Chapter 5 – the APRA wars and the Rome Conference

The beginning of the APRA wars

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

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

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

¹ Many cinema owners refused to join the agreement and the Cinematograph Exhibitors’ Associations of Victoria, Tasmania, South Australia and Western Australia bitterly attacked APRA.
even if it proved agency, it refused to demonstrate how, and to whom, it distributed income collected.

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

Compulsory arbitration

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

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

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

One of these proposals provided that if parties could not agree a copyright performance fee their dispute would be settled by arbitration. The copyright legislation allowed for voluntary arbitration but APRA regarded the idea of a compulsory requirement as anathema. Seven years later, it resolutely opposed the Royal Commission’s proposal for the Government to add a compulsory arbitration clause to the Copyright Act.
The remaining proposals concerned registration of musical copyrights and reservation of performing rights as preconditions for the enforcement of rights but they found no favour with government (although they were not immediately dismissed out of hand). Latham pointed out later to interested politicians, as well as copyright user groups, that the Berne Convention’s prohibition of copyright formalities precluded adoption of these legislative suggestions.

Latham passed Marks’s proposals to the Solicitor General asking for “a report and recommendation upon the question raised” and observing that if APRA’s rates were extortionate, as alleged, “it would appear that some alteration should be made in the Act unless [APRA] is prepared to reduce its proposed charges.” However, the Showmen’s Association relieved him of the need for further direct action, reaching agreement with APRA on rates in April 1926.

**APRA and the cinemas**

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

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

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

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

In 1926 nearly all films screened were silent. The average performance by the orchestras playing accompaniment to screenings in city and suburban theatres lasted two and half to three hours, and about 40 to 50 items of music were played during each performance. The 1926 agreement negotiated by the Showmen’s Association provided for separate scales of rates for city cinemas and suburban and country cinemas, but it did not allow discounts for low attendance, or if a cinema ran at a loss. City venues paid 45s per 100 seats per annum, rising to 90s per annum if average weekly gross takings exceeded £1000. The suburban and country theatres paid a maximum of 25s per 100 seats annually and a minimum fee of £1 5s per annum.

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

**Inequity of APRA’s rates**

The Royal Commission on Performing Rights carefully described the meaning of this omission for all cinema exhibitors, who continued to pay the rates set in 1926 or 1928, even though the quantity of music performed in cinemas after the introduction of talkies now dropped precipitately. After 1926, when sound pictures replaced silents, theatre proprietors began to realise they had little need to supply extraneous music. By 1932, orchestras had vanished from suburban theatres. In many, gramophone records were sometimes played briefly but in most instances the only music heard came from the soundtrack of the film.
The Commission report pointed out the inflexibility and inequity of APRA’s pricing schedule. It found that in 1926, a theatre of 1500 seats played an average of 50 music pieces per week compared with eight pieces per week in 1932. The theatre in 1926 gave 312 musical performances during the year, with performers playing an aggregate of 936 hours of music. In 1932, the theatre gave the same number of performances but performances lasted for an aggregate of 156 hours. In 1926, the theatre used 2600 pieces of music and in 1932, 416.

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

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

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

A draft bill for a copyright tribunal and international protests

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

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

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

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

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

**Response of local government**

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

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

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

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

*The owner of the performing right of a musical composition has the exclusive right to perform the composition in public, or to authorize its performance in public. Accordingly any person who wishes to perform in public music in which a performing right exists can do so only with the consent of the owner of the performing right.*
Latham’s letter directed the reader’s attention to section 15 of the Copyright Act, which imposed liability for copyright infringement on any person who, without authorisation of the owner, “for private profit” permitted a “theatre or other place of entertainment” to be used for the public performance of musical works. The provision did not apply, as Latham pointed out, if a person “was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement.”

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

**APRA’s conduct**

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

Supported by legislation, unchallenged as the single representative of the vast majority of owners, APRA was, as its opponents claimed, a fearsome commercial “combine” that could mow down any resistance in the courts. Without government intervention, the halls owners and entertainment venue proprietors, the most importuning of the music users, would eventually have to accept whatever terms APRA imposed. Latham, a coldly intelligent and detached individual, later the Chief Justice of the High Court, decided that he would have to do more than blandly defend APRA’s legal position.
He started pressing APRA about its methods. In a letter sent in May 1927, he informed APRA’s Secretary that “your Association has no legal right to compel owners of halls to take licences from you; although this method of securing remuneration for owners of copyright may be convenient to your Association.” He went on to say that the “terms and the general tone of communications sent by your Association to owners of halls have been unfortunate, inasmuch as they have not unnaturally suggested to the persons receiving them that you claimed a right to levy halls as such.”

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

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

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

Protest of local government – “The Copyright Levy”

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

The circular began melodramatically in the style of the opening sentence of The Communist Manifesto, warning of a hovering menace about to threaten the settled conditions of daily life:
A combine has been formed in Australia which controls the selling and performing of practically all the saleable music which has been composed throughout the world in the past fifty years.

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

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

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

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

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

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

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

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

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5 The circular observed that it was “hard to say on what basis” APRA determined fees. “Apparently,” it noted, “up to £7/7/- per annum was the figure originally favoured.”
6 The circular made a “conservative” estimate of 5000 halls in Australia.
No-one wants to deprive the Australian musician of the fullest possible reward for his genius. It would appear, however, that very little of the huge amount paid by the public in the way of copyright goes to the benefit of Australian composers. It is a question for consideration whether, if the public is to pay these huge sums, the matter should not be under Government control, in order to ensure that Australian artists get their full return. The Copyright Act was intended to benefit artists and composers. Under the present system of organisation, the music combine gets most of the benefit.

The LGA’s circular proceeded to expose APRA’s assumed motives. At a government-sponsored conference of music users and APRA,7 said its author, the LGA proposed that Parliament investigate ways to regulate the performing right. An APRA representative reportedly described this suggestion “as the most immoral proposition he had ever heard”. The circular ended with a call to arms, asking the owners of halls and other entertainment venues to contact their local members and press for parliamentary investigation of APRA’s activities. “The combine,” was already “getting firmly entrenched” and hall proprietors were entitled “to ask that the charges [of APRA] should be properly regulated and not left to this method of collection by threat.”

“Legalised bushranging”

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

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

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

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7 Presumably one in a series of conferences organised by the Postmaster General’s Department in July and August 1926.
The Roads Boards Association of WA also accepted the arguments in the circular. Although Roads Boards representatives met their APRA counterparts over several months and the two organisations corresponded over a dozen times, the West Australians asked the federal member for Dampier, Henry Gregory, to press Latham for a Royal Commission to investigate APRA. Gregory had already written to Bruce, asking for the appointment of a Royal Commission to investigate the need for changes to copyright legislation. Developments in broadcasting and cinema, and the establishment of APRA, he told Bruce, demanded a Government response.

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

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

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

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

APRA had informed Garran that the letters copied “demonstrate the moderate, even conciliatory, attitude which is adopted in our correspondence” but Gregory was not impressed. He acknowledged
that APRA “have behaved with the greatest courtesy” but he noted that the letters “do not afford much insight into the general question.” Gregory repeated the proposition that Latham would eventually act on, five years later:

*I still think that some action should be taken by the Government with a view of considering what amendments might be made to the Copyright Act and also whether any action should be taken under the same Act so as to afford protection to the general public against any unjust or unfair demands that may be made.*

**APRA responds and LGA proposes withdrawal from Berne Convention**

By the time of Gregory’s final letter in September 1927, APRA’s dispute with the proprietors of public halls and entertainment venues had flared into open warfare across Australia. APRA blamed the nation’s local government associations. R Nathan, APRA’s Chairman, informed Garran in a long letter in July that the “opposition on the part of Local Government authorities has left us the alternative of addressing ourselves directly to the promoters of entertainment in their public halls.”

APRA intended, he said, to “carry out its business … in a dignified and equitable manner” even though the “criticism and hostility” of its opponents were “clearly based on misunderstanding and ignorance”. However, he warned, its “conciliatory attitude” should not be interpreted “as a sign of weakness”. In early September, the NSW LGA wrote again to Latham, responding to Latham’s request, earlier in the year, for the disputing parties to submit legislative proposals for his consideration.

The LGA’s Executive asked the Government to declare APRA illegal as a “combine”, to impose costs liability on APRA in enforcement actions if damages awarded were less than £50, and to require APRA to publicly disclose details of revenue and distributions. The correspondence went further. The LGA proposed that Australia withdraw from the Berne Convention.8 By doing so, declared the letter, the Government would free itself from the Convention’s implied prohibition against placing limitations on the performing right. It could enact suitable restrictions – including the outlawing of APRA – and

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8 Australia was not yet an independent member of the Berne Convention. It accepted the obligations of the treaty as a British possession and became a member in its own right the following year in April 1928.
thereby ensure that Australian composers, rather than a publishers’ “combine”, benefited from the performing right. Latham refused this suggestion but the LGA’s proposal left him in no doubt about the alarm and hostility aroused in music users by APRA’s control of the performing right.

In placing Australian interest at the forefront of the argument, the LGA repeated arguments made in the parliamentary debates over import controls in 1912. The Association asked whether domestic laws made in accordance with international treaty benefited the national economic interest. The LGA thought not, at least in the case of the performing right. Collections for public performance in Australia hardly benefited Australians and if fees remitted overseas, mostly to Britain, were unlikely to much benefit British composers:

An examination of any of the lists sent out by the A.P.R.A. would make it appear that the Australian music market has been almost entirely captured by foreign music. It is doubtful out of every £100 the public contribute in payment for copyright as much as £1 goes to Australian composers.9

Several parliamentarians, including the Postmaster General, also forwarded copies of the LGA’s correspondence to Latham, but he was unmoved. He replied to them all that he had no intention of recommending that Australia withdraw from the Berne Convention. As he well knew, and his correspondents evidently did not, the Convention by now exercised powerful moral suasion in many parts of the world. To repudiate it would be seen, to borrow the type of language that copyright proponents were apt to use, as a declaration of barbarism.

**The Brisbane Memorial Statement**

In the meantime, APRA battled the Local Government Authority of Queensland, which in October 1927 published the *Brisbane Memorial Statement* attacking the collecting society. The Queensland Government endorsed the statement, sending it to Bruce asking him to forward a copy to Sir William Harrison Moore, Australia’s newly appointed delegate to the looming Rome Conference of the Berne Union.

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9 If the Government implemented its suggestions, the LGA said, Australia, like the United States, could “take charge of her own copyright affairs” and “make it a condition that nothing shall be copyrighted in Australia until it has been printed in Australia.”
APRA’s executive reacted furiously, and the Association fired a letter to the State’s Premier, declaring that, “we would have thought that you would have given us an opportunity of stating our case before supporting an amendment of the Copyright Act.” The letter enclosed a paragraph by paragraph statement of rebuttal of the Brisbane Memorial. The reader could not mistake the palpable tone of outrage in the letter. One paragraph in particular seemed to express the pent-up feelings held in during eight months of sometimes bitter attack:

We feel sure after perusal of same [the rebuttal statement] that the undeserved, untrue, and unmerited accusations launched against our Association would not have been supported by you or your Government had you been in possession of these facts, nor would you have been a party to the dissemination in places outside of Australia, of such slanderous statements impeaching the bona fides of an Australian corporation composed of Business men of unimpeachable integrity.

The Brisbane Memorial enumerated 18 reasons why APRA should not be allowed to collect fees for public performance. A couple of the points raised remain controversial in the modern era: APRA, said the Memorial, did not reveal to whom money collected was distributed, and it did not clearly establish its title to works. Other objections continue to press against modern orthodoxy on the merits of performing rights.

One objection stated that the original copyright legislators did not intend that performance right, if asserted, should be exercised in relation to new technologies like broadcasting. Another claimed that the benefits to the copyright owner of public performances ought to be taken into account when assessing fees, and a third suggested that APRA set fees arbitrarily. APRA responded to all criticisms in detail but it is hard to say how much its efforts influenced Latham.

On most points he would have agreed with the collecting society anyway. On the key questions of transparency and arbitrariness, however, he might not. Latham had already communicated to the Solicitor General his concern at the latitude the Copyright Act gave APRA to set fees. Very slowly, as the protests continued, he inched his way towards acceptance of the call for a royal commission.

**Moving forward**

Over the next two years, events mimicked Latham’s slow progress. The different commercial users of music continued their resistance to APRA’s claims for payment, though increasingly they stopped agitating for APRA to be declared illegal and concentrated on highlighting the
perceived unreasonableness of performance fees. As the war over fees dragged on, APRA’s right to enforce the performing right became more accepted and the organisation continued doggedly to pursue claims for payment. It won copyright infringement suits against councils that allowed unlicensed performances of music in public halls, and in March 1929 secured, in a test case against Radio 3DB in Sydney, an injunction restraining the unlicensed broadcasting of music.

Politicians continued to ask questions. The Chamber of Agricultural Societies of Queensland, lobbied by various constituent societies, protested to Colonel Donald Cameron, the MP for Brisbane, about APRA’s exactions. He, in May 1929, asked Latham if, “some relief may be possible, though perhaps it may mean amendment of the Copyright Act of 1912.” Latham responded equivocally. He pointed out APRA’s right to restrain the public performance of music, and suggested that the Government might adopt the Royal Commission on Wireless’s proposal that A Class stations pay APRA 5 per cent of annual revenue.

Latham more clearly indicated his intentions by informing APRA – in a letter requesting financial information on Cameron’s behalf – that the Government intended to give urgent attention to a bill to amend the Copyright Act. He did not disclose the contents of the bill – which contained the forerunner of the voluntary arbitration provision that would eventually be enacted in 1933 – but there is no reason to doubt the sincerity of his professed intentions.

APRA responded with alarm, and in July 1929, having received no response to a request to address Cabinet on the bill, wrote to Latham protesting a Country Party resolution “suggesting alterations to Copyright Law of a revolutionary character”. The Secretary N Edwards asked for “an official statement to be made in the House when Copyright Law is debated, to the effect that the Government has thoroughly satisfied itself on the bona fides of this Association and that in fact it establishes a very convenient situation to those who desire to perform copyright music at public entertainments.”

Latham responded bluntly that he was not prepared to undertake to make the requested statement. Instead he asked APRA to supply a schedule of public hall licence fees. Latham considered that the size of public performance fees demanded lay at the heart of users’ unhappiness with APRA. Reduce fees, he thought, and the problem of the performing right would disappear. He was only partly correct.
Fewer protests might be heard from the hall owners but the radio broadcasters and cinema exhibitors, by far APRA’s greatest sources of revenue, were quietly waiting for the opportunity to expose to a public inquiry what they considered the evil effect of APRA’s monopoly. They hoped that APRA might somehow be forced from the scene.

The opportunity, however, did not come as they hoped. In October 1929, the Government’s backbench revolted over Bruce’s attempt to dismantle the federal arbitration system, forcing a national election. 17 days before the Wall Street stockmarket collapse, Labor drove the Nationalist-Country Party coalition from office, and for two years, Latham’s copyright bill gathered dust in a drawer.

The Rome Conference 1928

Broadcasting and performance

Controversies centred on the musical performing right occupied the attention of Australian copyright policymakers from the mid 1920s until the outbreak of World War II. Though the battles over the performing right overshadowed other developments in copyright law, the period should be remembered also for the successful efforts of the broadcasting and recording industries to influence copyright policy.

In 1928, the Berne Union met in Rome to discuss amendments to the Berne Convention. A principal proposal involved recognition of the copyright author’s right to control the broadcasting of copyright works. Preparatory papers circulated by the Italian organisers of the Rome Conference left no doubt of the Union’s intentions and Australian radio broadcasters, already alarmed by APRA’s demands for performance fees, became doubly concerned that the Union’s recognition of an unqualified broadcasting right would set in stone the absolute right conferred on APRA by section 2 of the British Copyright Act.

Thus empowered, APRA could continue to demand whatever fees it wished for the broadcasting of music. Broadcasters, working with their British counterparts, set in train a resistance strategy that they hoped would result in the Berne Union accepting the principle that governments could legislate to qualify the broadcasting right. For their part, the record manufacturers tried, and failed, to secure international recognition of a manufacturers’ performing right in records. But they
did not give up and in the 1930s the common law (in Britain) recognised a right that, until then, policy makers devoutly disclaimed.

Official preparation for the Rome Conference began in earnest in the middle of 1927. In May, the Commonwealth Attorney General’s Department sent letters to main protagonists in the performing right saga advising that Professor William Harrison Moore would represent Australia, and welcoming “any practical suggestions which may assist the Conference in its task”. The next month, replying to a politician’s letter of complaint about APRA, Latham explained that his attention was fixed on international matters: “I am engaged,” he wrote, “upon this subject and other aspects of the Copyright Law in connection with the agenda of the [Rome] Conference.”

**Role of Australia and New Zealand**

The Rome Conference, held at the Palazzo Corsini, opened on 7 May 1928 and continued until 2 June. Delegates from 69 countries took part in the proceedings, 39 of which were members the Berne Union and 39 non-members. In the months preceding the Conference, the Italian delegates to the Conference, and the Berne Secretariat distributed to Union members proposals for amendment of the Convention.

Subcommittees discussed the proposals but the member delegates sitting in whole committee performed most of the work of the Conference. A Commission de Rédaction (drafting committee) performed the tasks of drafting and revision leading to the publication of the summary of proceedings, the *Rapport Général*. From the start, Australia and New Zealand played a vital role in proceedings, pressing the reluctant civil law nations to agree to allowing Union members to place restrictions on the broadcasting right. The civil law nations led by France, the supreme advocate of untrammelled authors’ rights, no doubt looked askance at the antipodean upstarts. New Zealand became a member of the Berne Union¹⁰ in 1927 and Australia in April 1928.

Although independent members, they aligned themselves closely with the British, Canadian and Indian delegations, the five working together as a bloc. According to Moore’s report to Parliament, the group’s “discussions were invaluable to the delegates themselves, and in my

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¹⁰ Commonly referred to in the official literature of the day as the International Copyright Union.
opinion very materially facilitated the work of the Conference.” 11 The delegates, bound by the Convention’s proviso that members could alter its provisions only by unanimous consent, displayed what Moore called a “certain spirit of accommodation”, trying hard for compromise whenever they reached impasse.

The Conference’s final Rapport Général listed seven text amendments, the most important and controversial of which protected moral rights and recognised the author’s right to authorise the radio broadcasting of a work, subject to the power of national legislatures to control the exercise of the right. The British bloc, and especially Australia and New Zealand, assisted by Norway, played a leading role in the debates over both categories of rights. The “British delegations”, as Moore called them, opposed the proposed moral rights amendment before accepting a revised version.

They played the primary role, amidst furious opposition led by the French delegates, in securing agreement to a proviso that allowed nations to limit the absolute right of authors to control the broadcasting of works. In the subcommittee on mechanical reproduction rights, the British bloc also raised the possibility of recognising either a mechanical performing right, or, to protect record purchasers, some limitation on the author’s performing right. The proposals aimed to ensure that record companies could not be forced to pay performance fees. For most delegates, who came to Rome expecting to participate in the elaboration of authors’ rights, the idea of recognising mechanical rights proved too much.

But the attitude of the “British delegations” is revealing. For them, it seemed, the interests of industries mattered as much as those of authors, and they seemed also to believe that the law must pragmatically reflect the bargains struck by opposed interest groups and their mediators – politicians. The French, peddling the impossible idea of a copyright system that allowed authors to absolutely control the production of copyright material, were horrified.

**The antipodean consensus**

The British attitude is more accurately described as the antipodean consensus. Months before the Rome Conference began, Moore and his New Zealand counterpart, the King’s Counsel, Samuel George

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Raymond, resolved to make sure that delegates heard in full the concerns of radio broadcasters and gramophone companies. They listened openly to the views expressed by the industries. On two consecutive days in Berne in October 1927, they met representatives of the Committee of the Mechanical Music Industry (UK) and the Columbia Gramophone Company.

Recently appointed as Australia’s delegate to the League of Nations, a position he held till 1930, Moore provided the Government with a clear account of the meeting and assured the industry representatives that he would give “careful consideration” to their views. The gramophone company representatives asked Moore and Raymond to support three principles: a universal statutory recording licence, compulsory registration of full details of a recording, and a public performance right in records.12

Moore politely warned the gramophone company representatives that most of his colleagues at the Rome Conference were likely to greet each of the industry’s proposals with disgust. He followed the arguments for a mechanical performing right with interest, and discovered that the gramophone industry did not intend to use the right to claim revenue. According to Wood and Shields, the industry’s envoys, record companies wanted to protect the purchasers of their recordings from claims for payment for exercising the author’s performing right.

In their view, a mechanical performing right neutralised the author’s performing right, preventing copyright owners from demanding that record companies pay performance fees for each record produced. Moore reported to the Government that he saw at once that the gramophone companies’ proposal would be rejected. He suggested to Woods and Shield that they forget about a mechanical performing right, and instead let him ask the Union for “a provision that every record should carry the right of public performance without fee.”

Woods and Shields readily agreed. In the end, Moore does not seem to have made his request. The “British delegation” asked Rome Conference delegates to consider an unqualified mechanical performing right, but no proposals benefitting the gramophone industry met with favour at the Conference. Even so, a careful observer might have

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12 Moore stated that the standard text Copinger on Copyright considered that the copyright of the first maker of a recording (i.e. the person authorised by the author to make a recording) included a public performance right.
detected a disturbance in the orderly process stage-managed by Italy, the host, and France, the champion of authors’ rights.

Subterranean rumblings were shaking the seemingly secure foundations on which the Union built the edifice of authors’ rights. Before the delegates left Rome, the rumblings, thanks mainly to the efforts of Moore and Raymond, resulted in a minor earthquake. In succeeding years the meaning of the tumult became clearer. The proponents of authors’ rights were forced to abandon forever the conceit that authors’ rights could be advanced without reciprocal gains for industries.

**Qualification of the broadcasting right**

The earthquake involved the assertion of broadcaster prerogative. It resulted, without doubt, from the energy and determination of the antipodean delegates. Moore and Raymond were not shy about identifying their leading roles in securing the restriction sought by broadcasters. Their two Conference reports asserted that they were principally responsible for persuading delegates to eventually agree to the principle of jurisdictional limitation to the new broadcasting right.

The General Report of the Conference concurred, admitting that the second paragraph of Article 11 bis (which recognised the author’s right to control the broadcasting of works) resulted from the efforts of the antipodean nations to bring the author’s exclusive right “under public control”. As Moore pointed out in his parliamentary report, the:

*Article as it now stands in the Convention is now described in the Rapport Général as a compromise between two opposing tendencies, with which the Rapport particularly associates the French and the Australian and New Zealand delegations respectively – the one for assimilating completely the right of broadcasting to the other exclusive rights of the author; the other for bringing the right under public control in view of the social and cultural interests involved.*

Raymond, a senior government lawyer, born and educated in country Victoria, said in his report that the President referred to Australia and New Zealand in the General Report as “the chief advocates of certain views.” Raymond also noted that the “entry of the Union by Canada, Australia, and New Zealand introduced an entirely new element – an element putting forward views considered as little short of revolutionary by some older members of the Union.”

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The successful advocacy by Australia and New Zealand of a position considered hostile to the ideals of the Berne Union demonstrated the impossibility of absolute commitment to the ideology of authors’ rights. No industry, in the common law countries at least, would countenance the concentration, in the hands of authors, of unlimited powers to restrict and tax industry’s use of copyright material. Antipodean intervention raised a new possibility previously not much on the mind of Union delegates.

Perhaps, some delegates began to see, qualification of authors’ rights represented a public gain. Previously, Union ideologues, if they thought about the question at all, would have assumed that the interests of the public and authors were synonymous. How could intelligent people not recognise that limitless privileges granted to the creative interest would not bring their nation the reciprocal benefit of eternal civilisation?

The new entrants to the Union thought differently. Both Moore and Raymond, coming from countries in the midst of bruising conflicts over APRA’s claims and methods,\(^{14}\) distinguished the public interest from the author’s interest, and claimed public benefit as the principal motivation for their efforts in Rome. According to Raymond, the Union should try to, “reconcile the just claims of the owners of copyright with the public interest”. He proudly stated that, “the interests of the public – that great body of purchasers and consumers of copyright wares – were vigorously voiced by the Dominions for the first time in the history of the International Copyright Conferences.”

What is particularly interesting about the reports of Moore and Raymond is that both imply a criticism of the Berne Union made more openly in later years by others – that its elaborations in favour of authors were intellectually sterile if they did not recognise the needs of industries, and, most importantly, the public. Both boldly put forward their countries as embodiments of a newer, more vital spirit lacking in the European nations. Australia and New Zealand, they implied, were not hidebound by prejudice.

Describing the necessity for restriction on the author’s absolute control of broadcasts of works, Moore said that in Australia and New Zealand, “the operation of the performing right was evidently felt as a grievance in a marked degree … the condition of new countries gave the matter a

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\(^{14}\) As its name suggested, APRA also operated in New Zealand.
greater importance there as more deeply affecting their social life and therefore their culture and development.”

Raymond was more direct. He declared that “a remote country such as New Zealand must, if it is to keep its place in the march of civilisation, be vigilant in keeping, so far as it can, the great discoveries of the radiophonic field free from domination by commercial and financial combines and associations.” Australia and New Zealand, “representing the public interests” were “unfettered by the overemphasized traditional respect for copyright-holders’ rights, and unhampered by capitalistic interests, so powerful in the counsels of the Old World countries.”

Raymond, more squarely than Moore, characterised the author as the greatest threat to the constructive growth of radio broadcasting in Australia and New Zealand. The two countries were, he said, “combating a world-wide association, having great capital revenues, and they succeeded by asserting the principle of home rule in radiophone control, and thus stemmed the tide of copyright uniformity.” Moore made clear, however, that he acted on clear instructions from his Government. “It was plain,” he wrote in his report, “that the Convention itself could not meet the varying conditions of different countries; all that was possible was to endeavour to secure for each country the power to regulate its own conditions; and my instructions were on these lines.”

**Position of Latham**

A year before the Conference, Latham received a 28 page report from G S Brown, the Registrar of Copyrights on “Proposals to be Submitted to the Rome Conference”. In it, Brown, a partisan for authors’ rights who strongly supported APRA in its licensing campaigns, denounced the pretensions, as he saw them, of the record manufacturers and broadcasters. “In no case,” he said, “should there be any admission of the prescriptive rights of broadcasting companies to copyright property.”

The Attorney, however, made up his mind in favour of the broadcasters. Having, as senior counsel, assisted a music publisher to enforce its performing right against a radio station, it is not likely that he did so out of preference. Latham, despite his reputation for union-

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15 He added the comment that, “It was interesting to note that the countries nearest to these in feeling on the subject were countries such as Denmark and Norway, where rural interests predominate.”
bashing, favoured no-one. He grew up in a strict Methodist household and later became a strict rationalist. In political life he maintained an attitude of cold disinterestedness. Like all Australian politicians, he understood the benefits that wireless offered to a remote and sparsely habited continent. He would not permit foreigners to create a future which might allow APRA, if it chose, to bring broadcasters to their knees.

Australia’s radio industry, diverse, fractious and vociferous, like that of the United States, resented curtailment and demanded commercial freedom. Broadcasters insisted that the copyright legislation, which they thought facilitated predatory commercial conduct, must be altered. In most countries of the Union, including Britain, State control of radio services through a national broadcaster produced an atmosphere of polite conformity that encouraged policymakers to view the activities of collecting societies like APRA with a friendliness not shared by their Australian counterparts.

Latham, though frequently exasperated by the naïve importunities of APRA’s opponents – including requests for Australia to withdraw from the Berne Convention or abolish the performing right – looked coldly on APRA’s conduct. His support for Moore’s activism testified to his attitude.

The argument with France

Moore and Raymond, together with the delegates of Canada and Norway, partially supported by the British delegation, worked hard to secure agreement to their qualification to proposed Article 11 bis. They wielded a single weapon. The requirement for unanimous agreement to any alteration to the Convention meant that they could, by casting negative votes, defeat the proposal to grant the author control of broadcasting of works. The real possibility that they might do so, unless the other nations agreed to their proposals, now opened the eyes of the other Conference delegates. Awakened to the necessity for compromise, these delegates began to take the antipodeans seriously.

The older members of the Union were astonished to find themselves in a tussle over the proposed Article 11 bis and even more amazed that two neophytes – Australia had been a member of the Union for one month – could assert their position in the teeth of opposition from the traditionalists led by France. For the delegates of the two countries, the task was fraught with effort and tension. As Moore said, the
proposals to reserve to national legislatures the “power to reconcile the exercise of the author’s rights with the public interest” started “innumerable” consultations and debates and led to proliferating drafts of proposed revisions.

The “Latin countries”, according to Moore, argued that any reservation of the broadcasting right was unnecessary. They claimed that the Convention dealt with private rights and did not restrict public powers to control abuses. Those in favour of the reservation – Australia, New Zealand, Canada, Britain and Norway – would not back down. Moore knew that broadcasters in Australia refused to accept accommodation and rejected the assurances of France and others. They sent a plain message: the Convention must explicitly qualify Article 11 bis.

The civil law countries insisted on their position. A sinister precedent disturbed them. They remembered how in 1908 delegates gave way to the phonographic industry, and the soothing words of the Anglo Saxons – only to find that the licence helped the gramophone industry to grow rich while availing authors nothing. Remembering how much they regretted the compulsory licence, most delegates fell in behind the French, unwilling to accept any limitation on the author’s right to control broadcasts.

Moore and Raymond did not give up. The argument over the restriction they proposed eventually came down to how a restriction to the broadcasting right might operate in practice. Australia and New Zealand insisted that legislatures should have the power to limit rights in the “public interest” (l’interêt public) but France would not accept a qualifying phrase that, if admitted, might be used to justify harm to the author’s interest. The French delegation instead proposed the term “public order” (l’ordre public), or more accurately, perhaps, “public administration”, which Moore and his colleague rejected as too narrow.

Resolution

Delegates now considered a new proposal that linked a right to limit authors’ rights to public interest considerations. The French agreed to the addition to Article 17 – which dealt with the power of governments to control the distribution of copyright works or products – of a clause permitting legislatures to authorise the restriction of rights by “such measures as might be considered justified by public requirements”. Frustratingly, the compromise failed. The Drafting Committee would
not accept the proposal. Delegates hoping for agreement on the broadcasting right grew desperate as the Conference neared its end.

Moore and Raymond stayed steadfast in their refusal to agree to Article 11 bis unless it contained a qualifying paragraph that would allow their governments to introduce legislative controls. “Finally,” said Moore, “as the proceedings drew to a close, any hope of modifying Article 11 in the direction proposed by Australia and New Zealand had to be abandoned.” Failure of the antipodean amendment meant failure of the broadcasting article as whole, and the Italian delegation made a final attempt at compromise. To general relief, Moore and Raymond accepted their draft amendment.

The paragraph agreed Article 11 bis (2) stated:

*It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.*

Neither Moore nor Raymond viewed the final draft of Article 11 bis with much enthusiasm. Moore said it was “in a form we could accept”. In his report, Raymond declared that, “[t]his article your delegate considers satisfactory.” Nonetheless, the two men could feel satisfied. They carried out their instructions and achieved their object.

They also staved off a rumoured attempt to overturn the qualification in Article 13 that allowed legislatures to impose reservations and conditions on the author’s control of mechanical reproduction of works and the public performance of such reproductions. Removal of the reservation would mean that the compulsory licensing of sound recordings would be inconsistent with the Convention and the pair circulated a memorandum stating they would not consent to any proposal suggesting revision. No proposal came, and, having made the names of their countries unforgettable to their fellow delegates, Moore and Raymond packed their bags and left Rome.

**Moore and Raymond**

The results of the work of Moore and Raymond should not be underestimated. Without the intervention of Australia and New Zealand, assisted, according to Moore, by “other British delegations”
and “some of the Continental countries”, it is likely that Article 11 bis would have extended to the author unrestricted control over the broadcasting of works, and unleashed, at least in the Australian radio industry, an angry spirit of confrontation.

Moore put the point soberly in his report. “It seemed to me,” he wrote, “particularly at this early stage in the development of broadcasting, when its possibilities were comparatively unknown, that it would be unwise to recognize rights in so absolute a manner as to embarrass their regulation and control in the public interest.” Aged in their 60s, Moore and Raymond were determined men at the end of distinguished legal careers, one a university professor, the other a Crown prosecutor. Their maturity and calm resolution allowed them to resist and defuse the sometimes hostile entreaties of other delegates.

Without the active lobbying of Moore and Raymond, Britain would probably not have agreed to introduce the proposal to introduce a qualifying paragraph to Article 11 bis. Negotiating on behalf of the BBC, British government officials felt they could comfortably moderate the demands of the Performing Right Society, and consequently the British Government felt no discomfort in the idea of the author’s absolute right to control radio broadcasts of works.

Particular credit perhaps also belonged to Moore. Sir William Harrison Moore, an Englishman, won the Chair of Law at Melbourne University in 1892 at the age of 25. A dainty, fastidious man, he specialised in constitutional law and greatly increased the prestige of the University’s law faculty. He taught constitutional and international law to the future consecutive Chief Justices, Latham and Sir Owen Dixon, and inspired them to take a broad intellectual view of the law’s possibilities. In 1927, Latham, a friend, secured his appointment as Australia’s delegate to the League of Nations, and in the following year, Moore participated in the Rome Conference.

Punctilious, hard working, and not afraid of controversy, he proved the ideal person to carry out difficult instructions “to secure for each country the power to regulate its own conditions”. With courtesy and tact, no doubt, but also with unshakeable determination, he and Raymond engaged persistently with their dissenting colleagues. The pair walked into the whirlwind of reproach and emerged successful revolutionaries.

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16 Norway and probably Denmark.
**Key role of Australia and New Zealand**

Australia and New Zealand, responding to the unique circumstances of their radio industries, were the agents of change and limitation at the Rome Conference. Much followed from the acceptance of revised Article 11 bis. It confirmed the realisation of observers in 1908 that the proponents of authors’ rights could not hope to continue their aggrandising activities without accommodating the interests of industries. It also introduced into the discourse of international copyright law the concept of the public interest. Finally, it suggested to the industries the possibility of organising themselves to secure rights analogous to those of copyright, the neighbouring rights. Their subsequent efforts resulted in the Rome Convention of 1961.17

In Australia, government could now act on the basis of a principle previously considered doubtful but now certain – that international copyright law permitted it to introduce legislative restrictions to curb oppressive use of the performing right against radio broadcasters. The permission in Article 11 bis (2) allowed governments to become more assertive in regulating the performing right. The national legislature could now regulate the author’s exclusive right to authorise broadcasts, provided it did not prejudice the author’s right to obtain *equitable remuneration*.

The new formula, however, threw up new difficulties. The difficulties encountered in reaching agreement on performing right fees led the Government, in 1932, to establish the Royal Commission on Performing Rights. They also foreshadowed future difficulties in determining the meaning of the phrase “equitable remuneration”. As instructed, Raymond supplied in his report to the New Zealand Parliament suggestions for legislation to regulate the exercise of the performing right.18 It is not clear to what extent Raymond’s

17 The Berne Union would not accept inclusion of related or neighbouring rights, i.e., exclusive reproductive and distributive rights granted to record companies, broadcasters and performers, but the 1948 Brussels Revision Conference proposed that members study how to protect sound recordings. The result was the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations established in 1961 – the Rome Convention.

18 In 1926, APRA claimed 10 per cent of the revenue of the Radio Broadcasting Company of New Zealand, which controlled the principal radio stations in the country. After the Government threatened legislative action to cap claims, APRA reduced its demand to 6 per cent. In 1927, further difficulties arose and RBC asked
recommendations encouraged the Australian Government in establishing the Royal Commission on Performing Rights. The Commission itself, however, paid close attention to his proposals, citing them in full in its Report.

In the relevant part, Raymond argued that copyright legislation should be amended to resolve difficulties created by the performance right (the law, he said, “needs alteration to meet present-day conditions”), a system of compulsory licensing for broadcasting should be introduced (“to afford protection against overcharge and other abuses”), a “competent authority to deal with compensation in default of agreement” should be appointed, and allowance should be made for the requirements of educational broadcasting.

The Royal Commission evidently agreed with at least one proposal, and recommended that the Government establish a tribunal to determine disputes relating to the public performance of musical works by broadcasting. The references in the Commission’s report to Raymond’s report, and Moore’s, were fitting. Without their work at the Rome Conference, it is possible that the Royal Commission would not have recommended the creation of a tribunal – a measure bitterly opposed by the suppliers of commercial music, and welcomed by users.

the Government to legislate. After receiving Raymond’s report, the Government passed an Act in 1928 that provided that between (the retrospective date) October 1927 and August 1929, unlicensed broadcasting of music did not infringe copyright. Under the Act, the Government deducted 7.5 per cent of revenue received from listeners’ licence fees during the period, and held the amount in trust for payment to validly claiming copyright owners. The legislation lapsed in 1929. The Government awarded the whole of the money to APRA, the sole claimant.