

July 17, 2019

**Brief in Support of Written Testimony of ACT | The App Association to the United States
International Trade Commission**

Investigation No. 332-571

**Hearing: U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New
Developments**

ACT | The App Association appreciates this opportunity to testify before the U.S. International Trade Commission (USITC). The App Association is pleased to contribute its views as the USITC examines matters relevant to its investigation of United States' trade and investment with Sub-Saharan Africa (SSA).

The App Association represents more than 5,000 app makers and connected device companies across the country, and throughout the mobile economy. Our members leverage the connectivity of smart devices to create innovative solutions that make our lives better. The App Association is a global leader for the small business software development and high-tech community that seek to grow and create jobs into new markets abroad. Additionally, the App Association is a member of the Department of Commerce's Industry Trade Advisory Committee on Information and Communications Technologies, Services, and Electronic Commerce.¹

As the world quickly embraced mobile technology, the hyper-competitive app ecosystem—valued at approximately \$1.3 trillion and responsible for 5.7 million American jobs—continues to produce more and more innovative and efficient solutions. These products leverage mobile technologies to drive the global digital economy across modalities and segments, significantly augmenting consumer and enterprise interactions and experiences. This global app ecosystem is led by U.S. companies, the vast majority of which are startups or small businesses the App Association represents.

¹ See <http://www.trade.gov/itac/committees/itac08.asp>.

While the global digital economy holds great promise for our small business digital economy members in terms of growth and competition, our members face a diverse array of challenges entering new markets. These barriers may be 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.

With respect to the digital economy and trade, the small business innovators that the App Association represents prioritize the following:

- **Facilitating Cross-Border Data Flows:** The seamless flow of data between economies and across political borders is essential to the functioning of the global economy. In order to grow their businesses and support more American jobs, small app development companies, in particular, must be able to rely on unfettered data flows as they seek access to new markets.
- **Data Localization Policies:** Companies looking to grow in new markets too often face regulations that force foreign providers to build and/or use local infrastructure in-country. These data localization requirements cause serious declines in imports and exports, reduce an economy's international competitiveness, and undermine domestic economic diversification. Our member companies do not have the resources to build, maintain, or use unique infrastructure in every country in which they may do business, and such requirements often effectively exclude them from commerce.
- **Customs Duties on Digital Content:** American app developers and technology companies need to take advantage of the internet's global nature to reach the billions of new customers outside of the United States. However, the "tolling" of data crossing political borders in order to collect customs duties directly contributes to the balkanization and reduced efficiency of the internet and effectively blocks these innovative products and services from market entry. We note that, since 1998, the World Trade Organization (WTO) has agreed to a moratorium on imposing customs duties on electronic transmissions² and that this moratorium is now at risk.

² World Trade Organization, The Geneva Ministerial Declaration on Global Electronic Commerce 25 May 1998, WT/MIN(98)/DEC/2, https://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm.

- **Requirements to Provide Source Code for Market Entry:** Some governments have put into place policies requiring companies to transfer or give access to proprietary source code before being able to legally enter that country's marketplace. For app developers and tech companies, intellectual property is the lifeblood of their innovations, and transfer of source code to a government presents an untenable risk of theft and piracy. These requirements are serious disincentives to digital trade and a non-starter for our members. In practice, such requirements lock small business software and tech innovators out of a market.
- **Prevent Public-Utility Style Regulations on Mobile Operating Systems:** Key markets have begun to implement policies that intend to treat mobile operating systems (OS) (e.g., iOS and Google Play) as public utilities.³ These policies, in effect, place foreign governments in the middle of private negotiations between mobile platforms and app developers. Since its inception, the app economy successfully operates under an agency-sale relationship that yields lower overhead costs, greater consumer access, simplified market entry, and stronger intellectual property protections for app developers with little-to-no government influence. Foreign governments regulating OS as public utilities stand to frustrate this harmonious relationship enjoyed by small business app developers and mobile platforms, which ultimately serves as a significant barrier of entry for our members in those countries.
- **The Ability to Use Strong Encryption Techniques to Protect End User Security and Privacy:** App economy innovators across the United States depend on technical data protection methods such as the use of strong encryption techniques to keep users safe from harms such as identity theft. However, some countries continue to demand that "backdoors" be built into encryption for the purposes of government access. These policies would degrade the safety and security of data, as well as the trust of end users, by creating known vulnerabilities that unauthorized parties can exploit. The viability of a small app development company's product from a security and privacy standpoint depends on the trust of its end users.

³ E.g., ARCEP, *Devices, The Weak Link in Achieving an Open Internet*, Report (2018), found here: https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018-ENG.pdf.

- **Protection of Intellectual Property:** The infringement and theft of intellectual property and trade secrets presents a major threat to the success of the App Association’s members and, in turn, the billions of consumers who rely on these app-based digital products and services. It is estimated that mobile app developers and publishers lose \$3-4 billion each year due to pirated apps, with up to 14 billion pirated app installs globally each year.⁴ 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. Strong, but fair, protection of intellectual property for copyrights, patents, trademarks, and trade secrets is essential.

⁴ John Koetsier, *App Developers Losing \$3-4 Billion Annually Thanks To 14 Billion Pirated Apps*, FORBES, (July 24, 2017), <https://www.forbes.com/sites/johnkoetsier/2017/07/24/app-developers-losing-3-4-billion-annually-thanks-to-14-billion-pirated-apps/#697b170460da>.

We appreciate USITC's efforts to evaluate United States' trade and investment with SSA and related challenges and opportunities. From the perspective of American small businesses in the software development and high-tech industries, the SSA, despite lower-than-expected gross domestic product (GDP) growth over the last few years, according to the World Bank,⁵ presents new opportunities for customer base growth. Increasingly, App Association members are turning to SSA markets as they seek to sustain growth and create more American jobs. Consider the following:⁶

- In 2017, mobile technologies and services generated 7.1 percent of GDP across SSA, amounting to \$110 billion of economic value added. By 2022, the SSA mobile economy will generate more than \$150 billion (or 7.9 percent of GDP) of economic value.
- 300 million more people in SSA are expected to come online via 44 million cellular internet of things (IoT) connections by 2025.
- SSA jobs supported by the app economy are expected to increase from 3 million in 2017, to 3.45 million in 2022. This job creation will in turn spur greater growth in SSA, creating further opportunities for American digital economy small businesses.

For new IoT consumer and enterprise applications that are already taking many verticals by storm elsewhere, these applications are positioning SSA markets to leapfrog forward. This opportunity is very apparent to our members and many of them are actively positioning themselves for SSA market entry, if they have not already. Even for developing markets that may need to rebuild infrastructure due to conflict, or which may suffer from ongoing issues due to conflicting practices such as mineral mining where supply chain technologies like blockchain to ensure the integrity of record, such IoT innovations stand poised to provide immense societal benefit.

As new internet infrastructure and last-mile connections are established,⁷ 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. However, SSA markets also present many challenges to digital economy innovators. We provide a non-exhaustive list of these barriers for the USITC's consideration in its investigation, appended to this testimony.

The App Association urges the United States to mitigate and eliminate these barriers through bilateral and/or multilateral agreements. We note that African Union (AU) Commission Chairman Moussa Faki recently announced the African Continental Free Trade Area (AfCFTA),⁸ which currently enjoys support from all African nations, save for Eritrea, and that, if realized, would represent a major global economic trade block. It is imperative that pro-digital economy policies are reflected in SSA market domestic laws, as well as trade agreements amongst or including SSA markets.

The App Association also notes that, in other key markets outside of SSA, policies are being proposed and finalized that would put into place serious barriers to growth of the digital economy and free trade. For example, China continues to utilize policies that discriminate against American digital economy small businesses in a variety of ways. Further, Indonesia has even codified new tariff codes for digital goods. Now, more than ever, it is imperative that the United States set the example for SSA on the best ways to cooperate in facilitating digital trade and the growth of the digital economy through trade agreements and U.S. domestic policies. Doing so will advance the ability of American small business innovators to grow into new markets to create more American jobs.

The App Association appreciates the opportunity to provide its views to the USITC on the United States' trade and investment with SSA.

Sincerely,



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⁵ Calderon, Cesar; Kambou, Gerard; Korman, Vijdan; Kubota, Megumi; Cantu Canales, Catalina. 2019. Africa's Pulse, No. 19, April 2019 : An Analysis of Issues Shaping Africa's Economic Future. Washington, DC: World Bank. © World Bank. <https://openknowledge.worldbank.org/handle/10986/31499> License: CC BY 3.0 IGO (World Bank Report Apr 2019).

⁶ CIO East Africa, *Connectivity enables Africa's digital transformation* (May 23, 2019), available at <https://www.cio.co.ke/connectivity-enables-africas-digital-transformation/>.

⁷ SSA broadband penetration rates continue to exponentially increase, with nearly 300 householders per 1,000 reportedly having active mobile broadband subscriptions as of 2017. World Bank Report Apr 2019 at p. 93.

⁸ *African Leaders Launch Landmark 55-Nation Trade Zone*, DETSCHE WELL (JULY 7, 2019) <https://www.dw.com/en/african-leaders-launch-landmark-55-nation-trade-zone/a-49503393>.

APPENDIX: NON-EXHAUSTIVE LIST OF SSA DIGITAL TRADE BARRIERS

ANGOLA

Intellectual Property (IP) Rights Protection: Angola joined the Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty. While the App Association was optimistic about this step, it is unfortunate that Angola's IP enforcement still remains weak.⁹

ETHIOPIA

Intellectual Property (IP) 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.¹⁰

GHANA

Intellectual Property (IP) Rights Protection: In January 2016, Ghana and the Swiss Federation jointly introduced Ghana's first national IP rights policy and strategy.¹¹ 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.¹²

⁹ USTR, *2019 National Trade Estimate Report on Foreign Trade Barriers*, 13 (2019).

¹⁰ *Id.* at 163.

¹¹ Ghana – Intellectual Property, Ghana Country Commercial Guide, EXPORT.GOV (last updated December 3, 2018), <https://www.export.gov/article?id=Ghana-Protecting-Intellectual-Property>.

¹² USTR, *2019 National Trade Estimate Report on Foreign Trade Barriers*, 163 (2019).

KENYA

Data Localization Requirements: In 2018, Kenya introduced a data protection bill that requires (1) local storage of personal data; (2) prohibits the cross-border processing of certain “sensitive personal data;” and (3) places strict conditions on the transfer of personal data outside Kenya.¹³ Our members are concerned that the bill’s language concerning cross-border data flow would place significant restrictions on outside investment and create a large barrier for digital trade in Kenya.

Intellectual Property (IP) 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 has enacted its “Guidelines for Nigerian Content Development in Information and 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.

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

¹³ Kenya Data Protection Bill (2018) <http://www.ict.go.ke/wp-content/uploads/2016/04/Kenya-Data-Protection-Bill-2018-14-08-2018.pdf>.

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

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

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.¹⁷ 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.¹⁸

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. Critics say that the copyright law may not meet international standards and may have overly broad exceptions to the copyright laws.¹⁹ Additionally, some stakeholders feel that the new Policy for South African IP will weaken exclusive patent rights.²⁰

¹⁷ *Id.* at 446.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*