Chapter 6 – The radio war and a new performing right

Two performing rights

A fresh start

In December 1931, in the midst of the Great Depression, the new United Australia Party, combining the Nationalist Party and Labor Party defectors, swept the Labor Government from office. Under Joe Lyons, the UAP attacked multiplying economic problems with the energy and will long sapped from its demoralised predecessor. John Latham, now also Deputy Prime Minister, returned to his old office of Attorney General in January 1932, and he reviewed afresh the old question of the performing right. He also began consulting with his colleague James Fenton, the Postmaster General, who was responsible for broadcasting policy. The two men soon discovered that they faced a host of difficulties, none of which their predecessors seemed in any way to have solved.

Elected just before the Wall Street crash in 1929, the Labor Government battled unavailingly with the problems of deflation, unemployment and economic misery for over two years. In that time, the question of the performing right shrank in importance. Against the sepia and grey background of national life, the ardour for fighting over public performance fees cooled. With the start of UAP rule in 1932, the picture changed and the copyright scene again throbbed with energy. The Depression was far from over but the defeat of the Labor Government, irreversibly tainted by incumbency in a time of disaster, offered new prospects for business interests clamouring for any sign of hope.

For those involved in copyright policy, the new mood promised a deliverance of sorts, enabling the Government and various interests groups to make a fresh assessment of long-standing problems. William Harrison Moore’s success in persuading the Berne Union to qualify

---

1 He was also Minister for External Affairs and Minister for Industry.
Article 11 *bis* at the Rome Conference pointed to the Government’s main preoccupation. For Latham and Fenton, broadcasting regulation mattered far more than complaints about licensing fees from local councils, cinema owners and the proprietors of entertainment venues. Both were determined to institute some sort of machinery to prevent APRA from wrecking the fragile economies of radio businesses still unable to turn profits. Both were also determined that APRA would not grab an undue portion of the listeners’ fees that subsidised the ABC.

**The radio ban**

At the same time, they were embroiled in debate over a matter unconnected with APRA, the so-called “radio ban”, the boycott against radio stations begun by record manufacturers in late 1931. The radio ban, instituted because record companies viewed radio as a commercial succubus, draining from listeners the vital desire to purchase records, created a new, unforeseen problem. It threatened to permanently cut the supply of new records to broadcasters and destroy the industry more swiftly and thoroughly than any action APRA was likely to take. In the end, it slowly petered out, its legitimacy questioned by 1933 report of the Royal Commission on Performing Rights. But it created a lasting memento – the mechanical performing right, which the record companies first insisted on to justify the ban, and then continued to assert long after the ban ended.

The radio ban, and the problem of thorny relations between one industry regulated by Latham’s department (gramophone) and another by Fenton’s department (broadcasting) were festering sores that Latham never fully salved. The record companies’ intransigence did not diminish during his term of office but the Attorney wasted not a second on the opinions of company executives. Considering himself, possibly correctly, the intellectual superior of everyone he met, he did not look for crumbs of mental comfort.

Instead, he plunged boldly and assertively into the question of APRA’s relations with music users. If he regarded the claims of the recording industry with indifference, he approached the APRA question with obvious confidence. He knew the history of APRA’s conflicts and already had definite views about the appropriate policy for resolving disputes over the performing right.
Groping towards a solution

In the early 1930s, APRA could look back on five years of success collecting performance fees. Revenues, derived mainly from payments received from the A Class radio stations, swelled its coffers. Though resenting its methods, few of its opponents denied the right of authors to receive payment for the public performance of music. Critics pointed out that APRA behaved like the monopolist it was, forcing the commercial users of music to pay exorbitant licence fees for playing music in public. APRA replied that, as a non-profit association acting for a large and diverse population of authors and publishers, its motives were not mercenary.

To the new Government, APRA sometimes seemed like a troublesome predator, but one that not could be culled. Something, however, had to be done. In a half decade, APRA’s energy and combativeness stirred the anger of public organisations and buoyant new industries across Australia. For five years, they vented their displeasure on government officials. Politicians were perplexed, though by the time he first left office in 1929, Latham had formed a reasonably clear view of how to tackle the APRA question.

The Government never doubted that the law permitted APRA to collect public performance fees. It evinced no interest in examining the merits of the performing right, or whether it properly extended to music broadcasts or music played in movies – questions asked by various of APRA’s opponents. On the other hand, Latham and his colleagues sympathised with commercial users who faced an unwelcome choice: pay whatever fees APRA demanded or stop playing music.

Little by little, the politicians and bureaucrats groped their way to a solution. They started from the premise that public performances of music must be authorised and paid for. They also saw clearly that terms of licensing could not be left to the parties to determine. APRA, a virtual monopolist backed by the law, had too much negotiating power. Thus the problem they tried to solve was how to ameliorate the bargaining position of the commercial users of music.

The Government’s hands were tied. Legislation and common law confirmed the right of copyright owners to demand fees for the public performance of music. Unless the Government attacked APRA on the grounds that authors must negotiate performance fees individually, not collectively through an agent like APRA, it could not force an end
to the APRA wars. Only by oblique means – Latham favoured compulsory arbitration – could it persuade the various parties to direct the energies wasted on conflict into constructive channels of negotiation.

In 1932, developments in other common law countries were suggesting ways to resolve performing right disputes and policymakers now looked overseas for solutions. In 1928, Samuel Raymond, New Zealand’s delegate to the Rome Conference, proposed, in his report to the New Zealand Parliament, regulation through compulsory licensing and determination of royalties by a “competent authority”. In 1929, a Select Committee of the House of Commons, reviewing the Musical Copyright Bill, proposed that the Government legislate to provide for compulsory arbitration of licensing disputes. Then in 1931, Canada legislated to allow the Government to prescribe licence fees.

Aware of overseas development and the complexities involved in achieving harmony in commercial relations between the suppliers and users of commercial music, the Government naturally trod carefully. It pragmatically decided to let an independent inquiry look thoroughly into all the issues and make recommendations for legislative reform.

The Royal Commission on Performing Rights began hearings and 1932 and the Royal Commissioner, Justice Owen, presented his findings in 1933. He described the unregulated battleground of the performing rights, the cold resolution of the suppliers of commercial music, and the fear and disarray of commercial users. Marshalling their forces under the banners of the musical and mechanical performing rights, APRA and the gramophone companies intended to flatten their opponents if needs be.

Owen contemplated with horror the prospect of a commercial scene littered with the corpses of their victims. He pinned his hopes on what he called the “sweet reasonableness” of the warring parties and proposed compulsory arbitration as a device to create peace between them.

**International developments – Britain and Canada**

**Britain**

The unhappiness of music users at the activities of the Performing Right Society in Britain caused the British Government in 1929 to
introduce the *Musical Copyright Bill*, which introduced compulsory licensing of performing rights, and established a fixed maximum fee payable to the copyright owner. It also required the owner to print, on every copy of a work, a reservation of the performing right.

The House of Commons referred the bill to a select committee which heard evidence from the Board of Trade, the Performing Right Society (England) and associations of music users. The committee’s Special Report summarised the complaints of music users. They said that the PRS did not publish lists of works it claimed to control, with the result that the user could not ascertain whether or not items of licensed music fell within the PRS’s claimed repertoire. Additionally, the society made arbitrary increases in licence fees and users had no means of protecting themselves against further increases or of ensuring any reasonable stability in charges.

The special report noted that compulsory notice of reservation would be likely to conflict with Britain’s obligations under the Berne Convention and that the PRS had offered to circulate to licensees a complete list of all its publisher members. In the committee’s view, this offer “goes a considerable way to meet the complaints made.” The committee described the PRS as a “super-monopoly” controlling 90 per cent or more of the performing rights in copyright music. Entertainment providers were “compelled” to pay the charges made by the Society. Music users were justified in their fear that the PRS would continue to demand higher and higher fees.

For this reason, the report found, the Government should legislate to provide that if the society refused to grant licences on reasonable terms, music users were entitled to appeal “to arbitration or to some other tribunal” for relief. The select committee then reported the bill without amendment. The Government, however, chose not to proceed with the bill. It no doubt came under great pressure from the PRS, by then an extremely powerful force in British economic life, but the equivocations of bureaucrats proved the decisive factor.

During the hearings, the PRS, the Board of Trade and the Foreign Office claimed that legislation restricting the performing rights of copyright owners could conflict with Britain’s treaty obligations under the Berne Convention. At the very least, said some witnesses, Britain might have to make a reservation or declaration in order to ratify the amending Rome Copyright Convention of 1928.
Placing weight on the evidence of government officials, the select committee recommended that the Board of Trade should frame a policy for adoption at the Brussels amending Conference scheduled for 1935. That policy would allow Britain unequivocally to “deal with any abuse of monopoly rights such as that to which reference has been made”. Rather than proceed with a controversial measure, the Government decided to defer further legislative action until the next meeting of the Berne Union.

**Canada**

In Canada, the Government acted more boldly. The Canadian *Copyright Amendment Act*, assented to on 11 June 1931, required musical performing right societies to file with the Copyright Office lists of all works to which a society claimed title and a statement of all licence fees imposed by the society from time to time. A society could not collect licence fees or charges for any work that was not included in the list filed with the Copyright Office.

The legislation provided that the Minister, after investigation and report by a Commissioner, could revise or otherwise prescribe licence fees, if satisfied that the society unduly withheld the grant of licences, collected excessive fees or otherwise acted in a manner detrimental to the public interest. Within months of the Act’s commencement, some Canadian broadcasting stations complained to the Minister about charges levied by the Canadian Performing Right Society. In 1932, he referred the complaint to a Commissioner, Mr Justice Ewing, for investigation and report.

**Record Manufacturers and the mechanical performing right**

*The radio ban*

In the 1920s, the broadcasting industry stood out like a giant among the entities fighting APRA. In the 1930s, another colossus joined the battlefield of performing rights though not in opposition to APRA. This was the Australian record manufacturing industry, which in 1931 declared commercial war on radio stations, banning them from purchasing and playing popular recordings.
The record manufacturers – the gramophone companies – attacked the radio stations because, they said, continuous broadcasting catastrophically undermined record sales. Asked by what right they could ban record sales, they made a radical claim much discussed during the proceedings of the Royal Commission on Performing Rights. They asserted that patent and copyright law conferred on them a performing right in records and insisted that broadcasters were liable to pay them public performance fees in addition to those paid to APRA.

The Royal Commissioner declared that he was “by no means satisfied” that a performing right in records could be inferred from either patents or copyright law. His report expressed strong scepticism about the validity of the record companies’ claim and the merits of arguments advanced in support of the claim. The report alluded to the fact that Britain’s High Court was shortly to determine a claim for the mechanical performing right, but it noted that a common law ruling could not considered definitive. Only Parliament, by legislation, could call into existence the claimed right.

Legislation did come, in Britain in 1956 and Australia in 1968. The common law presaged, or perhaps determined, the statutory law. In 1934, the British High Court found that the copyright in a record included a right to control the public performance of the record. In the early 1930s, however, few would have predicted this result. When Latham again took the reins of copyright policy in 1932, the claim for a mechanical performing seemed nothing more than a bold gambit to bolster a destructive stratagem.

For unquestionably, as became plain during the Royal Commission hearings, the gramophone companies were bent on using every resource to crush radio broadcasting. As dramatic and futile as such a scheme might seem to the modern eye, the gramophone industry, obsessively preoccupied with the diminution of record sales, saw only logic in its plan of annihilation.

**The decline in record sales**

The gramophone companies felt animus towards the radio stations from the early days of broadcasting. The three principal manufacturers, the Gramophone Company Limited, the Parlophone Company Limited

---

and Columbia Gramophone Company (Australia) Limited sustained heavy losses from 1926 until the opening the Royal Commission in 1932. In 1931, the Gramophone Company and Columbia Gramophone Company (including its subsidiary the Parlophone Company) merged in the United Kingdom to form Electric and Musical Industries Limited (EMI), creating an instant profit powerhouse. But consolidation did not help EMI’s Australian offshoots, the “associated record manufacturers”. Their managers continued to complain of revenue lost to broadcasting.

According to the associated manufacturers, disastrous profit results in Australia could be attributed to one cause: broadcasters. Radio stations playing hit records morning and night were discouraging listeners from buying gramophones and gramophone records. The gramophone industry felt the problem of lost sales most acutely in Australia, said the manufacturers, because of mixed broadcasting. The new commercial broadcasters, playing the latest tunes to attract market share, drew an ever-growing audience of listeners who now declined to buy the latest records.

Commercial failure in Australia galled EMI and its subsidiaries. Between 1911 and 1927, the profits of the Gramophone Company in Britain rose nearly fivefold and in the 1920s dividend returns increased fourfold to the amazing figure of 60 per cent.³ The Columbia Gramophone Company regularly declared exceptional annual profit increases⁴ and paid dividends of 45 per cent in 1929.⁵

In 1932, EMI declared issued capital of £6,265,749 but it could take no pleasure in the financial performance of its Australian offshoots. Capital and labour costs alone were cause for concern. In 1925, the Gramophone Company opened a factory in Erskineville in Sydney, and in 1926 the Columbia Gramophone Company one in Homebush, and in the years before the Royal Commission, the associated manufacturers employed over 500 people.⁶

³ Profits rose to the majestic figure of £760,000. Dividends in 1923 offered a 15 per cent return. In 1929, the return rose to 60 per cent.
⁴ For example, in 1923–1926, profits increased from £56,000 to £150,000.
⁵ The beginning of the Great Depression did not interrupt the march of profits. Dividends in 1930 were 40 per cent.
⁶ The factories were built at a combined cost of £300,000. In the period 1925 and 1931, the associated manufacturers employed up to 550 people and paid about £500,000 in wages and salaries.
The associated manufacturers could validly argue that competition did not explain declining sales. In 1932, the only local record companies competing to sell records in the Australian market were Moulded Products Limited of Melbourne (a subsidiary of Decca Records), the Klippel Company of Sydney and the Brunswick Company. The first manufactured records as a secondary part of its business and in 1933 lost its factory to fire, the second went into liquidation and the third ceased production.

The complaint against broadcasters seemed persuasive. Not only did the radio stations seem to satisfy popular demand for music, they also broadcast so often that listeners, so the record companies said, grew sick of hearing the same song and would not purchase records. Although the associated manufacturers ruled the field, they could point, as proof of their argument, to an 80 per cent fall in sales between 1927 and 1931.

**EMI and the war against radio**

EMI would not countenance such a decline in sales. Something had to be done, even allowing for the inevitably negative effect of the economic depression on record purchases. The merger of the Gramophone Company and Columbia Gramophone took place in March 1931, and, over the next few months, senior management worked out a course of action for the associated manufacturers in Australia. On 17 November 1931, the record companies issued to all broadcasting stations in Australia and New Zealand a written notice forbidding the use of their records for broadcasting.

The ban came as a surprise, causing the radio stations immediate difficulty. They depended on supplies of records from the record companies and now found themselves deprived of the latest record releases, the lifeblood of much popular broadcasting by the commercial stations. The record companies manufactured under letters patent held by Columbia Gramophone (Australia) Limited granted and relied on a provision in the *Patents Act 1903* that allowed them to impose conditions on the use of products manufactured under patent.

When the radio ban came into effect in November 1931, the broadcasters immediately entered into negotiations. The B Class commercial stations, the majority of which operated on restricted budgets and could not hope to attract large audiences, and therefore advertisers, without access to new music releases, were especially
alarmed. They were now forced to play music from their back-catalogues and to rely on importing records from the United States and Britain to obtain access to the latest releases. Importing music, however, did not solve their difficulties, since duties made imports prohibitively expensive, and the manufacturers used the import provisions of the Copyright Act to prevent radio stations from importing records manufactured by EMI in Britain.

In September 1932, the manufacturers reached an agreement with the Australian Broadcasting Commission that permitted the ABC to broadcast records for six months, subject to requirements about playtime frequency and the announcing of record titles and other details. Negotiations with the commercial stations, represented by the Australian Federation of Broadcasting Stations, were much more difficult, and conducted, as the Royal Commission reported, “in a far from friendly spirit”.

The record companies blamed the B Class stations for their predicament, and though both parties accepted a draft agreement in August 1932, in October, the associated manufacturers withdrew from negotiations. They declared themselves willing to enter into agreements with certain country stations but refused to reach any settlement with the metropolitan broadcasters.

The record companies’ demands were onerous. They required the B Class stations to discontinue request items, announce the maker of the record and full particulars of the record, state that copyright was reserved, broadcast only records of the associated manufacturers, limit the number of times a record was broadcast, limit broadcasts of records issued prior to the ban to once a week, and pay a broadcast fee.

Detailed announcements about the provenance and legal status of records could be expected to annoy most music listeners, and whether the details would encourage those listeners to purchase records was doubtful. However, the commercial stations were desperate for new music, and as the Royal Commission reported, the Federation of

---

7 The parties continued to observe the terms of the agreement, even after it formally lapsed.
8 The Royal Commission Report noted, mysteriously, that after a “representative of the Manufacturers left Australia,” relations between the parties “became more cordial”. Transcripts of Commission proceedings disclose the identity of the offending person – John Ritchie, General Manager of the Gramophone Company in Australia. EMI may have instructed him to implement the radio ban aggressively and recalled him when his presence became counterproductive.
Broadcasting Stations, “showed a willingness to co-operate as far as possible with the Manufacturers in maintaining the success of the latter’s trade.” They were willing to accept most of the terms laid down by record companies. But they could not accept the broadcast fee, or, more specifically, the performing right fee.

**The claim for mechanical performing right**

The record companies had two motives for asserting the mechanical performing right. First, they needed to establish a legal basis for imposing the broadcasting ban. As legal justification, they claimed a right under the patents legislation to impose any condition on the use of their records. This right, they said, allowed them to ban broadcasters from using their records and could encompass a performing right. More specifically, they argued, section 19 of the British Copyright Act (incorporated in the Australian legislation), supplied two performing rights, one in the author or composer or their assignee, and one in the record manufacturer. The manufacturer’s copyright in a record included the performing right in the record.

The associated manufacturers also claimed the performing right for pecuniary reasons. They saw the great revenues collected by the Performing Right Society in the United Kingdom, and APRA in Australia and New Zealand, and realised that fees levied on performances of a recording could possibly deliver similar returns. Thus a mercenary motivation soon reinforced the primary reason for the radio ban. The gramophone companies knew that the imposition of a performance fee would not help them to solve the problem of declining record sales. But the idea of reversing revenue deficits by taxing broadcasters perhaps seemed irresistible.

The claim for performance fees relied on assumptions radically different from those previously espoused by the recording industry. When William Harrison Moore met representatives of British gramophone companies prior to the Rome Conference, they agreed with him that the existence of a mechanical performing right could not be adduced from the language of section 19. They were mainly interested in claiming the right, they admitted, to ensure that the owner of musical copyright could not levy a performance fee on the individual purchaser of a record.

In 1928, the recording industry seemed far from definite about how it would enforce a performing right in records. By 1932, doubts had
disappeared. The proposed right promised lucrative collections from broadcasters into the indefinite future, and, as the Royal Commission discovered, the associated record manufacturers were not going to lightly surrender the prospect of securing a legislative amendment that promised to deliver possibly vast secondary income.

The quest for legal recognition of a mechanical performing right, seemingly masterminded at EMI’s headquarters in London, horrified commercial broadcasters. Their economic position remained parlous throughout the 1930s. Few could comfortably budget to pay performing right fees to both APRA and the associated manufacturers. None could feel confident that either APRA or the record companies would agree to discounts that took account of the straitened times. When the Royal Commission opened its investigation of the performing right in September 1932, the radio stations viewed the approaching proceedings with alarm.

**APRA’s offer to the ABC**

The Australian Broadcasting Commission took control of the National Broadcasting, or A Class, Stations on 1 July 1932. The object of the legislation establishing the ABC was to establish the conditions for national broadcasting for the public benefit. From the start of its operations, the ABC relied, as APRA knew, on access to the Association’s repertoire. In June 1932, APRA offered the national broadcaster a licence at rates much higher than those paid by the Australian Broadcasting Company, the previous controller of the A Class stations. The collecting society flatly refused the ABC’s counter-offer of 5 per cent of annual revenue, and negotiations ground to a halt. The ABC could not afford to accept APRA’s offer – if the APRA formula were applied, the ABC would be liable to pay public performance fees totalling about 13 per cent of annual revenue.

A comparison with the fees paid to the PRS by the BBC suggests that mutterings within the ABC of profiteering were justified. The BBC paid (on a basis of over 4.5 million licences) about £63,500 per annum for

---

9 The *Australian Broadcasting Commission Act 1932*.
10 The Australian Broadcasting Company paid APRA fees calculated as a proportion of monies received for listeners’ licences and equalling the equivalent of 2s per item of music performed up to 250,000 listeners’ licences, 1s 6d on the next 50,000 and 1s per item on all listeners’ licences over 300,000. APRA proposed to charge the new ABC 2s 4.5d per item per main station attracting up to 350,000 licensed listeners, and ¾d per item for each additional 10,000 listeners.
the whole repertoire of the Performing Right Society. If the BBC paid the rates proposed by APRA, it would remit an annual licence fee of £169,877. According to data collected by the Royal Commission on Performing Rights, APRA’s proposed formula, applied in other countries, would have increased annual licence fees paid in Germany by over 250 per cent, in Austria by nearly 300 per cent, in Poland by about 250 per cent and in the United States by 400 per cent.11

In support of its fees proposal, the ABC pointed out that no other country paid performance fees on a per item basis. It also objected that no other country had adopted a system of paying fees that increased as the number of listeners’ licences increased. But APRA refused to budge and when the Royal Commissioned opened in September 1932, neither side seemed ready to consider compromise. Eventually, in 1934, they agreed a formula much closer to the ABC’s proposal. APRA only changed its approach after the report of the Royal Commission on Performing Rights criticised it for greed.

**APRA and the commercial broadcasters**

In 1930, the B Class stations formed the Australian Federation of Broadcasting Stations to advocate public policy on their behalf and enable them to better deal with the demands of APRA. At this stage, APRA had successfully sued one Victorian station for broadcasting copyright music without authorisation and obtained injunctions against stations in Adelaide and Sydney preventing broadcasts of music. It had commenced or threatened litigation against various other broadcasters.

Up to the end of 1930, the commercial broadcasters collectively paid APRA annual public performance licence fees totalling over £3000. At the beginning of 1931, the Association increased its charges to £8000 per annum, and then, after negotiations with AFBS failed, reduced the annual charge to £6642 (exactly double the amount previously paid by the stations). Stations were charged at rates varying from ½d to 3d per item of music played, depending on the station’s audience size. APRA determined the total number of items played by reference to regular returns filed by the stations.

---

11 The Union Internationale de Radio Diffusion, Geneva, in the 1930s the leading authority on international broadcasting, supplied the data used by the Royal Commission to make these projections.
The position remained unchanged during the Royal Commission hearings, when B Class stations advised the Royal Commissioner they could not afford any increase to rates. In 1932, the most successful station earned a profit of £3229, while of the 30 stations, 16 incurred losses. Radio broadcasting involved considerable continuing investment in new equipment (and substantial depreciation losses) and heavy expenses, including the non-recoverable cost of advertising. Radio advertising was yet to deliver the financial bonanza that accrued in later years and accordingly broadcasters struggled for survival.

APRA argued that profit and loss statements gave a misleading picture of the stations’ financial strength. Newspapers held interests in four stations, music, radio and other business enterprises in another seven, religious bodies in five, and political or semi-political organisations in another three. If stations could not meet their financial obligations, APRA suggested, their owners could certainly afford to pay the public performance fees. The radio stations demurred. APRA, they said, dealt with them as independent enterprises, and was not entitled to rely on assumptions about their shareholders’ finances when proposing fees.

Significantly, in negotiations, APRA accepted arguments it would not have countenanced in discussions with the ABC. The commercial stations adamantly refused to pay fees calculated as a percentage of revenue. They argued that advertising expenses cancelled out a large portion of advertising revenue and they could not possibly afford to pay an arbitrary sum drawn from gross revenue. Charges made on a per item basis were essential if they were to manage budgets to pay the performance fee.

APRA and the commercial broadcasters were willing in one respect to imitate the ABC payment model. The ABC paid fees to APRA out of public funds received from payments for listeners’ licences. APRA and AFBS, unable to reach agreement on fees in 1932, presented the Royal Commission on Performing Rights with three proposals for resolving their impasse, each involving public subsidy.

The first was for the ABC to receive a larger allocation of fund from revenue received from listeners’ licence fees. The ABC could then pay a higher rate to APRA, allowing the Association to accept a much lower rate from the commercial stations. The second required the

12 Some of the profitable stations assisted the smaller stations to pay performance fees.
Government to allocate a portion of listeners’ fee revenue to the commercial stations to enable them to pay a higher rate to APRA. The third involved the Government advancing funds to the B Class stations to pay APRA charges, and the stations then adding the sum advanced to payments to government of each station’s licence fees.

The Royal Commission and the Government rejected all three proposals out of hand.

**Cinema exhibitors and municipal associations**

**Exhibitors**

For APRA, the cinemas were a key licensing target. By the beginning of the 1930s, they supplied APRA with the second highest portion of its annual takings, although the amount they paid still amounted to less than half that paid by A Class radio stations.13 When Latham returned to the copyright scene, he found that internal division complicated the negotiation position of cinema owners. Many detested the strategy of their national association which, after accepting an unpopular licensing agreement in 1926, aroused members’ fury by renewing the accord in 1928 on terms considered grossly unfair.

The new agreement renewed fee formulas that applied to the performance of orchestral music even though orchestras were disappearing from movie theatres.14 Additionally, cinema owners groaned under the burden meeting APRA’s licensing requirements. By 1932, they were compelled to supply regular lists of music performed in the soundtracks of movies, with details of titles authors and composers.15 They also paid film distributors a fee for incorporating sound recordings in films, a quasi public performance levy invented by the distributors.

---

13 In 1926, the Federated Picture Showmen’s Association agreed fees payable to APRA for the performance of music at movies shows. The rates agreed were at once attacked. Many of the Association’s members bitterly resented the terms of agreement and refused to be bound by it. The member associations of half the States of Australia supported them by criticising the national organisation for the agreement reached.

14 Made redundant by the advent of the “talkies” – films with soundtracks.

15 Exhibitors did not know, until they received films for exhibition, what portions of music were incorporated in films and they encountered much difficulty in supplying the details required by APRA.
In 1932, distressed by the exactions of APRA and distributors, and burdensome reporting requirements, cinema exhibitors united in asking the Government for radical relief – abolition of the performing right, at least insofar as it applied to them. They asked for what the Government could not give but the Royal Commissioner sympathised with them over their “great” difficulties. He considered that the situation of cinema owners provided an unambiguous example of how the performing right could be exercised oppressively. Only an independent arbitral panel, empowered to determine rates could, he declared, fix the problems faced by exhibitors.16

Local government

By 1932, not all of APRA’s main licensing targets were paying public performance fees. Municipal associations, in particular, adopted tactics opposite to those embraced by the cinema exhibitors’ national association. They refused to reach accords with APRA because they would not accept that APRA could legitimately performing right fees. They questioned how a commercial right could apply to public, or non-profit, activities.

Thus, when Latham resumed his duties as Attorney General, he found that APRA’s longest running in-principle dispute – that with Australia’s local government organisations (and other owners of entertainment venues) – remained unresolved. The municipal associations, especially the Local Government Association of NSW, remained the most vociferous and outspoken of APRA’s opponents, a fly in the ointment in the 1930s.

For APRA, their intransigence proved not only annoying but economically vexatious. Although hall owners’ contributions to APRA’s coffers were dwarfed by those of the national radio stations and the cinema owners, APRA knew that if they could not be made to pay fees, the size of their contribution would greatly augment revenue.

16 The Royal Commission report listed the problems of exhibitors: they found great difficulty in cataloguing items of music played in films, they had no readily available means of determining the copyright status of those items, and they could neither refuse to pay performance fees nor ascertain the criteria on which they were based. The solution, said the report, was a tribunal to determine licence fees and the terms of use. APRA should be compelled to file lists of charges which could be reviewed, when necessary, by the Minister.
Local government and the various hall owners proclaimed to Latham, and then the Royal Commission, that the use of their halls encouraged the public consumption of gramophone records and sheet music. Very often, they did not charge for the use of, or access to, a hall. Non-commercial venues should pay no more than nominal fees. The hall owners fought determinedly. By 1933, only 20 municipal and shire halls throughout Australia were licensed by APRA to play music.

**Decision to hold Royal Commission**

**Political considerations**

When John Latham resumed his duties as the nation’s first law officer, he hoped to develop his interest in international relations. Minister also for External Affairs and Industry, his portfolio responsibilities were vast and at first he seemed likely to concentrate on questions of trade and international cooperation. In 1932, he helped to secure the agreement of Britain and Canada to the principle of imperial trade preference, and in the same year attended disarmament and reparations conferences in Switzerland. But despite his workload, and his wish to play the role of a statesman, he did not back away from the copyright question.

He could not afford to do so, for the arguments over public performance payments were hardly abated after 1925. After two years of severe economic depression, the disputing parties were grimly pessimistic. The national radio stations groaned under the burden of paying by far the highest performance fees, their commercial cousins insisted they could not afford any increase to rates, the local government associations refused to pay charges and the cinema owners claimed unfair treatment. Anger at new demands from APRA for fee increases began to harden into enmity.

Latham knew he needed to tread warily. APRA’s position was, under the copyright legislation, legally unassailable. But the absence of any legal device for limiting the fees claimed by the Association could, he knew, be a source of public resentment against the Government. Battered by the times, the Australian public was in no mood to tolerate extravagant claims for licence fees that, if paid, might compromise the economic viability of some providers of public entertainment.

Radio listeners devoted to hearing broadcast music might not forgive Latham if he allowed APRA to insist on commercial settlements that
drove some stations out of business, and interrupted the soothing rhythms of music on the airwaves. At the same time, Latham did not wish to offended APRA, or the powerful worldwide community of performing right societies. Fiercely asserting its rights, supported by an international network, and manifesting unnerving moral certitude, APRA marched confidently across the political landscape, a commercial behemoth not to be trifled with.

Its actions placed Latham in a difficult position. By far the greatest proportion of APRA’s revenue came from payments from A Class radio stations and the collecting society had already signalled its intent to substantially increase the annual fee that the new government-owned ABC would be liable to pay – out of public funds – from July 1932. In the previous year, it doubled the charges payable by the commercial broadcasters, forcing smaller stations to call on larger ones for financial assistance to pay licence fees.

Latham needed to make peace between APRA and the broadcasters, and indeed APRA and any other group of commercial music users, as soon as possible. In 1929, emboldened by Harrison Moore’s success at the Rome Conference in 1928, he seemed intent on putting forward legislation to introduce the compulsory arbitration of disputes over public performance licence fees. Then his party coalition lost office and legislative plans fell by the wayside.

**Importance of broadcasters**

In 1932, Latham had the benefit of reviewing alternative approaches to copyright reform. In the first half of 1932, he, the Postmaster General James Fenton, and their departmental officers considered options for reform. Developments in international copyright law supported an interventionist policy. The treaty amendments secured by Moore and Raymond at the Rome Conference protected the Government from the criticism that official inquiry into the performing right of itself invaded the broadcasting rights of copyright owners. The amended Berne Convention provided that copyright owners controlled the broadcasting of copyright works but the Convention also allowed for restriction of the right. It compelled governments to preserve the owner’s moral rights and the right to equitable remuneration, but otherwise permitted them to legislate to qualify the exercise of the right – so far as it affected broadcasters.
For Latham and, in particular, Fenton, the healthy development of the radio industry, and therefore the needs of radio broadcasters, were paramount concerns. In considering the way forward, they thus paid close attention to any means that would allow APRA and its opponents to agree “equitable remuneration”. At the same time, Latham hoped to broaden the scope of an inquiry into the performing right, as it affected broadcasters, to include inquiry into the grievances of all the commercial music users who continued to pepper him with their complaints. While Article 11 of the Berne Convention granted authors of musical works the right to authorise the public performance of their works, it did not specifically disallow governments from legislative – or other – intervention that affected the way in which owners determined performance fees.

As long ago as June 1927, Latham’s parliamentary colleague Henry Gregory (who wrote also to the Prime Minister, Stanley Bruce) suggested to him a Royal Commission to investigate the twin questions of the performing right and claims for licence fees by APRA. Then, early in 1932, G L Chilvers, the Secretary of the Australian Federation of Broadcasting Stations, sent letters to Canberra that again raised the question of a public inquiry. Chilvers’ description of the collapse of licensing negotiations between APRA and the Federation reinforced Latham’s long-held view that legislative action might be necessary to regulate APRA’s activities.¹⁷

**Anger in Parliament**

Political reaction to the bill establishing the Australian Broadcasting Commission hastened Government action. Fenton introduced the bill in March, and to the Government’s surprise, the legislation produced an outpouring of anger in Parliament against APRA. APRA, said MPs, was “perpetrating a big bluff on the public of Australia” and “robbing promoters of entertainments, owners of halls etc.” The bill should be amended to “protect the general public from exploitation by … commercial pirates”.

---

¹⁷ In comments made during the hearings of the Royal Commission on Performing Rights, the Royal Commissioner, Justice Owen, said that Chilvers’ letters played a significant role in persuading Latham to seek the appointment of the Royal Commission. In correspondence to the Secretary of the Commission in November 1932, Chilvers said he understood that his letters were “an important factor” in the Government’s decision to commission the investigation of performing rights.
When the ABC bill passed in May, Latham was in Geneva attending the League of Nations’ disarmament conference. During his absence, a bipartisan deputation from both Houses asked Alexander McLachlan, the Acting Attorney General, to institute a public inquiry into the performing right, particularly payments made by broadcasters to APRA. In June, on McLachlan’s recommendation, the Government promised to hold an inquiry. On his return to Canberra, Latham immediately set his department to work on the terms of reference. On 31 August 1932, he rose in the House of Representatives to announce the Royal Commission into Performing Rights. The Commissioner was to report on the operation of the performing right, rates and conditions of payment of performing right fees and methods of collecting.\(^{18}\)

Latham explained to the House that Australia’s obligation to implement and observe the provisions of the Berne Convention limited the scope of action that the Commission could propose. The owner of musical works possessed the sole right to authorise public performances of the work by live shows, radio broadcasting, film exhibitions and the playing of gramophone records. Nothing the Commission might recommend would undermine the owner’s exclusive right to authorise public performances and receive payment for the performances.

On the other hand, the Berne Convention did not prevent the Government from investigating the terms, including rates of payment, on which owners licensed users to perform copyright works in public. Latham indicated that he expected the Commission to concentrate on establishing a formula for valuing the performing right. “The Government,” he said, “considers that a composer or his assignee is entitled to a reasonable reward for his creative effort. It is difficult to state what would be a reasonable reward in varying circumstances.”

The difficult task of working out ways for determining reasonable reward now fell to an independent body. Latham breathed a sigh of relief and turned his attention to the regulation of financial relations

\(^{18}\) The original terms of reference (the terms of reference were extended in November 1932 to include inquiry into issues arising between the owners and users of records) required the Commissioner to inquire and report upon –

\(a\) any questions that have arisen or may arise between persons interested in performing rights in copyright works and persons interested or concerned in the performance of such works whether as performers or as persons authorizing or controlling the performance, or as persons on whose premises the work is performed, or otherwise; and

\(b\) the rates, methods and conditions of payment to the owners of the copyright in musical and other works by the persons aforesaid for the right to perform such works in public.
between the Commonwealth and States and crimes legislation. His ambitions already lay in the direction of the High Court bench and though his interest in copyright matters did not flag, his part in the drama of the performing right became increasingly passive.

While the broadcasters were chiefly responsible for the decision to commission an inquiry, and the other commercial users of copyright music welcomed the Government’s intervention, APRA could claim at least one declared supporter. On 1 June 1932, Melbourne’s *Age* newspaper devoted three columns to explaining why critics of APRA were mistaken. The paper censured commercial broadcasters. “Wireless” had “robbed the composer of a large source of income”. A public inquiry into the fees charged by APRA would be “enlightening” to the public, which “has no desire to enjoy the product of a man’s brain without paying for its enjoyment”.

The *Age* concluded that while “some adjustment” of APRA’s fees might be found to be necessary, “in regard to its right to charge fees on behalf of the owners of copyright there can be no question whatever in the opinion of fair-minded men.”