

July 11, 2024

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

Re: Post-Hearing Written Comments of ACT | The App Association, *Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act for Calendar Year 2024* (88 Fed. Reg. 31579, Docket Number USTR-2023-0003)

In supplement to its June 6, 2024 written comments and June 27, 2024 public testimony to the United States Trade Representative (USTR) regarding implementation of the African Growth and Opportunity Act (AGOA), the App Association hereby submits its post-hearing written comments.

The App Association represents thousands of small business innovators and startups in the software development and high tech space located across the United States.¹ As the world embraces mobile technologies, our members create the innovative products and services that drive the global digital economy by improving workplace productivity, accelerating academic achievement, and helping people lead more efficient and healthier lives, which today represents an economy worth more than \$1.7 trillion annually and that provides over 5.9 million American jobs.²

Mobile technologies in Africa have already generated 1.7 million jobs and contributed \$144 billion to the continent's economy.³ While the global digital economy holds great promise for the small business digital economy in terms of growth and competition, many entrepreneurs face a diverse array of challenges entering new markets. These barriers include laws, regulations, policies, or practices that either exclude U.S. goods and services from foreign markets, artificially stimulate exports of particular domestic goods and services to the detriment of U.S. companies, or fail to provide adequate and effective protection of intellectual property rights for U.S. companies. While these challenges take many forms, they have the same net effect: impeding U.S. exports and investment, and depriving entrepreneurs and consumers in Africa of access and opportunity. With respect

¹ ACT | The App Association, *About*, available at <http://actonline.org/about>.

² ACT | The App Association, *State of the U.S. App Economy: 2020*, 7th Edition, <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>

³ Nathaniel Allen, *The promises and perils of Africa's digital revolution*, Brookings Institute (March 11, 2021) available at <https://www.brookings.edu/techstream/the-promises-and-perils-of-africas-digital-revolution/>

to improving Africa's digital economy and trade while also expanding opportunities for American innovators, the App Association supports following principles:

- ***Enabling Cross-Border Data Flows:*** The seamless flow of data between economies and across political borders is essential to the functioning of the global economy. Small business technology developers must be able to rely on unfettered data flows as they seek access to new markets.
- ***Prohibiting Data Localization Policies:*** American companies looking to expand into new markets often face regulations that force them and other foreign providers to build and/or use local infrastructure in the country. Data localization requirements seriously hinder imports and exports, reduce an economy's international competitiveness, and undermine domestic economic diversification. Our members do not have the resources to build or maintain unique infrastructure in every country in which they do business, and these requirements effectively exclude them from commerce.
- ***Prohibiting Customs Duties on Digital Content:*** American app developers and technology companies must take advantage of the internet's global nature to reach the 95 percent of customers who live outside of the United States. However, the tolling of data crossing political borders with the purpose of collecting customs duties directly contributes to the balkanization of the internet. These practices jeopardize the efficiency of the internet and effectively block innovative products and services from market entry.
- ***Ensuring Market Entry is Not Contingent on Source Code Transfer or Inspection:*** Some governments have proposed policies that require companies to transfer, or provide access to, proprietary source code as a requirement for legal market entry. Intellectual property is the lifeblood of app developers' and tech companies' innovation; the transfer of source code presents an untenable risk of theft and piracy. Government policies that pose these requirements are serious disincentives to international trade and a non-starter for the App Association's members.
- ***Preserving the Ability to Utilize Strong Encryption Techniques to Protect End User Security and Privacy:*** Global digital trade depends on the use of strong encryption techniques to keep users safe from harms like identity theft. However, some governments continue to demand that backdoors be built into encryption keys for the purpose of government access. These policies jeopardize the safety and security of data, as well as the trust of end users, by creating known vulnerabilities that unauthorized parties can exploit. From a privacy and security standpoint, the viability of an app company's product depends on the trust of its end users.
- ***Securing Intellectual Property Protections:*** The infringement and theft of intellectual property and trade secrets threatens the success of the App Association's members and hurts the billions of consumers who rely on these app-based digital products and services. These intellectual property violations can lead to customer data loss, interruption of service, revenue loss, and reputational damage – each alone a potential “end-of-life” occurrence for a small

app development company. The adequate and effective protection and enforcement of intellectual property rights (and the global adoption and full implementation of the WIPO Digital Treaties) is critical to the digital economy innovation and growth.

- ***Avoiding the Misapplication of Competition Laws to New and Emerging Technology Markets:*** Various regulators, including key trading partners, are currently considering or implementing policies that jeopardize the functionality of mobile operating systems and software distribution platforms that have enabled countless American small businesses to grow. Since its inception, the app economy has successfully operated under an agency-sale relationship that has yielded lower overhead costs, greater consumer access, simplified market entry, and strengthened intellectual property protections for app developers with little-to-no government influence. Foreign governments regulating digital platforms inconsistent with U.S. law will upend this harmonious relationship enjoyed by small-business app developers and mobile platforms, undermine consumer privacy, and ultimately serve as significant trade barriers.

Access to affordable and reliable internet and power is essential to unlocking the digital trade potential within the continent. However, without investment in broadband infrastructure, internet access will remain out of reach for many African people, especially those living in rural areas. Study has demonstrated that even 3G internet coverage can produce a 10 percent decline in poverty.⁴ Simultaneously, as new internet infrastructure and last-mile connections are established, the App Association is increasingly aware of digital trade barriers, either in proposal or already in place, that run counter to our general priorities noted above. We provide a non-exhaustive list of these barriers for your consideration in its investigation, appended to this letter.

While AGOA eligibility determinations already include modality-neutral evaluations (e.g., already include determining whether there is an adequate and effective protection and enforcement of intellectual property,⁵ which the App Association fully supports the continuation of), the growth and unrealized potential of the digital economy for both U.S. and AGOA-eligible businesses and consumers must be further prioritized. The App Association therefore urges the Administration to address the barriers to digital trade to exist across AGOA-eligible markets by including the App Association's digital trade policies above as prerequisites to AGOA eligibility, and to identify specific ways to help AGOA beneficiaries build their capacity to achieve these goals. Further, the App Association requests that AGOA beneficiaries demonstrate their steps to align with pro-digital trade goals in order to remain AGOA beneficiaries, including by notifying USTR of their efforts to create new laws and/or change existing laws to align with pro-digital trade goals noted above as well as their joining and enforcing relevant treaties.

⁴ Nathaniel Allen, *The promises and perils of Africa's digital revolution*, Brookings Institute (March 11, 2021) available at <https://www.brookings.edu/techstream/the-promises-and-perils-of-africas-digital-revolution/>

⁵ See AGOA Section 104(1)(C)(ii) and AGOA Section 111.

The App Association also urges the United States to mitigate and eliminate these barriers through bilateral and/or multilateral agreements.⁶ Now, more than ever, it is imperative that the United States set an example of the best ways to pursue digital trade and the growth of the digital economy through trade agreements (and U.S. domestic policies). For example, the African Continental Free Trade Area (AfCFTA) represents a major global economic trade block, and plans to develop digital economy provisions for the AfCFTA agreement.⁷ It is imperative that pro-digital economy policies are reflected across AGOA beneficiaries. Doing so will advance the ability of American small business innovators to grow into new markets to create more American jobs, while bolstering Africa's emerging digital economy.

We further provide the following, which were referenced during June 27, 2024 public testimony:

- ACT | The App Association's views on competition law reform proposals by the Common Market for Eastern and Southern Africa Competition Commission, dated May 5, 2024;⁸ and June 6, 2024.⁹
- A global industry association statement offering recommendations for the African Continental Free Trade Agreement's Digital Trade Pillar, dated August 7, 2023.¹⁰

⁶ The App Association notes some of these barriers in **Appendix A**.

⁷ <https://au-afcfta.org/>.

⁸ These comments are included as **Appendix B**.

⁹ These comments are included as **Appendix C**.

¹⁰ This global industry association statement is included as **Appendix D**.

The App Association appreciates the opportunity to provide its views and we look forward to working with the USTR to advance digital transformation and growth across sub-Saharan African countries that received AGOA benefits.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Scarpelli". The signature is fluid and cursive, with a prominent loop at the end.

Brian Scarpelli
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APPENDIX A

NON-EXHAUSTIVE LIST OF COUNTRY-SPECIFIC DIGITAL TRADE BARRIERS

ETHIOPIA

Intellectual Property Rights Protection: The App Association is encouraged by Ethiopia's efforts within the World Intellectual Property Organization (WIPO), but Ethiopia has not yet successfully joined key WIPO treaties. The Ethiopian Intellectual Property Office (EIPO) has been unable to carry out effective enforcement of IP infringement due to a lack of interagency coordination and resources.¹¹

GHANA

Intellectual Property Rights Protection: In January 2016, Ghana and the Swiss Federation jointly introduced Ghana's first national IP rights policy and strategy.¹² The App Association was hopeful that the country's IP initiative would spur innovation, entrepreneurship, and investment in the country's digital economy. However, it is reported that the policy is ineffective due to weak enforcement and extensive delays for IP infringement proceedings.¹³

KENYA

Issue: Digital Economy Taxation: Since 2021, Kenya has had a digital service tax in place that only applies to non-Kenyan entities. We have significant concerns with this tax, which contravenes WTO moratorium on ecommerce customs duties and undermines the OECD's consensus solution for digital economy taxation. We urge USTR to include this development in its NTE and to work with the Kenyan government to mitigate its damage and influence in the region.

Intellectual Property Rights Protection: Recently, Kenya took steps to strengthen its IP enforcement by updating its copyright and trademark legislation. The App Association sees this as a positive step to deter IP infringement in Kenya.¹⁴

NIGERIA

Data Localization & Nigerian Workforce Requirements: The Nigerian government enacted "Guidelines for Nigerian Content Development in Information and

¹¹ *Id.* at 163.

¹² Ghana – Intellectual Property, Ghana Country Commercial Guide, EXPORT.GOV (last updated December 3, 2018), <https://www.export.gov/article?id=Ghana-Protecting-Intellectual-Property>.

¹³ USTR, *2019 National Trade Estimate Report on Foreign Trade Barriers*, 163 (2019).

¹⁴ USTR, *2019 National Trade Estimate Report on Foreign Trade Barriers*, 312 (2019).

Communications Technology,”¹⁵ which raise a myriad of concerns for our members. The Nigerian government imposes data localization requirements on multinational companies. For instance, section 10.3 of the Nigerian government’s guidelines mandates multinational companies to not only store their data in Nigeria but also requires such companies to incorporate 50 percent of local products when manufacturing ICT devices in the region. Additionally, it requires companies to hire local engineers when manufacturing such products.

Digital Economy Taxation: Since 2020, Nigeria has been assessing taxes on non-resident companies based on their commerce over the internet/on digital platforms. We have significant concerns with this tax, which contravenes WTO moratorium on ecommerce customs duties and undermines the OECD’s consensus solution for digital economy taxation. We urge USTR to include this development in its NTE and to work with the Nigerian government to mitigate its damage and influence in the region.

Intellectual Property Rights Protection: While Nigeria has taken steps towards improving its IP protections¹⁶, Nigerian enforcement agencies lack the resources needed to effectively enforce IP rights.

¹⁵ NITDA, *Guidelines for Nigerian Content Development in Information and Communications Technology* (2017).

¹⁶ See USTR, *2019 National Trade Estimate Report on Foreign Trade Barriers* (2019) (“In 2017, Nigeria submitted its instruments of accession and ratification of four World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Marrakesh Treaty, and the Beijing Treaty”).

SOUTH AFRICA

Application of Antitrust Law to Digital Platforms: In 2021, the Competition Commission of South Africa (CCSA) launched a online intermediary platforms market inquiry.¹⁷ The App Association has provided detailed views on digital platforms and competition, as well as reactions and feedback on CCSA's specific proposals.¹⁸ The App Association has significant concerns with the potential of the South African government interjecting itself into the digital economy without an evidence base to support such an intervention, which would jeopardize the functionality of mobile operating systems and software distribution platforms that have enabled countless American small businesses to grow. We therefore request that the CCSA's inquiry into online intermediary platforms, and the risks it poses to American small business innovators that rely on software distribution platforms, be captured in the 2023 NTE report, and that the U.S. government work with South Africa to mitigate the risks such an intervention would pose while supporting U.S. small business digital economy trade and leadership.

IP Rights Protection: The South African government has attempted to take constructive first steps towards effective and efficient IP protections and enforcement by increasing the number of enforcement officials; improving the training program for these officials; and making the public more aware of its IP rights.¹⁹ Further, the Department of Trade and Industry (DTI) completed the Intellectual Property Policy of the Republic of South Africa, which will be the guide post for future IP legislation in South Africa.²⁰ While both of these government actions appear to be positive steps forward many concerns have been raised about the ineffectiveness of the Copyright law and the new Policy. Concern remains that the copyright law may not meet international standards and may have overly broad exceptions to the copyright laws.²¹ Additionally, some stakeholders have noted that the new Policy for South African IP will weaken exclusive patent rights.²²

¹⁷ <https://www.compcom.co.za/online-intermediation-platforms-market-inquiry/>.

¹⁸ E.g., <https://www.compcom.co.za/wp-content/uploads/2021/07/App-Association-Comments-on-OIPMI-Statement-of-Issues-18-Jun-2021.pdf>.

¹⁹ *Id.* at 446.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*