

**WIPO PERFORMANCES AND PHONOGRAMS TREATY,
ADOPTED BY THE DIPLOMATIC CONFERENCE
AT GENEVA ON 20 DECEMBER 1996
[1996] 80 SD 4425**

Documents tabled on 22 June 2004:

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NATIONAL INTEREST ANALYSIS: CATEGORY B TREATY

SUMMARY PAGE

WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference at Geneva on 20 December 1996 [1996] 80 SD 4425

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 Performances and Phonograms Treaty Copyright Treaty (WPPT) [1996] 80 SD 4425 by the entry into force of the AUSFTA, proposed for 1 January 2005.

3. Pursuant to Article 30(ii), the WPPT will bind Australia from the end of three months from the date on which Australia deposits its instrument of accession. The WPPT entered into force generally on 20 May 2002, after being ratified or acceded to by 30 countries in accordance with Article 29.

4. Accession by Australia to the WPPT 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 WPPT.

5. Apart from a reservation in accordance with Article 15(3) to be made and notified to the Director General of WIPO, Article 21 permits no reservations to the WPPT.

Overview and National Interest Summary

6. In December 1996, the WPPT and the WIPO Copyright Treaty (WCT) 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.

7. Accession to the WPPT is in Australia's national interest in providing adequate economic benefits to 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. As Australian law is already compliant with the majority of the obligations of the WPPT, it is in Australia's interests to enable its performers and copyright owners to receive a corresponding level of protection in all other treaty member countries.

Reasons for Australia to Take the Proposed Treaty Action

8. Following its accession or ratification by 30 countries, the WPPT entered into force on 20 May 2002. Since that time, it has gained wider acceptance worldwide and, at 24 February 2004, the WPPT had 43 member countries. Membership includes some of Australia's major trading partners, eg the USA and Japan. Accession by Australia to the WPPT 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.

9. Australia gained considerable standing in the international copyright community in being one of the first countries to implement the main obligations of the WPPT 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 'work with the performing arts community to devise workable performers' copyright legislation which recognises the value attached to the recording and communicating of performances'. Legislating to achieve compliance with this obligation of the WPPT will put Australia in a position to accede to the WPPT.

10. Under Article 17.1.4 of the AUSFTA, Australia is obliged to have acceded to the WPPT by the entry into force of the AUSFTA, subject to the fulfilment of its necessary internal requirements. 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 WPPT.

11. Accession by Australia to the WPPT 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 WPPT, Australia is an active participant in WIPO consideration of the adequacy of international copyright standards and the negotiation of possible new standards.

12. Article 3(1) of the WPPT requires Parties to accord the protection provided under the Treaty to the nationals of other Parties. Accordingly, Australia would have to meet this obligation if it becomes a Party. Equally, the existing Parties to the WPPT will be required to extend protection to Australian nationals.

13. Article 4(1) also 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 applies where a Party provides its nationals with more favourable treatment than that provided for under the WPPT. In this circumstance, Article 4(1) requires 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 the exclusive rights provided by the WPPT to rightsholders of other countries, which are currently members of the WPPT or which join in the future.

Obligations

14. 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 parallel provisions in the WCT.

15. In addition, **Article 4(1)** requires Contracting Parties to accord national treatment to the nationals of other Contracting Parties in relation to all the exclusive rights under the WPPT and in relation to the right to equitable remuneration for the broadcasting and communication to the public of sound recordings published for commercial purposes. The national treatment obligation in relation to equitable remuneration does not apply to the extent that the other Contracting Party makes use of Article 15(3) to limit or avoid the equitable remuneration obligation.

Expanded rights for performers

16. Contracting Parties are obliged under **Article 5(1)** to provide performers with moral rights in relation to their live aural performances or performances fixed in sound recordings. These rights are independent of a performer's economic rights and consist of the right of attribution (to be identified as the performer of the performance) and the right of integrity (to object to any distortion, mutilation, or other modification of the performance that would be prejudicial to the performer's reputation).

17. **Article 6** requires Contracting Parties to provide performers with exclusive rights in relation to the broadcasting and communication to the public of unfixed (ie, unrecorded) and as yet unbroadcasted aural performances, and the exclusive right of 'fixation' (ie, the recording) of unfixed performances.

Expanded rights for performers and producers of sound recordings

18. **Articles 7 and 11** oblige Contracting Parties to provide performers in and producers of sound recordings with exclusive rights of 'authorising the direct or indirect reproduction' of the sound recordings. The rights extend to authorising reproductions made in any manner or form, and thereby cover copies made in digital form or stored in an electronic medium.

19. **Articles 8 and 12** oblige Contracting Parties to grant a right of distribution to performers in and producers of sound recordings consisting of the exclusive right of making available to the public (whether through sale or other transfer of ownership) the original or tangible copies of their sound recordings. In applying this new obligation, Contracting Parties are free to determine the conditions, if any, under which the right will cease to operate (ie, be exhausted) after the first sale or transfer of ownership of the original or copy of the recording.

20. **Articles 9 and 13** oblige Contracting Parties to recognise commercial rental rights for performers in and producers of sound recordings in relation to authorising the commercial rental to the public of the original and copies of their sound recordings, even after there has been an authorised distribution of them.

21. Contracting Parties are obliged under **Articles 10 and 14** to ensure that the transmission of sound recordings through the Internet and in similar possible future networks, is subject to an exclusive right of authorisation for both performers in and producers of the sound recordings. This is an exclusive right to authorise the making available to the public of the sound recordings by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Obligation to provide equitable remuneration for broadcasting and communication of sound recordings to the public

22. **Article 15** requires Contracting Parties to provide for a right to equitable remuneration for performers and producers of sound recordings in respect of the direct or indirect use of commercial sound recordings for broadcasting and communication to the public. As noted above, this obligation may be made the subject of a partial or total reservation.

23. **Article 17** obliges Contracting Parties to apply a minimum term of protection for performances of at least 50 years from the end of the year when the performance was first fixed in a sound recording. Sound recordings must be protected for at least 50 years from the end of the year in which they were first published or, if not published within 50 years, then 50 years from the end of the year in which the recording was first made. Compliance with Article 17.4.4 of the AUSFTA will require the Copyright Act to protect sound recordings and performances fixed in sound recordings for at least 70 years from the end of the year in which they were first published, or if not published within 50 years, then 70 years from the end of the year in which the recording was first made. As a consequence of the national treatment provision in Article 4 of the WPPT, Australia will be required to extend this term of protection to performances or sound recordings of other countries which are currently members of the WPPT or which join in the future.

New obligations specific to protecting rights in the digital environment

24. **Articles 18 and 19** provide for new obligations on Contracting Parties to ensure that appropriate legal sanctions are available to support technological measures used for the protection of the rights of performers and producers in relation to sound recordings in the digital environment, such as encryption of the protected material, and to prohibit alteration or removal of electronic rights management information. Rights management information includes digital identifiers or other information identifying the performer, the performance of the performer, the producer of the sound recording, the sound recording, the owner of any right in the performance or the sound recording, or information about the terms or conditions of use of the sound recording.

Application of exceptions and limitations to rights

25. **Article 16** requires that any limitations of and exceptions to rights granted under the WPPT must be of the same kind as Contracting Parties provide for under national legislation in relation to copyright in literary and artistic works. Such limitations and exceptions must be confined to (1) certain special cases, that (2) do not conflict with a normal exploitation of the performance or sound recording, and (3) do not prejudice the legitimate interests of the performer or producer.

Specific enforcement provisions

26. **Article 23** obliges Contracting Parties to provide for effective enforcement procedures against infringement of the rights covered by the WPPT, including 'expeditious remedies to prevent infringements' and remedies which 'constitute a deterrent to further infringements'.

Assembly of Contracting Parties

27. **Article 24** establishes an Assembly of Contracting Parties which, as part of its work, will deal with the operation and development of the WPPT. The Assembly will meet every two years.

Implementation

28. Before Australia can accede to the WPPT, the Copyright Act will need to be amended to extend performers' rights over authorised sound recordings of their performances in accordance with the WPPT. Preparation of the legislation necessary to do this is well advanced, with a view to introduction in the current Parliamentary sittings as part of the package of legislation required to implement the obligations of the AUSFTA.

29. Amendments to the *Copyright (International Protection) Regulations 1969* will also be required to extend protection granted under the Copyright Act to rightsholders of other WPPT member countries.

30. Apart from legislating in this regard, Australian law is fully compliant with all the other obligations of the WPPT. The *Copyright Amendment (Digital Agenda) Act 2000* introduced major reforms to the Copyright Act which were consistent with the obligations of the WPPT in relation to the digital environment, including measures providing a new online right of communication to the public for rightsholders, measures to restrict the circumvention of technological measures, new enforcement measures in relation to circumvention devices and services, and new protection of rights management information.

Costs

31. Australia's accession to the WPPT will not impose any direct financial costs other than those costs associated with Australia's participation in the Assembly of Contracting Parties to the WPPT. Given that Australian law is compliant with the majority of the obligations of the WPPT, expenses associated with the enforcement of rights covered by the WPPT will be able to be met within existing budgets.

Consultation

32. 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.

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

Regulation Impact Statement

34. 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 WPPT.

Future Treaty Action

35. Article 24(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 WPPT.

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

37. Article 17.1.6 of the AUSFTA contains an exception to national treatment in relation to the rights of performers and producers of phonograms with respect to the secondary use of phonograms by means of analogue communications and free over-the-air radio broadcasting. The national treatment provision in Article 4 (1) of the WPPT requires Australia to provide the same level of protection to United States sound recordings as it would to Australian sound recordings. To ensure this AUSFTA exception to national treatment remained available to Australia, a reservation to Article 15(1) of the WPPT would be required. Notification of this aspect of the AUSFTA would be delivered to the Director General of WIPO in accordance with the requirements of Article 15(3) of the WPPT.

38. Although Article 21 provides that, subject to the provisions of Article 15(3), no reservations to the WPPT are permitted, Article 3(3) allows a country for the purposes of the WPPT to take advantage of limitations permitted in the Rome Convention to the criteria upon which protection will be extended to the nationals of other Contracting Parties. These criteria, contained in Article 5(1) of the Rome Convention, are nationality, fixation and publication.

Withdrawal or Denunciation

39. Article 31 of the WPPT 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 WPPT; 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 relation of the Contracting Parties remaining in the WPPT unaffected. The decision to denounce will be subject to the domestic treaty process, including the requirement for Executive Council approval.

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

21. WIPO Performances and Phonograms Treaty

(Geneva, 1996)

Status on February 24, 2004

State	Date on which State became party to the Treaty	State	Date on which State became party to the Treaty
Albania	May 20, 2002	Mali	May 20, 2002
Argentina	May 20, 2002	Mexico	May 20, 2002
Belarus	May 20, 2002	Mongolia	October 25, 2002
Bulgaria	May 20, 2002	Nicaragua	March 6, 2003
Burkina Faso	May 20, 2002	Panama	May 20, 2002
Chile ¹	May 20, 2002	Paraguay	May 20, 2002
Colombia	May 20, 2002	Peru	July 18, 2002
Costa Rica	May 20, 2002	Philippines	October 4, 2002
Croatia	May 20, 2002	Poland	October 21, 2003
Czech Republic	May 20, 2002	Republic of Moldova	May 20, 2002
Ecuador	May 20, 2002	Romania	May 20, 2002
El Salvador	May 20, 2002	Saint Lucia	May 20, 2002
Gabon	May 20, 2002	Senegal	May 20, 2002
Georgia	May 20, 2002	Serbia and Montenegro	June 13, 2003
Guatemala	January 8, 2003	Slovakia	May 20, 2002
Guinea	May 25, 2002	Slovenia	May 20, 2002
Honduras	May 20, 2002	Togo	May 21, 2003
Hungary	May 20, 2002	Ukraine	May 20, 2002
Jamaica	June 12, 2002	United States of America	May 20, 2002 ³
Japan	October 9, 2002 ²		
Jordan	May 24, 2004		
Kyrgyzstan	August 15, 2002		
Latvia	May 20, 2002		
Lithuania	May 20, 2002		

(Total : 43 States)

¹ Pursuant to Article 15, paragraph 3 of the Treaty, the Republic of Chile will apply the provisions of Article 15, paragraph 1 of the Treaty only in respect of direct uses of phonograms published for commercial purposes for broadcasting or for any communication to the public. Pursuant to Article 15, paragraph 3 of the Treaty, as regards phonograms the producer or performer of which is a national of another Contracting Party which has made a declaration under Article 15, paragraph 3 of the Treaty, the Republic of Chile will apply, notwithstanding the provisions of the preceding declaration, the provisions of Article 15, paragraph 1 of the Treaty to the extent that Party grants the protection provided for by the provisions of Article 15, paragraph 1 of the Treaty.

² Pursuant to Article 3(3), Japan will not apply the criterion of publication concerning the protection of producers of phonograms. Pursuant to Article 15(3), Japan will apply the provisions of Article 15(1) to the extent that Party grants the protection provided for by Article 15(1); and Japan will apply the provisions of Article 15(1) in respect of direct uses for broadcasting or for wire diffusion, but Japan will not apply the provisions of Article 15(1) to the phonograms made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and a time individually chosen by them.

³ Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.