

Berne Convention for the Protection of Literary and Artistic Works

National Interest Analysis, 25 January 2016

Executive summary

The Trans-Pacific Partnership (TPP) Agreement requires New Zealand to accede to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), as revised at Paris on 24 July 1971 and as amended on 28 September 1979 (Paris Revision). While New Zealand became a party to the Berne Convention on 24 April 1928, it is only a party to the 1928 Rome Revision. New Zealand is, however, already required to comply with Articles 1 to 21 of the Paris Revision of the Berne Convention under Article 9 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).

New Zealand would most likely meet this requirement by acceding to the Paris Revision of the Berne Convention, as amended in 1979, by providing its instrument of accession to the Director General of the World Intellectual Property Organization (WIPO).

No new legal obligations would be imposed on New Zealand by the accession, and no measures would be required to be adopted nor legislation amended. No economic, social, cultural or environment costs or effects have been identified.

The accession would enable New Zealand to ratify TPP.

Nature and timing of the proposed treaty action

The Berne Convention, adopted in 1886, deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted.

Further revisions of the Berne Convention took place at Paris in 1896, Berlin in 1908, Berne in 1914, Rome in 1928, Brussels in 1948, Stockholm in 1967, and at Paris in 1971 and amended in 1979. New Zealand became party to the Rome Revision on 24 April 1928.

Article 9 of the TRIPS Agreement requires New Zealand to comply with Articles 1 to 21 of the Paris Revision of the Berne Convention, except for Article 6^{bis} relating to the moral rights of authors. New Zealand is fully compliant with the Paris Revision, including with respect to Article 6^{bis}, despite not being party to the Revision. The proposal is for New Zealand to accede to the Paris Revision of the Berne Convention by depositing its instrument of accession with the Director General of World Intellectual Property Organization (WIPO).

Articles 1 to 21 of the Paris Revision of the Berne Convention would enter into force for New Zealand three months after New Zealand deposits its instrument with the Director General of WIPO.

Consultation will be undertaken with Tokelau to determine whether New Zealand's accession to the Berne Convention will extend to Tokelau as a non-self-governing territory of New Zealand.

Reasons for New Zealand becoming Party to the Paris Revision of the Berne Convention

TPP requires all Parties to be a Party to the Paris Revision of Berne Convention. The Government considers that becoming a Party to the TPP is in the national interest for the reasons given in the TPP National Interest Analysis.

There are 179 countries party to the Paris Revision of the Berne Convention.

Advantages and disadvantages to New Zealand of Paris Revision of the Berne Convention entering into force and not entering into force for New Zealand

There are no material advantages in acceding to the Paris revision of the Berne Convention. New Zealand rights holders already enjoy the benefits of the Paris revision of the Berne Convention through Article 9 of the TRIPS Agreement.

No disadvantages have been identified. New Zealand is already required to comply with the Paris revision of the Berne Convention.¹

Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms

No new legal obligations would be imposed on New Zealand by the treaty action. As explained above, under Article 9 of the TRIPS Agreement New Zealand is already obliged to provide the standards of protection of literary and artistic works required under the Paris Revision to the Berne Convention.

The Paris Revision of the Berne Convention requires Parties to adhere to three basic principles and contains a series of provisions determining the minimum protection to be granted by each Party to literary and artistic works and their authors.

The three basic principles are:

- (a) Works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "national treatment").
- (b) Protection must not be conditional upon compliance with any formality (principle of "automatic" protection).
- (c) Protection is independent of the existence of protection in the country of origin of the work (principle of "independence" of protection). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

The minimum standards of protection relate to the works and rights to be protected, and to the duration of protection, are:

¹ New Zealand would however need to ensure that the benefits of the Paris revision of the Berne Convention are extended to all current members of the WTO and Berne Union.

- (a) As to works, protection must include "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression" (Article 2(1) of the Convention).
- (b) Subject to certain allowed reservations, limitations or exceptions, the following are among the rights that must be recognized as exclusive rights of authorization:
- the right to translate;
 - the right to make adaptations and arrangements of the work;
 - the right to perform in public dramatic, dramatico-musical and musical works;
 - the right to recite literary works in public;
 - the right to communicate to the public the performance of such works;
 - the right to broadcast (with the possibility that a Contracting State may provide for a mere right to equitable remuneration instead of a right of authorization);
 - the right to make reproductions in any manner or form (with the possibility that a Contracting State may permit, in certain special cases, reproduction without authorization, provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author; and the possibility that a Contracting State may provide, in the case of sound recordings of musical works, for a right to equitable remuneration);
 - the right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work.

The Convention also provides for "moral rights", that is, the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation.

As to the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author's death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author's identity or if the author discloses his or her identity during that period; in the latter case, the general rule applies. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of the work.

The Convention allows certain limitations and exceptions on economic rights, that is, cases in which protected works may be used without the authorization of the owner of the copyright, and without payment of compensation. These limitations are commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10*bis* (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11*bis*(3) (ephemeral recordings for broadcasting purposes).

The Berne Union has an Assembly and an Executive Committee. Every country that is a member of the Union and has adhered to at least the administrative and final provisions of the Stockholm Act is a member of the Assembly. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member *ex officio*.

The establishment of the biennial program and budget of the WIPO Secretariat – as far as the Berne Union is concerned – is the task of its Assembly.

Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

New Zealand is already subject to this dispute settlement mechanism because it is a Party to the 1928 Rome Revision of the Berne Convention.

Each country may, at the time it deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation

No measures are required to be adopted nor legislation amended to enable the instrument of accession to be deposited with the Director General of WIPO.

Economic, social, cultural and environmental costs and effects of the treaty action

No economic, social, cultural or environment costs or effects have been identified.

The costs to New Zealand of compliance with the treaty

No costs to New Zealand would arise from accession to the Paris Revision of the Berne Convention.

Completed or proposed consultation with the community and parties interested in the treaty action

No consultations with the community or interested parties were undertaken in respect of the proposal to declare the effects of New Zealand's accession to the Paris Revision of the Berne Convention. As discussed above, the proposal has no impact on *status quo* regarding New Zealand's obligations to comply with articles 1 to 21 as required by the TRIPS Agreement.

Subsequent protocols and/or amendments to the treaty and their likely effects

Amendments to articles 1 to 21 may be made through a conference held in any one of the countries to the Paris Union attended by delegates of the countries (Article 18).

Withdrawal or denunciation provisions in the treaty

Any Party may denounce the Berne Convention by notifying the Director General of WIPO (Article 26). Such a denunciation also constitutes a denunciation of all earlier revisions of the treaty.

The denunciation takes effect 1 year after the Director General receives the notification.