

Explanatory Statement

Copyright Act 1968

Copyright (International Protection) Amendment Regulations 2018

Issued by the Authority of the Minister for Communications and the Arts

Purpose

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

The *Copyright (International Protection) Regulations 1969* (the Regulations) make provisions to this effect.

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.

Section 184 of the Act provides, in part, that the Governor-General may make regulations to extend protection under the Act for works and other subject-matter that are made or first published in foreign countries.

The purpose of the *Copyright (International Protection) Amendment Regulations 2018* (the 2018 Regulations) is to update the protection provided to foreign countries under the Regulations in accordance with Australia's treaty obligations and commitment to protecting international sound recordings and encoded broadcasts.

Part 1 of the 2018 Regulations is made under the authority of sections 184 and 249 of the Act.

Part 1 modernises and updates the Regulations in line with current legislation drafting practice. It also implements the Malaysia-Australia Free Trade Agreement (MAFTA) to extend the application of the Act to Malaysian encoded broadcasts.

As a condition for the making of regulations, section 184 specifies that the country must be a party to an international agreement specified in relation to the provision of the Act. The condition has been met as Malaysia is party to the MAFTA.

In accordance with Article 13.5 of the MAFTA, Australia is obliged to accord to 'nationals' of Malaysia the copyright covered by Chapter 13 of the MAFTA. Under Article 13.19 of the MAFTA, parties must protect encrypted programme-carrying satellite signals against unauthorised decoding and distribution. By extending the protection of foreign encoded broadcasts to Malaysia under subregulations 4(7B) and 4(7C), Australia fulfils its obligations under Articles 13.5 and 13.19 of the MAFTA.

The amendments in Part 2 of the 2018 Regulations extend protection for secondary uses of sound recordings to 32 other countries, updating the Regulations in accordance with Australia's commitment to protecting international sound recordings.

Secondary uses of sound recordings are the rights to:

- cause a sound recording to be heard in public, e.g. playing recorded music in a gym, and;
- broadcast a sound recording to the public, e.g. a radio station playing recorded music.

Part 2 is made under the authority of section 184 of the Act. As a condition for the making of regulations, section 184 specifies that the Minister must be satisfied that adequate protection is or will be given under the law of the foreign country in the related class of works.

To meet this condition, a review was undertaken to examine the legislation of these 32 countries to ascertain that their laws provide adequate protection for secondary uses. As international terminology around the protection of secondary uses of sound recordings can vary, the analysis confirmed the newly listed countries' laws protect either broadcast and public performance, or broadcast and communication to the public of sound recordings.

The details of these amendments are set out in [Attachment 1](#).

The 2018 Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Consultation

Regarding Part 1 of the 2018 Regulations, the Office of International Law of the Attorney-General's Department supported the amendments to implement the MAFTA.

The following stakeholders were consulted in relation to the amendments in Part 2 of the 2018 Regulations and supported the amendments:

- The Office of International Law of the Attorney-General's Department;
- The International Intellectual Property Section of the Department of Foreign Affairs and Trade, and;
- The Phonographic Performance Company of Australia.

Regulation Impact Statement

The Office of Best Practice Regulation has assessed the extension of copyright protection to Malaysian encoded broadcasts and foreign sound recordings as having minor regulatory impact on business, community organisations and individuals. As such, a Regulation Impact Statement is not required.

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at [Attachment 2](#).

Attachment 1: Notes on Sections

Section 1—Name

Section 1 provides for this instrument to be cited as the *Copyright (International Protection) Amendment Regulations 2018*.

Section 2—Commencement

Section 2 provides for the commencement of the 2018 Regulations.

The table provides that Sections 1 to 4 of Part 1, and anything in the 2018 Regulations not elsewhere covered by the table, commences the day after this instrument is registered on the Federal Register of Legislation.

Part 2 of the 2018 Regulations will commence on 1 January 2019 to align with the business practices of the Phonographic Performance Company of Australia, who are the main body affected by the amendments to Schedule 3.

Section 3—Authority

Section 3 provides that the 2018 Regulations are made under the authority of the *Copyright Act 1968* (the Act).

Sections 184 and 249 of the Act authorise the making of regulations in relation to foreign works and other subject matter.

Paragraph 184(1)(a) provides that the regulations made under the Act may apply any of the provisions of the Act in relation to sound recordings made or first published in a country in a like manner as those provisions apply in relation to sound recordings made or first published in Australia.

As a condition, paragraph 184(3)(b) provides that before the Governor-General makes a regulation for the purposes of subsection 184(1), the Minister must be satisfied that adequate protection is or will be given under the law of the foreign country in the related class of works.

Paragraph 184(1)(f) provides that the regulations made under the Act may apply any of the provisions of the Act in relation to television broadcasts and sound broadcasts made from places in a country by persons entitled under the law of that country to make such broadcasts in a like manner as those provisions apply to television broadcasts made from Australia by the Australian Broadcasting Corporation, the Special Broadcasting Service Corporation, by a holder of a licence allocated by the Australian Communications and Media Authority under the *Broadcasting Services Act 1992* or by a person authorised to make the broadcast by a class licence determined by that Authority under the Act.

As a condition, paragraph 184(3)(a) provides that before the Governor-General makes a regulation for the purposes of subsection 184(1), the country must be a party to an international agreement specified in relation to the provision of the Act. The condition has been met as Malaysia is party to the Malaysia-Australia Free Trade Agreement (MAFTA). The MAFTA contains articles relating to the operation of encoded broadcasts which are protected under the Act.

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.

Section 4—Schedules

Section 4 provides that an instrument specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in that Schedule, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Schedule 1 prescribes the amendments to be made to the Regulations.

Item 1—Regulation 2

Item 1 updates the instrument in accordance with current drafting practices.

The commencement provision is repealed because it is no longer needed. The date of commencement is recorded in the Endnote to each compilation. Instead, the commencement provision is replaced by a standard provision declaring the Act under which the instrument is made.

Item 2—Regulation 3 (after the heading)

Item 2 inserts references to a number of commonly used expressions and clarifies that these expressions are defined in the Act.

Item 3—Subregulation 3(1)

Item 3 omits “unless the contrary intention appears” to modernise the language of the instrument.

Item 4—Subregulation 3(1)

Item 4 inserts a new definition for foreign encoded broadcasts, to be defined under the new subregulation 4(7C).

Item 5—Subregulation 3(1) (definition of US broadcaster)

Item 5 repeals the definition of US broadcaster as this is now defined in subregulation 4(7C).

Item 6—Regulation 4 (heading)

Item 6 replaces the heading of regulation 4 with a simplified title. Instead, Regulation 4 is explained by the new subregulation 4(1AA).

Item 7—Regulation 4 (after the heading)

Item 7 defines the scope of regulation 4, clarifying that the regulation extends certain parts of the Act to foreign countries defined in Regulation 3, subject to exceptions and modifications described in the subregulations.

Item 8—Subregulation 4(7B)

Item 8 replaces subregulation 4(7B) and inserts three subregulations that refer to Malaysia as well as the United States of America (the US). The current subregulation 4(7B) only refers to the US.

Subregulation 4(7B) provides that Part VAA of the Act (Broadcast decoding devices) applies to a foreign encoded broadcast as if the foreign broadcast were an Australian encoded broadcast. Subregulation 4(7B) extends the protection of Part VAA of the Act against unauthorised access to encoded sound and television broadcasts to those made by US broadcasters from places in the US, and Malaysian broadcasters from places in Malaysia.

Subregulation 4(7C) defines foreign encoded broadcasts as either a broadcast that is made from Malaysia or the US, or by a broadcaster that is entitled to make broadcasts by Malaysian or US law, or by a citizen, national, resident, and body corporate headquartered in Malaysia or the US.

Subregulation 4(7D) specifies the relevant agreements to which Malaysia and the US are party. Subregulation 4(7D) fulfils the condition set by paragraph 184(3)(a) of the Act, which provides that the country must be a party to an international agreement specified in relation to the provision of the Act. The Malaysia-Australia Free Trade Agreement and the Australia-US Free Trade Agreement contain provisions that set obligations for parties to protect encoded broadcasts.

Item 9—Regulation 8 (heading)

Item 9 replaces the heading of regulation 8 with a simplified title. Instead, regulation 8 is explained by the new subregulation 8(1A).

Item 10—Regulation 8 (after the heading)

Item 10 defines the scope of regulation 8, clarifying that the regulation extends the performers' protection parts of the Act to foreign countries defined in regulation 3, subject to exceptions and modifications described in the subregulations.

Item 11—Part 4 (heading)

Item 11 inserts a new heading which refers to “savings” provisions for consistency with similar headings in other instruments.

Item 12—In the appropriate position in Part 4

Item 12 clarifies the commencement of the new subregulations 4(7B), 4(7C), 4(7D). This ensures that the Act only applies to foreign encoded broadcasts that occur after the regulations have come into force.

Item 12 also clarifies that Part 2 of the 2018 Regulations, relating to Australian broadcasts and public performances of sound recordings from newly added countries to Schedule 3, commences on 1 January 2019.

Part 2—Amendments commencing 1 January 2019

Item 13—Schedule 3

Item 13 extends protection for secondary uses of sound recordings to 32 other countries:

Albania	Lesotho
Andorra	Lithuania
Belarus	Mali
Bermuda	Monaco
Brunei	Mongolia
Bulgaria	Nicaragua
Burkina Faso	Nigeria
Cabo Verde	Peru
Croatia	Qatar
Dominica	Republic of Moldova
El Salvador	Saint Lucia
Hungary	Serbia
Indonesia	Slovenia
Kyrgyzstan	Switzerland
Latvia	Togo
Lebanon	Ukraine

To determine whether these 32 countries provided reciprocal protection for secondary uses, a review was undertaken. The status of the 32 countries regarding the Rome Convention or WPPT treaties was considered, and the legislation of these countries was examined to ensure that their laws provide adequate protection for secondary uses.

As international terminology around the protection of secondary uses of sound recordings can vary, the analysis confirmed the newly listed countries' laws protect either broadcast and public performance, or broadcast and communication to the public of sound recordings. In international usage, public performance or communication to the public of sound recordings can be considered causing sound recordings to be heard in public, as defined under the Australian *Copyright Act 1968*.

In addition to extending protection to these 32 countries, item 13 also updates the names of countries already in Schedule 3 in line with Australia's international protocols. The updated names of these three countries are:

Bahamas
Holy See
Slovak Republic

Attachment 2: Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Copyright (International Protection) Amendment Regulations 2018

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The purpose of the *Copyright (International Protection) Amendment Regulations 2018* (2018 Regulations) is to update the protection provided to foreign countries in the *Copyright (International Protection) Regulations 1969* in accordance with Australia's treaty obligations and commitment to protecting international sound recordings.

Item 8 of the 2018 Regulations implements the Malaysia-Australia Free Trade Agreement (MAFTA) to extend the application of the Act to Malaysian encoded broadcasts. Once this protection commences, unauthorised access to Malaysian encoded broadcasts will be an offence under Part VAA of the Act.

Item 13 of the 2018 Regulations extends protection for secondary uses of sound recordings to 32 countries. Copyright owners of sound recordings in the 32 countries will have the exclusive rights to cause a recording to be heard in public, and to broadcast a recording to the public.

Human rights implications

Having considered the likely impact of the Instrument and the nature of the applicable rights and freedoms, it has been determined that the Instrument engages the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which she/he is the author under Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Item 8 will promote Article 15(1)(c) of the ICESCR, the right to benefit from the protection of moral and material interests. Malaysian broadcasters will be able to materially benefit from the revenue gained from consumers accessing their content through legitimate avenues.

Item 13 will promote Article 15(1)(c) of the ICESCR, the right to benefit from the protection of moral and material interests. Copyright owners of sound recordings from the 32 countries will be able to materially benefit from royalties paid for the use of their sound recordings in Australian broadcasts and public performances.

The remaining provisions of the Instrument are mechanical changes and will have a minimal impact on the rights engaged.

Conclusion

This Instrument is compatible with human rights because it promotes the right to benefit from the protection of moral and material interests.