

# **Copyright (International Protection) Amendment Regulations 2003 (No. 1) 2003 No. 337**

## **EXPLANATORY STATEMENT**

### **Statutory Rules 2003 No. 337**

Issued by the authority of the Attorney-General

*Copyright Act 1968*

*Copyright (International Protection) Amendment Regulations 2003 (No. 1)*

The *Copyright Act 1968* (the Act) grants and determines the scope of copyright in Australia.

Section 249 of the Act, in part, provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the Regulations is to update the provisions of the *Copyright (International Protection) Regulations 1969* (the Principal Regulations). The Regulations extend copyright protection in Australia to foreign works and subject matter to comply with the obligations of relevant multilateral conventions, by providing an automatic update procedure that extends protection to future adherents to any of those international conventions. Previously it was necessary to amend the Principal Regulations every time another country acceded to or resigned from one of the listed conventions.

Further details of the scope of the Act and its legislative provisions are at [Attachment A](#).

The Regulations amend the Principal Regulations by removing Schedule 1, ('Countries to which the provisions of the Act apply'). Where a regulation previously referred to a country listed in that Schedule, the Regulations amend that regulation to make reference instead to a country which is a member of the relevant convention. The method of referring to countries that are listed in Schedule 3, ('Countries that provide rights for secondary uses of sound recordings') remains unchanged.

Apart from this mechanical change, the application of the Principal Regulations to the provisions in the Act remains unchanged except that:

- the definition of "relevant broadcaster" in subregulation 3(1) extends to foreign broadcasters who are individuals;
- subregulation 8(5) (the application of the Act to performances incorporated in a sound broadcast or television broadcast) extends to makers of a sound recording that are bodies corporate; and
- subregulations 8(6) to 8(7) extend the application of certain elements of Regulation 8 (the application of the performers' rights provisions of the Act to Rome Convention and World Trade Organization (WTO) countries) to all members of the WTO, irrespective of whether these countries are also members of the Rome Convention.

In addition, the Regulations amend the Principal Regulations to take into account current drafting practices.

Details of the Regulations are included in Attachment B.

The Regulations commence on gazettal.

## **ATTACHMENT A**

### Details of the scope of the *Copyright Act 1968* and its legislative provisions

Under the *Copyright Act 1968* (the Act), copyright protection is provided to original literary, dramatic, musical and artistic works, as well as to other subject matter (cinematograph films, sound recordings, broadcasts and published editions) where there is a relevant connection with Australia, such as if the author is an Australian citizen or resident, or the copyright material is first published in Australia. In addition, Australia is a member of several multilateral conventions which provide for an international copyright system through the principle of national treatment (formal reciprocity) which requires each convention country to give, with some exceptions, the same rights to nationals of other convention countries as it gives to its own nationals under its domestic law.

Sections 184 and 249 authorise the making of regulations in relation to foreign works and subject matter. Subsection 184(1) provides that the regulations made under the Act may apply any of the provisions of the Act (other than Part XIA which deals with performers' rights) to a country other than Australia in specified ways. Such regulations may apply a provision of the Act to another country without exception or modification, or subject to such exceptions or modifications as may be specified generally or in relation to such subject matter as may be specified. However, the regulations may not be made in relation to a country that is not a party to a convention relating to copyright to which Australia is also a party, unless the Governor-General is satisfied that, in respect of the class of works or other subject matter to which those provisions relate, provision has been or will be made under the law of that country by virtue of which adequate protection is or will be given to Australian copyright owners (subsection 184(3)). In other words, a requirement of substantive reciprocity must be satisfied where protection is extended other than to satisfy a requirement of national treatment that applies under the multilateral copyright conventions.

Section 248U, which mirrors section 184, authorises the extension of performers' rights under Part XIA of the Act to foreign performances.

## ATTACHMENT B

Details of the *Copyright (International Protection) Amendment Regulations 2003 (No. 1)*

**Regulation 1** provides that the regulations are the *Copyright (International Protection) Amendment Regulations 2003 (No. 1)*.

**Regulation 2** provides that the regulations commence on gazettal.

**Regulation 3** provides that Schedule 1 to the regulations amends the *Copyright (International Protection) Regulations 1969*.

**Schedule 1, item 1** inserts a new heading before regulation 1 which reads 'Part 1 Preliminary'.

**Schedule 1, item 2** amends subregulation 3(1) to insert a new definition of 'amending Regulations'. This definition states that the 'amending Regulations' means the *Copyright (International Protection) Amendment Regulations 2003 (No. 1)*.

**Schedule 1, item 3** amends subregulation 3(1) to insert new definitions of 'Berne Convention country' and 'foreign country'.

The item provides that a 'Berne Convention country' means a country that is a party to the Berne Convention for the Protection of Literary and Artistic Works. Paragraph (b) of the definition of 'Berne Convention country' provides that where, in accordance with international law, the application of the Berne Convention is extended to a territory of that party the definition should also extend to that territory.

Note 1 to this definition indicates that a person can find an authoritative list of countries who are parties to the Berne Convention at the World Intellectual Property Organization website. Note 2 indicates that the application of the Regulations to the territories of foreign countries prior to these amendments is provided for in subregulation 3(4) before its repeal by these amendments.

The item provides that a 'foreign country' means a country other than Australia.

**Schedule 1, item 4** amends subregulation 3(1) to substitute a new definition of 'relevant broadcaster'.

The item extends the previous definition of a 'relevant broadcaster' to include individual broadcasters, so long as such a broadcaster is entitled, under a law of the country that the broadcast is made from, to make that broadcast and is a citizen, national or resident of that country.

**Schedule 1, item 5** inserts new definitions of 'Rome Convention country' and 'Schedule 3 country', and relocates the definition of 'subject matter other than a work' which was in previous subregulation 3(2).

The item provides that a 'Rome Convention country' means a country that is a party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. Paragraph (b) of the definition of 'Rome Convention country' provides that where in accordance with international law, the application of the Rome Convention is extended to a territory of that party the definition should also extend to that territory.

Note 1 to this definition indicates that a person can find an authoritative list of countries who are parties to the Rome Convention at the World Intellectual Property Organization website. Note 2 indicates that the application of the Regulations to the territories of foreign countries prior to these amendments is provided for in subregulation 3(4) before its repeal by these amendments.

The item provides that a 'Schedule 3 country' means a country that is specified in Schedule 3 as providing rights for secondary uses of sound recordings. Paragraph (b) of the definition of 'Schedule 3 country' provides that where that country provides for those rights in a territory, the definition when applied to that country includes that territory. The note to this definition indicates that the application of the Regulations to the territories of foreign countries prior to these amendments is provided for in subregulation 3(4) before its repeal by these amendments.

The item provides that a 'subject-matter other than a work' means a published edition of a work or works, a sound recording, a cinematograph film, a sound broadcast or a television broadcast. The definition simplifies the language of previous regulation 3(3).

**Schedule 1, item 6** amends subregulation 3(1) to omit the definition of 'International Convention for the Protection of Literary and Artistic Works'. This definition is omitted because the Regulations instead refer to a Berne Convention country where previously they would have referred to a state that is a party to the International Convention for the Protection of Literary and Artistic Works.

**Schedule 1, item 7** amends subregulation 3(1) to insert new definitions of 'UCC country', and 'WTO country', and substitute a new definition of 'Universal Copyright Convention'.

The item provides that a 'UCC Country' means a country that is a party to the Universal Copyright Convention but not the Berne Convention or the World Trade Organisation (WTO). Paragraph (b) of the definition of 'UCC country' provides that where, in accordance with international law, the application of the UCC is extended to a territory of that party the definition should also extend to that territory.

Note 1 to this definition indicates that a person can find an authoritative list of countries who are parties to the UCC at the United Nations Educational, Scientific and Cultural Organization website. Note 2 indicates that the application of the Regulations to the territories of foreign countries prior to these amendments is provided for in subregulation 3(4) before its repeal by these amendments.

The item substitutes a new definition of 'Universal Copyright Convention' as the Universal Copyright Convention concluded at Geneva on 6 September 1952.

The item provides that a 'WTO country' means a country, including a separate customs territory, that is a member of the World Trade Organization. Paragraph (b) of the definition of 'WTO country' provides that where, in accordance with international law, membership of the WTO is extended to a territory of that party the definition should also extend to that territory.

Note 1 to this definition indicates that a person can find an authoritative list of countries who are members of the WTO at the World Trade Organization website. Note 2 indicates that the application of the Regulations to the territories of foreign countries prior to these amendments is provided for in subregulation 3(4) before its repeal by these amendments.

**Schedule 1, item 8** omits subregulations 3(2) and 3(4). Subregulation 3(2) provided a definition of 'subject matter other than work'. An amended definition of 'subject matter other than work' is discussed at item 5. Subregulation 3(4) provided that the application of the Principal Regulations extended to the territories listed in that subregulation. The definitions of 'Berne Convention country', 'Rome Convention country', 'Schedule 3 country' and 'WTO country' extend the application of the Principal Regulations to any territory which, by application of international law, is a territory of a member of the respective conventions.

**Schedule 1, item 9** omits regulations 4 to 13 and in their place inserts new regulations 4 to 17 under a new heading, 'Part 2 - Application of Act to works and subject-matter other than a work'.

Regulation 4 provides for the application of the Act to works and subject-matter other than works made or first published in Berne Convention countries, UCC countries, Rome Convention countries and WTO countries. Regulation 4 simplifies the language of the previous regulation 4 and applies the relevant provisions of the Act to convention countries as such, rather than as listed in Schedule 1.

Subregulation 4(1) extends protection under the Act to works or subject matter other than a work, made or first published in a Berne Convention country, a UCC country or a WTO country.

Subregulation 4(2) extends protection under the Act to an artistic work that is a building, or is attached to or forms part of a building, situated in a Berne Convention country, a UCC country or a WTO country.

Subregulation 4(3) extends the protection for a work or subject matter other than a work that applies to an Australian citizen at a material time to a person who is a citizen or national of a Berne Convention country, a UCC country or a WTO country at a material time.

Subregulation 4(4) extends the protection for a work or subject matter other than a work that applies to an Australian resident at a material time to a person who is resident in a Berne Convention country, a UCC country or a WTO country at a material time.

Subregulation 4(5) extends the protection under the Act that applies in respect of a body corporate incorporated under Australian law, at a material time, to a body incorporated under the law of a Berne Convention country, a UCC country or a WTO country at a material time.

Subregulation 4(6) extends the protection under the Act that applies to Australian sound or television broadcasts to a sound or television broadcast made at a material time by a relevant broadcaster from a place in a Rome Convention country.

Subregulation 4(7) relocates and rewords previous regulation 10A and provides that, in relation to subregulation 4(6), copyright does not subsist in Australia in a sound broadcast or television broadcast made from a place outside Australia before 1 January 1992.

Subregulation 4(8) provides that to the extent that regulation 4 is inconsistent with the Act, the application of the Act by these Regulations is modified accordingly.

Regulation 5 relocates and simplifies the language of the current regulation 8.

Subregulation 5(1) limits protection under the Act that is extended to foreign published editions by proposed regulation 4, to the duration of protection in Berne Convention countries, UCC countries and WTO countries identified as such, rather than as countries listed in Schedule 1.

Subregulation 5(2) identifies the relevant Berne Convention country, UCC Country or WTO Country as that in which the foreign edition was first published, the publisher of the edition was a citizen, national or resident, or the publisher was incorporated.

Subregulation 5(3) provides that to the extent that regulation 5 is inconsistent with the Act, the application of the Act by these Regulations is modified accordingly.

Regulation 6 replaces and simplifies the language of the previous regulation 6 concerning the category of foreign sound recordings to which the right under the Act to cause them to be heard in public is extended.

Regulation 7 replaces and simplifies the language of the previous regulation 7 concerning the category of foreign sound recordings to which the right under the Act to broadcast them is extended.

A new heading 'Part 3: Application of Act to performances' is inserted above new regulation 8.

New regulation 8 simplifies and condenses the language of the previous regulations 4A and 4B and applies the relevant provisions of the Act by referring to the concept of convention countries rather than the countries listed in Schedule 1.

Subregulation 8(1) defines 'applicable provision' and 'participating country' for the purposes of regulation 8.

The definition of 'applicable provision' refers to a provision that relates to a particular country depending on its membership of the relevant conventions. The effect of this definition is to distinguish which aspects of Part XIA of the Act extend to countries that are members of the Rome Convention or the WTO, or both. If a country is only a member of the WTO, only the provisions of Part XIA of the Act relating to sound recordings or sound broadcasts of live performances are extended. If a country is a member of the Rome Convention or of both Conventions, each provision of Part XIA of the Act applies.

A 'participating country' is defined as being a Rome Convention Country or a WTO country.

Subregulation 8(2) extends protection that applies under an applicable provision in respect of performances given in Australia to performances given in a participating country.

Subregulation 8(3) extends the protection that applies under an applicable provision to a person who is citizen or national of Australia to a person who is, at a material time, a citizen or national of a participating country.

Subregulation 8(4) extends the protection that applies under an applicable provision to a person who is a resident of Australia to a person who, at a material time, is resident in a participating country.

Subregulation 8(5) extends the protection that applies under an applicable provision to a performance that is incorporated in a sound recording if:

- the maker of the sound recording is, at the time when it was made, a citizen, national or resident of, or incorporated in, a participating country; or
- the first recording of the performance occurred in a participating country; and

subregulation 8(5) also extends such protection to a live performance incorporated in a sound broadcast or a television broadcast if the broadcast is made by a relevant broadcaster, from a place in a participating country.

Subregulation 8(6) provides that copyright does not subsist in Australia in respect of a performance given before 2 January 1992 that relates to a Rome Convention country. Unlike the Berne Convention, the UCC or WTO Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPs Agreement), the Rome Convention does not require protection of subject matter in existence before the entry into force of the Convention for Australia. While the Rome Convention entered into force in Australia on 30 September 1992, the *Copyright (International Protection) Regulations (Amendment) 1991* No. 452 provides for extension of protection of performances from 2 January 1992.

Subregulation 8(7) provides that subregulation 8(6) does not apply where a country is a member of both the Rome Convention and the WTO, and the rights relate to sound recordings, or sound broadcasts of live performances. This subregulation ensures that where protection is required under the TRIPs Agreement and the Rome Convention, then the TRIPs Agreement obligations will prevail and protection will extend to subject matter created prior to 2 January 1992.

Subregulation 8(8) provides that to the extent that regulation 8 is inconsistent with the Act, the application of the Act by these Regulations is to be modified accordingly.

Regulations 9, 10 and 11 simplify the language of the previous regulation 9, which deals with extension of protection to subject-matter pre-dating the commencement of the Principal Regulations, to ensure consistency with current drafting practice.

Regulation 12 simplifies the language of the previous regulation 10, which withholds protection under the Act from some subject-matter published or made in a UCC country, to ensure consistency with current drafting practice.

Regulation 13 simplifies the language of the previous regulations 11 to 13 to ensure consistency with current drafting practice. Regulation 13 provides for persons affected by the extension of protection to subject-matter because of a country having joined a relevant convention to be offered compensation before that protection can be applied to them.

Regulation 14 is a transitional provision that provides that the regulation 13 does not affect existing rights or liabilities under the previous regulations 11 to 13.

**Schedule 1, item 10** omits Schedule 1.

**Schedule 1, item 11** substitutes a new heading for Schedule 3. The new heading refers to subregulation 3(1) and regulations 6 and 7.