Chapter 11 – The road to the new Australian Copyright Act

The 1960s

*A long delay in implementation*

Completed in 1959 the Spicer Report met public indifference. The newspapers and Parliament said nothing. The Attorney General, Garfield Barwick, kept the report “under consideration” for 14 months, before informing the House of Representatives in April 1961 that he intended to call for public submissions on the Committee’s findings.

Barwick’s dilatoriness perhaps owed something to external interference. Sometime in 1960, he prepared a draft cabinet submission recommending the preparation of a copyright bill based on the report’s recommendations but the draft went no further. The recording and broadcasting industries were disappointed with the details of the report recommendations, and probably pressured Ministers to postpone legislative action.

At any rate, in 1961, Barwick announced that the “representations indicate that perhaps the committee had not sufficient material before it and that additional material which is now available might have altered its conclusion.” He made plain that no-one should expect rapid progress towards a bill. At budget estimates hearings, Barwick reported that the task of assimilating new material, and reviewing the report findings burdened his department. His own priorities seemed to lie elsewhere: “I must confess for my part that I have not attempted to deal with it [the material] finally, and it cannot be expected that any legislation will be presented during the life of this Parliament.”

In April 1962, he told Gough Whitlam, Labor Deputy Leader, that he hoped to introduce copyright legislation in the autumn session of 1963 – hardly a promise of alacrity. No legislation emerged, and in April 1964 the Liberal Coalition Government appointed Barwick Chief Justice of the High Court. Towards the close of 1964, Whitlam

---

1 Signed 22 December but only released to the public February 1961.
reminded his successor, Billy Snedden, of the Government’s inaction, again posing the question – when did the Government intend to introduce legislation?

The evidence of Coalition laxity could not be denied and Snedden admitted the tardiness of progress towards a bill. He said: “I am considering the Committee’s report and the representations which have been received from interested persons and organisations. I am unable to say, at this stage, when a Bill will be introduced.” The Government made no promises and the question of copyright legislation dropped from public notice.

The delay in official response to a significant report on legislative reform is astonishing, yet, Whitlam’s questioning aside,2 the Opposition seemed indifferent to the question of reform. Only in 1967, when the Government at last introduced a bill did Labor MPs again discuss copyright in Parliament. It took a new Attorney General, Nigel Bowen, to precipitate action. He swiftly withdrew the 1967 bill after protests from various interested groups, and in May 1968, introduced revised legislation. A month later, Parliament passed the new bill, a mere nine years after completion of the Spicer Report.

**The reasons for delay**

The remarkable delay between report and legislation suggests the unimportance of the Australian broadcasting and recording markets compared with those of Britain. In Australia, the great driving force of broadcasting policy in Britain, the market for sporting entertainment, remained relatively miniscule and untapped. Entertainers and sporting organisations exerted negligible influence. In Britain, the explosion of popular culture, facilitated by the 1956 Act, turned the copyright industries into economic giants with needs that politicians did not ignore.

Perhaps because so much of Australia’s own popular culture derived from foreign sources, the broadcasting and recording interests felt less compulsion than their British counterparts to accommodate the needs of entertainers and sports promoters. When the British sports promoters were shaking up the BBC in the 1950s, Australian broadcasters and record and film companies, relying on a steady stream of foreign content, were settling into mutually satisfactory

---

2 The questions formed part of a more general attack on the Government’s tardiness in implementing promises and producing legislation.
commercial arrangements, despite the deficiencies they perceived in the copyright law.

The arrangements worked, and copyright industries in Australia seemed unconcerned that custom, rather than statute, underpinned their commercial relationships. Record companies now recognised that the radio broadcasters were played an indispensable role in increasing sales. Despite their protestations to the Spicer Committee and the Government, they were willing to accept the broadcasting of records without payment. Their equanimity is not surprising. According to the Labor MP, Rex Connor, EMI (Australia) Ltd earned 45 per cent on capital in 1966–67. For their part, the broadcasters knew that advertising charges generated ample revenue to pay for performance fees for the playing of records.

As for the television broadcasters – the ABC and commercial stations – they benefited handsomely from their broadcasting licences and did not seem worried that they could not control commercial re-broadcasting, diffusion or the playing of broadcasts for profit in places of entertainment. This was so even though the British example showed that these modes of receiving broadcasts for commercial and (in the case of diffusion via wires) private purposes, if regulated, were sources of lucrative licensing fees.

Once again, the difference in the Australian approach could be ascribed to the relative smallness of the Australian market for re-broadcasting and diffusion services: the size of prospective returns from licensing fees did not automatically excite commercial broadcasters already profiting from advertising revenue.

The languorous mood in commercial life merely reflected the torpor of the political scene. In Canberra, the counterculture and social protest, if they made sense at all, were dimly perceived as the symptoms of a temporary sickness infecting the coastal cities. Day by day, a Government in office since 1949 slipped further into stuporous indifference. Few in its ranks were capable of the difficult, sustained work of creating complex legislation. For most of the 1960s, between the release of the Spicer Report and the passage of the Copyright Act, the Liberal Coalition Government adopted a laggardly approach to legislation.

Not all Ministers were apathetic. The arrival of Nigel Bowen as Attorney General in 1966 seems to have worked as a catalyst, galvanising his department to push ahead with copyright law reform.
Unlike his predecessors, Bowen had the stomach to oversee the development of what he described to the *Australian Financial Review* in 1967 as “a long and complex bill”. He faced a difficult task.

Even Barwick, who did not shirk the grind of legal practice, seemed happy to avoid the work of drafting a copyright bill. His interests perhaps lay elsewhere, but the readiness of so determined an individual to avoid the difficult task of creating the new copyright statute testifies to Bowen’s achievement. Barwick, though an outstanding advocate, performed indifferently as Attorney General, and may have lacked the imagination to understand the deep implications of copyright law reform.

His successor, Billy Snedden, regarded by many colleagues as a superficial thinker, did more than Barwick to prepare the way for legislation, but he was not the man to pull together complex threads of policy. On 20 April 1966, the task fell to the new Attorney General Bowen. He asked Cabinet for approval to prepare a copyright bill and his colleagues agreed that “legislation be prepared to give effect to the substance of the report of the Copyright Law Review Committee.”

**Role of Nigel Bowen**

So far as the enactment of copyright legislation is concerned, Bowen must be judged Australia’s most successful Attorney General. An exceptional lawyer, he displayed some of the weaknesses of other Attorneys who administered the Copyright Act. His understanding of issues of policy sometimes seemed weak, perhaps because he, like most lawyers, received little schooling in the history of legislation. He could be inconsistent and he failed to grasp the evil effects for Australian consumers of import controls. On the other hand, he showed depths of intellect and fortitude rarely shared by his predecessors. Past Attorneys who, nominally or actively, oversaw the passage of copyright legislation faced fewer challenges and dealt with far fewer organised interest groups.

Isaac Isaacs, the Attorney at the time of the 1905 Act, took no part in the copyright debates of that year. Senator John Keating, Minister Without Portfolio, oversaw the preparation of the Act and steered it through the Senate. Billy Hughes, Attorney in 1912 when Parliament passed the new Copyright Act, husbanded much legislation through Parliament. But the 1912 Copyright Act incorporated the British copyright legislation and involved uncomplicated drafting. John
Latham, who supervised the enactment of two minor changes to the legislation, chose not to support the main recommendations of the Owen Royal Commission. Had he done so, implementation would have called for significant revision of the Copyright Act, and possibly its overhaul.

Bowen, on the other hand, contended with the consequences of the Government’s long neglect of the Spicer Report. He started the process of consultation over again and controlled the process of creating legislation to supersede an obsolete statute. Apart from the difficulty of drafting provisions acceptable to contending factions, the scale of commercial and public interests affected by copyright legislation called for the utmost political skill and intellectual endeavour in the preparation of the new law.

As a lawyer, Bowen ranked alongside Latham. Unlucky not to be appointed to the High Court bench, he became the first Chief Judge of the Federal Court in 1977. Another Attorney General called him, in 2001, “one of the great lawyers of the last century”. Intellectual capacity, however, only promised that Bowen would grasp the material before him and distil argument into principle. Reform called for something more. For nearly a decade, Latham presided over the most poisonous commercial wrangling in Australian copyright history, and when the opportunity for reform presented itself, flew the coop for the High Court bench. Bowen, however, seized the mettle and did not falter. Determination, as much as intellectual brilliance, marked his short initial tenure as Attorney, and the Copyright Act stands as his major achievement.

The Government abandoned Bowen’s first Copyright Bill in 1967 and the response to the new bill introduced in 1968 testifies to Bowen’s achievement. Gil Duthie, a veteran Labor MP, congratulated him fulsomely for his “energy in getting this Bill before the House.” Duthie went on to “congratulate also his staff and the draftsmen who burnt the midnight oil to bring these clauses together in this mammoth document of 249 clauses.” He said they “achieved a miracle

---

3 Speech by Bob Ellicot, QC, celebrating his 50 years at the Sydney Bar, 17 November 2000. Julian Leeser reported in the Sydney Morning Herald on 1 January 2003 that the Prime Minister William McMahon wanted to appoint Bowen to the High Court in 1972. Fearing that his Government would lose the by-election for Bowen’s seat, he instead appointed Anthony Mason to the bench. Mason became the Chief Justice in 1987.

4 He was Attorney from 1966 to 1969 and again in 1971.
… in producing this most difficult and complex measure.” According to Duthie, the only other legislation of similar size to pass through the chamber in his 21 years of parliamentary service was the Trade Practices Bill.

A year earlier, the Fairfax newspapers welcomed Bowen’s initiative in bringing copyright legislation to Parliament. The Sydney Morning Herald stated in an editorial, “[i]t is a matter for reproach to several Governments that the recommendations of the Spicer Committee have for so long been gathering dust” – but no reproach could be levelled at Bowen. The Copyright Bill, said the Herald, “deserves a hearty welcome even though it is unlikely to attract much publicity.” The Australian Financial Review expressed equally positive sentiments: it said Bowen’s legislation “should finally lift Australia into the second half of the 20th century in regard to copyright.”

Interest groups

The first task Bowen faced in 1966 involved considering the submissions made to the Government following Barwick’s call in 1961 for comments on the Spicer Report. These pitted broadcasters against the owners of copyright works, especially in relation to so-called “ephemeral” recordings. They also raised again the vexed question of the performance right in records. The Spicer Committee recommended, consistent with Article 11bis(3) of the Brussels amendments to the Berne Convention, that broadcasters be entitled to make “not more than one” temporary recording of works authorised for broadcast. Such recordings were “purely to facilitate the broadcasting of copyright material” and were to be destroyed within six months of recording. The recommendation, however, pleased neither broadcasters nor copyright owners.

The Australian Federation of Commercial Broadcasting Stations6 submitted that broadcasters should be allowed to make multiple copies of the original ephemeral recording and that in addition, the right should extend beyond reproduction of works, and include commercial records. The Copyright Owners Reproduction Society, on the other

---

5 It shall, however be a matter for the legislation of the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting body by means of its own facilities and used for its own emissions. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorised by such legislation.

6 Renamed the Federation of Australian Broadcasting Stations.
hand, protested against the “sweeping abrogation of the Author’s right over the mechanical recording of his works” implied by the ephemeral recording right. Broadcasters would not confine themselves to using ephemeral recordings to facilitate broadcasting: the recordings were used “for a multiplicity of reasons none of which is essential to the ability of the Broadcaster to broadcast music.”

The dispute pointed to the new question confronting policymakers. Once rights were granted, to what extent should they be qualified? In the present case, should the right to authorise the recording of a work be qualified in any way that denied remuneration to the holder of the right? The owners of musical copyright were understandably nervous. In their eyes, the history of compulsory licensing told a story of usurpation that made an industry rich and artists poor.

The CORS submission stated that authors were “most anxious to see that history does not repeat itself in any new enactment appearing to convey a minor part of the Author’s right … and then find that a major part of the right has been given away forever.” CORS agreed with the restriction on ephemeral recordings and asked “why the record manufacturer should be placed in a better position than the author of the music in this respect.”

Why indeed. The Spicer Committee discussed the question of ephemeral recordings in detail and explained why record manufacturers should be treated differently from the authors of works. Its recommendation seemed to flow from a simple willingness to heed the wishes of the most powerful commercial faction. Even as early as 1961, the exemption of records from the Committee’s proposal on ephemeral recording looked strange.

As the broadcasters indicated, the claim that they would make ephemeral recordings to avoid buying records was risible. It was also a non-sequitur. Commercial radio broadcasters and record companies alike were interested in revenue, and as the 1960s blossomed it became clear they shared a relationship of wondrous mutual benefit. Advertising revenues and record sales engendered by top-of-the-pops broadcasting made the right to make ephemeral recordings small cheese.

Radio broadcasters returned to the question of the performing right in records. In their submission to the Government, they stressed the terms of the draft conventions on neighbouring rights drawn up by the ILO in 1956, UNESCO in 1957 and the draft Hague Convention of
1960. None, they said, “ever considered that the manufacturers should have more than a simple right to remuneration in respect of secondary uses.” In other words, a record company might charge for the playing of records by broadcasters but could otherwise place no conditions on their use.

The broadcasters’ association next raised the question of out-of-copyright films. The Spicer Committee recommended that owners of copyright in works used in films in which the copyright has expired should not be allowed to prevent the screening or playing of the film in public. Broadcasters now sought modification of the British provision recommended for adoption in Australia to permit television broadcasting of out-of-copyright films.

The British Joint Copyright Council, an umbrella group of copyright owner organisations, which argued that if a copyright work used in a film survived the film copyright, its owner was entitled to control re-screenings, vehemently opposed them. But as it happened, old films were to be increasingly used by television networks as “filler” with the result the right sought by the British Copyright Council would become increasingly less valuable commercially. The real issue for the broadcasters was securing rights to recently produced films and this depended on contract bargaining.

One other topic exercised both the broadcasters and copyright owners. This was the work of the Copyright Tribunal. APRA welcomed the creation of the Tribunal and expressed concerned merely that legislation should encourage minimisation of formalities in proceedings. In particular, it requested that the legal rules of evidence be waived in hearings. Broadcasters, however, were unhappy with the Committee’s recommendations about jurisdiction.

The Committee proposed that the Tribunal have jurisdiction to hear performing right disputes between users and three types of licensor. In the case of works, individual owners, such as publishers, would not have standing before the Tribunal. Only collective rights organisations, such as APRA, could take part in proceedings. As the Committee explained, the Gregory Committee proposed that a copyright tribunal be constituted to deal only with cases in which the licensor of works exercised monopoly or quasi-monopoly control over the performing right. With this proposal, the Spicer Committee agreed.

In the case of disputes over the performing right in sound recordings or television broadcasts, the Spicer Committee recommended that the
owner of copyright, or any organisation, could initiate or contest Tribunal actions. The broadcasters pointed out that if jurisdiction did not extend to the individual owners of copyright works, they could find themselves at the mercy of individual music publishers who could levy fees in the knowledge that the Tribunal would not restrain them.

Meanwhile, APRA found cause for concern in the Committee’s proposal for the commissioner of a work and its creator to share control of the work. The topic of commissioned works caused much debate in Britain years earlier and the Committee’s plan for the commissioner to control only uses of the work related to the purpose of the commission. With eyes fixed on the problems of proving ownership of some musical works in its repertoire, APRA declared the proposed scheme unworkable. Instead, it asked for the law to recognise, “as a matter of general principle”, that in the absence of contrary written agreement, copyright in the commissioned work remained the property of the creator.

All these concerns Bowen took into account in 1966 as he came to grips with the task of preparing the new copyright legislation. He wasted no time. In April, Cabinet accepted, “subject to the modifications indicated in the Submission”, his proposal to implement, in legislation, the recommendations of the Spicer Report. With forensic precision, he set about the arduous task of consulting interest groups and overseeing his department’s preparation of a copyright bill.

The 1967 Copyright Bill

Commissioned works, ephemeral recordings and the Tribunal

In May 1967, the Parliamentary Draftsman sent a memorandum to Cabinet’s Legislation Committee that summarised 14 “more significant” modifications to the legislative proposals of the Spicer Committee. In its treatment of commissioned works, the Bill followed the British Act, providing that the copyright in commissioned engravings, photographs and portraits belonged to the commissioner.

The Parliamentary Draftsman rejected the Spicer Committee’s scheme of dividing copyright in commissioned works as impractical. The drafters also rejected APRA’s 1961 proposal that the creator presumptively own copyright. Instead, the bill provided that the creator
could restrain the use of the work for any purpose other than that specified by the commissioner at the time of the commission.

In the case of ephemeral recordings, the bill gave broadcasters all they had asked for in 1961. They were authorised to make recordings of sound recordings and to make multiple copies – for the sole purpose of broadcasting – of each ephemeral recording. Moreover, broadcasting stations were entitled to make copies of ephemeral recordings made by other stations, provided they paid reproduction fees to the copyright owners.

Most surprisingly, perhaps, the bill extended the period allowed for retaining ephemeral recordings prior to destruction from the six months proposed by the Spicer Committee to 12 months. Copyright owners sought a period of 28 days Bowen approved an extended period on the basis that patterns of country broadcasting made the longer period necessary.

As for the Copyright Tribunal, the bill extended its jurisdiction beyond that envisaged by the Spicer Committee. The bill provided that in addition to adjudicating disputes over licence fees for the public performance of works, it would determine disputes over the equitable remuneration payable for recordings, ephemeral recordings, and the fees for the use of works.

**Performing right in records**

As preparation of the Copyright Bill, protracted by extensive consultations, extended into 1967, the performing right in records and the compulsory licence for recordings emerged as the principal subjects of controversy. The radio broadcasters still hoped to persuade the Government to dispense with provisions establishing the mechanical performing right, and the recording industry sought frantically to ensure that the Bill did not circumscribe the compulsory recording licence.

In due course the music industry managed to persuade the Government to revise the provisions dealing with compulsory licensing. The broadcasters failed, perhaps because they were outgunned by a more powerful industry lobby. Adrian Sterling, the Deputy Director-General of the International Federation of the Phonographic Industry, lobbied the Government hard, holding meetings with Bowen and his senior departmental officer in February 1967. The appearance of an IFPI representative in Australia no doubt
overshadowed the lobbying efforts of the broadcasters, whose efforts to win over Bowen were muted. Sterling, nowadays a distinguished legal academic and the author of major works on international copyright law, evidently impressed Bowen and Lindsay Curtis, the Senior Assistant Secretary of the Attorney General’s Department. Despite the protests of the broadcasters, the submitted bill implemented the Spicer Committee’s recommendation on the mechanical performing right.

Perhaps no-one doubted that the Government would reach a legislative solution in favour of the recording industry. Since *Cawardine* over 35 years before, broadcasters in Britain had come to view the payment of licence fees for playing records as a cost of business. The record companies argued that broadcasting lowered sales but as rock and roll and pop music took over musical tastes, they privately acknowledged an opposite truth. Radio broadcasting dramatically amplified sales. Soon enough the music industry eagerly supplied free samples of recordings to the radio stations.

The radio broadcasters still wanted change for understandable reasons. Mechanical performance fees might be recouped from advertising revenue, but they were a significant and annoying impost. If the Government could be persuaded not to impose the burden, the radio stations’ accountants would breathe easier. Bowen, however, proved obdurate. He could sense a tacit commercial peace between the recording and radio industries and saw no reason to depart from either the recommendation of the Spicer Committee.

Although the broadcasters’ association, the AFCBS, cited evidence of an international trend away from recognition of performing rights, Bowen’s advisors gave its arguments short shrift. A memorandum in August 1967 from Lindsay Curtis to the Secretary of his Department said disdainfully that the nations refusing to recognise the performing right were mostly “African countries”.

He recommended that rather than consulting trends, departmental officers conduct a survey “to see what countries grant or do not this right.” Curtis acknowledged that the United States did not recognise performing rights, but he cited information supplied by IFPI’s Adrian Sterling in a letter received five months previously. Sterling helpfully pointed out that Record Industry Association of America “has now unanimously decided to fight for the performing right and is using every effort to achieve this aim.”
IFPI and the Association of Australian Record Manufacturers encountered more difficulty trying to persuade the Government to amend provisions in the bill that reduced the scope of the compulsory licence. The bill did not permit record companies to record works under the licence if the original recordings were not made or imported into Australia.

In this respect, to the chagrin of the record industry, the legislation emulated equivalent provisions in the 1956 British Copyright Act. The British Act of 1911 allowed for the compulsory recording of works originally recorded anywhere in the British dominions. Under the 1956 Act, however, the compulsory licence applied solely to works recorded or imported into the United Kingdom.

The 1967 bill adopted the wording of the British legislation, specifying that the compulsory licensing provision only came into operation if records of a work were “made in or imported into Australia for the purpose of retail sale or with the consent of the owner of the copyright work.” The drafter’s intent could hardly be plainer: if the Australian rights’ holder withheld consent to the making or importing or recordings, record companies could not make compulsory recordings.

In practice, manufacturers would find themselves unable to automatically record works if records of the work were not in the hands of Australian retailers. The provisions of the bill also spelt the end for the practice of recording, with the Australian copyright holder’s consent, works recorded and sold in the United States only. The record companies were furious at what they considered a catastrophic narrowing of the scope of the licence. The Attorney General’s Department relayed their sentiments to Bowen but neither he, nor his departmental officers, were moved.

In a memorandum written at the end of August 1967, Lindsay Curtis told the Minister that the Association of Australian Record Manufacturers, “states that the existing practice in industry in Australia enables record manufacturers to make records of works under the present compulsory licensing provisions if these works have previously been recorded anywhere in the world by or with the consent of the owner of the Australian copyright.”
Bowen and Curtis supported the Spicer Committee’s argument that the rights of the Australian owner of copyright in a work were paramount. The Spicer Report said of the compulsory licence:

To the extent that it does operate we do not think it unreasonable that those who in Australia seek to enjoy benefits conferred by Australian law should do so by manufacturing records in Australia and thus contribute to the stability of that section of our manufacturing industry.

Applying the Committee’s logic, the department decided that the Australian rights holder must control the recording process. The first recording of a work in Australia (or the authorised importation of a recording) not the existence of foreign recordings, governed the operation of the compulsory licence. Bowen took an active interest in the question of compulsory recording, revealing a disposition towards authors’ rights. In departmental instructions, he informed Curtis that the Australian owner of copyright in works must be protected against derogation of rights. In March 1967, he told Curtis that Australian copyright owners should not “be made subject to what is done elsewhere with the consent of the owner of the copyright in that place”.

A few months later, in September, he told Curtis that he would not accept proposals to allow record companies to import records into Australia for the purpose of making recordings of the embodied works. Curtis’s memorandum of late August explained why: importing records under the compulsory licence “might encourage importation at the expense of manufacture in Australia”.

Bowen and Curtis evidently paid only fleeting attention to the history of copyright law-making. Throughout the 20th century, sometimes in leaps, sometimes little by little, the recording industry swept aside all opposition to its will. Curtis’s departmental predecessor, Joe Tipping, realised something of this truth when 35 years earlier he told John Keating that APRA was a “lamb” compared to “the gramophone companies lion”. Sure enough, in the months after the introduction the first Copyright bill on 18 May 1967, Bowen learnt that his position could not be sustained.

His refusal to allow the industry to import records to circumvent the limitations in the new provisions suggested that he shared the belief that the rights of copyright owners were inviolable. From this perspective, it mattered little that the primary right to control the reproduction of copyright material does not logically presuppose a right to control the distribution of that material.
Bowen and his advisors did not ask themselves difficult questions about import restrictions. Why should the Australian rights-holder who withheld consent to compulsory recording, be permitted to prevent the importing of records made legitimately overseas? Why did the interests on the copyright owner take precedence over the public’s interest in receiving a broad variety of records at lower prices? No-one at the Attorney General’s Department bothered to think about the ill effects of monopoly.

Officers otherwise willing to support the enactment of privileges for copyright industries now saw only a ravening industry depriving artists of their rights. Shortly, the industry itself would loudly proclaim the value of import controls preventing Australian retailers from importing records sold overseas. But who benefited from import controls mattered less than the harm they caused the public. Bowen failed to see that control over distribution, no matter who happened to be the copyright owner, worked against consumers.

Instead, he, Curtis, and others, traversed the same path as the Spicer Committee. According to the Committee, only four per cent of records sold in Australia were recorded domestically and the remainder pressed locally from imported matrices of foreign records. According the Committee’s logic, an Australian matrice was better than a foreign one, and forcing local companies to rely on the consent of an Australian rights-holder’s consent to the making of a record would produce a domestic manufacturing industry.

**The Government relents**

The music industry did not retreat and IFPI and the Australian Federation of Record Manufacturers agitated furiously against the shrunken compulsory licence. Faced with a barrage of arguments, Curtis suggested to Bowen that the offending provisions in the copyright bill be revised. “Having regard,” he said in a memorandum, “to the fact that the existing practice seems to have worked and that the business of the record manufacturers is geared to this practice, I suggest that the Bill should be amended to reflect this practice.”

Bowen described his reason for accepting Curtis’s advice in the blandest of terms. In his second reading speech for the 1968 Copyright Bill, he said simply that, after “full consideration of the arguments that were put by both sides I came to the conclusion that some changes should be made” to the compulsory licensing provisions. They now
applied if a work had, with the consent of the local copyright owner and for the purpose of retail sale, been recorded in, or imported into, the territory of any member of the Berne Union or the Universal Copyright Convention.

As modified, the compulsory licensing provisions stipulated that owners could not indefinitely withhold consent to the first recording of works (other than musical scores for stage or film). Owners suffered another shock. The Government decided not to increase the old rate of royalty payable on retail sales of records made under compulsory licence. Under the bill, the rate remained at 5 per cent, even though the Spicer Committee recommended that it be increased to 6.25 per cent and the higher rate applied in Britain from 1928.

Bowen reassured owners in his second reading speech that the Government did not regard the lower rate as immutable. But neither he nor his department were qualified to determine appropriate royalty rates. The task of fixing the rate, he said, would fall to the new Copyright Tribunal, which could comprehensively investigate value of money changes and market developments.

**Bowen and the import monopoly**

Bowen’s frank admission that his department was not equipped to determine the appropriate rate of royalty for records made under the compulsory licence showed the directness that characterised his conduct as Attorney General. He appeared less clear-sighted about the need for external consultation on another set of provisions that pertained far more to the welfare of Australian consumers. These were sections 37 and 102 of the bill, which prohibited the importation of copyright articles without consent of the copyright owner.

Almost a decade previously, the Spicer Committee showed deplorable ignorance of the history of the import controls in Australia. Now Bowen too failed to grasp the truth that the controls were designed to protect the monopoly of British publishers over the distribution of books throughout the Empire. Bowen evidently knew nothing of the reaction of earlier Australian legislators to the import monopoly. The

---

7 Bowen explained in his second reading speech that the reason for the exemption was that producers needed the scores to remain secret until release of the show or film.

8 Under the British system the royalty was calculated by reference to the retail price *exclusive* of sales tax. In Australia the retail price included wholesale tax.
great parliamentary generation of 1905 rejected import controls, and John Keating, who displayed an unrivalled grasp of the history of imperial copyright law, spoke with passion and logic against the monopoly over distribution.

Bowen focused attention on the importation provisions in 1967 following ructions over the Government’s proposal to extend the application of sections 37 and 102 of the bill to importation for non-commercial purposes. His department brought to his attention the discovery that an unwanted effect of the revision would be to revoke de facto freedoms hitherto enjoyed by libraries and broadcasters.

Even though section 10 of the 1912 Act allowed the copyright owner to restrain the importation of works regardless of the purpose for which they were imported, in practice libraries imported books and records unhindered. Lawyers interpreted section 10 to apply to importation for the purpose of retail sale. The proposed revision to the bill overturned longstanding practices that, in the case of the libraries at least, could be said to facilitate the delivery of public benefits.

Informed of the libraries’ import practices Bowen immediately rang the NSW State Librarian and discovered that the Library purchased many of its books from overseas. Armed with this information, he decided to retain existing practice. He felt, according to a departmental minute, that in the case of libraries, “there was no strong case for the English law on importation to be followed in Australia.” Local conditions were “significantly different” from those in the United Kingdom. Unlike Britain, Australia was “largely an importer of books, records, etc”.

Bowen’s ignorance of Australian copyright history now prevented him from applying similar reasoning to analysing the import controls generally. John Keating, Joseph Vardon and David Gordon, the three men who spoke out most powerfully against import controls in 1912 copyright debates, might have asked him a simple question. Why, if Australia was a net importer of copyright product, did the freedom to import items without the consent of the local rights-holder apply only to libraries?

Even the libraries’ exception provided the public with only a partial benefit. Booksellers would be unable to import cheap copies of books produced overseas and the readers would pay higher prices for the books supplied by the local rights-holder. As Curtis pointed out to Bowen, the library amendment “would be more likely to benefit book publishers than anyone else.” Freeing libraries from the publishers’
distribution stranglehold enabled them to import a wider variety of works at lower prices. But Bowen’s solicitude towards libraries did nothing to assist the purchasers of books and records in retail outlets.

Like the Spicer Committee, Bowen and his department took for granted that its long history justified the import monopoly. None thought to examine that history critically. It was not until the 1980s and 1990s that the justification for the monopoly would be seriously examined and politicians forced to reconsider the frauds visited against the public interest by sections 37 and 102 of the Australian Copyright Act.

In the meantime, the public accepted limited choice and high prices. It seemed that for Bowen, like so many legislators who preceded and followed him, certain principles and laws of copyright were decrees inspired by providence. Believing in the virtue of laws created by Parliament they willingly elaborated principles without regard for their justification.

In the case of the import monopoly, Bowen and his advisers fell prey to the false belief that time-honoured law is good law. Long trained in intellectual conformism, they did not understand that a law accepted for more than half a century may yet be rotten. The Australian public suffered the results of Bowen’s decision to retain the import monopoly. Copyright owners continued to control the supply of copyright product to Australia, and consumers continued to pay high prices for books and records, and later videos, DVDs and digital products.

**The debates of 1968**

**Labor’s stand**

In the early history of Australian parliamentary debate over copyright, one or two individuals rose above their colleagues in insight, understanding and conviction. These figures were united by the hatred of monopoly. In 1905, Sir Josiah Symon invoked Macaulay’s warnings against monopoly to argue passionately against the lengthy posthumous term, and seven years later John Keating and David Gordon attacked the import monopoly with equal moral force.

---

9 Import restrictions on sound recordings were lifted in Australia in 1998 and government and consumer surveys tracked a steady fall in prices from that year. Restrictions on computer programs were lifted in 2003.
None of these men belonged to the Labor Party, which in 1912 adopted a reactionary stance on the question of import controls. In 1968, however, Labor politicians linked the rights of authors with the development of national identity, and attacked some of the monopoly rights conferred by copyright law. No speaker during the 1968 debates showed the intellectual and moral depth of Symon or Keating but a few shared their scepticism over the motives of those who argued for more and more rights.

Labor MPs led the charge against key aspects of the 1968 Copyright Bill. They were led by Reginald Francis Xavier Connor, a massive, aggressive man twice convicted of assault and known by a variety of nicknames – “Al Capone” “King Kong”, “the Strangler”. According to a colleague, he “built a reputation for perspicacity on an impressive knowledge of chemistry, xenophobia, such profound non sequiturs as ‘life is an equation in hydrocarbons’, and mumbo jumbo about an annual ‘energy budget’.”

Six years after the Copyright Bill, he engineered the Khemlani Loans Affair that led to his resignation and the fall of the Whitlam Government. Bombastic and menacing, Rex Connor did not restrain himself in parliamentary debate. He hurled intemperate abuse at the Government but he spoke with confused prescience about the effect of copyright laws in limiting future access to copyright material. He glimpsed the future through a glass darkly but at least he guessed something about later developments that his colleagues did not. He also spoke speciously about the Government’s obligation to artists, bringing to public notice a favoured theme of future Labor governments, the need to join copyright and cultural policy.

“Time and space”

In his remarks after Bowen’s second reading speech, Connor, the unmistakable polymath, referred to “the Pharisee of old”, Pope Pius XII, Marshall McLuhan and Gutenberg. The rapid recitation of sources to illustrate his points unfortunately distracted his audience from a deeper insight: Connor grasped, indistinctly, the future of copyright law as a means for regulating global communications.

---

10 They advocated ideas of cultural protection that neither Keating nor Gordon, both ardent advocates of the Australian interest, shared.

Quoting McLuhan’s observation that a century of development in communications technology abolished “both time and space”, he noted that while the legislation “belatedly provides solutions to longstanding problems [of technology development] it fails utterly solve or to foresee those of the immediate future.” He correctly predicted that developments in video recording and computing would precipitate arguments for further copyright legislation, but more significantly, he exposed what copyright proponents regarded as a technical deficiency in the drafting of the Bill.

The 1968 legislation vested in the owner exclusive control over the reproduction, broadcasting and diffusion (distribution via terrestrial wires) of copyright subject matter, extending copyright protection to the known methods of reproduction, as well as the technologies of broadcasting and transmission by wires. This drafting formula presented future legislators with a difficulty. Whenever copyright owners succeeded in securing the extension of copyright to new reproduction and distribution technologies, they were forced to amend the Copyright Act to vest control of the new technologies in the owner.

In short, legislators played catch-up trying to ensure that copyright protection extended to all technologies that multiplied and disseminated copyright material. As Connor said, “radio, television, the modern phonograph recording industry, magnetic tape recorders, videotape, computers, new methods of printing, photocopying, satellites for communication and the transmission of entertainment programs, microfilming of books, and electronic diffusion services … have created new concepts of mass communication and new challenges even for nations which have progressively modified their law of copyright.”

The Bill, he made clear in his remarks, did not comprehend all the possible modes of reproducing and disseminating copyright material. In modern parlance, its provisions were not “technology neutral”, that is, they could not be interpreted to apply to all conceivable future modes of production and communication. The Bill, said Connor, “fails utterly to meet even the problems associated with the minor innovations of the technological age.” If implemented, the legislation would “fail dismally to meet the more complex problems associated with man’s march forward in the vanguard of electronic invention.” Viewed from the perspective of whether the copyright legislation applied to new technologies, these criticisms were to some extent vindicated.
Only in 2000 did Australia overcome the problem – from the copyright owner’s perspective – of new technologies falling outside the ambit of copyright legislation. Major legislative amendments introduced a so-called “technology-neutral” right of communication to the public, which replaced technology-specific dissemination rights. Copyright protection applied to any conceivable form of disseminating copyright material. The legislation also expanded the meaning of reproduction to include the digitisation of works and the conversion of digital works into a non-digital format.

Having suggested that the piecemeal extension of copyright to new technologies meant that existing legislation would be inadequate to regulate a communications economy characterised by continual innovation, Connor went no further. He turned instead to the policy considerations that motivated the Opposition and Government. According to Connor, the governing Coalition, “obsessed with proprietary rights” stood for big business, and more specifically, the copyright industries. The Labor Party, by contrast, was “primarily interested in the plight of Australian authors, dramatists, composers and artists.” A tide of imported books, films, records and television shows swamped their work and they deserved “a greater percentage of the remuneration which would otherwise be flowing overseas, much of it for syndicated rubbish or worse”.

**The “little people”**

Connor’s colleague, Gilbert Duthie averred that the copyright industries “will look after themselves and they have the power to do so.” Labor would “think principally of the authors, dramatists, composers and artists.” The Copyright Bill reflected the politics of power: the record companies, broadcasters and publishers “walked the fastest, longest and most often to the door of the Attorney General.” These industries, said Duthie, “had changes made in the 1967 Bill and those changes are reflected in the Bill that is now before us.”

Duthie declared his concern for “the little people, as I call them”. Echoing George Bernard Shaw’s comments in *The Times* in 1911 and 1949, he said that the little people “do not have the financial might, the stocks and shares and the status in the community to exert pressure, but they sweat and sacrifice to create works of art.” Parliament, he insisted, “should think of them primarily in this legislation.” Between them, Connor and Duthie announced a distinct policy towards
copyright law which the Labor Party proclaimed for the next 30 years. The declamations, however, rang hollow.

For 20 years before Duthie’s speech, cross-currents swirled around the coral edifice of authors’ rights, weakening the Berne Union’s many-hued creation. Copyright law still acknowledged the primary entitlement of authors but the growth of industrial copyright and neighbouring rights presaged a new age. Governments of all political persuasions now lent their ears to corporations, not the little people.

A policy of preferring “little people” to “big people”, the “rich industrialists” described by Bernard Shaw in 1911, is not to be derided. But Duthie’s conception of little people did not comprehend a larger group of “little people”, the great community of consumers who bought books and records and paid to see films. The Labor Party politicians seemed oblivious to the needs of the public. Preferment of Duthie’s little people inevitably meant disadvantage to the public. Many authors were no less grasping than industries and excessive privileges were invidious, whether in the hands of individuals or corporations.

**Cultural nationalism**

The little people doctrine justified the continuation of the import monopoly, which allowed copyright owners to restrict the supply of copyright product to Australia and fix the price of goods. Who paid for protection of the little people? Not the copyright industries, rich, powerful and well able, in Duthie’s words, to “look after themselves”. Connor supplied the Labor Party’s answer: government must subsidise those with an artistic vocation.

The legislature must recognise that “a new economic status should be provided for creative artists now covered by the field of copyright.” Additionally, the governments of Australia must employ creators enabling them to “practise their callings within the public services.” Connor supplied an alarming summary of the role to be played by artistic public servants. “Here would be people,” he said, “speaking to the nation, moulding the national ethos, and providing the mainstream of a truly Australian cultural sentiment and national spirit.”

If Australian voters wanted to free their country from the ancient curse of philistinism, they would have to accept the necessity for supporting artists in the public service. “The Australian market,” Connor declared, “has always been appallingly limited by population.” Limited demand meant that “with very few exceptions, no composer, author, dramatist
or artist can be assured, from within the limited Australian market, of an adequate return for the products of his creative talent and genius.”

Connor’s grand vision conflated copyright and cultural policy. “Is it to be wondered,” he asked, “that there are critics of the impediments to Australia’s cultural development and maturity? Is it to be wondered that there are critics of the absence of a major Australian film industry?” Consumed by his vision of cultural revolution, Connor added a proviso. The new class of artist bureaucrats must be secluded from the temptations posed by the copyright industries. Quarantined from “the dead hand of sordid commercial calculation” they could concentrate on producing works that satisfied “the human mind thirsting for knowledge or works of creative talent and genius”.

According to Connor, the bureaucrats would create a new Australia:

The products of their talent, and in some cases genius, would then be available to the whole of the Australian people through modern electronic communication media, without the interposition of commercial interests whose exclusive objective is the extraction of maximum profit for themselves, with minimum return to those responsible for the creation of works of artistic, cultural and literary merit.

Connor’s vision of a cultural nomenklatura created by copyright legislation perhaps owed something to his early affiliation with the Communist Party and membership of the communist-dominated Industrial Labor Party.12 In sketching the merging of copyright and cultural policy he anticipated the approach taken by future Labor Governments but his ideas went beyond anything envisaged by his Party.

“God help the composer”

Duthie commended Connor for his speech but he did not support the latter’s fantasy of a utopia created by artists. His ideas for copyright policy owed nothing to crypto-Marxian dreaming. Much more than Connor, he helped articulate the new Labor orthodoxy that placed “originators” at the forefront of policy. Duthie’s views represented a sane counterbalance to Connor’s, mainly because he did not assume a necessary connection between copyright regulation – designed principally to protect the economic interests of copyright owners – and

---

12 Connor was close to the Communist Party during his early political career. He joined the Industrial Labor Party in 1939, was a member of its central executive and a keen socialist.
the ideology of cultural development, which subordinated copyright policy to the goal of creating economic security for artists.

Duthie felt that Copyright Bill was designed to benefit the copyright industries, especially the “record manufacturers, the big shots of the music industry”, as he called them. He wanted to ensure that the creators, without whom “there would be no ballets, no publishers, no music houses and no record companies”, received a fair share of the profits generated by the industries. The “big shots”, said Duthie, were “getting on very well”. He observed ruefully to other MPs that “I have not heard of many record manufacturers going out of business”.

Duthie asked the House to consider the true purpose of copyright law. “What we have to understand,” he said, “and to think about is that is the originators who deserve basic protection in any legislation like this.” Unlike Connor, he made modest proposals to benefit creators. The Government, he believed, should continue to assist artists through institutions such as the Commonwealth Literary Fund and the Arts Council, but the only change to legislation he proposed was to increase the rate of statutory royalty payable for records sold to the figure of 6.25 per cent recommended by the Spicer Committee.

The rate was “anchored at 5 per cent in 1912” and he derided the Government’s proposal to leave future revision of the rate to the Copyright Tribunal. He was equally dismissive of the times specified in the Bill for review of the rate. The legislation provided that the Attorney General could request a review of the rate two years after the commencement of the Act and then five years after the first review. According to Duthie periods “of two years and five years are outrageously long before an appeal to the Tribunal may be heard.”

Otherwise, Duthie accepted with resignation a Bill that indeed created a suite of rights that belonged to industries not authors. Unlike Connor, he adopted a constructive approach to the Bill. Whereas Connor spat at the “slovenly Government” for its failings in regard to copyright policy, Duthie offered congratulations.

“We welcome this legislation,” he said. “It will do a lot to remove injustices. Where injustices remain the Copyright Tribunal will have to correct them.” The Tribunal, said Duthie, would be “composed of some of Australia’s top judges”. He ended his speech with a wry parting wish. “All I hope,” he said, “is that they are judges with musical souls. If they are not, God help the composers.”

319
The question of dissemination

Not all Labor politicians concentrated on the needs of copyright creators. Gordon Bryant, a member of the National Library Council, hoped that “members will play close attention to the field of libraries and their particular duties in regard to this legislation.” Libraries disseminated knowledge and Parliament “must take good care that there is no inhibition of our use of any material that is about.” The legislature “ought not to throw [originators] to the wolves as has been done so often”, but government must pay attention to the needs of copyright users.

Bryant reached a radical conclusion. “I am not even convinced,” he said, “that property rights in copyright should flow on after the death of an author.” Why, he asked, should royalties “have to be paid after an author has passed on?” If copyright died with its owner, the public benefited. If copyright works found their way more rapidly into the public domain, the public gained access to literature and music freely, or at least cheaply.

The long posthumous term merely enriched individuals who played no part in the creation of copyright works. “I understand,” Bryant noted with disapproval, “that a great deal of money is still flowing into the coffers of the Shaw estate.” But he doubted whether his views would impress other legislators. It was doubtful, said Bryant that their “attitudes to copyright and the protection of people’s rights are adequate to the task.”

Bryant asked a series of questions.

In copyright, where does the interest lie? Does it lie necessarily with the author? In a dramatic work, does it lie with the performers? If it is reproduced in printed form, does it lie with the publishers?

The answer he considered straightforward. The copyright industries lobbied the politicians and copyright laws were now made for their benefit. In the case of books, the “odds seem to favour the publisher.” Why?

He is likely to have the biggest interest. He is likely to have access to the corridors of power. He is likely to be more persuasive. So in the conflict of ideas, rights and so on … it is likely that the person who achieves the greatest success financially will be the publisher.
In the case of musical works, the record companies benefited more from the Copyright Bill than composers. The same applied to broadcasters. They, not the creators of broadcast works, gained significantly from the legislation.

Bryant concluded with more questions that crystallised his sentiments.

What are we to do about authors? How are we to encourage Australian authorship in the face of competition from overseas? Finally, what are we to do to protect the rights of customers who number more than 12 million?

According to Bryant, “the customer outside is interested in the whole field.” More than anyone else in Parliament, Bryant articulated the need for copyright users, in a world dominated by copyright owners, to secure access to copyright material. He said of the user:

He is interested in the works of dramatic art, in the right of access to sporting spectacles, in the right to read in public libraries when there is only one copy of a book available or perhaps when only a few copies of a book have been imported. Then there is the right of the student which at the present time, is probably one of the most compelling needs.

**Importation and price competition**

One Government MP expressed particular concern about the policy underlying the importation rules. Edward St John, a Coalition maverick shortly to stand as an Independent and lose his seat, repeated the old proposal, first rejected by the Spicer Committee, for importers to be permitted, under the terms of the compulsory licence to import records from overseas. He declared that it was “very necessary in the public interest that importers should not be held to ransom by the copyright owners, so that the Australian public may continue to enjoy the benefits of price competition.”

St John knew he was steering an imprudent political course – he said later in his speech, “I do not care how many bridges I have burnt behind me” – and his arguments did not sway Bowen. By trying to defeat importation restrictions by revision to the compulsory licensing provisions, he made failure certain. The Spicer Committee rejected the idea of extending the compulsory licence to include importation of records for the reason that the production and distribution of records are two different processes. According to this logic, a right intended to prevent a production monopoly should not in principle be used to try to defeat a distribution monopoly.
St John would have done more benefit to the cause of defeating the import monopoly by drawing attention to the “great big blackmailing clause” referred to in the House by John Keating 56 years earlier. In the 1968 Bill, the blackmailing clause was section 37, and by exposing the inequity of the distribution monopoly it conferred on copyright owners, St John could have established a precedent, in the tradition of Keating and Gordon before him, for principled objection to import control.

**Performing right in records**

Another backbencher, Alexander Buchanan, who, like St John, ended his career as an Independent, criticised the provisions creating the mechanical performing right. A politician of considerable experience, a farmer, and an amusing straight-talker, Buchanan recited the history of radio broadcasting in Australia. He declared that radio broadcasters did not accept the obligation to pay fees for playing records. Broadcasting conferred a great benefit on record manufacturers:

*The value to the maker of exposure by broadcast and penetration by transistor to the mind of the teenager and other areas of vacuity is so great that broadcasting stations are inundated with free copies of new records in the same extravagant way as doctors are importuned with free samples of new drugs by medical detailers … Some stations do not play anything else than these jungle tunes, and far from getting any royalty on them the makers should be fined for inflicting them on a defenceless public.*

“This performing right,” said Buchanan, “is a monstrous distortion of the very basis of creative production and original authorship which copyright involves.” Buchanan could not see how the investment of skill, effort and money justified the award of copyright in records, let alone the mechanical performing right. He said:

*None of this so-called technical skill adds one note to the score or one word to the lyric … if it does cost money, the ordinary processes of business require that the maker should seek his reward by the sales he is able to make of his records.*

He declared the reasons given by Justice Maugham for his judgment in *Cawardine* “arrant nonsense”. In criticising Maugham’s discovery that legislation bestowed on the record industry a mechanical performing, he followed directly in the footsteps of a former Lord Chancellor and important legal reformer. Buchanan did not repeat Lord Jowitt’s disparaging summary of Maugham’s “unfortunate” decision in favour of the Gramophone Company but his own criticisms brought to mind
those of the Labour peer. They may also have rung true to Bowen were he listening to them as a lawyer and not a politician.

Buchanan pointed out that the mechanical process of producing a record involved not a shred of originality or artistry. As conceived by the Berne Union and the British and Australian legislators of the early 20th century, copyright subsistence depended on originality. Only by corrupting principle could the legislature agree to vest copyright in the so-called ‘subject matter other than works’. When British legislators established the compulsory licence in 1911, they created a species of copyright that did not include the positive rights, including the performing right, vested in the owner of copyright in works.

For the most part, Buchanan’s comments fell on deaf ears, though at least one other Coalition backbencher shared his views. Ian Allan, a Country Party backbencher who worked as a radio announcer for the ABC in the late 1940s, was, like St John and Buchanan disenchanted with the Government. Like them, he criticised the Bill not because he wished to damage the Government but for reasons of principle. He complimented Bowen on the legislation and spoke in positive terms about the Bill as a whole. But when he came to provisions creating the mechanical performing right, he spoke vehemently against “this part of the legislation which forms only a tiny fraction of the whole Bill”.

Bowen, said Allan, knew very well that he considered this “one item in the Bill” to be “highly objectionable” and that “I cannot see any rational explanation for it”. He reminded his listeners that the British gramophone industry asked the Gorrell Committee in 1909 to recommend legislation to create a mechanical performing right. The industry, said Allan, wanted to boost record sales by encouraging the public performance of music. It needed the right, he claimed, to ensure that the playing of records in places of public entertainment would not be judged an infringement of copyright in works performed. Legislators enacted provisions permitting compulsory recording but they never intended for the industry to prevent others from playing records in public or demand fees for public performance.

According to Allan, only the peculiar reasoning of Justice Maugham, influenced by the cunning arguments of Sir Stafford Cripps, transformed a right to perform records in public to a right to control the public performance of records. But, said Allan, neither reason nor justice supported statutory recognition of the right identified by Maugham. To pass laws recognising the mechanical performing right,
he said, “offends my common sense”. Allan quoted the 35-year-old Owen Report, which emphatically rejected the record companies’ proposal for legislation to recognise the right. In the report, Justice Owen declared that:

The law should be made clear on this point, and, in the opinion of this Commission, the performing right now claimed by some record manufacturers is unreasonable, and, if in law it exists, this right should be abolished.

Allan attacked the reasons given by the Spicer Committee for supporting statutory recognition of the mechanical performing right. The Committee gave three reasons: the manufacture of records involved technical skill above that required in ordinary manufacturing processes, broadcasters relied on playing records to attract listeners, and the manufacturers invested significant amounts of capital to establish production facilities. According to the Committee, the investment of skill and capital, and the reliance of broadcasters on the supply of records, demanded legislation to create a right of public performance in records.

The “reasons given by the Spicer Committee,” said Allan “are really unsound.” He pointed out that, “on all scores the manufacturer of a record is in no better or worse category than the [ordinary] manufacturer.” Allan implied that all manufacturers could claim to exercise special production skill. “Even the man who moulds a toothbrush,” he said, “perhaps has some special claims to creative ability. His creative talents are called into use in designing the mould of the toothbrush.”

Nor should the fact that radio stations depended on playing records to attract listeners justify a claim for public performance fees. The advantage cut both ways. In the absence of broadcasting, record manufacturers would find they sold fewer records. The record companies had no need to antagonise broadcasters by demanding fees for an activity that benefited them as much as the radio stations. EMI, according to Allan, “pays a fee of $200,000 to Radio Luxembourg, a commercial station situated in Europe, to play and to popularise its records, because EMI knows that the way it can get its records sold to the public is by having them played by commercial stations.”

Allan disposed of the argument that industry investment called for statutory protection. The industry in Australia flourished in the absence of the mechanical performing right, and in any case, the contribution of
the record companies to Australian industry was small. The majority of investment behind the production of records sold in Australia occurred outside Australia. Companies imported 80 per cent of records played in Australia. Performance fees collected for the playing of these records, said Allan, would be mostly remitted to foreigners.

The Spicer Committee’s case for the mechanical performance right, said Allan, “was a very weak effort indeed.” No reasonable person could gainsay Allan’s logic in his dissection of the Spicer Committee’s arguments. Analysed so starkly, they seemed risible. His description of the gramophone industry’s quest for recognition of the performing right in Britain was not wholly accurate – the industry first evinced a strong interest in the right at the end of the 1920s – but taken together his arguments against the relevant provisions in the Bill powerfully refuted the Government’s reasons for recognising the right.

Buchanan’s last words on the subject no doubt raised a smile on the faces of others in the House. “Surely,” he said, “law should be based on logic and rational thinking.”

**The modern case for regulation**

The debate in the House of Representatives ended, Reginald Wright, the Minister for Works, introduced the Bill in the Senate. His speech mostly repeated Bowen’s second reading speech. His proved more illuminating, however, because, unlike Bowen, he carefully explained the policy underlying the legislation.

In so doing, he elaborated the balance theory of copyright. The main factions in contemporary copyright debate would affirm his statement of the law’s function would. Wright can thus be said to have articulated in Australia, perhaps for the first time, present orthodoxy about the purpose of regulation.

Copyright legislation, he said, must articulate “a reasonable compromise in cases where there are conflicting interests”. It must preserve the incentive to produce copyright material by protecting the legitimate economic interests of producers and balance against the interests of the producers the needs of the authors.

Wright stopped short of acknowledging dissemination of information as the primary goal of copyright policy. He never mentioned the public’s interest in comprehensive access to information, described by Gordon Bryant as the “people’s rights”. Nor did he share the Labor
Party’s preference for authors over producers. While the Government wanted “to see that authors receive due payment for use of their material” it recognised that “existing practices and existing relations in industries which depend upon copyright material cannot be ignored.”

“Without this protection,” said Wright, “it would not be likely that large sums would be invested in the production of books and magazines or the publishing of music.” Industries were also users of copyright material, and in this capacity, must be treated tenderly. The “broadcasting and television industry, the record industry and much of the entertainment industry” all “depend on being able to use copyright material on reasonable terms.”

Remarkably, Wright’s speech made no reference to the interests of the public. He seemed oblivious to the possibility that members of the public could use copyright material. For Wright, “users” were broadcasters and the entertainment industries. The purchasers of books and records, the viewers of film, television and entertainment, the radio listeners, these millions of individuals seem not to have entered into Wright’s calculations.13

Wright’s statement of copyright’s purpose, contemplated only two elements of the schema of interests nowadays consulted in discussions of copyright policy. In 1968, however, only Coalition dissenters, and Bryant of the Labor Party, suggested that laws directed towards assisting the creators and producers of copyright material should also operate to the benefit of those who paid to read, hear or view that material.

The Senate carried on a perfunctory debate after Wright introduced the Bill. The Opposition repeated its complaint, made in the Lower House, that the Government rushed consultation. Otherwise the Labor Senators offered little criticism of the legislation. The Party’s main speaker, Senator Doug McClelland, followed his Lower House colleagues and demanded that the Government ensure that creators were “adequately protected in the interests of the creative arts in this nation”.

13 Modern policy debate casts the members of the public interchangeably as “users” and “consumers” of copyright material. Some observers draw a distinction between users and consumers: in their formulation, the makers of electronic networks market to “users”, who have autonomy to decide how to use computer systems to obtain and use information, while the content providers of film, television, print and the internet dictate the choices of “consumers”.

326
The Bill passed, almost entirely unchanged, in June 1968. In 1905 and 1912 members of the Senate supplied the most perceptive and searching commentary on copyright legislation. In 1968, Senators said little about the Copyright Bill. Reasons for the change are not hard to find. The earlier senators, those of 1905 and some in 1912, were a more fearless breed, and the world they inhabited, less beholden to special pleading and special interest. Independent and willing to ignore party principle, they were, above all, resolute in placing the interests of their country before any others.

**A new era**

The debates of 1968 signalled the beginning of a new era in which policy-makers considered government accountable to interests of not only the creators and producers but also the public – the “users” (or “consumers”) of contemporary parlance. Connor’s scheme for commissariats of the arts marked the start of Labor’s support for the little people in preference to the public. His colleague Gordon Bryant expressed concern that the legislation neglected the interests of the libraries and their public, but his Party ignored him.

It fell to Coalition dissenters, abetted by Bryant, to advocate the public interest. One criticised restrictions on the importation of records and two attacked the mechanical performing right, this “monstrous distortion”, in the words of Buchanan, that operated to the disadvantage of radio broadcasters and the listening public. All critics regarded the new rights delivered to the copyright industries as inimical to the real purpose of copyright. All were unambiguously supporters of authors’ rights and they considered that the new industrial copyrights could not be justified in principle. Only by distortion and corruption of principle could they in any way be justified.

The Government paid no attention to any of the critics. Outside Parliament, the public uttered no words over the copyright legislation until 1969. Earlier, in 1967, the *Sydney Morning Herald*, in a short editorial that reproached the Government for taking so long to implement the recommendations of the Spicer Committee, gave the first Copyright Bill “a hearty welcome”.

In 1969, the *Herald* registered the first salvos in the still-continuing war between libraries and copyright owners’ groups. Debate began in August when Alan Horton, the General Secretary of the Library Association of Australia, responded to the threat of the Australian
Copyright Council to prosecute libraries and schools for photocopying books. He declared the reproduction of whole books, “entirely improper”, but disagreed with the ACC’s claim that students using coin-operated photocopying machines in libraries were “flagrantly” breaching the new Copyright Act.

According to the Library Association, to ban the photocopying of extracts in public and university libraries could “interfere with the free dissemination of information.” In September, Horton and Gus O’Donnell, the Chairman of the ACC debated the issue of legitimate copying for educational purposes in the pages of the Herald. A school student, Patricia York, joined the debate, pointing out the possible administrative consequences of draconian enforcement of the fair dealing and library provisions in the Act.

“May I ask?” she wrote, “what the authors, composers and publishers want? An inundation of letters from students asking to make a copy? A grand court case involving thousands of students? Or a lump sum from a Government which can ill afford it?” O’Donnell hastened to assure her of his organisation’s “great sympathy” and noted that all that “the council is saying is that excessive making of copies in schools is not fair dealing.”

Her question went unanswered. What did creators want? And to what extent were their wishes consistent with then needs of the public? These matters would be debated for decades. But the truth is that the Australian public in 1968 was uninterested in the new Copyright Act. Superficially, it seemed to change little: for the copyright industries, for authors and for students, business carried on as usual.

**Summary of the 1968 Act**

The *Copyright Act 1968* is a creature, or more accurately, a younger first cousin, of the British Act of 1956. Although said, when originally passed, to be better drafted and better arranged, it adopted the substance of the British Act’s provisions and followed exactly the fundamental categories of the British legislation.

Part I contained preliminary provisions, Part II dealt with matters of interpretation and in Part III, the nature and scope of copyright in works was set out. In orderly, comprehensible fashion, Part III specified the rights accruing to the owners of copyright in works, the copyright term, the types of infringement, the varieties of fair dealing,
other miscellaneous acts that did not constitute infringement, the libraries’ copying privileges and the content of the compulsory licence.

Part IV established a category previously unknown in Australian law: that of, ‘subject matter other than works’. The Act set out the nature of copyright in subject matter other than works – sound recordings, cinematograph films, television and sound broadcasts and the published editions of works – in plain terms. The old confused regime, in which films were recognised as a species of artistic works and broadcasts and published editions not recognised at all, disappeared. As in Part III, types of infringement were specified and the acts, including fair dealing, not constituting infringement, were laid out.

Part V dealt with remedies and offences, Part VI the constitution and functions of the Copyright Tribunal, Part VII the right of the Crown to use copyright material as-of-right subject to equitable remuneration, and Part VIII the application of the Act to foreign nationals and institutions.

The legislation thus introduced two distinct categories of copyright subject matter, ‘works’ and ‘subject matter other than works’, to the Australian statute books. These categories recognised the distinct interests of creators and producers. If the two recognised interest groups, creators and producers, disagreed over the amount of royalties payable for the use of material, they had recourse to the Copyright Tribunal, as did the record companies and the broadcaster in the event of commercial dispute.

The Act also recognised the public interest in access to copyright material on fair terms, at least partially, in the fair dealing and library provisions. The Act protected Crown use, with the result that it could be said the Act protected the interests of authors and producers while ensuring that the exclusive rights did not operate to wholly exclude government and public from the gratuitous use of copyright material.

Much about the new legislation seemed admirable. In drafting and arrangement it seemed lucid and coherent and it proved to work in practice. The prediction in 1968 of the Labor Senator, Doug McClelland, that “having regard to the problems that this Bill will create for professional creative people in this country … another Bill of this nature will certainly be before this chamber within five years” proved unfounded. The Act also had a great weakness: it failed really to secure for the public access to a broad range of copyright material at low prices. The import monopoly remained, with more provisions
added in favour of the copyright owner and the fair dealing and library provisions, supposedly designed to advantage the public, could be said to hedge with provisos what should be a birthright of citizens: to hear and to see without always to be reaching into their pockets.