



**the doj & cd**

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Mr Lionel October  
Director-General  
Department of Trade and Industry  
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0001

Dear Mr October

Attention: **Ms Tshillilo Mabirimisa**

**WIPO COPYRIGHT TREATY AND THE AGREED STATEMENTS OF THE DIPLOMATIC CONFERENCE THAT ADOPTED THE TREATY AND THE PROVISIONS OF THE BERNE CONVENTION (1971): YOUR E-MAIL DATED 09 APRIL 2018**

## INTRODUCTION

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 the WIPO Copyright Treaty ratified or acceded to and to obtain legal opinions on whether these Treaties are in conflict with the South African domestic law.

2. In terms of Article 1 of the WIPO Copyright Treaty it is a special agreement under Article 20 of the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention") that deals with the protection of works and the rights of their authors in the digital environment. Any Contracting Party must comply with the substantive provisions of the 1971 (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works. Furthermore, the WIPO Copyright Treaty mentions the following two subject matters to be protected by copyright: (i) computer programs, whatever the mode or form of their expression; and (ii) compilations of

data or other material ("databases"), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. (Where a database does not constitute such a creation, it is outside the scope of this Treaty.)<sup>1</sup>

3. As regards the rights granted to authors, apart from the rights recognized by the Berne Convention, the WIPO Copyright Treaty also grants (i) the right of distribution; (ii) the right of rental; and (iii) a broader right of communication to the public.<sup>2</sup>

4. We have therefore scrutinised the "WIPO Copyright Treaty and the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty" ("WCT"), in terms of paragraph 5.20(a) of the *Manual on Executive Acts of the President of the Republic of South Africa* ("Manual") and with reference to Chapter 5 of the *Constitutional Handbook for Members of the Executive* ("Constitutional Handbook"), the Constitution of the Republic of South Africa, 1996 ("Constitution") and other relevant legislation in order to ascertain whether it is not in conflict with the domestic law of the Republic of South Africa.

5. Since the WCT was concluded in 1996 and entered into force in 2002,<sup>3</sup> we naturally refrained from effecting any amendments to the WCT. 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 WCT**

### **Ad Preamble**

6. The Preamble indicates the Contracting Parties' intention which is to develop and maintain the protection of the rights of authors in their literary and artistic works 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

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<sup>1</sup> [http://www.wipo.int/treaties/en/ip/wct/summary\\_wct.html](http://www.wipo.int/treaties/en/ip/wct/summary_wct.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, as reflected in the Berne Convention. It appears to be in order.

#### Ad Article 1 – Relation to the Berne Convention

7. Article 1 provides that the WCT is a special agreement under the Berne Convention within the meaning of Article 20 of the Berne Convention, which Article stipulates that “[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.”<sup>5</sup>

8. This Article further provides that the WCT shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties. Therefore, although the Contracting Parties are permitted to enter into the WCT, it is precisely stipulated that nothing in the WCT shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

9. More importantly the Contracting Parties are obligated to comply with Articles 1 to 21 and the Appendix of the Berne Convention. This Article appears to be in order.

#### Ad Article 2: - Scope of Copyright Protection

10. Article 2 precisely provides that copyright protection extends to expressions and not to ideas, procedures, or methods of operation or mathematical concepts as such. It appears to be in order.

#### Ad Article 3 – Application of Articles 2 to 6 of the Berne Convention

11. Article 3 provides that Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 1 to 6 of the Berne Convention in respect of the protection provided for in the WCT in which Articles 1 and 2 spell out in detail what is included in the expression “literary and artistic works”. Articles 1 and 2 of the Berne Convention further oblige countries of the Union, through legislation, to determine, if

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<sup>5</sup> Berne Convention for the Protection of Literary and Artistic Works as amended, downloaded at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P212\\_41948](http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P212_41948)

necessary, the protection to be prescribed to works in general or any specified categories of works.

12. Article 3 of the Berne Convention provides the criteria of eligibility for protection of published works, whilst Article 4 provides for criteria of eligibility for protection of cinematographic works, works of architecture and certain artistic works, even if the conditions of Article 3 are not fulfilled.

13. Article 5 of the Berne Convention spells out the rights enjoyed by authors of works and under what circumstances, and which laws would be applicable to authors to enforce their respective rights, whilst Article 6 places a possible restriction of protection in respect of certain works of authors- 'nationals' of certain countries outside the Union and the means of redress available to them for safeguarding the rights granted to them by this Article while providing that the applicable legislation shall be governed by the country where protection is claimed. This Article appears to be in order.

#### Ad Article 4 – Computer Programs

14. Article 4 provides that computer programs, whatever mode or form of their expression, are protected as literary works within the meaning of Article 2 of the Berne Convention. It appears to be in order.

#### Ad Article 5 – Compilations of Data (Databases)

15. Article 5 provides that compilations of data or other material in any form, other than the data and material itself, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. It appears to be in order.

#### Ad Article 6 – Right of Distribution

16. Article 6 provides authors of literary and artistic works with the exclusive right of distributing or authorizing the distribution of the original and copies of their works through sale or other transfer of ownership subject to the Contracting Parties determining other applicable conditions after the first sale or other transfer of ownership of the original or a copy of the work which has to be done with the authorization of the author. It appears to be in order.

#### Ad Article 7 – Right of Rental

17. Article 7 provides that authors of computer programs, cinematographic works and works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works subject to conditions in subsection (2) and (3) in this Article. It appears to be in order.

#### Ad Article 8 – Right of Communication to the Public

18. Article 8 provides that authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them without having the exclusive rights they enjoy under the Berne Convention, as fully expounded in provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, compromised. This Article appears to be in order.

#### Ad Article 9 – Duration of the Protection of Photographic Works

19. Article 9 provides for the non-application of protection afforded to authors of photographic works, for a certain period of time or term, from the making of such a photographic work. It appears to be in order.

#### Ad Article 10 – Limitations and Exceptions

20. Article 10 provides Contracting Parties with the discretion to provide, in their national legislation, for limitations of or exceptions to the rights granted to authors of literary and artistic works under the WCT, provided such limitations or exceptions do not unreasonably prejudice the legitimate interests of the authors. It appears to be in order.

#### Ad Article 11 – Obligations concerning Technological Measures

21. Article 11 obliges the Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under the WCT or the Berne Convention in respect of acts which are not authorized by the authors concerned or permitted by law. It appears to be in order.

Ad Article 12 – Obligations concerning Rights Management Information

22. Article 12 further obliges the Contracting Parties to provide adequate and effective legal remedies against any person/s who knowingly removes or alters any electronic “rights management information” without authority; and distributes, imports for distribution, broadcasts or communicates to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority. The Article further provides the meaning of or what is covered under “rights management information”. It appears to be in order.

Ad Article 13 – Application in Time

23. Article 13 obliges the Contracting Parties to apply the provisions of Article 18 of the Berne Convention to all protection provided for in the WCT, which Article 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. This Article appears to be in order.

Ad Article 14 – Provisions on Enforcement of Rights

24. The Department’s attention is drawn to Article 14 that 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 WCT and to provide speedy and effective remedies against any act of infringement of rights covered under this Treaty, which remedies will also constitute a deterrent to further infringements. Should South Africa decide to accede to the WCT, the Department will have to ensure that the provisions of this Article are adhered to. This Article appears to be in order.

Ad Article 15 – Assembly

25. Article 15 makes it peremptory for Contracting Parties to have an Assembly which shall perform the functions allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to the WCT. This Article further 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. This 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 the WCT, the required majority for various kinds of decisions. This Article appears to be in order.

Ad Article 16 – International Bureau

26. Article 16 provides that the International Bureau of WIPO shall perform the administrative tasks concerning the Treaty. It appears to be in order.

Ad Article 17 – Eligibility for Becoming Party to the Treaty

27. Article 17 provides that any Member State of WIPO may become a party to the WCT Treaty. Most importantly this Article provides the Assembly with the discretion to decide to admit any intergovernmental organization to become party to the WCT 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.

28. This 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 this Treaty. This Article appears to be in order.

Ad Article 18 – Rights and Obligations under the Treaty

29. Article 19 provides that each Contracting Party shall enjoy all of the rights and assume all of the obligations under the WCT. It appears to be in order.

Ad Article 19 – Signature of the Treaty

30. Article 19 provides that the WCT 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 20 – Entry into Force of the Treaty

31. Article 20 provides that the WCT 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 21 – Effective Date of Becoming Party to the Treaty

32. Article 21 provides that the WCT shall bind the 30 States referred to in Article 20, from the date on which this Treaty 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 of ratification with the Director General of WIPO.** As regards the European Community, it is provided that it shall be bound by the WCT, 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 WCT in accordance with Article 20, or, three months after the entry into force of the WCT if such instrument has been deposited before the entry into force thereof. Any other intergovernmental organization that is admitted to become party to the WCT 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 22 – No Reservations to the Treaty

33. The Department's attention is drawn thereto that Article 22 provides that **no reservation to the WCT shall be admitted.** It appears in order.

Ad Article 23 – Denunciation of the Treaty

34. Article 23 provides that any Contracting Party may, by notification addressed to the Director General of WIPO, denounce the WCT and that such denunciation shall only take effect one year from the date on which the Director General of WIPO received the notification. It appears to be in order.

Ad Article 24 – Languages of the Treaty

35. Article 24 provides for the languages in which this Treaty can be signed, which is English, Arabic, Chinese, French, Russian and Spanish and provides that all these languages shall be equally authentic. The usage of any language other than the mentioned languages shall be established by the Director General of WIPO at the request of an interested party after consultation with all the interested parties. This Article appears to be in order.

Ad Article 25 – Depositary

36. Article 25 provides that the Director General of WIPO is the depositary of this Treaty. It appears to be in order.



37. As pointed out in paragraph 5 of this opinion, the WCT had entered into force in 2002. It would therefore appear that the WCT was ratified or acceded to by 30 States as provided in Article 20 without South Africa either ratifying or acceding to the WCT as required by Article 20 and without further appending its signature on or before 31 December 1997 as provided by Article 19 of the WCT. The implication thereof was that South Africa did not become a member of the WCT. However, Article 21 provides ways in which any member State could become a member of the WCT and thus be bound by the WCT after the WCT has entered into force. Put succinctly, each other State could only accede to the WCT 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 WCT, 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.

38. Having said the above, it must be noted that South Africa must still comply with our internal procedures for it to accede to the WCT. In this regard we wish to draw 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 WCT. 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, administration 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".

39. 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.)

40. 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. These 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. ..."

41. 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.

42. As regards agreements requiring approval by Parliament, paragraphs 5.4, 5.6 and 5.7 of the Manual provide 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.)**

43. In this regard and as pointed out earlier, Articles 20 and 21 of the WCT clearly indicate how any party can become a member to this international agreement, which is either through ratification or accession. We have further pointed out that since the WCT has already entered into force, South Africa could only become a party to the WCT through accession.

44. 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 present Convention:

"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.)

45. Since Articles 17, 20 and 21 of the WCT clearly provide for ratification of or accession to the WCT 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 WCT 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.

46. 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 14 of the WCT 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 WCT. In this regard the Department's attention is in particular drawn to Chapter I of the Copyright Act.

#### **CONCLUSION**

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

Yours sincerely,



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