Haul of Pirated Films*, Feb. 15, 2009, http://www.safact.co.za/press/PR_20090215.htm.

37. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 523 (February 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf>.

38. Republic of South Africa Department of Justice and Constitutional Development, *Press Statement: Opening of the Johannesburg Specialised Commercial Crime Court*, January 24, 2003, available at http://www.justice.gov.za/m_statements/2003/2003_01_24bac_statement.htm.

39. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 523 (February 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf>.

40. *Id.* at 525.

41. *Id.* at 525 ("Expressing in the law a presumption of ownership is needed to (sic) satisfy South Africa's international obligations and a presumption of subsistence of copyright will greatly reduce the procedural burdens on rights holders in proving their cases.")

42. Mark Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L.J. 79, 139 (2008).

27. Tonight, *DVD Piracy 'is Not Cool'*, June 10, 2009, <http://www.tonight.co.za/index.php?fSectionId=347&fArticleId=5029544>.

28. *Id.*

29. *Enforcement Partners*, SAFACT, http://www.safact.co.za/about_enforcement.htm; accessed September 7, 2009.

30. *Id.*

31. *Id.*

32. My Broadband, *Broadband and Piracy*, Oct. 7, 2009, <http://mybroadband.co.za/news/Internet/9911.html>. See also South African Federation Against Copyright Theft, *Statistics 2008*, http://www.safact.co.za/activities_2008.htm, available at http://www.safact.co.za/images/Actions_Analysis_Q1_Q2_2008.pdf (last visited Sept. 7, 2009) (demonstrating that most raids occur on street vendors and flea markets, thus showing copyright infringement consists of pirated DVDs).

33. South African Federation Against Copyright Theft, *Multi Million Rand Haul of Pirated Films*, Feb. 15, 2009, http://www.safact.co.za/press/PR_20090215.htm.

34. South African Federation Against Copyright Theft, *SAFACT Statistics Archives: Summary Statistics 1997-2007*, http://www.safact.co.za/statistics_archives.htm (last visited Sept. 7, 2009).

of gross remedies are sometimes ineffective deterrents.⁴³ However, even after winning a case and being awarded costs, the chances of collecting from a defendant are almost nonexistent. Following trial, the defendant will likely dispose of or transfer their assets and leave the country, thus leaving the right-holder without recourse to collect the damages awarded in the judgment.⁴⁴

III. Changing Current Copyright Legislation

Because South Africa is a party to most international conventions protecting intellectual property, it is determined to uphold its commitments to the World Trade Organization and to support the rights of local and foreign companies.⁴⁵ South Africa enacted the Intellectual Property Laws Amendment Act and the Counterfeit Goods Act (“CGA”) to ensure compliance with the TRIPS Agreement.⁴⁶ However, the Intellectual Property Alliance (“IIPA”) still has many recommendations that the South African government needs to implement in order to comply with TRIPS, such as:

(1) Reinstating police powers under the CGA: The IIPA recommends amending the CGA to clarify and simplify police procedures; ease time limits that do not allow cases to be reasonably prepared for the courts; reinstate powers of arrest; and include complainant’s right to submit evidence of economic damages for consideration in sentencing.

(2) Running Ex Officio Raids: The IIPA states that current on the spot raids amount to the cost of doing business.

(3) Adopting copyright legislation that complies with TRIPS and joining the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: The IIPA urges South Africa to enact copyright legislation that would improve the enforcement landscape and bring the national law in compliance with the TRIPS Agreement.⁴⁷ Others believe that “simply honoring international obligations is not enough” and in order to benefit local creators, South Africa’s intellectual

property rights laws ought to include features beyond the minimum TRIPS requirements.⁴⁸ For example, end-user piracy (the copying of software without obtaining a license⁴⁹) is also not a criminal offense in South Africa, 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.⁵⁰ The IIPA also recommends that other modernizing measures should be taken in addition to this legislation, including adequate protection of copyright materials on the Internet, such as notice and takedown measures and incentives for Internet service providers to cooperate in fighting infringement.⁵¹

(4) Developing joint intellectual property rights enforcement public awareness campaigns: The South African Government should work with copyright industries to inform the public on the detrimental effects of piracy and illegal downloading on South Africa’s domestic creative community.⁵²

IV. Benefits of Strong Copyright Protection

Since the implementation of the TRIPS agreement, there have been two major views regarding intellectual property protection for developing countries. First, that intellectual property protection is necessary for the advancement of developing countries. Second, that current international intellectual property laws do not properly serve developing countries’ needs.⁵³ The arguments supporting the first view states that strong protection “is essential to the successful operation of a system that promotes global innovation” because the economic nature of intellectual property strengthens the incentive for domestic innovation and creativity, and encourages foreign direct investment, thus promoting a country’s development.⁵⁴

The primary advantages for a film industry with a strong copyright system are that it:

(1) decentralizes and widely distributes control

43. *Id.* at 140.

44. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 523 (February 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf>.

45. South African Federation Against Copyright Theft, *Anti-Piracy Legislation in South Africa*, www.safact.co.za/piracy_legislation.htm (last visited Sept. 7, 2009).

46. *Id.*

47. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 520 (February 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf>.

48. Mark Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L.J. 79, 139 (2008).

49. <http://www.corel.com/servlet/Satellite/us/en/Content/1152796558890>

50. International Intellectual Property Alliance, *IIPA 2007 Special 301 Report Special Mention South Africa*, at 524 (February 12, 2007), <http://www.iipa.com/rbc/2007/2007SPEC301SOUTHAFRICA.pdf>.

51. *Id.* at 520-21.

52. *Id.* at 520-21.

53. Lauren Loew, *Creative Industries in Developing Countries and Intellectual Property Protection*, 9 Vand. J. Ent. & Tech. L. 171, 179-80 (2006).

54. *Id.* at 180.

over decisions about producing and paying for creative works, making it more likely to foster a popular, commercially successful industry;

(2) vests ownership in the original creator of the work, with the resulting independence and control providing greater economic and creative opportunities; and,

(3) enables creators and their collaborators in the film industry to use their own resources to finance their own creativity.⁵⁵

“Intellectual property protection benefits indigenous creativity in developing countries,” and the South Africa’s local film industry is an example of the indigenous creativity argument that intellectual property protection can assist countries escape lesser-developed status.⁵⁶

The alternative suggestion, made by those against imposing the current system of intellectual property protection on developing countries, is “that piracy helps lay the foundation for a developing country’s infrastructure, and, once in place, the developed infrastructure enables the developing country to benefit from increased protection.”⁵⁷ Piracy permits access to the technology needed for growth at low prices, develops critical skills in a developing country’s workforce, earns foreign exchange, produces and mobilizes domestic capital, and provides employment and cheaper products for the population.⁵⁸ Piracy, however, is one of the major problems, along with a host of infrastructure problems, which hinder indigenous creativity. Since almost all African countries have a piracy level over 25%, with some estimates reaching 85% to 90%, artists are hesitant to create new works.⁵⁹ Lack of effective enforcement against piracy hurts local creators and the development of local creative clusters since piracy:

deprives creators and legitimate distributors of sales, and it also creates a number of other deficiencies that impeded the development of local creative clusters, including preventing creators from securing capital to finance their work, pushing the surviving movie industry

to developed countries, and undermining local trade.⁶⁰ Thus, “a commercial industry that supports the creation of mass market films, books, and recorded music has little prospect of developing without its copyright and its enforcement.”⁶¹

Strong, effective copyright enforcement is the institution that best serves the basis for the development of South Africa’s commercial film industry.⁶² Some policymakers in developing countries question the value of strong copyright since it will inevitably displace workers in industries that involve piracy.⁶³ However, when the discussion is framed as a trade-off between local jobs and greater profits for foreign movie studios, it disregards local South African filmmakers, whose efforts will benefit the local economy and culture if protected by copyright.⁶⁴ Because the works of foreign movie companies will still be produced, developing markets with high rates of piracy, such as South Africa, are flooded with pirated foreign works “subsidized” by profits from foreign consumers.⁶⁵

The new business generated by greater domestic protection of copyright is likely to benefit local creators and creative industries the most because without effective copyright protection, the market for local creative works in less-developed countries is likely to be undermined by pirated foreign works.⁶⁶ Additionally, copyright enforcement is likely to generate additional local jobs that compensate for any job losses in piracy industries because it gives talented, creative people the opportunity to remain in their native countries rather than fleeing to more hospitable business climates.⁶⁷ Furthermore, even those involved in the piracy industries will be able to redeploy their skills to more creative, higher-paying work in legitimate copyright-based industries. They can thus move from being adversaries to business partners of local creators, creating a win-win situation for their home countries.⁶⁸

South Africa will reap financial and cultural benefits from increasing enforcement against its current pervasive levels of movie piracy. Foreign movie

55. Mark Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L.J. 79, 119 (2008).

56. Lauren Loew, *Creative Industries in Developing Countries and Intellectual Property Protection*, 9 Vand. J. Ent. & Tech. L. 171, 181 (2006).

57. *Id.* at 183.

58. Dru Brenner-Beck, *Do As I Say, Not As I Did*, 11 UCLA Pac. Basin L.J. 84, 102 (1992).

59. Lauren Loew, *Creative Industries in Developing Countries and Intellectual Property Protection*, 9 Vand. J. Ent. & Tech. L. 171, 182 (2006).

60. Mark Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L.J. 79, 127 (2008).

61. *Id.* at 119.

62. *Id.* at 119.

63. *Id.* at 120-121.

64. *Id.* at 120-121.

65. *Id.* at 121.

66. *Id.* at 121.

67. *Id.* at 121.

68. *Id.* at 122.

companies will be encouraged to invest in South Africa's film industry, domestic filmmakers and producers will be able to protect their current movie projects, and the South African film industry as a whole will benefit from the ingenuity that copyright protection incentivizes.