

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.

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

¹ See appendix 2.

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 1/2 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 overlay 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 federal 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 hoped 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 corraling 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 *Camardine* 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

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.

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 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 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 *Cavardine*, 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

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.

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 rapaciously 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

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.

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 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

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.

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 half-heartedly 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

⁸ The Berne Union postponed the 1935 Conference. A Conference finally took place in 1948.

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.

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

⁹ Cameron’s proposal replicated elements of Canadian legislation passed in 1931.

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

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.

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 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 Government’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

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."

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.