Chapter 15 – Policy observations

The purpose of this book was to determine empirically – by examining the historical record – and with particular reference to the development of copyright law in Australia, the truth or non-truth of modern assumptions about the origins and function of copyright law. It is the first study of 20th century copyright law to set the claims made about the function of copyright regulation in the context of how the laws actually came to be passed. The book shows that copyright law in Britain and Australia was not made in the way claimed by proponents of copyright orthodoxy. Consequently, it undermines or overturns long-held assumptions about copyright regulation.

Copyright laws in Australia were, through the 20th century and beyond, made to the design of self-interested individuals, not, as declared by copyright orthodoxy, governments seeking to stimulate the production and consumption of copyright material. Governments responded to political agitation by granting rights, and qualified those rights in the hope that the restrictions would prevent misuse leading to monopolies. In a legislative sense, governments operated primarily as amanuenses for private interests and it is in the motivations and actions of those private interests that the substance of the story of copyright lies.

Perhaps the most interesting fact to be gleaned from the history of 20th century copyright law is that the great agitation for authors’ rights, led by the Berne Union, ultimately worked to the advantage of industries, not individuals. The authors, and the Union, aspired to absolute control over the production of copyright material, control that they believed to be their natural entitlement. But the demand for mechanical rights unleashed a revolution with consequences they did not foresee. By demanding a surfeit of rights, they provoked the phonographic industry into seeking analogous rights.

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In a real sense, the modern copyright industries are the unwitting creation of the movement for authors’ rights. Had the Berne Union not asserted that the author must control mechanical reproduction, it is possible that the music and film industries, and later the broadcasting and software industries, would have been content to regulate their activities through contractual, rather than property, rights. Once the authors claimed the right to control mechanical reproduction – and dissemination – they confronted producers with the prospect of ruinous competition to secure rights to reproduce and disseminate. The producers pre-empted the creation of a system in which the mechanical rights were auctioned to the highest bidder by securing analogous rights (together with the privileges of compulsory licensing) in copyright legislation.

The pattern for future developments in copyright regulation was then set: authors were to be granted the right to control each new method of reproducing or disseminating copyright material and analogous rights were simultaneously awarded to producers. The aggrandising movement for authors’ rights created the modern industrial system of copyright production. Copyright regulation arose from a contest to control the process of producing copyright material, and, almost literally, the Berne Union and the industries laid down the law: governments then made laws according to their direction.

Along the way, legislators passed facilitating provisions to help collecting societies to secure – on behalf of copyright owners – payments in gross from the users of copyright material. Copyright legislation thus governed large-scale revenue transfers, a function never contemplated by the early legislators or even the proponents of authors’ rights. Between the world wars, Australia’s largest and oldest collecting society, APRA, drew its largest revenues from government – the A Class radio stations and then the ABC – which more willingly paid public performance fees. It then began to extract similar revenues from commercial radio stations.

CAL, now almost APRA’s equal in size of collections, began collecting in the mid 1980s and continues to draw the overwhelming proportion of its revenue from the public sector – schools, universities and government departments. Assisted by the Copyright Tribunal, which determines rates of equitable remuneration, the collecting societies bear witness to the efficacy in copyright history of skilful, determined lobbying by private interest groups – the copyright legislation places
lopsided emphasis on facilitating their extraction of rents from copyright users, in particular, public or government users.

The apotheosis of all these developments is the Age of America, which promises to subsume the local concerns of countries like Australia in the movement towards a worldwide copyright law friendly to the economic needs of the US copyright industries. The credo of US copyright imperialism is clear – it is spelt out in the TRIPS Agreement and, short of an unforeseen mental revolution, must soon dominate the world. And behind it lies the intelligence, foresight and energy of individuals, the successors in spirit (though the second group might disavow the first) of the men who created the authors’ rights movement, founded the Berne Union, and launched the modern age of copyright.

The following policy observations are drawn from the research contained in this book.

1. The Berne Convention precipitated the creation of modern copyright law

The influence of the Berne Convention on the domestic copyright law of Britain and Australia cannot be over-estimated. The historical record shows that the Berne Union’s optimising approach to author’s rights lies at the root of developments in British and Australian copyright law in the 20th century.

The assertion of optimal rights for authors forced the phonographic industry to seek, in self-defence, copyright protections that it might otherwise not have sought. The campaign for authors’ rights threatened the viability of the phonographic industry, and by asserting the legitimacy of a producers’ copyright, the industry encouraged like producers to campaign for copyright protection.²

The record does not disclose why the Convention proved so influential in policy-making, but it does reveal that the need to accede to the Convention, and the concept of a uniform imperial copyright law,

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² The broadcasting industry – successfully – and sports promoters – unsuccessfully – later followed the lead of the phonographic industry and cited the organised expenditure of labour, investment and skill as criteria for the grant of copyright. The phonographic industry, specifically John Drummond Robertson, persuaded the legislature that originality was not a necessary criterion for the subsistence of copyright.
influenced British and Australian policy-makers more profoundly than any other idea.

2. Early legislators tried to qualify the scope of copyright

Despite the optimising strategy of the Berne Convention, many early legislators and policymakers were concerned to limit, so far as they deemed practicable, the potential for copyright law to create harmful monopolies. They were also hostile to the claims of copyright producers-publishers and the phonographic industry – but ultimately conceded rights to the latter to prevent the owners of works from licensing only one or two record companies to make recordings.

Australia rejected the 50 year posthumous term in 1905 and politicians and members of the public criticised the term during the debates that preceded its adoption there in 1911. The British and Australian legislatures introduced compulsory licensing schemes for both books and records, effectively reducing the posthumous term for literary works to 25 years.

Their attitudes to copyright regulation were informed by natural law conceptions of copyright as a just reward for the creators of works. Economic calculation seems to have played a secondary role in government thinking. Conceptual confusion resulted: the official outlook was hostile to the producer interest, yet sympathetic to the creation of authors’ rights that were fundamentally economic in content.

While they sought to benefit authors in legislation, the British and Australian polities were forced to recognise that if they granted authors exclusive rights in relation to the fixation and dissemination of copyright works, they must perforce allow some analogous rights to the industries that made fixation and dissemination possible.

But the logic they imputed to copyright regulation derived strictly from natural law. In Australia in 1905, legislators solved the problem by ignoring (consciously or not) the existence of the mechanical industries, but in 1911 and 1912 the accommodation made between natural law and utilitarian economics split modern copyright law, conceptually and practically, from its forerunner in the 19th century.
Copyright orthodoxy holds that copyright laws were made to provide creators and industries with the incentive to produce and disseminate copyright material. In the 19th century, legislators sought principally to protect publishers against book piracy. In the 20th century, their successors paid little attention to questions of incentive, production or dissemination. Instead, they came to concentrate on satisfying a tripartite hierarchy of needs beginning with the necessity – declared in the Berne Convention – for authors to control the productive process, followed by the requirement that industries share, by analogous rights, in the rewards of production, and ending with the imperative for some legislative curbs on the power of the two primary pressure groups.

In the early years of the 20th century, legislators accepted natural law justifications for authors’ rights. By 1911–12 these conceptions did not preclude them from recognising the economic dangers of concentrating rights exclusively in the hands of authors. However, the admixture of natural law assumptions and propositions advanced out of economic self-interest confused and compromised policy for the rest of the century.

By a hybrid process, sometimes coherent, sometimes piecemeal, politicians created the modern law of authors’ and neighbouring rights, responding to the economic demands of competing factions. Those demands – often disguised in the language of natural law or justice – derived from calculations of economic self-interest unrelated to considerations of economic efficiency. The long posthumous term, the attempt to arrogate to authors monopoly control over the production process, the equal attempt of industries to exert maximum control over production and distribution – none of these features of law and law-making were designed to encourage production (already a certainty) or the dissemination (in the public interest) of copyright material at low prices.

Import controls allowing producers to control the distribution of copyright material, restricting supply and maintaining high prices, testified to the fact that copyright legislators were indifferent to public welfare. The question of how to encourage optimum production and dissemination seemingly never crossed their minds as they legislated for the long posthumous term and entrenched distribution controls in law.
4. Copyright does not confer an automatic right of remuneration

The putative principle that all uses of copyright subject matter are remunerable cannot be said to have been settled in policy or legislative debate. The historical record shows that when exclusive rights were first enacted early in the 20th century, legislators did not contemplate that copyright owners would demand fees for all copyright uses. When in the 1920s Australian copyright users disputed APRA’s right to levy performing right fees, the Government declared that the holder of the performing right could charge user fees. However, fees were recoverable under contract. Copyright law conferred only the positive right to authorise the public performance of music or the negative right to forbid performance.

The 1911 British Copyright Act conferred explicit rights to remuneration in the provisions establishing the compulsory sound recording and publishing licences. The compulsory licence for sound recordings specified a rate of fees payable to the copyright owner for recordings made for a commercial purpose. The 25 year rule allowed for publication of a work 25 years after the author’s death subject to payment of a royalty. Compensation for economic loss supplied the self-evident rationale (also stated in debate) for the right to remuneration.

Modern statutory schemes permitting compulsory copying by educational institutions and government were also justified on the grounds that they compensate the copyright owner for economic loss caused by educational or government copying. However, unlike the original compulsory licences, the statutory licences apply to mostly non-commercial copying carried out for educational or government purposes. When the Franki Committee recommended a statutory licence for educational copying in 1976, it could not point to identifiable economic losses caused to authors by photocopying. The Committee stated “substantial use” and “prejudice [to] sales” as the factors determining the requirement for remuneration.

While the exclusive rights can be interpreted logically to confer a right of remuneration for use, policymakers and parliamentarians have not interrogated the logic of remuneration for use in debate. Writings, speeches and debates that attended the passing of legislation in 1911 and 1912, and the subsequent history of copyright law-making in the 20th century, do not support the proposition that non-commercial use
is automatically remunerable. Prior to enactment of the statutory licences, the Franki Report and the Australian Parliament argued a priori that owners were entitled to demand fees for educational and government copying. But substantive debate on the justification for taxing non-commercial uses of copyright material is absent from the record.

Policymakers and legislators never reached consensus that all copyright uses should be remunerable. Since 1967, when the Berne Union enunciated criteria that permit exceptions to exclusive rights in national laws, the principle that use demands payment has received mostly implicit endorsement from copyright proponents and policymakers. However, it is doubtful whether the principle is dialectically aducible from copyright rationales proclaimed, since the beginning of the 20th century, in policy documents and legislative debates.

Questions about the nexus between the exclusive rights and remuneration cannot satisfactorily be settled a priori. They must lead to discussion of the purpose of the rights, a debate which necessarily involves consideration of legislative intent.

The case of Copyright Agency Limited v State of New South Wales suggests that in certain circumstances legislators do not consider that copyright confers an absolute entitlement to remuneration. In that case, the Full Federal Court found that the legal scheme for registering survey plans, established by statute, licensed government to reproduce and communicate the plans.

The historical record suggests that, historically, policymakers and legislators did not intend that non-commercial uses should invariably, if at all, be remunerable. The tenor of legislative debates suggests that few, if any, politicians in 1911 or 1912 would have agreed that non-commercial uses of material were remunerable. Nor is it clear that the early policymakers or legislators would have supported the expansive interpretations of owners’ rights that delivered the principle technical

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3 The Berne Convention, TRIPS Agreement and WIPO Copyright Agreement have established the “three step test” for determining whether legislative exceptions to exclusive rights are permissible. The criteria contained in the last two “steps” refer to the “normal exploitation of the work” and “unreasonable prejudice to the legitimate interests of the author”. Interpreted narrowly, these criteria confine statutory derogations from exclusive rights, and also suggest that the author is entitled to profit from most, if not all, copyright uses.

premise of the present statutory schemes – the idea that owners are entitled to discretely tax the copying of single pages of copyright works.

5. Legislators did not try to “balance” the interests of owners and users

The idea that copyright legislation creates a “balance” between the interests of copyright owners and copyright users, the fair dealing, library and educational provisions “balancing” the exclusive rights, is not supported by historical evidence. The Spicer Committee introduced the concept of a balance of interests to Australian policymakers in its 1959 report and thereafter they adopted the view that copyright legislation is designed to balance the interests of owners and users.\(^5\)

The Spicer Committee enunciated a novel idea. Legislators in the 19th and early 20th century passed copyright laws first to defend authors (and publishers) against piracy and then to allow growing classes of owners to control the production, distribution and use of copyright material. Fair dealing provisions in the 1911 British Copyright Act, and the enumeration of copyright offences, established the copyright owner’s hegemony – exceptions to exclusive rights were to be seen as a concession to the “public interest”. Only a handful of lawmakers in the 1911-12 copyright debates in Britain and Australia referred to the public interest.

From the 1920s onwards, commercial wars over performing rights in Britain and Australia led to loud protests over the alleged misuse of exclusive rights. Politicians realised that the perceived abuse – or misallocation – of proprietary rights could alienate the public and pragmatically tried to introduce “balance” to legislation that recognised the dominion of copyright owners. Prior to 1911, legislators did not recognise this dominion and regarded copyright as a limited privilege that ought not to curtail the public’s freedom to enjoy art, literature and music. Legislation aimed to outlaw piracy, that is, unauthorised reproduction for a commercial purpose.

\(^5\) See second reading speech of Reginald Wright, Minister for Works, explaining the Copyright Bill in the Australian Parliament in 1968. The Franki Committee’s terms of reference in 1974 included the requirement that the Committee recommend legislative or other changes “to effect a proper balance of interests” between owners and users.
6. Copyright legislation regulates taxation in gross of non-commercial (or non-competing) users to the detriment of public welfare

The legislative settlements of 1911 and 1912 were made in favour of copyright owners. Collective rights administration, relying on the schema established in 1911-1912, has caused public welfare deficits. The exercise of the performing right by the PRS and APRA, and the assertion of a mechanical recording right by the record industry, caused commercial warfare in the 1920s and 1930s. Administering collective rights schemes, and charging performing right licence fees, the PRS and APRA supervised the transfer in gross of funds from copyright users to owners.

Contemporary critics alleged that unequal bargaining power resulted in extortionate licence fees, and secrecy about distributions made impossible judgments about the efficiency and fairness of distributions. Similar criticisms were made over the last two decades and more in relation to statutory licence schemes for educational and government copying. Although the Copyright Tribunal is intended to create equity in commercial bargaining, critics allege that licence fees determined in the Tribunal have resulted in gross fees payments detrimental to public welfare.

A substantial part of the modern copyright legislation is dedicated to facilitating collective rights administration by collecting societies. The educational and government copying provisions in legislation, especially educational provisions, establish at length schemes for collecting fees. However, the schemes have not defused the criticisms that were applied to the PRS and APRA in the 1930s: legislation vests in collecting societies too much economic power, the benefit of collections to individual copyright owners is unproven, the justification for collections is doubtful and the size of collections for non-commercial copying diverts income from public interest activities (education and government administration). Additionally, the rationale for levying fees for non-commercial uses – that the exclusive rights comprehend the right to charge for any use – is open to challenge on historical and theoretical grounds.
Underlying these criticisms is the fundamental accusation: vested economic interest\textsuperscript{6} benefits from the statutory licences, and private taxation of sectors engaged in non-commercial activities (or that are not competing with copyright owners) creates economic inefficiency. Statutory licensing schemes facilitating revenue collection by collective rights administrators are justified by proponents on the basis that they represent the most efficient and equitable way of distributing licence fees to individual copyright owners. But proponents have never demonstrated (and refuse to demonstrate) that distributions reward individual owners in proportion to use made of their copyright material. The history of copyright regulation in the first half of the 20\textsuperscript{th} century does not disclose intent on the part of policymakers or legislators to endorse taxation of non-commercial or non-competing uses of copyright subject matter.

7. \textit{The structure of the Australian Copyright Act reflects sectional interest}

Substantial portions of the Australian Copyright Act are devoted to highly technical provisions dealing with the obligations of educational institutions under the educational statutory licence, the Copyright Tribunal and offences and remedies relating to infringement including by decryption and the use of circumvention devices. It could reasonably said that nearly half the Act, which, in less than 40 years burgeoned in length from a little over 100 pages to 678 pages, exhaustively establishes a system to protect revenue transfers. The economic efficiency of such a system is highly doubtful. The educational statutory licence is a primary example of an economically inefficient revenue device. Even assuming – an assumption unsupported by evidence – that the licence works to efficiently remunerate authors, devoting over 50 pages of legislation to procedures for extracting revenue betokens an unhealthy focus on rent-seeking.

Why copyright legislation, and therefore Parliament, should sanction a standardised revenue-collection process that substitutes for economic bargaining between copyright owner and user is mysterious – unless explained, in public choice terms, by the operation of sectional interest. Intelligent lobbying explains why the statutory licences apply to the

\textsuperscript{6} In the 1930s the alleged vested interests impugned were musical publishers and record companies. In the last two decades critics have identified publishers as CAL’s main constituency.
educational sector and government, and not the private sector. Private entities would reject out of hand the revenue demands made by collecting societies on schools, universities and government, then beat a path to the doors of politicians shouting for prohibition. But the system of State-endorsed revenue collecting by collecting societies, regulated under voluminous provisions of the Copyright Act, and sanctioned by the Copyright Tribunal, imposes considerable costs and limitations on copyright users, without demonstrably benefiting the majority of copyright authors.

8. Public interest considerations were raised consistently in policy and legislative debates

The aggrandising program of the Berne Union, and the claims of copyright industries seeking rights analogous to those granted authors, created a copyright law prejudiced against gratuitous public access to copyright material. Nevertheless, the public interest, while never a predominant concern of policy-makers or politicians, was raised in the 1905 legislative debate, at the Imperial Copyright Conference, by the *Sydney Morning Herald* in 1911, the Rome Conference of the Berne Union in 1928, and in the British and Australian legislative debates of 1911, 1912 and 1968. During the hearings of the Royal Commission of Performing Rights in 1932–33, Justice Owen and John Keating placed significant emphasis on the importance of considering the public interest in determining copyright policy.

9. The pursuit of authors’ rights led to the creation of analogous producers’ rights

By claiming for authors the right to control the production and performance of copyright material, the advocates of authors’ rights made certain the development of a movement towards neighbouring rights. The aggrandising activities of the Berne Union and its domestic proponents caused the phonographic industry in the United Kingdom to demand, in the 1911 Copyright Act, a compulsory licence and the protection of copyright.

Affronted that the phonographic industry could record performances of works without authorisation – and made large profits from doing so – authors sought and received the right to control the recording of musical works. Facing the prospect of authors authorising a single entity or restricted group to make recordings of their works, thereby
excluding the larger group of producers, the phonographic industry took steps to ensure that monopoly or cartel could not arise.

It did so by asserting that the record producer was entitled to copyright protection in the same degree as the author of a work, by seeking copyright in recordings, and agitating for the introduction of a compulsory licensing scheme.

But for the campaign for authors’ rights, the phonographic industry would not have sought copyright protection. The industry established a precedent. Later, the radio and television industries saw that proprietary rights provided them with control over broadcasting. Again, the aggrandising of the Berne Union encouraged these industries to act defensively. The Berne Union demanded that domestic laws recognise the right of authors to control the broadcasting of works. The broadcasting industries saw the need to secure an analogous right to control the process of dissemination.

The creative faction is thus the true author of the modern dispensation of copyright, in which the copyright industries enjoy rights analogous to those held by the owners of copyright in works.

10. Copyright protection did not cause the economic success of the copyright industries

For nearly two decades before the passing of the 1911 Copyright Act, the phonographic industry enjoyed immense commercial success from sales of gramophones and gramophone records. The industry profited from recording performances of works without consent of, or payment to, the owners of copyright in works, but it did not owe its success to the incentives supposedly supplied by copyright law.

Similarly, the broadcasting and software industries functioned highly successfully for many years – the radio industry for nearly 40 years – prior to seeking, and receiving, copyright protection. Prior to the extension of copyright protection to those industries in the 1950s, 1960s and 1970s, regulators did not leap to the conclusion that copyright should extend to the producers and disseminators of copyright material.

The Beveridge Committee inquiring into British television broadcasting declined to comment on the desirability of granting copyright to broadcasters, and the Gregory Committee proposed broadcasters’ copyright as the most convenient method of reconciling the competing
claims of broadcasters, sporting organisations and performers. Considerations of industrial regulation rather than incentives to production predominated in the analyses of both the Gregory and Spicer Committees.

11. **APRA’s revenue demands led to the creation of Article 11 bis(2) of the Berne Convention and the Australian Copyright Tribunal**

APRA’s campaign for public performance fees in the 1920s and 1930s precipitated a long battle with the commercial users of music. It had two specific consequences. In 1928, the Australian and New Zealand delegates to the Berne Union’s Rome Conference to amend the Berne Convention fought for agreement to qualify Article 11bis. Article 11bis(1) conferred on authors the right to control broadcasts. Paragraph 2, agreed thanks to the efforts of the antipodean delegates, permitted Union members to impose legislative conditions on the exercise of the right (provided they were not prejudicial to the moral rights of the author, nor the right to obtain equitable remuneration). This qualification followed the initial qualification of authors’ rights at the Berlin Conference in 1908 (which permitted legislative ‘reservations and conditions’ to be imposed on the grant of the mechanical reproduction right), and represented another step towards neighbouring rights.

The second consequence of APRA’s search for revenue was the establishment of the Copyright Tribunal. After the Royal Commission on Performing Rights recommended the creation of a tribunal, Australian lawmakers questioned whether the Berne Convention and imperial legislation permitted them to qualify the operation of the performing right in this way. Doubts were resolved after the 1956 British Act provided for a tribunal. The 1968 Australian Act followed suit.

12. **The record industry asserted the mechanical performing right opportunistically**

In Britain and Australia at the start of the 1930s record companies banned radio broadcasters from purchasing and playing their records. Radio stations relied on old stock or purchased records from foreign suppliers. The recording industry imposed the ban after a drastic fall in record sales at the end of the 1920s. Manufacturers feared that
broadcasters overplayed hit songs, discouraging listeners from purchasing their records. They hoped that the radio ban would send music listeners back into shops to buy the latest gramophone recordings. The radio bans naturally caused controversy in both countries and in Australia invited the attention of the Royal Commission on Performing Rights.

In Australia, the record industry went further than in Britain where the ban applied to the government-funded national broadcaster. Arguments at the Royal Commission disclosed the depth of feeling of record companies against commercial radio stations. The radio ban in Australia aimed to destroy the commercial stations, leaving only the national broadcaster, the ABC, to play records. Faced with hostile publicity the record companies scrambled to explain the legal basis for their prohibition on record sales. After two decades of restricted copyright in recordings, they discovered a performing right in records. According to the record companies, the compulsory licence to make records comprehended a derivative right to control the performance of those records. Thus, they claimed, they could prevent radio stations from playing their records.

The recording industry asserted the mechanical performing right opportunistically, to defend the legality of the radio ban, and then realised the future benefit of insisting on the right. A mechanical performing right, like the musical performing right, could be exercised to demand public performance fees. Fortunately for the industry, in 1934 the English High Court in *Gramophone Company Ltd v Stephen Cavardine and Co Ltd* agreed that the compulsory licence also conferred a mechanical performance right. The British and Australian Copyright Acts of 1956 and 1968 recognised the right.

**13. The role of individual agency is underestimated in analysis of copyright**

Modern theorising about the purpose and function of copyright seems often to imply that copyright laws developed according to an innate process of logic. Regulation, according to this view, followed from the official realisation that in order to stimulate production and dissemination, governments must create property in works and their embodiments.

In fact, policy-makers and legislators in the early part of the 20th century did not assert any like doctrine of copyright. They accepted the
resolutions of the Berne Union, without closely examining its reasoning, and sought to implement them because they believed in a vague notion, grounded in natural law principles, of an author’s entitlement to reward for labour.

Copyright law was made to the often conflicting, and sometimes incoherent, plans of individuals. Writers, expressing a zealous belief in their vocational entitlements, created the Berne Convention. Politicians who accepted or shared that belief gave legal effect to the decrees of the Convention. In the process, individuals made copyright law according to their predilections.

For example, the Australian *Copyright Bill* of 1905 proposed a posthumous copyright term of 30 years, but when the Bill was debated, the eloquence of Sir Josiah Symon ensured that the Australian term was 42 years from publication or seven years from the death of the author, whichever period was the longer. Australian assent to the principle of a 50 year posthumous term resulted principally from the actions of one man, Hallam Tennyson, who flouted official instructions when he supported the motion of the Imperial Copyright Conference in favour of the 50 year period.

Individual action was also decisive also in securing the introduction of a statutory compulsory licensing scheme for musical recordings. John Drummond Robertson, the head of the Gramophone Company Limited, Britain’s largest record producers, set the template for successful lobbying by industry of government when he persuaded the legislature to introduce compulsory licensing provisions in the Copyright Act of 1911. His arguments failed to sway the Gorrell Committee two years earlier but his persistence and intellectual force proved decisive before the House of Commons. Thanks to Robertson, the 1911 Act provided for the compulsory licence, which allowed record companies to sidestep authors and control the recording process. Until his intervention, the record companies stood to receive no more than a limited copyright in their recordings, a largely worthless gift in the absence of a compulsory licensing scheme.

In 1928, the determined efforts of William Harrison Moore and his New Zealand counterpart resulted in the Berne Union agreeing, at its Rome Conference, to allow members to place certain qualifications on the right of authors to control the broadcasting of works. By securing this proviso, they brought to international attention considerations of the public interest and hastened the movement towards neighbouring
rights. In 1934, Justice Frederick Maugham decided in *Gramophone Company Ltd v Stephen Cawardine and Co Ltd* that the compulsory licence encompassed a mechanical performing right. In so doing, Maugham ignored the seemingly irresistible counter-current of opinion which held that the copyright laws allowed only one performing right – the musical performing right.

At the beginning of the 1950s, the Association for the Protection of Copyright in Sports, stewarded by Sir Arthur Elvin and Francis Gentle, and advised by the leading barrister Kew Edwin Shelley (counsel to the PRS), precipitated the formation of the Gregory Committee. The Association did not succeed in securing sporting copyright: the Gregory Committee rejected its claims for copyright in sporting events and recommended the creation of broadcaster copyright. However, it is possible that but for the Association’s agitation, the British Government would have delayed review of the copyright laws by several years. Additionally, the strength of its agitation forced the Gregory Committee to engage seriously with the question of sporting broadcasts and to clear the way for legislative recognition of neighbouring rights.

In Australia in the 1970s, the firebrand advocacy of one man, Gustaf O’Donnell, also cleared a way – in this case for the creation of a collecting society, CAL, that now equals APRA in revenue takings and influence. Without O’Donnell’s energy and one track devotion to the cause of authors’ remuneration, it is unlikely that Australia would have legislated to create an educational statutory licence. The edifice of copyright revenue collecting in Australia is built on foundations laid by APRA in the 1920s and 1930s but O’Donnell’s proselytising made the supervening structure possible.

The Age of America did not emerge unbidden from the white heat of creation and transformation that established the global economic ascendancy of the US copyright industries. In the 1980s, a handful of senior executives and lawyers devised and implemented a strategy to tie intellectual property rights to trade policy. As a result, the Office of the United States Trade Representative became a copyright zealot negotiating multilateral and bilateral arrangements that established stringent protection and enforcement norms across the world. Together, the US IP industries and the USTR have made the world safer and safer for American copyright commerce.
14. The commercial struggle for control over the broadcasting of sport precipitated the Gregory Committee inquiry

From the late 1940s, sporting associations in the United Kingdom contested the right of the BBC to televise sporting events without the associations’ permission. To secure control over the broadcasting of events they demanded copyright in sporting spectacles on the basis that these spectacles amounted to public performances of sport. In 1950, the associations met to discuss a ban of all television broadcasting of sport and their pressure caused the Government to call a public inquiry into copyright law. After the Gregory Report in 1952 proposed that broadcast copyright vest in the BBC, the associations imposed a partial ban on the televising of sport. As a result of the disruption caused to sports broadcasting the Government a second, commercial, television broadcasting licence. The new Independent Television Authority (ITV) supplied some of the money demanded by the associations as a condition for permitting sports broadcasting.

15. The origins of Australian copyright policy orthodoxy lie in the Spicer Report and the second reading in the Senate of the 1968 Copyright Bill

The Spicer Committee introduced the idea that copyright regulation should aim to balance the interests of copyright owners and those of the users or consumers of copyright material. The Senate first articulated the theory that legislation must balance competing interests to preserve the incentive to produce, while promoting access to information, in 1968.

16. The parallel importation provisions of the Australian Copyright Act were carried over from imperial legislation

Import control formed part of British copyright legislation from the Statute of Anne in 1710. The importation provisions of the British Copyright Act of 1842 allowed the copyright owner to control the supply of overseas books into Britain, supposedly to deter foreign piracy. The 1842 Act was an imperial statute that applied to all British possessions, including the Australian colonies. In practice, it allowed British book publishers to control the supply of books into Australia, foreclosing from Australian distributors non-British sources of books, as well as British suppliers other than the publishers or their nominees.
The Australian Copyright Act of 1905 made no provision for import controls and instead made the importation of counterfeit goods an offence. In 1912, four Australian parliamentarians spoke passionately against the import control provisions in the 1912 Copyright Bill. In 1968 another parliamentarian attacked the controls. The Government in 1912 made no reasoned defence of the importation controls – they seem to have been imported into the Copyright Bill reflexively, because of their provenance in British legislation. Utilised then by British publishers, and later by all the copyright industries, to enforce distribution monopolies in Australia, they were carried into Australian law as a matter of automatic deference, rather than for any reason of national interest or necessity.

17. **Australian legislative debate has seen two great statements of principle: the first over the posthumous term and the second over import controls.**

In the 1905 Senate debate on the Copyright Bill, Sir Josiah Symon expounded on Thomas Macaulay’s famous warnings against a lengthy posthumous term. He declared that “copyright is a monopoly, and like all monopolies, it is evil in essence.” This statement of copyright scepticism can be taken as the essence of the 1905 Parliament’s attitude to copyright law. Parliament accepted that regulation was necessary to secure economic justice for authors, but it would not endorse a conception of copyright that extended beyond granting to copyright creators control over the production of books and works of art.

Parliament accepted Symon’s argument and rejected the posthumous copyright term of 30 years proposed in the Copyright Bill. It did so because it accepted that, in the words of Macaulay, the long posthumous term was “an impost on the public”, that, if enacted, would be “no nullity but a very serious and pernicious reality.”

Committed to incorporating the British Copyright Act of 1911 into Australian legislation, the parliamentarians of 1912, for the most part, did not cavil at accepting a 50 year posthumous term. But twice in the years between 1905 and 1912, the Australian Government declared its commitment to the shorter copyright term in the 1905 Act. Twice, however, its London representative, Lord Tennyson, thwarted its wish to have the Imperial Copyright Conference apprised of that commitment.
The second statement of principle concerned the import monopoly. In 1912, Senator John Keating began a debate on the topic, arguing fervently against the import controls in the Copyright Bill. His arguments, and those that followed, represented a profound assertion of the of the Australian interest against the impositions of foreign and private interests.

Keating warned of “the dangers that will beset the people of Australia if the Bill goes through” and declared the import provision “a great big blackmailing clause”. His Lower House colleague David Gordon said, “we should legislate according to Australian requirements” and noted that “the Australian public ought to be protected to the extent of preventing any person here from having a monopoly and charging them just what he may choose”. William Archibald declared “an injustice will be done to people in Australia’ and ‘[w]e should not make away with our rights.”

18. **The content of the modern copyright law of Australia is the entire creation of international conventions and British precedents**

Australians wrote the Copyright Act of 1905 according to their precepts. The Act of 1912, however, incorporated the British Act of 1911 into Australian law and the 1968 Act drew heavily on the British Act of 1956. The British statutes of 1911 and 1956 themselves resulted from the British Parliament implementing the prescripts of the Berlin Convention of 1908 and the Brussels Convention of 1948. The mechanical performing right written into both the British Act of 1956 and the Australian Act of 1968 was first accepted in British common law in 1934. Broadcast rights were introduced in accordance with the recommendation of the Gregory Committee.

To the extent that Australian copyright law follows the provisions of the Berne Convention – an example of a Convention prescript is the 50 year posthumous term – the Australian Government cannot reverse the copyright law without offending international treaty obligations. But not all aspects of the copyright law are derived from treaty obligations. The most obvious example of legislative provisions that can be overturned without affecting any legal obligation of the Commonwealth is the import control provisions.
19. Doubts over term persisted at the official level until the 1950s

The Brussels Convention made it mandatory for ratifying countries to legislate for a 50 year posthumous term for works. The Gregory Committee, however, declared that it was sympathetic to arguments in favour of a reduced term and recommended that the term for copyright in records and cinematograph films be 25 years from the date of production.