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Via Email: fr0525@ustr.eop.gov

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,
70 Fed. Reg. 177 (Sep. 14, 2005)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the September 14, 2005 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.

These comments explain IIPA's views on the importance of reviewing countries' copyright laws and enforcement practices under the AGOA's intellectual property rights (IPR) eligibility criteria. We also take this opportunity to reiterate that high levels of copyright and enforcement obligations (similar to those found in existing U.S. Free Trade Agreements) should be included in the IPR chapter of the South African Custom Union (SACU) FTA, which is currently under negotiation.

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,¹ 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

¹ IIPA's members are: [the Association of American Publishers \(AAP\)](#), [the Business 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 \(RIAA\)](#).



professional publications and journals (in both electronic and print media). The U.S. copyright industries contribute to nearly 6% of the gross domestic product to the total U.S. economy.²

IIPA's goal in foreign countries is to establish legal and enforcement regimes for copyright that not only deters piracy, but that also fosters technological and cultural development in these countries, encouraging local investment and employment. 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, however, make it easy for copyrighted materials to be pirated in other countries. Losses due to piracy of U.S. copyrighted materials around the world are conservatively estimated to reach \$25-\$30 billion annually (not including internet piracy).

THE INTELLECTUAL PROPERTY RIGHTS CRITERIA IN THE AGOA

In 2000, the African Growth Opportunity Act amended the U.S. trade law 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.³ Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-Saharan African countries.² Currently, 37 African countries have been designated as beneficiary countries eligible for AGOA benefits in 2004.⁵ Eleven sub-Saharan countries are not presently eligible.⁶

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) (19 USC 3703(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 —

² See the 2004 economic report prepared for the IIPA by Stephen Siwek of Economists Inc., [Copyright Industries in the U.S. Economy: the 2004 Report](http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf), available at http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf.

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

⁴ See Trade and Development Act of 2000, Title I of the Trade and Development Act of 2000, Pub. L. 106-200, 19 USC 3721 *et seq.*

⁵ Angola, Benin, Botswana, Burkina Faso, Cameroon, Cape Verde, Chad, Congo, (Democratic Republic of) Congo, Djibouti, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia. On October 2, 2000 34 countries in Sub-Saharan Africa were designated as eligible for the trade benefits of AGOA. On January 18, 2001, Swaziland was designated as the 35th AGOA eligible country and on May 16, 2002 Côte d'Ivoire was designated as the 36th AGOA eligible country. On January 1, 2003 The Gambia and the Democratic Republic of Congo were designated as the 37th and 38th AGOA eligible countries. On January 1, 2004, Angola was designated as AGOA eligible. On December 10, 2004, the President designated Burkina Faso as AGOA eligible.

⁶ Countries not yet designated as AGOA beneficiaries (or for which benefits were removed) include: Burundi, Central African Republic, Côte d'Ivoire, the Comoros, Equatorial Guinea, Eritrea, Liberia, Somalia, Togo, Sudan, and Zimbabwe. Effective January 1, 2004, the President removed the Central African Republic and Eritrea from the list of eligible countries. Effective January 1, 2005, the President removed Côte d'Ivoire from the list of eligible countries.



(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 (also the new Section 506A of the GSP statute, 19 USC 2466a)) 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*)

AGOA Eligibility Threshold: 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)).

De-designation of an AGOA Eligible Country: 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)).

“Adequate and Effective” in Light of TRIPS and the WIPO Internet Treaties

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)⁷ – Congress specifically defined the intellectual property criteria in that Act (similar to the GSP Act criteria) to require “TRIPS or greater” protection and enforcement.⁸ 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 intellectual property agreements.”⁹ 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 noted in its 2004 Special 301 decisions, “USTR devotes special attention to the increasingly important issue of the need for significantly improved enforcement against counterfeiting and piracy, with particular emphasis on the ongoing campaign to reduce production of unauthorized copies of “optical media” products such as CDs, VCDs, DVDs, and CD-ROMs. [...] In addition, USTR continues to focus on other critically important issues, including internet piracy, proper implementation of the TRIPS Agreement by developed and developing country WTO Members, and full implementation of TRIPS standards by new WTO Members at the time of their accession.”¹⁰

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 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 growth of e-commerce in coming years by ensuring that valuable content is protected from piracy on the Internet.

So far, seven countries in Africa have deposited their instruments to join these two digital treaties: **Botswana, Burkina Faso, Gabon, Guinea, Mali, Senegal and Togo.** A number of other countries in Africa are actively considering ratifying and implementing these treaties. Several other countries (as discussed below) have passed legislation that partially implements the WIPO “Internet” treaties.

⁷ 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).

⁸ Section 213(b)(5)(B)(ii) of the United States-Caribbean Basin Trade Partnership Act, 19 U.S.C. §2703(b)(5)(B)(ii).

⁹ 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.

¹⁰ Office of the U.S. Trade Representative, “Executive Summary of the 2004 Special 301 Decisions,” at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file963_5996.pdf (May 3, 2004).



COPYRIGHT PROTECTION AND ENFORCEMENT 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. This fact must be taken into account in determining whether to keep those countries so designated as beneficiaries of AGOA, and whether to so designate more countries.

Copyright Legislation in Sub-Saharan Africa

The U.S. government needs to make these countries immediately aware that these IPR criteria are not met at this time and give the countries time to 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 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.

For example, several of the SACU countries have either enacted legislation or are considering the same to implement these more complex provisions 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). Botswana joined the WCT and WPPT effective January 27, 2005.
- **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 reasonably good provisions on service provider liability. It also contains anti-hacking provisions against the unauthorized access to data, or the unlawful manufacture of devices that circumvent technological protection measures on a specific computer system to protect data; this is not, however, enough protection to satisfy the WCT/WPPT requirement as to technological protection measures. While the overall progress on copyright legislation is highly disappointing (making the SACU FTA important as a vehicle to accelerate that progress), the ECT Act does at least demonstrate that South Africa is quite familiar with these issues, and with electronic commerce, and the U.S. government will appropriately introduce strong obligations in the FTA that mirror the obligations introduced in the most recent FTAs.
- In **Swaziland**, a Copyright Bill was prepared in 1999, which contains some WCT and WPPT implementing language, although it does not contain any provisions on technological protection measures.



Inadequate Copyright Enforcement in Sub-Saharan Africa

Widespread copyright piracy remains a very serious problem among all African countries. Many copyright-based companies are still reluctant to invest in these smaller markets where piracy is, in effect, uncontrollable.

For example, in the key country in the region, South Africa, courts continue to give low priority to copyright infringement cases, and although prosecutors are becoming more active and more cases have proceeded to court, the number of convictions remains low, and penalties remain non-deterrent. Piracy rates for the audiovisual industry more than doubled from 2001 to 2004, from 15% to 40%, driven primarily by the growth in imports of optical disc piracy there. While this audiovisual piracy rate is low by African standards, this doubling in piracy represents a loss of market share to the legitimate industry. To make matters worse, the film piracy situation in other African countries is even more discouraging. With respect to software, the Business Software Alliance (BSA) reported in its recent global piracy study that its industry (which includes both U.S. and local publishers of business and consumer software in its study) lost an estimated \$196 million in South Africa in 2004, where the piracy rate was 37%.¹¹ For the entertainment software industry, much of the pirated product is being distributed through flea markets, kiosks and other informal traders.

Other procedural problems, including the lack of evidentiary presumptions of subsistence and ownership in copyright infringement cases, continue to subject entertainment software copyright owners to overly costly and burdensome procedural hurdles. These problems force plaintiffs to spend inordinate amounts of time and resources simply proving subsistence of copyright and ownership, and place South Africa squarely in violation of its TRIPS obligations.¹²

RELATED ISSUE: COPYRIGHT IN THE SACU FTA IPR NEGOTIATIONS

The negotiations for a Free Trade Agreement with the five countries (Botswana, Lesotho, Namibia, South Africa, and Swaziland) of the South African Customs Union (SACU) are resuming, but discussion of an IPR chapter is apparently still pending.

IIPA believes that the SACU countries should not be permitted to enter into an FTA with the U.S. without signing on to the full IPR Chapter, which contains high decrees of substantive and enforcement obligations, along the lines of the text found in the Singapore, Morocco, Bahrain, Australia, and Central America FTA agreements. Allowing these countries to sign on to a text that is “less than” the model FTA is unnecessary and would set a very bad precedent for future FTAs.

With respect to copyright matters in the SACU FTA, there is a general acceptance among most African nations, including South Africa, about the benefits of strong copyright laws and the need to fight piracy. All the countries in SACU are developing countries, except for Lesotho, which is a least-

¹¹ See BSA’s 2005 “Global Piracy Study,” at <http://www.bsa.org/globalstudy/upload/2005-Global-Study-English.pdf>.

¹² Whereas in certain other former Commonwealth countries, ownership by the plaintiff is presumed unless proof to the contrary is introduced, in South Africa a mere denial by the defendant shifts the burden to prove ownership to the plaintiff. As a result, the defendant in a copyright infringement case can and often does, without any supporting evidence, call into question the subsistence of copyright in a work, as well as the plaintiff’s ownership of that copyright. In numerous cases, plaintiffs have been forced to defend such unfounded challenges at great expense. The lack of presumptions continues to be a major impediment in the ability of right holders to effectively protect their rights in South Africa.



developed country. As such, South Africa, Botswana, Namibia, and Swaziland are now more than four years past the date on which they needed to fully comply with TRIPS. None of them have done so, either with respect to the substantive legislation (although Botswana and Namibia have come close) or enforcement on the ground. It is particularly noteworthy that South Africa had piecemeal legislation moving forward in 2000 that would have solved some of its remaining and pressing TRIPS deficiencies, among other things: providing TRIPS-compatible presumptions for copyright owners, providing statutory damages to address the notoriously low and non-deterrent remedy structure in South Africa, and to expressly criminalize end-user piracy of software, a TRIPS Article 61 requirement. The failure by the South African government to take those necessary steps further highlights the need for and strengthens the argument for the most advanced FTA IPR chapter possible, with the strongest possible substantive and enforcement provisions.

As noted, with regard to the WIPO treaties, the SACU countries recognize the importance of joining these treaties. Botswana joined the WCT and WPPT effective January 27, 2005. The government of South Africa recently stated publicly its intention to join these treaties.

CONCLUSION

IIPA appreciates this opportunity to provide the TPSC and the AGOA Subcommittee with our views on the AGOA and the intellectual property rights criteria that must be considered as these countries are evaluated to maintain their current AGOA eligibility and others considered for designation as new beneficiaries.

We highlight the importance the U.S. copyright-based industries place on a modern, comprehensive IPR chapter in the SACU FTA negotiations.

We look forward to working with you to foster improved copyright protection in this region.

Sincerely,

Eric H. Smith
President
International Intellectual Property Alliance