

WIPO Performances and Phonograms Treaty

National Interest Analysis, 25 January 2016

Executive summary

The Trans-Pacific Partnership (TPP) Agreement requires New Zealand to accede to the WIPO Performances and Phonograms Treaty (the WPPT). New Zealand copyright law already complies with most of the obligations under the treaty, particularly with respect to the protection of phonograms (sound recordings). Acceding to the WPPT would, however, require New Zealand to make a number of changes to its performers' rights regime in Part 9 of the Copyright Act 1994.

Primarily, the WPPT would require New Zealand to give performers new rights over the reproduction and distribution of their live performances and sound recordings of their performances. In practice, New Zealand performers already receive royalties for rights connected to their performances through contractual arrangements and it is not clear that the flow of royalties is likely to increase to any significant degree.

Acceding to the WPPT would enable New Zealand to ratify TPP. The TPP National Interest Analysis has been prepared separately, and incorporates the substantive analysis from this NIA.

Nature and timing of the proposed treaty action

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

The Government intends to accede to the WPPT as soon as practicable after the amendments to the Copyright Act 1994 necessary to accede to it come into force. The WPPT 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 WPPT will extend to Tokelau as a non-self-governing territory of New Zealand.

Reasons for New Zealand becoming Party to the WPPT

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 WPPT and the WIPO Copyright Treaty, collectively known as the "Internet Treaties". The Internet Treaties supplement the Berne Convention, of 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 on-line 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 into line with parts of the WPPT but to be compliant New Zealand would need to make substantial changes to our performers' rights regime in Part 9 of the Copyright Act.

TPP requires all Parties to be a Party to the WPPT. The Government intends New Zealand to accede to the WPPT because this would enable New Zealand 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 (which takes into account becoming a Party to the WPPT).

There are 94 Parties to the WPPT, 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 WPPT entering into force and not entering into force for New Zealand

The main advantage to New Zealand of the WPPT entering into force is that it would enable New Zealand to ratify TPP. It would also ensure that New Zealand performers enjoy the benefits of the same rights as performers who are nationals of those countries who are already party to the WPPT are provided with. Currently there are 87 countries party to the WPPT, including Australia, Canada, Chile, China, European Union, Malaysia, Japan, Korea, Mexico, Peru, Singapore, and the United States.

Currently in New Zealand, if performers consent to the making of a sound recording, only the producer of the sound recording has rights over the copying and distribution of the sound recording. The WPPT would require that performers also be given exclusive rights in performances recorded in sound recordings or communicated to the public. These include the right to authorise any copying of the sound recording of a performance, the selling of the sound recordings and the communication of their performance to the public. This would effectively mean performers would become co-owners of sound recordings with the sound recording producers. Unless the performers assigned the rights to the sound recording producers, any person wanting to copy or distribute the sound recording would need authorisation not only from the producer but from the performers as well. For example, if a band consisting of four members makes a record with a record company, each of the members would hold rights in the sound recording as well as the record company.

While performers would be given new rights over the copying and distribution of recordings of their performances, the potential impact of these new rights may be limited in practice. This is because performers would be able to assign their rights to third parties. In the above example of the band, the band members would be able to assign their rights to the record company. If this occurs, any person wanting to copy or distribute the sound recording of the band would only need the authorisation of the record company to do so.

In practice New Zealand performers already receive royalties for rights connected to their performance through contractual arrangements and it is not clear that the flow of royalties would be likely to increase to any significant degree.

The new rights for performers may benefit some New Zealand performers. It could give some better bargaining power when entering into recording contracts. However, this is unlikely to significantly change the bargaining dynamics or substantive outcomes of contracts between performers and the producers of sound recordings in most cases. If this did occur, it would generate a benefit to New Zealand if the outcome involved a greater flow of royalties, investment or other similar benefit to New Zealand from overseas.

Joining the WPPT would also require performers to be given moral rights over their performances and sound recordings of those performances, including the right to be identified as the performer

and to object to derogatory treatment of their performances. Currently only the producers of sound recordings and the authors of copyright works are given moral rights over sound recording and copyright works.

Giving performers new rights is unlikely to incentivise an increase in the number of performances, an increase in the number of sound recordings created from performances, or in the distribution and sale of sound recordings in the New Zealand market. The New Zealand market is a small market by world standards. Most performers are therefore likely to base their production and distribution decisions on the conditions in large overseas markets like the United States and Europe rather than on the regulatory conditions in the New Zealand market.

There may also be one off transaction costs for the recording industry in negotiating new contracts to cover the new performers' rights. This may have a flow through impact to the price of music and music services for consumers, although we would expect this to be minimal given contractual relationships would already exist in most cases.

If new rights for performers created greater uncertainty or transaction costs for the producers or owners of sound recordings, that could have a negative effect on distribution of their sound recordings in the New Zealand market. Additional performers' rights could also impose additional transaction and compliance costs on second generation creators, businesses and organisations like libraries, galleries and museums. Where performers have not assigned their performance rights to the producers of sound recordings, such businesses and organisations would be required to negotiate multiple licences, or bargain with more parties, to use the sound recordings. The higher the number of performers, and the higher the number of performers who decide to retain their rights, the higher the transaction costs are likely to become. If higher transaction costs did result, they could mean that new products or services dependent on using sound recordings as inputs (including online products and services) are either not provided, or are provided at a higher price. Either scenario would be likely to result in foregone consumption of those products and services.

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 3 requires Parties to provide the protection required to be given under the WPPT to the performers and producers of sound recordings who are nationals of another Party to the WPPT. Article 3(2) incorporates the tests under the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) to determine who are nationals of other WPPT Parties.

One effect of this is that the producer of a sound recording must be considered a national of another Party if:¹

- the producer is a national of another WPPT Party;
- the sound recording is originally recorded in another WPPT Party; or
- the sound recording is first published, or published within 30 days of its first publication, in another WPPT Party.²

¹ Article 3(2) of the WPPT and Article 5 of the Rome Convention.

Another effect of the incorporation of the tests under the Rome Convention is that a performer must be considered a national of another Party to the WPPT if:³

- the performance takes place in that other Party;
- the performance is incorporated into a sound recording that is protected under Article 5 of the Rome Convention (see previous paragraph); or
- the performance is a live performance that is broadcast by an organisation whose headquarters is:
 - situated in another WPPT Party; or
 - transmitted from another WPPT Party.⁴

Article 4 of the WPPT requires Parties to provide the exclusive rights granted in compliance with the WPPT to the nationals of other WPPT Parties in the same way as they are granted to their own nationals.⁵

Article 5 requires Parties to give performers the right to be identified as the performer of their live aural performances, or of their performances recorded in a sound recording, unless the performances is being used in a way that makes this impracticable. Parties are also required to give performers the right to object to any distortion, mutilation or other modification of their performances that would be prejudicial to their reputation. These two “moral rights” must remain with the performer throughout their life even if the economic rights are transferred and must not expire before the expiry of the economic rights.

Articles 6-10 require Parties to give certain exclusive economic rights to performers. These include:

- the exclusive right of authorising the recording of their live performances, the broadcasting of their live performances and the communication to the public (for example, webcasting over the internet) of their live performances (Article 6).
- the exclusive right of authorising the copying of their performances in sound recordings (Article 7).
- the exclusive right of authorising the physical distribution of sound recordings through sale or other transfer of ownership (Article 8).⁶
- the exclusive right of authorising the making available (for example, over the internet) of sound recordings of their performances so that the public can access them where and when they choose (Article 10).

Article 9 imposes no obligation on Parties.⁷

² Article 5(3) of the Rome Convention allows a Party to declare that it will provide protection only to producers of sound recordings originally recorded in another Party, or only to producers of sound recordings first published in, or published within 30 days of its first publication, in another Party.

³ Article 3(2) of the WPPT and Articles 4, 5 and 6 of the Rome Convention.

⁴ Article 6(2) of the Rome Convention allows a party to declare that it will provide protection only to broadcasts if the broadcasting organization’s headquarters is both situated in, and transmitted from, another Party.

⁵ Parties are not required to treat the nationals of other Parties in the same way as they treat their own nationals in respect of the single equitable remuneration right for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public under Article 15(1), if they declare under Article 15(3) that they will limit or not apply that right.

⁶ Parties are however free to provide that this right expires on the first sale or transfer of ownership, so that subsequent transactions are not subject to the performer’s consent.

⁷ Article 9 relates to rental rights but allows Parties flexibility to decide what categories of performance, if any, the right is applied to and does not impose an obligation to provide a rental right.

Articles 11-14 require Parties to give certain exclusive economic rights to producers of sound recordings. These include:

- the exclusive right of authorising the copying of their sound recordings (Article 11).
- the exclusive right of authorising the physical distribution of their sound recordings through sale or other transfer of ownership⁸ (Article 12).
- the exclusive right of authorising the commercial rental to the public of physical objects containing sound recording (even if they have been distributed with the authorisation of the producer) (Article 13).
- the exclusive right of authorising the making available (for example, over the internet) of their sound recordings so that the public can access them where and when they choose (Article 14).

Article 15 imposes no obligations on Parties.⁹

Article 16 requires Parties to ensure any exceptions or limitations to the rights provided in accordance with the WPPT to 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 performance or phonogram and 3) do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

Article 17 requires Parties to ensure that the exclusive economic rights they provide performers in accordance with Articles 6-10 do not expire until at least 50 years after the end of the year in which the performance was recorded. The exclusive economic rights provided to producers of sound recordings must not expire until:

- at least 50 years after the end of the year in which the sound recording was first published.
- if the sound recording is not published within 50 years of being made, 50 years after the end of the year in which it was made.

Article 18 requires Parties to protect against the circumvention of technological protection measures used by performers or producers of sound recordings in connection with the exercise of the rights Parties provide in accordance with the WPPT that restrict acts that infringe their exclusive economic rights.

Article 19 requires Parties to protect certain information attached to a sound recording or appearing in connection with the communication or making available of a sound recording (for example, identifying the performer, performance, producer, sound recording, owner or terms and conditions of use).

Article 20 prohibits Parties from requiring performers or producers of sound recordings to take any steps (for example, applying for registration) before they receive the rights set out in the WPPT.

Article 22 requires Parties to apply the exclusive economic rights in the WPPT to performances and sound recordings whose copyright has not yet expired. Parties may, however, provide the moral rights required to be provided under Article 5 in respect of performances that occurred after the Party became a party to the WPPT.

Article 23 requires Parties to ensure that performers and producers of sound recordings can enforce the rights given to them in accordance with the WPPT, including timely remedies that prevent infringements and constitute a deterrent to further infringements.

⁸ As with the performer’s distribution right, Parties are free to provide that this right expires on the first sale or transfer of ownership, so that subsequent transactions are not subject to the performer’s consent.

⁹ Article 15 provides for equitable remuneration for secondary uses but allows Parties to make a reservation so that no obligation is imposed by the Article.

Article 24 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 25-33 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 many of the WPPT's obligations through the Copyright Act 1994, particularly those relating to the rights of producers of sound recordings. However, New Zealand does not comply with a number of the WPPT's obligations with respect to performers' rights. The only feasible option to ensure compliance is to make a number of amendments to the Copyright Act 1994. These would include:

- giving performers the two new "moral rights":
 - the right to be identified as the performer of their live aural performances and in respect of sound recordings made from their performances.
 - the right to object to derogatory treatment of the communication of their performances and in the recording of those performances.
- giving performers at least new rights of:
 - authorising the copying of their performances in sound recordings.
 - authorising the distribution of sound recordings through sale or other transfer of ownership .
- reviewing and, if necessary, modifying the current exceptions and limitations relating to performers' rights so they are appropriate for New Zealand's domestic circumstances.

Amendments would also 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 WPPT to the performers and producers of sound recordings who are nationals of another Party to the WPPT. Currently the Order applies to only 75 of the 94 Parties to WPPT.

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

None have been identified.

There would be a cost to the government to send a delegate to attend the WPPT Assembly, which meet in ordinary session once every 2 years in Geneva, Switzerland. The WPPT 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 WPPT Assembly meeting. This has been considered as part of the TPP NIA.

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

In July 2001 a Discussion Paper on performers' rights was released.¹⁰ The Discussion Paper covered a number of issues relating to performers' rights, including whether New Zealand should accede to the WPPT. After this consultation the Government concluded¹¹ that:

¹⁰ The Discussion Paper can be found on the Ministry of Business, Innovation and Employment website at <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/performers-rights-discussion-paper-pdf>.

- There were no significant issues with the operation of the current performers' rights regime.
- There would be no substantive benefit to New Zealand from making changes to the performers' rights regime at that time.
- An extension of performers' rights would not necessarily result in increased or better performances, as performers appear to have a range of other incentives that encourage performance. These include incentives that are not primarily economic.
- As New Zealand is a net importer of performances, any benefits arising from the extension of performers' rights could simply flow overseas rather than to New Zealand.
- It was advisable for New Zealand to take into account changes made by other like jurisdictions before amending the performers' rights regime. Of New Zealand's major trading partners, only the United States and Japan were Parties to the WPPT at that time. The United Kingdom and Australia were in the process of adopting measures to enable them to accede.
- The performers' rights regime should be reviewed, taking into account future international developments, five years after the amendments implemented by the Copyright (New Technologies) Amendment Act 2008 or earlier if circumstances warrant it.

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

The Assembly can convoke a diplomatic conference for the revision of the WPPT (Article 24). 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

Any Party may denounce the WPPT by notifying the Director General of WIPO (Article 31). The denunciation takes effect 1 year after the Director General receives the notification.

¹¹ The Cabinet paper can be found on the Ministry of Business, Innovation and Employment website at <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/performers-rights-cabinet-paper-pdf>.