



Strengths and Weaknesses

Key Areas of Strength

- ✓ Draft copyright amendments and 2016 High Court ruling provide greater clarity on copyright exceptions and potentially insert DRM protection into the Copyright Act
- ✓ Relatively low level of software piracy—33% in 2015—compared with other African economies

Key Areas of Weakness

- ✗ Increasing policy emphasis on localization and local content requirements through public procurement and 2016 Industrial Policy Action Plan (IPAP)
- ✗ New IP Consultative Framework does not fundamentally address South Africa's gaps in IP protection—focus is not on innovation and development of new IP in South Africa but of use of existing developed IP
- ✗ Weak protection for patents and related rights
- ✗ Life sciences IP rights not in place
- ✗ High level of counterfeit goods

INDICATOR	SCORE	INDICATOR	SCORE
Category 1: Patents, Related Rights, and Limitations			
1. Term of protection	1	19. Frameworks against online sale of counterfeit goods	0.25
2. Patentability requirements	0	20. Industrial design term of protection	0.5
3. Patentability of CII	0	21. Exclusive rights, industrial design rights	0.25
4. Pharmaceutical-related enforcement	0	Category 4: Trade Secrets and Market Access	
5. Legislative criteria and active use of compulsory licensing	0	22. Protection of trade secrets	0.5
6. Pharmaceutical patent term restoration	0	23. Non-barriers to market access	0.75
7. Regulatory data protection term	0	24. Regulatory and administrative barriers to commercialization	0.5
8. Patent opposition	0	Category 5: Enforcement	
Category 2: Copyrights, Related Rights, and Limitations			
9. Term of protection	0.53	25. Physical counterfeiting rates	0.5
10. Exclusive rights	0.5	26. Software piracy rates	0.67
11. Cooperative action against online piracy	0.5	27. Civil and procedural remedies	0.5
12. Limitations and exceptions	0.25	28. Pre-established damages	0.25
13. Digital rights management	0.5	29. Criminal standards	0.5
14. Government use of licensed software	0.25	30. Effective border measures	0.5
Category 3: Trademarks, Related Rights, and Limitations			
15. Term of protection	1	31. Transparency and public reporting by customs	0
16. Limitations on use of brands	1	Category 6: Membership and Ratification of International Treaties	
17. Protection of well-known marks	0.5	32. WIPO Internet Treaties	0.5
18. Exclusive rights	0.5	33. Singapore Treaty on the Law of Trademarks	0
		34. Patent Law Treaty	0
		35. Post-TRIPS FTA	0
TOTAL: 12.70			

Spotlight on the National IP Environment

Past Editions versus Current Scores

South Africa's overall score has decreased from 39% (11.74 out of 30) in the fourth edition to 36% (12.70 out of 35) in the fifth edition. This decrease in score reflects a relatively mixed performance on the 5 new indicators added in the fifth edition. For example, South African customs authorities do not publish annual or systematic statistics on seizures of IP-infringing goods. This drop in score is also the result of the increased policy focus on localization and local content requirements.

General Comments

In July 2016, the Department of Trade and Industry (DTI) released the document "Intellectual Property Consultative Framework." This is not a legislative document or an overview of proposed policy reforms. Rather, the stated purpose of the framework is "not to prescribe South Africa's IP policy position, but to put forward the perspective of the DTI in a consultative instrument to facilitate what will be continuous engagement with governmental partners and society at large." The framework comes on the back of a long-standing debate in South Africa over IP rights and a number of legislative reform efforts over the past few years including a now withdrawn draft patent bill. It is a positive step that the government of South Africa recognizes the need for reform to its national IP environment and the value of consulting all stakeholders in that process. Unfortunately, this framework document focuses rather solely on one type of IP right, patents, and mainly on one high-tech sector, biopharmaceuticals. Like the Ministry of Science and Technology's 2014 flagship policy document for the biotechnology sectors, *The Bio-Economy Strategy*, the framework focuses on ways in which South Africa could better access existing and developed forms of IP including through the expanded use of compulsory licenses and parallel importation. There is no equivalent discussion on the manner in which IP can be created, be commercialized, and become an industrial asset. For economies—emerging and developed alike—the creation of new forms of intangible assets and IP are what will drive innovation, technological advances, and, ultimately, economic development and growth. IP rights are a critical component of this.

Copyrights, Related Rights, and Limitations

12. Scope of limitations and exceptions to copyrights and related rights: As mentioned in previous editions of the Index, South Africa is currently reforming its copyright law. Draft Copyright Act amendments were published in 2015 and made open to public consultations. These amendments contain numerous positive provisions relating to DRMs and TPMs corresponding with those already contained in chapter 12 of the Electronic Communications and Transactions Act. In addition, the proposed amendments also introduce a system of "fair use" exceptions to copyright. At the time of research, no final bill had been presented to the South African Parliament. However, in a separate development,

the High Court of South Africa finally made its judgment in the long-running court case between Moneyweb and Fin24 (two news websites) in May 2016. Of particular significance, the court's detailed outline of applicable criteria help define the meaning of fair dealing and relevant exceptions and limitations contained in the current Copyright Act. Although this judgment does not represent a sea change in South Africa's copyright environment—as detailed in previous editions of the Index, numerous gaps in copyright law still exist and significant challenges persist with regard to both digital and physical piracy—it nevertheless provides an important clarification to what had, up until now, been an area of copyright in which the case law was very sparse.

Trade Secrets and Market Access

23. Barriers to market access: As mentioned in previous editions of the Index, the South African government has for many years focused on developing its domestic economy through a range of localization policies. These policies are both general as well as industry and sector specific. For example, South Africa has long-standing local content requirements for certain sectors including broadcasting. Within public procurement, significant local content requirements have been in place since 2011 for a host of specially designated sectors ranging from automotive (buses), set-top boxes, clothing, and furniture. Local content requirements range from 10% to 100%, depending on the industry. More generally, the National Industrial Participation Programme (NIP) has been in place since the late 2000s. The NIP requires that foreign suppliers awarded government contracts within a month of signing a contract with the procuring entity also sign an obligation agreement where they commit to local economic activities. The ultimate purpose of the NIP is to build local capacity and partnering between local South African companies and international industry leaders. In 2016, the government intensified both these public procurement policies and the NIP framework, in particular its localization requirements. For instance, the DTI in the 2016 *Industrial Policy Action Plan 2016-17-2018-19* outlined new policies that strengthen these requirements. To begin with, the IPAP confirms the government's objective (first outlined in the 2014 five-year plan *Medium Term Strategic Framework*) of achieving a level of 75% local procurement. Specifically, the DTI is strengthening cross-governmental enforcement activities and ensuring greater compliance and application of these localization requirements. The IPAP also, both more broadly and in the sectoral focus-area discussions, places a heavy emphasis on the transfer of technologies from international rights holders to local companies. Conditioning market access and access to opportunities for public procurement on local partnering requirements and the sharing or divulging of proprietary technologies with local partners present significant barriers to trade and impediment to investment.