



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.