

Chapter 3: South Africa

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Introduction

As in many other countries, media piracy in South Africa is shaped by poverty and social inequality. Low incomes—some one-third of the population lives on less than \$US1 a day—high media prices, and a pervasive advertising culture create high demand for media goods but very limited legal access for the great majority of South Africans. Inevitably, pirated cassettes, books, discs, and now digital formats fill the gap.

Although this dynamic is commonplace in low- and middle-income countries, piracy in South Africa is also the product of a distinctive history of repression, political contestation, and diplomatic tension, reaching back to the apartheid era. The cultural economy of South Africa under apartheid was marked by illicit flows of many kinds, including books, video cassettes, and audio cassettes. The economic boycotts of South Africa in the 1980s and early 1990s made cultural goods expensive and often unavailable, leading to widespread and widely tolerated copying—perhaps most prominently of school textbooks. Government censorship and book bans made illegal copying an act of political resistance and gave rise to an array of clandestine distribution networks that enabled the circulation of dissident views. Apartheid’s restrictions on the movement of blacks and the geographical concentration of services in white communities further skewed media access, ensuring that the majority black population had almost no access to legal cultural markets. Vastly unequal purchasing power between blacks and whites meant that geographical barriers to access were, in most cases, redundant.

Sixteen years after the country’s first democratic elections, the formal restrictions on movement are gone, but the racial and economic geography of media access remains largely unchanged. Movie theatres, bookstores, and music retailers continue to be located almost exclusively in the (formerly whites-only) suburbs, while most black South Africans still work, live, and seek entertainment in townships situated at the peripheries of major cities. Large chains dominate the market, supplanting the older array of independent theatres and retailers. There are, today, less than a hundred movie complexes in a country of forty-seven million, with all but a handful located in expensive shopping malls and districts.

Trends in media consumption over the past decade are mixed. Although the global market for music CDs peaked in 2004, the South African market continued to expand through 2007—reaching \$126 million before falling slightly in 2008 and 2009. The percentage of the population attending the cinema at least once a year has dropped slightly, from 9.7% in 2001 to 8.7% in

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2008—led by a sharp decline in attendance by whites (SAARF 2008).¹ This drop is usually attributed to rising ticket prices, which average 35 rand (\$5) despite a brief price war from 2005 to 2007, and to the growth in the use of DVD players, which surged from 3% of total households in 2003 to 48.8% by the end of 2008 (Euromonitor International 2009). Much of the resulting demand for DVDs is served by pirate suppliers—up to 80% according to the industry group South African Federation Against Copyright Theft (SAFACT). Of the remaining legal market, rentals make up nearly 50% of revenues, leaving a very small home-video retail market.

The end of apartheid and economic sanctions in the mid-1990s produced a rapid flow of cultural goods into the South African marketplace, including movies, books, audio and video cassettes, and music CDs. The high prices and underdeveloped retail sector for these goods, however, meant that existing grey- and black-market practices for acquiring, copying, and circulating media retained their place in South African life—especially in poor communities. Textbook piracy remained ubiquitous and, according to the International Intellectual Property Alliance (IIPA), was responsible for larger total losses than either film or music piracy throughout the 1990s and early 2000s. As a global trade in pirated cassettes and discs emerged in the 1990s, South Africa became both a destination market and a transit point for CD and, later, DVD smuggling into other African countries. Industry accounts attribute much of this traffic to disc production in Southeast Asia—especially Malaysia—but South Asian networks also played a role as Pakistani immigrants began to cater to, and cultivate, South African tastes for Bollywood films and music.

1 Among the major racial groups, only blacks showed an increase in attendance, from 4.2% to 5.2% (OMD South Africa 2009, 2002). This trend may be changing, with the major chains reporting increased attendance figures for 2009, driven by Hollywood blockbusters like *Avatar* and *Iron Man*.

Despite the large informal economy, claims of losses to piracy in South Africa were never very high. The IIPA—calculating only losses to US companies—put the figure at \$129 million in 2000, of which two-thirds was attributed to business software. Brazil, Mexico, and Russia, by comparison, regularly approached \$1 billion in the late 1990s in the same reports, representing two to four times the per capita loss. Nonetheless, South Africa loomed very large in wider debates about the intellectual property (IP) obligations of middle-income and low-income countries under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets minimum standards for IP protection for members of the World Trade Organization (WTO).²

The Medicines Dispute and Its Shadow

In the late 1990s, South Africa faced a massive HIV/AIDS crisis, with infection rates approaching 20% of the adult population. New antiretroviral drug “cocktails” had proven effective in controlling the disease but were inaccessible to the vast majority of South Africans: the standard treatments cost, on average, \$12,000 per patient per year. In 1997, President Nelson Mandela signed the South African Medicines and Medical Devices Regulatory Act, which legalized compulsory licensing for HIV/AIDS drugs and—more importantly—the parallel importation of drugs from lower-priced sources, notably India. Although many observers viewed the act as compliant with relatively vague TRIPS provisions

2 South Africa faced the challenges of compliance earlier than many other comparable countries because it agreed to comply with TRIPS as a developed country—a status based on its leadership of the Southern African Customs Union (SACU), which the WTO classified as a developed-country region. As a result, South Africa began to implement TRIPS in 1995. India, in contrast, negotiated a ten-year TRIPS implementation schedule that gave them until 2005 to comply. Signatories identified by the UN as Least Developed Countries (LDCs), such as Lesotho, also a member of the SACU, have until 2016.

Acronyms and Abbreviations

BACSA	Business Against Crime South Africa
BSA	Business Software Alliance
CGA	Counterfeit Goods Act
DTI	Department of Trade and Industry
ECT Act	Electronic Communications and Transactions Act
ESA	Entertainment Software Association
FIFA	Fédération Internationale de Football Association (International Federation of Association Football)
IFPI	International Federation of the Phonographic Industry
IIPA	International Intellectual Property Alliance
IP	intellectual property
ISP	Internet service provider
ISPA	Internet Service Providers' Association
P2P	peer-to-peer
MPAA	Motion Picture Association of America
PICC/SABDC	Print Industries Cluster Council/South African Book Development Council
RIAA	Recording Industry Association of America
RISA	Recording Industry of South Africa
SACU	Southern African Customs Union
SAFACT	Southern African Federation Against Copyright Theft
SAPS	South African Police Service
SARS	South African Revenue Service (including the South African Customs Administration)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
USAID	United States Agency for International Development
USTR	Office of the United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

on parallel importation, it set the Mandela government on a collision course with US pharmaceutical companies, which filed suit in South African court to overturn the law.³

The US government took the side of the pharmaceutical companies and brought diplomatic pressure to bear. In 1999, the Office of the US Trade Representative (USTR) placed South Africa on its Special 301 “Priority Watch List” of countries that do not provide “adequate and effective” protection of intellectual property rights, signaling strong disapproval and raising the threat of sanctions (Sell 2003). The subsequent public backlash from groups such as Oxfam and Médecins Sans Frontières, however, proved damaging to the pharmaceutical companies and embarrassing to the Clinton administration, leading to pressure for a settlement.

The conflict was defused later that year when South Africa and the United States came to a written “understanding” regarding intellectual property protection, in which South Africa backed off threats of parallel importation in return for promises of more favorable arrangements with pharmaceutical companies and an end to US trade and diplomatic pressure. The pharmaceutical companies, for their part, dropped their lawsuit. The agreement also set in motion broader discussions at the WTO about strengthening access to medicines in poor countries facing public health crises—a debate framed initially by the Doha Declaration on the TRIPS Agreement and Public Health in 2001 and later provisionally resolved in 2003 by the “Medicines Decision,” which established parallel importation rules to combat health emergencies.

For much of the next decade, the medicines dispute and its resolution overshadowed other IP conflicts with South Africa. Throughout the early 2000s, the IIPA admonished South Africa for its enforcement failures in the copyright area—notably in the context of the flood of pirated CDs and DVDs that were arriving on the market. The IIPA recommended that South Africa be placed on the Special 301 Watch List in 2001 and 2002 and the Priority Watch List in 2003. It made “special mention” of South African enforcement problems in 2005, 2006, and 2007. Wary of further conflict, the USTR refused to implement these recommendations, making South Africa the main exception in recent years to the IIPA’s otherwise considerable influence on the Special 301 process.⁴

Throughout the period, the IIPA’s major concern was optical disc piracy. In 2003, it reported a leap in DVD piracy from 10–15% to 30–35% of the home-video market. The IIPA also reported that South Africa had become “one of the world’s largest breeding grounds for DVD retail piracy”—an improbable statement given that claimed losses never exceeded \$35 million in the period.

Despite IIPA efforts to push South Africa onto the watch lists, the country figured only intermittently in industry statistical reporting. As in other countries, the Business Software

3 For a summary of the dispute and the larger public health context, see Fisher and Rigamonti (2005).

4 In 2008, the USTR accepted 84% of the IIPA’s recommendations. In 2009, it accepted 91%. For more on this, see chapter 2.

Alliance (BSA) was the most reliable engine of piracy statistics, though it is unclear whether South Africa's software piracy rate was determined from direct samples or extrapolated from regional estimates. The Motion Picture Association of America (MPAA), for its part, did not include South Africa in its 2005 survey due to the insignificant size of the local movie market, which hovered around \$50 million per year. The Entertainment Software Association (ESA) conducted several consumer surveys in the early 2000s but stopped in 2003. The Recording Industry Association of America (RIAA) has made periodic reports to the IIPA that draw on estimates provided by its local counterpart RiSA (the Recording Industry of South Africa) but has never claimed more than \$8.5 million in losses in a given year.

In the absence of statistical inputs, the IIPA's South Africa reports relied heavily on reports of seizures and police activity, on local industry groups' accounts, and on a more or less stock array of criticisms of South African law and institutional arrangements. Few of the IIPA's complaints, consequently, were unique to South Africa. Through 2007 it continued to criticize the prevalence of book and business software piracy. It reiterated the need to address delays in the court system and the financial burden placed on plaintiffs in cases involving the seizure of goods.⁵ It objected to the scope of "fair dealing" provisions in South African copyright law, the lack of criminal penalties for "end-user piracy" of software by businesses, the burden of proof on complainants to demonstrate ownership in cases against alleged copyright infringement, and various failures to "cure remaining TRIPS deficiencies"—particularly around the implementation of South Africa's 1997 Counterfeit Goods Act. The 2007 IIPA report included this warning:

The impact of piracy in South Africa is devastating for legitimate right holders, legitimate distributors, and retail businesses (sale as well as rental), so much so that local copyright owners are mobilizing to take a stand against piracy. Legitimate distributors have reduced employment levels, some rental outlets have reported year-on-year decreases in business in the region of 30%, and many rental outlets have actually closed. (IIPA 2007)

Enforcement Autopilot

Much of this rhetoric is the IIPA on autopilot. By 2008, the level of industry complaints had fallen below the IIPA's radar, and no new reports had been filed. Local industry groups present a generally positive view of the enforcement effort and government cooperation, especially regarding efforts to suppress the optical disc trade. Connections between the Department of Trade and Industry (DTI), local and national police, and industry groups have strengthened

5 Notably, the obligation of the complainant to pay the storage bill for seized goods. Such obligations are a common feature of TRIPS-era customs law and are designed to protect the rights and property of the accused.

over the past decade, and the DTI in particular has become a powerful coordinator of enforcement activities and advocate for legislative change.

The 2010 World Cup, which South Africa hosted in June and July, provided the rationale for a further enforcement push, resulting in a boom in arrests and convictions of street vendors. Much of this effort took place in the context of the wider emphasis on public order and safety surrounding the event. But it also reflected agreements with FIFA and other corporate sponsors to protect World Cup–related merchandising from the inevitable knockoffs and copies. The South African Revenue Service (SARS), which includes the customs agency, significantly increased the number of raids on areas where counterfeit sports apparel were traded and created a new unit specifically to coordinate enforcement actions with FIFA. Other enforcement agencies also stepped up their activities, putting vendors of pirate DVDs and CDs under new pressure.

Despite this uptick in government involvement, anti-piracy efforts in South Africa remain, in key respects, a US-directed enterprise, only partially taken up by local networks of cultural producers and law enforcement agencies—with the DTI a strong standout in this regard. Although there has been some mobilization on the part of South African musicians, and although US-industry proxies, like SAFACT, also represent South African film studios and publishers, enforcement discourse and policy at a national level continue to be driven by US- and multinational-funded industry associations. The evidentiary discourse is similarly one-sided. Industry reports remain the primary—and in some cases the only—documents in the South African conversation on IP policy and enforcement.

By most official accounts, South Africa has become an enforcement success story. Industry reports have documented the decline of piracy on the street and in major flea markets, especially in the main urban centers. Cooperation between law enforcement and industry is strong, and agencies like the DTI have become activists within the government for still stronger enforcement policy and practices. Our work broadly confirms this ramp up, notably against the more organized forms of pirate vending in flea markets.

We were unable to gauge, however, whether these enforcement efforts have had any impact on the overall availability of pirated media. The weight of our evidence suggests not. Street vending networks, for instance, show considerable resilience in the face of police pressure. In our surveys of several major flea markets described as recently raided or shut down, pirated goods were widely available. And as in other countries where police pressure has been brought to bear against the organized street vendor sector, we found abundant signs of the deformalization and geographical dispersion of the trade, especially—in the South African case—into low-income areas, such as the black townships. These forms of distribution are organized predominantly around neighborhood networks and house-to-house vending, which makes them very difficult to police. Geographical differences also play an important role in enforcement, with a strong concentration of police activity in the major media markets of Johannesburg and Cape Town and less attention to piracy in more remote areas.

As elsewhere, the real problem for enforcement in South Africa is the proliferation of distribution channels. To date, South African rights holders have benefited from an unusual grace period with respect to Internet piracy. Prior to 2010, connectivity in and out of the country was limited to a single undersea cable running down the west coast of Africa (the SAT3 cable), resulting in very limited bandwidth and high prices. According to the Organisation for Economic Co-operation and Development, in 2008, South Africa had only 1.35 million broadband connections, representing a 2.8% penetration rate (Muller 2009).⁶ Quality of service has been poor, and low-end broadband services have generally included sharp bandwidth caps. The uptake of peer-to-peer (P2P) services in South Africa has consequently been limited, and the few notable efforts to create local P2P services have been aggressively blocked by the recording industry association, RiSA.

Over the next few years, however, this bandwidth shortage is expected to end as new undersea cables come into service. With computers and other digital storage and playback technologies also becoming more widely available, South Africa is likely to play rapid catch-up in the global digital-media economy—in both its licit and illicit forms.

The balance of this chapter examines these dynamics in more detail, with a focus on the relationship between licit and illicit media markets in South Africa, attitudes toward piracy, the legal framework for and practices of enforcement, and the complex interactions between inequality, de facto segregation, high prices, and an increasingly globalized media environment that shape the social organization of piracy. Like the other contributions to this report, this chapter explores these issues along two primary axes: (1) the role of piracy within different media sectors, including the markets for books, movies, music, and software; and (2) the relationship of different consuming publics to piracy.

We take up the second question through a series of snapshots of the organization of piracy within different South African communities, including a survey of software use among musicians, a social geography of South African pirate markets, and a study of pirate media practices in Hanover Park, a low-income township outside Cape Town.

Sectoral Effects

Collectively, these snapshots portray an incomplete process of media globalization, in which millions of South Africans have been integrated into a globalized media culture without a corresponding expansion of access. As elsewhere in this report, the “problem” of piracy in South Africa is also the problem of high-priced, anemic legal markets, which open the door to cheap, convenient, illicit alternatives. This is not a uniform dilemma, however. It varies considerably across the copyright sector, as do its consequences, modes of enforcement, and possible solutions.

6 The roughly comparable US rate was 65% (NTIA 2010).

Books

In the late 1990s and early 2000s, book piracy in South Africa was a primary concern of the IIPA and domestic publishing industry groups, with the latter represented primarily by the Print Industries Cluster Council (PICC, now the South African Book Development Council—SABDC⁷), consisting of publishers, retailers, and other stakeholders in the book value chain. In 2001, the IIPA argued that “at least 30–50% of text[books] used countrywide are pirate photocopies.” In 2004, the PICC observed that:

copyright infringement in South Africa is not a matter—at least not yet—of the mass piracy of trade books, like the pirated editions of Harry Potter titles that have appeared internationally, but of systematic copying of various kinds in the educational sector, public sector and businesses. (PICC 2004:55–56)

Book piracy in South Africa is a legacy of the academic and cultural boycotts of the apartheid era, when large-scale copying of academic texts was condoned on university campuses (PICC 2004:55–56). Photocopying provided access to educational materials that were otherwise unaffordable due to the combination of academic sanctions, which restricted access to overseas publications, and economic sanctions, which resulted in a poor exchange rate for the South African rand that doubled or tripled prices at the local level (Haricombe and Lancaster 1995:89). State censorship also played a role. The numerous books and articles banned by the apartheid government circulated widely via photocopies and private desktop publishing (Berger 2002:532). For many opponents of the government, book copying was an act of political opposition rather than a crime.

Reported levels of book piracy dropped precipitously in the early 2000s, from \$21 million in 2000 to \$2–3 million by 2006. This was attributed to greater “copyright consciousness” among educational institutions—especially universities, which began to assert more control over the copying of course materials. IIPA reporting nonetheless kept the issue alive in its Special 301 submissions through 2007.

Local partners, such as the PICC/SABDC, provide statistics on book piracy to the IIPA, but the PICC/SABDC does not undertake systematic data collection comparable to the consumer surveys of other industry groups. The PICC’s data on South African book piracy is composed of estimates made by “local representatives and consultants” (PICC 2004). In such cases, local affiliates—book publishers and vendors—are asked to provide estimates of the scope of piracy as a percentage of the total market. Such “supply-side” methodologies have a strongly subjective dimension and have been replaced by consumer surveys as the primary research methods of other industry groups. As the practice of book copying shifts from copy

7 PICC became the SABDC in 2007. The SABDC remains a notable South African example of public-private partnership in the enforcement area, as it is jointly funded by the Department of Arts and Culture and industry stakeholders.

machines to digital files, the number of distribution channels and the scale of the resulting collections are likely to explode, rendering both methods obsolete (see chapter 1).

From an enforcement perspective, book piracy is difficult to prosecute: students and academic staff are generally shielded from liability by exemptions in the Copyright Law that allow copying for personal use or study (at least with respect to text and images).⁸ Copy shops do have liability as commercial ventures but can be hard to prosecute because they provide an on-demand service and do not hold stock. While the copying of course packs by lecturers is being brought under tighter university control, we see no evidence of a wider impact on book copying nor any research that would provide a reasonable measure of its scope. The days of course-pack and book photocopying, in any event, are clearly numbered. The sharing of large-scale digital libraries among students promises to dwarf the practice, fueled by the coming wave of cheap digital readers.

Software

Of all the industry groups, the Business Software Alliance is arguably the most entrepreneurial in its approach to reporting and local enforcement. In South Africa, as elsewhere, this role includes software-licensing audits of businesses, which frequently result in large monetary settlements. It includes the use of monetary incentives for informers, who in theory can earn up to R100,000 (\$13,000) for information that results in the successful settlement or prosecution of a company using unlicensed software (though we are aware of no actual collections of that amount). For cases related to the retailing of pirated software, the BSA has sought penalties under the 1997 Counterfeit Goods Act (CGA), which specifies up to a R5,000 (\$700) fine per illegal copy and/or imprisonment for up to three years for a first conviction (with penalties scaling upward for subsequent convictions).

After reporting steady decreases in software piracy between 1997 and 2002, the BSA changed its methodology in 2003 to include Microsoft Windows and a variety of consumer applications. It registered a fourfold increase in losses to \$119 million for that year. For 2008, the BSA claimed some \$335 million in losses—an order of magnitude larger than any other industry estimate.

Through 2009, the BSA's loss claims were based on a formula equating pirated copies with lost sales. After years of criticism of this position, the BSA in 2010 dropped its references to losses in favor of a more general assertion about the “commercial value” of unlicensed copies. This was long overdue: high software prices in South Africa combined with the availability of open-source alternatives in many software categories always made this rough equivalence implausible. As we discuss in chapter 1, software piracy plays an important role in the price-discrimination and market-building strategies of the major vendors. Vendors weigh

8 Section 12(1)(a) of South Africa's Copyright Act provides an exception for literary and artistic works for, inter alia, personal use and study provided that it is consistent with “fair dealing.” Current law does not appear to provide a basis for extending fair dealing to film and sound recordings.

the strict enforcement of licenses against the very real possibility of large-scale open-source software adoption if end-user costs rise. This prospect is made more likely in South Africa by the government's very favorable open-source policy, adopted in 2007, which tilts public procurement decisions toward open-source solutions "unless proprietary software proves to be significantly superior" (DPSA 2009). In practice, the major software vendors step very carefully around these issues and do not make full use of their abilities to enforce licenses.

In contrast to its claims of losses, BSA-reported rates of software piracy in South Africa have held nearly steady since 2002 at around 35% (after falling dramatically in the late 1990s and early 2000s). A 1% uptick in 2008 generated a number of BSA-sourced stories about a rise in piracy, but as we discussed in the first chapter of this report, we are skeptical that the BSA can reliably measure trends at this level of detail. Minor year-to-year changes are likely to be statistical noise, outweighed by uncertainty at other levels, such as the difficulty of measuring the size of the open-source market or the number of computers being used in the country.

The BSA numbers do nonetheless tell a compelling, if different, story. At 35%, South Africa has one of the lowest reported business software piracy rates in the developing world. Russia, according to the same reports, had a 67% piracy rate in 2009, Mexico 60%, and Brazil 56%. South Africa's rate was also lower than many European countries: Greece, for example, had a 58% rate, Italy 49%, Spain 42%, and France 40% (BSA/IDC 2010). In other African countries, software piracy rates routinely exceed 80%.

Still, BSA representatives continue to press home the anti-piracy message. According to former BSA-South Africa chairperson Stephan Le Roux: "Software piracy is rampant in [South Africa] and found across all business sectors, including financial services, technology and manufacturing companies. This is having an impact on their efficiency and data security and ultimately on our economy" (Mabuza 2007). Even the global economic downturn becomes a rationale for expensive software licensing in this context. As current BSA chair Alaistar de Wet creatively rationalized: "In these uncertain economic times it is vital that companies do not skip corners and use unlicensed software, as this would increase the detrimental impact on those businesses and consumers as well as the local and global economy" (Manners 2009). This is the BSA on autopilot.

Music

The South African music market is tiny, registering \$120 million in wholesale revenues in 2009, with a roughly equal split between international product and local repertoire from South Africa's vibrant music scene (IFPI 2010). It is also an unusual market in that the transition to CDs happened slowly, reflecting the impact of the country's sharp socioeconomic and racial divide on consumer technology adoption. As a result, South Africa had a sizable cassette tape market through the early 2000s, built on the legacy infrastructure of cheap radio/cassette players. According to RiSA, the South African affiliate of the International Federation of the Phonographic Industry (IFPI), cassette sales accounted for R35 million (\$5 million) as recently

as 2007—down 75% from their 1998 level but still representing a significant distribution channel in poor and rural communities because of their low price (Durbach 2008). CD sales, for their part, continued to grow through 2007, providing a rare exception to the global decline of the format since 2004 (IFPI 2010).

According to the most recent numbers on South Africa reported by the RIAA (from 2006), US losses represent a tiny percentage of the music market. RIAA claimed \$8 million in losses in 2004 and \$8.5 million in 2005. RIAA representatives note that these losses are not equivalent to retail sales but, rather, are discounted to reflect a lower-than-one “substitution rate” between pirate and licit purchases. Consistent with the other industry groups, RIAA does not reveal how it calculates this number; nor has RiSA released information about how it conducts its consumer surveys.

Newer figures supplied by RiSA reflect a shift in methods and an apparent effort to escape the difficulties of substitution effects. The new RiSA data distinguishes between the street and retail values of pirated materials. For 2009, RiSA estimated the street value of pirated music at \$6.2 million and the equivalent retail value at \$30.2 million, without speculating about where “losses” fall within that range.⁹ Of the physical product seized, RiSA reports that some 65% was local repertoire, providing one indicator of a pirate market dominated by local production rather than imports.

Although there has been very little other published information on the overall scale or impact of music piracy in South Africa, the topic has consistently attracted public attention—not least through the outreach efforts of local musicians. Following a string of news reports in 2004 and 2005 about former music greats dying in poverty, both RiSA and musicians’ groups launched new campaigns against music piracy. The most prominent of these was Operation Dudula—a short-lived anti-piracy “movement” organized by local recording artist and poet Mzwakhe Mbuli, which attracted industry support before disintegrating amidst charges of vigilantism (see later in this chapter for a fuller discussion).

Games

The Southern African Federation Against Copyright Theft represents the interests of both movie and video-game companies and is one of the few international affiliates of the US-based Entertainment Software Association. With the support of the ESA, SAFACT engaged in a relatively broad range of consumer survey research and enforcement activities in the late 1990s and early 2000s, dating back to the first reported confiscation of pirated PlayStation discs in 1998.

In 1999, SAFACT launched a widely reported “war” against video-game pirates, consisting of a series of raids on pirate vendors and distributors. Cape Town and Mitchells Plain (a low-income township) were the focus of much of this effort, with the former described as a “hub of

9 Estimates supplied by RiSA in e-mail communications, December 14, 2009.

piracy” in South Africa and the latter as the “pirate capital of South Africa” (IOL 1999). This war, at least, appears to have ended. Despite IIPA statements as recently as 2007 that “pirated entertainment software products continue to be imported from Southeast Asia, particularly Malaysia,” (IIPA 2007) no new data on entertainment software piracy has been reported for South Africa since 2001—the last year in which the ESA conducted a survey. In 2009, we could not find any pirated video games in the Noord/Plein, Bruma, or Fordsburg markets—all major flea markets in Johannesburg hosting vendors of pirated CDs and DVDs. Our conclusion—largely shared by ESA but still surprising in bandwidth-poor South Africa—is that video-game piracy has moved online and, secondarily, into informal distribution networks among friends and local gaming communities.

As in other developing countries, gamers in South Africa appear split about the ethics of such behavior. Our informal survey of discussions of game piracy on the forums of MyBroadband.co.za (a popular Internet service provider) and other sites suggests that game companies are held in significantly higher esteem by their customers than the music and movie companies, whose products, market practices, and enforcement tactics generate more consistent criticism. The combination of rapid innovation in gaming and the very slow rollout of premium consoles and gaming services in South Africa supports a more easily understood case for commercial investment, the importance of legal markets, and consequently, the protection of content. Most of the major console vendors and games publishers have simply ignored the South African market over the past two decades, treating its small size and remoteness (and the dominance of low-cost PlayStation 1 and 2 systems and games) as disincentives to entry.¹⁰ Distinct from other more fully globalized markets, such as film, this deprivation makes itself felt among high-income consumers who could otherwise afford such goods, and fuels a variety of informal forms of parallel importation. As South Africa begins to be better integrated into global gaming markets, this dynamic is producing a comparatively complex debate about piracy within gaming communities, with arguments on both sides.

Nonetheless, the realities of international pricing and domestic incomes place a practical limit on this ambivalence. As of late 2009, *Gods of War* (PlayStation 2) and *Halo 3* (Xbox 360) retailed online at R274 (\$39) and R400 (\$57) on Kalahari.net—both well above their US retail levels. Like gamers in other countries with weak domestic publishing and distribution networks, South African consumers routinely order from foreign websites that offer wider stock and

10 Among earlier-generation systems, the PlayStation 1 and PlayStation 2 dominated the South African (and wider African) market. None of the Sony systems’ major competitors, including the Nintendo 64, the Sega Saturn, the Sega Dreamcast, and the original Xbox, were launched in South Africa. The Nintendo GameCube was picked up by local distributors but inadequately supported. The Xbox 360, launched in South Africa in 2006, was the first major system to be strongly marketed contemporary with its release in high-income countries. The popular Xbox LIVE service, however, is not available at the time of writing (it is scheduled for launch in November 2010). And in contrast to the PlayStation 1 and 2, Sony has not made a serious bid for the South African market with the PlayStation 3, which was priced at \$852 on its launch in 2007.

lower prices than local retailers—even after international shipping charges. This consumer-driven parallel-import sector in game software has no real equivalent in film or music.

Movies

There are, in total, under a hundred cinemas in South Africa—an absurdly small number for a country with forty-seven million inhabitants, though not an unusual ratio.¹¹ Over the past fifteen years, two companies, Ster-Kinekor and Nu Metro, have emerged as the dominant players in film exhibition, as well as home-video and video-game licensing. In 2009, the two companies owned seventy-eight of South Africa's multiplexes, with a combined total of over seven hundred screens. The remaining cinemas are owned by a handful of much smaller companies, such as the Avalon Group, and by the few remaining single-theatre owners.

Nearly all South African multiplexes are located in casino complexes or shopping malls in the formerly whites-only suburbs of the major cities. Prior to Ster-Kinekor's launch of a new multiplex in Soweto in 2007, there were no major cinemas in the predominantly black township areas. Both price and ease of access skew audience composition toward the wealthy, white minority.

Throughout the late 1990s and early 2000s, the Ster-Kinekor/Nu Metro duopoly progressively raised movie ticket prices, with average prices reaching R35 (\$5.75) by 2005.¹² Although cinema attendance by the new black middle class grew in that period, overall, audiences slightly declined—led by a sharp 30% drop in white audiences. In 2005, competition for this shifting audience triggered a price war between the two distributors. Ster-Kinekor converted some 70% of its screens into a budget cinema chain called Ster-Kinekor Junction, dropping prices to R14 (\$2.30). Shortly after, Nu Metro dropped prices across its theater chain to R12 (roughly \$2.00) (Worsdale 2005). The price war proved costly to both firms, forcing the sale and closure of several cinemas. When it was declared over in 2007, it left a transformed market—split between high-end multiplexes charging R35–R40 (\$5–\$5.70) and budget cinemas charging R17–R18 (\$2.50). The high end is now undergoing further segmentation as Ster-Kinekor and Nu Metro convert theatres to digital and 3D projection, hoping that the new features can justify higher prices and differentiate the theatrical experience further from the growing home-video market. The handful of new 3D theatres command a premium ticket price of R60 (\$8.50).

South Africa also has a small but viable market for Bollywood movies and music, and consequently for pirated Bollywood CDs and DVDs. In the early 2000s, Bollywood piracy

11 South Africa has more screens per capita, for example, than the other main countries in this report: Brazil, Russia, and India (see chapter 1). The United States, by comparison, has nearly six thousand cinemas, or roughly eight times the number of screens per capita.

12 The value of the rand against the dollar fluctuated significantly in the latter half of the last decade, from under 6:1 in 2005 to nearly 8:1 in 2010. Where possible, we have used values appropriate to the year cited.

was widely ascribed to Pakistani syndicates, who smuggled discs into South Africa for sale in the large South Asian immigrant communities. As this report's India work has documented, these syndicates moved into the DVD trade because of opportunities created by the conflict in Kashmir, which blocked legal trade between India and Pakistan and created a large Pakistani black market for Indian film. Their production and organizational capacities, in turn, leveraged the large Pakistani diaspora, creating an infrastructure for DVD exports to South Asian communities overseas—including the roughly 1.2 million South Asians living in South Africa.¹³

Legal Bollywood exhibition, retail, and rental infrastructure emerged in South Africa in the early 2000s, notably with the growth of the small Avalon Group cinema chain and Global Bollywood Music—the licensee for Indian music distributor T-Series. But Bollywood exhibition remains a very small niche market within the already small South African film market. The most successful Bollywood release for 2008 and 2009 was *Rab Ne Bana Di Jodi*, a romantic comedy and the third-highest-grossing film in Bollywood history. In 2009, it earned just \$151,000 in South Africa, placing it 101st in revenues among releases for the year.

The Bollywood case illustrates the “chicken or the egg” dilemma for new entrants into the South African (or any other) cultural market. In the absence of legal distribution, piracy creates the audience—in this case an audience grounded in the South Asian community but growing well beyond it. But the same process undercuts opportunities for legal distribution, reinforcing the low equilibrium of South Africa's media market. Legal distribution channels, in this context, become a poor indicator of popularity. If the widespread availability of Bollywood films in the pirate marketplace is any guide, film revenue numbers significantly understate Bollywood's presence in South African media culture.

After years of ignoring piracy in their overseas markets, Bollywood studios have become more active in enforcing rights in the United States and the United Kingdom, where large South Asian populations and poor local distribution ensure active markets in pirated Indian media. But the major Bollywood studios remain disorganized in South Africa. Few have registered trademarks for protection; none (as of mid-2010) have appointed local representatives who can collaborate with South African enforcement agencies in identifying infringing goods. SAFACT, the MPAA's representative in South Africa and the primary enforcer of film rights, has no Indian membership. This lack of on-the-ground presence has a direct effect on enforcement efforts: South African police and customs routinely ignore pirated Bollywood CDs and DVDs because there is no complainant to pursue a case or—more materially—to cover the storage costs associated with seized goods as required under the Counterfeit Goods Act. For all intents and purposes, there is no enforcement of Bollywood film rights in South Africa.¹⁴

13 Malaysia is the other frequently named foreign source for Bollywood (and Hollywood) DVDs—home, like South Africa, to a large South Asian population eager for new Bollywood films.

14 In the United Kingdom and the rest of Europe, the Bollywood distribution infrastructure is more developed, and Bollywood pirates have been subject to slightly more pressure. Yash Raj Films, one of the largest Bollywood studios, has played a particularly active role in both raids and lobbying (Agence France Press 2008) and has successfully brought charges in a handful of cases.

In general, pirate DVDs become available on or near a film's official release date. Prices vary dramatically by location, reflecting socioeconomic differences in the regular clientele of the main markets. The suburban Bruma Lake market, which primarily serves a middle-class Johannesburg public, occupies the high end, with prices typically ranging between R20 and R40 (\$2.50–\$5.00) for a new release. The Noord/Plein market in the center of town serves mostly black public-transit commuters and sells DVDs within a much lower price range—generally R10 to R20 (\$1.25–\$2.50).

The range of products available at these markets also reflects differences in clientele. At the Noord/Plein market, local music, South African movies, and older international action movies predominate. At Bruma Lake, the latest international movies and not-yet-broadcast television series are the ubiquitous items. In Fordsburg, a predominantly South Asian immigrant community, Bollywood movies and music are the norm. It is easy, though possibly too simplistic, to see these differences in terms of relative privileges in access to media and in an accompanying structure of preferences. Whereas the city center offers local favorites and old standbys to the mostly working-class commuters, the Bruma market is oriented toward consumers who have more access to a globalized media culture and who anticipate products not yet released in South Africa due to the windowing strategies of film and television studios.

As elsewhere, windowing strategies are giving way to simultaneous international release dates for movies and shorter delays between theatrical and DVD releases. Such efforts undercut one of the two basic advantages of the pirate marketplace. As James Lennox, current head of SAFACT, observes:

The delayed release of movies provides an opening for pirates to sell movies and DVDs that haven't yet been released. Delayed release and window periods between cinema and video release undoubtedly create a gap, but it must be emphasized that more and more films are released theatrically in South Africa within a day or two of release in a major territory, such as the US and UK.¹⁵

For the most part, television re-broadcasts of hit American series—a favorite genre in the Bruma market—have not yet followed suit. New seasons of *Lost* and *24*, both major hits in South Africa, have typically been re-broadcast a year or more after their premieres in the United States. Subscription television channels, like M-Net, offer shorter delays—indeed this is a large part of their added value. The last two seasons of *Lost* aired on M-Net only two months after their US premieres. But for many South African consumers, even such shortened delays are sharply felt: although national release windows can be managed and staggered, corresponding efforts to time popular anticipation surrounding global media goods have largely collapsed, driven by global advertising campaigns and the Internet. Demand in South Africa, consequently, nearly always runs ahead of supply—in terms both of price and availability. In

15 Interview with James Lennox, CEO of SAFACT, 2009.

this context, pirate distribution sets the consumer standard.

Lennox and other industry representatives are aware that the inadequacy of the local distribution infrastructure cedes access and convenience to the pirates, and he points to industry efforts to address the issue:

There are too few places to access legitimate products—cinemas, video shops, and retailers—in South Africa, and this creates a space for pirates. Many people who buy from street vendors are impulse buyers, and the legitimate outlets don't always cater to them. I don't think people think, "I am going off to buy, say, *Mama Mia* from a street vendor today." They pass a vendor, browse, see it, and buy. Our members are continually endeavoring to make genuine product more accessible, including selling DVDs at garages, clothing shops, and workplace vending machines.

But Lennox is unsympathetic to the other obvious differentiator—price:

We are aware that the cost is also used as an excuse by consumers to justify buying pirated goods . . . Prices at first release date have shown a steady rate of decline [and] . . . prices of DVDs come down after the first six months so consumers need to wait six months and then can buy the original—with all the extras—at anything from R50 to R90.¹⁶

Incremental price decreases reflect the hold of the Hollywood studios on local DVD pricing but bear little connection to consumer expectations or the de facto norms of media access in South Africa. Although there will probably always be a public disinterested or patient enough to balance waiting against discounts in the market for licit goods, this model clearly doesn't address the population that has been most effectively captured by Hollywood marketing. And therefore it offers no serious alternative to the pirate market. As in other countries, the growth of broadband and other digital media infrastructure will almost certainly widen this gap between the legal and illicit models.

Piracy and South African Film

Local film industries often feel these dilemmas acutely, but it is important to put them in perspective. The South African film industry has many problems, but it is far from clear that piracy is foremost among them. Its immediate difficulty is that Hollywood movies completely dominate the South African box office: only one South African film (*District 9*) appeared in the top-fifty box office earners in 2009 and only three in 2008.¹⁷ The massive production

16 Ibid.

17 One through ten in 2009 were: *Avatar*, *Ice Age: Dawn of the Dinosaurs*, *The Proposal*, *Transformers, 2012*, *Couples Retreat*, *The Hangover*, *Up*, *Fast and Furious*, and *Harry Potter and the Half Blood Prince*. The first

and advertising leverage of Hollywood and the scarcity of screens means that many South African films never get picked up for theatrical distribution. The South African film industry, consequently, is small and fragile. Despite recent high-profile hits like *District 9*, its fate has hinged largely on publicly funded television production—and in 2009 this market collapsed when the largest source of funding, the South African Broadcasting Corporation, suffered a financial crisis that undermined its ability to commission new work or even pay existing bills. As a result, the South African film industry shrank dramatically, from 25,000 employees in 2008 to around 8,000 in 2010.

At its peak, the domestic film industry produced only a handful of feature-length films per year, and few of these reached the mainstream film circuit. *Tsotsi* and *District 9* have been the notable international successes in recent years, with *Tsotsi* winning an Oscar for best foreign language film in 2006. The great majority of South African films are lower-budget productions aimed at South African audiences. *White Wedding*, *Jerusalem*, and the popular slapstick comedies of Leon Schuster are characteristic examples. Like most Hollywood and Bollywood blockbusters, these are generally available in pirate markets at the same time as their theatrical release. *Tsotsi*, notably, was widely reported as the most pirated DVD in South Africa in 2006 (Maggs 2006).

Indignation at the piracy of South African movies has been a key ingredient of SAFACT-sponsored radio and TV anti-piracy campaigns. These campaigns commonly rely on and reinforce a nationalist approach to IP rights, blaming “unpatriotic” consumers for buying pirated South African films. The campaigns appear to have had some localized success in highly policed markets, like Bruma, where pirate DVD vendors are reluctant to display South African movies (while showing no such qualms about Hollywood movies).¹⁸

Predictably, concern about the wider failure of the market for South African film has sparked interest in other distribution models. Here, the goal of broadening the audience points less to high-tech streaming solutions—like the US-based Hulu and Netflix, which are still years away from significant penetration of the South African market—than to the low-tech appropriation of street vendor networks as distributors and retailers for DVDs. This latter model has a notable success story: the Nigerian movie industry, which has a growing presence in the South African (and more broadly, African) DVD market.¹⁹ Now one of the largest movie industries in the world in terms of the total numbers of productions (with 1,200 movies released in 2008), the Nigerian movie industry emerged in the 1990s from a context of economic collapse and,

Bollywood films on the list appear at number 99 (*Love Aaj Kal*) and number 100 (*Kambakht Ishq*). See Box Office Mojo, <http://boxofficemojo.com/intl/southafrica/yearly/>.

18 This is not universal. Local films were on prominent display at the downscale Noord/Plein market in the center of Johannesburg. The enforcement agents we spoke with do not credit street pirates with much restraint when it comes to pirating local productions, and more than one indicated that South African films are pirated as flagrantly as Hollywood and Bollywood blockbusters.

19 Nigerian films have also been extensively taken up by the South African-owned Multichoice pay-television platform and are carried via satellite across Africa on its African Magic channel.

arguably, very successful cultural protectionism—factors that combined to sharply constrain the supply of foreign films and TV during an extended period in the 1970s and 1980s.²⁰ Because there was almost no formal distribution or exhibition infrastructure in Nigeria, early domestic producers co-opted the large informal sector for distribution, selling video cassettes at very low wholesale prices to vendors for resale (Ogbor 2009; Larkin 2004).

The possible use of informal vendors as distributors of licit goods has been a topic of repeated discussion in South Africa. The major distributors of Hollywood films, represented by SAFACT, have generally rejected this approach as too complicated. According to Lennox:

There are some obstacles to this for legitimate industry players, including the need to comply with Street Trading Bylaws, paying of minimum wages, acceptable working conditions, all of which if adhered to make the “informal” trading environment ineffective. The Road Traffic Act, for instance, prohibits selling by licensed street vendors within five meters of a junction. All pirated product sold by street vendors is sold within five meters of a junction, thus exposing the employers of “legitimate” traders operating in this zone to possible prosecution.²¹

A number of local industry players, however, have stronger incentives to test the model and have attempted to overcome the obstacles cited by Lennox. Bliksem DVDs, launched in December 2009, was one such effort. Bliksem sought to create a middle ground within street vendor culture that would allow legal, affordable DVDs to be sold to Johannesburg commuters. The Bliksem model depended on arrangements with local producers and distributors who were willing to break with the pricing conventions of the international studios—a list that eventually included most of the major South African production companies. Bliksem’s prices, in turn, were set not in relation to international DVD prices or existing licensing conventions but in relation to the chief competitors for disposable income: the pirate DVD market and, Bliksem founder Ben Horowitz notes, the pre-paid cell phone “air-time” market, which sets a de facto price benchmark:

[Consumers are] buying DVDs and CDs from pirates at R10 [\$1.25] and R20 [\$2.50]. I think the commuter market, the working class market . . . walking down the street and buying from vendors, their currency is based on buying air-time for pre-paid cell phone usage (which most commuters would purchase for between R35 and

20 Nigerian cultural protectionism continues to this day. The Nigerian Broadcasting Commission recently prohibited the screening of foreign movies during prime-time television slots. See Oxford Business Group (2010:190).

21 Interview with James Lennox, CEO of SAFACT, 2009. From a legal perspective this is a weak claim: if the distributors sell wholesale to street vendors, they are not legally responsible for the street vendors’ compliance with bylaws.

R50, on average). You're either buying air-time or you're buying some other luxury item. Anything R50 [\$6.25] is super luxury. Anything over R100 is out of reach. Nobody in this market is buying home entertainment for more than R100.²²

Bliksem DVDs sold legitimate copies of South African films for between R20 (\$2.50) and R60 (\$7.50)—prices higher than those of the low-end pirate vendors but significantly cheaper than retail outlets. And it delivered a strong anti-piracy appeals to consumers in the process—a posture that won it praise from Sony Pictures and allowed it to make deals with major local distributors, such as Nu Metro. But in contrast to its major counterparts in the US and Europe (and in India), the initiative was undercapitalized, could not secure significant discounts on Hollywood content, and had no opportunity scale or refine its model. Bliksem DVDs closed in July 2010. The two structural problems associated with Hollywood dominance of developing markets—high prices and poor distribution, especially for local film—remain unaddressed. As Ferdie Gazendam, CEO of Ster-Kinekor, observed:

It's not just about putting local content onto the shelves. It's very tough to find the shops. . . . The dilemma is that we are set in our ways because of the studios we represent. When it comes to local content we need to learn different ways to get the product to the market. (Smith 2006)

Piracy on the Internet

Until the summer of 2009, South Africa was linked to the wider global Internet by a single undersea cable, with a very modest total capacity of .8 gigabytes per second. Broadband services have been correspondingly expensive and low speed. The vast majority of consumer services come with bandwidth caps in the vicinity of 3 gigabytes per month—a level easily surpassed by streaming a single high-definition movie. The quality of South African broadband services also ranks near the bottom of international surveys (Muller 2009), with most ISPs unable to guarantee consistent performance for even common video services, such as YouTube. In this context, the uptake of bandwidth-intensive P2P services in South Africa has been very limited.

The bandwidth shortage, however, is expected to ease as new undersea cables come into service. Total bandwidth in and out of South Africa should improve to 2.58 gigabytes per second in 2010 and—according to plans—to 10.5 terabytes per second in 2013 (World Wide Worx 2009). Internet stakeholders on all sides expect that this increase will bring cheaper, better broadband services. As computers, storage, and playback technologies also become more widely available, South African participation in both the licit and the illicit global digital media economies is likely to expand dramatically.

22 Interview with Ben Horowitz of Bliksem DVDs, 2009.

The bandwidth shortage has given most rights holders a respite from Internet piracy in South Africa and has kept the rate of return on optical disc enforcement relatively high. Also as a result, existing jurisprudence on Internet-based infringement is thin—as is, by most accounts, enforcement and policing expertise regarding online activity. Industry groups, however, are preparing for the inevitable. RiSA, in particular, has laid the groundwork for wider online surveillance and enforcement, including attempts to establish ISP (Internet service provider) responsibility for blocking infringing third-party content and, ultimately, infringing users. These initiatives have met with mixed reactions from ISPs, and none have been directly tested in court.

Much of this effort is framed by the 2002 Electronic Communications and Transactions (ECT) Act, which introduced a standard set of immunities and liabilities for Internet and web-based-software service providers in regard to third-party infringement. Under the act, service providers have no obligation to monitor content on their service and bear no direct responsibility for infringement facilitated by or exposed through their service. In contrast, they are required to respond to take-down notices from rights holders when those parties provide a detailed account of infringing activity utilizing their service.

In South Africa, as elsewhere, these guidelines have left a great deal of room for uncertainty about the scope of the “safe harbor” for service providers, and to date there is very little clarifying South African jurisprudence. In particular, there is currently no basis for the “contributory infringement” standard established in the United States as an outcome of the suit against the Grokster P2P service.²³ Rights-holder organizations are, however, pushing strongly in that direction. In 2008, RiSA sent notices to South Africa’s Internet Service Providers’ Association (ISPA), demanding that they block access to two recently established local BitTorrent sites, Bitfarm and Newshost, which were accused of linking to infringing content. The ISPA cooperated, but the legal basis for the request was unclear and produced a challenge. Reinhardt Buys, the lawyer representing the site owners in the two cases, argued:

There is no legal precedent, whether in case law or legislation, in South Africa or elsewhere, confirming that the hosting of torrents and NZBs [a format for retrieving Usenet posts] and the indexing of such files is unlawful or illegal. (MyBroadband 2008)

This is a narrow but accurate reading of the international record. Although a large number of BitTorrent sites outside South Africa have been shut down through legal action, none of these suits have challenged the legality of torrent search engines per se: the underlying functionality is common to all search engines (including Google, which also returns infringing torrent files in searches). Cases have turned, instead, on other criteria for establishing liability,

23 MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (2005).

such as the proportion of infringing activity on the site, profits made in the course of the activity, or the flaunting of take-down requests—all factors, for example, in the high-profile 2009 guilty verdict in the Pirate Bay case in Sweden.

But such outcomes are not clear cut. In early 2010, a similar suit against the administrator of the UK-based P2P site OiNK failed due to the lack of a clear principle of contributory infringement in UK law. Such criteria would have been similarly challenging to establish in the Bitfarm and Newshost cases, and the lenient record of most South African judges on infringement probably did not provide much reassurance. Having succeeded in blocking the sites, RiSA did not pursue further action against the site owners. In a July 2009 interview with the authors, Buys continued to argue for the non-commercial status of the sites and their inclusion under existing safe harbor provisions. The case was like “punishing the photocopying machine in a library because it might be used for photocopying books”—a resonant example in South Africa. Responding to RiSA’s claims that the sites were organized by piracy syndicates, Buys observed that “they were just kids.”

In July 2009, RiSA served a number of ISPs with blocking notices regarding two foreign websites, www.gomusic.ru and www.soundlike.com, both of which sell MP3s at prices well below those of local online music vendors.²⁴ In this case, the ISPA resisted the request and informed RiSA that the notices fell outside the scope of the ECT Act. As ISPA General Manager Ant Brooks argued:

The law does not make provision for blocking a website, especially ones that are located overseas. ISPs are not the police and cannot just block access to a website on the very thin premise that at least some of the content is infringing copyright. Otherwise this will lead to anyone from anywhere giving any reason to block access to websites. (Vecchiato 2009)

Like most safe harbor clauses, the ECT Act limits the take-down procedure to content or services hosted on the network of the service provider (MyBroadband 2009). Broader requests to block criminally infringing activity of the kind alleged against gomusic.ru must still pass through a criminal investigation and a court order.

Discussions between the ISPA, RiSA, and other rights-holder groups about curbing Internet piracy continue. RiSA has started to track downloads using content-monitoring techniques,

24 The two services priced tracks at R1.20 (\$0.15) and R0.72 (\$0.09), respectively—far less than the online music services licensed in South Africa: the Nokia Music Store, which charges R10 per track (\$1.30) and R100 per album, and RhythmMusicOnline, which charges R7 per track for local music (the iTunes Store is not available in South Africa). The sites are the latest Russian variations on the popular AllofMP3 music store, which made use of a loophole in Russian law that allowed downloads to be characterized as broadcasts, subject to a modest compulsory license fee. Recent revisions to Russian copyright law have closed this loophole, but enforcement against the services has been inconsistent.

and there are reports of ISPs threatening users with account suspension and blacklisting on the basis of alleged infringement (MyBroadband 2009). Such practices are in line with wider industry efforts to make ISPs play a stronger role in enforcing rights-holder claims, but the law surrounding such practices remains unclear and may face serious challenges in the context of South Africa’s constitutionally protected right to privacy.

Attitudes toward Piracy

In the anti-piracy struggle, legal efforts and police actions are complemented by extensive “hearts-and-minds” campaigns waged through the media. South African newspaper readers and TV audiences, in particular, are exposed to a flood of industry-generated stories about the negative effects of piracy on local artists and producers. Between 2005 and 2008, the major broadcast and newspaper outlets carried some 846 stories on media piracy—a huge number in a country with just three major media markets (see table 3.1).

Table 3.1 Media Piracy Stories, 2005–2008

	2005	2006	2007	2008
Broadcast	113	215	108	33
Print	7	34	190	146
Total	120	249	298	179

Source: Authors based on data provided by Monitoring South Africa.

Piracy Stories

Raids, seizures, the release of new industry studies, and anti-piracy activities by local artists and celebrities all generate stories and—accounting for differences in time, place, and context—overwhelmingly present the same story of artists and local entrepreneurs victimized by piracy. Metaphors of bodily harm—of piracy killing and strangling artists, of pirates as bloodsuckers and parasites—are common and constitute a virtual template for media coverage (Naidu 2007).

SAFACT, RiSA, the BSA, and other industry associations have been remarkably successful at managing this media attention and the larger media narrative on piracy. As in other countries, however, we see a significant disconnect between the media narrative and actual consumer attitudes, which show much greater diversity and widespread tolerance of piracy in many circumstances. This diversity of opinion becomes immediately apparent in the various online forums that discuss IP policy and enforcement in South Africa—such as MyBroadband.co.za—where consumer perspectives, moral ambiguities, and industry narratives around piracy are routinely discussed. It is also visible in our interviews and limited survey work, which echo

other South African studies in finding pirate practices completely normalized and integrated into daily life (Van Belle, Macdonald, and Wilson 2007). As one source observed, “You can walk into any house in Soweto and find a stack of pirate CDs and DVDs.”²⁵

Empirical data on South African attitudes toward piracy remains thin. The most recent study, a DTI-funded consumer survey on counterfeiting and piracy from 2006 (Martins and van Wyk), found that personal copying was widespread: 58.1% of respondents indicated that they copied CDs, DVDs, computer software, and/or other material for themselves; 53.5% said they did so for friends; and 40.1% said they knew of people who copied discs for the purpose of resale.²⁶

Such surveys are challenging in communities where the informal economy plays a large role. In Hanover Park, a poor neighborhood where we investigated disc piracy (discussed in detail later in this chapter), residents often drew no distinction between pirated and legal goods. Pirated movies were simply referred to as movies, or sometimes as *kwaai* (good) movies. The remoteness—both geographic and economic—of the licit markets for these goods makes the distinction literally meaningless for many residents.

Anti-piracy advertising and media campaigns do not penetrate very far in these contexts. Some respondents in our Hanover Park survey did not understand the concept of piracy, obliging the researcher to explain the term. Others justified piracy in terms of the inequality between poor South Africans and the American firms that dominate the global media trade:

Morality doesn't really play a big factor because in America they don't feel the R80 [\$10.00] that they're losing from me. They can afford it. They all live in big fancy mansions, whereas I live in a flat here in Hanover Park; and so it doesn't really matter to me what they think about me being a pirate because my circumstances are different from theirs. It's more economical to get that pirated DVD. No, I don't think piracy is a crime.

Others made reference to the powerful contradictions of living at the periphery of global film culture—subject to its attractions and social effects but largely excluded from legal access:

I know piracy is a crime, but we will go for it . . . so we can say, “I am also part of the crowd. I also watched that movie.”

Still others offered more practical rationales, such as the need to keep children off the streets and away from the ubiquitous gang culture.

25 Interview with filmmaker Peter Ndebele, 2009.

26 The study drew on a small sample of 604 respondents from metropolitan areas and large cities in four key provinces: KwaZulu-Natal, the Western Cape, Gauteng, and the Eastern Cape. The sampling was random.

Collectively, our Hanover Park interviews revealed the extent to which piracy is embedded in—and, to a degree, an enabler of—an array of social functions around media that extend well beyond entertainment. Unlike in high-income homes with more screens, computers, and living space, DVD piracy in poor neighborhoods does not typically serve private acts of consumption. Rather, it serves collective ones, organized around groups of family and friends. Pirated discs are not primarily destined for personal collections but are circulated within social networks. Access to pirated media, in these contexts, feeds practices of viewing and sharing that reinforce links across families and within communities. In a context, moreover, in which access to audiovisual media is usually limited to radio and a handful of broadcast TV channels, pirated optical discs are the closest approximation of the rich, on-demand media culture taken for granted by most high-income consumers. Piracy in this context is flexible, low risk, cheaper than a ticket to the cinema and often highly customer-oriented. As one resident noted, “people even come to my door with movies.”

Software Piracy in Music Production

Because the struggling musician is arguably the iconic figure in anti-piracy campaigns, we decided to survey some of them about their attitudes toward piracy. We opted to focus not on music piracy, however, but on the use of the software tools that have become ubiquitous in recording and production. Increasingly, musicians and producers start their careers through self production, often at home, and consequently rely heavily on sound editing and mixing software. For genres that extensively sample or transform sounds, such as much contemporary pop and hip-hop, these tools are basic to production itself—not just to post-production. The high cost and, often, lack of availability of the most common software packages create a familiar dynamic in this context. As one independent-label CEO observed to us, South African hip-hop was built on home production and pirated software.

Among hip-hop artists and producers, the software toolbox revolves around a handful of widely used titles, including Fruity Loops Studio, Reason, Sony’s ACID Pro, and Apple’s Logic Studio. None of these products are designed or manufactured in South Africa, but demo versions with limited functionality can be downloaded for free from the official sites, and full versions are available online at prices ranging from \$200 to \$499. Because the production community is relatively small and interconnected, shared production techniques and training introduce strong network effects in the choice of products. Producers tend to use software that has been “vetted” in their communities, and these choices tend to self-reinforce as producers and musicians exchange knowledge. In our interviews, open-source alternatives, such as Audacity, did not even register.

Predictably, artists and producers are much more aware of and divided on the subject of piracy than residents of Hanover Park. Hopes for commercial success among the former still pass primarily through recording contracts and CD sales. Equally predictably, artists and producers at the margins of the business (for the purposes of our survey, those who produce

professionally but who do not earn a living from it) rely heavily on pirated software for the basic infrastructure of their craft.

Twenty-eight musicians and producers responded to our questionnaire (distributed via e-mail and Facebook). Nineteen of the twenty-eight respondents described themselves as established artists—a term that reflects their own perceptions of their professionalization and notoriety in their communities. Several had recorded in professional studios. All had participated in less formal practices of recording and mixing, notably on computers at home. None of the respondents were signed to major music labels.

Because the surveyed group was small, we do not place much weight on statistical findings from the study. Nonetheless, the results were striking: of the twenty-eight artists, twenty indicated that they use at least some pirated software. Half (14) indicated that they have “obtained a cracked copy from a friend/associate for free,” and just under half (13) have downloaded pirated software from the Internet. Just under half (13) said that they have purchased at least some software legally. When asked about their reasons for using unlicensed software, half (14) indicated that the genuine copies were too expensive, while six said that the software they needed was not available at local retailers.

Only two respondents stated that they were categorically opposed to software piracy. Others either described it as a necessary practice (12) or reported mixed views (13). In contrast with our consumer interviews in Hanover Park and elsewhere, few musicians offered blanket approval. Much more common was the articulation of an “ability to pay” principle, under which profiting through use of the software brings an obligation to purchase it legally. As one music producer argued:

This is Africa! We do not have access to the latest and greatest software when they release it. When it eventually lands the prices are ridiculous. So for a beginner it is a waste of time and money. If you are using the software to obtain more knowledge, then I do not have a problem with it even though it is illegal. Once you start using this software in an environment where you profit, then I have a problem. Go and buy it!

Variations on this theme ran throughout the musicians’ comments, combining respect for software developers, who are viewed as enablers of the new lower-cost production culture, with recognition that, in Africa, the cost of legal entry is prohibitive:

I suppose it is either a good thing or a bad thing depending on one’s perspective. The software companies and programmers will feel that cracked software will impact on their revenues, while cash-strapped music programmers or artists might feel that it enables them to do what they enjoy without having to lay out potentially large sums of money. From my personal perspective, if my only access to beat-making software was to pay for it, it is highly unlikely that I would ever have taken up this work at all.

Law and Enforcement

Despite the history of industry complaints, South Africa is now usually presented as an enforcement success story. Reported rates of piracy are the lowest in Africa and among the lowest for developing countries overall. The South African government cooperates closely with industry and, in the past decade, has significantly expanded public investment in the enforcement effort, including the creation of new courts and police units and the introduction of progressively stronger policing measures. IIPA reports—a reliable barometer of US-industry concern—repeatedly downgraded South Africa after 2002 and dropped reporting on the country altogether in 2007. The last IIPA report (2007) offered the usual denunciation: “The impact of piracy in South Africa is devastating for legitimate right holders, legitimate distributors, and retail businesses.” But it is clear that the overall industry perception of enforcement in South Africa has improved—and continues to improve. SAFACT CEO James Lennox, for example, is very positive about enforcement efforts and even defends the state against industry demands for more support:

Industry, in general, shouldn’t complain about a lack of state action in South Africa as it is up to industry to use the law to combat piracy. We have found the state to be very willing to assist—in all aspects, from raids to asset seizure. Some critics seem to think that the state should do it all.²⁷

Proof of commitment, for industry, is usually measured in raids, arrests, and convictions—and here the signs of government cooperation are tangible. In 2008, SAFACT participated in 853 piracy investigations and 973 raids, leading to some 617 arrests and 447 convictions. These figures represent a 59% increase in the number of raids over 2007 and a remarkable 936% increase in the number of convictions—a jump attributed to SAFACT’s decision to pursue criminal prosecutions in all cases of alleged infringement and to its increasingly close relationships with investigators and prosecutors associated with the commercial crimes courts, where most IP cases are heard.

This level of cooperation represents a significant turnaround from the early 2000s, when the IIPA and other industry groups routinely complained about the lack of public commitment to enforcement. The change owes much to South African government actions to expand enforcement efforts in the wake of TRIPS and to involve private partners in the process. In 1997, the Counterfeit Goods Act introduced TRIPS-level border controls and created an administrative architecture for enforcement. In the wake of the CGA, several government agencies began to take on new or more active roles in IP protection and enforcement, including the Department of Arts and Culture and especially the Department of Trade and Industry.

The DTI was not a newcomer to these issues. It played the main coordinating role in bringing South African legislation into compliance with TRIPS in the late 1990s and

27 Interview with James Lennox, CEO of SAFACT, 2009.

subsequently in the implementation and coordination of anti-counterfeiting efforts under the CGA. These tasks included modernizing the system for the local registration of trademarks and patents, strengthening border enforcement, and coordinating the growing range of public and private entities involved in enforcement, including the national and metropolitan police services, the South African Revenue Service, and the Department of Justice and Constitutional Development. For over a decade, the DTI has been the main actor in South African enforcement efforts and the main conduit of industry pressure for policy change.

TRIPS Compliance and Enforcement Legislation

Three pieces of legislation currently structure copyright and enforcement efforts in South Africa: the Counterfeit Goods Act, the Copyright Act, and the Electronic Communications and Transactions Act. Nearly all the provisions for policing and judicial process are found in the CGA, and much of the industry struggle for stronger enforcement in the past decade has involved the application of—and controversy around—its main provisions.

The CGA was enacted in 1997 to meet South Africa's obligations under the TRIPS agreement, which entered into force on January 1, 1998. The act criminalized the import, export, manufacture, trade, distribution, and display of “counterfeit goods”—a term usually reserved for trademark infringement but which has been applied more broadly under the CGA to pirated optical discs and other copyright-infringing goods. In practice, the law sets up a dual regime for enforcement: the CGA for products that violate trademarks (that is, counterfeit goods) and the Copyright Act for goods that violate copyright but not trademark (that is, pirated goods that make no effort to pass as legitimate products).

As with most anti-counterfeiting legislation, the CGA targets the commercial middlemen in the counterfeiting trade rather than consumers or end-users. The possession of counterfeit goods is not, in itself, an offense under the CGA: the criminal standard requires intent to sell. The act also makes clear that the possession of counterfeit goods for private or domestic use is not prohibited. The interpretation of this provision has been a point of ongoing controversy with rights-holder groups, particularly the BSA in regard to the use of pirated software by businesses, which has remained exempt from the criminal statute. Calls for the criminalization of “organizational end-user” piracy are part of the standard list of IIPA and BSA demands, based on the view that business use of pirated software should be treated as commercial-scale activity regardless of the intent to sell. To date, only a handful of countries have taken this step, usually as part of bilateral trade agreements with the United States. South Africa has so far resisted such a dramatic expansion of criminal liability.

The Copyright Act, for its part, follows the international norms for film and sound recordings set out in the Berne Convention, including a copyright term, for most works, equal to the life of the author plus fifty years and no registration requirement (in contrast to trademarks and patents, which must be registered) (Dean 1989). Within this framework, two varieties of infringement can become the subject of civil litigation in South Africa: (1) direct, or primary, infringement; and (2) indirect, or secondary, infringement. Primary infringement refers to acts

such as the unauthorized reproduction, adaptation, or other exploitation of a work (where such use falls outside the scope of the various exceptions and limitations to copyright, such as “fair dealing” provisions). Secondary infringement is committed by trading in infringing copies. The act thus establishes liability for street vending as well as dealing in so-called grey goods or parallel imports that violate customs or local-licensing agreements. There are a variety of possible remedies in such cases, including injunctions, damages, and the payment of royalties.²⁸

Criminal penalties under the Copyright Act are subject to two conditions: (1) a vendor must know that a copy is an infringing copy, and (2) that copy must be destined for sale or other commercial purposes. This standard is stricter than in civil litigation and often turns on determinations of intention. Intention, in turn, has become a complicated issue in South African enforcement because many vendors have responded to police pressure by staffing stalls with legal minors or persons who do not speak a local language, making the standard difficult to apply. When such cases do meet the threshold, the maximum allowable criminal penalty is extremely punitive, consisting of fines of up to R5,000 (\$625) and/or imprisonment for up to three years for each infringing article, in the case of a first conviction. These penalties rise to R10,000 (\$1,250) and five years per article for any subsequent convictions.²⁹ There is, in practice, no such thing as an isolated act of infringement, and in most such cases infringements number in the hundreds or thousands.

Anti-piracy under the Counterfeit Goods Act and the Copyright Act

Under the CGA, industry lobby groups have gained a prominent role in public enforcement efforts. Industry representatives often guide the process at every stage, from the initial investigation, to the raids themselves, to their eventual roles as plaintiffs in court.

Most such cases begin with complaints of copyright or trademark infringement by industry representatives to the DTI. The DTI generally responds by organizing a raid under the auspices of the CGA. This typically involves at least nominal coordination between the national police service, the SARS, the DTI, and the complainants. If the raid results in the seizure of goods suspected of trademark infringement, prosecutors can initiate a criminal complaint under the CGA. If only copyright infringement is at stake, the case can be pursued under either the CGA or the Copyright Act.

Raids may also be organized under the Copyright Act, in conjunction with the more general Criminal Procedure Act. Unlike the CGA, these provide no role for private groups, though industry representatives are known to participate anyway. In cases limited to copyright infringement, the Copyright Act offers two notable advantages for industry groups: (1) its implementation involves better-established and more familiar routines for both the police and the judiciary, and (2) the complainant does not bear the cost of storage of evidence seized

28 See section 24 of the Copyright Act.

29 See section 27(6) of the Copyright Act.

during a raid or bear responsibility for indemnifying the police in the event of a successful countersuit for damages (in sharp contrast to the CGA). In the case of large raids in which tens or even hundreds of thousands of discs are seized, such storage costs can be significant. This exemption has made the Copyright Act the preferred tool of the RiSA, in particular.

The DTI and industry groups continue to bring new legal tools and interpretations to bear on enforcement. In the past year, the DTI and prosecutors have started to use the 1996 Proceeds of Crime Act—an organized crime statute—to apply pressure on market owners and other businesses higher up the distribution chain. In the most common example, flea market owners are told to evict vendors accused of illegal trading or else face charges of benefiting financially from criminal activities conducted in their market. Such methods circumvent the problems—and the due process—associated with convicting vendors of pirated goods. Even when the threat of charges is not explicit, the prospect of continual police raids raises incentives for market owners to comply with police and industry demands.

Judicial Pushback

When civil claims or criminal charges are filed, cases enter the overburdened South African justice system, whose chronic problems, including prohibitive bail and lengthy pretrial detention, have been amply documented by the South African government itself (van Zyl 2009). From the industry perspective, the system creates obstacles to enforcement at every stage, from the slow pace of prosecutions, to the low rate of convictions, to the suspended sentences applied in most cases.

The DTI has been active in training different professional sectors to streamline the process and make maximal use of the police and judicial powers available under the law. They have worked with Metro Police in Johannesburg, for example, to change the legal regime under which street vending is policed—ending the long-standing practice of simply confiscating the goods of street vendors found trading without a license in favor of more frequent arrests designed to build police records on repeat offenders. They have helped train the commercial crimes unit within the South African Police Service (SAPS) to investigate and prosecute copyright infringement. They have pushed prosecutors to demand the maximum allowable sentences for vendors rather than the traditional admission of guilt and modest fine. And they have worked on South African judges, in particular, whose resistance to imposing stronger penalties has been a point of contention in the push for stronger public-private cooperation.

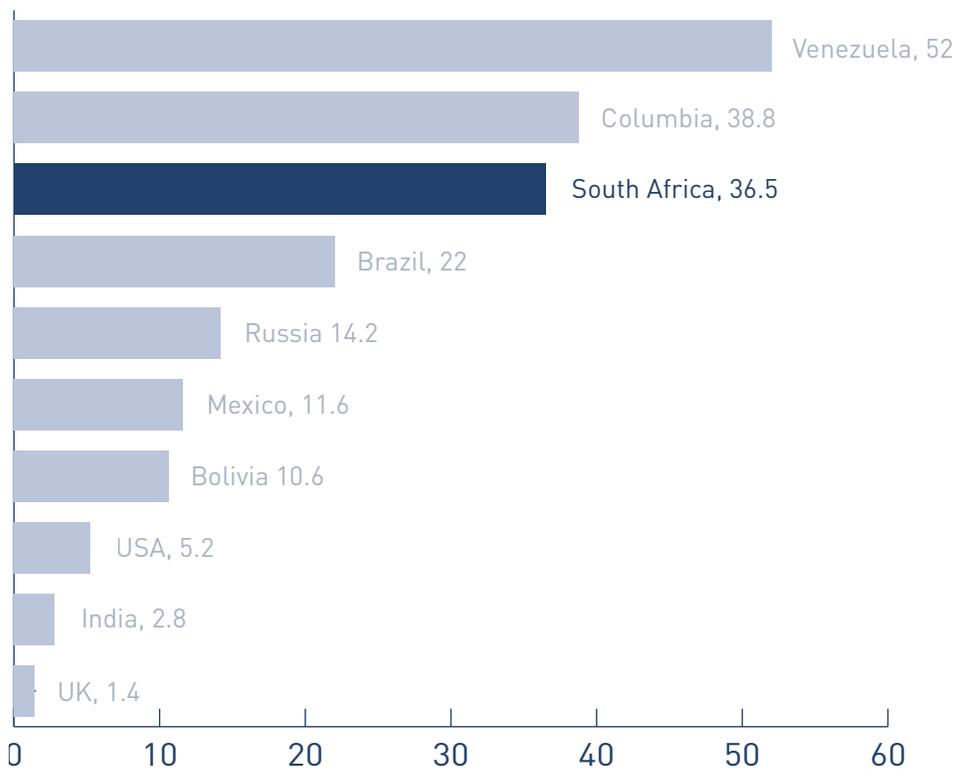
Judicial resistance to the enforcement agenda has been widespread throughout the court system, up to and including the commercial crime courts, which specialize in IP cases. Industry requests for the maximum statutory penalties have generally been ignored in favor of fines more commensurate with the ability of offenders to pay. Judges also frequently suspend fines or jail terms after sentencing, suggesting that many do not view street-level vending, in particular, as a serious crime. In a few notable cases involving the confiscation of small quantities of

infringing goods, judges have sent rebukes to prosecutors by imposing fines lower than those applicable in cases of admitted guilt.

Such pushback has been a persistent source of irritation for industry groups and commercial crimes prosecutors. Since the 1990s, the IIPA and other organizations have argued that sentences are too lenient to act as a deterrent (a point on which they are surely right) and that the lack of deterrence through the courts places South Africa out of compliance with TRIPS (a charge that could be brought against every other country in the WTO as well).³⁰ The first WTO ruling on this global issue came two years ago, in a case brought by the United States against China. On the key point of whether Chinese provisions for enforcement were adequate, the WTO found in favor of Chinese discretion, very likely setting precedent on the issue (WTO 2009).

The context of South African judicial resistance is obvious to anyone looking at the day-to-day activity of the criminal courts. South Africa averages 19,000 murders per year, according to police reports—among the highest in the world (see figure 3.1). It ranks similarly in other categories of violent crime. The court system, for its part, is hugely overburdened, with pretrial detentions of up to a year in many cases (van Zyl 2009).

Figure 3.1 Murders per 100,000 Inhabitants, 2007/2008



Source: UNODC (2009).

30 For our part, we have found no evidence of effective deterrent penalties in any of the countries examined in this report—including the United States. See chapter 1 for more on this issue.

As we repeatedly document in this report, there are inevitable tradeoffs in allocating scarce police, judicial, and penal resources among different types of crime. The scale of violent crime in South Africa makes these choices unusually stark, forcing judges to triage a variety of low-level offenses, including most forms of street-level piracy.

Judges and prosecutors face these tradeoffs in their daily activities. IP stakeholders, in contrast, do not and continue to push for greater prioritization of infringement in the courts. This pressure often takes the form of IP training programs for judges and prosecutors, which are run by the DTI and geared toward bringing judicial attitudes into closer alignment with industry enforcement goals. Industry groups are frequent sponsors of these programs, but funding and technical support also come from the array of foreign government proxies of those groups, notably the US Department of Justice, the US Department of Commerce, and the US Agency for International Development (USAID). The World Intellectual Property Organization (WIPO) has also played a long-term role in such technical assistance. Despite the prevalence of these events over the past decade, our work suggests that judicial culture in South Africa remains relatively insulated from industry pressure. In our interviews, neither prosecutors nor industry representatives felt that the training programs had accomplished much. Although we have no objective measures of this impact (or lack thereof), low conviction rates and weak penalties remain the norm.

The lack of strong sentences, however, does not imply a lack of punishment. Raids based on suspicion of piracy, confiscation of goods, arrests, and pretrial detention are the much more common, *de facto* forms of punishment in South Africa. The shift by industry groups toward criminal penalties for all infringement cases pushes vendors further into this extrajudicial punishment regime, providing more context for the resistance of judges to harsh sentencing once the case ends up in court. Conversely, even when significant fines are imposed, industry rights holders sometimes have difficulty collecting awards. The large role played in the optical disc retail trade by Pakistani and Chinese immigrants poses a particular challenge, in this regard, as such defendants can often transfer assets abroad or leave the country to avoid sentences.

Public-Private Justice

One anti-piracy measure routinely advocated by the IIPA and other industry groups is the creation of separate IP courts to expedite infringement cases. In South Africa, industry groups got much of what they wanted with the establishment of the commercial crime courts, which hear cases of fraud and other crime directed against businesses. The first commercial crime court was established in Pretoria in November 1999 through a partnership between the South African Police Service, the National Prosecuting Authority, the Department of Justice, and Business Against Crime South Africa (BACSA), a not-for-profit organization funded by South African businesses and USAID. BACSA played a critical role: it supplied the initial funding

Operation Dudula

Operation Dudula was an anti-piracy campaign organized by the recording artist, anti-apartheid activist, and poet Mzwakhe Mbuli, who had enjoyed considerable popularity in the 1990s. The campaign was built around Mbuli's organization, Concerned Musicians, and launched in 2006 with a series of marches in Johannesburg, Cape Town, Durban, Port Elizabeth, and Polokwane. Mbuli framed the marches as an effort to do what the industry groups and the state had failed to do: save artists "the millions" they were losing to pirates. In a typical interview, Mbuli declaimed:

It is time for this criminal behavior to stop . . . This is not only infringement of copyright material, it is also economic theft and I am appealing to all proud and patriotic South Africans to stand with us in this fight for the very life of our industry. On your marks, get set, ready, GO. Run Criminals Run! (Biggar 2006)

With its strong populist overtones, the campaign quickly attracted the participation of large numbers of local artists, who joined Mbuli in police raids on "burner labs" and flea markets, starting a trend of direct participation by aggrieved musicians in enforcement activities. The musicians, in turn, were often accompanied by film crews, who captured emotional scene-of-the-crime testimonials.

Like many campaigns, Operation Dudula was a media-centered effort, designed to intimidate pirate vendors and shame the South African consumer. It ran into trouble almost immediately, however, when marchers began to violently confront street vendors and local retailers—mainly Pakistanis and Chinese. The resulting physical harassment and destruction of property led to counterclaims of theft and assault. The resulting bad publicity brought the marches to an end. The legality of musician-accompanied raids was also challenged: none of the musicians held the rights to their own work, and they therefore had no legal standing to accompany police as complainants. As a result, Operation Dudula produced a wave of cases that could not be prosecuted.¹

Operation Dudula was initially supported by RiSA, the recording industry association. From RiSA's perspective, the movement provided welcome evidence of local support for the anti-piracy agenda and dramatized the role of artists, rather than corporations, as the main victims of piracy. But support from RiSA died amidst the charges of vigilantism and the controversy surrounding the marches. The break between RiSA and Operation Dudula went public in August 2006, with Mbuli calling for the resignation of RiSA chief Ken Lister (Coetzer 2006). Wider cooperation on raids between Dudula members and RiSA, the DTI, and the SAPS came to an end, and Operation Dudula eventually folded in 2008.

1 Interview with Advocate Nkebe Khanyane, National Prosecuting Authority of South Africa, 2009.

to hire prosecutors for the court and in so doing set the precedent for the quasi-privatization of the criminal justice system that has come to characterize the enforcement effort more generally. The perceived success of the Pretoria Commercial Crime Court led to the creation of a Johannesburg court in 2003, two additional courts in Durban and Cape Town, and new commercial crime units within the police service—all enjoying BACSA financial support.

Industry-sponsored staff training and education campaigns are routinely conducted for and through such public institutions and mark another side of public-private cooperation. BACSA continues to train prosecutors at the commercial crime courts. RiSA's Anti-Piracy Unit supports and trains officials in the South African Police Service, the National Prosecuting Authority, and the South African Revenue Service. Sony BMG funds customs and excise officials to deliver anti-piracy seminars to high school students. Microsoft South Africa funds local activities of the US-sponsored "STOP!" initiative—the Strategy Targeting Organized Piracy—which, in collaboration with the US Embassy and US Information Agency, also trains South African judges. As the other contributions to this report document, the expansion of enforcement in developing countries takes place through such blurring of public-private boundaries in law enforcement, policymaking, and the judicial system. The judiciary's central role and comparative insulation from stakeholder capture tend to foreground the resulting contradictions.

If these contradictions have a poster child in South Africa, it is Marcus Mocke, a small-scale Johannesburg distributor of pirated optical discs. In 2004, the Johannesburg Commercial Crime Task Force raided Mocke's residence and found four hundred pirated DVDs and PlayStation games. Mocke pled guilty to distributing and trading pirated goods in flea markets. In January 2005, the Johannesburg Commercial Crime Court handed down what was widely reported as the harshest piracy sentence in South African history: a choice between eight years in prison or a R400,000 fine (\$65,000). Mocke agreed to pay the fine. Fred Potgieter, then head of SAFACT, heralded the sentence as "a landmark decision and a major breakthrough in the war against piracy" (Bizcommunity 2005). The presiding judge later suspended the fine, contingent on Mocke's good behavior.

How Piracy Works in South Africa

The copying and circulation of illicit books, tapes, and other media has a long history in South Africa, linked to practices of political and cultural resistance to apartheid. Inevitably, these practices overlapped a wider range of economic needs, entrepreneurial practices, and implicit or explicit acts of social disobedience. Economic sanctions against South Africa made the informal economy the primary form of access to many kinds of goods, from textbooks to electronics. A grey-market service economy also flourished in this context as skilled workers offered their services directly to customers, circumventing both white-owned businesses and state taxes. The widespread theft and resale of factory goods mapped racial divides between labor and management and blurred the lines between criminal and political behavior. In this

fashion, the consumption of pirated goods was normalized and integrated into wider South African political and social practices. Piracy became part of everyday life and, as such, rarely needed justification.

Although the political valences of piracy have mostly dropped away in the post-apartheid era, the sharply racialized patterns of inequality and access to media have not—nor has the normalization of piracy and its role in a wider ethic of social disobedience. In this section, we explore this daily side of piracy and its complicated social geography. We draw on fieldwork conducted in three Johannesburg flea markets where vendors sell pirated music and film—Bruma, Noord/Plein, and Fordsburg Square—and from our investigation of the market for pirated goods in Hanover Park, a Cape Town township.

Optical Disc Piracy

The South African market for pirated media has two characteristics that distinguish it from other developing countries: (1) the very slow development of broadband services at the high end of the consumer spectrum and (2) the still active market for cassette tapes at the low end. In the middle lies the ocean of pirated CDs and DVDs.

As in other countries, the introduction of the cassette tape in South Africa in the 1970s gave rise both to industrial-scale cassette piracy and—notably—to the first large-scale consumer-based copy culture, built around “mix tapes.” South Africa was an importer of tapes from the United Kingdom but also had significant local production capacity that served the domestic market and enabled exports to surrounding countries. As inexpensive CD players became available in the early 1990s, the format went into rapid decline. By 1996, 42% of music sold in South Africa was in cassette format, compared to 53% on CD (DACST 1998).³¹

But in South Africa, as in many other poor countries, decline did not mean extinction. Rather, the cassette tape moved downmarket, catering primarily to low-income, often rural consumers who still depended heavily on battery-operated radio/cassette players. The available content in the cassette market shifted accordingly, away from international hits and toward music in the local vernaculars, including Shangaan music, Maskandi and Tswana traditional songs, music from Lesotho, and gospel. Legal copies of these cassettes remain relatively inexpensive, ranging from R14 (\$1.75) to R25 (\$3.10), with prices practically unchanged for the last fifteen years. By 2003, the formal market had shrunk to \$3.2 million, and by 2008 to less than \$400,000 (Euromonitor International 2009). Such numbers do not include the large informal market for cassettes. The Noord/Plein flea market, which serves working-class commuters, still has cassette vendors. And outside the urban centers, the cassette remains a significant medium that anchors a variety of local media practices, from music listening to the recording and sharing of local performances and religious sermons.

By industry accounts, 2000 and 2001 were the watershed years in South Africa’s shift to CD and DVD piracy. The IIPA’s South Africa report for 2001 noted the rapid influx of pirate

31 In comparison, cassettes accounted for 24% of the US market in 1996.

CDs and DVDs and on that basis called for South Africa's inclusion on the USTR's watch list. In our view, this nervousness involved a certain amount of projection on the part of industry. Music CDs were indeed circulating in South Africa in larger numbers by the end of the 1990s, driven by a ramp up in East European and South Asian production. But the high price of DVD players in 1999 and 2000 meant that the market for pirated movies was miniscule. The real boom in movie piracy, globally, would have to wait for the wave of cheap Chinese DVD players that hit the market beginning in 2003 and 2004. By 2005, multiformat DVD players were commodity items, priced as low as R250 (\$35). By 2008, DVD players were in 48% of South African households. By 2007, the IIPA had stopped bothering to report on South African piracy.

FLEA MARKETS AND STREET VENDORS

Optical disc piracy is part of the much larger informal economy in South Africa and shares much of its infrastructure. Traditionally, piracy has been associated with the flea markets that dot South African towns and cities. Vendors at flea markets typically operate from fixed stalls that they rent from market owners or managers, selling daily or on weekends, according to the market calendar. Street vending, in contrast, is a much more dispersed and transient practice. Vendors congregate around high-traffic intersections, trading in what they can physically carry during the day.

The main Johannesburg flea markets operate as both retail and wholesale sources for pirated goods—often, in the latter capacity, serving as supply hubs for wider networks of neighborhood, town, and rural vendors. Among the more established wholesalers, this system is highly organized: buyers place written orders, and sellers circulate lists of available titles, often outside the city.

Some buyers come from considerable distances to the main market hubs. During our interviews in Johannesburg, we encountered a buyer from Bloemfontein, a city some five hundred kilometers away, who said that he had come to buy the newest titles for “private clients.” These buyers connect flea markets and production networks in the urban centers to the more remote town- and neighborhood-based vending networks, where limited access to broadband, especially, constrains the range of readily available goods. In the larger cities, where broadband Internet is accessible but still scarce, some suppliers run subscription services that provide access to the most popular downloads in a given month. Others operate cottage production facilities, taking orders and delivering discs to their regular buyers.

Both RiSA and SAFACT publish newsletters that list “hot spots” where pirated goods are retailed and detail the results of police surveillance, raids, and pressure brought to bear on market operators. Many of the named hot spots in Johannesburg (Bruma and Rosebank) and in Pretoria (the Montana flea market) are described as “closed down” following rights-holder and police efforts. But our investigations had no difficulty identifying pirated music and films on

sale in the markets we visited. In South Africa, as elsewhere, strong street enforcement appears capable of suppressing the more organized forms of retail piracy but shows less evidence of impacting the lower strata of the informal economy, where more transient vending practices are the norm. When fixed stalls are shut down or their vendors evicted, pirate vendors often move to adjacent spaces, like the parking areas of shopping malls, or into the townships. The distribution chain reconfigures itself to limit risk.

Historically, the storage and packaging of imported pirate discs from Malaysia, China, and Pakistan required large local intermediaries to manage warehousing and distribution. These operations reflected what was still a largely industrial organization of CD and DVD piracy, built around centralized production in foreign factories and large-scale smuggling operations. Such operations were also obvious targets for enforcement, and South African police and customs registered a number of high-profile raids, arrests, and prosecutions throughout the early 2000s. By the second half of the decade, seizures of large shipments of CDs and DVDs had begun to drop. The SARS reported 165 seizures in 2006/7, 50 in 2007/8, and 37 in 2008/9, in an environment of rising enforcement activity.³²

As in the other countries documented in this report, we see little evidence that stronger enforcement is the determining factor in this decline. Rather, the industrial-scale, smuggling-based model is being supplanted by smaller, more distributed operators who produce discs locally, in closer proximity to their networks of vendors. According to Ben Horowitz, CEO of Bliksem DVDs, the new generation of small-scale pirate operations supplies “two or three areas; that’s about as big as [an operation] gets in the [Johannesburg] city center.”³³

Production and vending are almost always separated in these contexts—a strategy that keeps producers at arm’s length from the police. As Horowitz observes, this means that “the vendors have to take all the risk. They buy the DVDs probably for R5 [\$0.65], and the suppliers are producing for about R1.50 [\$0.20] per DVD.” Such arrangements mitigate risk for the producers while keeping production in relatively close alignment with consumer demand—a crucial advantage in a pirate market dominated by local repertoire. But as elsewhere, the underlying shift is technological: the rapidly declining costs of burners and other copying technologies have obviated much of the need for large-scale factories and for high-cost/high-risk investments in cross-border smuggling. In turn, this cottage industry is facing its own technological obsolescence as non-commercial Internet distribution and personal copying and storage technologies shift the locus of activity to the consumer.

MARKET DIFFERENTIATORS

Pirate CD and DVD vendors practice a variety of forms of market segmentation, visible in the differences in disc titles, quality, and prices available in South African flea markets. Fordsburg

32 Interview and follow-up e-mail communications with Sean Padiachy, head of the SARS FIFA World Cup customs unit, 2010.

33 Interview with Ben Horowitz, 2009.

Square's clientele is predominantly of South Indian descent and varied age and income. Vendors offer a wide selection of Bollywood film titles and music, supplemented by the usual mix of Hollywood films and popular Western music. The quality is generally very good, and discs are available across a range of prices, depending on the packaging and included extras. Fordsburg vendors—mainly South Asians from Pakistan and Bangladesh—also compile music CDs “on demand, while you wait,” pulling tracks together from different CD releases. Burning facilities are on site but generally kept in back rooms closed to the public.

While Fordsburg caters to the Bollywood niche market, the Bruma and Noord/Plein flea markets serve a broader range of consumer preferences, notably including local film and music. Bruma is frequented by a mostly middle-class and tourist clientele, Noord/Plein by predominantly black, working-class commuters traveling through the city center. Accordingly, Bruma is busiest on weekends, while the Noord/Plein market has a stronger daily presence.

BRUMA

Situated among the middle-class suburbs of Johannesburg, the Bruma flea market is one of the better-known hot spots for CD and DVD piracy, in part due to the ongoing lack of cooperation between market owners and police.³⁴ On the weekends, Bruma shoppers crowd the stalls selling pirated DVDs. Vendors generally cater to middle-class tastes shaped by global advertising cultures. The available stock tends toward US productions, such as television series like *Desperate Housewives* and *CSI*, currently exhibited movies (at the time of our visits in March 2009, *Slumdog Millionaire*, *Race to Witch Mountain*, and *Marley and Me* featured prominently), and a range of older Hollywood hits. There are no art-house movies on display, and classic titles are limited to old James Bond movies, Clint Eastwood films, and other assorted action films—though vendors can generally fill special requests on demand.

Staff are often young, immigrants, or both—signs of the disposable labor strategies that minimize liability and shelter owners from arrest. Many vendors, consequently, display very limited knowledge of the movies they sell. When asked about the availability of a classic, such as *Casablanca*, most vendors we questioned looked blank. Similar responses were received to queries about upcoming films that were not yet in theatres, such as *Duplicity* and *Monsters vs. Aliens*.

Bruma vendors price their goods for a clientele with middle-class disposable income and are generally prepared to meet the higher level of customer scrutiny that comes with those prices. Television sets with DVD players are set up on site to verify the quality of goods before purchase, though vendors are quick to volunteer which are “good” copies and which are poor. DVDs sell for R40–R50 (\$5.20–\$6.50) for “good-quality” copies and R20–R25 (\$2.60–\$3.20) for inferior copies. Only one stall that we visited had an extensive music collection, prominently identified as legitimate by signs on the shelves and walls.

34 Bruma is one of the “few flea markets who still refuse to take action against tenants committing illegal acts.” Interview with James Lennox, CEO of SAFACT, 2009.

NOORD/PLEIN

The Noord/Plein market surrounds a central Johannesburg taxi station where minibuses drop off and pick up thousands of commuters each day.³⁵ A wide variety of goods are sold, from secondhand clothing and shoes, to fruit and vegetables, to CDs and DVDs. The CD and DVD vendors are massed in a wide area around the taxi line, organized into two main zones often described by locals as separate markets. The zone immediately in front of the taxi line offers more costly goods with higher-quality packaging. A second zone behind the taxi line offers more obviously artisanal copies, mostly packaged in small plastic bags. The higher quality goods in front generally sell for R20 (\$2.50), while those in the back sell for R10 (\$1.25). Although Nollywood (Nigerian) films are not sold in the market proper, stalls specializing in the Nigerian “watch and buy” DVDs congregate just a few meters away, selling apparently legitimate copies of these movies for R20. Individual vendors also roam the area, selling the most popular recent films, both South African movies, such as *White Wedding* (a comedy in cinemas at the time of our visit) and *Jerusalem* (a drama released in 2008), and international hits, like *The Fast and the Furious 4* (released in South Africa in April 2009). On a visit during the week that Michael Jackson died, both zones were doing a brisk business in his CDs and DVDs.

Behind the taxi line, the low-end vendors stack DVDs and CDs in plastic sleeves on black crates. South African film and music—especially gospel—dominate the displays. The typical DVD pile includes most of the local hits of the past two decades: *Jerusalem*, *Madloputu*, *Sarafina*, *Swop*, *White Wedding*, the Schuster comedies *Mr. Bones 1* and *Mr. Bones 2* and *Mama Jack*, and others. Old but popular local television dramas, such as *Kwa Khala Nyonini* and *Bophelo Ke Semphego*, are also well represented. International films are available but tend toward older action movies, such as *The Fast and The Furious* and *The Good, The Bad and The Ugly*. Pornography is also widely available.

The market in front of the Noord/Plein taxi rank is smaller and caters to commuters with more money. DVDs are sold in packaging similar to that of the original products. South African gospel music and movies predominate here too, but there is a greater variety of titles and more of the current international hits, such as the recent *Transformers: Revenge of The Fallen* and albums by Beyoncé and Kanye West.

In interviews, consumers regularly voiced concerns about the quality of their purchases. As one woman admitted: “I know I’m buying at my own risk as [the discs] often do not play.” Pirate vendors catering to the high end of the market are sensitive to this problem and often have TVs and DVD players available to demonstrate the quality of the product to prospective buyers. Even low-end vendors without such equipment value return customers, however, and many mark their discs with personal symbols, which allow the buyer to return them if they prove defective.

35 The Noord/Plein market is always busy. When asked what hours he worked, one vendor responded that business is always good for them as there are always people flocking to the area. Another vendor reported that on a “good day” he can earn as much as R3,000 (\$375). Both of the vendors said they owned their own stalls, placing them in positions of relative privilege in this informal economy.

CULTURAL NATIONALISM

Although local content dominates markets like Noord/Plein, vendors are often circumspect about displaying pirated local goods. Musician-driven Operation Dudula and dedicated enforcement campaigns for major South African films like *Tsotsi* reflect—and have helped foster—a strain of cultural nationalism in South African anti-piracy efforts that appears to at least partially influence the behavior of vendors. Operation Dudula, in particular, framed piracy of local music and film as not merely wrong but “unpatriotic”—a dynamic we have seen at work in many locally grounded enforcement efforts and one that tends to operate to the benefit of a handful of high-profile local products. At the Noord/Plein market, for example, shelves are filled with South African gospel music, but many of the top stars, such as the “Queen of Gospel,” Rebecca Malope, are conspicuously absent. Malope was an active and visible participant in Operation Dudula marches against vendors. Similarly, in the Bruma market, there are surprisingly few South African titles on the shelves, and no copies of the hugely popular Leon Schuster slapstick comedies in sight. The visible stock is generally limited to lesser-known Afrikaans comedies, such as *Vaatjie Sien Sy Gat*.

When asked about South African movies, many Bruma vendors refused to talk further. A few said that they had copies of *Tsotsi* (2005) and *Jerusalema* (2008) but that these were “old now” and no longer routinely stocked. Unlike the slapstick Afrikaans titles on display, both are “serious” films, often presented as representatives of the national cinema. When we asked about a copy of the hit 2008 Schuster comedy *Mr. Bones 2*, a runner was sent off and returned twenty minutes later with the disc and photocopied cover in hand. As he surreptitiously handed us the copy, he whispered that “you can get arrested for having this” and just laughed when we asked whether this was true of any of the other clearly pirated goods on display. He admitted they regularly suffered raids and confiscation of goods, at which point “we just have to start copying them all over again.” He seemed concerned that openly displaying South African titles, like the Schuster movies, could have more serious repercussions, particularly if an angry customer elected to file a complaint. Unfortunately, our research was unable to explore this nationalist dimension in greater detail. It was unclear to us, for example, whether the *Tsotsi* campaign and Operation Dudula were the main sources of this anxiety or just leading indicators of wider enforcement bias for local goods. Vendors, at least, appear to believe the latter.

THE DEFORMALIZATION OF THE TRADE

Markets like Bruma and Noord/Plein are relatively exposed to pressure from police and industry groups. Such sites are easily raided, and the formalized rent and ownership structures in the markets give the DTI and the SARS leverage over market owners. As pressure on vendors has increased, we see evidence of a shift to less-exposed forms of trade, including more mobile street vending and the use of underage and/or immigrant labor to conduct most illegal sales. Pressure on the flea markets also appears to have reinforced long-standing practices of

neighborhood vending, especially in poor neighborhoods with limited access to media and larger markets. In this respect, our work confirms recent findings by SAFACT, RiSA, and other anti-piracy groups, which also describe a process of deformalization of the pirate trade.

In many cases, neighborhood vending involves home-based production of CDs and DVDs, and often home-based sales. Although such vending practices are small-scale, they are much harder to police, and they remove the vendor from the precariousness of operating in the flea market or on the street. They also embed vendors in closer service relationships with regular networks of customers, providing them (typically) more prominent roles as opinion-leaders within those networks. Inevitably, such security and prominence comes at the expense of volume and, in some contexts, the ability to charge premiums to tourists or middle-class customers. Such factors make neighborhood vending a lower-risk but also more marginal business than stalls in high-traffic marketplaces.

Hanover Park

Hanover Park is on the Cape Flats, on the outskirts of Cape Town. It is one of the many urban ghettos to which black South Africans were removed during apartheid and was referred to colloquially as the “dumping ground of apartheid.” Today, it is a so-called “coloured,” working-class township, located between a large industrial zone to the east and the middle-class coloured neighborhood of Lansdowne to the west.³⁶

NEIGHBORHOOD VENDING

Piracy takes several forms in Hanover Park. Many people have opportunities to visit flea markets, but the most common form of access to recorded media is the purchase of pirated feature films from local neighborhood vendors, usually for between R5 (\$0.65) and R10 (\$1.30). Increasingly, these vendors have their own computers and burners and can create products on demand for customers—by either downloading from the Internet, copying from their existing stock of popular films and music, or acquiring goods from wider vendor networks. When production tools are unavailable, neighborhood vendors act as retailers, purchasing discs wholesale or placing custom orders with the more established vendors and distributors in the large urban markets. Business models vary and include rental models and resale back to the vendor.

36 The term “coloured” is an apartheid designation that refers to people of mixed race origin. Today it is controversial, if still widely used. Of South Africa’s 47 million people, 9% are coloured, and most of these are concentrated in the Western Cape region, primarily Cape Town. Hanover Park is a coloured residential area, home to roughly 30,000 people, of whom some 11,000 are between the ages of 15 and 34. Only 1,700 possess a high school matriculation certificate. The overwhelming majority—nearly 80%—are native Afrikaans speakers. Unemployment is above 50% (Statistics South Africa 2010). The neighborhood is well known for gangsterism and by the late 1970s was home to nearly twenty gangs, each “owning” their own small patch of ghetto (Steinberg 2004).

In most cases, only a few gatekeepers within families or larger social networks maintain direct contact with the sellers. Most people in the community get their pirated media through a family member or close friend. Such networks are informal and highly dependent on personal trust.³⁷ Vendors maintain a stock of goods based on their judgments of what will be popular; the buyers (often male heads of households) choose the titles they think will be most appropriate for themselves and their families.

In our visits with home vendors, the latest movies were usually kept in a disc flipbook that buyers could browse. In a few cases, vendors showed customers previews of films. The recommendations given by vendors are often personalized and based on long-term relationships with their customers. Unlike the stall vendors in flea markets, who are often selected for their expendability in the event of a raid, neighborhood vending places a premium on expertise—real or feigned. Consistently, in our fieldwork, vendors cultivated the impression that they have seen all the films they have available for sale and provided brief synopses and reviews for prospective buyers. In this way, they become local opinion-leaders, influencing which films circulate in the neighborhood and gaining some modest corresponding social status.

Although vending at the low end of the market is often associated with low-quality products, our Hanover Park respondents had decidedly mixed views on this subject. A perceived tradeoff between low price and the risk of low quality was clearly present, as was the general willingness of consumers to make that bet. But the majority of Hanover Park residents indicated that the quality of the discs they acquired was usually high. Discs worked and showed few of the typical signs of a poorly pirated copy, such as subtitles in another language or screener code. Although we do not treat such opinions as definitive, they are consistent with the larger compression of pirate markets, evident throughout this report, as cheap reproduction equipment and access to high-quality Internet distribution improves. The obsolescence of much of the audiovisual equipment in Hancock Park homes also likely plays a role in lowering expectations.

CONSUMPTION

In middle-class South African communities, viewing movies and listening to music is increasingly a private experience, mediated by the availability of multiple screens, playback devices, and headphones and by the broader expansion of personal media. According to one recent study of South African students, pirated video—here, the US television show *Grey's Anatomy*—is almost always viewed alone (McQueen 2008). In Hanover Park, in contrast, all thirty of our interviews described viewing practices organized around friends and family.

The collective dimension of viewership was not described as a necessity in our interviews but rather as a basic part of the media experience that anchors other forms of sociability. As described by one respondent:

37 As we found in trying to establish relationships with local vendors. Our successful contacts came only with local assistance and took considerable time and repeat visits.

What I normally do is I invite my mother down for a nice cup of coffee, then I put her on the bed—she’s an elderly lady—and I say to her, “You like Bollywood movies,” and I put on a Bollywood movie. And all of us, we’re seven children, we all come together and talk about that afterwards.

Respondents expressed little interest in collecting or holding on to the pirated discs, once viewed. In a handful of cases, respondents indicated that they had resold their discs to other buyers in order to raise money to buy new films. Most, however, gave their discs away to friends or family members.

Consumers generally indicated that the cost of a pirated disc is low enough to permit a free flow of “used” goods. Consequently, for many individuals, pirated movies arrive second- or thirdhand—circulating after the initial purchase or acquisition. Such consumers were rarely interested in viewing the latest titles but rather saw value in media that had filtered through the community.

WHAT PEOPLE WATCH

It is a measure of both the naturalization of American cultural influence and the emergence of a newly globalized Indian culture that when Hanover Park respondents were asked whether they viewed “foreign” films, a substantial majority indicated Bollywood films. When explored further, actual viewing preferences almost always tended toward Hollywood, and to explorations of black culture and gang life in particular.

Genre preferences followed fairly stereotypical patterns in our interviews, with younger women often signaling preference for romantic comedies and teen movies (for example, *High School Musical*), younger men indicating a preference for action films, and older respondents adding dramas to the mix. One of our main informants in Hanover Park, a pirate vendor named Rafiek, reported that “nigga gangster movies” were his top-selling genre—a statement our interviews broadly confirmed, and one that resonates with the strong local hip-hop culture and interest in black American culture in general.³⁸ A large number of those interviewed also indicated that they often viewed pirated DVDs of standup comedy sets, usually by African American comedians, such as Dave Chapelle or Chris Rock, but also—and with some of the typical ambivalence toward acts of local piracy—South African comedians, like Joe Barber and Marc Lottering.

When asked about South African media, the response was remarkably thin. Among movies, only *Tsotsi* and *Jerusalem* were mentioned. Several respondents listed the TV programs *Generations* and *7de Laan* as among their favorites. Vendors—though not customers—indicated

38 Hip-hop emerged on the Cape Flats in the early 1980s as one of many responses to apartheid. It was particularly powerful in Cape Town, where it became a vehicle for expressing the tensions of racial marginalization (Watkins 2001).

that local slapstick Afrikaans comedies like *Vaatjie Sien Sy Gat* and *Poena is Koning*, which caricature poor white South Africans, were popular items. Field observation also points to sales of pornographic films and gospel-music videos, but there was little corroborating evidence for either in our interviews.

It is indicative of the poverty of media access in South Africa that these thin collections of pirated goods actually diversify the media environments in which people live. Very few South Africans inhabit the long-tail media environment characteristic of high-income, high-bandwidth countries.³⁹ Although enforcement pressure plays a role in forcing vendors to limit the breadth and quantity of stock, the selection of pirate goods is still surprisingly limited: a survey of titles in Noord/Plein turned up only forty-three distinct film and music discs, reproduced across dozens of stalls and tables. In Hanover Park, Rafiek casually sold our researcher a spindle of 120 European films that he had not been able to sell elsewhere—for R1 (\$0.13) per movie. All were high-quality copies of screeners or original DVD releases, but such work had no local audience. For film, especially, the primary function of South African pirate networks is to make the larger, advertising-driven mass culture much more accessible.

One sign of this dynamic is that, even in communities like Hanover Park where moviegoing is rare, the first selling point for pirate vendors is almost always speed. A large majority of Hanover Park respondents indicated that they sought out the latest releases. The “latest,” in this context, meant either a new release or—in some cases—an anticipated release that had been delayed in South Africa due to studio windowing strategies. Being able to view films at roughly the same time as more economically privileged consumers seems like a trivial concern, but our work suggests it is part of an increasingly powerful experience of inclusion in a globalized media community. Such forms of inclusion are especially significant in countries like South Africa, where real and perceived marginality—geographic, economic, racial, and other—are written into daily experience on many levels. Piracy is, in this limited sense, a means of bridging that marginality. Put differently, it is what happens when wildly successful marketing campaigns meet with wildly unsuccessful efforts to serve local audiences.

Conclusion

When asked whether the IIPA or the USTR play a role in DTI decisionmaking, Amanda Lotheringen, deputy director, responded with an unequivocal no. Given the diminishing interest of these US-based actors in South Africa in the last half decade, we see no reason to doubt this answer. But it seems equally clear that, where the DTI is concerned, no arm-twisting is needed. Like many other developing-country agencies responsible for trade policy, the DTI has taken the lead in pushing for stronger formal IP protection and enforcement measures. It

39 The baseline for (and often the limit of) media diversity in South Africa is the four “free-to-air” broadcast television channels, which reach nearly all South Africans. SAARF (2009) data shows that the next most popular form of access, subscription satellite television, reaches only 20% of viewers.

has adopted the agenda—or perhaps more accurately, the underlying assumptions—of the foreign interests that dominate the copyright economy in South Africa, and it has been a very effective *de facto* advocate for those interests. Beginning with the 2010 World Cup, South Africa seems poised for a new round of enforcement activism, including more public investment in policing and an expected overhaul of intellectual property rules, also under the guidance of the DTI.⁴⁰

The anti-piracy fight in South Africa has benefited considerably from association with wider security efforts, visible most prominently in the measures adopted for the World Cup. Police budgets have grown in recent years, with an anticipated further one-third growth in the national police budget between 2009 and 2012 (Parliamentary Monitoring Group 2009). Neither the DTI nor the SARS would reveal the size of their enforcement budgets, except to acknowledge that these too have increased.

As in other countries, however, the expansion of the enforcement agenda in South Africa faces a range of internal constraints, beginning with the heterogeneity of the different agencies and layers of government involved and the resistance of some of them to the enforcement maximalism of US-led industry groups. As elsewhere, there is an array of more pressing social problems that have their own claims, constituencies, and institutional centers of power. Copyright enforcement, under conditions of scarce policing resources and overburdened courts, is a zero-sum game that inevitably draws resources away from other issues. In the enforcement context, the obvious counterpoint is the crisis of public security, headlined by South Africa's high murder rate. But wider issues of access to knowledge and public health have also played important roles in shaping South Africa's IP politics.

Cooperation by the police and the DTI with industry groups has earned South Africa some respite from the continuous pressure placed on other countries in this report—most notably Russia, India, and Brazil, which often act as the geopolitical peers of South Africa in international forums like the WIPO and WTO. But our research was unable to answer one of the basic questions that should guide any expansion of public investment in this area: do enforcement efforts have any effect on the availability of pirated goods in South Africa? As in the other contributions to this report, we see evidence that enforcement can harass the more vulnerable parts of the retail pirate-disc channel, but we find no evidence that this represents any serious constraint on the consumer availability of pirated goods. In our view, availability in South Africa is shaped by factors that are largely exogenous to the enforcement effort: poverty, cheap consumer technologies, uniquely expensive broadband Internet service, the globalization of media culture, and the chronic weakness of legal distribution and exhibition channels. None of these seem likely to change in ways that will diminish the availability of pirated goods in the coming years.

40 Interview with Amanda Lotheringen, DTI deputy director, 2009.

Nonetheless, given the South African institutional landscape, the prospect of stronger enforcement policies—including consumer-directed enforcement—is a real one. The DTI and local industry groups are likely to push for the strongest available international norms, such as strict ISP liability and Internet surveillance of file transfers. Planned copyright law revision—and, very possibly, the recently completed international Anti-Counterfeiting Trade Agreement—will create a context for this push.

From our perspective, however, the central question should be how to create vibrant, accessible media markets and how, in particular, to move South Africa out of the high-price, small-market equilibrium it shares with many other developing countries. The conventional wisdom among industry groups is that stronger enforcement spurs the growth of the legal media market and thereby improves access to media. While we understand this logic, we do not see it operating in South Africa. The more salient factor, in our view, is competition within the domestic media market. In countries where large domestic media industries compete for audiences, piracy has been a catalyst for new, legal lower-cost business models. In countries where media markets are dominated by foreign multinationals, competition on price and services within the legal market is rare, and piracy becomes the primary form of local compensation. In such contexts, enforcement answers none of the core problems of media access or market growth.

South Africa straddles these global issues. In many respects, it presents a typical case of a multinational-dominated media market and an exemplary case of government cooperation with those multinationals on enforcement. But it has also seen local movie exhibitors dramatically reduce prices as a means of building local markets (providing the sole exception in this report to soaring ticket prices around the world). The Ster-Kinekor/Nu Metro price war significantly expanded the South African movie audience and proved that exhibitors in Hollywood-dominated markets can, under some significant constraints, pursue alternative market strategies. In most other respects, however, the high-price structure of South African media markets remains intact, with only hints of change at the peripheries in the form of experiments like Bliksem DVDs and new external players, such as the increasing presence of low-cost media from Nigeria and India. The key question for South Africa is whether such peripheral actors can prosper—lowering prices, democratizing access, and creating a mass legal market. The alternative, in our view, is simply more of the same: slowly growing legal markets pegged to rising incomes, fast-growing pirate markets pegged to decreasing technology costs, and expanded public investment in an enforcement effort with little demonstrable impact on either.

About the Study

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