After the Gregory Report

The continuing battle over televised sport

After publication of the Gregory Report in 1952 until the passing of the new British Copyright Act in 1956, the question of televised sport continued to occupy the headlines and the attention of copyright policymakers. Even in 1951, the Gregory Committee could not fail to notice the overwhelming importance of sport to television programmers.

Television began infiltrating the national consciousness in the 1930s and by the early 1950s millions had seen at least one sporting broadcast. The BBC first televised Wimbledon in 1937, the FA Cup Final in 1938, and the Olympics in 1948. In the space of a week in June 1952, the BBC broadcast Wimbledon, Test cricket, golf and the Olympic trials. In 1953, the Coronation, which attracted more television watchers than radio listeners, and the Cup Final (one of the greatest in football’s history) both transfixed the nation.

The report recognised that the sports associations controlled something of great value. After its publication, most observers accepted that, short of government legal intervention, the sports promoters could stymie the development of television broadcasting. And as the public witnessed over the next four years, if promoters withheld consent to the televising of sporting events, the BBC could do nothing. Whenever the promoters refused to allow the BBC to bring its cameras to sporting venues, the public went without televised sport.

The promoters first really flexed their muscles in 1952 by imposing a partial ban on broadcasting, though they permitted the televising of most major sporting events. The ban caused howls of outrage in some quarters but the ban served its purpose by reinforcing the key point: promoters wielded the whip hand in negotiations with the BBC. They decided that though the Gregory Committee refused to support their
bid for copyright protection, they would achieve their goals by gambit and bargaining.

Through lobbying and public pronouncements, they continued to influence the thinking of the politicians. In 1952, a year after the publication of the Committee’s report, the new Sports Promoters’ Association announced talks with the BBC. The talks, and the associations’ partial ban on televising sporting events, eventually caused a ripple through the House of Lords.

The Earl De La Warr, who as Postmaster General managed the Conservative Government’s broadcasting policy, promised to encourage the parties to compromise. As he told the Lords, he was “trying to bring the various parties together to attempt to persuade them to make some special arrangements during coronation year.” None of his listeners directly criticised the Government, but several expressed concern about the effect of the television ban. “Millions of people,” Lord Morrison said to the other peers, “are interested to know why they cannot see national sporting events on television.” Lord Brabazon agreed. He said: “there is an absolute impasse and unless something is done television entertainment is bound to degenerate badly.” Brabazon viewed the issue in pragmatic terms. He said: “it is a question of arranging hard business facts between promoters of sports and televisers.” Lord Howe took a more radical – or regressive – view of the best way to end the impasse. He suggested that, “if copyright could be conceded a reasonable compromise could be reached between sporting interests and the BBC and, probably, the film world.”

In 1953, after a few months of talks, Lord Lucas told the peers that there “was no friction between the BBC and the sporting promoters, who have their rights in the matter.” Like Brabazon he adopted a practical tone, expressing sympathy for the positions of the sporting associations. “National sport in this country,” he said, “is big business, with considerable capital investment, and these interests have to be looked after.” Though the BBC found itself pressed for funds, the sports promoters were entitled to claim a proper commercial rate of payment for permitting broadcasts. But the Government could not force solutions on the promoters: there would “have to be a voluntary arrangement between the corporation and the promoters.”

Negotiations dragged on for another three years. Finally, the Government stepped in. The public demanded sport, the BBC would not meet the financial demands of the sports associations, and the
sports promoters made clear that money must be found if sport were to be televised. So the Government issued a second television broadcasting licence in 1955 to a commercial television station, the Independent Television Authority (ITV). The beginning of the age of commercial television presaged by a few years the era of rich television deals between sporting associations and broadcasters.

Controversy did not end with the issue of a new licence. Many promoters still wanted copyright in the broadcasting of events and they united in their protests over the 1956 Copyright Bill. Mirabel Topham, the Chairman of Topham’s Ltd, and the most powerful woman in British racing, led the protests. She called the Bill “unjust and dangerous to sports promoters.” Her company leased the Aintree racecourse, home of the Grand National, and to highlight the value of television rights, Topham banned cameras from filming the 1956 race.¹ She acknowledged that she acted for political reasons. She intended to persuade Parliament to amend the Bill “to give racecourse executives proper control of their events.”

Topham’s action gained her national unpopularity but she made clear to politicians and the nation that the wishes of the controllers of professional sport in Britain must not be lightly disregarded. If the Government settled television broadcasting policy in favour of the television licensees, it also acknowledged the private rights and expectations of the sporting associations. The battle over sports broadcasting demonstrated how in a few years the complexion of debate about copyright regulation changed almost beyond recognition. Authors’ rights, though still accorded the highest status in the world of copyright law-making, no longer dominated regulatory calculations. Now the big questions of industry dominated policy thinking.

**Effect of the Gregory Report**

In total, the Gregory Report proved a profoundly important document. It provided the basis for the rewriting of British copyright legislation, and, in paragraph after paragraph, attended to questions about the neighbouring rights of sound recording, broadcasting and public performance. It should not be forgotten that without the battles over

¹ To the chagrin of broadcasters. A BBC official said of the Aintree ban: “We made, with the Independent Television Authority, what we considered was a fair and reasonable offer. We are naturally disappointed that Mrs Topham has been unable to see her way to accept it.” (*The Times*, 9 February 1956).
broadcasting policy, the formation of the Gregory Committee, or a committee like it, may have waited many years.

Without the efforts of the sports promoters, Harold Wilson’s 20 month delay in organising the Gregory Committee may have stretched into years. If the sports associations did not press their case so urgently, the Committee may have accepted less readily arguments that assumed parity between the claims of authors and industries. Its members may not have formed so clear a picture of television’s revolutionary effect on social and economic life. In one sense, the sporting associations, and not the BBC, made the case for broadcast copyright.

The report pointed to the road ahead. Four years after its publication, the new British Copyright Act established a new general category of analogous copyrights – that is, copyright in ‘subject matter other than works’. In 1968, new Australian legislation adopted the same categories. The report is therefore a precursor of a new age and new realities. Within a few years of its publication, government regulators devoted most of their attention to accommodating the needs of the copyright industries, the producers, distributors and broadcasters of records, films and television content. Soon enough, they began adapting also to the requirements of the newest and greatest of the copyright industries – the software industry.

The Spicer Committee

A narrow inquiry

The Menzies Liberal Coalition Government, closely watching events in Britain, first proposed to hold an inquiry into copyright law reform in the mid 1950s. The Governor General announced a copyright inquiry in 1954, only two years after publication of the Gregory Report. But the Government delayed the inquiry for four years, deciding to wait until the British Parliament digested the Gregory Report and passed a new Act. Australia evidently decide to watch Britain create precedents and then adopt British solutions.

The policy of the Government is clear from the Spicer Committee’s terms of reference which plainly asked the Committee to “advise which

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2 After the Liberal Coalition retained office in the election of May 1954, the Governor General announced the Government’s official political program and referred to a proposed copyright inquiry.
of the amendments recently made in the law of copyright in the United Kingdom should be incorporated into the Australian copyright law.” John Spicer and his colleagues were to translate the British Copyright Act of 1956 into Australian law, not to waste time devising original solutions to problems of copyright regulation.

The letter of appointment sent to each Committee member left no room for doubt. The pro forma issued by Neil O’Sullivan, the federal Attorney General said:

*The subject of the inquiry could easily give rise to investigations both widespread and prolonged. The relation between the Australian law and the United Kingdom law however has always been so close, and the matter has been so comprehensively and so recently reviewed in the United Kingdom, that I have found it possible to draw terms of reference … which will, I hope, enable the committee not only to concentrate its attention on the material available as a result of the review made in the United Kingdom, but also to obtain from interested persons and bodies written submissions directed specifically to the provisions adopted in the new United Kingdom Act rather than covering the whole subject at large.*

Dominated by the two judges, Spicer and Dean, the Committee could be trusted to implement O’Sullivan’s instructions rigorously and narrowly. Spicer and Dean would not embarrass the Government by, for example, inquiring into the policy on import controls. Their dominance of their colleagues, a solicitor, a bookseller and a clerical professor of music, ensured that the Committee rarely departed from the track cut out of hard ground by the Gregory Committee.

All the Committee members seemed to share the view that legal rules subsist in a hermetic environment of their own, unrelated to an outside world in which monopoly and predatory pricing are viewed as social evils. Their report never explained the policy underlying legal rules. It took as self-evident the principles and propositions enunciated in legislation and the Gregory Report. Thus the Committee failed to grapple with the question of parallel importation restrictions, a distinctly Australian problem about which the Gregory Committee said nothing – not surprisingly, since Britain benefited from the restrictions.

Its members seemed unable to look beyond legal precedent and principle to justify conclusions reached. But, like their British counterparts, they readily adopted pragmatic rationales for supporting the retention or creation of rights, even if they doubted that some rights could be supported in principle. The Committee manifested its
preference for pragmatism over principle in outlining reasons for retaining the compulsory recording licence. It said in its report:

*History perhaps more than logic plays its part in the development of ideas and in this case we think historical considerations coupled with practical realities lead to the conclusion that law should not be changed.*

**Conformism**

Handicapped by the narrow conceptual outlook of its members, the Spicer Committee did its job efficiently, according to the lights of legal analysis. But members seemed to have no interest in identifying the social objectives of copyright regulation, nor considering whether copyright law achieved these objectives, nor how such objectives might best be realised in the future. As a result, their report betrayed little knowledge of the crucial social, historical and economic questions relevant to copyright policy.

The limitations of narrow analysis were particularly evident in discussion of the posthumous term. Unlike the members of Canadian and New Zealand copyright inquiries,³ the members of the Spicer Committee could not bring themselves to consider proposing a shorter copyright term. They looked with seeming distaste on the willingness of their New Zealand and Canadian counterparts to contemplate the possibility of their countries standing outside the Berne Union.

The New Zealanders and Canadians argued that long periods of copyright subsistence benefited the economies of countries that exported large amounts of copyright material. Countries that imported copyright material, on the other hand, should welcome shorter periods, since expired copyright meant, in theory, free access to material. They recommended against ratification of the Convention amendments agreed at the Brussels Conference in 1948.

The Australian committee would not dream of proposing so radical a step. According to its report, principles of reciprocity and uniformity demanded that Australia remain within the Union. The report acknowledged that “justice to overseas authors” and ensuring that Australian creators received the same benefits overseas that foreign creators enjoyed in Australia took priority over “our economic interests” as “primarily a user country”. The Gregory Committee, on

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³ The Canadian Royal Commission reported in 1957 and the New Zealand Copyright Committee 1959.
the other hand, intimated that if unconstrained by the terms of the amended Berne Convention, it would have recommended that copyright run for a period of 25 to 50 years from the first publication of a work.

The Spicer Committee’s arguments about the posthumous term demonstrated dialectical narrowness, not questionable judgment. If the necessity for international uniformity is taken as a premise of copyright policymaking, the decision to support retention of the 50 year term could hardly be gainsaid. But the Committee failed intellectually in its examination of the import provisions in the copyright legislation. Their origins could be traced to the Statute of Anne, and since the 19th century they had enabled British publishers to control the supply of books to Britain’s overseas possessions. Politicians in both Houses of the Australian Parliament attacked import provisions in the 1912 Copyright Bill to no avail.

Given the chequered legislative history of the provisions, and the fact that the Berne Convention left the determination of import rules to the discretion of its members, the Spicer Committee could reasonably have examined the merits of the monopoly. Yet it failed to take the opportunity and in fact made no reference whatsoever to the history of the provisions and their effect on the price and range of imports.

So far as can be discerned, the Australian committee considered that long usage and international consensus validated the law on the posthumous term and the import monopoly. Members seemed to see no reason to look deeper into the history of the relevant provisions, to find no cause for further inquiry. Australia, they seemed to think, should remain faithful to time-honoured norms and disregard suggestions that some legal rules of long standing did not benefit the nation.

**Deficiencies of analysis**

When the two committees’ reports are compared, the Australian document seems more pedestrian in its analysis. The Australian discussion of the posthumous 50 year term is superficial when compared to that of the British committee. The Gregory Committee heard with interest arguments by the eminent economist Arnold Plant in favour of substantial reduction in the period of copyright. Spicer and his colleagues wasted no time on the esoteric question of whether so long a period of protection could be justified in principle.
Commenting on the Canadian and New Zealand recommendations for a copyright term of 56 years from first publication or the life of the author, they said in their report that they could “see no particular virtue” in the reduced period of protection. Why, they did not explain. Instead, they deflected the argument. The report said:

*We feel that the onus of showing that such a substantial alteration of our present law is desirable should be on the person advocating it. No-one has made a submission specifically urging us to recommend that Australia should not ratify the Brussels Convention.*

This statement, suggesting dislike of speculative inquiry, forewarned the reader that the Committee would rely heavily on precedent to determine its conclusions. In the case of copyright law, reasoning from precedent can produce unintended results. The Spicer Committee’s unwillingness to question established practice meant that it misunderstood the power of vested interest in the creation of copyright law and supported or proposed some rules that were inimical to the interests of the Australian public.

Chief among these were the legislative provisions that created the import monopoly and the lengthy posthumous term. If treaty obligation militated against reconsideration of the lengthy term, nothing prevented the Committee from attacking the import monopoly. Nothing, that is, except vested interest and established practice, and the Spicer Committee showed little willingness to question either.

The Committee’s conservatism seemed to induce a kind of intellectual paralysis. It appeared beyond the imaginations of its members to even consider adopting the course taken by its New Zealand and Canadian counterparts, both of which, as the Committee acknowledged, “were greatly influenced by the fact that their countries were largely users of copyright material.”

The approach of the Spicer Committee, conservative, cautious and legalist, is exemplified in its justification it gave for recommending that Australia retain the 50 year posthumous term. Its report declared:

*As Australia is primarily a user country and is likely to remain that way for some time, it might, of course, be in our economic interests to make the term of protection as short as possible. Factors other than the balance of payments are, however, involved, such as justice to overseas authors, the benefits of whose works Australians enjoy. We also mention that literary, dramatic, musical and artistic works of Australian origin are growing and receiving increasing recognition abroad. The*
United Kingdom will, we think, remain one of the main users of Australian copyright material and we are of the view that our authors should in that country be entitled to the same copyright protection as British authors. This can only be ensured by granting in Australia reciprocal benefits to British authors.

What is striking about this statement is that it acknowledges the cost to Australia of uniformity without taking the next step of exploring that cost. While the importance of reciprocity in international copyright relations is undeniable, reciprocity for a “user country” like Australia is purchased at a price. The Spicer Committee declined to discuss whether the benefit justified the price. Reciprocity and uniformity are safeguards against the cost and loneliness of isolation. But acceptance of norms that greatly advantage the interests of copyright owners means access limitations in the form of high prices and restricted supply.

In principle, a short period of copyright protection benefits the user country. It means earlier access to material, such as cheap editions of books, when the copyright expires. The Spicer Committee knew that a shorter term, if accepted internationally, would be, in principle, “in our economic interests” and likely to improve the “balance of payments”. It also knew that reality contradicted theory because the international copyright community would not have accepted Australian legislation creating a shorter term.

Even so, the Spicer Committee’s unwillingness to consider the consequences of unswerving loyalty to treaty norms showed a deficiency of imagination that continues to infect copyright policymaking in Australia. What the Committee failed to acknowledge, as it could have done, is that by endorsing the 50 year posthumous term, it placed pragmatic considerations of “justice to the overseas authors” and “reciprocal benefits to British authors” ahead of the – admittedly theoretical – Australian national interest. To raise these considerations as reasons for not exploring the arguments for a reduced term showed an inability to appreciate the economic and social dimension of copyright policy.

The Committee’s treatment of import controls suggested that its members were oblivious to the issues raised in the parliamentary debate over the copyright legislation of 1912. Their indifference to the effect of the “big blackmailing clause” as John Keating called section 10 of the 1912 Act would doubtless have aggravated Keating and his fellow opponents of the import monopoly, Vardon and
Gordon, had they been alive. But they were not, and no-one pointed out to the Committee members that these politicians once attacked import controls.

Blind to the history and function of the import monopoly, the Committee members recommended adoption of a provision substantially similar to the importing clause in the new British Act, concentrating their efforts on devising modifications that would facilitate the copyright owner’s enforcement of rights.

They placed the onus on the importer, seller or dealer to prove lack of knowledge and the absence of reasonable grounds for suspecting that the making or importation of a work took place without the owner’s consent. Changes were made to clarify the owner’s right and to remove the possibility of a person relying on ambiguous language to evade liability for breach of the section.

Then the ship sailed on. Questions of the national interest, dear to the hearts of Keating, Vardon and Gordon, vanished overboard. The Committee followed the course charted by the Gregory Committee: it accepted the desirability of repeating the substance of the new British statute in Australian legislation and recommended various changes of arrangement (for example, placing the definitions section at the beginning of the Australian Act) and style (removing perceived drafting ambiguities).

**Compulsory licence**

The disagreements between APRA and music users were only the first of many arguments about the commercial exploitation of copyright in Australia. Old animosities centred around the recording industry were also extensively replayed before the Spicer Committee. First, the record manufacturers and the owners of musical copyright spoke for and against the compulsory licence to manufacture records.

The Copyright Owners Reproduction Society called the compulsory licence system arbitrary. CORS told the Committee that the licence denied owners the power to bargain freely over the rate of royalty, and took from them the power to control the production of inferior recordings. Then record companies pressed their claim for the mechanical performing right, in the teeth of opposition from radio and television broadcasters.
The Spicer Committee favoured the recording industry. Its members recommended that Australian copyright legislation retain the compulsory licence and establish a public performance right in records. Like their counterparts on the Gregory Committee, they felt equivocal about both rights. Spicer and his colleagues were reluctant to interrupt settled practice and they did not wish to void years of legitimate investment. They declared themselves, “impressed by the argument that there would be some injustice in destroying rights in existence after money has been invested.” Yet when it came to justifying the rights in principle, the Committee struggled to find reasons to support its position.

The Committee admitted its difficulty in finding a “logical basis” for the legislative provision creating the compulsory licence. “No such licence,” said its report, “operates in relation to any other form of reproduction of copyright material.” This statement, though not strictly accurate, summed up the Committee’s difficulty. In legislation that implemented a Convention dedicated to authors’ rights, the compulsory licensing provisions were anomalous.

Sensibly, perhaps, the Committee chose not to dwell on the theoretical failings of the copyright legislation. Its report acknowledged that in “the absence of some clear logical basis for such a compulsory licence system we would not recommend such a provision” but it added a proviso. Long-established practice demanded that the licence be retained. When the Committee members made up their minds, they decided they could not ignore “the history of the matter and the widespread acceptance of the principle”.

Compulsory licensing could be readily justified as a device to defeat monopoly but not, from the perspective of authors’ rights, as an invasion of an exclusive right. The Spicer Report lucidly explained the theoretical function of compulsory licensing, and reinforced the argument by pointing out that anti-trust sentiment inspired the introduction of compulsory licensing in the United States in 1909. But the Committee could not find a “logical” basis for section 19 of the 1911 Copyright Act (which established the compulsory recording licence).

However, the report did not explain whether the compulsory licence actually functioned to defeat monopoly. The Committee’s support for

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4 Section 3 of the 1911 British Copyright Act licensed the reproduction of literary works 25 years after the author’s death.
its retention on the grounds of longevity is thus mystifying. If the licence could only be supported because it had survived for a long time, principle surely demanded that it be revoked. The Committee’s readiness to support the licence seemed to confirm that in copyright policymaking, the principles expounded by the Berne Union were now subordinate to economic considerations.

Seemingly, Spicer and his colleagues believed that the licensing provisions were not justified on their merits but should be retained to protect an industry. They seemed, in this instance, heedless of principle and preoccupied with the needs and expectations of the recording industry.

**Mechanical Performing Right**

Twenty-five years after *Gramophone Company Ltd v Stephen Cawardine and Co*, the record companies pressed the Spicer Committee to recommend legislative recognition of the mechanical performing right. They perhaps took the Committee’s compliance for granted, for they made only oral submissions. Their confidence proved justified. The Committee reported that the new British Copyright Act recognised a mechanical performing right, and proposed that Australian legislation follow suit.

The evidence heard for and against the right reprised the arguments of Bonney and Cook, barristers for the record companies and broadcasters, before the Owen Royal Commission in the early 1930s. The recording industry put its case first. Its representatives stated the necessity for the legislature to heed the common law. They insisted that Justice Maugham’s decision in *Cawardine* validated the claim for statutory recognition and pointed to the allegedly disastrous effect of radio broadcasting on sales in the 1930s.

The industry introduced one new element to the arguments heard by Justice Owen a quarter of a century previously: representatives now emphasised the vital relationship between the public performance of records and continued industry investment. If, they said, the industry could not recoup public performance fees, investment in more production would decline and eventually cease. Companies must be able to recoup the cost of investing in the production of records.

Arguing for statutory exclusion, the radio broadcasters were forced to try to persuade the Spicer Committee to disregard two powerful precedents, namely the decision in *Cawardine* and the decision of the
British legislature to recognise the mechanical performing right. The task proved hopeless. Devoted to uniformity and precedent, Spicer and his colleagues would not look beyond the principles of common law and British legislation.

The broadcasters pointed out that before the passage of the British Copyright Bill in 1956, Opposition Labour peers attacked the judgment in Cardew. Lord Lucas, previously involved in the Lords’ debate on sporting copyright, disparaged Maugham’s arguments. Lord Jowitt, an outstanding reforming lawyer and former Lord Chancellor, claimed that “the extraordinary ingenuity” of Sir Stafford Cripps, counsel for the Gramophone Company, “induced” Maugham’s decision. He concluded that “it was a great misfortune that the right was ever given.”

Further, said the radio broadcasters, arguments about investment cut no ice. Broadcasting posed no threat to the future of the recording industry. Radio stations boosted the popularity of records and indirectly poured money into the pockets of record companies. The right of public performance logically applied to one subject matter only: an original work. The pressing of record involved no originality, though the production process could not occur without the application of capital investment and expertise. Neither, however, warranted the statutory grant of a performance right.

They begged the Committee to consider that in practice, foreign industry would benefit from the mechanical performance right. Most records were produced overseas, and public performance fees would mostly be distributed to foreign record labels. These labels would benefit from the boon of booming retail sales – conferred by radio stations on record manufacturers – and the ever-increasing pool of fees collected for the public performance of recordings.

The record companies made no attempt to adduce some species of originality in their production activities. Instead, they concentrated on those factors that made their work economically valuable: technical skill, the selection of artists, marketing and above all financial investment. They also insisted that they were entitled to receive remuneration for the use of records for a commercial purpose. They reminded the Spicer Committee that its British counterpart recommended the grant to manufacturers of a public performance right. Finally, they drew an analogy with the proposal to recognise a performance right in a television broadcast, which the Spicer Committee endorsed without demur.
Committee’s reasoning

The Committee remarked that “the question is a very difficult one and is one upon which different minds will reach different conclusions.” Difficult, certainly, if its members, adopting the language used in their analysis of section 19, tried to find a “logical” basis for the creation of a mechanical performance right. If they accepted that copyright law derived from the principle that subsistence depended on authorial originality, then they could not justify recommending copyright subsistence in records, or derivative rights, such as the mechanical performance right.

They passed lightly over the problems of theoretical incompatibility and logical inconsistency and reached conclusions on pragmatic grounds. In so doing, they enlarged the rupture, begun in 1911 with the enactment of section 19, between principle and the claims of economic necessity. The British and Australian copyright inquiries acknowledged that the grand visions of the Berne Union were realisable only through the harnessing of industrial processes – recording, filming and broadcasting. In no sense would the industries built on these processes allow themselves to be controlled by authors. Thus, the ambitions of the proponents of authors’ rights made inevitable the grant of copyright to industries.

Politics, expediency and British precedent guided the choices of the Spicer Committee. Its members recognised that the political and commercial cost of withholding the mechanical performing right would likely be too much for any government to countenance. Their report stated their position slightly differently but delivered the unmistakable message was that policymakers could not afford to disregard the commercial expectations of a well-established and profitable industry.

As the Committee said, “the making of a record involves a considerable amount of artistic and technical skill.” The report went on:

*We do not think that the result of another person’s effort and skill should be made available to wide audiences by means of broadcasting or public performance without any payment being made to that person … We are also impressed by the argument that there would have been some injustice in destroying rights in existence after money has been invested in making records on the basis of existing law.*

Money invested … the new axiom of copyright law 50 years after the pioneering declamations of John Drummond Robertson, spokesman for the Gramophone Company. The report disclosed, almost in
passing, the truest reason for broadcasters to accept the enactment of a mechanical performing right. If broadcasters wanted copyright in broadcasts, they should concede to record manufacturers the right to control the playing of records.

The Committee made its recommendation not because the necessity for a mechanical performing right could obviously be extrapolated from the law of copyright, but rather to facilitate industry regulation along the lines sought by industry, not government. The record companies wanted the right, the broadcasters could put up with it, and most importantly, it was not going to prevent either from making money.

Other findings

The Committee also followed the British example by recommending ratification of the Brussels Convention, the addition of a broadcasting right to the primary rights of copyright authors, and a statutory schema that established a second category of copyright subject matter consisting of sound recordings, cinematograph films and broadcasts. It recommended the adoption of the British provisions dealing with library copying and copying for educational purposes and fair dealing. The report also proposed a new extended Crown copyright provision and adoption of the British provisions dealing with typographical arrangements.

Spicer and his colleagues observed the need for a copyright tribunal similar to that established in Britain and agreed with the Gregory Report that copyright should not subsist in performances or sporting spectacles. The term of copyright was to be 50 years from the death of the author and in the case of sound recordings and films, 50 years from the date of production. The report declared the 25 year rule for books redundant and called for the compulsory licence for records to be recognised in statute.

The question of sporting copyright, so central to the politics of copyright in Britain, featured hardly at all in the proceedings of the Spicer Committee. Only the Victorian Football League made strong submissions about copyright in sporting spectacles. In its submission, the VFL referred to the 1937 case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* as one that determined “that there was no

5 58 CLR 479
copyright in a spectacle”. In that case, the High Court held that owners of a racecourse could not prevent a company from broadcasting race results from a tower overlooking the racecourse.

The VFL argued, quoting Justice Dixon’s judgment, that “broadcasting rights” were “quasi-property”, and referred to section 115 of the *Broadcasting and Television Act 1942*, which prohibited broadcasting of sporting events using equipment placed outside the sporting grounds – if spectators paid entry fees. The VFL considered section 115 protection insufficient and asked for sporting copyright to protect the investment made by sporting bodies from the commercial depredations of radio and television broadcasters.

But the silence of other sports associations, and, more crucially, Britain’s rejection of proposals for sporting copyright, encouraged the Committee to reject the VFL’s request. The recognition of broadcast copyright in the British legislation set a precedent of which the Committee approved. In Australia, as well as Britain, television broadcasters would hold copyright in broadcasts but they would need to negotiate broadcast rights with the associations that controlled sporting grounds and fixtures.

**A copyright tribunal**

The Committee unhesitatingly recommended the formation of an Australian copyright tribunal. Perhaps the most interesting part of its report is the brief recitation of the history of Australian radio broadcasting and the activities of APRA. As the Committee pointed out, the problems that led the Gregory Report to recommend establishment of a copyright tribunal were experienced most acutely in Australia. Ironically, APRA and the radio manufacturers, the opponents of a tribunal in the 1930s, now supported the creation of such a body. By contrast, the broadcasters, who were the pre-eminent advocates of a tribunal 30 years previously, and the cinema exhibitors, now asked for the adoption of a more informal system of arbitration.

The Spicer Report devoted a whole chapter, and over 40 paragraphs to the question of the copyright tribunal. The focus on the question of performing rights disputes indicated strongly the continuing, and growing, importance of performing rights in the copyright economy. The archival record only reinforces the impression that the resolution of performing rights disputes remained a fundamental preoccupation of government and the suppliers and users of music.
Evidence of the attention given to performing right questions can be gleaned from the Attorney General’s Department records in the interwar period. The department maintained at least 47 files on different copyright subjects, mostly connected with radio broadcasting and the associated performance right. APRA, naturally, loomed large in records. The ‘Payment to APRA’ file, documenting ABC payments, remained current for 20 years from 1938. The titles of the other files chart the course of APRA’s activities during the period: ‘APRA radio stations agreement’ (1929); ‘AFBS arbitration with APRA’ (1933); and ‘APRA v B Class stations’ (1934). Other files indicate the early official interest in the question of broadcasting: the first file on ‘copyright broadcasting’ was opened in 1925 and it was followed quickly by files on copyright charges for music broadcasts (1926) and the conference held in Sydney in July 1926 to discuss performance fees.

In 1943, as the Spicer Report noted, the Parliamentary Standing Committee on Broadcasting proposed the compulsory arbitration of disputes between APRA and the ABC and APRA and commercial radio broadcasters. Legislation did not eventuate, but by the time of the Spicer Committee’s inquiry in 1959, all interested parties, including APRA, agreed on the desirability of compulsory arbitration. As the Committee said, not all accepted the need for a permanent tribunal to adjudicate disputes. However its report noted that if the principle of compulsory arbitration were universally accepted, the creation of a quasi-judicial body would produce a necessary uniformity of method and lead to the creation of precedents.

The Committee recommended that the Australian tribunal differ from its British counterpart in one respect. It would consist of three members, but to avoid the problems faced in Britain of finding sitting times convenient for all tribunal members, disputes submitted to the Australian body would be heard by one person only – the member in a position to hear a dispute at the earliest possible time.

**Differences in approach between the Spicer and Gregory Committees**

The attention devoted in the Spicer Report to the questions of compulsory licensing and the performing right in records highlighted not just the importance attached by government to regulating record production and broadcasting. It also revealed a divergence of priorities between the governments, and industries, of Britain and Australia. In
Australia, unlike Britain, the question of copyright in sporting spectacles occupied very little official attention.

While the Gregory Committee devoted considerable attention to discussing the grounds for establishing copyright in individual performances and spectacles (as distinct from the performance of a record or film) the Spicer Committee, probably wisely, paid little attention to the question. Instead, it emphasised the benefits of continuing the system of compulsory licensing and allowing record manufacturers a right of public performance, questions settled in Britain without significant controversy.

The reasons for the differing approaches to copyright in the two countries is not hard to find. The British recording and broadcasting markets were more developed than Australia’s, and the strength of the British recording industry meant that the compulsory licence and the performing right in records were never going to be under threat.

In Britain, the Government needed to make television broadcasting viable. The Australian Government faced smaller challenges. It could even have ignored the recording industry and favoured the arguments of radio broadcasters. Predictably, however, the legislative outcome in Australia turned out to be identical to that in Britain. The Spicer Committee never threatened to undermine the long tradition of Australian subservience to the copyright prescriptions of foreign nations.6

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6 See Appendix 3 for the Spicer Committee recommendations.