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 Performing Right Society, to

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 operations in 1914.
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 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 reproductive 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.

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.
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 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

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\(^3\) 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.
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 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

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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.
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. For 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

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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.
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 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 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.

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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.”

⁷ Its government owned successor, the Australian Broadcasting Commission, and then the retitled Australian Broadcasting Corporation, were also referred to as the ABC.
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 Association 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*
In that case, the plaintiff’s counsel, John Latham, 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.” 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 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.

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

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 £40,000 in 1926 equalled £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.
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

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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.
clear whether they intended 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.\textsuperscript{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

\textsuperscript{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.”
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 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.