

THE TRUE HISTORY OF COPYRIGHT

THE AUSTRALIAN EXPERIENCE 1905–2005



BENEDICT ATKINSON

FOREWORD BY BRIAN FITZGERALD

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The Australian experience 1905–2005

Benedict Atkinson

BA (Hons) LLM (Hons I)

University of Sydney

Solicitor Supreme Courts of ACT and NSW



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*You act like a man who being in a theatre, and having
seized upon the places that others might have taken,
seeks to prevent everyone else from entering, applying
to his own use that which should be for the use of all.*
St Basil the Great

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Foreword

In 2004 – the year of the Australian-US Free Trade Agreement – I was asked by a number of people whether anyone had looked at the history of Australian copyright law and policy. While there were bits and pieces available I could not point to any sustained and conceptual analysis of the path of copyright law in this country. It was my good fortune in 2005 (via a lead from my sister Anne Fitzgerald) to stumble upon the excellent work Ben Atkinson had undertaken as part of his LLM at the University of Sydney. Ever since that time I have recommended it to anyone who is interested in the topic.

Ben is an outstanding scholar and this book is testament to his ability. In it he manages to blend his passion for history with the thorny topic of copyright politics and law, managing to paint a fascinating picture of Australian history. I found it interesting to see the role different people had played in this story and hope one day with Ben's help we might be able to assemble a number of these personalities together in old Parliament House in Canberra to recreate and repurpose some of the debate.

At a deeper level Ben challenges us to consider the very rationale of copyright law. Ben's experience in working with government policy on copyright, his passion for history and the context of the AUSFTA provides the framework for understanding what has occurred in the past and what we face in the future. His work could have simply been a descriptive account of the history of the legislation but he has chosen to confront us with his ultimate conclusion that copyright law is fuelled by a volatile mix of ever-increasing vested interests. Ben's scholarly analysis, along with the fine detail of the history of the 1905, 1912 and 1968 Copyright Acts provides any student, policy maker, practitioner or user of copyright law with a tremendous platform on which to build understanding, argument and ultimately policy direction.

For me this book highlights the need for us to remain vigilant about the boundaries of copyright law and to find the balance that will prosper social and cultural as well as economic life. In this regard it is interesting to note the rise of large access corporations like Google Inc and Yahoo! Inc that are driven by their

business models to provide greater access. They will provide a serious challenge and counterweight to the interests that currently dominate copyright politics. In highlighting – in a “public choice” methodology – the rent seeking actors over the last 100 years, Ben opens our minds to the possibility of new rent seekers that may fundamentally change the way we view copyright into the future. A history written in 100 years time (with the benefit of hindsight) will no doubt talk about the Internet era and how new interests influenced the law making process to provide us with a new type of law around networked information relations and access.

I commend Ben on his excellent work and anticipate the future volumes. Like any good historian he must realise that he has only just begun his long journey into the history and politics of Australian copyright law. But in doing so he has unlocked a box that has been closed for far too long. My hope is that other researchers will follow him in this field of endeavour and provide a truly Australian perspective on the past, present and future of copyright law and policy.

Professor Brian Fitzgerald

*Director of the Intellectual Property Research Program
Faculty of Law
Queensland University of Technology*

Preface

This book grew out of my wish, when working for the Australian Commonwealth government, to find out whether copyright laws were made to encourage the production of copyright material. According to lobbyist after lobbyist visiting Canberra departmental offices, without the protection of more and more proprietary rights, creators would cease to produce. Without more laws and better enforcement, producers would have no reason to continue production because free riders, or “pirates”, would destroy their margins. Arguments made in favour of more copyright regulation applied equally to other forms of intellectual property protection.

Maximum property rights, according to the lobbyists, provided producers of non-rivalrous goods with the incentive to continue production. However, the incentive theory of intellectual property regulation, accepted uncritically at large as the inspiration for past regulators, seemed to me to be a counterfeit rationale that disguised price discrimination. I wanted to know whether policy makers and legislators really were, as the theory implied, disinterested and farsighted creators of optimal regulation. Did they make copyright laws to encourage efficient production and dissemination?

This book tries to answer that question. Hopefully, it will serve as a reference work for those who debate the purpose and function of copyright laws specifically and intellectual property laws generally. The work is intended to help resolve theoretical questions by supplying a detailed history of copyright law-making in Australia, and (though not comprehensively) the United Kingdom. I intended to make it readable. I tried to bring the actors in the drama of copyright history to life on the page and let their words and actions shape the book. Inevitably my opinions and prejudices influenced the narrative.

My view, arising out of my findings, is that the copyright term is grossly excessive. Possibly the simplest way – in theory – to cure the ills of copyright over-regulation is to cut the term of protection. A short term promotes dissemination and still provides plenty of opportunity for the producer to profit. What is the optimum period? No-one knows and no-one can know. I favour 18 years from

the date of production – the age of legal majority. Intrinsicly, a copyright work is no more the property of its creator than a child is the property of its parent. Its identity and existence are things distinct. The creator, like the parent, should have legally enforceable parental rights over the work. But 18 years from production (birth), the work (child) should be legally free from its creator's control.

I don't wish to obtrude my views on readers. I hope this book allows them to understand how copyright laws were made and to draw some conclusions about how they might be made better in the future.

Benedict Atkinson

Introduction

AIM

The purpose of this book is to examine the historical record, concentrating on the development of copyright law in Australia, to determine the truth of modern assumptions about the origins and function of copyright law. Modern governments espouse a uniform theory of copyright regulation. This is that intellectual property laws provide would-be creators and producers with the incentive to create, produce and disseminate subject matter or information that society consumes for entertainment, education, business activity and other private and public purposes.

According to the theory, optimum innovation means optimum diffusion of information,¹ and governments today assert that securing both is the object of regulation. But the modern theory of copyright espoused by government – the “copyright orthodoxy” – is untested, however obvious its conclusions may seem.

Scholars have examined aspects of the history of copyright law in the 18th and 19th centuries, as well as international copyright law-making, but none seems to have looked closely at the historical record – especially the archives of government and newspapers, and parliamentary debates – of the pivotal period of copyright law-making, the 20th century.

As a result, we have little knowledge of the motives of the legislators who made the laws of copyright and we have even less knowledge of what non-legislators, their views often expressed in the opinion and correspondence columns of newspapers, thought of regulation. Copyright theory exists in an evidentiary vac-

1 According to the *Review of Intellectual Property Legislation under the Competition Principles Agreement*, AGPS, 2000, (“the Ergas Report”) prepared for the Commonwealth government in 2000: “[b]alancing between providing incentives to invest in innovation on one hand, and for efficient diffusion of innovation on the other, is a central, and perhaps the crucial, element in the design of intellectual property laws.”(P5).

uum. Until the empirical task of looking at the record is complete, theories about why and how copyright works remain speculation. And the official explanation embraced by government remains problematic.

In summary, economic theory – or any other theory – concerning copyright is unverified, and until now, has been untested.² Insofar as current assumptions can be tested empirically, the best approach must be to consider the historical record to determine what was in the minds of makers of copyright law. If what they asserted the purpose of regulation to be turns out to differ from what theorists say the purpose of regulation is, then copyright orthodoxy must be admitted to present a deficient account of copyright’s purpose and function. More importantly, if faced with a crisis of orthodoxy, government policymakers ought to reconsider their assumptions.³

The aim of this book is to shed a clear light on Australian copyright law-making in the 20th century, and expose to daylight the motives that created modern copyright law. It presents detailed evidence about copyright law-making that allows the reader to make judgments about the extent to which the reality of law-making matches the theory of copyright’s function.

METHOD

The premise of the book is simple: as regulation is created by humans, the best

-
- 2 Empirical evidence adduced in support of copyright regulation consists of impressive industry statistics. The US International Intellectual Property Alliance releases annual reports which in recent years have shown that the US copyright industries continue to grow rapidly, generate nearly US\$1 trillion in revenue and earn more from exports than any other industrial sector.
 - 3 Government occasionally declares itself willing to reconsider copyright assumptions. In Australia in 1996, the Copyright Law Review Committee published a paper *Copyright Reform: A Consideration of Rationales, Interests and Objectives* (Office of Legal Information and Publishing, AGD), the purpose of which was “to stimulate debate on the arguments made in support of the modern copyright regime.” The CLRC’s subsequent reports on simplification of the Australian Copyright Act did not appear to have been influenced in any way by the 1996 paper. In 2002, the British Government published the report of the International Commission on Intellectual Property Rights, which considered the application of intellectual property rights in Third World countries. The report, *Integrating Intellectual Property Rights and Development Policy*, in the words of the *Economist* (14 September 2002) delivered a “central message [that] is both clear and controversial: poor places should avoid committing themselves to rich-world systems of IPR protection unless such systems are beneficial to their needs. Nor should rich countries, which professed so much interest in ‘sustainable development’ ... push for anything stronger.”

method of determining why and for what purpose laws were made is to examine what those who participated in the process leading to legislation wrote or said about the subject matter of regulation.

This means looking at parliamentary records, government departmental records and reports (the archives of the Commonwealth Attorney General's Department, from 1904 to 1968, as well as records of the Prime Minister's office), and reports in, and correspondence to, British and Australian newspapers in the periods 1909–1912, 1947–1956 and 1967–1969. The emphasis of research in on the Australian primary record, but as Australian legislation depended on British legislative precedent, the book pays considerable attention to events and debates in Britain at relevant times.

In this book, the participants in the legislative dramas that created the modern law of copyright in Australia speak for themselves. From their collective voice, it is hoped, something of the truth about how and why our copyright law came to be emerges.

THE THESIS

Once the *claims* made about the function of copyright regulation are examined in the context of how the laws *actually* came to be passed, a simple and dramatic thesis emerges: the copyright law was not actually made according to the design attributed to it by some theorists. Official orthodoxy about the purpose of copyright regulation and the function of copyright regulation is not supported by historical evidence.

The historical record – *Hansard*, government archival records and contemporary newspaper accounts and correspondence – tell a story not at all similar to that posited by copyright advocates. The economic success of the copyright industries is put forward as evidence of the necessity for copyright laws. But all copyright industries flourished without copyright protection. The radio broadcasting industry operated successfully without copyright protection for nearly 40 years.

Copyright orthodoxy tells us that without copyright laws granting creators and producers multiple rights to control production and supply, they will cease to produce. But in the period when the phonographic industry could make unauthorised recordings of musical works, music creators composed music. The absence of copyright protection did not affect the productive incentive of copyright industries. The record shows that without protection the recording, broadcasting and software industries grew like the green bay tree.

Orthodoxy also tells us that the corollary of creators and producers declining to produce is drastically reduced dissemination of copyright material, leading to a precipitous decline in social welfare. But the historical record informs us that

most legislators were indifferent to fine questions about disseminating information. If regulation works to disseminate the output of creators and producers, it does so by accident rather than design.

In short, the research explained in this book overturns long-held assumptions about copyright regulation and illustrates that the official consensus about the purpose and function of copyright law relies on a false interpretation of history.

NARRATIVE AND COUNTER-NARRATIVE

The sway of copyright orthodoxy is partly explained by a process of immanence: the official mind absorbed the lessons taught by writers like Charles Dickens and Victor Hugo (prominent in the activities leading to creation of the Berne Union), accepted generalisations about authors' rights, and came to accept unswervingly the principle that property rights are just reward for the ingenuity, effort and investment that turns abstractions into products.

Why does it matter whether the historical record supports copyright orthodoxy? Because copyright is property and property relations play a paramount role in creating social equality, and, more particularly, reducing inequality – in and between nations. To create property means to define and expropriate subject matter. The act of expropriation is exclusionary – for one person to possess property, another person must be excluded. The more that people are excluded from the benefits of property, or the more that subject matter is expropriated for the benefit of a few, the more inequality grows. The more that governments increase the scope of intellectual property rights – by, for example, extending the term of protection – the more people they exclude from freely reading, viewing, copying or otherwise dealing with the subject matter protected.

The argument against orthodoxy is not necessarily an argument against intellectual property. It points simply to an unwelcome truth: if governments wish to discourage the growth of inequality and more inequality, then intellectual property rights must be circumscribed not enlarged. This proposition is validated by the outcomes of international trade politics. The United States is, with resolve and far-sighted calculation, entrenching its comparative productive advantage through the export of intellectual property products. Countries trading with the US must make themselves safe havens for the sale of US IP exports in exchange for partial access to US markets.

But the trade highlights their inferiority – the US IP hegemony, and the secondary hegemonies of lesser IP exporters, such as the United Kingdom, guarantee in perpetuity the sway of rich countries over poorer. Continuing inequality is the sure outcome of international trade in IP products because the rich countries are owners and the poor renters. As IP rights spread across the globe, the US and some other rich countries own more, demand more and give less. The littoral

valleys of California possess the world more totally than ever the Romans did. Inequality also pertains within rich countries. The wealth of successful entertainers reflects the wealth of copyright industries. The extraordinary riches of software barons testify to the efficacy of copyright laws as a guarantor of profits. Property rights that generate wealth also create poverty – the poverty of opportunity to read, watch and listen, to learn and understand. For this reason, it is important to examine closely the justifications for copyright laws, to determine how much they are validated by history or how much they constitute a self-serving narrative.

The facts of history – what legislators said, what the correspondents to newspapers wrote, and what government departments were instructed to do – support a counter-narrative of copyright. According to this counter-narrative, individuals, acting for institutions or corporations, made the modern law of copyright, for their own gain and for the benefit of the coterie they served or identified with.

PUBLIC CHOICE THEORY

The counter-narrative of copyright accords with what public choice theory tells us about government behaviour. The theory, originated by James Buchanan and Gordon Tullock in the *Calculus of Consent*⁴, holds that governments, like private individuals, act in a self-interested way, misusing authority for financial and other gain. Public choice theory has revolutionised the way economists think about government behaviour and gives a pessimistic account of how much regulation reflects broad public interest as opposed to sectional. Many economists now take for granted that legislation is made not by government consulting the mass of the public, but rather organised public groups – industries for example.⁵

Public choice principles buttress Edwin Hettinger’s observation that *the justifiability of our intellectual property institutions is not settled by the facile asser-*

-
- 4 University of Michigan Press, 1962. See also the work of Noam Chomsky, especially in *Manufacturing Consent, The Political Economy of the Mass Media* (with Edward Herman), Pantheon Books, 1988, in which he argues that the media radically distorts the flow of information at the behest of private commercial interests.
 - 5 Australia’s polity has responded to some of the issues raised by public choice theory by introduction of the so-called “competition reforms”, which led, among other things, to the formation of the Ergas Committee in 1999. However, review of the kind undertaken by the Committee, while important and useful, is made on the government’s terms and government is not a disinterested analyst of the merits of regulation. If we decline to assume that the government, as legislator, automatically represents the public interest, if instead we assume the possibility that various third parties interpose between government and public, it becomes crucial to identify *how* legislation is made.

tion that our system of patents, copyrights and trade secrets provides necessary incentives for innovation and ensures maximally healthy competitive enterprise. This argument is not as easy to construct as one might think; substantial empirical evidence is needed.⁶

If public choice theory takes a pessimistic view of government behaviour, it also postulates that the solution to misgovernment is to expose official decision-making to critical scrutiny by creating a flow of information about how and why decisions are made. This book supplies some of the empirical evidence needed to determine how effective and equitable our copyright laws are.

SOME THEORETICAL CONSIDERATIONS

What, then, does the theoretical literature of copyright say? The theory adopted by government – that regulation creates a dynamic connection between output and dissemination by creating the conditions that encourage innovation and production – is one thing. But to what extent is it supported by the work of the independent analysts of the academy?

The first explanations for copyright law came from lawyers, not economists. They tended to function more as ideologues than disinterested theorists, and justified copyright a priori as a species of property. Lawyers were active in expounding rationales for copyright law from the literary property debates of the 18th century and through the 19th century. For instance, Thomas Scrutton, who advised the British Government in matters of copyright policy in the first decade of the 20th century, and sat on the Law of Copyright Committee in 1909⁷ wrote *The Laws of Copyright: An Examination of the Principles which Regulate Literary and Artistic Property in England and Other Countries* (John Murray, 1883) and *The Law of Copyright*, (William Clowes and Sons, 1896).

Economists were active in the 19th century in academic examination of the patent system, first as supporters, then critics.⁸ The *Economist*, the mouthpiece of British economic liberalism said in 1851, “patents are artificial stimuli to improvident exertions ... they cheat people by promising what they cannot perform ... they rarely give security to really good inventions, and elevate into importance a number of trifles ... no possible good can ever come of a Patent Law, however

6 Edwin C Hettinger, “Justifying Intellectual Property”, *Philosophy and Public Affairs* (1989) 18, p51.

7 The Gorrell Committee. Most of its recommendations were implemented in the British Copyright Act of 1911.

8 See Lionel Bently and Brad Sherman, *The Making of Modern Intellectual Property Law*, Cambridge University Press 1999, p149, fns30–31.

admirably it may be framed.”

As the legislature progressively extended the scope of copyright regulation, the natural law narrative that underlies property discourse came to dominate official thinking. As it applied to copyright law, and stripped of rhetoric, this account expounded a simple proposition: copyright laws are justified because authors and producers deserve to profit from their work.⁹

To this simple formula, lawyers at the end of the 19th century added a utilitarian hypothesis attractive to the Victorians as well as moderns: copyright protection, by rewarding labour and investment, stimulated production.¹⁰ The problem with this account, which formed a bridge between the 18th century view of copyright as the natural perquisite of authorship, and the 20th century idea of copyright as the reward for investment, is that it justified rather than explained.

The move away from partisan assumptions about the necessity for copyright law began with the eminent English economist Arnold Plant in 1934¹¹ and continued with the still more eminent American economist, Kenneth Arrow, in 1962.¹² In the 1960s, a growing number of economists began to subject copyright regulation to economic analysis, extending the process begun one century earlier, when utilitarian theorists turned their attention to patent law.¹³

Plant, unequivocally, and Arrow, indirectly, were critical of copyright laws. The former, who argued unsuccessfully before the Gregory Committee in 1951 for a radically circumscribed term of copyright, declared regulation to be socially inefficient.¹⁴ The latter concluded that while monopoly rights may provide a pro-

9 See Hettinger, *supra*, for an explanation of why the lawyers’ explanation proved so influential. As Hettinger noted: “Perhaps the most powerful intuition supporting property rights is that people are entitled to the fruits of their labour.” (At p36).

10 See Bently and Sherman, *supra*, pp174–5.

11 A Plant, “The Economic Aspects of Copyright in Books” (1934) *Economica*, 1, pp 167–95.

12 “Economic Welfare and the Allocation of Resources for Invention” (1962) *The Rate and Direction of Inventive Activity*, Princeton NJ: National Bureau of Economic Research, Princeton University Press, pp609–26.

13 For a discussion of the optimising trend in patent law towards the patenting of business methods, see Michal Likhovski, Michael Spence and Michael Molineaux, “The First Mover Monopoly: A study in patenting business methods in Europe”, *Oxford Intellectual Property Research Centre*’ (2000) WP 05/00. It is not difficult to discern a pattern of copyright optimisers imitating the example of patenting optimisers, the process perhaps explaining the progressive departure from strict adherence to the idea that copyright applies only to expression, not ideas.

14 The Board of Trade Copyright Committee 1951 chaired first by Lord Reading and then Lord Gregory. The Committee expressed some sympathy for Plant’s arguments but declared itself unable to accept them following the decision of the Berne

ducer with the incentive to produce, the offsetting desire to maintain monopoly profits is more likely to create a conservative rather than innovative approach to production. An inference could be made from Arrow's work that if copyright law provides an incentive to produce, it does not automatically provide an incentive to maximise either production or dissemination.

Soon after Arrow's intervention, another economist, Dan Lacy, published an article on the economics of publishing, in which he argued that the "communications industries" – the intermediaries between the creators and consumers of copyright material – dictated the flow of information according to criteria that might not promote optimum dissemination.¹⁵

Then in 1966, Hurt and Schuchman, in an article titled "The Economic Rationale for Copyright",¹⁶ identified the central, and continuing, problem of copyright theory: the evidence to demonstrate that copyright regulation provides an incentive to produce is lacking from the literature. In the same period, the transaction-cost theory of Ronald Coase, like Arrow a Nobel Prize winner (and strongly influenced in his early career by Arnold Plant) provided the grounds for an argument that copyright regulation increases transaction costs, thereby distorting the allocation of resources to the detriment of social welfare.

Coase's ideas, expounded most famously in two articles, *The Nature of the Firm*, published in Britain in 1937,¹⁷ and *The Problem of Social Cost*, published in the United States in 1961,¹⁸ focused on the economic cost of transactions. His research supported the view that regulation tended to increase transaction costs (and detract from social welfare) while the market, unfettered, tended to allocate resources efficiently. Coase's work tends to buttress the arguments both of advocates for intellectual property regulation and copyright sceptics. On the one hand, his work supports the view that property laws designed in very close consultation with industries are likely to create economic inefficiency. But Coase, like Arrow, made clear his belief that property rights are necessary if transactions are to take place efficiently. Coase's work provided the framework for the work of theoreticians of the law and economics movement, such as Harold Demsetz.

Union at its 1948 Brussels Conference to make a 50 year compulsory term mandatory for ratifying countries. In his 1934 article on copyright, *supra*, Plant argued for a compulsory licence in publishing operative five years after first publication. His argument traced the history of publishers securing legislative privileges in Britain from Tudor times onwards.

- 15 "The Economics of Publishing or Adam Smith and Literature" (1963) *Daedalus* 92, p.42.
- 16 R Hurt and Schuchman in *American Economic Review* (1966) May, pp421–432.
- 17 Collected in O Williamson and S Winter, *The Nature of the Firm: Origins, Evolution and Development*, Oxford University Press, 1991.
- 18 *Journal of Law and Economics*, 3, pp1–44.

Coase also did substantial research into broadcasting policy in Britain and the United States (see *British Broadcasting: A Study in Monopoly*, Longmans, 1950) and concluded that granting property rights to broadcasters solved problems of market failure.

Non-economists also began to undermine the natural law argument that copyright is a just reward for individual merit. In 1971, the philosopher John Rawls in *A Theory of Justice*,¹⁹ posited that native endowments – including the ability to expend effort – and chance, rather than objectively determined merit, determine individual rewards. Applying this theory in modified form, Edwin Hettinger, after affirming that effort (though not talent) *should* be rewarded, observed that intellectual property regulation does not reward effort equitably: a copyright product derived from little effort may yield substantially greater return than one resulting from significant investment.²⁰

Copyright laws, if they reward effort, also permit owners to recoup many times more than the cost of effort or investment. According to Hettinger, the argument that intellectual property regulation provided incentive to innovate is facile until it is verified by “substantial empirical evidence”.²¹ Writing in 1989, he pointed out the sterility of debating the merits of intellectual property law without reference to empirical evidence. Debate, it might be said, had not advanced in 23 years: in 1989 Hettinger drew exactly the lesson from his investigations as that adduced by Hurt and Schuchman in 1966. In the intervening two decades, however, the weight of opinion concerning copyright regulation had shifted, and current orthodoxy – that it promotes production and dissemination – became predominant.

The change may partly be ascribed to the rise of the law-and-economics movement and the proselytising work of two of its chief proponents, Harold Demsetz, who developed Coase’s ideas in the 1967 paper *Towards a Theory of Property Rights*, and Richard Posner. Demsetz placed particular stress of the need for strong, enforceable property rights in a liberal society while Posner emphasise the role played by property rights in giving individuals the security to engage in productive activity.²²

Out of their work grew the idea that the creation of property rights is a necessity, not an option, for policy-makers. In the schema they mapped for government, primacy is given to needs of property owners and their rights may be qualified only to the extent that limitations do not harm their economic interests. As Posner made clear in his analysis of the fair use doctrine, which involved com-

19 Harvard University Press, 1971.

20 “Justifying Intellectual Property”, *Philosophy and Public Affairs* (1989) 18, pp 31-52.

21 At p51.

22 *Economic Analysis of the Law*, Little, Brown, 1973.

paring the needs of consumers with those producers, government may strike a “balance” between the needs of owners and consumers of copyright material, but it must also give priority to promoting production rather than dissemination.²³

The law and economics movement created the conditions for government policy-makers to delineate a countervailing dichotomy between the perceived interests of owners-producers and publicconsumers. Posner has declared himself uncertain how to strike an equitable balance between the interests of these two groups,²⁴ but government betrays few doubts, or chooses to let the judiciary determine the scope of public access to copyright material. Governments around the world seem unshakably attached to the idea that “balance” is the key to creating optimum production and dissemination. Implicitly, stimulating production remains their fundamental objective.

A 2000 study of copyright and economic theory²⁵ makes a qualified case for copyright regulation but the qualifications are greater than those allowed by copyright orthodoxy. The study does not, for instance, discriminate between the interests of producers and consumers²⁶ and does not recommend an expansionary approach to regulation: it argues that while rights should be clearly defined, their scope ought to be determined by consulting the needs of *all* groups in society, and alternatives to copyright regulation explored.

The study also argues that thinking on copyright regulation has been strongly influenced by studies between 1969 and 1990 on the optimal scope of patent law.²⁷ So far as theory is concerned, however, it does not seem that the polarities

23 See e.g. W Landes and R Posner, “An Economic Analysis of Copyright Law” (1989) *Journal of Legal Studies*, 18, pp325–363.

24 Interview in *Reason*, 36, 1 April 2001, University of Chicago Law School.

25 Richard Watt, *Copyright and Economic Theory: Friends or Foes?* Edward Elgar, 2000. After a comprehensive survey of the economic literature on copyright, Watt looks at Pareto modelling of the benefits of copyright. According to Pareto theory, if regulation benefits some and disadvantages none, it should be introduced. Similarly, if its removal benefits some and disadvantages none, it should be removed. However, the Pareto modelling studies of the 1980s and 1990s allow for no solid conclusions to be drawn concerning the efficacy of copyright regulation.

26 Although it points out the difficulty of determining the efficacy of regulation as arguments for and against copyright are predicated on subjective determination of what constitutes “social welfare”. (See p123). According to Watt, social welfare is “impossible to measure empirically”.

27 Watt cites as the most significant influences, Nordhaus, *Invention Growth and Welfare. A Theoretical Treatment of Technological Change* (1969) Cambridge MA, The MIT Press, Scherer, 1972, “Nordhaus’ Theory and Optimal Patent Life: A Geometrical Reinterpretation” (1972) *American Economic Review*, 62, pp428–430, Tandon, “Optimal Patents with Compulsory Licensing”, *Journal of Political Economy* (1982) 90, pp 470-486, Gilbert and Shapiro “Optimal Patent Length and

of debate are exercising a continuing influence on government thinking. Even the middle ground, perhaps best represented by Stephen Breyer,²⁸ who observed that neither regulation nor its absence has a noticeable effect on social efficiency, seems to be ignored.

Bjorn Frank crystallised the dilemma of modern regulators in 1996: in framing copyright laws, he said, government must solve the problem of “the Scylla of underutilisation ... [and] the Charybdis of underproduction”.²⁹ It is not certain that theory nowadays offers much that government wants to hear. Copyright orthodoxy seems to be an impermeable doctrine uninformed by theoretical scepticism or knowledge of history.

Breadth” (1990) *RAND Journal of Economics*, 21, pp 106–112, Klemperer, “How Broad Should the Scope of Patent Protection Be?” (1990) *RAND Journal of Economics*, 21, pp 113–130.

28 “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs”, *Harvard Law Review* (1970) 84, p281–351.

29 “On an Art Without Copyright”, *Kyklos*, 49, pp 3–15.

Chapter 1 – Australia’s first Act

THE BEGINNING

In 1905, Australia passed its first federal Copyright Act. The Act’s probable author, John Henry Keating, declared it to be superior to any other copyright legislation in the English-speaking world.¹ It introduced regulatory innovations and it helped to precipitate the movement towards copyright legislative unity in the British Empire.

Most importantly, it marked the first and last time that Australian legislators made copyright law free from compulsion to accept the normative impositions of the Berne Convention of 1886 and other international agreements – or Britain itself. The Senate debate on the copyright term marked the last time that the issues raised in the greatest copyright controversies of the previous 200 years – the British debates over perpetual copyright and the posthumous term – were substantively aired in an English-speaking parliament.

As a result of the freedom they enjoyed to make copyright law as they, and not the members of the Berne Union,² saw fit, Australian parliamentarians did something in 1905 that would be impossible today. Motivated by support for the creative and public interests and hostile to the idea of copyright becoming a commodity in the hands of producers, then principally represented by publishers, they said the term of copyright should not greatly exceed the life of the owner. They

1 “I think I am not far wrong in saying that in 1905 Australia led the way so far as legislation on the subject of copyright is concerned.” – Senator J H Keating quoted in *Hansard* 23 October 1912.

2 Australia became a member of the Berne Union in 1928. Until then Britain extended the benefits and obligations of the Convention to Australia under section 8(1) of the 1886 *International Copyright Act*. Though independent, Australian legislators were culturally influenced by Britain and generally sympathetic to the thinking of the imperial Government. Very few would choose to pass legislation inconsistent with treaties entered into by Britain.

shortened the term offered in the Bill (life plus 30 years) and accepted a limited conception of copyright as the property of authors, not the third parties who might put the author's work to various commercial uses.

BEFORE FEDERATION

In the 19th century, Australian colonies other than Tasmania, borrowing definitions and concepts from the 1842 British Copyright Act, passed copyright legislation that required the authors of books, dramatic or musical pieces, or works of fine art (drawings, paintings, photographs, engravings and works of sculpture), to register their creations with central registries in each colony. Ownership conferred the “sole and exclusive right and liberty of making, printing, writing, drawing, painting, photographing, or otherwise howsoever multiplying copies of any matter, thing to which the said word is herein applied”. A performing right applied to registered dramatic or musical pieces.

NSW passed copyright Acts in 1852 and 1879, Victoria in 1869, South Australia in 1878, Queensland in 1887 and Western Australia in 1895. Queensland passed separate Acts governing the registration of copyright in books and dramatic pieces and works of fine art. Colonial copyright provided incomplete protection to authors. A colonial author who published a copyright work in Britain obtained copyright in all British possessions by the operation of imperial copyright legislation. Until the imperial *International Copyright Act 1886*, publication in a colony brought protection only in the colony. After the federal Copyright Act of 1905 came into force in 1907, the States gradually devolved their copyright registration functions to the federal Attorney General's Department in Melbourne.

In 1905, Australian legislators could draw little guidance from the parochial native statutes, which principally established rules of registration and administration. British law offered precedents and principles to draw upon, but the copyright law in the imperial centre, described in about 20 statutes, bemused politicians in Britain and her dominions. Australians trying to fashion a new federal copyright law from British principles were forced to navigate ancient British legislation dealing with copyright in printed material, engravings and sculptures, newer statutes dealing with dramatic, literary, musical, lecture and fine arts copyright, and international copyright Acts which applied rules throughout the Empire.³

3 *Print Copyright Act 1777, Engraving Copyright 1734, Sculpture Copyright Act 1798, Dramatic Copyright Act 1833, Copyright Act 1842, Lectures Copyright Act 1835, Fine Arts Copyright Act 1862, An Act to Amend the Law in relation to International Copyright 1844 and International Copyright Act 1886.*

ORIGINS OF THE COPYRIGHT ACT 1905

In 1905, some members of Parliament doubted the necessity for a federal copyright law. In the Upper House, Senator Hugh De Largie⁴ said the case for legislation was weak: “I am in favour of the idea of having a Copyright Act, but at the same time it should have been made clear that there is a pressing necessity or call from the country for a law of this kind. I know of no such demand having been made ... So far, the necessity for the introduction of this Bill has not been satisfactorily explained.”⁵

Another Senator, Staniforth Smith, said: “the British Acts are somewhat vague, and there is a multiplicity of them ... This Bill can only be considered as a complement to the British Act.” As De Largie said, the country did not cry out for copyright legislation. If, as he implied, legislators should respond to national necessity, there were no grounds in 1905 to enact the Copyright Act. No-one suggested publicly the need for a new copyright law. Even Senator Josiah Symon,⁶ an advocate of the legislation, acknowledged the absence of “urgency for this measure”.

The new Act resulted from political enthusiasm. The agents of reform were politicians in a rush, to whom the heads of federal powers set out in section 51 of the Constitution were not distant abstractions but the source of a new creation. During the first decade of Federation, Parliament legislated under no less than 32 of the 39 heads of power conferred by section 51, a striking indication of a feeling among parliamentarians that they must justify as soon as possible the mandate for federal power conferred by the framers of the Constitution.

By 1905, Parliament had already exercised the copyright power⁷ to pass the *Patents Act* of 1903. It did stop with patents and by 1906 completed the portfolio of copyright and industrial property legislation: the *Copyright* and *Trade Marks* Acts were passed concurrently in 1905, followed a year later by the *Designs Act*. In each case, with the possible exception of the Patents Act, the country did not need a federal statute. The State laws could have sufficed for a few years more. Section 51 inspired evangelical zeal in federal parliamentarians setting out to make the new Australia, and the Copyright Act of 1905 came from this zeal.

4 Hugh De Largie 1859-1947, Senator WA 1901–23 (Lab; National Labour; National).

5 *Hansard*, 29 August, p1634.

6 Sir Josiah Symon, 1846–1934, Senator SA, 1901-13 (Free Traders; Anti-Socialist), Attorney-General 1904–05.

7 Section 51 (xviii) of the Constitution conferring the power to legislate with respect to *Copyrights, patents of inventions or designs, and trade marks*.

IMPERIAL CONSIDERATIONS

John Henry Keating,⁸ addressing the Senate on the 1912 Bill for a Copyright Act, provided some insight into the reason for copyright legislation in 1905:

*Imperial legislation on the subject of copyright, looked for and desired so far back as the seventies, never became, and was not likely to become a substantial fact until some portion of the British Empire had led the way ... Australia led the way.*⁹

Keating's reference to the 1870s is to the 1875–1878 Royal Commission on Copyright in the Empire, called after a crisis sparked by rejection of a Canadian copyright bill. The imperial Government feared that the Canadian legislation might be ultra vires for derogating from the import rules in the imperial *Copyright Act 1842*. Resolution came in 1878 when the imperial government accepted that dominions could pass legislation imposing obligations additional to imperial laws. The Queen assented to the Canadian bill in accordance with a newly passed imperial statute empowering her to grant assent.

The Royal Commission reported in the same year, finding a copyright law “wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study ... in many parts so ill expressed that no-one who does not give such study can expect to understand it.”¹⁰ The report called for codification of the disparate British laws in a single comprehensive statute, but politicians, baulking at the demands of unifying the laws, put its recommendations to one side. The Government introduced a copyright bill into Parliament 20 years later but this fell into the hands of a House of Lords Select Committee and went no further. It was not until 1911 that Parliament finally passed a new Act, and repealed the conflicting legislation criticised by the Royal Commission.

Imperial inactivity may have resulted from the absence of necessity. Legislators throughout the Empire remembered as a cautionary tale the bitter debate over the bill that became the British Copyright Act of 1842. In 1905, Australian parliamentarians recalled with approval Thomas Macaulay's attack, during the debate, on the proposed term of copyright protection, but no-one wanted to revive the animosities of 1842. In the intervening 60 years, British publishers, the principal commercial beneficiaries of protections provided by the Act, were troubled

8 John Henry Keating 1872–1940, Senator Tasmania 1901–23 (Protectionist; Liberal; National).

9 *Hansard*, 23 October 1912. Keating neglected to mention the copyright Acts passed by Canada in 1875 and 1901, legislation which made Canada the chief legislative innovator among the self-governing dominions.

10 *Report of the Royal Commission on Copyright of 1878*; 24 PP (C2306).

mainly by non-recognition of their copyright in the United States, a problem that could not be remedied by reform of the imperial law.

It would be a mistake to assume, however, that Britain lacked any motive for legislative action. After it ratified the Berne Convention in 1886, in company with powerful European rivals like France and Germany, considerations of mutual advantage and national prestige appeared to awaken in the imperial legislature a belated recognition of the fruitful possibilities of international uniformity. In 1886, the British Parliament passed the *International Copyright Act* to allow Britain to accede to the Convention, and enthusiasm for the universalistic sentiments of the first international copyright conference perhaps revived local interest in the Royal Commission’s report of 1878.

The universalistic aspirations of imperial legislators were not as far-reaching as those of the Berne delegates but many were eager to create an imperial zone (consisting of Britain and the white dominions) that could become federal in nature – a proto-European Community but with closer linguistic and historical ties. In this zone, legislation would need to uniform or closely tied.

Keating and many of his colleagues were enthusiasts for the imperial idea and they were happy to lead the way in implementing the Royal Commission’s report. Allowing for imperial feeling and the common desire for legislative uniformity, the fact that Australia and Canada had both introduced up-to-date copyright legislation may, after 1905, have encouraged Westminster to give priority to preparing copyright legislation. In 1907, the imperial government produced draft imperial copyright legislation, which it circulated to dominion governments, but they expressed unhappiness with the draft. The legislation was abandoned and a new bill prepared for the imperial copyright conference held in London in 1910.¹¹

When the new British Copyright Act finally arrived in 1911 it owed its appearance primarily to the eagerness of legislators to implement the principles enunciated at the 1908 Berlin Conference of the Berne Union. But international considerations did not exclude imperial. The Act followed directly from the imperial copyright conference, which provided the dominions with the opportunity to consider the draft imperial legislation. That Britain took the unusual step of consulting the dominions in conference suggests that it may have been the dominions’ enthusiasm for uniformity that precipitated imperial legislation 33 years after the Royal Commission’s report in 1878.

11 Britain held the first imperial conference in London in 1907. Imperial conferences replaced the old colonial conferences of the white possessions and reflected the new standing of the self-governing dominions, providing a forum for discussing matters of imperial unity. They were the forerunner of today’s meetings of the Commonwealth Group of Nations.

THE PURPOSE OF THE LEGISLATION

The records of the federal Attorney General's Department, the administrative custodian of copyright legislation from 1907 until the present, provide little information on the preparation of the 1905 Act. Groom, the Minister for Home Affairs, not Isaac Isaacs, the Attorney General, introduced the Bill in the House of Representatives, and Isaacs did not participate in the legislative debate. In the Senate, two dominating figures articulated different visions of the legislation's purpose. John Henry Keating, Minister Without Portfolio in the ruling Protectionist party, oversaw preparation of the Copyright Bill, and though passionately interested in the legislation (he worked on the Bill "unduly late so interested I was"), was more interested in codifying principles than resolving questions of policy. By contrast, Sir Josiah Symon, Senate leader of the Free Traders, was interested in the philosophical implications of copyright regulation.

Symon made the more profound contribution to the debates that took place. A Scots immigrant to Adelaide, for two years federal Attorney General before the Free Trade party lost office, he was an outstanding lawyer, more willing than Keating to explore the premises for legislation. In 1905, he supplied the clearest statement of the philosophical intent underlying the Act:¹²

The system of copyright rests upon a recognition of the duty of Parliament and Government to secure justice to authors and involves the recognition, on the part of Parliament and Government, of the justice of establishing a property in the fruit of a man's reason, intellect and imagination.

Keating earlier put the case in more prosaic terms:

If honourable senators have regard to the condition of the present law – with the Imperial Act, the various State Acts, and the provisions of the Berne Convention in relation to international rights, all operating – they will see how necessary it is to have some clearly defined system of legislation for the whole of the Commonwealth [of Australia]. This Bill is intended to meet the situation, and in great part it follows very largely the lines laid down by the Imperial Commission, which bestowed a great deal of care, attention, research and thought to the whole subject. I think I can say with confidence that if the Bill be passed in its present – or anything like its present form – it will be regarded, not only in Australia, but in other parts of the Empire, as marking a distinct advance in legislation – perhaps the

12 This is not altogether surprising. Symon, de facto leader of the Free Trade party in the Senate, stated the legislation to be "a Bill of the late [Free Trade coalition] Government framed but not finally revised before they left office". However, the evidence as to which Government substantively prepared the Bill is conflicting.

greatest advance that has been made on this subject, and one well in conformity with, and not behind, the necessities of the times.

Each man provided a distinct rationale for the Act. Symon expressed the 18th century view of copyright as the author’s natural privilege, an idea that the Labor Senator, Henry Givens,¹³ forcefully supported:

In common with most other persons, I am firmly convinced an author or inventor has as much, if not more, right to the product of his brains, ingenuity or industry than any individual has to any form of property. I think that he has a greater right, inasmuch as the product of his brains, ingenuity or industry is something of his own creation which cannot be said of a great deal of property the right to which is fully recognised by this and other Parliaments. ¹⁴

Keating’s most obvious motivation seems to have been to create order in the Australian law out of what the Royal Commission of 1875 saw as chaos in the British law. A Hobart barrister who later joined the Melbourne Bar, Keating entered the Federation Parliament its youngest member, aged 29. Special Counsel to the 1932 Royal Commission on Performing Rights, he never rose to the heights of politics but no-one doubted his principles or intellectual penetration. He played a role in some of the most significant debates of early Australian copyright history and must be judged one of the most significant figures in the development of the Australian law. But like many lawyers trained to search for precedents and formulas he did not think deeply about the deeper questions of policy.

As far as he was concerned, British legislative developments provided the prototype for an Australian law. A line of authority established, all that remained was to draft the statute. He did not seem interested in determining the deeper implications or premises of copyright legislation. For him, the path to the Copyright Act of 1905 began not in the philosophical arguments of the 18th century but with the 1878 Report of the Royal Commission on Copyright. He admired the modernising sentiments of the Commission’s Report and considered that it, together with the findings of the House of Lords Select Committee, and the principles of the Berne Convention and the Paris revision Conference of 1897, provided the appropriate sources of Australian legislation.

13 Henry Thomas Givens 1864-1928, Senator Qld 1904-28 (Labor: National Labour; Nationals).

14 *Hansard*, 29 August 1905. Givens placed a caveat on his comments: “we should be exceedingly careful to see that any rights which we may give under this Bill shall not limit the rights of other people and shall not interfere with the welfare of the community.”

In the House of Representatives, Sir Littleton Groom, Minister for Home Affairs made a perfunctory statement of legislative purpose. “This”, he said, “is a Bill purely to regulate the administration of the copyright law within our own boundaries, and to take advantages of the Imperial Act, and the international agreement.” So much, then, for the purpose of copyright legislation in 1905. The unenlightening accounts given in the Australian Parliament for the purpose of this bill of uniformity (a bill that legislators agree will be passed) suggested that debate over its contents would be perfunctory. But the debates in 1905 produced more illuminating and informed discussion of issues than those preceding the enactment of copyright legislation in 1912 and 1968.

STRUCTURE AND CONTENT OF THE COPYRIGHT ACT 1905

For the modern reader, flattened by the never-ending circumlocutions of today’s gargantuan enactments, the Copyright Act of 1905 justifies Keating’s praise. It is concise and readable, well structured and annotated, the majority of its provisions set out in one or two paragraphs. The Act had a number of interesting features. It introduced the right to translate, abridge or convert a book,¹⁵ copyright in photographs,¹⁶ a lecturing right,¹⁷ divisibility of copyrights,¹⁸ a performing

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- 15 Section 13 (1) —The copyright in a book means the exclusive right to do, or authorise another person to do, all or any of the following things in respect of it: –
- (a) To make copies of it:
 - (b) To abridge it:
 - (c) To translate it:
 - (d) In the case of a dramatic work, to convert it into a novel or other non-dramatic work:
 - (e) In the case of a novel or other non-dramatic work, to convert it into a dramatic work: and
 - (f) In the case of a musical work, to make any new adaptation, transposition, arrangement, or setting of it, or any part of it, in any notation.
- 16 Section 4 — In this Act unless the contrary intention appears — ‘Artistic work’ includes —
- (a) any painting, drawing, or sculpture; and
 - (b) any engraving, etching, print, lithograph, woodcut, photograph...’.
- 17 Section 15 (1) —The lecturing right in a lecture means the exclusive right to deliver it, or authorize its delivery, in public, and except as hereinafter provided, to report it.

right in musical and dramatic works,¹⁹ the concept of fair dealing,²⁰ limited moral rights,²¹ provision for expedited enforcement of rights²² and injunctions against infringing exercises of the performing right.²³ It also codified the outcome of English cases on unpublished manuscripts²⁴ and suggested the beginnings of the modern category of employers’ or commissioners’ copyright.²⁵ Finally, it instituted a Copyright Office administering registration formalities designed primarily to assist the courts in determining copyright ownership.²⁶

The drafters made sure the bill conformed to the principles laid down by

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- 18 Section 25 — The copyright in a book, and the performing right in a dramatic or musical work and the lecturing right in a lecture shall be deemed to be distinct properties for the purposes of ownership, assignment, licence, transmission, and all other purposes; also section 26.
 - 19 Section 14 (1) —The performing right in a dramatic or musical work means the exclusive right to perform it, or authorize its performance, in public.
 - 20 Section 28 — Copyright in a book shall not be infringed by a person making an abridgment or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information.
 - 21 Section 29 — Where the author has parted with the copyright in his book and a translation or abridgement of the book is made with the consent of the owner of the copyright by some person other than the author, notice shall be given in the title-page of every copy of the translation or abridgement that it has been made by some person other than the author.
 - 22 Section 52 — permitting a Justice of the Peace to grant a search warrant for seizure of pirated works.
 - 23 Section 54 (1) —The owner of the performing right in a musical or dramatic work ... may, by notice in writing in the prescribed form, forbid the performance of the musical or dramatic work in infringement of his right...
 - 24 Section 7 — Subject to this and any other Acts of the Parliament, the Common Law of England relating to proprietary rights in unpublished literary compositions shall, after the commencement of this Act, apply throughout the Commonwealth.
 - 25 Section 22 (2) —The proprietor of a periodical in which an article, which has been contributed for valuable consideration, is first published shall be entitled to copyright in the article, but so that —
 - (a) he shall not be entitled to publish the article or authorize its publication except in the periodical in its original form of publication, and
 - (b) his right shall not excluded the right of the author of the article, under this section.
 - 26 Part VII — Registration of Copyrights.

the Berne Convention of 1886 and the Paris Conference of 1897. The protection of photographs as artistic works, and the rights of abridgement and translation followed the Convention text as did provisions for seizure of imported pirated books and allowance for certain limitations on the owner's right of reproduction. In addition, as laid down in the Berne text, the Act allowed for a person, upon completion of formalities, to translate a book if the owner of copyright had not exercised the translation right within ten years of publication. Copyright in the translation then subsisted in the translator.²⁷

The Berne text compelled members to reserve to the owner a performing right only in respect of translations but the Australian Act went further. It provided a performing right in all dramatic or musical works, although it also required that the right was to be reserved by notation in the title page or other conspicuous part of any dramatic or musical work published as a book.²⁸ In respect of the adaptation right, the Act also went further than the Convention text – the Berne Union experienced great difficulty in resolving its position on the issue²⁹ – and rejected English law on the subject.³⁰ The right to adapt a work, that is, to *transform* it from one form of work to another was set out explicitly in three

27 Sections 30–31.

28 Section 14

(1) —The performing right in a dramatic or musical work means the exclusive right to perform it, or authorize its performance in public.

(2) —Performing right shall subsist in every dramatic or musical work, whether the author is a British subject or not, which has, after the commencement of this Act, been performed in public in Australia, before or simultaneously with its performance in public elsewhere.

Section 32 (1) —Where a dramatic or musical work is published as a book, and it is intended that the performing right be reserved, the owner of the copyright, whether he has parted with the performing right or not, shall cause notice of the reservation of the performing right to be printed on the title page or in a conspicuous part of every copy of the book.

The Berne text made implementation of the performing right in relation to musical and dramatic works – as opposed to translations of them – discretionary, i.e., a matter of 'national treatment'.

29 See S Ricketson, *The Berne Convention for the Protection of Literary & Artistic Works: 1886–1986*, Kluwer, 1987, pp 389–399. The Union could not get beyond casting the right in the negative terms of adaptations constituting 'unlawful reproductions'. It left enunciation of the right in domestic laws to the discretion of members. Australia took the approach, still current, that adaptation encompassed transformation, e.g., turning a novel into a play.

30 Britain did not acknowledge the author's right to control dramatisation of a work although it permitted adaptation of a play into a novel.

parts.³¹

The Act divided into eight parts,³² greatly improving on the haphazard organisation of enactments that was characteristic of Victorian times. Artistic copyright was dealt with under Part IV of the Act not Part III, which concerned ‘Literary, Musical, and Dramatic Copyright’. The reason for this division is not entirely clear. Possibly the Act’s drafters wanted to distinguish between the plastic nature of artistic works like sculptures and the print format of most literary, musical and dramatic copyright.

More likely, the framers saw copyright as applicable primarily to two types of physical production: books and artistic works. In the Act, musical and dramatic works, although defined, were evidently seen, for conceptual purposes, as a subset of the category ‘Book’.³³ The authors of a musical or dramatic works could take advantage of the definition of a musical or dramatic work as a ‘Book’ and claim the benefit of the rights granted to the owner of a book. But the *only* exclusive right conferred on them as holders of the copyright in musical or dramatic works was the right of public performance.³⁴

In the case of books and artistic works the only fundamental difference between the rights granted under each category in the Act was that the author of a book was entitled to certain additional rights – abridgment, translation, conversion – that had no application to sculptures, paintings and so on. Otherwise, the Act made little distinction between the two. Legislators adopted the term of copyright in the British Act – 42 years from publication or for the author’s life and seven years, whichever period was the longer.³⁵ They made no change, either, to rules about artistic copyright, retaining the distinction between title and copyright – the owner of copyright in a painting, statue or bust sold retained copyright after sale of the item.³⁶ Copyright in a photograph made to order, or in the course of

31 Section 13(d), (e) and (f). For text, see footnote 33.

32 Part I — Preliminary; Part II — Administration; Part III — Literary, Musical, and Dramatic Copyright; Part IV — Artistic Copyright; Part V — Infringement of Copyright; Part VI — International and State Copyright; Part VII — Registration of Copyrights; Part VIII — Miscellaneous.

33 Section 4 — ‘Book’ includes any book or volume, and any part or division of a book or volume, and any article in a book or volume, and any pamphlet, periodical, sheet or letterpress, sheet of music, map, chart, diagram, or plan separately published, and any illustrations therein.

34 Section 14.

35 Sections 17 and 36.

36 Section 41(1) When the owner of the copyright in artistic work being a painting, or a statue, bust, or other like work, disposes of such work for valuable consideration, but does not assign the copyright therein, the owner of the copyright . . . may in the absence of any agreement in writing to the contrary make a replica of such work.

employment, passed to the purchaser or employer.³⁷

So much for the owner's positive rights. Equally important to the copyright owner are negative rights contained in the infringement provisions that set out the remedies available for breach of copyright. The 1905 Act devoted 18 clauses to the subject of infringement.³⁸ Discussing the Act in Senate debates in 1912, Keating seemed especially proud of the clauses dealing with injunctions, discussing them in some depth and stressing their novelty.³⁹ The provision for injunctions of infringing performances *were* new to copyright legislation but in other respects, the 1905 Act did not significantly enlarge the scope of actions set out in the British Copyright Act of 1842, the basis of the British law.

The Act of 1842 paid particular attention to copyright remedies, providing that works of piracy could be seized, damages awarded to the owner and the infringer subject to fines.⁴⁰ It placed on the defendant in an action the onus of proving – if the issue of ownership arose – that the plaintiff did not have good title⁴¹ and dealt in detail with the requirements of entering title details in the Registry of Books.⁴²

The Australian Act of 1905 provided that the owner of the “copyright in a book, the performing right in dramatic or musical work, the lecturing right in a lecture, or the copyright in an artistic work ... may maintain an action for damages or penalties or profits, and for an injunction, or for any of those remedies”.⁴³ Damages for infringement of the performing right in a dramatic or musical work or the lecturing right were to be calculated by reference to the infringer's profit and actual damage incurred.⁴⁴

If the infringement occurred in a theatre, the proprietor or principal, as appropriate, faced a penalty of £5 and minimum damages of £10, increased to the amount of profit made from infringement if that amount exceeded £10.⁴⁵ Additionally, the owner of the performing right in a musical or dramatic work could

37 Section 39 (1) When a photograph is made to order for valuable consideration the person to whose order it is made shall be entitled to the copyright therein as if he were the author thereof.

(2) Subject to sub-section (1) of this section, when a photograph is made by an employee on behalf of his employer the employer shall be deemed to be the author of the photograph.

38 Part V — Infringement of Copyright clauses 45-63.

39 See opening address, *Hansard*, 13 October 1912, pp 4410–11.

40 Sections XV and XVII.

41 Section XVI.

42 Sections XI-XIII and XXIV Part V — Infringement of Copyright.

43 Section 45.

44 Section 46.

45 Section 50.

restrain the performance of the work by notice in writing.⁴⁶ A failure to obey this notice incurred a penalty of £10.⁴⁷ The maximum penalty for dealing in pirated books or artistic works⁴⁸ was £50⁴⁹ and a defendant who could prove that “he did not know, and could not with reasonable care have ascertained, that the book was a pirated book or the work was a pirated artistic work” avoided liability.⁵⁰

The owner could require the infringer to deliver up pirated books and artistic works⁵¹ and search warrants could be issued for the purpose of seizure.⁵² More draconian, false representation of ownership of copyright in a book or artistic work or the performing right in a musical or dramatic work was designated an offence for which the penalty was two years’ imprisonment.⁵³

As a matter of passing curiosity, it is interesting to compare the approach to enforcement in 1842 with that of 1905. In the 1842 Act, the fine for dealing in pirated books was £10 and double the value of each pirated book seized⁵⁴ while in the 1905 Act the fine was £5 for each copy seized and liability was capped at of £50 in total. Quite conceivably, an offender in 1842 would have paid considerably more in a total fine than his counterpart in 1905. On the other hand, the British Act, unlike its Australian cousin, contained no penal provisions. Section 55 of the 1905 Act, prescribing prison for false representation.

International developments soon reduced the Copyright Act of 1905 to irrelevance. Its precepts were still rooted in the 19th century idea of copyright as literary property. Yet read today it seems powerfully modern. The style of the principal British statute, written at the beginning of Victoria’s reign and in the early days of Dickens’s fame, is discursive, elliptical and repetitive. The style of the 1905 Act is direct and unadorned. With its enactment, copyright in the English-speaking world moved away from the vanished days of pen, ink and manuscripts and into the present age.

46 Section 53.

47 Section 53.

48 Section 4 — ‘Pirated artistic work’ means a reproduction of an artistic work made in any manner without the authority of the owner of the copyright in the artistic work; ‘Pirated book’ means a reproduction of a book made in any manner without the authority of the owner of copyright in the book.

49 Section 50.

50 Section 50.

51 Section 53.

52 Section 56.

53 Section 55.

54 Section XVII.

MODERN CONCEPTIONS SHUNNED

Mechanical reproduction

The Copyright Bill contained an intriguing omission. It did not make provision for a mechanical reproduction right that, if enacted, would have placed the Australian statute at the forefront of the world's copyright laws. Possibly in 1905, many parliamentarians were yet to hear the term "mechanical reproduction". Coined to describe the mechanical performance of musical works by the operation of piano rolls in pianolas, from the end of the 19th century the phrase referred also to the recording of musical and vocal performances on rotating wax cylinders and later pressed records.

The Berne Union introduced the concept into copyright discourse when it declared in 1885 that a mechanical reproduction right would confer control of the manufacture and sale of instruments for the "mechanical reproduction" of "musical airs". Strangely, though, considering its advocacy of authors' rights, the Union then stipulated that mechanical reproduction did not infringe the author's exclusive right of reproduction. It did so to avoid offending Switzerland, home of a substantial industry manufacturing music boxes. The Swiss, according to George Bernard Shaw, were "privileged by custom to steal their tunes", a privilege that he claimed the Convention acknowledged when it exempted the manufacturers from the application of the reproduction right, "politely as a matter of course, like a vote of thanks".⁵⁵

The Union reversed its position in 1908, but in the meantime, the prototype of the modern music industry emerged in Britain, Western Europe and the United States. The manufacturers of pianola sheets, pianolas and gramophones (cylinders and drums were replaced early in the 20th century by pressed records) came to be known as the "phonographic industry", the name coming into general use by 1911. The immense popularity of "the people's music",⁵⁶ allied with the financial strength of the phonographic industry, created a powerful vested interest that strongly resisted any moves to granting the mechanical right.

By 1908, any astute observer could discern the phonographic industry's future as an economic superpower. In that year, the Gramophone Company Limited, the forerunner of EMI Ltd, paid dividends of 68 per cent on investment. A correspondent writing to *The Times* in 1911 pointed out that in the previous

55 Letter of G Bernard Shaw to *The Times*, "Composers and Compensation", Thursday 4 May 1911.

56 An article on 'Musical Copyright' in *The Times* of London, Saturday 29 June 1911 dealt with "the vexed question of mechanical contrivances" and "[t]he 'people's music' as it has been rather grotesquely called."

year, “7½ million records (discs and cylinders) were sold in the United Kingdom alone.” He went on to say that the “capital employed by these industries is extremely large. Over 2,000 persons are at present regularly employed by gramophone producers in this country; there are at least 10,000 dealers etc.”

The absence of debate among Australian legislators about the mechanical right illustrates powerfully how the Copyright Act of 1905 represented a bridge between the old and new worlds of copyright law. As indicated by Shaw’s protest about Swiss music box makers, composers and musical publishers were willing to tolerate the Swiss music box industry’s “theft” of music compositions. In 1905, Australian legislators no doubt knew of Swiss practice but they seemed oblivious to the explosive growth of the new phonographic industry – and the bitter resentment that the industry’s economic success aroused in composers and publishers. Seemingly ignorant of the leviathan casting its shadow (in the eyes authors at least) over the whole landscape of musical enterprise, Australian parliamentarians could congratulate themselves, that, in passing the 1905 Copyright Bill, they were, as Keating said, “creating precedents for the world”.

They perhaps felt constrained by common law precedent. In 1899, in *Boosey v Whight*,⁵⁷ a case soon made infamous in the polemics of authors’ rights proponents, the High Court in London established a precedent blessed by the phonographic industry and hated by musical composers and publishers.

Justice Stirling ruled that perforated paper rolls fed into an *Aeolian*, a mechanical wind instrument resembling a piano, functioned as part of the instrument, and were not sheets of music within the 1842 Copyright Act. Thereafter, downcast composers reluctantly accepted that, according to the law, processes that enabled the mechanical performance of a musical work – such as the recording of a song on a phonograph or gramophone record – did not infringe copyright. Gramophone companies rushed to record more works.

Compromise in Berlin

By 1908, the authors’ resentment commanded the attention of delegates at the Berne Union’s Berlin Revision Conference. Authors demanded, though with only partial success, the exclusive right to control the mechanical reproduction of musical works. The phonographic industry sent representatives to the Conference, and they pressed their case furiously.

For the first time, the Union felt compelled to accommodate the needs of a powerful new industry built on a new technology for reproducing works. Delegates insisted that the exclusive right to control the mechanical reproduction of works must vest in authors but they allowed a qualification. Members were au-

57 [1899] 1 Ch 836.

thorised to impose limitations and conditions on the mechanical right, with the result that within a few years various countries, including Britain and Australia, passed legislation allowing the compulsory licensing of musical recordings.

Union members could elect not to place any limitation on the mechanical reproduction right, and after the Berlin Conference, the advocates of authors' rights in Britain entertained solid hopes of persuading the imperial legislature to reject arguments for the legislative qualification of the mechanical right. At stake for the opposed factions were economic rights that pertained to the whole Empire.

Australia did not become an independent member of the Berne Union until 1928 and Britain signed the Berlin Convention on behalf of the dominions and possessions of the Empire. The war over the mechanical right begun at the Berlin Conference continued between 1909 and 1911 in the committee rooms and legislative chambers of the British Parliament, and the final settlement applied to Australia equally as it did to Britain.

Maintaining the 19th century nexus

The 1905 Act's silence on the question of mechanical reproduction may possibly be explained by inadvertent omission on the part of drafters and legislators. More likely, however, they chose to ignore the new conceptions in copyright policy enunciated in the Berne Convention. In doing so, they implicitly endorsed the ruling in *Boosey v Whight*, turning their backs on the extension of copyright beyond the parameters set out in the 19th century. In the 19th century schema, copyright applied primarily to literary property, and though it also protected dramatic, musical and artistic works it did so by prohibiting the unauthorised *multiplication* of the pages which embodied these works.

This much Justice Stirling implied in *Boosey*. He said that the 1842 Act conferred the right of "multiplying copies of something in the nature of a book". Perforated music rolls were "used simply as parts of a machine for the purpose of the production of musical sounds, not for the purpose of a book". If the framers of the Act intended copyright to apply to mechanical processes, they could easily have declared that music boxes or barrel organs, already long in use by 1842, reproduced musical compositions. The fact that they did not, suggested Justice Stirling, showed that they wished to restrict copyright to the species of literary property.

The most curious feature of the 1905 Act is the definition of 'Book', which eschewed the concept of a literary work as an abstraction *evidenced* by the material form in which it is captured. In the 19th century, material form usually involved paper, but the idea of abstract works, introduced in the Berne Convention, implied that copyright subject matter could be embodied, and used, in formats not yet imagined.

By assimilating the concept of ‘literary work’ in the definition of ‘Book’ and relating the definitions of both dramatic and musical works to that of ‘Book’, the framers of the Act tied the concept of literary property (and where appropriate, dramatic and musical works) to the production of books. They did so even though the most recent British copyright legislation, the International Copyright Act of 1886, referred in the provisions dealing with application of British Copyright Acts to the colonies, to ‘literary or artistic work[s]’. It is mysterious, in these circumstances, that the Australian Bill did not adopt the category of ‘literary work’.

The non-adoption, by the Bill’s drafters, of the category of ‘literary work’ therefore seems to have been deliberate, considering its provenance in the Berne Convention and use in the British legislation. They – and the parliamentarians debating the Bill – seem to have viewed the typesetting of books as the only type of mechanical reproduction to which copyright should extend *because* they considered preventing the piracy of books to be the fundamental purpose of copyright legislation. While aware of the growing possibilities of mechanical reproduction they rejected the idea of allowing literary property in anything other than books.

As a result, the Act was strongly biased towards the traditional notion of copyright as literary property – and the associated idea that the other forms of expression are protected only in the form of bound sheets or pages – when such a bias was by no means inevitable. The Berne Convention already treated literary property as an abstraction, like dramatic and musical works, that could be reproduced or adapted in the formats permitted by new technologies. The Copyright Act of 1905 therefore failed to break the historical nexus between literary property and copyright, and endorse the new reality of a world in which literary, dramatic and musical works were transformed into commodities produced en masse for the profit of giant industries.

An approach “in conformity with, and not behind, the necessities of the times” (the words of Keating introducing the Bill) would have been to recognise distinct property rights in ‘literary’, ‘dramatic and ‘musical’ works instead of concentrating the reproductive and transformative rights in books, and allowing dramatic and musical works only a right of performance. The decision to confine the scope of copyright was consistent with the view of Australian senators that copyright should protect writers, composers and artists from the predations of duplicators. Very soon, however, the 1905 Act’s limited conception of copyright became untenable as the creative interest demanded new rights and the phonographic industry reacted ferociously to some of those demands.

MACAULAY AND THE COPYRIGHT TERM

The argument over perpetual copyright

In 1905 Australian copyright legislators, for the first and last time, made law unconstrained by international regulatory norms. Not coincidentally, they were especially concerned with an issue that became non-negotiable after the Berlin Conference of 1908. This was the ancient sticking point of copyright lawmaking, the duration of protection. For centuries, publishers maintained an unshakeable interest in the length of their monopoly to print books. Historically, the publishers' interest, the copyright term, and copyright regulation were inextricably linked.

Over the centuries, the British literary mind seemed to locate publishers in the same ambiguous moral universe as Shylock. Usurers in spirit, the publishers felt ill-used. They demanded their pound of flesh and hedged the field with restrictive practices and yet – they made possible the world of books. Like Shakespeare's anti-hero, they were indispensable but unloved. The copyright debates of the early 20th century testify to the grim disrepute which came to accompany their activities.

Under Henry VIII, publishers printed books under royal patents. In 1557 a group of them formed the Stationers' Company, which licensed printing rights to members and controlled all production. In the Elizabethan and Stuart periods, the Stationers collaborated with the Star Chamber in the suppression of proscribed literature. Abolition of the Star Chamber in 1641 and the 15 year disappearance of the Crown hardly dented the continuing enlargement of the Company's monopoly. In 1643, the Stationers petitioned for a renewal of their monopoly, arguing for copyright in strikingly modern terms.⁵⁸

A 1643 ordinance, succeeded by an Act in 1662, entrenched their monopoly, allowing the Stationers' to license the printing of books, and prohibit the printing of certain works. The Crown renewed the 1662 Act twice more and the legislation lapsed in 1694. In the ensuing period of instability, the members of the Stationers' Company were threatened with competition from printers springing up around the nation. Now far less interested in censorship, the Crown showed no in-

58 See Plant, "Economic Aspects of Copyright in Books", *supra*. Plant enumerated the six parts of the Stationers' argument. Their second part outlines a species of the incentive theory of copyright: "A well-regulated property of copies amongst stationers, makes printing flourish, and books more plentiful and cheap; whereas Community (though it seems not so, at first, to such as look less seriously, and intently upon it) brings in confusion, and many other disorders both to the damage of the State and the Company of Stationers also; and this will many ways be evidenced."

clination to renew their privileges. To resolve their dilemma, the Stationers – principally London booksellers – travelled the time-honoured route followed since 1557. They lobbied the Government remorselessly, arguing stridently for perpetual copyright.

The Government only partly rewarded their boldness. In 1710 the *Statute of Anne* conferred copyright on *authors*, or their assigns, for a period of 14 years from publication (renewable for the same term by authors who were alive at expiration). It also established penalties for piracy. The Act seemed to follow the scheme established for patents in the 1623 *Statute of Monopolies*, and to embody a narrow conception of the scope of property in books. Although the legislature evidently wished to open the book trade to competition, and to confer bargaining power on authors, the Statute of Anne seems to have benefited the London booksellers. They were the assignees of most authorial copyright and the 14 year term conferred a significant economic benefit.

The booksellers, used to 150 years of monopoly, were not satisfied. Although they knew that the economic utility of literary works usually vanished within three years of publication, they were psychologically accustomed to the prospect of indefinite privileges and could not countenance limitation. For three decades after the Statute of Anne, they struggled to contain their feelings but eventually the pressure of competition from Irish, Scottish and North American publishers printing cheap editions became unbearable.

Led first by the able and highly successful London bookseller, Andrew Millar, they sought from the middle of the 18th century to secure a common law decree that copyright lasted forever. Their efforts continued into the 19th century and prior to the enactment of the Copyright Act of 1842, some proponents of the bill claimed that literary property should, like real property, exist in perpetuity. They were rebuffed. In the earlier period, Millar and his fellow publishers met a mixed reception but ultimately their efforts ended in failure. The public, and authors, split in their position on the perpetual term. Opponents of the perpetual term, including Dr Johnson, while accepting the need to remunerate authors for their work, pointed out that literary property should become, after a time, the possession of the public.

The booksellers asserted the existence of perpetual common law copyright in a series of cases beginning in 1750 and leading to *Donaldson v Becket* in 1774.⁵⁹

59 *Millar v Kinkaid* (1750) 98 ER 210; *Tonson v Walker* (1752) 36 ER 1017; *Tonson v Collins* (1761) 96 ER 169; *Millar v Donaldson* (1765) 28 ER 924; *Millar v Taylor* (1769) 98 ER 201. On the cases, see Mark Rose, *Authors and Owners, The Invention of Copyright*, Harvard University Press, 1993, and Bently and Sherman, *supra*. Rose identified the case of *Pope v Curll* (1741) (the plaintiff was Alexander Pope), as the first instance in common law of a judge “severing the immaterial from the

They maintained that this copyright overrode the restricted term of 28 years from publication granted in the Statute of Anne in 1710, but in *Donaldson*, the House of Lords rejected their arguments. In a vote of all peers, not just the Law Lords (who voted narrowly in favour of the booksellers), the Lords repudiated the idea of common law copyright.⁶⁰

To reach this position, the Lords' reversed their own judgment, reached five years earlier in *Millar v Taylor* (1769). In that case, the Law Lords, led by Lord Mansfield, found that the author's copyright survived elapse of the term set out the Statute of Anne. The contrary ruling in *Donaldson*, however, did not entirely settle debate. Advocates of the perpetual term could point out that the Law Lords were closely tied on the vital question of whether statute extinguished the perpetual term of common law copyright, and it is even possible that they voted narrowly in favour of common law copyright.⁶¹

However, because dogmatists for the perpetual term could argue that *Donaldson v Becket* had not truly settled the argument about term, their opponents failed to inter the idea of perpetual common law copyright with the 18th century. Before 1842, polemicists, authors and publishers expended considerable effort promoting the idea that literary property should be treated in the same way as real and personal property – a personal possession with no limit placed on the term of ownership.

Macaulay's intervention

Before 1842, the parliamentary petitions of authors such as the poet Wordsworth popularised the idea of a creative work as a personal possession belonging by natural right to the author. Writers as diverse as Robert Southey and Charles Dickens passionately accepted the argument of natural rights and they inspired Thomas Noon Talfourd, a parliamentarian and a friend of Wordsworth, to take up cudgels on behalf of the suffering population of authors. He introduced his first copyright bill in 1837 but his second bill of 1841 began again the great debate over term.

Although he stated that justice demanded perpetual copyright, Talfourd sought a copyright term of life of the author plus 60 years. This period approx-

material aspect of literary property". He also cited Pope as the second known user of the term "copyright", in a letter to a bookseller in 1727 and identified Timothy Childe as the first, in the Stationers' Register for 31 May 1701.

- 60 See Rose, *ibid*. In the 18th century legal issues although considered in substance by the Law Lords were actually voted upon by the Lords as a whole.
- 61 Rose discussed the possibility that the clerk of the House misattributed votes, and that the Law Lords voted by a majority of either 6–5 or 7–5 for common law copyright.

imated to the posthumous term of 50 years eventually accepted by the Berne Union at the Berlin Conference of 1908, and greatly outstripped the posthumous period of 30 years set out in the Australian Copyright Bill of 1905. It also commanded considerable support. Supposedly the possibility that the family of Sir Walter Scott would soon lose copyright in his works aroused the sympathy of the House of Commons.⁶² But the proposed term failed to win the final support of Parliament after the historian and poet Thomas Babington Macaulay persuaded the Commons of the viciousness of long publishing monopolies.

In 1831, Macaulay made his parliamentary reputation with a dazzling speech in support of the famous Reform Bill that remodelled the electoral system and extended the franchise. Ten years later, he was at the height of his literary success. But unlike Dickens, who in the same period was histrionic about the wickedness of copyright piracy, he regarded copyright as a necessary evil not a moral necessity. The legislature, he said, need only to look to the public interest, not the heavens or natural law, to determine how copyright should be constituted. Above all, the rights of the owner ought to be subordinate to the needs of the public.

With his attacks on the idea of lengthy posthumous copyright, Macaulay placed the public interest in optimum dissemination of information at the forefront of copyright policy. Coming from the English liberal tradition, and reacting to the illiberalism that is a dominant tendency of copyright law-making, he placed readers’ interests before those of authors or publishers. Macaulay’s career of copyright controversy lasted for little more than a year, from the introduction of a Copyright Bill in January 1841 until the appearance of its successor in March 1842. The Bill passed into law on 1 July 1842 but only after much agonised consideration of his and Talfourd’s passionate arguments in the previous year.

In the end, the parliamentarians accepted Macaulay’s arguments in favour of a reduced copyright term as well his formula of life plus seven years or 42 years from publication, whichever occurred later (according to a witness to the Gorrell Committee in 1909, Macaulay chose the period of 42 years simply because the debate over the second bill took place in 1842).⁶³ The idea of posthumous copyright lasting 60 years – as proposed in Talfourd’s Bill introduced on 29 January 1841 – seems to have roused him to something like noble rage. An infrequent parliamentary speaker, Macaulay rose on 5 February 1841, after hearing Talfourd speak in support of the Bill, to make the second of his two famous speeches in

62 Evidence of John Henry Parker, retired publisher, before the Royal Commission on Copyrights 1876–78, quoted in Arnold Plant, “The Economic Aspects of Copyright in Books”, *supra*.

63 Evidence of Charles Whibley to Committee on the Law of Copyright 1909–*Appendix of Statements of Evidence Submitted to the Committee* (Cd 5051). According to Ricketson, *supra*, the influence of France, which chose the term arbitrarily, led to the adoption in the Berne Convention of the 50 year posthumous term.

the Commons.

Some of his words may prove prophetic in the age of the internet:

Just as the absurd acts which prohibited the sale of game have been virtually repealed by the poacher, just as many absurd revenue acts have been virtually repealed by the smuggler, so will this law be virtually repealed by piratical book-sellers ... Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. On which side indeed should the public sympathy be when the question is whether some book as popular as Robinson Crusoe, or the Pilgrim's Progress, shall be in every cottage or whether it shall be confined to the libraries of the rich for advantage of the great-grandson of a bookseller who, a hundred years before, drove a hard bargain for the copyright with the author when in great distress?

Although his argument was long and rhetorically complex, Macaulay summarised the dangers of copyright in a few concise sentences:

For consider this; the evil effects of the [copyright] monopoly are proportioned to the length of its duration. A monopoly of 60 years produces twice as much evil as a monopoly of 30 years, and thrice as much evil as a monopoly of 20 years.

Macaulay considered the long posthumous term an evil rather than copyright in itself, which he thought a “necessity” to remunerate authors, although the “tax is an exceedingly bad one”. He accepted in principle that consanguinity provided sufficient reason to allow posthumous copyright. But, he said, reality often trduced the expectations of heirs. A posthumous term carried the promise of future profit and this promise attracted bidders. As often as not, the author would sell the heir’s copyright patrimony to the highest bidder.

Thus, at the time a book should be freely available to the public, production and price were fixed according to the prerogatives of monopoly. The longer the term of monopoly the worse the abuse of the public. The benefit to authors was not a primary consideration. “Considered as a boon to them,” he said, “it is a mere nullity, but considered as an impost on the public, it is no nullity but a very serious and pernicious reality.”

Turning to the other main argument for posthumous copyright, that it provides the author with an incentive to produce for the economic benefit of descendants, Macaulay again pointed out that theory did not describe reality. He declared that “an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action.”

Macaulay considered copyright the only productive alternative to a system of patronage but he rejected the idea of copyright as a commodity that might be

traded in the distant future. It existed for one reason only, because “men whose profession is literature ... must be remunerated for their literary labour.” He made fun of the natural law claims made for copyright. “Might not the *pars rationabilis* of our old law have a fair claim to be regarded as of celestial institution?” he asked. “Was the statute of distributions enacted in Heaven long before it was adopted by Parliament?”

Macaulay won the battles of 1841 and 1842. His ideas fell out of favour after 1905, when Australian legislators remembered his arguments with admiration. He established in public debate, however, a notion of the public interest and an understanding that rights awarded for a just cause may be subverted and abused. Macaulay rejected the idea of copyright as a quasi-sacred commodity voicing the scepticism that informed, but did not significantly influence, copyright debates in the 20th century.

THE DEBATE OVER THE 1905 COPYRIGHT ACT

The posthumous term and publishers

The Senate provided the forum for the deepest consideration of the 1905 Copyright Bill and the debate concentrated overwhelmingly on the duration of copyright, with only limited excursions outside that topic into matters of newspaper copyright, penalties, and the overlap of copyright and designs legislation. Sir Josiah Symon, who raised the question of term, in substance paraphrased Macaulay, whom he quoted generously. While copyright was necessary because we “cannot possibly have a supply of good books unless men of letters are liberally remunerated”, there were, he said, “great disadvantages in connexion with copyright, unless framed upon lines and within limits which are, as far as possible, just.” The greatest disadvantage was that “copyright is a monopoly, and like all monopolies, it is evil in essence.”

In advancing this argument, Symon lacked Macaulay’s subtlety for Macaulay attacked the long posthumous term without condemning copyright itself. Symon noted that the difficulty for legislators lay in fixing the term but he was certain that copyright ought to expire with the death of the owner – a position derived from Macaulay’s proposition that a long posthumous term turns copyright into a commodity: “an evil, I venture to think, exists especially in giving posthumous monopoly ... rather than a long fixed period dating from the publication of the book intended to be protected.”

Two factors relevant to contemporary copyright analysis determined Symon’s position: first, the inequality of bargaining power between the creator of copyright works and the producer of copyright material, such as a publisher, and second, the public interest. In regard to the first issue, Symon reflected a

sentiment not especially evident in 1842 but prevalent among parliamentarians, Australian and British, in the early part of the 20th century: solid dislike of publishers.

Many politicians believed that publishers exploited authors ruthlessly. The Labor Senator, Henry Givens, declared that publishers were the main beneficiaries of copyright law. They, he said, “get a rich return, while the authors very often go hungry”, and made “handsome profits out of copyright bought at an exceedingly low figure”. Authors were “a struggling class and publishers have taken advantage of their position and shamefully sweated them”.

Symon’s statement captured the position aptly enough:

And after all, we must not forget that it is not the author who derives the greatest benefit from any system of copyright, and we must be careful not to place in the hands of others than the authors the benefit to be derived from such a system. It is the booksellers and publishers, who may drive a hard bargain with the author for the copyright of his work, and who may, after the author’s death, if you make the period of copyright too long, enjoy wealth ... intended to be for the author and his descendants.

Here again the ghost of Macaulay stood at Symon’s side. Macaulay responded to Talfourd’s description of the poverty of Milton’s granddaughter with the observation that perpetual copyright in the hands of a publisher barred her from enjoying a share of her grandfather’s estate – not the limited statutory term against which Talfourd agitated. In doing so, he turned the argument in favour of a long term for authors on its head, showing how a statutory right of great longevity does not automatically work in favour of its intended beneficiaries.

As Macaulay pointed out, the creator, when presented with the immediate advantage of whatever reward is held out for assignment of the right, will often disregard future advantage in favour of present benefit. Because the first owner of copyright typically relies on an intermediary to provide financial and other wherewithal to expose the subject matter of copyright to the market, the owner’s bargaining power is usually inferior to that of the intermediary. As a result, the owner often loses control – or ownership – of the right.

Senator Givens, who spoke loudest in the Senate against publishers, certainly took inequality of economic power between author and publisher for granted. Although silent on Symon’s strictures about posthumous copyright, he evidently felt strongly that copyright should function as a system of preferment for authors, *not* as an economic boon to the mediators between the author and market. By today’s standards, his solution, comprising a limited right of assignment (in short, no assignment to publishers) and compulsory royalties, was drastic. But what is more significant is that in 1905, Givens and Symon wished to limit the opportunity for assignees – like publishers – to secure, through superior bargaining power, the

rights intended for creators.

The public interest

They were concerned about the danger that the posthumous term, in their opinion, posed to the public interest. Symon introduced to Australian debate the idea of the public interest in copyright. Speaking of the publisher’s willingness to “levy blackmail”, he said, “the public have an interest in this; the public are entitled to have at the earliest possible period the benefit of a man’s intellect thrown open to them at the cheapest possible rate”. The Labor Senator Hugh De Largie used similar language. Arguing that piracy should be condoned if produced a supply of cheap books, De Largie twice used the phrase “public interest”.

Givens took up the theme and also contributed another novel phrase bandied about in subsequent Australian political arguments. Australians should fear, he said “a tax on knowledge” that would result from the term proposed in the Copyright Bill of life plus 30 years. “That period,” said Givens, “is altogether too long.” Above all, he said, the rights of authors were paramount *provided* they “shall not interfere with the welfare of the community.”

Apart from a long and learned dissertation on the history of copyright when he introduced the Bill, Senator Keating remained mostly in the background of debate, apparently most interested in securing the passage of the bill without significant alteration. Symon and Givens played the largest roles but they did not speak to an uninterested or hostile audience. Their fellow Senators accepted their recommendation on term and rejected the Bill’s proposed period of life plus 30 years, substituting Macaulay’s formula of seven years after death or 42 years from publication, whichever elapsed first. In doing so, they repudiated one of the most revered elements of modern copyright law – the lengthy posthumous term.

The momentous decision to choose a shorter copyright term amounted to rejection of the idea of copyright as a commodity and a declaration in favour of making copyright the property of the author alone. Givens took an even more radical view. He believed that the system of literary property impoverished the author and debased works. Copyright should function, he thought, simply as a boon to authors, not publishers. He proposed legislation that restricted the author’s power of assignment and allowed for payment of compulsory royalties.

Givens’ concern over equality of bargaining, and his willingness to disrupt accepted commercial practice, reflected his days as a trade union organiser in Queensland, but his proposals for establishing a copyright law that very largely benefited authors were too romantic even for the 1905 Senate. No-one would agree to limit the owner’s right of assignment, explicitly recognised in copyright law since 1842, and underpinned by contractual principles. Givens, though, recognised more clearly than his colleagues that the copyright system, based on authors’ rights, delivered primary economic power into the hands of the produc-

ers, not the originators, of copyright material.

Considering the irreducible character of modern copyright law, it is worth remembering the extent to which Givens considered the economic rights conferred by copyright law to be negotiable. He viewed copyright as a plastic creation that could be moulded by principles of fairness and equality, and in applying those principles, he looked to the previous half century of political resistance to the claims of property and capital. But he could not alter the reality that copyright was a thing to be traded to the most successful bidder. Once the Statue of Anne replaced the old licensing system and assimilated the concept of exclusive possession – which confers ownership and the right of disposal – there could be no turning back. Once adopted, principles of property usually endure.

Even so, in 1905, the elaboration of secondary rules remained up for grabs. It was still possible to argue about the copyright term and to link it, as Symon did, to justice for author and public. Symon won the argument on term in 1905 (against Keating's wishes) but this victory for limitation of exclusive rights lasted for only six years. The Berne Convention released a tide that swept away the arguments of Symon, Givens and others in the Australian Parliament, and drowned the prophetic voice of Macaulay.

By 1912, when a new statute replaced the legislative innovation of 1905, most copyright legislators seemed scarcely to understand arguments about the public interest. That in 1905 parliamentarians considered themselves at liberty to pillory publishers, and condemn the long posthumous term as a public abuse, illustrates how completely Australia came to surrender legislative independence to the law makers of the Berne Union and, later, other international bodies. Later politicians accepted norms that would have made many men of the 1905 generation turn in their graves.

A BRIDGE TO THE MODERN

The Copyright Act of 1905 seems, in style and arrangement, strikingly modern, its provisions departing gracefully from the outdated formulations of the existing British statutes. Its drafters preserved the old conception of books instead of introducing the concept of literary works and ignored the reality of mechanical reproduction. On the other hand, they effected innovations in the sum of rights conferred on copyright owners and the remedies available to them. In this light, the Act appears both modern and pre-modern.

It is modern in style, structure, and the new flexibility displayed towards the categories of copyright, and their application – seen, for example, in the provision for divisibility of copyright and transformation of works. It is pre-modern in the sense that drafters and legislators did not consider themselves bound to implement the Berne Convention, or even to follow British precedents (though

parliamentarians were careful not to enact legislation that offended the provisions of British legislation). They retained a limited view of the scope of copyright law and adhered to 19th century conceptions about literary property and the other categories of subject matter protected by copyright.

The generation of 1905 took account of the Berne Convention and legislated in general (though not always direct) conformity with its edicts of 1886 and 1897. They did so not because they felt a compulsion to follow international developments. Rather, they supported the principle of international copyright reciprocity, and in any case, before 1908 nothing in the Convention texts offended the sensibilities of a legislature that supported authors’ rights. This kind of independence soon became impossible. Britain’s response to the Berne Union’s Berlin Revision Conference established the Convention’s primacy over imperial legislatures. Australians accepted the axiom that the Berne Union led and national parliaments followed.

The premises accepted by Australian legislators in 1905 thus differed radically from those of 1912. In 1905, the legislators did as they saw fit, while in 1912 they accepted without demur the Convention’s authority to prescribe binding rules. The distance between the world of copyright in 1905 and that in 1912 is best illustrated by the different approaches of legislators to the question of mechanical reproduction. In 1905, they seemed uninterested in the phonographic industry. By 1912, following heated debate in Britain about the industry’s claims for legal preferment, few politicians doubted that its demands must in some way be accommodated.

The 1905 Act, despite its appearance of modernity, is characterised by a possibly wilful absence of foresight about the new way in which copyright material could be reproduced and performed. Its primitive division of copyright into literary and artistic property and the failure (or refusal) to grasp the idea of property in mechanical reproductions would soon become untenable. With the emergence of the mechanical reproduction right, copyright ceased to be the sole province of authors, and in time became an instrument of industrial power utilised with ferocity and relentless premeditation.

In sum, the 1905 Act marked the beginning of the modern era of copyright. From this time, legal privilege that had its beginnings in the control of books, the Stationers’ monopoly, the emergence of publishers, and the idea of the author’s moral entitlement would be transformed into a legal device for protecting and enlarging the giant industrial revenues of the music, film, publishing, broadcasting and software industries.

Chapter 2 – International developments

TRANSITION TO THE MODERN ERA

1905 marked the high tide of Australian independence in making copyright policy. The tide then ran out. Between 1908 and 1910, the Berne Convention's Berlin Revision, the British Board of Trade's inquiry into the law of copyright, and the Imperial Copyright Conference, created new policy for the British Empire. Australia responded promptly to developments, enacting copyright legislation in 1912 that incorporated the British Copyright Act of 1911.

The new legislation unambiguously recognised property in abstractions and made clear that copyright was not subject specific: it did not apply in distinct ways to literary property – books – or musical or dramatic ‘pieces’ or the manifestations of ‘fine arts’. It applied to mental formulations designated ‘works’ and the physical configuration that allowed a work to be fixed, multiplied and distributed. In short, distinct copyrights could apply to the work *and* the physical format that embodied it. Legal protection lasted for 50 years after the death of the author or, in the case of the product embodying a work, 50 years from the date of production.

The consequences of these changes were momentous. Once nations agreed that the physical format embodying copyright works was mutable – not restricted to a fixed category such as books – and that each format attracted copyright protection, they opened the way for the industries that fixed works in records or film to control the multiplication of copies. Authors, the intended beneficiaries of copyright legislation, would now share its benefits with the film and music industries. The industries did not consider copyright protection a necessary condition for economic success. But the aggressive drive for authors' rights forced them into a game of brinkmanship that secured new forms of analogous copyright undreamt of a few years earlier. The fledgling bird released in 1905 now truly took wing.

The half dozen years following the Act of 1905 marked an end and a beginning. All vestiges of copyright literalism, the idea that property in abstractions

is impossible, were swept from legal discourse, and Macaulay's arguments for a narrow reading of copyright's scope rejected.

COPYRIGHT MODERNISM

The London booksellers' agitation for perpetual copyright failed in 1774, but their efforts marked the beginning of a campaign that, nearly 140 years later, secured legislative recognition of intangible property. Their arguments, sustained by moral certitude, continue to be reprised in favour of extending the reach of the law. Great names of English law, including Lord Mansfield and William Blackstone,¹ asserted the natural right of authors to property in their work and, consistent with John Locke's appropriation theory, a right to own the product of their labour.

Inevitably, the 18th century debate settled around the question of whether an abstraction could be owned. The booksellers had no doubt. So long as the author's work could be realised in physical form, they said, the requirements of property were substantively satisfied. This modernist thesis – modern because the rationale is still commonly advanced today – said that as a matter of justice, the object of protection must be the mental composite given shape by the author of a work.

By contrast, the argument against literary property asserted that mental formulations could not be owned. However real, they, unlike realty or chattels, could not be possessed, occupied, disposed of, or destroyed. A book could be owned but not its contents. In the words of Attorney General Thurlow in *Donaldson v Becket* (1774), a literary work was “beyond the comprehension of man's understanding and hardly capable of being defined”. As Justice Yates said in *Millar v Taylor* (1769), the property alleged by the booksellers “is in the mind alone; incapable of other modes of acquisition or enjoyment, than by mental possession ... these are the phantoms which the author would grasp and confine to himself.”²

The argument over literary property thus raised, at an early stage in copyright history, the problem of applying to abstractions rules designed for the physical world. If property in a work arises on material fixation, materiality determines ownership and the work itself can only be said to be possessed nominally. Undefined according to the canons of physical measurement, existing in the spirit realm, the “phantom” to which Justice Yates referred cannot be said to conform to the ordinary rules governing property subsistence.

1 William Murray (later Lord Mansfield) in *Millar v Kinkaid* and *Tonson v Walker*, and Blackstone in *Tonson v Collins*.

2 Bently and Sherman, *supra*.

Literary property advocates, however, maintained that a book was simply the physical means for realising the work. The book – a chattel – and the work – literary property – were conceptually distinct but physically indivisible. Justice Aston made this point in *Millar v Taylor*. He asserted that “when ... communicated to the sight and understanding of every man by the *medium of printing*, the work becomes a distinguishable subject of property.”³

It was enough, so far as property rules were concerned, for mental work to be reduced to physical form. The work could then be enjoyed by possession of the thing in which it was embodied. No title was claimed in the ideas expressed – the author owned the expression of the ideas.⁴ For literalists such as Thurlow, this point of view was untenable. It was not sufficient to say that realisation in material form of an abstract work satisfied the absolute legal requirement that property must be definable. The law recognised property in certain incorporeal subject matter, such as the right to sue to recover a debt, but in such an instance, the property consisted of something readily definable – a legal right. The idea of literary property, however, required acceptance of the concept that while material form defined the protected subject matter, copyright actually vested in something distinct, intangible, intrinsically indefinable. For the literalists, such a formula stretched the idea of property too far.

Though the literalists won the argument in *Donaldson v Becket*, the extended litigation over common law copyright began the march of copyright modernism. Perhaps because of the intensity of controversy, and closeness of the final vote among the Law Lords, the interested public could accept the idea of property in the invisible. Sympathetic legislators, however, continued to work in a conceptual fog, making no distinction between property in a ‘book’ and the expressive contents of the book.

In the British Empire, the fog did not lift until 1911, when the new British Act adopted the scheme of works enunciated in the Berne Convention. Perhaps the absence of conceptual clarity evident in the Copyright Act of 1842, and to a lesser extent, the Australian Act of 1905, pointed to uneasiness over the doctrine of abstract property. The drafting of the latter Act, in particular, seemed

3 Discussed Bently and Sherman, *supra*, p28.

4 Supporters of literary property drew a clear distinction between the book and its literary contents. As Rose, *supra*, noted, Blackstone’s *Commentaries* popularised the idea of property in immaterial works, making clear that the subject of legal protection was the invisible literary work. “The paper and print are merely accidents, which serve as vehicles to convey [the author’s] style and sentiment to a distance. Every duplicate therefore of a work ... is the same identical work, which was produced by the author’s invention and labour.” However, the drafters of the 1842 Act did not explicitly distinguish between works and the material form to which they were reduced.

consciously to avoid recognising a flexible category of works that could extend copyright much beyond the world of literary and musical publishing.

Literal arguments against copyright seemed to fall out of favour almost as soon as the Lords handed down their decision in *Donaldson v Becket*. Why this was so is not hard to understand. A century before the literary property debates, the philosopher John Locke asserted that labour supplied the basis for the creation of property, and his older contemporary, Thomas Hobbes, stated that within the boundaries created by the social contract, individuals could construct the world as they saw fit. Taken together, these principles provided the basis for a permissive view of property rights that by the late 18th century would take for granted the right of individuals to own the fruits of their intellects.

Thus the victory of the literalists in *Donaldson v Becket* proved anomalous. Copyright literalism dissolved in thin air and the modernist argument infiltrated the legislative consciousness. When, in 1886, the Berne Convention created international consensus in favour of property in works, it was only a matter of time before Britain enacted copyright rules that reflected the new understanding.

The influence of the Convention, and the political activity of the phonographic industry, defending itself against the assertion of the mechanical reproduction right, emerge as the twin determinants of copyright policy-making in the years 1905–1912. The British and Australian Copyright Acts of 1911 and 1912 showed no traces of the literalism discernible in the statutes they replaced. By the end of the first decade of the 20th century, copyright was no longer explicitly tied to books or any other format. The modern era had truly begun.

THE BERLIN CONFERENCE OF 1908

The scope of authors' rights

The Berlin Conference called to discuss revisions to the Convention texts adopted in 1886 (in Berne) and 1897 (in Paris), spread the copyright gospel to the world.⁵ Britain promptly ratified the Conference text on behalf of the Empire and set about giving legal effect to the agreed principles. Soon came the 1911 Copyright

5 The decisions of the Conference affected a large proportion of the world's population. Membership had grown slowly since 1897 to 16 nations (France Belgium, Spain, Italy, Monaco, Germany, Sweden, Norway, Denmark, Switzerland, Luxembourg, Britain, Haiti, Honduras, Tunisia and Japan) but 21 non-Union members attended as observers (including the United States and most of the Latin American States) and the membership included, by default, the imperial possessions of Britain (including Australia) and France. The US and Latin American countries established parallel conventions.

Act, adopted the following year in the Australian Copyright Act.

The Berlin delegates systematically enlarged the scope of authors' rights. Translations, adaptations, arrangements of music and other transformative reproductions of literary and artistic works were now to be protected as original works. Delegates confirmed the principle of national treatment. Union members were forbidden from making the grant of copyright dependent on formalities such as registration. The Convention permitted the author of a work to control its translation and prohibited reproduction of a journal article without the writer's consent. Newspaper articles could, in the absence of explicit prohibition, be reproduced in other newspapers. Indirect appropriations, or adaptations – including dramatisations and abridgements – made without consent of the author were also prohibited.

The delegates also agreed to a copyright term of life plus fifty years or fifty years from the date of making a mechanical reproduction,⁶ making clear that copyright had a life of its own distinct from that of the author. Copyright in a work could, in theory, be disposed of as a commodity by persons unknown to, and unconnected with, the author. Most significantly, the Conference text declared that authors should have the right to authorise mechanical recording of musical works and the public performance of those works. With this proposition, they started a battle that began the transformation of the copyright system into the instrument of industrial power.

Until now, statesmen, politicians, and no doubt the interested public, could happily assent to the message of authorial entitlement spread by Victor Hugo, Bernard Shaw and others. It symbolised, seemingly, a benign and useful aspiration. But if justice for authors meant the right to control, and possibly disrupt, the production of phonograms, on which a new industry relied for profit, and the music-loving public for pleasure, the deserving author suddenly became a more sinister figure.

The fatal concession

Now, for the first time, the Berne Union overreached itself. The advocates of authors' rights ran into opposition. For the first time in the history of international copyright law-making, the creative interest found it must bend to the industrial if conflict arose. In one sense, the authors' rights movement caused its own downfall, though the influence of the Convention testifies to the Union's remarkable success in realising its program. From the beginning, the admixture of mercenary motives hopelessly contaminated the ideal of moral justice for creators. Berlin delegates now discovered that if authors wanted the right to control "indirect ap-

6 Members were not obliged to introduce the 50 year term into domestic law but most did.

propriations” of musical works by mechanical reproduction, they would have to deal with a ruthless industry not inclined to give much weight to considerations of moral rights or natural justice.

At Berlin, the phonographic industry fought the battle for the producer interest and won a defensive victory. The amending text laid down that members could make the grant of the mechanical right subject to “reservations and conditions”, meaning that a country could introduce a compulsory licensing scheme that allowed reproduction without consent. Countries could even grant manufacturers a parallel copyright in mechanical reproductions. It is not certain that the industry would have involved itself in copyright regulation had the Berne Union not recognised the author’s mechanical copyright. In any event, in securing provision in the Berlin text for countries to impose reservations and conditions on the right, the industry’s representatives established a pattern of active persuasion imitated by different industries in the future.

They also ensured that their industry and the fledgling film industry could expect, over time, to receive the benefits of property rights. And what could in principle extend to these industries could extend also to the broadcasting industry and any other industry reproducing or disseminating works. The final decision of the Conference, to recognise a new category of *cinematographic works*, went largely unnoticed, but it also symbolised the delegates’ expansive conception of copyright as a mode of regulation that could extend flexibly to encompass new technological means of utilising and disseminating works.

After 1908, authors saw the apparent boon of a mechanical reproduction right undone by the fatal concession allowing countries to limit the scope of the new right. For all their appeals to a moral authority derived from the founding principles of the Union, they discovered that sentiment is no safeguard against the cold calculations of commerce.

THE GORRELL COMMITTEE

Soon after the Berlin Conference ended, the British Board of Trade appointed a copyright committee, chaired by Lord Gorrell, to examine the amended Berne Convention. The Gorrell Committee reported in December 1909, recommending that Britain ratify the Convention.⁷ Then in 1910 the Government produced a copyright bill and called an imperial copyright conference to consider the bill. A

7 The British delegates informed the Berlin Conference that any opposition of Britain’s self-governing dominions would present a serious obstacle to Britain’s accession. The dominions gave assent in 1910 at the Imperial Conference of 1910. All the parties accepted the provisions of the draft British Copyright Bill prepared by the Board of Trade, and agreed to adopt substantially similar legislation.

new bill, introduced in 1911, passed into law as the imperial Copyright Act. The following year, Australia adopted the legislation in its new Copyright Act.

The Times described the Gorrell Committee as “very strong and impartial”. It consisted of literary and music publishers, Oxford University’s first professor of English, an artist, a playwright and two lawyers, including Sir Thomas Scrutton, an advisor to the Government and author of a famous late 19th century text, *The Law of Copyright*. Scrutton also appeared for the plaintiff in *Boosey v Whight* and could be expected to firmly endorse the author’s right to unfettered control of mechanical reproduction.

So constituted, the Committee stood firmly for authors’ rights and could be expected to endorse implementation of the Berne Convention in British law, which it duly did. But without a single member who understood the driving commercial necessity that created animosity to proposals for an unqualified mechanical reproduction right, the Committee struggled to answer the main question placed before it.

The mechanical reproduction right

Its members did not doubt that Britain should implement the revised Berne Convention but they faced a difficult choice. Should they recommend qualification of the mechanical reproduction and allied performance rights prescribed by the revised Convention, or insist that the rights vest absolutely in authors? Article 13(1) of the revised Convention stated:

The authors of musical works shall have the exclusive right of authorising (1) the adaptation of those works to instruments which can produce them mechanically; (2) the public performance of the said works by means of these instruments.

If enacted, these rights would give British music composers and publishers unprecedented power to dictate commercial terms to the manufacturers of records. Qualification, permitted by the Article 13(2),⁸ would return bargaining power to the manufacturers. As the Gorrell Committee heard, the recording industry grew wealthy from the 1880s by recording musical works without consent.

After 1899, *Boosey v Whight* stood as authority for the principle that mechanical processes that facilitated the mechanical performance of musical works did not infringe copyright. From the distance of more than a century, the judgment

8 “Reservations and conditions relating to the application of this article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.”

of Justice Stirling can be seen as the last gasp of copyright literalism. He saw clearly that the creators of the 1842 Act intended that copyright apply to books, in a broad sense that comprehended dramatic, musical and fine art compositions.

They did not intend that definitions of copyright be stretched to include mechanical operations, or indeed abstractions that could not be rendered on a page.⁹ The authors' rights movement brooked no such posited limitation. Advocates insisted that authors must control mechanical processes that allowed for the performance or dissemination of works. The profit motive silenced dissent. Thus Article 13(2) stoked controversy. Authors and publishers on one hand, and the recording industry on the other, prepared to battle before Parliament for the right to control the manufacturing process.

The Committee received 25 submissions from artists, architects, musicians and writers, four from publishers, four from newspapers and printers, and 14 from the phonographic industry. Authors, the creators of literary, dramatic, artistic and musical works, comprised an active faction that pursued its interests independently from the literary and musical publishers. George Bernard Shaw gave evidence to the Committee on behalf of the Society of Authors and Georges Mailard spoke for the International Literary and Artistic Association, the principal instigator of the Berne Convention.

Amazingly, however, only one music publisher gave evidence to the Committee, even though the recording industry was, according to the publishers, destroying the sales of sheet music. On the other hand, the Copyright Association and the Publishers' Association ably represented literary publishers. The Publishers' Association cunningly sought to enlarge the author's reproductive right to include methods of reproduction not yet discovered, proposing that legislation refer to reproduction by "mechanical and other means".

The Columbia Phonograph Company pointed out that the phonographic industry had become more than an economic phenomenon:

During the present generation, there has sprung up an industry in instruments that mechanically reproduce music, so vast and far-reaching that in every civilised country on the globe talking machines and piano players are influencing the lives and temper of the masses of the people, bring into the homes of the rich and the poor, but especially to the humbler classes of the community, the elevating and educational advantages of the purest and most beneficent of the arts.

9 An interesting aspect of the judgment in *Boosey v Whight* is that Justice Stirling's reasons for denying copyright in the perforations in a music roll in some ways prefigure the arguments given by some common law judges in the 1980s for not recognising copyright in the object code of computer programs. Justice Stirling considered that copyright vested in the literary notation of musical symbols on a page but not perforations "for the production of musical sounds".

Compulsory licence

What is most noticeable in the statements of evidence is the phonographic industry's determined pressing of the case for a compulsory licence to record musical works. For the spokesmen of the recording companies, 20 years of effort and investment were at stake and they pushed their message relentlessly. John Drummond Robertson, the manager of the Gramophone Company (the forerunner of EMI), and later prominent in public debate over the 1911 Copyright Bill, drew the Committee's attention to the industry's economic contribution:

How great are the interests involved in the case of a company like our own with its branches and agencies and affiliated companies extending over Europe, Asia, Africa, and Australasia requires little demonstration. In illustration we only adduce that during the last year, we, ourselves, paid no less than £150,000, in wages and salaries, and that the tangible assets of our company, as shown in its last Report, amounted to £757,000.

The spokesmen of the record companies based their arguments on principles of fairness. Why, they asked, should a legitimate industry contributing to employment and satisfying public demand, now be forced to surrender its autonomy to creators? Why should justice for authors mean that the industry must cede control of a practice which the law, and previously the Berne Union itself, considered acceptable? For Drummond Robertson, the novelty of the proposed mechanical right compounded the unfairness. The right must:

[A]t any rate in British law, be regarded not as the extension of an existing right, but as the creation of a new one. This new right can only be put into effect at the expense of somebody, and in this case the burden is to be placed on our trade ... it must not be forgotten that our industry has grown up under the aegis of the Berne Convention internationally, and at home under domestic law, and that vast interests have been created under conditions which specifically denied to the composer any right in phonographic publication.

According to Robertson, having consented for so long to the practice, the legislature had no reasonable basis for arbitrarily depriving the industry of the power to record, without the author's consent, performances of works:

It is in our opinion, a case for equitable adjustment as between the claims of those who acquire a new right in virtue of statute, and of those who are called upon to surrender interests, created under existing international and domestic law. We hold that legislation should not create an unrestricted right in phonographic publication, but should strike a fair bargain as between conflicting interests.

The creative interest, on the other hand, asserted, in the words of the Gorrell Report, that they “should have the exclusive right of authorising the adaptation of their work to such instruments [phonograms] – that it is in reality part of the literary property which they have in the products of their own brains.” Composers also objected to the compulsory licence on they grounds of integrity, alleging that unless they controlled the process of reproduction, they would be unable to prevent the production of degraded versions of their work.

The Committee members agreed unequivocally that as a matter of justice, composers should be granted the power to control mechanical reproduction of their works. As they pointed out in the report, most “of the witnesses who advocated a compulsory licence did not deny the justice of the author’s claim”. On this question, the Gorrell Committee saw no difficulty and recommended adoption of the first paragraph of Article 13. But the Committee frankly admitted that in determining the “reservations and conditions” that should apply to the right it confronted “certain very difficult questions”.

The question of investment

The report discussed the question of the compulsory licence at much greater length than any other topic. As the Committee said, it considered the arguments “very carefully” and “thought it right to state the two views somewhat fully”. In the end, in the time-honoured tradition of government inquiries, it decided on a compromise that it perhaps hoped would create Drummond Robertson’s “fair bargain” between “competing interests”.

It rejected the compulsory licence, and in particular the argument that in the hands of authors the manufacturing right would “produce a monopoly which would ruin the businesses of a large number of manufacturers”. Given the large number of composers and the “enormous” demand for phonographs, “it seems probable that the views of the witnesses are exaggerated.” The Committee based its decision on the principle of freedom of contract, which, in Britain, “has generally been considered ... most beneficial to the development of all kinds of industries”. Composers were a diffuse class, with differing priorities, and no single manufacturer was likely to secure licences from even the majority of them. Monopoly was therefore unlikely.

The Committee did, however, accept the argument that the law should recognise or protect the investment of the industry over many years. As its report said, “discs and other records are only produced at considerable expenditure.” More significantly, the manufacturers also displayed “a considerable amount of art and ingenuity in the making up of these records”. The manufacturers were “producing works which are to a certain extent new and original, and into which the reproduction of the author’s part has only entered to the extent of giving the original basis of production”. For these reasons, the Committee members considered

records as “one of the things which can be the subject of copyright and further recommend that public performances by means of pirated copies of these records should also be treated as an infringement of the rights of the manufacturer.”

Phonogram and performance copyright

The Gramophone Company and the Columbia Phonograph Company (on behalf of a large group of smaller manufacturers) both proposed a manufacturer’s copyright in recordings and their public performance. The Columbia Phonograph Company argued that if the law protected the owner of a musical work against piracy, it should equally protect the manufacturer of a record against counterfeit production. But once again, Drummond Robertson, on behalf of the Gramophone Company, presented the most persuasive arguments.

He stated that “a twofold copyright protection should be accorded to the phonogram, and on precisely the same lines as the Convention affords protection to the cinematograph.” Quoting from the Report of the Berlin Conference, he pointed out that the Convention provided for copyright not only in cinematographs but translations and musical arrangements, if they could be regarded as original in character. “If this view is correct,” he said, “a phonogram is to be regarded as a mode of multiplication coming within the scope of Intellectual Ownership.”

Drummond Robertson did not stop at requesting copyright in the phonogram. He claimed that phonographic companies should be granted the right to control performances of the sound recording. The public performance of a record was “merely a mechanical reproduction of the artiste’s original rendering, postulating no skill.” He advanced a straightforward reason for granting the right: it represented “part return for the emoluments which the composer is to receive”.

The Committee’s compromise

The Times, a firm advocate of the creative interest¹⁰ gave vent to its feelings in

10 *The Times* covered the issue of copyright reform very closely, endorsing the Gorrell Report in a lengthy article on the first Copyright Bill introduced in 1910. The newspaper was, through its editorial and correspondence pages, the principal medium for public debate over the 1911 Copyright Bill. On its pages, authors, publishers, record manufacturers and interested individuals argued over the terms of the Bill. George Bernard Shaw and John Drummond Robertson engaged in an antagonistic controversy over compulsory licensing. In Australia, *The Sydney Morning Herald*, a very different newspaper, also discussed copyright. It made its sympathies clear when it said of Dickens that “His case is certainly proof that the time has come for some alteration of the copyright law, which will protect the property of a writer as well as

two columns. The proposal to introduce copyright in records, and an allied public performance right, it declared “a really remarkable application of the doctrine of vested interests”. According to the newspaper, while it “would seem to be equitable that some concession should be made for the existing property of manufacturers”, only composers and authors deserved copyright protection.

Though *The Times* might not admit it, the Berne Union and its advocates were no less a vested interest than the record manufacturers. Faced with two distinct economic factions that both engaged politicians’ sympathy, the Committee wrestled with a dilemma. The owners of works could make a persuasive claim for political preferment on moral grounds, and the producers of records could point to the economic and social benefits that their industry delivered to Britain. To solve the problem, the Committee gave with one hand, and took with the other.

In doing so, it accelerated the trend, begun in Berlin the year before, to accommodating the claims of the industries that produced products embodying copyright works. The members of the Berne Union and the Gorrell Committee knew that few governments would pass legislation that might – according to the phonographic industry – endanger years of investment and production. Their willingness to contemplate allied rights for producers marched hand in hand with the growing realisation that the business of musical copyright had become big business.

The Berlin Conference and Gorrell Committee did not agree on how copyright legislation should benefit producers, though both implicitly recognised in principle that producers were entitled to some benefit. The Berlin Revision formula of “reservations and conditions” contemplated a system of compulsory licensing but it did not recognise a manufacturers’ copyright in recordings. However the final Conference document did provide that cinematographic works could be protected separately as literary or artistic works if they displayed original character derived from “arrangement of the acting form or the combination of the incidents represented”.

The Gorrell Committee took a different view. Drummond Robertson argued that if the Berlin Union could accept copyright in cinematographic works, the Gorell Committee could equally recognise copyright in records. The Committee members accepted his argument and they recommended legislation to create copyright in recordings. Unlike the delegates at the Berlin Conference, they rejected the idea of compulsory licensing, and also refused to support the proposal for manufacturers to receive a performing right in records.

Weaknesses of Committee’s reasoning

The Committee thus balked at endorsing what the recording industry really

the public interest.” (15 April 1911).

wanted.¹¹ Its unwillingness to support the compulsory licence pointed to intellectual confusion in copyright policy-making. The proponents of authors' rights spoke of moral necessity but they wanted exclusive control of productive processes to which they contributed neither capital nor expertise. Claiming moral right, they did not admit mercenary motives. Nor were they asked to. Policy-makers accepted moral arguments for copyright protection without examining the economic rationales underlying the demands for legislation.

Their naïveté, deliberate or unwitting, provoked the angry assault of the industry threatened by the authors' grab for power. The record companies, alarmed at the possibility that authors or publishers could dictate the terms on which records were made, furiously rejected what they considered a grab for economic power disguised in the language of moral entitlement. On what basis, men like Drummond Robertson demanded to know, did the creative interest claim property in works? If they aimed to secure moral rights for authors, said Robertson, they had no need to demand control over the production and distribution of products embodying works.

All they needed were equitable rights to restrain non-attribution or interference with the integrity of works. If they sought the exclusive right to control production, they were asking for something that bore no necessary relationship to the author's moral rights. If securing economic return for the author's labour and originality became a rationale for copyright protection then why should such protection not also protect the investment of industries that produced copyright material and thereby generated the returns that accrued to authors?

Whether or not the Gorrell Committee members were alive to these considerations, logical doubts hang over its report and they apply to modern copyright policy-making. Considering its membership, a bookish gathering of lawyers, publishers and various authors' representatives, it is not surprising that the Committee declined to take the bold step of recommending a compulsory licence. Two years later, British parliamentarians comfortable with the phonographic industry's language of investment and profit expectations, proved much less tentative.

They recognised that if the mechanical rights of authors were too extensive and those of manufacturers too limited, soon enough government might face a political problem it did not want: monopoly. As the industry itself argued, if the bargaining power of authors outweighed that of manufacturers, over time the most commercially powerful producer would probably succeed in outbidding its rivals to secure rights to the majority of works.

11 The compulsory licensing system allowed manufacturers to make, subject to paying the owner a royalty, a recording of any work already recorded with the owner's authorisation. In developed form it originated in Germany (though France introduced a system of compulsory licensing in the 19th century) and had lately been introduced to the United States by the Copyright Act of 1909.

Monopoly and the claims of industry

The industry argued that if the legislature conferred on authors the power to exclude from the production process the majority of producers, it would create monopoly or oligopoly. The Gorrell Committee, though not blind to this possibility did not accept that the disaggregated mass of authors would license a single producer to make records. The Reported canvassed the issue of monopoly in some detail and quoted the first section of the 1909 US Copyright Act, which provided for compulsory licensing. But in the Committee's view, the "large number of composers" and "enormous production of, and demand for, these mechanical instruments" meant fears of monopoly were "exaggerated".

Committee members were not swayed by the evidence of the Columbia Phonograph Company, which referred to comments of the US House of Representatives' Committee on Patents. The US House Committee declared that compulsory licensing prevented "the establishment of a mechanical-music trust" and further pointed out that without it, "the progress of science and useful arts would not be promoted, but rather hindered, and ... powerful and dangerous monopolies might be fostered".

In a utilitarian political environment, no tenable policy could give new rights to authors and ignore the claims of the manufacturers who made the mechanical rights possible. But even though compulsory licensing seemed to offer a solution to the problem of reconciling the interests of creators and producers,¹² the Gorrell Committee held back, hamstrung by its allegiance to authors' rights. The Gorrell Committee presented its Report in 1909. In the 1911 parliamentary debates over the Copyright Bill, it would be apparent that to politicians, output, jobs and revenue counted for more than sentiment. They might speak platitudes about the moral rights of authors and purchase Dickens Stamps,¹³ but they would also legislate in favour of industries that were economically productive.

Like the members of the Gorell Committee, the politicians of 1911 seemed unwilling to face, or even utter, the difficult questions that called into doubt the

12 Owners of works were, in theory, compensated for the loss of bargaining power by a remuneration formula based on a fixed royalty paid on each sale. The method of remuneration remains the greatest source of contention in compulsory licensing schemes.

13 A philanthropic scheme instituted in 1911 encouraged owners of copies of Dickens's novels to purchase an ornamental stamp to be affixed in their books. The proceeds were to be held in trust and distributed to Dickens's descendants. Supported by Lord Roseberry, Augustine Birrell and Sir Arthur Conan Doyle, among others, and launched at a grand mayoral meeting in the City of London, nothing very much seems to have come of it. In Australia, the *Sydney Morning Herald* supported the scheme, stating "Many of [Dickens's] readers will be glad to take part in a truly democratic testimonial even if they do not agree ... as to the excellence of the stamp."

logical integrity of copyright policy. In relation to musical recordings, for example, who played the more important role in making a recording a commercial success? Composer, performer or manufacturer? The first expended the most intellectual effort, the second provided the vital human interpolation, the third took the financial risk. On what basis should any or all be granted rights of property? Was copyright regulation anything more than a system for extracting revenue from the public and distributing it to vested interests?

Such questions were not asked in 1909, 1911 or 1912. The commercial users of music in Australia in the interwar years, grappling with claims for public performance payments, demanded to know the rationale that sanctioned mass remuneration under copyright legislation. Slowly, little by little, government responded to these difficult questions with legislation and policy justification. Whether the answers supplied in laws and official documents constitute an adequate response to the problems of conflicting interest remains an open question.

THE IMPERIAL COPYRIGHT CONFERENCE

A quest for uniformity

Two months before sending delegates to the Berlin Revision Conference, the British Government began planning for an imperial conference to consider how the Berne Convention could be assimilated into the copyright laws of Britain and the self-governing dominions – Canada, South Africa, Australia and New Zealand. In early September 1908, Lord Crewe, the Colonial Secretary, advised the gubernatorial authorities that “an amendment of the existing law is urgently needed” and proposed discussion by a “subsidiary Conference with a view to concurrent legislation, if agreement can be arrived.”

Crewe, jarred by the dominions’ negative response to draft imperial copyright legislation circulated in 1907, hoped that a conference to discuss the updated Berne Convention would lead to unanimity. For reasons of convenience, the Colonial Office abandoned Ottawa as the chosen venue for the conference, and selected London in its place. It proposed that the copyright conference would be held as a subsidiary meeting of the imperial conference scheduled for 1910. This decision illustrated both the practical significance of the proposed copyright legislation, and the emphasis placed by Whitehall on imperial unity. Imperial conferences, the first of which Britain hosted in 1907, replaced the old colonial conferences of the white colonies and reflected the new standing of the self-governing dominions.

They provided a forum for discussing matters of imperial unity and were the forerunner of today’s meetings of the Commonwealth Group of Nations. Britain’s readiness to add copyright to the list of primary matters to be discussed at the

1910 Conference indicated clearly the importance it attached to common legislative implementation of the revised Berne Convention. In the end, the imperial conference took place in 1911, but the subsidiary copyright conference went ahead as planned, in May 1910.

Crewe had a particular reason for not rushing to convene a copyright meeting. By scheduling the Copyright Conference for 1910, he gave the Board of Trade time to digest the findings of the Gorrell Committee and prepare draft legislation for consideration. When the delegates of the self-governing dominions joined their British counterparts in London in 1910, they would have digested the recommendations of the Gorrell Report, and the Colonial Office could present them with the *Bill to Amend and Consolidate the Law Relating to Copyright (1910)*.

The President of the Board of Trade, Sydney Buxton, opened the Copyright Conference on 18 May 1910. He called ratification of the amended Berne Convention, recommended by the Gorrell Committee, “an imperial as well as a United Kingdom question”. For that reason “it was necessary ... to take into consultation those representing the self-governing Dominions over the seas.” Buxton stressed the need, arising from considerations of “efficiency” and “the Imperial connection”, for uniform copyright legislation throughout the Empire. “His Majesty’s Government,” he said, “consider it highly important to attain as great a degree of uniformity as is reasonably practicable among the principal Nations of the world with regard to international copyright.”

While the British Government, according to Buxton, considered ratification “desirable”, it was “not committed in any sense” to “the detailed provisions of the Convention”. The provisions would be “fully open to discussion by the Conference”. For the British Government in 1910, securing imperial unity on any legislation with international dimensions was a matter of real importance. Britain stood at the head of what might loosely be called a federated system of international government, and for reasons of trade and politics, needed to ensure that legislation passed in the dominions did not have the effect of damaging interests governed by British legislation.

In copyright matters, for instance, British copyright owners would be furious if a country such as Australia passed legislation allowing for a shorter term for protection of copyright works or the import into Australia, without consent of the copyright owner, of remaindered copies of British books. As Britain, and none of the dominions, was a member of the Berne Union, it could, if it chose, ratify the Berlin Revision without dominion assent. But if it did so, it put at risk the probability of all the dominions legislating to implement the Convention on uniform lines.

Friendly and unanimous feeling

Invited to remember “the Imperial connection” the Conference delegates showed, in words of Australia’s delegate, Lord Tennyson, “friendly and unanimous feeling” and the desire “as far as possible to get legislation on uniform lines”.¹⁴ The Conference began at the Foreign Office and, according to the memorandum of proceedings, “resolved itself into Committee for discussion of the subject in detail”. Delegates held seven meetings but their work attracted little public attention. *The Times* reported only that an imperial copyright conference “was held at the Foreign Office yesterday” and explained that it was “private” and “lasted for five hours”.

The friendly and unanimous feeling of the delegates is scarcely surprising. The period immediately before the Great War perhaps represented the high point of imperial sentiment in Britain and the self-governing dominions. In the Australian Senate debates on copyright in 1905 and 1912, parliamentarians often referred to Britain as “Home”, not in the authentic sense of a place of belonging or return, but as an abstraction denoting the source of legislative unity in the Empire. John Keating, a Catholic of Irish descent schooled at Riverview, the Jesuit boarding school in Sydney,¹⁵ referred to “Home” twice in the copyright debates of 1912.

In the early 20th century, many individuals embraced the idea of a union of equality and brotherhood between Britain and the self-governing dominions.¹⁶ Public figures in favour of the imperial ideal were keen to create a collective of certain English-speaking nations that, united by common trade and social aims, could become federal in nature – an early prototype of the European Community, though with closer linguistic and historical ties binding members. Naturally, within this collective, legislation would need to be uniform or closely tied.

For many Australian politicians, accepting a common imperial law incorporating an international copyright convention seemed a desirable, even necessary, act. However, it was not inevitable that the dominion representatives would assent to all the propositions that their hosts put to them at the Copyright Conference. Australian governments after 1905, for example, consistently stated their

14 Cable, Tennyson to Prime Minister, 4 December 1911, National Archives of Australia.

15 Where he was a schoolmate of the brilliant and tragic poet Christopher Brennan.

16 An article *The Times* on 1 November 1911, reported the meeting of the Imperial Mission concerning ‘Imperial Unity’: “The Duke of Marlborough, who presided, said that the cardinal principles upon which the Imperial Mission laid stress were (1)Imperial Preference; (2) Imperial defence; and (3) emigration ... If the Empire could hold together and could organise itself for cooperation in common purposes then the *status* of the people of the Empire as a whole would be equal to that of any of the great foreign nations.”

hostility to the 50 year posthumous term proposed in the Berne Convention. But the death of King Edward VII 12 days before the Conference opened may have put an end to any thoughts of dissension. As London made sorrowful preparations for the royal funeral, the delegates breathed an atmosphere of patriotism and imperial sentiment that swirled through the city.

When they first met on 18 May, it is unlikely that any intended to buck the trend towards uniformity. By the time the grandees of the Empire farewelled the King at Westminster Abbey on 22 May, the delegates had reached agreement after, according to the memorandum of proceedings, “full discussion”. They accepted 12 resolutions that supported, among other things, Britain’s ratification of the Berlin Convention “with as few reservations as possible”, the passing of new imperial legislation that would form the basis for uniform copyright codes, the adoption in legislation of the 50 year posthumous term, and the banning of importation of “pirated” copyright works into Britain or the Empire.

To what extent King Edward’s death contributed to the uniformity of opinion at the Copyright Conference is a matter for speculation. No hint of fractiousness invaded proceedings and the British authorities secured the outcome they hoped for. They were helped greatly by the actions of Lord Tennyson, Australia’s delegate, who deliberately disobeyed instructions from the Australian Prime Minister concerning the 50 year posthumous term. Had Tennyson listened to orders from Melbourne, *The Times* would undoubtedly have detected an atmosphere of hostility in the corridors of the Foreign Office.

Lord Tennyson and the copyright term

After receiving Lord Crewe’s proposal in September 1908 for a copyright conference, the Australian Government adopted a casual approach to preparations. 18 months remained until the scheduled date for the conference and the Government seemed lulled by the time available for planning. Dilatoriness crept into preparations. No-one in Melbourne appeared to attach much importance to securing the services of an appropriate representative to protect Australian interests. John Keating, a government minister, or Sir Josiah Symon, an Independent at the time of the Conference, were two potential candidates for the role, and it was not impossible for either to absent himself from parliamentary duties to go to London.

Instead, the Government appointed Lord Tennyson as its representative in November 1908. In doing so, it showed either carelessness regarding Australia’s interests or unblinking willingness to consent to whatever Britain might propose in copyright matters. By contrast, the other dominions appointed native representatives. Canada sent both its Minister for Agriculture and Registrar of Copyrights, New Zealand its High Commissioner and South Africa the Agent General for the Transvaal.

The Government should have been in no doubt that Tennyson would support

propositions put forward by his own nation, even if they conflicted with Australian wishes. The eldest son of the poet laureate Alfred Tennyson, Hallam Tennyson was the former Governor of South Australia (1899–1902) and Governor General of Australia (1903–04). Popular and hardworking in both roles, he felt deep loyalty to his country, and the tenor of his correspondence with Australian officials leaves no doubt that he expected Australia to adopt a subordinate role in its dealings with Britain. Tennyson qualified as a barrister, but did not practise, and it is unlikely that he knew much about copyright law. His qualification appeared to be his years of high office in Australia. On the one topic raised at the copyright conference about which the Australian Government stated a firm preference, he maintained a contrary view, in keeping with British wishes. The topic was the 50 year posthumous term.

It is clear from the record that after appointing Tennyson and supplying him with copies of the Australian Copyright Act and related memoranda in January 1909, the Government took little interest in his doings, even though he consistently flouted stated policy. From the start, Tennyson seemed interested in only one topic, that of the posthumous term. At his request, Captain Collins, the Commonwealth Representative in London, cabled Melbourne to seek directions on the question, and received an unequivocal reply from the Department of External Affairs: “Tennyson should be instructed not to favour extended term on part of Australia.”

The department’s memorandum included an official statement of instructions from the Attorney General, Billy Hughes. Hughes declared the Government’s opposition to the 50 year term and provided reasons for its policy. The legislators of 1905, he said, evinced “considerable opposition” to the 30 year posthumous term and “there has been nothing to indicate a change of opinion since”. As he pointed out, the copyright interests of Australia and Britain were not always identical. “The number of works published, the authors of which would be benefited by the extended term, is small in Great Britain and probably nil in Australia. Consequently the matter is of greater relative importance in Great Britain than it is in Australia.”

Tennyson had no reason for doubt about the Government’s position. Collins passed the memorandum, marked “Instructions to Commonwealth Representative”, to him directly. But he would not rest, and continued to pester Collins on the subject of copyright duration. He never explained why the question of term was important to him.

He no doubt identified strongly with the cause of authors. Tennyson’s tastes, not surprisingly, were literary, he published two books, and he was his father’s companion and biographer. Unlike Dickens, the elder Tennyson, who benefited from government sinecures from 1845, is not reported to have complained about copyright piracy or the term of copyright protection. His son, however, may have been distressed when, after copyright in the incomplete first edition of *In*

Memoriam lapsed, copies were widely circulated to the detriment of the poet's reputation.

At any rate, he pressed Collins to ask his masters in Australia to reconsider their position and at first they obliged. On 15 February 1909, about six weeks after sending Tennyson the first memorandum from Melbourne, Collins telegraphed him relaying the news that he had been told to, "inform Tennyson if United Kingdom and other countries, Copyright Union agree extension fifty years, unlikely Commonwealth would not accept alteration". For the rest of the year, Tennyson stayed mostly silent, though he evidently caused minor offence by criticising the Australian Copyright Act. In April, Captain Collins cabled the Secretary of the Department of External Affairs on his behalf, conveying the statement that "I have always cabled my criticisms privately, direct to [the Government]."

So stood matters until early 1910 and the dispatch to Tennyson of two cables from the Prime Minister, Alfred Deakin. Deakin wanted to retain the term for copyright set out in the 1905 Act, and also stated his opposition to copyright in the performance of dumbshows and works of architecture. Tennyson did not rush to respond but his return telegram, six weeks after Deakin's last cable, was emphatic. He congratulated the Prime Minister on his "statesmanlike dispatch" then asked permission to "omit your Clause on term of copyright" on the grounds that "the authorities consider present system open to grave objections and strongly advocate addition of fixed term to the term of the authors' life".

Tennyson's ingenious references to "grave objections", which implied that the correct copyright term could be arrived at by a process of logic, and unnamed "authorities", perhaps the members of the Gorrell Committee, might have swayed Deakin, but the last sentence of his telegram, expressed with fantastic condescension, could also have proved fatal to his case. "If you insist," he said, "on my advocating for literary work this clause of yours I shall be placed in grave difficulty. Leave me free hand." As it happened, Deakin found no time to respond. He lost office on 29 April, to be replaced by Andrew Fisher, who immediately informed Tennyson that he wanted to review the new British Copyright Bill before deciding Australia's position.

Copies of the Bill were provided to delegates in advance of the Copyright Conference, but Tennyson evidently did not intend to share the contents with the Australian Prime Minister. On 17 May, the day before the start of the Copyright Conference, he cabled Fisher with a blunt message. "Your proposal to consider details of Bill going through Parliament here impracticable." The Secretary of the Attorney General's Department, Robert Garran, replied for Fisher. It was, he said plaintively, "not suggested that details of Bills going through Parliament should be considered ... but that Commonwealth should have opportunity to consider draft Bill and make suggestions before introduction."

The Australian Government seemed then to cave in to its noble representa-

tive. In his telegram to Fisher, Tennyson proposed that Australia commit by treaty “to legislate in general conformity with the convention upon legislation being introduced into the Imperial Parliament, and in favour of extension of copyright to life and 50 years and the general lines of the report of the Departmental Committee.” In the absence of contrary instructions, he exercised the free hand he sought. The Commonwealth could now be in no doubt about what to expect from his involvement in the Copyright Conference: consent to all British proposals, and more practically, commitment to legislate in conformity with the British Copyright Act once it was enacted.

RESOLUTIONS AND CONCLUSION

The Copyright Conference agreed 12 resolutions.

Resolution 1 recommended that the British Government ratify the Berlin Convention with as few reservations as possible.

Resolution 2 recommended that the British Government pass a new copyright law applicable to all British possessions and acknowledged the right of self-governing dominions to adopt the British legislation, pass identical legislation or decline to choose either of the first two options. However, a dominion could only modify the provisions of the British legislation if the modifications applied to the jurisdiction of the dominion alone. If a dominion chose to ignore the British legislation it would possess no rights in other parts of the Empire except as conferred by Order in Council or by order of the Governor of a dominion in Council.

Resolution 3 recommended that once the new imperial legislation took effect the existing imperial legislation should be repealed except insofar as it applied to a dominion to which the new legislation did not extend.

Resolution 4 recommended that copyright under the new imperial legislation should subsist only in works of which the author was a British subject or resident of one of the parts of the Empire to which the legislation extended, and copyright should cease if the works was published outside such parts of the Empire. In addition, obligations under the Convention were applicable solely to works the authors of which were citizens or residents of a member of the Union.

Resolution 5 recommended that the Crown be empowered to direct by Order in Council that the benefits of the new imperial legislation extend to the works of authors who were subjects, citizens or residents of a foreign country.

Resolution 6 recommended that subject to proper qualifications, copyright should include the sole right to produce or reproduce a work, or any substantial part of it, in any material form whatsoever and in any language to perform, or deliver, the work or any substantial part of it, in public, and, if the work was unpublished, to publish the work, and should include the sole right to dramatise

novels and vice versa, and to make records etc by means of which a work may be mechanically performed.

Resolution 7 recommended that in the interest of international uniformity to which the Conference “attaches great importance” the copyright term be the life of the author and an additional term of 50 of years. However, the Conference considered it “essential” that after the death of the author of a published work, “effective provision should be made to secure that after the death of the author the reasonable requirements of the public be met as regards the supply and the terms of publication of the work, and permission to perform it in public”. The recommendation concerning term was “conditional on the enactment of some provision of this nature”.

Resolution 8 recommended that formalities, such as registration, be abolished.

Resolution 9 recommended that the definition of artistic works be extended to apply to architecture or craftsmanship.

Resolution 10 recommended that existing works receive the same protections as future works under the new legislation.

Resolution 11 recommended that the “importation of pirated copies of a copyright work” into Britain, or any part of its possessions to which the imperial legislation would apply, be prohibited.

Resolution 12 recommended copyright should not apply to works that infringed copyright.

The memorandum of Conference proceedings noted that a “draft Bill for the consolidation and amendment of the Law of Copyright embodying the above conclusions was submitted to the Conference, and generally approved, after discussion in detail.” On this note, the Imperial Copyright Conference ended, on the lines laid out by the British Government. The draft Copyright Bill approved by the delegates passed into law the following year, following further refinement and debate. After another year, Australia accepted the option of incorporation, passing a Copyright Act that adopted the provisions of the British legislation and included further clauses specific to Australia.

Chapter 3 – A new era and new legislation

THE COPYRIGHT DEBATE IN BRITAIN, 1911–12

A public debate

For most of 1911, from Buxton's introduction of the Copyright Bill on 2 April until its passage through the Lords on 16 December, a dual debate occupied the pages of *The Times*, which followed the copyright controversies of that year attentively. By comparison, the pages of the *Sydney Morning Herald* in 1912 made few references to the Copyright Bill before the Commonwealth Parliament and the issues debated. The absence of correspondence on the subject in the Australian newspaper suggested that Australians, unlike interested Britons, felt little interest in the topic of copyright. The pattern recurred in 1956, when Britain passed a new Copyright Act, and 1968, when Australia followed suit: substantive debate in Britain and minimal interest in Australia.

It would be a mistake to infer Australian intellectual apathy from these comparisons. What they reveal is the economic relevance to both countries of copyright regulation. Britain, in 1911, was the home of a nascent film industry, a powerful phonographic industry, the forerunner of today's music industry, and a highly developed publishing industry. The latter two industries had already established the characteristics that distinguish their modern counterparts: comparatively low fixed costs, high revenues and high variable profits affected by changes in taste. Selling to the public, they deliberately addressed their political arguments to a public audience.

Australia, lacking Britain's resources of population, technology and historical memory could not hope to create an economically productive culture of creative endeavour on the British scale. Australia played a pioneering role in the early development of cinema but it imported, rather than produced, most of its copyright product. In 1912 and 1968, when Parliament adopted new copyright statutes, the Australian press rarely broke its silence on matters of copyright policy. Unfortunately, indifference caused blindness, and Australians failed to

see how imperial rules sometimes caused harm to the interests of the Australian public. For instance, Australians paid high prices for imported books but few protested against the import controls that allowed British publishers to maintain high prices.¹

The political background and focus of debate

On 26 July 1910, two months after the Imperial Copyright Conference ended, Sydney Buxton introduced in the Commons a copyright bill giving effect to the recommendations of the Conference and Gorell Committee. The bill arrived in the middle of ferocious political warfare over the Government's attempts to curb the powers of the House of Lords. Dissolution and a General Election in December stymied progress and copyright advocates waited impatiently for several months before the bill returned to the legislative program.

The Government revived the bill in April 1911, passing it to Standing Committee A, a cross-party "Grand Committee", for consideration and report. The Grand Committee sat 13 times between the middle of April and 13 July, in which time the bill underwent, as *The Times* reported on 14 July, "a considerable transformation". Departing from the recommendation of the Gorrell Committee, the Committee proposed provisions allowing for the compulsory licensing of recordings. The modified bill passed to the Lords in November.

Despite the internecine bitterness poisoning political life in 1911 – the Lords lost their power to veto Commons' bills after two years of bloodcurdling political struggle – the Copyright Bill escaped the partisanship that earlier derailed the Government's social reform measures, and now sabotaged the Home Rule Bill. The reason for the absence of controversy is not hard to find – all parties could agree on the excellence of introducing new property rights. Their support for a bill of property illustrated, with blinding clarity, the politicians' attitude to copyright regulation. So long as it could be said to reasonably satisfy the economic needs of the competing interest groups, they were not disturbed by the generous apportioning of possessory entitlements.

Britain, home to booming recording, film and publishing industries, did not resist the extension of authors' rights and the conferral of rights on industries. But public acquiescence did not mean indifference. *The Times*, for instance, followed matters of copyright policy with keen interest in 1911, as it did in 1956,

1 Apathy did not always rule. The Librarian of Fisher Library at Sydney University, Andrew D Osborn, wrote to the Copyright Law Review Committee (the Spicer Committee) on 14 October 1959 to protest restrictions on the import of books. He noted that in his opening address to the University he declared that "the situation in the booktrade and in Australian cultural life was so serious that a Royal Commission was necessary at the present juncture."

when a new Act replaced the old. The public debate in Britain, recorded in the pages of *The Times*, concentrated on the claims of the phonographic industry, and the grievances of the publishers, an emphasis that confirmed the politicians' shift towards satisfying the needs of producers. George Bernard Shaw, who in May 1911 carried out a brief and amusing correspondence in *The Times* with John Drummond Robertson of the Gramophone Company, summarised the position dramatically but not wholly inaccurately:

An injustice has to be done either to us artists or to the manufacturers. We, being artists, are poor and politically insignificant. They, being industrialists, are rich and can bully Governments. I suppose we must go to the wall, but I do not see why we should do so without politely informing the public and the Government that we thoroughly understand what is happening to us, and that we submit to injustice because we cannot help ourselves, and not in the least because we are imposed upon by the special pleading of Mr Drummond Robertson and those whom he represents.

Put more starkly, copyright regulation divided the spoils of property between two groups, and one benefited the most at the expense of the other. But regulators neglected a third interest group – the public. As the Liberal MP, Frederick Booth, pointed out in May 1911, in “the bargaining between various interests” the “public are being lost sight of”. In November, Lord Courtney, an egalitarian Liberal peer born, incidentally, a year after Macaulay’s first great speech in favour of the Reform Bill, said the 50 year posthumous term was “going to sacrifice the whole reading public”. A handful of their Liberal colleagues also argued against the long posthumous term. Otherwise, both Houses wasted little time pondering the needs of those who bought books and records.

Compulsory licence for musical works

The Grand Committee had a nasty surprise in store for those who expected a smooth transition to the kind of Copyright Act envisaged by the Gorrell Committee and the Board of Trade. As amended, section 19 of the bill conferred on record manufacturers copyright in records and authorised them to make recordings of any recorded work subject to payment of a royalty.² Perhaps because the Gorrell Committee endorsed the manufacturer’s copyright in records, possibly as a sop for rejecting arguments for the compulsory licence, the provision for manufacturers’ copyright met a muted response. Section 19(2), the compulsory licence provision, aroused, however, a furious reaction from musical composers and pub-

2 Section 19(3) provided that the royalty payable for each record sold in the first two years after commencement of the Act was 2.5 per cent and thereafter, 5 per cent.

lishers. Their response is not surprising, since the Gorrell Committee dismissed the arguments for compulsory licensing in categorical terms, and the bill introduced by Buxton contained no provision for the licence.

The fact that the Grand Committee added to the bill so contentious a clause, and few in the Commons or Lords opposed the innovation, illustrates how dramatically, in two years, the phonographic industry transformed thinking about the purpose of copyright regulation. Legislators still mouthed platitudes about authors' rights, but they now recognised the economic consequences of recognising such rights in law. They, far more than the Gorrell Committee, a gathering of supporters of authors' rights, saw the naivety of granting rights that, if unqualified, threatened the competitive existence of one of Britain's newest and most powerful industries.

The recording industry as a whole lobbied to change attitudes, but publicly at least, the indefatigable John Drummond Robertson, manager of the Gramophone Company, seems to have done the most to persuade policy makers of the intended function of compulsory licensing as a device to defeat manufacturing monopoly. Robertson destroyed the proposition that investment and risk ought to rank behind originality as the determinant of legal preferment. For the first time, politicians heard it said without equivocation that the manufacturer of a record had an equal or better claim to the benefits of copyright protection than the author of the recorded work. Robertson preached the heresy of equal entitlement to three audiences: the Gorrell Committee, which rejected his reasoning, the readers of *The Times*, in the pages of which he engaged in a lively controversy during May 1911, and the politicians of the Grand Committee.

On every occasion that he entered into debate he did so by taking, figuratively, two steps forward. He refused to apologise for the alleged deprecations of his industry, and instead painted the record companies as injured parties. According to Robertson, *Boosey v Whight*, the hated reminder of judicial witlessness, conferred a legal right on the recording industry, the right to copy. The industry had nothing to be ashamed of and reason for grievance. If the legislature proposed to take away a common law right, let it provide compensation.

Arguments in *The Times*

The merits and demerits of the proposed compulsory licence were illuminated in the letters page of *The Times*. The prominent men who took a public stand against statutory licensing were Sir Charles Stanford and William Wallace, famous composers and articulate advocates for their fellow musicians, William Boosey the proprietor of the venerable firm of music publishers Boosey and Co,³ and forth-

3 Established by John Boosey in the 1760s and in William Boosey's day the publisher of Elgar. Later the firm published Vaughan Williams.

right defender of music publishers, and, not least, George Bernard Shaw. John Drummond Robertson opposed them unaided.

Robertson staked his position in a letter to *The Times* on 2 May 1911:

The reasonableness of the proposal is grounded in the fact that a new right and a large new source of profit [the mechanical rights] is being created for the author, to which he contributes nothing from the inventive and artistic side. His work is no more valuable because mechanical reproduction, one of the greatest wonders of the age, has been brought to a high state of perfection by the skill of the inventor and the ingenuity of the mechanician.

Shaw and Boosey responded two days later. The latter concentrated on the extraordinary profits achieved by Robertson's company when returns to composers were nil. The Gramophone Company's profits amounted "during the last three years to the huge total of £358, 557 17s 6d". Furthermore, the Chairman had announced in 1908 "that for each £100 invested they [shareholders] had already received the sum of £168 in dividends." Nor could it be said that the phonographic industry did not take revenues from music publishers. "Records for mechanical players are copies of a work," said Boosey. "Abundant evidence was given before the Board of Trade Committee that the sale of sheet music had been enormously depreciated by the kindly advertising influence and sale of mechanical discs and rolls."

Shaw emphasised that the indispensable role of the composer in the chain of production that led to the sale of a record justified the grant of the mechanical right to authors.

The letter of Mr J. Drummond Robertson is unanswerable, not because it is convincing, but because its audacity paralyses all the nervous centres which make controversy possible. Our comfort is that, if it is brought forward and pushed to its logical conclusion in a speech in the House of Commons, that Assembly, if it has any conscience and any logic, will be stupefied beyond all power of passing the Copyright Bill or anything else for the remainder of the session.

Shaw referred to the desperate circumstances of Richard Wagner.

He was far past middle age before he was free of the most humiliating pecuniary anxieties. And now, if you please, the manufacturers who have made more money out of Wagner's music than he ever spent in his whole life, and who never paid him a farthing, want his heirs to compensate them for the loss of their power to steal his music with impunity.

Shaw attributed responsibility for the economic distress of composers not to the

phonographic industry alone but society as well. “The community sinned,” he said, “and the community should atone.” Robertson responded a few days later “I had supposed that this subject was too dry for dramatic treatment: but Mr Bernard Shaw’s letter will have convinced your readers to the contrary, if it convinces them of nothing else.” Robertson pointed out that the statutory licence was designed to prevent a producer monopoly, not as an impost on authors. If Wagner was robbed, he was robbed as much by publishers as record manufacturers. The statutory licence, in theory, ought to benefit composers by increasing the dissemination of works and simultaneously expanding the base for payment of royalties.

Robertson undermined the Berne consensus, which asserted moral rights as the basis for economic rights. He denied that natural right, sacred entitlement or social obligation justified the claims of authors to copyright protection. If technology were the means of disseminating a work, the person who invented the technology or used the technology to disseminate the work, was no less justified in claiming a reward than the author. “It is self-evident,” he said, “that the share contributed by the author is indispensable, but so also is the work of the artist and the manufacturer”.

These were bold apologetics. Robertson dared to say what no-one else would: copyright legislation regulated the production and distribution of goods for commercial purposes. For all the fine words about justice for artists, composers were no more deserving and no less grasping than any other individuals who contributed to the production of records. Shaw, and the other champions of the artistic interest had no grounds for reproaching the phonographic industry, said Robertson, for doing what was legal:

Inasmuch as the exclusive right of making mechanical copies of a rendering of his work has not yet been conferred on the composer by statute, this particular and novel form of reproduction is in public domain and is free to all.

In any case, making a record did not involve copying, “but a registration of the sound waves of the voice of the singer”. Having acted within the law, and now facing the introduction of a new right that took control of the recording process out of their hands, manufacturers were entitled to receive the benefit of the compulsory licence. While the industry recognised that “the composer has a claim to some measure of protection in respect of phonographic publication” Shaw’s talk of theft obscured the real and continuing question as to whether property concepts could really fit abstractions:

I now turn to Mr Shaw’s second proposition ... that makers of records have been stealing the author’s work in the past. This, of course, can only start from the premiss [sic] that an author’s work is property. Whether it ever was so has been the subject of endless argumentation; but it is precisely because the author was

helpless to enforce any property right at Common Law in his published work that the Legislature started to find a remedy.

If, as Robertson implied, the legislature discovered property in a work for reasons of politics, the scope of rights conferred should be narrow:

But, in conferring this great boon on literature, the Act of 1709 did not establish a freehold right in an author's creation. On the contrary, it gave him a leasehold with a limited term of years, during which the author would be free from molestation and would enjoy statutory protection against trespassers on his domain, but with reversion to the public at the end of his lease.

Shaw, his nervous centres seemingly still paralysed, did not respond to Robertson's letter. Nor did William Boosey, who emphasised the Gramophone Company's vested interest, and was evidently felt much concerned about the perceived threat posed to sheet music publishers by record sales. But Shaw did, in a certain sense, sum up the position when said in his letter that an "injustice has to be done either to us artists or the manufacturers." He was clear about who would win in Parliament. "They," he said, "being industrialists are rich and can bully Governments."

Bullying or not, and certainly rich, the "industrialists" did win in Parliament. The Grand Committee added to the Bill a provision allowing for compulsory licensing. But it was not as if authors were abandoned. The legislation still offered them primary rights. With his long experience of politics and publishers, Shaw evidently entertained few illusions that copyright regulation might produce justice. In any case, justice for industrialists was not justice for Shaw, and justice for Shaw did not necessarily mean justice for the public. In the two months between Robertson's last letter in *The Times* and the last meeting of the Grand Committee, he would have pressed his case publicly with vigour. Whether or not the Committee members were, as suggested by Shaw, bullied behind closed doors, they no doubt based their decision on appraisal of economic realities.

The phonographic industry was not only a powerful economic force, it created the gramophone society. In 1913, one third of British households possessed gramophones and in 1914, the Gramophone Company sold 4 million records. Government could not easily ignore the special pleading of which Shaw accused Robertson. At issue, it seemed, were employment, investment, dividends, tax revenue and a hugely popular source of recreational diversion. It was easy enough for the Government to accept the argument that placing the mechanical rights in the hands of creators would result in monopoly or cartel. Compulsory licensing allowing any manufacturer to make a recording of any work recorded – subject to returning to the work's owner a prescribed royalty on sales – offered an appealing solution to politicians looking for an equitable compromise between opposed

interests.

The publishers and the restrictions on term

For all the bitterness aroused in some quarters by the compulsory licence, provisions governing the publishing of books most occupied the minds of legislators and public during the debates of 1911. This was not surprising. Ever since the beginning of the 17th century, when the Stationers Company began collaborating with the government in the control of books, publishers were villains in the public eye. Politicians shared this general dislike, though it did not stop them from passing copyright legislation that benefited publishers. Publishers fitted squarely into the category of rich and bullying industrialists maligned by George Bernard Shaw. As John Murray, a leading publisher, said in a letter to *The Times* published shortly before the Grand Committee reported, the “Government admitted at the start that if the publishers opposed their Bill, they could not hope to pass it.”⁴

Australian politicians were noticeably hostile to publishers, and since British publishers profited ruthlessly from their control of the Australian market, they had reason to dislike them. In 1912 Senator St Ledger reflected the mood of many colleagues when he reminded them of Dr Johnson’s satirical paraphrasing of St John’s Gospel 18:40: “Now there was a *publisher* and his name was Barabbas.”⁵ British and Australian parliamentarians both referred in the copyright debates to the sad story of Milton’s grand-daughter, left destitute because her grandfather’s literary estate passed into the hands of a publisher.

As far back as 1842, Talfourd and Macaulay commented on her penury, Talfourd as a moral illustrating the need to pass laws providing for the welfare of authors and their descendants, Macaulay as evidence that such laws only strengthen the hand of publishers. The story was certainly a striking one. As Augustine Birrell, writer and Irish Nationalist MP, told the Commons in April 1911, for licensing the publication of *Paradise Lost*, Milton received £5 advance, £5 at the end of the first run of 1,500 copies, £5 at the end of the second run of 1500 (which occurred within 2 or 3 years of first publications) and £5 at the end of the third impression. When he died, his widow parted with all her rights for £8.

Opposition to publishers, often more visceral than rational, did highlight the awkward truth that copyright laws were a form of business regulation that did not invariably work to the benefit of authors. What was good for publishers – a long copyright term, the right of publication and exclusive distribution rights – was not automatically good for authors, for whom the terms of their publishing contracts

4 Letter John Murray to *The Times* published 7 July 1911.

5 The verse says ‘Now there was a thief and his name was Barabbas’

were all-important. As the debates of 1911 made plain, copyright law represented more of a bargain between commerce and law than law and art.

Unfortunately for publishers, they were businessmen in a peculiar business. As the reaction of legislators showed, many people regarded the conventional commercial practice of driving hard bargains as unseemly if it disadvantaged authors. To make matters worse, publishers made no attempt to be liked. In letters to *The Times*, Charles James Longman and Thomas Fisher Unwin called the Copyright Bill a “wooden gift horse” and a “gross injustice to be remedied”. For good measure, John Murray later described Lord Courtenay as the victim of “an hallucination” (for suggesting that publishers include in the price of a book the cost of supplying copies to certain libraries). He then observed that “utmost pains have been taken in drafting the Bill to exclude publishers from the extended benefits given to authors.”

Dogmatic and unflagging, the publishers were as friendly as hungry crocodiles. Often self-made, they founded, or inherited, publishing houses still successful today – Heinemann, Unwin, John Murray, Methuen, Longman and Macmillan. They were tough, calculating and unrelenting, the victors in recent memory of a ferocious commercial battle with *The Times*. In 1905, the broadsheet tried to arrest falling circulation by introducing the Book Club, which very soon became the object of the publishers concentrated fury.

The Book Club allowed subscribers to sell or lend books to one another, resulting in extraordinary price savings. For example, the Club advertised Winston Churchill’s *Lord Randolph Churchill* in 1906 for seven shillings instead of 36 shillings. Publishers organised a boycott of the newspaper, which replied by asking its readers to boycott Macmillan. The battle ended in 1908 when John Murray sued *The Times*, for libel and the court awarded £7500 damages. The paper published letters accusing Murray of “simple extortion” but his lawyers showed that correspondents underestimated his production costs. Lord Northcliffe, *The Times*’ new owner, then put an end to further arguments and sought to pacify the publishers.

No wonder that politicians, seeing the strength and dogmatism of publishers disliked and feared them. There was certainly no trace of friendliness towards publishers in the bill presented by Buxton, as they loudly pointed out. In particular, they objected to section 4 which provided for the republication or performance of works under compulsory licence if, after the author’s death, the copyright owner unreasonably withheld consent. The compulsory licence could only operate 25 years after the first publication of the work.

At the end of March 1911, William Heinemann spoke disapprovingly of section 4 in his presidential address to the annual meeting of Publishers Association. In the ensuing three weeks, three more publishers took up cudgels in *The Times*. Frederick Macmillan called section 4 “a grave injustice to authors” and CJ Longman likened it to a Trojan horse accompanying the gift of the long posthumous

term. Edward Bell, the head of George Bell & Sons, wrote to warn that the provision posed dangers to authors as well as publishers. He called the introduction of a 50 year posthumous term “the most important reform” in the Bill but warned that the operation of section 4 would confer on the devisees of literary property “a damnosa hereditas.”

The provision, according to Bell, opened the way to “any speculative printer or publisher who may see a chance of making profit for himself out of a 6d or 1s edition of a more expensive book published 25 years before’. He knew where to lay the blame for the appearance of section 3. “It is difficult to assign an adequate reason for this irritating provision if not to conciliate those supporters of the Government who grudge authors any rights at all.”

Two members of the House of Commons shared his annoyance. On 6 April, the leader of the Opposition, Arthur Balfour, criticised the Government’s “happy detachment” in “so lightly” introducing a provision that “if abused, might evidently be a source of infinite injustice”. The next day, Augustine Birrell, an Irish Nationalist MP, and the author of a book of essays on copyright,⁶ said, “I confess with regard to all this stuff about price, I do not think there is anything in it.”

Parliament supports the 25 year rule

Parliament’s response provides some indication of the general antipathy for publishers. The Grand Committee modified section 4 but not in a way that would please its critics. When passed, the Copyright Act contained three co-located provisions that publishers could regard as inimical to their interests. Section 3 permitted reproduction of works for sale 25 years after the death of their authors subject to payment of royalties.⁷ Section 4 now simply repeated, in substance, the formula in clause V of the repealed 1842 Copyright Act, authorising the Privy

6 *Seven Lectures on the Law and History of Copyright in Books*, Rothman & Co, USA, 1971. Although a member of the Nationalist Party, Birrell was English, not Irish. He was Chief Secretary for Ireland 1907–1916 and more highly regarded as a writer than as a politician.

7 The journalist and literary compiler Clement K Shorter, may have helped inspire the Grand Committee to adopt the 25 year limitation. In a letter to *The Times* on 20 April 1911, Shorter disputed Buxton’s statement in his Second Reading speech (7 April 1911) that “nowadays the author retained it [copyright] in nearly every case.” To ensure that authors did not give away their copyright, they had to be protected. “Why should it not be definitely laid down in the Copyright Bill that publishers can only buy copyright for a limited period, that while the author and the author’s executors hold the copyright of his books, for 50 years from his death that these books may not be entirely alienated from the author and his executors merely for the benefit of publishers?”

Council to order republication or public performance of a work at any time after the death of its author, if the owner withheld consent. Section 5(2) prohibited assignment of copyright in a work, except by devise under a will, after the expiry of 25 years from the death of the author.

Publishers saw the 50 year posthumous term seemingly shrink to 25 years. They could not receive an assignment of copyright that lasted for more than 25 years after the author's death, and they now contended with a new possibility: at the time they surrendered the copyright (it reverted back to the author's estate), any person giving the prescribed notice, and paying royalty of 10 per cent of the retail price of books sold, could begin to publish the particular work in competition with them. Moreover – an unlikely prospect – they could be forced to permit competitors to publish or perform a work if at any time after the owner's death they were judged by the Privy Council's Judicial Committee to be withholding the work from the public.

Though members of the Grand Committee might have expected that sections 3, 4 and 5, as revised, would stir the publishers like hornets shaken from their nest, the correspondence page of *The Times* registered no protest. The publishers were probably sensible not to waste energy arguing over Parliament's innovations. They understood that the commercial value of most copyright works is exhausted within 25 years of publication and no doubt regarded the 25 year rule as commercially harmless. They knew too that no applications were made under clause V of the 1842 Act, which provided for republication of a book without the copyright owner's consent.

Forty years later, the Gregory Committee, which recommended the changes that led to the British Copyright Act of 1956, called for abolition of the 25 year rule, declaring that section 3 was redundant. According to the Committee, it was industry practice for the original publisher or a competitor to issue cheap editions long before the elapse of 25 years after the author's death. As for section 4, allowing for compulsory licensing of works withheld, no person had applied to the Privy Council's Judicial Committee under the terms of the provision. Like section V of the 1842 Act, the provision had not been used.

The 25 year rule functioned symbolically. The Government evidently wished to prevent the publishing trade from relying on the 50 year posthumous term to curtail competition. Copyright law, including the posthumous term, conferred great privileges on business, and these privileges were liable to abuse. The publishers could argue that fears of abuse were unwarranted. As the Gregory Committee observed, the short currency of most books meant that cheap editions became available within a few years of an author's death, if not before.

The addition to the Bill of the 25 year rule revealed the curious dichotomy between the general enthusiasm for the extension of property rights, and the equally general distaste for Shaw's "industrialists", who stood behind authors as copyright beneficiaries. These mixed emotions perhaps burdened copyright

legislators. Many seemed unable to avoid seeing the process of regulation as a morality play, in which authors were innocents and producers villains. But framing copyright laws never involved a pure exercise in providing economic justice to authors. Now, more than ever, it involved a contest for economic advantage, and conferred rights that allowed works to be traded as commodities.

Who benefits?

Debate over the long posthumous term focused on the question of who benefits most from copyright law. Frederick Booth, a Minister and the Liberal Member for Pontefract, told the Commons that the 50 year posthumous term, however qualified, principally benefited publishers. Booth, as he said, championed “the cause of the poor reader, and the men who want more enlightenment but who have been deprived of the advantage of education earlier in life.” To such people, in his view, “the ready access to wholesome and cheap literature is one of the best ends that could be achieved” by legislation.

Unfortunately, “the people behind this Bill are not poor men; they are rich publishers and others with a large stock of books and they naturally want as long a period as possible given to their monopoly so as to be sure of selling their goods at a profit”. To Booth, Buxton’s statement that the 25 year rule would promote “free trade in the copyright” seemed risible.

Booth spoke at the end of July, when the Grand Committee had reported on the Bill, and he protested vehemently against “arrangements” made “behind the back of the House”. He was, he said, “the one outspoken critic of the Bill” following Buxton’s second reading speech, and for that reason excluded from the Grand Committee. The strength of his feelings can be gauged by the fact that he declared that he did not regard the Bill as a Government measure. Booth proposed that the Bill be recommitted to a Select Committee for more comprehensive treatment but receiving support from only one colleague, withdrew the motion.

Booth reported to the House that he had received letters from workingmen throughout Britain protesting that the Bill “attacked” their “right and privilege to enjoy cheap literature”. He had also received correspondence from publishers who felt the legislation would “put money unjustly in their pockets”. In his view, the Grand Committee’s changes hardly impeded the wrongful march of the publisher interest. If the Government really wished to benefit the public interest, he said, it should introduce a 20 year posthumous term.

In both Houses, only four others, three of whom were members of the Liberal Government, joined him in calling for a shorter period of copyright protection. The Scottish MP, James Dundas White, who in a letter to *The Times* two months earlier, referred to “a monopoly of copyright ... set up against the public”, pointed out that the Berlin Convention did not compel ratifying countries to adopt the 50 year term. Following this point, George Heynes Radford, the Labour

Member for Islington East, suggested that a posthumous period of 25 years was appropriate.

Then a few months later, in the Lords, Lord Courtenay proposed that the existing arrangement instituted in 1842 be retained. Like the MPs who wanted to limit the posthumous term, Courtenay considered the primary object of copyright policy ought to be to encourage the dissemination of literature at reasonable prices. To this end, they considered a limited term essential. According to Courtenay, speaking in November 1911, the “claim for [the] extension was not supported by any injustice shown in the past ... and is much to be deprecated in the interests of education.”

These men argued in vain. Buxton, confident of the Government’s position (MPs negated Radford’s proposed amendment of the term by 118 votes, 153 to 35), did not waste much time debating the merits of the long term. He said simply that the Government introduced the new period “in order to bring the law in this country into conformity with that in other countries.” Later, he added that though the Grand Committee’s decision was irreversible, it made provision for the 25 year rule and compulsory licence to guard against abuse.

In the Lords, Courtenay’s arguments were disposed of without ado. Lord Haldane made the doubtful assertion that the Gorrell Committee supported the 50 year term after “much discussion and inquiry”. But he was on firmer ground when he implied that rights of property do not admit of much limitation. “My noble friend,” he said, “proposes to treat authors in a different way from that in which the law treats other people in respect of their property.”

Lord Gorrell naturally agreed. As he said, submissions to the Committee he chaired in 1909 supported term extension. Furthermore, he declared, the new term “would not militate against the production of cheap editions, for publishers and authors found that it paid them to appeal to a wide public.” So the long posthumous term passed into law with little controversy. The publishers focused their attention on another topic. Though they found the 25 year rule, in the words of Edward Bell, “irritating”, they were concerned, almost obsessively, with a subject that, to the modern eye, seems of minor economic importance.

Compulsory deposit

The 1842 Act required publishers, on demand (and on pain of a £5 fine), to deliver a copy of each book published to the Stationers Company, as well as to the Bodleian Library, the Public Library of Cambridge, the Library of the Faculty of Advocates at Edinburgh and the Library of Trinity College, Dublin. The Bill of 1911 enlarged slightly on this stipulation, requiring publishers to supply a copy of each new publication to the British Museum and adding the Welsh National Library to the list of institutions entitled to demand delivery of new books.

The practice of compulsory (now called statutory) deposit began in the early

17th century. According to the publisher John Murray (in a letter to *The Times* of 7 July 1911), the “compulsory presentation of copies of all books published began in 1602, when no book was permitted to be printed without a licence”. According to Murray, it “was apparently with a view to enforcing the provisions of the Act, and bringing all books readily to the cognisance of the censors, that three copies had to be delivered gratis – one to the King’s Library, one to Oxford, and one to Cambridge”.⁸

After Heinemann, Longman, Unwin and Bell protested over section 4 of the Copyright Bill in April 1911, the publishers concentrated their full attention on the question of compulsory deposit. From May until the Lords approved the final version of the Bill in November, Murray, Heinemann and Unwin poured out, in the pages of *The Times*, their complaints against the tyranny of section 15 (‘Delivery of Books to Libraries’). They – mostly the indefatigable Murray – rushed into print on no fewer than 12 occasions, engaging a variety of opponents, the officials of Cambridge University and the National Library of Wales, “an author”, “a reader”,⁹ even the MP Dundas White.

In a final gambit in November, the Council of the Publishers Association of Great Britain and Ireland addressed a Memorandum on the Copyright Bill to the House of Lords. The Memorandum criticised the “exaction” as a “remnant of an enactment connected with the literary censorship” and said that publishers “feel very acutely the injustice of the burden which they are singled out from all other classes of the community to bear”.

Two weeks after the Lords received the Memorandum, John Murray wrote to

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- 8 Murray repeated a common myth about compulsory deposit. The practice resulted from the efforts of a private citizen not government’s wish to control opposition or dissent. It began in 1610 when Sir Thomas Bodley, who wanted to expand Oxford University’s library, secured the agreement of the Stationer’s Company to supply the university with copies of works produced. A Star Chamber decree, and then Licensing Acts of 1662 and 1664, gave legal force to the arrangement and the licensing Acts required that books be supplied also to the Royal Library and Cambridge University library. The Government did censor books collected by this device, and probably passed the licensing Acts to facilitate censorship. However, Bodley intended to create a bibliographic record of English literature. See John Gilchrist, “Copyright Deposit, Legal Deposit or Library Deposit? The Government’s Role as Preserver of Copyright Material”, *Queensland University of Technology Law and Justice Journal*, Vol 5 No 2, 2005.
- 9 Quite commonly correspondents identified themselves by a title rather than name. The letter of “An author” published on 21 November called the publishers’ arguments “absurdly exaggerated”, and “strongly deprecate[d] any alteration of the existing practice”. The writer noted that if compulsory deposit were “[r]egarded as a tax, authors, whom the publishers take care to pass it on to, would willingly pay it, in return for more adequate protection of their copyright”.

The Times summing up the publishers' ostensible source of grievance. By then, the cause was lost. According to Murray: "if matters had been left as they were we would have remained silent; but when we discover that it [compulsory deposit] is regarded as capable of extension for new institutions, and as we have no guarantee that this extension may not be continued in future, we consider that it is time to take objection". In the same letter, he said that if politicians considered the compulsory supply of books a national necessity, the nation, and not publishers alone, should bear the costs involved. "If it is a national duty and the country is so wealthy, the injustice of throwing this national and Imperial impost on one small body of citizens becomes all the more glaring."

A week earlier, William Heinemann wrote to *The Times* to make plain to the Lords that publishers "object in principle to the unjust tax levied upon us." He severely criticised the publishers' opponents for their "airiness of attitude", which, he said, was "characteristic of practically all the arguments used on behalf of the University libraries to maintain a privilege they have acquired in a not over-creditable way." More to the point, the supply of free books could be counted "equal to an addition of over 3d in the pound to the income tax I already paid on the profits of my business."¹⁰

Murray said in correspondence published shortly before Heinemann's that publishers resented being "mulcted". The unfairness of section 15 pointed to the right course of action. Invented, according to Murray, as a device to assist official censorship, compulsory deposit should be abolished. The "sole pretext which could have justified so unusual and unjust a tax has long ago disappeared, and yet we are compelled to pay it still, and it is being increased as a sop to certain supporters of the Government."

The publishers' furious reaction to section 15 and the energy they expended on seeking to overturn the provision doubtless perplexed legislators. Even if the statistic quoted by Heinemann were correct, the cost to publishers of supplying free books to certain libraries was insignificant. The real reason for their hostility, which they may have been reluctant to disclose, is to be found in the letter of "A Reader" to *The Times* in November 1911. The letter pointed out that, it "is perhaps not the five copies that hurt the publishers, but the 50 that would have sold, had not the book been in the University Library. But against this may be set the 500 readers who would never see the book if it was not in the library."

If the publishers opposed compulsory deposit because they feared that libraries threatened their business, they were, to borrow John Murray's phrase deprecating Lord Courtenay, "victims of a hallucination". They were wealthy men and their businesses were flourishing, so their sense of grievance must have seemed inexplicable. The history of copyright regulation shows that paranoia is

10 Letter WM Heinemann to *The Times*, 23 November 1911. 3d was threepence; there were 240 pence in the pound.

frequently the companion of vested interest.

Coleridge-Taylor and compulsory royalties

In November 1912, the Society of Authors launched in London an appeal for the widow and children of the composer Samuel Coleridge-Taylor. Author of the popular song *Hiawatha*, Coleridge-Taylor died three months earlier, leaving his family in straitened circumstances. The Chairman of the Society's Committee of Management, J Squire Sprigge, wrote to *The Times* to publicise the appeal, and suggested that the musical publishers Novello & Co were implicated in the family's poverty. In the course of advocating a system of compulsory royalties, he said the musician's case supplied "an admirable example of the trouble that may and often does follow upon the outright sale of literary or artistic property".

Given the popularity of Coleridge-Taylor's work, why was his estate threadbare? In Sprigge's view, because Novello & Co, bought the rights to *Hiawatha* outright: "it is our experience," he said, "that it is the author of the work who is generally disappointed by the disposal of copyright." Sprigge opposed outright assignment because "a system is bad in business which by its capricious event leaves behind it either a recollection of pecuniary loss with the publisher or a deep sense of injustice with the author." If the value of sales much exceeded the price of assignment, authors who had assigned their rights for a nominal fee could be left impoverished.

Sprigge criticised the publishers for taking advantage of their superior bargaining strength to secure the assignment of *Hiawatha* at a low price and refuse royalties. Royalties, he said, "would have provided sufficient money for the dependants without any appeal to the public." The case of Coleridge-Taylor testified to the truth that, "in all the usual circumstances, and especially in the cases of young writers and composers, the disposal of copyright is to be absolutely avoided and the royalty system should be adopted." According to Sprigge, the royalty system distributed risk equitably, saving the publisher from the cost of purchasing copyright in a work and allowing the author to share in sales revenue.

Five days later, Novello & Co replied in *The Times* that it did not object to paying royalties. It adopted the royalty system 40 years previously and made "constant use" of it "in suitable cases". The publisher responded obliquely to the implication that it took advantage of Coleridge-Taylor, stating that, "it is characteristic of young and unknown composers that they usually desire to sell their works outright". But it rejected the proposition that the composer did not benefit from his dealings with Novello & Co. The firm published six Coleridge-Taylor works, securing an assignment of three and paying royalties on the others.

The composer Sir Charles Stanford quickly joined the controversy. In two letters to *The Times*, he claimed that Novello & Co drove hard bargains with Coleridge-Taylor in his early career, refusing his request for royalties on one

work and insisting on complete assignment in return for 20 copies of the work when published. According to Stanford, Coleridge-Taylor, accepted these terms because he was unknown, and desperate for recognition. As for *Hiawatha*, the “question is ... its profits and where they went, and the grounds upon which the appeal to the public for the composer’s family has been rendered necessary at all.”

Novello & Co replied that Coleridge Taylor did not ask for a royalty on sales of *Hiawatha*. In other words, the publisher seemed to say, caveat vendor. If Coleridge-Taylor, contracting freely, and in his right mind, struck a poor bargain, the publisher could not be said to be responsible for his later poverty. The last words in *The Times* went to Sprigge, writing again on behalf of the Society of Authors. Of Novello & Co, Sprigge said:

They say that Mr Coleridge-Taylor was not refused a royalty. The real question is – Did he obtain a royalty? ... under a fair royalty system such an unfortunate position as we have in Mr Coleridge-Taylor’s case – viz the need for a pecuniary appeal to the public on behalf of the dead author of a famous and popular work – could not occur often. For the author would have received during his lifetime and his dependants would be receiving after his death, a due share of the profits earned by his work and genius.

The exchange of letters in *The Times* lasted a little over two weeks. Then, at the beginning of January 1913, *The Musical Times* reprinted the entire correspondence. It did so for a better reason than further darkening the reputation of publishers. The controversy over Coleridge-Taylor’s estate hinted at the beginnings of the movement to the collective administration of rights. The Society of Authors appeared to want the Government to institute a system that supposedly overcame the problem of unequal bargaining power by allowing the composer a fixed share of sales. However, over the next year, a different solution became apparent.

In 1914, composers and publishers established the Performing Right Society to collect revenue on their behalf for the performance of musical works. They created a model of taxation that, once emulated, allowed copyright owners to license and claim remuneration for every conceivable use of copyright material. A decade later, the Performing Right Society helped to establish its Australian counterpart which, in the years leading to the Second World War, enforced its right to collect fees for the performance of musical works.

After 1913, Sprigge’s proposal for a system of compulsory royalty payments to bring equality to the bargains between publishers and authors went no further. The hard reality of inequality of bargaining power continued to govern creator-producer relations and for most authors, contract determined income. But the appearance of the PRS signalled something new and radical in thinking about

copyright. Henceforward, the law would work to deliver revenue to owners predictably and comprehensively.

FAIR DEALING

Private and public interests

The creation of a system for collecting revenue for the licensed use of copyright material pointed to the remarkable possibilities for profit the law offered to copyright owners. Authors, and the industries that relied on their works to supply mass entertainment, were now placed in a position to demand payment for allowing copyright material to be copied, transformed, fixated, performed or otherwise used. Use determined remuneration: the person who wished to exercise any of the exclusive rights of copyright must pay the owner of the right for a licence to do so.

The Act of 1911 transformed the scope of copyright regulation beyond the imagining of the men who created the legislation it replaced, and those who passed the Australian Act of 1905. Before 1911, copyright laws functioned primarily to allow publishers to control the supply of books in Britain and its Empire. After 1911, they regulated the large scale production of books, records and films, and, in the case of records and films, their public performance.

The growth of collective rights administration, pioneered by the Performing Right Society, and the ever-increasing revenue from licence fees generally, marched in step with the continuing growth of the copyright industries, and the explosion in mass entertainment. These developments reinforced the status of the Berne Convention and vindicated, in their own eyes, the assertiveness of the advocates of authors rights. But the headlong rush to profit gave rise to a disquieting question. The new rights benefited the copyright owner but did they much benefit buyer of books and records, the viewer of films, and, shortly, the radio listener?

Apart from the conventional statements about the moral entitlement of authors, little in the official literature indicated that policy makers were motivated to consider public before private interest. From the publication of the Gorrell Report until the passage of the 1911 Act, law-makers concerned themselves principally with conferring economic privileges on designated categories of copyright owner. Even when qualifying the exclusive rights for the benefit of the public, legislators framed limitations to protect the commercial interests of copyright owners.

Section 2(1) of the 1911 Copyright Bill, which specified the acts not constituting infringement of copyright,¹¹ permitted the public to make certain uses

11 “Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which

of copyright material without permission or payment, but not in ways that could not undermine the flow of revenue to copyright owners. The acts enumerated involved non-commercial and educational uses, and were cast in narrow, qualified terms that could hardly be said to demonstrate that the Government prepared the Bill with much thought for public welfare.

The Grand Committee showed still less inclination to permit limitation of the exclusive rights. As Buxton said before the Commons in July 1911, section 2(1) “aroused a great deal of controversy” among Committee members. They added, according to the Liberal maverick Josiah Wedgwood, “proviso to proviso” to avoid “pitfalls” seen to threaten the copyright owner’s interests. In the end, perhaps the most expansive, and certainly the most recognised proviso merely allowed a person to make a ‘fair dealing’ with any work “for the purposes of private study, research, criticism, review or newspaper study”.¹²

The contents of section 2(1) betoken how legislators came to a new understanding of the purpose of copyright law, one that reflected the emergence of a new hegemony, that of the copyright “owner”. The new power of the copyright owner derived not only from the exclusive rights but also the enactment of offences for exercising the rights without permission.

The 1842 Copyright Act proscribed ‘Piracy of Books’, the unauthorised printing, import, publication or possession of books for ‘Sale or Hire’, and the sale or hire of such books, or the offering of the books for sale or hire.¹³ Be-

is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:-

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary ...” The next five sub-paragraphs in the provision dealt with the non-reproductive use of artistic works for creating other artistic works, the making or publishing of paintings, photographs etc of sculptures or works of architecture, the publication, for schools of short passages of copyright works in mainly non-copyright collections, the publication of public lectures in newspapers, and public reading or recitation by an individual of a reasonable extract from a published work.

- 12 The Australian Copyright Act 1905, section 28 said: “Copyright in a book shall not be infringed by a person making an abridgement or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair copies from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purpose of criticism, review or refutation, or in the ordinary course of reporting scientific information.” The British Act, unlike the Australian, allowed for fair dealing for private study or newspaper summary but the Australian Act seemed to contemplate a broader ambit of copying activity by the individual.
- 13 Clause XV of the Act was called ‘Remedy for the Piracy of Books by Action on the Case’. The purpose of prohibition was to protect the owners of literary property

fore 1911, the prohibition against piracy did not apply to the unauthorised use of a book for a purpose other than *sale or hire*. The enforcement provisions of the 1911 Act, however, did away with the limited construction of the owner's privilege. They declared unauthorised reproduction or performance of a work by *anyone* for *any* purpose an infringement.

According to the Act, a person infringed copyright “who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred.” Under the legislation, any person who exercised any right ‘exclusive’ to the owner, for any purpose, committed an offence – save for the operation of section 2(1), the fair dealing provision, and section 19(2), the compulsory licence provision.¹⁴ After 1911, the progressive elaboration in legislation of owners’ rights resulted in related expansion in the total of statutory remedies available to the owner.

The copyright owner became a punitive figure, enforcing the multiplying remedies and forcefully ejecting, in the words of John Drummond Robertson, “trespassers on his domain”. In one sense, the 1911 Act treated copyright trespassers more kindly than previous legislation. They were now declared “infringers” not “pirates”. The change in terminology occurred thanks to the Government Minister Frederick Booth who attacked as “wrong and ridiculous” the time-honoured convention of calling breaches of copyright “piratical”. This characterisation reflected, he said, questionable assumptions about the moral content of property rights.

He asserted that the word “pirate” should not be applied to “the poor people who stood in the gutters of our streets and furtively sold copies of a work to the public”. Using the description “so as to apply to the poor seller of goods only served to prejudice a man when placed on his trial, [it] being afterwards applied to him as a stigma”. He proposed that the word “infringing” be substituted in the Bill for the word “pirated”. The Unionist MP, Sir William Anson, opposed his motion on the grounds that the word “pirated” was not “an offensive [description] to apply to persons who appropriated the property of other people” but the House accepted the amendment.

from pirate presses in France and Ireland as well as the United Kingdom.

- 14 According to Patterson, *supra*, US courts in the 19th century distinguished between the use of the *copyright* and the use of the *work*. The Constitution allowed copyright owners to restrain piracy but stated that the purpose of copyright was to “promote the progress of Science and the useful Arts”. In Patterson’s analysis, the Constitution intended that copyright would promote learning while also protecting the author from the piracies of commercial competitors. Its *purpose* was to disseminate, its *function* to protect. The fair use doctrine was promulgated to allow competitors to use a copyright work provided the use did not provide an unfair commercial advantage. Non-commercial uses were never considered infringements.

Public access

The ascendancy of copyright owners is traceable not only to the prestige of the Berne Convention, the proselytising of its adherents and the aggressive lobbying of the phonographic industry. Already in the United States, in the later 19th century, courts determining the boundaries of copyright protection began to assert the hegemony of copyright ownership. They did so by developing the “fair use” doctrine, which permitted free unauthorised public access to copyright material in restricted circumstances. Fair use, ostensibly a doctrine promoting public access to copyright material, entrenched the author’s prerogatives as the determinant of copyright subsistence. In defining the circumstances in which a person could use copyright material gratuitously and without permission, the courts accepted the presumption – not previously adopted – that any other unlicensed use constituted infringement.

In Britain, courts in the 18th century developed the concept of “fair abridgement” – the basis for the statutory category of “fair dealing” – to permit a person other than the author to abridge a work for private, (but not commercial) purposes. In applying the relevant provisions of legislation to protect the author from piracy, 19th century judges faced the question of what the non-copyright holder *was* permitted to do. The 1911 Act answered the question simply, declaring, in section 2(1), that copyright in a work “shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.”

The courts’ gradual delineation of authors’ rights created, inevitably, a metaphorical territory of copyright. Some scholars have drawn an analogy between the common law process of mapping authors’ rights and the enclosure of common land in Britain after the Reformation. In both instances, the law ratified expropriation of subject matter held in common. In the 17th century, common land became private land, and the new landholders erected fences to repel trespassers. In the 19th century, according to scholars, lawyers began the still continuing process of seizure and enclosure of the intellectual commons. As defined, fair use constituted a public right of way across private property, a limited privilege granted as a convenience to those who would otherwise be trespassers. The doctrine, far from benefiting the public, testified to the steady alienation of territory once common to all.¹⁵

The common law moved inevitably in the direction of treating copyright subject matter as an exclusive possession, foreclosed from the public except by

15 See e.g. Hannibal Travis, “Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment” (2000) *Berkeley Technology Law Journal*, 15(2), pp 1–65.

permission or for specified purposes, such as fair dealing.¹⁶ Reasons for the enclosure of the abstract domain are not hard to find. Statutory rights, once conferred, must be interpreted, and the process of interpreting and elaborating tends to enlarge rather than reduce the ambit of those rights. In the English-speaking world, cultural axioms create in lawyers deep psychological aversion to hedging the claims of property, even in the realm of abstractions.

19th century developments in the United States, in particular, testify to this truth. When the United States enacted federal copyright codes in 1790 and 1831, politicians, remembering the independence struggle, wanted to ensure that copyright not be used prevent free speech or allow censorship. The second Act granted the author “the sole right and liberty of printing, reprinting, publishing and vending” a work and it fell to the courts to determine the extent to which the Constitution limited or enlarged the right. Judges were called upon to consider the effect of Article I, section 8, cl.8 of the Constitution, which grants Congress power to make laws to “promote the Progress of Sciences and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” and the First Amendment, which guarantees freedom of speech and the press.

Taken together, the constitutional directive to make copyright laws to promote learning, and the First Amendment’s guarantee of free expression, could be expected to influence courts to define authors’ rights narrowly. But judges ultimately resolved the conflict between the claims of property and free speech in favour of the former. The fair use doctrine implicitly asserted the sovereignty of the copyright owner over the use of expressive content, making public access to information a highly conditional privilege.

As one scholar observed, codification of the fair use doctrine in the 1909 US Copyright Act “brought consumer conduct within the realm of infringement” and started “a termitic infestation of the constitutional right of free speech”. According to the same scholar, in the century ensuing since the Act of 1909, fair use law “enlarge[d] the concept of infringement at the expense of the individual consumer’s right to copy the work for the purposes of learning.”¹⁷

16 The Australian Act of 1905 dispensed with the presumption that copyright infringement must involve activity directed towards commercial advantage – “[i]f any person infringes any right conferred by this Act ...” – and it made the important concession that “private use” of a book was not an offence. Moreover, in theory, it embraced a broader version of fair dealing, allowing for “fair extracts” as well as specified fair dealings.

17 Lyman Patterson, *supra*. Patterson stated that: “copyright has both a purpose and a function. The purpose is to promote learning; the function is to protect the author’s economic interest. The function, however, must serve the purpose, not vice versa. To say that the copyright owner has a right to the profit and a right to deny public

In legislation, the expanding range of rights and offences marked most clearly the hegemony of the owner. In the 19th century, the statutes of both the United States and United Kingdom defined infringement narrowly. In Britain, piracy constituted the sole copyright offence. The fair dealing provisions in the 1911 Act, and its enumeration of copyright offences, confirmed the new status of the copyright owner. Statutory provisions forgiving what would otherwise be construed as trespass on the owner's property – namely the fair dealing provisions as they were progressively enunciated – were now understood as a concession to the “public interest”. When Parliament struck a balance between the public and private interest in 1911, it did so very firmly in favour of the latter.

1912 PARLIAMENTARY DEBATE IN AUSTRALIA

The necessity for conformity

The Australian federal Parliament passed the Copyright Act of 1912 in a period of intense legislative activity – between 1910 and 1913, Parliament passed 113 Bills. This fact may account for the relatively perfunctory treatment given by both Houses to many substantive portions of the Bill after its introduction in July.¹⁸ Legislators debated the Bill at some length in October 1912 but they considered provisions largely in committee, spending considerable time on questions of machinery and drafting.

Politicians resolved to incorporate the British Copyright Act of 1911 in the new copyright legislation for pragmatic reasons. As Australian parliamentarians knew, uniform legislative rules throughout the Empire were an important preliminary to creating the uniform system favoured by imperialist politicians. They also knew that the privileges enjoyed by members of the Berne Union flowed to Australia in its capacity as a British possession, not as an individual State. Until Australia joined the Union in its own right, it must align its legislation to that of Britain or risk ostracism from the Berne family.

As standing outside the Union seemed to be unthinkable, and numerous politicians subscribed to the ideal of imperial unity, it may seem self-evident that in 1912 parliamentarians agreed on the necessity for adopting the British Act. In fact, the Labor Government, manifesting some of the independent spirit

access is to fly in the face of the constitutional scheme of copyright. The purpose of copyright relates to the use of the work; the function of copyright relates to the use of the copyright. In order to protect the author against the use of the copyright, it is not necessary to deny the consumer the use of the work..”(P46).

18 The Governor General assented to the Bill on 20 November.

of the parliamentary generation of 1905, responded to British developments by introducing in 1911¹⁹ independent legislation to extend Australian copyright protection to the works of authors in Britain, the Empire or the countries of the Berne Union.

The Government soon learnt that any new copyright legislation must conform to British requirements. On 1 December, shortly before passing its own copyright Bill, the imperial Government communicated to its antipodean counterpart a politely coercive message: failure to adopt British copyright legislation would mean that Britain would no longer recognise Australian copyright. Equally importantly, if Australia did not adopt the legislation its Act would not fulfil the requirements of the amended Berne Convention.

A few days later, Lord Tennyson, silent since the London Copyright Conference, cabled the Prime Minister, Fisher, to “earnestly request you to postpone Bill till you have text imperial act [sic].” His message emphasised the necessity for uniformity and the risk of falling out-of-step with the Union. “There was,” said Tennyson, “friendly and unanimous feeling at Conference last year and desire on the part of all to get legislation on uniform lines ... By your action you may put yourselves outside limits Berlin convention and place myself and the Government in an awkward position.”

Fisher’s Government did not hurry to comply with British requests. But sometime in early 1912, it dropped the draft bill and concentrated on preparing new legislation that incorporated the British Act and included various provisions specific to Australian conditions. No-one, however, expressed enthusiasm for the British legislation. In October, Senator Keating called the Act “unintelligible to the ordinary person ... drafted in such a way that it is impossible for the layman to follow it.”²⁰ By contrast, he said, the Australian Act “is, to those interested in its operation, at least intelligible. On the other hand, to those interested in its operation, and to those who may be called upon to interpret it, the English Act that we are about to adopt is not always intelligible.”

Commenting on section 13(2) of the British Act, which dealt with compensation, Keating said, “some of our latest admitted barristers and solicitors would have been capable of drafting that clause in a more lucid way ... I could quote other clauses which are far worse in respect to draftsmanship.” In the House of Representatives, the Attorney General, Billy Hughes, expressed a similar view: “I am bound to say that not only in this, but in other sections, the drafting of the Act leaves a great deal to be desired, and that the field for litigation seems to be most prolific.”

But, as Keating said, the Government had “no alternative” to adopting the

19 In November, prior to the passage of the British legislation.

20 *Hansard* 23 October 1912, p4512.

imperial legislation.

If we are going to impose conditions with respect to copyright which are not recognised by the International Copyright Union, we shall be setting ourselves up as different from nearly every other civilised nation in the world. It should be our desire to come into line with them.

The Government's decision meant the loss of legislative autonomy. Parliamentary debate on the 1912 Copyright Bill could only be significantly constrained, for the incorporation provision in the British Act made plain that the British Parliament did not envisage the dominions making even modest changes to substantive clauses.²¹

Sure enough, much of the debate over the Copyright Bill involved a dreary exchange of non sequiturs on subjects ranging from library deposit to the accuracy of the marginal notes to legislation. Only Patrick Glynn complained, in the House of Representatives, at the length of the proposed copyright term. He reminded the House that two years earlier, the Labor Government itself sent a memorandum to Britain protesting the proposed 50 year posthumous term. The other MPs did not seem to care much.

They realised that discussion of the legislative provisions could only be, for the most part, a waste of time. In the Senate, Sir Josiah Symon, the outstanding contributor to the debates of 1905 remained silent. Never a frequent speaker, the end of his parliamentary career neared and his party no longer favoured him.²² His silence symbolised the change in approach to matters of copyright policy between 1905 and 1912.

In that time, a new understanding superseded the conception of copyright as a limited set of rights directed towards protecting the owner of literary or musical property from unauthorised copiers. The success of the Berlin Conference made clear that substantive debate on issues such as the copyright term would now take place at conferences of the Berne Union. The Union had become the motor of legislative change. No wonder that Symon had nothing to say.

21 Section 25(1) read as follows: "This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's Dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of the that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature."

22 He ran for Parliament as an Independent in 1913, and lost.

Import controls

A small minority of parliamentarians in 1912 did contest an element of the British legislation that operated to the undoubted disadvantage of Australians – the grant to the copyright owner of exclusive control over the distribution of copyright material. Britain introduced distribution controls in the early 18th century to limit the influx from the Continent and Ireland of pirated books. Controls worked by vesting in copyright owners exclusive control of the distribution of copyright material. Owners could prosecute in British courts any person who imported books for sale or hire without their permission, and used their power to control the supply of books.²³

After the 1800 Act of Union that made Ireland formally a part of the United Kingdom, book piracy, previously a flourishing activity, gradually disappeared because copyright holders were able to enforce in Irish courts the provisions of British copyright and customs legislation. With the passing of the Copyright Act of 1842, the owner's exclusive power applied, under section XVII, to all British possessions, creating a monopoly, throughout the Empire, over the import or export of legitimate copyright material. Naturally, British publishers greatly valued import controls as a device for stifling competition. As long as colonials were debarred from importing (or domestic suppliers from exporting) books without the copyright owner's licence,²⁴ the latter was free to determine price, range and quantities free from the imperatives of competition.

British publishers were, as their letters to *The Times* during the 1911 copyright debates showed, viscerally attached to the distribution monopoly, particularly as it related to the colonies. The ties of history intensified the emotions some exporters. C J Longman, for instance, could look back 150 years to the days when his great-grandfather transformed Longman into a great exporter of books to the North American colonies. His uncle published a pamphlet on colonial copyright in 1872. For the publishers, so it seemed, Providence conjured countries like Australia to supply them with captive markets until the end of time.

Shortly before the introduction of the 1911 Copyright Bill, William Heinemann addressed the Publishers Association and warned of the dangers to the

23 Section XVII of the 1842 Copyright Act established import controls. The marginal note stated: "No person except the proprietor, &c. shall import into the British Dominions for Sale or Hire any Book first composed &c. within the United Kingdom and reprinted elsewhere, under penalty of Forfeiture, and if so of 10l. and double the value; and Books may be seized by Officers of Customs and Excise."

24 Divisibility of copyright, recognised domestically in Australia in the 1905 Act, and introduced in imperial legislation in the 1911 Act, meant that the British copyright owner could grant copyright for a territory to a local who could then print and publish a British work in the territory.

import monopoly posed by “certain socialistic pretensions existing exclusively so far in certain of the Colonies”. Months earlier, Lord Tennyson cabled the Australian Government to advise it of a measure in the British Copyright Bill that would make publishers liable for proceedings in Australia as well as Britain. The publishers, said Tennyson, found the prospect “intolerable”. Why not, he asked, amend Australian legislation to ensure the owner of an Australian work could only be sued in Australia, and the owner of a British work in Britain?

Domestic publishers were also high-handed. In August 1911, George Robertson, co-founder of Angus and Robertson booksellers, dispatched a handwritten note to Billy Hughes (it began “Dear W Hughes”) curtly protesting against the “extraordinary omission of the British Government” to introduce in its Copyright Bill a provision that retaliated against the manufacturing provision in the United States’ Copyright Act. The tenor of the letter implied that Hughes ought to fix the anomaly and the latter certainly responded with alacrity.

He promised to “communicate with the Home Government in reference to the omission” and a fortnight later, the Registrar of Copyrights supplied him with a report titled “Angus & Robertson Ltd, Literary Copyright – Provisions of English, American and Australian Laws”. Representations made on Robertson’s behalf, however, were unavailing. The Commons briefly debated a proposal to add to the Copyright Bill a retaliatory manufacturing provision, but Government pressure led to withdrawal of the proposal.

Adoption of the British Copyright Act did not automatically mean that Australia must adopt rules that allowed British publishers, or their licensees, to monopolise the supply to Australia of books produced or sold in Britain. Under section 25(1) of the British Act, the selfgoverning dominions could adopt the legislation “with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion.” However, to undo the import provisions enunciated in section 14 of the British Act, parliamentarians needed to be certain that any nullifying changes constituted modification or addition adapting the provisions to Australian conditions.

Few, if any, legislators could have declared with confidence that section 25(1) contemplated revocation of the import provisions. Attempting to decipher the section, they would more likely concur with Hughes’s statement that the drafting of the Act left “a great deal to be desired”, or perhaps agree Keating’s observation that the legislation was “unintelligible”. Section 14(7), did, however, provide some clarity. It said of section 14 as a whole: “This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.”

Even if the apparent intent of section 14(7) were ignored and legislators thought it theoretically possible to revoke the prohibition expressed in section 14, practicality stood in the way. Any weakening of the import rules would cause a

row with Britain and complicate incorporation of the British Act. For the great majority of parliamentarians such a course of action seemed unthinkable. They supported unwaveringly section 10 of the Australian Copyright Bill which vested in Australian copyright holders control over the import of copyright works.

Debate over the import monopoly

The import monopoly did, nonetheless, occupy the greatest amount of debating time and, more than any copyright issue discussed in Parliament in either 1905 or 1912, aroused the passions of a few speakers. Exchanges were frank. On one occasion Keating said of the Labor Senator Gregory McGregor, who betrayed no understanding that the monopoly might penalise consumers, “I really begin to totter my belief that the Vice-President of the Executive Council understands the Bill with which he is dealing.”

Australian legislators chose to believe the comforting illusion that British and Australian interests were indivisible and laws made by the former must benefit the latter. Though Joseph Vardon and John Keating pointed out to senators the importance of legislating in Australia’s interest, and Keating implored them to reconsider their endorsement of the distribution monopoly, the need for imperial uniformity remained a predominant concern. In debate, none of the proponents of import controls advanced a single substantive argument for their re-enactment.

Vardon, a successful printer and publisher before entering politics, and a committed opponent of the distribution monopoly, drew attention to its intended function as a deterrent to piracy. Hughes, who introduced the Copyright Bill in the House of Representatives, and McGregor, Labor’s Senate leader, did not advance principles or evidence to justify the monopoly. Hughes did not refer to the monopoly at all. Pressed on the indirectly related question of double payment of royalties, he maintained in relation to sections 10 and 19 of the Bill, which together could be read to impose the obligation, that “the law is quite clear”: double royalties were not applicable.

McGregor hotly defended the necessity for carrying the import restrictions into Australian law. “A man,” he said, “might go to another country, purchase a copy [of a work] there, and bring it into the Commonwealth. It should be kept out, I say.” He railed against the idea of anyone obtaining copies of a work – albeit unpirated – from a foreign source without the owner’s authorisation:

Suppose ... the owner of a copyright in Canada assigned it to a person in New Zealand ... If this amendment were carried, the person in New Zealand could send copies into Australia, where he should have no right to send them. We do not want any business of that description to eventuate in the Commonwealth.

He begged his colleagues to support him in rejecting Vardon’s proposal to amend

section 10 of the Bill²⁵ to allow an Australian to import unpirated copies of works from Britain or its dominions.²⁶ They obliged, rejecting the proposal by a majority of 13 votes, 18 noes to five ayes. Significantly, however, of the six senators who participated in the copyright debates of 1905, only two voted against the amendment and both were Government members.²⁷

British politicians and publishers might have predicted the Australian vote. British parliamentarians took the continuation of import controls for granted. During the copyright debates, no legislator bothered to speak a single word of justification for their existence, assuming no doubt that the dominions would continue to do their duty and uphold protocols favouring British exporters. The 18 senators who voted against Vardon's amendment justified such confidence.

Dissent of John Keating

The shift in Australian thinking between 1905 and 1912 is striking. The men who passed Australia's first Copyright Act refused to introduce a distribution monopoly, and rather than attack piracy by granting copyright owners the power to control the importation of works, chose to make the import of a pirated work an offence.²⁸ The solution, as they saw it, lay not in distribution monopolies but a simple prohibition of dealings in pirated works. A person could import copies of a work from any source provided that the copies were legitimate.

For the generation of 1912 the catchcry of uniformity swept away considerations of national interest. Governments of any political stripe usually deferred to imperial custom. Politicians in general seemed to consider the longevity of the import monopoly sufficient reason for continuance. They were opposed by a gal-

25 Section 10(1) of the Bill read: "Copies made out of the Commonwealth of any work in which copyright subsists which if made in the Commonwealth would infringe copyright, and as to which the owner of copyright gives notice in writing by himself or his agent to the Comptroller-General of Customs, that he is desirous that such copies should not be imported into the Commonwealth, shall not be so imported and shall, subject to the provisions of this section, be deemed prohibited imports within the meaning of the Customs Act 1901–1910."

26 The proposed amendment, to be added to sub-section (6) of section 10, was to read: "This section shall have effect as the necessary modification of section 14 of the British Copyright Act but shall not apply to copies which have been purchased or made in some other part of His Majesty's dominions to which this Act extends without infringement of the rights of the copyright there."

27 Keating, Lt Col Gould, Symon and Walker voted for the amendment; De Largie and Givens voted against. MacGregor was in the Senate in 1905 but did not participate in the copyright debates.

28 Section 50 of the *Copyright Act 1905*.

lant few. Symon was silent, but Keating, the other giant of 1905, wasted no time in speaking out. Keating had no axe to grind. Despite his understandable pride in the 1905 Act, he was not hostile to the copyright bill.

He supported incorporation of the British legislation, and particularly welcomed the 50 year posthumous term and the mechanical rights. But he bitterly opposed import controls. Section 10, he called, “a big blackmailing clause”. A commanding man with a beguiling speaking voice – Robert Menzies described him after his death in 1940 as “one of the finest orators in Australia” – Keating tried his utmost to persuade his Senate colleagues. Speaking in October 1912, he stressed the inequity of applying to Australian conditions a rule designed for the benefit of British publishers.

“We have to realise,” he said, “that copyright legislation affects not merely publishers, printers, and authors, but readers. It may be assumed in these days of universal education copyright legislation affects the whole community.” After inconclusive Committee discussion of Vardon’s proposed amendment to section 10, Keating adopted “a somewhat unusual course”. He made a final heartfelt appeal to the Government to reconsider its attitude:

I do not wish to re-open the discussion upon clause 10 or to take the highly unusual course of asking that the Bill should be recommitted for its further consideration, because I feel that the Vice-President of the Executive Council and his colleagues will realise their responsibility. I point out to the Vice-President of the Executive Council in all friendliness, the dangers that will beset the people of Australia if the Bill goes through in the form in which the Committee is about to report it to the Senate ... In adopting this legislation we are adopting British legislation, and honourable senators must recognise that Great Britain is a totally different country from Australia. In adopting clause 10 ... we are adopting a provision made in the United Kingdom to meet conditions with respect to importation of pirated copies, which are totally dissimilar from those which apply in Australia.

Keating gave two examples of the interests which might be affected by the operation of section 10. The first concerned Australian importers of film, records, and moving pictures – “they might find that some individual in Australia claims to have bought the rights in those things and may hold them up at the Customs House. The provision will absolutely prevent such persons carrying on their ordinary business.”

The second example related to a piece of music.

If, for instance, a certain piece of music becomes a “craze” in London, what is to prevent an individual in Australia exploiting it by purchasing the rights for Australia from the owner of the copyright in England? He will buy only Australian

rights. Then a firm carrying on legitimate business in Australia may cable an order to their London agents for 1,500 copies of the piece of music in question, and before they arrive a man walks into the Customs House, and says, "You cannot land these, because I have Australian rights."

Finally, Keating repeated his belief that section 10, unamended, would have sinister consequences:

[S]ection 10, as it stands, affords [opportunity] for blackmail. I used that word by interjection when the matter was being discussed, and I did so advisedly. The clause opens to the door to blackmail, unless we insert a provision of the nature to which I have referred.

His pleas, though, went unheeded. The Senate Committee greeted his arguments with silent indifference, as it had those of Senator Vardon, who warned that section 10, if enacted, would lead to the evils of monopoly:

The result of that provision is to practically give a monopoly to a man who chooses to buy the copyright of a song, as far as Australia is concerned. Take, for example, the importer of 1000 copies of a popular song. When his consignment reaches Australia, he may find that he can not get delivery through the Customs, and the song will be destroyed as a prohibited import.

If some modification is not made to adapt the British Act to the Commonwealth, an opportunity will be offered to persons in the music trade to practically corner the sale of popular music here.

Double royalty and national interest

Patrick Glynn, Deakin's Attorney General in the Fusion government of 1909–10, construed the problem differently in the House of Representatives. He was concerned that the local owner of copyright could demand from a person importing records made under compulsory licence in Britain the same royalty paid already to the British copyright owner. Payment of the so-called "double royalty", a concern both for British exporters and Australian importers, was a question of excise rather than import restriction.

And though, at the official level, the British and Australians were unanimous in their opposition to double royalties, the debate over whether the purported obligation could be legitimately inferred from the legislation was to continue into 1913. Glynn mistakenly attributed the double royalty obligation to the section 10 distribution monopoly,²⁹ confusing the terms of debate. However, by directing the House's attention to section 10, he inadvertently focused attention on the underlying issue that had been raised by Keating and Vardon – the effect of section

10 on the Australian national interest.

The Labor MP, William Archibald, a follower of Gladstone, an enthusiast for the writings of Macaulay, and the man responsible for the establishment in South Australia of free libraries in corporate towns, broke ranks with the Government on section 10. He said that the Australian interest should be the only criterion for approving legislation. The worst aspect of failing to undo the double royalty obligation, he said, was that, “an injustice will be done to people in Australia.”

In the same vein, he said: “I think this Parliament ought to be prepared to go to great lengths to protect Australians from being called upon to pay twice ... the Bill is introduced to obtain uniform copyright law throughout the Empire, and I recognise that the object is most desirable, provided that we can secure it without inflicting any injustice on our own people.”

The last speaker on the topic of section 10, David John Gordon, an active member of the Liberal Union executive, ignored fiscal considerations altogether and made a stirring declaration in favour of legislating in the national interest. He said, “we can easily imagine an Australian firm purchasing the copyright of a popular song or a set of films in England and under this clause securing a very large monopoly in Australia.”

He said of section 10:

The clause as drafted is all very well from the British aspect, but from the Australian stand-point it seems to me that we ought to consider the position of the people in this part of the world, and to modify the law to suit our own purposes rather than to suit those of persons who are copyrighting in Great Britain. For example, we can easily imagine an Australian firm purchasing the copyright of a popular song or a set of films in England, and under this clause securing very large monopoly in Australia ...

I submit that we should legislate according to Australian requirements, rather than be content to accept the honourable gentleman's [Attorney General Hughes's] statement that the Bill has been drafted to bring us into line with the British copyright law, and that we cannot amend it in any way without breaking some agreement at which we have arrived at the Berlin Convention ...

I do not wish to see any piracy going on. I desire to insure to the author of a popular song the fruits of his own brain. At the same time, the Australian public ought to be protected to the extent of preventing any person here from having a monopoly and charging them just what he may choose, merely because he happens to have purchased that monopoly for a mere song on the other side of the world.

29 It was the combination of copyright divisibility and British franking regulations that led to double royalties.

Gordon, a former journalist, willingly challenged the orthodoxy of placing international unity before national self-interest. In the vanished spirit of 1905, he expressed a bold belief: that Australia's national interest should be preferred to Britain's. He perhaps implied something more, that imperial compacts and international agreements were not sacred covenants. Archibald, the Labor renegade, immediately supported his sentiments, declaring that politicians "should not make away with our rights for the sake of securing uniformity."

The Government listened to Gordon in polite silence, then ignored him. Like Vardon and Keating, he spoke in vain. Australia adopted import controls designed for the benefit of British copyright owners and enforced rules that would allow copyright owners to control supply, and fix prices, for the rest of the century.

Publishers and the colonies

Before the new legislation, British publishers were much attached to the rights granted to them under section XVII of the 1842 Copyright Act. As owners of the copyright in books, they alone could import into any British possession any book for sale or hire. The import monopoly increased the price of books imported into the colonies (and later the self-governing dominions) and increased the publishers' profits. Ostensibly, the monopoly prevented piracy of books by enabling the copyright owner to ensure only legitimate copies of books were supplied. In fact, it prevented colonial importers from obtaining books from British wholesalers or retailer at prices lower than those charged by the publishers.

Although colonial markets provided rich pickings for British publishers, the publishers did not look kindly on the colonials who added to their profits. In evidence to the Gorrell Committee, John Murray spoke of the "difficulty which has for many years been experienced with the self-governing colonies with regard to copyright legislation". In 1911, prior to introduction of the Copyright Bill, William Heinemann observed, with apparent distaste, "a growing feeling in the colonies that the enjoyment of copyright should be granted only against a substantial quid pro quo and that it should be limited – in the interest of democracy."

C J Longman, contemplating section 26(1) of the 1911 Act, which permitted self-governing dominions to repeal imperial copyright legislation, noted mournfully in a letter to *The Times* that "the time has arrived when full power to legislate on copyright must be given to the self-governing Dominions." But, said Longman, they must not be allowed to disadvantage British interests: it was the duty of the British polity to consider "how to obtain from the Dominions the best terms for British authors and artists". He, for one, had no doubt that grave danger was looming. The dominions might adopt a manufacturing requirement similar to the reviled obligation in force in the United States.

To secure copyright, British publishers would have to go to the expense of

printing in the offending dominion and if they failed to do so, domestic pirates could publish unauthorised editions of British works and secure local copyright:

What the adoption of a manufacturing clause by each and all of our Dominions against the Mother Country would mean is known to many and need not be enlarged on here. Mr Buxton does not think there is any fear of its occurring. Many persons, however, believe that sooner or later it is certain to occur, and probably sooner.

In correspondence to *The Times*, John Murray raised the same prospect, alluding to the manufacturing provisions in the new Canadian Copyright Bill and the Australian Act of 1905. The *Sydney Morning Herald*, however, rejected as “unfounded” his prediction that the provisions, if enforced, would prove “disastrous to British authors”. The paper pointed out that dominion legislation could not exclude an imperial statute, and the British Copyright Act of 1842 gave the British copyright-holder protection in all British possessions. Moreover, the Australian Act stipulated that to satisfy the manufacturing requirement the British owner need only supply proof of title.

The attitude of British publishers towards Australia stemmed from the ancient mercantilist practices of their trade. Although free trade proponents attacked the waste and inefficiency of the imperial trade system, few exporters were going to advocate that captive imperial markets be freed from laws nicely calculated to increase the margins of British businesses.

With the growth of the Empire, publishers and government combined to create a legislative vice for the colonies that prevented countries such as Australia from importing British books, sheet music and fine art prints from any source other than the copyright owner. Yet the effects of the monopoly aroused little protest. Even opponents of the monopoly, when they considered how it worked in practice, concentrated on the activities of Australian opportunists, not British vested interest. David Gordon, for instance, criticised the monopoly as detrimental to public interest, but he saw the harm coming mostly from sharp-eyed locals exploiting s10(1) to establish a monopoly in the distribution of English hit records.

It did not seem to occur to him – and certainly not to proponents of controls – that the foreign producers of records and books might choose to keep the local rights, or assign them to an Australian subsidiary, and thereby retain the monopoly. In any event, the practice of the British publishing houses provided a long-standing example of monopoly upheld by imperial legislation to the detriment of local interests. In 1912, Australian legislators, seemingly oblivious to that example, sought unity in preference to attacking monopoly, and disadvantaged future generations of Australians.

THE COPYRIGHT ACT 1912

The *Copyright Act 1912*, which applied for 56 years until the passing of new legislation in 1968, suffers by comparison with the Act it replaced. The Act of 1905 is a model of clear organisation and concise prose but, more importantly, it truly reflected the aims of Australian legislators looking to the Australian interest. The Act of 1912 incorporated British legislation drafted from the British perspective. Adopted in Australia because of perceived necessity, the British Act created norms that reflected international agreement.

The new legislation abandoned the old formula for the copyright term, dating back to the 1842 imperial Act, introduced a generic class of ‘works’ (meaning that the traditional category of ‘Books’ disappeared from the statute books) and the compulsory licensing of literary and musical works. It enlarged the scope of copyright to include production or reproduction in any material form whatsoever, including the right to make a record or cinematograph film.

At the same time, the 1912 Act abandoned the 1905 prohibition against importing of pirated copies of books or artistic works in favour of an import clause that allowed the owner of a work to prevent the importation of even legitimate copies of the work. The class of copyright infringements expanded to include a list of civil offences and the set of summary remedies similarly grew. In conventional copyright narratives, an accretion of new rights and remedies is usually described as “modernisation” or “updating” of legislation, but the uneasy accommodation of foreign legislation in the “modernisation” of the Australian legislation meant the 1912 Act, if modernised, also seemed unbalanced.

The Act was divided into two parts. The first, drafted in Australia, constituted the Act proper and was divided into five parts that dealt in turn with preliminaries, incorporation of the British Act and interpretation of the Act to adapt it to Australian conditions, import controls, summary remedies, the Copyright Office, and miscellaneous matters (primarily concerned with statutory deposit). The second part formed the Schedule to the Act and comprised the British Act. It was the Schedule that provided the substance of Australia’s copyright law until 1968. Part I was headed ‘Imperial Copyright’ and set out the rights, remedies, obligations and application of copyright. Part II, ‘International Copyright’, concerned Orders in Council extending the provisions of the Act to foreign [i.e. non-imperial] works and British possessions other than the Dominions. Part III, ‘Supplemental Provisions’, comprised certain saving provisions and the interpretation section.

As to rights, copyright subsisted, throughout the Empire, in works published anywhere within the Empire.³⁰ Copyright meant “the sole right to produce or re-

30 *Copyright Act 1912* (No 20 of 1912), Schedule, section 1(1)(a).

produce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof.”³¹ It included the rights of translation, conversion from one type of work to another, performance of a converted work, and the making or records, perforated rolls, cinematograph films, “or other contrivance by means of which the work may be mechanically performed and delivered, and to authorize any such acts as aforesaid.”³² Copyright was divisible.³³

Infringement occurred if a person “without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright.”³⁴ It was an infringement to deal in copyright works, or to import works to any part of the Empire to which the Act applied, for commercial purposes and without authorisation.³⁵

Infringement did not occur in the case of “fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary”;³⁶ the re-use by an artist of materials used to produce a commissioned work, so long as the main design of the work was not repeated or imitated; the making of artistic works which reproduced sculptures or works of artistic craftsmanship located in a public place, or architectural works of art; the publication for schools of collections of mostly non-copyright matter containing short passages from published literary works; the publication in a newspaper of a public lecture; and the public reading or recitation of a reasonable extract from a published work.³⁷

The term of copyright subsisted for the life of the author and a period of 50 years after the author’s death.³⁸ The Act permitted a person, 25 years after the author’s death, by giving a prescribed notice, to reproduce the work for sale, providing that royalties of 10 per cent of the sale price of each copy sold were paid to the owner. In addition, following an author’s death, a person could apply to the Privy Council for a licence to reproduce a work that the owner was allegedly withholding from the public.³⁹ The author could assign copyright in a work for a period of 25 years only, at which time the copyright reverted to the author’s estate.⁴⁰

31 Section 1(2).

32 Section 1(2)(d).

33 Section 5(2): ‘The owner of the copyright in any work may assign the right, either wholly or partially ...’

34 Section 2(1).

35 Section 2(2).

36 Section 2(1)(i).

37 Section 2(1)(ii)–(vi).

38 Section 3.

39 Section 4.

40 Section 5(2).

In actions for infringement, the Act conferred on the owner the right to obtain an injunction or interdict, damages, accounts and the recovery of infringing material.⁴¹ Summary remedies consisted of fines of 40 shillings for each copy of a work made, without authorisation, for commercial purposes (up to a maximum sum of £50), fines of £50 for possession of plates for the production of infringing copies, or for allowing a work to be publicly performed for profit, and the destruction of plates or infringing copies or their delivery to the owner of the work infringed.⁴²

The Act established a separate copyright “records, perforated rolls, and other contrivances by means of which sounds may be reproduced, in like manner as if such contrivances were musical works”. Copyright lasted 50 years from “the making of the original plate from which the contrivance was directly or indirectly derived”. Once a work was recorded, any person could make new recordings of the work provided a royalty was paid to the owner at the following rates: 2.5 per cent of the sale price of each record sold, if the recording was made within two years of the commencement of the Act, and thereafter at a rate of 5 per cent.

Copyright in photographs lasted for 50 years from the making of the original negative⁴³ and ‘photographs’ (separately defined as including “photolithograph and any work produced by a process analogous to photography”) were included within the definition of ‘artistic work’.⁴⁴ The Act placed ‘Cinematograph’ (defined as including “any work produced by any process analogous to cinematography”) in the definition of ‘dramatic work’, or rather, “any cinematograph production where the arrangement or acting form or the combination of incidents give the work an original character”.

41 Section 6(1)–(3).

42 Section 11(1)–(13).

43 Section 21.

44 Section 35(1).

Chapter 4 – The broadcasting revolution and performing rights

REVENUE COLLECTION

In the years between the world wars, neither Britain nor Australia made significant changes to copyright legislation. Yet the period is characterised by tumult and commotion. The creature given life by the legislation of 1911 and 1912 begins to flex its limbs and move among mortals startled and sometimes outraged by its peremptory demands for recognition and obedience.

One theme dominated copyright discourse – the demand by performing right societies, and later record companies, for the payment of public performance royalties. By 1940, commercial users of music grudgingly acknowledged the right of copyright owners to receive payment for the public performance of music, and the consensus pointed to a subtle yet radical transformation in perceptions about the function of copyright law.

Henceforward, policymakers accepted a legislative principle never acknowledged by the originators of the British and Australian Copyright Acts. They determined that the legislation could function as an instrument to regulate the sweeping transfer of income from users of copyright material to controllers of that material. Copyright owners could, if they wished, permit collecting societies to bargain with users on their behalf. The revenue collecting system inaugurated between the wars proved hugely lucrative, although critics detected in its operations the malodour of rent-seeking.

In 1914, holders of the performing right in Britain, led by the larger music publishing houses, seized the opportunity offered to them by widespread use of gramophones to play music in public leisure and entertainment venues. Inspired by example of France and Germany,¹ they established a collecting society, the

1 Société des Auteurs, Compositeurs et Editeurs de Musique established France 1851, and Gesellschaft für Musikalische Aufführungs established in the early years of the 20th century. The American Society of Composers, Authors and Publishers began

Performing Right Society, to collect royalty payments from the public users of musical works – orchestras, opera companies, music halls and, more lucratively, the thousands of venues playing gramophone records in public.

The PRS responded rapidly to the onset of mass radio broadcasting. In the early 1920s, after the formation of the British Broadcasting Company, it began demanding performance fees for the broadcasting of music. British music publishers were alert to commercial possibilities overseas, and through their subsidiaries and affiliates in Australia, arranged for the formation of a sister society in Australia – the Australasian Performing Right Society.

APRA, formed in 1926, shifted official thinking in Australia about the function of copyright law. Its insistence on payment for the public performance of music, its doggedness and its stridency, led to the Royal Commission on Performing Rights in 1933 and the spread of the axiom that the person who uses copyright material must pay for that use.

The metamorphosis of copyright legislation into the medium facilitating the collective transfer of income from users to owners depended on other developments that could hardly be predicted when Parliament enacted the legislation: the growth of radio broadcasting, the spread of mass entertainment, and the playing of music to radio audiences.

The radio broadcasting revolution began after the First World War, transforming society and bringing riches within the reach of certain classes of copyright owner. Wireless broadcasting created huge demand for public performance of music and songs, and also stunning new possibilities for the remuneration of owners of musical copyright. In Britain, the PRS seized its chance and demanded copyright payments from the new British Broadcasting Company.

The founders of the PRS, principally music publishers, were motivated by antagonism for the recording industry and alarm at the continuing decline in sheet music sales. They hoped to collect public performance fees for live entertainments or the playing of music on gramophones. None guessed that innovations in wireless telegraphy would shortly create the radio industry and a rich source of future revenue. APRA carried in Australia the torch lit in Britain by the PRS, a shareholder and guiding influence in the Australian company.

Australian copyright regulation in the interwar years is the story of businessmen and politicians working out how to most efficiently regulate the musical performing right and how to respond to the record industry's claim for a mechanical performing right. At a deeper level, it reflects a seismic shift in official thinking about how the copyright law ought to work in practice. That shift could not have occurred without the advent of radio and the various commercial and public interests it brought into play. To understand how those interests intersected, the inquirer must consider the history of both the public performance right

operations in 1914.

and radio broadcasting in Australia.

THE PUBLIC PERFORMANCE RIGHT

A legislative throwaway

In 1833, Britain passed *An Act to Amend the Laws Relating to Dramatic Literary Property*. The Act granted of the author of dramatic literary property, or the author's assignee, the sole right to control 'representations' of 'dramatic pieces'. The 1842 Copyright Act added to the copyright holder's inventory an explicit performance right and extended the term of protection for dramatic pieces to the period now applying to literary property – life plus seven years or 42 years from the date of first publication, whichever period expired last. The 1842 Act also provided that the protections applicable to dramatic literary property, including the new term of protection, now applied to 'musical compositions'.

Under the 1842 Act, the holder of copyright in a dramatic piece or a musical composition, enjoyed the "sole Liberty of representing or performing, or causing or permitting to be represented or performed, any Dramatic Piece or Musical Composition". For the purposes of copyright duration, the Act declared the first performance of a dramatic or musical work to be equivalent to the first publication of a book. Though the primary focus of publishers – and therefore legislators – remained fixed on books, legislation thus accommodated the economic interests of playwrights and composers (and, again, the publishers standing behind them) from a relatively early stage.

In the 19th century, the performing right, exercised astutely, could deliver a large part of the total economic benefit that accrued to the holder of copyright in dramatic or musical works. By the turn of the century sales of sheet music – used for domestic performances on the piano and other instruments – also generated large revenues, and constituted the primary part of most music publishers' income. But the holder of copyright in popular works could also hope to generate similar revenue from payments received for public performances of plays, operas or music.

Income came from individual agreements between copyright owners and the entities contracting to perform works. Clever theatrical impresarios amassed fortunes in the 19th century but few dramatists or musicians grew rich from the pickings: the pecuniary benefits of copyright ownership most often flowed to publishers with the resources to enforce the performing right through initial demands and then commercial negotiation.

The most interesting aspect of the performing right is that it represents the first departure in copyright law from the concept that copyright comprises repro-

ductive and distributive rights. The idea that copyright law exists primarily to allow the owner to control the production and supply of books permeates 19th century legislation and common law. In Britain and the Empire, the 1842 Act reigned supreme as the primary source of copyright law.² Literary property took the first place in the thinking of legislators and lawyers.

Dramatic and musical property attracted the same rights, but embodied on sheets of paper they were seen as subsidiary products, secondary, by a long distance, to books. The performing right can thus be seen as a kind of legislative throwaway, an expedient that recognised that the economic value of plays, and to a lesser extent musical compositions, lay in public performance for the benefit of a paying audience.

But this throwaway carried with it grand consequences. So far as legislators were concerned, copyright really concerned books. Many seemed to view the performing right as a latent principle, an ethereal proposition given spectral life by the peculiar natures of subsidiary categories – dramatic and musical property. Gramophone, and then radio, changed everything, and when the conceptual mists cleared, surprised onlookers saw that the holders of the performing right occupied central places at the copyright banquet.

A quiet revolutionary right

In the early 20th century the question of the performing right received perfunctory treatment. The Gorrell Committee discussed the performing right in some detail but only in a single context: it proposed abolition of the requirement in the 1882 *Copyright (Musical Compositions) Act* for formal reservation of the right print in copies of music. Before the passage of the 1911 Copyright Act, those who stood to gain most from the performing right – musical authors and publishers – spent little time debating the merits of the performing right. Instead, they expended most of their energy arguing with the record manufacturers over the proposed compulsory recording licence.

Musical copyright holders knew that the spread of the gramophone through the whole range of public venues – including tea houses and restaurants – would enable them to demand performance fees from an expanding list of licensees. But at this stage, they were not greatly concerned with the knotty question of how to

2 The *Copyright (Musical Compositions) Act 1882* discretely codified the rights of the owner of musical copyright. The Act provided that to retain the performance right, the copyright owner must publish a reservation notice on the title page of every published copy of music. The Gorrell Committee, noting the Berne Convention's prohibition of formalities, advocated that the publication requirement be abolished and the 1911 Act made no mention of formalities.

negotiate with, and collect from, the aggregate of public users of gramophones. Nor, of course, did they perceive the revenue possibilities that became apparent with the spread of radio.

Gramophone and radio soon caused a change of attitude. Public performances of music to mass audiences, whether disparate listeners to records played publicly, or the aggregated mass of radio listeners, created growing demand. Control of the public performance right thus delivered an extraordinary windfall. The entertainment venues and radio stations that wished to supply the demand were forced to negotiate like supplicants with holders of the performing right.

The owners of literary copyright now watched enviously as a cognate right, once regarded as trivial in comparison to the right of reproduction, created new economies, all the while delivering new riches to the upstart lords of copyright – musical composers and publishers. The legislators in 1911 still viewed the public performance right as one of secondary economic importance. They could not foresee the radical effect of the radio revolution, but had they understood the income collecting possibilities created by the already common public use of gramophones, they would most likely have placed curbs on the right.

But they did not and most of the commercial disputes over the performing right in Britain and Australia after World War I were protracted because the holders of the right could wield it oppressively. The unqualified nature of the performing right became a recurrent theme of copyright disputes in Australia and eventually the Royal Commission on Performing Rights recommended in 1933 the creation of a tribunal to fairly arbitrate disputes. That proposal, however, went unheeded.

The performing right, brandished so fiercely by the Performing Right Society in Britain, and APRA in Australia, nestled unobtrusively in section 2 of the 1911 Copyright Act. Section 2 stated that:

For the purposes of this Act, “copyright” means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public ...

The exercise of this quiet revolutionary right, barely noticed when Britain and Australia debated copyright bills, soon enough unleashed bitter commercial warfare, in Australia especially, and changed the copyright landscape in both countries.

THE HISTORY OF RADIO BROADCASTING IN AUSTRALIA TO THE 1930S

The growth of wireless telegraphy and the onset of radio

In 1896, Guglielmo Marconi patented the process of wireless telegraphy, enabling users to transmit Morse code over the airwaves. The new technology promised rapid communication across continents and oceans, and opened to Australia new possibilities in communication. To meet the challenge, the Commonwealth Parliament passed the *Wireless Telegraphy Act 1905*, authorising the Postmaster General's Department to oversee the development of communications infrastructure.

Before 1915, the Government, together with the local affiliates of Telefunken and the Marconi Company, built 19 wireless telegraphy stations in the capital cities and strategic locations across the Australian coastline. During the First World War, the Royal Australian Navy manned the stations, and two more outposts built by the Government. The public knew little of wireless communication but technology advanced rapidly. Innovators in Europe and the United States developed two-way radio communication, or "radio telephony", first delivered by vacuum tube. The US Marconi Company began work on multi-point communication and after the War, the Marconi Company inaugurated the modern era of radio broadcasting.

When the technology of mass radio communication became available after the War, radio amateurs proliferated. Australians were especially enthusiastic in the uptake and use of the new technology, later assembling home-made "crystal" sets in their thousands to either communicate by voice or to tune in to commercial or public radio broadcasts. In 1914, members of the public knew little of radio. In 1918, they knew a little more. After 1920, the entire population knew of the existence of the new communications phenomenon and most listened to records broadcast on radio.

The copyright implications of the radio revolution are probably more far-reaching than any other change effected by technology or politics in the history of copyright law. Radio (or wireless) altered the perceptions of copyright owners and users in two specific ways. In the first place, it alerted owners (initially the holders of music copyright, later record companies) to the possibility of claiming payment for any copyright use facilitated by a particular technology (in the case of radio, the playing of recordings). Secondly, it hardened the resolve of the recording industry, the film industry and broadcasters themselves to secure their own copyrights to prospect for and protect seams of revenue.

In Australia, as radio accelerated the transformation of copyright from a device of limited economic utility – one that principally benefitted publishers – to an instrument for optimising the profits of copyright industries, the name of

APRA became universally known, and sometimes, almost universally reviled. The activities of APRA exemplified how the law of copyright, once a tool for controlling piracy, became a springboard for the assertion of positive rights that delivered revenue, and more revenue, to copyright owners.

The rise of AWA and developments in radio

Everything in the Australian wireless communication scene changed after the end of World War I, thanks to the emergence of a powerful communications company created by Telefunken and Marconi.³ Led by a gifted English autodidact, Ernest Fisk, Amalgamated Wireless Australasia Ltd became the leviathan of the Australian communications industry. AWA supplied most of the country's radio equipment and, driven by its Managing Director, aspired to control radio broadcasting across the continent.

At the end of the War, Fisk had cause to hope for a broadcast monopoly. AWA could claim that its relationship with the Marconi Company provided the key to unlocking the door to national broadcasting in Australia. By 1920, the work of Marconi engineers made voice broadcasting to multiple receivers possible, inaugurating the age of radio. In June 1920, radio amateurs in Britain listened to the broadcast of a Nellie Melba concert. In November of the same year, a Pittsburgh radio station broadcast the results of the presidential election and by the following year, 31 licensed stations were broadcasting in the United States.⁴

By then, Fisk had several times demonstrated the power of radio transmission to an amazed Australian audience. In 1918, he arranged for the first spoken radio transmission to Australia (a message from the Prime Minister Billy Hughes from the Western Front) and in 1919 the first transmission within Australia (the playing of *God Save the King* between AWA's Sydney office and a nearby building). He astonished federal parliamentarians in November 1919 by arranging for a gramophone recording of *Rule Britannia* and a live performance of *Advance Australia Fair* to be broadcast to Parliament House in Melbourne from a point 18 kilometres distant.

Fisk impressed on politicians the value of AWA's connection with the Marconi Company. Only AWA, said Fisk, possessed the expertise and capital to build and run new broadcasting stations throughout Australia. His company could readily take control of the wireless stations built before the War and create a national

3 In 1913, Telefunken and the Marconi Company resolved patent disputes over the design of wireless stations, merging the Australasian Wireless Company and the Australian Marconi Wireless Telegraph Company to form AWA.

4 In 1922, a New York station broadcast the first radio advertisements, and by year's end, 571 stations, sharing two wavelengths, were broadcasting news, entertainment and advertising to the American public.

broadcasting service similar to that offered by the British Broadcasting Company, which began exclusive broadcasts in November 1922.

For a short while, it looked as though he would get his way. Regulations issued at the end of 1922 established an AWA monopoly but a new Government promptly scuppered Fisk's plans, cancelling the exclusive arrangement. Unabashed, he won the Government's assent to a new scheme that capitalised on AWA's pre-eminence in the supply of wireless sets. Regulations now required listeners to buy receivers pre-tuned to receive those station frequencies for which they paid subscriptions.

Listeners, however, were not prepared to accept restricted access and a mere 1400 subscribers bought the sealed sets. When the Government realised that thousands of radio amateurs tuned into broadcasts on unlicensed home-assembled radio kits and crystal sets, the scheme collapsed.

Fisk decided to surrender. AWA consolidated its role as Australia's primary supplier of radio station transmitters, valves and other equipment, but it played no further role in the debate over licensing and programming policy. In 1924, the Government embraced mixed broadcasting, supporting the introduction of a Commonwealth-backed chain of national broadcasters and the award of broadcast licences to private metropolitan companies. The Government saw the merit of combining British and American practice: in Britain the BBC held the sole broadcasting licence while in the United States stations were privately owned and supported themselves by advertising.

The mixed broadcasting system

Under the mixed scheme, national broadcasters, the "A Class" stations, were supported by the licence fees paid by purchasers of radio sets and revenue from restricted advertising. The metropolitan "B Class" stations received funding from private sources and advertising revenue. Government officials intended that A Class stations would provide more refined programming, while the B Class stations would compete with each other to satisfy the demand for popular entertainment.

One consideration drove the new policy: the need to efficiently finance the spread of stations across the continent to reach listeners scattered in all parts of the country. The Nationalist Coalition Government proclaimed the slogan "Men, Money, Markets" and wanted no truck with policies that placed the burden for spreading radio broadcasting entirely on the shoulders of government.

The Royal Commission on Wireless in 1927 endorsed the mixed policy, recognising that it permitted the rapid growth of broadcasting throughout Australia. The Commission characterised the policy as one of decentralisation and "local control" designed to prevent the growth of "powerful vested interests". Evidence of success came immediately. 66,000 listeners' licences were issued in the

scheme's first year and the number more than doubled in 1926.

For the broadcasters, especially the B Class stations, popularity did not mean financial success. No station of either class made a profit. A Class stations, supported by licence fees, performed best, playing gramophone music and broadcasting short talks, children's hours and news.⁵ The B Class stations, a number of which were formed for proselytising rather than commercial purposes (the Theosophical Society founded Radio 2GB and the NSW Trades and Labor Council Radio 2KY) fared worse, and for several years relied on private funding for survival.

Growth and difficulties

Complaints about the seemingly privileged position of the A Class stations, the financial position of the broadcasters, and deficient or non-existent broadcasting in rural or remote areas, elicited a swift Government response. At the beginning of 1927, it appointed a Royal Commission to investigate wireless broadcasting in Australia. The Commission reported rapidly, finding that "very little change to the existing system is advisable at the present time."

Much of the discussion in its report concentrated on the future of the A Class stations. The Commissioners considered alternative proposals for a single company to own and operate all the stations, or for government to own the stations (the British government had recently assumed control of the British Broadcasting Company, renaming it the British Broadcasting Corporation). They rejected these options, concluding that concentration of ownership would "deprive the public of the benefit of the incentive which the present regulations give to the broadcasting stations to maintain an effective and satisfactory service."

The Royal Commission recommended that the revenue from listeners' licence fees be pooled and the income distributed in fixed and variable amounts. Other recommendations included the re-allocation of wave lengths within existing wave bands, limitation of the number of B Class stations in proportion to population concentrations, and restriction of A Class station advertising rights.

The Commission's conservative approach aimed at making existing arrangements work. Alternatives proposed for altering the ownership arrangements for A Class stations failed, said the Commission's report "to do justice to the excellent work that the existing broadcasting companies have already performed and would

5 The *Sydney Morning Herald* reported in 1929 that 2FC and 2BL, both A Class stations, together devoted, on average, 44 per cent of broadcast time to music, 15 per cent to talks and information, 8 per cent to sporting coverage, 10 per cent to educational features and 7 per cent to children's entertainment. The BBC and the National Broadcasting Company of America, by contrast, allocated 62 per cent and 67 per cent respectively of playtime to music.

deprive them of any chance of recouping themselves for their serious losses.”

Although wireless continued to boom in Australia (between 1927 and the beginning of 1933, the number of listeners’ licences rose from over 233,000 to 419,000) complaints about the variable service offered by the A Class stations, and the continued difficulties in relaying programs to rural areas, forced a change of policy. The Government decided that when the A Class station licences expired in 1929–30, they would be offered by tender to a single company that would offer nationwide programming. In the meantime, B Class stations created the pattern for modern commercial radio broadcasting, offering the public extended playlists of the latest recorded popular music interspersed with other programming and advertising.

By the time the Royal Commission on Performing Rights reported in 1933, 46 commercial stations operated in Australia. Throughout the period of growth, margins remained tight for both A and B Class stations. In 1929, the A Class station 6WF, backed by the deep pockets of Westralian Farmers Ltd, nearly folded, and Government subsidy saved Adelaide’s A Class station. The onset of the Great Depression in 1929 imposed more financial constraints, limiting advertising revenue and slowing the uptake of listeners’ licences, yet the commercial radio industry continued to grow.

The 1930s – pressure on the ABC

The persistent theme of debate over broadcasting industry policy in the 1930s is that of the effects of economic depression on the capacity of radio stations to satisfy public demand and pay APRA for the playing of copyright musical works. The necessity for paying licence fees to APRA applied to commercial and non-commercial broadcasters alike, and the increasing difficulty faced by the private owners of A Class stations led to the Commonwealth exerting control over the 12 national stations in 1932 – five years after the Royal Commission on wireless argued against government ownership.⁶

APRA was fully conscious of the value of the government funding. Throughout the 1930s, the non-commercial stations, funded by licence fees, were its

6 The *Sydney Morning Herald* anticipated this development in 1929, noting that “many radio experts ... believe that the Postmaster-General will eventually have to agree to the establishment of a broadcasting organisation in Australia similar to that of the BBC in Britain.” The *Herald* editorial observed that, it “is probable that the system provided for in the new contract is merely a stepping stone to that fuller control by a quasi-official organisation which will probably be brought about in time. The system of dual control now adopted offers so many pitfalls for officials, as well as the contractor, that probably united control will be welcomed later, as the easiest way out of many difficulties.”

primary source of revenue. Thus APRA watched the Government's strategy for A Class stations intently. In 1929, the Government contracted a private company owned by theatre impresario Benjamin Fuller and music publisher Frank Albert, to supply all A Class station programming for three years. Within months, APRA, the Government and the Australian Broadcasting Company – or ABC – viewed the new arrangements with disfavour. The contract forbade advertising and the Great Depression saw licence fees plummet, disappointing the income expectations of this triumvirate of interests.

Another limitation dampened financial hopes. The Government insisted that the ABC⁷ avoid broadcasting anything “repugnant to good taste” and “cultivate a public desire for ... subjects which tend to elevate the mind.” As the difficulty of reconciling these strictures with revenue-generation became obvious, Fuller and Albert grew frustrated, and they happily relinquished their contract in June 1932.

In May 1932, the newly elected United Australia Party passed the *Australian Broadcasting Commission Act*, and the new ABC began broadcasting from July, following the model of the BBC. Government ownership removed the immediacy of the economic threat posed to the ABC by the downturn in licence fees and the new arrangement explicitly demarcated the boundaries between public and commercial broadcasting.

APRA maintained unremitting pressure on the ABC in either of its guises to pay extensive public performance fees. When the Attorney General, John Latham, asked Cabinet in 1932 to authorise a Royal Commission to investigate APRA's activities, he did so because he could no longer hold down the lid of a boiling pot. Commercial broadcasters pressed hardest for the Royal Commission but Latham knew that APRA itself looked to the ABC for the largest part of its revenue. APRA would negotiate ruthlessly to extract from the ABC the largest amount possible for performance fees. The Royal Commission crowned years of anger and dispute over APRA's demands for payment of public performance fees and its report officially endorsed the principle of mass revenue collection by copyright collecting societies.

APRA AND THE WAR OVER THE PERFORMING RIGHT

Formation of APRA

APRA came into existence in Sydney on 4 January 1926, registered as a company limited by guarantee. Its members each provided a guarantee of £10. The Associ-

7 Its government owned successor, the Australian Broadcasting Commission, and then the retitled Australian Broadcasting Corporation, were also referred to as the ABC.

ation operated on a non-profit basis, with no assets other than business premises, furniture and minor items. Its objects, set out in the Memorandum of Association, were to “enter into and carry into effect an Agreement between the Performing Right Society Limited (England) and the Company”, to “protect and enforce the rights of authors composers and publishers of music and literary and dramatic works and the owners holders and licensees of copyrights and performing rights for such works etc”, and to “exercise and enforce of members of the Company ... all rights and remedies of the proprietors etc.”

The subscribers to the Memorandum and Articles of Association consisted of eight music importers and publishers controlling the sale of sheet music in Australia, and the firm of British music publishers, Chappell and Co. By 1932, the membership had grown to consist also of another two Australian music publishers, three New Zealand music publishing companies, and the Performing Right Society Limited (England). Affiliates included the PRS and corresponding societies in France, Italy, Spain, Sweden and elsewhere.

Significantly, in light of later controversy, Articles 113 and 114 were secrecy provisions requiring directors and employees of APRA to keep secret the details of transactions or accounts of the company, unless ordered to make disclosures by a director, a court or a person to whom the matter in question related. Outsiders were not “entitled to acquire discovery of any information respecting any detail of the Company’s trading or any matter which is or may be in the nature of a trade secret, mystery of trade or secret process which may relate to the conduct of the business of the Company.”

The Performing Right Society loomed large in APRA’s thinking and activities. Under a contract executed on 11 January 1926, the two societies agreed that the PRS would nominate one member of APRA’s board. APRA would furnish the PRS with details of performances of works and collections made for those performances, and, most significantly, pay the PRS 40 per cent of its net revenue (from sources other than broadcasting) after deducting expenses. In 1926 APRA claimed to control a repertoire of approximately two million works belonging to 16,000 members.

APRA begins collecting

On 1 July 1925, prior to incorporation, APRA began announcing, in Australian newspapers, its intention to collect performance fees from theatres, music halls, picture theatres, cabarets, dancing halls, restaurants and “all places of amusement or otherwise where music is publicly performed.” It proposed to follow the pattern of the PRS which for over a decade had successfully collected licence fees from “places of amusement” and, more recently, the BBC.

APRA’s announcements now began a long period of dispute with the suppliers of public entertainment that led to (though did not end with) the Royal

Commission on Performing Rights held between 1932 and 1933. Over a decade, as radio broadcasting created a new culture of information and entertainment, APRA fought, on multiple fronts, a public and successful battle for copyright remuneration. It faced three opponents – the owners of public entertainment venues, radio stations and, to a smaller degree, record manufacturers. It also grappled, less successfully, with government.

Battling with the commercial users of musical works, APRA enjoyed a decisive advantage. Copyright legislation unambiguously conferred on the copyright owner the right to control the public performance of works, a fact recognised in 1925 by a unanimous decision of the Victorian Supreme Court in *Chappell & Co Ltd v Associated Radio Co Ltd*.⁸ In that case, the plaintiff's counsel, John Latham,⁹ persuaded three judges that the unauthorised broadcasting of music infringed the music publisher's copyright.

At no stage, however, did APRA win easy victories. Politicians, bureaucrats, local government officials, entertainment entrepreneurs, and the representatives of the broadcasters and record manufacturers agreed that law conferred on the owner of musical copyright the right to control the public performance of copyright music. Yet many of these individuals, especially the local government associations that controlled public halls, opposed the claims of APRA with visceral intensity. They viewed APRA as a thief, an impostor, trying to reap where it did not sow.

Concerns about APRA

APRA's insistence that it licensed, on behalf of owners, at least 90 per cent of all copyright musical works cut little ice. As the Cinematograph Exhibitors' Association explained plaintively in a letter to the Postmaster General in May 1932 – a few months before the announcement of the Royal Commission – “[i]t has been one continual conflict since 1925.”¹⁰ APRA's opponents declared that its claims emerged as if from mist: no-one could say whether the licence fees claimed justly remunerated copyright owners, since APRA refused to disclose details of its distributions or the rationale for the quantum of fees.

APRA's status as a non-profit organisation intended to disburse monies collected to copyright owners made little difference to its opponents. The Association's aggressive assertion of the performance right, its seemingly arbitrary

8 *Chappell & Co Ltd v Associated Radio Company Ltd* (1925) VLR 350.

9 Federal Attorney General for most of the decade 1925–1935 – the decade of the APRA wars.

10 “A gun was held to the head of the whole of the Entrepreneurs by the Australasian Performing Right Association and we were practically forced to come to an arrangement which even then [1926 and 1928] was considered extortionate and unfair.”

scale of fees, and its unwillingness to disclose details of the repertoire of works it claimed to control, or the copyright owners for whom fees were said to be collected, caused outrage.

Successive governments from different sides of politics shared the concern about APRA's secretiveness and its methods. Latham, the Attorney General between 1925 and 1929, and 1932 and 1935, consistently supported the right of APRA to collect licence fees on behalf of its members. But in April 1926, he expressed concern, in a memorandum to the Solicitor General, about the rates levied by the Association, and raised the possibility of amending the Copyright Act unless APRA was "prepared to reduce its proposed charges".

He also disliked the tone of APRA's correspondence. In 1927, after reading an APRA letter that referred disparagingly to music hall owners, he told the Secretary of his Department, Robert Garran, to inform APRA of his displeasure. If APRA's letter reflected the usual tone of its correspondence, then, wrote Garran, the Attorney considered, "it is not a matter for surprise that the activities of the Association have aroused widespread antagonism."

As they must under the law, the Government and bureaucracy consistently upheld APRA's legal right to collect licence fees on behalf of authors and composers. On 5 June 1926, after the first year of controversy surrounding APRA's activities, the Melbourne *Argus* quoted comments made by G S Brown, the Registrar of Copyrights, in response to complaints against APRA. "If the public were fully informed," he said, "as to the position of concerning copyright, it is probable that the demands of the Performing Rights Association would be regarded not only philosophically but as reasonable and just." APRA, said Brown, "is not attempting exploitation but is only asking for its just and legitimate right."

The themes emerging in APRA's first decade of operation still inform modern copyright politics. Then, as now, opponents of collective rights administration reproved the collecting society for refusing to name collection beneficiaries or disclose details of the amounts distributed. As now, they also pointed to the unreality of determining licence fees without reference to meaningful criteria for establishing the value of copyright works, or distinguishing, in less than an arbitrary way, between works of different complexity, quality or popularity.

In the 1920s and 1930s, the proponents of collective rights administration also defended the system with arguments heard today. Without collective action, they said, individual authors would be unable to negotiate, or collect, fees for the widespread use of their works. The work of collecting societies like APRA thus allowed copyright owners who lacked the necessary resources to enforce their performing rights. In short, the collecting society interposed by necessity on behalf of owners to secure licence fees.

Licence fees

In the years 1927–1933, the period separating the royal commission reports on wireless and performing rights, APRA penetrated the popular consciousness, becoming perhaps the most unpopular corporate entity in Australian commercial life. Yet despite the grumbles and hostility, demands for payment rarely met outright refusal. The users of commercial music argued about APRA's methods, and the size of its levies, but they accepted their legal obligation to pay a fee to exercise the musical performing right. They would not, however, accept that APRA was entitled to independently determine a scale of fees and then insist upon payment of those fees.

Government officials agreed. In 1928, Sir Robert Garran reassured the Managing Director of Union Theatres in Sydney of Latham's view that APRA "clearly has no right to "demand" a yearly toll from anybody." APRA could, however, prosecute or prevent unlicensed performances, and it could withhold consent to performances if the party wishing to exercise the performance right refused to pay the licence fee demanded. APRA, said Garran, had "the right to take proceedings against persons who perform without licence any work in which it owns the performing right; and also to name its price for granting a licence to perform any or all such works."

In short, APRA could not compel payment of fees but it could prevent public performances and make payment a condition of performance. Pointing the way directly ahead to the 1932 Royal Commission on Performing Rights, Garran observed to his correspondent that the "force of your complaint against the Performing Rights Association [about APRA's licence fees] depends very largely on the reasonableness or otherwise of the terms for which they offer for licences". From 1926 onwards, however, arguments about reasonableness did not stop APRA from drawing money into its coffers in increasing annual increments.

When in 1929 Latham requested APRA to supply revenue figure for the two preceding financial years, the Association reported annual revenue in 1927 of £28,466 increasing to £40,608 in 1928.¹¹ A Class radio stations contributed the vast bulk of these sums, which were deducted from radio set licence fee revenues allocated by government. In 1927, the A Class stations paid fees to APRA totalling over £15,000 and the following year their total contribution exceeded

11 Although comparisons of the value of money between eras can only be highly approximate, the website MeasuringWorth.com calculates, by reference to GDP, that UK£40,000 in 1926 equalled UK£11.2 million in 2005. Britain and Australia returned to the gold standard in 1926 and the Australian pound was fixed in value to the pound sterling (the return to the gold standard caused deflation, a factor in determining the value of money in 1926). In 1931, the Labor Government devalued the Australian pound against sterling by 25 per cent to combat inflation. UK£1 bought AUS£1 5s.

£26,000.

By contrast, in 1927 and 1928 respectively, the B Class stations, unable to rely on the revenue from the listeners' licence fees, paid the relatively trifling sums of £99 and £259. In the same years, picture theatres paid APRA nearly £9000 and over £9,500 respectively. Hotels, restaurants and cafes contributed £867 and £938 respectively, dance halls £841 and £1,169, and public halls over £2,000 and £2,500.

APRA also placed its balance sheets before the Royal Commission on Performing Rights. It reported receipts from the A Class stations, in 1929, 1930 and 1931, totalling £33,022, £28, 775 and £28, 843. In the same years, the B Class stations paid £536, £1,887 and £2,506. The other users contributed aggregate totals of £13,890, £14,579 and £18,562.

APRA's receipts from A Class stations fell in 1930 and 1931, though the total amounts collected from the other user categories continued to rise at an average annual compound rate above 40 per cent. The fall in payments from APRA's major fee contributors is attributable to the effect of the Great Depression: an economically straitened public stopped buying new radio sets, and many listeners could not afford to renew their listeners' licences. As a result, APRA drew fees from a reduced total of allocated revenue, and its gross takings declined.

The Depression, however, only interrupted the upward trend in APRA's takings from the radio stations. In 1939, the Postmaster General reported that in the previous financial year, APRA collected a total of £60,000 from all radio broadcasters. The Australian Broadcasting Commission contributed £44,000 of this sum and the commercial radio stations the remaining £16,000.

Collecting strategy

The pattern of APRA's fee takings in the first several years of its existence reveal a coolly premeditated strategy. In the first year of collecting, revenue from the A Class stations exceeded that from all other sources by a factor of nearly four, and though the margin narrowed considerably in succeeding years, the increasing size of receipts from the government-funded broadcasters showed clearly the focus of APRA's attention.

In the late 1920s, APRA spent considerable energy battling the representatives of picture theatres and public halls to secure licence agreements that delivered lucrative returns into the 1930s. Yet, except in the acute period of economic depression, these sources of income rarely supplied more than half the amount of revenue delivered by the A Class stations. In 1929, when A Class stations paid APRA £33,022, gross revenue from all non-broadcasting sources was £13,890 – a handsome sum, but one that predicted APRA would in future devote most of its efforts to maximising returns from broadcasters.

Although APRA began operations in the early days of radio broadcasting, at

a time when the government-funded and commercial stations struggled to break even, in the mid 1920s the bright economic prospects of radio stations were already visible to most observers. When APRA announced its collecting intentions in July 1925, broadcasting fever had swept the nation for year, and the new medium promised to attract a rapidly multiplying audience of new listeners every year. During the year, 66,000 listeners paid for radio licences and that figure doubled in 1926, increasing more than sixfold by 1932, when the Royal Commission on Performing Rights began its investigations.

The Royal Commission found that in 1931, Australian radio stations broadcast about one million musical items, compared with about 180,000 broadcast in Britain. The extraordinary depth and diversity of Australian broadcasting did not mean that Australian stations played more copyright or popular music – the PRS collected more than double APRA’s annual takings – but it demonstrated the profound underlying demand across the continent for communication and exchange of information.

APRA knew in 1925 that this demand would guarantee the longevity of the new medium and supply rich dividends into the indefinite future. It took a decade before the Association began to extract significant revenue from the commercial radio stations but in the meantime it realised that the financing of A Class stations through allocations of listeners’ fees promised to create a river of gold. When APRA began its operations, a single listener paid a little over one pound for a radio licence, and the rapidly multiplying number of licences delivered certain funding to the government-funded stations. Secure financing of the A Class stations seemed like a surety of continued copyright payments to the collecting society.

APRA did not neglect its other sources of revenue. The copyright history of the 1920s is as much about APRA’s commercial struggle with the picture theatre owners and the associations controlling public halls as it is about disputes with broadcasters. In the 1930s, the field of conflict is less crowded and the primary copyright dispute of importance is that between APRA and the broadcasters over performing right licensing fees.

The Commonwealth Radio Conference 1926

Taking its cue from the PRS, APRA in 1926 wasted no time in demanding performance fees from the fledgling Australian radio industry. The new radio stations could not dispute APRA’s right to exact licence fees – Regulation 74 of the *Wireless Telegraphy Regulations* prohibited licensed broadcasters from transmitting copyright works without the consent of owners – but they were outraged by the fees proposed. The broadcasters’ resentment simmered for a year and finally boiled over in a two day conference organised by the Association for the Development of Wireless in Australia and held in May 1926.

The ADWA's "Commonwealth Radio Conference" made two resolutions: to ask the Commonwealth government to appoint a royal commission to investigate wireless in Australia, and to place before the royal commission "special reports covering Copyright, Patents, Licence Fees, Education and Scientific Research". The Conference report acknowledged the right of copyright owners to receive remuneration for the public performance of copyright material but criticised APRA for greed and aggression.

The wireless stations agreed on five key points. The first two continue to be raised in a variety of ways in modern copyright discussions. According to the ADWA, the original copyright legislators never contemplated that the principles they espoused would be extended to a technology of which they had no knowledge, and APRA had no basis for assuming that these legislators would have intended that copyright owners could claim a performance fee for radio broadcasting.

The last three points concerned the absolute nature of the performance right: the radio stations were aggrieved that "copyright claimants" could "demand any royalty they think fit" and, by withholding permission to perform copyright works, "withdraw the latest music". Finally, they noted, because APRA demanded what they called extortionate performance fees, stations could only afford to play a limited repertoire of works: APRA's greed worked to "deprive the public of radio programmes they are just entitled to."

Without doubt, the catalogue of APRA wrongs listed in by the ADWA in the conference report would have impressed the government audience to whom it was directed. According to the ADWA, in the previous year APRA had, among other things, claimed up to 21 per cent of the broadcasters' net revenue in licence fees, withdrawn consent for the playing of popular works, prevented the broadcast of more than two numbers from an opera in a single radio program, restricted to four the number of times per week that popular items could be played, claimed twice for the same performance and claimed fees for the performance of works out of copyright.

The ADWA report inspired swift official action on behalf of the A Class stations. The Government called a conference that met on 23 July 1926 to discuss the national stations' copyright broadcasting fees and a second conference in August. Percy Deane, Secretary of the Prime Minister's Department, agreed for APRA to receive 10 per cent of station revenue drawn from fees for the first 100,000 listeners' licences issued in Australia. APRA would receive 5 per cent of revenue allocated for any further licences issued.

The position of the B Class stations, however, remained unsettled. APRA concentrated its efforts on those stations that in 1926 received income from advertising. In the case of one station, APRA began by demanding payment of 3s 6d per copyright item broadcast and gradually reduced the claim to less than one tenth of the original claim.

The Royal Commission on Wireless 1927

Perplexed by the problems arising in connection with the performing right, the Government included the investigation of broadcast copyright in the terms of reference of the its inquiry into the wireless industry. The Royal Commission on Wireless began its inquiry in January 1927, reporting ten months later. The Royal Commission's report noted reprovingly that APRA already wished to change the terms of the A Class station payment arrangements agreed with Percy Deane a year before. APRA proposed that it should now receive 7.5 per cent of total revenue received for listeners' licence fees, irrespective of the number of licences issued.

The report went on to state that APRA's licence fees were "in our opinion, out of proportion to the service rendered, or value given by the Association, or the author whom they represent, and is an advantage that in the majority of instances was never contemplated as likely to belong to either the author or composer or the assignee of the copyright." The report also observed that, according to "the latest figures in our possession relating to the practice in England the proportion of total revenue paid by broadcasting stations in Australia is more than double that paid in the former country."

The Commissioners concluded that copyright owners "derive considerable benefit from the broadcasting of their works, and the publicity so given broadly counterbalances any loss on sales of sheet music." They explicitly declined, however, to debate the merits of the performing right. As their report said, though "the validity of copyright as applied to broadcasting has been questioned in evidence tendered to this Commission, we deem such questions outside the terms of reference ... and have therefore assumed its validity."

They instead recommended that the compulsory licensing provisions of section 19 of the British *Copyright Act 1911* be applied to broadcast copyright. Under the scheme they envisaged, the radio stations could play the full repertoire of music controlled by APRA but would be liable to pay royalties to the owners of copyright. Importantly, the report also recommended that Australia should advocate, at the 1928 Rome Conference to revise the Berne Convention, amendment of the Convention to permit members to limit the amount of royalty payable by broadcasters.

The Commission proposed a limit on licence fees in Australia of, in the case of A Class stations, 5 per cent of annual revenue (or fourpence per performance), and in the case of B Class stations, fourpence per performance of musical works.¹² The Commissioners did not make clear whether they intended

12 At the Rome Conference, Australia and New Zealand (supported especially by Canada) would argue strongly, and successfully, for allowance for restriction on the newly recognised right of copyright owners to control copyright broadcasts.

that the radio stations should be permitted to negotiate royalty rates lower than those specified in the Report. They probably intended the figures to be taken as fixed rates and hoped that their proposal would eliminate fractiousness and bring certainty to an unsettled industry.¹³

Government officials were not persuaded. Their disquiet, aired privately in 1926, illustrates how, for government, the matter of regulating the performing right swiftly became an intractable problem. The Secretary of the Prime Minister's Department felt so concerned that in May 1926, he asked the Commissioners for an interim report, even though they had not finished hearing evidence. The four royal commissioners would not furnish a report but they supplied a summary setting out their intended proposals on broadcast copyright policy.

Preliminary government views

After looking at a draft summary of the Commissioners' recommendations, the Attorney General's Department prepared a memorandum pointing out the difficulty of government fixing the fees payable for the public performance of music. The memorandum declared it "out of the question" that "the [Berne] Convention should attempt to lay down a scale of royalties and prescribe their distribution." Next, it criticised the Commission's reference to the principles set out in section 19 of the British Copyright Act, "which provides for copyright in material records". The Commissioners were, by referring to section 19, trying to propose a system of compulsory licensing with caps placed upon the amount of royalty claimable. However, according to the Attorney General's Department, there "is little analogy between the two cases" and "the only principle intended to applied is that of a royalty fixed on an arbitrary basis."

The memorandum is worth re-examining chiefly because it canvassed two objections that were raised repeatedly in the next decade of public debate over the performing right. They go to the heart of the practical difficulties raised by the administration of collective rights – the problems of distributing performance fees to copyright holders and determining rates of remuneration. The author of the memorandum adopted a pessimistic position on each of these questions. The memorandum declared that "the basis of royalty suggested is impracticable."

The alternatives of 5 per cent of gross annual revenue (in the case of A Class stations) or, at the election of the copyright owner, fourpence per performance, were "irreconcilable" because "if some copyright owners select the second, the first is thrown out of adjustment, because the percentage is clearly intended to

13 Time showed their proposal to be unrealistic. In 1933, the Royal Commission on Performing Rights reported that the "royalty suggested [by the Royal Commission on Wireless] was found to be impracticable and it has not been suggested to the present Commission that such a basis should be adopted."

satisfy the claims of *all* copyright owners.” The writer declared that distribution by APRA (“a private association, which claims to represent the bulk of copyright owners, but certainly does not represent them all”) of bulk royalties collected under the percentage system was “obviously impossible”.

In the case of the proposed remuneration system based on fee-per-performance, the fixed fee of 4d per performance was “unsatisfactory, even as an alternative.” A flat fee did not allow for discrimination between works that varied in complexity and length. “A whole opera or oratorio, or a symphony in five movements, is placed on a level with a fox-trot or a morceau of a few bars.” Equally, the percentage system failed to allow for differences in the relative popularity of songs, nor the different artistic quality of pieces of music. The writer asked – in unfortunate language – “who is to assess the dividends, say, for Rosenkavalier and a coon song?”

The memorandum seemingly favoured market determination of performing right fees, though the author did not discuss the fact that the public performance right loaded the market in the copyright holder’s favour. The memorandum stated that “it is open to doubt whether sufficient reason has been shown for not allowing a composer to market his work at his own price.” But it offered no solution to the problem of APRA imposing unreasonable licensing terms on a captive market.

Perhaps because APRA had been active for a mere 12 months, the author wrote condescendingly about the strength of its negotiating position and the concerns about oppression expressed by the radio stations. APRA was “one particular Association.” A “reasonable solution” was “not likely to be reached except after thorough inquiry”. But the memorandum supplied no detail about the “reasonable solution”. The reason for silence was no doubt that government, and probably the Royal Commissioners, were flummoxed by the sudden appearance of APRA, and the seemingly vast scope of difficulties raised by its active enforcement of the performing right.

Chapter 5 – the APRA wars and the Rome Conference

THE BEGINNING OF THE APRA WARS

APRA campaigned on various fronts. In 1926, the collecting society pursued a parallel campaign to secure remuneration from the owners of entertainment venues. In doing so, it began to touch the nerves of politicians and the public in ways that were scarcely evident in its negotiations with the broadcasters. It encountered organised and vociferous opposition from cinema exhibitors represented by the Federated Picture Showmen's Association, agricultural societies represented by the Queensland Chamber of Agricultural Societies, and, most forcefully, municipal and shire associations represented most effectively by the Local Government Association of NSW.

APRA reached agreements with the cinema exhibitors in 1926 and 1928 – though in both instances the contracts signed by the Federated Picture Showmen's Association caused great resentment¹ – but its efforts to persuade local government, or any public association, to accept an obligation to pay copyright fees for performances in public halls, were conspicuously unsuccessful. When the Royal Commission on Performing Rights reported in 1933, only 20 municipal or shire halls in the whole of Australia were licensed by APRA for the public performance of musical works.

According to the Royal Commission's report, the local government associations objected to APRA's charges not on the grounds that they were excessive but that they should not be made at all. Not all owners of public halls resisted the principle that copyright owners should be remunerated for the public performance of their works. But, with exceptions, they refused to countenance payments to APRA on the grounds that the Association made claims for payment without proof that it did so on behalf of the owners of the works performed, and

1 Many cinema owners refused to join the agreement and the Cinematograph Exhibitors' Associations of Victoria, Tasmania, South Australia and Western Australia bitterly attacked APRA.

that even if it proved agency, it refused to demonstrate how, and to whom, it distributed income collected.

A recurrent theme of opposition to APRA, expressed by all the classes of users on whom the collecting society levied copyright fees, was that while users did not object to direct payment of reasonable fees to copyright owners, they did not accept that APRA's charges were reasonable, and they doubted its willingness – or ability – to fairly distribute revenue to individual owners.

Compulsory arbitration

In the case of the cinema exhibitors, APRA succeeded in overcoming commercial opposition perhaps because it was intensely motivated by the prospect of large financial returns. In 1926, cinemas, soon to play talking films, still hired orchestras, or pianists or organists, to play an accompaniment to silent films screened. For APRA, fees for these performances represented possible revenue that would be exceeded only by that provided by the A Class stations.

Negotiations with the Federated Picture Showmen's Association were at first difficult. Walter Marks, a parliamentary colleague of Attorney General Latham, chaired the 1928 Royal Commission on the Moving Picture Industry in Australia, and lobbied Latham on behalf of the Showmen's Association. As he said in a letter in April 1926, the "position is clearly one of 'bargaining', but according to Mr Howe [the Association's President] two conferences have left the position as formerly existing extortion as compared with England and America."

His next comment raised the question that was to occupy much of the attention of the Royal Commission on Performing Rights. "It would appear," said his letter, "that the parties cannot get before an Arbitrator without an amendment to the Act." To cure the perceived legislative defect, Marks submitted to Latham "three amendments of the Copyright Act for your consideration".

One of these proposals provided that if parties could not agree a copyright performance fee their dispute would be settled by arbitration. The copyright legislation allowed for voluntary arbitration but APRA regarded the idea of a compulsory requirement as anathema. Seven years later, it resolutely opposed the Royal Commission's proposal for the Government to add a compulsory arbitration clause to the Copyright Act.

The remaining proposals concerned registration of musical copyrights and reservation of performing rights as preconditions for the enforcement of rights but they found no favour with government (although they were not immediately dismissed out of hand). Latham pointed out later to interested politicians, as well as copyright user groups, that the Berne Convention's prohibition of copyright formalities precluded adoption of these legislative suggestions.

Latham passed Marks's proposals to the Solicitor General asking for "a report and recommendation upon the question raised" and observing that if APRA's

rates were extortionate, as alleged, “it would appear that some alteration should be made in the Act unless [APRA] is prepared to reduce its proposed charges.” However, the Showmen’s Association relieved him of the need for further direct action, reaching agreement with APRA on rates in April 1926.

APRA and the cinemas

Many cinema exhibitors grudgingly accepted the terms of the agreement, which were negotiated at conferences chaired by Percy Deane, the Secretary of the Prime Minister’s Department.² Others joined a new agreement in 1928, which introduced new and increased tariffs. But all bitterly attacked what they looked upon as profiteering by APRA. As the complaints multiplied, the atmosphere of distrust poisoned the Showmen’s Association’s relationship with APRA. By 1932 APRA refused to negotiate with any association representing exhibitors and concentrated on issuing individual licences to cinema exhibitors.

The report of the Royal Commission on Performing Rights made plain the sympathies of the single Royal Commissioner. He called APRA’s refusal to negotiate, “unfortunate ... particularly in view of the conciliatory attitude of the exhibitors before the Commission.” According to the report, the “difficulties of the exhibitor ... are great ... he is met with claims for performing fees which he has no means of disputing; and he is faced with charges which he contends are not arrived at on any settled basis.” The Royal Commissioner declared himself “satisfied” that “the exhibitors only agreed to the Australasian Performing Right Association’s terms under pressure”.

The unhappiness of cinema owners pointed to a weakness in collective rights administration mentioned repeatedly in the 1920s and 1930s. Valuation methods were arbitrary and the absence of any qualifications to the performing right delivered almost total bargaining power to APRA. Additionally, as the cinema exhibitors could demonstrate, while APRA quickly spotted opportunities for demanding performing right fees, it would not discount fees to allow for reductions in music performances.

In 1926 nearly all films screened were silent. The average performance by the orchestras playing accompaniment to screenings in city and suburban theatres lasted two and half to three hours, and about 40 to 50 items of music were played during each performance. The 1926 agreement negotiated by the Showmen’s Association provided for separate scales of rates for city cinemas and suburban and

2 In the cinematic trade press, the President of the Showmen’s Association urged exhibitors to “embrace” the two year agreement with APRA, “as there is no doubt that I have effected a favourable settlement, and it must be recognised that [APRA] is in a position to impose higher charges on isolated showmen who refuse to subscribe to the general scheme.”

country cinemas, but it did not allow discounts for low attendance, or if a cinema ran at a loss. City venues paid 45s per 100 seats per annum, rising to 90s per annum if average weekly gross takings exceeded £1000. The suburban and country theatres paid a maximum of 25s per 100 seats annually and a minimum fee of £1 5s per annum.

The new agreement introduced by APRA in 1928 maintained the 1926 tariff levels for existing and conforming subscribers but increased rates for those theatres said to have breached the 1926 agreement or which had commenced business after the 1926 agreement. Concessions were withdrawn. The new agreement made no allowance for the change in music performance patterns that followed the advent, after 1926, of sound pictures.

Inequity of APRA's rates

The Royal Commission on Performing Rights carefully described the meaning of this omission for all cinema exhibitors, who continued to pay the rates set in 1926 or 1928, even though the quantity of music performed in cinemas after the introduction of talkies now dropped precipitately. After 1926, when sound pictures replaced silents, theatre proprietors began to realise they had little need to supply extraneous music. By 1932, orchestras had vanished from suburban theatres. In many, gramophone records were sometimes played briefly but in most instances the only music heard came from the soundtrack of the film.

The Commission report pointed out the inflexibility and inequity of APRA's pricing schedule. It found that in 1926, a theatre of 1500 seats played an average of 50 music pieces per week compared with eight pieces per week in 1932. The theatre in 1926 gave 312 musical performances during the year, with performers playing an aggregate of 936 hours of music. In 1932, the theatre gave the same number of performances but performances lasted for an aggregate of 156 hours. In 1926, the theatre used 2600 pieces of music and in 1932, 416.

Although the performers it hired played much less music, and far less variety of music, occupying, in 1932, only one sixth the amount of time their predecessors spent in performance six years earlier, the theatre paid APRA the same annual amount, £18 15s, for the performance right. A similar theatre paying under the 1928 tariff would be liable to pay APRA £28 per annum. Not surprisingly, considering the popularity of cinema, APRA's annual takings from picture theatres continued to rise steadily, from £7,622 in 1927 to £9,989 in 1931.

J C Langley, the Secretary of the Cinematograph Exhibitors' Association, noted in a 1932 letter to the Postmaster-General that by 1930, cinemas played an average of 30 minutes recorded music per performance, yet APRA continued to charge them for the performance of three hours of live orchestral music. The Royal Commission on Performing Rights, sitting in the midst of the Great Depression, listened sympathetically to exhibitor complaints about heavy imposts in

a time of straitened circumstances.

Few observers understood APRA's determination to apply to the talkies tariffs determined when orchestras performed music before, during and after the playing of silent films. The Commission also heard exhibitors express their unhappiness at the difficulties of paying APRA performance fees for the music contained in the soundtracks of films and decided that a licence to use APRA's entire repertoire for a reasonable annual fee "under reasonable conditions" would removed "many of the difficulties now experienced by exhibitors".

A draft bill for a copyright tribunal and international protests

To resolve their difficulties, the cinema exhibitors proposed to the Royal Commission the formation of a tribunal to allow the parties to reach reasonable terms and to review lists of APRA's charges. As long ago as 1926, they made a similar suggestion to Walter Marks, who passed to Latham a suggested compulsory arbitration provision drafted by the lawyer for the Showmen's Association. Latham took the exhibitors' concerns seriously and his department modelled a draft amending bill on the draft provision supplied by Marks.

The draft bill never reached Parliament, but it signalled the seriousness with which the Attorney, even at the outset of controversy, regarded disputes over the performing right. The draft bill gave Latham useful leverage with APRA. In 1929, he requested confidential financial information from the collecting society and advised, incidentally, that the Government would, in the next Parliamentary session, give priority to considering a copyright amending bill. APRA responded within three days, disclosing detailed financial information, and anxiously asking that a company delegation could address Cabinet on the subject of the performing right.

Neither Latham, as his departmental memorandums showed, nor his parliamentary colleagues, were ready to reach firm conclusions about regulating performing rights until an official inquiry could fully consider the consequences of APRA's irruption into the landscape of music use. In the meantime, opposition to APRA's tactic of sending letters of demand containing the threat of legal proceedings if music users did not agree to pay specified copyright licence fees grew into furious protests within two years of APRA emerging. Similar patterns of protest emerged also in Canada and South Africa.

In Canada, the Motion Pictures Distributors and Exhibitors of Canada instructed cinema owners not to take out licences with the Canadian Performing Right Society, and invited the PRS to join in a test case to determine whether it could validly impose and collect licence fees. The PRS declined the invitation. The Government proved more forthcoming: it withdrew provisions in amending legislation that confirmed the right of the PRS to function as a collecting society.

John Cooper, the President of the Canadian distributors' association said in correspondence to his British counterpart in May 1926, that cinema owners in the dominions "would be quite prepared to pay copyright fees to local owners of copyright and local composers but they do not feel justified in paying fees to British or foreign composers and copyright holders." The fee, he said, should be moderate and paid for a purpose. "We can quite see," he wrote, "where a reasonable fee to encourage domestic production of music might be justifiable but we are not clear that we are under obligation to pay toll to copyright holders and composers who live outside our countries."

Response of local government

Domineering in its attitude towards the cinema exhibitors, APRA encountered in the responses of local government depths of antagonism it could scarcely have guessed. From the start, municipal councils, which controlled public halls across Australia, doubted APRA's declarations of fidelity to the interests of music composers and openly declared it the income-maximising agent of publishing houses. In February 1927, the Local Government Association of NSW issued a circular titled *The Copyright Levy – Should Public Bodies be Forced to Pay*, and declared APRA a "combine" of publishers. This combine, said the LGA, subverted the law:

It is apparently only within recent years that some enterprising genius discovered what a money-maker the Copyright Act would be if were only worked in the right way. As a matter of practice, the author does not publish musical works himself, but arranges for their publication by a music house, to which he sells the copyright either for a lump sum or a royalty. These music houses, being comprised of business firms, are naturally anxious to extract every possible penny of revenue from the works they are selling.

In 1926, APRA sent the owners of public halls and similar places of entertainment a circular notice which included a form of licence and a demand for an annual licence fee of £3 15s for the public performance of music. The Secretary of the LGA wrote to Latham asking for protection against "threatening letters of this nature" and the wrongful "use" of the "quasi criminal procedure of the Copyright Act." He asked the Attorney to "take some action that would protect the public against such a use of the Copyright Act". In the same period, a number of federal parliamentarians lobbied by art schools, memorial associations and other institutions began to press Latham to curtail APRA, preferably by disqualifying legislation.

Latham's pro forma response expressed the Government's unchanging position:

The owner of the performing right of a musical composition has the exclusive right to perform the composition in public, or to authorize its performance in public. Accordingly any person who wishes to perform in public music in which a performing right exists can do so only with the consent of the owner of the performing right.

Latham's letter directed the reader's attention to section 15 of the Copyright Act, which imposed liability for copyright infringement on any person who, without authorisation of the owner, "for private profit" permitted a "theatre or other place of entertainment" to be used for the public performance of musical works. The provision did not apply, as Latham pointed out, if a person "was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement."

The letter concluded that while unlicensed public performances of music infringed copyright, the liability of a hall owner for unlicensed public performances depended on the owner's "degree of control" over a performance. Each "particular case would have to receive consideration on its merits." The question of degree of control loomed large in the coming debates between APRA and the owners of entertainment venues, but it was another proposition in Latham's letter that pointed, unwittingly, to the real issue raised by APRA's activities: "the terms upon which the musical composition can be performed in public are left to be determined by agreement between the parties."

APRA's conduct

Although Latham upheld APRA's right, as assignee of musical copyrights, to prohibit unlicensed performances, he soon became interested in examining APRA's conduct. This change of emphasis resulted from receiving continued protests about the organisation's behaviour. Exposed to the continuing controversies that attended APRA's aggressive licensing drives, Latham realised that he could not fairly maintain that the contending parties should be left alone to negotiate licensing terms.

Supported by legislation, unchallenged as the single representative of the vast majority of owners, APRA was, as its opponents claimed, a fearsome commercial "combine" that could mow down any resistance in the courts. Without government intervention, the halls owners and entertainment venue proprietors, the most importuning of the music users, would eventually have to accept whatever terms APRA imposed. Latham, a coldly intelligent and detached individual, later the Chief Justice of the High Court, decided that he would have to do more than blandly defend APRA's legal position.

He started pressing APRA about its methods. In a letter sent in May 1927, he informed APRA's Secretary that "your Association has no legal right to com-

pel owners of halls to take licences from you; although this method of securing remuneration for owners of copyright may be convenient to your Association.” He went on to say that the “terms and the general tone of communications sent by your Association to owners of halls have been unfortunate, inasmuch as they have not unnaturally suggested to the persons receiving them that you claimed a right to levy halls as such.”

Latham did more than emphasise that APRA wrongly implied that hall owners could not refuse a licence (and choose either to infringe copyright or to ban musical performances). The language of his letter implied that he accepted the most serious charge levelled at the collecting society, that of profiteering. “It would also seem,” he said, “from letters that I have received, that in some cases the payment demanded has been reasonably complained of as excessive.”

Forensically precise about applying the law and adducing evidence, he was testy with APRA’s opponents whenever he detected exaggeration or special pleading in their arguments. He appeared impartial, though he intimated a belief that legislation might be needed to place some restriction on APRA’s bargaining power:

I am not prepared to express any opinion upon the legal position or upon what may be regarded as the merits in any particular case. Consideration will be given to any definite proposals which may be made for an alteration of the law.

Protest of local government – “The Copyright Levy”

Neither APRA nor the federal Government could not afford to ignore the groundswell of protest generated by local government. The NSW LGA’s circular *The Copyright Levy* rapidly gained nationwide prominence. 44 local councils sent the circular to 30 federal politicians. They also communicated directly with Latham protesting APRA’s fees. From February 1927, copies of the circular made their way across the country forcing APRA, then in negotiation with the Roads Boards Association of WA – the owner of entertainment venues throughout the State – to explain to the Board that the circular’s “violent description of our activities” was “utterly at variance with the facts”.

The circular began melodramatically in the style of the opening sentence of *The Communist Manifesto*, warning of a hovering menace about to threaten the settled conditions of daily life:

A combine has been formed in Australia which controls the selling and performing of practically all the saleable music which has been composed throughout the world in the past fifty years.

The circular listed the current and proposed exactions imposed by APRA, stating

that, “under the law, this combine has the power to enforce most of its demands.” APRA, according to the author,³ could only be resisted by concerted and determined action. “To say,” he wrote, “that this body is aggressive is to describe it mildly.” APRA had tried “to frighten” prospective licensees and “has issued many threats of prosecution and has officials patrolling Australia, threatening the owners of public halls with penalties.”

APRA’s tactics included undertaking equitable actions which involved legal costs that few hall owners could countenance. “As part of a policy of threatening and frightening,” said the circular, “there is no doubt that the cost of an equity suit is a valuable weapon.” The circular proposed a plan of action:

We think it is only right that the law should be altered, and the purpose of sending you this pamphlet is to ask your co-operation in securing an alteration of the law so as to protect the public and public institutions against threats and levies of this huge and wealthy combine.

The circular did not mention Latham’s observation, in his pro forma correspondence of a few months before, that the liability of a hall owner for infringing public performances depended on the degree of control which the owner exercised over a performance in a hall.⁴ Instead, it reported, not altogether accurately, that APRA “would secure a conviction if it could show that the hall-owner knew that at the dance some particular piece of music was to be played, that it was copyright, and that he, nevertheless, let the hall.”

The circular pointed to the noticeable effect of organised resistance on APRA strategy of demanding high fees. Encountering resistance, APRA dropped its fees. The circular stated that: “the hall owners appear to be the only section of the public successful in resisting the demands of the A.P.R.A. ... Finding little response to their earlier threats, they subsequently made a number of reduced offers. On one occasion as little as 5/- per hall per annum was offered to the friendly societies ...”⁵

Above all, APRA could in theory increase its fees ad infinitum, “there being, of course, no legal limit to the amount that can be demanded.” APRA pos-

3 A Bluett, solicitor and Secretary of the Local Government Association of NSW.

4 In *Corporation of the City of Adelaide v Australasian Performing Right Association* (1928), the High Court held that a hall owner could not be said to have given permission for a public performance in the hall even though the owner had been informed an infringement would occur and could have prevented infringement by terminating the hall rental contract. In December 1928, the Privy Council dismissed APRA’s application for leave to appeal the High Court’s decision.

5 The circular observed that it was “hard to say on what basis” APRA determined fees. “Apparently,” it noted, “up to £7/7/- per annum was the figure originally favoured.”

sessed an absolute right. Nothing in the copyright legislation prevented it from wielding the performing right as an instrument of oppression. APRA, said the circular, “apparently intends to comb the country with a fine-tooth comb so that no hall, however small or remote will escape from paying its yearly fee.”⁶ Given such power, why would APRA not exert it to maximum commercial advantage? “There can,” the circular said, “be little quarrel with the A.P.R.A. as a business organization squeezing out of the public all it can possibly exact.”

These observations led directly to a query raised again and again over several years by the various opponents of APRA. Did the framers of copyright legislation intend the law to function to allow taxation by private collectives? In the words of the circular, the “question for the public to settle is whether the law as it stands is a fair one and whether the framers of it ever had in mind the creation of such an organisation for the exploitation of copyright.” Nearly every individual or organisation that wrestled with APRA over the payment of performing right fees would admit only one answer: the 19th century legislators invented the public performance right to allow composers to secure much needed income, and their 20th century successors never intended it to be used as a tool for unjust enrichment.

In the emotionally charged atmosphere of the late 1920s, APRA’s antagonists could find nothing to commend its activities, not even its function as a vehicle for remunerating authors. They conjured the image of a pristine Australian commercial scene pastoral in its peaceful predictability. Against an imagined background of snow white purity APRA stood out like a black wolf, a hovering menace descending from the wintry skyline to savage the sheep below. Certainly, opponents wanted to see composers rewarded for their work. But APRA the ravening wolf served one master, the publishers:

No-one wants to deprive the Australian musician of the fullest possible reward for his genius. It would appear, however, that very little of the huge amount paid by the public in the way of copyright goes to the benefit of Australian composers. It is a question for consideration whether, if the public is to pay these huge sums, the matter should not be under Government control, in order to ensure that Australian artists get their full return. The Copyright Act was intended to benefit artists and composers. Under the present system of organisation, the music combine gets most of the benefit.

The LGA’s circular proceeded to expose APRA’s assumed motives. At a government-sponsored conference of music users and APRA,⁷ said its author, the

6 The circular made a “conservative” estimate of 5000 halls in Australia.

7 Presumably one in a series of conferences organised by the Postmaster General’s Department in July and August 1926.

LGA proposed that Parliament investigate ways to regulate the performing right. An APRA representative reportedly described this suggestion “as the most immoral proposition he had ever heard”. The circular ended with a call to arms, asking the owners of halls and other entertainment venues to contact their local members and press for parliamentary investigation of APRA’s activities. “The combine,” was already “getting firmly entrenched” and hall proprietors were entitled “to ask that the charges [of APRA] should be properly regulated and not left to this method of collection by threat.”

“Legalised bushranging”

The LGA circular electrified its audience, prompting a torrent of protest letters to Parliament and galvanising local government officials. Within days, the *Evening News* in Sydney reported Alderman Jackett of Burwood Council saying that APRA “will make a demand upon the churches to pay a licence fee for the hymns they sing.” In April 1927, *The Sun* quoted a letter from the Prime Minister, Stanley Bruce, read at a meeting of Newtown Council. Bruce declared that:

The whole question of copyright law is an extraordinarily difficult and complex one, because of the number of international conferences with regard to copyright. The matter could not be dealt with by an alteration of the law without possibly very serious results to Australian citizens who desire copyright privileges in other countries.

Alderman Turtle summed up the feelings of Newtown’s Councillors. The activities of APRA were, he said, “legalised bushranging”.

The Roads Boards Association of WA also accepted the arguments in the circular. Although Roads Boards representatives met their APRA counterparts over several months and the two organisations corresponded over a dozen times, the West Australians asked the federal member for Dampier, Henry Gregory, to press Latham for a Royal Commission to investigate APRA. Gregory had already written to Bruce, asking for the appointment of a Royal Commission to investigate the need for changes to copyright legislation. Developments in broadcasting and cinema, and the establishment of APRA, he told Bruce, demanded a Government response.

He repeated his request to Latham, asking for “full enquiry into the demands and legal rights of the Performing Rights Association” and noting the “very strong impression that exploitation would not be too strong a term to use in regard to the demands made by this Association.” Latham passed the correspondence to APRA for comment. He informed Gregory that questions about APRA “have been similarly raised with countries on the other side of the world, and apparently the difficulties there have been adjusted with a reasonable degree of satisfaction

to those concerned.”

The Government, he said, was not going to abolish the performing right as to do so would make Australia a “pirate nation in Copyright Law”. However, he assured Gregory, the Government wanted to establish a system for determining fair remuneration and distribution. Latham did not underestimate the difficulties ahead:

I have not been able to obtain from any source any suggestion for a reasonable system of assessing payments and securing that they should go to the author, but I have put the matter very plainly to the Performing Rights Association, and I hope that the difficulties will be surmounted.

If Latham thought he could avoid giving the performing right controversy his total attention, events soon disabused him. The Roads Boards of WA wrote to all West Australian federal parliamentarians asking them to support Gregory, and in August 1927, Latham duly received a stream of mail requesting that he investigate APRA. He responded by asking Garran to send Gregory copies of APRA’s correspondence with the Roads Boards, the Local Authorities Association of Queensland, and Canon Garland of Brisbane.

APRA had informed Garran that the letters copied “demonstrate the moderate, even conciliatory, attitude which is adopted in our correspondence” but Gregory was not impressed. He acknowledged that APRA “have behaved with the greatest courtesy” but he noted that the letters “do not afford much insight into the general question.” Gregory repeated the proposition that Latham would eventually act on, five years later:

I still think that some action should be taken by the Government with a view of considering what amendments might be made to the Copyright Act and also whether any action should be taken under the same Act so as to afford protection to the general public against any unjust or unfair demands that may be made.

APRA responds and LGA proposes withdrawal from Berne Convention

By the time of Gregory’s final letter in September 1927, APRA’s dispute with the proprietors of public halls and entertainment venues had flared into open warfare across Australia. APRA blamed the nation’s local government associations. R Nathan, APRA’s Chairman, informed Garran in a long letter in July that the “opposition on the part of Local Government authorities has left us the alternative of addressing ourselves directly to the promoters of entertainment in their public halls.”

APRA intended, he said, to “carry out its business ... in a dignified and eq-

uitable manner” even though the “criticism and hostility” of its opponents were “clearly based on misunderstanding and ignorance”. However, he warned, its “conciliatory attitude” should not be interpreted “as a sign of weakness”. In early September, the NSW LGA wrote again to Latham, responding to Latham’s request, earlier in the year, for the disputing parties to submit legislative proposals for his consideration.

The LGA’s Executive asked the Government to declare APRA illegal as a “combine”, to impose costs liability on APRA in enforcement actions if damages awarded were less than £50, and to require APRA to publicly disclose details of revenue and distributions. The correspondence went further. The LGA proposed that Australia withdraw from the Berne Convention.⁸ By doing so, declared the letter, the Government would free itself from the Convention’s implied prohibition against placing limitations on the performing right. It could enact suitable restrictions – including the outlawing of APRA – and thereby ensure that Australian composers, rather than a publishers’ “combine”, benefited from the performing right. Latham refused this suggestion but the LGA’s proposal left him in no doubt about the alarm and hostility aroused in music users by APRA’s control of the performing right.

In placing Australian interest at the forefront of the argument, the LGA repeated arguments made in the parliamentary debates over import controls in 1912. The Association asked whether domestic laws made in accordance with international treaty benefited the national economic interest. The LGA thought not, at least in the case of the performing right. Collections for public performance in Australia hardly benefited Australians and if fees remitted overseas, mostly to Britain, were unlikely to much benefit British composers:

*An examination of any of the lists sent out by the A.P.R.A. would make it appear that the Australian music market has been almost entirely captured by foreign music. It is doubtful out of every £100 the public contribute in payment for copy-right as much as £1 goes to Australian composers.*⁹

Several parliamentarians, including the Postmaster General, also forwarded copies of the LGA’s correspondence to Latham, but he was unmoved. He replied to them all that he had no intention of recommending that Australia withdraw

8 Australia was not yet an independent member of the Berne Convention. It accepted the obligations of the treaty as a British possession and became a member in its own right the following year in April 1928.

9 If the Government implemented its suggestions, the LGA said, Australia, like the United States, could “take charge of her own copyright affairs” and “make it a condition that nothing shall be copyrighted in Australia until it has been printed in Australia.”

from the Berne Convention. As he well knew, and his correspondents evidently did not, the Convention by now exercised powerful moral suasion in many parts of the world. To repudiate it would be seen, to borrow the type of language that copyright proponents were apt to use, as a declaration of barbarism.

The Brisbane Memorial Statement

In the meantime, APRA battled the Local Government Authority of Queensland, which in October 1927 published the *Brisbane Memorial Statement* attacking the collecting society. The Queensland Government endorsed the statement, sending it to Bruce asking him to forward a copy to Sir William Harrison Moore, Australia's newly appointed delegate to the looming Rome Conference of the Berne Union.

APRA's executive reacted furiously, and the Association fired a letter to the State's Premier, declaring that, "we would have thought that you would have given us an opportunity of stating our case before supporting an amendment of the Copyright Act." The letter enclosed a paragraph by paragraph statement of rebuttal of the Brisbane Memorial. The reader could not mistake the palpable tone of outrage in the letter. One paragraph in particular seemed to express the pent-up feelings held in during eight months of sometimes bitter attack:

We feel sure after perusal of same [the rebuttal statement] that the undeserved, untrue, and unmerited accusations launched against our Association would not have been supported by you or your Government had you been in possession of these facts, nor would you have been a party to the dissemination in places outside of Australia, of such slanderous statements impeaching the bona fides of an Australian corporation composed of Business men of unimpeachable integrity.

The Brisbane Memorial enumerated 18 reasons why APRA should not be allowed to collect fees for public performance. A couple of the points raised remain controversial in the modern era: APRA, said the Memorial, did not reveal to whom money collected was distributed, and it did not clearly establish its title to works. Other objections continue to press against modern orthodoxy on the merits of performing rights.

One objection stated that the original copyright legislators did not intend that performance right, if asserted, should be exercised in relation to new technologies like broadcasting. Another claimed that the benefits to the copyright owner of public performances ought to be taken into account when assessing fees, and a third suggested that APRA set fees arbitrarily. APRA responded to all criticisms in detail but it is hard to say how much its efforts influenced Latham.

On most points he would have agreed with the collecting society anyway. On the key questions of transparency and arbitrariness, however, he might not.

Latham had already communicated to the Solicitor General his concern at the latitude the Copyright Act gave APRA to set fees. Very slowly, as the protests continued, he inched his way towards acceptance of the call for a royal commission.

Moving forward

Over the next two years, events mimicked Latham's slow progress. The different commercial users of music continued their resistance to APRA's claims for payment, though increasingly they stopped agitating for APRA to be declared illegal and concentrated on highlighting the perceived unreasonableness of performance fees. As the war over fees dragged on, APRA's right to enforce the performing right became more accepted and the organisation continued doggedly to pursue claims for payment. It won copyright infringement suits against councils that allowed unlicensed performances of music in public halls, and in March 1929 secured, in a test case against Radio 3DB in Sydney, an injunction restraining the unlicensed broadcasting of music.

Politicians continued to ask questions. The Chamber of Agricultural Societies of Queensland, lobbied by various constituent societies, protested to Colonel Donald Cameron, the MP for Brisbane, about APRA's exactions. He, in May 1929, asked Latham if, "some relief may be possible, though perhaps it may mean amendment of the Copyright Act of 1912." Latham responded equivocally. He pointed out APRA's right to restrain the public performance of music, and suggested that the Government might adopt the Royal Commission on Wireless's proposal that A Class stations pay APRA 5 per cent of annual revenue.

Latham more clearly indicated his intentions by informing APRA – in a letter requesting financial information on Cameron's behalf – that the Government intended to give urgent attention to a bill to amend the Copyright Act. He did not disclose the contents of the bill – which contained the forerunner of the voluntary arbitration provision that would eventually be enacted in 1933 – but there is no reason to doubt the sincerity of his professed intentions.

APRA responded with alarm, and in July 1929, having received no response to a request to address Cabinet on the bill, wrote to Latham protesting a Country Party resolution "suggesting alterations to Copyright Law of a revolutionary character". The Secretary N Edwards asked for "an official statement to be made in the House when Copyright Law is debated, to the effect that the Government has thoroughly satisfied itself on the bona fides of this Association and that in fact it establishes a very convenient situation to those who desire to perform copyright music at public entertainments."

Latham responded bluntly that he was not prepared to undertake to make the requested statement. Instead he asked APRA to supply a schedule of public hall licence fees. Latham considered that the size of public performance fees

demand lay at the heart of users' unhappiness with APRA. Reduce fees, he thought, and the problem of the performing right would disappear. He was only partly correct.

Fewer protests might be heard from the hall owners but the radio broadcasters and cinema exhibitors, by far APRA's greatest sources of revenue, were quietly waiting for the opportunity to expose to a public inquiry what they considered the evil effect of APRA's monopoly. They hoped that APRA might somehow be forced from the scene.

The opportunity, however, did not come as they hoped. In October 1929, the Government's backbench revolted over Bruce's attempt to dismantle the federal arbitration system, forcing a national election. 17 days before the Wall Street stockmarket collapse, Labor drove the Nationalist-Country Party coalition from office, and for two years, Latham's copyright bill gathered dust in a drawer.

THE ROME CONFERENCE 1928

Broadcasting and performance

Controversies centred on the musical performing right occupied the attention of Australian copyright policymakers from the mid 1920s until the outbreak of World War II. Though the battles over the performing right overshadowed other developments in copyright law, the period should be remembered also for the successful efforts of the broadcasting and recording industries to influence copyright policy.

In 1928, the Berne Union met in Rome to discuss amendments to the Berne Convention. A principal proposal involved recognition of the copyright author's right to control the broadcasting of copyright works. Preparatory papers circulated by the Italian organisers of the Rome Conference left no doubt of the Union's intentions and Australian radio broadcasters, already alarmed by APRA's demands for performance fees, became doubly concerned that the Union's recognition of an unqualified broadcasting right would set in stone the absolute right conferred on APRA by section 2 of the British Copyright Act.

Thus empowered, APRA could continue to demand whatever fees it wished for the broadcasting of music. Broadcasters, working with their British counterparts, set in train a resistance strategy that they hoped would result in the Berne Union accepting the principle that governments could legislate to qualify the broadcasting right. For their part, the record manufacturers tried, and failed, to secure international recognition of a manufacturers' performing right in records. But they did not give up and in the 1930s the common law (in Britain) recognised a right that, until then, policy makers devoutly disclaimed.

Official preparation for the Rome Conference began in earnest in the middle

of 1927. In May, the Commonwealth Attorney General's Department sent letters to main protagonists in the performing right saga advising that Professor William Harrison Moore would represent Australia, and welcoming "any practical suggestions which may assist the Conference in its task". The next month, replying to a politician's letter of complaint about APRA, Latham explained that his attention was fixed on international matters: "I am engaged," he wrote, "upon this subject and other aspects of the Copyright Law in connection with the agenda of the [Rome] Conference."

Role of Australia and New Zealand

The Rome Conference, held at the Palazzo Corsini, opened on 7 May 1928 and continued until 2 June. Delegates from 69 countries took part in the proceedings, 39 of which were members the Berne Union and 39 non-members. In the months preceding the Conference, the Italian delegates to the Conference, and the Berne Secretariat distributed to Union members proposals for amendment of the Convention.

Subcommittees discussed the proposals but the member delegates sitting in whole committee performed most of the work of the Conference. A Commission de Rédaction (drafting committee) performed the tasks of drafting and revision leading to the publication of the summary of proceedings, the *Rapport Général*. From the start, Australia and New Zealand played a vital role in proceedings, pressing the reluctant civil law nations to agree to allowing Union members to place restrictions on the broadcasting right. The civil law nations led by France, the supreme advocate of untrammelled authors' rights, no doubt looked askance at the antipodean upstarts. New Zealand became a member of the Berne Union¹⁰ in 1927 and Australia in April 1928.

Although independent members, they aligned themselves closely with the British, Canadian and Indian delegations, the five working together as a bloc. According to Moore's report to Parliament, the group's "discussions were invaluable to the delegates themselves, and in my opinion very materially facilitated the work of the Conference."¹¹ The delegates, bound by the Convention's proviso that members could alter its provisions only by unanimous consent, displayed what Moore called a "certain spirit of accommodation", trying hard for compromise whenever they reached impasse.

The Conference's final *Rapport Général* listed seven text amendments, the most important and controversial of which protected moral rights and recognised

10 Commonly referred to in the official literature of the day as the International Copyright Union.

11 *Report of the Australian Delegate (International Copyright Conference, Rome)*, presented to the Commonwealth Parliament in August 1928.

the author's right to authorise the radio broadcasting of a work, subject to the power of national legislatures to control the exercise of the right. The British bloc, and especially Australia and New Zealand, assisted by Norway, played a leading role in the debates over both categories of rights. The "British delegations", as Moore called them, opposed the proposed moral rights amendment before accepting a revised version.

They played the primary role, amidst furious opposition led by the French delegates, in securing agreement to a proviso that allowed nations to limit the absolute right of authors to control the broadcasting of works. In the subcommittee on mechanical reproduction rights, the British bloc also raised the possibility of recognising either a mechanical performing right, or, to protect record purchasers, some limitation on the author's performing right. The proposals aimed to ensure that record companies could not be forced to pay performance fees. For most delegates, who came to Rome expecting to participate in the elaboration of authors' rights, the idea of recognising mechanical rights proved too much.

But the attitude of the "British delegations" is revealing. For them, it seemed, the interests of industries mattered as much as those of authors, and they seemed also to believe that the law must pragmatically reflect the bargains struck by opposed interest groups and their mediators – politicians. The French, peddling the impossible idea of a copyright system that allowed authors to absolutely control the production of copyright material, were horrified.

The antipodean consensus

The British attitude is more accurately described as the antipodean consensus. Months before the Rome Conference began, Moore and his New Zealand counterpart, the King's Counsel, Samuel George Raymond, resolved to make sure that delegates heard in full the concerns of radio broadcasters and gramophone companies. They listened openly to the views expressed by the industries. On two consecutive days in Berne in October 1927, they met representatives of the Committee of the Mechanical Music Industry (UK) and the Columbia Gramophone Company.

Recently appointed as Australia's delegate to the League of Nations, a position he held till 1930, Moore provided the Government with a clear account of the meeting and assured the industry representatives that he would give "careful consideration" to their views. The gramophone company representatives asked Moore and Raymond to support three principles: a universal statutory recording licence, compulsory registration of full details of a recording, and a public performance right in records.¹²

12 Moore stated that the standard text *Copinger on Copyright* considered that the copyright of the first maker of a recording (i.e. the person authorised by the author to

Moore politely warned the gramophone company representatives that most of his colleagues at the Rome Conference were likely to greet each of the industry's proposals with disgust. He followed the arguments for a mechanical performing right with interest, and discovered that the gramophone industry did not intend to use the right to claim revenue. According to Wood and Shields, the industry's envoys, record companies wanted to protect the purchasers of their recordings from claims for payment for exercising the author's performing right.

In their view, a mechanical performing right neutralised the author's performing right, preventing copyright owners from demanding that record companies pay performance fees for each record produced. Moore reported to the Government that he saw at once that the gramophone companies' proposal would be rejected. He suggested to Woods and Shield that they forget about a mechanical performing right, and instead let him ask the Union for "a provision that every record should carry the right of public performance without fee."

Woods and Shields readily agreed. In the end, Moore does not seem to have made his request. The "British delegation" asked Rome Conference delegates to consider an unqualified mechanical performing right, but no proposals benefitting the gramophone industry met with favour at the Conference. Even so, a careful observer might have detected a disturbance in the orderly process stage-managed by Italy, the host, and France, the champion of authors' rights.

Subterranean rumblings were shaking the seemingly secure foundations on which the Union built the edifice of authors' rights. Before the delegates left Rome, the rumblings, thanks mainly to the efforts of Moore and Raymond, resulted in a minor earthquake. In succeeding years the meaning of the tumult became clearer. The proponents of authors' rights were forced to abandon forever the conceit that authors' rights could be advanced without reciprocal gains for industries.

Qualification of the broadcasting right

The earthquake involved the assertion of broadcaster prerogative. It resulted, without doubt, from the energy and determination of the antipodean delegates. Moore and Raymond were not shy about identifying their leading roles in securing the restriction sought by broadcasters. Their two Conference reports asserted that they were principally responsible for persuading delegates to eventually agree to the principle of jurisdictional limitation to the new broadcasting right.

The General Report of the Conference concurred, admitting that the second paragraph of Article 11 *bis* (which recognised the author's right to control the broadcasting of works) resulted from the efforts of the antipodean nations to bring the author's exclusive right "under public control". As Moore pointed out in his

make a recording) included a public performance right.

parliamentary report, the:

Article as it now stands in the Convention is now described in the Rapport Général as a compromise between two opposing tendencies, with which the Rapport particularly associates the French and the Australian and New Zealand delegations respectively – the one for assimilating completely the right of broadcasting to the other exclusive rights of the author; the other for bringing the right under public control in view of the social and cultural interests involved.

Raymond, a senior government lawyer, born and educated in country Victoria, said in his report that the President referred to Australia and New Zealand in the General Report as “the chief advocates of certain views.”¹³ Raymond also noted that the “entry of the Union by Canada, Australia, and New Zealand introduced an entirely new element – an element putting forward views considered as little short of revolutionary by some older members of the Union.”

The successful advocacy by Australia and New Zealand of a position considered hostile to the ideals of the Berne Union demonstrated the impossibility of absolute commitment to the ideology of authors’ rights. No industry, in the common law countries at least, would countenance the concentration, in the hands of authors, of unlimited powers to restrict and tax industry’s use of copyright material. Antipodean intervention raised a new possibility previously not much on the mind of Union delegates.

Perhaps, some delegates began to see, qualification of authors’ rights represented a public gain. Previously, Union ideologues, if they thought about the question at all, would have assumed that the interests of the public and authors were synonymous. How could intelligent people not recognise that limitless privileges granted to the creative interest would not bring their nation the reciprocal benefit of eternal civilisation?

The new entrants to the Union thought differently. Both Moore and Raymond, coming from countries in the midst of bruising conflicts over APRA’s claims and methods,¹⁴ distinguished the public interest from the author’s interest, and claimed public benefit as the principal motivation for their efforts in Rome. According to Raymond, the Union should try to, “reconcile the just claims of the owners of copyright with the public interest”. He proudly stated that, “the interests of the public – that great body of purchasers and consumers of copyright wares – were vigorously voiced by the Dominions for the first time in the history of the International Copyright Conferences.”

What is particularly interesting about the reports of Moore and Raymond is

13 *Report on the International Copyright Conference Rome 1928.*

14 As its name suggested, APRA also operated in New Zealand.

that both imply a criticism of the Berne Union made more openly in later years by others – that its elaborations in favour of authors were intellectually sterile if they did not recognise the needs of industries, and, most importantly, the public. Both boldly put forward their countries as embodiments of a newer, more vital spirit lacking in the European nations. Australia and New Zealand, they implied, were not hidebound by prejudice.

Describing the necessity for restriction on the author's absolute control of broadcasts of works, Moore said that in Australia and New Zealand, "the operation of the performing right was evidently felt as a grievance in a marked degree ... the condition of new countries gave the matter a greater importance there as more deeply affecting their social life and therefore their culture and development."¹⁵ Raymond was more direct.

He declared that "a remote country such as New Zealand must, if it is to keep its place in the march of civilisation, be vigilant in keeping, so far as it can, the great discoveries of the radiophonic field free from domination by commercial and financial combines and associations." Australia and New Zealand, "representing the public interests" were "unfettered by the overemphasized traditional respect for copyright-holders' rights, and unhampered by capitalistic interests, so powerful in the counsels of the Old World countries."

Raymond, more squarely than Moore, characterised the author as the greatest threat to the constructive growth of radio broadcasting in Australia and New Zealand. The two countries were, he said, "combating a world-wide association, having great capital revenues, and they succeeded by asserting the principle of home rule in radiophone control, and thus stemmed the tide of copyright uniformity." Moore made clear, however, that he acted on clear instructions from his Government. "It was plain," he wrote in his report, "that the Convention itself could not meet the varying conditions of different countries; all that was possible was to endeavour to secure for each country the power to regulate its own conditions; and my instructions were on these lines."

Position of Latham

A year before the Conference, Latham received a 28 page report from G S Brown, the Registrar of Copyrights on "Proposals to be Submitted to the Rome Conference". In it, Brown, a partisan for authors' rights who strongly supported APRA in its licensing campaigns, denounced the pretensions, as he saw them, of the record manufacturers and broadcasters. "In no case," he said, "should there be any admission of the prescriptive rights of broadcasting companies to copyright

15 He added the comment that, "It was interesting to note that the countries nearest to these in feeling on the subject were countries such as Denmark and Norway, where rural interests predominate."

property.”

The Attorney, however, made up his mind in favour of the broadcasters. Having, as senior counsel, assisted a music publisher to enforce its performing right against a radio station, it is not likely that he did so out of preference. Latham, despite his reputation for union-bashing, favoured no-one. He grew up in a strict Methodist household and later became a strict rationalist. In political life he maintained an attitude of cold disinterestedness. Like all Australian politicians, he understood the benefits that wireless offered to a remote and sparsely habited continent. He would not permit foreigners to create a future which might allow APRA, if it chose, to bring broadcasters to their knees.

Australia’s radio industry, diverse, fractious and vociferous, like that of the United States, resented curtailment and demanded commercial freedom. Broadcasters insisted that the copyright legislation, which they thought facilitated predatory commercial conduct, must be altered. In most countries of the Union, including Britain, State control of radio services through a national broadcaster produced an atmosphere of polite conformity that encouraged policymakers to view the activities of collecting societies like APRA with a friendliness not shared by their Australian counterparts.

Latham, though frequently exasperated by the naïve importunities of APRA’s opponents – including requests for Australia to withdraw from the Berne Convention or abolish the performing right – looked coldly on APRA’s conduct. His support for Moore’s activism testified to his attitude.

The argument with France

Moore and Raymond, together with the delegates of Canada and Norway, partially supported by the British delegation, worked hard to secure agreement to their qualification to proposed Article 11 *bis*. They wielded a single weapon. The requirement for unanimous agreement to any alteration to the Convention meant that they could, by casting negative votes, defeat the proposal to grant the author control of broadcasting of works. The real possibility that they might do so, unless the other nations agreed to their proposals, now opened the eyes of the other Conference delegates. Awakened to the necessity for compromise, these delegates began to take the antipodeans seriously.

The older members of the Union were astonished to find themselves in a tussle over the proposed Article 11 *bis* and even more amazed that two neophytes – Australia had been a member of the Union for one month – could assert their position in the teeth of opposition from the traditionalists led by France. For the delegates of the two countries, the task was fraught with effort and tension. As Moore said, the proposals to reserve to national legislatures the “power to reconcile the exercise of the author’s rights with the public interest” started “innumerable” consultations and debates and led to proliferating drafts of proposed

revisions.

The “Latin countries”, according to Moore, argued that any reservation of the broadcasting right was unnecessary. They claimed that the Convention dealt with private rights and did not restrict public powers to control abuses. Those in favour of the reservation – Australia, New Zealand, Canada, Britain and Norway – would not back down. Moore knew that broadcasters in Australia refused to accept accommodation and rejected the assurances of France and others. They sent a plain message: the Convention must explicitly qualify Article 11 *bis*.

The civil law countries insisted on their position. A sinister precedent disturbed them. They remembered how in 1908 delegates gave way to the phonographic industry, and the soothing words of the Anglo Saxons – only to find that the licence helped the gramophone industry to grow rich while availing authors nothing. Remembering how much they regretted the compulsory licence, most delegates fell in behind the French, unwilling to accept any limitation on the author’s right to control broadcasts.

Moore and Raymond did not give up. The argument over the restriction they proposed eventually came down to how a restriction to the broadcasting right might operate in practice. Australia and New Zealand insisted that legislatures should have the power to limit rights in the “public interest” (*l’interêt public*) but France would not accept a qualifying phrase that, if admitted, might be used to justify harm to the author’s interest. The French delegation instead proposed the term “public order” (*l’ordre public*), or more accurately, perhaps, “public administration”, which Moore and his colleague rejected as too narrow.

Resolution

Delegates now considered a new proposal that linked a right to limit authors’ rights to public interest considerations. The French agreed to the addition to Article 17 – which dealt with the power of governments to control the distribution of copyright works or products – of a clause permitting legislatures to authorise the restriction of rights by “such measures as might be considered justified by public requirements”. Frustratingly, the compromise failed. The Drafting Committee would not accept the proposal. Delegates hoping for agreement on the broadcasting right grew desperate as the Conference neared its end.

Moore and Raymond stayed steadfast in their refusal to agree to Article 11 *bis* unless it contained a qualifying paragraph that would allow their governments to introduce legislative controls. “Finally,” said Moore, “as the proceedings drew to a close, any hope of modifying Article 11 in the direction proposed by Australia and New Zealand had to be abandoned.” Failure of the antipodean amendment meant failure of the broadcasting article as whole, and the Italian delegation made a final attempt at compromise. To general relief, Moore and Raymond accepted their draft amendment.

The paragraph agreed Article 11 *bis* (2) stated:

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Neither Moore nor Raymond viewed the final draft of Article 11 *bis* with much enthusiasm. Moore said it was “in a form we could accept”. In his report, Raymond declared that, “[t]his article your delegate considers satisfactory.” Nonetheless, the two men could feel satisfied. They carried out their instructions and achieved their object.

They also staved off a rumoured attempt to overturn the qualification in Article 13 that allowed legislatures to impose reservations and conditions on the author’s control of mechanical reproduction of works and the public performance of such reproductions. Removal of the reservation would mean that the compulsory licensing of sound recordings would be inconsistent with the Convention and the pair circulated a memorandum stating they would not consent to any proposal suggesting revision. No proposal came, and, having made the names of their countries unforgettable to their fellow delegates, Moore and Raymond packed their bags and left Rome.

Moore and Raymond

The results of the work of Moore and Raymond should not be underestimated. Without the intervention of Australia and New Zealand, assisted, according to Moore, by “other British delegations” and “some of the Continental countries”,¹⁶ it is likely that Article 11 *bis* would have extended to the author unrestricted control over the broadcasting of works, and unleashed, at least in the Australian radio industry, an angry spirit of confrontation.

Moore put the point soberly in his report. “It seemed to me,” he wrote, “particularly at this early stage in the development of broadcasting, when its possibilities were comparatively unknown, that it would be unwise to recognize rights in so absolute a manner as to embarrass their regulation and control in the public interest.” Aged in their 60s, Moore and Raymond were determined men at the end of distinguished legal careers, one a university professor, the other a Crown prosecutor. Their maturity and calm resolution allowed them to resist and

16 Norway and probably Denmark.

defuse the sometimes hostile entreaties of other delegates.

Without the active lobbying of Moore and Raymond, Britain would probably not have agreed to introduce the proposal to introduce a qualifying paragraph to Article 11 *bis*. Negotiating on behalf of the BBC, British government officials felt they could comfortably moderate the demands of the Performing Right Society, and consequently the British Government felt no discomfort in the idea of the author's absolute right to control radio broadcasts of works.

Particular credit perhaps also belonged to Moore. Sir William Harrison Moore, an Englishman, won the Chair of Law at Melbourne University in 1892 at the age of 25. A dainty, fastidious man, he specialised in constitutional law and greatly increased the prestige of the University's law faculty. He taught constitutional and international law to the future consecutive Chief Justices, Latham and Sir Owen Dixon, and inspired them to take a broad intellectual view of the law's possibilities. In 1927, Latham, a friend, secured his appointment as Australia's delegate to the League of Nations, and in the following year, Moore participated in the Rome Conference.

Punctilious, hard working, and not afraid of controversy, he proved the ideal person to carry out difficult instructions "to secure for each country the power to regulate its own conditions". With courtesy and tact, no doubt, but also with unshakeable determination, he and Raymond engaged persistently with their dissenting colleagues. The pair walked into the whirlwind of reproach and emerged successful revolutionaries.

Key role of Australia and New Zealand

Australia and New Zealand, responding to the unique circumstances of their radio industries, were the agents of change and limitation at the Rome Conference. Much followed from the acceptance of revised Article 11 *bis*. It confirmed the realisation of observers in 1908 that the proponents of authors' rights could not hope to continue their aggrandising activities without accommodating the interests of industries. It also introduced into the discourse of international copyright law the concept of the public interest. Finally, it suggested to the industries the possibility of organising themselves to secure rights analogous to those of copyright, the neighbouring rights. Their subsequent efforts resulted in the Rome Convention of 1961.¹⁷

17 The Berne Union would not accept inclusion of related or neighbouring rights, i.e., exclusive reproductive and distributive rights granted to record companies, broadcasters and performers, but the 1948 Brussels Revision Conference proposed that members study how to protect sound recordings. The result was the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations established in 1961 – the Rome Convention.

In Australia, government could now act on the basis of a principle previously considered doubtful but now certain – that international copyright law permitted it to introduce legislative restrictions to curb oppressive use of the performing right against radio broadcasters. The permission in Article 11 *bis* (2) allowed governments to become more assertive in regulating the performing right. The national legislature could now regulate the author’s exclusive right to authorise broadcasts, provided it did not prejudice the author’s right to obtain *equitable remuneration*.

The new formula, however, threw up new difficulties. The difficulties encountered in reaching agreement on performing right fees led the Government, in 1932, to establish the Royal Commission on Performing Rights. They also foreshadowed future difficulties in determining the meaning of the phrase “equitable remuneration”.

As instructed, Raymond supplied in his report to the New Zealand Parliament suggestions for legislation to regulate the exercise of the performing right.¹⁸ It is not clear to what extent Raymond’s recommendations encouraged the Australian Government in establishing the Royal Commission on Performing Rights. The Commission itself, however, paid close attention to his proposals, citing them in full in its Report.

In the relevant part, Raymond argued that copyright legislation should be amended to resolve difficulties created by the performance right (the law, he said, “needs alteration to meet present-day conditions”), a system of compulsory licensing for broadcasting should be introduced (“to afford protection against overcharge and other abuses”), a “competent authority to deal with compensation in default of agreement” should be appointed, and allowance should be made for the requirements of educational broadcasting.

The Royal Commission evidently agreed with at least one proposal, and recommended that the Government establish a tribunal to determine disputes relating to the public performance of musical works by broadcasting. The references in the Commission’s report to Raymond’s report, and Moore’s, were

18 In 1926, APRA claimed 10 per cent of the revenue of the Radio Broadcasting Company of New Zealand, which controlled the principal radio stations in the country. After the Government threatened legislative action to cap claims, APRA reduced its demand to 6 per cent. In 1927, further difficulties arose and RBC asked the Government to legislate. After receiving Raymond’s report, the Government passed an Act in 1928 that provided that between (the retrospective date) October 1927 and August 1929, unlicensed broadcasting of music did not infringe copyright. Under the Act, the Government deducted 7.5 per cent of revenue received from listeners’ licence fees during the period, and held the amount in trust for payment to validly claiming copyright owners. The legislation lapsed in 1929. The Government awarded the whole of the money to APRA, the sole claimant.

fitting. Without their work at the Rome Conference, it is possible that the Royal Commission would not have recommended the creation of a tribunal – a measure bitterly opposed by the suppliers of commercial music, and welcomed by users.

Chapter 6 – The radio war and a new performing right

TWO PERFORMING RIGHTS

A fresh start

In December 1931, in the midst of the Great Depression, the new United Australia Party, combining the Nationalist Party and Labor Party defectors, swept the Labor Government from office. Under Joe Lyons, the UAP attacked multiplying economic problems with the energy and will long sapped from its demoralised predecessor. John Latham, now also Deputy Prime Minister, returned to his old office of Attorney General in January 1932,¹ and he reviewed afresh the old question of the performing right. He also began consulting with his colleague James Fenton, the Postmaster General, who was responsible for broadcasting policy. The two men soon discovered that they faced a host of difficulties, none of which their predecessors seemed in any way to have solved.

Elected just before the Wall Street crash in 1929, the Labor Government battled unavailingly with the problems of deflation, unemployment and economic misery for over two years. In that time, the question of the performing right shrank in importance. Against the sepia and grey background of national life, the ardour for fighting over public performance fees cooled. With the start of UAP rule in 1932, the picture changed and the copyright scene again throbbed with energy. The Depression was far from over but the defeat of the Labor Government, irreversibly tainted by incumbency in a time of disaster, offered new prospects for business interests clamouring for any sign of hope.

For those involved in copyright policy, the new mood promised a deliverance of sorts, enabling the Government and various interests groups to make a fresh assessment of long-standing problems. William Harrison Moore's success in persuading the Berne Union to qualify Article 11 *bis* at the Rome Conference

1 He was also Minister for External Affairs and Minister for Industry.

pointed to the Government's main preoccupation. For Latham and Fenton, broadcasting regulation mattered far more than complaints about licensing fees from local councils, cinema owners and the proprietors of entertainment venues. Both were determined to institute some sort of machinery to prevent APRA from wrecking the fragile economies of radio businesses still unable to turn profits. Both were also determined that APRA would not grab an undue portion of the listeners' fees that subsidised the ABC.

The radio ban

At the same time, they were embroiled in debate over a matter unconnected with APRA, the so-called "radio ban", the boycott against radio stations begun by record manufacturers in late 1931. The radio ban, instituted because record companies viewed radio as a commercial succubus, draining from listeners the vital desire to purchase records, created a new, unforeseen problem. It threatened to permanently cut the supply of new records to broadcasters and destroy the industry more swiftly and thoroughly than any action APRA was likely to take. In the end, it slowly petered out, its legitimacy questioned by 1933 report of the Royal Commission on Performing Rights. But it created a lasting memento – the mechanical performing right, which the record companies first insisted on to justify the ban, and then continued to assert long after the ban ended.

The radio ban, and the problem of thorny relations between one industry regulated by Latham's department (gramophone) and another by Fenton's department (broadcasting) were festering sores that Latham never fully salved. The record companies' intransigence did not diminish during his term of office but the Attorney wasted not a second on the opinions of company executives. Considering himself, possibly correctly, the intellectual superior of everyone he met, he did not look for crumbs of mental comfort.

Instead, he plunged boldly and assertively into the question of APRA's relations with music users. If he regarded the claims of the recording industry with indifference, he approached the APRA question with obvious confidence. He knew the history of APRA's conflicts and already had definite views about the appropriate policy for resolving disputes over the performing right.

Groping towards a solution

In the early 1930s, APRA could look back on five years of success collecting performance fees. Revenues, derived mainly from payments received from the A Class radio stations, swelled its coffers. Though resenting its methods, few of its opponents denied the right of authors to receive payment for the public performance of music. Critics pointed out that APRA behaved like the monopolist it was, forcing the commercial users of music to pay exorbitant licence fees for

playing music in public. APRA replied that, as a non-profit association acting for a large and diverse population of authors and publishers, its motives were not mercenary.

To the new Government, APRA sometimes seemed like a troublesome predator, but one that not could be culled. Something, however, had to be done. In a half decade, APRA's energy and combativeness stirred the anger of public organisations and buoyant new industries across Australia. For five years, they vented their displeasure on government officials. Politicians were perplexed, though by the time he first left office in 1929, Latham had formed a reasonably clear view of how to tackle the APRA question.

The Government never doubted that the law permitted APRA to collect public performance fees. It evinced no interest in examining the merits of the performing right, or whether it properly extended to music broadcasts or music played in movies – questions asked by various of APRA's opponents. On the other hand, Latham and his colleagues sympathised with commercial users who faced an unwelcome choice: pay whatever fees APRA demanded or stop playing music.

Little by little, the politicians and bureaucrats groped their way to a solution. They started from the premise that public performances of music must be authorised and paid for. They also saw clearly that terms of licensing could not be left to the parties to determine. APRA, a virtual monopolist backed by the law, had too much negotiating power. Thus the problem they tried to solve was how to ameliorate the bargaining position of the commercial users of music.

The Government's hands were tied. Legislation and common law confirmed the right of copyright owners to demand fees for the public performance of music. Unless the Government attacked APRA on the grounds that authors must negotiate performance fees individually, not collectively through an agent like APRA, it could not force an end to the APRA wars. Only by oblique means – Latham favoured compulsory arbitration – could it persuade the various parties to direct the energies wasted on conflict into constructive channels of negotiation.

In 1932, developments in other common law countries were suggesting ways to resolve performing right disputes and policymakers now looked overseas for solutions. In 1928, Samuel Raymond, New Zealand's delegate to the Rome Conference, proposed, in his report to the New Zealand Parliament, regulation through compulsory licensing and determination of royalties by a "competent authority". In 1929, a Select Committee of the House of Commons, reviewing the *Musical Copyright Bill*, proposed that the Government legislate to provide for compulsory arbitration of licensing disputes. Then in 1931, Canada legislated to allow the Government to prescribe licence fees.

Aware of overseas development and the complexities involved in achieving harmony in commercial relations between the suppliers and users of commercial music, the Government naturally trod carefully. It pragmatically decided to let an

independent inquiry look thoroughly into all the issues and make recommendations for legislative reform.

The Royal Commission on Performing Rights began hearings in 1932 and the Royal Commissioner, Justice Owen, presented his findings in 1933. He described the unregulated battleground of the performing rights, the cold resolution of the suppliers of commercial music, and the fear and disarray of commercial users. Marshalling their forces under the banners of the musical and mechanical performing rights, APRA and the gramophone companies intended to flatten their opponents if needs be.

Owen contemplated with horror the prospect of a commercial scene littered with the corpses of their victims. He pinned his hopes on what he called the “sweet reasonableness” of the warring parties and proposed compulsory arbitration as a device to create peace between them.

INTERNATIONAL DEVELOPMENTS – BRITAIN AND CANADA

Britain

The unhappiness of music users at the activities of the Performing Right Society in Britain caused the British Government in 1929 to introduce the *Musical Copyright Bill*, which introduced compulsory licensing of performing rights, and established a fixed maximum fee payable to the copyright owner. It also required the owner to print, on every copy of a work, a reservation of the performing right.

The House of Commons referred the bill to a select committee which heard evidence from the Board of Trade, the Performing Right Society (England) and associations of music users. The committee’s Special Report summarised the complaints of music users. They said that the PRS did not publish lists of works it claimed to control, with the result that the user could not ascertain whether or not items of licensed music fell within the PRS’s claimed repertoire. Additionally, the society made arbitrary increases in licence fees and users had no means of protecting themselves against further increases or of ensuring any reasonable stability in charges.

The special report noted that compulsory notice of reservation would be likely to conflict with Britain’s obligations under the Berne Convention and that the PRS had offered to circulate to licensees a complete list of all its publisher members. In the committee’s view, this offer “goes a considerable way to meet the complaints made.” The committee described the PRS as a “super-monopoly” controlling 90 per cent or more of the performing rights in copyright music. Entertainment providers were “compelled” to pay the charges made by the Society. Music users were justified in their fear that the PRS would continue to demand

higher and higher fees.

For this reason, the report found, the Government should legislate to provide that if the society refused to grant licences on reasonable terms, music users were entitled to appeal “to arbitration or to some other tribunal” for relief. The select committee then reported the bill without amendment. The Government, however, chose not to proceed with the bill. It no doubt came under great pressure from the PRS, by then an extremely powerful force in British economic life, but the equivocations of bureaucrats proved the decisive factor.

During the hearings, the PRS, the Board of Trade and the Foreign Office claimed that legislation restricting the performing rights of copyright owners could conflict with Britain’s treaty obligations under the Berne Convention. At the very least, said some witnesses, Britain might have to make a reservation or declaration in order to ratify the amending Rome Copyright Convention of 1928.

Placing weight on the evidence of government officials, the select committee recommended that the Board of Trade should frame a policy for adoption at the Brussels amending Conference scheduled for 1935. That policy would allow Britain unequivocally to “deal with any abuse of monopoly rights such as that to which reference has been made”. Rather than proceed with a controversial measure, the Government decided to defer further legislative action until the next meeting of the Berne Union.

Canada

In Canada, the Government acted more boldly. The Canadian *Copyright Amendment Act*, assented to on 11 June 1931, required musical performing right societies to file with the Copyright Office lists of all works to which a society claimed title and a statement of all licence fees imposed by the society from time to time. A society could not collect licence fees or charges for any work that was not included in the list filed with the Copyright Office.

The legislation provided that the Minister, after investigation and report by a Commissioner, could revise or otherwise prescribe licence fees, if satisfied that the society unduly withheld the grant of licences, collected excessive fees or otherwise acted in a manner detrimental to the public interest. Within months of the Act’s commencement, some Canadian broadcasting stations complained to the Minister about charges levied by the Canadian Performing Right Society. In 1932, he referred the complaint to a Commissioner, Mr Justice Ewing, for investigation and report.

RECORD MANUFACTURERS AND THE MECHANICAL PERFORMING RIGHT

The radio ban

In the 1920s, the broadcasting industry stood out like a giant among the entities fighting APRA. In the 1930s, another colossus joined the battlefield of performing rights though not in opposition to APRA. This was the Australian record manufacturing industry, which in 1931 declared commercial war on radio stations, banning them from purchasing and playing popular recordings.

The record manufacturers – the gramophone companies – attacked the radio stations because, they said, continuous broadcasting catastrophically undermined record sales. Asked by what right they could ban record sales, they made a radical claim much discussed during the proceedings of the Royal Commission on Performing Rights. They asserted that patent and copyright law conferred on them a performing right in records and insisted that broadcasters were liable to pay them public performance fees in addition to those paid to APRA.

The Royal Commissioner declared that he was “by no means satisfied” that a performing right in records could be inferred from either patents or copyright law. His report expressed strong scepticism about the validity of the record companies’ claim and the merits of arguments advanced in support of the claim. The report alluded to the fact that Britain’s High Court was shortly to determine a claim for the mechanical performing right,² but it noted that a common law ruling could not be considered definitive. Only Parliament, by legislation, could call into existence the claimed right.

Legislation did come, in Britain in 1956 and Australia in 1968. The common law presaged, or perhaps determined, the statutory law. In 1934, the British High Court found that the copyright in a record included a right to control the public performance of the record. In the early 1930s, however, few would have predicted this result. When Latham again took the reins of copyright policy in 1932, the claim for a mechanical performing right seemed nothing more than a bold gambit to bolster a destructive stratagem.

For unquestionably, as became plain during the Royal Commission hearings, the gramophone companies were bent on using every resource to crush radio broadcasting. As dramatic and futile as such a scheme might seem to the modern eye, the gramophone industry, obsessively preoccupied with the diminution of record sales, saw only logic in its plan of annihilation.

2 *Gramophone Co Ltd v Cawardine & Co* [1934] 1 Ch 451.

The decline in record sales

The gramophone companies felt animus towards the radio stations from the early days of broadcasting. The three principal manufacturers, the Gramophone Company Limited, the Parlophone Company Limited and Columbia Gramophone Company (Australia) Limited sustained heavy losses from 1926 until the opening the Royal Commission in 1932. In 1931, the Gramophone Company and Columbia Gramophone Company (including its subsidiary the Parlophone Company) merged in the United Kingdom to form Electric and Musical Industries Limited (EMI), creating an instant profit powerhouse. But consolidation did not help EMI's Australian offshoots, the "associated record manufacturers". Their managers continued to complain of revenue lost to broadcasting.

According to the associated manufacturers, disastrous profit results in Australia could be attributed to one cause: broadcasters. Radio stations playing hit records morning and night were discouraging listeners from buying gramophones and gramophone records. The gramophone industry felt the problem of lost sales most acutely in Australia, said the manufacturers, because of mixed broadcasting. The new commercial broadcasters, playing the latest tunes to attract market share, drew an ever-growing audience of listeners who now declined to buy the latest records.

Commercial failure in Australia galled EMI and its subsidiaries. Between 1911 and 1927, the profits of the Gramophone Company in Britain rose nearly fivefold and in the 1920s dividend returns increased fourfold to the amazing figure of 60 per cent.³ The Columbia Gramophone Company regularly declared exceptional annual profit increases⁴ and paid dividends of 45 per cent in 1929.⁵

In 1932, EMI declared issued capital of £6,265,749 but it could take no pleasure in the financial performance of its Australian offshoots. Capital and labour costs alone were cause for concern. In 1925, the Gramophone Company opened a factory in Erskineville in Sydney, and in 1926 the Columbia Gramophone Company one in Homebush, and in the years before the Royal Commission, the associated manufacturers employed over 500 people.⁶

The associated manufacturers could validly argue that competition did not explain declining sales. In 1932, the only local record companies competing to

3 Profits rose to the majestic figure of £760,000. Dividends in 1923 offered a 15 per cent return. In 1929, the return rose to 60 per cent.

4 For example, in 1923–1926, profits increased from £56,000 to £150,000.

5 The beginning of the Great Depression did not interrupt the march of profits. Dividends in 1930 were 40 per cent.

6 The factories were built at a combined cost of £300,000. In the period 1925 and 1931, the associated manufacturers employed up to 550 people and paid about £500,000 in wages and salaries.

sell records in the Australian market were Moulded Products Limited of Melbourne (a subsidiary of Decca Records), the Klippel Company of Sydney and the Brunswick Company. The first manufactured records as a secondary part of its business and in 1933 lost its factory to fire, the second went into liquidation and the third ceased production.

The complaint against broadcasters seemed persuasive. Not only did the radio stations seem to satisfy popular demand for music, they also broadcast so often that listeners, so the record companies said, grew sick of hearing the same song and would not purchase records. Although the associated manufacturers ruled the field, they could point, as proof of their argument, to an 80 per cent fall in sales between 1927 and 1931.

EMI and the war against radio

EMI would not countenance such a decline in sales. Something had to be done, even allowing for the inevitably negative effect of the economic depression on record purchases. The merger of the Gramophone Company and Columbia Gramophone took place in March 1931, and, over the next few months, senior management worked out a course of action for the associated manufacturers in Australia. On 17 November 1931, the record companies issued to all broadcasting stations in Australia and New Zealand a written notice forbidding the use of their records for broadcasting.

The ban came as a surprise, causing the radio stations immediate difficulty. They depended on supplies of records from the record companies and now found themselves deprived of the latest record releases, the lifeblood of much popular broadcasting by the commercial stations. The record companies manufactured under letters patent held by Columbia Gramophone (Australia) Limited granted and relied on a provision in the *Patents Act 1903* that allowed them to impose conditions on the use of products manufactured under patent.

When the radio ban came into effect in November 1931, the broadcasters immediately entered into negotiations. The B Class commercial stations, the majority of which operated on restricted budgets and could not hope to attract large audiences, and therefore advertisers, without access to new music releases, were especially alarmed. They were now forced to play music from their back-catalogues and to rely on importing records from the United States and Britain to obtain access to the latest releases. Importing music, however, did not solve their difficulties, since duties made imports prohibitively expensive, and the manufacturers used the import provisions of the Copyright Act to prevent radio stations from importing records manufactured by EMI in Britain.

In September 1932, the manufacturers reached an agreement with the Australian Broadcasting Commission that permitted the ABC to broadcast records for six months,⁷ subject to requirements about playtime frequency and the announc-

ing of record titles and other details. Negotiations with the commercial stations, represented by the Australian Federation of Broadcasting Stations, were much more difficult, and conducted, as the Royal Commission reported, “in a far from friendly spirit”.⁸

The record companies blamed the B Class stations for their predicament, and though both parties accepted a draft agreement in August 1932, in October, the associated manufacturers withdrew from negotiations. They declared themselves willing to enter into agreements with certain country stations but refused to reach any settlement with the metropolitan broadcasters.

The record companies’ demands were onerous. They required the B Class stations to discontinue request items, announce the maker of the record and full particulars of the record, state that copyright was reserved, broadcast only records of the associated manufacturers, limit the number of times a record was broadcast, limit broadcasts of records issued prior to the ban to once a week, and pay a broadcast fee.

Detailed announcements about the provenance and legal status of records could be expected to annoy most music listeners, and whether the details would encourage those listeners to purchase records was doubtful. However, the commercial stations were desperate for new music, and as the Royal Commission reported, the Federation of Broadcasting Stations, “showed a willingness to cooperate as far as possible with the Manufacturers in maintaining the success of the latter’s trade.” They were willing to accept most of the terms laid down by record companies. But they could not accept the broadcast fee, or, more specifically, the performing right fee.

The claim for mechanical performing right

The record companies had two motives for asserting the mechanical performing right. First, they needed to establish a legal basis for imposing the broadcasting ban. As legal justification, they claimed a right under the patents legislation to impose any condition on the use of their records. This right, they said, allowed them to ban broadcasters from using their records and could encompass a performing right. More specifically, they argued, section 19 of the British Copyright

7 The parties continued to observe the terms of the agreement, even after it formally lapsed.

8 The Royal Commission Report noted, mysteriously, that after a “representative of the Manufacturers left Australia,” relations between the parties “became more cordial”. Transcripts of Commission proceedings disclose the identity of the offending person – John Ritchie, General Manager of the Gramophone Company in Australia. EMI may have instructed him to implement the radio ban aggressively and recalled him when his presence became counterproductive.

Act (incorporated in the Australian legislation), supplied two performing rights, one in the author or composer or their assignee, and one in the record manufacturer. The manufacturer's copyright in a record included the performing right in the record.

The associated manufacturers also claimed the performing right for pecuniary reasons. They saw the great revenues collected by the Performing Right Society in the United Kingdom, and APRA in Australia and New Zealand, and realised that fees levied on performances of a recording could possibly deliver similar returns. Thus a mercenary motivation soon reinforced the primary reason for the radio ban. The gramophone companies knew that the imposition of a performance fee would not help them to solve the problem of declining record sales. But the idea of reversing revenue deficits by taxing broadcasters perhaps seemed irresistible.

The claim for performance fees relied on assumptions radically different from those previously espoused by the recording industry. When William Harrison Moore met representatives of British gramophone companies prior to the Rome Conference, they agreed with him that the existence of a mechanical performing right could not be adduced from the language of section 19. They were mainly interested in claiming the right, they admitted, to ensure that the owner of musical copyright could not levy a performance fee on the individual purchaser of a record.

In 1928, the recording industry seemed far from definite about how it would enforce a performing right in records. By 1932, doubts had disappeared. The proposed right promised lucrative collections from broadcasters into the indefinite future, and, as the Royal Commission discovered, the associated record manufacturers were not going to lightly surrender the prospect of securing a legislative amendment that promised to deliver possibly vast secondary income.

The quest for legal recognition of a mechanical performing right, seemingly masterminded at EMI's headquarters in London, horrified commercial broadcasters. Their economic position remained parlous throughout the 1930s. Few could comfortably budget to pay performing right fees to both APRA and the associated manufacturers. None could feel confident that either APRA or the record companies would agree to discounts that took account of the straitened times. When the Royal Commission opened its investigation of the performing right in September 1932, the radio stations viewed the approaching proceedings with alarm.

APRA'S OFFER TO THE ABC

The Australian Broadcasting Commission took control of the National Broadcasting, or A Class, Stations on 1 July 1932. The object of the legislation establishing the ABC was to establish the conditions for national broadcasting for the pub-

lic benefit.⁹ From the start of its operations, the ABC relied, as APRA knew, on access to the Association's repertoire. In June 1932, APRA offered the national broadcaster a licence at rates much higher than those paid by the Australian Broadcasting Company, the previous controller of the A Class stations.¹⁰ The collecting society flatly refused the ABC's counteroffer of 5 per cent of annual revenue, and negotiations ground to a halt. The ABC could not afford to accept APRA's offer – if the APRA formula were applied, the ABC would be liable to pay public performance fees totalling about 13 per cent of annual revenue.

A comparison with the fees paid to the PRS by the BBC suggests that mutterings within the ABC of profiteering were justified. The BBC paid (on a basis of over 4.5 million licences) about £63,500 per annum for the whole repertoire of the Performing Right Society. If the BBC paid the rates proposed by APRA, it would remit an annual licence fee of £169,877. According to data collected by the Royal Commission on Performing Rights, APRA's proposed formula, applied in other countries, would have increased annual licence fees paid in Germany by over 250 per cent, in Austria by nearly 300 per cent, in Poland by about 250 per cent and in the United States by 400 per cent.¹¹

In support of its fees proposal, the ABC pointed out that no other country paid performance fees on a per item basis. It also objected that no other country had adopted a system of paying fees that increased as the number of listeners' licences increased. But APRA refused to budge and when the Royal Commission opened in September 1932, neither side seemed ready to consider compromise. Eventually, in 1934, they agreed a formula much closer to the ABC's proposal. APRA only changed its approach after the report of the Royal Commission on Performing Rights criticised it for greed.

APRA AND THE COMMERCIAL BROADCASTERS

In 1930, the B Class stations formed the Australian Federation of Broadcasting Stations to advocate public policy on their behalf and enable them to better deal

9 *The Australian Broadcasting Commission Act 1932.*

10 The Australian Broadcasting Company paid APRA fees calculated as a proportion of monies received for listeners' licences and equalling the equivalent of 2s per item of music performed up to 250,000 listeners' licences, 1s 6d on the next 50,000 and 1s per item on all listeners' licences over 300,000. APRA proposed to charge the new ABC 2s 4.5d per item per main station attracting up to 350,000 licensed listeners, and ¾d per item for each additional 10,000 listeners.

11 The Union Internationale de Radio Diffusion, Geneva, in the 1930s the leading authority on international broadcasting, supplied the data used by the Royal Commission to make these projections.

with the demands of APRA. At this stage, APRA had successfully sued one Victorian station for broadcasting copyright music without authorisation and obtained injunctions against stations in Adelaide and Sydney preventing broadcasts of music. It had commenced or threatened litigation against various other broadcasters.

Up to the end of 1930, the commercial broadcasters collectively paid APRA annual public performance licence fees totalling over £3000. At the beginning of 1931, the Association increased its charges to £8000 per annum, and then, after negotiations with AFBS failed, reduced the annual charge to £6642 (exactly double the amount previously paid by the stations). Stations were charged at rates varying from ½d to 3d per item of music played, depending on the station's audience size. APRA determined the total number of items played by reference to regular returns filed by the stations.

The position remained unchanged during the Royal Commission hearings, when B Class stations advised the Royal Commissioner they could not afford any increase to rates. In 1932, the most successful station earned a profit of £3229, while of the 30 stations, 16 incurred losses.¹² Radio broadcasting involved considerable continuing investment in new equipment (and substantial depreciation losses) and heavy expenses, including the non-recoverable cost of advertising. Radio advertising was yet to deliver the financial bonanza that accrued in later years and accordingly broadcasters struggled for survival.

APRA argued that profit and loss statements gave a misleading picture of the stations' financial strength. Newspapers held interests in four stations, music, radio and other business enterprises in another seven, religious bodies in five, and political or semi-political organisations in another three. If stations could not meet their financial obligations, APRA suggested, their owners could certainly afford to pay the public performance fees. The radio stations demurred. APRA, they said, dealt with them as independent enterprises, and was not entitled to rely on assumptions about their shareholders' finances when proposing fees.

Significantly, in negotiations, APRA accepted arguments it would not have countenanced in discussions with the ABC. The commercial stations adamantly refused to pay fees calculated as a percentage of revenue. They argued that advertising expenses cancelled out a large portion of advertising revenue and they could not possibly afford to pay an arbitrary sum drawn from gross revenue. Charges made on a per item basis were essential if they were to manage budgets to pay the performance fee.

APRA and the commercial broadcasters were willing in one respect to imitate the ABC payment model. The ABC paid fees to APRA out of public funds received from payments for listeners' licences. APRA and AFBS, unable to reach

12 Some of the profitable stations assisted the smaller stations to pay performance fees.

agreement on fees in 1932, presented the Royal Commission on Performing Rights with three proposals for resolving their impasse, each involving public subsidy.

The first was for the ABC to receive a larger allocation of fund from revenue received from listeners' licence fees. The ABC could then pay a higher rate to APRA, allowing the Association to accept a much lower rate from the commercial stations. The second required the Government to allocate a portion of listeners' fee revenue to the commercial stations to enable them to pay a higher rate to APRA. The third involved the Government advancing funds to the B Class stations to pay APRA charges, and the stations then adding the sum advanced to payments to government of each station's licence fees.

The Royal Commission and the Government rejected all three proposals out of hand.

CINEMA EXHIBITORS AND MUNICIPAL ASSOCIATIONS

Exhibitors

For APRA, the cinemas were a key licensing target. By the beginning of the 1930s, they supplied APRA with the second highest portion of its annual takings, although the amount they paid still amounted to less than half that paid by A Class radio stations.¹³ When Latham returned to the copyright scene, he found that internal division complicated the negotiation position of cinema owners. Many detested the strategy of their national association which, after accepting an unpopular licensing agreement in 1926, aroused members' fury by renewing the accord in 1928 on terms considered grossly unfair.

The new agreement renewed fee formulas that applied to the performance of orchestral music even though orchestras were disappearing from movie theatres.¹⁴ Additionally, cinema owners groaned under the burden meeting APRA's licensing requirements. By 1932, they were compelled to supply regular lists of music performed in the soundtracks of movies, with details of titles authors and composers.¹⁵ They also paid film distributors a fee for incorporating sound

13 In 1926, the Federated Picture Showmen's Association agreed fees payable to APRA for the performance of music at movies shows. The rates agreed were at once attacked. Many of the Association's members bitterly resented the terms of agreement and refused to be bound by it. The member associations of half the States of Australia supported them by criticising the national organisation for the agreement reached.

14 Made redundant by the advent of the "talkies" – films with soundtracks.

recordings in films, a quasi public performance levy invented by the distributors.

In 1932, distressed by the exactions of APRA and distributors, and burdensome reporting requirements, cinema exhibitors united in asking the Government for radical relief – abolition of the performing right, at least insofar as it applied to them. They asked for what the Government could not give but the Royal Commissioner sympathised with them over their “great” difficulties. He considered that the situation of cinema owners provided an unambiguous example of how the performing right could be exercised oppressively. Only an independent arbitral panel, empowered to determine rates could, he declared, fix the problems faced by exhibitors.¹⁶

Local government

By 1932, not all of APRA’s main licensing targets were paying public performance fees. Municipal associations, in particular, adopted tactics opposite to those embraced by the cinema exhibitors’ national association. They refused to reach accords with APRA because they would not accept that APRA could legitimately performing right fees. They questioned how a commercial right could apply to public, or non-profit, activities.

Thus, when Latham resumed his duties as Attorney General, he found that APRA’s longest running in-principle dispute – that with Australia’s local government organisations (and other owners of entertainment venues) – remained unresolved. The municipal associations, especially the Local Government Association of NSW, remained the most vociferous and outspoken of APRA’s opponents, a fly in the ointment in the 1930s.

For APRA, their intransigence proved not only annoying but economically vexatious. Although hall owners’ contributions to APRA’s coffers were dwarfed by those of the national radio stations and the cinema owners, APRA knew that if they could not be made to pay fees, the size of their contribution would greatly augment revenue.

Local government and the various hall owners proclaimed to Latham, and

15 Exhibitors did not know, until they received films for exhibition, what portions of music were incorporated in films and they encountered much difficulty in supplying the details required by APRA.

16 The Royal Commission report listed the problems of exhibitors: they found great difficulty in cataloguing items of music played in films, they had no readily available means of determining the copyright status of those items, and they could neither refuse to pay performance fees nor ascertain the criteria on which they were based. The solution, said the report, was a tribunal to determine licence fees and the terms of use. APRA should be compelled to file lists of charges which could be reviewed, when necessary, by the Minister.

then the Royal Commission, that the use of their halls encouraged the public consumption of gramophone records and sheet music. Very often, they did not charge for the use of, or access to, a hall. Non-commercial venues should pay no more than nominal fees. The hall owners fought determinedly. By 1933, only 20 municipal and shire halls throughout Australia were licensed by APRA to play music.

DECISION TO HOLD ROYAL COMMISSION

Political considerations

When John Latham resumed his duties as the nation's first law officer, he hoped to develop his interest in international relations. Minister also for External Affairs and Industry, his portfolio responsibilities were vast and at first he seemed likely to concentrate on questions of trade and international cooperation. In 1932, he helped to secure the agreement of Britain and Canada to the principle of imperial trade preference, and in the same year attended disarmament and reparations conferences in Switzerland. But despite his workload, and his wish to play the role of a statesman, he did not back away from the copyright question.

He could not afford to do so, for the arguments over public performance payments were hardly abated after 1925. After two years of severe economic depression, the disputing parties were grimly pessimistic. The national radio stations groaned under the burden of paying by far the highest performance fees, their commercial cousins insisted they could not afford any increase to rates, the local government associations refused to pay charges and the cinema owners claimed unfair treatment. Anger at new demands from APRA for fee increases began to harden into enmity.

Latham knew he needed to tread warily. APRA's position was, under the copyright legislation, legally unassailable. But the absence of any legal device for limiting the fees claimed by the Association could, he knew, be a source of public resentment against the Government. Battered by the times, the Australian public was in no mood to tolerate extravagant claims for licence fees that, if paid, might compromise the economic viability of some providers of public entertainment.

Radio listeners devoted to hearing broadcast music might not forgive Latham if he allowed APRA to insist on commercial settlements that drove some stations out of business, and interrupted the soothing rhythms of music on the airwaves. At the same time, Latham did not wish to offend APRA, or the powerful worldwide community of performing right societies. Fiercely asserting its rights, supported by an international network, and manifesting unnerving moral certitude, APRA marched confidently across the political landscape, a commercial behemoth not to be trifled with.

Its actions placed Latham in a difficult position. By far the greatest proportion of APRA's revenue came from payments from A Class radio stations and the collecting society had already signalled its intent to substantially increase the annual fee that the new government-owned ABC would be liable to pay – out of public funds – from July 1932. In the previous year, it doubled the charges payable by the commercial broadcasters, forcing smaller stations to call on larger ones for financial assistance to pay licence fees.

Latham needed to make peace between APRA and the broadcasters, and indeed APRA and any other group of commercial music users, as soon as possible. In 1929, emboldened by Harrison Moore's success at the Rome Conference in 1928, he seemed intent on putting forward legislation to introduce the compulsory arbitration of disputes over public performance licence fees. Then his party coalition lost office and legislative plans fell by the wayside.

Importance of broadcasters

In 1932, Latham had the benefit of reviewing alternative approaches to copyright reform. In the first half of 1932, he, the Postmaster General James Fenton, and their departmental officers considered options for reform. Developments in international copyright law supported an interventionist policy. The treaty amendments secured by Moore and Raymond at the Rome Conference protected the Government from the criticism that official inquiry into the performing right of itself invaded the broadcasting rights of copyright owners. The amended Berne Convention provided that copyright owners controlled the broadcasting of copyright works but the Convention also allowed for restriction of the right. It compelled governments to preserve the owner's moral rights and the right to equitable remuneration, but otherwise permitted them to legislate to qualify the exercise of the right – so far as it affected broadcasters.

For Latham and, in particular, Fenton, the healthy development of the radio industry, and therefore the needs of radio broadcasters, were paramount concerns. In considering the way forward, they thus paid close attention to any means that would allow APRA and its opponents to agree "equitable remuneration". At the same time, Latham hoped to broaden the scope of an inquiry into the performing right, as it affected broadcasters, to include inquiry into the grievances of all the commercial music users who continued to pepper him with their complaints. While Article 11 of the Berne Convention granted authors of musical works the right to authorise the public performance of their works, it did not specifically disallow governments from legislative – or other – intervention that affected the way in which owners determined performance fees.

As long ago as June 1927, Latham's parliamentary colleague Henry Gregory (who wrote also to the Prime Minister, Stanley Bruce) suggested to him a Royal Commission to investigate the twin questions of the performing right and claims

for licence fees by APRA. Then, early in 1932, G L Chilvers, the Secretary of the Australian Federation of Broadcasting Stations, sent letters to Canberra that again raised the question of a public inquiry. Chilvers' description of the collapse of licensing negotiations between APRA and the Federation reinforced Latham's long-held view that legislative action might be necessary to regulate APRA's activities.¹⁷

Anger in Parliament

Political reaction to the bill establishing the Australian Broadcasting Commission hastened Government action. Fenton introduced the bill in March, and to the Government's surprise, the legislation produced an outpouring of anger in Parliament against APRA. APRA, said MPs, was "perpetrating a big bluff on the public of Australia" and "robbing promoters of entertainments, owners of halls etc." The bill should be amended to "protect the general public from exploitation by ... commercial pirates".

When the ABC bill passed in May, Latham was in Geneva attending the League of Nations' disarmament conference. During his absence, a bipartisan deputation from both Houses asked Alexander McLachlan, the Acting Attorney General, to institute a public inquiry into the performing right, particularly payments made by broadcasters to APRA. In June, on McLachlan's recommendation, the Government promised to hold an inquiry. On his return to Canberra, Latham immediately set his department to work on the terms of reference. On 31 August 1932, he rose in the House of Representatives to announce the Royal Commission into Performing Rights. The Commissioner was to report on the operation of the performing right, rates and conditions of payment of performing right fees and methods of collecting.¹⁸

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- 17 In comments made during the hearings of the Royal Commission on Performing Rights, the Royal Commissioner, Justice Owen, said that Chilvers' letters played a significant role in persuading Latham to seek the appointment of the Royal Commission. In correspondence to the Secretary of the Commission in November 1932, Chilvers said he understood that his letters were "an important factor" in the Government's decision to commission the investigation of performing rights.
- 18 The original terms of reference (the terms of reference were extended in November 1932 to include inquiry into issues arising between the owners and users of records) required the Commissioner to inquire and report upon –
- (a) any questions that have arisen or may arise between persons interested in performing rights in copyright works and persons interested or concerned in the performance of such works whether as performers or as persons authorizing or controlling the performance, or as persons on whose premises the work is performed, or otherwise; and
 - (b) the rates, methods and conditions of payment to the owners of the copyright

Latham explained to the House that Australia's obligation to implement and observe the provisions of the Berne Convention limited the scope of action that the Commission could propose. The owner of musical works possessed the sole right to authorise public performances of the work by live shows, radio broadcasting, film exhibitions and the playing of gramophone records. Nothing the Commission might recommend would undermine the owner's exclusive right to authorise public performances and receive payment for the performances.

On the other hand, the Berne Convention did not prevent the Government from investigating the terms, including rates of payment, on which owners licensed users to perform copyright works in public. Latham indicated that he expected the Commission to concentrate on establishing a formula for valuing the performing right. "The Government," he said, "considers that a composer or his assignee is entitled to a reasonable reward for his creative effort. It is difficult to state what would be a reasonable reward in varying circumstances."

The difficult task of working out ways for determining reasonable reward now fell to an independent body. Latham breathed a sigh of relief and turned his attention to the regulation of financial relations between the Commonwealth and States and crimes legislation. His ambitions already lay in the direction of the High Court bench and though his interest in copyright matters did not flag, his part in the drama of the performing right became increasingly passive.

While the broadcasters were chiefly responsible for the decision to commission an inquiry, and the other commercial users of copyright music welcomed the Government's intervention, APRA could claim at least one declared supporter. On 1 June 1932, Melbourne's *Age* newspaper devoted three columns to explaining why critics of APRA were mistaken. The paper censured commercial broadcasters. "Wireless" had "robbed the composer of a large source of income". A public inquiry into the fees charged by APRA would be "enlightening" to the public, which "has no desire to enjoy the product of a man's brain without paying for its enjoyment".

The *Age* concluded that while "some adjustment" of APRA's fees might be found to be necessary, "in regard to its right to charge fees on behalf of the owners of copyright there can be no question whatever in the opinion of fair-minded men."

in musical and other works by the persons aforesaid for the right to perform such works in public.

Chapter 7 – Public inquiry and arguments over performing rights

THE ROYAL COMMISSION ON PERFORMING RIGHTS

The Commission

The Royal Commission on Performing Rights heard evidence from 23 September 1932 until 20 March 1933 – a protracted inquiry, as the Commissioner noted in his closing remarks. The inquiry held 67 sittings, heard evidence from 60 witnesses and registered 169 exhibits. The number of parties represented, and the complexity of evidence, slowed proceedings. A shoestring budget also retarded progress.

In the midst of Depression, the Government could spare little money for public inquiries. The Royal Commissioner, Sir William Langer Owen, a retired judge of the NSW Supreme Court offered his services free of charge (an offer gratefully accepted by Latham),¹ and conducted proceedings without the assistance of fellow commissioners. He received administrative assistance from a Commission secretary and invaluable help from a giant from Australia's vanished days of independent copyright law-making – John Keating. Latham shrewdly appointed Keating, the key parliamentary figure in the preparation of the 1905 Copyright Act, and now a venerable member of the Melbourne Bar, as Counsel Assisting the Royal Commission.

The Commission conducted proceedings on government premises, occupying the seventh floor of the Commonwealth Bank building in Sydney. Despite its straitened circumstances, the Commission functioned as a model of efficiency. The transcripts of evidence indicate that Owen marshalled the evidence with skill

1 Justice Owen also waived his travel allowance for NSW travel, as his NSW judge's pass covered train fares in the State. He asked that if his daily expenses for travel outside NSW were smaller than his daily allowance, he only be reimbursed for the amount actually spent.

and courtesy and both he and Keating traversed the complicated and deceptive terrain of performing rights with clear sight and sure feet.

Both men were well fitted for the task before them. During hearings, Keating showed, as he did in the Senate copyright debates in 1905 and 1912, humour, penetrating mind, a gift for advocacy and prodigious knowledge of copyright history. Owen, a tall man distinguished by a handlebar moustache, helped found the NSW Bar in 1896. An upright, courteous individual, the father of Sir William Owen, a High Court judge between 1961 and 1972, he displayed high intellect and strong moral purpose.

Looking down on Martin Place from Owen's rooms, the pair discussed the evidence in the early morning and late at night, as Owen said in closing remarks, and reached conclusions that prepared the ground for the creation, nearly 40 years later, of the Australian Copyright Tribunal. Keating began proceedings on 23 September 1932. He explained that while the inquiry would provide APRA and the commercial users of music the opportunity to explain fully their differences over the terms of use, both he and the Commissioner would adopt the principle that the public's interest in hearing public performances of music must not be unreasonably curtailed. Writing to the Attorney General three days later, Owen said that Keating's address "was very able, very impartial, and gave great satisfaction to all who were present."

Owen went on to explain that he had ordered that the first part of proceedings would concentrate on relations between the national broadcasting stations² (the ABC) and APRA. To enable the parties to prepare their cases, evidence and information, he adjourned proceedings to 4 October. He then proposed to examine APRA's relations with the B Class broadcasters. To avoid expense and delay, the Commission hoped to collect as much of its evidence as possible in Sydney, but Owen indicated that he would be prepared to hear evidence in Melbourne and any other capital city if necessary.

The barristers for the main contending parties filled the Commission's hearing room in the Commonwealth Bank Building for most days of proceedings. With so much at stake, and the ever-present possibility of one interest group attacking or implicating another, the various counsel, even when not presenting evidence, rarely left their listening posts for more than a few days. The seniority of the lawyers filing in each day before Owen indicated plainly to the Commissioner the deadly commercial intent of their hirers.

The King's Counsel Horace Markell and Reginald Bonney, leaders of the Sydney Bar and later judges,³ represented, respectively, APRA and the record manufacturers, the two factions resisting government intervention in the war over

2 Still also known as the 'A Class' stations.

3 Markell joined the District Court bench in 1935 and Bonney the Supreme Court in 1940.

performing rights. APRA engaged Frank Kitto, the future High Court judge, as Markell's junior. The B Class broadcasting stations hired gifted though relatively junior lawyers to represent them – first Clive Evatt (made KC in 1935) and then Richard Cook, described by Owen during proceedings as “one of the most able young men we have at the Bar”.⁴ In 1955, Cook the son of Australia's sixth minister Joseph Cook, became a judge of the NSW Industrial Relations Commission. Mr H P Williams, the General Manager of the ABC, though not a lawyer, represented his organisation, as Owen said in his Report, “with marked ability”.

Breakdown of negotiations over radio ban

When the Royal Commission resumed proceedings in October 1932, Williams, on behalf of the ABC, and Markell, for APRA, addressed Owen over several days. Outside events then suddenly interrupted the program of hearings foreshadowed by Owen in August. Negotiations over the terms on which B Class stations could use gramophone records broke down, with the result that the radio ban, in force for a year, now seemed destined to continue indefinitely.

The commercial broadcasters were now highly alarmed. They were deprived for the foreseeable future of access to the latest record releases, and theoretically, the use of all records in their stock manufactured by the three record companies. Relying on importing records of mostly inferior quality from foreign suppliers unaffiliated with EMI, the stations expressed doubts about their continued financial viability. Owen reacted immediately to the failure of negotiations. He asked Bonney to explain why the associated manufacturers considered that they were entitled prohibit the playing of their records on radio and received an unequivocal response. The record companies, said Bonney, considered that under the Copyright Act and Patents Act, they could impose any conditions they saw fit on the public performance of their records.

Owen and Keating were agitated. A Royal Commission intended to investigate commercial and legal issues surrounding APRA's exercise of the performing right could now not avoid investigation the legality of the radio ban. Although Bonney at first did not specifically claim a performing right on behalf of his

4 Owen made this statement during Markell's closing address. He said that Cook “gave one of the most able addresses I have ever had the pleasure of listening to, certainly for one of his years of the profession.” In his own final address, Bonney said that “we, too, feel that Mr Cook's address to this Commission was an outstanding contribution, and as adversaries ... we should like to offer our humble tribute to the masterly manner in which Mr Cook got a grip of the proceedings, and to his masterly conduct of them all through.” Cook replaced Evatt at short notice, and, as Bonney said, “came into this Commission under very difficult circumstances indeed.”

clients, Owen and Keating drew an obvious conclusion: if the record companies believed that they could control the public performance of records under copyright legislation, they must infer from their copyright in records manufactured a derivative right to perform the records in public.

Adding to their difficulties, the two men knew that affiliated manufacturers in Britain and Europe were considering, or already implementing, similar bans. Leaving aside the effect on the unity of the Berne Union of international acceptance of a manufacturers' performing right in records, such a right, if implemented, might derange the system of copyright payments that APRA laboured for nearly a decade to enforce. The commercial users of music, still reluctant to pay APRA's performance fee, would be horrified at the thought of a second performance fee, and APRA itself could be expected to swiftly take up cudgels against the manufacturers if the new right undermined its profits.

In short, chaos in the commercial world regulated by the Copyright Act threatened. In the end, APRA reacted with indifference to the claim for the manufacturers' performing right. In October 1932, however, neither Owen nor Keating could guess at how the protagonists with whom they were soon to contend would react over time to the copyright implications of the radio ban. Owen responded to the uncertainty by contacting Latham, while Keating drafted additional terms of reference for the Commission to inquire into relations between the producers and commercial users of records.

The gramophone companies lion

Latham gained Cabinet's approval for the proposed new commission, and wasted no time getting in touch with the former Prime Minister, Stanley Bruce, now Minister-without-Portfolio in London.⁵ What information could he provide on the nature and extent of the claim for a performing made in Britain by record manufacturers? Bruce cabled his reply within 24 hours. The gramophone companies had labelled records to prohibit the BBC from playing their records without permission. They had declared their intention to charge fees for the public performance of records and "performances other than broadcasting [were] now the chief concern."

Significantly, the Performing Right Society had claimed, in the October edition of the *Performing Right Gazette*, the exclusive right to control the public performance of copyright music in any format or by any means, including records and broadcasting. The BBC, said Bruce in his telegram, "do not admit copyright but think Companies may have a claim in equity, as unrestricted use would kill

5 The Prime Minister, Joe Lyons, sent Bruce to London partly to ensure that he did not become a threat to his position. Bruce led the Australian delegation to the Ottawa Convention and in 1933 accepted the position of High Commissioner to London.

the sale of records.”⁶

Joe Tipping, the copyright law specialist in Latham’s department, and an observer at the Commission hearings, wrote to Keating a few days later enclosing a copy of Bruce’s communication. He explained that *Thompson v Warner Bros*, a 1929 English High Court case cited by Bruce, established that the law permitted “only one performing right”.

For Tipping the meaning of the case for the Royal Commission seemed clear. “On this decision, the gramophone companies have no right to claim performing fees under the Copyright Act and a conflict between them and APRA is certain.” Though Markell, APRA’s senior counsel at the Royal Commission hearings, “was inclined to treat the gramophone companies proposals as no concern of APRA”, claims for fees for playing records “must ultimately cause a fight between the record manufacturers and APRA.”

Tipping shared his opinion that the radio ban unmasked the real power in the business of supplying and using copyright music. The proposed agreement between the associated manufacturers and B Class stations – now discarded by the record companies – “shows how serious the matter is for those Stations”. APRA, he said, “is a lamb altogether compared to the gramophone companies lion.” Tipping informed Keating that he felt little optimism about the possibility of government resolving commercial impasses created by either the APRA lamb or gramophone company lion.

The latter constituted “another monopoly – the same as the music publishers have their monopoly”. Unfortunately, the Commonwealth’s powers to legislate against monopolies were “nil” and the Government could only overcome the deficit in constitutional power by seeking constitutional amendment. Tipping closed his letter with welcome practical news. The Governor General had signed the new commission containing the additional terms of reference. The Royal Commission could inquire into issues arising between the record companies and the radio broadcasters and the basis on which the manufacturers claimed fees for, and imposed conditions on, the public performance of their records.⁷

6 The BBC was negotiating an agreement with the gramophone companies that would restrict it to playing records for 14 hours a week and require it to acknowledge the provenance of records played.

7 The new commission added two terms of reference to the two original terms of reference. The commission asked Owen to *inquire and report upon – (c) any questions that have arisen or may arise between persons interested in the manufacture, use or sale of any mechanical contrivances by means of which any musical or other work may be mechanically performed, whether so interested under or by virtue of the Copyright Act 1912 or otherwise, and persons interested or concerned in using such contrivances for the purpose of mechanically performing such musical or other works in public, whether as persons authorizing or control-*

Position of the main parties

Now empowered to investigate the legal questions arising between the associated manufacturers and the commercial broadcasters, Owen and Keating resumed their inquiry. The motives of the parties involved in the inquiry were clearer and as hearings continued, their intentions became unmistakable. A week after the close of proceedings, when Owen retired to his home in Bellevue Hill to write his report, and Keating to Selborne Chambers in Melbourne, the latter wrote to the Attorney General enclosing a memorandum summarising his observations of the material disclosed, and suggesting legislative reforms.

A single paragraph in his letter candidly outlined the motives of the two most powerful commercial entities represented at the Commission. Keating told Latham that:

In reading the enclosed Memorandum it should be remembered that the general attitude of Counsel for A.P.R.A. and Counsel for the Associated Manufacturers throughout the Inquiry might be summed up as if they said: "We want to be left alone. There is no need for any legislation to solve present or future problems adverted to here. Leave them to us to settle by private negotiation. The public in general is not interested in, nor affected by, these 'problems'. The Federal Parliament may have the power to legislate regarding them. But it can only do so by conflicting with International Convention and the British Copyright Act of 1911, thus excluding Australia from the International Copyright Union and from the Inter-Imperial Copyright System."

The commercial users of music, as the evidence before Owen soon revealed, were united by an opposing aspiration. They, led by the ABC and the commercial broadcasters, whose complaints were most responsible for the creation of the Royal Commission, wanted the Copyright Act to establish procedures for the mandatory arbitration of licensing disputes, preferably by a dedicated tribunal.

The polarity of opinions expressed by APRA and the associated manufacturers on the one hand, and the users of commercial music on the other, should not have surprised Owen or Keating. The Copyright Act gave APRA, as assignee of musical copyright, all that it could ask for – the unlimited capacity to enforce the performing right. Compulsory arbitration, the institution of a tribunal, each rep-

ling such performance, or as persons on whose premises such performance takes place, or otherwise; and

(d) the rates, methods and conditions of payment (if any) to the persons interested as aforesaid in the manufacture, use or sale of such contrivances by the persons interested or concerned as aforesaid in using such contrivances for the purpose of mechanically performing such musical or other works in public.

resented a potential roadblock on the journey to the creation of an efficient and lucrative system for remunerating the use of copyright musical works.

The gramophone companies did not benefit so directly from copyright legislation. But if left alone to pursue their objectives through the ordinary business channels of negotiation and ultimatum they could confidently expect to control the public performance of their records. They disliked the idea of compulsory arbitration because adjudication required that they surrender control of dispute resolution to an independent authority. After 30 years of extraordinary economic growth they felt no wish to allow third parties to intrude into disputes they could settle on their own terms.

As became clear when Reginald Bonney, the companies' senior counsel, expounded his arguments, the associated manufacturers saw no need for conciliation. Their profit statements did not justify Tipping's description of them as a "lion" but their parent EMI was a true giant whose revenues, profits and assertiveness imbued its Australian subsidiaries with the unshakeable belief that in commercial disputes they must enforce their will by compulsion.

The radio ban duplicated an embargo imposed by the British gramophone industry (on the BBC's playing of music), and Bonney repeated the justification given in Britain for prohibition. Copyright in a recording, he said, entailed a right of public performance, and nothing prevented the record companies from enforcing the right to stop broadcasters from playing their recordings. If the Royal Commission proposed to recommend any amendment to the copyright legislation, it should be to explicitly recognise the manufacturers' performing right.

The stunned Royal Commissioner, and the various representatives of commercial music users assembled before him saw the matter differently. Owen asserted that his commission did not authorise him to recommend legislation to recognise the performing right for which Bonney argued. Throughout proceedings, he remained fixed on the idea that only the creation of a quasi-judicial forum for determining disputes would bring order and some harmony to relations between the various parties presenting their arguments to him.

As for the users, they cried out to Owen for deliverance from the cruel ordinances of copyright law – or at least their amelioration. From the middle of the 1920s, motivated by outrage and economic exigency, they fought APRA with degrees of resolve and prevarication, and always unsuccessfully. For them – the radio broadcasters, cinematograph exhibitors, owners of entertainment venues and miscellaneous other users of commercial music – the Royal Commission represented a welcome opportunity to expose APRA's perceived venality, and obtain protection from what they saw as its ceaselessly growing imposts.

For the commercial radio stations, the Commission presented an opportunity on two fronts. They had no wish to pay more to APRA, and argued pointedly that they could not afford to pay much in performing right fees. But they wanted above all to bring to Owen's notice the evils of the radio ban, and discredit the

record companies' legal justifications for the embargo under patent and copyright law.

Outline of proceedings

All the categories of music user accepted that they could not persuade Owen to recommend abolition of the performing right. But they were agreed on one general action that might check APRA's appetite for revenue: the creation of a third party adjudicator to whom the parties must refer unresolved licensing disputes. Owen and Keating accepted the necessity for such an adjudicator and working out how an arbitral tribunal might work in practice became a primary focus of their attention.

After hearing Williams for the ABC, and Markell for APRA, in October 1932 and then part of November, Owen took evidence from Evatt for the B Class stations and Bonney for the record companies. Over December and into the New Year he heard from an extensive list of witnesses, including Bluett the secretary for the NSW Local Government Association, APRA's active opponent since the mid 1920s. In February and March 1933, he invited the biggest commercial concerns represented at the Commission – APRA and the record companies on one side, and the users of music, the radio broadcasters, and to a lesser extent, the cinema exhibitors, on the other – to address him again.

As Keating told Latham in his letter, APRA and the gramophone industry wanted government inaction. With art and industry, they pressed their arguments against official intrusion into the relations between the providers and users of commercial music. Owen, however, listened more sympathetically as the broadcasters conjured a vision of a primitive commercial world in which APRA and the record companies roamed free like angry dinosaurs, ready to consume any business that stood in their paths.

Though the hostility between the users and controllers of commercial music became apparent early in proceedings, the specific enmities of different parties emerged more slowly. Predictably, APRA attracted criticism from many quarters. The cinematograph exhibitors and other user groups, such as the Local Government Association of NSW, were outraged by the ever-growing size of annual copyright fees and joined in a concentrated attack on APRA's licensing policy. But the most cogent criticism came from H P Williams, General Manager and counsel for the ABC.

The ABC

Williams told Owen that compared to the levies fixed for the B Class radio stations, the licence fees paid by the ABC to APRA were ridiculously high. In 1931, the year before the Royal Commission began, the amount of total annual copy-

right royalty paid by to APRA by the ABC's predecessor was more than nine times greater than total fees paid by the commercial stations. Why, said Williams, should the ABC pay rates inflated to capitalise on the boon of government revenue allocations?

Williams also attacked the argument that in setting broadcasting fees, APRA was entitled to take into consideration the effect of the gramophone and broadcasting on sales of sheet music. As he said, "mechanical presentation is but a stage in the march of progress and therefore permits of no retrospective compensation." The real motives of APRA, he suggested, could be discerned from its policy of taxing government (represented by the ABC) more heavily than any other user of commercial music.

APRA, he implied, made a mercenary decision to take advantage of the ABC because it, as a public utility, stood in the position of a willing buyer. It accepted the legal obligation to pay licence fees and would not fight to the death over the amount. APRA taxed the ABC most heavily because it could, not because the ABC placed the greatest value on commercial music, or because the music supplied commanded, by some other measure, a higher price. Williams said:

My Commission stoutly contests the suggestion that because a licence fee is paid by listeners for the services from its stations, this permits the holders of copyrights to make an inequitable charge ... I respectfully submit that here again we find the attitude of APRA influenced not by concern for the composer and author, but the by an intensive effort to constitute a new source of revenue for the music houses and publishers.

After Williams' address, the B Class stations told Owen simply that they, unlike the ABC, could not afford to pay higher fees. But they were not primarily concerned with the depredations of APRA. They concentrated mostly on questions raised by the record companies and they could hardly afford to do otherwise. For concentrated vitriol, no speeches by other barristers at the hearings matched those of Reginald Schofield Bonney, the counsel for the associated manufacturers, as he attacked the motives and usefulness of the commercial radio stations.

“A noisome weed”

Bonney expressed the antagonism of the manufacturers in polite sentences that disclosed intensity of feeling and destructive intent. As his argument unfolded the real wish of his clients became clear. Attributing falling sales to the repeated playing of recorded music, and fearing that broadcasting might fatally undermine profits, the associated manufacturers wanted the commercial stations banned. Bonney never directly voiced this radical aspiration, and instead emphasised the wisdom of licensing a single national broadcaster – like the BBC – to supply ra-

dio programming to the nation.

He left his listeners in no doubt that the gramophone companies considered commercial broadcasting a threat to their existence, and the radio ban a rational response to the reckless conduct of the B Class stations. He tried particularly hard to show that unlike the ABC, the commercial broadcasters did not serve the public interest. They were motivated by profit alone and cared little for the sensibilities of their audience, which endured advertisements every three or so minutes.

The national broadcaster, said Bonney catered to all levels of public demand. It satisfied the public's demand for music and its diverse programming, including broadcasts of Test cricket, catered to a wider variety of tastes than did the programming of all the B Class stations. Yes, he responded to Owen, a certain amount of commercial broadcasting did provide welcome publicity for the latest record releases. But B Class broadcasters had long since passed the "saturation" point at which broadcasting began to exercise a negative effect on record sales. Music played over and over on the radio meant listeners became sick of songs long before they wanted to buy the recording. Commercial broadcasting, said Bonney, "has grown up not as a handsome plant but as a noisome weed."

As to the effects of the radio ban on commercial broadcasting, the record companies were not perturbed by the possibility of driving some stations out of business and depriving their listeners of music. "Of course my contention is," said Bonney, "to put it in all its bluntness simply that there is no need to come to terms." Bonney called the claim of broadcasters that the ban would drive some to extinction pure speculation. The evidence of one station manager, he said, showed that the previous year had been a successful one for the industry, 10 new stations had come into existence since the ban, and two stations had increased the price of advertising to cash in on demand.

While Bonney made no apology for the radio ban or its possible effects, he pointed out that it hardly constituted as frightening a threat to the B class stations as they pretended. When the commercial broadcasters pushed for the holding of a Royal Commission at the beginning of 1932, a few months *after* imposition of the ban, they did not mention their dispute with the record companies, or the ban itself. Instead, they focused on APRA, asking the Government for a public inquiry into the activities of APRA and the musical performing right.

The public, said Bonney, would not be disturbed if the ban drove some stations to the wall. Before the ban, he observed, recorded music was "broadcast morning, noon and night, with the result that people were getting rather sickened of music as home entertainment." Owen responded bluntly. "I think the opinions as to there being too much music on the air depends very much on the state of the liver of the man giving evidence. It is a matter of opinion."

The Royal Commissioner seemed unimpressed by Bonney's other arguments. Nothing suggested that the Government wished to undo the policy of the

1920s, which called for the co-existence of commercial and public radio to diversify programming and extend broadcasting into all parts of the country. Whether or not commercial broadcasters intended to benefit the public he considered beside the point. They provided a public benefit, whatever their motivation, and their owners supplied funds, that government could not, for creating a truly national broadcasting system.

That broadcasting undermined record sales Owen thought debatable: one factor in the decline of sales could be the unwillingness of consumers to spend on records during a period of severe economic depression.⁸ As to the relative merits of ABC programming compared with that of the commercial stations, if radio advertising offended Bonney's sensibilities, Owen did not propose to waste any time debating questions of taste that were irrelevant to the biggest question before him.

The gramophone companies oppose a tribunal

On behalf of the associated manufacturers, Bonney rejected the idea of a tribunal to resolve copyright disputes. The "rights of property and rights of private contract," he said, "should only be interfered with in extreme cases." The radio ban did not invite government intervention: "why," he asked Owen, "should Parliament be asked to intercede in what is purely a business dispute, a business difference between two parties?"

Certainly not, he suggested, on public interest grounds:

Does the public interest demand that all the weight and power of Federal legislation should be brought to bear to save a few stations a few pounds?⁹ Surely the public interest does not demand that? All that public interest demands is that the public shall have a reasonable broadcasting service.

Could, Bonney asked, a copyright tribunal understand the intricacies of commercial disputes? Left alone, would the parties not reach agreement more efficiently? As Bonney pointed out, "I have had some experience of arbitration and I may say that I could scarcely imagine a better way of sending the parties into liqui-

8 To which point Bonney responded that the public had spent £7 million on radio licences since 1925 and continued in large numbers to buy radio sets at the considerable cost of £27 10s per receiver.

There should be some tribunal to determine the conditions if the parties cannot agree and there ought to be some machinery provided by the legislature whereby, if the tribunal determines the conditions, the B Class stations should be allowed to broadcast your records providing they could show that they had offered to fulfil the conditions laid down by the tribunal.

ation.” The record companies opposed the concept of an arbitrator setting down the terms on which their records could be used by broadcasters.

Arbitration, Bonney implied, offered a blunt instrument. His clients anticipated that arbitral or tribunal rulings in particular disputes would establish precedents that would be applied, with unfortunate results, to others. For example, an arbitrator or tribunal might decide that the terms of an arbitrated settlement fixing conditions of use by a public broadcaster should apply equally to commercial broadcasters. His clients, said Bonney, considered third party involvement in commercial disputes anathema:

Any interference or control of that sort with a business is in itself an evil; it is a bad thing and should be avoided if possible; and it is a cause of action which in the case of a business which is struggling its hardest to make both ends meet – and it is not making both ends meet – which may make all the difference between that business continuing and it being scared out of existence. One has to take that view of government interference.

Owen did not share Bonney’s pessimism. He considered the case for legislation to be simple and compelling and paraphrased the arguments of Richard Cook, counsel for the B Class stations:

There should be some tribunal to determine the conditions if the parties cannot agree and there ought to be some machinery provided by the legislature whereby, if the tribunal determines the conditions, the B Class stations should be allowed to broadcast your records providing they could show that they had offered to fulfil the conditions laid down by the tribunal.

Rationale for the radio ban – the mechanical performance right

Finally, Bonney and Owen turned to the vital legal question – on what basis did the associated manufacturers claim they were entitled to enforce a radio ban? Under the patents and copyright legislation, said Bonney. The former allegedly gave a right to control the use of a thing manufactured under patent, the second a right to control the performance of records. At the outset, Owen made clear that his commission did not ask him to – and nor could he – determine justiciable legal issues. At the same time, he could not ignore the question and pretend that the recording industry’s bold claim for a new right did not promise mischief for users and regulators alike.

The claim for the mechanical performing right seems to have arisen directly from the British recording industry’s frustration at the seemingly disastrous effect of radio broadcasting on record sales. The record companies knew that banning

the use of records by broadcasters under patent legislation entailed risk. Under section 87 of the Patents Act, a broadcaster “unfairly prejudiced” by the ban could sue for revocation of the patent (in this case to manufacture a record) and the Government could readily amend the legislation to prohibit the withholding of supply.

By contrast, the declaration of a public performance right in records offered attractive possibilities as the gramophone companies fought to bring the radio industry to heel. If not opposed by government, the claimed right allowed record companies the choice of exercising potent alternatives: they could either ban radio stations from playing records, or allow them to play the records subject to whatever conditions they wished to impose, including the charging of public performance fees.

When pressed by Owen on the question of the mechanical performing right, Bonney willingly confirmed the Commissioner’s worst fears. His clients were not prepared to say that the radio ban technically involved a ban of the public performance of records but they did assert the right to control such performances. On what basis, asked Owen? Because, replied Bonney, section 19 of the British Copyright Act (which provided for a compulsory licence to record works) created copyright in records “as if such contrivances were musical works”, and under section 1 of the Act, copyright included the right of public performance. If, under the Act, copyright in a record subsisted “as if” it were a musical work, then the copyright in a record comprehended the performing right that attached directly to musical works.

Bonney gave short shrift to the objection, raised earlier by Markell and Cook, and repeated by Owen, that the compulsory licence permitted a licensee only to record a work and control subsequent reproductions of the recording. According to the argument, the definition, in section 1(2) of copyright as the ‘sole right’ to produce or reproduce a work for various purposes, applied only to the owners of works – the owners of records made under compulsory licence were excluded. The makers of records and those reproducing records under compulsory licence could replicate their recordings, but not control their use for any other purpose. Bonney called the argument “the height of absurdity”.

If, said Bonney, the Act regarded an original or licensed recording “as if” it were a musical work then the maker of the recordings, whether directly authorised or recording under compulsory licence, held the sole right to multiply the recordings for any of the purposes of copyright, including public performance. Owen then responded with the question that had exercised his mind for months.

He agreed that the record company could be said to possess an implicit performance right. As he said, “in one sense you have the right of performance; you can yourselves perform or can give a licence to others to perform.” What interested him, he indicated to Bonney, was the “right to charge for performance”. A right to control the public performance of a thing included the right to demand

fees for the licence to perform.

According to the Royal Commissioner, a record company could prevent the piracy of records, but not charge performance fees. Owen justified his position by referring to the language of the compulsory licence in section 19. The licence referred to the making of records “by means of which the work may be mechanically performed”. In the Commissioner’s view, the mechanical act of playing a record did not constitute performance. As he said, the “performance of the work and the use of the contrivance are two entirely different things.”

Bonney expressed the opposite view: “I submit firstly,” he said, “that the word ‘perform’ has exactly the same meaning as the word ‘play’.” Before the Gorrell Committee in 1909, he said, a number of witnesses, chief among them John Drummond Robertson of the Gramophone Company (who contended strongly for the performing right in records) referred to the words interchangeably.

The Act treated a record as if it were a musical work, thereby vesting, as Bonney reiterated, the public performance right in the owner of the record. The playing of a gramophone record in public was the mechanical analogue of the live acoustic performance of a musical work. Thus playing a record involved performance no less than a concert given by musicians. As Bonney pointed out, the definition of ‘performance’ in the Act referred to “any acoustic representation of a work”. This definition, he concluded, “is sufficient for my purpose.”

For Owen, the consequences of Bonney’s arguments succeeding before the courts raised a frightening prospect: two performing right fees, increased costs and probably commercial warfare. He emphasised that the Gorrell Committee had accepted the necessity for record makers to receive sufficient legal protection to allow them to prevent or attack the piracy of records. Reading section 19 in light of the Gorrell Report, he thought that legislators in 1911 intended copyright in records to comprise twin rights – the first to reproduce recordings and the second to prevent unauthorised reproduction. Bonney contended that the second right implied a performance right.

Commissioner and counsel engaged in a sharp exchange that indicated Owen’s high mindedness and a certain naivety that Bonney gently disparaged.

Mr Bonney *What is the idea of protecting a person against the performance of a pirated article if he has no right whatever in the performance of the original?*

The Commis- *Because it is a wicked use of a pirated article. The man has*
sioner *robbed you of an article which you made at great expense.*

Mr Bonney *Such legislation against wickedness in general is very rare. I*
submit they had in mind the protection of a right which is hurt
by what is being done.

The Commissioner *What injury is it to you, if by skill you have produced a record?*

Mr Bonney *If I have no right of public performance it does not do me any injury for a pirate to perform 100 pirated works.*

The Commissioner *Yes, it does, because people buy the pirated ones instead of yours. Your object is to keep up your sales not to collect fees for performances.*

Paying to listen

Owen's last point brought the discussion back to the nub of the question that pre-occupied him. Was the law of copyright intended to establish a gigantic industrial system for imposing and collecting revenue or did it have a more limited purpose clearly founded in the doctrine of authors' rights? Any observer who listened to the his comments throughout the hearings, particularly those addressed to Keating, could guess that Bonney's reply filled him with foreboding.

Bonney said of the broadcasting of recorded music: "it becomes necessary to ask whether in fairness the public who gets its enjoyment of those records through a new channel should not be called upon to pay." The record companies must get return on investment. "There is no escape from that proposition," said Bonney. "And if the sources of revenue that have accrued to them [the companies] in the past are cut off, then they must look for new avenues of revenue."

Pressed by Owen, who rejected the idea of imposing imposts on the public for the privilege of listening to music, he insisted that the commercial users of records should be obliged to pay public performance fees:

[T]he person who uses that record in public for his own profit, who could not otherwise obtain that profit, should pay for it; does not justice require that those who have provided him with those means should be entitled to charge for it?

Bonney reprised the arguments made 20 years before by Drummond Robertson during the British copyright debates of 1909 and 1911. The record companies produced records at great expense, bringing the benefits of performances by the best artists to private and public audiences. Did not justice demand that anyone who benefited commercially from playing records should pay a price to the record company that made the benefit possible? Was not the technology that made the dissemination of works possible as valuable as the works themselves?

The record manufacturer, said Bonney, deserved to receive more than the revenue received from the sale of chattels. If the owners of musical works were

entitled to remuneration for the various uses of the work, then the manufacturers of records were entitled to claim a similar entitlement. Bonney declared:

In each case one has a thing of value, a thing of value for the purpose of public performance; and if in the one case remuneration is fair because a thing of value is put in the hands of the user, then in the other case I submit it is equally fair that the originator or manufacturer of that thing of value should be entitled to charge in the same way for that public performance, the use of that in public by the broadcaster or whoever the user may be.

Bonney's case proceeded with certainty and logic. The transcript of evidence shows that when he summarised his argument in the form of a rhetorical question, the Commissioner's reply disconcerted him:

Mr Bonney *If the performance of that [a recording] in public is of value to the public, why should not it be paid for? Is there any logical possible answer to that question?*

The Commis- *There is one answer that affects my mind to some extent, and sioner that is since 1909 when you say that evidence was given up till 1933 it has never been suggested that they [the record compa- nies] had such a right.*

Mr Bonney *It has never been suggested that they have any such right?*

The Commis- No.
sioner

Mr Bonney *Your Honour will pardon me.*

Later, Owen asked Bonney:

If it [the public performance right] is of such great value to you and you are so much entitled to this protection, one would have expected, would not one, that it would have been asserted?

To this query, Bonney made no meaningful response. The belated discovery of a mechanical performing right could not affect in principle its legitimacy. But Owen identified an uncomfortable truth: the gramophone industry adduced the existence of the right in order to place the broadcasting ban on a more secure legal footing, then realised that it could also be relied on to claim performance fees.

Owen wrote in his report that, "in England this claim to a performing right is being or is to be insisted upon against all users in public, whether broadcasters

or not, and apparently the same claim is being made on the Continent.” To Bonney, he observed that the British High Court and the Victorian Supreme Court rejected the proposition that a mechanical performing right existed alongside the musical performing right.¹⁰ Having tossed dialectical gelignite at the Royal Commissioner, Bonney was sanguine: as he said, the industry in Britain had begun two test cases, and the courts would determine the question.

It mattered little to the record companies if Owen agreed that the arguments for the right were correct. They did not expect the legislature to move quickly in their favour. What counted was that they could present defensible legal arguments to support the radio ban while they prepared to persuade the courts to recognise the right. Owen devoted little more than a page of his report to discussing the question of the mechanical performing right, but as the transcripts of evidence showed, he felt alarm at the possibility of users paying two performance fees.

In his report he affirmed that copyright in a record vested in the manufacturer then asked, “was it intended that, by a grant of ‘Copyright’, he should also be given a right of performance of the work incorporated in his record?” His answer indicated clearly his own position. It would, he said, “apparently lead to extraordinary results if Section 19 has given that right to the maker.” But the Commissioner refused to make any more definite statement on the merits of the record companies’ claim. His final words on the subject made clear that the legislature, not courts, should determine the question:

The Commission is informed that litigation is pending in Great Britain in which this question will arise for decision, but the Commission considers that legislation by the Commonwealth Parliament is necessary in order to make the legal position clear.

“A dragon, devastating the countryside”

Described by Joe Tipping, copyright expert at the Attorney General’s Department, as “a lamb altogether next to the gramophone lion”, APRA, in the figurative sense, more closely resembled a dragon at the Royal Commission. Purcell, barrister for the Cinematograph Exhibitors Association, told the Commissioner that APRA began operations as the “watchdog of copyright holders’ rights” but now, “instead of being the watchdog ... has become a dragon, devastating the countryside.” Its chief counsel, Horace Markell, breathed fire on its behalf, and, as Keating reported later to Latham, staked a simple position identical to that sketched by Bonney: leave us alone to enforce our commercial will.

10 *Thompson v Warner Bros (1929)* Ch Div; *Australasian Performing Right Association v 3DB Broadcasting Company (1929)* VSC.

Like the gramophone companies, APRA rejected the idea, embraced by the users of musical copyright, of a copyright tribunal. Like the recording industry, APRA preferred to settle disputes by exercising superior – usually overwhelming – bargaining power. If opponents were recalcitrant, it could rely on reserves of money and patience to win battles in the courts. It wielded the performing right like a magic wand, and though many complained, few dared to resist the obligation to pay performance fees.

Markell presented APRA's position at the Royal Commission with a masterly combination of boldness, evasion and guile. His response to probing about the disparity between fees paid by the ABC and the commercial radio stations illustrated his skill to perfection. Yes, the licence fees paid by the ABC dwarfed those collected from the B stations. But no, the ABC rates were not too high: rather, the commercial stations paid far too little. Why the disparity? Because, frankly, government organisations met their legal obligations, negotiated agreements on realistic terms and paid on demand.

Commercial organisations, by contrast, willingly avoided legal obligations if they could. To secure their compliance meant time and effort. For this reason, Markell told Owen, APRA had at first been satisfied with obtaining from the B Class stations nominal payments that represented a tiny fraction of their total advertising revenues. It now intended to demand much higher fees that represented the real value of copyright music to the stations.

On the subject of a tribunal, Markell proved equally forthright. The institution of a tribunal, or the passing of legislative amendments providing for compulsory arbitration might “encourage the spirit of reasonableness” but “that is a very doubtful point.” The history of conciliation in Australia after the passing of the arbitration legislation had “not been what one had hoped, but rather it ranged the parties on opposite sides.” According to Markell, sometimes “when you range people on opposite sides of a table you raise a spirit of antagonism.” If there was to be a tribunal, however, it must be an institution of last resort, adopting flexible procedure and presided over by a member of the judiciary, preferably a member of the High Court.

Markell became less direct when the Commissioner asked him to respond to the complaints made by users about APRA. APRA could not deliver the transparency of process that critics demanded. Any requirement to provide a comprehensive list of authors and composers on whose behalf the Association collected fees imposed an impossible burden: through its association with other performing right societies around the world, APRA's repertoire comprised millions of works.

To provide accurate statements of distributions to authors or composers was also too difficult. APRA remitted the great bulk of money collected in Australia to the Performing Right Society in Britain and it could not compel its British cousin to provide distribution information. In any case, distributions were often

based on the records of music use, such as submitted broadcaster playlists, and users often made inaccurate attributions. Accordingly, a large sum of money collected could not be immediately distributed and must instead be held in a general trust fund.

As to the criticism that APRA worked in the interests of music publishers not the creators of music, Markell pointed out that the authors and composers constituted half the membership of the board of the PRS. In other performing right societies, said Markell, the author predominated. Though publishers monopolised APRA's board, the miniscule number of music creators in Australia meant that the publishers of foreign authors and composers must necessarily dominate the Association. About 99 per cent of music played in Australia originated abroad and it was only through foreign publishers, or their local representatives, that APRA could hope to remunerate the originators of the music.

APRA's objections to the proposed tribunal and method of determining fees

Markell demurred at proposals that aimed to impose restraints on the use of the performing right. Compulsory arbitration to fix conditions for playing music he called bad in principle. Parties should be left to themselves to strike commercial bargains and government should not interfere with the contractual process. In any case, said Markell, legislation would be *ultra vires*: Australia had failed to ratify the Rome Conference amendments within the scheduled period, and the Berne Convention minus the Rome revisions did not permit legislative restriction of the performing right. Additionally the British Copyright Act of 1911, adopted in the Australian legislation, did not contemplate restriction.

Markell's submissions are chiefly interesting for the light they shed on APRA's approach to valuing licensed music, and its pragmatic emphasis on optimising returns from its most pliable licensee, namely government. His arguments against legislation are of less relevance, though they seem to reinforce the contention of contemporary critics that exclusive collecting societies tend to exhibit the classic behavioural patterns of the monopolist: dislike of scrutiny or accountability, solitary focus on maximising returns and the arbitrary fixing of price.

Markell summed up APRA's approach in his explanation of the different approaches taken by his clients to the ABC and the B Class stations. For APRA, the key difference between the two lay in the fact that the Commonwealth funded the national broadcaster using a fixed percentage of revenue collected from listeners' fees. As Markell implied, in APRA's eyes, secure government funding meant continuing capacity – and willingness – to pay at a higher rate.

The B Class stations, he said, were “in business for profit, therefore we make them a very much smaller charge than if they were subsidised by the Government.” The ABC, APRA found far more amenable:

When we are dealing with the Government we have not to bother about whether it is paying its way; we simply say “We are entitled to this”, and the Government says “Yes, we want to use your music.” It is a matter of plain business; but that is not the case with the B Class stations, where the position is that we have erred on the side of charging them too little.

On the subject of fixing licence fees, Markell explained that APRA adopted a purely pragmatic approach: it took the most money from the most secure source and spent little time on trying to determine criteria to objectively determine the value of copyright music. He said:

Our revenue from the sale of phonograph records and sheet music is very small; as our remuneration from those sources is so small, that factor has to be taken into consideration in saying what is a reasonable payment in the case of broadcasting. I think that is a fair way to put it.

But trying to objectively value music involved “a very difficult inquiry ... [i]t is almost impossible to arrive at it.” On this point, the Commissioner agreed. Owen told Markell that he recognised that in valuing an intangible, “[t]here are one thousand and one things to consider.” His solution to the difficulty prefigured the approach adopted by the modern Australian Copyright Tribunal – the “first thing I would look to,” he said, “is what the parties have done.” Negotiated agreement, Owen seemed to suggest, implied some element of free consent and therefore fairness – thus, how could a tribunal determine a fair licence fee “except by what they [the parties] agreed to take”.

Seizing his opportunity, Markell observed that “any fee must be arbitrary.” To try to establish valuation criteria was unnecessary. “As I said in the first instance,” he pointed out, “the actual question of reasonableness in the fee is not of very great importance.” Markell posed a rhetorical query:

Is there any reason under these circumstances to upset the primary rule which I think everybody will admit is best in the long run, that is, to leave the parties to do what they think is a reasonable thing under the circumstances?’

Turning to APRA’s method of charging the B Class stations on a per item basis, Markell and the Commissioner found themselves in accord:

Mr Markell *It does seem to be a very fair scheme, and though all things in this inquiry, as far as paying a fee is concerned, must be on an arbitrary basis because there is no standard comparison ...*

The Commis- *Music has no value excepting of an arbitrary nature; you can-
sioner not assess its value except in an arbitrary way.*

Mr Markell *So it must be arbitrary at the inception.*

However, Markell carefully enunciated the need for principle over arbitrariness if a particular factor could be interpreted in APRA's favour. The most important principle to recognise, in the age of broadcasting, was that size of audience dictated size of licence fee. "Once it is established," he said, "that the principle of a larger audience means possibly more compensation, and that is a larger amount, then it is only a question of how much."

Though not likely to provide insight into the philosophical question of a musical work's intrinsic value, the principle of audience size made sense if applied to the commercial broadcasters. They relied on audience share to attract advertisers and it could be argued that the value they placed on licensed music grew as their share of listeners increased.

The principle could not so easily applied to the ABC, which paid APRA much more in licence fees than the commercial broadcasters. Markell could not enlighten Owen as to why its larger national audience implied the official broadcaster, providing a service without regard to commercial considerations, should pay higher fees. He simply said: "we are entitled to an increased charge anyway because it reaches a greater number of people, that is as far as I can put it your Honour."

Returning to his theme that fixing a licence fee could not be done without some resort to arbitrary calculation, Markell suggested both that both the ABC and commercial broadcasters should be required to pay APRA fees equivalent to 10 per cent of annual listeners' licence payments. He did not bother to explain why 10 per cent represented fair remuneration, arguing only that as both broadcasters and the public craved copyright music, both should be prepared to pay a sizeable toll for the privilege of hearing that music.

"I submit," he said, "that the public has no right to use our property without paying reasonable fees." Markell considered it axiomatic that "[i]f you wish to have the music you want, you must be prepared to pay a reasonable price for it." In any case, "I am not sure that the public objects to paying this amount." The case for payment by broadcasters followed more directly. The industry, and the social phenomenon, of broadcasting would not have been possible without the supply of copyright music, and broadcasters must pay a proper price for using what was for them an indispensable commodity.

The commercial radio stations

Of all the commercial users of music represented at the Commission, the B Class commercial stations most cogently pressed the case for the users of copyright music. Owen, as he observed to Markell towards the end of hearings, regarded the submissions of their barrister, Richard Cook, a replacement at short notice for the

stations' first counsel, Clive Evatt, as a tour de force.

Cook delivered a sustained attack on the practices and arguments of, first, APRA, and next, the gramophone companies. He enunciated a single theme: a tribunal must be established to ensure that users could avoid commercial oppression. Only an independent arbitrator could prevent the suppliers of music from misusing their bargaining power to insist on conditions that restricted the supply, and increased the cost, of music delivered to the public.

Perhaps the outstanding virtue of Cook's address lay in his simple appeal for consideration of a neglected interest group – the public. He did not discuss at length how copyright music might be valued or the terms on which it should be licensed. Instead he emphasised that the public wanted music and the B Class stations supplied the public need in the most populated and the remotest parts of the country.

If APRA, through high prices, or the associated manufacturers, through the radio ban, restricted supply, the public suffered as much as his clients. Cook suggested symbiosis in the needs of the everyday listener and commercial radio stations:

When one takes these factors into consideration I submit it can be claimed with certainty that there is a public interest in any question which affect the life blood of the industry, that is music, and in view of that the desirability of the legislature's intervention arises.

Artfully, he insinuated that the suppliers of commercial music had each become a public menace. The need for a tribunal, he said, became clear “when one finds that you have a combination controlling an essential commodity and that that combination is dealing with an industry that is of public importance.” The associated manufacturers displayed the worst attributes of monopolists. While the gramophone companies pretended that they imposed the radio ban to defeat ruinous competition from broadcasters, in truth, they intended prohibition to maximise profits and drive radio stations out of business.

Cook proposed that the Government legislate to make arbitration of copyright licensing disputes compulsory once attempts at negotiation were exhausted. The principle of arbitration as a last resort greatly impressed Owen, who repeatedly made clear his opinion that any tribunal must be regarded as the last – rather than first – step taken towards determining rates. According to Cook, for an arbitral system to work, parties must first expect to try to resolve commercial disputes by negotiation. Under his proposed scheme, if they could not reach agreement they should try to appoint an arbitrator to hear evidence and make a ruling. If they could not agree an arbitrator, the Minister should be empowered to constitute an arbitral tribunal. The ruling of an arbitrator or tribunal so appointed would be a “common rule” binding on the parties.

Above all, he said, the public interest in access to the plentiful supply of commercial music must be maintained. The B Class stations were the people's voice. Cook told Owen that the oppressive commercial conduct of both APRA and the record manufacturers showed why the Commissioner should reject their arguments in favour of absolute freedom of negotiation. Only the possibility of recourse to an arbitral tribunal, said Cook, would restore harmony to the world of commercial music.

Cook also attacked Bonney's arguments for the mechanical performing right. If the copyright legislation described copyright as a 'sole' right, then either the author or the record manufacturer owned copyright but not both. The legislature undoubtedly intended the author (or assign) to be the 'sole' owner of copyright. Under section 19 of the British Act, copyright in records subsisted "as if" records were musical works, but for one purpose only: to enable the record manufacturer to sue counterfeiters for pirating records. The recommendations of the Gorrell Committee, the transcripts of its proceedings, and the parliamentary debates leading to the passing of the British Act, showed that legislators intended to confer a purely defensive copyright – the right to prevent unauthorised reproductions of records.

Support for APRA

John Keating, counsel assisting the Commission, now 61 years of age, seemed to enjoy reprising his old Parliamentary role as an arbiter of copyright destinies. As he did in the Senate in 1905, he began his final address to the Royal Commission by delivering a long and learned history of the copyright law. He then reached his starting premise: the musical performing right could not be impeached. APRA, as assignee, enjoyed the right absolutely. Only Parliament could abolish the performing right and so long as Parliament respected the long provenance of the right in British law, or considered itself bound by the Berne Convention, it would take no such step.

Keating concluded that APRA's rates seemed reasonable. He said, "I do not think there is anything in the evidence that has come before your Honour on the part of any witness which supports an objection to the quantum of APRA's charges." Owen replied that he considered it, "impossible to say on the present state of the evidence and [it] would be most unjust to say that their charges were extortionate or anything of that kind, but they do make certain charges which certain users object to very strongly, and give their reasons."

Keating went on to endorse APRA's function as the mediator of collective rights:

There is nothing, therefore, on the face of it to say that an organisation like APRA in Australia or the PRS in England is an organization which should not exist;

it may serve a very useful purpose ... it would be practically impossible for the persons whom the law gives rights under the Copyright Acts to be adequately protected and their rights adequately guarded were it not for some such combination.

Necessity for controls over performing right

Keating openly acknowledged that an unfettered right, such as the performing right, or a putative right, like the mechanical performing right, when combined with commercial strength, offered to its holder great temptation: the possibility of rapid enrichment gained at possibly ruinous cost to those who asked to be licensed to exercise the right.

Parliament must, suggested Keating, introduce controls to ensure that the holder of performing rights could not wield those rights like an absolute monarch but must instead submit, where necessary, to the injunctions of civil authority. If created, said Keating, a copyright tribunal would most likely bring the APRA wars to an end, and restrain the record manufacturers, if they secured common law recognition of the mechanical performing right.

But how could Parliament introduce controls? APRA claimed that international law and the policy of the British Copyright Act prohibited the Government from placing any limitations on the performing right. Treaty obligations, according to the collecting society, provided the strongest argument against government action. While the Rome Conference amended the Berne Convention to allow legislatures to impose restrictions on the broadcasting right, Australia had not yet ratified the Rome amendments, and the expiry date for ratification had passed.

The unamended Berne Convention, which admitted no limitation on the performing right, bound Australia. When passing the 1911 Copyright Act, the British legislature implemented the 1908 Berlin Conference amendments to the Berne Convention, intending that the performing right should apply without restriction. Only the compulsory recording licence imposed a restriction on the operation of an exclusive right, in this case the right to make a recording. According to APRA, unless Australia intended to endanger what Keating called “international comity” and “inter-imperial comity” on copyright questions, it could take no action to restrict the performing right.

Hearing these arguments, Owen expressed his concern about recommending any action that could be considered in breach of international law or offensive to the spirit of the Berne Union or the intent of the British Copyright Act. His counsel, however, did not share his fears. Keating told Owen of his certainty that Parliament could legislate to restrict the application of the performing right. He expressed confidence that he could turn APRA’s arguments over the requirements of international law, and legislative policy, on their head, and prove that Australia could pass laws to restrict the exercise of the performing right.

Keating made his case with subtlety and ingenuity. APRA, he said, reasoned from the correct premise. The Commonwealth must respect authors' rights. Whether Australia was, by elapse of time, debarred from ratifying the Rome Conference amendments, he did not know, though he did not think so. If Australia did, in the future, ratify the amendments, then the legislature could impose legislative restrictions on the broadcasting right without difficulty.

Australia, said Keating, must certainly avoid legislative action that curtailed authors' rights. *But*, he went on, no treaty obligation, or legal policy, stood in the way of legislation that imposed limits on the assignees, or licensees, of authors. The Berne Convention and the British Copyright Act recognised the assignability of copyright. APRA, the assignee of composers and authors, possessed in full the legal title to the musical performing right. However, the Convention and the British Copyright Act were intended to benefit authors and creators *not* their assigns or licensees.

As Keating pointed out, the Berlin Revision Conference in 1908 amended the Berne Convention to excise references to the author's "lawful representatives" or publishers. The new Article 4, which replaced the old Article 2 omitted references to personal representatives and in Article 6, which replaced Article 3, "publishers were swept off the map, and the privileges of the Convention were confined to authors."¹¹

The Convention, said Keating, "is intended for authors and authors only. It is not for the assignees, not for their lawful representatives even; it originally was, but it is not now." In his view, a plain reading of Article 4:

leaves it impossible to avoid or escape the inference that the Berlin Convention Article 4 as it stands today has no application whatever to such a body as APRA or to any merger or combination or persons or bodies corporate or unincorporated, such as the associated manufacturers. They have been outside the scope of the Conventions since 1908.

Power to create a tribunal and nature of tribunal

As assignee, APRA could exercise the exclusive rights and enforce its copyright, but it possessed "no standing under the Convention". The Association, said Keating, had legal standing "in general law as the assignee or as the attorney" of authors, "but not under the [British Copyright] Act". While the Convention constrained the Government from passing legislation that restricted the rights of authors, it in no way prevented the creation of a tribunal that would regulate

11 Keating said of Article 6, "Nothing could more clearly demonstrate the deliberate intent of the Convention at Berlin in 1908 to restrict the privileges and benefits of the Convention to authors and authors alone."

APRA's conduct. Rights conferred on the author through the legislative implementation of treaty obligations were inviolable, unless treaty amendment permitted qualification. However, once assigned, the rights were no longer unassailable. If the assignee exercised rights contrary to the public interest, the legislature could impose restrictions in the public interest.

The Commonwealth could, said Keating, legislate to create a copyright tribunal, and it should do so. But the tribunal should function as the forum of last resort. The parties to a dispute ought to be encouraged to resolve differences by ordinary commercial means and only after making best efforts to reach agreement should they refer the dispute for determination by an independent referee.

The tribunal should therefore be an occasional forum convened by a senior judge as circumstances demanded, and conducted with the minimum of procedural formality. The principle of "no discrimination" would apply to tribunal determinations. In other words, rates and conditions determined by the tribunal would apply to the whole class of users not simply to the party to proceedings. If the tribunal determined licence conditions to apply to one radio station, other stations could demand from APRA similar licences.

APRA's reporting obligations

With these conclusions, Owen enthusiastically agreed. He gave more cautious assent to Keating's succeeding propositions. APRA, declared Keating, appeared to conduct itself honourably, but it held a monopoly over musical performing rights, and any monopolist could abuse its power. The tribunal could force APRA to accept licensing conditions that reflected ordinary standards of reasonableness. But any individual or organisation lacking means would by necessity shun tribunal proceedings and be forced to accept whatever licence APRA offered.

It was crucial, therefore, to expose APRA's fees and distributions to public scrutiny. Parliament, Keating declared, should be asked to pass legislation requiring APRA to report annually on its sources of income and distributions. Critics of APRA told the Commission that they did not object to paying reasonable licence fees if they could be assured that the payments reached the individual composers of music. But they disliked charges seemingly calculated by reference to a single yardstick, the need to increase the revenues of publishers. Let APRA demonstrate in annual reports that it benefited the originators, said Keating. Additionally, APRA should be compelled to indemnify the subjects of mistaken copyright infringement claims.

Keating rejected the argument that APRA could not supply meaningful distribution reports since it remitted most funds collected to the Performing Right Society. Reporting income and the tiny proportion of receipts distributed in Australia would impose discipline on APRA and the Australian precedent might encourage other jurisdictions, including the United Kingdom, to require their per-

forming right societies to publish similar statements. In the foreseeable future, APRA could simply ask the PRS for lists of distributions made from income collected in Australia.

Keating on the gramophone companies

Keating spoke with less certainty about the associated manufacturers. He declared himself perplexed by, “the indefinite policy and course of conduct of the gramophone manufacturers”. Bonney claimed a mechanical performance right for the manufacturers, and justified the claim at length, but he would not say unequivocally that the record companies intended to rely on the right to enforce the radio ban. On the other hand, they would not say definitely that they asserted the right to withhold supply of records under patents legislation. Nor would they predict for how long they intended to maintain the ban.

At any rate, said Keating, the “position is a very serious one so far as Australia is concerned.” The ban threatened the future of B Class broadcasters. While he could think of no definite recommendation, something needed to be done. He suggested the Government should not be shy about tackling the record companies. In 1911, they acquired copyright in records in “a peculiar way” and the compulsory recording licence in no way placed them on an equal footing with authors as the intended beneficiaries of exclusive rights.

Until successfully contested, said Keating, the 1929 Chancery case *Thompson v Warner Bros* stood as authority for the principle that copyright legislation conferred no performing right on the manufacturers of gramophone records. They could not justify the ban on the basis that the broadcasters infringed their performing right in records. Relying on patents law to maintain the ban was only slightly less problematic. If the Government saw “any disposition on the part of the manufacturers to abuse the concessions and privileges” of patents law, it should respond as it ‘in its wisdom thinks fit.’

As Keating and Owen agreed, a tribunal determining licensing conditions would not assist the radio broadcasters affected by the radio ban. The jurisdiction of the proposed tribunal could not extend to deciding questions of law, including the legality of the radio ban. Keating then issued a veiled warning to the associated manufacturers. He suggested that if the radio ban continued, the Commonwealth could attack their conduct under the *Australian Industries Preservation Act 1906* – “an Act against monopolies” as Keating called it.

The question of the public interest

Keating ended his address by suggesting that copyright policy makers should consult the public interest when making policy. In the present instance, the “public interest is increasing because the demand on the part of the public is being

stimulated by the very activities of the radio broadcasting stations.” What the public needed should be the measure of how government determined policy. To hear music over the radio, the public depended on APRA and the broadcasters to reach agreement. “So the public is vitally interested in all relations between those two huge bodies.” The public “[is] vitally interested in seeing that they work together harmoniously” and the simple objective of government must be to bring accord to their relations.

The Royal Commissioner adopted a more pragmatic view:

The whole question to my mind is to what extent should the conflict between those rights of public demand, assuming the public interest is there, to what extent and in what way should these differences be adjusted.

Owen’s approach more truly anticipated the attitude of future copyright policy makers, who (despite contrary declarations) allowed political considerations, rather than abstractions such as the public interest, to guide policy formation. He declared himself attentive to the needs of APRA. “Any method,” he said, “of unjustly dealing with the controllers of this extraordinary asset [music copyright] is greatly to be deprecated, there is no question about that.”

Owen’s sympathy for APRA did not result from political calculation. Like most officers of government institutions, he reflexively favoured the interests of property. The social and economic effects of APRA’s stranglehold on the performing right did not much concern him. For the Royal Commissioner, an upstanding and highly conscientious man, a property right sanctioned by treaty, and adopted by the imperial legislature, must be right in principle. As custodian of the right, APRA, which in any case appeared to conduct its affairs reasonably, should be treated with primary consideration.

Owen, however, took no part of his commission lightly. He told Keating that the whole question of the performing right “impresses my mind at the moment and makes me anxious and troubled.” The Commissioner was sensitive to the public’s need for music. He referred Keating to an article in the April 1931 edition of the *Journal of Radio Law*, which examined the discussion of the rights of the public at the Rome Conference. In the article, the author, Dr W Hoffman referred to the subordination of private to public (or ‘State’) interest:

*Thus the right of the individual and the right of the public strongly conflict with each other in broadcasting and, at the Conference of Rome, M. Giannini had to employ all his skill to succeed in bringing together the divergent interests in the compromise formula of Article 11 bis of which the Committee’s report justly said, “The subcommittee wished thus to harmonise the rights of the author with the general interests of the State, to which individual interests should particularly submit themselves.”*¹²

Keating responded that the suppliers and users of commercial music “ought to be brought together, and the public is vitally interested in seeing that they work together harmoniously.” Owen acknowledged the point. The best the Commission could do was to recommend certain actions to allow the Government to better regulate performing rights.

And, as both men agreed, the most efficacious way of producing commercial harmony, at least in the case of the musical performing right, was to create a tribunal. The tribunal should be headed by a judge and constituted occasionally, on demand, as a last resort. It should be able to determine licensing terms in a flexible, efficient and relatively informal manner and create precedents to guide future commercial relations.

12 Dr W Hoffman article on Rome Convention in *Journal of Radio Law*, April 1931.

Chapter 8 – Beyond authors’ rights

THE ROYAL COMMISSION REPORT

Owen retreated to his home at the end of March 1933 to write the Royal Commission report. The Government published the report at the end of May 1933. With typical industry, Owen assimilated the complex testimony of 60 witnesses, and the subtle, conflicting arguments of counsel, to prepare a comprehensive survey of the disputes over performing rights. In writing the report, he performed his last act of public service. He died at home of cancer in January 1935.

The Royal Commissioner made 15 recommendations.¹ The first proposed the creation of a copyright tribunal to determine licensing conditions, and the majority of the following recommendations proposed the imposition on APRA of reporting and other obligations. The report recommended that Parliament determine whether record companies could lawfully claim the performing right and consider whether at the next Berne Convention Conference (scheduled for Brussels in 1935), Australia should lobby for legislatures to receive the explicit right to regulate performing right societies.

Owen dealt with his subject matter thematically. The first part of the report examined the history of APRA, the legality of the performing right and the issues surrounding APRA’s assertion and enforcement of the right. The second discussed in turn the concerns and proposals of each of the major users of commercial music. The third examined the radio ban, the claim for the mechanical performing right, and the arguments for invoking patents legislation to prohibit the supply of records. The report also considered the arguments for the institution of a tribunal, treaty considerations, the legislative powers of Parliament and the interests of the public.

1 See appendix 2.

APRA and the performing right

At the beginning of the report Owen asserted the legitimacy of the musical performing right. Musical performing rights, he wrote, were recognised in British law long prior to the 1911 Act and both the 1905 and 1912 Australian Acts recognised the right. Courts recognised the necessity for the existence of a body like APRA to safeguard the interests of musical authors. APRA, a monopoly, wielded immense power but the Commission heard no evidence to suggest that it claims were extortionate.

According to Owen, APRA “carries on its business on sound lines, is managed by capable and reasonable men, protects to the best of its ability the interests of the copyright owners it represents, accounts, as best it can, to those whose money it collects, and attempts to afford information to those who use or seek the music it claims to control.”

The Royal Commissioner recognised that its monopoly over the performing right in music gave it power that could be abused. APRA, said Owen, “can write its own terms ... and, unless the law be altered there can be no restraint upon its demands.” The “user in public and the community itself” were dependent on its goodwill. “It cannot be said,” wrote Owen, “that the demands made hitherto have been extortionate, but they can be made so.” A tribunal would provide music users with redress against the misuse of APRA’s power.

But as Owen carefully pointed out, while the tribunal would determine fees and other licensing conditions, his readers should not draw the conclusion that APRA’s levies were too high. The Commissioner disagreed with views expressed six years earlier in the report of the Royal Commission on Wireless. In 1927, the royal commissioners concluded that APRA’s fees were out of proportion to “the service rendered or value given” by the collecting society.

Owen acknowledged their views but tactfully suggested that the earlier commissioners were not adequately informed about the behaviour of APRA. They received, he explained, “evidence that was far less complete than has been placed before the present Commission.” Owen politely ignored their criticism APRA.

He acknowledged, however, that the users of music all expressed “strong feeling” that APRA appeared to operate for the benefit of publishers not the authors to whom most users agreed licence fees collected should be disbursed. He recognised the inadequacies of APRA’s reporting:

The balance fees prepared annually by the Australasian Performing Right Association are not available to users of music, do not furnish details of the distribution of fees collected, and afford no information as to how publisher members allocate the fees coming to them.

The report said that to bolster public confidence, APRA should be required to file annual accounts setting out details of fees received and distributed and furnish a

list of members. Additionally, APRA should supply complete lists of its repertoire or, if this was not possible, lists of the works it wished to protect.

Broadcasters

Owen's report extolled the public benefits of radio broadcasting and asked a simple question:

Should not the rights of authors, composers and publishers be harmonized with the general interests of the State, to which individual interests should particularly submit themselves?

He declared his sympathy for radio stations facing rising imposts from APRA and constriction in the supply of records. Too much broadcasting of records "must prejudice sales" but conditions "imposing constant announcement of the make, titles etc of records" were "unfair". Broadcasters were at APRA's mercy. If, as claimed, broadcasting caused falling sales of sheet music and records, APRA could remedy income deficits by increasing its levies.

Whatever the effect of broadcasting on sales, licensing revenues were safe. In Owen's opinion, while broadcasting did contribute to the falling sale of records, the Great Depression contributed most directly to the downturn in sales.

The Royal Commissioner also dismissed APRA's attempt to discredit the ABC's complaint about the disparity between fees paid by the national broadcaster compared with those paid by the B Class stations. The ABC argued that it should not be charged fees higher than those paid by the commercial stations. APRA responded by asserting that the rates paid by the commercial stations were too low. According to APRA the lower rate should be raised, not the reverse. Owen disagreed. He wrote:

The Australian Broadcasting Commission not unfairly points out, not that the charge of from 3d to ½ d per item levied on the 'B' Class stations is too low, but that the proposed charge to the National stations is far too high.

Owen emphasised that the B Class stations deserved consideration. They could not be classified, like the ABC, as a public utility but they performed a valuable function in disseminating the benefits of broadcasting, including the playing of music, to all parts of Australia:

The "B" Class stations meet a public demand which at present and for some years the National stations cannot fill. They bring within the reach of listeners valuable and interesting information, speeches, lectures and addresses on matters of public importance, and classical music of value from an educational point

of view. It is true they operate in order to make a profit, but none the less stations render a useful public service.

The record companies

Turning to the associated manufacturers, Owen concentrated on the radio ban, specifically the claimed cause of the ban – the fall in record sales – and dealt only briefly with his greater concern, the claim for the mechanical performing right. Surprisingly, he devoted only a page to topics that occupied a considerable amount of the Royal Commission's time, and, as revealed by transcripts, undoubtedly caused the Commissioner anxiety, which he confessed to Keating.

The report acknowledged that in 1927–1931, the record companies suffered “a remarkable falling off in sales”. In those four years, the principal distributor for the manufacturers, Hoffnung and Company, posted a drop in sales of almost 80 per cent. “The real question,” wrote Owen, “is to what cause or causes should this be attributed.” He considered economic depression to be the main reason for the sales catastrophe. Though the record companies argued that continuous playing of new releases discouraged listeners from buying records, in the years before the Depression they viewed broadcasting “as a means of advertising their records over the air”. When the effects of economic depression ceased to distort sales figures, it might be seen, wrote Owen, that music broadcasting boosted demand for records.

As he pointed out, if the record companies were correct about the effect of broadcasting, the radio ban should have helped them to rapidly recover their economic position. The companies, though, would not provide sales figure for the first 12 months of the ban, saying they needed a longer period to accurately assess its effectiveness. The Commissioner disagreed, implying his suspicion that the ban reflected a simple, misguided, desire to stamp out a rival for the attention of music listeners.

Even under current conditions, wrote Owen, radio broadcasting gave “much and valuable advertisement” to records, though stations ought to be careful not to overplay hits. Additionally, they ought to broadcast some details of songs played, including the title of the song and the name of the company that produced the song recording. The report suggested that the associated manufacturers were mistaken to view the broadcasters as economic rivals. But creating commercial peace between the two posed an “apparently insuperable difficulty”.

Owen's sympathies, not overtly expressed, undoubtedly lay with the commercial radio stations. He discussed the associated manufacturers' control over the production and supply of records in Australia, indicating that they functioned as a monopoly, but he stopped short of stating that they intended the radio ban to drive perceived competitors out of business.

The Report referred ambiguously to the possibility of “legislative action” to

end the radio ban, but Owen concluded that a commercial dispute over supply did not warrant the Commission recommending such action. Only if “the public at large” called for legislation should the Government respond.

Owen did not equivocate on the subject of the claimed mechanical performing right. The report noted that the common law did not support the adducing of such a right. It was “by no means clear” that the British legislature in 1911 intended to create the claimed right. And the idea of the manufacturer’s performing right in a record raised philosophic and practical difficulties.

In the first place, it seemed self-evident that the playing of a record involved a single acoustic performance, which implied the existence of a single performing right that must properly vest in the creator of the music heard – not “the maker of mechanical contrivance” that functioned to allow the music to be heard. Secondly, if the manufacturers’ performing right were recognised, users would be asked to accept conditions, and pay fees, to use two separate rights. The effect on commerce would be “extraordinary”.

The Tribunal

Having outlined the differences between the suppliers and users of commercial music, and their individual characteristics and concerns, Owen turned to the real purpose of holding the Royal Commission: identifying appropriate measures to bring harmony to the relations between the users and suppliers of copyright music. For the Commissioner, the most necessary step required the legislature to create an arbitral tribunal. As he wrote in the report, the “claim that some form of tribunal should be constituted finally to determine disputes is supported by every class of user and is based on clearly established facts.”

While the suppliers of music argued that “interference by a tribunal is an invasion of the right of contract”, the public performance of music was a public good, and the needs of the public must be preferred to the preferences of APRA and the record companies. The report said that, “the question is whether the interests of those who control most of the music should not be made to give way, to an extent at any rate, to the good of the people.”

Owen also advised that a tribunal or some form of compulsory arbitration was necessary to resolve the dispute between the associated manufacturers and the radio stations – it was “contrary to the interest of the public that these disputes should exist or should continue.” In support of the idea of a tribunal, he pointed out that in the United Kingdom the Music Users’ Association had pressed for some form of tribunal while the users also strongly urged a Select Committee of the House of Commons to recommend the creation of a tribunal.

In Italy, an Arbitration Commission determined copyright disputes, while in Norway the Minister could authorise the broadcasting of works and fix rates of remuneration to authors. In the United States, radio stations intended to ask fed-

eral authorities to either dissolve the American Performing Right Association for monopoly practice or to create a copyright tribunal. The Australian tribunal, if created, should not be made in the image of Federal or State Arbitration Courts.

As Owen observed, a tribunal constituted like a court would display the disadvantages of a permanent court – delay, expense and the fostering of a spirit of litigation. The copyright tribunal should adopt simple and inexpensive methods and procedures and need only be convened by application to the Minister. The Minister would then simply refer the dispute for determination or arbitration by a competent person.

The report indicated that if the system envisaged by Owen were implemented, an arbitrator would constitute the tribunal to hear disputes as necessary. In complex matters, the single arbitrator might be joined by others. Owen suggested the appointment of a senior judicial officer to the post of arbitrator and explicitly rejected proposals for the appointment of one of the presidents of the State chartered accountancy institutes, or the Solicitor General or the Registrar of Copyrights.

“Miscellaneous users of music”

Miscellaneous users of music referred to in the Report included the Australian Steamship Owners' Federation, catering industries, cinematograph exhibitors, municipal and shire associations, retail traders and religious and charitable bodies. Owen considered the argument of shipping companies that live or gramophone music played on ships was not-for-profit to be “unsound” but commented no further. He expressed sympathy for the argument of hotels, cafes and boarding houses that none played music on their premises for profit, but again offered no definite comment.

On the other hand, he endorsed the proposals of the cinematograph exhibitors who asked for the establishment of a tribunal to determine licensing conditions and the introduction of a requirement for APRA to file lists of charge, to be reviewed, when necessary, by the Minister.

The municipal organisations presented arguments that evidently caused Owen difficulty, and he chose to summarise their contentions without himself drawing conclusions. The associations claimed that music played in public halls promoted interest in music, and performances usually occurred during no-fee or charitable events. The associations, however, showed no inclination to pay fees at all. Only about 20 halls throughout Australia paid APRA copyright fees. The rest did not dispute APRA's levies on the grounds that they were too high but that they should not be made at all.

Turning to the complaints of retail trade associations of various States, Owen again made no findings. He recited the associations' complaints: they did not argue that APRA's fees were too high but rather that they could not understand

the basis on which fees were determined and they could not prevent APRA from capriciously increasing charges at any time. Additionally, their members could supply APRA with returns of music performed giving details of titles, authors and composers etc.

APRA reserved the right to charge licence fees for the performance of music in churches and the premises of other religious venues or charities. Usually, it waived fees but it did charge broadcasters for the broadcasting of religious services. APRA's claim for fees in these instances, said Owen, was "unreasonable". In a number of instances APRA had acted "hastily and without reasonable consideration for the difficulties of some users of music". The report implied, but did not state, that APRA should refrain from collecting copyright fees from religious or charitable bodies.

Conclusions

After extensively discussing the claims of the suppliers and users of commercial music, and the environment in which they negotiated terms of use, Owen summarised his findings. APRA he called a "super-monopoly" and the associated manufacturers an effective monopoly. Individually or together they could exert their market power to interrupt or wholly stop the supply of commercial music to the public. Both could grievously harm the commercial users of copyright music, in particular, the broadcasters. The establishment of a copyright tribunal would help to prevent either collective from abusing its monopoly power, and ensure that the controllers of music supplied music to users on reasonable terms.

Owen declined to report on the reasonableness of the charges and licensing conditions imposed by APRA or the merits of the radio ban. But he did make certain adverse findings. APRA's charges to the ABC were "excessive" and the ABC's offer to pay 6 per cent of revenue in licence fees was "reasonably fair". APRA's rates charged to the B Class stations for 1932 were "reasonably fair". Charges to picture theatres were "excessive" and obligations concerning the making of distribution returns required modification.

Charges to other users, such as ship owners, hotels, restaurants and cafes were "not calculated on any reasonably settled basis" and complaints were justified. The associated manufacturers should offer to the B Class stations the same terms for the supply of records as those offered to the ABC. Finally, the terms of agreements or licences for the use of records or musical works should be from two to three years.

Owen explained that public necessity prompted his call for legislation to end the copyright wars. If disputes between the controllers and users of music were private in scope, Parliament would have no obvious motives to intervene. But the copyright disputes investigated by the Royal Commission caused people at large detriment. The need to protect the public justified legislative intervention.

Owen acknowledged the common perception that copyright owners were insatiable and demanded revenue from all conceivable sources. As he pointed out, broadcasting and the gramophone hugely increased the numbers able to hear public performances of music, and the owners and suppliers of copyright music demanded remuneration from all the public disseminators of music. Relay broadcasting, the rediffusion of music by speakers, the use of records for broadcasting, the playing of music at religious services or for charitable services – all were the subject of claims for payment.

The report emphasised that while authors, composers and publishers were “entitled to every consideration” their interest must “be reconciled with those of the listening public.” Owen pointedly omitted to refer to the record companies when listing the interests deserving “every consideration”. His recommendations reflected both his, and Keating’s, principled attitude towards legal reform. Neither could step outside the narrow parameters of their inquiry – they could not, even if they wished to, disparage the performing right – but they could, and did, propose an adjudicative solution to the problems posed by APRA’s monopoly power.

The proposed solution anticipated the establishment of today’s Copyright Tribunal, the imperfect bequest, in an abstract sense, of copyright users demanding checks on APRA’s power. Owen, a stickler for ethical commercial practice, followed Keating’s recommendation and proposed that APRA be compelled to report on income and distributions. To the frustration of aggrieved licensees confronted with APRA’s payment demands (and later those of other collecting societies), the Australian legislature never implemented this proposal.

In the end, Owen’s report reflected a conventional respect for authors’ rights and a pragmatic search for ways to moderate, in the public interest, the exercise of absolute entitlements. The limited discussion of the record companies’ claim for a mechanical performance right, and the disavowal of that claim, reveal Owen not as a visionary but rather a man of his time – a time about to be extinguished by the era of copyright industries demanding and receiving the suite of analogous rights that placed them on an equal footing with authors.

THE GOVERNMENT’S RESPONSE

The Government printed the Royal Commission’s report at the end of May 1933, and waited until the beginning of the Spring session in August before releasing it to Parliament. While most observers reacted mutely to the report, APRA orchestrated a firestorm of protest from foreign performing right societies and various famous composers. How much their protest influenced the Government’s response to the report is hard to judge. John Latham, the Minister most likely to shape that response, would soon retire from politics, and seemed disengaged from

his portfolio.

Now 56 years old, a major figure in federal politics for the last decade, the Attorney General harboured no illusions about his future in Canberra. The Prime Minister, Joe Lyons, a skilful and adaptable leader, would win another two terms of office and always proved more adept than his deputy at uniting the disparate factions of the UAP. Latham, who stood aside at the inception of the UAP to let Lyons lead the new party, accepted that he would never replace Lyons, two years his junior, as Prime Minister.

When APRA began campaigning to discredit the findings of the Royal Commission, Latham knew that Lyons would appoint him Chief Justice of the High Court after the imminent retirement of the ancient Sir Frank Gavan Duffy, then 81 years of age. What he thought of Owen's report is hard to tell. He seems not have thought much about copyright questions after his initial burst of energy in 1932. Hoping, perhaps, to be remembered as the lucid and uncompromising practitioner of principle in politics, he probably felt averse to steering the Government into a noisy public quarrel with APRA.

At any rate, Latham decided against recommending that Cabinet accept Owen's recommendations. The Government implemented only one of the 15 legislative amendments proposed by the Royal Commission to regulate the exercise of performing rights in Australia. Recommendation 8 of the report proposed legislation to provide "a remedy in case of groundless threats of legal proceedings" by APRA and in 1935 Parliament passed implementing legislation.

Voluntary arbitration

Latham did not give way to APRA entirely. After publication of the Commission's Report, he instructed his department to prepare an amending bill to permit the voluntary arbitration of performing rights. But why Latham considered the amending legislation, passed in December 1933, would have any positive effect, is mysterious.

The new provision in the Copyright Act did not confer a substantively new legal entitlement, though it allowed the parties to regard the referee of their squabble as a simulacrum of government authority. Section 13A provided that disputants could apply to the Attorney General "for the determination of their quarrel by voluntary arbitration by an arbitrator mutually selected, or, failing such selection, by the Governor General".

Not surprisingly, everyone involved in the arguments over the performing rights greeted the legislation with indifference. A quarter of a century after its enactment, the Spicer Committee, reviewing the copyright law, reported that section 13A remained unused. For over 30 years it lived quietly in the lowlands of the Copyright Act, probably the most pointless ordinance passed in Latham's long career as the Commonwealth's first law officer.

A reason for Latham endorsing so meaningless an enactment is not hard to guess. He perhaps no longer had the stomach for the intricacies, and the rough and tumble, of the war over performing rights. Section 13A achieved nothing practical but the provision gave the appearance of responding to the Royal Commission's principal recommendation, and caused no offence to APRA. Latham could even believe, if he chose, that the amendment in some way implemented a legislative solution he had supported since the 1920s.

In his first period as Attorney, Latham advocated in private the necessity for the compulsory arbitration of performing right disputes. Only by this measure, he thought, could parties with no negotiating power – the users of music – hope to deal on more equal terms with a leviathan like APRA. When, in 1927, the Picture Showmen's Association suggested that the Government pass legislation to allow for compulsory arbitration, he told his department to prepare a draft arbitration bill. Latham may have considered asking Cabinet to approve the bill for introduction to Parliament, but if he did so, he ran out of time. His party lost office in 1929, and when he resumed his post as Attorney in 1932, he decided on a wide-ranging inquiry into the performing right – the Royal Commission.

For Latham in 1933, the Commission's report proposing wide-ranging copyright legislation, and a furious APRA, probably seemed like twin serpents weaving circles on the path ahead. By securing the introduction of section 13A, the Attorney neatly avoided both. A provision allowing for government-sanctioned voluntary arbitration suggested Government responsiveness while allowing Latham to quietly wind up his long involvement in copyright policy-making. Since the legislation offended no-one, and since the Government's indifference to Owen's recommendations suited APRA and the record manufacturers, no-one protested as the Royal Commission report disappeared into the maw of history.

The formal Government response and Owen's views

In October 1933, Latham told Parliament that the Government did not intend to implement the Royal Commission's legislative proposals. The Commission's recommendations raised difficult legal and practical questions and he hope to achieve solutions by encouraging agreement between the parties. Negotiated outcomes to resolve disputes, he said, were preferable to legislation. The Attorney received support from an unexpected quarter. Shortly after Latham's announcement to Parliament, Owen wrote to him concurring with the need to resolve differences by negotiation.

According to Owen, "only obstinacy and an absence of sweet reasonableness seemed to keep the parties apart." He told Latham that in his report, he "intended to convey ... that legislation should be resorted to only if agreement was found to be impossible." The rights of copyright owners, he said, including the record companies, "should only be interfered with or curtailed if, failing agreement, the

public interest demanded legislative action.” For Owen, “it was obvious that on most of the important issues, agreement between the two parties was not only desirable but possible.”

Thus the resolution for which Latham laboured with intelligence and determination from the early days of his first term as Attorney General never materialised. In the last days of his office it lay within his power to propose a settlement that anticipated some changes introduced in the new Copyright Act of 1968, most notably the introduction of the Copyright Tribunal. He might even have overseen the introduction of revolutionary legislation that required APRA to report publicly on income distributions. Less dramatically, he could have secured amendments that made the rediffusion of broadcasts non-remunerable.

But Latham knew that if the Government implemented Owen’s recommendations, the way ahead would be fraught with danger and difficulty. APRA and the record companies, giants opposed to legislative action, stood in the way. And it was by no means clear, to judge from the conflicting noises of legal experts, that the Commonwealth could amend the copyright legislation to restrict the operation of the performing right and permit compulsory arbitration.

Latham, his gaze now fixed on new fields of endeavour, evidently saw no benefit in steering the Government down the path of reform. For another 12 months he settled his political affairs, resigning before the next General Election in October 1934, and handing his seat and ministry to a forceful newcomer – Robert Menzies. Latham began his new duties as Chief Justice of the High Court in February 1935.

LATHAM’S LEGACY

Latham left a mixed legacy. Intellectually, few, if any, of his predecessors or successors equalled him. None managed the copyright law regulatory process with the same sustained attention for so long a period. None understood so clearly the constraints and necessities that simultaneously inhibited and motivated Commonwealth policy makers entrusted with the task of copyright law reform.

But unlike some others, Latham failed to grasp the nettle. He decided in the 1920s that the best way to end the APRA wars was to legislate to allow the compulsory arbitration of copyright disputes, and his department prepared draft arbitration legislation. In the 1930s, however, he decided not to support the Owen Royal Commission’s central recommendation, that the Government create a copyright tribunal to determine quarrels over performing rights.

From the early days of APRA’s battles with music users, Latham knew that users demanded that APRA publicly disclose details of its income distributions. Yet he declined to support Owen’s proposal for the Government to compel such disclosure. He harboured no illusions about APRA’s intentions, but when he

departed office commercial music users, the ABC especially, were no better positioned in their negotiations with APRA than 10 years before.

Latham chose to share Owen's illusion that the controllers and users of commercial music were a mere step away from resolving, in an equitable way, their differences over fees and the conditions of music licensing. To accept the illusion meant ignoring the reality that APRA (by unequivocal legal right) and the record companies (by asserted legal right) controlled the performance of music without limitation. Allowing for boundaries of pragmatism or necessity, they could dictate the licence terms accepted by users.

In part, Latham's response to the recommendations of the Royal Commission's reflected his temperament. In politics, the man described by the press as "the disembodied brain" and "the last proud scion in a long line of pokers", easily discerned principles of action and the necessities of policy. But he was a thinker not a finisher. Though he reformed the arbitration laws in the late 1920s, his application of the legislation contributed to an industrial relations quagmire that ended in the defeat of his Government.

Latham disliked in principle the idea of government interposing between parties striking a bargain. As his use of the arbitration provisions to harass unions showed, the problems caused by inequality of bargaining power occupied his mind far less than those resulting from unlawful or unsavoury behaviour. More importantly, though, Latham abandoned the cause of copyright law reform, a cause he took seriously, because time ran out. Committed to a new career, he wanted to spend his last year in office tying the loose ends of policy not corralling the dogs of copyright war.

His unwillingness to make a final effort to resolve performing rights issues can only be seen, in hindsight, as an abnegation of responsibility. Latham left all users of commercial music, but the broadcasters especially, in the lurch. He left his colleague, the Postmaster General, to struggle on unaided with broadcasting regulation. For the rest of the decade, successive Postmasters General fought the APRA dragon, trying to ensure that public performance fees did not wreak havoc on an industry still trying to find financial stability. Their shared bitterness against APRA spilled over in a stormy parliamentary debate in 1939. But they might also have criticised – and in private perhaps did – the quiescence of Latham in 1933. Latham, the advocate of free enterprise, the scourge of unions, proved maladroit at combating the evils of monopoly.

Latham, it seems, simply closed his eyes to the difficulties ahead, and the likelihood that his inaction would amplify those difficulties. He perhaps told himself that the Owen Report highlighted the issues confronting copyright policy makers and suggested a path of reform. He chose not to follow that path but he knew that his successors could profitably consult Owen's findings in the future. In the meantime, he possibly reassured himself with the thought that the suppliers and users of copyright music knew much more about each other than before, and

could be expected to agree to a semblance of peace in the copyright world.

RECOGNITION OF THE MECHANICAL PERFORMING RIGHT

Months before Latham left Canberra, he learnt that the Chancery Division of the High Court in London had recognised the existence of a mechanical performing right. In *Gramophone Company Limited v Stephen Cawardine and Company*,² a case heard in December 1933, but decided the following year, Justice Maugham ruled that the owners of copyright in records were entitled to control public performances of the records.

Maugham judgment limited the record owner's performing right in one important way. He asserted that record owner's performance right must be "subordinate" to the "original" copyright of the owner of the copyright in works. Accordingly, if the owner of the subordinate copyright permitted the playing of a record in public, the owner of original copyright could prohibit the performance. Subject to this limitation, however, the owner of copyright in records could license for profit the playing of records in public.

Maugham's decision doubtless stunned Australian watchers, though the official records disclose little about the reactions of bureaucrats or politicians. Latham may perhaps have been fleetingly interested. Owen, who greatly feared the consequences of users having to pay to exercise two performing rights, would certainly have felt disappointed. Keating, not so worried about the prospect of two payments, probably read the decision with growing bemusement. The record manufacturers, as they digested the implications of the case, were surely jubilant. The decision, though not binding in Australia, lent persuasive support to their argument for the mechanical performing right, and validated their legal justification for the radio ban.

From the modern perspective, the judgment is important chiefly for another reason. It signifies something like the first breathless entry of new kings into the inner sanctum of the copyright temple: here, they pick up the stone idols dedicated to authors' rights and smash them against the wall. Soon, no-one dared to doubt the claim of the recording, film and broadcasting industries to be treated by the polity with the same consideration, and perhaps more, than that shown authors.

2 1 Ch 451 [1934].

Influence of Justice Maugham

The result in *Cawardine* vindicated the arguments of John Drummond Robertson in the London copyright debates of 1909 and 1911. Another judge may have responded to the submissions differently. In Frederick Maugham, the proponents of mechanical rights found, fortuitously, a judge who made his mind up in original ways. In him they happily discovered a cussed rationalist – a little like Latham – who mixed detachment with a few strong aversions.

For the creative vocation he felt none of the sentiment overflowing in the delegates of the Berne Union. The literary success of his brother Somerset Maugham annoyed him greatly. Frederick's only son Robin, whom he considered a wastrel, became a writer, and benefited from Somerset's tutelage. Frederick disliked his brother and son and they warmly reciprocated his feelings. Robin, in a book of reflections on his uncle, said that Somerset Maugham felt certain he would make a much better judge than his brother, while Frederick never wavered from the belief that he possessed the greater literary talent.³

When he came to decide the case, Justice Maugham is unlikely to have felt any trace of kindness towards authors. Stripped of sentimental vagaries about the vocation of writers, arguments for authors' rights sometimes appear threadbare, and Maugham applied cold logic to determine that effort and investment can properly be accorded copyright protection as readily as creative endeavour.

It would be a mistake to assume that his aversion to his literary relatives, or his disdain for their choice of career, caused him to favour the gramophone industry. The Gramophone Company hired as its chief barrister Sir Stafford Cripps, an upper class socialist Labour MP and politically Maugham's antithesis. Maugham, later a Conservative Lord Chancellor, appointed first a hereditary, then a life, peer, probably regarded Cripps as a quisling who betrayed his caste to espouse class warfare.⁴ He may have felt a degree of animus towards Cripps similar to that he displayed to his brother and son. But like Latham, he looked with detachment at the evidence, and regarded with equal frostiness the human beings arguing before him.

The arguments in *Cawardine*

The Gramophone Company brought *Cawardine* as a test case to determine the

3 Robin Maugham, *Somerset and all the Maughams*, 1966.

4 A highly successful barrister from a rich family, Cripps joined the Labour Party in 1930 and became Solicitor General the following year. An evangelical Christian and doctrinaire Marxist (except in religious matters) he helped found the Socialist League in 1932. He became Chancellor of the Exchequer in the Labour Government in 1947 and retired from politics in 1950. He died in 1952 aged 62.

scope of its rights under section 19, the compulsory licensing provision of the British Copyright Act. Cawardine, the defendant company, played records made by the Gramophone Company in its tea and coffee rooms. The plaintiff asked a simple question. Could it obtain an injunction to restrain the defendant from infringing its copyright in records by playing those records in public?

Cripps presented an uncomplicated argument. Under section 19, the Gramophone Company owned copyright in the records. The copyright in a record comprised the elements of copyright set out in section 1 of the Act. The owner could therefore prevent third parties from playing the record in public without consent. Cawardine's counsel argued that the "rights" of copyright enumerated in section 1 were 'sole' rights that vested solely in the owner of copyright in works. Only the owner of the embodied works could prevent the playing of a record in public. The argument for a "performance" right in a record involved a "complete contradiction in terms."

Maugham resolved the conflicting arguments adeptly by accepting the fundamental propositions of both sides. Yes, he agreed, the copyright of the owners of works took precedence over that of the makers of recordings. But the superiority of their copyright did not prevent the makers of records from asserting a public performance right. The right remained subordinate to the original copyright subsisting in works. According to Maugham original and subordinate, or special, copyright co-existed. The sole rights of copyright in section 1 vested in the original owner of copyright, but the owner of subordinate copyright could, so long as the copyrights did not conflict, control the playing of records in public. He said:

Therefore in my opinion the original owner has under s.1 of the Act the sole right or performing the work in public, and this includes the sole right of performing the work by any mechanical means, and the existence of what I have termed special copyright under s. 19 does not derogate from this right of the original owner. If the contrary had been intended I should certainly have expected clear words in s. 19 to that effect, and they are not to be found.

Maugham indulged in the judicial vice of inventing legislative intent to support his suppositions. When the legislators in 1911 approved section 19, they made themselves clear on only one point: the necessity for compulsory licensing to avoid monopoly conduct by authors. They did not clarify why they created a manufacturer's copyright or make clear the intended scope of the copyright. Nor did they say anything that justified the inference that they intended to create a subordinate copyright.

New insight

Maugham produced a sleight of hand and a compelling one. The pragmatic temptation is to agree that positive rights can fairly be deduced from lacunae in legislation and the silence of the legislature. But nothing in the Act positively indicated that the subordinate right to control the reproduction of records made under compulsory licence included a subordinate right of public performance.

Judicial inventiveness may sometimes be necessary to make sense of legislation, and though Maugham made unjustified inferences about Parliament's intent, his expedient fictions about original and subordinate copyright offered new insight into the function of copyright. What is most interesting about his judgment, though, is that he stated, as if channelling the spirit of Drummond Robertson, a purely utilitarian view of the basis for copyright.

He described the finding of a mechanical performing right as a matter of fairness:

It is, in my opinion, a reasonable construction that the owner of a special copyright under s. 19 in a record of which he is the owner has the sole right to use that record for a performance in public, provided that the overriding rights of the original owner do not intervene ... I see no fairness or injustice that is likely to arise from my construction of the section. On the other hand, I can see considerable objection from that standpoint, to the view that persons may obtain, without doing anything more than buying a record, the advantage of the work, skill and labour expended by the makers of gramophone records for the purposes of a public performance.

Earlier, Maugham referred to the “skill, both of a technical and a musical kind” needed in making records. He emphasised also that to make records, companies need to invest considerable capital and hire skilled producers, technicians and performers. The gramophone industry's scale of investment, Maugham implied, deserved reward. He did not mention the Royal Commission on Performing Rights but the Australian inquiry also discussed the relevance of industry investment to the award of legal rights.⁵

Maugham evidently believed that courts and governments should be solicitous to those who invested in industries that produced or disseminated copyright material. He willingly dispensed with slogans about authors' rights to proclaim

5 Reginald Bonney, counsel for the associated manufacturers, stated unequivocally that investment leading to production deserved legal protection, and he explained why – investment is necessary to produce records, and the value of a record is evidenced not only by its purchase but the playing of it. The performance value of a record justified recognition of the mechanical performing right.

something that few in public life were yet prepared to say – that effort and investment entitled the copyright industrialists to the rewards and protections of copyright legislation. After *Cawardine*, the industrialists felt no fear in announcing that they, as much as creators, deserved legislation that fenced out imitators and protected them from predation.

AFTER LATHAM

Robert Menzies, Latham's 39-year-old successor as the Member for Kooyong, also replaced Latham as Attorney General and Minister for Industry in October 1934. Intellectually highly gifted, Menzies applied his brains and energy far more to questions of industry, trade and international relations than copyright policy. His first significant participation in copyright policy affairs also seems to have been his last. In early 1935, Menzies met the representatives of APRA and the commercial radio stations to discuss their continuing dispute over licence fees and displayed impressive grasp of new subject matter.

The meeting took place in Sydney on Saturday 26 January, Australia Day, and Menzies made clear that he was donating his time generously to the assembled antagonists. "I am not wishing my services on you," he said, "I have plenty of other things to do". Earlier, he said, "I am here in an unofficial way because the Crown is not immediately concerned in this thing." Starting proceedings at 11 am and continuing for well over two hours, he controlled the meeting with the mixture of logic, intelligence, impatience and flashes of humour, that in a few years carried him to the Lodge.

Menzies asked the warring parties to make peace. The public, he said, "have some interest in this, that is why I thought I would get you together to see whether we can evade all that sort of thing." His efforts were partly successful and the parties agreed to extend the term of their existing agreement to the end of 1935. From the modern perspective, however, the future Prime Minister's notes of the meeting are more revealing than the transcript of proceedings.

Menzies had little sympathy for the commercial broadcasters. They paid, in total, copyright fees one tenth the size of the fees levied on the ABC, and still pressed for a 25 per cent discount. He wrote that they were "not sincere." But he felt no more sympathy for APRA. "A.P.R.A.," he noted, "is not free from blame. It is the most effective performing right collecting agency in the world. Its revenue is proportionately the greatest but it is never satisfied."

Menzies understood that APRA obeyed an internal law of engorgement: left alone, it would suck revenue from any available source without limit or cessation. He saw also that it fell to the Government to create the machinery to moderate APRA's claims. The Association "should be given to understand," he wrote in his notes, "that a halt must be called somewhere. The percentage increases of the

past few years have a snowball effect and will ultimately lead to the B Class Stations paying as much as the highly financial A Class stations.”

Menzies last sentence proved prophetic. “The other outstanding matters in dispute,” he wrote, “will never be settled until the whole of the Copyright Law is recast.” His notes also tacitly acknowledged that bargaining strength, not agreement on the intrinsic merits of copyright material, determined the fees extracted by copyright owners. Speaking of the “steps” involved in deciding fees, he declared, “I admit they are purely arbitrary but you have got to come to arbitrary arrangement some day.”

Menzies views on performing right fees and copyright regulation generally are perhaps best revealed in a comment made during the middle of the Australia Day meeting. “You could stay here till the crack of doom and never work out a [valuation] formula,” he told his audience. Menzies was an ambitious politician in a hurry. Unlike Latham, he did not take an interest in the law for its own sake. In the handful of years before he became Prime Minister, he did not intend to waste time conciliating and coddling businessmen who could make their own bargains.

He no doubt anticipated that as Latham predicted – correctly – the suppliers and users of music would reach commercial accommodations. So they did. Soon enough, commercial users agreed to the terms offered by the suppliers of music. Self-regulation secured supply and delivered music to the public. For Menzies, silence in the world of performing rights was enough. He did not have time to consider the deeper questions that Latham pondered and ultimately abandoned.

Appropriately, perhaps, Langer Owen died at home in Bellevue Hill the day before Menzies’ meeting a few kilometres away in Sydney. In every way a gentleman, he wanted to see good intentions in those who appeared before him. With him passed an era in which the Government engaged actively in copyright politics on behalf of the public. The new era under Menzies appeared very different.

THE MENZIES YEARS

Policy quietism and APRA’s consolidation

For the remainder of the decade, copyright users paid up and shut up. As the Owen Report vanished from memory, and after Latham departed to Melbourne, users calculated that their chances of effectively resisting the APRA-gramophone company Goliath were negligible. When the main advocates for the public interest departed the political scene, they were like David deprived of his sling. The problem was not that APRA and the gramophone companies invariably acted raptaciously or treated the commercial users unfairly. The radio broadcasters, the cinema exhibitors and the local government associations were capable of looking after themselves. But the public knew little about commercial transactions that

imposed public costs.⁶

Policy quietism entrenched the idea that the copyright owner's exclusive rights are the expressions of moral necessity. Left to regulate themselves, the suppliers and users of music continued their arguments over licence fees. The suppliers soon enough forced the consent of users to new agreements and created in the second half of the 1930s the prototype of the modern copyright collecting system. They extracted growing revenues for the aggregate use of copyright works and reinforced the dominance of copyright owners over users. Revenue and more revenue became the silent catchcries of APRA and the record companies, although the latter were yet to demand performance levies from radio broadcasters.

APRA collected fees from the source most able and willing to pay – the ABC – and concentrated on increasing the flow of revenue from secondary sources, including the B Class stations and cinemas. By 1950, revenue from commercial radio stations exceeded that provided by the ABC. The gramophone companies, emboldened by the decision in *Cawardine*, began to make noises about payment for mechanical performances, though for another 30 years commercial broadcasters refused to pay. The ABC was not so lucky. The Labor MP Rex Connor, said during the debate over the Copyright Bill in 1968, that the ABC was “mulcted of about \$45,000 a year.” Connor asserted that because the ABC “has no right of advertising it is in the unfortunate position of having no bargaining power.”

The ABC and APRA agreed new licence payments in 1934, the former agreeing to pay APRA £27,000 per year and 6 per cent of listeners' fee income received in excess of £250,000. Within two years, APRA pressed for an increased rate and the ABC responded by proposing arbitration. After APRA, in the words of a Government Minister, “stonewalled”⁷ for two years, the parties submitted their dispute to arbitration by Clive Teece KC, a member of the Sydney Bar. The ABC agreed to pay 6d per listener's licence, an amount totalling about £50,000 per annum.

For over 15 years, however, the ABC maintained that the agreed rate was a provisional amount that could be reduced. Until at least the end of the 1950s, all letters to APRA enclosing payment ended with this paragraph: “We make this payment on the clear and distinct understanding that it shall not constitute or be

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- 6 Through increased radio licence fees, the imposition of higher cinema ticket prices, fees for using halls etc. While the B Class radio stations did not pass on costs, increased public performance fees meant an intangible cost for the public: to recoup income the commercial stations increased advertising costs and advertising time.
 - 7 Eric Harrison, Postmaster-General (United Australia Party), speaking in Parliament 5 June 1939. Harrison explained that the ABC was “loathe” to take part in another arbitration because APRA's delaying tactics, including the threat of legal action, resulted in the loss of £40,000.

deemed to constitute any admission of your association's right to receive payment at this rate, and without prejudice of any the ABC's rights."

Gramophone companies and commercial radio

The gramophone companies benefited significantly from Menzies' indifference to copyright affairs. They continued the radio ban though it would be over three decades before they squeezed out of the commercial broadcasters something they never anticipated when they began their: public performance fees. Common law recognition in Britain of the mechanical performing right galvanised the industry and caused it to see that even if broadcasting reduced sales, public performance fees might create a torrent of profits.

Record companies and commercial radio stations thus began the slow march to the modern era of mutual support. By the 1960s, the conditions that the gramophone industry tried to impose on radio announcers 30 years before would have seemed bizarre to the new species of announcer, the disc jockey. By then, the name of the recording artist counted far more than the name of the recording company, and the companies had come to realise that in the new consumer culture frequent airplay meant increased sales.

In the 1930s, however, the record companies remained suspicious. They continued to jealously control the supply of records and pressed hard on customs officials to enforce their import monopoly. The companies' suspicion of broadcasters is palpable in a 1936 memorandum from the Comptroller General of Customs to all State offices. The Comptroller General instructed customs officers to examine record consignments imported by *all* commercial radio stations. The consignments would be examined by an agent of the associated manufacturers and any unauthorised imports seized.

A sullen peace

As Menzies skipped his way to higher office, a neglectful master, sullen peace descended on the Australian copyright scene. The institution of a copyright tribunal waited another 30 years. The Government did halfheartedly consider the possibility of legislation but it decided against the idea. In 1936, Menzies attended trade talks in Britain, and the Acting Attorney, Thomas Brennan, twice advised the Postmaster General about establishing the tribunal.

Brennan considered whether the Commonwealth could amend the British Copyright Act (adopted as a Schedule to the Australian Act) to create the tribunal. He concluded that it could not. Under section 25 of the British Act, if a self-governing dominion (like Australia) adopted the Act, the Act became the law of the dominion. Section 25 permitted modification of the Act only in relation to procedure and remedies and to adapt the Act to local circumstances. To amend the

Act to permit a system of compulsory arbitration went beyond the modifications contemplated in section 25.

The Government, said Brennan, could repeal the British Act and substitute new provisions, including one conferring the power to legislate to create a tribunal. However, this measure would “involve a great deal of work in preparing the Bill and piloting it through Parliament.” Brennan advised that any action would be “undesirable” before the Berne Union held its Brussels Revision Conference in 1937.⁸

Yet though the Government finally abandoned any lingering intention to implement recommendations of the Owen Report, and the parties arguing over the performing right patched together working agreements, old resentments remained. APRA, in particular, attracted the animosity of politicians and possibly the public they represented.

THE END OF AN ERA – THE DEBATE OVER APRA

Former Postmaster General speaks out against APRA

On 5 June 1939, politicians from all parties furiously attacked APRA in the House of Representatives. The Country Party MP, and former Postmaster General, Archie Cameron, began the assault. Lately a member of the Coalition Government, now in nominal opposition after his party left its coalition with the UAP in April 1939, Cameron moved a House adjournment. He wanted to discuss a “definite matter of urgent public importance”, namely the powers of APRA, its place in Australian society, and the UAP Government’s attitude towards it. Five MPs supported his motion and began an emotional debate. One parliamentarian said Cameron had stirred up “a hornet’s nest”. Billy Hughes, Attorney General again at the age of 77, soberly acknowledged that his former colleague “raised a very important and, certainly, a highly complex question.”

Cameron, perhaps partly motivated by continuing hostility between the Country Party and the UAP after the former’s withdrawal from the Government coalition two months earlier, called for the repeal of the Copyright Act. He wanted new legislation that permitted government to prescribe performing right fees and collect fees on behalf of authors.⁹ The Labor Party backed him. Frank Forde, Labor Prime Minister for eight days in 1945, supported all proposals. He called for the Government to “bestir itself” and implement the recommendations in the Owen Report.

8 The Berne Union postponed the 1935 Conference. A Conference finally took place in 1948.

9 Cameron’s proposal replicated elements of Canadian legislation passed in 1931.

Cameron's complaints reprised themes raised by APRA's opponents in the 1920s and they struck home forcefully. After the long hiatus in public controversy over its activities, the debate shocked APRA. It swiftly issued a rebuttal statement to politicians and the heads of relevant government departments, though its fears were probably unwarranted. Hughes staunchly defended APRA in the House and showed no inclination to legislate.

During the April debate, Government Ministers reacted unenthusiastically to Cameron's speech. But they were obviously shaken. Hughes struggled to defend the performing right and the continuing neglect of the Owen Report. Eric Harrison, the Postmaster General, who held portfolio responsibility for the ABC and broadcasting policy, agreed with Hughes about the difficulty of creating new copyright legislation. But he also expressed undisguised dislike for APRA.

That Harrison should agree with Cameron about the iniquities of APRA is hardly surprising. Throughout the 1930s, the Postmaster General's Department conducted a covert war against APRA, which departmental officers, and their political masters, considered a menace to effective broadcasting policy. Trying to encourage the sustainable national growth of a radio industry struggling for economic survival, they reacted with fury to APRA's loud demands for payment of performance fees. Though successive Postmaster Generals worked with counterpart Attorneys to help resolve the disputes between APRA and radio broadcasters, their sympathies, far more than those of the Attorneys, lay with the radio stations. Sympathy for broadcasters translated into barely concealed hostility towards APRA.

MPs listened favourably to Cameron's proposals. They knew that as Harrison's immediate predecessor in the position of Postmaster General, he dealt personally with APRA representatives during the 1938 arbitration of the ABC-APRA dispute over performance fees. He could thus claim relevant knowledge and experience and, some may have thought, a disinterested attitude. Many politicians had another reason for supporting Cameron. They were deeply suspicious about the collecting society's social utility. They could not understand why, after two royal commissions, one on wireless, the second on performing rights, complaints about APRA persisted.

The call for a new Act and controls on APRA

Cameron told the House that despite recent troubles, he felt no hostility to the Government. Nor did he wish to harm authors. The law, however, failed to effectively protect authors. He presented a simple remedy. "The present Copyright Act," he said, "should be abolished and replaced by an entirely new Act." The Act, according to Cameron, was "iniquitous". It placed no limit on APRA's freedom to levy extortionate rates. As a result, APRA, "practically points a gun at the heads of those in charge of broadcasting as it does when dealing with picture

shows, schools of art and others.”

Parliament, Cameron said, passed the copyright legislation to benefit authors, not an organisation like APRA, that collected income for an “international concern which has very little interest in the development of music or art.”¹⁰ He did not pause to describe the “international concern” but his audience no doubt drew the logical inference: income remitted to the PRS and other performing right societies found its way into the pockets of foreign, mostly British, music publishers. Foreign beneficiaries received about 99 per cent of copyright revenue collected in Australia, and their returns increased year after year.

Cameron pointed out that, broadcasters, hotels, cafes, passenger steamers, dance halls, districts halls and mechanics institutes paid steadily increasing sums to play music. While the use of music in cinemas had fallen by 70 per cent since the introduction of talking films, APRA had doubled performance fees and remained unsatisfied. Now hotels and cafes were liable for re-diffusion fees, paying, in other words for the amplification of radio broadcasts by speakers.

In one sense, Cameron was whistling in the wind. As he wryly observed, “I shall be told by the Attorney General that it is difficult to alter the situation because Australia is a party to an international agreement.” But in another way, he hit the nail uncomfortably on the head. APRA, could, as he said, “charge anything it likes, and it does.” Yet for six years, UAP Governments had ignored the chief recommendation of the Owen Report and chosen not to create a copyright tribunal. Cameron now called for the creation of “a legally constituted authority” to prescribe fees. He asked the Government also to emulate the Canadian practice of publishing annual lists of copyright fees payable by music users.

Labor’s position

Frank Forde, speaking after Cameron, forcefully drew attention to the Government’s failure to implement the Owen Report. He pointed out that the Royal Commission made 15 “helpful” recommendations “but, with two minor exceptions they have been ignored.” Forde asked for “definite” action to place checks on “the unbridled rapacity of this combine.” Unlike Cameron, he directed his ire at local publishers as well as foreign. He said:

Among the persons who derive the greatest benefit from these fees are the owners of the most expensive private yachts on the Sydney Harbour.

Forde declared that Labor stood squarely behind the artist and composer, and he

10 According to Cameron, while APRA claimed to control the performing right in over 80 per cent of copyright music, it could probably not claim legally to hold the right in more than 50 per cent of cases.

called on Hughes to take action, along the lines suggested by Cameron:

We stand for the protection of the rights of composers and writers; but we are opposed to exploitation by middlemen who are not composers, but publishers who have purchased Australian rights for nominal sums and are fleecing the public ...

It is useless for him [the Attorney General] to tell us that nothing can be done this year because of other legislation, because this is surely one of the big questions of the moment that calls for legislative action.

The Government defends itself

Hughes reacted with characteristic passion. He reminded his listeners that he was Attorney General when Parliament enacted the Copyright Act in 1912. Forgetting the criticism of the legislation by Keating and others in the Senate, he observed that the Act “was then considered to be a highly satisfactory piece of legislation”. The drafters, however, could not anticipate the effect of radio, gramophone and cinema on popular taste and the use of music. The new developments created a dilemma for legislators:

The Government recognises very clearly that there is room for improvement. But it is not easy to protect composers, and at the same time ensure that listeners shall have that wide range of choice to which they are entitled at low cost.

Practicalities constrained the Government. According to Hughes, section 25 of the incorporated British Copyright Act prevented the Government from amending the copyright legislation so to create a body to fix fees would require repeal and a new Act. The Government was prepared to consider establishing a tribunal but the difficulties involved could not be ignored. Nor could the Government ignore the Berne Convention, which, according to Hughes, permitted the fixing of fees for broadcasting only, and not any other kind of public performance.

Hughes reminded MPs that the purpose of an organisation like APRA was to achieve the end that critics sought: the effective remuneration of authors by the collective administration of rights. As part of the international family of performing right societies, APRA enabled Australian composers to receive income for the public performance of their works not only in Australia but abroad. Did the critics offer a better method of remuneration? “I ask honourable members,” he said, “how that [remuneration] is to be done except through an organization of this kind.”

Reluctant support of Postmaster General

Eric Harrison, the Postmaster General more reluctantly justified the Govern-

ment's policy of inaction. He told the House that he agreed with some of Cameron's chief criticisms of APRA. Harrison himself cast doubt on the efficacy of the collective administration of rights. Supposition and guesswork, rather than accurate accounting, underpinned the collecting system. As he said to the Parliament:

The Australasian Performing Right Association would find it difficult to establish in court that compositions for the public presentation of which a royalty was claimed was in fact broadcast by any station or stations at any given time or times.

If APRA could not accurately determine the authorship of music played in public then the public could not be certain that APRA appropriately distributed licensing income. One thing Harrison considered certain. As the Attorney General pointed out, giving effect to suggested changes to the Copyright Act would probably necessitate, as a first step, repeal of the existing legislation. Any change affecting the interests of APRA would involve difficult negotiations. According to Harrison, APRA "stonewalled very successfully" during its protracted licensing negotiations with the ABC. It was unlikely to be a productive participant in any process designed to produce new copyright legislation.

Harrison made the divergence between the Government's attitude and his own views plain enough to MPs. Larry Anthony, the Country Party Member for Richmond, summed up the general mood when he observed to the House:

Although I am quite prepared to believe that the present Postmaster General is desirous of giving this matter fair consideration, he has to have the backing of the Attorney General and the Cabinet in any decision he makes, and from what we have heard this afternoon I am not all satisfied that he has the full degree of support for his opinions from the members of Cabinet which would enable him to protect the public against the rapacity of this international group which is exploiting it.

REASONS FOR GOVERNMENT INACTION

The Government's attitude grew out of the heedlessness of the Menzies years, when a tacit policy of non-interference by the Attorney General allowed APRA a free hand to pursue tactics that generated more resentment. In 1939 many politicians, including some in Government circles, considered that APRA served the interests of publishers, not authors. No-one could argue that its methods for collecting and distributing income were open to question. Few would say that its reluctance to disclose information did not deserve censure.¹¹ The Postmaster

General had himself suggested that APRA's representatives had, in at least one instance, acted aggressively and dishonourably.

The statements made about APRA in House of Representatives in 1939 indicate that politicians were even more hostile to the collecting society at the end of the decade than the beginning. Yet the Government, now led by Menzies, remained unmoved by calls for action, mainly because it could afford not to act. Even if peace in the copyright world came on the terms of the suppliers of music, no-one could deny that the public continued to hear music played over the radio and by gramophone. No voters protested at the percentage of their listeners' licence charges paid as performing rights fees. No-one noticeably objected to the increases to advertising time on commercial radio as stations recouped the cost of paying public performance fees.

As for the composers of copyright music, for whom the politicians declared sympathy, they seemed happy enough with APRA's distribution policy. Parliamentarians in 1939 were not. Speaker after speaker praised Cameron for raising the question of performing right fees. Many demanded information about the proportion of royalties collected by APRA that found their way to the pockets of artists. The terms "blackmail" and "exploitation" recurred, as they had done at done at large during the last 15 years.

But nothing happened. Within months, war broke out and APRA became one of the least of the Government's concerns. The calls for change and the clamour for renewal died, and copyright policy sank into the dreamless realms of stasis. Only the passing of a new British Copyright Act, more than 15 more years later, roused copyright policymakers from their torpor.

11 The Member for Richmond, Larry Anthony (Country Party) said: "The Postmaster General said that he was unable to secure the information [about distributions] as it was in the private possession of the Association and that the Association was not inclined to disclose it."

Chapter 9 – Reform

THE 1950S: THE DRIVE FOR REFORM

Copyright committees

In 1968, the Australian Parliament passed a new Copyright Act. The legislation implemented recommendations of the Spicer Committee, which examined options to reform the copyright law at the end of the 1950s. The Committee, chaired by Justice John Spicer, took the British Copyright Act of 1956 “as the basis for our examination of the problems raised for our consideration”.¹ Its report proposed that Australia substantively copy the British legislation.²

Imitation did not mean commendation. The report pointed out several failings in the drafting and organisation of the British Act, echoing the criticisms of John Keating and Billy Hughes in the 1912 parliamentary copyright debates. Emulating Keating and Hughes, who found the skills of British parliamentary draftsmen wanting, the Committee praised the “superior” drafting of Commonwealth legislation since Federation. Conceptually, however, the Australian legislation owed everything to its British cousin.

The British Act too resulted from an official inquiry. In 1951, the Board of Trade convened a committee to examine the legislative implications of dual subject matter: the revisions to the Berne Convention agreed in Brussels in 1948, and developments in broadcasting.³ The committee, chaired first by Lord Read-

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- 1 The Committee’s terms of reference were: “to examine the copyright law of Australia, and to advise which of the amendments recently made in the law of copyright in the United Kingdom should be incorporated into Australian copyright law and what other alterations or additions, if any, should be made to the copyright law of Australia.”
 - 2 *Report of the Copyright Law Review Committee 1959*, Commonwealth Government Printer 1960.
 - 3 The terms of reference for the Committee were: “[t]o consider and report whether

ing and then Sir Henry Gregory, reported in 1952.⁴

History repeated itself, for in 1909, the British Government also asked for expert advice on Convention revisions and the regulatory claims of a new industry. Like the Gorrell Committee 43 years earlier, the Gregory Committee recommended amendment of the British law consistent with the terms of the revised Convention and immediate subsequent ratification of the treaty. Unlike the Gorrell Committee, it did not equivocate when asked to endorse extension of copyright protection to an industry, in this case, the broadcasting industry.

In Australia, history also repeated itself. Though legislators no longer felt obliged to draft legislation in conformity with British statutes, the Government followed the pattern of 1912.⁵ Legislators felt the suasion of the Berne Convention and, in practice, following the Convention meant following the British legislative model. Treaty obligations were sacred in Britain and Australia, and after Britain adopted the limited amendments to the Convention agreed at Brussels, Australia chose to do the same.

The Gregory and Spicer committees did not hesitate to call for ratification of the amended Convention. They supported broadcast copyright but they wrestled with questions of logical justification. On what grounds could legislation intended to protect authors be expanded to include copyright in broadcasts? If arguments could be found to support a copyright never envisaged by the founders of the Berne Union, why not approve copyright in public performances?

A new attitude

The copyright committees of the 1950s differed in spirit from the Gorrell Committee. In 1909, committee members were guided by the doctrine of authors rights and most considered the compulsory recording licence an unwise concession to the gramophone industry. By the 1950s, officials thought differently. While the Gregory Committee regarded broadcast and recording copyright as “subsidiary” to authors’ rights, it advised the Government to pay heed to the

any, and if so what, changes are desirable in the law relating to copyright in literary, dramatic, musical and artistic works with particular regard to technical developments and the revised International Convention for the Protection of Literary and Artistic Works signed at Brussels in June, 1948, and to consider and report on related matters.”

- 4 *Report of the Board of Trade Copyright Committee*, London, HMSO, 1952 (the Gregory Committee Report).
- 5 In 1931, the *Statute of Westminster* – accepted in Australian law in 1942 – provided that Britain could only legislate for the dominions at their request and with their assent. By the 1950s, the idea of imperial legislative unity was dead and the former dominions no longer adopted British imperial legislation.

interests of the industries responsible for the production and dissemination of copyright material. As early as page 3, the Gregory Report declared:

There are, of course, trade interests. Indeed, the output of the United Kingdom publishing trade in 1951 has been estimated as being in the neighbourhood of £40 million, of which probably slightly more than £12 m represents exports ... Labour, skill and money have all gone to the making of the broadcast or gramophone record and we can see no justification for leaving the results of this combination open to piracy.

Similarly, the Spicer Report, in discussing the merits of the mechanical performing right declared:

We are of the view that the making of a record involves a considerable amount of artistic and technical skill ... It certainly seems unjust that these [broadcasting] stations should profit by the artistic and technical skills of others without being required to make any payment other than the price of the record.

The arguments of the later committees, which upheld the principles of the Berne Convention while proposing copyright in records, broadcasts and mechanical performances, never rose to heights of sophistication. Proponents, from Reginald Bonney at the Royal Commission on Performing Rights, to Frederick Maugham in *Cawardine* and then the members of the Gregory and Spicer Committees, made the same essential point: productive industrial investment demands legal protection to prevent free riders from utilising the products of industry for profit. For the modern committees questions of legal principle were not paramount – principle must accommodate industrial need.

Weaknesses of the copyright committees

The Spicer Committee, and, to a lesser extent, the Gregory Committee, were dominated by lawyers. The Gregory Committee contained lawyers, a civil servant, a Fellow of the Royal Society, a Fellow of the Library Association and the barrister and legal scholar F E Skone James. The President of the Book Publishers' Association and the Acting Director of the Melbourne Conservatorium of Music were members of the Spicer Committee but they bowed to the influence of two senior judges.

Legalism and vested interest could not fail to influence the conclusions of each inquiry. Lord Gregory graduated in economics from the London School of Economics but he could not claim expertise in analysis of the merits and function of regulation. He spent his civil service career administering laws controlling customs and excise, wartime logistics, enemy property and trade.

Australia felt the problem of circumscribed analysis more acutely. British governments did not view copyright regulation as the exclusive province of the legal arm of government, and policy-makers evinced less devotion to legal norms and precedents than their Australian counterparts. The members of the Gregory Committee, for instance, were impressed by criticisms of the long posthumous term made by the economist Sir Arnold Plant, Sir Ernest Cassel Professor of Commerce at the University of London.⁶ They recorded their favourable impression of his arguments though they stated that they were constrained from accepting his recommendations.

The Australian committee displayed no such willingness to consider the intellectual merits of arguments that undermined the copyright faith. It consisted of two judges, John Spicer and Arthur Dean, a Melbourne solicitor, A J Moir, George Ferguson, a director of Angus and Robertson who was also President of the Book Publishers' Association, and the Reverend Dr Percy Jones, the Acting Director of the Melbourne Conservatorium of Music. Leslie Zines, an officer of the Commonwealth Attorney-General's Department and later an eminent scholar of constitutional law, acted as secretary to the Committee.

Spicer, the Chief Judge of the Commonwealth Industrial Court and a former Commonwealth Attorney General led his Committee with vigour, but in technical legal matters he deferred to Dean, a judge of the Victorian Supreme Court. As Attorney, he appointed Dean to lead inquiries into the Australian patents and trademarks legislation and, Dean, an expert in industrial property, provided the Committee's intellectual leadership.⁷ Together with Spicer, he controlled the Committee's hearings, directed its analysis of evidence, and, ultimately, determined its conclusions.

The Australian branch of PEN and the Australian Journalists' Association both protested to Garfield Barwick, the Attorney General, over the composition

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- 6 In "The Economic Aspects of Copyright in Books", *supra*, Plant quoted David Hume who in 1771 wrote to his publisher, "I have heard you frequently say that no publisher would find profit in making an edition which would take more than three years in selling". Plant proposed in the article a compulsory licence allowing book publishers to publish new editions of a published work five years after its first publication.
- 7 In January 1958, the Commonwealth Attorney General wrote to his Victorian counterpart to explain the background to Dean's appointment. After he chaired the patents and trademarks inquiries, the Government envisaged that Justice Dean would chair a copyright inquiry. When Dean went on leave in 1956, he spent some time in London familiarising himself with the pending British copyright legislation. However, on his return he expressed doubt as to whether he could combine his judicial duties with chairing the copyright committee unless he received staff assistance. For this reason, the Government chose Spicer as chair and invited Dean to join the Committee as an ordinary member.

of the Committee. PEN complained in 1959 of the exclusion from the Committee of authors' representatives, and the Journalists' Association argued that the composition of the Committee reflected bias towards publishers. But PEN and the Journalists' Association themselves represented sectional interests: the real mischief in the Government's selection of Committee members was not that one interest group or another was excluded but that no voice of detachment could be heard.

The problem was not one of bias but the possibility that the leadership of two judicial officers would result in stultifying legalism rather than independent analysis. Copyright policy development cried out for more than the elaboration of precedent and legal principle, but in vain. Neither Spicer nor Dean possessed the liberal intellect necessary to point out – as Symon or Keating might have done 50 years previously – the accumulating contradictions in copyright policy.

Their legalism produced the formula that lies at the heart of modern copyright policy: the notion that the aim of copyright policy is, as the Spicer Report stated, “balancing the interests of the copyright owner with those of copyright users and the general public”. For today's policy makers, the idea that legislators must balance competing interests is self-evident and also historically validated. They take for granted the false idea that legislators throughout the history of copyright law-making have tried to create such a balance private and public interests.

Spicer and his colleagues seemed unaware that in enunciating the balance theory they were advancing a novel idea. They paid little heed to the motivations and concerns of past legislators, reflecting the outlook of all subsequent policy-makers and legislators, none of whom paid more than superficial attention to the history of copyright law-making. Carelessness about the past pointed to the fundamental weakness of the 1950s copyright committees. They analysed laws by reference to present demands and paid little attention to rationales, experiences or conditions that explained how copyright laws came into existence.

The copyright balance and the notion of public interest

Today, policymakers seem universally to accept that the public interest is protected in legislation by the fair dealing, library and educational provisions. These provisions are said to “balance” the exclusive rights of copyright owners. Yet legislators who passed copyright laws in the 19th and early 20th centuries did not refer to the balance of interests. They sought to defend authors against piracy and later created exclusive rights that extended their control over the production and use of copyright material.

The idea of a public interest in copyright policymaking only arose when a portion of the public realised that copyright owners could – and did – demand payment for the public performance of music. The same public quickly realised

that payment of licence fees whetted the appetites of copyright owners and their representatives: they seemed never to cease wanting more revenue from more sources. In the 1930s, the demands for revenue were driven by organised interests in Britain and Australia, namely associations of composers and music publishers. Then the record companies began to levy performance fees. Users faced two choices: pay fees or flout the copyright law. They usually paid.

Users, private as well as commercial, discovered that proprietary rights opened the way to more and more controls over the use and dissemination of copyright material. Many protested loudly. Policymakers, beset by the louder demands of copyright owners and prospective owners, now felt the undertow of public resentment. As politicians discovered after collecting societies licensed the public performance of music, demands for payment sometimes evoked strong reactions. In the 1950s, a new generation of politicians came to understand that the ambitions of copyright owners and claimants, if realised, could alienate their greater constituency – the public. In articulating the principle of “copyright balance” the Spicer Committee expressed the politicians’ new-found pragmatism.

The Committee failed to understand that the authors’ rights movement subverted traditional conceptions about copyright law. Only in 1911, when common law ideas of fair dealing crept into British statutory law did the notion of separation between the private and public interest strongly emerge in copyright discourse.

Before then, copyright consisted of a limited set of rights directed against piracy that, with the exception of the import provisions, only slightly restricted the public’s freedom to deal liberally with literary or other works. Far from balancing rights, legislation assumed that copyright privileges did not curtail the public’s freedom to enjoy literature, art and music.

By devising the principle that copyright policy must balance public and private interests, as if the two were equal, the Spicer Committee ensured for the private interest a dominant position in future copyright legislation. The Committee seemed to implicitly suggest what the early legislators never contemplated: that gratuitous access to copyright material is a privilege to be granted by the legislature on narrow terms.⁸

It is also possible that the Committee intended its formulation to limit the ambitions of copyright owners. Copyright legislation began as a limited state-

8 It is true that publishers seeking monopoly privilege instigated the Statute of Anne and private interest and lobbying was at the heart of most British copyright legislation (the first copyright statute of Australia, by contrast, was prepared without reference to private interests). What is unquestionable, though, is that government always envisaged a limited scope for copyright privileges and saw outlawing piracy—that is, unauthorised reproduction for a *commercial* purpose – as the essential object of legislation.

ment of private rights and each restatement increased the scope of private rights. The Spicer Committee may have calculated that only statutory recognition of the public interest could stem the headlong rush towards ever more radical legislative statements of private entitlement.

Perhaps. What is most striking about both copyright committees is that their findings confirmed once and for all that the industrial interest ruled copyright policy. By encouraging legislators to create proprietary rights in the output of industrial producers and disseminators, they smoothed the way to the systematic re-ordering of British and Australian legislation. The process of reform that began with the Gregory Committee created the categories, structure and language of contemporary copyright law.

The Brussels Conference

At the close of the Rome Revision Conference of 1928, when delegates felt stronger intimations of dissent from the dogma of authors' rights, the members of the Berne Union agreed to meet again in Brussels. The Brussels Conference, scheduled for 1935 and postponed till 1936, eventually took place in 1948. The years of delay did nothing to dim the enthusiasm of civil law countries for authors' rights, but now they faced a Rubicon: should they maintain the doctrine of the creator's unique entitlement or cross the river to accommodate the dissenters?

They chose to conserve their gains. The shouts of industry representatives thronging the opposite bank went unheeded. Delegates did not actively oppose the record companies and broadcasters but they made clear they would not endorse the new concept of "neighbouring rights" – the putative rights of producers analogous to those enjoyed by the authors of works. Instead, they agreed, among other things, to broaden the exclusive right of authors to permit the televising of works, and their retransmission, as well as the public communication of retransmissions and their fixation after transmission.

Members were permitted to determine the conditions under which the rights could be exercised. Delegates also agreed on changes to clarify that the Berne Convention itself extended protection to the public performance of works. Britain, joined by a number of countries including Australia, declared a reservation, insisting that national legislatures must be allowed to pass laws to prevent copyright owners from abusing public performance rights.

The industries realised they must look elsewhere for recognition of neighbouring rights. But they secured one significant concession at the Brussels Revision Conference. Delegates resolved that members should try to study how copyright protection could be extended uniformly to sound recordings, broadcasts and performers. International cooperation and collaborative studies led to the creation, in 1961, of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations – the Rome Conven-

tion.

The willingness to examine ways to recognise neighbouring rights pointed to a truth that the Union delegates could hardly countenance. The claims of the recording and broadcasting industries could be parried but only for so long. Put to politicians, their arguments would disarm opposition for they created what most governments revere – wealth, employment and influence.

Neighbouring rights

The neighbouring rights movement conveniently created formulations that government committees could understand and legislators adopt. The movement grew from attempts in civil law countries to ally the idea of copyright as a personal moral entitlement to the creation of copyright in sound recordings. How, asked civil lawyers, could copyright, the personal possession of a human creator, apply also to an impersonal entity, such as a record company? The answer they gave was that copyright did not apply to any person or entity that did not create works. However, those who performed, fixed and disseminated copyright works possessed *related rights*, or neighbouring rights, as the French called them.

In 1936, Austria passed legislation that created the “related rights” of performers, producers of sound recordings and film recordings, and broadcasters. Italy followed suit in 1941 and the Scandinavian nations in the 1960s. In 1961, the United International Bureau for the Protection of Intellectual Property, UNESCO and the International Labour Organisation, jointly inaugurated the Rome Convention. Signed by 40 States it protected performers against unauthorised fixation or broadcasting of their performances.

Record producers received the right to authorise or prevent unauthorised direct or indirect reproduction of phonograms and broadcasters’ rights of authorisation or prohibition in relation to rebroadcasts, recordings and fees. More protection followed. The Phonograms Convention of 1971, instigated by the music industry, and created with the authority of WIPO and UNESCO, required members to prohibit unauthorised reproduction, and importation of unauthorised reproductions for distribution to the public.

The drafters of the Rome Convention drew on the concept of related or *neighbouring rights* and the drafters of the 1956 British Copyright Act would, in their turn, draw on Continental formulations to create the category of ‘subject matter other than works’.

George Bernard Shaw’s last sally

The nonagenarian George Bernard Shaw reintroduced the topic of copyright to public discourse in Britain in January 1949. In 1911, he supplied an epitaph to authors’ rights when he wrote to *The Times* of the clash between “artists” and

“industrialists”. “I suppose,” he said then of artists, “we must go to the wall”. Now, he could have said, “my warning has come to pass and we have gone to the wall”, for despite the benefits conferred on successful artists by copyright ownership, the great revenues of the copyright industries were not distributed to the advantage of most creators. But Shaw no longer protested about the evils of the gramophone industry. Though he continued to agitate for his fellow artists, he now attacked taxation policy.

He wrote to *The Times* to harangue the Labour Government for taxing the annual income of “professional authors, playwrights, composers, painters, publishers, theatre managers, music sellers, and picture dealers”. According to Shaw, since their income varied more than that of any gambler, they should be taxed each year on the annual average of twenty years’ income. Shaw articulated more clearly than anyone else the argument that the special hardship of the artistic vocation obliges government to specially protect artists. Towards the end of his letter, when he raised his old grievance against the finite duration of copyright, he asked, “[why] is property in our creations communised after less than two lifetimes, and that of simple distributors made perpetual? Why is property in turnips made eternal and absolute when property in ideas is temporary and conditional?”

His own response is hardly likely to have won many converts to the idea of a 20 year average for taxing creators. “As well ask,” he said, “why the British people dread and hate intellect.” Predictably, the Government ignored Shaw’s suggestions for income tax reform, but he did win support in the same month from another writer, Charles Morgan as well as the Society of Authors. Other correspondents to *The Times*, including A A Milne, opposed him, but soon enough, correspondence on the subject died out. Shaw’s last sally on behalf of authors is symbolically important because it clarified, on the cusp of a new era, that after 40 years of legislation framed to advance the interests of authors, the creative interest was still, to borrow his description of 1911, “poor and insignificant”, still at the mercy of “industrialists [who] are rich and can bully Governments”.

Shaw extolled a pipe dream, as did all the proponents of authors’ rights, who imagined that copyright protection could turn a vocation into a profession. Although he saw their plight clearly, Shaw seemed not to comprehend that the nature of their calling meant that artists as a class could not expect any more from government than the supposed windfall delivered by the Act of 1911. The analogy he drew between writing and gambling was apt. As he said, artists “live by gambling in values more desperately uncertain than the chances of any starter in a horse or dog race”.

As he went on to say, no “turf book-maker would budget for such odds.” Yet the supply of would-be artists would never dry out and Shaw knew why: “the few occasional winnings are so great, and the prestige and eminence they confer so ardently desired that punters are never lacking.” What Shaw seemed unwilling to accept is that most artists offer little that is useful to governments and so are

ignored. But authors – or, as Shaw would have said, publishers – had reason to bless government. Thanks to the efforts of the Berne Union, governments around the world made the gift of authors’ rights. Yet even by 1949 it was clear that copyright policy involved the regulation of industries, and the demands of those industries, not authors, commanded official attention.

THE GOVERNMENT STIRS

The first sign that the British Labour Government intended to reform the copyright law came a few months after the correspondence over Shaw’s tax proposal. In July 1949, Harold Wilson, the President of the Board of Trade, announced in the House of Commons that ratification of the Brussels Convention required amendment to the copyright law. He went on to say that he was considering the advisability of a “general inquiry into its working”. Public performance rights, the harbingers of commercial warfare in Australia and Britain before the War, remained the greatest concern of regulators. Wilson told the Commons that the “question whether there is any abuse in the exercise of the exclusive rights of public performance of musical works in this country such as would justify legislation is one of the matters which could be dealt with in such inquiry.”

By mentioning performing rights, Wilson hoped to placate the many businesses aggrieved at the tactics of music collecting societies. The British collecting societies – the Performing Rights Society, which collected performance fees for composers, lyricists and publishers, and Phonographic Performance Ltd, which collected fees for record companies – were separately accused of the arbitrary determination of rates and the withholding of licences to play music.

The battles played out in Britain in the 1930s over performing rights continued, as they did in Australia, in continuing arguments over licence fees. By the late 1940s, matters were coming to a head. The users of commercial music (such as the BBC) had argued over conditions of licensing for over two decades. Users, broadcasters especially, were still incensed by the newer requirement to pay for the public performance of records. They still resented copyright collecting societies but they had come to accept them as permanent evils that could not be avoided.

In Britain, new forces were emerging that presented politicians with new challenges. The BBC now also broadcast television programs to the nation. Television promised to bring sporting events to mass audiences. The BBC could only televise sport with the consent of sporting associations and the owners of sporting venues and now engaged in a tug of war over broadcasting rights. The broadcaster knew that millions watched and craved sport on television. The associations and owners knew that control over the staging of sporting events meant extraordinary commercial bargaining power. They began to consider how to exercise their

control to maximum advantage and decided to press for copyright in sporting spectacles.

The BBC too saw the value of securing copyright in broadcasts. Creators, manufacturers and broadcasters emerged as distinct constituencies that government must account to in a way un contemplated even in the 1930s, when the battles of the gramophone and radio industries commanded attention. It took the Gregory and Spicer Committees to resolve tensions, even if their solution was imperfect in the eyes of the interested parties.

THE PERFORMING RIGHT AND SPORT

Though Wilson singled out musical performing rights as the prime focus of the Board of Trade's mooted inquiry into copyright in the early 1950s, the British Government realised that the public's main interest lay in the direction of televised sport. The question of musical performance faded from public view and attention concentrated on the possibility of granting copyright in sporting spectacles (and, by association, in public performances generally).

Sporting associations, which controlled the events coveted by the BBC, the nation's only licensed broadcaster, were unwavering about the necessity for copyright in sporting performances. Within a year of Shaw's letter to *The Times* denouncing restrictions on authors' copyright, they began a campaign to secure copyright in spectacles. By this time, they were involved in a wrangle with the BBC over the televising of sport. In 1949, the Beveridge Report on Broadcasting suggested that the Government legislate to permit the televising of sporting events irrespective of the objections of sporting associations. Emboldened, the BBC demanded the right to telecast events on its terms. The associations responded furiously.

First, they formed the Association for the Protection of Copyright in Sports. The Association represented 94 sports organisations, including the Football Association, the Lawn Tennis Association, MCC, Amateur Athletic Association, the Rugby Football Union, the Greyhound Racing Association, the Professional Golfers Association and Epsom Racecourse. *The Times* reported that on 24 March 1950, the Association met to discuss a ban on the televising of all sporting events until the review of copyright law contemplated by Wilson.

At the meeting, Kew Edwin Shelley, KC, legal counsel to the Performing Right Society stated his hope that within five years "sports promoters will have a complete copyright of any event which they organise." He proposed that the holder of copyright, sports associations could grant the BBC a primary licence to broadcast events, and give "hotels, public houses, clubs, halls, institutes and factories" a secondary licence to play the broadcasts. Shelley supplied the Association with a breakdown of anticipated revenues from copyright licensing after

five years. He projected total annual returns of £154,000, consisting of £10,000 from the BBC, £25,000 from hotels, £30,000 from large clubs, £20,000 from public houses, £15,000 from halls, £2,500 from cafes, £1,500 from institutes and factories, and £50,000 from cinemas. He calculated administration expenses, including legal and wages at £34,000, leaving £120,000 for distribution. These figures – miniscule when compared with the broadcasting fees paid today to some sports associations – clarified the commercial potential of televised sport.

Adding to the clamour, the chairman of Wembley Stadium, Sir Arthur Elvin, supported the call for a ban on televised sport “unless some satisfactory undertaking is soon given to sporting promoters that their events will in due course be protected by copyright.” He told *The Times* that, “the promoters, with suitable safeguards, do not necessarily object to the domestic televising of certain of their events [but] they do object to the televising of such events being exploited by outside interests for commercial purposes.”

Francis Steward Gentle, vice-chairman of the Association,⁹ informed *The Times* that the “question has now reached a head and some solution must be worked out to the greatest good of for the greatest number – or rather the least harm for the few.” He pointed out that sports promoters had called for copyright in sporting spectacles for five years.

According to Gentle, the common law right to refuse television crews entry to sports venues did not help the Association’s members. The BBC would not offer more than £250 for the right to televise games and other events. Television executives wanted sport televised and they wanted to secure rights at low cost. Gentle considered the BBC’s offer derisory when compared with the takings of the clubs and public houses that charged admission fees to patrons who came to watch events like the FA Cup Final. Even worse, Gentle said, television broadcasts affected gate receipts since many regular spectators now chose to watch events on television.

The Government could hardly ignore the publicity surrounding the Association for the Protection of Copyright in Sports. The Postmaster General, Ness Edwards, met Gentle in May and they discussed sports copyright with representatives of the BBC and the Radio Industry Council. Edwards gave little away, though he promised the Association that the Government would not issue commercial television licences without consulting the sports promoters. He told the Commons that while he wanted the promoters to agree to the BBC televising more sport, he also recognised that they “should have a reasonable safeguard of their legitimate interests.”

Faced with repeated demands for copyright in sporting spectacles, the Labour Government still hesitated. In November 1950, Wilson told the Commons

9 Gentle, a solicitor, was also the longtime Chairman and Managing Director of the Greyhound Racing Association Trust Ltd.

that an inquiry into copyright law remained “under consideration”. Then the continuing impasse over televised sport finally forced his hand. In April 1951, he announced the formation of a committee “to consider and report whether any, and if so what, changes are desirable in the law relating to copyright.” The Committee, originally chaired by Lord Reading, who soon resigned to take up his appointment as Under Secretary of State for Foreign Affairs, included the first woman to sit on a copyright committee of inquiry, Miss B A Godwin.

THE GREGORY COMMITTEE

A philosophical transformation

The pages of *The Times* between the announcement of the Gregory Committee in 1951 and the passing of the *Copyright Act 1956* record intensive lobbying of government. One interest group after another declared in print its right to special government consideration. In 1911, before the passing of the Copyright Act, Parliament heard repeatedly from publishers and the record industry. Others made their voices heard but not as a chorus. In the 1950s, the scene changed. The march of technology, the growth of the recording and broadcasting industries and the activities of collecting societies meant that the politics and possibilities of copyright policy were now much more complex.

The Gregory Committee began a transformation of British and Australian copyright law less by foresight than accident. Its members did not appear to comprehend the forces of economic and social emancipation that would soon recreate the entertainment industries in a form unimagined. Even so, they proposed changes to the law that facilitated the expansion and interconnection of the music, film, television, sport and broadcasting industries. In no small part, changes to the copyright law helped to usher in the age of rock and roll, celebrity and sports-obsessed television broadcasting.

The industries that created the new age – television, radio, music and film – steered the Committee in their preferred direction. Their representatives most likely did not foresee the coming revolution in the content and delivery of mass entertainment. But they knew that copyright in recordings and broadcasts would allow existing businesses to entrench competitive advantages. Galvanised by the prospect of exclusive rights held for lengthy terms, they passionately argued the case for protecting industrial investment.

The Gregory Committee listened sympathetically as they stated their position. In an era of reconstruction and growth, it was no surprise that a government committee should prove so receptive to the argument that investment and output deserved the protection of property rights. More surprisingly, the Gregory Committee chose to boldly depart, though not in direct utterance, from the axiom

that copyright law existed to protect the interests of authors. For the first time in copyright history, a government committee made the qualification for copyright protection a matter, plain and simple, of industrial economics.

The Gregory Committee, and later the British legislature, put to one side the requirement of creative originality. They also put to one side the requirement that copyright subject matter subsist in works. They now judged that investment, labour and the control of technology entitled industries involved in the production and dissemination of works to benefit from copyright protection. As the Committee said in relation to broadcasting copyright:

[T]he position of the BBC, as we see it, is not very different from that of a gramophone company or a film company. It assembles its own programmes and transmits them at considerable cost and skill ... it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.

The Committee did not dispense with existing principles and categories. But it did not let consideration of authors' rights deter it from proposing extension of copyright protection to industries. The Gregory Report carefully articulated the view that all rights other than those accruing to authors of works were subsidiary rights of copyright. The Committee wanted the distinction between the primary rights of authors, and the neighbouring rights of the industries, made clear in legislation – hence the 1956 Act's formulation of 'subject matter other than works'. The Report said:

[W]e regard the rights we recommend for broadcast programs or gramophone records as subsidiary to the primary rights of the composer and author of a copyright work reproduced by these technical means, and that performing rights in programmes or records should be without prejudice to that primary right ... we recommend that this principle should be recognised in any future legislation ... consideration should be given to the question whether rights of this kind should not be described by some term distinguishing them from copyright in its primary sense.

Nevertheless the Gregory Committee cast the die in favour of the industries. The time of analogous copyright, the legal bedrock of the modern entertainment and communications industries, had arrived. The recognition in Britain of copyright in 'subject matter other than works' established a regulatory system that allowed the industries to defend and extend their turf. After the 1956 Copyright Act, the copyright industries began in earnest to use property rights to control the reproduction and distribution of copyright material and to develop multiplying revenue streams.

The sports promoters

The Gregory Committee acknowledged the public importance of resolving controversy over the proposal for sporting copyright. Its report noted that the “inability of the BBC to come to terms with sports promoters in the field of television has largely overshadowed in public estimation the other copyright questions we have been considering.” During Committee hearings, the promoters took full advantage of the public’s interest and ensured the spotlight remained fixed on the issue of televised sport.

Francis Gentle told the Committee in September 1951 that sports promoters were similar to authors, composers or playwrights. They too were creators, and their creations, the spectacles they organised, attracted large audiences. They, no less than authors, deserved protection from free-riding. Sir Arthur Elvin told the same hearing that copyright in spectacles would increase the frequency of sports broadcasts. Before promoters struck deals with any broadcasters, however, they demanded legal protection. “We want,” he said, “to get as many of our sports events as we can on the television screen, but we object to outside interests exploiting us.”

According to Gentle, the sports associations could not rely on the laws of trespass to keep cameras away from grounds. Nothing in law prevented the BBC, if denied entry to sporting venues, from televising events using telephoto lens. As an example of the effect of televised sport on the population at large, he referred to a BBC broadcast of a boxing title fight. Fans, he said, streamed “round the streets looking for television aerials, and [paid] 2s 6d to go into private houses to view it.”

Like the gramophone industry before the War, the sports promoters feared broadcasting. Just as the record companies decided that radio listeners would not buy records, the promoters reasoned that viewers glued to television screens would never want to enter a stadium again. Amateur associations also expressed alarm. E H L Clynes of the Amateur Athletic Association complained to the Gregory Committee that “our work for many years has been retarded because of lack of finance.” He warned that, “if there is going to be still more television our income is going to drop.”

The associations were straightforward about their aims. Encouraged by Kew Shelley, chief counsel to the Performing Right Society, they hoped to secure a species of performing right that would allow the PRS to collect public performance fees on their behalf. But they could not overcome the theoretical difficulties raised by the Gregory Committee. As the Committee pointed out, the musical and mechanical performance rights applied to works and recordings that were already fixed. Collecting societies levied fees for the public performance of fixed, definable copyright subject matter.

Sporting spectacles, broadcast via television, undoubtedly involved performance, but not of definable subject matter. They were constituted by the fluid

actions of individuals. Faced with the demands of the sports promoters, the Gregory Committee could reasonably argue that existing principles would not allow the extension of copyright to what was indefinite. Strangely, though, the Committee looked more to precedent than principle when it opposed the grant of copyright in sporting performances:

Copyright has never extended to a horse race or to a performance by an artiste or group of artistes, whether intended to be seen or heard, and we recommend that no such right be established.

Perhaps equally strange, the Committee accepted that copyright should apply to the *broadcasts* of events or performances – strange because only by a stretch of the imagination can a broadcast *transmission* be said to “fixate” subject matter. Fixation really occurs as the transmission is recorded. This technicality did not inconvenience the Committee members, however. In their view, the industrial investment necessary to make broadcasting a reality supplied its own justification for the award of copyright (although they chose not to consider the argument that sports associations also committed expertise and investment to the development of stadiums and competitions). The report said:

In the case of broadcast performance, we have recommended a right against the recording or unauthorized broadcasting of the performance transmitted ... Labour, skill and money have all gone to the making of the broadcast or gramophone record and we can see no justification for leaving the results of this combination to piracy.

The Association for the Protection of Sport in Copyright might more profitably have asked for copyright in broadcasts of events and the recordings of broadcasts. But the idea of copyright in broadcasts and recordings was itself a novelty, and the Association probably knew that the Government would be unwilling to award broadcast copyright to an organisation other than the BBC. As the Gregory Committee said, a performer’s copyright would most likely create commercial chaos, with multiple performers or promoters demanding payment of licence fees for the privilege of recording, filming and broadcasting the show. Better, said the Committee, to vest the performing right in the one entity, the broadcaster, than leave broadcaster and performers to negotiate commercial agreements. Only by this means could the show go on. As the Committee observed:

We are satisfied that only if the financial and other relations between the BBC and the Sports Associations and others are worked out on a voluntary basis will a sufficiently flexible scheme be produced.

The sporting associations, and others arguing for performing rights could not – and did not try to – demonstrate that copyright in spectacles represented a logical outgrowth from the doctrine of authors’ rights. They could, however, assert that creativity, ingenuity, skill and investment were all manifest in the delivery of public spectacles and performances.

They could feel aggrieved that the Gregory Committee rejected the proposal yet supported the grant of copyright to recording companies, filmmakers and broadcasters on the grounds of investment and skill. Granted, the production of records and films involved the fixation of works. Yet, if, as most observers seemed to believe, copyright law existed to benefit authors, why allow copyright in sound recordings and films? After all, there was yet no such thing as “publishers’ copyright”.

The music industry and performers

The Gregory Committee devoted considerable attention to questions surrounding the performance of music. The first inquiry concerned an issue familiar in Australia. The Music Users’ Federation charged the Performing Right Society with licensing the public performance of music on unfair terms, and called for the creation of a copyright tribunal. Just as APRA in the 1930s opposed the creation of a copyright tribunal in Australia, the Performing Right Society fiercely rejected the possibility of a British tribunal. The PRS submitted to the Gregory Committee that, “no vestige of a case has been made out ... that there has been any ‘abuse of monopoly power’.”

The Committee then heard evidence of a battle between the record companies and performers. For several years, the record companies and the Musicians’ Union jointly administered Phonographic Performance Ltd, the society that issued licences, and collected fees, for the public performance of records. The PPL, arguing that restrictions preserved the supply of studio performers, pursued a policy of withholding performance licences from venues that refused to employ performers to play live music.

By 1951, the PPL’s policy, strongly supported by the Musicians’ Union, had become irksome to the recording industry. Once hostile to the unconstrained public performance of recorded music, the industry now adopted a permissive attitude. Record labels rejected arguments in favour of licensing restrictions and instructed the PPL to stop policing the hiring of musicians.

Industry executives now believed that the public performance of music stimulated the increasingly voracious demand for records. The labels saw no benefit in refusing licences to maintain the supply of performers since demand for records ensured the continued supply of performers. Better, they argued, to freely issue performance licences – the more music played in public, the more money made.

The Musicians' Union reacted furiously. One Union representative, reported *The Times*, said musicians were not going “to play the music at their own funeral”. Musicians, he declared, wanted employment, and unless limits were placed on the public performance of music, opportunities for performers would dry up. Soon enough, the Union alleged, the ranks of performers would thin and those that remained would refuse to record music. The record companies were unmoved and insisted that the PPL must not refuse performance licences to clubs.

Their change of heart pointed to an ironic reversal of attitude. In the 1930s in both Britain and Australia, the recording industry attacked radio stations for supposedly broadcasting popular music continuously. Broadcasting, they argued, caused catastrophic declines in record sales. Now, armed with the common law mechanical performing right, the labels considered the public performance of music a blessing.

Public performance actually boosted the sales of records and the more that users played records in public, the more the companies collected in performance fees. The Musicians' Union could not hope to win its battle with the record companies. Sure enough, the Gregory Committee rejected arguments in favour of restrictive licensing and its report criticised the PPL's restrictive approach to licensing.

Though the Committee showed little sympathy for performers, musicians did not give up. The composers organised themselves to press other matters before Parliament and the public. They wrote to *The Times* and lobbied legislators, on their own behalf and through the offices of the Performing Rights Society. They asked for repeal of the compulsory recording licence, the exemption of the BBC from paying fees for broadcasting music and the exemption of diffusion service providers from paying fees for relaying broadcasts.

During the debates over the Copyright Bill in 1956, 397 petitioners signed a memorandum to Parliament and letter writers included a multitude of famous names: Vaughan Williams, Compton Mackenzie, Benjamin Britten, Arthur Bliss and Eric Coates. A larger group of signatories petitioned Parliament on behalf of the Performing Right Society. To no avail. In the contest for political favour, the recording industry crushed the Music Union and the PRS.

The longstanding advocates of the performing right made way before the irresistible force – the new copyright compact that gave preference to the demands of industries. In 1911, George Bernard Shaw wrote of the leaders of the recording industry: “They, being industrialists, are rich and can bully Governments.” Whether or not the industry bullied governments, in 1956 it defeated its opponents more comprehensively than in 1911, when Bernard Shaw protested the introduction of the compulsory recording licence.

Manufacturers copyright and the mechanical performing right

After skirmishing with the musicians, the record companies went on the attack. Their industry association, the British Phonographic Industry, told the Gregory Committee that the demands of the film and broadcasting industries “transformed” the “whole situation” of the recording industry. The BPI made clear that if the Government recognised distinct copyrights in films and broadcasts, it must also grant copyrights to the oldest of this trio of industries.

A compulsory licence to make records no longer sufficed. The industry demanded positive rights. To add to the negative right to prohibit the reproduction of recordings, manufacturers now demanded rights to authorise broadcasts and the public performance of records. The BPI pointed out that radio stations, film soundtracks and places of public entertainment used sound recordings. An expanded copyright that allowed the industry to control the performance of records confirmed a common law right and fairly recognised the investment and expertise that made the production of records possible.

Composers and the Performing Right Society opposed arguments for the mechanical performance right out of economic self-interest. They feared that once record companies were permitted to collect income for public performance, the BBC would cavil at paying dual performance fees. The worst result, they felt, would be that the BBC, and future independent broadcasters, insisted on paying lower fees to both. To the PRS, and those for whom it collected fees, the mechanical performance right represented a threat to revenue.

The BBC opposed the mechanical right for the opposite reason. Its executives first expressed alarm at the prospect of paying two fees in 1930, when the gramophone industry declared its right to prohibit the broadcasting of music. Twenty years later, the BBC feared overpayment as much as the PRS feared underpayment. The authors’ rights proponents also forcefully opposed an enlarged copyright in recordings. They wanted abolition of the compulsory licence and by analogy the extinguishing of a copyright in records.

After listening to lengthy arguments, the Gregory Committee eventually gave way to the recording industry. It did so because, as its report noted, compulsory licensing provisions were, “the law of the land for forty years”. As the report said, during that time “*trade interests have grown up*” [italics added]. The Committee did not intend to disturb those trade interests. It reported blandly that, “we do not feel that a sufficiently strong case has been made out for making a fundamental change now”. The Spicer Committee repeated this endorsement, though both committees damned the compulsory licence with faint praise.

Its longevity, they said, justified its continuance. In principle, neither committee supported an exception to authors’ rights that was nakedly economic in function. By contrast, neighbouring rights were supportable in principle because they conferred a distinct benefit and did not directly undermine the author’s ex-

clusive rights. Each committee decided that abolition of the exception would be economically more unjust than retention. Retention of the compulsory licence pointed the way to support for extended copyright in sound recordings. Again, the industrial interest trumped the individual private interest.

Endorsement of the Brussels Conference amendments

The Gregory Committee's terms of reference required that it pay "particular regard" to the effect of the amendments agreed at the Brussels Revision Conference. The Committee reported on the amended Convention in six paragraphs dominated by platitudes that supported an inevitable conclusion. "Our general attitude", the report said, "is that we are strongly of the opinion that Her Majesty's Government should accede to the latest text."

The reasons were simple:

We have indicated our appreciation of the high standards of the Union. We believe that is in the interests alike of the general public and of authors, composers and artists, that the rights of the latter in the works of their brain should not merely enjoy protection in the country of origin, but also that wider protection to be gained only in association with other countries ... There are of course trade interests ... We believe that this trade, based on the interchange of ideas between countries, is one which is important entirely beyond its value in money.

The brief treatment of the Brussels amendments suggested that the Committee wanted to fry bigger fish. The amended Convention it considered important, so far as it went, but it offered no theoretical solution to the problem that brought the Committee into existence: the impasse between the sporting promoters and the BBC. Their dispute captured the public's attention because millions of television viewers demanded televised sport. Refinements in authors' rights could be considered and approved without great difficulty. The argument over broadcasting copyright alarmed the Government and every day provoked the ire of voters.

Everything else to be decided by the Gregory Committee followed from reconciling conflicting commercial interests to ensure that entertainment of all varieties could be shown on television. The difficulty confronting the Committee should not be underestimated. The most pressing issue confronting its members could be neatly distilled in one question – should copyright subsist in sporting spectacles?

Copyright in broadcasts

The Committee gave straightforward reasons for proposing that copyright subsist in the broadcasts of performances rather than performances themselves. Copy-

right law is intended to benefit the creators of works. The criterion for copyright subsistence is reduction of the work to a material form. Performances are reducible to a material form (by recording) but they are not themselves works. In the case of drama or ballet, for example, they are interpretations of works. Broadcasts, on the other hand, like sound recordings or films, provide the means for transmitting and fixating works. They are not mere interpretations, but the means of translating works into a form that can be appreciated by an audience.

So far as broadcasts were concerned, the weakness in the Committee's reasoning lay in the fact that many broadcasts are concerned with spectacles – “performances” – not works, meaning that in many instances of broadcasting, the supposedly essential connection between authorship and material fixation does not exist. The Committee did not stop to consider this break in the chain of its logic. Instead, it clinched the argument in favour of broadcast copyright by drawing an analogy between broadcasters and the makers of records and films:

The position of the BBC, as we see it, is not in principle, very different from that of a gramophone company or film company. It assembles its own programmes and transmits them at considerable cost and skill. When using copyright material it pays the copyright owner, and it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.

While sports promoters might claim that they wished to protect the products of their skill and investment, the Committee found a compelling reason, apart from the transient nature of performances, for rejecting copyright in sporting spectacles. If copyright applied to sporting performances, then, in principle, it must apply to all performances, with the result that a multiplicity of licence fees could be demanded for broadcasting a spectacle involving a number of performers.

In its report, the Committee declared itself “convinced” that if public performance were copyright, “before long, there would grow up around the public performance of television a thick hedge of licences which would be required from many associations of copyright owners (as well as from individuals) with inevitable complaints and confusion in the minds of the public.”

So broadcasts were to join sound recordings and cinematograph films as copyright subject matter, even though, unlike records and films, they involved the transmission, rather than fixation, of works. The report recommended that broadcasters enjoy the right to prevent the unauthorised reuse of broadcasts, either by rebroadcasting, or by the making of records for sale and subsequent performance. The positive right to authorise the broadcasting of a work accrued to the owner of the work.

By recommending broadcast copyright, the Gregory Committee materially aided the growth of the developing television industry. The BBC, for the time be-

ing the exclusive holder of broadcast copyright, had won its copyright battle with sports promoters. But it knew that it would have to strike contractual bargains with the all the suppliers of television content.

In the case of some sporting associations, television broadcasting, far from destroying audiences at sporting venues, delivered television audiences of millions and eventually hundreds of millions, and poured undreamt of sums into their coffers. On the cusp of a new world, the BBC and sports associations continued to fight over rights of access and the broadcasting of events. Within a decade, their conceptions about the value of sports broadcasting were changed beyond reckoning.

In the meantime, they inched blindly towards accommodation. The Committee's seminal recommendation resulted, four years later, in copyright in broadcasts. But the Committee also proposed other farreaching changes that eventually helped to reshape the copyright world.

Copyright term

The Gregory Committee accepted that Britain's ratification of the Berne Convention as recently amended would require abolition of legislative provisions that compelled copyright owners to permit reproduction of works after elapse of half of the posthumous term. It also insisted that the 50 year posthumous term for works must remain undisturbed. When it came to propose the period of copyright in recordings and films, the Committee settled on a subsistence period of 25 years from production. The reasons it gave for proposing a 25 year term pointed to a shift in official thinking.

The new approach, less sacerdotal and more blunt, slowly entrenched the idea that as the copyright industries generated more and more revenue, so they deserved more and more legal protection. Even though, applied to the question of copyright subsistence, it resulted in a recommendation that did not please the industries, they had reason to take heart. They could, and in 1956 did, influence legislators to adopt a 50 year term. And they could celebrate the fact that even the inferior period proposed by the Gregory Committee offered a significant benefit to film and record producers.

Though the Committee sought an "empirical" solution to the question of how long copyright in films and sound recordings should subsist, it settled arbitrarily on a period of 25 years from production. However, its reasons revealed a willingness – apparent throughout its report – to substitute for traditional arguments about moral entitlement declarations about business investment and the expectations of business.

The Committee made clear its opinion that authors, the primary beneficiaries of copyright protection, must always receive legislative benefits superior to those conferred on the industries, the prospective holders of analogous copyrights. But

it also intended that the industries' copyright confer real economic benefits. The arguments in the report, though, were ambiguous and confused. In the end, the Committee wrote simply that:

We are by no means satisfied that a term of 50 years' protection is justified for either a gramophone record or a cinematograph film, and we consider that this period gives them an excessive period of protection in comparison with other articles produced commercially. We accordingly recommend that the period of protection should be reduced to one of 25 years.

Fair dealing, publishers, libraries, Crown copyright and the Tribunal

The Gregory Committee recommended that fair dealing for the purpose of criticism or review be added to the statutory list of fair dealings. In addition, it proposed legislative provisions that would permit libraries to copy, at the request of students or researchers, for the purpose of research or study, whole articles from periodicals. Subject to conditions, any fair dealing by a student would be regarded as done by a librarian acting on the student's behalf.

Publishers were vociferous in public debate as they were in 1911. In 1951, they denied reducing royalties to preserve margins,¹⁰ renewed their time-honoured attacks on statutory deposit, and demanded typography copyright protection. Their opponents of 1911, the libraries, organised themselves effectively for the first time. The Library Association made successful representations to the Committee concerning library copying of books and manuscripts, as well as the reproduction of journal articles.¹¹

The Committee proposed a modest extension to the ambit of the Crown copyright provision in the existing legislation. The 1911 British Copyright Act

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- 10 In letters to the *The Times* (April 1951), S Curtis Brown and Stanley Unwin argued that rising production costs compelled publishers to either reduce the royalty paid to authors, or increase the price of books. According to Unwin, authors typically preferred a lower royalty and static prices on the basis that more books would be sold and total royalties would be greater. On the same day as Unwin, *The Times* published a letter from Alex Miller: he stated that discounting the royalty would only marginally offset the purported increased production costs – in short, unless publishers proposed to substantially discount their own margins to attack rising costs, the argument for a reduced royalty was a ruse.
- 11 An illustration of the libraries' willingness to engage in controversy came in 1956, when the Standing Conference of National and University Libraries protested in *The Times* against the requirement in the Copyright Bill to charge researchers the full cost of library reproduction.

vested in the Crown copyright in works produced by its employees, or under its direction or control. The original provision seems to have been inspired by the Treasury’s classification of government publications into seven categories.¹² Treasury decreed that the first four categories of works were issued for the use and information of the public and the last three for more restricted purposes.

The Crown copyright provision formalised Crown ownership of these categories of works and enabled government to more efficiently control the dissemination of its output. The Committee’s report stated that the Crown should be empowered to reproduce copyright material relating to the equipment of the Armed Forces, and possibly also for civil defence and essential communication, “subject to compensation”. The 1956 Act enlarged the Crown copyright provision and extended Crown ownership to unpublished works.

The Committee next proposed a measure that promised to draw to a close the wars of the 1920s and 1930s: the introduction of a Copyright Tribunal to arbitrate disputes between the collecting societies and the “users” of copyright material, the persons or entities charged fees for the right to play sound and television broadcasts, and music, in public. The report recommended that wide-ranging powers be vested in the Tribunal, allowing it to rewrite the terms of licences, to compel the grant of a licence and to fix the annual fees charged for different classes of licence. The Tribunal was to consist of a number of Government appointees and be chaired by a judge, former judge, or senior barrister.

12 The categories were: (1) Reports of Select Committees and Royal Commissions (2) Statutory Papers laid before Parliamentary (3) Parliamentary Command Papers (4) Acts of Parliament (5) Official books (6) Literary or quasi-literary works (e.g. departmental journals, reports) (7) Charts and Ordnance Maps. Treasury Minute 28 June 1912 said: “My Lords see no reason why such works – often produced at considerable cost – should be reproduced by private enterprise for the benefit of individual publishers.”

Chapter 10 – A new British Act and the Spicer Committee

AFTER THE GREGORY REPORT

The continuing battle over televised sport

After publication of the Gregory Report in 1952 until the passing of the new British Copyright Act in 1956, the question of televised sport continued to occupy the headlines and the attention of copyright policymakers. Even in 1951, the Gregory Committee could not fail to notice the overwhelming importance of sport to television programmers.

Television began infiltrating the national consciousness in the 1930s and by the early 1950s millions had seen at least one sporting broadcast. The BBC first televised Wimbledon in 1937, the FA Cup Final in 1938, and the Olympics in 1948. In the space of a week in June 1952, the BBC broadcast Wimbledon, Test cricket, golf and the Olympic trials. In 1953, the Coronation, which attracted more television watchers than radio listeners, and the Cup Final (one of the greatest in football's history) both transfixed the nation.

The report recognised that the sports associations controlled something of great value. After its publication, most observers accepted that, short of government legal intervention, the sports promoters could stymie the development of television broadcasting. And as the public witnessed over the next four years, if promoters withheld consent to the televising of sporting events, the BBC could do nothing. Whenever the promoters refused to allow the BBC to bring its cameras to sporting venues, the public went without televised sport.

The promoters first really flexed their muscles in 1952 by imposing a partial ban on broadcasting, though they permitted the televising of most major sporting events. The ban caused howls of outrage in some quarters but the ban served its purpose by reinforcing the key point: promoters wielded the whip hand in negotiations with the BBC. They decided that though the Gregory Committee refused to support their bid for copyright protection, they would achieve their goals by gambit and bargaining.

Through lobbying and public pronouncements, they continued to influence the thinking of the politicians. In 1952, a year after the publication of the Committee's report, the new Sports Promoters' Association announced talks with the BBC. The talks, and the associations' partial ban on televising sporting events, eventually caused a ripple through the House of Lords.

The Earl De La Warr, who as Postmaster General managed the Conservative Government's broadcasting policy, promised to encourage the parties to compromise. As he told the Lords, he was "trying to bring the various parties together to attempt to persuade them to make some special arrangements during coronation year." None of his listeners directly criticised the Government, but several expressed concern about the effect of the television ban. "Millions of people," Lord Morrison said to the other peers, "are interested to know why they cannot see national sporting events on television." Lord Brabazon agreed. He said: "there is an absolute impasse and unless something is done television entertainment is bound to degenerate badly." Brabazon viewed the issue in pragmatic terms. He said: "it is a question of arranging hard business facts between promoters of sports and televisers." Lord Howe took a more radical – or regressive – view of the best way to end the impasse. He suggested that, "if copyright could be conceded a reasonable compromise could be reached between sporting interests and the BBC and, probably, the film world."

In 1953, after a few months of talks, Lord Lucas told the peers that there "was no friction between the BBC and the sporting promoters, who have their rights in the matter." Like Brabazon he adopted a practical tone, expressing sympathy for the positions of the sporting associations. "National sport in this country," he said, "is big business, with considerable capital investment, and these interests have to be looked after." Though the BBC found itself pressed for funds, the sports promoters were entitled to claim a proper commercial rate of payment for permitting broadcasts. But the Government could not force solutions on the promoters: there would "have to be a voluntary arrangement between the corporation and the promoters."

Negotiations dragged on for another three years. Finally, the Government stepped in. The public demanded sport, the BBC would not meet the financial demands of the sports associations, and the sports promoters made clear that money must be found if sport were to be televised. So the Government issued a second television broadcasting licence in 1955 to a commercial television station, the Independent Television Authority (ITV). The beginning of the age of commercial television presaged by a few years the era of rich television deals between sporting associations and broadcasters.

Controversy did not end with the issue of a new licence. Many promoters still wanted copyright in the broadcasting of events and they united in their protests over the 1956 Copyright Bill. Mirabel Topham, the Chairman of Topham's Ltd, and the most powerful woman in British racing, led the protests. She called the

Bill “unjust and dangerous to sports promoters.” Her company leased the Aintree racecourse, home of the Grand National, and to highlight the value of television rights, Topham banned cameras from filming the 1956 race.¹ She acknowledged that she acted for political reasons. She intended to persuade Parliament to amend the Bill “to give racecourse executives proper control of their events.”

Topham’s action gained her national unpopularity but she made clear to politicians and the nation that the wishes of the controllers of professional sport in Britain must not be lightly disregarded. If the Government settled television broadcasting policy in favour of the television licensees, it also acknowledged the private rights and expectations of the sporting associations. The battle over sports broadcasting demonstrated how in a few years the complexion of debate about copyright regulation changed almost beyond recognition. Authors’ rights, though still accorded the highest status in the world of copyright law-making, no longer dominated regulatory calculations. Now the big questions of industry dominated policy thinking.

Effect of the Gregory Report

In total, the Gregory Report proved a profoundly important document. It provided the basis for the rewriting of British copyright legislation, and, in paragraph after paragraph, attended to questions about the neighbouring rights of sound recording, broadcasting and public performance. It should not be forgotten that without the battles over broadcasting policy, the formation of the Gregory Committee, or a committee like it, may have waited many years.

Without the efforts of the sports promoters, Harold Wilson’s 20 month delay in organising the Gregory Committee may have stretched into years. If the sports associations did not press their case so urgently, the Committee may have accepted less readily arguments that assumed parity between the claims of authors and industries. Its members may not have formed so clear a picture of television’s revolutionary effect on social and economic life. In one sense, the sporting associations, and not the BBC, made the case for broadcast copyright.

The report pointed to the road ahead. Four years after its publication, the new British Copyright Act established a new general category of analogous copyrights – that is, copyright in ‘subject matter other than works’. In 1968, new Australian legislation adopted the same categories. The report is therefore a precursor of a new age and new realities. Within a few years of its publication, government regulators devoted most of their attention to accommodating the needs of

1 To the chagrin of broadcasters. A BBC official said of the Aintree ban: “We made, with the Independent Television Authority, what we considered was a fair and reasonable offer. We are naturally disappointed that Mrs Topham has been unable to see her way to accept it.” (*The Times*, 9 February 1956).

the copyright industries, the producers, distributors and broadcasters of records, films and television content. Soon enough, they began adapting also to the requirements of the newest and greatest of the copyright industries – the software industry.

THE SPICER COMMITTEE

A narrow inquiry

The Menzies Liberal Coalition Government, closely watching events in Britain, first proposed to hold an inquiry into copyright law reform in the mid 1950s. The Governor General announced a copyright inquiry in 1954, only two years after publication of the Gregory Report.² But the Government delayed the inquiry for four years, deciding to wait until the British Parliament digested the Gregory Report and passed a new Act. Australia evidently decide to watch Britain create precedents and then adopt British solutions.

The policy of the Government is clear from the Spicer Committee's terms of reference which plainly asked the Committee to "advise which of the amendments recently made in the law of copyright in the United Kingdom should be incorporated into the Australian copyright law." John Spicer and his colleagues were to translate the British Copyright Act of 1956 into Australian law, not to waste time devising original solutions to problems of copyright regulation.

The letter of appointment sent to each Committee member left no room for doubt. The pro forma issued by Neil O'Sullivan, the federal Attorney General said:

The subject of the inquiry could easily give rise to investigations both widespread and prolonged. The relation between the Australian law and the United Kingdom law however has always been so close, and the matter has been so comprehensively and so recently reviewed in the United Kingdom, that I have found it possible to draw terms of reference ... which will, I hope, enable the committee not only to concentrate its attention on the material available as a result of the review made in the United Kingdom, but also to obtain from interested persons and bodies written submissions directed specifically to the provisions adopted in the new United Kingdom Act rather than covering the whole subject at large.

Dominated by the two judges, Spicer and Dean, the Committee could be trusted

2 After the Liberal Coalition retained office in the election of May 1954, the Governor General announced the Government's official political program and referred to a proposed copyright inquiry.

to implement O’Sullivan’s instructions rigorously and narrowly. Spicer and Dean would not embarrass the Government by, for example, inquiring into the policy on import controls. Their dominance of their colleagues, a solicitor, a bookseller and a clerical professor of music, ensured that the Committee rarely departed from the track cut out of hard ground by the Gregory Committee.

All the Committee members seemed to share the view that legal rules subsist in a hermetic environment of their own, unrelated to an outside world in which monopoly and predatory pricing are viewed as social evils. Their report never explained the policy underlying legal rules. It took as self-evident the principles and propositions enunciated in legislation and the Gregory Report. Thus the Committee failed to grapple with the question of parallel importation restrictions, a distinctly Australian problem about which the Gregory Committee said nothing – not surprisingly, since Britain benefited from the restrictions.

Its members seemed unable to look beyond legal precedent and principle to justify conclusions reached. But, like their British counterparts, they readily adopted pragmatic rationales for supporting the retention or creation of rights, even if they doubted that some rights could be supported in principle. The Committee manifested its preference for pragmatism over principle in outlining reasons for retaining the compulsory recording licence. It said in its report:

History perhaps more than logic plays its part in the development of ideas and in this case we think historical considerations coupled with practical realities lead to the conclusion that law should not be changed.

Conformism

Handicapped by the narrow conceptual outlook of its members, the Spicer Committee did its job efficiently, according to the lights of legal analysis. But members seemed to have no interest in identifying the social objectives of copyright regulation, nor considering whether copyright law achieved these objectives, nor how such objectives might best be realised in the future. As a result, their report betrayed little knowledge of the crucial social, historical and economic questions relevant to copyright policy.

The limitations of narrow analysis were particularly evident in discussion of the posthumous term. Unlike the members of Canadian and New Zealand copyright inquiries,³ the members of the Spicer Committee could not bring themselves to consider proposing a shorter copyright term. They looked with seeming distaste on the willingness of their New Zealand and Canadian counterparts to contemplate the possibility of their countries standing outside the Berne Union.

3 The Canadian Royal Commission reported in 1957 and the New Zealand Copyright Committee 1959.

The New Zealanders and Canadians argued that long periods of copyright subsistence benefited the economies of countries that exported large amounts of copyright material. Countries that imported copyright material, on the other hand, should welcome shorter periods, since expired copyright meant, in theory, free access to material. They recommended against ratification of the Convention amendments agreed at the Brussels Conference in 1948.

The Australian committee would not dream of proposing so radical a step. According to its report, principles of reciprocity and uniformity demanded that Australia remain within the Union. The report acknowledged that “justice to overseas authors” and ensuring that Australian creators received the same benefits overseas that foreign creators enjoyed in Australia took priority over “our economic interests” as “primarily a user country”. The Gregory Committee, on the other hand, intimated that if unconstrained by the terms of the amended Berne Convention, it would have recommended that copyright run for a period of 25 to 50 years from the first publication of a work.

The Spicer Committee’s arguments about the posthumous term demonstrated dialectical narrowness, not questionable judgment. If the necessity for international uniformity is taken as a premise of copyright policymaking, the decision to support retention of the 50 year term could hardly be gainsaid. But the Committee failed intellectually in its examination of the import provisions in the copyright legislation. Their origins could be traced to the Statute of Anne, and since the 19th century they had enabled British publishers to control the supply of books to Britain’s overseas possessions. Politicians in both Houses of the Australian Parliament attacked import provisions in the 1912 Copyright Bill to no avail.

Given the chequered legislative history of the provisions, and the fact that the Berne Convention left the determination of import rules to the discretion of its members, the Spicer Committee could reasonably have examined the merits of the monopoly. Yet it failed to take the opportunity and in fact made no reference whatsoever to the history of the provisions and their effect on the price and range of imports.

So far as can be discerned, the Australian committee considered that long usage and international consensus validated the law on the posthumous term and the import monopoly. Members seemed to see no reason to look deeper into the history of the relevant provisions, to find no cause for further inquiry. Australia, they seemed to think, should remain faithful to time-honoured norms and disregard suggestions that some legal rules of long standing did not benefit the nation.

Deficiencies of analysis

When the two committees’ reports are compared, the Australian document seems more pedestrian in its analysis. The Australian discussion of the posthumous 50

year term is superficial when compared to that of the British committee. The Gregory Committee heard with interest arguments by the eminent economist Arnold Plant in favour of substantial reduction in the period of copyright. Spicer and his colleagues wasted no time on the esoteric question of whether so long a period of protection could be justified in principle.

Commenting on the Canadian and New Zealand recommendations for a copyright term of 56 years from first publication or the life of the author, they said in their report that they could “see no particular virtue” in the reduced period of protection. Why, they did not explain. Instead, they deflected the argument. The report said:

We feel that the onus of showing that such a substantial alteration of our present law is desirable should be on the person advocating it. No-one has made a submission specifically urging us to recommend that Australia should not ratify the Brussels Convention.

This statement, suggesting dislike of speculative inquiry, forewarned the reader that the Committee would rely heavily on precedent to determine its conclusions. In the case of copyright law, reasoning from precedent can produce unintended results. The Spicer Committee’s unwillingness to question established practice meant that it misunderstood the power of vested interest in the creation of copyright law and supported or proposed some rules that were inimical to the interests of the Australian public.

Chief among these were the legislative provisions that created the import monopoly and the lengthy posthumous term. If treaty obligation militated against reconsideration of the lengthy term, nothing prevented the Committee from attacking the import monopoly. Nothing, that is, except vested interest and established practice, and the Spicer Committee showed little willingness to question either.

The Committee’s conservatism seemed to induce a kind of intellectual paralysis. It appeared beyond the imaginations of its members to even consider adopting the course taken by its New Zealand and Canadian counterparts, both of which, as the Committee acknowledged, “were greatly influenced by the fact that their countries were largely users of copyright material.”

The approach of the Spicer Committee, conservative, cautious and legalist, is exemplified in its justification it gave for recommending that Australia retain the 50 year posthumous term. Its report declared:

As Australia is primarily a user country and is likely to remain that way for some time, it might, of course, be in our economic interests to make the term of protection as short as possible. Factors other than the balance of payments are, however, involved, such as justice to overseas authors, the benefits of whose

works Australians enjoy. We also mention that literary, dramatic, musical and artistic works of Australian origin are growing and receiving increasing recognition abroad. The United Kingdom will, we think, remain one of the main users of Australian copyright material and we are of the view that our authors should in that country be entitled to the same copyright protection as British authors. This can only be ensured by granting in Australia reciprocal benefits to British authors.

What is striking about this statement is that it acknowledges the cost to Australia of uniformity without taking the next step of exploring that cost. While the importance of reciprocity in international copyright relations is undeniable, reciprocity for a “user country” like Australia is purchased at a price. The Spicer Committee declined to discuss whether the benefit justified the price. Reciprocity and uniformity are safeguards against the cost and loneliness of isolation. But acceptance of norms that greatly advantage the interests of copyright owners means access limitations in the form of high prices and restricted supply.

In principle, a short period of copyright protection benefits the user country. It means earlier access to material, such as cheap editions of books, when the copyright expires. The Spicer Committee knew that a shorter term, if accepted internationally, would be, in principle, “in our economic interests” and likely to improve the “balance of payments”. It also knew that reality contradicted theory because the international copyright community would not have accepted Australian legislation creating a shorter term.

Even so, the Spicer Committee’s unwillingness to consider the consequences of unswerving loyalty to treaty norms showed a deficiency of imagination that continues to infect copyright policymaking in Australia. What the Committee failed to *acknowledge*, as it could have done, is that by endorsing the 50 year posthumous term, it placed pragmatic considerations of “justice to the overseas authors” and “reciprocal benefits to British authors” ahead of the – admittedly theoretical – Australian national interest. To raise these considerations as reasons for not exploring the arguments for a reduced term showed an inability to appreciate the economic and social dimension of copyright policy.

The Committee’s treatment of import controls suggested that its members were oblivious to the issues raised in the parliamentary debate over the copyright legislation of 1912. Their indifference to the effect of the “big blackmailing clause” as John Keating called section 10 of the 1912 Act would doubtless have aggravated Keating and his fellow opponents of the import monopoly, Vardon and Gordon, had they been alive. But they were not, and no-one pointed out to the Committee members that these politicians once attacked import controls.

Blind to the history and function of the import monopoly, the Committee members recommended adoption of a provision substantially similar to the importing clause in the new British Act, concentrating their efforts on devising

modifications that would facilitate the copyright owner's enforcement of rights.

They placed the onus on the importer, seller or dealer to prove lack of knowledge and the absence of reasonable grounds for suspecting that the making or importation of a work took place without the owner's consent. Changes were made to clarify the owner's right and to remove the possibility of a person relying on ambiguous language to evade liability for breach of the section.

Then the ship sailed on. Questions of the national interest, dear to the hearts of Keating, Vardon and Gordon, vanished overboard. The Committee followed the course charted by the Gregory Committee: it accepted the desirability of repeating the substance of the new British statute in Australian legislation and recommended various changes of arrangement (for example, placing the definitions section at the beginning of the Australian Act) and style (removing perceived drafting ambiguities).

Compulsory licence

The disagreements between APRA and music users were only the first of many arguments about the commercial exploitation of copyright in Australia. Old animosities centred around the recording industry were also extensively replayed before the Spicer Committee. First, the record manufacturers and the owners of musical copyright spoke for and against the compulsory licence to manufacture records.

The Copyright Owners Reproduction Society called the compulsory licence system arbitrary. CORS told the Committee that the licence denied owners the power to bargain freely over the rate of royalty, and took from them the power to control the production of inferior recordings. Then record companies pressed their claim for the mechanical performing right, in the teeth of opposition from radio and television broadcasters.

The Spicer Committee favoured the recording industry. Its members recommended that Australian copyright legislation retain the compulsory licence and establish a public performance right in records. Like their counterparts on the Gregory Committee, they felt equivocal about both rights. Spicer and his colleagues were reluctant to interrupt settled practice and they did not wish to void years of legitimate investment. They declared themselves, "impressed by the argument that there would be some injustice in destroying rights in existence after money has been invested." Yet when it came to justifying the rights in principle, the Committee struggled to find reasons to support its position.

The Committee admitted its difficulty in finding a "logical basis" for the legislative provision creating the compulsory licence. "No such licence," said its report, "operates in relation to any other form of reproduction of copyright material." This statement, though not strictly accurate,⁴ summed up the Committee's difficulty. In legislation that implemented a Convention dedicated to authors'

rights, the compulsory licensing provisions were anomalous.

Sensibly, perhaps, the Committee chose not to dwell on the theoretical failings of the copyright legislation. Its report acknowledged that in “the absence of some clear logical basis for such a compulsory licence system we would not recommend such a provision” but it added a proviso. Long-established practice demanded that the licence be retained. When the Committee members made up their minds, they decided they could not ignore “the history of the matter and the widespread acceptance of the principle”.

Compulsory licensing could be readily justified as a device to defeat monopoly but not, from the perspective of authors’ rights, as an invasion of an exclusive right. The Spicer Report lucidly explained the theoretical function of compulsory licensing, and reinforced the argument by pointing out that anti-trust sentiment inspired the introduction of compulsory licensing in the United States in 1909. But the Committee could not find a “logical” basis for section 19 of the 1911 Copyright Act (which established the compulsory recording licence).

However, the report did not explain whether the compulsory licence actually functioned to defeat monopoly. The Committee’s support for its retention on the grounds of longevity is thus mystifying. If the licence could only be supported because it had survived for a long time, principle surely demanded that it be revoked. The Committee’s readiness to support the licence seemed to confirm that in copyright policymaking, the principles expounded by the Berne Union were now subordinate to economic considerations.

Seemingly, Spicer and his colleagues believed that the licensing provisions were not justified on their merits but should be retained to protect an industry. They seemed, in this instance, heedless of principle and preoccupied with the needs and expectations of the recording industry.

Mechanical Performing Right

Twenty-five years after *Gramophone Company Ltd v Stephen Cawardine and Co*, the record companies pressed the Spicer Committee to recommend legislative recognition of the mechanical performing right. They perhaps took the Committee’s compliance for granted, for they made only oral submissions. Their confidence proved justified. The Committee reported that the new British Copyright Act recognised a mechanical performing right, and proposed that Australian legislation follow suit.

The evidence heard for and against the right reprised the arguments of Boney and Cook, barristers for the record companies and broadcasters, before the Owen Royal Commission in the early 1930s. The recording industry put its case

4 Section 3 of the 1911 British Copyright Act licensed the reproduction of literary works 25 years after the author’s death.

first. Its representatives stated the necessity for the legislature to heed the common law. They insisted that Justice Maugham's decision in *Cawardine* validated the claim for statutory recognition and pointed to the allegedly disastrous effect of radio broadcasting on sales in the 1930s.

The industry introduced one new element to the arguments heard by Justice Owen a quarter of a century previously: representatives now emphasised the vital relationship between the public performance of records and continued industry investment. If, they said, the industry could not recoup public performance fees, investment in more production would decline and eventually cease. Companies must be able to recoup the cost of investing in the production of records.

Arguing for statutory exclusion, the radio broadcasters were forced to try to persuade the Spicer Committee to disregard two powerful precedents, namely the decision in *Cawardine* and the decision of the British legislature to recognise the mechanical performing right. The task proved hopeless. Devoted to uniformity and precedent, Spicer and his colleagues would not look beyond the principles of common law and British legislation.

The broadcasters pointed out that before the passage of the British *Copyright Bill* in 1956, Opposition Labour peers attacked the judgment in *Cawardine*. Lord Lucas, previously involved in the Lords' debate on sporting copyright, disparaged Maugham's arguments. Lord Jowitt, an outstanding reforming lawyer and former Lord Chancellor, claimed that "the extraordinary ingenuity" of Sir Stafford Cripps, counsel for the Gramophone Company, "induced" Maugham's decision. He concluded that "it was a great misfortune that the right was ever given."

Further, said the radio broadcasters, arguments about investment cut no ice. Broadcasting posed no threat to the future of the recording industry. Radio stations boosted the popularity of records and indirectly poured money into the pockets of record companies. The right of public performance logically applied to one subject matter only: an original work. The pressing of record involved no originality, though the production process could not occur without the application of capital investment and expertise. Neither, however, warranted the statutory grant of a performance right.

They begged the Committee to consider that in practice, foreign industry would benefit from the mechanical performance right. Most records were produced overseas, and public performance fees would mostly be distributed to foreign record labels. These labels would benefit from the boon of booming retail sales – conferred by radio stations on record manufacturers – and the ever-increasing pool of fees collected for the public performance of recordings.

The record companies made no attempt to adduce some species of originality in their production activities. Instead, they concentrated on those factors that made their work economically valuable: technical skill, the selection of artists, marketing and above all financial investment. They also insisted that they were

entitled to receive remuneration for the use of records for a commercial purpose. They reminded the Spicer Committee that its British counterpart recommended the grant to manufacturers of a public performance right. Finally, they drew an analogy with the proposal to recognise a performance right in a television broadcast, which the Spicer Committee endorsed without demur.

Committee's reasoning

The Committee remarked that “the question is a very difficult one and is one upon which different minds will reach different conclusions.” Difficult, certainly, if its members, adopting the language used in their analysis of section 19, tried to find a “logical” basis for the creation of a mechanical performance right. If they accepted that copyright law derived from the principle that subsistence depended on authorial originality, then they could not justify recommending copyright subsistence in records, or derivative rights, such as the mechanical performance right.

They passed lightly over the problems of theoretical incompatibility and logical inconsistency and reached conclusions on pragmatic grounds. In so doing, they enlarged the rupture, begun in 1911 with the enactment of section 19, between principle and the claims of economic necessity. The British and Australian copyright inquiries acknowledged that the grand visions of the Berne Union were realisable only through the harnessing of industrial processes – recording, filming and broadcasting. In no sense would the industries built on these processes allow themselves to be controlled by authors. Thus, the ambitions of the proponents of authors' rights made inevitable the grant of copyright to industries.

Politics, expedience and British precedent guided the choices of the Spicer Committee. Its members recognised that the political and commercial cost of withholding the mechanical performing right would likely be too much for any government to countenance. Their report stated their position slightly differently but delivered the unmistakable message was that policymakers could not afford to disregard the commercial expectations of a well-established and profitable industry.

As the Committee said, “the making of a record involves a considerable amount of artistic and technical skill.” The report went on:

We do not think that the result of another person's effort and skill should be made available to wide audiences by means of broadcasting or public performance without any payment being made to that person ... We are also impressed by the argument that there would have been some injustice in destroying rights in existence after money has been invested in making records on the basis of existing law.

Money invested ... the new axiom of copyright law 50 years after the pioneering

declamations of John Drummond Robertson, spokesman for the Gramophone Company. The report disclosed, almost in passing, the truest reason for broadcasters to accept the enactment of a mechanical performing right. If broadcasters wanted copyright in broadcasts, they should concede to record manufacturers the right to control the playing of records.

The Committee made its recommendation not because the necessity for a mechanical performing right could obviously be extrapolated from the law of copyright, but rather to facilitate industry regulation along the lines sought by industry, not government. The record companies wanted the right, the broadcasters could put up with it, and most importantly, it was not going to prevent either from making money.

Other findings

The Committee also followed the British example by recommending ratification of the Brussels Convention, the addition of a broadcasting right to the primary rights of copyright authors, and a statutory schema that established a second category of copyright subject matter consisting of sound recordings, cinematograph films and broadcasts. It recommended the adoption of the British provisions dealing with library copying and copying for educational purposes and fair dealing. The report also proposed a new extended Crown copyright provision and adoption of the British provisions dealing with typographical arrangements.

Spicer and his colleagues observed the need for a copyright tribunal similar to that established in Britain and agreed with the Gregory Report that copyright should not subsist in performances or sporting spectacles. The term of copyright was to be 50 years from the death of the author and in the case of sound recordings and films, 50 years from the date of production. The report declared the 25 year rule for books redundant and called for the compulsory licence for records to be recognised in statute.

The question of sporting copyright, so central to the politics of copyright in Britain, featured hardly at all in the proceedings of the Spicer Committee. Only the Victorian Football League made strong submissions about copyright in sporting spectacles. In its submission, the VFL referred to the 1937 case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*⁵ as one that determined “that there was no copyright in a spectacle”. In that case, the High Court held that owners of a racecourse could not prevent a company from broadcasting race results from a tower overlooking the racecourse.

The VFL argued, quoting Justice Dixon’s judgment, that “broadcasting rights” were “quasi-property”, and referred to section 115 of the *Broadcasting*

5 58 CLR 479

and Television Act 1942, which prohibited broadcasting of sporting events using equipment placed outside the sporting grounds – if spectators paid entry fees. The VFL considered section 115 protection insufficient and asked for sporting copyright to protect the investment made by sporting bodies from the commercial deprecations of radio and television broadcasters.

But the silence of other sports associations, and, more crucially, Britain's rejection of proposals for sporting copyright, encouraged the Committee to reject the VFL's request. The recognition of broadcast copyright in the British legislation set a precedent of which the Committee approved. In Australia, as well as Britain, television broadcasters would hold copyright in broadcasts but they would need to negotiate broadcast rights with the associations that controlled sporting grounds and fixtures.

A copyright tribunal

The Committee unhesitatingly recommended the formation of an Australian copyright tribunal. Perhaps the most interesting part of its report is the brief recitation of the history of Australian radio broadcasting and the activities of APRA. As the Committee pointed out, the problems that led the Gregory Report to recommend establishment of a copyright tribunal were experienced most acutely in Australia. Ironically, APRA and the radio manufacturers, the opponents of a tribunal in the 1930s, now supported the creation of such a body. By contrast, the broadcasters, who were the pre-eminent advocates of a tribunal 30 years previously, and the cinema exhibitors, now asked for the adoption of a more informal system of arbitration.

The Spicer Report devoted a whole chapter, and over 40 paragraphs to the question of the copyright tribunal. The focus on the question of performing rights disputes indicated strongly the continuing, and growing, importance of performing rights in the copyright economy. The archival record only reinforces the impression that the resolution of performing rights disputes remained a fundamental preoccupation of government and the suppliers and users of music.

Evidence of the attention given to performing right questions can be gleaned from the Attorney General's Department records in the interwar period. The department maintained at least 47 files on different copyright subjects, mostly connected with radio broadcasting and the associated performance right. APRA, naturally, loomed large in records. The 'Payment to APRA' file, documenting ABC payments, remained current for 20 years from 1938. The titles of the other files chart the course of APRA's activities during the period: 'APRA radio stations agreement' (1929); 'AFBS arbitration with APRA' (1933); and 'APRA v B Class stations' (1934). Other files indicate the early official interest in the question of broadcasting: the first file on 'copyright broadcasting' was opened in 1925 and it was followed quickly by files on copyright charges for music broadcasts

(1926) and the conference held in Sydney in July 1926 to discuss performance fees.

In 1943, as the Spicer Report noted, the Parliamentary Standing Committee on Broadcasting proposed the compulsory arbitration of disputes between APRA and the ABC and APRA and commercial radio broadcasters. Legislation did not eventuate, but by the time of the Spicer Committee's inquiry in 1959, all interested parties, including APRA, agreed on the desirability of compulsory arbitration. As the Committee said, not all accepted the need for a permanent tribunal to adjudicate disputes. However its report noted that if the principle of compulsory arbitration were universally accepted, the creation of a quasi-judicial body would produce a necessary uniformity of method and lead to the creation of precedents.

The Committee recommended that the Australian tribunal differ from its British counterpart in one respect. It would consist of three members, but to avoid the problems faced in Britain of finding sitting times convenient for all tribunal members, disputes submitted to the Australian body would be heard by one person only – the member in a position to hear a dispute at the earliest possible time.

DIFFERENCES IN APPROACH BETWEEN THE SPICER AND GREGORY COMMITTEES

The attention devoted in the Spicer Report to the questions of compulsory licensing and the performing right in records highlighted not just the importance attached by government to regulating record production and broadcasting. It also revealed a divergence of priorities between the governments, and industries, of Britain and Australia. In Australia, unlike Britain, the question of copyright in sporting spectacles occupied very little official attention.

While the Gregory Committee devoted considerable attention to discussing the grounds for establishing copyright in individual performances and spectacles (as distinct from the performance of a record or film) the Spicer Committee, probably wisely, paid little attention to the question. Instead, it emphasised the benefits of continuing the system of compulsory licensing and allowing record manufacturers a right of public performance, questions settled in Britain without significant controversy.

The reasons for the differing approaches to copyright in the two countries is not hard to find. The British recording and broadcasting markets were more developed than Australia's, and the strength of the British recording industry meant that the compulsory licence and the performing right in records were never going to be under threat.

In Britain, the Government needed to make television broadcasting viable. The Australian Government faced smaller challenges. It could even have ignored

the recording industry and favoured the arguments of radio broadcasters. Predictably, however, the legislative outcome in Australia turned out to be identical to that in Britain. The Spicer Committee never threatened to undermine the long tradition of Australian subservience to the copyright prescriptions of foreign nations.⁶

6 See Appendix 3 for the Spicer Committee recommendations.

Chapter 11 – The road to the new Australian Copyright Act

THE 1960S

A long delay in implementation

Completed in 1959¹ the Spicer Report met public indifference. The newspapers and Parliament said nothing. The Attorney General, Garfield Barwick, kept the report “under consideration” for 14 months, before informing the House of Representatives in April 1961 that he intended to call for public submissions on the Committee’s findings.

Barwick’s dilatoriness perhaps owed something to external interference. Sometime in 1960, he prepared a draft cabinet submission recommending the preparation of a copyright bill based on the report’s recommendations but the draft went no further. The recording and broadcasting industries were disappointed with the details of the report recommendations, and probably pressured Ministers to postpone legislative action.

At any rate, in 1961, Barwick announced that the “representations indicate that perhaps the committee had not sufficient material before it and that additional material which is now available might have altered its conclusion.” He made plain that no-one should expect rapid progress towards a bill. At budget estimates hearings, Barwick reported that the task of assimilating new material, and reviewing the report findings burdened his department. His own priorities seemed to lie elsewhere: “I must confess for my part that I have not attempted to deal with it [the material] finally, and it cannot be expected that any legislation will be presented during the life of this Parliament.”

In April 1962, he told Gough Whitlam, Labor Deputy Leader, that he hoped to introduce copyright legislation in the autumn session of 1963 – hardly a promise of alacrity. No legislation emerged, and in April 1964 the Liberal Coali-

1 Signed 22 December but only released to the public February 1961.

tion Government appointed Barwick Chief Justice of the High Court. Towards the close of 1964, Whitlam reminded his successor, Billy Snedden, of the Government's inaction, again posing the question – when did the Government intend to introduce legislation?

The evidence of Coalition laxity could not be denied and Snedden admitted the tardiness of progress towards a bill. He said: "I am considering the Committee's report and the representations which have been received from interested persons and organisations. I am unable to say, at this stage, when a Bill will be introduced." The Government made no promises and the question of copyright legislation dropped from public notice.

The delay in official response to a significant report on legislative reform is astonishing, yet, Whitlam's questioning aside,² the Opposition seemed indifferent to the question of reform. Only in 1967, when the Government at last introduced a bill did Labor MPs again discuss copyright in Parliament. It took a new Attorney General, Nigel Bowen, to precipitate action. He swiftly withdrew the 1967 bill after protests from various interested groups, and in May 1968, introduced revised legislation. A month later, Parliament passed the new bill, a mere nine years after completion of the Spicer Report.

The reasons for delay

The remarkable delay between report and legislation suggests the unimportance of the Australian broadcasting and recording markets compared with those of Britain. In Australia, the great driving force of broadcasting policy in Britain, the market for sporting entertainment, remained relatively miniscule and untapped. Entertainers and sporting organisations exerted negligible influence. In Britain, the explosion of popular culture, facilitated by the 1956 Act, turned the copyright industries into economic giants with needs that politicians did not ignore.

Perhaps because so much of Australia's own popular culture derived from foreign sources, the broadcasting and recording interests felt less compulsion than their British counterparts to accommodate the needs of entertainers and sports promoters. When the British sports promoters were shaking up the BBC in the 1950s, Australian broadcasters and record and film companies, relying on a steady stream of foreign content, were settling into mutually satisfactory commercial arrangements, despite the deficiencies they perceived in the copyright law.

The arrangements worked, and copyright industries in Australia seemed unconcerned that custom, rather than statute, underpinned their commercial relationships. Record companies now recognised that the radio broadcasters were

2 The questions formed part of a more general attack on the Government's tardiness in implementing promises and producing legislation.

played an indispensable role in increasing sales. Despite their protestations to the Spicer Committee and the Government, they were willing to accept the broadcasting of records without payment. Their equanimity is not surprising. According to the Labor MP, Rex Connor, EMI (Australia) Ltd earned 45 per cent on capital in 1966–67. For their part, the broadcasters knew that advertising charges generated ample revenue to pay for performance fees for the playing of records.

As for the television broadcasters – the ABC and commercial stations – they benefited handsomely from their broadcasting licences and did not seem worried that they could not control commercial re-broadcasting, diffusion or the playing of broadcasts for profit in places of entertainment. This was so even though the British example showed that these modes of receiving broadcasts for commercial and (in the case of diffusion via wires) private purposes, if regulated, were sources of lucrative licensing fees.

Once again, the difference in the Australian approach could be ascribed to the relative smallness of the Australian market for re-broadcasting and diffusion services: the size of prospective returns from licensing fees did not automatically excite commercial broadcasters already profiting from advertising revenue.

The languorous mood in commercial life merely reflected the torpor of the political scene. In Canberra, the counterculture and social protest, if they made sense at all, were dimly perceived as the symptoms of a temporary sickness infecting the coastal cities. Day by day, a Government in office since 1949 slipped further into stuporous indifference. Few in its ranks were capable of the difficult, sustained work of creating complex legislation. For most of the 1960s, between the release of the Spicer Report and the passage of the Copyright Act, the Liberal Coalition Government adopted a laggardly approach to legislation.

Not all Ministers were apathetic. The arrival of Nigel Bowen as Attorney General in 1966 seems to have worked as a catalyst, galvanising his department to push ahead with copyright law reform. Unlike his predecessors, Bowen had the stomach to oversee the development of what he described to the *Australian Financial Review* in 1967 as “a long and complex bill”. He faced a difficult task.

Even Barwick, who did not shirk the grind of legal practice, seemed happy to avoid the work of drafting a copyright bill. His interests perhaps lay elsewhere, but the readiness of so determined an individual to avoid the difficult task of creating the new copyright statute testifies to Bowen’s achievement. Barwick, though an outstanding advocate, performed indifferently as Attorney General, and may have lacked the imagination to understand the deep implications of copyright law reform.

His successor, Billy Snedden, regarded by many colleagues as a superficial thinker, did more than Barwick to prepare the way for legislation, but he was not the man to pull together complex threads of policy. On 20 April 1966, the task fell to the new Attorney General Bowen. He asked Cabinet for approval to prepare a copyright bill and his colleagues agreed that “legislation be prepared to give ef-

fect to the substance of the report of the Copyright Law Review Committee.”

Role of Nigel Bowen

So far as the enactment of copyright legislation is concerned, Bowen must be judged Australia’s most successful Attorney General. An exceptional lawyer, he displayed some of the weaknesses of other Attorneys who administered the Copyright Act. His understanding of issues of policy sometimes seemed weak, perhaps because he, like most lawyers, received little schooling in the history of legislation. He could be inconsistent and he failed to grasp the evil effects for Australian consumers of import controls. On the other hand, he showed depths of intellect and fortitude rarely shared by his predecessors. Past Attorneys who, nominally or actively, oversaw the passage of copyright legislation faced fewer challenges and dealt with far fewer organised interest groups.

Isaac Isaacs, the Attorney at the time of the 1905 Act, took no part in the copyright debates of that year. Senator John Keating, Minister Without Portfolio, oversaw the preparation of the Act and steered it through the Senate. Billy Hughes, Attorney in 1912 when Parliament passed the new Copyright Act, husbanded much legislation through Parliament. But the 1912 Copyright Act incorporated the British copyright legislation and involved uncomplicated drafting. John Latham, who supervised the enactment of two minor changes to the legislation, chose not to support the main recommendations of the Owen Royal Commission. Had he done so, implementation would have called for significant revision of the Copyright Act, and possibly its overhaul.

Bowen, on the other hand, contended with the consequences of the Government’s long neglect of the Spicer Report. He started the process of consultation over again and controlled the process of creating legislation to supersede an obsolete statute. Apart from the difficulty of drafting provisions acceptable to contending factions, the scale of commercial and public interests affected by copyright legislation called for the utmost political skill and intellectual endeavour in the preparation of the new law.

As a lawyer, Bowen ranked alongside Latham. Unlucky not to be appointed to the High Court bench, he became the first Chief Judge of the Federal Court in 1977. Another Attorney General called him, in 2001, “one of the great lawyers of the last century”.³ Intellectual capacity, however, only promised that Bowen

3 Speech by Bob Ellicot, QC, celebrating his 50 years at the Sydney Bar, 17 November 2000. Julian Leaser reported in the *Sydney Morning Herald* on 1 January 2003 that the Prime Minister William McMahon wanted to appoint Bowen to the High Court in 1972. Fearing that his Government would lose the by-election for Bowen’s seat, he instead appointed Anthony Mason to the bench. Mason became the Chief Justice in 1987.

would grasp the material before him and distil argument into principle. Reform called for something more. For nearly a decade, Latham presided over the most poisonous commercial wrangling in Australian copyright history, and when the opportunity for reform presented itself, flew the coop for the High Court bench. Bowen, however, seized the mettle and did not falter. Determination, as much as intellectual brilliance, marked his short initial tenure as Attorney, and the Copyright Act stands as his major achievement.⁴

The Government abandoned Bowen's first Copyright Bill in 1967 and the response to the new bill introduced in 1968 testifies to Bowen's achievement. Gil Duthie, a veteran Labor MP, congratulated him fulsomely for his "energy in getting this Bill before the House." Duthie went on to "congratulate also his staff and the draftsmen who burnt the midnight oil to bring these clauses together in this mammoth document of 249 clauses." He said they "achieved a miracle ... in producing this most difficult and complex measure." According to Duthie, the only other legislation of similar size to pass through the chamber in his 21 years of parliamentary service was the *Trade Practices Bill*.

A year earlier, the Fairfax newspapers welcomed Bowen's initiative in bringing copyright legislation to Parliament. The *Sydney Morning Herald* stated in an editorial, "[i]t is a matter for reproach to several Governments that the recommendations of the Spicer Committee have for so long been gathering dust" – but no reproach could be levelled at Bowen. The Copyright Bill, said the *Herald*, "deserves a hearty welcome even though it is unlikely to attract much publicity." The *Australian Financial Review* expressed equally positive sentiments: it said Bowen's legislation "should finally lift Australia into the second half of the 20th century in regard to copyright."

Interest groups

The first task Bowen faced in 1966 involved considering the submissions made to the Government following Barwick's call in 1961 for comments on the Spicer Report. These pitted broadcasters against the owners of copyright works, especially in relation to so-called "ephemeral" recordings. They also raised again the vexed question of the performance right in records. The Spicer Committee recommended, consistent with Article 11*bis*(3)⁵ of the Brussels amendments to the Berne Convention, that broadcasters be entitled to make "not more than one"

4 He was Attorney from 1966 to 1969 and again in 1971.

5 *It shall, however be a matter for the legislation of the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting body by means of its own facilities and used for its own emissions. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorised by such legislation.*

temporary recording of works authorised for broadcast. Such recordings were “purely to facilitate the broadcasting of copyright material” and were to be destroyed within six months of recording. The recommendation, however, pleased neither broadcasters nor copyright owners.

The Australian Federation of Commercial Broadcasting Stations⁶ submitted that broadcasters should be allowed to make multiple copies of the original ephemeral recording and that in addition, the right should extend beyond reproduction of works, and include commercial records. The Copyright Owners Reproduction Society, on the other hand, protested against the “sweeping abrogation of the Author’s right over the mechanical recording of his works” implied by the ephemeral recording right. Broadcasters would not confine themselves to using ephemeral recordings to facilitate broadcasting: the recordings were used “for a multiplicity of reasons none of which is *essential* to the ability of the Broadcaster to broadcast music.”

The dispute pointed to the new question confronting policymakers. Once rights were granted, to what extent should they be qualified? In the present case, should the right to authorise the recording of a work be qualified in any way that denied remuneration to the holder of the right? The owners of musical copyright were understandably nervous. In their eyes, the history of compulsory licensing told a story of usurpation that made an industry rich and artists poor.

The CORS submission stated that authors were “most anxious to see that history does not repeat itself in any new enactment appearing to convey a minor part of the Author’s right ... and then find that a major part of the right has been given away forever.” CORS agreed with the restriction on ephemeral recordings and asked “why the record manufacturer should be placed in a better position than the author of the music in this respect.”

Why indeed. The Spicer Committee discussed the question of ephemeral recordings in detail and explained why record manufacturers should be treated differently from the authors of works. Its recommendation seemed to flow from a simple willingness to heed the wishes of the most powerful commercial faction. Even as early as 1961, the exemption of records from the Committee’s proposal on ephemeral recording looked strange.

As the broadcasters indicated, the claim that they would make ephemeral recordings to avoid buying records was risible. It was also a non-sequitur. Commercial radio broadcasters and record companies alike were interested in revenue, and as the 1960s blossomed it became clear they shared a relationship of wondrous mutual benefit. Advertising revenues and record sales engendered by top-of-the-pops broadcasting made the right to make ephemeral recordings small cheese.

6 Renamed the Federation of Australian Broadcasting Stations.

Radio broadcasters returned to the question of the performing right in records. In their submission to the Government, they stressed the terms of the draft conventions on neighbouring rights drawn up by the ILO in 1956, UNESCO in 1957 and the draft Hague Convention of 1960. None, they said, “ever considered that the manufacturers should have more than a simple right to remuneration in respect of secondary uses.” In other words, a record company might charge for the playing of records by broadcasters but could otherwise place no conditions on their use.

The broadcasters’ association next raised the question of out-of-copyright films. The Spicer Committee recommended that owners of copyright in works used in films in which the copyright has expired should not be allowed to prevent the screening or playing of the film in public. Broadcasters now sought modification of the British provision recommended for adoption in Australia to permit television broadcasting of out-of-copyright films.

The British Joint Copyright Council, an umbrella group of copyright owner organisations, which argued that if a copyright work used in a film survived the film copyright, its owner was entitled to control rescreenings, vehemently opposed them. But as it happened, old films were to be increasingly used by television networks as “filler” with the result the right sought by the British Copyright Council would become increasingly less valuable commercially. The real issue for the broadcasters was securing rights to recently produced films and this depended on contract bargaining.

One other topic exercised both the broadcasters and copyright owners. This was the work of the Copyright Tribunal. APRA welcomed the creation of the Tribunal and expressed concern merely that legislation should encourage minimisation of formalities in proceedings. In particular, it requested that the legal rules of evidence be waived in hearings. Broadcasters, however, were unhappy with the Committee’s recommendations about jurisdiction.

The Committee proposed that the Tribunal have jurisdiction to hear performing right disputes between users and three types of licensor. In the case of works, individual owners, such as publishers, would not have standing before the Tribunal. Only collective rights organisations, such as APRA, could take part in proceedings. As the Committee explained, the Gregory Committee proposed that a copyright tribunal be constituted to deal only with cases in which the licensor of works exercised monopoly or quasi-monopoly control over the performing right. With this proposal, the Spicer Committee agreed.

In the case of disputes over the performing right in sound recordings or television broadcasts, the Spicer Committee recommended that the owner of copyright, or any organisation, could initiate or contest Tribunal actions. The broadcasters pointed out that if jurisdiction did not extend to the individual owners of copyright works, they could find themselves at the mercy of individual music publishers who could levy fees in the knowledge that the Tribunal would

not restrain them.

Meanwhile, APRA found cause for concern in the Committee's proposal for the commissioner of a work and its creator to share control of the work. The topic of commissioned works caused much debate in Britain years earlier and the Committee's plan for the commissioner to control only uses of the work related to the purpose of the commission. With eyes fixed on the problems of proving ownership of some musical works in its repertoire, APRA declared the proposed scheme unworkable. Instead, it asked for the law to recognise, "as a matter of general principle", that in the absence of contrary written agreement, copyright in the commissioned work remained the property of the creator.

All these concerns Bowen took into account in 1966 as he came to grips with the task of preparing the new copyright legislation. He wasted no time. In April, Cabinet accepted, "subject to the modifications indicated in the Submission", his proposal to implement, in legislation, the recommendations of the Spicer Report. With forensic precision, he set about the arduous task of consulting interest groups and overseeing his department's preparation of a copyright bill.

THE 1967 COPYRIGHT BILL

Commissioned works, ephemeral recordings and the Tribunal

In May 1967, the Parliamentary Draftsman sent a memorandum to Cabinet's Legislation Committee that summarised 14 "more significant" modifications to the legislative proposals of the Spicer Committee. In its treatment of commissioned works, the Bill followed the British Act, providing that the copyright in commissioned engravings, photographs and portraits belonged to the commissioner.

The Parliamentary Draftsman rejected the Spicer Committee's scheme of dividing copyright in commissioned works as impractical. The drafters also rejected APRA's 1961 proposal that the creator presumptively own copyright. Instead, the bill provided that the creator could restrain the use of the work for any purpose other than that specified by the commissioner at the time of the commission.

In the case of ephemeral recordings, the bill gave broadcasters all they had asked for in 1961. They were authorised to make recordings of sound recordings and to make multiple copies – for the sole purpose of broadcasting – of each ephemeral recording. Moreover, broadcasting stations were entitled to make copies of ephemeral recordings made by other stations, provided they paid reproduction fees to the copyright owners.

Most surprisingly, perhaps, the bill extended the period allowed for retaining ephemeral recordings prior to destruction from the six months proposed by the

Spicer Committee to 12 months. Copyright owners sought a period of 28 days Bowen approved an extended period on the basis that patterns of country broadcasting made the longer period necessary.

As for the Copyright Tribunal, the bill extended its jurisdiction beyond that envisaged by the Spicer Committee. The bill provided that in addition to adjudicating disputes over licence fees for the public performance of works, it would determine disputes over the equitable remuneration payable for recordings, ephemeral recordings, and the fees for the use of works.

Performing right in records

As preparation of the Copyright Bill, protracted by extensive consultations, extended into 1967, the performing right in records and the compulsory licence for recordings emerged as the principal subjects of controversy. The radio broadcasters still hoped to persuade the Government to dispense with provisions establishing the mechanical performing right, and the recording industry sought frantically to ensure that the Bill did not circumscribe the compulsory recording licence.

In due course the music industry managed to persuade the Government to revise the provisions dealing with compulsory licensing. The broadcasters failed, perhaps because they were outgunned by a more powerful industry lobby. Adrian Sterling, the Deputy Director-General of the International Federation of the Phonographic Industry, lobbied the Government hard, holding meetings with Bowen and his senior departmental officer in February 1967. The appearance of an IFPI representative in Australia no doubt overshadowed the lobbying efforts of the broadcasters, whose efforts to win over Bowen were muted. Sterling, nowadays a distinguished legal academic and the author of major works on international copyright law, evidently impressed Bowen and Lindsay Curtis, the Senior Assistant Secretary of the Attorney General's Department. Despite the protests of the broadcasters, the submitted bill implemented the Spicer Committee's recommendation on the mechanical performing right.

Perhaps no-one doubted that the Government would reach a legislative solution in favour of the recording industry. Since *Cawardine* over 35 years before, broadcasters in Britain had come to view the payment of licence fees for playing records as a cost of business. The record companies argued that broadcasting lowered sales but as rock and roll and pop music took over musical tastes, they privately acknowledged an opposite truth. Radio broadcasting dramatically amplified sales. Soon enough the music industry eagerly supplied free samples of recordings to the radio stations.

The radio broadcasters still wanted change for understandable reasons. Mechanical performance fees might be recouped from advertising revenue, but they were a significant and annoying impost. If the Government could be persuaded not to impose the burden, the radio stations' accountants would breathe easier.

Bowen, however, proved obdurate. He could sense a tacit commercial peace between the recording and radio industries and saw no reason to depart from either the recommendation of the Spicer Committee.

Although the broadcasters' association, the AFCBS, cited evidence of an international trend away from recognition of performing rights, Bowen's advisors gave its arguments short shrift. A memorandum in August 1967 from Lindsay Curtis to the Secretary of his Department said disdainfully that the nations refusing to recognise the performing right were mostly "African countries".

He recommended that rather than consulting trends, departmental officers conduct a survey "to see what countries grant or do not this right." Curtis acknowledged that the United States did not recognise performing rights, but he cited information supplied by IFPI's Adrian Sterling in a letter received five months previously. Sterling helpfully pointed out that Record Industry Association of America "has now unanimously decided to fight for the performing right and is using every effort to achieve this aim."

The compulsory recording licence

IFPI and the Association of Australian Record Manufacturers encountered more difficulty trying to persuade the Government to amend provisions in the bill that reduced the scope of the compulsory licence. The bill did not permit record companies to record works under the licence if the original recordings were not made or imported into Australia.

In this respect, to the chagrin of the record industry, the legislation emulated equivalent provisions in the 1956 British Copyright Act. The British Act of 1911 allowed for the compulsory recording of works originally recorded anywhere in the British dominions. Under the 1956 Act, however, the compulsory licence applied solely to works recorded or imported into the United Kingdom.

The 1967 bill adopted the wording of the British legislation, specifying that the compulsory licensing provision only came into operation if records of a work were "made in or imported into Australia for the purpose of retail sale or with the consent of the owner of the copyright work." The drafter's intent could hardly be plainer: if the Australian rights' holder withheld consent to the making or importing or recordings, record companies could not make compulsory recordings.

In practice, manufacturers would find themselves unable to automatically record works if records of the work were not in the hands of Australian retailers. The provisions of the bill also spelt the end for the practice of recording, with the Australian copyright holder's consent, works recorded and sold in the United States only. The record companies were furious at what they considered a catastrophic narrowing of the scope of the licence. The Attorney General's Department relayed their sentiments to Bowen but neither he, nor his departmental officers, were moved.

In a memorandum written at the end of August 1967, Lindsay Curtis told the Minister that the Association of Australian Record Manufacturers, “states that the existing practice in industry in Australia enables record manufacturers to make records of works under the present compulsory licensing provisions if these works have previously been recorded anywhere in the world by or with the consent of the owner of the Australian copyright.”

Bowen and Curtis supported the Spicer Committee’s argument that the rights of the Australian owner of copyright in a work were paramount. The Spicer Report said of the compulsory licence:

To the extent that it does operate we do not think it unreasonable that those who in Australia seek to enjoy benefits conferred by Australian law should do so by manufacturing records in Australia and thus contribute to the stability of that section of our manufacturing industry.

Applying the Committee’s logic, the department decided that the Australian rights holder must control the recording process. The first recording of a work in Australia (or the authorised importation of a recording) not the existence of foreign recordings, governed the operation of the compulsory licence. Bowen took an active interest in the question of compulsory recording, revealing a disposition towards authors’ rights. In departmental instructions, he informed Curtis that the Australian owner of copyright in works must be protected against derogation of rights. In March 1967, he told Curtis that Australian copyright owners should not “be made subject to what is done elsewhere with the consent of the owner of the copyright in that place”.

A few months later, in September, he told Curtis that he would not accept proposals to allow record companies to import records into Australia for the purpose of making recordings of the embodied works. Curtis’s memorandum of late August explained why: importing records under the compulsory licence “might encourage importation at the expense of manufacture in Australia”.

Bowen and Curtis evidently paid only fleeting attention to the history of copyright law-making. Throughout the 20th century, sometimes in leaps, sometimes little by little, the recording industry swept aside all opposition to its will. Curtis’s departmental predecessor, Joe Tipping, realised something of this truth when 35 years earlier he told John Keating that APRA was a “lamb” compared to “the gramophone companies lion”. Sure enough, in the months after the introduction the first Copyright bill on 18 May 1967, Bowen learnt that his position could not be sustained.

His refusal to allow the industry to import records to circumvent the limitations in the new provisions suggested that he shared the belief that the rights of copyright owners were inviolable. From this perspective, it mattered little that the primary right to control the reproduction of copyright material does not logically

presuppose a right to control the distribution of that material.

Bowen and his advisors did not ask themselves difficult questions about import restrictions. Why should the Australian rights-holder who withheld consent to compulsory recording, be permitted to prevent the importing of records made legitimately overseas? Why did the interests on the copyright owner take precedence over the public's interest in receiving a broad variety of records at lower prices? No-one at the Attorney General's Department bothered to think about the ill effects of monopoly.

Officers otherwise willing to support the enactment of privileges for copyright industries now saw only a ravaging industry depriving artists of their rights. Shortly, the industry itself would loudly proclaim the value of import controls preventing Australian retailers from importing records sold overseas. But who benefited from import controls mattered less than the harm they caused the public. Bowen failed to see that control over distribution, no matter who happened to be the copyright owner, worked against consumers.

Instead, he, Curtis, and others, traversed the same path as the Spicer Committee. According to the Committee, only four per cent of records sold in Australia were recorded domestically and the remainder pressed locally from imported matrices of foreign records. According the Committee's logic, an Australian matrice was better than a foreign one, and forcing local companies to rely on the consent of an Australian rights-holder's consent to the making of a record would produce a domestic manufacturing industry.

The Government relents

The music industry did not retreat and IFPI and the Australian Federation of Record Manufacturers agitated furiously against the shrunken compulsory licence. Faced with a barrage of arguments, Curtis suggested to Bowen that the offending provisions in the copyright bill be revised. "Having regard," he said in a memorandum, "to the fact that the existing practice seems to have worked and that the business of the record manufacturers is geared to this practice, I suggest that the Bill should be amended to reflect this practice."

Bowen described his reason for accepting Curtis's advice in the blandest of terms. In his second reading speech for the 1968 Copyright Bill, he said simply that, after "full consideration of the arguments that were put by both sides I came to the conclusion that some changes should be made" to the compulsory licensing provisions. They now applied if a work had, with the consent of the local copyright owner and for the purpose of retail sale, been recorded in, or imported into, the territory of any member of the Berne Union or the Universal Copyright Convention.

As modified, the compulsory licensing provisions stipulated that owners could not indefinitely withhold consent to the first recording of works (other than

musical scores for stage or film).⁷ Owners suffered another shock. The Government decided not to increase the old rate of royalty payable on retail sales of records made under compulsory licence. Under the bill, the rate remained at 5 per cent, even though the Spicer Committee recommended that it be increased to 6.25 per cent and the higher rate applied in Britain from 1928.⁸

Bowen reassured owners in his second reading speech that the Government did not regard the lower rate as immutable. But neither he nor his department were qualified to determine appropriate royalty rates. The task of fixing the rate, he said, would fall to the new Copyright Tribunal, which could comprehensively investigate value of money changes and market developments.

Bowen and the import monopoly

Bowen's frank admission that his department was not equipped to determine the appropriate rate of royalty for records made under the compulsory licence showed the directness that characterised his conduct as Attorney General. He appeared less clear-sighted about the need for external consultation on another set of provisions that pertained far more to the welfare of Australian consumers. These were sections 37 and 102 of the bill, which prohibited the importation of copyright articles without consent of the copyright owner.

Almost a decade previously, the Spicer Committee showed deplorable ignorance of the history of the import controls in Australia. Now Bowen too failed to grasp the truth that the controls were designed to protect the monopoly of British publishers over the distribution of books throughout the Empire. Bowen evidently knew nothing of the reaction of earlier Australian legislators to the import monopoly. The great parliamentary generation of 1905 rejected import controls, and John Keating, who displayed an unrivalled grasp of the history of imperial copyright law, spoke with passion and logic against the monopoly over distribution.

Bowen focused attention on the importation provisions in 1967 following ructions over the Government's proposal to extend the application of sections 37 and 102 of the bill to importation for non-commercial purposes. His department brought to his attention the discovery that an unwanted effect of the revision would be to revoke *de facto* freedoms hitherto enjoyed by libraries and broadcasters.

Even though section 10 of the 1912 Act allowed the copyright owner to restrain the importation of works regardless of the purpose for which they were imported, in practice libraries imported books and records unhindered. Lawyers

7 Bowen explained in his second reading speech that the reason for the exemption was that producers needed the scores to remain secret until release of the show or film.

8 Under the British system the royalty was calculated by reference to the retail price *exclusive* of sales tax. In Australia the retail price included wholesale tax.

interpreted section 10 to apply to importation for the purpose of retail sale. The proposed revision to the bill overturned longstanding practices that, in the case of the libraries at least, could be said to facilitate the delivery of public benefits.

Informed of the libraries' import practices Bowen immediately rang the NSW State Librarian and discovered that the Library purchased many of its books from overseas. Armed with this information, he decided to retain existing practice. He felt, according to a departmental minute, that in the case of libraries, "there was no strong case for the English law on importation to be followed in Australia." Local conditions were "significantly different" from those in the United Kingdom. Unlike Britain, Australia was "largely an importer of books, records, etc".

Bowen's ignorance of Australian copyright history now prevented him from applying similar reasoning to analysing the import controls generally. John Keating, Joseph Vardon and David Gordon, the three men who spoke out most powerfully against import controls in 1912 copyright debates, might have asked him a simple question. Why, if Australia was a net importer of copyright product, did the freedom to import items without the consent of the local rights-holder apply only to libraries?

Even the libraries' exception provided the public with only a partial benefit. Booksellers would be unable to import cheap copies of books produced overseas and the readers would pay higher prices for the books supplied by the local rights-holder. As Curtis pointed out to Bowen, the library amendment "would be more likely to benefit book publishers than anyone else." Freeing libraries from the publishers' distribution stranglehold enabled them to import a wider variety of works at lower prices. But Bowen's solicitude towards libraries did nothing to assist the purchasers of books and records in retail outlets.

Like the Spicer Committee, Bowen and his department took for granted that its long history justified the import monopoly. None thought to examine that history critically. It was not until the 1980s and 1990s that the justification for the monopoly would be seriously examined and politicians forced to reconsider the frauds visited against the public interest by sections 37 and 102 of the Australian Copyright Act.

In the meantime, the public accepted limited choice and high prices.⁹ It seemed that for Bowen, like so many legislators who preceded and followed him, certain principles and laws of copyright were decrees inspired by providence. Believing in the virtue of laws created by Parliament they willingly elaborated principles without regard for their justification.

In the case of the import monopoly, Bowen and his advisers fell prey to the

9 Import restrictions on sound recordings were lifted in Australia in 1998 and government and consumer surveys tracked a steady fall in prices from that year. Restrictions on computer programs were lifted in 2003.

false belief that time-honoured law is good law. Long trained in intellectual conformism, they did not understand that a law accepted for more than half a century may yet be rotten. The Australian public suffered the results of Bowen's decision to retain the import monopoly. Copyright owners continued to control the supply of copyright product to Australia, and consumers continued to pay high prices for books and records, and later videos, DVDs and digital products.

THE DEBATES OF 1968

Labor's stand

In the early history of Australian parliamentary debate over copyright, one or two individuals rose above their colleagues in insight, understanding and conviction. These figures were united by the hatred of monopoly. In 1905, Sir Josiah Symon invoked Macaulay's warnings against monopoly to argue passionately against the lengthy posthumous term, and seven years later John Keating and David Gordon attacked the import monopoly with equal moral force.

None of these men belonged to the Labor Party, which in 1912 adopted a reactionary stance on the question of import controls. In 1968, however, Labor politicians linked the rights of authors with the development of national identity, and attacked some of the monopoly rights conferred by copyright law.¹⁰ No speaker during the 1968 debates showed the intellectual and moral depth of Symon or Keating but a few shared their scepticism over the motives of those who argued for more and more rights.

Labor MPs led the charge against key aspects of the 1968 Copyright Bill. They were led by Reginald Francis Xavier Connor, a massive, aggressive man twice convicted of assault and known by a variety of nicknames – “Al Capone” “King Kong”, “the Strangler”. According to a colleague, he “built a reputation for perspicacity on an impressive knowledge of chemistry, xenophobia, such profound non sequiturs as ‘life is an equation in hydrocarbons’, and mumbo jumbo about an annual ‘energy budget’.”¹¹

Six years after the Copyright Bill, he engineered the Khemlani Loans Affair that led to his resignation and the fall of the Whitlam Government. Bombastic and menacing, Rex Connor did not restrain himself in parliamentary debate. He hurled intemperate abuse at the Government but he spoke with confused pre-science about the effect of copyright laws in limiting future access to copyright

10 They advocated ideas of cultural protection that neither Keating nor Gordon, both ardent advocates of the Australian interest, shared.

11 Peter Walsh, *Confessions of a Failed Finance Minister*, Random House, 1995, pp19–20.

material. He glimpsed the future through a glass darkly but at least he guessed something about later developments that his colleagues did not. He also spoke speciously about the Government's obligation to artists, bringing to public notice a favoured theme of future Labor governments, the need to join copyright and cultural policy.

“Time and space”

In his remarks after Bowen's second reading speech, Connor, the unmistakable polymath, referred to “the Pharisee of old”, Pope Pius XII, Marshall McLuhan and Gutenberg. The rapid recitation of sources to illustrate his points unfortunately distracted his audience from a deeper insight: Connor grasped, indistinctly, the future of copyright law as a means for regulating global communications.

Quoting McLuhan's observation that a century of development in communications technology abolished “both time and space”, he noted that while the legislation “belatedly provides solutions to longstanding problems [of technology development] it fails utterly solve or to foresee those of the immediate future.” He correctly predicted that developments in video recording and computing would precipitate arguments for further copyright legislation, but more significantly, he exposed what copyright proponents regarded as a technical deficiency in the drafting of the Bill.

The 1968 legislation vested in the owner exclusive control over the reproduction, broadcasting and diffusion (distribution via terrestrial wires) of copyright subject matter, extending copyright protection to the known methods of reproduction, as well as the technologies of broadcasting and transmission by wires. This drafting formula presented future legislators with a difficulty. Whenever copyright owners succeeded in securing the extension of copyright to new reproduction and distribution technologies, they were forced to amend the Copyright Act to vest control of the new technologies in the owner.

In short, legislators played catch-up trying to ensure that copyright protection extended to all technologies that multiplied and disseminated copyright material. As Connor said, “radio, television, the modern phonograph recording industry, magnetic tape recorders, videotape, computers, new methods of printing, photocopying, satellites for communication and the transmission of entertainment programs, microfilming of books, and electronic diffusion services ... have created new concepts of mass communication and new challenges even for nations which have progressively modified their law of copyright.”

The Bill, he made clear in his remarks, did not comprehend all the possible modes of reproducing and disseminating copyright material. In modern parlance, its provisions were not “technology neutral”, that is, they could not be interpreted to apply to all conceivable future modes of production and communication. The Bill, said Connor, “fails utterly to meet even the problems associated with the mi-

nor innovations of the technological age.” If implemented, the legislation would “fail dismally to meet the more complex problems associated with man’s march forward in the vanguard of electronic invention.” Viewed from the perspective of whether the copyright legislation applied to new technologies, these criticisms were to some extent vindicated.

Only in 2000 did Australia overcome the problem – from the copyright owner’s perspective – of new technologies falling outside the ambit of copyright legislation. Major legislative amendments introduced a so-called “technology-neutral” right of communication to the public, which replaced technology-specific dissemination rights. Copyright protection applied to any conceivable form of disseminating copyright material. The legislation also expanded the meaning of reproduction to include the digitisation of works and the conversion of digital works into a non-digital format.

Having suggested that the piecemeal extension of copyright to new technologies meant that existing legislation would be inadequate to regulate a communications economy characterised by continual innovation, Connor went no further. He turned instead to the policy considerations that motivated the Opposition and Government. According to Connor, the governing Coalition, “obsessed with proprietary rights” stood for big business, and more specifically, the copyright industries. The Labor Party, by contrast, was “primarily interested in the plight of Australian authors, dramatists, composers and artists.” A tide of imported books, films, records and television shows swamped their work and they deserved “a greater percentage of the remuneration which would otherwise be flowing overseas, much of it for syndicated rubbish or worse”.

The “little people”

Connor’s colleague, Gilbert Duthie averred that the copyright industries “will look after themselves and they have the power to do so.” Labor would “think principally of the authors, dramatists, composers and artists.” The Copyright Bill reflected the politics of power: the record companies, broadcasters and publishers “walked the fastest, longest and most often to the door of the Attorney General.” These industries, said Duthie, “had changes made in the 1967 Bill and those changes are reflected in the Bill that is now before us.”

Duthie declared his concern for “the little people, as I call them”. Echoing George Bernard Shaw’s comments in *The Times* in 1911 and 1949, he said that the little people “do not have the financial might, the stocks and shares and the status in the community to exert pressure, but they sweat and sacrifice to create works of art.” Parliament, he insisted, “should think of them primarily in this legislation.” Between them, Connor and Duthie announced a distinct policy towards copyright law which the Labor Party proclaimed for the next 30 years. The declarations, however, rang hollow.

For 20 years before Duthie's speech, cross-currents swirled around the coral edifice of authors' rights, weakening the Berne Union's many-hued creation. Copyright law still acknowledged the primary entitlement of authors but the growth of industrial copyright and neighbouring rights presaged a new age. Governments of all political persuasions now lent their ears to corporations, not the little people.

A policy of preferring "little people" to "big people", the "rich industrialists" described by Bernard Shaw in 1911, is not to be derided. But Duthie's conception of little people did not comprehend a larger group of "little people", the great community of consumers who bought books and records and paid to see films. The Labor Party politicians seemed oblivious to the needs of the public. Preferment of Duthie's little people inevitably meant disadvantage to the public. Many authors were no less grasping than industries and excessive privileges were invidious, whether in the hands of individuals or corporations.

Cultural nationalism

The little people doctrine justified the continuation of the import monopoly, which allowed copyright owners to restrict the supply of copyright product to Australia and fix the price of goods. Who paid for protection of the little people? Not the copyright industries, rich, powerful and well able, in Duthie's words, to "look after themselves". Connor supplied the Labor Party's answer: government must subsidise those with an artistic vocation.

The legislature must recognise that "a new economic status should be provided for creative artists now covered by the field of copyright." Additionally, the governments of Australia must employ creators enabling them to "practise their callings within the public services." Connor supplied an alarming summary of the role to be played by artistic public servants. "Here would be people," he said, "speaking to the nation, moulding the national ethos, and providing the mainstream of a truly Australian cultural sentiment and national spirit."

If Australian voters wanted to free their country from the ancient curse of philistinism, they would have to accept the necessity for supporting artists in the public service. "The Australian market," Connor declared, "has always been appallingly limited by population." Limited demand meant that "with very few exceptions, no composer, author, dramatist or artist can be assured, from within the limited Australian market, of an adequate return for the products of his creative talent and genius."

Connor's grand vision conflated copyright and cultural policy. "Is it to be wondered," he asked, "that there are critics of the impediments to Australia's cultural development and maturity? Is it to be wondered that there are critics of the absence of a major Australian film industry?" Consumed by his vision of cultural revolution, Connor added a proviso. The new class of artist bureaucrats must

be secluded from the temptations posed by the copyright industries. Quarantined from “the dead hand of sordid commercial calculation” they could concentrate on producing works that satisfied “the human mind thirsting for knowledge or works of creative talent and genius”.

According to Connor, the bureaucrats would create a new Australia:

The products of their talent, and in some cases genius, would then be available to the whole of the Australian people through modern electronic communication media, without the interposition of commercial interests whose exclusive objective is the extraction of maximum profit for themselves, with minimum return to those responsible for the creation of works of artistic, cultural and literary merit.

Connor’s vision of a cultural nomenklatura created by copyright legislation perhaps owed something to his early affiliation with the Communist Party and membership of the communist-dominated Industrial Labor Party.¹² In sketching the merging of copyright and cultural policy he anticipated the approach taken by future Labor Governments but his ideas went beyond anything envisaged by his Party.

“God help the composer”

Duthie commended Connor for his speech but he did not support the latter’s fantasy of a utopia created by artists. His ideas for copyright policy owed nothing to crypto-Marxian dreaming. Much more than Connor, he helped articulate the new Labor orthodoxy that placed “originators” at the forefront of policy. Duthie’s views represented a sane counterbalance to Connor’s, mainly because he did not assume a necessary connection between copyright regulation – designed principally to protect the economic interests of copyright owners – and the ideology of cultural development, which subordinated copyright policy to the goal of creating economic security for artists.

Duthie felt that Copyright Bill was designed to benefit the copyright industries, especially the “record manufacturers, the big shots of the music industry”, as he called them. He wanted to ensure that the creators, without whom “there would be no ballets, no publishers, no music houses and no record companies”, received a fair share of the profits generated by the industries. The “big shots”, said Duthie, were “getting on very well”. He observed ruefully to other MPs that “I have not heard of many record manufacturers going out of business”.

Duthie asked the House to consider the true purpose of copyright law. “What

12 Connor was close to the Communist Party during his early political career. He joined the Industrial Labor Party in 1939, was a member of its central executive and a keen socialist.

we have to understand,” he said, “and to think about is that is the originators who deserve basic protection in any legislation like this.” Unlike Connor, he made modest proposals to benefit creators. The Government, he believed, should continue to assist artists through institutions such as the Commonwealth Literary Fund and the Arts Council, but the only change to legislation he proposed was to increase the rate of statutory royalty payable for records sold to the figure of 6.25 per cent recommended by the Spicer Committee.

The rate was “anchored at 5 per cent in 1912” and he derided the Government’s proposal to leave future revision of the rate to the Copyright Tribunal. He was equally dismissive of the times specified in the Bill for review of the rate. The legislation provided that the Attorney General could request a review of the rate two years after the commencement of the Act and then five years after the first review. According to Duthie periods “of two years and five years are outrageously long before an appeal to the Tribunal may be heard.”

Otherwise, Duthie accepted with resignation a Bill that indeed created a suite of rights that belonged to industries not authors. Unlike Connor, he adopted a constructive approach to the Bill. Whereas Connor spat at the “slovenly Government” for its failings in regard to copyright policy, Duthie offered congratulations.

“We welcome this legislation,” he said. “It will do a lot to remove injustices. Where injustices remain the Copyright Tribunal will have to correct them.” The Tribunal, said Duthie, would be “composed of some of Australia’s top judges”. He ended his speech with a wry parting wish. “All I hope,” he said, “is that they are judges with musical souls. If they are not, God help the composers.”

The question of dissemination

Not all Labor politicians concentrated on the needs of copyright creators. Gordon Bryant, a member of the National Library Council, hoped that “members will play close attention to the field of libraries and their particular duties in regard to this legislation.” Libraries disseminated knowledge and Parliament “must take good care that there is no inhibition of our use of any material that is about.” The legislature “ought not to throw [originators] to the wolves as has been done so often”, but government must pay attention to the needs of copyright users.

Bryant reached a radical conclusion. “I am not even convinced,” he said, “that property rights in copyright should flow on after the death of an author.” Why, he asked, should royalties “have to be paid after an author has passed on?” If copyright died with its owner, the public benefited. If copyright works found their way more rapidly into the public domain, the public gained access to literature and music freely, or at least cheaply.

The long posthumous term merely enriched individuals who played no part in the creation of copyright works. “I understand,” Bryant noted with disapproval,

“that a great deal of money is still flowing into the coffers of the Shaw estate.” But he doubted whether his views would impress other legislators. It was doubtful, said Bryant that their “attitudes to copyright and the protection of people’s rights are adequate to the task.”

Bryant asked a series of questions.

In copyright, where does the interest lie? Does it lie necessarily with the author? In a dramatic work does it lie with the performers? If it is reproduced in printed form, does it lie with the publishers?

The answer he considered straightforward. The copyright industries lobbied the politicians and copyright laws were now made for their benefit. In the case of books, the “odds seem to favour the publisher.” Why?

He is likely to have the biggest interest. He is likely to have access to the corridors of power. He is likely to be more persuasive. So in the conflict of ideas, rights and so on ... it is likely that the person who achieves the greatest success financially will be the publisher.

In the case of musical works, the record companies benefited more from the Copyright Bill than composers. The same applied to broadcasters. They, not the creators of broadcast works, gained significantly from the legislation.

Bryant concluded with more questions that crystallised his sentiments.

What are we to do about authors? How are we to encourage Australian authorship in the face of competition from overseas? Finally, what are we to do to protect the rights of customers who number more than 12 million?

According to Bryant, “the customer outside is interested in the whole field.” More than anyone else in Parliament, Bryant articulated the need for copyright users, in a world dominated by copyright owners, to secure access to copyright material. He said of the user:

He is interested in the works of dramatic art, in the right of access to sporting spectacles, in the right to read in public libraries when there is only one copy of a book available or perhaps when only a few copies of a book have been imported. Then there is the right of the student which at the present time, is probably one of the most compelling needs.

Importation and price competition

One Government MP expressed particular concern about the policy underlying

the importation rules. Edward St John, a Coalition maverick shortly to stand as an Independent and lose his seat, repeated the old proposal, first rejected by the Spicer Committee, for importers to be permitted, under the terms of the compulsory licence to import records from overseas. He declared that it was “very necessary in the public interest that importers should not be held to ransom by the copyright owners, so that the Australian public may continue to enjoy the benefits of price competition.”

St John knew he was steering an imprudent political course – he said later in his speech, “I do not care how many bridges I have burnt behind me” – and his arguments did not sway Bowen. By trying to defeat importation restrictions by revision to the compulsory licensing provisions, he made failure certain. The Spicer Committee rejected the idea of extending the compulsory licence to include importation of records for the reason that the production and distribution of records are two different processes. According to this logic, a right intended to prevent a production monopoly should not in principle be used to try to defeat a distribution monopoly.

St John would have done more benefit to the cause of defeating the import monopoly by drawing attention to the “great big blackmailing clause” referred to in the House by John Keating 56 years earlier. In the 1968 Bill, the blackmailing clause was section 37, and by exposing the inequity of the distribution monopoly it conferred on copyright owners, St John could have established a precedent, in the tradition of Keating and Gordon before him, for principled objection to import control.

Performing right in records

Another backbencher, Alexander Buchanan, who, like St John, ended his career as an Independent, criticised the provisions creating the mechanical performing right. A politician of considerable experience, a farmer, and an amusing straight-talker, Buchanan recited the history of radio broadcasting in Australia. He declared that radio broadcasters did not accept the obligation to pay fees for playing records. Broadcasting conferred a great benefit on record manufacturers:

The value to the maker of exposure by broadcast and penetration by transistor to the mind of the teenager and other areas of vacuity is so great that broadcasting stations are inundated with free copies of new records in the same extravagant way as doctors are importuned with free samples of new drugs by medical detailers ... Some stations do not play anything else than these jungle tunes, and far from getting any royalty on them the makers should be fined for inflicting them on a defenceless public.

“This performing right,” said Buchanan, “is a monstrous distortion of the very

basis of creative production and original authorship which copyright involves.” Buchanan could not see how the investment of skill, effort and money justified the award of copyright in records, let alone the mechanical performing right. He said:

None of this so-called technical skill adds one note to the score or one word to the lyric ... if it does cost money, the ordinary processes of business require that the maker should seek his reward by the sales he is able to make of his records.

He declared the reasons given by Justice Maugham for his judgment in *Cawardine* “arrant nonsense”. In criticising Maugham’s discovery that legislation bestowed on the record industry a mechanical performing, he followed directly in the footsteps of a former Lord Chancellor and important legal reformer. Buchanan did not repeat Lord Jowitt’s disparaging summary of Maugham’s “unfortunate” decision in favour of the Gramophone Company but his own criticisms brought to mind those of the Labour peer. They may also have rung true to Bowen were he listening to them as a lawyer and not a politician.

Buchanan pointed out that the mechanical process of producing a record involved not a shred of originality or artistry. As conceived by the Berne Union and the British and Australian legislators of the early 20th century, copyright subsistence depended on originality. Only by corrupting principle could the legislature agree to vest copyright in the so-called ‘subject matter other than works’. When British legislators established the compulsory licence in 1911, they created a species of copyright that did not include the positive rights, including the performing right, vested in the owner of copyright in works.

For the most part, Buchanan’s comments fell on deaf ears, though at least one other Coalition backbencher shared his views. Ian Allan, a Country Party backbencher who worked as a radio announcer for the ABC in the late 1940s, was, like St John and Buchanan disenchanted with the Government. Like them, he criticised the Bill not because he wished to damage the Government but for reasons of principle. He complimented Bowen on the legislation and spoke in positive terms about the Bill as a whole. But when he came to provisions creating the mechanical performing right, he spoke vehemently against “this part of the legislation which forms only a tiny fraction of the whole Bill”.

Bowen, said Allan, knew very well that he considered this “one item in the Bill” to be “highly objectionable” and that “I cannot see any rational explanation for it”. He reminded his listeners that the British gramophone industry asked the Gorrell Committee in 1909 to recommend legislation to create a mechanical performing right. The industry, said Allan, wanted to boost record sales by encouraging the public performance of music. It needed the right, he claimed, to ensure that the playing of records in places of public entertainment would not be judged an infringement of copyright in works performed. Legislators enacted

provisions permitting compulsory recording but they never intended for the industry to prevent others from playing records in public or demand fees for public performance.

According to Allan, only the peculiar reasoning of Justice Maugham, influenced by the cunning arguments of Sir Stafford Cripps, transformed a right to perform records in public to a right to control the public performance of records. But, said Allan, neither reason nor justice supported statutory recognition of the right identified by Maugham. To pass laws recognising the mechanical performing right, he said, “offends my common sense”. Allan quoted the 35-year-old Owen Report, which emphatically rejected the record companies’ proposal for legislation to recognise the right. In the report, Justice Owen declared that:

The law should be made clear on this point, and, in the opinion of this Commission, the performing right now claimed by some record manufacturers is unreasonable, and, if in law it exists, this right should be abolished.

Allan attacked the reasons given by the Spicer Committee for supporting statutory recognition of the mechanical performing right. The Committee gave three reasons: the manufacture of records involved technical skill above that required in ordinary manufacturing processes, broadcasters relied on playing records to attract listeners, and the manufacturers invested significant amounts of capital to establish production facilities. According to the Committee, the investment of skill and capital, and the reliance of broadcasters on the supply of records, demanded legislation to create a right of public performance in records.

The “reasons given by the Spicer Committee,” said Allan “are really unsound.” He pointed out that, “on all scores the manufacturer of a record is in no better or worse category than the [ordinary] manufacturer.” Allan implied that all manufacturers could claim to exercise special production skill. “Even the man who moulds a toothbrush,” he said, “perhaps has some special claims to creative ability. His creative talents are called into use in designing the mould of the toothbrush.”

Nor should the fact that radio stations depended on playing records to attract listeners justify a claim for public performance fees. The advantage cut both ways. In the absence of broadcasting, record manufacturers would find they sold fewer records. The record companies had no need to antagonise broadcasters by demanding fees for an activity that benefited them as much as the radio stations. EMI, according to Allan, “pays a fee of \$200,000 to Radio Luxembourg, a commercial station situated in Europe, to play and to popularise its records, because EMI knows that the way it can get its records sold to the public is by having them played by commercial stations.”

Allan disposed of the argument that industry investment called for statutory protection. The industry in Australia flourished in the absence of the mechanical

performing right, and in any case, the contribution of the record companies to Australian industry was small. The majority of investment behind the production of records sold in Australia occurred outside Australia. Companies imported 80 per cent of records played in Australia. Performance fees collected for the playing of these records, said Allan, would be mostly remitted to foreigners.

The Spicer Committee's case for the mechanical performance right, said Allan, "was a very weak effort indeed." No reasonable person could gainsay Allan's logic in his dissection of the Spicer Committee's arguments. Analysed so starkly, they seemed risible. His description of the gramophone industry's quest for recognition of the performing right in Britain was not wholly accurate – the industry first evinced a strong interest in the right at the end of the 1920s – but taken together his arguments against the relevant provisions in the Bill powerfully refuted the Government's reasons for recognising the right.

Buchanan's last words on the subject no doubt raised a smile on the faces of others in the House. "Surely," he said, "law should be based on logic and rational thinking."

The modern case for regulation

The debate in the House of Representatives ended, Reginald Wright, the Minister for Works, introduced the Bill in the Senate. His speech mostly repeated Bowen's second reading speech. His proved more illuminating, however, because, unlike Bowen, he carefully explained the policy underlying the legislation.

In so doing, he elaborated the balance theory of copyright. The main factions in contemporary copyright debate would affirm his statement of the law's function would. Wright can thus be said to have articulated in Australia, perhaps for the first time, present orthodoxy about the purpose of regulation.

Copyright legislation, he said, must articulate "a reasonable compromise in cases where there are conflicting interests". It must preserve the incentive to produce copyright material by protecting the legitimate economic interests of producers and balance against the interests of the producers the needs of the authors.

Wright stopped short of acknowledging dissemination of information as the primary goal of copyright policy. He never mentioned the public's interest in comprehensive access to information, described by Gordon Bryant as the "people's rights". Nor did he share the Labor Party's preference for authors over producers. While the Government wanted "to see that authors receive due payment for use of their material" it recognised that "existing practices and existing relations in industries which depend upon copyright material cannot be ignored."

"Without this protection," said Wright, "it would not be likely that large sums would be invested in the production of books and magazines or the publishing of music." Industries were also users of copyright material, and in this

capacity, must be treated tenderly. The “broadcasting and television industry, the record industry and much of the entertainment industry” all “depend on being able to use copyright material on reasonable terms.”

Remarkably, Wright’s speech made no reference to the interests of the public. He seemed oblivious to the possibility that members of the public could use copyright material. For Wright, “users” were broadcasters and the entertainment industries. The purchasers of books and records, the viewers of film, television and entertainment, the radio listeners, these millions of individuals seem not to have entered into Wright’s calculations.¹³

Wright’s statement of copyright’s purpose, contemplated only two elements of the schema of interests nowadays consulted in discussions of copyright policy. In 1968, however, only Coalition dissenters, and Bryant of the Labor Party, suggested that laws directed towards assisting the creators and producers of copyright material should also operate to the benefit of those who paid to read, hear or view that material.

The Senate carried on a perfunctory debate after Wright introduced the Bill. The Opposition repeated its complaint, made in the Lower House, that the Government rushed consultation. Otherwise the Labor Senators offered little criticism of the legislation. The Party’s main speaker, Senator Doug McClelland, followed his Lower House colleagues and demanded that the Government ensure that creators were “adequately protected in the interests of the creative arts in this nation”.

The Bill passed, almost entirely unchanged, in June 1968. In 1905 and 1912 members of the Senate supplied the most perceptive and searching commentary on copyright legislation. In 1968, Senators said little about the Copyright Bill. Reasons for the change are not hard to find. The earlier senators, those of 1905 and some in 1912, were a more fearless breed, and the world they inhabited, less beholden to special pleading and special interest. Independent and willing to ignore party principle, they were, above all, resolute in placing the interests of their country before any others.

A new era

The debates of 1968 signalled the beginning of a new era in which policy-makers considered government accountable to interests of not only the creators and

13 Modern policy debate casts the members of the public interchangeably as “users” and “consumers” of copyright material. Some observers draw a distinction between users and consumers: in their formulation, the makers of electronic networks market to “users”, who have autonomy to decide how to use computer systems to obtain and use information, while the content providers of film, television, print and the internet dictate the choices of “consumers”.

producers but also the public – the “users” (or “consumers”) of contemporary parlance. Connor’s scheme for commissariats of the arts marked the start of Labor’s support for the little people in preference to the public. His colleague Gordon Bryant expressed concern that the legislation neglected the interests of the libraries and their public, but his Party ignored him.

It fell to Coalition dissenters, abetted by Bryant, to advocate the public interest. One criticised restrictions on the importation of records and two attacked the mechanical performing right, this “monstrous distortion”, in the words of Buchanan, that operated to the disadvantage of radio broadcasters and the listening public. All critics regarded the new rights delivered to the copyright industries as inimical to the real purpose of copyright. All were unambiguously supporters of authors’ rights and they considered that the new industrial copyrights could not be justified in principle. Only by distortion and corruption of principle could they in any way be justified.

The Government paid no attention to any of the critics. Outside Parliament, the public uttered no words over the copyright legislation until 1969. Earlier, in 1967, the *Sydney Morning Herald*, in a short editorial that reproached the Government for taking so long to implement the recommendations of the Spicer Committee, gave the first Copyright Bill “a hearty welcome”.

In 1969, the *Herald* registered the first salvos in the still-continuing war between libraries and copyright owners’ groups. Debate began in August when Alan Horton, the General Secretary of the Library Association of Australia, responded to the threat of the Australian Copyright Council to prosecute libraries and schools for photocopying books. He declared the reproduction of whole books, “entirely improper”, but disagreed with the ACC’s claim that students using coin-operated photocopying machines in libraries were “flagrantly” breaching the new Copyright Act.

According to the Library Association, to ban the photocopying of extracts in public and university libraries could “interfere with the free dissemination of information.” In September, Horton and Gus O’Donnell, the Chairman of the ACC debated the issue of legitimate copying for educational purposes in the pages of the *Herald*. A school student, Patricia York, joined the debate, pointing out the possible administrative consequences of draconian enforcement of the fair dealing and library provisions in the Act.

“May I ask?” she wrote, “what the authors, composers and publishers want? An inundation of letters from students asking to make a copy? A grand court case involving thousands of students? Or a lump sum from a Government which can ill afford it?” O’Donnell hastened to assure her of his organisation’s “great sympathy” and noted that all that “the council is saying is that excessive making of copies in schools is not fair dealing.”

Her question went unanswered. What *did* creators want? And to what extent were their wishes consistent with then needs of the public? These matters would

be debated for decades. But the truth is that the Australian public in 1968 was uninterested in the new Copyright Act. Superficially, it seemed to change little: for the copyright industries, for authors and for students, business carried on as usual.

SUMMARY OF THE 1968 ACT

The *Copyright Act 1968* is a creature, or more accurately, a younger first cousin, of the British Act of 1956. Although said, when originally passed, to be better drafted and better arranged, it adopted the substance of the British Act's provisions and followed exactly the fundamental categories of the British legislation.

Part I contained preliminary provisions, Part II dealt with matters of interpretation and in Part III, the nature and scope of copyright in works was set out. In orderly, comprehensible fashion, Part III specified the rights accruing to the owners of copyright in works, the copyright term, the types of infringement, the varieties of fair dealing, other miscellaneous acts that did not constitute infringement, the libraries' copying privileges and the content of the compulsory licence.

Part IV established a category previously unknown in Australian law: that of, 'subject matter other than works'. The Act set out the nature of copyright in subject matter other than works – sound recordings, cinematograph films, television and sound broadcasts and the published editions of works – in plain terms. The old confused regime, in which films were recognised as a species of artistic works and broadcasts and published editions not recognised at all, disappeared. As in Part III, types of infringement were specified and the acts, including fair dealing, not constituting infringement, were laid out.

Part V dealt with remedies and offences, Part VI the constitution and functions of the Copyright Tribunal, Part VII the right of the Crown to use copyright material as-of-right subject to equitable remuneration, and Part VIII the application of the Act to foreign nationals and institutions.

The legislation thus introduced two distinct categories of copyright subject matter, 'works' and 'subject matter other than works', to the Australian statute books. These categories recognised the distinct interests of creators and producers. If the two recognised interest groups, creators and producers, disagreed over the amount of royalties payable for the use of material, they had recourse to the Copyright Tribunal, as did the record companies and the broadcaster in the event of commercial dispute.

The Act also recognised the public interest in access to copyright material on fair terms, at least partially, in the fair dealing and library provisions. The Act protected Crown use, with the result that it could be said the Act protected the interests of authors and producers while ensuring that the exclusive rights did not operate to wholly exclude government and public from the gratuitous use of

copyright material.

Much about the new legislation seemed admirable. In drafting and arrangement it seemed lucid and coherent and it proved to work in practice. The prediction in 1968 of the Labor Senator, Doug McClelland, that “having regard to the problems that this Bill will create for professional creative people in this country ... another Bill of this nature will certainly be before this chamber within five years” proved unfounded. The Act also had a great weakness: it failed really to secure for the public access to a broad range of copyright material at low prices. The import monopoly remained, with more provisions added in favour of the copyright owner and the fair dealing and library provisions, supposedly designed to advantage the public, could be said to hedge with provisos what should be a birthright of citizens: to hear and to see without always to be reaching into their pockets.

Chapter 12 – Developments in Australia after 1968

A NEW SUPREMACY

The changing world order

The copyright world's American age begins in 1976 when the United States passed a new Copyright Act that embraced neighbouring rights and created copyright in computer programs. The gargantuan growth of the software industry in the United States, the emergence of Apple and Microsoft corporations as exemplars of the new industry, and the flood of exports from Silicon Valley soon demonstrated the unequivocal domination by the US of the world's digital economy.

In the last two decades of the 20th century, personal computers running proprietary US software across the globe suggested more than the economic power of the US. Their ubiquitousness symbolised the ascendancy, in most spheres of life, granted to those possessing property rights. Like the recording, film and broadcasting industries before it, the software industry came into the world unprotected by copyright law, and grew healthy, strong and intelligent – intelligent enough for its leaders to tread the path of opportunity to a magic door labelled “copyright”. The end of this journey rushes into view as if predestined. Like the leaders of the older industries who walked the same well-worn path long before them, the representatives of the new software corporations saw the magic portal open onto the pathway to riches. Thereafter, they did not rest until they persuaded the legislature to recognise property in computer programs.

Following the US example, Australia amended the Copyright Act in 1984 to recognise computer programs as literary works. Other countries did the same – Britain in 1985. The extension of copyright protection to software in advanced economies entrenched the great advantage enjoyed by the US industries in the development, production and export of digital products. On a broader level, it illustrated a new reality. The United States polity now increasingly worked as one with its industries exporting copyright products across the globe. The US iden-

tified national trade interests with the specific needs outlined by the recording, film, broadcasting and software industries.

Driven by the trade prerogatives of the United States, international institutions forged a new copyright architecture that incorporated the gains made over a century by the Berne Union and the proponents of neighbouring rights. Acting through the machinery of trade negotiations, treaties, and the World Trade Organization, the US created itself the new hegemon of international copyright law, effectively supplanting in influence the Berne Union and Rome Convention. Australia, obedient to the Berne Union and its legislative amanuensis, the United Kingdom, accepted the new master unquestioningly.

The shape of the new world made for the benefit of the US copyright industries only became apparent in the 1990s. The polarity between trade advantages demanded by the United States and those accruing to the importers of copyright products, demonstrated the transformation of copyright law into an instrument for enlarging and enforcing comparative economic advantage. Yet none of the framers of the Australian Copyright Act in 1968 could have imagined the new worldwide legislative machinery that guaranteed profits eternal to the conglomerates and start-ups of California.

Some at least must have felt presentiments about the role to be played by Australia in future developments. Only two years before the passage of the Australian Copyright Act, the Australian Prime Minister promised the visiting US President that wherever he went, Australia would follow. And when the American imperium governing through international copyright law came into being, Australia enthusiastically accepted its edicts.

Domestic developments

The Australian scene for 30 years after the enactment of Australia's copyright legislation is dominated by the rise of a new collecting society to rival APRA in influence and effectiveness as well as its perceived brutal invasiveness. Founded in 1974, the Copyright Agency Limited, by litigation or the threat of litigation, and grinding determination, forced educational institutions to pay licence fees for the photocopying of copyright works.

Backed by the compulsory licence for educational copying, which required universities and schools to pay equitable remuneration for copying on their premises, CAL collected ever-increasing payments from the mid-1980s. In 1998, the organisation's lobbying efforts secured another coup. The Government authorised CAL under the copyright legislation to collect fees under the statutory licence for government copying.

CAL, like APRA, did not avoid the criticism that it functioned as the satrap for foreign masters, channelling receipts to publishers in Britain and the United States. Whatever the merits of the criticism, one fact is undeniable. Despite the

existence of some native copyright industries, Australia is an outpost of the American copyright empire, enforcing copyright laws that benefit the United States, and remitting across the Pacific sales income, licence fees and other revenue collected.

THE PROBLEM OF PHOTOCOPYING

Reprography

Reprography is the reproduction of graphics by mechanical or electrical means, including photocopying. Until the 1950s, authors and industries busy arguing for copyright protection paid scant the various processes of reprography. Then photocopying, invented in 1938 by Chester Carlson, a night student at New York University Law School, revolutionised the field. The Haloid Company, renamed Xerox Corporation in 1961, produced the first Xerox photocopier in 1950. In 1959, the company began manufacturing the Xerox 914, a commercial document copier that could make 100,000 paper copies of documents per month.

Japanese companies, including Ricoh Company and Fuji Xerox, quickly entered the photocopier market. According to evidence before a Committee of the US House of Representatives in 1965, in the preceding year copying machines in the US produced 9.5 billion copies of document pages. By the time Australia passed its new Copyright Act in 1968, photocopiers were omnipresent in all sectors of the economies of developed nations. According to one report in 1973, 600,000 machines throughout the world produced 30 billion pages annually in libraries and offices.¹

Statistics published by Sydney's two largest universities suggested that their photocopiers produced about 2 million pages in 1969.² Though no parliamentarians debating the Copyright Bill raised questions about the legitimacy of photocopying, legal debate over the practice began as soon as the new legislation commenced in 1969. Organisations representing authors and publishers pressed universities for more information about their copying practices. The Australian Vice-Chancellors' Committee, relying on legal advice that university libraries could rely on the fair dealing provisions in the Copyright Act, thumbed its nose at the publishers.

1 Reported by Gavin Souter "Copyright versus photocopying" in the *Sydney Morning Herald*, 27 December 1973.

2 In 1968, Sydney University reported that its machines produced 873,780 copies. The University of New South Wales reported that in one 21 week period in 1969, students and staff made 325,100 copies.

First salvos over photocopying

The Australian Copyright Council, a collective of copyright creator interests³ formed in January 1968, fired its first salvo in July 1969, sending a letter to the country's directors of education, vice-chancellors, principals of colleges and secondary schools, and librarians. The letter attached the advice of a leading Sydney QC. Couched in temperate formal language, the letter summarised the advice, explaining the narrow parameters of permitted photocopying.

The ACC was rarely so circumspect again. Increasingly, the debate with the educational sector turned into a battle in which both sides staked definite positions from which neither would in principle resile. The domestic battle led to an official inquiry and then the introduction of statutory licensing schemes for educational and government copying. These developments, however, lay in the future. In 1969, the ACC felt its way cautiously, mindful that international copyright committees were yet to produce definite opinions on the legal status of photocopying, and inter-governmental agreement on the topic remained far off.

Yet the question of photocopying occupied the minds of publishers from the moment that Xerox 914 swept the world. As millions of photocopiers produced billions of copies they stood by, desolate, as the world tolerated copying without recompense. Brooding on the usurpations of the copiers, they looked jealously on the magic of the new machines. Like Caliban, envious and fearful, they plotted to regain their island from Prospero. How, they asked themselves, to subvert the magic and restore harmony to a universe in which nothing is for free?

The International Publishers Association took up cudgels throughout the 1960s, taking part in all international copyright meetings convened by government or professional organisations. It dolefully reported in 1973 that while photocopying "can be a valuable aid in specific, strictly defined cases, it can likewise be an evil making continually greater inroads." The following year, the Australian Society of Authors declared that "a way must be found of allowing the creators of copyright to share with the users of copyright the benefits of the new techniques."⁴

International developments

Governments responded promptly to the many similar expressions of concern

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- 3 Though partly funded by government, receiving grants from the Australian Council for the Arts, an agency of the Department of the Prime Minister.
 - 4 International Publishers Association, *Second Memorandum on Reprographic Reproduction* submitted to UNESCO and WIPO for the Meeting of Experts May 1973 and submission of the Australian Society of Authors to CLRC inquiry into reprography 11 October 1974.

and the promptings of international library organisations.⁵ As early as 1961, UNESCO's Intergovernmental Copyright Committee⁶ and the Executive Committee of the Berne Union examined, in the words of a jointly appointed Committee of Experts, "copyright problems raised by the reproduction of protected works by photography or by processes analogous to photography and to formulate recommendations for possible solutions."⁷

After 1961, UNESCO and the Berne Union discussed the question of photocopying biannually well into the 1970s. The two organisations determined in Paris in 1973 that the time "is not yet ripe for taking a definite stand", and instructed the Committee of Experts and a joint working group to continue work on policy recommendations. In Australia, the ACC gave up hopes for the international consensus that would force the Government to regulate photocopying in universities, schools and government.

Role of the ACC

Working closely with the Australian Council for the Arts, the ACC pressed successive governments for action after sending its letter to educational heads in 1969. Led by Gustaf O'Donnell, a man of bomb-proof self-righteousness in the cause of authors, the ACC proved itself by far the most formidable lobbyist on the Australian copyright scene. Chairman also of the Australian Society of Authors, O'Donnell pressed the cause of authors and publishers with indefatigable zeal and bombast.

Beside him stood David Catterns and Peter Banki, legal officers at the ACC. Quietly, they researched the law, followed international developments and presented submissions on the need for regulation. Little by little, and then in strides, this triumvirate of advocates made the case for a wide-reaching official examination of photocopying practices.

Banki and Catterns were beginning long careers of mostly unbroken success arguing the position of copyright owners in the Copyright Tribunal and elsewhere. Over 20 years later, Banki founded one of Sydney's leading intellectual property law firms while Catterns, appointed Queens Counsel, led a string of cases in the Tribunal.

They put an unequivocal position to government: the owners of copyright works must be paid for the copying of works by any technological means regard-

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- 5 International Federation for Documentation and International Federation of Library Associations.
 - 6 The Intergovernmental Committee of the Universal Copyright Convention.
 - 7 Report prepared by secretariats of UNESCO and Berne Union on meeting of Committee of Experts on the Photographic Reproduction of Protected Works, Paris 1–5 July 1968.

less of the purpose of the copying. The fair dealing provisions in the Act applied to restricted types of copying but the bulk of copying ought to be remunerated. The triumvirate did not argue strongly that photocopying deprived authors of income, insisting instead that copying signified the remunerable value of works. To fairly recompense creators, let the owner and copier quantify the value and agree terms of payment.

The ACC found an ally in the Labor Government. After coming to power in 1972, the Prime Minister Gough Whitlam enthusiastically implemented a cultural policy that embraced the doctrine of the little people enunciated by Gil Duthie during the 1968 copyright debate. Duthie demanded that the little people, the artists and creators, receive their due. O'Donnell, an ALP member, Whitlam devotee and unshakeable ally of little people everywhere, could hardly fail to win an audience in Canberra.

He received ardent support from Senator Doug McClelland, who in 1968 predicted that new technologies would, within five years, consign the new Copyright Act to history. The Attorney General, Lionel Murphy, a libertarian like O'Donnell, showed more interest in social reform than the plight of the little people, but his department steered him in the direction mapped by the ACC.

After the failure of photocopying talks in Paris in 1973, officers concluded that Australia would have to find its own solution to the question of photocopying. In December 1973, a departmental spokesman told the media that arguments over photocopying 'should be examined by an expert committee'.⁸ On 20 June 1974, Murphy announced the appointment of a committee to examine photocopying practices in Australia.

The ACC and its constituency of owners' groups, universities, libraries and the various representatives of copyright users now embarked on the process that led ultimately to statutory licensing.

THE THIRD WORLD AND COPYRIGHT ACCESS

A European convention

When in 1886 the Berne Union breathed life into its creation, an observer of the new world created by authors' rights might yet have seen small specks in the cloudless skies overhead. Over the next 85 years, the specks became proliferating dark smudges producing deluges and storms that might have washed away the aggrandising dreams of the creator faction. In the end, the reciprocity of greed created understanding, and authors and industries alike annexed the expanding

8 "Copyright versus photocopying" *Sydney Morning Herald*, 27 December 1973.

universe of abstract property rights.

One blemish remained on the mirrored surface of this world, and efforts to remove the stain seemed to avail nothing. First Latin American countries, joined by the United States, and later, countries of the Third World, stood outside the Berne Union, and, if they joined the Union, manifested attitudes considered unbecoming to signatories to the Convention – the Berne Convention, after all, reflected the aspirations of European writers and publishers supplying developed markets.

Observers from other continents, which depended on a cheap supply of books, did not automatically share the desire for authors to exert control over production and distribution. The United States – a publishing outlaw pirating British works throughout the 19th century – and various Latin American countries entered into several multilateral conventions that loosely imitated the Berne Convention. But they declined to accept the prescriptive requirements of the European convention.

Special needs and special rights

After the Second World War, UNESCO sponsored conferences that led to the creation, in 1952 of the Universal Copyright Convention. The obligations of signatory nations were general not specific: member States were to provide “adequate and effective protection” of copyright works. Unlike the Berne Convention, the UCC required signatories to comply with simple formalities before they could take advantage of protection under the Convention. Owners were required to affix to works the © symbol, specify the copyright holder’s name and state the year of first publication.

Signatories to the UCC included the US, a large number of Berne Union members, and nearly 30 South American, Asian and African countries not affiliated to the Union. The UCC offered to the less developed nations the benefit of less stringent protection standards. More importantly, it suggested to developing nations that were members of the Berne Union the possibility of demanding special rights that recognised their developmental needs.

For the first time, international copyright forums began to recognise the existence of a generalised, transnational “user” interest. Policymakers began to recognise the common interests of the different “users” of copyright material: ordinary individuals, institutions and organisations, and, at the broadest level, nations. Each category of user sought access to copyright material. At the close of the 1950s, the UCC Intergovernmental Committee began considering the access needs of Third World members. In 1960, UNESCO resolved ways to examine ways to cheaply deliver educational books to underdeveloped countries.

Brazzaville

These developments informed the Intergovernmental Copyright Committee's examination of photocopying practices. Then came the bombshell that threatened to blow asunder the Berne Union. At Brazzaville in 1963, African countries at a copyright legislative policy meeting organised by UNESCO and the Berne Union declared a manifesto of special needs. Chief among their requirements were acceptance of a reduced period of copyright protection and the free use of works for educational and school purposes.

For the first time, the copyright idol rocked on its Swiss pedestal. For half a century, the religion of authors' rights withstood the challenges posed by the industries, adapting to become a hybrid faith accepted throughout the developed world. Refinements and demands for protection resulted in a process of accretion, not derogation. Rights, once created, were sacred. None among the adherents dared to breathe profane thoughts about weakening protection.

Until now. The Third World neophytes shaking the gates of the copyright temple began to frighten the older religionists of the Berne Union. By the time of the Union's Stockholm Revision Conference in 1967, the recommendations of a committee of governmental experts caused more fear and trembling, not to mention anger among authors' and publishers' groups.

Governments considered the legitimacy of the Berne Union to be at stake. If the less developed nations, led by India, were unable to secure exemptions from the stringent requirements of the Convention, they might leave the Union. Their departure, in an age grappling with the after-effects of colonialism, would confirm suspicions that the Convention functioned to protect and advance the economic interests of Western countries.

Third World copyright rejected

The committee of experts proposed that developing countries be permitted to apply to make reservations to the Convention on the grounds of economic, scientific, social and cultural needs. Reservations, applicable for a fixed period, could include the right to use works freely for scholastic purposes. The Stockholm Conference adopted a Protocol to the Convention that permitted Third World nations to adopt a posthumous term for foreign works of 25 years.

Additionally, subject to conditions, countries could permit the compulsory translation and publication of untranslated foreign works. Worst of all, from the perspective of the developed nations, the less developed countries could institute compulsory licences for copying literary and artistic works for teaching, study and research purposes.

Naturally, such outrageous defilements of the divine credo revealed in 1886 could not go unpunished. Shock at the outcome of the Stockholm Conference turned to anger, and the governments of developed countries lost any fear of

causing offence to former colonies. Encouraged by the publishers and authors' associations, the advanced nations, led by Britain, struck back. Knock-kneed Scandinavians were despatched to the rear of the vanguard, and the British informed the world that their country would not ratify the Stockholm Protocol. The United States helpfully reinforced the message: widespread acceptance of the Protocol, it said, would prevent it from joining the Berne Union.

Together, the Berne Union and UNESCO hammered out the solution demanded by the publishers and authors of the developed nations. At their 1971 joint revision conference in Paris they agreed to amendments to the two Conventions that guaranteed the developing countries limited freedoms to translate and copy foreign works under compulsory licence. But the restricted possibilities now open to these countries were not enticing and few established licensing arrangements.

The possibility of Third World copyright vanished. The prestige of the Berne Convention grew rather than diminished. The decade or so of controversy over special copying rights for less developed countries not only sharpened understanding of the concept of a "user interest", it awoke policy makers to the idea of special needs that warranted qualification to, or derogation from, the exclusive rights.

COMMON LAW DEVELOPMENTS

ACC challenges university copying

The Australian Copyright Council, dominated by the publisher and authors' associations, doubtless exulted at the tidal wave of self-interest that swept away the copyright aspirations of Third World nations. When the Labor Party came to power in 1972, the ACC could rejoice in concert with a Government eager to uplift the little people even at cost to the poor and uneducated of other continents.

Even so, the activities of one category of domestic user, the educational institutions, eroded the general happiness. In the universities and schools, students continued to freely copy the pages of texts. Educators freely used photocopiers to replicate extracts they made available to students. To the frustration of publishers and authors, UNESCO and the World Intellectual Property Organization⁹ seemed unable to issue clear edicts demanding that users pay for photocopying.

Two months before Murphy announced the Government's copyright photocopying inquiry, O'Donnell and his lieutenants took action. They began a test case in the Supreme Court of NSW seeking a declaration that the University

9 Now the body administering the Berne Convention.

of NSW infringed copyright by failing to properly regulate photocopying on its premises.

In *Moorhouse v University of New South Wales*,¹⁰ the Court heard that, at the behest of the ACC, a graduate of UNSW went to the university library and photocopied a story from *The Americans, Baby*, a book of 20 short stories written by Frank Moorhouse. Moorhouse, joined by his publisher Angus and Robertson, then agreed for proceedings to be launched in his name.

Justice Hutley gave an equivocal ruling, finding that the copier breached copyright but that university did not authorise the breach. On appeal and cross-appeal, the High Court determined that the university authorised the copyright infringement by failing to adequately warn copiers of infringement liability or to supervise copying.¹¹

The ACC greeted the ultimate result of the *Moorhouse* case with qualified enthusiasm. The case located the onus for restraining copyright infringement by the users of photocopiers firmly within the ambit of university responsibilities. In this respect it clarified in Australia a principle that the ACC previously hoped to see promulgated by international copyright bodies.

The High Court's ruling, however, could be viewed two ways. Justices Gibbs and Jacobs (joined by Justice McTiernan) clearly did not think that they enunciated any startling principle of copyright law. Their judgments make clear their view that omissions rather than intent lay behind UNSW's permissiveness. By placing appropriately worded warning notices near photocopiers and adequately policing photocopying rooms, universities would avoid authorisation liability.

Many contemporary observers failed to see significant implications in the judgment. When the Government's inquiry into photocopying concluded a year after the High Court's ruling, it reported that "it is difficult to see that this case provides an authority for any proposition other than that the placing of coin-operated self-service machines in a library without adequate notices at least drawing users' attention to relevant provisions of the Copyright Act constitutes an authorisation within section 36."

Time soon revealed the importance of the High Court's decision to copyright owners. The result in *Moorhouse* galvanised the ACC, and sparked life in the newly created Copyright Agency Limited, established to collect photocopying fees. Above all, it stood as authority for a proposition that owners took for granted but which governments were yet to state definitively: copyright owners were entitled to control the mass photocopying of their works in institutional venues such as universities.

10 (1974) 23 FLR 112.

11 *University of NSW v Moorhouse* (1975) 133 CLR 1.

Williams and Wilkins Co v United States

In the United States, meanwhile, a case first heard in 1973 and resolved by the Supreme Court in 1975 reached conclusions less palatable to owners. In *Williams and Wilkins Co v United States*,¹² the plaintiff, a publisher of medical journals asserted that two government libraries infringed its copyright by photocopying articles from its journals. A Commissioner of the US Court of Claims agreed. On appeal, however, the full court found that the libraries' photocopying constituted 'fair use' of the articles.

The court ruled that medicine and medical research would be hurt by prohibition of copying and the plaintiff failed to show that it was, or would be, harmed by the copying. Significantly, the court stated that Congress, not the courts, should determine the legal status of photocopying. According to the Court, the 1909 US Copyright Act and the doctrine of fair use provided no adequate guidance on how to approach the question. The main judgment stated that "the courts are now precluded, both by the Act and by the nature of the judicial process, from contriving pragmatic or compromise solutions which would reflect the legislature's choices of policy and its mediation among the competing interests."

The Supreme Court responded cryptically to the publishers' appeal. The eight justices hearing the appeal split evenly on the question of fair use and dismissed the appeal, issuing no reasons for their decision. Technically, the split decision constituted affirmation of the view expressed by the inferior court that Congress should determine the legal implications of photocopying. Congress then supplied some guidance – it codified the fair use doctrine in 1976, specifying in new copyright legislation the factors that determine when the fair use defence can be raised.¹³

Implications

The *Williams and Wilkins* case aroused strong emotions. Copyright owners regarded the decision of the Court of Claims as transgressive, unjustly undermining, or more accurately, usurping, property rights. Some dissidents from copyright orthodoxy hailed the dawn of a new era in which the legislature and courts would place special emphasis on the social and educational needs of different types of users. The dawn they saw glimmering on the horizon, however, proved to be a false one.

The Australian Government's inquiry into photocopying paid some attention

12 (1973) 487 F2d 1375 (Ct Cl) and (1975) 420 US 376 (USC).

13 1. The purpose and character of the use. 2. The nature of the copyright work. 3. The amount and substantiality of the portion used. 4. The effect of the use on the potential market for, or value of, the copyright work.

to *Williams and Wilkins* and the inquiry committee, after considering US legislative proposals prepared after the case, declared that Australia should not place “undue” restrictions of the dissemination of technical and scientific information. Given its limited effect on policy formation in Australia, the case is important as an historical signifier, reminding observers of a period in copyright legal history when lawmakers contemplated the possibility that photocopying ought not to be regarded as an unacceptable interference with property rights.

The case is significant for another reason. The reactions it evoked typified the strain of histrionic self-justification that infected the discourse of copyright proponents from the first days of publishers demanding perpetual rights. Stripped of surface glitter, the discourse often reveals something ugly: covetousness and presumption masquerading as moral right.

Copyright narcissism

In *Williams and Wilkins*, the Chief Judge of the Court of Claims, Arnold Wilson Cowen said in his dissenting judgment that the court was “making the Dred Scott decision of copyright law”. Copyright supporters enthusiastically repeated the reference to Dred Scott, a Missouri slave. No-one noticed the grotesqueness of this parallel, which clothed copyright owners in the threadbare apparel of the truly downtrodden.

Dred Scott, a slave in Missouri, sued for freedom in the 1840s, and through a long process of appeals, his case wound its way to the Supreme Court. By a 7–2 majority America’s highest court declared in 1856 that Scott must remain a slave. The Court held that Negroes could not become citizens of the United States and that the Constitution permitted slavery in all the States of the Union. The Negro had “no rights which the white man was bound to respect, and ... the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it.”

For Cowen, iniquity marched in the footsteps of those who denied remuneration to copyright owners. Like Dred Scott, he seemed to say, copyright holders fought a battle of cosmic dimensions against the forces of oppression and human abasement. If photocopying went unremunerated, they would find themselves abandoned in Babylon mourning the loss of the copyright kingdom. This outlandish conflation of the demands of copyright holders with the emancipation struggle of slaves and abolitionists in America aroused no skerrick of shame in the copyright movement.

The moral distance between those demanding more rents and the slaves and emancipists demanding freedom hardly needs elaboration. Yet copyright observers readily accepted Cowen’s identification of copyright owners with the tragic history of the slave population of the United States, and the hopelessness

and helplessness felt by the toiling inhabitants of southern estates.

Such is the power of delusion. The supporters of more and greater rights for copyright owners never wanted for reasons to identify owners with the ragged army of the forsaken – but what possible parallel could Cowen have seen between the position of copyright holders, the owners of property, and Dred Scott, a slave?

Once exposed, the identifications concealed in his analogy reveal the narcissism of the copyright advocates who demand to control every use of copyright works as a right, human, natural or divine. In the passion play enacted in their minds, the owner is always a victim, crucified by the hostile public and the inaction of legislators. Their narrative of suffering supports fantastic comparisons, and reading Cowen's judgment, some aggrieved owners might readily have cast themselves metaphorically in the role of Dred Scott and other slaves.

Had they not felt vicariously the slaver's lash in legislative hedging and qualifications? Could they, the victims of a million violations by heedless copiers, not understand the slaves' pain? The agony of flesh shredded by double-headed whips equalled their own torment as government delayed justice. Were not they victims also of a cruel mistress, the law? Were they not forced to watch helplessly as the indifferent public, like slave owners, consumed – stole – the fruits of their labour?

If he insisted on the slave analogy, Cowen could more accurately have identified copyright owners with the enemies of Dred Scott. Some slave owners owned great plantations. Some small. Some owned thousands of slaves, some only one. But all were owners, possessing the person of the slave like a dumb thing. All appropriated in total. Most demanded more appropriations, more uses. Few could imagine that they did not own by divine or natural ordinance. That their slaves might have uses, or wishes, or pursuits beyond their command they would not admit.

Copyright owners too accepted no limitation on their ambition. They believed passionately, if they believed at all, that nature or divinity decreed their right to control the universe of known ways to replicate copyright works and the embodiments of works. Thus photocopying, even if it deprived them of none of the income supplied by the sale of books, must be brought within their control, and, God or nature willing, every copy of every page of every work known to the world, must be paid for.

Use demands recompense

Arguments for photocopying remuneration represented a shift in copyright thinking. In the 19th century the laws allowed British publishers to control the supply of books in the British Empire, to prosecute pirates and shut down illicit book

presses. The enactment of exclusive rights in the early 20th century extended the author's control over the uses of works. But no-one in either period said that copyright owners were entitled to income for non-commercial use.

In the 19th century, copyright prohibitions related solely to commercial activities, namely piracy and the unauthorised importing of books. The parliamentary and press debates on copyright legislation in 1905, 1911 and 1912 show that politicians did not intend legislation to grant an absolute right to remuneration. The purpose of use mattered. Legislators expected owners to exercise the exclusive rights to control commercial processes like the production of books or commercial activities like the public performance of music.

None betrayed an obvious wish for owners to secure payment from entities, like libraries, that did not use copyright material for commercial gain. Nothing in their public statements indicated that they would have shared Gus O'Donnell's angry belief that universities were morally obliged to pay for photocopying. The war for photocopying payment grew out of a new sense of entitlement, a belief, unknown in 1911, that use always demanded recompense.

THE FRANKI COMMITTEE

The Attorney General, Lionel Murphy, appointed the Copyright Law Committee on Reprographic Reproduction in 1974 with the following reference:

To examine the question of reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interests between owners of copyright and the users of copyright material in respect of reprographic reproduction. The term 'reprographic reproduction' includes any system or technique by which facsimile reproductions are made in any size or form.

Justice Robert Franki of the Australian Industrial Court, a man with extensive experience in the practice of intellectual property law, chaired the Committee. The other members were Joyce Shewcroft, the legal adviser to the ABC, Colin Marks, a Sydney solicitor with extensive experience in the practice of copyright law, and Murray Haddrick, a senior officer in the federal Attorney General's Department.

In May 1975, Lindsay Curtis, heavily involved in the 1968 Copyright Bill, and now First Assistant Secretary at the Attorney General's Department, replaced Haddrick. John Gilchrist, a young officer of the Attorney General's Department, later an academic and expert member of the last Copyright Law Review Committee inquiry (into Crown copyright), acted as secretary.¹⁴

Questions of statutory licensing

Though viewed as the originator of Australia's modern system of educational and government copying by statutory licence, the Franki Committee actually expressed equivocal views about the benefits of statutory licensing. It recommended the introduction of a statutory licence for educational copying as the action most likely to achieve a balance between the interests of owners and users. But none of its members harboured any illusions about the problems involved in instituting a system that appropriately remunerated authors.

Contemporary readers of the Franki Report might be tempted to decide that history has disproved many of the Committee's conclusions. The report disparaged the statistical sampling system now used to estimate the number and type of photocopies made in libraries and other localities. It rejected the idea of calculating remuneration by reference to per page rates for photocopies. It discounted the possibility of Australia instituting an effective collective rights administration scheme for the collection and distribution of photocopying fees. It stated that a collecting agency for photocopying "could not hope to operate" effectively in Australia for the foreseeable future.

In all of these judgments, the Committee appears to have been mistaken. Educational institutions and government now commonly accept sampling as an appropriate method for determining copying volumes. Remuneration is calculated according to a formula that depends on agreed rates for copying pages of different works. The Copyright Agency Limited (CAL) has operated in Australia with great success for over 20 years. Few people involved in policy debate seriously question the feasibility of collectively administering the rights of the owners of copyright in works.

On the other hand, the reasons given by the Committee for its scepticism remain powerfully relevant. The Committee emphasised the difficulty of accurately estimating, by sampling, the number of copies made of works attributable to a specific author, and the concomitant problem of apportioning and distributing income accurately to authors. This difficulty continues to cast doubt on the efficacy of the collective rights administration of works.

Distributions

While the income from CAL's collections from educational institutions has, over about 15 years, risen exponentially, the question remains whether individual au-

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- 14 John Gilchrist wrote additional comments to the CLRC's *Crown Copyright* report in 2005 proposing ways to make its recommendations more effective, including directly stating in legislation that government is authorised to use copyright material for statutory purposes.

thors really benefit from collections, or indeed whether collections on behalf of so diffuse a population could ever benefit anyone other than a concentrated minority of writers whose works remain consistently in demand for educational or other purposes.¹⁵ The problem is compounded by another – the maddening opaqueness of CAL’s collection and distribution process, and its unwillingness to disclose meaningful information about distributions.

Lenin’s question “who, whom?” springs to mind whenever the question of distributions is discussed. Who reaps the benefits? Among whom are the spoils divided? In this respect, CAL follows exactly in the tradition of APRA, which attracted public opprobrium in the 1920s and 1930s for its refusal to divulge details of how it distributed licence fees. Then, as now, critics argued that the collecting society functioned as the stooge of publishers, not the benefactor of authors.

Statisticians employed by CAL argue that sampling allows for the efficient determination of copies made because the snapshot of copying taken over the period of several weeks predicts future patterns. The total number of copies made in different categories such as “books” “newspapers” and “journals” is unlikely to vary significantly between significant sample periods. The question that remains unanswered, however, is how allocations to the individual authors within categories are made, and the actual share of total income distributed to them.

Record keeping

The Franki Committee essayed the problems of accurately determining volumes copied and the amount copied of different authors’ works and came to an unpalatable decision. It adopted the principle of recordkeeping, which holds that the only way to establish largely accurate statistics on volumes and types of copying is to institute a rigorously policed system of record-keeping. When copies are made, copiers record the details of works copied and supervisors patrolling photocopying areas ensure compliance.

On this point the Committee was uncompromising, though it allowed one departure from the general principle. Universities were not required to police the

15 See *Report of the Copyright Law Committee on Reprographic Reproduction* (1976), para 2.27, p24: “Even if it were practical to record each copying instance of a private individual to which section 40 applied and by some method to enforce payment by him to a central collecting agency, we are quite satisfied that in most, if not substantially all of the copying instances great difficulty and expense would be involved in paying royalties of a small amount to copyright owners (and in particular the authors) and the costs of collection and distribution must exceed any reasonable royalty which the individual copier would be likely to pay, or indeed, a Government could reasonably be expected to provide, if it wished to fund some forms of copying by an individual on, for example, a self-service machine in a university library.”

keeping of records. Instead, under the Committee's proposal, the Act would be amended to require universities to keep records of copying in the prescribed format (title, author, publisher, pages copied, number of copies made etc). Copyright owners would be entitled to inspect records on demand.

ACC proposals and the Committee's conclusions

The ACC greeted the Franki Committee's recommendation for the institution of an educational statutory licensing scheme with faint praise. Peter Banki, one architect of the ACC's policy, and the author of a detailed submission to the Committee by the Australian Council for the Arts,¹⁶ argued strongly for a voluntary licensing scheme supplemented by statutory licences. Banki, and Gus O'Donnell, considered statutory licensing a denial of a fundamental right of property: the right to refuse. Why, they asked, should owners be forced to allow others to copy their work?

The ACC, having argued cogently for per page remuneration fixed according to category of work copied, found itself further disappointed by the Committee's approach to remuneration. The Committee rejected the principle of fixed per page rates with the parties or the Tribunal determining the particular rates. According to the Franki Report, the difficulties of such a scheme were too great. However, the Committee offered no deeply thought-out alternative. The Report provided simply that the user must pay a royalty for copying if the owner demanded one within the prescribed period.

Equally disappointing for the ACC, its proposal for the institution of a sampling system for determining levels of institutional copying went unheeded. The Franki Report, when it appeared in October 1976, appeared to give the ACC's constituency of publishers, authors and others much less than they hoped. The ACC's chief officers, and in particular Banki, who laboured intensively to produce the very lengthy submission by the Council for the Arts, may have looked on the Report with some bitterness.

Of the interest groups, only the ACC attended all the public hearings held by the Franki Committee in different capital cities of Australia. It pressed the case for copyright owners more fluently, compellingly, passionately, and sometimes aggressively, than any comparable representative group. But at the end of 1976, its grand vision of universities and government paying for photocopying by an orderly process mediated by the Copyright Tribunal seemed in doubt.

In the end, the seemingly bitter pill of the Franki Report proved palatable. The recommendation for statutory licensing incontrovertibly established the principle, hitherto uncertain, that all photocopying, subject to limited exemptions,

16 Drafted as a Special Research Project supported by groups of consultants.

must be paid for. Together with the High Court's judgment in *Moorhouse*, the Franki Report handed the advantage in the looming battles over remuneration to copyright owners.

To the ACC in 1976, this truth may not have been apparent. Its creation, CAL, would struggle for a few years to persuade educational institutions that the law applied the user-pays principle to photocopying. When the legislature amended the Act in 1980 to introduce a compulsory licensing scheme on the lines recommended by the Franki Committee, the onus remained on copyright owners to police the record-keeping of institutions and to propose methods of remuneration.

Eventually the difficulties vanished. In time, legislative amendment delivered what the ACC sought: a licensing system for educational and government copying, with users obliged to pay specified rates for pages copied, and to submit to sampling surveys to determine the amounts copied. And, as the ACC wanted, the Copyright Tribunal determined disputes over rates and the terms of licensing.

Committee's orthodoxy

On one level, the ACC, the Australian Society of Authors and the other groups who demanded regulation of photocopying were justified to feel disappointed by the Franki Report. The Committee acknowledged plainly that a reader of the Report could judge where its sympathies lay:

We are aware that the proposal [for statutory licensing] ... might seem to favour the interests of education against the interests of copyright owners. It would entitle copies to be made of a work or part of a work without the permission of the copyright owner, whilst leaving the copyright owners with the practical problem of collecting the royalties due to them under the proposal.

The Committee reached a conclusion that nowadays would evoke angry reactions from the copyright owner groups. "The evidence we have," said the Report, "shows that much of the photocopying that takes place is likely to be within the exceptions to the rights of the copyright owner established in the *Copyright Act*." The Committee went on to note that "much" student photocopying constituted "fair-dealing" under section 40 of the Act. It also pointed out that Australia's geographical isolation and its vastness necessitated policy sensitive to the needs of a population especially dependent on the effective dissemination of information.¹⁷

17 A point raised at least twice in the Franki Report. See, e.g. paragraph 1.02, page 9: "There is, we believe, particularly in Australia, a very considerable public interest in ensuring a free flow of information in education and research, and the interests

Undoubtedly, for the members of the Franki Committee, education, and the need for dissemination of information took precedence over the demands of copyright owners. The Committee took, however, an orthodox approach to its assessment of owners' rights. It could hardly have done otherwise. Its members were experienced copyright lawyers disposed to favour the consolidation and refinement of property rights.

Its report articulated the following premise for the Committee's inquiry:

However, in principle we consider that multiple copying should not be carried out without remuneration to the copyright owner in any case where it represents a substantial use of his property or it could prejudice sales of his work, particularly if the work has been specifically written for use in schools.

The Committee adopted the principle in Article 9 of the Berne Convention, which permits legislatures to permit the reproduction of works in special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Applying the principle of remuneration, together with the so-called "three step test" in Article 9, the Franki Committee could not fail to reach the conclusion that owners must be remunerated for photocopying. The Committee nonetheless recognised that the owners' frequent references to moral and natural rights, disguised, unintentionally or otherwise, a simple, insistent demand for payment. As the Report wryly noted:

Virtually the entire object underlying the authors' claims for control over reprographic reproduction is to ensure increased remuneration for this use of their works. The view that 'what is worth copying is worth protecting' has been put before us emphatically and persuasively. However, what this usually means is "what is worth copying is worth paying for." Very few authors want restrictions for their own sake but rather as a means of securing remuneration.

The right to photocopying remuneration

Given its membership of intellectual property lawyers, it is hardly surprising that the Committee never canvassed the relevant philosophical question – is recognition of an owner's right to remuneration for photocopying consistent with whatever purposes can be discerned in the legislative grants of reproductive rights to copyright owners?

The question is not redundant. The Copyright Tribunal when determining

of individual copyright owners must be balanced against this element of public interest."

disputes over equitable remuneration for copying could also have asked how a categorical value could be assigned to pages copied. On what basis can a single page of a work of fiction be said to be worth, for example, 2 cents, and that of a page of poetry 4 cents?

Would legislators who passed laws giving publishers control over the production and supply of books have agreed that the law could be interpreted to allow publishers to exact tolls for copying the individual pages of a work? Would they even have agreed that a value could be assigned to a page separated from the whole work? Was it any part of their intention that law first designed to control piracy should in the future authorise something unforeseen, like the mass taxation of photocopies?

Because a principle of law can be flexibly applied to circumstances unforeseen at the time of the law's making does not, of itself, justify the new application of principle. The purpose of the principle is relevant to its application. In the 1920s, radio stations argued that legislators did not intend that the public performance right should extend to the playing of music over radio. Why, they said, should copyright owners profit from the invention of broadcasting? Why should a technological advance to which they contributed nothing benefit them?

It can certainly be said that the early legislators never intended that a group of industries should benefit from copyright protection. Principles of reproductive and distributive control developed by the Berne Union and early legislators were intended to benefit authors (though legislators accepted that authors could assign copyright to publishers). It is quite possible that early legislators would have welcomed a world in which copyright owners exacted rent from photocopying. But it is difficult to see, in principle, how they would have supported exactions that treated an indivisible thing – the copyright work – as something divisible.

In short, they may not have agreed that the copyright holder should control the use of disaggregated parts of a work – embodied in the pages of a book – as distinct from the work as whole. The Franki Committee did not engage in considered historical analysis. Its lack of interest in copyright history is not surprising. Policymakers tend to make assumptions about the original purpose of copyright law based on the folklore of anecdote, supposition and half-remembered history. But the folklore is deceiving.

For instance, the theory that parliaments designed copyright law to create a balance between the interests of owners and users is a fiction. The law actually arose according to the compound plan of different human agents seeking advantage for their own faction. No legislators could foresee, and not all would have approved of, what the law became.

Justifying the photocopying royalty

In the case of photocopying, the burning, unanswered question is how the owner,

who is entitled to control uses of the *work*, justifies control over pages, and the payment of royalties for copying of pages. How does the copying of pages harm the owner? The cost of book piracy is roughly, or sometimes exactly, quantifiable. Piracy imposes a cost affecting tangible production. But what economic harm to the owner is done by the copying of pages?

The Franki Committee asked this question of respondents to the inquiry.¹⁸ Peter Banki, in his submission for the Council for the Arts, said that, “too many variable factors exist, preventing simple statistics on income loss.” Banki’s reply spoke for the position of owners as a whole:

If one sees copyright as a device to prevent monopoly, and if one admits that users have a vested interest in the continuation of profitable publishing, then the measure of damages is not only invalid as a tool by which to assess the position – it is a handicap. In any case, it is fruitless to attempt any calculations of damage – no measure of damages can accurately assess the claims of authors and publishers.

This statement, which would doubtless win the approval of copyright proponents and many neutral observers, flatly stymied the Franki Committee’s request for information on economic damage.

In substance, Banki seemed almost to say, “As the case for the photocopying royalty is self-evident, the Committee should dispense with the trifling and irrelevant matter of demonstrating the harm caused by royalty-free photocopying.” The history of copyright policy debate has seen many other equally bold statements made and accepted. Outside the world of misbehaving monopolists, it is difficult to imagine a supplicant to government alleging harm, demanding compensating rights, then declining to substantiate the allegation of harm.

The reason for the difficulty explained by Banki is twofold. First, unless photocopying amounts in fact to piracy – the copying of whole works, or substantial parts, for commercial purposes – it does not significantly affect sales of books. In this case, royalty-free photocopying represents a lost opportunity for securing revenue. Secondly, even allowing for the possibility that copying causes economic damage to owners, if copiers copy the works of a multiplicity of authors, then quantifiable economic losses, when disaggregated, are likely to be small. By contrast, if the numbers of authors habitually copied is small then publishers should be able to quantify their losses.

18 The question posed in a discussion document: “What is the actual effect of copying on sales and on the financial rewards to authors and/or publishers? Can precise quantitative illustrations be given of the detrimental effect, if any? If copying had not taken place would the number of copies sold have been increased and, if so, what would be the measure of financial advantage to authors and/or publishers?”

Banki's unwillingness to put forward estimates of loss, and the silence of copyright owners on the question of economic harm, pointed to one conclusion. Many owners were not deeply troubled by economic losses caused by photocopying. What most upset them was that they could as yet find no entry to the pathway to profit represented by photocopying levies.

One of the most cogent submissions to the Franki Committee on the question of the economic harm caused by photocopying came from Leonard Jolley, the chief librarian of the University of Western Australia. Concentrating on the copying of articles in academic journals, Jolley asserted that "it is impossible to see how making several copies is more injurious to any author or publisher than making one."

According to Jolley, articles could not realistically be called commodities. The print runs of journals were usually very limited, and the period in which they sold to the public very short. No university student would profit from making several copies of an article and offering them for sale. Given the diffuse, fragmented demand for academic journals, with the audience for most periodicals usually small, academic publishers depended on the subscriptions of libraries to sustain production.

Although Jolley did not make the point explicitly, his message seemed clear. Why did publishers protest so much about photocopying? Not because copying undermined the often meagre profits of academic publishers but rather because photocopying royalties promised a new source of income. Jolley came to the crux of his argument, insisting that royalties should only be awarded as compensation for economic loss:

*The only proposal "capable of implementation in a practical manner" would appear to be to grant free permission to copy to any non-profit making institution except where demonstrable harm is caused to either authors in or publishers of learned journals. It is quite certain that no demonstrable harm is caused to either authors in or publishers of learned journals. It is pretty certain that no demonstrable harm is caused to publishers of other journals and newspapers since the sale of these is almost entirely restricted to a very brief period.*¹⁹

The Committee's recommendations

The Franki Committee made 35 proposals for legislative amendments or pro-

19 Jolley acknowledged that "What is quite demonstrably harmful to publishers and authors is the practice of certain education authorities which will in effect create their own textbooks by making several hundred copies of different chapters from books on the same subject and circulate them within their educational system." Later, CAL collected fees for copying to create such "coursepacks".

cedural innovations.²⁰ The report grouped the recommendations in subject categories – fair dealing, copying by libraries, copying for preservation purposes, multiple copying, copying in other circumstances and Crown copyright. The most important changes proposed related to fair dealing, library copying and multiple copying.

First, the Committee proposed amendment to the Act to clarify the liability of libraries for photocopying by users of the library. If the library displayed notices in the prescribed form drawing users attention to the relevant provisions in the Act, the library could not be said to have authorised illegal copying.

The Committee recommended that section 40 of the Act be augmented to specify the criteria to be considered when determining whether an instance of photocopying constituted a fair dealing. The relevant factors included the purpose and character of the dealing, the nature of the work, the amount and substantiality of copying, the temporal and commercial availability of the work and the effect of the dealing on the potential market for the work.

The Committee also recommended that the Act be amended to deem that a single photocopy of a single article, or articles on the same topic in the same journal, or the chapter of a work, or 10 per cent of the work (whichever portion was the greater), constituted a fair dealing.

The Committee's recommendations concerning library copying also involved the application of existing principles to photocopying, and slight amplification of those principles. Under the scheme envisaged by the Committee, the photocopying of a chapter of a work, or 10 per cent of the work, constituted a "reasonable portion" for the purposes of section 49.

Subject to procedural requirements, a library would be permitted to photocopy a whole work or large portion of the work if the work could not be obtained within a reasonable time at a normal commercial price. However, libraries would not be permitted to make a profit from supplying copies. The Committee also specified that library copying for these purposes was "to remain without remuneration to the copyright owner."

By far the most significant changes proposed by the Committee concerned multiple copying by libraries and the users of libraries. Libraries were, subject to procedural requirements, to be allowed to make up to six copies of a single journal article for library use. Libraries could, subject to the same conditions, make up to six copies of a substantial portion of a work (other than article) that was not reasonably available at a normal commercial price.

The Committee proposed the introduction of a statutory licensing scheme that permitted the photocopying of copyright material for educational purposes by universities and schools subject to the keeping of records specifying the titles

20 See Appendix 4.

of works copied, the number of pages copied, the number of copies made and the name of the author and publisher of each work copied. Requirements applicable to ordinary library copying of works would apply – thus, subject to the relevant conditions, whole works or substantial portions of works could be copied, as could single articles in journals or articles on the same topic.

The report provided that copying under the statutory licence would be remunerable. Educational institutions must keep records of copying and “pay an appropriate royalty if demanded by the copyright owner or his agent within a prescribed period of time (say three years).”

Chapter 13 – After 1980: collecting societies and software copyright

AFTER THE FRANKI REPORT – THE 1980 AMENDMENTS

Release of the Franki Report

In August 1976, two months before publication of the Franki Report, the *Sydney Morning Herald* journalist Gavin Souter summarised the social importance and economic implications of photocopying in educational institutions. A “boon” to education, the “photocopying revolution” had, he wrote, created “a prodigious industry”. One visit to the copying room at any university library would persuade the sceptic that a large portion of the 16 million copies made in Australian universities were reproductions of copyright works.

According to Souter, the Copyright Agency Limited, authorised to collect copyright fees on behalf of 2000 authors, was already active in licensing copying. The Department of Humanities at the Footscray Institute of Technology agreed to pay CAL one cent for every page copied of a book on CAL’s schedule of 1000 works. CAL intended to distribute payments between authors and publishers in a ratio, in some cases, of 80/20 and in the case of certain textbooks, 50/50.

Souter’s article sheds revealing light on the views of the ACC as the Franki Committee finalised its work. Gus O’Donnell told Souter of a meeting between the ACC and the Australian Vice-Chancellors’ Committee. “Basically what we told them,” said O’Donnell, “was that we don’t think the Franki Report is going to get universities totally off the hook. They’re still going to have to come to terms with copyright owners, so they should start talking now.” Souter reported that the universities replied that “they would wait for Franki.”

O’Donnell correctly surmised that the Franki Committee intended to propose legislation to create liability for educational copying. At the same time, his language suggested awareness that the recommendations would prove more generous to universities than the ACC wished. The universities evidently felt hopeful that the Franki Committee would either dash the ACC’s ambitions or make rec-

ommendations that obliged them only to contract with authors and publishers individually.

When released in October 1976, the report attracted little public attention and neither the ACC nor the educational sector rushed to support or denounce its findings. Both factions seemed to batten down the hatches. Both knew that the proposed statutory licensing scheme would be difficult for CAL to administer, creating a significant administrative burden for universities and a significant policing burden for CAL. With the resources of both groups stretched, they could only work slowly towards accommodation, and hope to influence the politicians who framed the legislation creating the statutory licence.

The Liberal Coalition Government responded by asking for public submissions on the Report and consulting with the respondent interest groups. In June 1978, the Attorney General, Senator Durack announced that authors would be able to claim remuneration for photocopies of their work under legislation to be introduced in the following session of Parliament. The author's fee would be negotiated by 'representatives' of the author and educational institutions. Legislation did not, however, appear in the succeeding four sessions of Parliament.

Statutory licence for educational copying

Only after the passage of two years, during which the opposed parties bent the ear of politicians, did the Government finally introduce legislation. Introduced by the Government in September 1980, a copyright bill embraced the Franki Committee's recommendations. The ACC's intensive lobbying efforts failed and the legislation provided for the introduction of a statutory licence that permitted educational establishments to copy works subject to maintaining copying records.

Ian Viner, the Minister for Employment and Youth Affairs, who introduced the amending bill, said the Government gave "close" attention to the ACC's "alternative" proposals, which envisaged voluntary licensing and compulsory income collecting for authors by CAL. However, he said, the Government did not wish to place authors in a difficult position. They, or their representatives, were free to enter into voluntary licensing arrangements but the educational institutions could also choose to avail themselves of the statutory licence scheme established by the legislation.

Importantly, the amending bill introduced procedural improvements that refined the Franki Committee's proposal for a statutory licence scheme. Records were to be kept in a form that allowed the copyright owner to inspect the records without having to examine the details of other copying. The legislation created an offence for failing to maintain records in the prescribed form. These improvements cured a major weakness of the Committee's proposal, which failed to identify a method of distinguishing between copying under statutory licence and other copying provisions of the Act.

The Opposition Labor Party responded in an equivocal way. In the House of Representatives and the Senate, it moved voluminous technical amendments to the bill. But its MPs seemed divided over the effect of the legislation. Lionel Bowen, the Shadow Attorney General, noted that Australia was a net importer of copyright products and much of the income collected in Australia on behalf of owners would be sent overseas.

Users and the little people

Bowen observed that the Labor Party believed that “the users of copyright have been unjustifiably disadvantaged by this legislation.” The favouritism shown towards owners “will be at the expense of obtaining information and knowledge.” Additionally, while his party did not object to the statutory licence, it should apply only when the user copied more than a reasonable portion, or 10 per cent or one chapter of a book. Bowen decried the time-consuming and extensive procedural requirements adopted in the bill, such as the certification procedures for copying a part of a book not readily available in, or through, bookstores.

Bowen’s position did not repudiate outright Labor’s favoured doctrine of the little people, the authors and artists who depended on government favours for economic survival. But it suggested a radical forward step by his party in favour of users, hitherto seen by the Labor Party as only too willing to deprive the little people of their due reward by activities such as photocopying.

By contrast, Barry Jones, the MP for Lalor, expressed views firmly in favour of the little people. Perhaps with slight irony, he congratulated the Attorney General’s Department for “record despatch in dealing with a report of this magnitude”. Like Rex Connor 12 years previously, he quoted Marshall McLuhan who declared that the Xerox machine made every man his own publisher. By making mass reproduction possible, photocopying menaced the little people. If authors were not protected, foreign authors would receive no return, and no publisher would import their works. Authors needed “the financial incentives which induce people to write”.

The tension between the views expressed by Bowen and Jones, which probably neither recognised, soon enough resolved in favour of the little people. The idea that every use of copyright material is remunerable, including, according to some, the act of reading a work, reasserted itself as a dogmatic truth in Labor’s cupboard of dogma.

Jones seemed oblivious to the fact that without photocopying royalties publishers and authors received returns from the sale of works. He did not bother to ask whether photocopying undermined the sale of works. Bowen stood up for the user but thereafter, the Labor Government, in office for 13 years from 1983, left users to wander in the wilderness created by government.

The copyright amendment bill eventually became law in 1981.¹ Though con-

sidered to favour the educational establishments, it began the long ascendancy of the publishers over educational institutions in Australia. In his speech to Parliament in the 1980 copyright debate, Bowen quoted a telegram sent by the Law Institute of Victoria. The Institute asked for postponement of the copyright legislation. The telegram referred to the conclusions of the copyright reform committee led by Justice Whitford in the United Kingdom.

Those conclusions, according to the Institute, differed from those of the Franki Committee. The Whitford Committee favoured “strengthening the claims of a copyright owner rather than weakening.” The Committee also seemed to support the licensing, collection and distribution arrangements proposed by the ACC.

Outcome of legislation

In time, the ACC, through its own efforts and the agency of CAL, achieved all that it set out to secure at the start of the Franki inquiry. It perhaps achieved more than it sought. It did so by concerted effort and persuasiveness, and because governments, leaning always towards the claims of property, favoured the interests of copyright owners and the little people. In achieving its aims, the ACC overthrew two key presumptions articulated by Viner in his second reading speech introducing the copyright bill.

The first is that most photocopying in educational institutions falls within the legislative definition of fair dealing or copying exception. The second is that the authors of works should be free to opt-out of any collecting scheme administered by a collecting agency such as CAL. The first presumption has not been definitively proved false because CAL does not permit effective external auditing of collected data.

The Franki Report, and the 1981 copyright amendments were seen to reinforce the “balance” of interests between copyright owners and users. Unlike later reports and amendments, they can be read to perhaps favour, certainly to strongly identify, the interests of users. Both placed the onus for identifying infringement and then proposing licensing rates on the copyright owner, or, specifically, CAL. However, though the principle of statutory licensing remains entrenched in Australian law, the ends contemplated in the Franki Report and the implementing legislation were not realised.

Neither intended the creation of a copyright ascendancy. The strategy of the ACC in the 1970s and 1980s closely resembled that pursued by APRA in the 1930s. APRA vehemently resisted the creation of a copyright tribunal to determine licensing disputes. Possessing a nearly complete repertoire of known copyright musical works, and unconstrained by any legislative checks, it wished

1 Date of assent 19 September 1980, date of commencement sections 17–19 on 29 September 1980; remainder on 1 August 1981.

to be left alone to use its overwhelming bargaining power to force radio stations and others to accept its terms. Later, realising that a tribunal offered a more efficient means of achieving a roughly similar result, it endorsed the creation of the Australian Copyright Tribunal.

Similarly, the ACC saw that once legislation permitted a representative of owners to collect photocopying royalties on their behalf, owners would be placed in a position of negotiating strength. They had no need, in principle, to let a third party, such as the Copyright Tribunal, mediate between them and users. A direct bargain promised larger returns. Like APRA, the ACC came to see that the Tribunal could efficiently facilitate copying agreements that delivered attractive financial returns. Its activities, and those of CAL, reflect the intent to create, by degree, optimal conditions for determining and collecting fees.

Over a number of years, CAL persuaded government to legislate to revoke primary elements of the statutory scheme envisaged by the Franki Committee. A sampling system for estimating copying replaced the record-keeping system introduced in the 1981 legislation. Rates were determined by the Copyright Tribunal on a per page per copy basis. CAL became the exclusive Australian collecting representative of the entire collective of authors and publishers. The delicate balance sought by the Franki Committee – feasible or not – vanished into the air.

THE RISE OF CAL

The early days

In hindsight, CAL's success seems inevitable. Its great rise from the days spent scratching in the dust for crumbs occurred over 25 years as if predestined. In reality, CAL fought hard, reliant on human effort and wiles, to secure its position of power and dominance, and sometimes without confidence of winning the battle.

In this respect, it did not resemble APRA, which began operations in 1926 backed by the resources of the British Performing Rights Society. By then, the PRS could look back on 12 years of existence in which it swept away domestic opposition to its claims. APRA could rely on the finances and advice of its British parent and could rely also on a priceless legal asset – the performing right.

CAL could not in the beginning claim, like APRA, to represent the vast majority of copyright holders in its field. It was yet to secure the authority to act exclusively on behalf of most copyright owners. Its officers were neophytes in the enterprise of collecting copyright fees. APRA, though in 1926 newly incorporated, could rely on the expertise and experience of British executives who, for over a decade, established the PRS's business.

The advantages CAL could claim in 1981 were the determined backing of

the ACC and its constituents, the author, publisher and journalist associations, and the existence of a new legal requirement for educational organisations to pay for photocopying. But the task ahead seemed daunting.

The Copyright Act placed the onus on copyright owners to obtain records of copying from educational bodies and create legally sustainable payment claims from data that was likely to be piecemeal or defective in other ways. The educational sector, especially the universities, showed little inclination in the past to cooperate with authors, publishers or their representatives. The job of determining liabilities and then securing payment seemed complex and difficult.

Trying to give effect to the statutory licensing scheme, CAL confronted the educational institutions as an impecunious newcomer. From the beginning, however, it received moral support from some quarters of government. An explanatory document from 1974 recorded CAL's gratitude for the "encouragement" received from Senator Doug McClelland, the Minister for Media, and his department. The Council for the Arts, a government agency which helped to finance the ACC, enthusiastically endorsed the creation of the new collecting society.

The founding of CAL realised, in one aspect, the Labor Government's little people policy in favour of the arts generally, and writers specifically. The later criticism of the organisation as a vehicle serving primarily the interests of publishers lends depth to the separate criticism that Labor's arts policy – foreshadowed in the speeches of Rex Connor and Gil Duthie in the 1968 parliamentary debate on copyright – falsely assumed that the creative interest could be advanced without reference to commercial imperatives. In the case of CAL, the commercial imperatives of publishers in due course swept aside the aspirations of many authors, and Gus O'Donnell himself.

Registered as a company in 1974, CAL presented its first submission *Reproduction in Schools* to the Australian Education Council in Hobart in February 1974. The submission proposed a voluntary licensing scheme for government schools' copying in all States. A second submission, *Reproduction in Universities*, followed. In the early years, CAL's board advocated voluntary licensing. Chaired by O'Donnell, the Board, which also consisted of representatives of the associations of architects, publishers,² musicians and photographers, insisted on the author's right to refuse permission to copy.

After the 1981 amendments to the Act, CAL adapted itself to the unwelcome reality of statutory licensing. Its board, and the ACC, saw presciently that the most effective way to achieve practical regulation of photocopying lay in tribunal arbitration. Accordingly, in 1983 CAL launched the first of many proceedings in the Copyright Tribunal that, together with facilitating legislative amendments,

2 George Ferguson, Director of the Australian Book Publishers Association, a member of the Spicer Committee and a strong advocate before the Franki Committee of the publishers' interests, represented Australian publishers.

helped the organisation achieve its astonishing success as a collecting society.

Civil war

In the two years between the amendments and CAL's first case in the Tribunal, internal revolution transformed the agency. Frankly described in the official history of CAL's first 30 years,³ civil war broke out between O'Donnell and members of the CAL board representing publishers. Partisans for O'Donnell might have said that the conduct of his opponents was reminiscent of that which raised the ire of Australian senators during the 1905 and 1912 copyright debates.

Alternatively, the ousting of O'Donnell from CAL's board, and the rejection of his belief that CAL must above all serve the interests of authors, not publishers, can be seen as victories for economic realism. The publishers paid the bills, produced the books and distributed the book royalties. They had no intention of letting the ideology of authors' rights upset the business of collecting photocopying fees.

CAL's civil war confounded Labor's doctrine of little people, a doctrine which played no small part, philosophically, in the founding of the agency. The corporate transformation of CAL attests to the power of industries in determining how the rights of copyright owners are deployed and exercised. It also exposes a strain of venality in the authors' rights doctrine.

O'Donnell's insistence on preference for authors subtracted from consideration the role of publishers in making authors' works saleable. It also, by mental alchemy, transformed the legal right to remuneration to a moral right that brooked no limitation in any way disagreeable to authors or their representatives. O'Donnell's approach became untenable. However much authors or governments demand preferment for artists, industries control rights and, pursuing profits, they sometimes subvert policies intended to deliver income or other benefits to creators. Publishers were hardly less mercenary than authors but they controlled the supply of money.

The warfare between O'Donnell and the publishers erupted in 1981. The four publishers who sat on the CAL board as members of the Australian Book Publishers' Association became increasingly hostile to O'Donnell's insistence that CAL must distribute photocopying fees direct to authors. They demanded that publishers, who produced and distributed the authors' works, and were practised in distributing book royalties, should receive income collected and then make allocations to authors.

By 1982, CAL's funding from miscellaneous sources evaporated, and the ABPA showed its hand. The Association refused to supply emergency funding

3 Peter Meredith, *Realising the Vision: a History of the Copyright Agency Limited 1974–2004* available at www.copyright.com.au/history_of_cal.htm.

and established its own collecting agency. The Australian Society of Authors, which until now supported O'Donnell, recognised that CAL could not continue without publisher support and, within months, caved in. Its management committee forced O'Donnell to resign from CAL and in 1983 APBA directors returned to CAL's board.

The APBA and ASA agreed to joint funding of CAL but the balance of power now lay unequivocally with the publishers, victors on the battlefield and keepers of the purse. Shocked and confused, O'Donnell and his supporters retreated. Seemingly, the work of an era lay in tatters. The publishers and their allies swept aside the past leader of the ASA and ACC, the man most responsible for the creation of CAL. They proved, again, the truth of George Bernard's Shaw's statement in 1911 that in a contest between artists and industrialists, the artists "must go to the wall".⁴

Now began the ascent of CAL. Its board members saw that proceedings in the Copyright Tribunal promised the most efficient way of achieving their objectives and they resolved to apply to the Tribunal for the determination of rates for educational copying.

Tribunal proceedings

CAL's 1983 application to the Tribunal to determine a per page rate for photocopying resulted in lengthy proceedings that only ended in March 1985. In *Copyright Agency Ltd v Department of Education of NSW*,⁵ Justice Sheppard, settling on a rough median between the rates proposed by the parties, ruled that the State educational departments and various tertiary institutions were liable to pay a rate of 2 cents per page of copyright works copied.

In doing so he fulfilled the prediction of the *Sydney Morning Herald* journalist Michele Field, who in 1983 wrote, "the tribunal will decide on something between 2 cents and 3 cents a page – too low to make authors and publishers happy, too high to be easily absorbed by school budgets." She went on to say that nobody would "be satisfied and that perhaps is a definition of fairness in determining compensation."

Field also predicted with flawless accuracy the process of reasoning adopted by Sheppard. As she said, the Tribunal "will probably be guided in its determi-

4 Shaw protested to *The Times* about the proposed compulsory licence for recordings in the British Copyright Bill. He said: "An injustice has to be done either to us artists or the manufacturers. We, being artists, are poor and politically insignificant. They, being industrialists, are rich and can bully Governments. I suppose we must go to the wall but I do not see why we should do so without politely informing the public and the Government that we thoroughly understand what is happening to us ..."

5 [1985] ACopyT1.

nation of a fair price by looking at the costs of previous permissions ... Then it must say that these value levels are to be discounted for a number of reasons.” Her most salient point followed: the Tribunal “will have to go through a set of motions and by something that looks like a process of deduction arrive at a pretty arbitrary figure.”

Justice Sheppard determined the per page rate almost exactly as Field predicted. As she anticipated, he arrived at the figure of 2 cents by “a set of motions” that camouflaged an arbitrary method of reasoning. He also established the base rate for future adjustments by the Tribunal and the standard for future calculations of the value of copyright material.

His approach is readily justified. Sheppard adopted the classic arbitral method of determining the value of goods or services. First he looked for evidence of previous bargains between the parties or bargains between other parties that established comparable industry norms. Then he took into account factors that might affect the bargain. In the 1930s, Justice Owen and Attorney General Latham expected that an arbitrator would use similar methods to determine the performance fees payable to APRA by radio stations. The arbitrator who determined the ABC’s liability to APRA in 1939 employed this conventional approach to valuation.

Sheppard, though, seemed not to appreciate the novel aspects of the proceedings before him. The parties had not tried to negotiate a price. Nor did the prospective payer derive a commercial benefit from the remunerable activity. Properly construed, Sheppard’s task involved pure valuation and called more for abstraction than consideration of hypothetical bargains determined by reference to the economic needs of the parties.

Valuation

What intrinsic value could be attributed to the page of a work considered discretely? The question seemed unanswerable. A more meaningful approach asked what value could be attributed to the exercise of the right to photocopy works. Framed in this way, the inquiry yields the answer that the attributable value of copying individual pages is negligible. The direct financial benefit to users of non-commercial copying is nil while the direct financial losses caused by photocopying seemed also, in most cases, to be nugatory.

Sheppard did not canvass such abstractions. Had he done so, he might have settled on a rate much closer to the 2 cents proposed by the educational sector. In the midst of Sheppard’s “motions” the glaring truth went unnoticed: if copying did not deliver pecuniary profit to the copier or financial detriment to the owner, the presumption must be that the monetary value of copies made, or the thing copied, being indeterminate, must be low rather than high. In logical terms, the idea of fixing a per page rate for copies that applied uniformly to different works

and different categories of work could not be justified.

Justice Sheppard recognised the illogic inherent in the exercise he performed, but he pressed ahead, as he had to. The unfortunate consequence of his findings, which were perhaps inevitable – given the common understanding that he must create a notional bargain – is that ever since his decision, the copyright community has embraced a falsehood about the value of copying. This is that copies possess value in themselves and though the value cannot be precisely determined, the parties disputing value are merely bargaining over the price of goods and services.

However they are not. The bargain is over the value of a page copied. Self-evidently, a copier attaches utility value to a page copied but the value is not, by any measure, accurately quantifiable. More importantly, the most meaningful measures – pecuniary benefit to copier and detriment to owner – indicate that the value attributed to a copied page should be negligible. The proposition that copying is of itself remunerable, that every copy of a page must be remunerated, departs from the idea that copyright subsists in the entire work. It leads straight to the Gomorrah of copyright functioning solely as a device to raise revenue for owners.

Be this as it may, Justice Sheppard's decision in 1985 marked the beginning of CAL's climb up copyright's emerald mountain to the heights of prosperity and influence. Its receipts for educational copying in the first year after the decision amounted to a little over \$14,000. Two decades later it recorded total annual revenue in excess of \$100 million. Annual licensing income grew progressively over the years, aided by favourable decisions of the Copyright Tribunal setting rates. CAL's future revenue prospects may be gauged from the fact that 60 per cent of total revenue growth occurred in a four year period after 2001.

Success of CAL

CAL's achievement is remarkable. Facing a hostile or indifferent academic establishment, its officers undertook the tortuous work of examining the photocopying records of universities and schools, meeting with officials to complain about non-compliance with statutory record-keeping requirements, despatching invoices and waiting for results. In the early period, the agency employed one full time collections officer and a pair of administrative assistants.

Yet little by little their persistence paid dividends. The organisation pushed for administrative reforms to achieve the ACC's vision of mixed voluntary and statutory licensing, with copying quantities determined by sampling surveys, not the arduous process of record-keeping. Underlying all these efforts, the per page copying rate, reviewable at intervals by the Copyright Tribunal, constituted the bedrock which enabled CAL to quantify copying and verify invoices.

A breakthrough came in 1989. The Labor Government passed legislation

amending the Copyright Act to permit voluntary licensing and institute sampling as the approved method for determining the quantum of copying. Licensed to act on behalf of more and more Australian authors and benefiting from reciprocal arrangements with sister organisations throughout the world, CAL also found itself in a position to collect for a growing army of authors and publishers.

The agency cemented its position by persuading the Government to amend the Act to provide that only one collecting society could administer either the educational or government statutory licences for copying. On application, CAL was declared the sole collecting society for educational and government copying. Parallel with the statutory licences, CAL embarked on an ambitious scheme to issue voluntary licences for commercial photocopying but by far the greatest part of its income poured in from the educational sector.

Like APRA decades earlier, CAL pursued a pragmatic strategy of optimising returns by shooting sitting ducks. In the 1930s, APRA concentrated on negotiating licences with the ABC, which, as a government corporation, considered itself bound to honour the statutory obligation to pay performance fees. In the 1990s and beyond, the educational and government sectors similarly accepted statutory obligations that most commercial entities ignored.

CAL only paid serious attention to copying by Commonwealth, State and Territory governments from about 2002 onwards. In the preceding 15 years, it concentrated the greatest part of its efforts on educational establishments, and in 1999 obtained a ruling from Justice Burchett in the Copyright Tribunal which increased the per page copying rate to 4 cents.⁶ Revenue from educational institutions totalled about 90 per cent of total CAL income.

Digital and government copying

From the mid 1990s CAL also consistently lobbied the federal Government to implement, on favourable terms, the relevant terms of the 1996 WIPO Copyright Treaty. The WIPO Copyright Treaty obliges contracting parties, including Australia, to give effect to obligations concerning the distribution, rental and communication of copyright material and the enforcement of these rights. Australia implemented the Treaty by passing the *Copyright Amendment (Digital Agenda) Act 2000*, which created the new exclusive right of communication to the public.

The new communication right allowed copyright owners to control the transmission of digitised copyright material over the internet. The creation of the right accomplished for authors and publishers the objective sought by CAL for

6 Justice Burchett set the per page rate for coursepacks at 5 cents, for page copies of artistic works and print music at 15 cents and for an artwork copied onto a slide at \$1 per slide.

a decade: control over digital transactions involving copyright material. Owners gained the right to profit in cyberspace and CAL a new mission that guaranteed its future influence.

The benefits for owners were not absolute. To CAL's dismay, the Government extended copying exceptions applicable to print copying to the copying of digital material. From the commencement of the Government's amending legislation in 2001, CAL argued repeatedly in public for restrictions on fair dealings in the digital environment, limitations on the decryption of software intended to prevent unauthorised access to copyright material, and extension of the posthumous term.

Simultaneously, the agency advocated a new method for educational institutions and others, to secure access to digital copyright material. Under the scheme proposed, users could browse a virtual library of registered works and, for a fee, download selected works from the CAL website. All the while, as CAL participated in public debate and examined new ways of collecting online copying fees, its revenues grew.

Government represented a second source of secure revenue to CAL. Once apprised of the existence of the statutory licence – and CAL's status as the declared collecting society for authors and publishers – government departments across the country did not cavil at the obligation to pay for copying. A photocopying agreement signed in 1994 expired at the beginning of the new century and CAL began desultory negotiations for new contracts. By 2004, CAL's demands had increased. It wanted government – and the educational sector – to pay fees for all digital copying and communication of works.

The collecting society also demanded that government pay for copying survey maps and plans, hitherto assumed to have been created “by or under the direction or control” of government – and, therefore, owned by government under section 176 of the Copyright Act. To secure remuneration for plan copying, CAL pursued the strategy that had won it success after success since 1985 – litigation in the Copyright Tribunal.

A setback

In 2003, CAL asked the Tribunal to determine “equitable remuneration” (that is, fix fees) for the copying by NSW government of survey maps and plans. According to CAL, surveyors owned copyright in the registered plans, hitherto assumed to have been created “by or under the direction or control” of government, and, therefore, owned by government under section 176 of the Copyright Act.

The State of New South Wales, adopting propositions suggested by a Queensland academic, Dr Anne Fitzgerald, argued that detailed instructions issued by government specifying how survey plans were to be prepared, manifested governmental direction or control. In the alternative, the State argued that a

royalty-free licence to copy maps and plans could be implied from the language of statutes and regulations governing plan registration. The systematic integration of plans in the government’s digital cadastral database – to help regulate State-wide property annexation, acquisition and disposal – demonstrated the non-commercial public utility of the plans.

In 2006, the Tribunal referred findings of fact to the Full Federal Court for determination of 11 questions of law. The Full Court, consisting of Justices Emmett, Lindgren and Finkelstein, each a judge of the Tribunal, heard arguments in March 2007 and delivered its judgment three months later. In *Copyright Agency Limited v State of New South Wales*,⁷ their Honours ruled that copyright in maps and plans vested in the surveyors who created them but they also found that the statutory and regulatory framework for registration licensed the State to copy the maps and plans without remunerating surveyors.

In judging the meaning of the phrase “direction or control”, Justices Emmett and Lindgren concentrated on the element of compulsion implied in the nouns. The State, they pointed out, could not compel surveyors to draw plans, it could only specify the way in which registrable plans must be prepared. Justice Finkelstein similarly found that “direction” referred to the “power” of the Crown to “require” the creation of a work and “control” to the “dominion” of the Crown over the “execution” of the work. Plans were made in fulfilment of private contracts and not under the State’s direction or control. For this reason, plan copyright vested in the surveyor (or the surveyor’s assignee, a point not discussed in the judgment).

The Full Court declared that the legal scheme for registration licensed the State “to do everything that ... the State is obliged or authorised to do with or in relation to registered plans.” The registration scheme existed for one reason: to create or affect legal rights in relation to land. Survey plans were created to enable the State to compile and maintain its cadastre and thus regulate real property transactions. The judgment of Justice Emmett, joined by Justice Lindgren, did not elaborate on the State purposes that necessitated an implied licence. Instead, the judgment seemed to treat as self-evident the inference that the terms of the statutory and regulatory scheme for registration manifested Parliament’s intent to create an implied licence. Their Honours said:

The whole purpose and object of the preparation and lodgement with LPI of the Relevant Plans was to obtain registration of them so as to become registered plans, with the intention of creating or affecting legal rights in, or with respect to, the land to which they relate, or to create or affect the capacity to create or affect legal rights in respect of that land. The purpose was that lots in the Relevant

7 [2007] FCAFC 80.

Plans, whether a plan of subdivision or a strata plan, would become separate and discrete parcels in the register of landholdings of the State. These lots or parcels would themselves become part of the cadastre of the State, by the infrastructure and mechanisms provided for under the Real Property Act, the Conveyancing Act, the Strata Freehold Act, the Strata Leasehold Act and the Community Land Act. The surveyors who prepared each of the Relevant Plans must be taken to have authorised the State to do, in relation to the Relevant Plans, everything that the State is obliged to do in consequence of their registration, quite apart from the coincidental effect of s 183(1).

In summary, the Federal Court construed section 176 of the Copyright Act narrowly and recognised authorial copyright in survey plans. To this extent, CAL's arguments succeeded before the Court. But on the fundamental question of remuneration, CAL failed, and the Court's implication of an unrestricted government licence to use survey plans for public purposes (as set out in the statutory registration scheme) may mean that *Copyright Agency Limited v State of New South Wales* comes to be regarded as a seminal case in the development of Australian copyright law.⁸ If the High Court hears an appeal against the Full Court's decision, its judgment may confirm the putative principle that use of copyright material is remunerable, or perhaps point alternatively to a new principle that use does not confer an automatic right to remuneration.

Revenue gains

Despite this setback in the Federal Court, CAL's revenue prospects surely gladdened the hearts of its board members. The problems of recording and reporting digital copying, and the communication of copies, as well as valuing these transactions, perplexed owners and users alike. But in the print domain, CAL continued to register rapid rises in annual revenue, thanks to increases to per page copying rates for educational institutions. In 1996 it recorded annual revenue of over \$18 million. Within five years, annual income more than doubled. In the following five years, income rose by nearly 60 per cent to over \$100 million, while expenditure remained below 15 per cent of revenue.

In the financial year ending 2006, educational institutions contributed \$77.5 million to CAL's coffers and the government sector \$6.8 million. The agency could declare decades of remarkable achievement, and did so in 2004, publishing a celebratory history of its first 30 years. The real work of collection and distribution took place in the years after 1986, and only after 1996, when income poured out of universities and schools, did CAL truly entrench itself in public conscious-

⁸ See also Chapter 4 'Copyright' in B. Fitzgerald, A. Fitzgerald, T. Beale, G. Middleton, and YF Lim, *Internet and E-Commerce Law and Policy*, Thomson, 2007.

ness as a collecting society equivalent in status and influence to APRA.

The copyright gospel

In the two decades from 1986, one figure seemed to personify the agency and its philosophy. Michael Fraser joined CAL in 1985 and carried out the protracted and difficult task of inspecting records of copying at schools and tertiary institutions, collating data and preparing invoices. He wrote the agency's first business plan, and his ideas about how CAL should develop shaped the organisation's future. Although not bellicose like Gus O'Donnell, he shared the latter's partisanship for copyright owners.

As CAL's chief executive for 20 years, he became O'Donnell's spiritual heir, ardently performing the duty identified long before by CAL's first chairman as a sacred necessity – collecting taxes for photocopying. Unlike O'Donnell, however, he did not prefer the interests of authors over those of publishers, and concentrated on the accretion of revenue, a pragmatic strategy favoured by publishing houses.

Fraser is perhaps the most remarkable figure to appear in contemporary Australian copyright politics. An ambling, softly spoken, seemingly unworldly figure, he impressed his views on government committees and officials with consistent, persuasive force, becoming identified, like no other person, with the cause of copyright owners. Fraser guided CAL to extraordinary income growth but his chief contribution did not lie in business planning. He is likely to be remembered, above all, as a singularly effective proselytiser for the cause of copyright protection.

In spreading the good news of the copyright gospel he won over Parliamentary and government inquiry committees and numerous politicians and government officials. Only the hint of unctuousness blemished the perfection of his formal manner. The other advocates of copyright, usually less tranquil in their presentation, were not so successful in drawing immediately favourable responses from interrogators. Politicians reflexively accept the theorem that property rights may expand but do not contract, and to varying degrees, are inclined to favour the arguments of copyright advocates. Even so, Fraser's gift for something like hypnotic persuasion advanced the interests of copyright owners generally in a way that cannot be overestimated.

Possibly, his mesmeric intensity in discourse, combined with his seeming detachment from proceedings, derived from his reputed attachment to Buddhist practice. In public hearings, his calm presence among fraught gatherings of politicians and lobbyists suggested a Tibetan Buddhist tableau, in which the enlightened figure floats far above the angry demons who contend in the infernal realms below.

He was not free from delusion. He wholeheartedly embraced the simple mes-

sage proclaimed by Gus O'Donnell and the copyright movement at large, that a work, in any manifestation, is property, the use of which demands remuneration. Advocates of this view have marched in step for a century to make the idea that every use is remunerable a legal reality. Taken to its logical conclusion, the theory demands that the act of reading a work be taxed. Yet even if theory is realised in law, it may still be contradicted by logic, commonsense or natural justice.

Under Michael Fraser, CAL achieved staggering success in revenue collection, and came to represent a maximalist view of copyright in public debate. In this respect, the agency embodied the American zeitgeist that demanded more control, and more and more revenue to feed the copyright machine. But neither Fraser, nor his allies, have ever satisfactorily explained their demands for more and greater entitlements for copyright owners.

They reversed Proudhon's 19th century aphorism that property is theft. In their eyes, the thieves were those who declared the right to use property without payment. Whether or not something should be declared property, or whether a user should pay for use were questions they would not debate. If the law declared subject matter property then the legislative rationale, or the politics leading to legislation, or any philosophical consideration, were irrelevant.

Quod scripsi scripsi: the law justified itself. On this basis the great copyright caravan headed into the West to create a new world, and at the wild frontiers of this world, outlaws were hunted down. But one truth remained: the proponents of copyright never showed by what right, or reason, other than legislative fiat, they could turn users into renegades and drive them from the scene.

Fraser departed CAL in May 2007, his work faintly praised by the agency's chairman Brian Johns. Johns thanked Fraser for his "long and successful service to CAL" and added that "we wish him well in his future endeavours." Like his predecessor Gus O'Donnell, he departed seemingly unwept, unhonoured and unsung. Fraser's persuasive gifts perhaps no longer suited the requirements of a major company intending to efficiently secure revenue from sources outside the educational and government sectors. But his long tenure worked greatly to CAL's advantage, his zeal helping to secure many advantages decreed by government and tribunal.

A reversal for CAL and possible consequences

A few weeks after Fraser's resignation, the unanimous decision of the Full Federal Court in *Copyright Agency Limited v State of New South Wales* dismayed CAL's executive. While the agency swiftly applied for leave to appeal the decision, the case threatened to disturb CAL's confident march into the rose-coloured dawn of a new era. The Full Court's findings undermined the assumption that copyright unfailingly conferred a right of remuneration. Its judgment struck at a cherished article of the copyright faith. Since 1968, copyright proponents and

policymakers in Australia took for granted the copyright owner's automatic entitlement to economic reward.

The Franki Report accepted unquestioningly the owner's right to exact fees for per page copying in educational institutions and the statutory licence for educational copying implicitly assumed that the law demanded remuneration for page photocopying. Cases in the Copyright Tribunal fixed equitable remuneration for page copying and neither parties nor judges questioned the legal justification (outside the statutory licensing schemes) for collecting fees for the non-commercial copying of fractions of a work. CAL enjoyed success after success as the Tribunal determined fees, and increases to fees, for educational and government copying.

Now, for the first time in its history, the agency tasted the bitter fruits of unequivocal legal defeat. For the first time, a court listened to arguments that attacked the premise that made possible CAL's ascendancy – the idea that all copying outside the statutory exceptions is remunerable. The Court found that NSW government could, by implied licence, copy and communicate registered survey plans without paying royalties to surveyors. CAL found itself denied the right to collect fees under a statutory licence. The 3-0 margin of decision and the award of costs against the agency underlined the extent of its setback.

CAL applied to the High Court for special leave to appeal the Full Court's judgment on the principal ground that the statutory licence for government copying, conferred by section 183 of the Copyright Act, precludes any other licence for government copying and communication. According to CAL's application, the section 183 licence created a comprehensive scheme for government copying that enjoined remuneration. The legislature intended the licence to govern total government use of copyright material. Considered in isolation or the context of an appeal to the High Court,⁹ the Full Court's decision invites consideration of related questions ignored or dismissed over decades – whether the *purpose* of a copyright use ought to determine whether the use is remunerable, or be considered a primary factor in determining scales of remuneration.

Consideration of purpose leads directly to examination of both legislative and administrative intent – what Parliament intended when passing copyright laws, and what policy the executive adopted when interpreting rights. Such an exercise is not precluded by the treaty obligation to limit exceptions to the exclusive rights and could lead to radical conclusions, including the proposition that that if copyright does not of itself confer a right to remuneration, the right is circumstantial.¹⁰

9 At the time of publication, the High Court had not heard CAL's application for special leave to appeal, lodged on 30 July 2007.

10 Article 9(2) of the Berne Convention, adopted in Article 13 of the TRIPS Agreement, requires signatories to restrict limitations and exceptions to the exclusive rights

In what circumstances might the right not apply? It is doubtful that legislators in Britain and Australia in 1911 and 1912 intended for copyright owners to claim remuneration for non-commercial uses of copyright material. Nor is it clear that their successors in 1956 and 1968 in any way envisaged the compensation schemes effected by the statutory licences for educational and government copying. The Spicer Committee proposed that the Crown pay just compensation to copyright owners for the compulsory use of their copyright material, but neither the Committee nor any other official body considered criteria for determining compensation, and, by association, any grounds for denying compensation.

Copyright Agency Limited v State of New South Wales has made possible meaningful debate over questions previously ignored. What is the commercial detriment to copyright owners of educational or government uses of copyright material? Should a non-commercial purpose, or a use that is not directed towards competition or advantage in a market, be subject to copyright fees? If the answer is yes, should the fees be discounted to allow for the purpose of use?

These questions, if posed by the Copyright Tribunal, might lead to reduction of fees fixed for remuneration under statutory schemes. Posed by policymakers, they might conceivably result in initiatives to declare, for instance, government use of copyright material for categorically non-commercial public purposes exempt from fees or protected by restrictions on fees.

THE COPYRIGHT COLLECTING SOCIETIES

The question of distributions

At the beginning of the new century, APRA and CAL constituted the vanguard

to “certain special cases” which “do not conflict with the normal exploitation” of copyright works and “do not unreasonably prejudice the legitimate interests of the rights holder.” The Canadian scholar Daniel Gervais argued that the “three step test” for determining whether an exception satisfied treaty requirements should be reversed so that more weight is given to consideration of questions of economic prejudice and exploitability. He proposed an “effects-based” test that focused on the *effect* of a use rather than the nature of the use. Private uses that do not directly harm the owner’s economic interests ought usually to be allowed for practical and public interest reasons. See Daniel J. Gervais, “Towards a New Core International Copyright Norm: The Reverse Three Step Test”, *Marquette Intellectual Property Law Review*, Vol 9, Spring 2005. Gervais tied effect to purpose. “The author has a right in respect of any commercially significant use; use that would normally be the subject of a commercial transaction. Any situation not covered by this right would be one that is not subject to normal commercial exploitation and is justified by a valid public interest purpose.”

of copyright collecting societies in Australia. By this stage, over 10 collecting societies operated in Australia and New Zealand, evidencing what could only be guessed at when APRA commenced operations in the 1920s: a significant function of contemporary copyright legislation is to efficiently regulate the transfer of income from the army of copyright users to copyright owners, or, put another way, to facilitate the taxation of copyright use.

In 2006, APRA and CAL each collected more than \$100 million annually from their licensees. The other main societies lagged far behind in income returns but most collected multiple millions of dollars each year. The final destination of money collected remains largely unknown. Collecting societies jealously guard the details of distributions and outsiders, including major licensees such as government agencies, cannot ascertain to whom, and in what amount, licence fees are distributed.

A fog has covered distributions since the 1920s. APRA's articles of association contained a secrecy clause and nowadays CAL flatly refuses, on confidentiality grounds, to disclose distribution details. APRA's first licensees, music hall owners, radio stations and so on, declared that they were willing to pay public performance fees to the authors of music, but did not want fees distributed to music publishers. APRA, however, resisted their requests for full disclosure of distributions.

Secrecy breeds suspicion and critics continue to impugn the silence of collecting societies on distributions. The main suspicion has not altered since the 1920s. Collecting societies, say critics, are primarily conduits for the transfer of bulk receipts to music and literary publishers and a handful of recording, film and media corporations. Societies respond to criticisms by pointing to their constitutions and policies, which sometimes require that authors' representatives occupy 50 per cent of board seats, or that authors receive the majority of income collected.

Secrecy prompts a second, less commonly articulated, concern. If – in the case of APRA and CAL – the bulk of money collected finds its way in royalty payments to authors, do their royalties justify the massive income transfer from users to owners? If justice to authors is measured in monetary returns, does the collecting system deliver justice to authors? If, for the sake of argument, CAL distributes to Australian authors an average annual royalty payment of \$100, does this return justify the cost of collection, including the cost of contract negotiation?

One thing is certain. The refusal of collecting societies to disclose at least rudimentary statistics about distributions precludes meaningful debate about the merits of the collecting system. Another fact is undeniable. The copyright industries are intimately connected with the major collecting societies, and though it cannot be said definitely that they represent the collecting arms of the industries, the societies and industries are entwined in relationships of mutual benefit.

Sources of income

In 2006, a number of important societies operated in parallel to APRA and CAL. They included Screenrights (the Audiovisual Copyright Society Ltd), the Australian Mechanical Copyright Owners' Society Ltd (AMCOS), the Phonographic Performance Company of Australia Ltd (PPCA) and the Visual Arts Copyright Collecting Agency (Viscopy).

Formed in 1990, Screenrights is declared under the Copyright Act as the collecting society for copying by educational institutions of material broadcast on TV and radio. AMCOS collects, on behalf of the music publishers and composers royalties for recordings of performances of musical works. Its origins can be traced to 1956 (though the company website states the date of incorporation as 1979). The PPCA, founded in 1969, collects, on behalf of record companies, fees for the public performance and broadcasting of sound recordings and music videos. Viscopy, established in 1995, collects royalties for the publication of visual art.

The greater number of Australian collecting societies collect fees for the exercise of the mechanical and performing rights applying to musical works, sound recordings and films. Their licensees are usually, though not invariably, commercial users of copyright material. The great bulk of income collected by CAL and Screenrights, however, is derived from the non-commercial sector. Following in the path of APRA, which for years derived the largest portion of its revenue from the ABC, they secured from the educational and government sectors lucrative and certain sources of income.

Further questions thus demand consideration. If justice for authors means the payment of royalties for copying, why has CAL neglected to sweep through the world of commerce to ensure that authors are remunerated for the millions of copies of works made by businesses each year? Why is Screenrights constituted to collect primarily from educational institutions? Why did governments legislate to ensure that the educational sector and government paid photocopying royalties while allowing business to thumb its nose at authors?

One answer is that on the great plains annexed by the copyright pioneers and their successors, the educational and government bodies move thoughtlessly like herds of wildebeest, easy prey for predators seeking sustenance. The commercial world, symbolised best by trampling elephants, represents a more fearsome challenge. If they dare to confront the trumpeting herd, the predators soon scatter, lest they be crushed.

COPYRIGHT IN SOFTWARE

A new imperium

In June 1984, Australia amended the Copyright Act to protect computer programs as literary works. In doing so, it followed the United States, which in 1976 recognised copyright in software, and preceded Britain, which recognised software copyright in 1985. Japan, the Federal Republic of Germany and France also passed software copyright legislation in 1985. More than any other event, the recognition of software copyright in countries such as Australia and Britain signified the coming dominance of the United States in world copyright affairs.

The US copyright imperium, directed by the magnates of software, film, television, music, publishing and internet industries, first began to truly exercise its might in the 1980s. The importunities of industry leaders, intensely stated on Capitol Hill and in the Office of the United States Trade Representative, created an energy that radiated through the world's copyright decision-making bodies and the world's legislatures.

The Australian software legislation in 1984 marked the starting point of US domination in Australian copyright law-making. Afterwards, Australia amended the Copyright Act in conformity with the prescripts of the US industries as these were mediated by Congress, the USTR and world copyright organisations.

The 1984 amendments also established a template for the process of future revisions. As in 1984, government determines the shape of amendments by reference to one or all of the same constellation of interlinked factors: international copyright law or practice, trade prerogatives of the United States and the demands of industry. Then follows the preparation of draft legislation (or a plan of legislation), domestic consultation, and finally the passage of legislation that satisfies the needs of owners while recognising the exceptions and fair dealing principles in the Copyright Act.

From 1984, most significant modifications to Australian copyright law were determined by the wishes of the United States and domestic consultation only marginally altered the substance of amendments. The old imperium that dominated Australian copyright thinking, constituted in no particular order by the Berne Convention and Britain, vanished as a determining entity. The Berne Convention continued in force but new international forums and instruments, functioning to satisfy the export requirements of the US copyright industries, dictated the pattern of legislative revision.

The United States recognises copyright in software

The story of software copyright protection begins in the United States. In 1964, the US Copyright Office registered two computer programs, one recorded on

paper, the other on magnetic tape. The Copyright Office determined that the sequences on punched cards, the storage medium for computer programs, expressed data that could be understood by a person. A computer program, whether expressed on paper or a tape, yielded functional meanings and, subject to the requirements of originality, intelligibility and publication, could be protected, according to the Office, as a literary work.

For a decade after 1974, WIPO, at the instigation of the United Nations, examined possibilities for “sui generis”, or stand-alone, copyright protection that the UN hoped might facilitate Third World access to software. WIPO presented model provisions for international consideration, and proposed the option of owners depositing source code with a registration office. When copyright expired, the code would be released to the public. The international computer industry did not support the model provisions and the proposals lapsed.

In 1976, the new US Copyright Act defined ‘literary works’ as works “expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” The House of Representatives Report explaining the Act said that the literary works included computer databases and programs “to the extent that they incorporate authorship in the programmer’s expression of original ideas”.

The definition of literary works in the Act, however, did not clearly identify the scope of copyright protection of software. To cure this defect, amendments passed in 1980, introduced a definition of computer programs and specified types of non-infringing copying or adaptation of programs. The amendments were only partly successful. Over the next 15 years and beyond, courts in the US, Britain and Australia were asked to interpret definitions of computer programs and the boundaries of legitimate copying.

Doubts over object code

In the United States, the courts soon confirmed that copyright protected source and object code and then turned to articulating methods to determine whether protection extended to the non-literal elements of a program. The scope of software protection increased steadily over the years. In Australia, the first significant litigation on software copyright turned on whether copyright protection extended to object code, which converts source code into machine-readable form. In *Apple Computer Inc v Computer Edge Pty Ltd*,¹¹ the judge at first instance found that copyright protected only source code. The full court of the Federal Court swiftly reversed his finding, but, to eliminate doubt, the Government in 1984 amended

11 (1983) 50 ALR 581.

the Copyright Act to establish that copyright vested in both forms of code.

Despite the amendments, the defendant company appealed to Australia's highest court. In 1986, in *Computer Edge Pty Ltd v Apple Computer Inc*, the High Court found that while source code – in this case evidenced by writing on paper – is a literary work within the meaning of the definition in the Copyright Act, object code is not.¹² The majority decided that object code stored in the circuitry of computers sold by the appellant did not adapt or reproduce source code.

In reaching its conclusions, the Court interpreted the copyright legislation in force at the time of the alleged infringements, not the legislation as amended in 1984. The judges focused on the question of infringement by reproduction, and determined that infringement required substantial literal reproduction – electrical impulses processing source code were not literal. The Court's decision received a mixed reception and before long the weight of US jurisprudence and industry pressure demanded a shift in judicial attitude. A new consensus became clear in 1992, when three judges of the High Court emphasised that the definition of computer program in the amended Act extended to object code.¹³

In the early 1980s, the main computer producers were unvarying in their position on the copyright status of both object and source code. In Australia, US computer giants, such as Apple, never flagged in proclaiming the message that copyright subsists in object code. Their Australian subsidiaries informed the federal Government that without copyright in both types of code, the computer industry would perish, the victim of Taiwanese and other offshore pirates.

The 1984 amendments reflected the Government's wholehearted acceptance of the argument that continued investment demanded property rights. They also embodied the Government's direct response to the Federal Court finding that copyright did not subsist in object code.

The Apple case

Proceedings in the Apple case, as the trio of court battles waged between the Apple corporation and Computer Edge became known, began in 1983. Apple sued Computer Edge, a Melbourne computer retailer in the Federal Court. Apple alleged infringement of copyright and trade practices legislation and sought damages and injunctions preventing the company from selling personal computers.

The owner of Computer Edge, Michael Suss, fell out with Apple before 1983, when the latter cancelled his licence to sell its computers. Contravening

12 1CLR 171. The Court's ruling confirmed the judgment of Justice Beaumont at first instance in the Federal Court (1983) and the minority reasoning of Justice Sheppard on the Full Bench of the Federal Court (1984).

13 Chief Justice Mason and Justices Brennan and Deane in *Autodesk Inc v Martin Dya-son & Ors* (1992) 173 CLR 330.

Apple's instructions, Suss sold the computers with non-proprietary disk drives because, he said, the American disk drives were too expensive. After losing his dealership, Suss turned to selling Taiwanese computers, badging them as Wombat computers.

Apple mounted an uncomplicated case against Suss. According to the company, the Taiwanese manufacturers of Wombat computers copied on six machine microchips object code from the Apple programs Applesoft and Applestart. By importing and selling the allegedly infringing machines, Suss, and his company, said the statement of claim, broke the law. The object code in each chip constituted a literary work within the meaning given to that term in the Copyright Act, and reproductions of the code therefore infringed Apple's copyright.

Bolstered by legislative trends in the United States, and a recent victory in a similar matter heard by the US Court of Appeals,¹⁴ Apple approached the case confidently. The validity of its arguments seemed, in the eyes of executives, self-evident. To general consternation, however, the company's arguments found no favour with the trial judge. In December 1983, Justice Brian Beaumont declared object code etched onto the microchips to be purely functional, with no original expressive elements. The code did no more than control a sequence of operations in the computer. Minus the key element of originality, object code could not be called a literary work.

Politicians, no less than industry executives, were stunned. The Attorney General, Gareth Evans, the Minister for Trade and Industry, John Button, and Barry Jones, the Minister for Science and Technology – all partisans for investment in local industry – swiftly huddled with representatives of companies and industry associations. After a fortnight, they announced that the Government would legislate to “ensure software is adequately protected”. In a press release, they indicated that legislation might amend the Copyright Act but stated a preference for protecting software under patents legislation.

Appeal to the Full Court

In the meantime, Apple launched an immediate appeal, throwing its full weight behind the court action, heard in February 1984. According to a contemporary report in the *Sydney Morning Herald*, the company “poured a lot of resources into the effort, which at times has assumed the dimensions of a Holy Crusade – against the infidel company and its boss.” Suss struck back by denouncing the Government for “pandering to the whim of the multinationals.”

By the Herald's reckoning, the Australian computer industry considered Suss a “traitor to the cause”, a purveyor of “rotten Apples”. Apple's national market-

14 *Apple Computer Inc v Franklin Computer Corporation* (1983) 714 F2d 1240.

ing manager put Apple’s position simply. “We believe,” he said, “that property rights should be protected.” To run the appeal, Apple retained the services of Michael McHugh QC, then only five years away from appointment to the High Court bench.

Not everyone agreed that software should be called property. Alfred Langer, the spokesman of Software Liberation, announced in the *Herald* in early 1984 that “copyright laws are an artificial restraint on trade, intended to preserve monopolies over products that would otherwise have their prices pushed down by free competition.” Suss argued that software development depended on copying and adaptation. Apple’s leaders, he said, “encourage other people to write programs for the Apple and there are now many thousands of programs available. Why shouldn’t there be other machines available which can run those programs?”

The appeal to the full bench of the Federal Court resulted in a swift reversal of Beaumont’s decision and the award of full costs against Suss.¹⁵ On the question of software infringement, the majority ruled that object code fell within the definition of the legislative definition of ‘literary work’. Justice Fox said:

There is no necessity for a literary work to be a work of any literary quality. It is accepted that the term includes mathematical tables, codes, and in general alphanumerical works. One limit, doubtless, is that it needs to be a work and to have had some skill, even if small, applied to its preparation. There is no doubt that a great deal of skill went into the preparation of what was written, and that what was written could be read and understood by suitably trained people.

In his dissent, Justice Sheppard noted that translation of source code into object code, which involves the generation of electrical impulses, could not be seen by the human eye. Only the machine could understand or see the object code. In short, a human could not make sense of the code – a printout of object code displays digital notations on paper, which, taken together, cannot be literally understood. Invisible, and, in literal form inexplicable, object code in computer chips could not be classified as a literary work.

Suss, cast by the press as David confronting Goliath, boldly pressed on, appealing the decision to the High Court. He found vindication two years later, but the High Court’s decision in his favour came too late. By then the Government had corralled the bolting horse and shut the stable door.¹⁶

15 *Apple Computer Inc v Computer Edge Pty Ltd* (1984) 53 ALR 225.

16 The 1984 amendments attracted the criticism that they did not amend the section in the Act explaining the meaning of ‘reproduction’ to encompass the ways in which a computer digitally stores information. Some software proprietors considered that courts and legislation took a restrictive view of copying that opened doors to infringement.

The Government's response

The Government's amending legislation changed the Act's definition of 'literary work' to include a 'computer program', defined as "an expression" of "instructions" to a computer in "any language, code or notation".¹⁷ The bill also defined 'adaptation' of a computer program to clearly establish that the term applied to the translation of computer languages for purposes such as compiling or assembling programs. The bill made clear that the definition of 'infringing copy' applied to copies of adaptations of works. It also defined the term 'material form' to apply to non-visible forms of storage from which or work or adaptation could be reproduced, including in disks, integrated circuits and computer memory.

From an historical perspective, the Government's response to the first *Apple* decision is interesting not principally because of the content of its legislative amendments but the way in which they were prepared and implemented. The Attorney General Gareth Evans, abetted by his ministerial colleagues John Button and Barry Jones, who were responsible for the Government's industrial and scientific policy, never wavered in the belief that Justice Beaumont's decision threatened an industry.

Each minister emphasised the need to protect the Australian software industry and each characterised software piracy as a potentially catastrophic threat to the industry's survival. Arguments about the creative benefit of restricting proprietary software rights cut no ice. What mattered was that local programmers and suppliers, working for (or in concert with) US manufacturers, expressed alarm about the increasing penetration of the Australian market by Taiwanese manufacturers.

Ironically, the legislative reforms seemed to stultify rather than encourage the development of a native Australian programming industry, and they consolidated the hold of US manufacturers on the domestic market. The most interesting fact about Evans's approach to reform is that his analysis – and that of his department – relied heavily on the premise that investment by copyright proprietors (or putative proprietors) demands legal protection. The Spicer Committee introduced to Australian copyright thinking the simple proposition that investment deserves legal protection and Evans entrenched it as the unwavering theme of future policy makers.

While the idea of government protecting legitimate investment from unfair

17 The complete definition referred also to conversion to another language and reproduction in another material form for the purpose of causing a computer to perform a particular function. The Government amended the Act in 2000 to substitute a simpler, definition which stated that 'computer program' means "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."

competition is hardly controversial, Evans and his colleagues pre-judged the question of fair competition. They rejected Justice Beaumont's decision not for reasons of principle but because they believed, with good reason, that Australia could not afford to ignore the wishes of the US computer industry. The needs of Apple and the larger US software community lay behind Evans's rush to legislation, though he referred in communiqués to the need to secure the Australian industry's future.

Contemporary press reporting suggested divided opinions among Australian software programmers and suppliers in the six months between Beaumont's decision and the Government's amendments. Some programmers argued that copyright protection would concentrate proprietary rights in the hands of large manufacturers and stifle innovation. The suppliers of US software argued that without protection local software producers would lose incentive to create programs, while US companies would lose incentive to export to Australia.

Debate and consultation

They argued that Beaumont's decision threatened the local packaged software market, which before his decision they expected to grow at a rate of 100 per cent per annum. The Australian Computer Services Association, chaired by Jodee Rich, later a controversial figure in the telecommunications industry, led the protests. Rich declared that in the six months after Beaumont's judgment, Imagineering, his packaged software supply company, lost 30 per cent of sales to supplies of imported copied software.

The Government responded unequivocally in favour of Apple and groups like ACSA represented by Rich. Its approach prefigured that of the United Kingdom Parliament, which a year later passed private member's bill to amend the copyright legislation to recognise copyright in computer programs. The passage of the UK bill owed a great deal to the campaigning of the British Federation Against Software Theft.¹⁸ In both Australia and Britain, Government listened to an uncomplicated message about investment and revenue, and blocked out voices spreading alternative arguments.

It made a straightforward choice to accept a natural hegemony created by the explosive growth of the US software industry and its spread across the globe. Embracing the prerogatives of the US industry made sense commercially and politically. Once accepted, the argument that Australian industry depended on US investment precluded considerations of principle.

Thus even if arguments that Taiwanese computer chips did not infringe

18 In 1984, FAST estimated the cost to the computer industry of piracy at £150 million per annum. The Department of Trade and Industry reported that in the same period the annual turnover of the British software industry was about £1 billion.

copyright laws were sustainable in principle, necessity demanded that the law must change. Concerns about the possibility of copyright law facilitating price and distribution control by software companies were irrelevant. Even the radical suggestion that new laws would spell the end of a genuinely independent local industry, and enforce the total control of US manufacturers, made no impression on the Government.

Evans explained the Government's philosophy in his second reading speech for the amendments, delivered on 4 June 1984. When he announced the decision to legislate two weeks after Beaumont's judgement:

My department had already consulted with industry regarding international software developments on the legal status of computerised software, computerised data banks and computer-created works and some issues had been raised in the current review of audiovisual copyright laws. Officers had also participated in studies of these matters at the international level.

He outlined to his listeners the process of consultation managed by the Attorney General's Department prior to the drafting of legislation. In January, the department wrote to "industry and user" groups supplying a short options paper and inviting submissions on "the manner in which the Copyright Act might be amended".

The department received almost 100 responses and in March 1984 held a National Symposium on Legal Protection of Computer Software "to consider both domestic and international policies for Australia and also to cover other computer-related copyright issues, such as the protection to be accorded to works stored in, or created with the aid of, computers."

In April, the Government invited WIPO to convene a working group to consider technical questions related to the legal protection of software. By the time amendments were drafted, Evans's department had heard from a range of local and international technical and legal experts, as well as the representatives of libraries, universities, consumer groups, government agencies, the legal profession, patent attorneys, the press and the computer industry.

How much a consensus emerged to shape the Government's views, or the Government discerned a consensus that satisfied its objectives, can only be guessed. At any rate, its stated intention to legislate to overcome the effect of Justice Beaumont's decision found realisation a mere six months after the decision, in June 1984. The consultative approach adopted by Evans's department, and the reasons he gave for legislation, created the essential pattern for future copyright legislative amendments.

The need for legislation

According to Evans, consultation confirmed the vital need for legislation:

From the consultations it was clear that the absence of legal protection and continued uncertainty as to the state of the law would jeopardise the local software industry and that it was urgently necessary for there to be some legal protection.

The reason he gave for urgency was that free riders could easily duplicate software developed at great expense. One silent exclamation cements the arguments in Evans's speech: "investment!" For the first time in Australian copyright history, a speech introducing copyright legislation concentrated fundamentally on economic utility as the rationale for protection.

Evans gave complete expression to the utilitarian philosophy enunciated by the Spicer Committee, which believed that the fact of large-scale productive investment justified granting copyright protection. He outlined with due reverence the balance theory of copyright balance and explained that the utility of computer software made protection necessary:

In practice, the relative economic importance of the different rights comprising a copyright depends very much on the nature of the protected material and on the technology available for its exploitation. Thus, in achieving an optimum balance between the interests of creators and users of copyright materials, it is necessary to have regard to technological factors.

The technology in question, computer software, demanded that the interests of the computer industry be given full weight. Evans did not speak of the US computer industry, which stood behind developments on the local scene, and instead gave rein to suppositions about local industry development that were probably suggested to his department by John Button and Barry Jones. Through their portfolios, Button and Jones promoted the development of national industry and scientific research, fuelling visions of indigenous technology development that next found expression in plans to create a native defence industry.

Speaking in a new vernacular popularised by government economists, Evans linked recognition of copyright in software with efficiency and national competitiveness:

It follows that the efficiency and competitiveness of Australian industry and commerce are in part dependent upon the availability of appropriate computer systems. Australia can best ensure this by fostering a strong capability for systems development. This capability needs to be able effectively to integrate locally developed (as well as imported) hardware and software to provide systems best suited to our requirements and which have the potential to be marketed overseas.

A strong local software industry is an integral part of this capability.

We are fortunate to have such an industry. Indeed the Australian computer software industry is internationally competitive and there are a growing number of organisations in this country whose main activities are software research and development. The industry is important in its own right and is capable of making a valuable contribution to the Government's industrial development objectives.

Evans wasted no time on the thorny issue of recognising computer code that might have no literal expression as a literary work. The possibilities for Australia created by investment, innovation and industry development, catchcries of a progressive new Government, supplied sufficient reason for action. If anyone thought otherwise, or argued against protection of software, said Evans, "the onus lay heavily upon those so contending to demonstrate why software should be treated differently from other technological developments."

The opponents of the reforms, said Evans, failed to make their case. "The Government," he declared, "has concluded that the onus was not met." Nothing, it seemed, could justify throwing away the opportunity to support the creation of a booming Australian software industry:

Copyright protection will stimulate innovation and further growth of Australia's software industry and, to the extent international copyright conventions apply, ensure protection for exported software.

Protection also has important consequences for users. There are risks of a withdrawal or limitation on the availability of imported software in the absence of copyright protection. Such a limitation would seriously jeopardise the viability of most local computer manufacturers since many obtain their systems' software under licence from overseas' suppliers.

Evans's last sentence supplied an unintended clue to Australia's prospects as an internationally-recognised producer and exporter of software. Since the proprietary software used in Australia as the basis for "innovation and further growth", and local adaptations, belonged to US licensors, Australian industry could only hope to play the role of creative subordinate to the giants of US software production.

Whether the Australian computer industry fulfilled the hopes of Evans, Button or Jones is a matter for conjecture. What is certain is that his reforms made the Australian commercial environment safer for American business and presaged the new era of American dominance in Australian, and world, copyright affairs.

Chapter 14 – The Age of America

ADMINISTRATION AND POLICY

The year 1984 not only inaugurated Australia's rebirth as an imperial auxiliary, beholden to the economic might of the United States. It also began a new phase in the Commonwealth's administration of copyright laws. In 1984, the Copyright Law Review Committee, an occasional committee of experts supported by the Attorney General's Department, presented its first report to the Attorney on the legal meaning of publication.

Until its abolition in 2005, the CLRC reported on 11 other occasions, making recommendations on diverse subject matter ranging from moral rights to simplification of the Copyright Act and Crown copyright. The Committee followed in the tradition of the Spicer and Franki committees, reporting – to much more confined effect – on matters of mainly domestic concern, and proposing legislative improvements. Separately, different Attorneys commissioned reports on new communications, copyright collecting societies and the competitive effect of intellectual property legislation.

This burst of activity reflected a larger dynamism, which grew out of the efflorescence of American power in international trade politics. In the space of a few years, from the beginning of the Uruguay Round of GATT trade talks in 1987, to the formation of the World Trade Organization in 1994, and the signing of WIPO's Copyright Treaty in 1996,¹ the United States inspired the transformation of international copyright law. After the last milestone, countries like Australia rapidly passed legislation recognising new copyright protections and remedies for infringement.

1 Also the WIPO Performances and Phonograms Treaty adopted 20 December 1996.

Role of the federal Attorney General's Department

In this period, the Attorney General's Department stepped out of the shadow cast by larger departments tending to the legislation, policies and international agreements vital to Australia's welfare. It presented itself as the sophisticated interpreter of international consensus on copyright principles, and, unwittingly, began to fill the role of Australian amanuensis to the United States, the power across-the-seas.

At the time of the Franki Report, about three lawyers of the Attorney General's Department tended to copyright policy matters. In 1968, the Labor MP Gil Duthie, praised the department's tiny band of copyright lawyers for their extraordinary achievement in bringing the Copyright Bill rapidly to fruition. In the years after 1984, the number of lawyers employed to administer the Copyright Act, and carry out various policy functions, multiplied. The intellectual property branch, later renamed the copyright branch, grew in size about fivefold.

In the eyes of government, it was a powerhouse of specialist expertise. Others chafed at the department's orthodoxy, which rigidly reflected the international consensus in favour of owners' rights. While departmental lawyers were exceptionally able in statutory interpretation and the analysis of legal principle, they were deficient in their understanding of the historical context in which principles emerged. They could not look beyond the narrow prescriptions of international copyright lawmakers, led by the US, to fathom how and why the laws of copyright really came to be made. As a result, their policy judgments were sterile and they discounted valid arguments against optimal interpretations of proprietary rights.

As copyright laws grew in complexity after 1984, as the trade concerns of the United States came to dominate international copyright discourse, as the global economy based on the supply and consumption of copyright products grew in value and prominence, a copyright sodality preached in Australia a doctrine of legislative necessity. According to the ACC, CAL, APRA, ARIA, the Business Software Alliance, the Motion Picture Association and so on, Australia must zealously reform and augment its copyright laws or perish in the desert of international disrepute.

It fell to the Attorney General's Department to translate international norms into domestic legislation, to mediate between the interests of copyright owners and users, to maintain the so-called balance between the interests of these protagonists in the copyright drama, and to position Australia to participate in the copyright world's American peace.

In the airless atmosphere of policymaking, the urge for conformity suffocated debate. Departmental officers diligently reported the views of copyright user groups but they honoured above all the imperative declared by the United States Trade Representative: reform your laws to extend and protect the rights of copyright industries or suffer isolation, irrelevance and economic retardation.

Why they acted in this way is not hard to fathom. Lawyers are trained in exegesis not historical analysis. Those inclined to doubt received wisdom or the numinous character of legislation rarely find employment in government legal departments. The officers of the Attorney General's Department worked conscientiously and competently, trying to steer a middle course between opposed factions. But their thinking lacked the vital spark of originality and they endorsed historically inaccurate presumptions about the purpose of copyright.

Unconsciously, they favoured the idea that copyright law is designed to encourage production. To optimise output, new laws must refine, add to, and sometimes qualify rights as international agreements demand. The necessity for alteration outside international law, or the content of principles adopted, did not concern them. Implicitly, they accepted that copyright laws must increase to protect the interests of copyright owners, and those interests became their intrinsic concern.

This favouritism reflects nothing on the legal ability of departmental lawyers or their motives. The Berne Convention and later copyright agreements, once ratified, demanded legislative action to implement agreed principles. The Attorney General's Department could not support the undermining of agreed principles. But in the department's policy hothouse, arguments in favour of permissible qualifications to proprietary rights usually wilted.

Participation in international conferences and approach of Attorney General's Department

The participation of departmental officers in international copyright lawmaking reinforced the unwillingness to challenge conventional thinking, and interpret accords in new ways. Officers' attendance at international conferences, beginning in the 1960s, exercised a powerful influence in shaping the department's narrow interpretive outlook. This outlook represented something new in Australian policy thinking. Until the 1960s, Australia did not align itself to the thinking of the international copyright bureaucracy. Its representatives to conferences of the Berne Union were men of noticeable intellectual independence.

Sir William Harrison Moore, Australia's delegate at the Berne Union's 1928 Rome Conference, could count as academic disciples two future High Court judges, Latham and Dixon. An outstanding constitutional law scholar, much in demand during the Federation debates, he might, at a pinch, accept temporary subordinate status to Government Ministers. He felt no such obligation to anyone else. W J Dignam, KC, the High Commissioner to Ireland, also a constitutional law expert, represented Australia at the Berne Union's Brussels Conference in 1948.² In his report of the Conference, he openly criticised the policy and tactics of the British and various other delegations.

Afterwards, attitudes changed. Senior officers of the Attorney General's De-

partment first represented Australia at the Stockholm revision Conference of 1967. From that year onwards, a shift to conformity not evident in the conference reports of either Moore or Dignam (or in their conduct at the conferences) is suddenly discernible. Very gradually, the weight of international conformism began to exert more and more centrifugal force on domestic activities.

Once the Attorney General's Department began to represent Australia internationally, a strong drive for harmonisation on the lines expected by copyright owners became inevitable. Conformity did not result only from the conservatism inculcated by legal training. The department's extreme orthodoxy in matters which admitted a variety of interpretations extended back to its beginnings in 1901, and owed something to the personality of its first head, the plain-thinking Robert Garran. Garran led the department for 31 years and impressed his own stamp of caution and pragmatism on its practices.³

Under his leadership, the department consolidated its hold over the management of intellectual policy legislation. It exercised administrative responsibility for copyright legislation from 1907, managing the registration of copyrights through a controlled agency, the Copyright Office. In the 1920s, matters of copyright policy were handled directly by the Attorney General John Latham and Latham continued to drive policy into the middle of the 1930s. Then responsibility for copyright policy matters passed to a departmental lawyer, Joe Tipping.

In the late 1960s, Lindsay Curtis managed a number of lawyers dealing with a variety of subjects, including copyright policy. Until this period, the department managed copyright responsibilities as an adjunct to tasks perceived to be more important, and expended partial energy on copyright policy. Perceptions started slowly to change. Curtis supplied Nigel Bowen, the Attorney General, with extensive advice during the preparation of the 1968 copyright legislation, sparking more awareness of the international character of copyright law, and the possibility for Australia to share the prestige of international treaty development.

Departmental differences and growth of distinctive copyright policy

It should not be supposed that the requirements of international law allowed only one way of making or implementing copyright policy. In the 1930s, for example,

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- 2 The Department of External Affairs, not the Attorney General's Department, held responsibility for Australian participation at the Conference. Hugh Gilchrist, an officer from DEA supported Dignam in Brussels.
 - 3 The Australian Dictionary of Biography said that, "[a]s a lawyer Garran was in general far-sighted and meticulous rather than inventive. He was thoroughly aware that "constitutional law is not pure logic it is logic plus politics", and he favoured a pragmatic, commonsensical approach to its interpretation."

the Comptroller General for Customs⁴ and the Postmaster General's Department occasionally took issue with the perceived indulgence shown by Attorney General's Department towards some copyright owners. The Postmaster General's Department greatly resented APRA's aggressive negotiating tactics towards the ABC, and the effect of its financial demands on the radio industry's economic stability.

The Postmaster General's portfolio included responsibility for broadcasting policy and successive Ministers questioned the size of APRA's takings and its distribution policy. One former holder of the portfolio said in Parliament in 1939 that APRA "practically points a gun at the heads of those in charge of broadcasting." He went on to suggest that in response to criticisms, the Attorney General would declare his hands bound by the Berne Convention and pay no further attention.⁵

Experience probably justified this jaundiced view. Successive Attorneys in the period of the APRA wars commented that they could take no legislative or administrative action that undermined obligations under the Berne Convention. But neither they nor their department worried much about the domestic consequences of rigid interpretation of international legal norms. Until the commissioning of the Spicer Report and the preparation of the 1968 Copyright Bill, the department saw little reason to spend much time on policy deliberation.

Undoubtedly, the department supported the aims of the Berne Convention and saw a necessity for Australia to work towards implementation of revisions. Arguments and conclusions about policy were more provisional. Officers like Curtis seemed to rely on firm assumptions rather than unchangeable convictions.

Over time, however, assumptions hardened into certainties. In 1975, the department's copyright lawyers were open-minded about claims for photocopying remuneration. 20 years and more later, they would not dream of questioning the necessity for the statutory licensing system or the basis on which CAL collected photocopying remuneration.

By the 1990s, copyright policymaking in Australia resembled a game. The Attorney General's Department umpired the rival claims of owners and users, the two categories of interest group fighting over reform proposals. The representatives of each interest stood on either side of the net. Backed by possession of the exclusive rights and the weight of self-interpreted tradition, copyright owners towered above their opponents, superior in every aspect of play. Their opponents,

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- 4 In the mid 1930s, the Comptroller General for Customs, responsible for enforcing import control restrictions, expressed irritation in an official note at the importunities of record companies claiming that suppliers were illegally importing records without authorisation.
 - 5 Tension between the Postmaster General and Attorney prefigured differences between the communications and legal portfolios over copyright policy in the 1990s.

outmuscled and desperate, scrapped around the margins of the court, losing most points.

It seemingly did not occur to the Government to consider options to redress the imbalance of power. Balance did not call for favouritism but recognition that the copyright user groups, lacking the resources of their opponents, often did not press their arguments with the depth and acumen their case demanded. Then a change of Government in 1996 brought a change of strategy. The new Liberal Coalition Government decreed that the Attorney General's Department must share policy responsibility for the Copyright Act with the Department of Communications, IT and the Arts.⁶

Joint responsibility for copyright policy

On its face, the Government's decision seems a curious one. For the first time in the history of the copyright legislation, two departments exercised joint policy responsibility. The sharing of policy responsibility is both unusual and potentially dangerous. Government agencies frequently espouse subtly different principles. They often do not share sympathies. If conflicting principles and different sensibilities meet in practice, the result is likely to be stalemate.

In the 1930s, the Attorney General's Department cooperated with the Postmaster General's Department to align copyright and broadcasting policy. The two departments looked on APRA's activities with markedly different emotions. The Department of Communications, IT and the Arts, DOCITA, similarly felt differently from the Attorney General's Department about certain protagonists in the contemporary copyright policy drama.

Responsible, like its forerunner the Postmaster General's Department, for broadcasting policy, DOCITA wished to encourage the dissemination of information and the growth of communications. Inevitably, its officers viewed with disfavour the use of copyrights to restrict the flow of information to maximise revenue.

The explanation for the Government's decision to split copyright responsibilities perhaps lies in its reformist enthusiasm. Cabinet probably deliberated the wholesale transfer of copyright legislation to DOCITA, a portfolio with responsibility for the technologies with which most copyright industries were vitally interested. Tradition, far more than logic, supported the Attorney General retaining portfolio responsibility for the legislation. His department did not administer industrial property legislation,⁷ why should it retain responsibility for copyright

6 The Attorney General's Department retained sole responsibility for the administration of the Act.

7 IP Australia is responsible for patents, trademarks, designs and plant breeders rights legislation.

legislation?

The proponents for change may have reasoned thus, but tradition proved a bulwark against a complete shift in portfolio responsibility. Cabinet agreed to piecemeal reform and split policy responsibilities while agreeing that the Attorney should retain administrative control of the Copyright Act. The compromise broke down eight years later, when the Government abandoned its radical experiment and granted the Attorney full policy control over the legislation.

The splitting of policy responsibilities in 1996 produced a new approach to copyright policymaking at a moment of floodtide in international copyright law. The WTO's 1994 Agreement on Trade-Related Aspects of International Property Rights, and the 1996 WIPO Copyright Treaty and Performances and Phonograms Treaty, prescribed legislative standards that, if they were to be met, called for intense commitment. The TRIPS Agreement demanded the creation of new enforcement procedures, while the WIPO treaties provided, among other things, for the extension of copyright into the digital environment.

Australia now committed to substantive changes to its copyright legislation and implementation of the so-called "digital agenda". At the heart of the digital agenda lay the new right of communication to the public, which, once enacted, would allow copyright owners to control the transmission of copyright material over the internet. Together, the Attorney General's Department and DOCITA embarked on the road to reform, cooperatively and with mutual goodwill. In 2000, the two departments delivered Australia's biggest copyright reform since the passing of the 1968 Act, the *Copyright Amendment (Digital Agenda) Act*, which made the communication right a reality.

Goodwill did not, however, mean the absence of controversy, nor did it produce unanimity in the interpretation of obligations or opinions about correct formulations of policy. In a real sense, the Government's action in splitting policy responsibility rescued the digital agenda legislation from the increasingly narrow conceptualisations and rationalisations of the Attorney General's Department, which, by the mid 1990s, reflexively supported the will of the copyright industries and the USTR.

Concentrating its gaze on the bargains and accords of the WTO and WIPO, the department never consciously chose to adopt the formulas, slogans and principles invented in boardrooms and political offices across the United States. But TRIPS and the WIPO copyright and performances and phonograms treaties were emanations of US volition. By uncritically joining in, then promulgating, the international consensus, the department accepted American vision of how domestic copyright policy should be made and implemented.

Role of DOCITA

DOCITA, less hidebound by the deadweight of legal scholarship, begged to differ

with the vision endorsed by the Attorney General's Department. Like its ancestor, the Postmaster General's Department, it filled the role of copyright gadfly, biting and annoying its lumbering sister agency, stabled at the Robert Garran Offices one kilometre down the road. More importantly, the officers of the Intellectual Property Branch at DOCITA succeeded in doing what their counterparts at the Attorney General's Department had for some years failed to do: they critically interrogated the arguments of the whole coterie that compromised the great beast of copyright self-interest.

Their outrageous presumption stemmed from the naïve confidence of relative youth and the willingness of the Communications Minister, Richard Alston, to support questioning of the central canon of the case for maximum owners' rights – the idea that in the digital domain, copyright owners should not be subject to the limitations and exceptions that otherwise applied to copyright transactions. According to the argument, in the digital environment, fair dealing, library exceptions and the other devices for increasing dissemination would cause havoc to owners' rights.

Digital technology permitted rapid, mass reproduction of material and the communication of copies. According to copyright owners, in the digital realm, any qualification of owners' rights would work like a virus, multiplying diminutions of the owners' entitlements. Curiously, the argument turned on its head the old principle that copyright law must expand to enable the owner to control the applications of new technology. Now, proponents seemed to argue, the law must contract to allow owners to prevent misuse of technology.

Alston's departmental officers regarded the argument with scepticism and listened to the contrary claims of the copyright user groups, such as libraries, with more consideration than they were used to. The contrary argument held that if in the digital domain the exclusive rights operated truly exclusively, opportunities for free access to information on the internet would increasingly diminish, destroying the idea of a great worldwide communications exchange.

Alston's portfolio included responsibility for broadcasting, film and media policy and also the regulation of internet commerce. Unlike the Attorney General, he was required to pay attention to commercial users of copyright material, who, though they might also be copyright owners, needed to ensure that the pathways of digital communication were not choked by impassable hedges of proprietary rights. So he supported vigorous questioning of arguments for maximum rights and endorsed the extension of copyright exceptions into the digital environment.

Dismantling import controls

At the same time, he pressed for the overthrow of the vestige in the Copyright Act of British mercantilist oppression, the import monopoly. Restrictions in the Act prevented Australian retailers from importing non-pirated copyright product

without the consent of the copyright owner. The controls, first created in the 18th century, and carried into the British Copyright Act of 1842, were designed to allow British publishers to control the supply of books throughout the Empire.

Progressively extended, they allowed record, film and software companies to regulate the import of their products into Australia and prevent domestic suppliers from importing the same product from cheaper foreign sources, such as wholesalers in the original market. Control of supply meant control of price and, depending on the commercial decisions of the copyright owner, restrictions on consumer choice. The Labor Government attacked book import restrictions in the early 1990s, but it wilted before the counter-attacks of the publishing industry and legislation passed in 1993 barely impinged on industry practice.

The Coalition Government, elected on a platform of economic reform, proved more determined, turning its sights on the recording industry. Legislation passed in 1998 amended the Copyright Act to allow distributors to import non-pirated sound recordings without the owner's consent. This reform, achieved in the teeth of ferocious industry opposition, represented possibly the purest blow delivered to vested interest in the history of Australian copyright legislation. It resulted, as intended, in lower retail prices and greater choice. Its other salutary effect could hardly be underestimated, for the passage of legislation signified that reform uncorrupted by the claims of sectional interest is achievable.

Amidst the seemingly unceasing elaborations of rights that confine rather than liberate, even one such small departure from the prevailing will to enclosure suggested a remarkable possibility: the venous breathing organism of copyright is mortal and therefore subject to limitation. The Government, naturally, ventured no such outlandish view. It looked pragmatically at the possibility of reform and slowly and inconsistently tried to dismantle other import restrictions. In 2003, further legislation permitted the parallel importation of computer programs, but controls continued to apply to books, periodicals and films.

THE DIGITAL AGENDA REFORMS AND THE AFTERMATH

New legislation

The attitude of the Attorney General's Department to questions of copyright policy can be gauged from the fact sheet it published in 2001 to explain the *Copyright Amendment (Digital Agenda) Act* passed the previous year. The document described the reform as if it were intrinsically justified, a measure to help realise property's total dominion in a fugitive world of abstractions:

The development of new communications technologies has exposed gaps in copy-

right protection under the Copyright Act 1968 (the Act). For example, the Act currently only grants copyright owners limited, technology-specific transmission rights, e.g., the right to broadcast only extends to ‘wireless’ broadcasts, and the existing cable diffusion right does not extend to sound recordings or television and radio broadcasts. Further, copyright owners currently do not have effective rights in relation to the use of their copyright material on the Internet.

The fact sheet elucidated no further. The reader looking for justification searched in vain. So far as could be discerned, the department looked on copyright law as the expression of fathomless Providence manifesting a will that must be obeyed. Thus spake Providence: owners are without sufficient rights, let them have rights. Hearing these words from the copyright divinity, the lawyers of the Attorney General’s Department set about their salvific work with fear and trembling, or at least earnest certainty. Alston’s department, not convinced about copyright’s supernatural nature, took a different view. For this reason, the amending legislation extended existing restrictions on owners’ rights into the digital environment. The fact sheet grudgingly disclosed that:

Users of copyright material, such as libraries and educational institutions, are concerned about being able to maintain reasonable access to copyright material in a digital environment. Carriers and Internet service providers (ISPs) are worried about facing uncertain liability for copyright infringements which are committed by third parties whilst using their facilities.

As the fact sheet reported, the digital agenda legislation changed the Copyright Act in five ways. It created a new exclusive right of communication to the public, carried into the digital environment exceptions to the exclusive rights of copyright owners (including educational and other statutory licences), introduced new enforcement measures, limited and clarified the third party liability of internet carriers and introduced a statutory licence scheme for the retransmission of free-to-air broadcasts. In so doing, it created a regulatory framework for internet transactions, the effect and benefits of which only later historians can fully judge.

Exit DOCITA

One truth about the legislation is easily discernible. Though the amendments could mostly be said to fulfil copyright’s divine plan, the meddling of DOCITA imparted the stain of sacrilege to the ritual of remaking the copyright law. By fighting for exceptions to owners’ rights, DOCITA aroused the wrath of the copyright daemon. Copyright owner groups, channellers of this fierce spirit, demanded its propitiation.

The Government offered DOCITA, the author of so much cosmic distur-

bance, as a sacrificial victim. In 2004, it revoked the department's joint custody of office copyright policy, returning the copyright legislation to the exclusive ministrations of the Attorney General's Department. But the various proxies of industries and associations were not appeased. They insisted that Australia demonstrate obedience to the cosmic will, preferably by deleting from the Act the exceptions to the communication right.

The Government reluctantly admitted that the collective willpower of user groups and the public prevented it from taking this desirable step. However, the path to deliverance instantly suggested itself. What better way to pacify an enraged copyright spirit than by offering new rights that augmented the temporal manifestations of its power? The United States now helpfully guided the Government on the road to liberation, freeing it from the curse brought on the nation by DOCITA's impieties.

Restrictions on user rights

Under a free trade agreement with the US that took effect in 2005, Australia agreed to amend the Copyright Act in ways calculated to please copyright proponents. Among other things, the agreement required Australia to extend the term of copyright by 20 years, change the definition of material reproduction to encompass temporary copying that facilitates the playing of infringing material, protect electronic rights management information, introduce new criminal provisions and impose restrictions on the circumvention of technological protection measures.

Though the Government initiated inquiries to determine the extent to which users should be permitted free electronic access to copyright material, 100 years after the first federal Copyright Act, Australia enjoyed little of the legislative freedom exercised by the great parliamentary generation of 1905. In 1905, legislators knew of the Berne Convention and shared a conviction that the rights of authors must be recognised.

They felt no need to follow the letter of the Convention and they considered themselves to be setting precedents far ahead of the copyright statutes of Britain and its other possessions. They were characterised above all by a spirit of independence that inspired them to deprecate the backwardness of British policy, attack publishers and declare the United States a pirate nation plundering the works of foreign writers. That spirit vanished within seven years, but for a short time an emancipated generation could make copyright policy without deference to Westminster or Berne.

From the time of the 1912 Act, uniformity was the catchcry of policy but adherence to the Berne Convention, and the intermediary provisions of British imperial law, created a psychology still distinct from that manifested by contemporary lawmakers. When Parliament passed the 1968 Copyright Act, few doubted that Australia must comply with the requirements of the Convention but

the international law seemingly offered latitude to work out domestic arrangements without excessive foreign interference. No-one guessed that in 30 years the content of copyright laws would form an integral part of trade negotiations and underpin the trade ascendancy of a single nation.⁸

No-one guessed either that the dynamic influence of the United States on international copyright law-making would cause the length of Australian copyright legislation to grow radically in size. At the close of 1980, the year in which Parliament passed the most significant amendments to the copyright legislation since its passage in 1968, the Copyright Act numbered 112 pages. Twenty five years later, the Act numbered 516 pages. By 30 March 2007, the reprinted legislation, which now included amendments implementing the US-Australian free trade agreement, had grown to 678 pages.

By 2005, the thinking of Australian policymakers and bureaucrats seemed almost indistinguishable from that of the USTR. The Attorney General's Department, and its partner in policy servility, the Department of Foreign Affairs and Trade, examined questions of fair use but their officers were quite unable to separate Australian national interest from US trade interest. The dazzle of power supplies only a partial explanation for their failure. The truer cause of the collective myopia is the lawyer's tendency to examine form not substance, to swim on the surface and not dive to the depths.

Government lawyers really believed that the TRIPS Agreement and WIPO Copyright Agreement, and the complex bi-lateral trade agreements negotiated by the US with countries around the globe, obeyed an irresistible internal logic that must be followed. They were right only to the extent that Australia, if it acceded to multilateral agreements, or signed unilateral ones, could not resile from implementing them. But the failure to interrogate the logic of the agreements, to see what economic motives lay behind them, resulted in a surrender of independence that would have shocked the generation of 1905.

By 2005, obtuseness and the politics of economic power determined Australian copyright policy. Policymakers, learnedly explaining the obligations of international law, obediently agreed – in the interests of the nation – to Australia's status a tributary of the American hegemon. The greatest irony is that 100 years earlier, Australian politicians attacked with great vehemence the copyright policy of the United States, and even proposed legislation to strike at American publishers.

8 And the group of other net exporters of intellectual property.

The Age of America – copyright, trade and imperial hegemony

Conditions in the copyright world after its acceptance of the American peace seemed to fulfil the mysterious words of St Mark's gospel: "For he that has, to him shall be given, and he that has not, that also which he has shall be taken away from him." That this was so owed nothing to divine ordinance and everything to calculated human action.

The availability of international copyright enforcement procedures using the processes of the WTO, and worldwide acceptance of the protection standards enjoined by the TRIPS Agreement and the WIPO treaties, entrenched America's economic advantage. Countries like Australia, which hoped to barter trade concessions with the US at the WTO, and in bilateral trade agreements, eventually discovered an unpleasant truth: like Rome and Britain before it, the United States typically negotiates from a position of implacable strength.

To the US, more was given, and from Australia, more was taken. Hoping to secure greater access to protected agricultural markets, Australian negotiators, the trade minister and the bureaucratic devotees of American power, agreed to the legislative demands of the USTR. The free trade agreement signed in 2004 helped to maximise the copyright owner's advantage but the advantage lay with the exporters of copyright products: the US copyright industries. As they grew stronger, the US prospects of Australian agricultural exporters seemed to vanish like Canberra's morning mist.

The strangely lopsided bargain struck in 2004 mirrored similar pacts agreed to by the United States and other supplicant nations hoping to coax reciprocal benefits from the world's copyright powerhouse. Nothing stopped the march of US power or the progress of its copyright industries. Harnessed brilliantly and ruthlessly by the USTR, the international trade system fortified the comparative advantage of the US in the production of intellectual property.

How did the age of America come to pass? What did it reveal? What did it portend? The answers to these questions cast light on the larger question. For what purpose were copyright laws made in the Englishspeaking world, and for whom?

Economics and politics

The US ascendancy in the production and export of copyright products is powerfully illustrated by annual national trade statistics. In 2005, the US copyright industries, the movie, television, software, publishing and music industries, contributed nearly US\$820 billion to national GDP. If the contribution of related industries, such as the retailers and distributors of copyright content, is included in the calculation, the total contribution rises to nearly \$1.4 trillion, over 11 per cent of GDP. In 2005, the copyright industries recorded foreign sales of over

\$110 billion, ahead of nearly all other industrial sectors, including aeronautics, pharmaceuticals, agriculture and manufacturing.

Most importantly, in the same period copyright industries accounted for nearly 13 per cent of real total national economic growth. Industry statistics disclose that in the 20 years after the passing of the US Copyright Act in 1976, the industries' contribution to US GDP grew by over 240 per cent. Official and private reports projected that growth of the GDP and export contribution of the copyright industries would continue and far outstrip that of any other industrial sector.

When the International Intellectual Property Alliance, a coalition of copyright industry representative groups,⁹ released its annual economic survey at the US Capitol in 2007, the Republican Representative Lamar Smith outlined why the US government took intellectual property policy seriously.

What is clear from this and previous studies of the copyright industries is that their contribution to this country's economic growth continues to increase in size and importance. These statistics call upon our own government and governments throughout the world that also experience the rapid growth of their IPR sectors to redouble their efforts to nurture these industries through adoption of modern legislation that takes into account changes in technology and through vigorous enforcement.

Copyright industries are uniquely dependent on governments' willingness to enforce good laws, particularly as globalization expands and internet and broadband penetration escalates rapidly around the globe. Indeed, as our citizens and creators look to the great potential of a world of e-commerce, the legal and secure transmission of valuable copyrighted content over the Internet will be at the centre of continued growth and productivity in the US economy. Yet this continued growth is in danger. We should not forget that unchecked piracy of

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At the same time, the head of the Motion Picture Association of America, Dan Glickman, a former Democrat House Representative explained how industry statistics influenced trade negotiations.

When I was a member of Congress, this is the sort of information I would use to help me understand an issue. When the US Trade Representative sits down to negotiate with China about IP issues, this is the sort of information she draws on. That's why we do this.

A few months earlier, the Deputy US Trade Representative, Karen Bhatia, addressed a meeting of the National Academy of Recording Arts and Sciences in Washington. She noted, for the benefit of her music industry audience, that the US accounted for about 40 per cent of the US\$34 billion global music market. The US copyright industries, she said, were at the “forefront” of US export growth. The trend was “not going to slow down ... as more and more developing countries grow their middle class and themselves become integrated in the global economy.” She then explained the “three components” of US trade policy: 1. Market access 2. Rules for secure e-commerce 3. Intellectual property protection. Discussing the third component, she said:

First – it's incredibly important. Given the United States' strength in IP-intensive industries, having in place laws, systems and regimes that protect US intellectual property abroad is perhaps the most important trade enforcement challenge we face. And – I should note – having in place such laws, systems and regimes should be important to our trading partners, many of whom are themselves trying hard to develop their own IP-intensive industries.

She highlighted the successes enjoyed by the USTR, including the signing of free trade agreements including ‘rigorous IP commitments’,¹⁰ and concluded by explaining the US’s determination to continue to press for high standards of copyright protection and enforcement.

And so we will not stop. We will continue to advance our agenda. As we do that, I hope that we can count on all of you in the music industry to continue your strong support for free trade. Your voice matters. The success of the free trade agenda is not something any of us should take for granted ... we believe that free trade is worth the effort to defend and advance, on behalf of the nation's economy and the American workers, farmers and businesses that depend on the prosperity of our economy.

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As Bhatia's speech showed, the Office sometimes needs to inveigle and rally even its natural supporters. It is not an invincible force omnisciently securing a global US trade hegemony. Its policy does not enjoy the unified support of the US polity and the USTR does not regard trade bargaining as an easy process with predictable results. Trade officers seem truly to view trade concessions that appear evanescent to foreigners as the harbingers of domestic hardship. Bhatia gave no indication that the USTR saw the US's overwhelming comparative advantage in key sectors – such as intellectual property – as a predictor of one-side bargains. From the USTR's perspective, the US must fight for free trade (or more accurately, free trade advantages) tooth and nail.

The genesis of US copyright trade policy

For all that, hindsight suggests much more than the semblance of design and forethought in the USTR's campaign for the international harmonisation of copyright standards and the global acceptance of strict enforcement protocols. In carrying out this program, the Office worked together with the US copyright industries explicitly accepting the assumption – expressed in the comments of Lamar Smith and Dan Glickman – that the interests of the industries and the nation were indivisible.

The beginnings of cooperation, and the genesis of the USTR's copyright trade policy lie in the 1970s. In that decade, many policymakers were demoralised by flooding Japanese imports, inflation and the rising evidence of US economic decline. The seemingly unstoppable growth of the Japanese electronics and computer manufacturing industries suggested to some Americans that their country would soon be supplanted as the world's leading producer of sophisticated technology. Apparent decline, however, masked the beginnings of remarkable economic metamorphosis.

The US remained, at the end of the 1970s, by far the world's dominant economic power. But reforms designed to liberalise the financial system, and an emphasis on the so-called knowledge economy opened the way to greater economic ascendancy. So far as the political rise of the copyright industries is concerned, the transformative surge resulted from collective private action and the achievements of one sector in particular – the software industry. US over-

lordship in the copyright world thus came from the same source that created the panoply of exclusive rights throughout the world: calculated economic self-interest.

The staggering success of the software industry, or any other industry, did not depend on maximal intellectual property rights, but extensive proprietary rights undoubtedly worked in favour of IBM and newer giants like Apple and Microsoft. In 1970s, the computer software industry staked its claim for domestic copyright protection, and then looked abroad, demanding that countries like Australia follow the US pattern. The rise of the software industry, and the PC revolution, testified to the value of lobbying for proprietary rights, leading other copyright industries to perceive the value of co-opting government to achieve economic goals.

Although industry and government cooperation to create a framework for the international enforcement of intellectual property rights began in the 1980s, 1976 is the watershed year of the American copyright age. In 1976, the US legislature passed a new Copyright Act, which replaced the statute of 1909. The new Act recognised copyright in computer programs and introduced the schema of protection familiar to signatories of the Berne and Rome Conventions. For the copyright industries it represented an apotheosis, albeit incomplete, recognising the range of economic and distributive rights that would allow the industries to exert iron control over the production and dissemination of material. Thus empowered, they were ready to carry the fight for draconian enforcement of rights to Congress and then across the seas.

The 1980s

The US government listened with friendly ears to demands for a strategy for rights enforcement in foreign jurisdictions. In the early 1980s, the calls came not only from the copyright industries but the immensely powerful pharmaceuticals and biotechnology sectors. The leaders of industry enmeshment with government were the companies Pfizer and IBM, and they were joined by companies such as Monsanto and mainstays of the entertainment industry like Warner Communications. In 1984, the formation of the International Intellectual Property Alliance created an insistent new voice heard regularly since in the offices of Capitol Hill and the USTR.

A pair of Australian scholars has shown that the industries channelled their influence mostly through the powerful Advisory Committee on Trade Negotiations, a body established to ensure that trade policy reflected industry needs.¹¹ In

11 John Braithwaite and Peter Drahos have published a number of works on the alignment of IP objectives with US trade policy. See e.g. *Global Business Regulation*, Cambridge University Press, 2000 and *Information Feudalism: Who Owns the*

the early 1980s, Pfizer's CEO, Edmund Pratt, became chair of the ACTN, and assisted by IBM's chairman, John Opel, a committee member, he established an intellectual property task force that made recommendations which formed the basis of the US's intellectual property trade strategy. These business visionaries, and Jacques Gorlin, a Washington lawyer who conceived the idea of linking IP rights with the GATT negotiations, lit the way forward.

Implementing their strategy, the US pressed for international agreement on stringent, enforceable intellectual property standards, negotiated bilateral agreements to fill the lacunae in protection, and rigorously policed international compliance with IP standards. In the 1980s, changes to trade legislation transformed the Office of the USTR into an agent of the industries. Trade concessions available to designated developing countries were revoked if they did not effectively curtail piracy and counterfeiting. The Special 301 WatchList, introduced in 1988, continues to provide a running log of nations under USTR surveillance for alleged failure to implement regulatory or enforcement obligations. The US threatens, and can impose, trade sanctions for deemed non-compliance under Special 301.

With the formation of the WTO in 1994, the proselytising of the ACTN and IPA, the lobbying of various industry groups, the compliance of trade negotiators, and the cooperation of the EC and Japan, finally resulted in the schema devised 15 years earlier. The WTO's General Council oversees three subsidiary councils, one of which is responsible for TRIPS, and also supervises dispute resolution. Under the rubric of TRIPS, the USTR monitors international compliance with intellectual property standards, and threatens delinquent nations with sanctions under Special 301 or action under the WTO's dispute settlement procedures.

Individual agency and industry motivations

The American age, symbolised in political terms by the importance accorded by the WTO to intellectual property norms and their enforcement, is thus the remarkable achievement of business leaders working to achieve economic ends through formal political means. Their successful co-opting of politicians and politics is not the least of their accomplishments. Perhaps their greater success lies in the simplification of reality to present a message now treated as self-evident by most copyright policymakers: piracy of products produced or exported by the US copyright industries is not merely a violation of international law but a moral evil that threatens creativity and therefore continued production.

US ascendancy in the production of copyright material testifies to the unceasing ingenuity and energy of American capitalism and an everpresent Ameri-

Knowledge Economy?, Earthscan, 2002. Much of the detail in this chapter on government-business links in US trade policy relies on their research.

can cultural genius. US leadership in the politics and economics of copyright, on the other hand, is not the automatic consequence of creative pre-eminence. To a significant degree, it results from calculation and intelligent forethought.

Deliberation, planning and coordinated action were necessary for the copyright industries to begin to achieve their economic goal of defeating global piracy. This goal is directed towards revenue maximisation and is not usually fuelled by serious concern that piracy threatens the existence of the industries. The creation of a global framework for attacking piracy is the latest, and most extraordinary, product of a propagandising tendency evident throughout the history of copyright law.

This tendency can be discerned in the calculated use of the political process to mould the law to deliver a benefit (authors' rights advocates and all the copyright industries) or protect against perceived harm (the phonographic industry). The political language of political propagandists is often moralising, perhaps because industry representatives preaching ruin and desolation believe the horror they describe.

Alternatively, they may rely on hyperbole to conceal limitations in their arguments. At any rate, they usually make their arguments with skill, persuasiveness and sometimes an element of judicious cunning. Thus US advocates speak of copyright piracy as theft, ignoring the possibility that organised copyright infringement is usually a response to price discrimination.

Copyright history manifests another tendency which American indignation over piracy confirms. Copyright proponents are motivated by economic needs not moral qualms. In Australia, APRA and CAL exalted the moral entitlement of copyright owners to remuneration yet both organisations sought unrelentingly to squeeze the most revenue from the fattest, slowest partridge in the pear tree.

The recording industry, which angrily denounces pirates for destroying the livelihoods of artists, happily built its early profits on pirate (that is, unauthorised) recordings of the works of composers and lyricists. Publishers and record companies defended distribution monopolies as bulwarks against the supply of pirated product felt no concern about using the monopolies to fix prices. The greatest irony, however, lies in the moral fever of the US as it spreads its message of copyright necessity throughout the world. For the copyright policeman was once a pirate.

A PIRATE NATION AND THE AUSTRALIAN RESPONSE

US practice in the 19th century

The United States, although an observer at all conferences of the Berne Union,

did not become a party to the Convention until 1989. For most of its copyright history, its domestic law did not recognise the principle of reciprocity that is the basis of international copyright relations. US law provided that copyright only subsisted in works printed or made in the United States. Consequently, any books printed overseas could be copied in the US and the copier would own the copyright.

In the 19th century, Britain and its possessions¹² regarded the United States as a piratical market, and the indifference of the American polity to loud appeals for reform aroused great indignation among politicians and publishers. During his first American reading tour in 1841, Charles Dickens attacked American copyright practices. His zeal backfired: the American press, including a young New York news editor called Walt Whitman, wrongly charged him with disliking America. Few Americans took any notice of his views. The United States, wanting to keep prices low for readers, and provide advantages to the local publishing industry, happily disregarded foreign opprobrium – even the fulminations of Australian politicians.

Throughout the 19th century, US publishers printed the works of foreign authors without compensation. Even a treaty agreed with Britain at the end of the 19th century allowing for international copyright did not lead to total reciprocity. For most of the 20th century British editions were marked ‘Not for sale in the USA’. But the United States remained oblivious to foreign criticism. To British authors and publishers, America loomed darkly across the Atlantic, the great pirate nation. But they were helpless to strike back and quite unable to secure remunerative access to the world’s greatest publishing market.

The country’s history as a copyright pirate stands in ironic counterpoint to its present status as global copyright enforcer. Today the US threatens economic sanctions against importing nations that fail to institute the copyright standards decreed by the WTO or enforce rights rigorously. Its prosecutorial zeal is not limited to developing nations. The US lists countries on the Special 301 WatchList in a three-tiered hierarchy: countries in tier one may be threatened with trade sanctions and the threat may after a period translate into sanctions. Australia has been listed in tier two on a number of occasions.

A symbolic blow

In the 19th century, few Americans saw practical value in international copyright. American practice, though it had little effect on the fortunes of Australian au-

12 Including Australia, although damage to Australian authors was slight and the Australian public might have welcomed the importation of cheap American editions.

thors, aroused considerable scorn and criticism in Australia. In 1905, Australian politicians (whose present day successors willingly accept American strictures on the evils of copyright piracy), felt strongly enough to urge a symbolic blow against the great infringer.

Their particular concern with this issue is surprising. In 1905, modern pirated editions of Henry Lawson were appearing on the American market but the problem of American piracy mainly affected British publishers. The idea that the fight would be better left to the British to prosecute does not seem to have crossed the minds of Australian legislators. Far removed from the emanations of disgust crossing the Atlantic, they were outraged at the slight to Britain's commercial interest.

Australians probably suffered more from the commercial practices of British publishers than the production of cheap editions by American publishers. In any case Britain had ratified American practice in an 1891 Treaty between the two nations, with the result that protests made out of loyalty to Britain were meaningless. Politicians may have thought that the US law prejudiced nascent Australian publishers who could not – unlike their larger British counterparts – afford the costs of printing editions in the United States, and so were unable to secure American copyright. But even this argument, although strictly true, was unrealistic.¹³

A number of parliamentarians demanded a stiff response to US practice. They shared a simple aim: let the legislation impose, in the words of William Webster, a Labor MP, “a duty on American books, which would place on American authors a disability equivalent to that now placed on Australian authors who wish to register in America.” Their philosophical reasons were equally succinct. As Webster said, they wanted to “secure fair play in America, and to do justice to Australian authors.”

When Andrew Fisher, later Labor Prime Minister, pointed out that the British authorities were “yearly making representations” to their US counterparts, he received a terse reply from Richard Crouch, a Protectionist MP. “Unfortunately,” said Crouch, “Imperial Governments, for the most part, belong the Manchester school, and they push their free-trade views to such an extent, that they are not prepared to defend British authors and publishers. They are opposed to a policy of retaliation ...”

The anti-Americans were evidently not acquainted the views of Senator

13 The greatest threat to the viability of Australian publishers was not restricted access to the US market but the profound imbalance in commercial strength between the under-capitalised local firm and its powerful and long-established British rival. Imperial legislation prohibited Australia from importing US editions direct from America, cutting off access to a large range of cheap books. And Australia itself obligingly ended all hope of access to American editions by banning their importation under the Customs Act.

De Largie, expressed when the Senate considered the American question a few months earlier. Given the choleric nature of their opinions on the subject this was just as well. His calculations were utilitarian. A country like Australia, he said, with no native publishing industry to speak of, and a constituency of readers, not writers, would be best served by ignoring foreign copyright in the same way as the Americans had done. “I question whether we shall be consulting the public interest by passing such a Bill. For many years the United States has had no copyright law in the same sense as this. The result was that in America, books for which £1 would have had to be paid in the United Kingdom could be purchased for about 2s”.¹⁴

The anti-Americans were tilting at windmills. As Littleton Groom, the Protectionist Minister for Home Affairs, pointed out, the 1905 Australian Copyright Bill imposed on foreigners exactly the disability considered to be at the root of the American problem – that of making local printing and publication conditions for the grant of copyright.¹⁵ And a decision to impose penalties on Americans would hurt Australians more than Americans. The anti-Americans were not abashed. When asked whether 80 million Americans would take any notice of the opinion of four million Australians, George Reid, leader of the Free Traders and former Prime Minister, said, “[t]hey might do so. But in any event the four million people have a right to look after themselves in a manly way.”

The anti-Americans failed, but they made their mark as men of independent mind.¹⁶ Many took a robust view of Australia’s standing on a matter of principle, a view similar to that which sparked Britain’s 1875 Royal Commission into copyright – the belief that a selfgoverning nation (Canada) possessed the right to enact legislation potentially in conflict with imperial legislation. To these assertive spirits, Groom pointed out that penalising Americans in Australian legislation would conflict with the rights of Americans under the *International Copyright Act 1886* and might therefore be *ultra vires*.¹⁷

14 When Senator Symon reproached De Largie that the US practised piracy he replied that so long as the result was that books were cheap he was not concerned.

15 Defending the Copyright Bill, Groom referred more than once to British drafting precedents. Hugh Mahon, the Labor Member for Coolgardie burst out: “I do not suppose that all the intelligence in the world reposes in the mind of the British Parliamentary Draftsman.”

16 H Mahon, Member for Coolgardie, *ibid*, p.7250.

17 In reply, George Reid was unequivocal about the Commonwealth’s right to exercise unhindered its power under section 52 of the Constitution: “I think that rights granted under an Imperial Statute have nothing to do with an Australian law. The idea that they have requires to be suppressed.” In the Upper House, Senator Givens said section 51(viii) allowed Australia to legislate freely.¹⁷ “I do not hold with the idea that the Commonwealth Act should be subservient in the smallest degree to the

CONCLUSION

A new creation born from demands embodied in a Swiss treaty, and the hectoring of industries, is not one that excites the imagination. Yet the bloodless annexation that created the modern system of copyright law is, in some ways, as significant as the dramatic conquests that made possible the empires of Rome, Spain and Britain. Like the enduring sovereignties of mind and spirit created by those powers, the copyright system is likely to last and to concentrate economic and social power in the hands of the lucky few – the owners of copyright, and the nations that export copyright material.

Examining the history of copyright law is important because knowledge of the historical record allows policymakers to more accurately assess the truth of claims made by the importuners for legislative change. The historian's interpretation of the record is implanted with bias and supposition, yet, even so, the interpreter reveals truths: what relevant people said and did, and the results of their words and deeds.

Copyright law is a hybrid, human, factional creation that emerged from the efforts of individuals, groups, industries, and latterly, nations, to secure economic benefits and to protect themselves from economic harm. Often, the beneficiaries of copyright protection opposed each other. All were self-interested. The law did not result from the plan of legislators who intended to create a balance between the interest of owner and user, or to optimise social welfare by maximising productive incentive. The makers of the copyright system sought private economic advantage, and paid little heed to considerations of social welfare.

Modern explanations of the purpose and function of copyright law are mostly false hypotheses. They justify proprietary rights that entrench the economic advantage of a minority and the social disadvantage of the majority. During the 20th century, copyright discourse mostly reflected the values of owners and concentrated on the necessity of expropriation. As legislation conferred on copyright holders possessory entitlements similar to those enjoyed by the owners of land and tangible things, attitudes to abstract property became increasingly devotional. Those baulking at expropriation were called trespassers, thieves, pirates. Then, as modern developments in liberal economics began to infiltrate government, politicians began to pay some attention to public needs. As the century ended, advocates asked why copyright material, encrypted, locked, foreclosed by law, stayed out of the reach of those consumers who lacked the means to pay the price fixed by copyright owners.

Politicians, however, did not allow the concern for consumer welfare to disturb official orthodoxy about the purpose of copyright legislation. The copyright

Imperial Act.”

law exists, according to most copyright proponents, to guarantee production. Without the incentive supplied by property rights, creators and industries would cease to produce and disseminate copyright material. In the new century, this theory continued to underpin legislative policy. Despite claims that legislation functioned to serve public and not private interest, governments legislated to permit far-reaching digital rights management practices, and restrictive copy protection and technical protection measures. Conversely, laws forbade circumvention of most types of protection.

Copyright owners cast themselves in the role of victims. From 1999 onwards, entertainment conglomerates pursued legal action against a string of peer-to-peer file sharers engaged in unauthorised copying of copyright material.¹⁸ They also revived distribution controls through the use of technology.¹⁹ Although copyright owners did not invariably succeed in litigation, legislative developments pointed to a future in which courts must in most cases find in their favour.

In 2005, the US Supreme Court found that companies supplying peer-to-peer software could be held liable for infringement by users.²⁰ Although observers were divided over the effect of the judgment, some considered that if courts relied on the logic expressed by some judges, copyright owners could ultimately prevent the sale of any technology that makes possible copyright infringement. Legislation inspired by the US copyright industries placed owners in a position to more effectively control the digital reproduction and distribution of copyright material, and the use of copyright products.

Courts and juries struck punitively at individual defendants. Between 2003 and 2007, the Recording Industry Association of America sued 26,000 people for the alleged use of music file-sharing software. Jammie Thomas, one of the thousands sued, refused to pay an out-of-court settlement. On 4 October 2007, a federal jury in Minnesota ordered her to pay US\$220,000 to six US record companies for offering songs online through a Kazaa file-sharing account.²¹ The damages awarded were equivalent to about five times Thomas's annual salary.²²

18 *A&M Records Inc v Napster Inc* 239 F Supp 3d 1004 (9th Cir 2001), *MGM Inc v Grokster Ltd* 545 US 913 (2005), *Arista Records Inc et al v Limewire Inc* filed August 2006, NYDC.

19 See Brian Fitzgerald, "The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer's Liberty or Copyright Menace/Circumvention Device?", *Media and Arts Law Review* (2005) Vol 10, No 1, 85-98, esp. discussion of the High Court's approach to defining circumvention in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

20 *MGM Inc v Grokster Ltd* 545 US 913 (2005).

21 *Virgin Records America Inc et al v Jammie Thomas* USDC (Minn) 2007

22 The judge ruled that the jury could convict Thomas even if not presented with proof that her computer ran file-sharing software at the time record companies de-

In the developed world, the malign consequences of courts permitting copyright owners to create “copyright jails”,²³ or, in other words, to exercise near total control over the dissemination and use of copyright material, are principally, though not wholly, economic. Unconstrained, producers will continue their time-honoured and slothful practices of overcharging and undersupplying, and of raking fees for the non-commercial use of copyright material.

By reviving, in different guises, a device invented to guarantee the profits of British publishers – distribution controls – they will increase profits by restricting the uses of copyright products. Even so, although inefficient production, supply and pricing causes social detriment, most consumers in the developed world can secure access to copyright material by paying a price premium. Though they may be unable to buy products priced too high, or not supplied because producers choose to ignore demand, they will secure access to much of the material they consider necessary to satisfy their needs.

In the less developed world, the would-be consumer is more unfortunate. Price discrimination and supply restrictions (including limited electronic access) can place copyright material out of the reach of those for whom the material may be not merely an optional consumable but a vital source of knowledge and education. When restricted access results in national disadvantage, trade policy that insists on maximum rights for copyright industries creates a type of moral hazard injurious to nations – on the moral level, to the advantaged trading party, and on the material level, to the disadvantaged party.

The disposition of property rights limits or increases social equality. If the citizens of less developed countries are unable to purchase copyright products or gain access to copyright material, they cannot hope for equality with their counterparts in the developed world. Nor can their nations create the cultures of creative capability that developed nations, the United States in particular, proclaim will result from the spread of intellectual property norms across the globe.

For the less developed world, copyright absolutism and the strict enforcement of IP rights, are the harbingers of permanent disadvantage. The developed world’s unwillingness to truly acknowledge the special needs of the less developed countries, manifest in the swift repudiation in the 1960s of proposals for special access rights – involving the creation of something akin to a Third World

tected the infringement, or that she used her computer keyboard at the time of infringement. The judge also advised jury members that the offering of files for downloading determined guilt: if they agreed that the defendant made files available, then in the absence of proof that another person downloaded files, they could find her guilty of file-sharing.

23 See Brian Fitzgerald, “Copyright vision: copyright jails” in www.onlineopinion.com.au, 26 October 2006: “Let us not build Australia into some sort of copyright jail; let us prosper in the new economy with copyright vision.”

copyright – entrenches the detriment. Nor are developed nations likely to modify fundamental policy. The economic benefits of copyright are too great. By one measure, the annual output of the US copyright industries is greater in value than the total output of the Australian economy.

The 2004 “Geneva Declaration on the Future of WIPO”, instigated by Argentina and Brazil, enunciates a program for reconsidering WIPO’s conventional approach to the development of international intellectual property law. But whether international forums can persuade the international copyright industries to reconsider economic imperatives, or the United States its trade policy assumptions, is doubtful.

Even so, the Age of America, though the creation of copyright industries, spreads catchcries of dissent from within the copyright system. Yearning to be free from the system’s constraints, some capitalists demand rights to control and distribute copyright information. The inventors of search engines, self-styled “access” corporations, companies chafing at government control of saleable information, and competitors hostile to others’ proprietary rights, clamour for change. Outside the United States, China, and perhaps India, both eager to use communications technology to create national advantage, may destabilise the assumptions of the USTR and international copyright lawmakers.

As the example of the United States shows, dynamic capitalist economies in the primitive stage of development are not friendly to ideas of property that constrains growth. Over time, however, such economies, as they produce goods that can be labelled copyright and sold for profit, learn to like possessory entitlements. Even the concerns of capitalists disgruntled by the limitations of copyright can probably be accommodated. Throughout the 20th century, copyright lawmakers showed a genius for syncretism and the copyright system may find a way to embrace the renegades who demand the freedom to assist the flow of information.

Property relations determine social equality and welfare. Without property, liberal society is impossible. The history of the 20th century testifies grimly to the social misery created by State ownership of productive resources. But concentration of property ownership in private hands produces inequality. The history of copyright is a history of legislators creating rules that allow a few to control valuable subject matter.

Conceptually, the owners of copyright are landlords, controllers of property for a lifetime and 70 years. Those who purchase and use copyright material are renters. Because of the rules of modern copyright law, the landlords’ holdings are vast. The renters are many and they pay inordinately high rents. Some – many, if the poorer countries are taken into account – cannot afford the rent, and are excluded, often permanently, from the liberal and productive benefits of access to copyright material.

Chapter 15 – Policy observations

The purpose of this book was to determine empirically – by examining the historical record – and with particular reference to the development of copyright law in Australia, the truth or non-truth of modern assumptions about the origins and function of copyright law. It is the first study of 20th century copyright law to set the *claims* made about the function of copyright regulation in the context of how the laws *actually* came to be passed.¹ The book shows that copyright law in Britain and Australia was not made in the way claimed by proponents of copyright orthodoxy. Consequently, it undermines or overturns long-held assumptions about copyright regulation.

Copyright laws in Australia were, through the 20th century and beyond, made to the design of self-interested individuals, not, as declared by copyright orthodoxy, governments seeking to stimulate the production and consumption of copyright material. Governments responded to political agitation by granting rights, and qualified those rights in the hope that the restrictions would prevent misuse leading to monopolies. In a legislative sense, governments operated primarily as amanuenses for private interests and it is in the motivations and actions of those private interests that the substance of the story of copyright lies.

Perhaps the most interesting fact to be gleaned from the history of 20th century copyright law is that the great agitation for authors' rights, led by the Berne Union, ultimately worked to the advantage of industries, not individuals. The authors, and the Union, aspired to absolute control over the production of copyright material, control that they believed to be their natural entitlement. But the demand for mechanical rights unleashed a revolution with consequences they did

1 The research involved looking at Australian and British parliamentary records, government departmental records and reports (including the archives of the Commonwealth Attorney General's Department and records of the Prime Minister's office), and reports in, and correspondence to, British and Australian newspapers in the periods 1909–1912, 1925–1940, 1947–1956, 1958–1962, 1967–1969, 1972–1980.

not foresee. By demanding a surfeit of rights, they provoked the phonographic industry into seeking analogous rights.

In a real sense, the modern copyright industries are the unwitting creation of the movement for authors' rights. Had the Berne Union not asserted that the author must control mechanical reproduction, it is possible that the music and film industries, and later the broadcasting and software industries, would have been content to regulate their activities through contractual, rather than property, rights. Once the authors claimed the right to control mechanical reproduction – and dissemination – they confronted producers with the prospect of ruinous competition to secure rights to reproduce and disseminate. The producers pre-empted the creation of a system in which the mechanical rights were auctioned to the highest bidder by securing analogous rights (together with the privileges of compulsory licensing) in copyright legislation.

The pattern for future developments in copyright regulation was then set: authors were to be granted the right to control each new method of reproducing or disseminating copyright material and analogous rights were simultaneously awarded to producers. The aggrandising movement for authors' rights created the modern industrial system of copyright production. Copyright regulation arose from a contest to control the process of producing copyright material, and, almost literally, the Berne Union and the industries laid down the law: governments then made laws according to their direction.

Along the way, legislators passed facilitating provisions to help collecting societies to secure – on behalf of copyright owners – payments in gross from the users of copyright material. Copyright legislation thus governed large-scale revenue transfers, a function never contemplated by the early legislators or even the proponents of authors' rights. Between the world wars, Australia's largest and oldest collecting society, APRA, drew its largest revenues from government – the A Class radio stations and then the ABC – which more willingly paid public performance fees. It then began to extract similar revenues from commercial radio stations.

CAL, now almost APRA's equal in size of collections, began collecting in the mid 1980s and continues to draw the overwhelming proportion of its revenue from the public sector – schools, universities and government departments. Assisted by the Copyright Tribunal, which determines rates of equitable remuneration, the collecting societies bear witness to the efficacy in copyright history of skilful, determined lobbying by private interest groups – the copyright legislation places lopsided emphasis on facilitating their extraction of rents from copyright users, in particular, public or government users.

The apotheosis of all these developments is the Age of America, which promises to subsume the local concerns of countries like Australia in the movement towards a worldwide copyright law friendly to the economic needs of the US copyright industries. The credo of US copyright imperialism is clear – it is

spelt out in the TRIPS Agreement and, short of an unforeseen mental revolution, must soon dominate the world. And behind it lies the intelligence, foresight and energy of individuals, the successors in spirit (though the second group might disavow the first) of the men who created the authors' rights movement, founded the Berne Union, and launched the modern age of copyright.

The following policy observations are drawn from the research contained in this book.

1. The Berne Convention precipitated the creation of modern copyright law

The influence of the Berne Convention on the domestic copyright law of Britain and Australia cannot be over-estimated. The historical record shows that the Berne Union's optimising approach to author's rights lies at the root of developments in British and Australian copyright law in the 20th century.

The assertion of optimal rights for authors forced the phonographic industry to seek, in self-defence, copyright protections that it might otherwise not have sought. The campaign for authors' rights threatened the viability of the phonographic industry, and by asserting the legitimacy of a producers' copyright, the industry encouraged like producers to campaign for copyright protection.²

The record does not disclose why the Convention proved so influential in policy-making, but it does reveal that the need to accede to the Convention, *and* the concept of a uniform imperial copyright law, influenced British and Australian policy-makers more profoundly than any other idea.

2. Early legislators tried to qualify the scope of copyright

Despite the optimising strategy of the Berne Convention, many early legislators and policymakers were concerned to limit, so far as they deemed practicable, the potential for copyright law to create harmful monopolies. They were also hostile to the claims of copyright producers-publishers and the phonographic industry – but ultimately conceded rights to the latter to prevent the owners of works from licensing only one or two record companies to make recordings.

Australia rejected the 50 year posthumous term in 1905 and politicians and members of the public criticised the term during the debates that preceded its

2 The broadcasting industry – successfully – and sports promoters – unsuccessfully – later followed the lead of the phonographic industry and cited the organised expenditure of labour, investment and skill as criteria for the grant of copyright. The phonographic industry, specifically John Drummond Robertson, persuaded the legislature that originality was not a necessary criterion for the subsistence of copyright.

adoption there in 1911. The British and Australian legislatures introduced compulsory licensing schemes for both books and records, effectively reducing the posthumous term for literary works to 25 years.

Their attitudes to copyright regulation were informed by natural law conceptions of copyright as a just reward for the creators of works. Economic calculation seems to have played a secondary role in government thinking. Conceptual confusion resulted: the official outlook was hostile to the producer interest, yet sympathetic to the creation of authors' rights that were fundamentally economic in content.

While they sought to benefit authors in legislation, the British and Australian polities were forced to recognise that if they granted authors exclusive rights in relation to the fixation and dissemination of copyright works, they must perforce allow some analogous rights to the industries that made fixation and dissemination possible.

But the logic they imputed to copyright regulation derived strictly from natural law. In Australia in 1905, legislators solved the problem by ignoring (consciously or not) the existence of the mechanical industries, but in 1911 and 1912 the accommodation made between natural law and utilitarian economics split modern copyright law, conceptually and practically, from its forerunner in the 19th century.

3. 20th century legislators paid little attention to questions of incentive or production

Copyright orthodoxy holds that copyright laws were made to provide creators and industries with the incentive to produce and disseminate copyright material. In the 19th century, legislators sought principally to protect publishers against book piracy. In the 20th century, their successors paid little attention to questions of incentive, production or dissemination. Instead, they came to concentrate on satisfying a tripartite hierarchy of needs beginning with the necessity – declared in the Berne Convention – for authors to control the productive process, followed by the requirement that industries share, by analogous rights, in the rewards of production, and ending with the imperative for some legislative curbs on the power of the two primary pressure groups.

In the early years of the 20th century, legislators accepted natural law justifications for authors' rights. By 1911–12 these conceptions did not preclude them from recognising the economic dangers of concentrating rights exclusively in the hands of authors. However, the admixture of natural law assumptions and propositions advanced out of economic self-interest confused and compromised policy for the rest of the century.

By a hybrid process, sometimes coherent, sometimes piecemeal, politicians created the modern law of authors' and neighbouring rights, responding to the economic demands of competing factions. Those demands – often disguised in the language of natural law or justice – derived from calculations of economic self-interest unrelated to considerations of economic efficiency. The long posthumous term, the attempt to arrogate to authors monopoly control over the production process, the equal attempt of industries to exert maximum control over production and distribution – none of these features of law and law-making were designed to encourage production (already a certainty) or the dissemination (in the public interest) of copyright material at low prices.

Import controls allowing producers to control the distribution of copyright material, restricting supply and maintaining high prices, testified to the fact that copyright legislators were indifferent to public welfare. The question of how to encourage optimum production and dissemination seemingly never crossed their minds as they legislated for the long posthumous term and entrenched distribution controls in law.

4. Copyright does not confer an automatic right of remuneration

The putative principle that all uses of copyright subject matter are remunerable cannot be said to have been settled in policy or legislative debate. The historical record shows that when exclusive rights were first enacted early in the 20th century, legislators did not contemplate that copyright owners would demand fees for all copyright uses. When in the 1920s Australian copyright users disputed APRA's right to levy performing right fees, the Government declared that the holder of the performing right could charge user fees. However, fees were recoverable under contract. Copyright law conferred only the positive right to authorise the public performance of music or the negative right to forbid performance.

The 1911 British Copyright Act conferred explicit rights to remuneration in the provisions establishing the compulsory sound recording and publishing licences. The compulsory licence for sound recordings specified a rate of fees payable to the copyright owner for recordings made for a commercial purpose. The 25 year rule allowed for publication of a work 25 years after the author's death subject to payment of a royalty. Compensation for economic loss supplied the self-evident rationale (also stated in debate) for the right to remuneration.

Modern statutory schemes permitting compulsory copying by educational institutions and government were also justified on the grounds that they compensate the copyright owner for economic loss caused by educational or government copying. However, unlike the original compulsory licences, the statutory licences apply to mostly non-commercial copying carried out for educational or government purposes. When the Franki Committee recommended a statutory licence for

educational copying in 1976, it could not point to identifiable economic losses caused to authors by photocopying. The Committee stated “substantial use” and “prejudice [to] sales” as the factors determining the requirement for remuneration.

While the exclusive rights can be interpreted logically to confer a right of remuneration for use, policymakers and parliamentarians have not interrogated the logic of remuneration for use in debate. Writings, speeches and debates that attended the passing of legislation in 1911 and 1912, and the subsequent history of copyright law-making in the 20th century, do not support the proposition that non-commercial use is automatically remunerable. Prior to enactment of the statutory licences, the Franki Report and the Australian Parliament argued a priori that owners were entitled to demand fees for educational and government copying. But substantive debate on the justification for taxing non-commercial uses of copyright material is absent from the record.

Policymakers and legislators never reached consensus that all copyright uses should be remunerable. Since 1967, when the Berne Union enunciated criteria that permit exceptions to exclusive rights in national laws, the principle that use demands payment has received mostly implicit endorsement from copyright proponents and policymakers.³ However, it is doubtful whether the principle is dialectically adducible from copyright rationales proclaimed, since the beginning of the 20th century, in policy documents and legislative debates.

Questions about the nexus between the exclusive rights and remuneration cannot satisfactorily be settled a priori. They must lead to discussion of the *purpose* of the rights, a debate which necessarily involves consideration of legislative intent.

The case of *Copyright Agency Limited v State of New South Wales*⁴ suggests that in certain circumstances legislators do not consider that copyright confers an absolute entitlement to remuneration. In that case, the Full Federal Court found that the legal scheme for registering survey plans, established by statute, licensed government to reproduce and communicate the plans.

The historical record suggests that, historically, policymakers and legislators did not intend that non-commercial uses should invariably, if at all, be remunera-

3 The Berne Convention, TRIPS Agreement and WIPO Copyright Agreement have established the “three step test” for determining whether legislative exceptions to exclusive rights are permissible. The criteria contained in the last two “steps” refer to the “normal exploitation of the work” and “unreasonable prejudice to the legitimate interests of the author”. Interpreted narrowly, these criteria confine statutory derogations from exclusive rights, and also suggest that the author is entitled to profit from most, if not all, copyright uses.

4 [2007] FCAFC 80.

ble. The tenor of legislative debates suggests that few, if any, politicians in 1911 or 1912 would have agreed that noncommercial uses of material were remunerable. Nor is it clear that the early policymakers or legislators would have supported the expansive interpretations of owners' rights that delivered the principle technical premise of the present statutory schemes – the idea that owners are entitled to discretely tax the copying of single pages of copyright works.

5. Legislators did not try to “balance” the interests of owners and users

The idea that copyright legislation creates a “balance” between the interests of copyright owners and copyright users, the fair dealing, library and educational provisions “balancing” the exclusive rights, is not supported by historical evidence. The Spicer Committee introduced the concept of a balance of interests to Australian policymakers in its 1959 report and thereafter they adopted the view that copyright legislation is designed to balance the interests of owners and users.⁵

The Spicer Committee enunciated a novel idea. Legislators in the 19th and early 20th century passed copyright laws first to defend authors (and publishers) against piracy and then to allow growing classes of owners to control the production, distribution and use of copyright material. Fair dealing provisions in the 1911 British Copyright Act, and the enumeration of copyright offences, established the copyright owner's hegemony – exceptions to exclusive rights were to be seen as a concession to the “public interest”. Only a handful of lawmakers in the 1911-12 copyright debates in Britain and Australia referred to the public interest.

From the 1920s onwards, commercial wars over performing rights in Britain and Australia led to loud protests over the alleged misuse of exclusive rights. Politicians realised that the perceived abuse – or misallocation – of proprietary rights could alienate the public and pragmatically tried to introduce “balance” to legislation that recognised the dominion of copyright owners. Prior to 1911, legislators did not recognise this dominion and regarded copyright as a limited privilege that ought not to curtail the public's freedom to enjoy art, literature and music. Legislation aimed to outlaw piracy, that is, unauthorised reproduction for a commercial purpose.

5 See second reading speech of Reginald Wright, Minister for Works, explaining the Copyright Bill in the Australian Parliament in 1968. The Franki Committee's terms of reference in 1974 included the requirement that the Committee recommend legislative or other changes “to effect a proper balance of interests” between owners and users.

6. Copyright legislation regulates taxation in gross of non-commercial (or non-competing) users to the detriment of public welfare

The legislative settlements of 1911 and 1912 were made in favour of copyright owners. Collective rights administration, relying on the schema established in 1911-1912, has caused public welfare deficits. The exercise of the performing right by the PRS and APRA, and the assertion of a mechanical recording right by the record industry, caused commercial warfare in the 1920s and 1930s. Administering collective rights schemes, and charging performing right licence fees, the PRS and APRA supervised the transfer in gross of funds from copyright users to owners.

Contemporary critics alleged that unequal bargaining power resulted in extortionate licence fees, and secrecy about distributions made impossible judgments about the efficiency and fairness of distributions. Similar criticisms were made over the last two decades and more in relation to statutory licence schemes for educational and government copying. Although the Copyright Tribunal is intended to create equity in commercial bargaining, critics allege that licence fees determined in the Tribunal have resulted in gross fees payments detrimental to public welfare.

A substantial part of the modern copyright legislation is dedicated to facilitating collective rights administration by collecting societies. The educational and government copying provisions in legislation, especially educational provisions, establish at length schemes for collecting fees. However, the schemes have not defused the criticisms that were applied to the PRS and APRA in the 1930s: legislation vests in collecting societies too much economic power, the benefit of collections to individual copyright owners is unproven, the justification for collections is doubtful and the size of collections for noncommercial copying diverts income from public interest activities (education and government administration). Additionally, the rationale for levying fees for non-commercial uses – that the exclusive rights comprehend the right to charge for any use – is open to challenge on historical and theoretical grounds.

Underlying these criticisms is the fundamental accusation: vested economic interest⁶ benefits from the statutory licences, and private taxation of sectors engaged in non-commercial activities (or that are not competing with copyright owners) creates economic inefficiency. Statutory licensing schemes facilitating revenue collection by collective rights administrators are justified by proponents on the basis that they represent the most efficient and equitable way of distrib-

6 In the 1930s the alleged vested interests impugned were musical publishers and record companies. In the last two decades critics have identified publishers as CAL's main constituency.

uting licence fees to individual copyright owners. But proponents have never demonstrated (and refuse to demonstrate) that distributions reward individual owners in proportion to use made of their copyright material. The history of copyright regulation in the first half of the 20th century does not disclose intent on the part of policymakers or legislators to endorse taxation of non-commercial or non-competing uses of copyright subject matter.

7. The structure of the Australian Copyright Act reflects sectional interest

Substantial portions of the Australian Copyright Act are devoted to highly technical provisions dealing with the obligations of educational institutions under the educational statutory licence, the Copyright Tribunal and offences and remedies relating to infringement including by decryption and the use of circumvention devices. It could reasonably be said that nearly half the Act, which, in less than 40 years burgeoned in length from a little over 100 pages to 678 pages, exhaustively establishes a system to protect revenue transfers. The economic efficiency of such a system is highly doubtful. The educational statutory licence is a primary example of an economically inefficient revenue device. Even assuming – an assumption unsupported by evidence – that the licence works to efficiently remunerate authors, devoting over 50 pages of legislation to procedures for extracting revenue betokens an unhealthy focus on rent-seeking.

Why copyright legislation, and therefore Parliament, should sanction a standardised revenue-collection process that substitutes for economic bargaining between copyright owner and user is mysterious – unless explained, in public choice terms, by the operation of sectional interest. Intelligent lobbying explains why the statutory licences apply to the educational sector and government, and not the private sector. Private entities would reject out of hand the revenue demands made by collecting societies on schools, universities and government, then beat a path to the doors of politicians shouting for prohibition. But the system of State-endorsed revenue collecting by collecting societies, regulated under voluminous provisions of the Copyright Act, and sanctioned by the Copyright Tribunal, imposes considerable costs and limitations on copyright users, without demonstrably benefiting the majority of copyright authors.

8. Public interest considerations were raised consistently in policy and legislative debates

The aggrandising program of the Berne Union, and the claims of copyright industries seeking rights analogous to those granted authors, created a copyright law prejudiced against gratuitous public access to copyright material. Nevertheless, the public interest, while never a predominant concern of policy-makers or

politicians, was raised in the 1905 legislative debate, at the Imperial Copyright Conference, by the *Sydney Morning Herald* in 1911, the Rome Conference of the Berne Union in 1928, and in the British and Australian legislative debates of 1911, 1912 and 1968. During the hearings of the Royal Commission of Performing Rights in 1932–33, Justice Owen and John Keating placed significant emphasis on the importance of considering the public interest in determining copyright policy.

9. The pursuit of authors' rights led to the creation of analogous producers' rights

By claiming for authors the right to control the production and performance of copyright material, the advocates of authors' rights made certain the development of a movement towards neighbouring rights. The aggrandising activities of the Berne Union and its domestic proponents caused the phonographic industry in the United Kingdom to demand, in the 1911 Copyright Act, a compulsory licence and the protection of copyright.

Affronted that the phonographic industry could record performances of works without authorisation – and made large profits from doing so – authors sought and received the right to control the recording of musical works. Facing the prospect of authors authorising a single entity or restricted group to make recordings of their works, thereby excluding the larger group of producers, the phonographic industry took steps to ensure that monopoly or cartel could not arise.

It did so by asserting that the record producer was entitled to copyright protection in the same degree as the author of a work, by seeking copyright in recordings, and agitating for the introduction of a compulsory licensing scheme.

But for the campaign for authors' rights, the phonographic industry would not have sought copyright protection. The industry established a precedent. Later, the radio and television industries saw that proprietary rights provided them with control over broadcasting. Again, the aggrandising of the Berne Union encouraged these industries to act defensively. The Berne Union demanded that domestic laws recognise the right of authors to control the broadcasting of works. The broadcasting industries saw the need to secure an analogous right to control the process of dissemination.

The creative faction is thus the true author of the modern dispensation of copyright, in which the copyright industries enjoy rights analogous to those held by the owners of copyright in works.

10. Copyright protection did not cause the economic success of the copyright industries

For nearly two decades before the passing of the 1911 Copyright Act, the phonographic industry enjoyed immense commercial success from sales of gramophones and gramophone records. The industry profited from recording performances of works without consent of, or payment to, the owners of copyright in works, but it did not owe its success to the incentives supposedly supplied by copyright law.

Similarly, the broadcasting and software industries functioned highly successfully for many years – the radio industry for nearly 40 years – prior to seeking, and receiving, copyright protection. Prior to the extension of copyright protection to those industries in the 1950s, 1960s and 1970s, regulators did not leap to the conclusion that copyright should extend to the producers and disseminators of copyright material.

The Beveridge Committee inquiring into British television broadcasting declined to comment on the desirability of granting copyright to broadcasters, and the Gregory Committee proposed broadcasters' copyright as the most convenient method of reconciling the competing claims of broadcasters, sporting organisations and performers. Considerations of industrial regulation rather than incentives to production predominated in the analyses of both the Gregory and Spicer Committees.

11. APRA's revenue demands led to the creation of Article 11 bis(2) of the Berne Convention and the Australian Copyright Tribunal

APRA's campaign for public performance fees in the 1920s and 1930s precipitated a long battle with the commercial users of music. It had two specific consequences. In 1928, the Australian and New Zealand delegates to the Berne Union's Rome Conference to amend the Berne Convention fought for agreement to qualify Article 11*bis*. Article 11*bis*(1) conferred on authors the right to control broadcasts. Paragraph 2, agreed thanks to the efforts of the antipodean delegates, permitted Union members to impose legislative conditions on the exercise of the right (provided they were not prejudicial to the moral rights of the author, nor the right to obtain equitable remuneration). This qualification followed the initial qualification of authors' rights at the Berlin Conference in 1908 (which permitted legislative 'reservations and conditions' to be imposed on the grant of the mechanical reproduction right), and represented another step towards neighbouring rights.

The second consequence of APRA's search for revenue was the establishment of the Copyright Tribunal. After the Royal Commission on Performing Rights recommended the creation of a tribunal, Australian lawmakers questioned

whether the Berne Convention and imperial legislation permitted them to qualify the operation of the performing right in this way. Doubts were resolved after the 1956 British Act provided for a tribunal. The 1968 Australian Act followed suit.

12. The record industry asserted the mechanical performing right opportunistically

In Britain and Australia at the start of the 1930s record companies banned radio broadcasters from purchasing and playing their records. Radio stations relied on old stock or purchased records from foreign suppliers. The recording industry imposed the ban after a drastic fall in record sales at the end of the 1920s. Manufacturers feared that broadcasters overplayed hit songs, discouraging listeners from purchasing their records. They hoped that the radio ban would send music listeners back into shops to buy the latest gramophone recordings. The radio bans naturally caused controversy in both countries and in Australia invited the attention of the Royal Commission on Performing Rights.

In Australia, the record industry went further than in Britain where the ban applied to the government-funded national broadcaster. Arguments at the Royal Commission disclosed the depth of feeling of record companies against commercial radio stations. The radio ban in Australia aimed to destroy the commercial stations, leaving only the national broadcaster, the ABC, to play records. Faced with hostile publicity the record companies scrambled to explain the legal basis for their prohibition on record sales. After two decades of restricted copyright in recordings, they discovered a performing right in records. According to the record companies, the compulsory licence to make records comprehended a derivative right to control the performance of those records. Thus, they claimed, they could prevent radio stations from playing their records.

The recording industry asserted the mechanical performing right opportunistically, to defend the legality of the radio ban, and then realised the future benefit of insisting on the right. A mechanical performing right, like the musical performing right, could be exercised to demand public performance fees. Fortunately for the industry, in 1934 the English High Court in *Gramophone Company Ltd v Stephen Cawardine and Co Ltd* agreed that the compulsory licence also conferred a mechanical performance right. The British and Australian Copyright Acts of 1956 and 1968 recognised the right.

13. The role of individual agency is underestimated in analysis of copyright

Modern theorising about the purpose and function of copyright seems often to imply that copyright laws developed according to an innate process of logic. Regulation, according to this view, followed from the official realisation that in order

to stimulate production and dissemination, governments must create property in works and their embodiments.

In fact, policy-makers and legislators in the early part of the 20th century did not assert any like doctrine of copyright. They accepted the resolutions of the Berne Union, without closely examining its reasoning, and sought to implement them because they believed in a vague notion, grounded in natural law principles, of an author's entitlement to reward for labour.

Copyright law was made to the often conflicting, and sometimes incoherent, plans of individuals. Writers, expressing a zealous belief in their vocational entitlements, created the Berne Convention. Politicians who accepted or shared that belief gave legal effect to the decrees of the Convention. In the process, individuals made copyright law according to their predilections.

For example, the Australian *Copyright Bill* of 1905 proposed a posthumous copyright term of 30 years, but when the Bill was debated, the eloquence of Sir Josiah Symon ensured that the Australian term was 42 years from publication or seven years from the death of the author, whichever period was the longer. Australian assent to the principle of a 50 year posthumous term resulted principally from the actions of one man, Hallam Tennyson, who flouted official instructions when he supported the motion of the Imperial Copyright Conference in favour of the 50 year period.

Individual action was also decisive also in securing the introduction of a statutory compulsory licensing scheme for musical recordings. John Drummond Robertson, the head of the Gramophone Company Limited, Britain's largest record producers, set the template for successful lobbying by industry of government when he persuaded the legislature to introduce compulsory licensing provisions in the Copyright Act of 1911. His arguments failed to sway the Gorrell Committee two years earlier but his persistence and intellectual force proved decisive before the House of Commons. Thanks to Robertson, the 1911 Act provided for the compulsory licence, which allowed record companies to sidestep authors and control the recording process. Until his intervention, the record companies stood to receive no more than a limited copyright in their recordings, a largely worthless gift in the absence of a compulsory licensing scheme.

In 1928, the determined efforts of William Harrison Moore and his New Zealand counterpart resulted in the Berne Union agreeing, at its Rome Conference, to allow members to place certain qualifications on the right of authors to control the broadcasting of works. By securing this proviso, they brought to international attention considerations of the public interest and hastened the movement towards neighbouring rights. In 1934, Justice Frederick Maugham decided in *Gramophone Company Ltd v Stephen Cawardine and Co Ltd* that the compulsory licence encompassed a mechanical performing right. In so doing, Maugham ignored the seemingly irresistible counter-current of opinion which held that the copyright laws allowed only one performing right – the musical per-

forming right.

At the beginning of the 1950s, the Association for the Protection of Copyright in Sports, stewarded by Sir Arthur Elvin and Francis Gentle, and advised by the leading barrister Kew Edwin Shelley (counsel to the PRS), precipitated the formation of the Gregory Committee. The Association did not succeed in securing sporting copyright: the Gregory Committee rejected its claims for copyright in sporting events and recommended the creation of broadcaster copyright. However, it is possible that but for the Association's agitation, the British Government would have delayed review of the copyright laws by several years. Additionally, the strength of its agitation forced the Gregory Committee to engage seriously with the question of sporting broadcasts and to clear the way for legislative recognition of neighbouring rights.

In Australia in the 1970s, the firebrand advocacy of one man, Gustaf O'Donnell, also cleared a way – in this case for the creation of a collecting society, CAL, that now equals APRA in revenue takings and influence. Without O'Donnell's energy and one track devotion to the cause of authors' remuneration, it is unlikely that Australia would have legislated to create an educational statutory licence. The edifice of copyright revenue collecting in Australia is built on foundations laid by APRA in the 1920s and 1930s but O'Donnell's proselytising made the supervening structure possible.

The Age of America did not emerge unbidden from the white heat of creation and transformation that established the global economic ascendancy of the US copyright industries. In the 1980s, a handful of senior executives and lawyers devised and implemented a strategy to tie intellectual property rights to trade policy. As a result, the Office of the United States Trade Representative became a copyright zealot negotiating multilateral and bilateral arrangements that established stringent protection and enforcement norms across the world. Together, the US IP industries and the USTR have made the world safer and safer for American copyright commerce.

14. The commercial struggle for control over the broadcasting of sport precipitated the Gregory Committee inquiry

From the late 1940s, sporting associations in the United Kingdom contested the right of the BBC to televise sporting events without the associations' permission. To secure control over the broadcasting of events they demanded copyright in sporting spectacles on the basis that these spectacles amounted to public performances of sport. In 1950, the associations met to discuss a ban of all television broadcasting of sport and their pressure caused the Government to call a public inquiry into copyright law. After the Gregory Report in 1952 proposed that broadcast copyright vest in the BBC, the associations imposed a partial ban on

the televising of sport. As a result of the disruption caused to sports broadcasting the Government a second, commercial, television broadcasting licence. The new Independent Television Authority (ITV) supplied some of the money demanded by the associations as a condition for permitting sports broadcasting.

15. The origins of Australian copyright policy orthodoxy lie in the Spicer Report and the second reading in the Senate of the 1968 Copyright Bill

The Spicer Committee introduced the idea that copyright regulation should aim to balance the interests of copyright owners and those of the users or consumers of copyright material. The Senate first articulated the theory that legislation must balance competing interests to preserve the incentive to produce, while promoting access to information, in 1968.

16. The parallel importation provisions of the Australian Copyright Act were carried over from imperial legislation

Import control formed part of British copyright legislation from the Statute of Anne in 1710. The importation provisions of the British Copyright Act of 1842 allowed the copyright owner to control the supply of overseas books into Britain, supposedly to deter foreign piracy. The 1842 Act was an imperial statute that applied to all British possessions, including the Australian colonies. In practice, it allowed British book publishers to control the supply of books into Australia, foreclosing from Australian distributors non-British sources of books, as well as British suppliers other than the publishers or their nominees. The Australian Copyright Act of 1905 made no provision for import controls and instead made the importation of counterfeit goods an offence. In 1912, four Australian parliamentarians spoke passionately against the import control provisions in the 1912 Copyright Bill. In 1968 another parliamentarian attacked the controls. The Government in 1912 made no reasoned defence of the importation controls – they seem to have been imported into the Copyright Bill reflexively, because of their provenance in British legislation. Utilised then by British publishers, and later by all the copyright industries, to enforce distribution monopolies in Australia, they were carried into Australian law as a matter of automatic deference, rather than for any reason of national interest or necessity.

17. Australian legislative debate has seen two great statements of principle: the first over the posthumous term and the second over import controls.

In the 1905 Senate debate on the Copyright Bill, Sir Josiah Symon expounded

on Thomas Macaulay's famous warnings against a lengthy posthumous term. He declared that "copyright is a monopoly, and like all monopolies, it is evil in essence." This statement of copyright scepticism can be taken as the essence of the 1905 Parliament's attitude to copyright law. Parliament accepted that regulation was necessary to secure economic justice for authors, but it would not endorse a conception of copyright that extended beyond granting to copyright creators control over the production of books and works of art.

Parliament accepted Symon's argument and rejected the posthumous copyright term of 30 years proposed in the Copyright Bill. It did so because it accepted that, in the words of Macaulay, the long posthumous term was "an impost on the public", that, if enacted, would be "no nullity but a very serious and pernicious reality."

Committed to incorporating the British Copyright Act of 1911 into Australian legislation, the parliamentarians of 1912, for the most part, did not cavil at accepting a 50 year posthumous term. But twice in the years between 1905 and 1912, the Australian Government declared its commitment to the shorter copyright term in the 1905 Act. Twice, however, its London representative, Lord Tennyson, thwarted its wish to have the Imperial Copyright Conference apprised of that commitment.

The second statement of principle concerned the import monopoly. In 1912, Senator John Keating began a debate on the topic, arguing fervently against the import controls in the Copyright Bill. His arguments, and those that followed, represented a profound assertion of the of the Australian interest against the impositions of foreign and private interests.

Keating warned of "the dangers that will beset the people of Australia if the Bill goes through" and declared the import provision "a great big blackmailing clause". His Lower House colleague David Gordon said, "we should legislate according to Australian requirements" and noted that "the Australian public ought to be protected to the extent of preventing any person here from having a monopoly and charging them just what he may choose". William Archibald declared "an injustice will be done to people in Australia" and "[w]e should not make away with our rights."

18. The content of the modern copyright law of Australia is the entire creation of international conventions and British precedents

Australians wrote the Copyright Act of 1905 according to their precepts. The Act of 1912, however, incorporated the British Act of 1911 into Australian law and the 1968 Act drew heavily on the British Act of 1956. The British statutes of 1911 and 1956 themselves resulted from the British Parliament implementing the precepts of the Berlin Convention of 1908 and the Brussels Convention of 1948.

The mechanical performing right written into both the British Act of 1956 and the Australian Act of 1968 was first accepted in British common law in 1934. Broadcast rights were introduced in accordance with the recommendation of the Gregory Committee.

To the extent that Australian copyright law follows the provisions of the Berne Convention – an example of a Convention prescript is the 50 year posthumous term – the Australian Government cannot reverse the copyright law without offending international treaty obligations. But not all aspects of the copyright law are derived from treaty obligations. The most obvious example of legislative provisions that can be overturned without affecting any legal obligation of the Commonwealth is the import control provisions.

19. Doubts over term persisted at the official level until the 1950s

The Brussels Convention made it mandatory for ratifying countries to legislate for a 50 year posthumous term for works. The Gregory Committee, however, declared that it was sympathetic to arguments in favour of a reduced term and recommended that the term for copyright in records and cinematograph films be 25 years from the date of production.

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Appendix 1

Timeline of key events in the development of Anglo-Australian copyright law

- 1557 Formation of Stationers' Company to print books and license printing of books.
- 1643–94 Licensing legislation empowers Stationers' Company to control the licensing of books. The guild system of selling books creates the prototype of publishing companies.
- 1710⁷ The *Statute of Anne* vests copyright in the author of a book for a maximum period of 28 years from publication.
- 1750–1774 After a series of conflicting cases, *Millar v Kinkaid* (1750), *Tonson v Walker* (1752), *Tonson v Collins* (1761), *Millar v Donaldson* (1765), *Millar v Taylor* (1769), *Donaldson v Becket* (1774), the House of Lords determines that the Statute of Anne extinguished common law copyright, which publishers argue lasts in perpetuity.
- 1776 The American Revolution splits the development of copyright in Britain and the United States. The two countries develop their copyright laws independently.
- 1790 United States *Copyright Act* creates a copyright term of 14 years.
- 1831 US copyright term amended to 28 years.

7 A number of writers date the Statute of Anne at 1709. See discussion at the website of Karl-Erik Tallmo, www.copyrighthistory.com/anne.html.

- 1833 Britain passes *An Act to Amend the Laws Relating to Dramatic Literary Property*. The author is entitled to control ‘representations’ of ‘dramatic pieces’. The musical performing right is explicitly recognised in the *Copyright Act 1842*.
- 1841 Thomas Noon Talfourd (having introduced a bill in 1837) introduces copyright bill in the House of Commons proposing a posthumous copyright term of 60 years. Thomas Babington Macaulay makes a famous speech attacking the bill: “For consider this; the evil effects of the [copyright] monopoly are proportioned to the length of its duration. A monopoly of 60 years produces twice as much evil as a monopoly of 30 years, and thrice as much evil as a monopoly of 20 years.”
- 1842 Parliament passes a new Copyright Act vesting copyright in the author of ‘books’ (volumes, pamphlets, sheets, maps etc) the exclusive right to multiply copies. The Act confers on the copyright holder control over the distribution of books in British possessions. It adopts a new copyright term: 42 years from publication or seven years after death, whichever is the longer.
- Macaulay is said to have suggested the term of 42 years (Minutes of evidence, Gorrell Committee inquiry) because the Parliament passed the copyright bill in the year 1842.
- 1844 *International Copyright Act*. Beginnings of principle of copyright reciprocity: by Order in Council foreign copyright works may be protected as if first published in Britain (the *International Copyright Act 1886* provides that orders are only to be made if reciprocal privileges are granted). No importation into dominions of books protected by the Act printed in a country other than that in which they were first published.
- 1875 Royal Commission on Copyright examines imperial copyright law. Commission appointed after constitutional crisis over Canadian copyright bill that contravened the import restrictions of the imperial *Copyright Act 1842*. Reports 1878.
- 1886 The Berne Convention. The beginning of international copyright law controlled by the Berne Union.
- 1886 *International Copyright Act*. Works published in colonies receive

- benefit of British copyright protection. Provisions to implement Berne Convention.
- 1891 US copyright treaty with Britain recognises reciprocal copyright in books.
- 1905 Senator Sir Josiah Symon speech on the 1905 Australian *Copyright Bill*. Supports authors' rights and attacks the long posthumous term: "copyright is a monopoly, and like all monopolies, it is evil in essence." Other senators attack publishers, support authors' rights and argue for the interests of the public.
- Australian *Copyright Act*. Recognises copyright in 'books' and ignores mechanical reproduction. A posthumous term of 30 years. Recognises copyright divisibility and translation rights. The first proto-modern legislation in the Englishspeaking world.
- 1908 At the Berne Union's Berlin Conference, the phonographic industry secures a proviso that allows legislatures to place limitations on the author's control over mechanical reproduction – the beginning of analogous copyrights.
- 1909 The Gorrell Committee inquires into the law of copyright and implementation of the Berne Convention as amended at the Berlin Conference. John Drummond Robertson of the Gramophone Company leads the phonographic industry's advocacy of the compulsory recording licence, copyright in recordings and the mechanical performing right. For the first time, the argument that industrial investment and effort demands the protection of analogous copyrights is heard by government.
- The Gorrell Committee reports and supports, almost wholesale, the authors' rights program set out in the Berne Convention. It rejects most of Drummond Robertson's arguments and supports only legislation to create a defensive copyright protecting manufacturers against piracy of recordings.
- Congress passes the US *Copyright Act*. Protects copyright works for a renewable term of 28 years from first publication. Requires registration. Creates a compulsory licence for recordings.
- 1910 The Imperial Copyright Conference. Considers a draft imperial

copyright bill intended to create a uniform copyright law for the Empire. Delegates accept the principle of unity and agree the bill, which implements the Berne Convention. Conceptually, imperial copyright is a forerunner of TRIPS.

- 1911 Imperial *Copyright Act* passed. The new Act implements the revised Berne Convention, establishing copyright in works for a posthumous period of 50 years. The exclusive rights of the owner include a mechanical reproduction right, the range of offences is substantially increased and fair dealing provisions introduced. The phonographic industry, with Drummond Robertson again at the forefront, persuades the legislature to create a limited copyright in sound recordings and to introduce a compulsory recording licence.
- 1912 Australian *Copyright Act* passed. The Act repeals the 1905 legislation and adopts the imperial legislation in Australian law. Despite the strong protests of three politicians, the Act reintroduces distribution controls created in the 1842 imperial *Copyright Act*. These controls, originally designed to enable British publishers to control the supply of books, allow copyright owners to control the importation of copyright works into Australia.
- 1912–1913 Samuel Coleridge-Taylor controversy. The United Kingdom’s Society of Authors proposes compulsory royalties to prevent exploitation of authors by publishers. The idea of compulsory payments suggests collection of payments for the performing right.
- 1914 Formation in the United Kingdom of the Performing Right Society. The PRS administers the collective performing rights of the owners of musical copyright. As assignee of the right, it collects performance fees from entertainment venues and other places where music is performed publicly and distributes the fees to the owners of copyright works performed. Copyright legislation becomes, for the first time, the instrument of mass revenue collection.
- 1920 Nellie Melba concert broadcast by wireless in Britain. The radio broadcasting revolution begins.
- 1922 Formation of British Broadcasting Company and beginning of public radio broadcasting in Britain.
- 1924 Mixed broadcasting begins in Australia. Public broadcasters – A

- Class stations – and private commercial broadcasters – B Class stations – share the airwaves.
- 1926 Formation of the Australasian Performing Right Society (at the instigation of the PRS). APRA immediately begins demanding performance fees from the users of commercial music, including radio broadcasters.
- 1927 Royal Commission on Wireless criticises APRA, supports mixed broadcasting.
- 1928 Berne Union holds Rome Conference to consider proposals to revise Berne Convention. The revised Convention confers on authors the right to control the broadcasting of works. The efforts of the Australian and NZ delegates results in a proviso that permits legislatures to place qualifications on the author’s exclusive control over the performing right.
- 1931 The radio ban. Australian record companies – “the associated manufacturers” – impose a ban on the sale of records to radio stations and the playing of their records by the stations. They argue that patents and copyright legislation permits them to impose a ban and argue for a mechanical performing right (i.e. record companies have performing right in records). In Britain, a similar ban is imposed by record companies on the BBC.
- 1932–33 Royal Commission on Performing Rights. Proposes the creation of a copyright tribunal to arbitrate performing right licensing disputes. Rejects the mechanical performance right claimed by the record companies. Proposes that APRA be compelled to publicly disclose details of income and distributions. The Government declines to implement the recommendations.
- 1934 *Gramophone Company Ltd v Stephen Cawardine & Co* (Ch D). Justice Maugham finds that section 19 of the *Copyright Act 1911* creates a mechanical performing right. His reasoning reprises the arguments of Drummond Robertson in 1909 and 1911 – the recording industry’s investment and skill demands protection.
- 1934–38 APRA pursues licensees, and in particular, radio broadcasters, for increased performance fees. Increases were agreed with the ABC, APRA’s main source of revenue, in 1934 and 1938 (after arbitra-

- tion).
- 1936 Austria passes a law recognising ‘related rights’ of performers, the producers of sound and film recordings, and broadcasters. Related rights are more commonly known as ‘neighbouring rights’.
- 1937 Wimbledon broadcast on television for first time in Britain, bringing sport to a national audience.
- 1938 FA Cup Final broadcast on television for first time in Britain.
- 1939 APRA is attacked in Australian Parliament by past and present Postmasters General (responsible for broadcasting policy) and numerous other politicians.
- 1948 Berne Union’s Brussels Conference to revise the Berne Convention. Enacting the 50 year posthumous term becomes a mandatory obligation and the author’s right to control the broadcasting of works is extended to television broadcasting. The Union does not endorse neighbouring rights but resolves that members should study how copyright can be uniformly extended to sound recordings, broadcasts and performers.
- 1950 Establishment in Britain of Association for the Protection of Copyright in Sport. For several years, sporting associations have argued for copyright in sporting spectacles. The drive for sporting copyright is opposed by the BBC, which wishes to secure copyright in broadcasts.
- US Haloid Company (later Xerox Corporation) produces first photocopier.
- 1951 In response to the argument over broadcasting rights, and the consistent agitation of the APCS, the Government calls an inquiry into copyright chaired first by Lord Reading and then Lord Gregory.
- 1952 Gregory Report published. Recommends new legislation to replace the 1911 *Copyright Act*. Proposes broadcaster copyright in broadcasts and recordings of broadcasts. The BBC is to own copyright in television broadcasts – no copyright in spectacles but sporting associations deserve consideration. Recommends also that record manufacturers have full copyright in records including the mechan-

ical performing right. Proposes that the Government implement the revised Berne Convention.

Universal Copyright Convention. Convention is inaugurated by UNESCO as a multilateral alternative to Berne Convention. It imposes less demanding obligations on members: they are to provide “adequate and effective” protection. Introduces the © symbol. The US, not a member of the Berne Convention, joins the UCC.

- 1956 New British *Copyright Act* implements Gregory Committee recommendations and creates new category of ‘subject matter other than works’, which recognises copyright in broadcasts, recordings and mechanical performances. The categories of ‘works’ and ‘subject matter other than works’ establish equivalence between authorial copyright and the analogous copyrights of record and film producers, and broadcasters.
- 1958 Australian Government establishes Spicer Committee to inquire into the copyright law. The Committee’s brief is to advise on adoption of changes to British copyright law.
- 1959 Spicer Report completed. Recommends Australian legislation on UK lines. Proposes establishment of the Copyright Tribunal.
- Haloid Company (Xerox Corporation) manufactures the Xerox 914 photocopier.
- 1961 UN Bureau for Protection of Intellectual Property, UNESCO and ILO create in Rome the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. The Rome Convention recognises the neighbouring rights of performers, broadcasters and record producers in performances, broadcasts and recordings.
- 1963 Brazzaville Conference. African nations demand third world copyright. They inform UNESCO and the Berne Union that a shorter copyright term should apply to material imported by less developed nations and they should be entitled to free use of copyright material for educational and school purposes.
- 1964 US Copyright Office registers two computer programs.

- 1965 US Congress Committee hears that in 1964, US produced 9.5 billion photocopied pages.
- 1967 Berne Union's Stockholm Conference. Concept of third world copyright is accepted by the Union. Less developed nations can make reservations allowing them for a certain period to reproduce literary and artistic works for educational purposes, and to make compulsory translations and publications of unavailable foreign works.
- 1968–69 Third world copyright is rejected. Developed nations, led by Britain and influenced by United States, reject the scope of reservations powers agreed in 1967.
- 1968 Australian Parliament passes *Copyright Act*. Implements the changes introduced by the British *Copyright Act 1956*. Also retains parallel importation restrictions giving the copyright owners control over the distribution of copyright material.
- 1969 Phonographic Performance Company of Australia formed to collect mechanical performing right fees.
- 1971 Paris Revision Conference of Berne Union and UNESCO. Berne Convention and UCC grant less developed nations limited freedoms to translate foreign works under compulsory licence.
- WIPO and UNESCO, at instigation of industry, create the Phonograms Convention which requires members to prohibit the unauthorised reproduction and importation of unauthorised reproductions of recordings for distribution to the public.
- 1973 According to Australian newspaper report, the world produced 30 billion photocopied pages in the previous year.
- 1974 Australian Government announces inquiry into photocopying practice and the need for legislative changes to protect the interests of copyright owners. Inquiry chaired by Justice Franki.
- Australian Copyright Council forms the Copyright Agency Limited (CAL) to collect licence fees for the photocopying of works.
- 1975 Australian High Court finds, in *University of NSW v Moorhouse*,

that the university authorised copyright infringement in its library by failing to adequately warn persons photocopying material of infringement liability, and by failing to adequately supervise photocopying.

US Supreme Court splits evenly on question of fair use in *Williams and Wilkins Co v United States*, a case appealed from the full court of the Court of Claims. The full court ruled that photocopying by two government libraries of articles in medical journals published by the respondent constituted fair use. The effect of the decision is that the courts refer determination of the copyright status of photocopying to Congress.

- 1976 Franki Report published. 35 recommendations concerning photocopying, library copying and fair dealing. Proposed introduction of a statutory licence for educational copying. Educational institutions to keep records of copying and pay “appropriate royalty”.

US *Copyright Act*. The new legislation replaces the *Copyright Act 1909*. Recognises neighbouring rights, recognises copyright in ‘computer program’ and codifies fair use doctrine.

- 1979 Australasian Mechanical Copyright Owners Society formed to collect royalties for recordings made of the musical works owned by publishers and composers.

- 1980 Australia passes legislation implementing recommendations of the Franki Committee. Establishes a statutory licence for educational copying with educational institutions obliged to maintain records of copying.

- 1984 Australia amends the Copyright Act 1968 to recognise copyright in computer programs. Computer programs are defined to include both source and object code.

International Intellectual Property Alliance (membership Association of American Publishers, Business Software Alliance, Entertainment Software Alliance, Independent Film and Television Alliance, Motion Picture Association of America, National Music Publishers’ Association, Recording Industry Association of America) formed.

- 1985 In *Copyright Agency Limited v Department of Education of NSW*, the Copyright Tribunal determines that NSW educational institutions must pay CAL 2 cents per page copied by educational users.
- Britain, Federal Republic of Germany and Japan pass legislation recognising copyright in computer programs.
- 1988 New British *Copyright Act* replaces *Copyright Act 1956*.
- Office of US Trade Representative establishes Special 301 Watch-List to rate international compliance with US-endorsed intellectual property standards.
- 1989 US joins Berne Union.
- 1990 Australian Audiovisual Society (Screenrights) formed to collect fees for the copying of broadcasts by educational sector and government.
- 1994 World Trade Organization formed. TRIPS Agreement establishes uniform global copyright standards and establishes enforcement and dispute resolution procedures.
- 1995 Viscopy formed in Australia to collect fees for the publication of visual art.
- 1998 *Digital Millennium Copyright Act* amends the US Copyright Act to implement the 1996 WIPO treaties. Criminalises the production and dissemination of circumvention devices and the circumvention of controls on access to copyright material.
- 2000 Australian *Copyright Amendment (Digital Agenda) Act* passed. It amends the Copyright Act 1968 to implement the WIPO treaties. Introduces, among other things, a new right of communication to the public and enforcement measures.
- 2001 European Union passes *EU Copyright Directive* implementing 1996 WIPO treaties.
- 2005 US-Australia Free Trade Agreement. Copyright term extended to posthumous period of 70 years. New criminal sanctions introduced in Australian legislation. Restrictions imposed on circumvention of

technological protection measures and new protections for electronic rights management information.

2007

In *Copyright Agency Limited v State of NSW*, the Australian Full Federal Court finds that copyright in maps and plans vests in the surveyors who created them. The Court ruled, however, that the statutory and regulatory framework for registration licensed the State of NSW to copy the maps and plans without remunerating surveyors. The decision could encourage reexamination of the purpose of use when determining remuneration – one possibility is that government use of copyright material for categorically non-commercial public purposes is declared exempt from fees or protected by restrictions on fees.

Appendix 2

Recommendations of the Royal Commission on Performing Rights 1933

That legislation be introduced having the following objects:

- (1) The establishment of a tribunal to determine disputes arising out of the performance in public of musical works and/or the use of records in public.
- (2) Providing that it shall be lawful for any person to perform in public a musical work or to use in public a record (the subject of the dispute), provided such person proves that he has paid or has tendered any charge and has complied with or has bona fide offered to comply with any terms and conditions imposed by such a tribunal.
- (3) Compelling the Australasian Performing Right Association from time to time to file at such place and in such form and within such time as may be prescribed lists of all musical works in respect of which authority is claimed to issue or grant performing licences or to collect fees and providing that the Australasian Performing Right Association shall not be entitled to collect any fees for licences for the performance of musical works which are not specified in such lists.
- (4) Compelling the filing of statements of all fees and charges which the Australasian Performing Right Association proposes from time to time to collect as compensation for the issue or grant of licences for the performance of musical work and providing for revision of these fees and charges.
- (5) Compelling the filing from time to time of accounts of the receipts and distribution of fees collected by the Australasian Performing Right Associ-

ation and of accounts of fees received from the association and distributed by its members.

- (6) Providing that until the time prescribed for the filing of the original lists of musical works and the statements of charges has expired, the present rights of the Australasian Performing Right Association shall remain unimpaired.
- (7) Providing that the Australasian Performing Right Association shall lodge with the Minister within the time and in the form prescribed, security (in say the sum of £3000) to meet claims made upon the Australasian Performing Right Association for costs and other moneys payable by the Australasian Performing Right Association.
- (8) Providing a remedy in case of groundless threats of legal proceedings by the Australasian Performing Right Association, adopting with the necessary modifications, section 91A of the *Patents Act 1903–1921*.
- (9) Providing that a performing fee shall not be payable for the relay of any musical work by a broadcaster if the broadcaster has paid or tendered the performing fee due for the performance by the originating station.
- (10) Providing that (except where admission fees are collected or similar charges are made by the user of the receiving apparatus) there shall be no performing right in respect of the rediffusion of any musical working public if the broadcaster has been licensed by the owner of copyright to perform the musical work in question.
- (11) Providing that there shall be no fee or charge payable for the performance of any musical work in any place for religious, charitable, fraternal or educational purposes if the entire proceeds, after deducting the reasonable cost of presenting the same, are devoted exclusively to religious, charitable, fraternal or educational purposes or for the maintenance of the place where such performance is held.
- (12) Providing that there shall be no charge made for any performing right in a musical work where the performance is not directly for private profit.
- (13) Providing that there shall be no performing charge or fee for the broadcasting of musical works forming part of religious services.
- (14) Determining whether a performing fee can or cannot be lawfully claimed

by the manufacturer for the use of a record in public.

- (15) This Commission further recommends that consideration should be given to the question whether the delegate of the Commonwealth of Australia to the next International Convention to be held at Brussels in 1935 should not be instructed again to press upon the convention the claims and interests of the public in connexion with the performance of musical works in public and the advisability of regulating and controlling the activities of such monopolies as the Australasian Performing Right Association and similar societies. It may also be suggested that the International Convention should be urged to recognise the power of Parliament in each country of the union to regulate and control societies such as these, if their activities be detrimental to the public.

Appendix 3

Recommendations of Copyright Law Review Committee appointed to consider what alterations are desirable to the Copyright Law of the Commonwealth 1959

Our principal recommendations are as follows. (References in this summary to ‘the 1956 Act’ are references to the Copyright Act, 1956 of the United Kingdom.)

Conventions

- (1) Australia should adhere to the Brussels Revision of the Berne Convention (para 51) and the Universal Copyright Convention (para 52).

Literary, dramatic and musical works

- (2) Provisions similar to section 2 of the 1956 Act should be enacted (paras 53–65). However, it should not be a ‘restricted act’ to perform publicly a work by means of the operation of a broadcast receiving set or gramophone record at any premises where persons reside or sleep as part of the amenities provided exclusively for residents or their guests (para 70).

Artistic works

- (3) Provisions to the effect of section 3 of the 1956 Act should be enacted (paras 71–78).

Ownership of copyright

- (4) Provisions similar to section 4 (1), (2), (4), (5) and (6) of the 1956 Act should be enacted (paras 78–91).
- (5) A person who commissions a work for valuable consideration should, in the

absence of agreement to the contrary, be the owner of copyright in the work insofar as it relates to the purpose for which he commissioned it, provided that his purpose was communicated to the author before the work was made. In all other respects copyright should remain in the author (para 85).

Infringement by importation, sale, etc

- (6) In adapting section 5 of the 1956 Act it should be provided that in subsections (2) and (3) the onus should be on the importer, seller or dealer to prove that he was not aware and had no reasonable grounds for suspecting that the making or importation of the work was an infringement of copyright (para 94).
- (7) The words 'by the importer' should be added after 'made' in a provision corresponding to section 5 (2) (para 95).
- (8) It should not be an infringement by 'importation' to bring an infringing copy from a Territory to the Commonwealth or *vice versa* (para 96).
- (9) Provisions to the effect of section 5 (5) and (6) of the 1956 Act (dealing with the liability of owners of places of public entertainment) should be enacted subject to deleting the words 'to such persons as may desire to hire them' in sub-section 6 (paras. 103–105).

Fair dealing with literary, dramatic and musical works

- (10) Provisions to the effect of section 6 (1) and (2) of the 1956 Act should be enacted (para 106).
- (11) In adapting section 6 (3) of the 1956 Act (dealing with the reporting of current events) it should be made clear that in cases coming within paragraph (b), 'fair dealing' does not extend to the playing of musical works that do not form part of the current event being reported (para 108).
- (12) In adapting section 6 (5) of the 1956 Act (dealing with recitations) the proviso and the requirement that the recitation should be by one person should be deleted (para 106).
- (13) In adapting section 6 (6) of the 1956 Act (dealing with collections for use in schools) the provision should extend to works collected for use in educational institutions (paras 111, 113).

- (14) It should not be an infringement of copyright to make an ephemeral reproduction of any literary dramatic or musical work for the purpose of broadcasting that work where the person who makes the reproduction is authorized by assignment, licence or by virtue of the Act to broadcast the work. A reproduction should be deemed to be ephemeral if it is destroyed after six months (para 128).
- (15) The ephemeral reproduction provisions should not extend to the recording of records (para 125).
- (16) There should not be any statutory right to retain reproductions made under the ephemeral reproduction provisions for archival purposes (para 126).

Works in libraries

- (17) In adapting section 7 of the 1956 Act (dealing with the supplying of copies of works by librarians) –
 - (a) the provisions should be extended to include libraries of commercial concerns which are conducted for profit provided the library itself is non-profit-making (paras 137, 143);
 - (b) paragraph (d) of sub-section (2) should be altered to permit the copying of more than one article from one publication if the articles copied relate to the same subject-matter (para 151);
 - (c) the proviso to sub-section (3) should be omitted but it should be provided that after copying a part of a non-periodical work the library should give notice to the copyright owner within a reasonable time of the amount that had been copied and the person to whom the copy had been supplied (para 151);
 - (d) sub-section (6) (dealing with the copying of old unpublished manuscripts) should extend to the copying of articles and engravings. The words ‘seventy-five years’ should be substituted for ‘one hundred years’ (para 151);
 - (e) authority should be given to university librarians to supply, for the purposes of research or private study, copies of unpublished theses deposited with them (para 151).

Compulsory licence to manufacture records

- (18) The system of compulsory licensing in respect of gramophone records should be retained and provisions along the lines of section 8 of the 1956

Act should be enacted subject to the following alterations (para 171):

- (a) the words 'or consent' should be added after 'licence' in sub-section (1) (a) (para 187);
- (b) the words 'by retail' should be omitted from paragraphs (c) and (d) of sub-section (1) (para 191);
- (c) the rate of royalty should be 6 1/4 per cent of the ordinary retail selling price and no deduction should be made from that price in respect of sales tax or cost of record containers (paras 197–200);
- (d) a copyright tribunal should have the task of revising the rate (para 197);
- (e) the minimum royalty provided for in subsection (4) should be one penny (para 204);
- (f) Where several work are included on one record and they are all in copyright, the royalty should be apportioned among the copyright owners by dividing the royalty by the number of works on the record (para 203);
- (g) where a record includes non-copyright material, the total royalty should be reduced proportionately (para 206);
- (h) the use of adhesive stamps should be abolished and the manufacturer should be required to keep on deposit with the copyright owner an amount equal to its royalty on his dealings for the previous month and, in the case of a new manufacturer, an amount equal to the royalty on his estimated dealings for the first month (para 210);
- (i) where the Regulations require the giving of notice and information to the copyright owner, it should be an offence to give false information (para 211);
- (j) in sub-section (6) (which defines 'adaptation') 'instruments' should be substituted for 'performers' (para 213);
- (k) the compulsory licence system should extend to the importation of a matrix or a record for the purpose of making records from it for sale (para 185).

Fair dealing with artistic works

- (19) Provisions to the effect of section 9 of the 1956 Act should be enacted (paras 217–221).
- (20) Fair dealing with an artistic work for the purposes of reporting a current event should not constitute an infringement (para 222).
- (21) Provision should be made for ephemeral reproductions of artistic works on

the same basis as that in relation to literary, dramatic and musical works (para 222).

Anonymous and pseudonymous works and works of joint authorship

- (22) Provisions to the effect of the Second and Third Schedules to the 1956 Act should be enacted, but they should be placed in the body of the Act (para 223).

Gramophone records

- (23) The performing right in gramophone records should be retained (para 245).
- (24) The performing right should be conferred in respect of all records that are in copyright in Australia without regard to whether provisions for such a right exist in the country of first publication (para 253).
- (25) Provisions to the effect of section 12 of the 1956 Act should be enacted subject to altering sub-section (7) by deleting the words ‘or mainly’ in paragraph (a) and adding ‘or their guests’ after ‘therein’ (para 264).

Cinematograph films

- (26) Provisions to the effect of section 13 of the 1956 Act should be enacted subject to altering sub-section (4) to provide that where a film is commissioned for valuable consideration the person who commissioned the film should, in the absence of agreement to the contrary, be the owner of copyright to the extent of his purpose in commissioning the film provided his purpose is communicated to the maker before the film is made (paras 268–275).

Sound and television broadcasts

- (27) Copyright should subsist in every television or sound broadcast made by the Australian Broadcasting Commission or a person licensed under the *Broadcasting and Television Act 1942–1956* (para 290).
- (28) Provisions along the lines of section 14 of the 1956 Act should be enacted, subject to the following alterations:
- (a) ‘for the private use of the person doing the act’ should be substituted for ‘for private purposes’ in sub-section (4) (a) and (b) (para 294);
 - (b) the words ‘exceed the prices usually charged at that place and’

- should be deleted from subsection (8) (b) (para 298);
- (c) paragraph (i) of the proviso to sub-section (8) should provide that no account shall be taken of performances at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates and their guests (para 299).

Copyright in typographical arrangements

- (29) Provisions to the effect of section 15 of the 1956 Act should be enacted (para 302).

Infringement of copyright in records, etc, by importation, sale or similar dealings

- (30) Provisions to the effect of section 16 of the 1956 Act should be enacted (para 304).

Remedies for infringement

- (31) Provisions to the effect of sections 17, and 18 and 19 of the 1956 Act should be enacted subject to the following alterations:
- (a) sub-section (2) of section 17 should exempt from liability for damages for infringement persons who at the time of an infringement were not aware and had no reasonable grounds for suspecting that the act was an infringement of copyright (para 308);
 - (b) the provision in sub-section (4) of section 17, that no injunction shall be made after the construction of a building has been begun, should be deleted (para 311),
 - (c) paragraph (d) of section 18(3) should define 'infringing copy' to include a film or record made directly from a broadcast (para 320).
- (32) Provisions to the effect of section 20 of the 1956 Act should be enacted subject to altering sub-section (7) to provide that the benefits of the presumptions are conferred only when the information was on the label at the time the records were first issued (para 328).
- (33) Provisions to the effect of section 21(1) to (5) of the 1956 Act should be enacted (para 330).
- (34) In adapting sub-sections (7) and (8) of section 21 of the 1956 Act, the maximum penalties for offences under sub-sections (1) and (2) should be five

pounds for each article to which the offence relates or, in cases other than a first offence, two months imprisonment. A fine should not exceed two hundred pounds in respect of articles comprised in the same transaction. A person found guilty of an offence under sub-sections (3) to (5) should be liable to a fine not exceeding two hundred pounds or (in a case other than first conviction under the section) to imprisonment for two months (para 331).

- (35) Provisions to the effect of section 22 of the 1956 Act should be enacted (paras 337–339).

Tribunal

- (36) There should be a tribunal to deal with disputes between bodies authorized to grant licences for the public performance of works and persons desiring licences (para 355).
- (37) The tribunal should consist of three persons who are either legal practitioners of some years' standing or who hold or have held judicial office. One member should have the title of 'President' (para 355).
- (38) Only one member should, unless the parties otherwise agree, sit on the tribunal to hear any particular matter (para 355).
- (39) Provisions similar to sections 24, 25, 26, 27, 29 and 30 of the 1956 Act should be enacted (paras 356–378), but a licensing body should have the power to refer to the tribunal a proposed licensing scheme or an existing licensing scheme (para 365).
- (40) The tribunal should be called 'the Copyright Tribunal' (para 377).

Extension or restriction of operation of Act

- (41) The Act should extend to all Territories under the authority of the Commonwealth (para 382).
- (42) Provisions similar to section 32 of the 1956 Act should be enacted (para 384).
- (43) Provisions similar to sections 33 and 35 of the 1956 Act should be enacted (paras 387, 388).

Assignments, licences and testamentary dispositions

- (44) In adapting section 36 of the 1956 Act, the provision in subsection (4), enabling a purchaser in good faith and without notice to defeat the claims of a prior licensee, should be deleted (para 392).
- (45) Section 5 (2.) of the 1911 Act should be repealed and not reenacted in a new Copyright Act (para 396).
- (46) Provisions to the effect of section 37 (with the exception of subsection (4)) and section 38 of the 1956 Act should be enacted (paras 397, 400).

The Crown

- (47) Provisions to the effect of section 39 of the 1956 Act should be enacted and should be applicable to the Crown in the right of the Commonwealth and the States (para 403).
- (48) The Commonwealth and the States should be empowered to use copyright material for any purposes of the Crown, subject to payment of just compensation (para 405).

Broadcasts of recordings and films

- (49) Provisions similar to section 40 of the 1956 Act should be enacted (para 413).

Use of copyright material for education

- (50) Provisions to the effect of sub-sections (1) to (5) of section 41 of the 1956 Act should be enacted (para 416). In adapting that section, it should be made clear that the word 'school' extends to all education institutions not conducted for profit (para 419).
- (51) The recording by school authorities of school broadcasts of the ABC should not constitute a breach of copyright in the works broadcast if the recording is not used outside the school (para 418).

False attribution of authorship

- (52) In adapting section 43 of the 1956 Act, it should be provided that actions under that section cannot be brought after the death of the author (para 425).

Forfeited works

- (53) In adapting section 46 (3) of the 1956 Act, it should be provided that the Crown cannot sell forfeited works that are in copyright without the consent of the copyright owner unless the action which gave rise to the forfeiture was committed by the copyright owner (para 427).

Industrial designs

- (54) Provisions similar to the effect of sections 10 and 44 of the 1956 Act should be enacted (para 436).

Definitions

- (55) In adapting section 48 of the 1956 Act –
- (a) the definition of ‘author’ in relation to ‘photograph’ should be ‘the person who takes the photograph’ (para 428);
 - (b) the definition of ‘wireless telegraphy’ should be set out in a Copyright Act fully and not by reference to another Act (para 439);
 - (c) in sub-section (3), the latter part of that provision should read ‘and is operated as part of the amenities provided exclusively for residents or inmates therein or their guests’ (para 440).
- (32) Provisions to the effect of section 20 of the 1956 Act should be enacted subject to altering sub-section (7) to provide that the benefits of the presumptions are conferred only when the information was on the label at the time the records were first issued (para 328).

Copyright Act 1912–1950

(a) *Registration and summary offences*

- (57) Provision for voluntary registration and for summary offences dependent on registration set out in Parts III and IV of the *Copyright Act 1912–1950* should be repealed (paras 462, 466).

(b) *Deposit of books*

- (58) It should be made clear that section 40 of the *Copyright Act 1912–1950* extends only to books that are published in the Commonwealth and have not been previously published elsewhere (para 468).
- (59) The definition of ‘book’ in section 40 should include ‘sheet of music’ (para 469).

(c) ***Groundless threats of legal proceedings***

- (60) There should be a civil remedy in cases of groundless threats of legal proceedings along the lines of section 121 of the Patents Act (para 471).

Miscellaneous

(a) ***Performers' right***

- (61) No recommendation is made regarding the grant to performers of a right in the nature of copyright (para 477).
- (62) There should not be any right in the nature of copyright in respect of sporting spectacles (para 480).

(b) ***The Court***

- (63) The Supreme Court of the States and Territories should have exclusive original jurisdiction in copyright actions (para 486).

(c) ***'Droit Moral'***

- (64) Provision should not be made to prevent a purchaser of an artistic work from exhibiting that work without the consent of the artist (para 490).

(d) ***Filing of List of Works***

- (65) Provision should not be made to require a licensing body to file a list of the works in which it owns copyright (paras 492, 493).

(e) ***Maps***

- (66) Provision should not be made to require map producers to indicate on their maps the source of the material used in their production (para 495).

Appendix 4

Recommendations of the Copyright Law Committee on Reprographic Reproduction 1976 (Franki Committee)

Copying within the concept of fair dealing

- (1) The words in section 40 of the *Copyright Act 1968–1973* ‘for the purpose of research or private study’ be replaced, so far as it applies to reprographic reproduction, by the words ‘for the purpose of research or study’. Two members of the Committee would extend this recommendation to the phrase ‘for purposes such as research, study, private or personal use’. Copying within the amended section to remain without remuneration to the copyright owner. (2.18, 2.64–2.68)
- (2) The Act be amended to make it clear that the installation and use of self-service copying machines in libraries does not of itself impose any liability for copyright infringement upon the librarian or librarian’s employer provided notices in a form prescribed by regulation are displayed drawing users’ attention to the relevant provisions of the Act. (2.53)
- (3) For the purposes of section 40, the concept of ‘fair dealing’ be retained, but a provision should be added to the section, so far as it applies to reprographic reproduction along the following lines:
 - (a) In determining-whether a dealing with a work in any particular case is a fair dealing the factors to be considered shall include:
 - (i) The purpose and character of the dealing;
 - (ii) The nature of the work;
 - (iii) The amount and substantiality of the portion taken in relation to the whole work;
 - (iv) Whether the work can be obtained within a reasonable time at a normal commercial price;

- (v) The effect of the dealing upon the potential market for or value of the work; and
- (b) Without restricting the meaning of the expression ‘fair dealing’ the making of one copy for (research or study*):
- (i) in the case of copying from a ‘periodical publication, of not more than a single article or, where more than one article relates to the same subject matter, those articles; or
 - (ii) in the case of copying from an edition of a work, of not more than one chapter or 10 per cent of the number of pages in that edition, whichever is the greater, is a fair dealing-with the work. (2.60)
- * the words in brackets should correspond with the words used in section 40.
- (4) The Act be amended to make it clear that sections 40 and 43 maybe applied to copying by a library or archives, if that copying is not otherwise permitted and also that the provisions of Divisions 3 and 5 of Part 111 apply to published editions of works dealt with in section 88. (2.69 and 2.70)

Copying by a library for users

- (1) The words ‘reasonable portion’ in section 49(3) of the Act be retained but a provision be added that, in the case of copying from an edition of a work, up to one chapter or 10 per cent of the number of pages in that edition, whichever is the greater, shall be deemed to fall within the words ‘a reasonable portion’. (3.17 and 3.18)
- (2) The words that ‘he requires the copy for the purpose of research or private study and he will not use it for any other purpose’ in section 49(3) be amended so that the words ‘for the purpose of research or private study’ correspond with the words adopted for section 40. (3.21)
- (3) A provision be added to the Act permitting the copying in a library of an entire work or more than a reasonable portion of it where that work forms part of a collection in the library if the librarian has first determined on the basis of a reasonable investigation that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect, and provided a declaration is also made by the user of the library that the copy is required for a purpose specified in section 49(3) as proposed to be amended and provided the declarations are open for

inspection upon reasonable notice and are retained by the library for a period of 12 months. (3.19)

- (4) A library be permitted to supply copies within the limits of section 49 as proposed to be amended without having to require payment for the copies. However, it should not be permitted to make a profit from supplying copies under this section, or under section 50. (3.24)
- (5) There be no requirement for the librarian to be satisfied as to the purpose for which the copy is required under section 49, but the Act should provide that the condition is fulfilled if the librarian or a person acting on his behalf receives in good faith a signed statement by the person requesting the copy, declaring that the purpose for which the copy is required falls within the words of the section and that he will not use the copy for any other purpose. The Act also provide a penalty where the user of the library makes a false declaration. (3.26)
- (6) The provisions of section 49 be extended to ‘archives’ which should be suitably defined. (3.34)
- (7) Section 112 dealing with reproduction by libraries of published editions of works be amended to conform with the recommendations made with respect to section 49. (3.36)
- (8) Copying within section 49 to remain without remuneration to the copyright owner. (3.05, 3.14)

Copying by libraries for other libraries

- (1) The restriction in regulation 4 of the Copyright Regulations which states that the protection of section 50 does not apply where the supplying library has previously supplied a copy of the work to the requesting library unless the librarian of the supplying library is satisfied that the copy so previously supplied has been lost destroyed or damaged, be eliminated except in the case where the requesting librarian requires the copy for the shelves of his library. (4. 15)
- (2) Section 50 of the Act be amended so that it is an infringement of copyright for the requesting library to supply the copy obtained from the supplying library otherwise than in the case where the librarian of the requesting library or the person acting on his behalf receives in good faith a signed statement by the person requesting the copy declaring that the purposes for which the

copy is required fall within the same purposes as we recommend for section 49, and further that he will not use the copy for any other purpose. The librarian of the supplying library should be protected by section 50 provided he is informed that the declaration has been obtained in the requesting library. A penalty be provided for a false declaration. (4.16)

- (3) Where a librarian requests through the inter-library loan system a copy of an article or other work or of part of an article or other work for its own collection, the making of such a copy not be protected by section 50 unless, if a copy has previously been supplied by the librarian of the supplying library to the requesting library, the librarian of the requesting library is satisfied that the copy previously supplied has been lost, destroyed or damaged and so informs the supplying library. (4.17)
- (4) The same provisions recommended with regard to the words 'a reasonable portion' for section 49 be incorporated in section 50. (4.19)
- (5) The requirement in section 50 that before more than 'a reasonable portion' of the work may be copied the librarian by whom or on whose behalf the copy is made must not know the name and address of any person entitled to authorise the making of the copy and could not by reasonable enquiry ascertain the name and address of such person be replaced by a provision that the librarian has first determined on the basis of a reasonable investigation that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect and provided the declaration is open for inspection upon reasonable notice and is retained for a period of twelve months. (4.20)
- (6) Section 50 be extended to archives, which should be suitably defined. (4.21)
- (7) Copying within section 50 to remain without remuneration to the copyright owner. (4.09)

Copying of published and unpublished works for preservation and certain other purposes

- (1) An unpublished work may be copied by a library or archives for preservation or security or for research use in that or another library or archives but provision be made to ensure that this does not cause the work to become a published work. (5.04)
- (2) Where a published work held by a library or archives is damaged, deterio-

rating, lost or stolen, the library or archives be permitted to make a replacement copy if after a reasonable investigation the librarian has determined that an unused copy of the work cannot be obtained within a reasonable time at a normal commercial price and makes a declaration to this effect. The declaration is to be open for inspection upon reasonable notice and is to be retained by the library for a period of 12 months. (5.10)

- (3) It not be an infringement of copyright for a library or archives to make one microfilm or microfiche copy of any work in the collection of the library or archives where it is intended to destroy the original. (5.12, 5.13)
- (4) The words ‘for the purpose of research or private study’ in section 51(1)(d) be replaced by the words adopted for section 40. (5.14)
- (5) Section 51(2), which permits the copying by a librarian of the library of a manuscript, thesis or similar literary work that has not been published, for supplying to a person who satisfies the librarian, or a person acting on behalf of the librarian, that he requires the copy for the purpose of research or private study and that he will not use it for any other purpose, be amended, as far as concerns reprographic reproduction, so that the words ‘for the purpose of research or private study’ be replaced by whatever words are adopted for section 40. (5.15)

Multiple copying in non-profit educational establishments

- (1) A library of a non-profit educational establishment be permitted to make up to six copies of a single article in a periodical without infringement of copyright and without remuneration to copyright owners for use within the library provided that the librarian making the copies intended that they would only be used in the library and would ultimately be destroyed. (1.46 and 6.02)
- (2) If multiple copies of more than an insubstantial part of a published work other than an article in a periodical are required in a library conducted by a non-profit educational establishment the library be permitted to make up to six copies of that work thereof without remuneration in any case where the work has not been separately published, or if it has been separately published, it has been ascertained after reasonable inquiry that copies cannot be obtained within a reasonable time at a normal commercial price. This right should be subject to the condition that the librarian making the copies intended that they would only be used in the library and would ultimately be destroyed. (1.50, 6.02)

- (3) (a) The Act be amended to provide for a statutory licence scheme permitting a non-profit educational establishment to make multiple copies of parts of a work and in some cases of whole works for classroom use or for distribution to students, subject to recording any copying taking place under the scheme and an obligation to pay an appropriate royalty if demanded by the copyright owner or his agent within a prescribed period of time (say three years). (6.39)
- (b) The records to be kept in respect of this copying to show as a minimum, the title of the work copied, the number of pages copied, the number of copies made, the author of the work (where known) and the publisher of the work. (6.52)
- (c) The proposed statutory licensing scheme to extend to the making of copies of published literary, dramatic or musical works in the following circumstances:
- (i) where the work concerned is not separately published – the whole of that work may be copied;
 - (ii) where the work concerned has been separately published, but copies cannot be obtained within a reasonable time at a normal commercial price – the whole of that work may be copied;
 - (iii) not more than one article in the same periodical publication may be copied unless the articles relate to the same subject matter;
 - (iv) in any other case, not more than a reasonable portion of the work may be copied.
- (d) Where a work or part of a work that may be copied under the proposed scheme contains an artistic work by way of illustration or explanation, then the making of the copy not be an infringement of the copyright in the artistic work. (6.58, 6.59)
- (e) Legislation provide that up to 10 per cent of the number of pages in an edition of a work or one chapter, whichever is the greater, should always be regarded as a reasonable portion. (6.60)
- (4) The making of multiple copies in any non-profit educational establishment of up to two pages or one per cent of the number of pages (whichever is the greater) in an edition of a work or of two or more works in any period of 14 days be permitted without remuneration and without infringement of copyright provided (except in the case of a diagram, map, chart or plan) the part copied does not comprise or include a separate work. (6.67)
- (5) The Act to permit a teacher or lecturer to make without remuneration and without infringement of copyright of up to three copies of a copyright work or part of a work for the purpose of classroom instruction within the limita-

tions described in paragraph 6.58.(6.6 8)

- (6) A non-profit educational establishment conducting educational courses by correspondence or on an external study basis for students be allowed to prepare, without requests from students, such copies as may be appropriate for the students of journal articles or reasonable portions of works to the same extent as a librarian could provide copies for a person on request made under section 49 of the *Copyright Act*. This should not extend to material reproduced as part of lecture notes. (6.73)

Copying in other circumstances

- (1) The Crown or a person authorised by the Crown be entitled to copy a work in circumstances where a private individual would be entitled to copy it without obligation to the copyright owners. If it be accepted that this is the result presently achieved by section 183 of the Act, no change in the Act would be required. (7.10)
- (2) The Crown not be permitted to rely on section 183 for the making of multiple copies of works for use in government schools, and the recommendations made in respect of multiple copying in non-profit educational establishments to apply to government and non-government educational establishments alike. (7.11)
- (3) The following words be added to section 43, 'or by a fair dealing with such a work for the purpose of or in the course of the provision of professional advice by a legal practitioner or patent attorney as to the legal rights or obligations of a person'. Two members of the Committee would omit the words 'as to the legal rights or obligations of a person'. (7.16)

Crown copyright

- (1) The Act make it clear that any act that is excluded from infringement of copyright under that Act should equally not be an infringement of any prerogative copyright of the Crown. (8.06)
- (2) The Act be amended to make it clear that a person is entitled to make reprographic reproductions of a statute, or an instrument made under authority of a statute, an order, judgment or award of a Court or other tribunal, or of the reasons for decision of a Court or other tribunal. The sale of a copy so made should not be permitted, except that this would not prevent the cost of making the copy being recovered from a person to whom the copy is supplied.

(8.07)

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