



August 29, 2011

**VIA REGULATIONS.GOV (Docket No. USTR-2011-0009)**

Donald W. Eiss  
 Acting Chair, Trade Policy Staff Committee  
 Office of the U.S. Trade Representative  
 600 17th Street, NW  
 Washington, DC 20508

**Re: Request for Public Comments on Interim Review of Eligibility of Côte d'Ivoire, Guinea, and Niger for Benefits Under the African Growth and Opportunity Act, 76 Fed. Reg. 50284 (August 12, 2011)**

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) submits these comments in response to the August 12, 2011 Federal Register notice in which the African Growth and Opportunity Act Implementation Subcommittee of the Trade Policy Staff Committee is requesting public comments in connection with the interim review of the eligibility of Côte d'Ivoire,<sup>1</sup> Guinea,<sup>2</sup> and Niger for AGOA benefits. As part of the interim review, IIPA urges the Administration to examine these countries' copyright laws and enforcement practices under the AGOA's intellectual property rights (IPR) eligibility criteria. It is important to indicate steps these 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. Finally, IIPA notes that, to varying degrees, the countries subject to the interim review may 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 conjunction with the U.S. Patent and Trademark Office, the U.S. Department of Commerce, the U.S. Department of State, the U.S. Copyright Office, and others, undertake a review of conditions in these 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 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

<sup>1</sup> On May 16, 2002 Côte d'Ivoire was designated as the 36th AGOA eligible country, but effective January 1, 2005, Côte d'Ivoire was removed from the list of eligible countries.

<sup>2</sup> Guinea was one of the original 34 countries in Sub-Saharan Africa designated as eligible for the trade benefits of AGOA on October 2, 2000. On December 23, 2009, the President removed Guinea from the list of AGOA eligible countries.



represent.<sup>3</sup> IIPA's seven member associations represent over 1,900 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).

The U.S. copyright-based industries are one of the most dynamic sectors of the U.S. economy, contributing over 6% to the overall GDP, nearly 4% of all U.S. employment, and contributing mightily to foreign sales and exports. Unfortunately, inexpensive and accessible reproduction technologies, and the massive growth of the Internet, make it easy for copyrighted materials to be stolen –pirated – in other countries, including AGOA countries. Such piracy causes innumerable harm – billions in output to the U.S. economy, costing jobs, earnings, and tax revenues. 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. 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.<sup>4</sup> Title I of the Trade and Development Act of 2000 contains provisions for enhanced trade benefits for sub-Saharan African countries.<sup>5</sup> As of June 2011, 37 sub-Saharan African countries were eligible for AGOA benefits.<sup>6</sup>

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),<sup>7</sup> 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).<sup>8</sup> Reading

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<sup>3</sup> IIPA's seven member associations 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).

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

<sup>5</sup> 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.*

<sup>6</sup> The following 37 sub-Saharan African countries were designated as beneficiary sub-Saharan African countries as of June 2011: Angola; Republic of Benin; Republic of Botswana; Burkina Faso; Burundi; Republic of Cape Verde; Republic of Cameroon; Union of the Comoros; Republic of Chad; 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; 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. See Africa Growth and Opportunity Act, *General Country Eligibility Provisions*, at <http://www.agoa.gov/AGOAEligibility/index.asp>.

<sup>7</sup> 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:



these two provisions together, **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)).

As discussed in previous IIPA submissions, 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) – Congress specifically defined the intellectual property criteria in that Act (similar to the GSP criteria) to require “TRIPS or greater” protection and enforcement. 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.” **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.**

### **C. INTERIM REVIEW OF ELIGIBILITY OF CÔTE D’IVOIRE, GUINEA, AND NIGER FOR BENEFITS UNDER AGOA**

The AGOA is an important opportunity for qualifying beneficiary countries to gain access to the U.S. market, and for U.S. trade interests to partner in the growth of new and growing foreign markets, including in the copyright sector. At the same time, as an economy develops, it should look to legal and enforcement IPR mechanisms that can incentivize its own creative industries and foster economic growth and stability. For these reasons, IIPA urges the

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(...continued)

(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).

<sup>8</sup> 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)



AGOA Act Implementation Subcommittee to recommend for AGOA eligibility only those countries of lesser capacity that demonstrate some measure of progress toward adequate and effective protection of intellectual property. IIPA suggests that in advance of making AGOA-eligibility determinations, 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, the U.S. Copyright Office, and others, undertake a review of conditions in Côte d'Ivoire, Guinea, and Niger 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.

As the experience of the copyright industries has shown, piracy that causes damage on a global scale may take hold in markets regardless of size or capacity. As part of evaluating whether the criterion in section 502 of the GSP statute requiring the provision of "adequate and effective" protection of intellectual property rights have been met, then, the review should seek to determine whether these countries' governments recognize the significant challenges posed by piracy, including piracy in the digital environment over the Internet and mobile networks, unauthorized end-user piracy of business software, and other challenges, and whether they have begun to address these challenges. An example of one measure is whether the countries have adopted the two "Internet" treaties of the World Intellectual Property Organization (WIPO), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). 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.

Of the three countries currently under interim review for AGOA eligibility, Guinea has deposited its instruments to join the WCT and the WPPT. IIPA encourages the U.S. government to work through the governments in Côte d'Ivoire, Guinea, and Niger to exchange detailed accounts of what they are doing in the legislative area as well as in the area of enforcement of copyright to implement the TRIPS Agreement, the WCT, and the WPPT, and overall to meet their AGOA eligibility criteria.

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 for designation as AGOA beneficiaries. It is also essential to take stock of the lack of sufficient capacity to meaningfully protect copyright in candidate 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 sub-Saharan Africa as a region.

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Alliance