

Copyright (International Protection) Amendment Regulations 2004 (No. 1) 2004 No. 257

EXPLANATORY STATEMENT

Statutory Rules 2004 No. 257

Issued by the authority of the Attorney-General

Copyright Act 1968

Copyright (International Protection) Amendment Regulations 2004 (No. 1)

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

Section 249 of the Act provides, in part, 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.

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

The *US Free Trade Agreement Implementation Act 2004* (the USFTA Act) consists of nine schedules that amend the relevant Australian legislation to fulfil Australia's obligations under the Australia - United States Free Trade Agreement (AUSFTA). Schedule 9 to the USFTA Act amends the Act to fulfil obligations under Chapter 17 of the AUSFTA, which deals with Intellectual Property Rights. Article 17.4.4 of the AUSFTA requires Australia to accede to the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These treaties require a minimum level of protection to be provided domestically, and for relevant domestic protection to be extended to nationals of WCT and WPPT member countries.

The purpose of the Regulations is to amend the provisions of the *Copyright (International Protection) Regulations 1969* (the Principal Regulations) to extend copyright protection in Australia to foreign works and subject matter to comply with the obligations of the WCT and WPPT, in fulfilment of Australia's obligations under the AUSFTA.

Apart from the AUSFTA related amendment, the application of the Principal Regulations to the provisions in the Act remains unchanged except that:

- a clarification is made that the provisions in regulation 4 also implement Australia's obligations under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention),
- regulation 8 is amended to extend protection to performances of nationals from World Trade Organisation countries in relation to audiovisual broadcasts of their performances; and
- the connections that a performance must have with a convention country to be eligible for protection under regulation 8 are more directly expressed.

In addition, the Regulations amend the Principal Regulations to state which provisions of the Act provide authority for regulations 4 and 8 to be made.

Details of the Regulations are included in [Attachment B](#).

The Act specifies no conditions that need to be met before the power to make the Regulations may be exercised.

The proposed Regulations commence on the commencement of Part 3 of Schedule 9 to the USFTA Act. This will be the earlier date of the entry into force of the AUSFTA or the entry into force for Australia of the WPPT. Entry into force of the WPPT for Australia would be 3 months after the deposit of the instrument with the Director General of WIPO. Executive Council consideration of a proposal for this purpose will be sought in the near future.

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 2004 (No. 1)*

Regulation 1 provides that the regulations are the *Copyright (International Protection) Amendment Regulations 2004 (No. 1)*.

Regulation 2 provides that the regulations commence on the commencement of Part 3 of Schedule 9 to the *US Free Trade Agreement Implementation Act 2004* (the USFTA Act). This commencement provision reflects that authority for item 11 of Schedule 1 below is provided by section 248U of the *Copyright Act 1968* (the Act) as amended by Part 3 of Schedule 91 of the USFTA Act.

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

Schedule 1- Amendments

Item 1 inserts new definitions of 'WCT country' and 'WPPT country'.

This item defines a 'WCT country' as a foreign country that is a party to the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT). 'WPPT' is defined as a foreign country that is a party to the WIPO Performances and Phonograms Treaty (WPPT). The notes to these definitions state that a person seeking information about parties to those treaties can find an authoritative list of countries which are parties to the WCT or WPPT at the World Intellectual Property Organization website.

Item 2 substitutes a new heading to regulation 4. The new heading includes reference to the WCT and the WPPT. The new heading also refers a person to section 184 of the Act which provides authority for the regulation.

Item 3 amends subregulation 4(1) to replace the words 'a UCC country' with the words 'a Rome Convention country, a UCC country, a WCT country, a WPPT country'. This item has two effects. Firstly, it extends the operation of subregulation 4(1), so that a provision of the Act that applies in relation to a work or edition, first published, or a sound recording or film first published or made in Australia, applies to a work or edition first published, or sound recording or film first made or published in a WCT or WPPT country.

Secondly, the inclusion of the reference to a 'Rome Convention country' clarifies that the subregulation applies to sound recordings made in a Rome Convention Country. The Principal Regulations currently have this effect, as Article 24 of the Rome Convention requires all parties who accede to the Convention to be members of either the Berne Convention or the UCC. Thus, the current references to Berne Convention countries and UCC countries will necessarily include all Rome Convention countries. The reference to 'Rome Convention countries' alerts people that subregulation 4(1) implements obligations under the Rome Convention in addition to the other treaties referred to.

Item 4 inserts new subregulations 4(1A) and (1B). New subregulation 4(1A) provides that a reference to a sound recording made or first published in a WPPT country is taken to include a reference to a sound recording, wherever made, incorporating a live performance given in a WPPT country. This subregulation is subject to subregulation 4(1B). Subregulation 4(1B) provides that subregulation 4(1 A) only applies in relation to a person who is a maker of the sound recording and a performer in the performance, or an assignee of such a person's share of the copyright. The effect of this subregulation is to deny protection to a person who is the maker of a sound recording only by virtue of being the owner of the master record.

Item 5 amends subregulation 4(2) to replace the words 'a UCC country' with the words 'a UCC country, a WCT country'. This item has the effect that subregulation 4(2) also applies to artistic works that are buildings (or attached to, or forming part of buildings) situated in WCT countries.

Item 6 amends subregulations 4(3), (4) and (5) to replace the words 'a UCC country' with the words 'a Rome Convention country, a UCC country, a WCT country, a WPPT country'. This item has the effect that subregulation 4(3) applies to citizens or nationals of WCT and WPPT countries. Subregulation (4) applies to persons resident in a WCT or WPPT country and subregulation (5) applies bodies incorporated under the law of a WCT or WPPT country.

For the reasons discussed above in relation to Schedule 1, item 3, the inclusion of the reference to a 'Rome Convention country' clarifies that the subregulations apply to citizens of Rome Convention countries and residents and bodies incorporated in Rome Convention Countries.

Item 7 amends the definition of 'relevant country' in subregulation 5(2) to insert a reference to a WCT country. This item amends regulation 5 with the effect that the protection afforded to published editions of works relating to a WCT country is limited to that provided under the law of that WCT country.

Item 8 substitutes a new heading to regulation 8. The new heading includes reference to the WPPT. The new heading also refers a person to section 248U of the Act which provides authority for the regulation.

Item 9 omits paragraph (a) of the definition of 'applicable provision' and inserts a new paragraph (a). The amended 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 provisions of Part XIA of the Act extend to countries that are members of the Rome Convention, and which provisions extend to countries which are members of the WPPT or the WTO. If a country is only a member of the WTO or the WPPT, only the provisions of Part XIA of the Act relating to sound recordings or communications will be

extended. If a country is a member of the Rome Convention then each provision of Part XIA of the Act applies.

Currently regulation 5 does not extend the provisions of Part XIA of the Act to WTO members in respect of unauthorised non-online communication to the public of live performances, as required by the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPs Agreement) Article 14(1). This is remedied by the amendments made by this item which substitute 'communicate to the public' for 'broadcast'. This amendment ensures Australian compliance with Article 14(1) of TRIPs as well as Article 6 of the WPPT. The reference to communication includes a broadcast, broadcasting being a form of communication to the public under the Act.

Item 10 includes a WPPT country in the definition of 'participating country' in subregulation 8(1). This item has the effect of extending the operation of regulation 8 to WPPT countries as well as Rome Convention Countries and WTO countries.

Item 11 inserts new subregulations 8(2A), (2B) and (2C).

New subregulation 8(2A) provides that an applicable provision applies in relation to a sound recording, made in a participating country, of a performance in the same way as the provision applies, under the Act in relation to a sound recording given in Australia and as if the sound recording were made in Australia. Subparagraph 8(5)(a)(ii) currently deems a performance given in a participating country to include a reference to a performance that is incorporated in a sound recording if the first recording of the performance occurred in the participating country. Paragraph 248U(1)(aa) of the Act, which was introduced by the USFTA Act, provides authority for this subregulation to be expressed in a more direct form.

New subregulation 8(2B) provides that an applicable provision applies in relation to a broadcast made by a relevant broadcaster from a place in a participating country, of a performance:, in the same way as the provision applies, under the Act, in relation to a broadcast given in Australia of a performance, as if the foreign broadcast were made in Australia. Paragraph 8(5)(b) currently deems a performance given in a participating country to include a reference to a performance that is incorporated in a broadcast if the broadcast is made by a relevant broadcaster from a place in the participating country.

Paragraph 248U(1)(ab) of the Act, which was introduced by the USFTA Act, provides authority for this subregulation to be expressed in a more direct form.

New subregulation 8(2C) provides that an applicable provision applies in relation to a sound recording made by a person who is a citizen, national or resident of a participating country in the same way as the provision applies, under the Act, in relation to a recording of a performance given in Australia and as if the person were an Australian citizen or resident. Subparagraph 8(5)(a)(i) currently deems a performance given in a participating country to include a reference to a performance that is incorporated in a sound recording if the maker of the recording is a citizen or national of the participating country, or a person resident in or a body corporate incorporated under the law of the participating country.

Paragraph 248U(1)(ac) of the Act, which was introduced by the USFTA Act, provides authority for this subregulation to be expressed in a more direct form.

Item 12 omits subregulation 8(5). The operation of subregulation 8(5) is replaced by new subregulations 8(2A), (2B) and (2C). See item 11 above.

Item 13 substitutes a new subregulation 8(7). New subregulation 8(7) provides that subregulation 8(6) does not apply where a country is a member of the Rome Convention and a member of either the WTO or WPPT or both, and the rights relate to sound recordings, or communications of live performances. This subregulation ensures that where protection is required under the TRIPs Agreement or the WPPT and the Rome Convention, then the TRIPs Agreement and WPPT obligations will prevail and protection will extend to subject matter created

prior to 2 January 1992. Unlike the TRIPS Agreement or the WPPT, 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.

Item 14 replaces references to 'a Berne Convention country' with references to 'a Berne Convention country, a WCT country' wherever it occurs in paragraphs 9(1)(a) and (b). This item has the effect that where a work to which regulation 9 applies was first published or performed in a WCT country or if the author of the work was a national, citizen or resident of a WCT country, then Division 5 of Part XI the Act applies to the work as if the first publication or performance took place in Australia, or the author was an Australian citizen or resident of Australia at the time.

Item 15 replaces the reference to 'a Berne Convention country' with a reference to 'a Berne Convention country, a WCT country' in subregulation 10(1). This item has the effect that for the purpose of determining whether copyright subsists in a work first published in a WCT country prior to 1 May 1969 that work will be treated as if it had been first published in Australia.

Item 16 adds reference to 'WCT country' and 'WPPT country' to the definition of 'convention country' in subregulation 13(3). The effect of this item is to provide for persons affected by the extension of protection to subject-matter because of the commencement of the amending regulations, or because of a country having subsequently joined the WCT or WPPT, to be offered compensation before that protection can be enforced against them.