

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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VIA REGULATIONS.GOV (Docket No. USTR–2013–0035)

Constance Hamilton
Deputy Assistant U.S. Trade Representative for Africa
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act in 2014, 78 Fed. Reg. 60367 (October 1, 2013)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the October 1, 2013 request for public comments circulated by the African Growth and Opportunity Act (AGOA) Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the U.S. Trade Representative, in connection with the review of the eligibility of sub-Saharan African countries to receive AGOA benefits.

A. Description of the IIPA and its Members

The IIPA is a coalition of seven trade associations representing copyright-based industries in bilateral and multilateral efforts working to improve international protection of copyrighted materials and address market access barriers for the creative industries we represent.¹ IIPA's seven member associations represent over 3,200 companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software and entertainment software (such as videogame discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).

¹ IIPA's seven member associations are: the Association of American Publishers (AAP), BSA | The Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy. Inexpensive and accessible reproduction technologies, and the massive growth of the Internet, however, make it easy for copyrighted materials to be pirated in other countries. IIPA strives in foreign countries for the establishment of copyright law and enforcement that deter piracy. Such regimes create a framework for trade in IIPA members' creative products, foster technological and cultural development, and encourage investment and employment in the creative industries.

B. AGOA and the Protection and Enforcement of Intellectual Property Rights

The IIPA continues to look to the AGOA as an important opportunity for U.S. trade interests to partner in the growth of new and growing foreign markets, including in the copyright sector, as AGOA-eligible beneficiary countries gain access to the U.S. market. As an economy develops, it should look to intellectual property law and enforcement mechanisms that can incentivize its own creative industries and foster economic growth and stability. The U.S. Government's AGOA review is one of only few regularly occurring opportunities to examine intellectual property protection and enforcement in AGOA-eligible countries and to provide guidance to make those mechanisms more effective.

As the experience of the copyright industries has shown, where young markets fail to take steps toward protection and enforcement, piracy can take hold regardless of a country's size or capacity and cause damage on a global scale. Governments should take note that as economies expand into new platforms, so must the scope of the rule of law. For many regions of the developing world, including Africa, this has implicated a need for laws and enforcement measures to address illegal activities that take place over broadband Internet access and, increasingly, mobile devices. Mobile devices have brought incredible economic opportunity for individuals and legitimate businesses in sub-Saharan Africa, reaching an estimated 545 million subscriptions on the continent in 2013 (more than 63 subscriptions per 100 inhabitants), according to the UN's International Telecommunication Union (ITU).² In 2012, the ITU reports that there were about 100 mobile phone subscriptions per 100 inhabitants in Ghana, over 71 subscriptions per 100 inhabitants in Kenya, over 67 subscriptions per 100 inhabitants in Nigeria, over 87 subscriptions per 100 inhabitants in Senegal, and 134 subscriptions per 100 inhabitants in South Africa. This impressive technological growth, unfortunately, is accompanied by illegitimate activities that could hamper legitimate economic growth if unchecked.

For these reasons, it is crucial that countries demonstrate some measure of progress toward adequate and effective protection of intellectual property, as a key element to AGOA eligibility. We urge the Administration to continue to examine copyright laws and enforcement practices under the intellectual property rights (IPR) eligibility criteria of AGOA with a view toward positive growth in the economic futures of AGOA-eligible countries. Under section 104 of the AGOA Act, the President may designate a country as eligible for AGOA benefits if, among other criteria, it "has established, or is making continual progress toward establishing ... [t]he elimination of barriers to United States trade and investment, including by ... the protection

² See <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

of intellectual property.” 19 USC 3703(a)(1)(C)(ii). Under the GSP program, section 502(c)(5) of the 1974 Act provides 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.” 19 USC 2462(c)(5). In exchange for the trade benefits these programs offer, such key intellectual property rights provisions ensure that countries with adequate capacity have established the necessary laws and enforcement measures to protect copyright works, and that countries with lesser capacity make continual progress toward establishing such laws and measures.

As IIPA has explained in previous AGOA-related filings,³ just what amounts to “adequate and effective” protection of intellectual property rights is a flexible measure that changes over time. The requirements of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), including regarding copyright protection and enforcement, are key considerations in this determination. Today, in the face of challenges such as optical media piracy, piracy that occurs over the Internet and mobile networks, and unauthorized uses of copyright works by businesses, the two “Internet” treaties of the World Intellectual Property Organization (WIPO) – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – contemplate many of the needed legal changes. These treaties provide essential legal frameworks for the continued growth of e-commerce in coming years by ensuring that valuable content is protected from piracy on the Internet.

C. Request for Review of Conditions in Sub-Saharan Africa

The IIPA requests that the Administration continue to assess the progress of AGOA-eligible governments in legislative measures and in the enforcement of copyright, and to identify those countries that could benefit from U.S. assistance in capacity building to meet the requirement to provide “adequate and effective” protection of intellectual property rights (IPR). Such an exercise would further benefit both AGOA-eligible nationals and U.S. companies seeking to do business in those nations by creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law.

Cable piracy in AGOA-eligible countries is an ongoing concern in 2013. The transition from analog to digital signals has resulted in a notable decline in some incidents of piracy in the region; still, older and easier-to-pirate technology is still widely used in many Francophone countries, making platform operators in those countries more susceptible to incidents of piracy. Incidents of cable piracy have also been reported in **Ghana, Kenya, Nigeria, and Tanzania** in the past year. Efforts are in place to legitimize local operators so as to limit the inclination to engage in piracy of popular channels. In one example, the MPAA reports that in January 2013, it learned that a cable operator known as Coconut Digital TV in Tanzania was pirating two major cable channels; local affiliates have sought the intervention of the Tanzania Communications Regulatory Authority.

³ See, for example, IIPA’s 2009 Public Comments in the Annual Review of AGOA Country Eligibility, available at <http://www.iipa.com/agoa.html>.

Widespread copyright piracy remains a very serious problem among all African countries. As a result, it may be the case that many copyright-based sectors and companies are still reluctant to invest in these smaller markets where piracy is, in effect, uncontrollable. As AGOA-eligible countries consider reforms to their copyright systems, they should be encouraged to work with stakeholders and the U.S. Government, while considering the requirement to provide adequate and effective protection of IPR under AGOA. Some recent developments include:

- The **Nigerian** Copyright Commission is currently undertaking an effort to review the country's copyright law. This effort was sparked in part by the recognition that Nigeria's domestic copyright industries are generating levels of revenue that are extremely low in light of the high levels of consumer demand for Nigerian cultural products, such as Nollywood motion pictures.⁴
- **South Africa** recently sought comments on a draft Intellectual Property Strategy that includes recommendations regarding its copyright policy.⁵ Notably, the recommendations discourage accession to the WIPO Copyright Treaty and appear to criticize U.S. and EU laws implementing that agreement, stating that the "DCMA [sic] and EU Directive restrict the number of downloads, whether for commercial or personal/research use." A broad exception to copyright that would allow unrestricted copying (such as downloads) of copyright works for "personal" use could result in severe harm to the legitimate online markets for both South African and foreign copyrighted works alike. Moreover, such an exception could bring the country out of compliance with its obligations under Article 13 of the TRIPS Agreement, which requires members to "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

Several countries have either enacted legislation or are considering the implementation of the WIPO treaties. So far, nine countries in Africa (excluding North Africa) have deposited their instruments to join the WCT and the WPPT: Benin, Botswana, Burkina Faso, Gabon, Ghana, Guinea, Mali, Senegal and Togo. While Kenya, Namibia, Nigeria, and South Africa signed the WCT and WPPT between 1996 and 1997, these four important AGOA-eligible countries have yet to ratify or implement either of the treaties.

Again this year, we suggest that USTR incorporate as part of the annual review process a request that the eligible AGOA countries provide a brief update on the status of their current copyright legislation as well as their plans, if any, to amend their copyright legislation. Such information would be most useful at this stage of the review, before the final report is issued.


⁴ See <http://www.copyrightreform.org/reforms/economic-rationale.aspx>.

⁵ See http://www.greengazette.co.za/pages/national-gazette-36816-of-04-september-2013-vol-579_20130904-GGN-36816-003, pages 29-30.

CONCLUSION

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with its views on the AGOA. It is essential that the annual AGOA review remain an opportunity to evaluate the progress of its beneficiaries toward meeting their intellectual property rights criteria. It is also essential to undertake reviews of the conditions in such countries to determine if capacity building assistance can make a difference. We look forward to working with you to foster improved copyright protection in sub-Saharan Africa as a region.

Respectfully submitted,



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International Intellectual Property Alliance