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Via regulations.gov (Docket No. USTR-2020-0011)

April 13, 2020

Edward Gresser
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
1724 F Street, NW
Washington, DC 20508

Re: Request for comments on Negotiating Objectives for a United States-Republic of Kenya Trade Agreement, 85 Fed. Reg. 16450

Dear Mr. Gresser:

The Motion Picture Association (MPA) offers the following comments in response to USTR's Federal Register notice inviting submissions from the public on negotiating objectives for a trade agreement with Kenya. The MPA represents six of the largest producers and distributors of film, television and streaming entertainment in the world: Netflix Studios LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and, Warner Bros. Entertainment Inc.

The motion picture and television industry is a major U.S. employer that supported 2.5 million American jobs and $181 billion in total wages in 2018. Jobs in the core business of producing, marketing, and manufacturing motion pictures and television shows are high quality jobs with an average salary of $101,199 – 78 percent higher than the average salary nationwide.

Furthermore, the U.S. film and television industry made nearly $49 billion in payments to over 280,000 local businesses in 2018. The industry also generated $28 billion in public revenues and contributed $242 billion in sales to the overall economy, up 18 percent from 2014.

Importantly, the U.S. film and television industry is one of the most highly competitive in the world; one of the few that consistently generates a positive balance of trade in virtually every country in which it does business. Engaged in over 130 countries, it registered $16.3 billion in exports worldwide in 2018. The industry also had a positive services trade surplus of $9.4 billion in 2018, or four percent of the total U.S. private sector trade surplus in services. For comparison purposes, the industry runs a trade surplus larger than each of the surpluses in the transport, telecommunications, insurance, and health related services sectors.

To enhance the competitiveness of the U.S. motion picture and television industry and to create growth opportunities for the 81,000 small businesses operating within the industry, overseas markets must be open and secure. MPA strongly supports the negotiation of trade agreements that protect and enforce copyright, lower access barriers for U.S. audiovisual products and services, and promote legitimate digital trade.

Finally, MPA agrees with President Kenyatta that these negotiations could serve as a basis for the United States' reengagement with other African countries.[1] MPA also believes that a free trade agreement with Kenya could help to inform the AfCFTA. With this in mind, it is important that a U.S.-Kenya agreement be comprehensive in scope and secure high-standard copyright protections and effective enforcement provisions; secure market access for the U.S. motion picture and television industry; and, establish meaningful rules for the online marketplace, including non-discrimination.

Below is MPA's initial assessment of negotiating objectives for a trade agreement with Kenya.

Services and Investment

Kenya has WTO Mode 1 commitments for audiovisual services production, as well as Mode 3 projection services commitments. These obligations indicate a recognition of the value of the motion picture and television industry to Kenya's economy and a recognition that cultural promotion and open markets are compatible and complementary. These commitments, however, are from 1994 and they do not encourage the foreign investment in distribution that the Kenyan Film Commission has identified as important to the Kenyan audiovisual industry[2] nor do they reflect the importance of the online marketplace to Kenyan creators.[3] To best ensure a comprehensive scope and secure market access for evolving and future business models, MPA believes that the U.S.-Kenya FTA must follow the negative list format.

It is of the utmost importance that the U.S.-Kenya investment chapter captures all forms of investment, including intellectual property. Similar to USMCA, this chapter should ensure that U.S. investors have the opportunity to establish, acquire, and operate investments. It is important that investors are provided national treatment and that investments are not constrained by performance requirements that mandate domestic content quotas. Negotiations with Kenya provide an opportunity for Kenya to reconsider the unreasonably high local content quotas for broadcasters (40 percent local content in the first year and 60 percent local content within four

[1] President Kenyatta remarks at U.S. Chamber of Commerce, February 6, 2020.
[2] Kenyan Film Commission, *Economic Contribution of the Film Industry in Kenya*. http://kenyafilmcommission.com/images/EconomicContributionofFilmIndustryinKenya.pdf
[3] Kenyan Film Commission, *Copyright and the Audiovisual Industry in Kenya*. http://kenyafilmcommission.com/images/pdf/COPYRIGHT--THE-AUDIOVISUAL-INDUSTRY-IN-KENYA.pdf

years).[4] These burdensome quotas may promote the creation of a large amount of low-quality titles, but they do not promote sustained growth and development of the audiovisual sector.

MPA notes that the USMCA does not provide for comprehensive investor-state dispute settlement. Investor-state is particularly important when a trading partner's judicial systems may not be fully mature as it ensures that U.S. investors have access to a neutral and fair international dispute settlement system. MPA recommends that for the U.S.-Kenya agreement, USTR reconsider its approach to this mechanism.

Given the nature of the online marketplace – including essentially unlimited capacity, immense diversity, and rapid change – the U.S.-Kenya agreement should ensure non-discrimination in the digital marketplace.

Intellectual Property Rights

A strong outcome on copyright and enforcement is a key trade policy objective for the U.S. motion picture and television industry. Copyright underpins the legitimate licensing and distribution of audiovisual content around the world. It is the lifeblood of the industry and of our industry's efforts to embrace new digital distribution models that meet the expectations of our consumers worldwide.

The theft of copyrighted works is exceptionally harmful to our industry's ability to compete globally. A 2016 study by Carnegie Mellon focusing on movie piracy determined that if piracy was eliminated in the theatrical window, box-office revenues would increase by 15 percent or $1.3 billion per year.[5] Kenyan producers have also drawn a connection between piracy and declining box office revenues.[6] And, the Government of Kenya has acknowledged that piracy is a significant challenge in Kenya.[7]

A free trade agreement between Kenya and the United States provides an important opportunity to modernize the Kenyan copyright framework to the benefit of U.S. and Kenyan producers alike and to secure both the legal and practical tools necessary to protect intellectual property rights in the digital age. It is also a unique opportunity to develop an effective copyright and enforcement template for the African continent.

Like the USMCA, a U.S.-Kenya agreement should include obligations to fully implement the WIPO Internet Treaties, including the rights of distribution and communication to the public and explicit protection of electronic copies. While Kenya signed the WCT and WPPT in 1996, it has yet to implement these treaties. The USMCA also includes a strong framework for technological

[4] Programming Code for Free-to-Air Radio and Television Services in Kenya, Section 18, Communications Authority of Kenya.
[5] Ma, Liye and Montgomery, Aland and Smith, Michael D., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University (Feb 24, 2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.
[6] CGTN, "Film Industry: How to Get Fans Back Into the Cinema," January 27, 2020. https://africa.cgtn.com/2020/01/27/film-industry-how-to-get-fans-back-into-the-cinema/
[7] WIPO Magazine interview with Acting Director of the Kenyan Industrial Property Institute, April 2016, https://www.wipo.int/wipo_magazine/en/2016/04/article_0007.html

protection measures (TPMs) and uncompromised civil and criminal enforcement remedies and these strong standards should be included in a U.S.-Kenya agreement.

Consistent with the USMCA, a U.S.-Kenya agreement should provide rights holders with the contractual freedom to license their works on a territorially exclusive basis. Barriers to contractual freedom restrict the quality and scope of content available to consumers and undermines the financing model for large and small producers alike. Further, a U.S.-Kenya agreement should reflect the global consensus on term of protection for copyrighted works which is life of the author plus 70 years and a comparable term for works measured by date of publication; the current term of protection in Kenya is 50 years.

A U.S-Kenya agreement should also reflect the strong enforcement standards of the USMCA on unauthorized camcording; cable and satellite signal theft; *ex-officio* authority for law enforcement and border enforcement; and, include an explicit provision on aiding and abetting.

On civil enforcement, MPA believes that a U.S.-Kenya agreement must include an explicit, stand-alone obligation to provide for secondary liability. The doctrine of secondary liability is central to enforcement broadly and online enforcement in particular. It is also important to secure statutory damages. Statutory damages are imperative in online infringement cases where there is substantial harm but that harm is difficult to quantify. Further, A U.S.-Kenya agreement should also ensure that rightsholders have fully effective injunctive relief, as provided by Rule 65 of the U.S. Code of Civil Procedures, including the ability to extend injunctive relief to appropriate third parties.

A U.S.-Kenya agreement should reflect the USMCA article on exceptions and limitations to copyright, i.e. a clear recitation of the three-step test. This provides both rightsholders and users a familiar and widely understood and accepted framework for exceptions and limitations to copyright. The three-step test, which is the time-tested standard reflected in TRIPS, the Berne Convention and the 1996 WIPO Internet Treaties, remains a flexible and broadly supported mechanism that supports appropriate exceptions, including in the digital environment, and can accommodate different legal traditions.

With regard to online enforcement, a U.S.-Kenya agreement should include disciplines that can effectively address online piracy. This means moving away from a rote recitation of Section 512 of the U.S. Digital Millennium Copyright Act (DMCA). Rather, we recommend moving to high-level language that reflects the fundamental principles of the DMCA. Such an approach would be fully consistent with U.S. law and create some policy space for Kenya to be innovative in its approach to online piracy. In so doing, a U.S.-Kenya agreement would be consistent with Trade Promotion Authority's (TPA) negotiating objective of "ensuring that standards of protection and enforcement keep pace with technological developments."

Finally, a U.S.-Kenya agreement should ensure that internet retransmissions of television signals (whether terrestrial, cable or satellite) is permitted only under market-based negotiations with applicable rights holders as was contained in KORUS and numerous other FTAs.

Digital Trade

The legitimate online marketplace for film and television content continues to expand and diversify. Today there are more than 450 legitimate online services around the world providing high-quality video on demand content to consumers. High-quality content drives the success of these platforms. Cisco estimates that by 2020, there will be one million minutes of video content crossing global IP networks each minute. And the U.S. Chamber of Commerce Global IP Center's 2017 IP Index found a high correlation between strong copyright protection and innovative technologies for enjoying content and found that countries with high levels of copyright protection had wider and more convenient access to video content.

Establishing disciplines that recognize the integral role of content in the online ecosystem, as discussed in the above intellectual property and services sections, is critically important to facilitating legitimate digital trade. Also important are provisions to ensure the free flow of data between markets and to prevent localization barriers. Finally, a U.S.-Kenya agreement should ensure non-discrimination of digital products and prohibit the assessment of duties on electronic transmissions.

MPA does not support the inclusion of a legal framework for limitations to liability for platform providers to reflect elements of Section 230 of the U.S. Communications Decency Act. MPA believes that even with the IP carveout included in the USMCA, such a provision complicates online copyright enforcement. Moreover, given the ongoing U.S. domestic debate regarding the scope of the liability shield for platform providers, the suggestion to export these provisions to foreign territories is especially questionable.

Goods and Customs

MPA member companies export a range of filmed entertainment products, delivering U.S. produced content to theaters, rental and retail establishments, and free and pay television operators. These products fall under tariff lines 3706.10 and 3706.90 (cinematographic film) and 8523 (Discs, tapes, solid-state non-volatile storage devices, "smart cards" and other media for the recording of sound or of other phenomena, whether or not recorded, including matrices and masters for the production of discs). MPA recommends that the U.S.-Kenya agreement eliminate tariffs on these lines. A U.S.-Kenya agreement should include a discipline prohibiting the assessment of duties on electronic transmissions.

MPA members occasionally find that customs officers assess *ad valorem* duties based on potential royalties generated rather than solely on the value of the carrier medium. The economic consequence of such policies can mean hundreds of thousands of dollars per film or television series. Moreover, such policies are burdensome, subjective, and depress commercial activity. In addition, because royalties are subject to remittance, withholding and income taxes, such duties are also a form of double taxation.

MPAA notes that in 2011 and 2013, Kenya sought to assess duties based on potential royalties of home entertainment and theatrical digital cinema packs. While these policies were ultimately repealed, it underscores the imperative of eliminating tariffs on U.S. filmed entertainment exports in the U.S.-Kenya trade agreement.

Good Governance and Anti-Corruption

The U.S.-Kenya agreement should follow the USMCA and include not just institutional transparency provisions but also include specific provisions for transparency in the domestic regulatory processes including licensing decisions. This is particularly important for the U.S. motion picture industry that occasionally finds itself subject to discriminatory licensing regimes in foreign territories. Robust transparency provisions would provide the U.S. motion picture industry with some recourse should such discriminatory practices arise in the future and be a meaningful complement to the work Kenya has already undertaken to foster industry's ability to conduct business openly and fairly.

Closing

The six major studios of the MPA generate billions of dollars annually from filmed entertainment and television programming distributed around the globe. Notwithstanding this singular achievement, the U.S. motion picture and television industry faces daunting barriers in many markets as well as relentless challenges to the integrity of its product. The economic and cultural vitality of the creative industries is one of our nation's most valuable assets.

MPA supports negotiation of a U.S.-Kenya agreement that will open and secure market access for the U.S. motion picture and television industry and protect the intellectual property that fuels the development and success of this industry.

MPA appreciates the opportunity to comment on the proposed U.S.-Kenya agreement and is ready to provide further information or answer questions as required.

Sincerely,

/Anissa Brennan/

Anissa Brennan
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