

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



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October 10, 2001

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street NW, Room 122
Washington, DC 20508

Re: Public Comments on Determining Country Eligibility for Benefits Under the African Growth and Opportunity Act (AGOA), Title I of the Trade and Development Act of 2000, 66 Fed. Reg. 49059 (September 25, 2001)

Dear Ms. Blue:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the September 25 request for public comments circulated by the African Growth and Opportunity Act Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the U.S. Trade Representative, in connection with the annual review of the eligibility of sub-Saharan African countries for the AGOA's benefits.

These comments outline our views on the intellectual property rights eligibility criteria that the President must consider when designating these sub-Saharan African countries as eligible beneficiary countries under the African Growth and Opportunity Act (AGOA).

DESCRIPTION OF THE IIPA AND ITS MEMBERS

The International Intellectual Property Alliance (the "IIPA" or "Alliance") is a coalition formed in 1984 consisting of seven trade associations, each of which represents a significant segment of the copyright industry in the United States. The IIPA consists of AFMA (formerly the American Film Marketing Association), the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

The IIPA represents more than 2,000 U.S. companies producing and distributing works protected by copyright laws throughout the world: all types of computer software, including business software and entertainment software (such as videogame CD-ROMs and cartridges, personal computer CD-ROMs, and multimedia products); motion pictures, television programs and home videocassettes, video CDs and DVDs; music; records, CDs and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in electronic and print media).

The U.S. copyright-based companies are the leading edge of the world's high technology, entertainment, and publishing industries. According to Copyright Industries in the U.S. Economy: The 2000 Report, prepared for IIPA by Economists, Inc., the core copyright industries accounted for \$457.2 billion in value added to the U.S. economy, or approximately 4.94% of the Gross Domestic Product (GDP) in 1999. In 1999, the total copyright industries¹ accounted for \$677.9 billion in value added, or approximately 7.33% of GDP.

The U.S. copyright industries are also among the nation's most dynamic and fast-growing economic sectors. The core copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy between 1977 and 1999 (7.2% vs. 3.1%). Employment in the core copyright industries grew more than three times the rate of national employment growth between 1977 and 1999 (5.0% vs. 1.6%). More than 7.6 million workers were employed by the total copyright industries, about 5.7% of the total U.S. work force, in 1999. The core copyright industries generated an estimated \$79.65 billion in foreign sales and exports in 1997, a 19.1% gain over 1997 and larger than almost all other industry sectors, including aircraft, motor vehicles, plastics, chemicals, etc. For more detailed information on the IIPA and its members, visit www.iipa.com.

THE INTELLECTUAL PROPERTY RIGHTS CRITERIA IN THE AGOA

Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-Saharan African countries.² Specifically, the African Growth and Opportunity Act (AGOA) amends the Generalized System of Preferences (GSP) program³ to authorize the President to designate sub-Saharan African countries as eligible for additional preferential tariff treatment for certain articles.

Country eligibility criteria under the AGOA are found in two places – Section 104 of the Trade and Development Act of 2000 (which appears in Subtitle A containing the provisions of AGOA itself) and in Section 111 of that Act (which appears in Subtitle B – in effect amendments to the GSP Act adding AGOA to GSP through adding a new Section 506A).

First, the specific AGOA criterion for intellectual property is found in Section 104 (a)(1)(C)(ii) which provides:

(a) In General.— The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country —

¹ The "total" copyright industries encompass the "core" industries and portions of many other industries which either create, distribute, or depend upon copyright works. Examples include retail trade (a portion of which is sales of video, audio, software and books, for example), the doll and toy industry, and computer manufacturing.

² Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000).

³ Generalized System of Preferences program, Title V of the Trade Act of 1974, as amended, 19 USC 2461 et seq.

(1) Has established, or is making continual progress toward establishing—

[...]

- (C) The elimination of barriers to United States trade and investment, including by—
- (i) The provision of national treatment and measures to create an environment conducive to domestic and foreign investment;
 - (ii) The protection of intellectual property;** and
 - (iii) The resolution of bilateral trade and investment disputes; [emphasis added].

Second, Section 111 of the AGOA (now the new Section 506A of the GSP statute) provides as follows:

SEC. 506A. DESIGNATION OF SUB-SAHARAN AFRICAN COUNTRIES FOR CERTAIN BENEFITS.

(a) Authority to Designate.—

- (1) In general.— Notwithstanding any other provision of law, the President is authorized to designate a country listed in section 107 of the African Growth and Opportunity Act as a beneficiary sub-Saharan African country eligible for the benefits described in subsection (b)—
- (A) if the President determines that the country meeting the eligibility requirements set forth in section 104 of that Act [which contains the above quoted intellectual property eligibility criterion], as such requirements are in effect on the date of enactment of that Act; and
 - (B) subject to the authority granted to the President under subsections (a), (d), and (e) of section 502, **if the country otherwise meets the eligibility criteria set forth in section 502.** (emphasis added)

Reading the new Section 104 of AGOA together with the new Section 506A of the GSP Act, it seems clear that countries that do not meet the GSP criteria in Section 502 cannot become beneficiaries under AGOA. Section 502(c) and (c)(5) provide that the President “shall take into account” in “determining whether to designate” a country under GSP, **“the extent to which such country is providing adequate and effective protection of intellectual property rights;”** (emphasis added).

This criterion requiring the provision of “adequate and effective” protection of intellectual property rights, including copyright protection and enforcement, is a flexible one that changes over time. For example, in the program adopted at the same time as AGOA – the Caribbean Basin Trade Partnership Act (CBTPA)⁴ – Congress specifically defined the intellectual property criteria in that Act (similar to the GSP Act criteria) to require “TRIPS or greater” protection and enforcement.⁵ In defining what might be meant by “greater” protection, Congress noted in the Conference Report that such protection rises to the

⁴ Title II, Trade and Development Act of 2000, Pub. L. 106-200 (May 18, 2000) (also known as the United States-Caribbean Basin Trade Partnership Act).

⁵ Section 213(b)(5)(B)(ii) of the United States-Caribbean Basin Trade Partnership Act, 19 U.S.C. §2703(b)(5)(B)(ii).

level of that provided in the U.S.’ “bilateral intellectual property agreements.”⁶ In conclusion, therefore, sub-Saharan African countries that wish to become eligible for the enhanced benefits under AGOA must at least meet TRIPS requirements for both copyright protection and enforcement.

While the TRIPS Agreement represents the floor of protection that must exist under AGOA and other U.S. preferential trade programs, TRIPS alone is not sufficient given the flexible standard embodied in the “adequate and effective” standard in Section 502 of the GSP statute. One of the copyright industries’ biggest challenges in the area of substantive copyright law reform is to elevate the levels of protection to account for changes in the digital environment, not only in fighting optical media piracy but piracy that occurs over digital networks. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a potential global plague. It makes it cheaper and easier than ever for thieves to distribute unauthorized copies of copyrighted materials around the globe. As USTR notes, “the internet is even more problematic [than optical media piracy] in that it has provided an efficient global distribution network for pirate products.”⁷ Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed.

Many of these legal changes are contemplated by the two so-called “internet” treaties of the World Intellectual Property Organization (WIPO): the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). In fact, the U.S. government has worked at all levels to encourage countries to sign, ratify and implement these two treaties. These treaties provide the essential legal framework for the continued spectacular growth of e-commerce in coming years by ensuring that valuable content is fully protected from piracy on the Internet. A number of countries in Africa are actively considering ratifying and implementing these treaties. For example, the governments of Burkina Faso and Senegal have ratified both WIPO treaties (with Burkina Faso already depositing them), while the Cabinets in Mali and Mauritius have approved ratification. Meanwhile, several other countries, including Tanzania and Botswana, have passed legislation that partially implements the WIPO “Internet” treaties. A level of protection that contemplates piracy over the Internet is part of the overall framework of “adequate and effective” protection in today’s world.

COPYRIGHT PROTECTION IN SUB-SAHARAN AFRICA

Few of the countries in sub-Saharan Africa come close to meeting the TRIPS-mandated levels of protection, particularly in the enforcement area.⁸ This must be taken into account in determining whether to keep those countries so designated as beneficiaries of AGOA, and whether to so designate further countries. The U.S. government needs to make these countries immediately aware that these IPR criteria

⁶ See Conference Report of the House of Representatives on the Trade and Development Act of 2000 [to accompany H.R. 434], Joint Explanatory Statement of the Committee of Conference on Subtitle B—Trade Benefits for Caribbean Basin Countries.

⁷ Press Release 01-25, Office of the U.S. Trade Representative, “USTR Releases Reports Emphasizing Enforcement Priorities,” April 30, 2001, at 6.


⁸ South Africa’s law remains TRIPS-incompatible, and does not yet implement the requirements of the WIPO “Internet” treaties. The government of South Africa released a Green Paper on Electronic Commerce in early 2001, and IIPA commented on this Green Paper on March 30, 2001. Draft legislation with minor amendments to the copyright law has recently been tabled, and further draft legislation will be forthcoming shortly, intended in part to implement the WIPO “Internet” treaties. IIPA is very concerned that these drafts may not reinstate the very positive amendments put forward in 2000 (which included the criminalization of end-user piracy, statutory damages, and a fix to the current TRIPS-deficient provision on presumption of subsistence and ownership of copyright), and may fall short of adequate implementation of TRIPS and the WIPO “Internet” treaties.

are not met at this time and give the countries time to bring their regimes into compliance before determining whether to change the designation. We also strongly encourage the U.S. government to work through the embassies in the region to provide detailed accounts of what these governments are doing, in the legislative area as well as in the area of enforcement of copyright, to meet their AGOA eligibility criteria as discussed above.

CONCLUSION

IIPA appreciates this opportunity to provide the Subcommittee with our views on the AGOA and the intellectual property rights criteria that must be considered as the countries in sub-Saharan Africa are considered for designation as beneficiaries. We look forward to working with the Subcommittee to foster improved copyright protection in this region.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Smith", with a stylized flourish extending to the right.

Eric H. Smith
President
International Intellectual Property Alliance