

August 1, 2018

**VIA REGULATIONS.GOV (Docket No. USTR–2018–0022)**

Edward Gresser  
Chair of the Trade Policy Staff Committee  
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, 83 Fed. Reg. 31629 (July 6, 2018)**

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the July 6, 2018 request for public comments circulated by the African Growth and Opportunity Act (AGOA) Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the Office of 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**

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. IIPA's five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software, including interactive games for video game consoles, handheld devices, personal computers and the Internet; educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include Association of American Publishers ([www.publishers.org](http://www.publishers.org)), Entertainment Software Association ([www.theesa.com](http://www.theesa.com)), Independent Film & Television Alliance ([www.ifta-online.org](http://www.ifta-online.org)), Motion Picture Association of America ([www.mpa.org](http://www.mpa.org)), and Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)).

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy.<sup>1</sup> Inexpensive and accessible reproduction technologies, however, make it easy for copyrighted materials to be pirated in other countries, including in the online environment. IIPA strives for the establishment of modern copyright law and enforcement regimes in foreign countries that deter piracy, because such regimes create a framework for trade in 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**

As sub-Saharan economies develop, governments should look to intellectual property law and enforcement mechanisms that can incentivize their own creative industries and foster economic growth and stability. The U.S. Government's AGOA review is one of only a 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. IIPA appreciates the opportunity to participate in the process.

IIPA highlights below serious concerns with **South Africa's** copyright law amendments, as well as some positive indications of improvements in copyright protection and enforcement in **Nigeria, Burundi, Kenya, Rwanda, Tanzania, and Uganda.**

The protection and enforcement of intellectual property rights are important prerequisites for AGOA eligibility.<sup>2</sup> The adequate and effective protection and enforcement of copyright is the foundation on which both U.S. and local creators and investors base their production and distribution activities in AGOA-eligible markets. Creators from AGOA beneficiary countries recognize the importance of adequate and effective copyright protection and enforcement to incentivize investment in the production of cultural works, and allow local artists to sustain their livelihoods.<sup>3</sup>

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<sup>1</sup>See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report* (December 6, 2016) available at: <https://iipa.org/reports/copyright-industries-us-economy/>. The "core" copyright industries in the U.S. outpaced the U.S. economy, growing at 4.8% between 2012 and 2015, while the U.S. economy grew by 2.11%. The core copyright industries generated over \$1.2 trillion dollars of economic output in 2015, accounting for 6.88% of the entire economy. Core copyright industries are those whose primary purpose is to create, produce, distribute, or exhibit copyright materials.

<sup>2</sup>See AGOA Section 104(a)(1)(C)(ii) (19 U.S.C. § 3703(a)(1)(C)(ii)) and AGOA Section 111 (adding Section 506A to the Trade Act of 1974 authorizing the President to designate AGOA eligible countries if he determines they meet the criteria of AGOA Section 104 and the Generalized System of Preferences (GSP) country eligibility criteria of Section 502 of the Trade Act of 1974, including Section 502(c)(5) (19 U.S.C. § 2462(c)(5))).

<sup>3</sup>See, e.g., Peace Hyde, "The Fortune and Fury Behind Nollywood," Jan. 30, 2018, *Forbes Africa*, <https://www.forbesafrica.com/life/2018/01/30/fortune-fury-behind-nollywood/> (quoting Kofi Ansah, an emerging Ghanaian movie producer: "Piracy works with informal networks and to be honest, there is really no fear of punishment because you hardly hear of anybody who has been arrested on the grounds of video piracy. That is where the law needs to act. Instill a fear of imprisonment and people will behave accordingly."); Sharon Kantengwa, "Rwanda: Why Rwanda's Hillywood Dream Is Still Elusive," Mar. 2, 2018, *The New Times*, <https://allafrica.com/stories/201803020040.html> (quoting Willy Ndahiro, an actor and founder of Hillywood Actors and Modelling Agency: "Rwandan films are not well protected property rights infringement. Although the law was put in place in 2009, stakeholders have not put into account any implementation and instead movies are increasingly

As a key element to AGOA eligibility, it is crucial that AGOA beneficiaries demonstrate some progress toward the adequate and effective protection of intellectual property. We urge the Administration to continue to consider copyright laws and enforcement practices under the intellectual property eligibility criteria of AGOA.<sup>4</sup> As IIPA has explained in previous AGOA-related filings,<sup>5</sup> just what amounts to “adequate and effective” protection of intellectual property rights is a flexible measure that rightly changes over time. The obligations of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (“TRIPS Agreement”), which provide global minimum standards of copyright protection and enforcement, are central to this determination. Also central to the determination are the standards provided under the World Intellectual Property Organization (WIPO) Internet treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – which contemplate many of the legal norms for a sustainable and healthy online marketplace. These treaties establish a foundation for essential legal frameworks for the continued growth of legitimate digital trade by providing copyright holders with a full panoply of exclusive rights in the digital networked environment to protect their valuable content.

The Government of **Nigeria** has recognized the importance of the growing film industry, now the second largest in the world, as well as a vibrant and growing music industry.<sup>6</sup> Nigeria’s minister of information and culture, Lai Mohammed, recently commented, “When we talk about diversifying the economy it is not just about agriculture or solid minerals alone, it is about the creative industry – about the films, theatre and music.”<sup>7</sup> Unfortunately, pervasive piracy remains a significant obstacle for Nigerian artists, who, as a result, struggle to receive any compensation for their works.<sup>8</sup> Stronger copyright protection and enforcement are needed to support the country’s burgeoning creative sector, which, according to one study, is expected to grow from \$4.8 billion in 2015 to more than \$8 billion in 2019.<sup>9</sup> IIPA welcomed Nigeria’s ratification of the WIPO Internet treaties in 2017, and encourages the Government of Nigeria to fully implement these treaties without delay. In addition, capacity building is needed in Nigeria to

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being pirated.”); Muhamed Bah, “Gambia: Film Makers, Actors Lament On Challenges Within the Industry,” July 6, 2018, *FOROYAA Newspaper*, <https://allafrica.com/stories/201807060745.html> (quoting Sheikh Tijan Sonko, a film producer, actor and entertainer: “Government must do all they can to assist them in their fight against piracy on their products; that this is the worst illegal activity that is killing their work; that they will not make any gain either for the nation or themselves, if this illegal activity continues.”).

<sup>4</sup>For AGOA intellectual property eligibility criteria, see AGOA Sections cited *supra* note 2.

<sup>5</sup>See, e.g., IIPA’s 2009 Public Comments in the Annual Review of AGOA Country Eligibility, available at <https://iipa.org/files/uploads/2018/01/IIPAAGOAFilingtoUSTR101909-1.pdf>.

<sup>6</sup>For example, Universal Music recently launched a division in Nigeria. See Richard Smirke, “Universal Music Grows African Presence With Launch Of Nigeria Division,” July 17, 2018, *Billboard*, <https://www.billboard.com/articles/business/8465836/universal-music-nigeria-western-africa-ezegozie-eze>.

<sup>7</sup>See Franck Kuwonu, “Nigeria’s ‘new oil’ export is beating the charts,” May 28, 2018, *Business Report*, <https://www.iol.co.za/business-report/opinion/opinion-nigerias-new-oil-export-is-beating-the-charts-15194513>.

<sup>8</sup>See, e.g., Dionne Searcey, “Nigeria’s Afrobeats Music Scene is Booming, but Profits Go to Pirates,” June 3, 2017, *NY Times*, <https://www.nytimes.com/2017/06/03/world/africa/nigeria-lagos-afrobeats-music-piracy-seyi-shay.html>.

<sup>9</sup>See Kuwonu, <https://www.iol.co.za/business-report/opinion/opinion-nigerias-new-oil-export-is-beating-the-charts-15194513>. See also Joseph Onyekwere, “Nigeria: Outdated Laws, Bane of Nigeria's Creative Industry, Says Idigbe,” May 15, 2018, *The Guardian*, <https://allafrica.com/stories/201805150315.html>.

increase awareness not only of intellectual property crimes, but also of the legal tools that aid in enforcement against all forms of cybercrime.<sup>10</sup>

The East African Community (the regional intergovernmental organization of **Burundi, Kenya, Rwanda, Tanzania, and Uganda**) adopted the EAC Creative and Cultural Industries Bill of 2015, which would establish a Creative and Cultural Industries Council, whose purposes include “to enhance awareness of intellectual property rights, and consequently strengthen the foundation for successful creative and cultural industries.”<sup>11</sup> Unfortunately, Tanzania has withheld its assent for this initiative, putting its future in jeopardy.<sup>12</sup> IIPA encourages Tanzania and the rest of the East African Community to follow through with this important commitment to incentivize its creative and cultural industries, with dedicated resources and the assistance of international capacity building wherever available.

**South Africa’s** Copyright Law needs many fundamental amendments to bring South Africa into compliance with the international treaty framework (notably the WIPO Internet treaties), as well as international norms that have since been developed. In 2015, the Parliament introduced a Copyright Amendment Bill (the “2015 Bill”), but it was fatally flawed and fell well short of meeting South Africa’s copyright treaty obligations<sup>13</sup> and the international standards of copyright protection and enforcement in the digital age. Because of feedback from many rights holder groups and experts from around the world, the 2015 Bill was tabled pending further review and discussion with stakeholders. In December 2016 and May 2017, two bills, amounting to a revised version of the troubling 2015 Copyright Amendment Bill, were introduced. These revised bills, the 2016 Performers Protection Amendment Bill and the 2017 Copyright Amendment Bill, addressed only a few of the concerns with the highly problematic 2015 Bill. Unfortunately, many of the most problematic provisions remain in this latest version of the 2017 Bill.

As drafted, many provisions of the 2017 Bill lack clarity, create unnecessary burdens on rights holders, and/or fall short of needed reforms. Moreover, adoption of this bill would place South Africa out of compliance with the AGOA eligibility criteria regarding intellectual property. If the 2017 Bill were adopted, South Africa’s copyright framework would not provide adequate and effective protection and enforcement of intellectual property. Specifically, the key issues of immediate and primary concern to the U.S. copyright industries include:

- An ill-considered importation of the U.S. “fair use” rubric appended to a proliferation of extremely broad and new exceptions and limitations to copyright protection, the effect

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<sup>10</sup>See Adeyemi Adepotun, “25% of cybercrime cases unresolved,” Sep. 2, 2015, *The Guardian*, <http://www.nguardiannews.com/2015/09/25-of-cybercrime-cases-unresolved/>.

<sup>11</sup>See Section 6 of the Creative and Cultural Industries Bill; see also Anthony Weseka: “New Regional Law to Protect Artists,” *Daily Monitor*, Aug. 27, 2015, <http://www.monitor.co.ug/News/National/New-regional-law-to-protect-local-artistes/-/688334/2847294/-/15f4mkrz/-/index.html>.

<sup>12</sup>See Zephania Ubwani, “East Africa: EALA Bills Hang in the Balance After Rejection By Tanzania,” April 24, 2017, *The Citizen*, <https://allafrica.com/stories/201704240739.html>.

<sup>13</sup>See, e.g., WTO Agreement on Trade-related Aspects of Intellectual Property Rights (“TRIPS Agreement”) Article 13, and Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) Article 9.

of which would imperil the legitimate markets for educational texts, locally-distributed works, and online works, in general.

- New provisions regarding the “making available” right for record producers which have a far broader impact across the copyright industries, raising significant concerns.
- Licensing and regulatory mechanisms that are likely to undermine the digital marketplace by regulating the relationship between creative parties rather than by providing a robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.
- Unnecessary restrictions on rights holders to contract on the open market, a key factor for the healthy growth of the entire creative sector. For example, the 2017 Bill limits assignment of rights to 25 years.
- Inadequate criminal and civil remedies for infringement, including online piracy.

These provisions are inconsistent with South Africa’s international obligations under the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and the WTO TRIPS Agreement. For example, certain provisions far exceed the scope of exceptions and limitations permitted under those agreements.<sup>14</sup> Further, these provisions are incompatible with the WPPT, which South Africa has stated it intends to ratify. Finally, as indicated above, the incompatibility of these provisions with a healthy, sustainable and fair digital marketplace for creators, both domestic and foreign, run afoul of the AGOA eligibility criteria to provide adequate and effective protection and enforcement of intellectual property.

Many of the proposals in the 2017 Bill suggest a mistaken assumption that there is a fixed market for copyrighted works and that the government’s role is to regulate the internal relationships of the creative community rather than to incentivize new investment in creative output. This misguided approach will stagnate South Africa’s cultural community. If it does not make important revisions to these proposed provisions, South Africa will take a giant step backward in its effort to strengthen its copyright-based industries. South Africa would be better served by providing clear and unencumbered rights in its law that will allow its creative communities to increase investment to meet the growing demand for creative works of all kinds, in all formats.

Internet use in Africa has skyrocketed, growing from 53.6 million users in 2010 to 190.1 million users in 2016, according to the UN’s International Telecommunication Union (ITU).<sup>15</sup> Nigeria has 48 million users, South Africa has 30 million users, Ethiopia has 16 million users, Kenya has 13 million users, and Ghana has nearly 10 million users. This impressive technological growth, unfortunately, is accompanied by illegitimate activities that will hamper legitimate economic growth if left unchecked. To effectively ensure a safe, healthy, and

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<sup>14</sup> See WTO TRIPS Agreement Article 13, and Berne Convention Article 9.

<sup>15</sup> See World Telecommunication/ICT Indicators Database 2017, <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

sustainable digital marketplace, AGOA economies should assess whether their legal regimes are capable of responding to today's challenges, including rampant online piracy.

### **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.

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

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

We recommend that USTR require, as part of the annual review process, that the eligible AGOA countries provide an update on the status of their current copyright legislation as well as their plans, if any, to amend their copyright legislation and to accede to relevant international instruments. Such information would be most useful in advance of the determination of the recommendations for AGOA eligibility.

As noted above, South Africa's 2017 Copyright Amendment Bill remains riddled with problematic and troublesome provisions that run afoul of international norms and would, if enacted, result in international treaty violations, stifle opportunities to invest in South Africa's creative economy, and, importantly, place South Africa out of compliance with AGOA's eligibility criteria.

## **CONCLUSION**

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with our 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, and to identify opportunities to enhance IPR protection and to thereby expand economic development. 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,

A handwritten signature in black ink, appearing to read "Kevin M. Rosenbaum". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kevin M. Rosenbaum  
International Intellectual Property Alliance