

EXPLANATORY MEMORANDUM OF ACCESSION TO THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) COPYRIGHT TREATY, 1996 ('THE WCT')

The World Intellectual Property Organization (WIPO) adopted the WIPO Copyright Treaty (WCT) at Geneva on 20 December 1996. In terms of the World Intellectual Property Organization's web database, South Africa signed the WCT 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 WCT, 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 WCT.

The WCT entered into force in March 2002, three months following ratification or accession by at least thirty member states as per the provisions of Article 20. Essentially amendments cannot be effected to the WCT. Contracting Parties have the obligation to ensure that appropriate provisions exist in their national laws for the effective enforcement of the rights in the Treaty (Article 14). 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 WCT are granted, under South African copyright law, the rights to which they are entitled under the Treaties. Acceding to the Treaty will not require amendments to the Constitution but will introduce new rights for performers, producers and authors of copyright works which enhances intellectual property rights.

The WCT is a special agreement under the Berne Convention and it deals with the protection of works and authors specifically on the digital platform (Article 1). The WCT extends copyright protection to computer programs (whatever the mode or form of expression) and compilations of data or other material ("databases"), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations.

The WCT grants authors the right of distribution; the right of rental; and a broader right of communication to the public (Article 6 to 8). Limitations and exceptions can be provided in domestic legislation in line with a three step test and provided that legitimate interests

of authors are not unreasonably prejudiced (Article 10). The WCT also obliges Contracting Parties to provide legal remedies against the circumvention of technological measures (e.g. encryption) and against unauthorised modification rights management information necessary for licensing, collecting and distribution of their royalties (Article 11 to 12).

The WCT is in the best interests of the South Africa as it ensures that South African copyright law will keep pace with technological change, thus affording important protection against piracy for rights holders in the areas of computer programmes and databases. The WCT does not allow contracting parties to make reservations to any of its provisions (Article 22). Each Contracting Party can be represented by one member at the Assembly responsible for maintenance and development of the WCT, expenses of the delegate are borne by the Contracting Party (Article 15).

Besides the expenses provided for in Article 15 of the delegates attending the Assembly to be constituted to deal with matters concerning the operation, application, development and maintenance of the WCT 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 copyright owners and authors.