

WIPO Copyright Treaty, and Performances and Phonograms Treaty

Introduction

- 9.1 Article 17.1.4 of the Australia-United States Free Trade Agreement (AUSFTA) requires that Australia accede to the World Intellectual Property Organisation (WIPO) *Copyright Treaty (Geneva, 20 December 1996)* (WCT) and *WIPO Performances and Phonograms Treaty (Geneva, 20 December 1996)* (WPPT). Accession is to have occurred prior to entry into force of the AUSFTA on 1 January 2005.¹
- 9.2 The WPPT and WCT were adopted at the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva in December 1996. The treaties supplement the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention).²
- 9.3 The WCT entered into force generally on 6 March 2002, after being ratified or acceded to by 30 countries, in accordance with its

1 World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty (WPPT) National Interest Analysis (NIA), para. 2; WIPO Copyright Treaty (WCT) NIA, para. 2.

2 WPPT NIA, para. 6; WCT NIA, para. 6.

provisions.³ The WPPT entered into force generally on 20 May 2002, after being ratified or acceded to by 30 countries.⁴

9.4 Australia actively participated in the making of these treaties and has worked towards accession since the conclusion of negotiations in 1996. Australia was one of the first countries to implement the main obligations of the treaties, with its enactment of the *Copyright Amendment (Digital Agenda) Act 2000*.⁵

9.5 The treaties expand the rights of copyright owners in works, films and sound recordings and for performers in the online environment. They also standardise the criteria for exceptions to copyright as applicable in the digital environment.⁶ The WCT and WPPT mark ‘an important advance in improving international copyright standards to meet the challenges posed by digital technology’.⁷

9.6 According to Ms Helen Daniels of the Attorney-General’s Department,

Australian accession to the two treaties will help to secure better protection abroad for Australian works, films, sound recordings and performers. This is a clear benefit to the important cultural sector of our community. The treaty standards with which Australian law has to comply were painstakingly negotiated with active Australian participation and enjoy wide and growing acceptance by countries around the world. Accession will also strengthen Australia’s support for the work and role of WIPO in promoting international cooperation in the protection and use of intellectual property. Australia continues to be an active participant in WIPO consideration of the adequacy of international copyright standards and the negotiation of possible new standards.⁸

WIPO Copyright Treaty

Background

9.7 The National Interest Analysis (NIA) states that the WCT will benefit Australian copyright owners and performers by

3 WCT NIA, para. 3.

4 WPPT NIA, para. 3.

5 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 14.

6 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 14.

7 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 14.

8 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 16.

providing adequate economic benefits to Australian copyright owners by securing improved protection for their works and productions in the markets of our major trading partners and a growing number of other overseas markets.⁹

9.8 Ms Daniels explained to the Committee that,

The WIPO Copyright Treaty adds to protection under the Berne convention in the following ways. It provides for expanded rights for owners of copyright in works and films; protection of new categories of works; and specific obligations concerning the protection of technological protection measures and concerning rights management information. In addition, contracting parties must comply with substantive provisions of the Berne convention. This last requirement was included because non Berne convention members are eligible to accede to the WIPO Copyright Treaty without also acceding to the Berne convention.¹⁰

9.9 The Committee notes that, given that Australian law is already compliant with the majority of obligations under the WCT, it is beneficial to ratify the treaty so that Australian performers and copyright owners receive a similar level of protection in other member countries as they do in Australia.¹¹

Key benefits of the WCT

9.10 The NIA outlines numerous benefits expected to occur as a result of Australian ratification of the WCT

- There are currently 46 countries party to the WCT, including major trading partners of Australia such as the USA and Japan.¹² The WCT requires member countries to extend the protection provided under the treaty to Australian copyright owners. Further, Article 3 of the WCT requires members to apply a provision of the Berne Convention regarding national treatment, whereby they must extend all protection offered to their own nationals (where this exceeds the rights required under the WCT) to the nationals of other member countries. Thus, Australian copyright owners would have increased protection in key overseas markets.¹³

9 WCT NIA, para. 6.

10 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

11 WCT NIA, para. 6.

12 WCT NIA, para. 7.

13 WCT NIA, para. 11.

- Australia already complies with the WCT's main obligations. The enactment of the *Copyright Amendment (Digital Agenda) Act 2000* brought Australia considerable international standing as one of the first countries to implement the WCT obligations. The passage of further legislation to achieve full compliance with the WCT would fulfil the Government's 2001 electoral commitment under its *Arts for All* policy to extend the duration of photographic copyright (50 years from publication) to life of the author plus 50 years, as required under the WCT.¹⁴ In accordance with the requirements of the AUSFTA, this will be extended to life plus 70 years.¹⁵
- Australia is obliged to accede to the WCT under both the AUSFTA and the Singapore-Australia Free Trade Agreement (SAFTA). Failure to meet this obligation may potentially damage Australia's relationship with these important trade and investment partners.¹⁶
- Australia made substantial contribution to the negotiation of the WCT and actively participates in WIPO's consideration of international copyright standards. Accession to the WCT will further strengthen Australia's support for WIPO in promoting international cooperation in the protection and use of intellectual property.¹⁷

Key obligations under the WCT

9.11 The NIA also notes obligations to be incurred by Australia upon accession to the WCT

- Parties to the WCT are required to provide expanded rights for copyright owners, such as rights over distribution, rental and communication of works to the public. Further, new categories of works, such as computer programs and databases, are protected, and Parties incur specific obligations regarding the protection of technological measures and rights management information¹⁸
- Parties must grant authors of literary and artistic works rights of distribution over their works. Parties may determine the conditions in which the right will be exhausted after the first sale or transfer of ownership of the original or copy of the work¹⁹

14 WCT NIA, para. 8.

15 WCT NIA, para. 22.

16 WCT NIA, para. 9.

17 WCT NIA, para. 10.

18 WCT NIA, para. 12.

19 WCT NIA, para. 13; WCT Article 6.

- Authors are granted commercial rental rights over their works including computer programs, cinematographic works, and works embodied in sound recordings. The Committee notes that these provisions of the WCT are modelled on Article 11 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²⁰
- Parties must ensure that the Internet transmission of literary and artistic works is subject to exclusive authorisation rights. Further, Parties must ensure that works available online are available ‘in such a way that members of the public may access [them] from a place and at a time individually chosen by them’²¹
- Photographic works are protected by a standard term of life of the author plus 50 years²²
- The WCT imposes new obligations regarding computer programs and databases. Parties must recognise programs as literary works protected by copyright within the meaning of Article 2 of the Berne Convention.²³ Compilations of data and other material in any other form are also protected as long as they constitute intellectual creations²⁴
- Parties are required to meet new obligations to protect rights in the digital environment, by ensuring that appropriate legal sanctions are available to support technological measures used to protect author’s rights²⁵
- Where a Party seeks to limit an obligation incurred under the WCT or the Berne Convention, such limitation must be confined to ‘certain special cases’ that ‘do not conflict with normal exploitation of the work’ and ‘do not unreasonably prejudice the legitimate interests of the author’.²⁶ The WCT does not permit reservations to be made²⁷
- Parties are obliged to provide effective enforcement procedures against infringement of rights provided under the WCT and the

20 WCT NIA, para. 14; WCT Article 7.

21 WCT NIA, para. 15; WCT Article 8.

22 WCT NIA, para. 16; WCT Article 9.

23 WCT NIA, para. 17; WCT Article 4.

24 WCT NIA, para. 17; WCT Article 5.

25 WCT NIA, para. 18; WCT Articles 11 and 12.

26 WCT NIA, para. 19; WCT Article 10.

27 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

Berne Convention. Such procedures must include measures to both prevent infringements and deter future infringements²⁸

- Parties must provide national treatment to the nationals of other WCT member countries.²⁹

Performances and Phonograms Treaty

Background

- 9.12 The NIA states that the WPPT will benefit Australian copyright owners and performers by
- securing improved protection for their productions and performances in the markets of our major trading partners and other overseas markets.³⁰
- 9.13 The Committee notes that, given that Australian law is already compliant with the majority of obligations under the WPPT, it is beneficial to ratify the treaty so that Australian performers and copyright owners receive a similar level of protection in other member countries as they do in Australia.³¹
- 9.14 The NIA explains that the WPPT
- provides for the protection of rights of performers, other than rights in relation to audiovisual fixations of their performances, and the rights of producers of phonograms (ie, sound recordings). The WPPT provides for expanded rights for both producers and performers (notably rights of reproduction, distribution, rental and making available online to the public). It also provides for specific rights for performers, including moral rights and rights authorising the broadcasting and communication of unfixed (ie, unrecorded) performances. Specific obligations are also placed on Contracting Parties concerning protection of technological measures and rights management information, which parallels provisions in the WCT.³²
- 9.15 The operation and development of the WPPT will be governed by the Assembly of Contracting Parties, which will meet every two years.³³

28 WCT NIA para. 20; WCT Article 14(2).

29 WCT NIA, para. 21; WCT Article 3; Berne Convention Articles 2 - 6.

30 WPPT NIA, para. 7.

31 WPPT NIA, para. 7.

32 WPPT NIA, para. 14.

33 WPPT NIA, para. 27; WPPT Article 24.

Key benefits of the WPPT

- 9.16 The NIA outlines numerous benefits expected to occur as a result of Australian ratification of the WPPT
- There are currently 43 countries party to the WPPT, including major trading partners of Australia such as the USA and Japan. Under Article 3(1) of the WPPT, all member countries must extend the protection provided under the treaty to Australian copyright owners³⁴
 - Australia already complies with the WPPT's main obligations. The enactment of the *Copyright Amendment (Digital Agenda) Act 2000* brought Australia considerable international standing as one of the first countries to implement the WPPT obligations. The passage of further legislation to achieve full compliance with the WPPT would fulfil the Government's 2001 electoral commitment to 'work with the performing arts community to devise workable performers' copyright legislation which recognises the value attached to the recording and communicating of performances', under its *Arts for All* policy³⁵
 - Australia is obliged to accede to the WPPT under both the AUSFTA and the SAFTA. Failure to meet this obligation may potentially damage Australia's relationship with these important trade and investment partners³⁶
 - Australia made substantial contribution to the negotiation of the WPPT and actively participates in WIPO's consideration of international copyright standards. Accession to the WPPT will further strengthen Australia's support for WIPO in promoting international cooperation in the protection and use of intellectual property³⁷
 - In situations where the nationals of a member country are given more favourable treatment than that required under the WPPT, the WPPT's national treatment obligation requires that country to extend such treatment to the nationals of all member countries.³⁸

34 WPPT NIA, paras. 8 and 12.

35 WPPT NIA, para. 9.

36 WPPT NIA, para. 10.

37 WPPT NIA, para. 11.

38 WPPT NIA, para. 13.

Key obligations under the WPPT

- 9.17 The NIA also notes obligations to be incurred by Australia upon accession to the WPPT
- Parties to the WPPT must meet obligations regarding protection of technological measures and rights management information, which parallel provisions in the WCT³⁹
 - Parties must extend national treatment to the nationals of other Parties in relation to rights under the WPPT and to the right to equitable remuneration for the broadcasting and communication to the public of sound recordings that have been published for commercial purposes. This latter obligation does not apply where the other Party has limited or avoided the equitable remuneration obligation under Article 15(3) of the WPPT.⁴⁰ National treatment requires that a Party accord the same treatment to nationals of another Party as it does to its own nationals⁴¹
 - Performers' rights are expanded, with Parties being required to provide moral rights in relation to live performances or performances fixed in sound recordings. Separate from economic rights, moral rights exist over attribution and integrity of performances.⁴² Performers are also given exclusive rights over broadcasting and communication to the public of unrecorded broadcasts and performances and the exclusive right to the recording of these⁴³
 - Rights for performers and the producers of sound recordings are also expanded under the treaty. Parties must give these performers and producers exclusive rights of 'authorising the direct or indirect reproduction' of sound recordings, regardless of the manner or form of reproduction.⁴⁴ Performers and producers of sound recordings are also granted exclusive distribution rights over the public availability of their sound recordings. Parties may determine at what stage such right is extinguished after the first sale or transfer of ownership of the original or copy of the sound recording.⁴⁵ Parties are obliged to recognise the rights of producers and performers over the authorisation of commercial rental to the

39 WPPT NIA, para. 14.

40 WPPT NIA, para. 15; WPPT Article 4(1).

41 WPPT NIA, para. 13.

42 WPPT NIA, para. 16; WPPT Article 5(1).

43 WPPT NIA, para. 17; WPPT Article 6.

44 WPPT NIA, para. 18; WPPT Articles 7 and 11.

45 WPPT NIA, para. 19; WPPT Articles 8 and 12.

public of recordings, even after authorised distribution.⁴⁶ The transmission of sound recordings over the Internet and similar future networks in a way that members of the public may access such recordings at a place and time individually chosen by them, is subject to the exclusive right of authorisation of producers and performers of the recordings⁴⁷

- Parties are obliged to provide equitable remuneration for performers and producers for the broadcasting and communication of sound recordings to the public. Partial or total reservation may be taken to this obligation.⁴⁸ A minimum term of protection of at least 50 years after a performance is first fixed in a sound recording is required under the treaty. Recordings are protected for 50 years after their first publication, or after their recording if they are not published.⁴⁹ Under the AUSFTA, this term is increased to 70 years.⁵⁰ Under the national treatment provision of the WPPT, Australia must extend this term of protection to performances or sound recordings of other WPPT members⁵¹
- The treaty creates new obligations for the protection of rights in the digital environment. Parties must ensure that legal sanctions are available to support technological measures used to protect the rights of performers and producers of sound recordings⁵²
- Conditions are placed on the limitations and exceptions that Parties may make to rights granted under the WPPT⁵³
- Parties are obliged to provide effective enforcement procedures against breach of the rights granted under the WPPT. Enforcement procedures must include both remedies and deterrent aspects.⁵⁴

Reservations

9.18 Generally, reservations to the WPPT are not permitted.⁵⁵ However, Parties may take advantage of those limitations permitted in the Rome Convention, regarding the extent to which protection will be

46 WPPT NIA, para. 20; WPPT Articles 9 and 13.

47 WPPT NIA, para. 21; WPPT Articles 10 and 14.

48 WPPT NIA, para. 22; WPPT Article 15.

49 WPPT NIA, para. 23; WPPT Article 17.

50 WPPT NIA, para. 23; AUSFTA, Article 17.4.4.

51 WPPT NIA, para. 23.

52 WPPT NIA, para. 24; WPPT Articles 18 and 19.

53 WPPT NIA, para. 25; WPPT Article 16.

54 WPPT NIA, para. 26; WPPT Article 23.

55 WPPT NIA, para. 38; WPPT Article 21.

extended to the nationals of other Parties, based on the criteria of nationality, fixation and publication.⁵⁶

- 9.19 Due to the interaction between Articles 15(1) and 15(3) of the WPPT and Article 17.1.6 of the AUSFTA, Australia may take advantage of a reservation to the WPPT made by the United States, regarding an exception to national treatment with respect to the secondary use of phonograms in analogue communications and free-to-air radio broadcasting.⁵⁷

Entry into force

- 9.20 The WPPT entered into force on 20 May 2002, and will bind Australia from the end of three months after Australia's deposit of its instrument of accession.⁵⁸

Implementation

- 9.21 The main obligations of the WPPT and WCT were implemented by the *Copyright Amendment (Digital Agenda) Act 2000*. Further obligations are met by the *US Free Trade Agreement Implementation Act 2004*.⁵⁹
- 9.22 Implementation of the WPPT will require amendment to the Copyright Act to extend performers' rights over sound recordings of their performances.⁶⁰ Further, performers must be granted moral rights performers as required by the WPPT. These moral rights are provided for in the *US Free Trade Agreement Implementation Act 2004*.⁶¹
- 9.23 Consistent with implementation of the WCT, *US Free Trade Agreement Implementation Act 2004* amended the Copyright Act to extend the duration of the term of photographic copyright to life of the author plus 70 years.⁶²

56 WPPT NIA, para. 38; WPPT Article 3(3).

57 WPPT NIA, para. 37; Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

58 WPPT NIA, para. 3.

59 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 15.

60 WPPT NIA, para. 28.

61 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 16.

62 WCT NIA, para. 22.

- 9.24 The *Copyright (International Protection) Regulations 1969* will also be amended to extend protection granted under the Copyright Act to nationals of WPPT and WCT member countries.⁶³
- 9.25 Other requirements of the WPPT and WCT regarding copyright in the digital environment were incorporated into Australian law by the *Copyright Amendment (Digital Agenda) Act 2000*.⁶⁴
- 9.26 The Committee notes that advice was sought from the Office of International Law to ensure that all aspects of Australian copyright law, notwithstanding the above mentioned amendments, are in compliance with the WPPT and the WCT.⁶⁵

Costs

- 9.27 There will be no costs incurred as a result of Australia's accession to the WPPT and WCT apart from those associated with participating in the WPPT's Assembly of Contracting Parties and the WCT's Assembly of Members States. As Australian law is compliant with the majority of the obligations of both treaties, the enforcement of these rights will not incur additional costs.⁶⁶

Consultation

- 9.28 The Committee notes that these treaties have been the subject of formal and informal consultations with copyright stakeholders over a period of years from 1996 to 2004.⁶⁷
- 9.29 In 1997 the Attorney General's Department sought comment on those aspects of the WPPT and WCT to be incorporated into the *Copyright Amendment (Digital Agenda) Act 2000*, legislation relating to performers' rights and the proposed extension of the copyright term over photographs.⁶⁸
- 9.30 Meetings have been held with representatives from the record, film, television and radio industries, including performers, producers and broadcasters. The NIA states that 'most stakeholders do not object to

63 WPPT NIA, para. 29; WCT NIA, para. 23.

64 WPPT NIA, para. 30; WCT NIA, para. 24.

65 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, p. 16.

66 WPPT NIA, para. 31; WCT NIA, para. 25.

67 WPPT NIA, Annex 1; WCT NIA, Annex 1.

68 WPPT NIA, Annex 1; WCT NIA, Annex 1.

amending the law to give new rights to performers and thus for Australia to be in a position to accede to the WPPT treaty'.⁶⁹

9.31 Recently, consultations were carried out with 64 copyright stakeholders.⁷⁰ These stakeholders were contacted in May 2004 to seek their views on possible accession to the WCT and WPPT. As of June 2004, four submissions were received, from the Australian Broadcasting Corporation (ABC), Commercial Radio Australia (CRA), the Australian Library and Information Association (ALIA) and the Australian War Memorial (which did not comment).⁷¹ ALIA's concern related to the speed of the AUSFTA implementation process.⁷²

9.32 In regard to the ABC, the NIA states that

The ABC has raised concerns about being adversely affected by new laws pertaining to performers rights due to the breadth of material that it administers.⁷³

9.33 Mr Christopher Creswell of the Attorney-General's Department advised the Committee that the ABC's concerns were due to the fact that

through the diversity of activities, they are both a producer and a broadcaster of sound recordings and also employ performers so they have to consider these various capacities in which they operate in considering the impact of the proposed new performers' rights.⁷⁴

Mr Creswell reassured the Committee that

after these extensive consultations in which we have carefully responded to their comments of substance, they are reasonably satisfied that they can manage the impact of the new rights.⁷⁵

9.34 The concerns of CRA are also outlined in the NIA

The CRA has recommended that national treatment in relation to remuneration for broadcasting rights be provided only on a reciprocal basis. It should be noted that the AUSFTA contains an exception in Article 17.1.6 allowing a

69 WPPT NIA, Annex 1; WCT NIA, Annex 1.

70 WPPT NIA, para. 33; WCT NIA, para. 27.

71 Ms Helen Daniels, *Transcript of Evidence*, 9 August 2004, pp. 16-17.

72 WPPT NIA, Annex 1; WCT NIA, Annex 1.

73 WPPT NIA, Annex 1; WCT NIA, Annex 1.

74 Mr Christopher Creswell, *Transcript of Evidence*, 9 August 2004, p. 17.

75 Mr Christopher Creswell, *Transcript of Evidence*, 9 August 2004, p. 17.

Party to the agreement to limit the rights of performers and producers of the other Party with respect to the secondary use of phonograms by means of analogue communications and free over-the-air radio broadcasting.⁷⁶

9.35 Mr Creswell assured the Committee that the CRA's concerns are addressed in the AUSFTA exception and national treatment provisions, and that Australian radio stations will not have to pay remuneration for broadcasting US recordings when this does not occur in the US.⁷⁷

9.36 In regard to consultation with State and Territory Governments, the NIA states that

The States and Territories were notified of Australia's proposed accession to the WPPT in the Standing Committee on Treaties (SCOT) through the SCOT Schedule of Treaties. To date there has been no request for further information. Given that copyright falls within the legislative power of the Commonwealth, Australia's proposed accession to the WPPT will have a negligible impact on the legislative and administrative functions of the States and Territories.⁷⁸

Conclusion and recommendations

9.37 The Committee notes that, given that Australian law is already compliant with the majority of obligations under the WPPT and WCT, it is beneficial to accede to the treaty so that Australian performers and copyright owners receive a similar level of protection in other member countries as they do in Australia. Accession will also be beneficial in fulfilling Australia's obligations under the AUSFTA and the SAFTA.

76 WPPT NIA, Annex 1; WCR NIA, Annex .

77 Mr Christopher Creswell, *Transcript of Evidence*, 9 August 2004, p. 17.

78 WPPT NIA, para. 32; WCT NIA, para. 26.

Recommendation 9

The Committee supports the *WIPO Copyright Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996* and recommends that binding treaty action be taken.

Recommendation 10

The Committee supports the *WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996* and recommends that binding treaty action be taken.

Dr Andrew Southcott MP
Committee Chair