

June 23, 2022

VIA REGULATIONS.GOV (Docket No. USTR–2022–0004)

William Shpiece
Chair of the Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: “2023 AGOA Eligibility Review”—South Africa, Nigeria, Kenya, Rwanda, Tanzania, Uganda, and Namibia—IIPA’s Written Comments on the Annual Review of Country Eligibility for Benefits under the African Growth and Opportunity Act, 87 Fed. Reg. 28856 (May 11, 2022)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) appreciates the opportunity to submit these comments in response to the May 11, 2022, request for public comments 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 copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include: Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).

Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

Historically, the U.S. copyright-based industries have been one of the fastest-growing and most dynamic sectors of the U.S. economy, responsible for millions of well-paying U.S. jobs.¹ Inexpensive and accessible reproduction technologies, however, make it easy for copyrighted materials to be pirated in other countries, including in the online environment. IIPA's goals abroad include for foreign countries to adopt copyright laws and enforcement regimes that keep pace with market and technological trends to encourage the creation and dissemination of copyright materials, and to deter piracy of unauthorized materials in these countries. Such strong and effective copyright laws and enforcement 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 Copyright

As sub-Saharan African economies develop, governments should look to copyright law and enforcement mechanisms that can incentivize their own creative industries and foster economic growth and stability. Unfortunately, as the U.S. International Trade Commission (USITC) noted in a 2020 report, piracy is a “widespread issue for rights holders operating in [the sub-Saharan African] market” and “poor administration of copyright regimes is a common issue in the key markets.”² 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 these mechanisms more effective. IIPA appreciates the opportunity to participate in the process.

Internet use in Africa has skyrocketed. According to Internet World Stats, in December 2021 there were 590.3 million users in Africa.³ Nigeria was estimated to have 154.3 million users, South Africa was estimated to have 34.5 million users, and Kenya was estimated to have 46.9 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

¹ In December 2020, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2020 Report*, prepared by Economists Inc. (2020 Report). According to the 2020 Report, the “core” copyright industries in the United States generated over \$1.5 trillion of economic output in 2019, accounting for 7.41% of the entire economy, and employed approximately 5.7 million workers in 2019, accounting for 3.79% of the entire U.S. workforce and 4.46% of total private employment in the U.S. The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on average 43% higher wages than other U.S. workers. In addition, according to the 2020 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 5.87% between 2016 and 2019, while the U.S. economy grew by 2.48%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2020 Report calls the “total” copyright industries), the numbers are even more compelling. Additionally, the 2020 Report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. Given the importance of digital delivery to the copyright-based industries, this sector has the potential to multiply its export revenues if our trading partners provide strong copyright-protective environments. In 2019, these sectors contributed \$218.8 billion in foreign sales and exports, exceeding that of many other industry sectors, including chemicals, pharmaceutical and medicines, electronic equipment, appliances and components, agricultural products, and aerospace products and parts. The full economic report is available at <https://iipa.org/reports/copyright-industries-us-economy/>.

² U.S. International Trade Commission, “U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments,” Investigation No. 332-571, March 2020 [hereinafter USITC Africa Report], 172, <https://www.usitc.gov/publications/332/pub5043.pdf>.

³ See Internet World Stats at <https://www.internetworldstats.com/stats1.htm>.

safe, healthy, and sustainable digital marketplace, AGOA-eligible countries should assess whether their legal regimes are capable of responding to today's challenges, including rampant online piracy.

For the copyright industries to flourish in AGOA-eligible markets, these countries need to: (i) have copyright laws that meet high standards of protection; (ii) provide efficient copyright enforcement and sound legal structures to enable healthy licensing of works and recordings; and (iii) eliminate market access barriers and unfair competitive practices. Markets with these features also will help AGOA-eligible countries to develop, nurture, and enjoy the fruits of their own cultural and creative output. The ongoing implementation of the African Continental Free Trade Agreement provides an important opportunity to reinforce these principles and ensure the continent enjoys the benefits of adequate and effective protection of intellectual property rights.

These principles are echoed by two World Intellectual Property Organization (WIPO) studies conducted in 2013 and 2014 concerning the creative industries in Kenya, Burkina Faso, and Senegal. Among the recommendations from the two studies were the following: greater respect for contracts, as "contracts are in many cases non-existent [in Kenya], which as such is a hurdle for the audiovisual industry to become more professional;" ratification and implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties), which should be "urgently considered as Internet legal and illegal distribution is rapidly changing the market;" and "a concerted effort against audiovisual piracy in both East-Africa and West-Africa," which "would have a positive effect on the market."⁴

Unfortunately, in AGOA-eligible markets rights holders and copyright-dependent services generally confront inadequate and ineffective copyright protection, deficient local laws, weak enforcement, and market access barriers (or other discriminatory or unfair competitive practices). These shortcomings enable parties to engage in piracy, some on a commercial scale, because it is a high-profit, low risk enterprise, unencumbered by the considerable costs associated with either producing and licensing works, or protecting them against theft.

The protection and enforcement of intellectual property rights are important prerequisites for AGOA eligibility.⁵ 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

⁴ See Tarja Koskinen-Olsson, "STUDY ON COLLECTIVE NEGOTIATION OF RIGHTS AND COLLECTIVE MANAGEMENT OF RIGHTS IN THE AUDIOVISUAL SECTOR", WIPO Committee on Development and Intellectual Property, August 12, 2014. https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf; and Bertrand Moullier, Benoit Muller, "SCOPING STUDY ON STRENGTHENING AND DEVELOPMENT OF THE AUDIOVISUAL SECTOR IN BURKINA FASO AND CERTAIN AFRICAN COUNTRIES", WIPO Committee on Development and Intellectual Property, September 25, 2013, https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_12/cdip_12_inf_3.pdf.

⁵ 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))).

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. There is no shortage of news reports that highlight local artists struggling to make a living in the face of widespread piracy in sub-Saharan Africa.⁶ Restrictions on live performances due to the COVID-19 pandemic have worsened the problem for artists, further heightening the importance of providing adequate and effective copyright protection to enable legitimate licensing markets.⁷ In addition to economic and cultural benefits, adequate and effective protection of intellectual property rights importantly supports good governance principles, including rule of law, judicial independence, control of corruption, and political stability.⁸

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.⁹ As IIPA has explained in previous AGOA-related filings, just what amounts to “adequate and effective” protection of intellectual property rights is a flexible measure that rightly changes over time.¹⁰ The obligations of the WTO

⁶ See, e.g., Godfrey Ivudria, “Illegal Content Online Mars African Creative Industries,” Jan. 18, 2022, [Busiweek](https://www.busiweek.com/illegal-content-online-mars-african-creative-industries/), <https://www.busiweek.com/illegal-content-online-mars-african-creative-industries/> (quoting Mark Mulready, Vice President of Irdeto, the world leader in digital platform cybersecurity: “[In Africa], content piracy robs content creators, artists and entire creative communities of their royalties. Besides the creators, publishers, and distributors, it hurts the entire media industry.”); Peter Choge, “Content piracy: Kenya’s little understood multibillion shilling crime,” April 29, 2022, [Music Africa](https://www.musicinafrica.net/magazine/content-piracy-kenyas-little-understood-multibillion-shilling-crime), <https://www.musicinafrica.net/magazine/content-piracy-kenyas-little-understood-multibillion-shilling-crime> (“[In Kenya], between 90% and 95% of content revenue is lost to pirates.”); Paula Luckhoff, “Nigeria’s Nollywood is blooming, but losing big to online streaming platforms,” May 19, 2022, [Cape Talk](https://www.capetalk.co.za/articles/445344/nigeria-s-nollywood-is-booming-but-losing-big-to-online-streaming-pirates), <https://www.capetalk.co.za/articles/445344/nigeria-s-nollywood-is-booming-but-losing-big-to-online-streaming-pirates> (quoting Victor Kgomoewana, author of ‘Africa Bounces Back,’ “The booming industry loses a cut to pirated video materials.” For example, the Nigerian movie ‘Blood Sisters,’ premiering in May on Netflix, was ranked a number nine in global views, and was subsequently uploaded “on NetNaijia, a free-to-air streaming platform ‘notorious for movie piracy.’”); Peace Hyde, “The Blockbuster Named Nollywood,” Oct. 8, 2020, [Forbes Africa](https://www.forbesafrica.com/cover-story/2020/10/08/the-blockbuster-named-nollywood/), <https://www.forbesafrica.com/cover-story/2020/10/08/the-blockbuster-named-nollywood/> (quoting Omoni Oboli, producer, director, owner of Dioni Visions Entertainment, and actress, “The Nigerian movie industry needs a major boost to spark the flames that are clearly unwilling to be put out. Unlike other forms of entertainment, movie producers have only the sales and release of their movies to make their money back. With no serious checks and curtailing of the nature of piracy and no aggressive protection of intellectual property, we’re pretty much left to our own individual means of getting our money back from our work.”).

⁷ See, e.g., Sifelana Tsiko, “Jerusalem Creator Master KG Wants to be Paid Royalties,” March 3, 2021, [Black Star News](https://www.blackstarnews.com/entertainment/music/jerusalem-creator-master-kg-wants-to-be-paid-royalties.html), <https://www.blackstarnews.com/entertainment/music/jerusalem-creator-master-kg-wants-to-be-paid-royalties.html> (“Piracy hurts African musicians and leave them impoverished. Many struggle to survive using proceeds from live performances, but that option has been eliminated due to Covid-19 restrictions.”); Columbus Mabika, “Zimbabwe: Govt Implored to Tackle Piracy,” May 24, 2021, [The Herald](https://allafrica.com/stories/202105240585.html), <https://allafrica.com/stories/202105240585.html>. (“Artistes are concerned with the surge in cases of piracy, especially involving music, videos and books leaving some of the producers wallowing in abject poverty, especially with live shows banned at the moment due to Covid-19.”).

⁸ See USITC Africa Report at 169 (noting that evaluating the “overall IP environment” in sub-Saharan Africa requires, among other things, looking at factors including “rule of law, judicial independence, control of corruption, and political stability,” and further observing that “legal and political factors can play an important role in the IP environment” in sub-Saharan Africa).

⁹ For AGOA intellectual property eligibility criteria, see AGOA Sections cited *supra* note 5.

¹⁰ 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>.

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 WIPO Internet Treaties, which contemplate many of the legal norms for a sustainable and healthy online marketplace. These treaties establish a foundation for essential legal frameworks that foster 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.

C. Copyright Protection and Enforcement in Select AGOA Countries

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

Nigeria

Nigeria’s vibrant film and music industries are critical to its economy.¹¹ Nigeria’s Minister of Information and Culture, Lai Mohammed, recently summarized the conclusion of an Afreximbank report that the creative industry “is a resource which is limitless, renewable, and can easily create wealth and jobs.”¹² He further stated, “When you look at the development of the creative industry in Africa today you will realize that we are sitting on a goldmine.”¹³ Unfortunately, pervasive piracy remains a significant obstacle for Nigerian authors and artists, who, as a result, struggle to receive any compensation for their works.¹⁴ Illustrating the problem, a Nigerian actor commenting on the decline of that country’s Hausa language film industry (known as “Kannywood”) pointed to piracy, stating that “[w]e are all not happy and surely, piracy was what destroyed us.”¹⁵ In its report on Africa, the USITC found that piracy “remains the largest threat” to the film industry in Nigeria, citing to a 2014 Nigeria Copyright Commission (NCC) report that estimated that Nigeria lost over \$1 billion annually to film piracy.¹⁶ Particularly as

¹¹ Universal Music has launched a division in Nigeria, and Netflix has increased its investment in Nigeria as well as other key markets in Sub-Saharan Africa. 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-ezezie-eze), <https://www.billboard.com/articles/business/8465836/universal-music-nigeria-western-africa-ezezie-eze>; and Christopher Vourlias, “Netflix’s Head of African Originals Lays Out Streamer’s Plans for the Continent (EXCLUSIVE),” Feb. 28, 2020, [Variety](https://variety.com/2020/digital/news/netflix-head-african-originals-lays-out-plans-for-continent-1203518648/), <https://variety.com/2020/digital/news/netflix-head-african-originals-lays-out-plans-for-continent-1203518648/>.

¹² See Ikilima Abubakar, “Creative industry, the only hope of Africa – Lai Mohammed,” June 21, 2022 [Daylight Reporters](https://daylightreporters.com/2022/06/creative-industry-the-only-hope-of-africa-lai-mohammed/), <https://daylightreporters.com/2022/06/creative-industry-the-only-hope-of-africa-lai-mohammed/>.

¹³ See *id.*

¹⁴ See, e.g., “Nigeria: Piracy Is Endangering Kannywood Industry – Uzee,” March 7, 2021, [Leadership \(Abuja\)](https://allafrica.com/stories/202103100305.html), <https://allafrica.com/stories/202103100305.html> and 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), <https://www.nytimes.com/2017/06/03/world/africa/nigeria-lagos-afrobeats-music-piracy-seyi-shay.html>.

¹⁵ See, Mohammed Lere, “Nigeria: Kannywood is on the Brink of Collapse – Actor,” June 24, 2019, [Premium Times](https://allafrica.com/stories/201906240774.html), <https://allafrica.com/stories/201906240774.html>.

¹⁶ USITC Africa Report at 185.

Nigeria looks to recover from economic damage caused by the pandemic, stronger copyright protection and enforcement are needed to support the country's burgeoning creative sector.¹⁷

Nigeria ratified the WCT and WPPT in 2018, but it has not fully implemented the treaties, and, as a result, its legal regime has fallen short of international copyright norms in several key respects. A draft copyright bill, first circulated in 2017, was re-circulated as an Executive Bill, alongside a Private Member Bill in 2021. Following a public consultation, including positive engagement by the U.S. Government, the two bills were ultimately merged – resulting in a Draft Copyright Bill (DCB). Although the DCB has not been released publicly, IIPA understands that the legislation addresses some of stakeholders' concerns with the Executive Bill, including providing definitions for technological protection measures (TPMs) and broadcasting that are consistent with the WIPO Internet Treaties, removing the registration requirement to exercise exclusive rights, and providing for expeditious takedowns and provisions to address repeat infringers.

However, there remain several significant deficiencies that should be corrected for Nigeria to properly implement the WIPO Internet Treaties and meet its international obligations, including the following:

- Section 35 of the DCB introduces a compulsory license scheme that is arguably incompatible with Nigeria's international obligations under the Berne Convention and the WCT. Under this provision, the NCC could bypass the copyright owner and authorize the use of a copyrighted work "by any person for the purpose of rectifying the abuse of a dominant market position or to promote public interest." The provision would undermine rights holders' ability to assert their rights in or license their works because any user could request that the NCC bypass the copyright owner and authorize or prohibit certain uses of a work based on the mere allegation that the user "made a reasonable effort to obtain permission from the owner of copyright on reasonable commercial terms and conditions and that the effort was not successful."
- The DCB includes a proposal to add extended collective licensing (ECL) in Nigeria. An ECL system is appropriate only in well-developed collective rights management systems, where organizations represent a substantial number of rights holders for each segment of the collective marketplace. As noted below, Nigeria's collective management system is inadequate. For these reasons, such a system is not appropriate in Nigeria.
- The DCB appears to provide for a hybrid fair use-fair dealing provision that is substantially broader than the U.S. fair use doctrine for several reasons. First, the provision includes additional broad purposes that are not present in the U.S. statute, including "private use" and "private study." Second, U.S. fair use is determined on a fact-intensive, case-by-case basis. Without the foundation of a well-developed body of case law, Nigeria's untested,

¹⁷ See Samuel Andrews, "Netflix Naija: creative freedom in Nigeria's emerging digital space?," March 19, 2020, The Conversation, <https://theconversation.com/netflix-naija-creative-freedom-in-nigerias-emerging-digital-space-133252>. 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>.

broader fair use provision would result in uncertainty for both rights holders and users on the parameters of permissible uses. The additional broad purposes listed in the text adds to the uncertainty and risk that Nigerian judges, none of whom have ever adjudicated a fair use case and would be doing so without any binding precedent to guide them, will find an unacceptably wide range of uses to be non-infringing. Third, the expansive new “fair use” exception is included as part of a “fair dealing” system that includes several overly broad new exceptions, as discussed below. This unprecedented hybrid approach further adds to the uncertainty and risk that the fair use provision will deny copyright owners fundamental protections on which they rely to license their works and sound recordings. Therefore, the proposed broad hybrid fair use-fair dealing provision is inconsistent with the three-step test because it is not limited to certain special cases and there is a substantial risk that it would be applied in a manner that conflicts with the normal exploitation of a work or unreasonably prejudices the legitimate interests of the rights holder.

- An exception for archives, libraries, and galleries, is broader than the exception in U.S. law and inconsistent with the three-step test, because it would permit these institutions to make and distribute “copies of works protected under this Bill as part of their ordinary activities” without limitation, and it would also permit lending such copies to users.
- The DCB also would provide for compulsory licenses for translation and for reproduction of published works. This provision should be revised to ensure it is calibrated according to the terms of the Berne Convention Appendix, which currently it is not.
- While the DCB includes an exclusive right of distribution, extraneous language has been added that appears to limit the right of distribution “for commercial purposes” and for works that have “not been subject to distribution authorized by the owner.” IIPA is concerned that this language could be interpreted to extend the concept of exhaustion of rights to distributions of digital content.
- The DCB would propose draconian criminal sanctions, including imprisonment, for rights holders who fail to keep proper records of the disposition of their rights. This proposal is unprecedented and disproportionate to any intended purpose and should be deleted from the draft law.
- The overbroad quotation exception should be revised to limit the use of a quotation to purposes of criticism or review.
- Private copying exceptions, and with them, provisions for levies, should apply only to content that is lawfully acquired—the exceptions should not be misused as a license to legalize piracy—and ensure that rights holders receive adequate shares of collections made, deductions are kept to a minimum, and compensation is payable directly to rights holders.
- The term for sound recordings should be extended to 70 years from fixation or publication (and the same for juridical entities), and, for works, to the life of the author(s) plus 70 years.

An additional concern in Nigeria is the absence of an accredited collective management organization (CMO) for music rights holders to manage their public performance and broadcast rights. This absence is the result of a dispute between the NCC and the COSON Limited CMO, which was responsible for managing performance rights in musical works and sound recordings, but whose operating license was withdrawn by the NCC. Since then, working with rights holders, steps were taken to improve COSON's transparency and governance. As a result, IIPA recommends COSON should be reinstated. Additionally, the draft law should define CMOs and their proper governance, so that CMOs should exist only if they are owned or controlled by their member rights holders and are non-profit organizations. With these provisions in place, as well as improved enforcement as noted below, CMOs would be able to license effectively in Nigeria.

Nigeria also needs to more effectively enforce against the numerous unlicensed online music and audiovisual services that operate in Nigeria, which are harming many markets inside and outside of Nigeria. If passed, new criminal provisions in the DCB should be used by the NCC as the basis for enforcement actions against such services. Moreover, more resources are needed for the NCC online enforcement unit to adequately engage in sustain efforts to combat piracy in the country, including so that authorities have critical resources such as electricity and Internet access.

East African Community

The East African Community (the regional intergovernmental organization of **Burundi, Kenya, Rwanda, Tanzania, and Uganda**) passed 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.”¹⁸ Unfortunately, Tanzania has withheld its assent for this initiative, putting its future in jeopardy.¹⁹ Tanzania's continued reluctance to adopt the EAC Bill is deeply concerning; adoption of the Bill is long overdue. 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.

Kenya

In 2019, **Kenya's** Attorney General Kihara Kariuki highlighted the creative industries' contribution to Kenya's economy, citing a study estimating the contribution to be 5.3% of GDP and stating, “The protection of the copyrights will essentially put money into the pockets of authors, producers and all creators.”²⁰ Yet Kenya's copyright legal and enforcement frameworks remain deficient, and piracy, particularly online, remains a significant barrier for the creative industries in Kenya. While the Government of Kenya has indicated its intention to ratify the WIPO

¹⁸ See Section 6(e) of the Creative and Cultural Industries Bill, available at <https://ipkenya.files.wordpress.com/2015/03/eac-creative-and-cultural-industries-bill-2015.pdf>.

¹⁹See 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>.

²⁰See Anyango Otieno, “AG: Kenya to ratify copyright protection, information laws”, June 11, 2019, *The Standard*, <https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp>.

Internet Treaties, it has yet to do so or to set a timeframe for accession.²¹ Kenya should ratify and implement the WIPO Internet Treaties as part of its ongoing Copyright Act amendment process. Kenya's 2019 Copyright Act amendment was intended to address some of the challenges of the digital age, but Kenya's copyright framework remains deficient in a number of significant respects. A 2020 draft Intellectual Property Bill (IP Bill), which largely incorporated 2019 amendments to the Copyright Act, failed to address many of these deficiencies, and included additional provisions that fall short of Kenya's international obligations and best practices.

In 2021, a proposal was introduced in Parliament that would have repealed the ISP liability provisions adopted in Kenya's 2019 Copyright Act. Due to critical outreach by the U.S. Government and concerns expressed by the Kenyan Copyright Office and local stakeholders, the problematic proposal was withdrawn, but there remains concern that it could move forward so this should be monitored closely.

To ensure its legal framework provides adequate and effective protection and enforcement of intellectual property rights, Kenya's government should address shortcomings in Kenya's copyright and enforcement framework, including by:

- deleting the provisions in the IP Bill requiring copyright registration and compulsory recordation of assignments, and removing the requirement in the Copyright Act that authentication devices be affixed to sound recordings, all of which are incompatible with Kenya's international obligations, including under the Berne Convention, the TRIPS Agreement, and the WPPT;
- ensuring that the exclusive rights of communication to the public and making available are clearly defined and meet the requirements of the WPPT;
- ensuring that exclusive rights apply to all sound recordings, including "born digital" recordings;
- retaining the rights of communication to the public and broadcasting as exclusive rights;
- providing adequate and effective protections for TPMs and rights management information (RMI), in line with international standards;
- providing a term of protection consistent with international standards (life of the author plus 70 years, or at least 70 years from fixation or publication for sound recordings or works not measured by the life of a natural person);
- expressly incorporating the three-step test into the law to properly confine the scope of exceptions and limitations to copyright protection;

²¹Kenya's Attorney General has affirmed that the government "is considering ratification of the WIPO Internet Treaties." See *id.*

- adding online liability principles to ensure adequate legal incentives for cooperation between ISPs and rights holders;
- clarifying the correct scope of ISP safe harbors from liability as applying to only passive and neutral intermediaries that do not contribute to infringing activities;
- revising notice and takedown procedures to ensure expeditious takedown of infringing materials and other measures demonstrated effective in preventing or restraining infringement, and by removing onerous notice requirements;
- introducing an obligation for ISPs to adopt and implement a repeat infringer policy;
- ensuring effective, transparent, and accountable collective management of rights consistent with international standards and best practices to ensure rights holders are able to control the use of their rights;
- introducing a rate-setting standard applicable to the licensing of collectively managed rights requiring that rates reflect the economic value of the use of the rights in trade (i.e., willing buyer/willing seller standard);
- providing deterrent civil and criminal penalties to combat piracy; and
- clarifying the role of the proposed IP Tribunal.

IIPA hopes the Government of Kenya will address these concerns to ensure Kenya meets its international commitments, including the AGOA eligibility criteria on intellectual property rights, and complies with international norms.

South Africa

South Africa's current legal regime fails to provide adequate and effective protection of copyrighted materials. Significant reforms are needed to South Africa's Copyright Act and Performers' Protection Act to bring the country's laws into compliance with international agreements, including the TRIPS Agreement, and the WIPO Internet Treaties.²² For example, South Africa lacks basic protections required to enable trade in copyrighted materials in the digital environment. These basic protections should include the right of copyright owners to control the distribution of copies of their works and sound recordings, and to control the manner in which their works and sound recordings are communicated to the public. South Africa also lacks adequate protections for TPMs, which foster many of the innovative products and services available online by allowing creators to control and manage access to copyrighted works (for example, via streaming services), and to diversify products and services. At the same time, TPMs enable consumers to enjoy desired content on a variety of platforms, in many different formats, and at a time of their choosing. In addition, South Africa's legal regime does not provide adequate civil

²²South Africa's Cabinet has approved the country's accession to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the "WIPO Internet Treaties"), and the Beijing Treaty.

remedies or criminal penalties to allow rights holders to recover their losses from infringement or to deter piracy. Without an adequate means to remedy infringement or deter piracy, the path for legitimate services to operate is difficult.

In late 2018, the South African Parliament adopted the first major revision of the copyright and related laws in decades. While the intent of South Africa's copyright reform process was to bring the country's laws into compliance with international agreements, the bills that ultimately passed fell far short of international norms for the protection of copyrighted works in the digital era. Moreover, the copyright reform process, which began in 2015, transpired without adequate consultation with the public and, where opportunity for public consultations was provided, comments submitted by rights holders apparently were largely disregarded.

In June 2020, South Africa's President referred the two bills—the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB)—back to the National Assembly based on “a number of reservations as to the Constitutionality of the Bills.” The National Assembly concurred with the President's assessment that the bills were processed incorrectly under the Constitution and recommended that the bills be referred to the Joint Tagging Mechanism Committee to re-tag the bills for processing under the proper constitutional provision (Section 76), which requires the provincial governments to consider the bills as well. The Portfolio Committee on Trade and Industry (Portfolio Committee) held public hearings in August 2021, and in November 2021. The Portfolio Committee opened a further call for public participation through written submissions to consult with stakeholders and the public on certain provisions that were amended during its initial deliberations. During the hearings, the South Africa Institute of Intellectual Property Lawyers (SAIPL) observed that the Institute's Copyright Committee identified at least nineteen sets of provisions in the CAB that raised treaty and constitutional compliance concerns. SAIPL and other stakeholders also requested release of the economic impact assessment study on the CAB. The Portfolio Committee subsequently resolved to amend the CAB and PPAB.

The most recent public comment process on the bills took place in December 2021 and January 2022. In May 2022, the Portfolio Committee met with the Department of Trade, Industry, and Competition (DTIC) to hear DTIC's proposed amendments to the CAB. Unfortunately, DTIC made virtually no improvements to the bill. As a result, several industry stakeholders and associations made submissions to the Portfolio Committee calling on it to reject the CAB or suspend proceedings until an economic impact assessment has been published, as is legally required under South Africa's Socio-Economic Impact Assessment System (SEIAS) guidelines.

Unfortunately, in June 2022, the Portfolio Committee voted for the bills to proceed in their current form. It is anticipated that the bills will be tabled for deliberation in the National Assembly in August 2022. If adopted by the National Assembly, the bills would then be considered by the National Council of Provinces and the governments of the nine provinces, starting a process by which each province would arrange separate public consultations on the bills in their entirety. The majority of provinces must approve for the bills to advance back to the President for his assent. At that point, the President would have the option to either assent to the bills or refer the bills to the Constitutional Court to adjudicate any remaining constitutional concerns.

Enactment of the bills in their current form would place South Africa out of compliance with the AGOA eligibility criteria, the GSP eligibility criteria, international norms, and South Africa's obligations under the TRIPS Agreement.²³ It is critical that the Portfolio Committee and the National Assembly not rush this process or make only cosmetic revisions. Instead, consistent with the President's directives, South Africa's Parliament, in full consultation with stakeholders and independent IP law experts, should redraft the bills to address the concerns of *all* stakeholders and ensure the provisions comply with South Africa's constitution and with international agreements.

At a time when South Africa is endeavoring to rebound from the economic impacts of the global pandemic, the stakes are extremely high for the Parliament to redraft these bills to avoid destabilizing the creative industries and to support a thriving copyright sector, which contributes so significantly to economic and job growth in the country and which has potential for substantial growth under the proper conditions.²⁴ The bills contain many provisions that lack clarity, risk major negative disruption of the creative industries, pose significant harm to the creators they purport to protect, and fall far short of needed reforms. IIPA's country report on South Africa, submitted to USTR as part of IIPA's 2022 Special 301 submission includes a full description of the deficiencies in the two pending bills, as well as other deficiencies in South Africa's legal and enforcement regimes.²⁵ Major issues of immediate and primary concern to the copyright industries are the following:

- The bills would severely restrict the freedom of rights holders to contract in the open market, which is a key factor for the healthy growth of the entire creative sector. These restrictions would fundamentally impair the value of copyrighted materials by depriving rights holders of the ability to freely license and otherwise derive value from their copyrighted works and sound recordings. For example, both the CAB and the PPAB limit certain assignments of rights to a maximum of 25 years, and both bills provide ministerial powers to set standard and compulsory contractual terms for contracts covering seemingly any transfer or use of rights.
- The bills would create an overbroad amalgamation of copyright exceptions that includes a more expansive version of the U.S. "fair use" rubric (not in line with the U.S. doctrine) appended to a proliferation of extremely open-ended new exceptions and limitations to

²³For additional details, see IIPA's comments and post-hearing brief on South Africa's Generalized System of Preferences (GSP) eligibility in the 2019 annual GSP review, available at <https://www.iipa.org/files/uploads/2020/01/2020-01-17-IIPA-South-Africa-GSP-Review-Written-Comments-and-Notice-of-Intent-to-Testify.pdf> and <https://www.iipa.org/files/uploads/2020/03/SOUTH-AFRICA-IIPA-GSP-Post-Hearing-Brief.pdf>.

²⁴According to a study conducted by the Department of Trade and Industry (the DTI) and the World Intellectual Property Organization (WIPO) in 2010 using data from 2008, the South African copyright-based industries contributed 4.11% to gross domestic product (GDP) and 4.08% to employment. See WIPO, Economic Contributions of Copyright Based Industries in South Africa, available at https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf.

²⁵ IIPA's 2022 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>. The 2022 South Africa country report from IIPA's Special 301 submission is available at https://www.iipa.org/files/uploads/2022/02/2022_South-Africa-1.pdf.

copyright protection (on top of “fair dealing” provisions), resulting in an unclear thicket of exceptions and limitations.

- The bills would overly regulate the relationship between creative parties, including mandating the mode of remuneration for audiovisual performers, which would undermine the digital marketplace and severely limit the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings, rather than providing a robust legal framework for the protection of creative works within which private parties can freely negotiate the terms of their relationships.
- The bills would not provide adequate criminal or civil remedies for infringement, including online piracy, and would deny rights holders the ability to effectively enforce their rights against infringers, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.
- The bills’ provisions on TPMs are inadequate, falling short of the requirements of the WIPO Internet Treaties, and the overbroad exceptions to prohibitions on the circumvention of such measures would further impinge on the ability of legitimate markets for copyrighted materials to launch and develop. While amendments proposed in 2021 made some improvements, they ultimately failed to address these concerns.

These provisions are inconsistent with South Africa’s international obligations, for example, by far exceeding the scope of exceptions and limitations permitted under the TRIPS Agreement (Article 13) and the Berne Convention (Article 9). Moreover, aspects of both bills are incompatible with the WIPO Internet Treaties. The incompatibility of these provisions with a healthy, sustainable, and fair digital marketplace for creators, both domestic and foreign, runs afoul of the AGOA eligibility criteria to provide “adequate and effective protection” of intellectual property rights.

Furthermore, this legislative process is occurring against a backdrop of increasing online piracy in South Africa. Growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse, drive this piracy. In addition, piracy devices (i.e., set-top boxes equipped with apps for accessing pirated content) and sticks pre-loaded with infringing content or apps, continue to grow in popularity in South Africa. Enforcement in South Africa is not, at present, adequate or effective. To facilitate a healthy online ecosystem, South Africa should appoint cybercrime inspectors and develop a cybercrime security hub recognizing copyright as one of its priorities.

Namibia

Namibia is proceeding to revise the Copyright Act and Neighboring Rights Act of 1994. Although it was a 1996 signatory to the WCT and WPPT, Namibia has neither acceded to those treaties, nor revised its laws to implement the WCT and WPPT. At present, the Business and Intellectual Property Authority (BIPA) is preparing a draft Copyright Law for Namibia. There are several concerns with the existing law (and draft law).

First, Namibia’s draft law should limit exceptions and limitations—explicitly—to the Berne three-step test. Several of the proposed exceptions would not comply with the three-step test—including the private use and private copying, quotation, and the hyperlinking exceptions—and these provisions should either be amended, or deleted from the draft law. In addition to enumerated exceptions, many of which are broadly-written and ill-defined, the draft law includes a sweeping “fair use” provision. The adoption of a hybrid system with both “fair use” (to be determined by a regulatory body in lieu of a case-by-case judicial determination, as in the United States), and broad enumerated exceptions, would undermine the protections for rights holders and result in uncertainty for the production and dissemination of copyrighted materials

Second, in the Namibian draft law, the provisions on TPMs should be revised to ensure compliance with the WIPO Internet Treaties. Treaty compliant provisions on TPMs should cover both the acts of circumvention, as well as the trafficking in any technology, device, product or service that will circumvent, or that are designed to circumvent, a TPM. A clear definition of a “technological protection measure,” consistent with the WIPO Internet Treaties, is an important component of any new law, and so are strong civil and criminal remedies for TPM violations.

Third, the “safe harbor” provisions—which limit third party monetary liability for platforms and certain services—should only apply to passive and neutral activities of intermediaries that do not contribute to infringing activities.

Fourth, the draft law should clarify the scope of protection for sound recordings, including the reproduction right, right of broadcasting, and communication to the public and making available right.

Last, the term of protection for works should be life plus 70 years. For sound recordings (or works created by juridical entities), the term should be at least 70 years calculated from first fixation or publication (and not, as the draft proposes, based on a “life plus” term). Most sound recording producers, for example, are juridical entities, so such a life plus term would not be appropriate.

Rather than weaken its existing law, Namibia should take this opportunity to revise its copyright law to ensure that it is meeting the AGOA criteria to provide adequate and effective protection of intellectual property rights.

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

IIPA requests that the Administration continue to assess the progress of AGOA-eligible governments in legislative measures and enforcement of copyright protections, 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. 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 online 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 intellectual property rights under AGOA.

Several AGOA-eligible countries have either enacted legislation or are considering the implementation of the WIPO Internet Treaties. So far, thirteen AGOA-eligible countries have deposited their instruments to join the WCT and the WPPT: **Benin, Botswana, Burkina Faso, Cabo Verde, Comoros, Gabon, Ghana, Madagascar, Nigeria, Senegal, Sao Tome and Principe, Togo, and Uganda.** 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.

IIPA recommends 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 CAB and the PPAB contain numerous problematic 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. In addition, USTR should monitor legislative reform efforts in Kenya, Namibia, and Nigeria and engage with these governments to ensure the resulting copyright legal frameworks meet AGOA's eligibility criteria.

CONCLUSION

IIPA appreciates this opportunity to provide the Trade Policy Staff Committee and the AGOA Subcommittee with our views on AGOA and its eligibility criteria regarding the adequate and effective protection of intellectual property rights. It is essential that the annual AGOA review remain an opportunity to evaluate the progress of its beneficiaries toward meeting these intellectual property rights criteria, and to identify opportunities to enhance intellectual property protection and 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,

/Kevin M. Rosenbaum/

Kevin M. Rosenbaum
Executive Director
International Intellectual Property Alliance