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Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER

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Date: 22 May 2018

Mr Lionel October
Director-General
Department of Trade and Industry
Private Bag X84
PRETORIA
0001

Dear Mr October

Attention: Ms Tshililo 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).¹

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.²

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 2002,³ 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 1994.⁴

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

¹ http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html at page 1

² Ibid at page 1

³ Ibid at page 2

⁴ <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, 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".

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**