

# SOUTH AFRICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR return South Africa to the Watch List in 2018.<sup>1</sup>

**Executive Summary:** As an important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region. It is now more important than ever to maintain and expand proper incentives for investment in the creation of original material—of motion pictures, music, video games, and books and journals in all formats. New technologies for distribution of cultural materials provide exciting opportunities for growth of the copyright industries and all creators. To capture this opportunity, it is essential that right holders enjoy, in law and practice, exclusive rights that enable them to securely disseminate their goods and develop new legitimate services. South Africa's government has stated its commitment to protecting intellectual property and its desire to bring its laws into compliance with international treaties and commitments. Indeed, in 2018 South Africa will host the second WIPO "Respect for IP" international conference. However, since 2015 South Africa has embarked on a project to update and amend its Copyright Act which resulted in three fundamentally problematic bills—the first a Copyright Amendment Bill in 2015, followed by a "Performer's Protection Amendment Bill," and in May 2017 a revised version of the 2015 Copyright Amendment Bill. The 2017 Bill raises many concerns for the content industries, and moves South Africa further away from international norms, rather than into compliance with the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) which South Africa signed in 1997 but has yet to ratify or implement. Moreover, it will undermine the potential of the modern marketplace because it fails to establish a clear legal framework—particularly in the digital arena where the potential for growth is most evident. Many of these defects stem from an approach that focuses on government interference in the distribution of revenue from licensing, rather than on ensuring the vibrancy of a free market in creative materials. Considerable work remains to make this Bill acceptable, and the full extent of the clarifications needed to establish a robust system of copyright incentives through amendments to the Copyright Act go beyond those raised in this report. The Bill would benefit from revision, not only to reflect concerns from all stakeholders, but also to reduce ambiguity and thereby establish greater certainty in the law for right holders and users alike. Considering the importance of the task of modernizing South Africa's Copyright Act, and the degree of concern raised by the creative industries with the current bill, IIPA recommends that the U.S. Government send a clear message that any amendments to the Copyright Act must address the concerns of *all* interested stakeholders.

### PRIORITY ACTIONS REQUESTED IN 2018

- Significantly improve the Copyright Amendment Bill and the Performer's Protection Amendment Bill to make them compatible with international treaties and commitments.
- Engage in effective enforcement against online piracy, including by appointing cybercrime investigators and developing a cybercrime security hub recognizing copyright as a priority.
- Ratify and fully implement the WCT and WPPT.

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<sup>1</sup>For more details on South Africa's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of South Africa's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



## COPYRIGHT LAW IN SOUTH AFRICA

Amendment of South Africa's Copyright Law is needed to bring the country's laws into compliance with international treaties. In 2015, a Copyright Amendment Bill was introduced (2015 Bill), intended to effect this purpose. However, the 2015 Bill was highly unsatisfactory. Following criticism from many right holders groups, including IIPA, the 2015 Bill was tabled until further review and discussion with stakeholders. In December 2016 and May 2017, two bills, amounting to a revised version of the troubling 2015 Copyright Amendment Bill, were introduced. These revised bills, the 2016 Performers Protection Amendment Bill (Performers Bill) and the 2017 Copyright Amendment Bill (2017 Bill), address only a few of the problems in the 2015 Bill, and many of the most problematic provisions carried over to the new bills.

As drafted, many provisions of the bills lack clarity, create unnecessary burdens, or fall short of needed reforms. Major issues of immediate and primary concern to the copyright industries are the following:

- An ill-considered importation of the U.S. "fair use" rubric is appended to a proliferation of extremely broad new exceptions and limitations to copyright protection, whose effects would imperil the legitimate markets for educational texts, locally-distributed works, and online works in general.
- Licensing and regulatory mechanisms that are likely to undermine the digital marketplace by regulating the relationship between creative parties rather than providing a robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.
- Provisions for technological protection measures (TPMs) that fall short of consensus international standards regarding TPMs as set forth in the WCT and the WPPT, and as found in modern copyright statutes of many other countries.
- Unnecessary restrictions on the freedom of right holders to contract on the open market, a key factor for the healthy growth of the entire creative sector. For example, the 2017 Bill has a blanket override of contractual provisions with respect to "any acts which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act," and both bills limit assignment of rights to 25 years.
- New provisions regarding the "making available" right for record producers, which raise significant concerns because they are likely to be read far too narrowly, and would subject the making available right to a *de facto* compulsory licensing regime and a 50/50 split of revenues between producers and performers. As drafted, the provisions are incompatible with the WPPT.

Taken as a whole, these provisions are inconsistent with South Africa's international obligations, since they far exceed the degree of exceptions and limitations permitted under the WTO TRIPS Agreement and are incompatible with the WPPT. This is inconsistent with South Africa's welcome stated commitment to ratifying the WPPT.

### **2017 Copyright Amendment Bill (2017 Bill)**

Many of the proposals in the 2017 Bill suggest a mistaken assumption that there is a fixed market for works, and that the government's role is to regulate the internal relationships of the creative community rather than to incentivize new creative output. This misguided approach will instead result in a stagnation of South Africa's cultural community. Without important revisions to these provisions, South Africa will be taking a step backward in the effort to strengthen copyright incentives. South Africa would be better served by providing clear and unencumbered rights that would allow the creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats. It is important to note that the 2017 Bill is an extremely broad-reaching document. IIPA's comments do not reflect comprehensive or complete revisions of the 2017 Bill, but instead highlight some of the major concerns for the copyright sectors.

## Fair Use; Exceptions and Limitations

The 2017 Bill drastically expands the exceptions and limitations to copyright in South Africa's law. The results are confusing, will undermine the predictability needed to support a robust marketplace in copyright works, and appear to far exceed the degree of exceptions and limitations permitted under South Africa's international obligations, namely under Article 13 of the WTO TRIPS Agreement. The government should be guided by a 2016 High Court decision that firmly rejected an expansive reading of South Africa's provisions on exceptions and limitations, rejecting arguments that copyright stifled freedom of expression, and holding that copyright is a constitutionally protected property interest. The case rejected any interpretation of the "public interest" that would serve to constrain copyright protection.<sup>2</sup>

The 2015 Bill declared as "fair use" and non-infringing an indefinite number of activities and a broad range of purposes, thereby misapplying the concept of U.S.-style fair use to an unbounded regime. The 2017 Bill makes some small adjustments, and instead provides a closed list of eight broad categories of "purposes" that may be fair use. However, some of these purposes could be used to undermine the development of legitimate markets, such as the proposed fair use purpose of "expanding access for underserved populations," which, in addition to being unclear, could be used to generate revenue from copyright protected works without the involvement of right holders. Each use under the enumerated purposes is to be evaluated using at least the four statutory factors from the U.S. fair use test. However, this is likely to be difficult to apply, as South Africa lacks the decades of legal precedent that have served to define, refine, and qualify the fair use doctrine in the United States. IIPA's members operate successfully both in the United States, the leading jurisdiction applying the fair use doctrine, and in the many other markets that do not. The relative confidence with which copyright owners and users can function within the fair use environment in the United States is a result of nearly two centuries of case law that has developed and (after codification) elaborated on the main factors to be considered; how they are to be balanced and weighed in particular cases; what presumptions ought to apply; and so forth. Without the foundation of a well-developed body of case law, South Africa's importation of the fair use doctrine seriously risks moving it out of compliance with its international obligations. Furthermore, South Africa's legal system lacks the negative consequences, such as statutory and punitive damages, that infringers face in the United States. Instead, infringers in South Africa would risk little more than deferred payment by claiming fair use, so the likelihood of misuse of the doctrine of fair use is great.

At the same time, the draft retains the "fair dealing" system that has, to date, operated in South Africa and also introduces a number of extremely broad new exceptions and limitations to copyright protection—including "scholarship, teaching and education,"—which have the potential to adversely impact the legitimate markets for educational texts, locally-distributed works, and online works in general. Taken together, these three parallel and overlapping exceptions regimes virtually guarantee an intolerable level of confusion and uncertainty about which uses of copyright works require licenses and which do not. A robust legitimate marketplace for works cannot develop in such an unpredictable environment, and may well jeopardize the existing licensing system in the country. South Africa need only look to the Canadian educational publishing market to see the effects of an ill-advised adoption of a broad and undefined exception for education. A study by PricewaterhouseCoopers (PwC) predicted "significant negative consequences" for the South African publishing industry should the fair use provision and overbroad exceptions be adopted.<sup>3</sup> The study notes that a 33% weighted average decline in sales would likely occur, with concomitant reductions in GDP, VAT, and corporate tax revenue collections. Some 89% of publishers surveyed noted that the 2017 Bill, if adopted in its current form, would negatively impact their operations, likely resulting in retrenchments and possible business closures.

In addition to the introduction of "fair use" into South African law, the following new or expanded statutory exceptions contained in the 2017 Bill are of particular concern:

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<sup>2</sup>See <http://www.saflii.org/za/cases/ZAGPJHC/2016/228.pdf>.

<sup>3</sup>See "The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry," available at <http://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>.

Section 12A(j) allows individuals to make copies for “personal uses,” while Section 12A(2) could be read to nullify any efforts to prevent the circumvention of TPMs, particularly given that the current draft amendments offer no protections for TPMs that restrict access to copyrighted material. These broad exceptions in effect allow for private copying without any remuneration for right holders, which is out of step with international norms.

Section 12A(1)(f) grants an exception for making translations for the purpose of “giving or receiving instruction.” The scope of this proposed exception could be interpreted too broadly, particularly as it allows for communication to the public, albeit for non-commercial purposes. Though the draft attempts to limit the scope by defining its purpose, it could undermine the author’s translation rights, which is a significant market for authors and their publishers, and one for which just compensation is warranted.

Section 13A provides an exception for temporary reproduction of a work “to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work which have no independent economic significance.” This provision also allows for *reformatting* an integral and essential part of a technical process, if the purpose of those copies or adaptations is to enable a transmission. Such language could hinder efforts to work with online intermediaries to put a stop to piracy. If any such exception is to be included, IIPA recommends that the word “lawful” be replaced by “authorized,” so that this provision meets its principal objective (ensuring that incidental copies made in the course of a licensed use does not give rise to separate liability) without frustrating enforcement efforts where the “incidental” reproduction within the jurisdiction of South Africa is the only justiciable act in a claim against an unauthorized transmission.

Section 13B permits the copying of works, recordings, and broadcasts for educational purposes with very few limitations. Subsection 13B(4) on open access of “scientific and other contributions” is overreaching and will likely undermine the rights of authors and publishers, and also deny authors academic freedom. Subsection 13B(5) specifically authorizes the copying of entire textbooks under certain conditions, even those that are available for authorized purchase or licensing, if the price is deemed to be not “reasonably related to that normally charged in the country for comparable works.” The impact of these provisions on normal exploitation of works for educational markets is likely to far exceed what is permitted under international standards.

Section 19D provides an exception for persons with disabilities, as defined earlier in the draft amendments to mean essentially disabilities that relate to the ability to read books. This would benefit from tighter drafting. While South Africa is not a signatory to the Marrakesh VIP Treaty, it would be prudent to bring the provision in line with the Treaty by including the requirement that the exception may apply only to authorized entities.

### **Making Available Right and Obstacles to Private Licensing**

The proposed amendment to Section 9(e) confirms that sound recording producers have the exclusive making available right set out in WPPT Article 14. This is a positive change, as this right underpins the digital music industry. However, the wording of draft Section 9(e) omits an express reference to “public performance,” as provided for in the WPPT definition of “communication to the public,”—communication to the public “includes making the sounds or representations of sounds fixed in a phonogram audible to the public.” To avoid any misunderstanding that the amended act is removing public performance from the existing Section 9(e) of the Act, we submit that the new Section 9(e) should expressly refer to public performance. (Existing Section 9(e) in the Copyright Act provides sound recording producers with an exclusive right of communication to the public.)

The 2017 Bill makes several changes to the law regarding the communication to the public and broadcast of works that could excessively interfere with private licensing, to the detriment of the operation of the digital marketplace. The provisions of the proposed new Section 9A of the 2017 Bill are extremely concerning, and are inconsistent with WPPT and international practices. The effect of Section 9A would be to downgrade the existing full exclusive rights, in existing Section 9(c) and (d), and the amended communication to the public and making available right in proposed Section 9(e), to mere remuneration rights, render contractual negotiations unworkable, undermine

the economics of the digital music economy, and introduce a sweeping statutory licensing regime that will negatively impact investment in new production.

For example, proposed amended Section 9A(1)(aA)-(aE) has the effect of downgrading the right of communication to the public from an exclusive right to a mere right of remuneration, by removing the ability of right holders to choose whether or not to license. It merely allows them to negotiate the royalty for a license, and if this fails, the newly constituted Tribunal may adjudicate the amount (a *de facto* compulsory license). It also establishes a requirement for advance notice and approval for the broadcast of sound recordings, introducing unnecessary complications to the right holders/broadcaster relationship, and confusingly seems to permit users to use works without first entering into a license (Section 9A(aB)). This is particularly troublesome because existing South African law (Section 9e) represents a global best practice in transposition of the WPPT standards, providing that the communication to the public right is an exclusive right. Limiting this exclusive right is counter to the modernizing aims of the bill. Exclusive rights enable record companies or their collective management organizations (CMOs) to negotiate fair commercial terms for the public performance and broadcast of sound recordings.

Most troubling, though, is the effect that these provisions would have on the exclusive making available right, which would fall within the sweeping statutory licensing scheme in Section 9A by reason of Section 9(e)'s grouping together the distinct rights of communication to the public and making available to the public.

The making available to the public right underpins the licensing of digital services that offer any "interactive" uses of music, i.e. any making available of music other than purely "linear" communications to the public where the user has no control over the music that is communicated by the service. (Linear transmissions are covered by the communication to the public right.) WPPT Article 14 provides that the making available right is exclusive, and does not provide any option for contracting parties to provide lesser protection, such as by making the right a remuneration right as proposed by Section 9A(1)(a)(iii).

In practice, the exclusive right enables right holders to enter into bespoke licensing agreements with a wide range of services of terms negotiated between the right holders and the service. This right has enabled the recording industry to licence some 350 digital services globally, and 14 in South Africa alone.

Downgrading the making available right to a mere remuneration right would be seriously detrimental to the music market in South Africa, likely reducing revenues for artists and producers alike, and possibly rendering the economics of a digital music market in South Africa wholly unworkable. At a minimum, it should be made clear that the provisions of Section 9A do not apply to the making available right, to be consistent with the international treaties and international practice.

Confusingly, Section 9A(2)(a) provides that royalties from communications to the public (and seemingly also from making available to the public, as a result of the two rights being grouped together in Section 9(e)) "shall be divided equally between the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust on the one hand and the performer on the other hand or between the recording company, user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust." This provision is incomprehensible, as it appears to be stating that a user would share in royalties it pays for use of the work, and brings in parties not normally relevant to the licensing of sound recordings. It is already established industry practice globally (and in South Africa) that the revenues from the public performance and broadcasting of sound recordings are shared equally between the sound recording owner (record companies) and performers. This draft provision should be revised to reflect and clarify this arrangement for public performance and broadcasting. Moreover, insofar as the section applies to revenues from the "making available" right, IIPA opposes a mandatory 50/50 split because it is contrary to international industry practice and would render the South African digital music market unviable. Both to adhere to international law and practice, and to sustain investment in the creation of new original recordings, it is essential that performers and labels be allowed to negotiate the relevant terms of their economic relationships.

To require that revenues from the making available right be shared equally between record producers and the performers would be economically unfeasible, considering that record companies cover all the costs and carry the risk of bringing new artists to market. Compulsory equal sharing of all revenues from making available to the public would remove all profit from record companies, making it economically unviable to continue to produce new recordings, and breaking the cycle of investment in artists and repertoire and therefore harming all participants in the creation of recorded music, from performers to record producers.

In addition, throughout Section 9A, the possibility of referring matters to the Intellectual Property Tribunal, which is granted the power to set the terms of license agreements between a right holder and a user, creates further government interference with the normal operation of private negotiations. While IIPA would support the role of the Tribunal with respect to licensing by collecting societies, it should have no role in private contracts between individual right holders and users.

### **Limitations on Contractual Relations**

Several new provisions in the 2017 Bill place direct limitations on contractual relations regarding copyrights, and as a result would restrict the ways that protected works could be offered for use and enjoyment in the market. These provisions place restrictions on the possible ways in which private parties can collaborate to facilitate the public's access to copyrighted works, and ultimately harm the market value of the books, films, sound recordings, video games, and other works created by South African authors. Section 22(b)(3) limits the term of an assignment to 25 years from the date of agreement. This is unnecessary and will ultimately hurt authors and artists, as, for example, it undermines record companies' ability to invest in new talent. An artist's catalogue or historic repertoire is an important part of the revenues a record company factors into its artist agreements. Proposed Section 22(a)(1) provides that rights belonging to the State may not be assigned. Finally, proposed Section 39B renders unenforceable any contractual term either restricting acts that would not infringe copyright or renouncing rights provided in the Copyright Act. While this revision to the 2015 Bill seeks to clarify that dedication of works to the public domain is allowed, it remains confusing and limits parties' ability to contract with each other.

### **Technological Protection Measures**

Technological protection measures are vital tools for the book publishing, film, music, and video game industries in the digital era, enabling creators and right holders to offer consumers their desired content, at the time and in the manner of their choosing, while also empowering right holders to explore new markets opened up by current and emerging technologies. The 2017 Bill introduces protections for certain TPMs, but these fall short of the scope of protection that would meet the standard set forth by the WIPO Internet Treaties and the global consensus reflected in the laws of many other countries. The draft definition of "technological protection measure" in Section 1 covers only those measures that are "designed to prevent or restrict infringement of copyright work"; but the consensus global standards also cover TPMs that control access to copies of works, as reflected in the WIPO Treaties' language calling for such safeguards. The protection against unauthorized access, and not solely against infringement, is at the heart of global TPM standards. A well defined TPMs standard provides right holders with the tools necessary to combat, not just the use of illegally-obtained works, performances, or phonograms, but also the traffic in and provision of circumvention devices and services.

Section 28P of the 2017 Bill requires considerable further review and refinement. As drafted, it would allow circumvention of TPMs in order to carry out any "act permitted in terms of any exception" under the Copyright Act, which exceptions, as discussed above, are exceptionally broad. The provision further allows third parties to provide circumvention services with respect to permitted acts using circumvention devices. By taking this blanket approach, the legislation omits the careful tailoring needed to ensure that statutory exceptions to the TPMs provisions are confined to situations in which there is no alternative means for carrying out the non-infringing use, and therefore avoid undermining the basic integrity and effectiveness of the prohibition on circumvention, or on trafficking in circumvention devices or services.

## **Intellectual Property Tribunal**

Proposed amended Sections 29 through 29S would establish an Intellectual Property Tribunal, to replace the existing Copyright Tribunal. The Tribunal's purpose would purportedly be to assist the public in the transition to the new copyright regime by resolving disputes and settling the law, particularly in relation to the proposed "fair use" and other exceptions. This assumes that the Tribunal will be staffed with qualified professionals, adequately resourced, and accessible to the parties it is intended to serve, though none of these things are required by the 2017 Bill. Nor do the proposed provisions sufficiently delineate the Tribunal's scope. Indeed, the 2017 Bill adds a Schedule 2 to Section 22(3), which would allow any person to apply to the Tribunal for a license to make a translation of a work, including broadcasts or to reproduce and publish out of print additions for "instructional activities," with few limitations.

To the extent that a revitalized Tribunal is to be considered, it would best serve the South Africa market with a much more limited mission, confined to copyright matters related to collective licensing.

Another significant concern with these provisions is the lack of benchmarks for how the Intellectual Property Tribunal should determine royalties in the event of a dispute between a collective licensing body and a user. It is imperative that the legislation set out that rates should be determined with reference to the value to the user of the rights in trade and the economic value of the service provided by the collective licensing body. Licensing rates should reflect market forces based on a willing buyer and a willing seller, and not by reference to a perceived and vague "public good." If creators are not rewarded at market-related rates, even the best copyright regime in the world will not achieve its objectives.

## **Collective Management of Rights**

IIPA is concerned by the draft provision requiring one CMO for each right (proposed Section 22B(4)(b)(6)). It appears this could prohibit the existing collaboration between performers and producers in the SAMPRA CMO, which administers needle time rights on behalf of both recording artists and record labels. If that interpretation of the drafting is correct, this proposal goes against the interests of those right holders, the users (licensees), the public at large, and industry standards. Joint sound recording producer and performer organizations operate in some 40 territories. By working together on the licensing of rights, performers and producers save costs, increasing the proportion of revenues returned to them. This also reduces transaction costs to users, who can take a license from one CMO that covers both performers' and producers' rights.

Also troubling is draft Section 22D(1) which proposes that users (as well as right holders) should have control over collecting societies. There can be no possible justification for allowing users to control an entity from which they seek licenses.

As a general point, it is also vital that any rates set by the Tribunal for public performance or "needletime" should reflect the economic value of the use of recorded music in trade. This would be consistent with international good practice, which seeks to ensure that right holders are remunerated adequately for the high value of recorded music.

## **State Intervention in Private Investments and the Public Domain**

The 2017 Bill contains concerning provisions that revert rights to the government in situations that could discourage investment, while unnecessarily diminishing the public domain. The proposed Section 5(2) transfers to the state all rights in works "funded by" or made under the direction or control of the state. This broad provision could be interpreted to involve works developed with the most remote of government interaction and could reverse incentives for public-private cooperation in creative development.

## Term of Protection

At present, sound recordings only receive a term of protection of 50 years from the year in which the recording was first published. The 2017 Bill should be revised to include a proposal to extend the term of protection for sound recordings to 70 years. This will provide greater incentives for the production of sound recordings, and also provide producers with a stronger incentive to invest in the local recording industry, spurring economic growth as well as tax revenues and enabling producers to continue offering recordings to local consumers in updated and restored formats as those formats are developed.

## 2016 Performers' Protection Amendments Bill (Performers Bill)

A portion of the original 2015 Copyright Amendment Bill, now dubbed the Performers' Protection Amendments Bill, was published separately in December 2016, apparently to implement provisions of the Beijing Treaty. It is reportedly on hold until consideration of the 2017 Bill is concluded. Like the 2017 Bill, areas of the Performers' Bill cause substantial concern, for the same reasons.

In particular, Section 3A seeks to limit the term of assignment to 25 years. As discussed above, this will have a negative impact on both industry and individual authors. Section 5 would introduce a sweeping statutory licensing scheme equivalent to that proposed in Section 9A of the 2017 Bill. Section 3B introduces producers' rights in a way that is inconsistent with the existing and proposed Section 9 of the Copyright Act.

## Cybercrimes and Cybersecurity Bill

This bill aims to put in place a coherent and integrated cybersecurity legislative framework. However, the bill overreaches and grants a concerning level of discretion to the government's security cluster. For instance, the bill grants the South African Police Service and the State Security Agency far-reaching powers to investigate, search, and seize literally any electronic device, with verbally granted search warrants deemed sufficient to take action. Such a provision could invite abuse. IIPA recommends that this bill be revised to place limits on such powers, and also to add a site-blocking provision similar to successful provisions across the European Union.

The bill defines an Electronic Communication and Service Provider (ESCP) very broadly. An ESCP includes a person who provides an electronic communications service with an electronic communications service license; a financial institution; or anyone (including an entity) who processes or stores data for someone else—an ESCP is, thus, essentially "everyone." ESCPs, pursuant to the bill, would be required to keep their customers updated about cybercrime trends, but the bill does not specify the frequency of these updates nor the mode of communication that should be employed. This section also requires that companies preserve any information that may be of assistance to law enforcement agencies, including origin, destination, route, time, date, size, duration and type of service. IIPA urges policymakers to revise the bill to offer more clarity, more specificity, and less onerous requirements for online stakeholders.

## MARKET ACCESS ISSUES IN SOUTH AFRICA

**Broadcast Quota:** In 2014, the Independent Communications Authority of South Africa (ICASA) began the Review of Regulation on South African Local Content: Television and Radio. While the regulations have yet to be finalized, IIPA recommends that that market forces, rather than discriminatory quota regimes, should be used to determine programming allocation.

**Online Value-Added Tax:** In May 2014, South Africa published regulations relating to registration and payment of value-added tax on all online transactions conducted in, from, or through South Africa. Currently levied at 14%, the tax includes online selling of content such as films, TV series, games, and e-books.



## COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN SOUTH AFRICA

Creative sectors in South Africa are growing, but face the challenge of illegal competition. One group of South African artists lamented that they “came together as youths to try and make a living out of music, but these street vendors are killing our business by illegally selling pirated CDs and DVDs that we would have released.”<sup>4</sup>

**Internet Piracy:** Online piracy continues to grow in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. Easy access to pre-released film and television content through international torrent, linking and cyberlocker sites, also fuels online piracy in the country. As South Africa lacks injunctive relief for right holders, consumer access to these infringing sites continues unabated.

**Piracy Devices and Apps:** Set-top boxes and sticks pre-loaded with infringing content or apps continue to grow in popularity in South Africa. Consumers use these devices to bypass subscription services or to consume unauthorized copyrighted content such as music, movies, TV series or sporting events. These devices are most commonly sold to South African consumers online, on services such as *gumtree*. There are some companies that develop devices pre-loaded with infringing music content for use in various stores, pubs, and taverns.

**Parallel Imports:** The Copyright Law does not protect against parallel imports. As a result, the motion picture industry has sought protection under the Film and Publications Act. Industry stakeholders are in the process of developing a MOU with the Film and Publication Board, which will focus on joint cooperation on enforcement against parallel imports.

**Enforcement:** The Electronic Communications and Transactions Act (ECTA), read with the Copyright Act, is the legislation that right holders rely upon for title, site, and link take downs. The lack of cybercrime inspectors continues to limit the full potential of this legislation. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.

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<sup>4</sup>Savious Kwinika, “South Africa: Piracy Frustrates Budding Artists,” *allafrica.com* (June 9, 2014), available at <http://allafrica.com/stories/201406100742.html>.