



international relations & cooperation

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International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

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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.

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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