



**the dti**

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

## **EXPLANATORY MEMORANDUM OF ACCESSION TO THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) PERFORMANCES AND PHONOGRAMS TREATY, 1996 ('THE WPPT')**

The World Intellectual Property Organization (WIPO) adopted the WIPO Performers and Phonograms Treaty (WPPT) at Geneva on 20 December 1996. In terms of the World Intellectual Property Organization's web database, South Africa signed the WPPT on 12 December 1997. A copy of the Presidential Minute authorizing such signature is not in the Department of Trade and Industry's possession and could not be obtained from the Presidency. Given the concern that the necessary constitutional authorisation may not have been obtained prior to signing the WPPT, the Department of International Relations and Cooperation advised that the signature should be disregarded internally and South Africa must express its interest to be bound by way of an Instrument of Accession rather than an Instrument of Ratification. Especially since accession and ratification will have the same legal effect of binding South Africa to the terms of the WPPT.

The WPPT entered into force in March 2002, three months following ratification or accession by at least thirty member states as per the provisions of Article 29. Essentially amendments cannot be effected to the WPPT. Article 1 states that provisions in the WPPT do not derogate from obligations in terms of the Rome Conventions nor affect the protection of literary and artistic works in terms of the Berne Convention.

Contracting Parties have the obligation to ensure that appropriate provisions exist in their national laws to ensure the effective enforcement of the rights in the Treaty (Article 23). The Treaty is hence a non-self-executing Treaty and will not automatically become judicially enforceable once Parliament has approved it in terms of section 231(2) of the Constitution. It will only become judicially enforceable through the implementation of domestic legislation. The Copyright Amendment Bill and the Performers' Protection Amendment Bill address this matter and are before Parliament.

Legislation is also required to ensure that other parties to the WPPT are granted, under South African copyright law, the rights to which they are entitled under the Treaty. Acceding to the Treaty will not require amendments to the Constitution but will introduce new rights for performers and producers of phonograms which enhances intellectual property rights.

The WPPT deals with the rights of performers (actors, singers, musicians, etc.); and producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds) specifically in the digital environment (Article 2 to 3). Beneficiaries of the WPPT are performers and producers of phonograms who are

members of contracting parties that are eligible for protection under the Rome Convention (Article 3). National treatment equally applies in terms of Article 4 of the WPPT.

The WPPT grants performers economic rights (Article 6 to 10) on their fixed or in unfixed (live) performances and moral rights (Article 5) which remain valid beyond the transfer of performers' rights. Moral rights, this entitles performers the right to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation. Producers of phonograms are also granted the same economic rights in their phonograms (Article 11 to 14). Performers and producers of phonograms also enjoy the right to a single equitable remuneration for the direct or indirect of phonograms published for commercial broadcasting or for any communication to the public (Article 15).

The WPPT is in the best interests of South Africa as it ensures that protection of South African performers and producers of phonograms will keep pace with technological change, thus affording protection and economic benefits in the digital environment. Except for Article 15, which allows Contracting Parties to declare that it will apply the provisions regarding equitable remuneration for partly or not at all, the WPPT does not allow contracting parties to make reservations on any other provisions (Article 21).

Each Contracting Party can be represented by one member at the Assembly responsible for maintenance and development of the WPPT, expenses of the delegate are borne by the Contracting Party (Article 24). Besides the expenses provided for in Article 24 and the annual WIPO member's fees which South Africa by virtue of being a WIPO member pays, no further expenses will be incurred with respect to this Treaty. Any financial implications that may be incurred by government or industry in the application of this Treaty will be offset by the greater benefits the Treaty introduces for performers and producers of phonograms.



**the doj & cd**

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Date: 22 May 2018

Mr Lionel October  
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Dear Mr October

Attention: Ms Tshillo Mabirimisa

**WIPO PERFORMANCES AND PHONOGRAMS TREATY 1996: YOUR E-MAIL  
DATED 09 APRIL 2018**

1. The Department of Trade and Industry (the "Department") informs us that it is embarking on a process to ratify the World Intellectual Property Organization (the "WIPO") Treaties/Agreements. It appears from the Department's e-mail that the Department is requesting our assistance on the procedure to be followed to have Appendix 8 dealing the WIPO Performances and Phonograms Treaty 1996 (adopted in Geneva on December 20, 1996) (the "WPPT") ratified or acceded to and to obtain a legal opinion on whether the WPPT is conflict with the South African domestic law.
2. The WPPT deals with the rights of the following two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds). These rights are addressed in the same instrument, because most of the rights granted by the WPPT to performers are

rights connected to their fixed, purely aural performances (which are the subject matter of phonograms).<sup>1</sup>

3. Furthermore, as far as performers are concerned, the WPPT grants performers the following economic rights in their performances fixed in phonograms (not in audio-visual fixations, such as motion pictures): (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available. As far as producers of phonograms are concerned, the Treaty grants them the following economic rights in their phonograms: (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available.<sup>2</sup>

4. We have therefore scrutinised the WPPT in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* (the "Manual") and with reference to *Chapter 5 of the Constitutional Handbook for Members of the Executive* (the "Constitutional Handbook"), the Constitution of the Republic of South Africa, 1996 (the "Constitution") and other relevant legislation in order to ascertain whether it is in conflict with the domestic law of the Republic of South Africa.

5. Since the WPPT was concluded in 1996 and entered into force in 2002,<sup>3</sup> we naturally refrained from effecting any amendments to the WPPT. It must further be noted that South Africa became a member of WIPO on 23 March 1975. In October 1977 it was decided not to permit further South African participation in activities of WIPO. South Africa again resumed participation in the activities of WIPO and its subsidiary bodies, after a decision to this effect by an Extraordinary Session of its Co-ordination Committee, held on 29 July 1994.<sup>4</sup>

## **DISCUSSION OF THE WPPT**

### **Ad Preamble**

6. The Preamble indicates the Contracting Parties' intention which is to develop and maintain the protection of the rights of performers and producers of phonograms in an effective and uniform way and to further introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological

<sup>1</sup> [http://www.wipo.int/treaties/en/ip/wppt/summary\\_wppt.html](http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html) at page 1

<sup>2</sup> Ibid at page 1

<sup>3</sup> Ibid at page 2

<sup>4</sup> <http://www.dirco.gov.za/foreign/Multilateral/inter/wipo.htm> at page 1



developments in a manner that maintains a balance between the rights of authors and the larger public interest, particularly in education, research and access to information. It appears to be in order.

## **Chapter I – General Provisions**

### **Ad Article 1 – Relation to other Conventions**

7. Article 1 provides that nothing in the WPPT shall derogate from the existing obligations of the Contracting Parties towards each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization, done on 26 October 1961 (the "Rome Convention").

8. Article 1 further provides that the protection granted under the WPPT shall in no way affect the protection of copyright in literary and artistic works, neither shall it have any connection with treaties nor prejudice any rights and obligations under any other treaties. This Article appears to be in order.

### **Ad Article 2: - Definitions**

9. Article 2 provides detailed definitions on what is meant by performers, phonogram, fixation, producer of phonogram, publication of fixed performance or phonogram, broadcasting, and communication to the public of a performance or a phonogram. The definitions appear to be in order.

### **Ad Article 3 – Beneficiaries of Protection under this Treaty**

10. Article 3 obliges the Contracting Party to provide the protection offered under the WPPT to performers and producers of phonograms who are nationals of other Contracting Parties. It further provides that nationals of other Contracting Parties shall be understood to be performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention.

11. The Article further provides that any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation as provided in Article 5(3) of the Rome Convention by depositing an instrument of notification with the Secretary-General of the United Nations. This Article appears to be in order.

#### Ad Article 4 – National Treatment

12. Article 4(1) provides that each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of the WPPT, unless any Contracting Party declares, in a notification deposited with the Director-General of WIPO, that it will apply the provisions of Article 15(3) allowing any Contracting Party to exclude the right to equitable remuneration, or that it will limit their application in some other way, or that it will not apply these provisions at all. This appears to be in order.

### **Chapter II - Rights of Performers**

#### Ad Article 5 – Moral Rights of Performers

13. Article 5(1) provides that performers shall, independent of their economic rights, with regards to their live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of their performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of their performances that would be prejudicial to their reputations. Such rights granted to a performer in accordance with paragraph (1) shall, after his or her death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed unless the Contracting Parties' legislation, at the moment of their ratification of or accession to this Treaty, did not provide for protection after the death of the performer of all those rights.

14. Most importantly, this Article provides that the means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed. This Article appears to be in order.

#### Ad Article 6 – Economic Rights of Performers in their Unfixed Performances

15. Article 6 provides that the performers shall enjoy the exclusive right of authorizing, as regards their performances, the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and the fixation of their unfixed performances. This Article appears to be in order.



Ad Article 7 – Right of Reproduction

16. Article 7 provides that performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form. It appears to be in order.

Ad Article 8 – Right of Distribution

17. Article 8 provides that performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

18. Article 8(2) further permits a Contracting Party to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer. The Article appears to be in order

Ad Article 9 – Right of Rental

19. Article 9 provides performers with the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms in accordance with the domestic law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

20. This Article further permits a Contracting Party which on 15 April 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, to maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers. This Article appears to be in order.

Ad Article 10 – Right of Making Available of Fixed Performances

21. Article 10 provides performers with the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. It appears to be in order.

### **Chapter III - Rights of Producers of Phonograms**

#### **Ad Article 11 – Right of Reproduction**

22. Article 11 provides performers with the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

This Article also appears to be in order.

#### **Ad Article 12 – Right of Distribution**

23. Article 12 provides performers with the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

24. Article 12(2) further permits Contracting Parties the right to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram. The Article appears to be in order.

#### **Ad Article 13 – Right of Rental**

25. Article 13 provides producers of phonograms with the exclusive right of authorizing the commercial rental to the public of the original and copies of their phonograms, even after distribution of them by, or pursuant to, authorization by the performer.

26. This Article further permits a Contracting Party which on 15 April 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their producers of phonograms for the rental of copies of their phonograms, to maintain that system, provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of producers of phonograms. This Article appears to be in order.

#### **Ad Article 14 – Right of Making Available of Phonograms**

27. Article 14 provides producers of phonograms with the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. This Article appears to be in order.



#### **Chapter IV - Common Provisions**

##### **Ad Article 15 - Right to Remuneration for Broadcasting and Communication to the Public**

28. Article 15(1) provides that performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

29. Paragraph (2) provides Contracting Parties with the discretion to establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Alternatively Contracting Parties may enact national legislation that provides that, in the absence of an agreement between the performer and the producer of a phonogram, performers and producers of phonograms shall share the single equitable remuneration.

30. Paragraph (3) further provides that any Contracting Party may, in a notification deposited with the Director-General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. Whilst paragraph (4) provides that, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them, shall be considered as if they had been published for commercial purposes. This Article appears to be in order.

##### **Ad Article 16 – Limitations and Exceptions**

31. Article 16(1) provides the Contracting Parties with the discretion, in their national legislation, to provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

32. Paragraph (2) provides that the Contracting Parties shall confine any limitations of or exceptions to rights provided for in the WPPT to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram. This Article appears to be in order.

Ad Article 17 – Term of Protection

33. Article 17 provides the term of protection to be granted to performers and producers of phonograms under this Treaty for a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram or the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made. The Article appears to be in order.

Ad Article 18 – Obligations concerning Technological Measures

34. Article 18 provides that the Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law. This Article appears to be in order.

Ad Article 19 – Obligations concerning Rights Management Information

35. Article 19 obliges the Contracting Parties to provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty-

- (i) to remove or alter any electronic rights management information without authority;

- (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

36. The Article further provides the meaning of or what is covered under "rights management information". This Article appears to be in order.

Ad Article 20 - Formalities

37. Article 20 provides that the enjoyment and exercise of the rights provided for in the WPPT shall not be subject to any formality. This Article appears to be in order.



#### Ad Article 21 - Reservations

38. The Department's attention is drawn thereto that Article 21 provides that no reservation to the WPPT shall be admitted unless declared in terms of Article 15(3) and the instrument is deposited with the Director- General of WIPO. This Article appears to be in order.

#### Ad Article 22 – Application in Time

39. Article 22(1) obliges the Contracting Parties to apply the provisions of Article 18 of the Berne Convention to all protections provided for in the WPPT. Article 18 provides protection to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. Article 18 of the Berne Convention further provides that these provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

40. Paragraph (2) provides that notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of the WPPT to performances which occurred after the entry into force of the WPPT for that Party. This Article appears to be in order.

#### Ad Article 23 – Provisions on Enforcement of Rights

41. The Department's attention is drawn thereto that Article 23 obliges the Contracting Parties to provide an undertaking to adopt, in accordance with their legal systems, the measures necessary to ensure the application of the WPPT and to provide speedy and effective remedies against any act of infringement of rights covered under the WPPT, which remedies will also constitute a deterrent to further infringements. This Article appears to be in order.

#### **Chapter V - Administrative and Final Clauses**

#### Ad Article 24 - Assembly

42. Article 24 makes it peremptory for Contracting Parties to have an Assembly which shall, besides dealing with matters concerning the maintenance, application, operation and development of this Treaty, perform the functions allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organizations to become party to the WPPT

43. The Article provides that each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts and that each Contracting Party shall have one vote and shall vote only in its own name. The Article further provides that the expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Article further allows the Assembly to establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions. This Article appears to be in order.

Ad Article 25 – International Bureau

44. Article 25 provides that the International Bureau of WIPO shall perform the administrative tasks concerning the WPPT. It appears to be in order.

Ad Article 26 – Eligibility for Becoming Party to the Treaty

45. Article 26 provides that any Member State of WIPO may become a party to this Treaty. Most importantly the Article provides the Assembly with the discretion to decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

46. The Article further provides the European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, with the discretion to become party to the WPPT. This Article appears to be in order.

Ad Article 27 – Rights and Obligations under the Treaty

47. Article 27 provides that each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty. It appears to be in order.

Ad Article 28 – Signature of the Treaty

48. Article 28 provides that the WPPT shall be open for signature by any Member State of WIPO and by the European Community until 31 December 1997. It appears to be in order.



Ad Article 29 – Entry into Force of the Treaty

49. Article 29 provides that the WPPT shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director-General of WIPO. It appears to be in order.

Ad Article 30 – Effective Date of Becoming Party to the Treaty

50. Article 30 provides that this Treaty shall bind the 30 States referred to in Article 29, from the date on which the WPPT has entered into force. The Article further provides that each other State shall accede to this Treaty after the expiration of three months from the date on which the State has deposited its instrument with the Director-General of WIPO. Whilst the European Community shall be bound by the WPPT, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of the WPPT in accordance with Article 29, or, three months after the entry into force of the WPPT if such instrument has been deposited before the entry into force of the WPPT. Any other intergovernmental organization that is admitted to become party to the WPPT shall be bound, from the expiration of three months after the deposit of its instrument of accession. This Article appears to be in order.

Ad Article 31 – Denunciation of the Treaty

51. Article 31 provides that any Contracting Party may, by notification addressed to the Director-General of WIPO, denounce the WPPT and such denunciation shall only take effect one year from the date on which the Director-General of WIPO received the notification. This Article appears to be in order.

Ad Article 32 – Languages of the Treaty

52. Article 32(1) provides for languages in which the WPPT can be signed, which are English, Arabic, Chinese, French, Russian and Spanish, all these languages being equally authentic. The usage of any language other than those referred to in paragraph (1) shall be established by the Director-General of WIPO on the request by any interested party after consultation with all the interested parties. This Article appears to be in order.

Ad Article 33 – Depositary

53. Article 33 provides that the Director-General of WIPO is the depositary of this Treaty. It appears to be in order.

54. As pointed out in paragraph 5 of this opinion, the WPPT had entered into force in 2002. It would also appear that the WPPT was ratified or acceded to by 30 States as provided for by Article 29, without South Africa either ratifying or acceding to the WPPT as required by Article 29 and without further appending its signature on or before 31 December 1997 as provided by Article 28 of the WPPT. The implication thereof was that South Africa did not become a member of the WPPT. However, Article 30 provides ways in which any member State could become a member of the WPPT and could thus be bound by the WPPT. Putting it succinctly, each other State could only accede to the WPPT after the expiration of three months from the date on which the State has deposited its instrument of ratification with the Director-General of WIPO. Thus to be part of the WPPT, South Africa would have to deposit its accession instrument with the Director-General of WIPO and will then be bound only after the expiration of three months from the date on which it has deposited such an instrument with Director-General of WIPO.

52. Having said the above, it must be noted that South Africa must still comply with our internal procedures for it to accede to the WPPT. In this regard we wish to draw the Department's attention to the provisions of section 231 of the Constitution which deals with international agreements and the procedures to be followed by South Africa to accede to the WPPT. The said section reads as follows:

**"231. International agreements.-**

(1) The negotiation and signing of all agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect".

55. The provisions of section 231 of the Constitution were discussed comprehensively by the Constitutional Court in the case of *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC). The court remarked as follows at p375 with regard to the approval of international agreements:



"[89] The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. But an international agreement signed by the executive does not automatically bind the Republic, unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament.

[90] The approval of an agreement by Parliament does not, however, make it law in the Republic, unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval, unless it is inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an 'international agreement becomes law in the Republic when it is enacted into law by national legislation'.

[91] The approval of an international agreement, under s 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign State, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an 'international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty'. The approval of an international agreement under s 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other States, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law, or taking other steps to bring our laws in line with the agreement, to the extent they do not already comply.

[92] An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory States. An international agreement that has been ratified by Parliament under s 231(2), however, does not become part of our law, until and unless it is incorporated into our law by national legislation." (See also *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) at paragraph [26] on 688A/B-C/D.)

56. Paragraph 5.5 of the Manual stipulates that agreements of a technical, administrative or executive nature refer to agreements which are departmentally specific and which are not of any major political or other significance. The agreements generally have no financial consequences and do not affect the domestic law of both parties. With regards to the determination of whether an agreement is of a technical, administrative or executive nature, *Erika de Wet in Shelton, International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*, at pp. 567-593, states as follows:

"The Constitution does not give any indication of which agreements would qualify as technical, administrative or executive. The internal practice which has developed within the Office of the Chief State Law Adviser is to consider



as "technical" those agreements which do not have major political significance; do not require additional budgetary allocation from Parliament over and above the budget provided by particular government department; and agreements which do not impact domestic law. They are often of a bilateral nature and concern routine agreements for which a single government department is responsible for implementation. ..."

57. According to chapter 5 (paragraph 5 on p 44) of the Constitutional Handbook, technical, administrative or executive agreements are agreements which -

- (a) are departmental specific;
- (b) are of no major political or other significance;
- (c) have no financial consequences; and
- (d) do not affect domestic laws.

58. As regards agreements requiring approval by Parliament, paragraphs 5.4, 5.6 and 5.7 of the Manual provides as follows:

**"5.4 Section 231(2) of the Constitution provides that all international agreements shall bind the Republic only after they have been approved by resolution of both Houses of Parliament. The exceptions are: (1) agreements of a technical, administrative or executive nature, or (2) those which do not require accession or ratification. The result is that Parliament is required to approve only agreements which require "ratification or accession" and which are not of a technical, administrative or executive nature.**

**5.6 Departments should not lightly determine that such agreements requiring ratification or accession are "technical, administrative or executive". Failure to allow Parliament to ratify an agreement might result in a defect in the conclusion of the agreement.**

**5.7 Although there is no rule as to which types of agreement require ratification or accession, this requirement is generally stated in the text of the agreement. As a general guideline this applies normally to multilateral agreements, although in some cases such a procedure could also be required for bilateral agreements." (Our emphasis.)**

59. In this regard and as pointed out earlier, Article 29 and 30 of the WPPT Treaty clearly indicates how any party can become a member to this international agreement. That is either through ratification or accession. We have further pointed out that since WPPT has entered into force, South Africa would only become a party to this Treaty through accession.

60. J Dugard, *International Law. A South African Perspective*, (3rd Ed), at pp. 408-409 remarks as follows with regard to formal and multilateral agreements such as the WPPT:

"Formal agreements, particularly multilateral agreements, normally require ratification in addition to signature. This requires the representative of the state subsequently to endorse the earlier signature. This provides the state with an opportunity to reconsider its decision to be bound by the treaty and, if necessary, to effect changes to its own law to enable it to fulfil its obligations under the treaty. In practice treaties generally indicate whether ratification is required, but where this is not done the intention of the parties will have to be ascertained from the surrounding circumstances. Although a state is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts which would defeat the object and purpose of such a treaty until it has made clear its intention not to be bound by the treaty.

**A state may later become a party to a treaty in whose negotiation it did not participate, and which it did not sign, by means of accession, provided that the original parties accept that such states may accede to the treaty.** Multilateral law-making treaties that seek to achieve a large measure of universality generally include an accession clause. For instance, the International Covenant on Civil and Political Rights provides that it shall be open to accession, *inter alia*, by any member state of the United Nations.

While it is not difficult to identify an international agreement subject to ratification or accession, in practice, it may prove difficult to identify an agreement of a technical, administrative or executive nature which comes into force on signature alone. All will depend upon the intention of the parties which must be ascertained from the circumstances surrounding the conclusion of the treaty. The practice of the government law advisors is to treat agreements of a routine nature, flowing from the daily activities of government departments as not requiring parliamentary approval. Where, however, there is any doubt, the agreement is referred to Parliament." (Our emphasis.) (With regard to the highlighted parts see also M Olivier, *Informal international agreements under the 1996 constitution*, SAYIL Vol. 22, 1997, p63 at p 64.)

61. Since Articles 28, 29 and 30 of the WPPT clearly provides for ratification of or accession to the WPPT in accordance with the applicable constitutional or internal rules and procedures of a Member State, and since it is a multilateral agreement, we are of the opinion that it falls within the scope of section 231(2) of the Constitution and will therefore bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. In view thereof, the WPPT still has to be submitted to Parliament for purposes of ratification if it is to bind the Republic. We must hasten to state that although a state is not bound by a treaty that it has not ratified, it is obliged to refrain from acts which would defeat the object and purpose of such a treaty until it has made clear its intention not to be bound by the treaty.

62. We have also considered the provisions of the following Acts:

Copyright Act, 1978 (Act No. 98 of 1978); and

Intellectual Property Laws Rationalisation Act, 1996 (Act No. 107 of 1996).

Article 23 of the WPPT obliges the Contracting Parties to provide an undertaking to adopt, in accordance with their legal systems, the measures necessary to ensure the

application of the WPPT In this regard the Department's attention is in particular drawn to Chapter I of the Copyright Act.

#### **CONCLUSION**

63. Subject to our aforementioned remarks and comments, no provision of the WPPT is, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa.

Yours sincerely,

A handwritten signature in dark ink, consisting of a large, stylized 'M' followed by a horizontal line extending to the right.

---

**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER  
TW MESEFO // W J J NEL // M A OLWAGE // A JOHAAR**





## international relations & cooperation

Department:  
International Relations and Cooperation  
REPUBLIC OF SOUTH AFRICA

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File: 10/16/3/4  
RO 198/2018

Ms M Herfurth  
Directorate: Multilateral Trade Relations

### ACCESSION TO THE WORLD INTELLECTUAL PROPERTY ORGANISATION PERFORMANCES AND PHONOGRAMS TREATY ("WPPT")

1. Your request for a legal opinion, received on 15 June 2018, under reference 18herfurthm0614e, refers.
2. The Department of Trade and Industry ("DTI") is interested in becoming a party to the WPPT. This Office has thus been requested to provide advice on the WPPT's consistency with international law and South Africa's international obligations.
3. We have been informed that an Inter-Ministerial Committee ("IMC") has been established in relation to South Africa's new Intellectual Property Policy. We trust that the decision to become a party to the WPPT was approved by the IMC.
4. The WPPT entered into force on 20 May 2002. According to Article 26(1) of the WPPT, any Member State of WIPO may become a party to the WPPT. South Africa meets this requirement.
5. Whilst WIPO has record of South Africa having signed the WPPT on 12 December 1997, our Office does not have any record of a legal opinion, certification, President's Minute or signing of the WPPT. A copy of the President's Minute was requested from the DTI, however, to date this has not been provided, and it appears that the DTI does not have record of the President's Minute. The Presidency has similarly not been able to provide a copy of the relevant President's Minute.
6. No powers to authorise the retrospective or *ex post facto* creation of a President's Minute exist. In the absence of any President Minute, our office is concerned that the necessary constitutional authorisation may not have been obtained prior to signing the WPPT. As a result, the signature should be regarded as void from a South African point of view.
7. It is imperative that the absence of a President's Minute is brought to the attention of Cabinet as well as Parliament.

#### CONFIDENTIALITY NOTE:

This legal opinion might contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the opinion to the intended recipient you are hereby notified that any dissemination, distribution, or copying the documentation is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (IL) immediately by telephone, and return the original message to the Office of the Chief State Law Adviser (IL).

8. As the intention is still for South Africa to become a party to the WPPT, it does not seem practical or in the interests of South Africa's international reputation to withdraw the signature and then to proceed with accession. Accession has the same legal effect as ratification. As a result, we propose that the signature be disregarded internally and South Africa should express its interest on the international level to be bound by the WPPT by way of accession rather than through ratification.

9. We note that according to the legal opinion of the Department of Justice and Constitutional Development ("DOJCD"), no provision of the WPPT is in conflict with South African domestic law. In relation to Article 23(1) of the WPPT, which obliges Contracting Parties to adopt measures necessary to ensure the application of the WPPT, DOJCD refers to Chapter 1 of the Copyright Act. It is thus assumed, that Chapter 1 satisfies the obligation of Article 23(1) of the WPPT. However, we wish to note that there is currently a process ongoing for the amendment of domestic intellectual property law and the DTI should only proceed with accession to the WPPT once the South African domestic law is in line with international law.

10. We have analysed the text of the WPPT and wish to draw your attention to the following:

10.1. References are made to the Intentional Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961 ("Rome Convention"). South Africa is not yet a party to the Rome Convention, however, it has expressed the intention of becoming a party thereto. In this regard, we refer you to the legal opinion issued by this Office on 11 June 2018, under reference number RO170/2018.

10.1.1. In particular, Article 3(2) of the WPPT provides that "[t]he nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention."

10.1.2. Article 3(3) of the WPPT provides: "[a]ny Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO)". These provisions in the Rome Convention allow a Contracting State to declare that it will only apply certain criteria for granting national treatment to producers of phonograms by one Contracting State to another Contracting State.

10.1.3. Article 3(3) of the WPPT does not specify when such a notification should be made. In the absence of anything to the contrary, such notification should be made at the time of ratification or accession. However, the context of the Rome Convention suggests that the notification may be made at any time and shall become effective six months after it has been deposited. Furthermore, it appears that such an interpretation is in line with the practice followed by the depositary, as indicated by Japan in its declaration to the Director General of WIPO, dated 21 January 2008.

10.1.4. Nevertheless, if South Africa wishes to make a notification pursuant to Article 3(3) of the WPPT, it is advisable that this be done at the time of accession.

10.2. No reservations may be made in terms of Article 21 of the WPPT, except pursuant to Article 15(3) of the WPPT. In terms of Article 15(3), "[a]ny Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all." If South Africa wishes to make a reservation in this regard, it must do so at the time of accession. The intention to enter such a reservation should be brought to the attention of Cabinet and Parliament. If a Contracting Party has made a reservation in terms of Article 15(3) of



WPPT, Article 4(1) will not apply vis-à-vis that Contracting Party, as provided in Article 4(2) of the WPPT.

10.3. Article 22(1) of WPPT provides that Article 18 of the Berne Convention will be applicable to the WPPT, Article 18 addresses the applicability of the Berne Convention to works already in existence at the time of its entry into force. South Africa is a party to the Berne Convention.

11. The Constitution provides in Section 231 as follows:

*(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).*

*(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.*

12. The "Manual on Executive Acts of the President of the Republic of South Africa", published in March 1999, provides as follows with respect to section 231(3) of the Constitution:

*The terms technical, administrative and executive agreement are used interchangeably and refer to the following categories of international agreements:*

- (a) Agreements which are departmentally specific;*
- (b) Agreements which are not of major political or other significance;*
- (c) Agreements which have no financial consequences, and do not affect domestic law. These are agreements flowing from the everyday activities of government departments and are often drafted in simplified form.*

13. It is clear that agreements which "affect" domestic law will be considered as agreements which are not of technical, administrative or executive nature, and which must hence be processed in terms of Section 231(2) of the Constitution, and must be approved by Parliament.

14. In this respect, it should be noted that international agreements of the nature of the WPPT, which provides in Article 23:

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.*
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.*

15. In light of the above provisions, we conclude that the WPPT is the type of agreement which may affect domestic law and should thus be processed in terms of Section 231(2) of the Constitution.

16. In order to obtain Parliamentary approval the WPPT needs to be certified by this Office. The documentation required for certification consists of:

- two copies of the Explanatory Memorandum setting out the purpose of the WPPT;
- two copies of the finally agreed text of the WPPT;
- a certificate of authenticity issued by the Minister of the DTI;
- two copies of the legal opinions from the State Law Advisers at the Department of Justice and Constitutional Development and this Office;
- completed certification form; and
- all documentation in folder Z137.

17. Following certification, the WPPT must be submitted to Parliament in the following manner:



17.1. Approach the relevant Cabinet Portfolio Committee for Cabinet approval. The line function Department must prepare a Cabinet Memorandum. The various Cabinet Committees may have their own requirements for the format of Cabinet Memoranda. The usual headings required are: Subject; Purpose; Summary; Discussion; Organisational and Personnel Implications; Financial Implications; Communication Implications; Constitutional Implications; Other Departments/Bodies consulted; Recommendations.

17.2. The WPPT must be considered by Parliament (both the National Assembly and National Council of Provinces):

- The line function department must prepare an Explanatory Memorandum setting out the history, objectives and implications of the agreement;
- The legal opinions from the State Law Advisors of both Departments (DOJ&CD and DIRCO) must be included;
- It must be stated whether the agreement contains any self-executing provisions in terms of section 231(4) of the Constitution;
- The projected financial and other costs of the agreement must be set out;
- The Explanatory Memorandum must contain all other information needed to take an informed decision.

18. If the intention is to enter a reservation or declaration to the WPPT, this intention, together with the implications, should be brought to the attention of both Cabinet and Parliament.

19. The Instrument of Accession must be deposited with the Director General of WIPO:

- The Line Function Department must prepare the Instrument of Accession and submit it to the South African Treaty Section within DIRCO;
- The Minister of International Relations and Cooperation or the President must sign the Instrument of Accession;
- DIRCO will send the Instrument of Accession to the relevant depositary through the diplomatic channels.

20. The WPPT must be deposited with the Treaty Section at DIRCO. The documents required are:

- A certified copy of the WPPT;
- The President's Minute or Parliamentary authorisation;
- Copy of the signed Instrument of Accession.

21. According to Article 30(ii), the WPPT will bind a South Africa after three months from the date upon which it has deposited its instrument of accession to the Director General of WIPO.

22. Legal Privilege and Confidentiality. Kindly be reminded that this communication constitutes legal advice that is legally privileged and confidential. It is intended solely for the consumption of the client, desk or department, and may not be freely disclosed to any third party, foreign State or international organisation without the express consent of the client, after taking legal advice from departmental legal advisers.

23. We trust that our comments will be of assistance to you.



**R BRAMMER**  
**STATE LAW ADVISER (IL)**

**PRETORIA**  
**9 JULY 2018**

ANNEXURE C

T. NADU-UGAID

STATE LAW ADVISER  
(INTERNATIONAL LAW)

05-10-2018



**WIPO Performances and Phonograms Treaty (WPPT)**

**and**

**the agreed statements of the Diplomatic Conference that adopted  
the Treaty**

**(WIPO Performances and Phonograms Treaty) (1996)**

## TABLE OF CONTENTS

### Preamble

### CHAPTER I: General Provisions

Article 1: Relation to Other Conventions

Article 2: Definitions

Article 3: Beneficiaries of Protection under this Treaty

Article 4: National Treatment

### CHAPTER II: Rights of Performers

Article 5: Moral Rights of Performers

Article 6: Economic Rights of Performers in their Unfixed Performances

Article 7: Right of Reproduction

Article 8: Right of Distribution

Article 9: Right of Rental

Article 10: Right of Making Available of Fixed Performances

### CHAPTER III: Rights of Producers of Phonograms

Article 11: Right of Reproduction

Article 12: Right of Distribution

Article 13: Right of Rental

Article 14: Right of Making Available of Phonograms

### CHAPTER IV: Common Provisions

Article 15: Right to Remuneration for Broadcasting and Communication to the Public

Article 16: Limitations and Exceptions

Article 17: Term of Protection

Article 18: Obligations concerning Technological Measures

Article 19: Obligations concerning Rights Management Information

Article 20: Formalities

Article 21: Reservations

Article 22: Application in Time

Article 23: Provisions on Enforcement of Rights

### CHAPTER V: Administrative and Final Clauses

Article 24: Assembly

Article 25: International Bureau

Article 26: Eligibility for Becoming Party to the Treaty

Article 27: Rights and Obligations under the Treaty

Article 28: Signature of the Treaty

Article 29: Entry into Force of the Treaty

Article 30: Effective Date of Becoming Party to the Treaty

Article 31: Denunciation of the Treaty

Article 32: Languages of the Treaty

Article 33: Depositary



## **Preamble**

### *The Contracting Parties,*

*Desiring* to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

*Recognizing* the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

*Recognizing* the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

*Recognizing* the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

*Have agreed* as follows:

## **CHAPTER I- General Provisions**

### **Article 1**

#### **Relation to Other Conventions**

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.<sup>1</sup>

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

### **Article 2**

#### **Definitions**

For the purposes of this Treaty:

(a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;<sup>2</sup>

(c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

(e) "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;<sup>3</sup>

(f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(g) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

### Article 3

#### Beneficiaries of Protection under this Treaty<sup>4</sup>

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.<sup>5</sup>

(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

### Article 4

#### National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights



specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

## **CHAPTER II- Rights of Performers**

### **Article 5**

#### **Moral Rights of Performers**

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

### **Article 6**

#### **Economic Rights of Performers in their Unfixed Performances**

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

### **Article 7**

#### **Right of Reproduction**

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.<sup>6</sup>

## **Article 8**

### **Right of Distribution**

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.<sup>3</sup>

## **Article 9**

### **Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.<sup>3</sup>

## **Article 10**

### **Right of Making Available of Fixed Performances**

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

## **CHAPTER III-Rights of Producers of Phonograms**

## **Article 11**

### **Right of Reproduction**

Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.<sup>6</sup>



## **Article 12**

### **Right of Distribution**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram.<sup>3</sup>

## **Article 13**

### **Right of Rental**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their phonograms, even after distribution of them, by or pursuant to, authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.<sup>3</sup>

## **Article 14**

### **Right of Making Available of Phonograms**

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

## **CHAPTER IV- Common Provisions**

## **Article 15**

### **Right to Remuneration for Broadcasting and Communication to the Public**

(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.<sup>7, 8</sup>

## **Article 16**

### **Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.<sup>6, 2</sup>

## **Article 17**

### **Term of Protection**

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

## **Article 18**

### **Obligations concerning Technological Measures**



Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

## **Article 19**

### **Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.<sup>10</sup>

## **Article 20**

### **Formalities**

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

## **Article 21**

### **Reservations**

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

## **Article 22**

### **Application in Time**

(1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

(2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party.

## Article 23

### Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

## CHAPTER V- Administrative and Final Clauses

### Article 24

#### Assembly

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.



(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

## **Article 25**

### **International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

## **Article 26**

### **Eligibility for Becoming Party to the Treaty**

- (1) Any Member State of WIPO may become party to this Treaty.
- (2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.
- (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

## **Article 27**

### **Rights and Obligations under the Treaty**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

## **Article 28**

### **Signature of the Treaty**

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

## **Article 29**

### **Entry into Force of the Treaty**

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

## **Article 30**

### **Effective Date of Becoming Party to the Treaty**

This Treaty shall bind:

- (i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

## **Article 31**

### **Denunciation of the Treaty**

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

## **Article 32**

### **Languages of the Treaty**

- (1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
- (2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

## **Article 33**

### **Depositary**



The Director General of WIPO is the depositary of this Treaty.

<sup>1</sup> **Agreed statement concerning Article 1(2):** It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.

It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.

<sup>2</sup> **Agreed statement concerning Article 2(b):** It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.

<sup>3</sup> **Agreed statement concerning Articles 2(e), 8, 9, 12, and 13:** As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

<sup>4</sup> **Agreed statement concerning Article 3:** It is understood that the reference in Articles 5(a) and 16(a)(iv) of the Rome Convention to "national of another Contracting State" will, when applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is a member of that organization.

<sup>5</sup> **Agreed statement concerning Article 3(2):** For the application of Article 3(2), it is understood that fixation means the finalization of the master tape ("bande-mère").

<sup>6</sup> **Agreed statement concerning Articles 7, 11 and 16:** The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.

<sup>7</sup> **Agreed statement concerning Article 15:** It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

<sup>8</sup> **Agreed statement concerning Article 15:** It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.

<sup>9</sup> **Agreed statement concerning Article 16:** The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty. [The text of the agreed statement concerning Article 10 of the WCT reads as follows: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions

should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

“It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”]

<sup>10</sup> **Agreed statement concerning Article 19:** The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 19 (on Obligations concerning Rights Management Information) of the WIPO Performances and Phonograms Treaty.

[The text of the agreed statement concerning Article 12 of the WCT reads as follows: “It is understood that the reference to ‘infringement of any right covered by this Treaty or the Berne Convention’ includes both exclusive rights and rights of remuneration.

“It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.”]





ANNEXURE D  
81/172488

(Z 19E)



PRESIDENT'S MINUTE NO. 294

In terms of section 231 of the Constitution of the Republic of South Africa, 1996, I hereby approve that the attached agreement on the WIPO Performances and Phonograms Treaty (WPPT) and the agreed statements of the Diplomatic Conference that adopted the Treaty (1996) between the Republic of South Africa and the World Intellectual Property Organisation be entered into, and I hereby undertake to sign this (full text of agreement) on behalf of the Republic of South Africa.

Given under my Hand at Johannesburg..... on this 04 day of November....., Two Thousand and Eighteen.

  
.....  
**PRESIDENT**

  
.....  
**MINISTER OF THE CABINET**