

**WIPO COPYRIGHT TREATY, ADOPTED BY THE DIPLOMATIC
CONFERENCE AT GENEVA ON 20 DECEMBER 1996
[1996] ATSD 4424**

Documents tabled on 22 June 2004:

National Interest Analysis

Text of the Proposed Treaty Action

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NATIONAL INTEREST ANALYSIS: CATEGORY B TREATY

SUMMARY PAGE

WIPO Copyright Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996 [1996] ATSD 4424

Date of Tabling of Proposed Treaty Action

1. 22 June 2004.

Nature and Timing of Proposed Treaty Action

2. It is proposed that Australia lodge its instrument of accession with the Director General of the World Intellectual Property Organisation (WIPO) as soon as possible after completion of the treaty making processes, including the enactment of Commonwealth legislation and prior to 1 January 2005 in order to comply with Article 17.1.4 of the Australia-US Free Trade Agreement (AUSFTA). Article 17.1.4 of the AUSFTA requires Australia to have acceded to the WIPO Copyright Treaty (WCT) [1996] ATSD 4424 by the entry into force of the AUSFTA, proposed for 1 January 2005.

3. Pursuant to Article 21 (ii), the WCT will bind Australia from the end of three months from the date on which Australia deposits its instrument of accession. The WCT entered into force generally on 6 March 2002, after being ratified or acceded to by 30 countries in accordance with Article 20.

4. Accession by Australia to the WCT will not terminate an existing treaty upon entry into force. It will simply expand the number and range of States that are currently members of the WCT.

Overview and National Interest Summary

5. In December 1996, the WCT and the WIPO Phonograms and Performances Treaty (WPPT) were adopted in Geneva at the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions. The treaties were designed to supplement the provisions of 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) by expanding rights for owners of copyright in works, films and sound recordings and for performers in the online environment. Both treaties mark an important advance in improving international copyright standards to meet the challenges posed for protecting copyright and related rights in the online environment.

6. Accession to the WCT is in Australia's national interest in 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. Given that Australian law is already largely compliant with the obligations of the WCT, it is in Australia's interests to enable Australia's creators to receive a corresponding level of protection in all other treaty member countries.

Reasons for Australia to Take the Proposed Treaty Action

7. Following its accession or ratification by 30 countries, the WCT entered into force on 6 March 2002. Since that time, it has gained wider acceptance worldwide and, at 24 March 2004, the WCT had 46 member countries. Membership includes some of Australia's major trading partners, eg, the USA and Japan. Accession by Australia to the WCT would therefore provide adequate economic benefits to Australian copyright owners by securing improved protection for their works and productions in the markets of our major trading partners, as well as in a growing number of other overseas markets.

8. Australia gained considerable standing in the international copyright community in being one of the first countries to implement the main obligations of the WCT following the enactment of the *Copyright Amendment (Digital Agenda) Act 2000*. As part of the Government's 2001 electoral commitments made under its *Arts for All* policy, the Government undertook to extend the current duration of photographic copyright (50 years from publication) to the standard required by application of Article 9(2) of the WCT, namely, the life of the author plus 50 years. Legislating to achieve compliance with this obligation of the WCT will put Australia in a position to accede to the WCT. Accession would secure the benefits of improved protection abroad for Australia's creators.

9. Under Article 17.1.4 of the AUSFTA, subject to the fulfilment of its necessary internal requirements, Australia is obliged to have acceded to the WCT by the entry into force of the AUSFTA. Non-compliance with the AUSFTA could risk damaging Australia's relationship with its most important trade and investment partner. The Singapore-Australia Free Trade Agreement also obliges Australia to become a party to the WCT.

10. Accession by Australia to the WCT will strengthen Australia's support for the work and role of WIPO in promoting international cooperation in the protection and use of intellectual property. In addition to being a substantial and active contributor to the negotiation of the WCT, Australia is an active participant in WIPO consideration of the adequacy of international copyright standards and the negotiation of possible new standards.

11. Article 3 of the WCT requires Parties to apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in the WCT. Article 5(1) of the Berne Convention imposes a national treatment obligation on Parties, requiring them to accord the same treatment to the nationals of other Parties as it provides to its own nationals. This provision will apply where a Party provides its nationals with more favourable treatment than that provided for under the WCT, requiring that Party to provide the same treatment to nationals of other Parties. Accordingly, Australia would be required to extend the same level of protection granted to its nationals under the *Copyright Act 1968* (Copyright Act), relating to works protected by the WCT, and the rights specially granted by the WCT, to rightsholders of other countries, which are currently members of the WCT or which join in the future.

Obligations

12. The WCT provides for expanded rights for copyright owners (notably, the rights of distribution, rental and communication to the public), protection of new categories of works (computer programs and databases) and specific obligations concerning protection of technological measures and rights management information. In addition, **Article 1(4)** requires

Contracting Parties to comply with Articles 1 to 21 and the Appendix to the Berne Convention and thereby to apply the rights and obligations thereunder.

Expanded rights for copyright owners

13. **Article 6** provides for a minimum obligation on Contracting Parties to grant a right of distribution for authors of literary and artistic works consisting of the exclusive right of making available to the public the original and copies of their works, whether through sale or other transfer of ownership. In applying this new obligation, Contracting Parties are free to determine the conditions, if any, in which the right will cease to operate (be exhausted) after the first authorised sale or transfer of ownership of the original or copy of the work.

14. Modelled on Article 11 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), **Article 7** obliges Contracting Parties to recognise commercial rental rights for authors of computer programs (provided that the program forms an essential object of the rental), cinematographic works (eg, videocassettes, DVDs or other forms of pre-recorded films and provided that the commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction), and works embodied in sound recordings (eg, music and song lyrics).

15. **Article 8** obliges Contracting Parties to ensure that the transmission of literary and artistic works through the Internet and in similar possible future networks is subject to an exclusive right of authorisation. **Article 8** thereby extends the provisions of the Berne Convention concerning the exclusive right of communication to the public to works in all circumstances and obliges Contracting Parties to include as part of the communication right a new minimum right of making works available online 'in such a way that members of the public may access [them] from a place and at a time individually chosen by them'.

16. **Article 9** obliges Contracting Parties not to apply the provisions of Article 7(4) of the Berne Convention in respect of photographic works. Contracting Parties are thereby obliged to apply to photographs the standard term of protection of the author's life plus a further 50 years instead of the Berne Convention minimum, in Article 7(4), of 25 years from the taking of the photograph.

New obligations regarding computer programs and databases

17. **Article 4** of the WCT obliges Contracting Parties to recognise computer programs as literary works protected by copyright, within the meaning of Article 2 of the Berne Convention, irrespective of the mode or form of their expression. **Article 5** clarifies that compilations of not only works but also data and any other material in any form are protected in the same way as collections of works under Article 2(5) of the Berne Convention provided that such compilations constitute, by reason of their selection or arrangement, intellectual creations.

New obligations specific to protecting rights in the digital environment

18. **Articles 11 and 12** provide new obligations for Contracting Parties to ensure that appropriate legal sanctions are available to support technological measures used for the protection of authors' rights in the digital environment, such as encryption of the protected material, and to prohibit alteration or removal of electronic rights management information. This would include digital identifiers or other information identifying the work, the author thereof, and any other rightsholder in the work or laying down the terms and conditions for the use of the work.

Application of exceptions and limitations to protection

19. In providing for any limitations of and exceptions to rights granted under the WCT or any rights granted under the Berne Convention, **Article 10** obliges Contracting States to confine them to (1) certain special cases, that (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author.

Specific enforcement provisions

20. **Article 14(2)** obliges Contracting Parties to provide for effective enforcement procedures against infringement of the rights covered by the WCT, including 'expeditious remedies to prevent infringements' and remedies which 'constitute a deterrent to further infringements'. In addition to the rights covered by the WCT (ie, the right of distribution (Article 6), rental (Article 7) and communication to the public (Article 8)), Contracting Parties are also obliged to provide effective enforcement procedures for rights provided under the Berne Convention, on the basis that Article 1(4) requires that Contracting Parties apply Articles 1 to 21 of the Berne Convention.

21. Because all obligations of Articles 2 to 6 of the Berne Convention, including the principle of national treatment, apply to Contracting Parties to the WCT pursuant to **Article 3** of the WCT, other WCT member countries are required to provide the same level of protection to Australian rightsholders as they do to their own nationals.

Implementation

22. Before Australia can accede to the WCT, the Copyright Act will need to be amended to extend the duration of the term of photographic copyright to address the obligations under Article 9(2) of the WCT (ie, to at least the minimum standard term of the author's life plus a further 50 years). Legislation is planned to be introduced in the current Parliamentary sittings as part of the package of amendments extending the general term of copyright protection in Australia to 70 years from the death of the author, as required by the AUSFTA. The legislation will extend the term of protection for photographs to 70 years from the death of the author.

23. Amendments to the *Copyright (International Protection) Regulations 1969* will also be required to ensure protection granted under the Copyright Act is extended to rightsholders of other WCT member countries in compliance with the principle of national treatment arising by virtue of **Article 3** of the WCT.

24. Apart from legislating for these outstanding treaty obligations, Australian law is fully compliant with all the other obligations of the WCT. The *Copyright Amendment (Digital Agenda) Act 2000* introduced major reforms to the Copyright Act which were consistent with the obligations of the WCT in relation to the digital environment, including measures providing for a new online right of communication to the public for rightsholders, measures to restrict the circumvention of technological measures, a new definition of 'computer program', new enforcement measures in relation to circumvention devices and services, and new protection of rights management information and broadcast decoding devices.

Costs

25. Australia's accession to the WCT will not impose any direct financial costs other than those associated with participating in the Assembly of Member States to the WCT pursuant to **Article 15**. Given that Australian law is already compliant with the obligations of the WCT,

except for the term of photographic copyright, expenses associated with the enforcement of rights covered by the WCT will be able to be met within existing budgets.

Consultation

26. The States and Territories were notified of Australia's proposed accession to the WCT 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 WCT will have a negligible impact on the legislative and administrative functions of the States and Territories.

27. The Government has consulted with 64 key copyright stakeholders regarding its proposal to accede to the WCT. A summary of the stakeholders consulted and the outcome of the consultation process is attached at Appendix A.

Regulation Impact Statement

28. On the basis that a Regulation Impact Statement (RIS) was prepared for the decision to accede to the AUSFTA, the Office of Regulation Review has concluded that there is no requirement to prepare a RIS for accession to the WCT.

Future Treaty Action

29. **Article 15(2)(c)** indirectly provides for the negotiation of future legally binding instruments by empowering the Assembly of Contracting Parties to decide on convening a diplomatic conference to revise the WCT.

30. There is no provision in the WCT binding Contracting Parties to any revision of it adopted at such a diplomatic conference.

31. No reservations to the WCT are to be admitted (**Article 22**).

Withdrawal or Denunciation

32. **Article 23** of the WCT provides for denunciation by written notice to the Director General of WIPO. No time limits are placed on the right for a Contracting Party to denounce the WCT; however, denunciation takes effect one year after the notice is received. The denunciation has the effect of ending the status of the notifying party as a Contracting Party, but leaving the relations of the Contracting Parties remaining in the WCT unaffected. A decision by Australia to denounce would be subject to the domestic treaty processes.

Contact details

Copyright Law Branch
Attorney-General's Department

Annex 1

Stakeholders Consultation Regarding Australia's Accession to the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)

There have been formal and informal consultations with stakeholders on the subject matter of the treaties over a number of years from 1996 to 2004. In 1997 discussion papers were prepared by the Attorney-General's Department seeking comments on aspects of the WCT and WPPT to be included in the *Copyright Amendment (Digital Agenda) Act 2000* and the legislation relating to performers' rights. The Government also sought comments on the proposed extension of term for copyright protection in photographs. A large number of submissions were received pursuant to these discussion papers and were taken into account by the Government in devising the proposed legislative models for copyright reform.

A number of meetings have also been held with representatives of the record industry, performers, producers of films and television programs and radio and television broadcasters. Most stakeholders do not object to amending the law to give new rights to performers and thus for Australia to be in a position to accede to the WPPT Treaty.

There have been no strong objections by stakeholders consulted in extending the term of photographic copyright.

Most recently, 64 stakeholders were sent a letter on 26 May 2004 to seek their views on possible accession to both treaties. As of 10 June 2004, three submissions have been received. The submissions are from the Australian Broadcasting Corporation (ABC), Commercial Radio Australia (CRA) and the Australian Library and Information Association (ALIA). 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. 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 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. ALIA has indicated its concern about the speed of the AUSFTA implementation process.

The Attorney-General's Department is preparing a response to these and other submissions received. The concerns raised have been considered in the policy-making process to develop the proposed laws.

A complete list of the stakeholders consulted regarding performers rights and the extension of the term of copyright protection for photographs is set out below.

Performers' Rights

- *Advertising Federation of Australia Ltd*
- *Arts Law Centre*
- *Arts Law Centre of Queensland Inc*
- *Association of Independent Record Labels*
- *Australasian Performing Right Association (APRA) and Australasian Mechanical Copyright Owners' Society Ltd (AMCOS)*
- *Australian Association of National Advertisers*
- *Australian Broadcasting Corporation (made own submission and part of FITG)*
- *Australian Copyright Council*
- *Australia Council for the Arts*
- *Australian Digital Alliance*
- *Australian Entertainment Industry Employer's Association*
- *Australian Film Television and Radio School*
- *Australian Independent Distributors Association (part of FITG)*
- *Australian Interactive Multimedia Industry Association*
- *Australian Subscription Television and Radio Association (ASTRA) (made own submission and part of FITG)*
- *Australian Record Industry Association (ARIA)*
- *The Cabinet Office News South Wales*
- *Commercial Radio Australia (previously known as FARBL)*
- *Commercial Television Australia (previously known as FACTS made own submission and part of FITG)*
- *Communications Law Centre*
- *Community Broadcasting Association of Australia*
- *Film and Television Industry Group (FITG)*
- *Fox Studios (part of FITG)*

- *Grundy Television (part of FITG)*
- *Law Council of Australia (Intellectual Property Committee, Business Law Section)*
- *Media and Entertainment Arts Alliance (MEAA)*
- *Motion Picture Association (made own submission and part of FITG)*
- *Motion Picture Distribution Association of Australia (part of FITG)*
- *Music Managers Forum (Australia) Formerly known as International Manager's Forum (Australia)*
- *Musician's Union of Australia*
- *National Library of Australia*
- *Phonographic Performance Company of Australia (PPCA)*
- *Matthew Rimmer, Lecturer, Faculty of Law, Australian National University*
- *Screen Producers Association of Australia (SPAA made own submission and part of FITG)*
- *Screenrights*
- *SBS (made own submission and part of FITG)*
- *National Film and Sound Archive / ScreenSound Australia (now a branch within the Australian Film Commission)*
- *Telstra*
- *Village Roadshow Limited*
- *West Australian Music Industry Association*

Extension of term of photographs

- *Advertising Federation of Australia Ltd*
- *artsACT*
- *Arts Law Centre*
- *Arts Victoria*
- *Arts WA*
- *Australian Association of National Advertisers (also listed for performers)*
- *Australian Broadcasting Authority*
- *Australian Chamber of Commerce and Industry*
- *Australian Copyright Council – see contact details above (also listed for performers)*
- *Australian Digital Alliance*
- *Australian Entertainment Industry Association*
- *Australian Institute of Professional Photographers (AIPP)*
- *Australian Library and Information Association*
- *Australian Local Government Association*
- *Australian Museum*
- *Australian National Maritime Museum*
- *Australian Publishers Association*
- *Australian War Memorial/Council of Australian Museum Directors*
- *Combined Newspapers and Magazines Copyright Committee of Australia*
- *Copyright Agency Limited*
- *Council of Australian State*
- *Craft Australia*
- *Historic Houses Trust of New South Wales*
- *Law Council of Australia (Intellectual Property Committee, Business Law Section)*

- *National Archives of Australia*
- *National Library of Australia*
- *National Museum of Australia*
- *Powerhouse Museum*
- *Queensland Museum*
- *ScreenSound Australia (now a branch within the Australian Film Commission)*
- *Society of Advertising Commercial and Magazine Photographers Association (ACMP)*
- *State Library of NSW*
- *State Library of Victoria*
- *Vi\$copy*

Additional cultural organisations which were not original submitters:

- *Australian Centre for the Moving Image*
- *Museums Australia*

Annex 2

20. WIPO Copyright Treaty

(Geneva, 1996)

Status on March 24, 2004

State	Date on which State became party to the Treaty	State	Date on which State became party to the Treaty
Argentina.....	March 6, 2002	Mexico.....	March 6, 2002
Belarus.....	March 6, 2002	Mongolia.....	October 25, 2002
Bulgaria.....	March 6, 2002	Nicaragua.....	March 6, 2003
Burkina Faso.....	March 6, 2002	Panama.....	March 6, 2002
Chile.....	March 6, 2002	Paraguay.....	March 6, 2002
Colombia.....	March 6, 2002	Peru.....	March 6, 2002
Costa Rica.....	March 6, 2002	Philippines.....	October 4, 2002
Croatia.....	March 6, 2002	Poland.....	March 23, 2004
Cyprus.....	November 4, 2003	Republic of Korea.....	June 24, 2004
Czech Republic.....	March 6, 2002	Republic of Moldova.....	March 6, 2002
Ecuador.....	March 6, 2002	Romania.....	March 6, 2002
El Salvador.....	March 6, 2002	Saint Lucia.....	March 6, 2002
Gabon.....	March 6, 2002	Senegal.....	May 18, 2002
Georgia.....	March 6, 2002	Serbia and Montenegro.....	June 13, 2003
Guatemala.....	February 4, 2003	Slovakia.....	March 6, 2002
Guinea.....	May 25, 2002	Slovenia.....	March 6, 2002
Honduras.....	May 20, 2002	The former Yugoslav Republic of Macedonia.....	February 4, 2004
Hungary.....	March 6, 2002	Togo.....	May 21, 2003
Indonesia.....	March 6, 2002	Ukraine.....	March 6, 2002
Jamaica.....	June 12, 2002	United States of America.....	March 6, 2002
Japan.....	March 6, 2002		
Jordan.....	April 27, 2004		
Kyrgyzstan.....	March 6, 2002		
Latvia.....	March 6, 2002		
Lithuania.....	March 6, 2002		
Mali.....	April 24, 2002		

(Total : 46 States)