

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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VIA REGULATIONS.GOV (Docket No. USTR-2010-0024)

Ms. Gloria Blue

Executive Secretary, Trade Policy Staff Committee

Office of the U.S. Trade Representative

600 17th Street, NW, Room F516

Washington, DC 20508

Re: African Growth and Opportunity Act Implementation Subcommittee of the Trade Policy Staff Committee; Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act, 75 Fed. Reg. 61239-40 (October 4, 2010)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the October 4, 2010 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 annual review of the eligibility of sub-Saharan African countries for AGOA benefits.

This submission explains IIPA's views on the importance of the Administration examining countries' copyright laws and enforcement practices under the AGOA's intellectual property rights (IPR) eligibility criteria. We appreciate that the Subcommittee has discussed AGOA countries' copyright laws and enforcement in its previous reports,¹ and we would strongly encourage the Subcommittee to draw upon recent reports (such as those prepared by the IIPA in its annual Special 301 process) to enrich the record in future reports. It is important to indicate steps the beneficiary countries are taking to ensure that the AGOA IPR criteria for eligibility are being met, but where piracy problems persist or get worse, it is important to note instances in which the AGOA criteria may not be being met at present.

IIPA also takes the opportunity in this year's filing to note that many of the AGOA-eligible countries lack sufficient capacity to meaningfully protect copyright, both for their own nationals and for U.S. copyright owners. IIPA suggests that the U.S. Trade Representative, in

¹ For example, the May 2008 USTR report very briefly mentioned intellectual property rights in Benin, Burkina Faso, Burundi, Cameroon, the Central African Republic, Comoros, Congo (Democratic Republic of), the Gambia, Ghana, Kenya, Madagascar, Mali, Namibia, Nigeria, Senegal, and Sierra Leone, and South Africa. See United States Trade Representative, "2008 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act," May 2008, at http://www.ustr.gov/assets/Trade_Development/Preference_Programs/AGOA/asset_upload_file203_14905.



conjunction with the U.S. Patent and Trademark Office, the U.S. Department of Commerce, the U.S. Department of State, and the U.S. Copyright Office, undertake a review of conditions in some of the AGOA beneficiary countries to determine whether U.S. assistance in capacity building could be valuable in creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law.

A. DESCRIPTION OF THE IIPA AND ITS MEMBERS

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of seven trade associations,² each representing a significant segment of the U.S. copyright community. These member associations represent 1,900 U.S. 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 CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). The core U.S. copyright industries contributed an estimated 6.44% of the U.S. gross domestic product (GDP) in 2007.³

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's goals in foreign countries include the establishment of legal and enforcement regimes for copyright that deter piracy, thus creating an adequate framework for trade in IIPA members' creative products, as well as fostering technological and cultural development, thus encouraging investment and employment in the creative industries.

B. THE INTELLECTUAL PROPERTY RIGHTS CRITERIA IN THE AGOA

The African Growth Opportunity Act amended the U.S. trade law in 2000 to authorize the President to designate sub-Saharan African countries as eligible for duty-free tariff treatment for certain products under the Generalized System of Preferences (GSP) trade program.⁴ Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-

² IIPA's members are: Association of American Publishers (AAP), Business Software Alliance (BSA), Entertainment Software Association (ESA), Independent Film & Television Alliance (IFTA), Motion Picture Association of America (MPAA), National Music Publishers' Association (NMPA), and Recording Industry Association of America (RIAA).

³ See the 2009 economic report prepared for the IIPA by Stephen Siwek of Economists Inc., *Copyright Industries in the U.S. Economy: the 2003 - 2007 Report*, available at <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>.

⁴ See Generalized System of Preferences, Title V of the Trade Act of 1974, as amended, 19 USC 2461 *et seq.*



Saharan African countries.⁵ As of January 2010, 38 sub-Saharan African countries were eligible for AGOA benefits.⁶ Ten sub-Saharan countries are not presently eligible.⁷

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 Section 506A).

First, the specific AGOA criterion for intellectual property is found in Section 104 (a)(1)(C)(ii) (19 USC 3703(a)(1)(C)(ii)) 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) 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).

⁵ See Trade and Development Act of 2000, Title 1 of the Trade and Development Act of 2000, Pub. L. 106-200, 19 USC 3721 *et seq.*

⁶ These are: Angola, Republic of Benin, Republic of Botswana, Burkina Faso, Burundi, Republic of Cape Verde, Republic of Cameroon, Republic of Chad, Federal Islamic Republic of Comoros, Republic of Congo, Democratic Republic of Congo, Republic of Djibouti, Ethiopia, Gabonese Republic, The Gambia, Republic of Ghana, Republic of Guinea-Bissau, Republic of Kenya, Kingdom of Lesotho, Republic of Liberia, Republic of Malawi, Republic of Mali, Islamic Republic of Mauritania, Republic of Mauritius, Republic of Mozambique, Republic of Namibia, Federal Republic of Nigeria, Republic of Rwanda, Sao Tome & Principe, Republic of Senegal, Republic of Seychelles, Republic of Sierra Leone, Republic of South Africa, Kingdom of Swaziland, United Republic of Tanzania, Republic of Togo, Republic of Uganda, and Republic of Zambia.

⁷ Countries not eligible for AGOA benefits include: Central African Republic, Republic of Cote d'Ivoire, Republic of Guinea, Republic of Equatorial Guinea, State of Eritrea, Republic of Madagascar, Republic of Niger, Somalia, Republic of Sudan, and Republic of Zimbabwe.



Second, Section 111 of the AGOA (also Section 506A of the GSP statute, 19 USC 2466a) provides the following regarding eligibility designation:

(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*)

Thus, reading together the two provisions above (Section 104 of the AGOA and 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.** As this committee already knows, Section 502(c)(5) of the GSP program 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” (see 19 USC 2462(c)(5)).

Furthermore, Section 506A of the GSP Act provides that if the President determines that a beneficiary country is not making “continual progress” in meeting the eligibility requirements, he must terminate that country’s AGOA designation (see 19 USC 2466a(a)(3)).

C. “ADEQUATE AND EFFECTIVE” IN LIGHT OF TRIPS AND THE WCT AND WPPT

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)⁸ – Congress specifically defined the intellectual property criteria in that Act (similar to the GSP Act criteria) to require “TRIPS or greater” protection and enforcement.⁹ In defining what might be meant by “greater” protection, Congress noted in the Conference Report that such protection rises to the level of that provided in the U.S.’ “bilateral

⁸ 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).

⁹ Section 213(b)(5)(B)(ii) of the United States-Caribbean Basin Trade Partnership Act, 19 U.S.C. §2703(b)(5)(B)(ii).



intellectual property agreements.”¹⁰ **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 the Internet or mobile networks, or, e.g., in the form of unauthorized uses by businesses.

The Internet and mobile networks are fundamentally transforming copyright piracy from a mostly local phenomenon to a global problem. Copying over these platforms is also cheaper and easier. Modern copyright laws must respond to the changes in the Internet distribution of unauthorized copies of copyrighted materials by providing that creators have the basic right to control distribution of copies of their creations. Many of these legal changes are contemplated by the two “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 growth of e-commerce in coming years by ensuring that valuable content is protected from piracy on the Internet.

So far, nine countries in Africa (excluding North Africa) have deposited their instruments to join the WCT: **Benin, Botswana, Burkina Faso, Gabon, Ghana, Guinea, Mali, Senegal and Togo.** In addition, eight of the nine countries have deposited their instruments to join the WPPT: **Benin, Botswana, Burkina Faso, Gabon, Guinea, Mali, Senegal and Togo.** Ghana passed legislation to accede to the WPPT as well on August 25, 2004, and deposited the legislation with WIPO on August 18, 2006.¹¹ A number of other countries in Africa are actively considering ratifying the treaties, and many more have already taken steps to implement them.

D. REQUEST FOR REVIEW OF CONDITIONS FOR ASSISTANCE AND CAPACITY BUILDING IN SUB-SAHARAN AFRICA

IIPA notes that few of the countries in sub-Saharan Africa come close to meeting the TRIPS-mandated levels of protection, particularly in the enforcement area, but also notes that many of the AGOA-eligible countries lack sufficient capacity to meaningfully protect copyright,

¹⁰ 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.

¹¹ Thus, while we believe the effective date of accession to the WPPT for Ghana is November 18, 2006, the WIPO website does not yet reflect this accession.



both for their own nationals and for U.S. copyright owners. IIPA once again suggests that the U.S. Trade Representative, in conjunction with the U.S. Patent and Trademark Office, the U.S. Department of Commerce, the U.S. Department of State, and the U.S. Copyright Office, undertake a review of conditions in some of the AGOA beneficiary countries to determine whether U.S. assistance in capacity building could be valuable in creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law. Such reviews and resulting assistance would be in advance of determining whether to keep these countries designated as beneficiaries of AGOA, and whether to designate more countries.

Copyright Legislation in Sub-Saharan Africa

The U.S. government should, for example, make these countries aware that the AGOA IPR criteria are not met at this time and indicate that they should bring their regimes into compliance before determining whether to change the designation. IIPA encourages the U.S. government to work through the embassies in the region to exchange 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.

For example, several countries have either enacted legislation or are considering the implementation of the WIPO treaties.

- **Botswana** enacted legislation (the Copyright and Neighboring Rights Law (2000)), which seeks to implement these provisions in the WIPO treaties (though not entirely successfully, in our view).
- **Namibia** enacted the Copyright Act, 2002, and this Bill contains measures intended to implement the WIPO treaties.
- While legislation to bring South Africa's copyright law closer into line with TRIPS stalled in 2000, in 2002, the government of **South Africa** enacted the Electronic Communications and Transactions Act, 2002 (No. 25 of 2002), which contains some reasonably good provisions dealing with issues of liability of service provider for illegal online conduct, although this was not copyright-specific legislation.

As part of the annual review process, we suggest that USTR 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.



Trade Policy and Copyright Enforcement in Sub-Saharan Africa

In IIPA's previous Special 301 submissions, we have reported on copyright-related developments in **Nigeria, Kenya, and South Africa**. Trade losses are not readily available for all industries, but the Business Software Alliance estimates the value of unlicensed software in selected sub-Saharan African countries at **\$290 million** in 2009. The Special 301 process has not resulted in inclusion of any African countries (other than North Africa) on the current USTR lists. Nevertheless, 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.

E. CONCLUSION

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with its views on the AGOA. It is essential that the intellectual property rights criteria be considered as these countries are evaluated to maintain their current AGOA eligibility and others considered for designation as new beneficiaries. It is also essential to take stock of the lack of sufficient capacity to meaningfully protect copyright in AGOA countries, and 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 this region.

Respectfully submitted,

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