

# **WIPO Copyright Treaty**

## **National Interest Analysis, 25 January 2016**

### **Executive summary**

The Trans-Pacific Partnership (TPP) Agreement requires New Zealand to accede to the WIPO Copyright Treaty (WCT). New Zealand copyright law already substantially complies with the obligations under the WCT already so accession would require New Zealand to make only minor any legislative changes.

Acceding to the WCT would enable New Zealand to ratify TPP, which is the subject of a separate National Interest Analysis.

### **Nature and timing of the proposed treaty action**

The WCT is a multilateral treaty that was concluded in Geneva on 20 December 1996. It entered into force on 6 March 2002.

The Government intends to accede to the WCT before it ratifies TPP. The WCT would enter into force for New Zealand three months after New Zealand deposits its instrument of accession with the Director General of the World Intellectual Property Organization (WIPO).

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

### **Reasons for New Zealand becoming Party to the WCT**

In 1996 WIPO Members concluded two new international copyright treaties addressing the implications of digital technology and the Internet for copyright and related rights. These were the WCT and the WIPO Performances and Phonograms Treaty (WPPT), collectively known as the "Internet Treaties". The Internet Treaties supplement the Berne Convention, to which New Zealand is a Member.

The technological developments that led to the rapid and transformative growth of the Internet and on-line environment in the early 1990s created uncertainty about the application of copyright in the online environment. The Internet Treaties sought to provide new minimum standards for the protection of copyright to ensure that they take account of digital technology and the online environment. These new minimum standards clarified the application of copyright and related rights in the digital environment and created new online rights.

The Copyright (New Technologies) Amendment Act 2008 brought New Zealand law substantially into line with the WCT.

TPP requires all Parties to be a Party to the WCT. The Government proposes to accede to the WCT in order to ratify TPP. The Government considers that becoming a party to TPP is in the national interest for the reasons given in the TPP National Interest Analysis.

There are 93 Parties to the WCT, including Australia, Canada, China, the European Union, Japan, Korea, Singapore, the United Kingdom and the United States of America.

## **Advantages and disadvantages to New Zealand of WCT entering into force and not entering into force for New Zealand**

The World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) would require all WCT Parties to provide New Zealand creators and distributors of copyright content with the rights set out in the WCT when they distribute the content over the Internet. These include the right to authorise or prohibit any distribution to the public of their works over the internet and protect against the circumvention of technological protection measures.

WCT Parties that are also members of the WTO already have obligations to provide most of the rights under the WCT to New Zealand creators and distributors under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>1</sup> New Zealand creators and distributors also enjoy these rights in most key markets as a matter of practice. Acceding to the WCT would, however, provide additional assurance that the rights New Zealand creators and distributors of content currently enjoy would not be removed.

New Zealand already substantially complies with the WCT so the new obligations it would place on New Zealand would not create direct disadvantages. The new obligations would, however, place new limitations on the government's ability to modify New Zealand's copyright settings to ensure they are appropriate for our domestic circumstances.

## **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**

*Article 1* requires Parties to comply with Articles 1-21 and the Appendix of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), but does not require membership of the Berne Convention. This Article applies the reproduction right and the permitted exceptions as set out in Berne Convention in the digital environment.

*Article 2* is an interpretive provision that merely confirms the recognised and applied scope of copyright protection.

*Article 3* incorporates the obligation under the Berne Convention to provide national treatment. This means that Parties must provide the protection that they provide in accordance with the WCT to authors who are nationals of another Party to the WCT.

*Articles 4 and 5* require Parties to protect additional categories of works. These include:

- computer programmes (Article 4); and
- compilations of data, provided there is originality in the selection of the data or other material (i.e. it does not extend to protection of non-original databases) (Article 5). Protection does not extend to the data itself and the elements of the compilation continue to be provided with any copyright protection they may have independently of the compilation.

*Articles 6 and 8* require Parties to give certain exclusive economic rights to authors. These include:

- the exclusive right of authorising the making available (for example, over the internet) of the original and any copies<sup>2</sup> of their phonograms through sale or other transfer (Article 6).

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<sup>1</sup> See Article 3(1) of the TRIPS Agreement.

<sup>2</sup> The expressions "copies" and "original and copies," refer exclusively to fixed copies that can be put into circulation as tangible objects.

- the exclusive right of authorising any communication or making available (for example, over the internet) to the public of their works by wire or wireless means so that the public can access them where and when they choose (Article 8).

*Article 7* requires Parties to give exclusive right to authors of computer programmes, cinematographic works and works embodied in phonograms of authorising the commercial rental to the public of the originals or copies of their works but imposes no obligations on Parties.<sup>3</sup>

*Article 9* requires Parties to provide a term of protection for photographic works that is consistent with the general norms for term of protection (if there is an author, at least life plus 50 years, or if there is not a known author, at least 50 years from the making of the work). Previously the Berne Convention had required Parties to provide a minimum term of 25 years from the year in which the work was made.<sup>4</sup>

*Article 10* requires Parties to ensure any exceptions or limitations to the rights provided in accordance with the WCT meet the “three-step test”. The test requires Parties to confine limitations and exceptions to 1) certain special cases 2) that do not conflict with a normal exploitation of the work and 3) do not unreasonably prejudice the legitimate interests of the author. Agreed Statements provide that existing limitations and exceptions that are considered appropriate in the non-digital world may be carried over into the digital environment and conversely recognise that it may be necessary to devise new exceptions and limitations for the digital environment.

*Article 11* requires Parties to protect against the circumvention of technological protection measures used by copyright authors and owners in connection with the exercise of the rights Parties provide in accordance with the WCT (and Berne) that restrict acts that infringe their exclusive economic rights.

*Article 12* requires Parties to protect certain information attached to works or copies of works or appearing in connection with the communication or making available of works or copies of works (for example, identifying the work, the author of the work, the owner of any right in the work, or terms and conditions of use).

*Article 13* requires Parties to apply the exclusive economic rights in the WCT to all works protected by the WCT whose copyright has not yet expired.

*Article 14* requires that Parties ensure that any author or owner of any right under the WCT can enforce the rights given to them in accordance with the WCT, including timely remedies that prevent infringements and constitute a deterrent to further infringements.

*Article 15* requires Parties to be represented by a delegate at the Assembly at the Party’s expense, which meet in ordinary session once every 2 years.

*Articles 16-24* are administrative articles that do not impose any obligations on Parties.

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

New Zealand already complies with the obligations in the WCT through the Copyright Act 1994.

Amendments would be required to the Copyright (Application to Other Countries) Order 1995 to ensure that New Zealand provides the protection required to be given under the WCT to the authors

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<sup>3</sup> The Agreed Statement to Article 7 makes clear that the scope and conditions of the protection of the right of rental should be the same as the relevant provisions of TRIPS; therefore no new obligation is imposed.

<sup>4</sup> This Article has no connection with the digital agenda. It builds on the ongoing assimilation of photographic works to other categories of works.

who are nationals of another Party to the WCT. Currently the Order does not apply to all WCT Members.

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

We do not expect there to be any significant economic, social, cultural or environmental costs or effects of acceding to the WCT. New Zealand already substantially complies with the WCT obligations and already enjoys most of the benefits it provides its members.

### **The costs to New Zealand of compliance with the treaty**

The Government would be required to fund a delegate to attend the WCT Assembly, which meet in ordinary session once every 2 years in Geneva, Switzerland. The WCT Assembly takes place at the same time as the WIPO General Assemblies that a New Zealand representative already attends, so in practice there would not be any extra cost in attending the WCT Assembly. (This was also considered as part of the TPP National Interest Analysis.)

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

In July 2001 a Discussion Paper on digital technology and the Copyright Act 1994 was released. The Discussion Paper covered a number of issues relating to new international standards on digital issues covered by the WCT, including whether New Zealand should accede to the WCT. After this consultation the Government agreed to pursue a number of amendments to the Copyright Act to ensure it kept pace with developments in digital technology. The Government noted that these amendments would make the Copyright Act substantially consistent with the WCT.

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

The Assembly can convoke a diplomatic conference for the revision of the WCT (Article 15). The rules governing the diplomatic conference would need to be agreed by the Assembly.

The Assembly may establish its own rules of procedure. Each Party has one vote in the Assembly.

There is no provision for amendments to enter into force automatically or for the negotiation of future related legally binding instruments. Any amendments to the WCT would be required to go through New Zealand's standard domestic approval processes before New Zealand would be legally bound by them.

### **Withdrawal or denunciation provisions in the treaty**

Article 23 of the WCT states that any Party may denounce the WCT by notifying the Director General of WIPO. The denunciation takes effect 1 year after the Director General receives the notification.