

## Chapter 9 – Reform

### The 1950s: the drive for reform

#### *Copyright committees*

In 1968, the Australian Parliament passed a new Copyright Act. The legislation implemented recommendations of the Spicer Committee, which examined options to reform the copyright law at the end of the 1950s. The Committee, chaired by Justice John Spicer, took the British Copyright Act of 1956 “as the basis for our examination of the problems raised for our consideration”.<sup>1</sup> Its report proposed that Australia substantively copy the British legislation.<sup>2</sup>

Imitation did not mean commendation. The report pointed out several failings in the drafting and organisation of the British Act, echoing the criticisms of John Keating and Billy Hughes in the 1912 parliamentary copyright debates. Emulating Keating and Hughes, who found the skills of British parliamentary draftsmen wanting, the Committee praised the “superior” drafting of Commonwealth legislation since Federation. Conceptually, however, the Australian legislation owed everything to its British cousin.

The British Act too resulted from an official inquiry. In 1951, the Board of Trade convened a committee to examine the legislative implications of dual subject matter: the revisions to the Berne Convention agreed in Brussels in 1948, and developments in broadcasting.<sup>3</sup> The committee, chaired first by Lord Reading and then Sir Henry Gregory, reported in 1952.<sup>4</sup>

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<sup>1</sup> The Committee’s terms of reference were: “to examine the copyright law of Australia, and to advise which of the amendments recently made in the law of copyright in the United Kingdom should be incorporated into Australian copyright law and what other alterations or additions, if any, should be made to the copyright law of Australia.”

<sup>2</sup> *Report of the Copyright Law Review Committee 1959*, Commonwealth Government Printer 1960.

<sup>3</sup> The terms of reference for the Committee were: “[t]o consider and report whether any, and if so what, changes are desirable in the law relating to copyright in literary, dramatic, musical and artistic works with particular regard to technical developments and the revised International Convention for the Protection of

History repeated itself, for in 1909, the British Government also asked for expert advice on Convention revisions and the regulatory claims of a new industry. Like the Gorrell Committee 43 years earlier, the Gregory Committee recommended amendment of the British law consistent with the terms of the revised Convention and immediate subsequent ratification of the treaty. Unlike the Gorrell Committee, it did not equivocate when asked to endorse extension of copyright protection to an industry, in this case, the broadcasting industry.

In Australia, history also repeated itself. Though legislators no longer felt obliged to draft legislation in conformity with British statutes, the Government followed the pattern of 1912.<sup>5</sup> Legislators felt the suasion of the Berne Convention and, in practice, following the Convention meant following the British legislative model. Treaty obligations were sacred in Britain and Australia, and after Britain adopted the limited amendments to the Convention agreed at Brussels, Australia chose to do the same.

The Gregory and Spicer committees did not hesitate to call for ratification of the amended Convention. They supported broadcast copyright but they wrestled with questions of logical justification. On what grounds could legislation intended to protect authors be expanded to include copyright in broadcasts? If arguments could be found to support a copyright never envisaged by the founders of the Berne Union, why not approve copyright in public performances?

### ***A new attitude***

The copyright committees of the 1950s differed in spirit from the Gorrell Committee. In 1909, committee members were guided by the doctrine of authors rights and most considered the compulsory recording licence an unwise concession to the gramophone industry. By the 1950s, officials thought differently. While the Gregory Committee regarded broadcast and recording copyright as “subsidiary” to authors’

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Literary and Artistic Works signed at Brussels in June, 1948, and to consider and report on related matters.”

<sup>4</sup> *Report of the Board of Trade Copyright Committee*, London, HMSO, 1952 (the Gregory Committee Report).

<sup>5</sup> In 1931, the *Statute of Westminster* – accepted in Australian law in 1942 – provided that Britain could only legislate for the dominions at their request and with their assent. By the 1950s, the idea of imperial legislative unity was dead and the former dominions no longer adopted British imperial legislation.

rights, it advised the Government to pay heed to the interests of the industries responsible for the production and dissemination of copyright material. As early as page 3, the Gregory Report declared:

*There are, of course, trade interests. Indeed, the output of the United Kingdom publishing trade in 1951 has been estimated as being in the neighbourhood of £40 million, of which probably slightly more than £12 m represents exports ... Labour, skill and money have all gone to the making of the broadcast or gramophone record and we can see no justification for leaving the results of this combination open to piracy.*

Similarly, the Spicer Report, in discussing the merits of the mechanical performing right declared:

*We are of the view that the making of a record involves a considerable amount of artistic and technical skill ... It certainly seems unjust that these [broadcasting] stations should profit by the artistic and technical skills of others without being required to make any payment other than the price of the record.*

The arguments of the later committees, which upheld the principles of the Berne Convention while proposing copyright in records, broadcasts and mechanical performances, never rose to heights of sophistication. Proponents, from Reginald Bonney at the Royal Commission on Performing Rights, to Frederick Maugham in *Camardine* and then the members of the Gregory and Spicer Committees, made the same essential point: productive industrial investment demands legal protection to prevent free riders from utilising the products of industry for profit. For the modern committees questions of legal principle were not paramount – principle must accommodate industrial need.

### ***Weaknesses of the copyright committees***

The Spicer Committee, and, to a lesser extent, the Gregory Committee, were dominated by lawyers. The Gregory Committee contained lawyers, a civil servant, a Fellow of the Royal Society, a Fellow of the Library Association and the barrister and legal scholar F E Skone James. The President of the Book Publishers' Association and the Acting Director of the Melbourne Conservatorium of Music were members of the Spicer Committee but they bowed to the influence of two senior judges.

Legalism and vested interest could not fail to influence the conclusions of each inquiry. Lord Gregory graduated in economics from the London School of Economics but he could not claim expertise in

analysis of the merits and function of regulation. He spent his civil service career administering laws controlling customs and excise, wartime logistics, enemy property and trade.

Australia felt the problem of circumscribed analysis more acutely. British governments did not view copyright regulation as the exclusive province of the legal arm of government, and policy-makers evinced less devotion to legal norms and precedents than their Australian counterparts. The members of the Gregory Committee, for instance, were impressed by criticisms of the long posthumous term made by the economist Sir Arnold Plant, Sir Ernest Cassel Professor of Commerce at the University of London.<sup>6</sup> They recorded their favourable impression of his arguments though they stated that they were constrained from accepting his recommendations.

The Australian committee displayed no such willingness to consider the intellectual merits of arguments that undermined the copyright faith. It consisted of two judges, John Spicer and Arthur Dean, a Melbourne solicitor, A J Moir, George Ferguson, a director of Angus and Robertson who was also President of the Book Publishers' Association, and the Reverend Dr Percy Jones, the Acting Director of the Melbourne Conservatorium of Music. Leslie Zines, an officer of the Commonwealth Attorney-General's Department and later an eminent scholar of constitutional law, acted as secretary to the Committee.

Spicer, the Chief Judge of the Commonwealth Industrial Court and a former Commonwealth Attorney General led his Committee with vigour, but in technical legal matters he deferred to Dean, a judge of the Victorian Supreme Court. As Attorney, he appointed Dean to lead inquiries into the Australian patents and trademarks legislation and, Dean, an expert in industrial property, provided the Committee's intellectual leadership.<sup>7</sup> Together with Spicer, he controlled the

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<sup>6</sup> In "The Economic Aspects of Copyright in Books", *supra*, Plant quoted David Hume who in 1771 wrote to his publisher, "I have heard you frequently say that no publisher would find profit in making an edition which would take more than three years in selling". Plant proposed in the article a compulsory licence allowing book publishers to publish new editions of a published work five years after its first publication.

<sup>7</sup> In January 1958, the Commonwealth Attorney General wrote to his Victorian counterpart to explain the background to Dean's appointment. After he chaired the patents and trademarks inquiries, the Government envisaged that Justice Dean would chair a copyright inquiry. When Dean went on leave in 1956, he spent some time in London familiarising himself with the pending British copyright legislation. However, on his return he expressed doubt as to whether he could combine his

Committee's hearings, directed its analysis of evidence, and, ultimately, determined its conclusions.

The Australian branch of PEN and the Australian Journalists' Association both protested to Garfield Barwick, the Attorney General, over the composition of the Committee. PEN complained in 1959 of the exclusion from the Committee of authors' representatives, and the Journalists' Association argued that the composition of the Committee reflected bias towards publishers. But PEN and the Journalists' Association themselves represented sectional interests: the real mischief in the Government's selection of Committee members was not that one interest group or another was excluded but that no voice of detachment could be heard.

The problem was not one of bias but the possibility that the leadership of two judicial officers would result in stultifying legalism rather than independent analysis. Copyright policy development cried out for more than the elaboration of precedent and legal principle, but in vain. Neither Spicer nor Dean possessed the liberal intellect necessary to point out – as Symon or Keating might have done 50 years previously – the accumulating contradictions in copyright policy.

Their legalism produced the formula that lies at the heart of modern copyright policy: the notion that the aim of copyright policy is, as the Spicer Report stated, “balancing the interests of the copyright owner with those of copyright users and the general public”. For today's policy makers, the idea that legislators must balance competing interests is self-evident and also historically validated. They take for granted the false idea that legislators throughout the history of copyright law-making have tried to create such a balance private and public interests.

Spicer and his colleagues seemed unaware that in enunciating the balance theory they were advancing a novel idea. They paid little heed to the motivations and concerns of past legislators, reflecting the outlook of all subsequent policymakers and legislators, none of whom paid more than superficial attention to the history of copyright law-making. Carelessness about the past pointed to the fundamental weakness of the 1950s copyright committees. They analysed laws by reference to present demands and paid little attention to rationales,

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judicial duties with chairing the copyright committee unless he received staff assistance. For this reason, the Government chose Spicer as chair and invited Dean to join the Committee as an ordinary member.

experiences or conditions that explained how copyright laws came into existence.

### ***The copyright balance and the notion of public interest***

Today, policymakers seem universally to accept that the public interest is protected in legislation by the fair dealing, library and educational provisions. These provisions are said to “balance” the exclusive rights of copyright owners. Yet legislators who passed copyright laws in the 19<sup>th</sup> and early 20<sup>th</sup> centuries did not refer to the balance of interests. They sought to defend authors against piracy and later created exclusive rights that extended their control over the production and use of copyright material.

The idea of a public interest in copyright policymaking only arose when a portion of the public realised that copyright owners could – and did – demand payment for the public performance of music. The same public quickly realised that payment of licence fees whetted the appetites of copyright owners and their representatives: they seemed never to cease wanting more revenue from more sources. In the 1930s, the demands for revenue were driven by organised interests in Britain and Australia, namely associations of composers and music publishers. Then the record companies began to levy performance fees. Users faced two choices: pay fees or flout the copyright law. They usually paid.

Users, private as well as commercial, discovered that proprietary rights opened the way to more and more controls over the use and dissemination of copyright material. Many protested loudly. Policymakers, beset by the louder demands of copyright owners and prospective owners, now felt the undertow of public resentment. As politicians discovered after collecting societies licensed the public performance of music, demands for payment sometimes evoked strong reactions. In the 1950s, a new generation of politicians came to understand that the ambitions of copyright owners and claimants, if realised, could alienate their greater constituency – the public. In articulating the principle of “copyright balance” the Spicer Committee expressed the politicians’ new-found pragmatism.

The Committee failed to understand that the authors’ rights movement subverted traditional conceptions about copyright law. Only in 1911, when common law ideas of fair dealing crept into British statutory law

did the notion of separation between the private and public interest strongly emerge in copyright discourse.

Before then, copyright consisted of a limited set of rights directed against piracy that, with the exception of the import provisions, only slightly restricted the public's freedom to deal liberally with literary or other works. Far from balancing rights, legislation assumed that copyright privileges did not curtail the public's freedom to enjoy literature, art and music.

By devising the principle that copyright policy must balance public and private interests, as if the two were equal, the Spicer Committee ensured for the private interest a dominant position in future copyright legislation. The Committee seemed to implicitly suggest what the early legislators never contemplated: that gratuitous access to copyright material is a privilege to be granted by the legislature on narrow terms.<sup>8</sup>

It is also possible that the Committee intended its formulation to limit the ambitions of copyright owners. Copyright legislation began as a limited statement of private rights and each restatement increased the scope of private rights. The Spicer Committee may have calculated that only statutory recognition of the public interest could stem the headlong rush towards ever more radical legislative statements of private entitlement.

Perhaps. What is most striking about both copyright committees is that their findings confirmed once and for all that the industrial interest ruled copyright policy. By encouraging legislators to create proprietary rights in the output of industrial producers and disseminators, they smoothed the way to the systematic re-ordering of British and Australian legislation. The process of reform that began with the Gregory Committee created the categories, structure and language of contemporary copyright law.

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<sup>8</sup> It is true that publishers seeking monopoly privilege instigated the Statute of Anne and private interest and lobbying was at the heart of most British copyright legislation (the first copyright statute of Australia, by contrast, was prepared without reference to private interests). What is unquestionable, though, is that government always envisaged a limited scope for copyright privileges and saw outlawing piracy—that is, unauthorised reproduction for a *commercial* purpose – as the essential object of legislation.

## *The Brussels Conference*

At the close of the Rome Revision Conference of 1928, when delegates felt stronger intimations of dissent from the dogma of authors' rights, the members of the Berne Union agreed to meet again in Brussels. The Brussels Conference, scheduled for 1935 and postponed till 1936, eventually took place in 1948. The years of delay did nothing to dim the enthusiasm of civil law countries for authors' rights, but now they faced a Rubicon: should they maintain the doctrine of the creator's unique entitlement or cross the river to accommodate the dissenters?

They chose to conserve their gains. The shouts of industry representatives thronging the opposite bank went unheeded. Delegates did not actively oppose the record companies and broadcasters but they made clear they that they would not endorse the new concept of "neighbouring rights" – the putative rights of producers analogous to those enjoyed by the authors of works. Instead, they agreed, among other things, to broaden the exclusive right of authors to permit the televising of works, and their retransmission, as well as the public communication of retransmissions and their fixation after transmission.

Members were permitted to determine the conditions under which the rights could be exercised. Delegates also agreed on changes to clarify that the Berne Convention itself extended protection to the public performance of works. Britain, joined by a number of countries including Australia, declared a reservation, insisting that national legislatures must be allowed to pass laws to prevent copyright owners from abusing public performance rights.

The industries realised they must look elsewhere for recognition of neighbouring rights. But they secured one significant concession at the Brussels Revision Conference. Delegates resolved that members should try to study how copyright protection could be extended uniformly to sound recordings, broadcasts and performers. International cooperation and collaborative studies led to the creation, in 1961, of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations – the Rome Convention.

The willingness to examine ways to recognise neighbouring rights pointed to a truth that the Union delegates could hardly countenance. The claims of the recording and broadcasting industries could be parried but only for so long. Put to politicians, their arguments would

disarm opposition for they created what most governments revere – wealth, employment and influence.

### ***Neighbouring rights***

The neighbouring rights movement conveniently created formulations that government committees could understand and legislators adopt. The movement grew from attempts in civil law countries to ally the idea of copyright as a personal moral entitlement to the creation of copyright in sound recordings. How, asked civil lawyers, could copyright, the personal possession of a human creator, apply also to an impersonal entity, such as a record company? The answer they gave was that copyright did not apply to any person or entity that did not create works. However, those who performed, fixed and disseminated copyright works possessed *related rights*, or neighbouring rights, as the French called them.

In 1936, Austria passed legislation that created the “related rights” of performers, producers of sound recordings and film recordings, and broadcasters. Italy followed suit in 1941 and the Scandinavian nations in the 1960s. In 1961, the United International Bureau for the Protection of Intellectual Property, UNESCO and the International Labour Organisation, jointly inaugurated the Rome Convention. Signed by 40 States it protected performers against unauthorised fixation or broadcasting of their performances.

Record producers received the right to authorise or prevent unauthorised direct or indirect reproduction of phonograms and broadcasters’ rights of authorisation or prohibition in relation to rebroadcasts, recordings and fees. More protection followed. The Phonograms Convention of 1971, instigated by the music industry, and created with the authority of WIPO and UNESCO, required members to prohibit unauthorised reproduction, and importation of unauthorised reproductions for distribution to the public.

The drafters of the Rome Convention drew on the concept of related or *neighbouring rights* and the drafters of the 1956 British Copyright Act would, in their turn, draw on Continental formulations to create the category of ‘subject matter other than works’.

### ***George Bernard Shaw’s last sally***

The nonagenarian George Bernard Shaw reintroduced the topic of copyright to public discourse in Britain in January 1949. In 1911, he

supplied an epitaph to authors' rights when he wrote to *The Times* of the clash between "artists" and "industrialists". "I suppose," he said then of artists, "we must go to the wall". Now, he could have said, "my warning has come to pass and we have gone to the wall", for despite the benefits conferred on successful artists by copyright ownership, the great revenues of the copyright industries were not distributed to the advantage of most creators. But Shaw no longer protested about the evils of the gramophone industry. Though he continued to agitate for his fellow artists, he now attacked taxation policy.

He wrote to *The Times* to harangue the Labour Government for taxing the annual income of "professional authors, playwrights, composers, painters, publishers, theatre managers, music sellers, and picture dealers". According to Shaw, since their income varied more than that of any gambler, they should be taxed each year on the annual average of twenty years' income. Shaw articulated more clearly than anyone else the argument that the special hardship of the artistic vocation obliges government to specially protect artists. Towards the end of his letter, when he raised his old grievance against the finite duration of copyright, he asked, "[why] is property in our creations communised after less than two lifetimes, and that of simple distributors made perpetual? Why is property in turnips made eternal and absolute when property in ideas is temporary and conditional?"

His own response is hardly likely to have won many converts to the idea of a 20 year average for taxing creators. "As well ask," he said, "why the British people dread and hate intellect." Predictably, the Government ignored Shaw's suggestions for income tax reform, but he did win support in the same month from another writer, Charles Morgan as well as the Society of Authors. Other correspondents to *The Times*, including A A Milne, opposed him, but soon enough, correspondence on the subject died out. Shaw's last sally on behalf of authors is symbolically important because it clarified, on the cusp of a new era, that after 40 years of legislation framed to advance the interests of authors, the creative interest was still, to borrow his description of 1911, "poor and insignificant", still at the mercy of "industrialists [who] are rich and can bully Governments".

Shaw extolled a pipe dream, as did all the proponents of authors' rights, who imagined that copyright protection could turn a vocation into a profession. Although he saw their plight clearly, Shaw seemed not to comprehend that the nature of their calling meant that artists as a class could not expect any more from government than the supposed

windfall delivered by the Act of 1911. The analogy he drew between writing and gambling was apt. As he said, artists “live by gambling in values more desperately uncertain than the chances of any starter in a horse or dog race”.

As he went on to say, no “turf book-maker would budget for such odds.” Yet the supply of would-be artists would never dry out and Shaw knew why: “the few occasional winnings are so great, and the prestige and eminence they confer so ardently desired that punters are never lacking.” What Shaw seemed unwilling to accept is that most artists offer little that is useful to governments and so are ignored. But authors – or, as Shaw would have said, publishers – had reason to bless government. Thanks to the efforts of the Berne Union, governments around the world made the gift of authors’ rights. Yet even by 1949 it was clear that copyright policy involved the regulation of industries, and the demands of those industries, not authors, commanded official attention.

## **The Government stirs**

The first sign that the British Labour Government intended to reform the copyright law came a few months after the correspondence over Shaw’s tax proposal. In July 1949, Harold Wilson, the President of the Board of Trade, announced in the House of Commons that ratification of the Brussels Convention required amendment to the copyright law. He went on to say that he was considering the advisability of a “general inquiry into its working”. Public performance rights, the harbingers of commercial warfare in Australia and Britain before the War, remained the greatest concern of regulators. Wilson told the Commons that the “question whether there is any abuse in the exercise of the exclusive rights of public performance of musical works in this country such as would justify legislation is one of the matters which could be dealt with in such inquiry.”

By mentioning performing rights, Wilson hoped to placate the many businesses aggrieved at the tactics of music collecting societies. The British collecting societies – the Performing Rights Society, which collected performance fees for composers, lyricists and publishers, and Phonographic Performance Ltd, which collected fees for record companies – were separately accused of the arbitrary determination of rates and the withholding of licences to play music.

The battles played out in Britain in the 1930s over performing rights continued, as they did in Australia, in continuing arguments over licence fees. By the late 1940s, matters were coming to a head. The users of commercial music (such as the BBC) had argued over conditions of licensing for over two decades. Users, broadcasters especially, were still incensed by the newer requirement to pay for the public performance of records. They still resented copyright collecting societies but they had come to accept them as permanent evils that could not be avoided.

In Britain, new forces were emerging that presented politicians with new challenges. The BBC now also broadcast television programs to the nation. Television promised to bring sporting events to mass audiences. The BBC could only televise sport with the consent of sporting associations and the owners of sporting venues and now engaged in a tug of war over broadcasting rights. The broadcaster knew that millions watched and craved sport on television. The associations and owners knew that control over the staging of sporting events meant extraordinary commercial bargaining power. They began to consider how to exercise their control to maximum advantage and decided to press for copyright in sporting spectacles.

The BBC too saw the value of securing copyright in broadcasts. Creators, manufacturers and broadcasters emerged as distinct constituencies that government must account to in a way un contemplated even in the 1930s, when the battles of the gramophone and radio industries commanded attention. It took the Gregory and Spicer Committees to resolve tensions, even if their solution was imperfect in the eyes of the interested parties.

## **The performing right and sport**

Though Wilson singled out musical performing rights as the prime focus of the Board of Trade's mooted inquiry into copyright in the early 1950s, the British Government realised that the public's main interest lay in the direction of televised sport. The question of musical performance faded from public view and attention concentrated on the possibility of granting copyright in sporting spectacles (and, by association, in public performances generally).

Sporting associations, which controlled the events coveted by the BBC, the nation's only licensed broadcaster, were unwavering about the necessity for copyright in sporting performances. Within a year of

Shaw's letter to *The Times* denouncing restrictions on authors' copyright, they began a campaign to secure copyright in spectacles. By this time, they were involved in a wrangle with the BBC over the televising of sport. In 1949, the Beveridge Report on Broadcasting suggested that the Government legislate to permit the televising of sporting events irrespective of the objections of sporting associations. Emboldened, the BBC demanded the right to telecast events on its terms. The associations responded furiously.

First, they formed the Association for the Protection of Copyright in Sports. The Association represented 94 sports organisations, including the Football Association, the Lawn Tennis Association, MCC, Amateur Athletic Association, the Rugby Football Union, the Greyhound Racing Association, the Professional Golfers Association and Epsom Racecourse. *The Times* reported that on 24 March 1950, the Association met to discuss a ban on the televising of all sporting events until the review of copyright law contemplated by Wilson.

At the meeting, Kew Edwin Shelley, KC, legal counsel to the Performing Right Society stated his hope that within five years "sports promoters will have a complete copyright of any event which they organise." He proposed that the holder of copyright, sports associations could grant the BBC a primary licence to broadcast events, and give "hotels, public houses, clubs, halls, institutes and factories" a secondary licence to play the broadcasts. Shelley supplied the Association with a breakdown of anticipated revenues from copyright licensing after five years. He projected total annual returns of £154,000, consisting of £10,000 from the BBC, £25,000 from hotels, £30,000 from large clubs, £20,000 from public houses, £15,000 from halls, £2,500 from cafes, £1,500 from institutes and factories, and £50,000 from cinemas. He calculated administration expenses, including legal and wages at £34,000, leaving £120,000 for distribution. These figures – minuscule when compared with the broadcasting fees paid today to some sports associations – clarified the commercial potential of televised sport.

Adding to the clamour, the chairman of Wembley Stadium, Sir Arthur Elvin, supported the call for a ban on televised sport "unless some satisfactory undertaking is soon given to sporting promoters that their events will in due course be protected by copyright." He told *The Times* that, "the promoters, with suitable safeguards, do not necessarily object to the domestic televising of certain of their events [but] they do object

to the televising of such events being exploited by outside interests for commercial purposes.”

Francis Steward Gentle, vice-chairman of the Association,<sup>9</sup> informed *The Times* that the “question has now reached a head and some solution must be worked out to the greatest good of for the greatest number – or rather the least harm for the few.” He pointed out that sports promoters had called for copyright in sporting spectacles for five years.

According to Gentle, the common law right to refuse television crews entry to sports venues did not help the Association’s members. The BBC would not offer more than £250 for the right to televise games and other events. Television executives wanted sport televised and they wanted to secure rights at low cost. Gentle considered the BBC’s offer derisory when compared with the takings of the clubs and public houses that charged admission fees to patrons who came to watch events like the FA Cup Final. Even worse, Gentle said, television broadcasts affected gate receipts since many regular spectators now chose to watch events on television.

The Government could hardly ignore the publicity surrounding the Association for the Protection of Copyright in Sports. The Postmaster General, Ness Edwards, met Gentle in May and they discussed sports copyright with representatives of the BBC and the Radio Industry Council. Edwards gave little away, though he promised the Association that the Government would not issue commercial television licences without consulting the sports promoters. He told the Commons that while he wanted the promoters to agree to the BBC televising more sport, he also recognised that they “should have a reasonable safeguard of their legitimate interests.”

Faced with repeated demands for copyright in sporting spectacles, the Labour Government still hesitated. In November 1950, Wilson told the Commons that an inquiry into copyright law remained “under consideration”. Then the continuing impasse over televised sport finally forced his hand. In April 1951, he announced the formation of a committee “to consider and report whether any, and if so what, changes are desirable in the law relating to copyright.” The Committee, originally chaired by Lord Reading, who soon resigned to take up his appointment as Under Secretary of State for Foreign

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<sup>9</sup> Gentle, a solicitor, was also the longtime Chairman and Managing Director of the Greyhound Racing Association Trust Ltd.

Affairs, included the first woman to sit on a copyright committee of inquiry, Miss B A Godwin.

## The Gregory Committee

### *A philosophical transformation*

The pages of *The Times* between the announcement of the Gregory Committee in 1951 and the passing of the *Copyright Act 1956* record intensive lobbying of government. One interest group after another declared in print its right to special government consideration. In 1911, before the passing of the Copyright Act, Parliament heard repeatedly from publishers and the record industry. Others made their voices heard but not as a chorus. In the 1950s, the scene changed. The march of technology, the growth of the recording and broadcasting industries and the activities of collecting societies meant that the politics and possibilities of copyright policy were now much more complex.

The Gregory Committee began a transformation of British and Australian copyright law less by foresight than accident. Its members did not appear to comprehend the forces of economic and social emancipation that would soon recreate the entertainment industries in a form unimagined. Even so, they proposed changes to the law that facilitated the expansion and interconnection of the music, film, television, sport and broadcasting industries. In no small part, changes to the copyright law helped to usher in the age of rock and roll, celebrity and sports-obsessed television broadcasting.

The industries that created the new age – television, radio, music and film – steered the Committee in their preferred direction. Their representatives most likely did not foresee the coming revolution in the content and delivery of mass entertainment. But they knew that copyright in recordings and broadcasts would allow existing businesses to entrench competitive advantages. Galvanised by the prospect of exclusive rights held for lengthy terms, they passionately argued the case for protecting industrial investment.

The Gregory Committee listened sympathetically as they stated their position. In an era of reconstruction and growth, it was no surprise that a government committee should prove so receptive to the argument that investment and output deserved the protection of property rights. More surprisingly, the Gregory Committee chose to

boldly depart, though not in direct utterance, from the axiom that copyright law existed to protect the interests of authors. For the first time in copyright history, a government committee made the qualification for copyright protection a matter, plain and simple, of industrial economics.

The Gregory Committee, and later the British legislature, put to one side the requirement of creative originality. They also put to one side the requirement that copyright subject matter subsist in works. They now judged that investment, labour and the control of technology entitled industries involved in the production and dissemination of works to benefit from copyright protection. As the Committee said in relation to broadcasting copyright:

*[T]he position of the BBC, as we see it, is not very different from that of a gramophone company or a film company. It assembles its own programmes and transmits them at considerable cost and skill ... it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.*

The Committee did not dispense with existing principles and categories. But it did not let consideration of authors' rights deter it from proposing extension of copyright protection to industries. The Gregory Report carefully articulated the view that all rights other than those accruing to authors of works were subsidiary rights of copyright. The Committee wanted the distinction between the primary rights of authors, and the neighbouring rights of the industries, made clear in legislation – hence the 1956 Act's formulation of 'subject matter other than works'. The Report said:

*[W]e regard the rights we recommend for broadcast programs or gramophone records as subsidiary to the primary rights of the composer and author of a copyright work reproduced by these technical means, and that performing rights in programmes or records should be without prejudice to that primary right ... we recommend that this principle should be recognised in any future legislation ... consideration should be given to the question whether rights of this kind should not be described by some term distinguishing them from copyright in its primary sense.*

Nevertheless the Gregory Committee cast the die in favour of the industries. The time of analogous copyright, the legal bedrock of the modern entertainment and communications industries, had arrived. The recognition in Britain of copyright in 'subject matter other than works' established a regulatory system that allowed the industries to defend and extend their turf. After the 1956 Copyright Act, the

copyright industries began in earnest to use property rights to control the reproduction and distribution of copyright material and to develop multiplying revenue streams.

### ***The sports promoters***

The Gregory Committee acknowledged the public importance of resolving controversy over the proposal for sporting copyright. Its report noted that the “inability of the BBC to come to terms with sports promoters in the field of television has largely overshadowed in public estimation the other copyright questions we have been considering.” During Committee hearings, the promoters took full advantage of the public’s interest and ensured the spotlight remained fixed on the issue of televised sport.

Francis Gentle told the Committee in September 1951 that sports promoters were similar to authors, composers or playwrights. They too were creators, and their creations, the spectacles they organised, attracted large audiences. They, no less than authors, deserved protection from free-riding. Sir Arthur Elvin told the same hearing that copyright in spectacles would increase the frequency of sports broadcasts. Before promoters struck deals with any broadcasters, however, they demanded legal protection. “We want,” he said, “to get as many of our sports events as we can on the television screen, but we object to outside interests exploiting us.”

According to Gentle, the sports associations could not rely on the laws of trespass to keep cameras away from grounds. Nothing in law prevented the BBC, if denied entry to sporting venues, from televising events using telephoto lens. As an example of the effect of televised sport on the population at large, he referred to a BBC broadcast of a boxing title fight. Fans, he said, streamed “round the streets looking for television aerials, and [paid] 2s 6d to go into private houses to view it.”

Like the gramophone industry before the War, the sports promoters feared broadcasting. Just as the record companies decided that radio listeners would not buy records, the promoters reasoned that viewers glued to television screens would never want to enter a stadium again. Amateur associations also expressed alarm. E H L Clynes of the Amateur Athletic Association complained to the Gregory Committee that “our work for many years has been retarded because of lack of finance.” He warned that, “if there is going to be still more television our income is going to drop.”

The associations were straightforward about their aims. Encouraged by Kew Shelley, chief counsel to the Performing Right Society, they hoped to secure a species of performing right that would allow the PRS to collect public performance fees on their behalf. But they could not overcome the theoretical difficulties raised by the Gregory Committee. As the Committee pointed out, the musical and mechanical performance rights applied to works and recordings that were already fixed. Collecting societies levied fees for the public performance of fixed, definable copyright subject matter.

Sporting spectacles, broadcast via television, undoubtedly involved performance, but not of definable subject matter. They were constituted by the fluid actions of individuals. Faced with the demands of the sports promoters, the Gregory Committee could reasonably argue that existing principles would not allow the extension of copyright to what was indefinite. Strangely, though, the Committee looked more to precedent than principle when it opposed the grant of copyright in sporting performances:

*Copyright has never extended to a horse race or to a performance by an artiste or group of artistes, whether intended to be seen or heard, and we recommend that no such right be established.*

Perhaps equally strange, the Committee accepted that copyright should apply to the *broadcasts* of events or performances – strange because only by a stretch of the imagination can a broadcast *transmission* be said to “fixate” subject matter. Fixation really occurs as the transmission is recorded. This technicality did not inconvenience the Committee members, however. In their view, the industrial investment necessary to make broadcasting a reality supplied its own justification for the award of copyright (although they chose not to consider the argument that sports associations also committed expertise and investment to the development of stadiums and competitions). The report said:

*In the case of broadcast performance, we have recommended a right against the recording or unauthorized broadcasting of the performance transmitted ... Labour, skill and money have all gone to the making of the broadcast or gramophone record and we can see no justification for leaving the results of this combination to piracy.*

The Association for the Protection of Sport in Copyright might more profitably have asked for copyright in broadcasts of events and the recordings of broadcasts. But the idea of copyright in broadcasts and recordings was itself a novelty, and the Association probably knew that

the Government would be unwilling to award broadcast copyright to an organisation other than the BBC. As the Gregory Committee said, a performer's copyright would most likely create commercial chaos, with multiple performers or promoters demanding payment of licence fees for the privilege of recording, filming and broadcasting the show. Better, said the Committee, to vest the performing right in the one entity, the broadcaster, than leave broadcaster and performers to negotiate commercial agreements. Only by this means could the show go on. As the Committee observed:

*We are satisfied that only if the financial and other relations between the BBC and the Sports Associations and others are worked out on a voluntary basis will a sufficiently flexible scheme be produced.*

The sporting associations, and others arguing for performing rights could not – and did not try to – demonstrate that copyright in spectacles represented a logical outgrowth from the doctrine of authors' rights. They could, however, assert that creativity, ingenuity, skill and investment were all manifest in the delivery of public spectacles and performances.

They could feel aggrieved that the Gregory Committee rejected the proposal yet supported the grant of copyright to recording companies, filmmakers and broadcasters on the grounds of investment and skill. Granted, the production of records and films involved the fixation of works. Yet, if, as most observers seemed to believe, copyright law existed to benefit authors, why allow copyright in sound recordings and films? After all, there was yet no such thing as “publishers' copyright”.

### ***The music industry and performers***

The Gregory Committee devoted considerable attention to questions surrounding the performance of music. The first inquiry concerned an issue familiar in Australia. The Music Users' Federation charged the Performing Right Society with licensing the public performance of music on unfair terms, and called for the creation of a copyright tribunal. Just as APRA in the 1930s opposed the creation of a copyright tribunal in Australia, the Performing Right Society fiercely rejected the possibility of a British tribunal. The PRS submitted to the Gregory Committee that, “no vestige of a case has been made out ... that there has been any 'abuse of monopoly power'.”

The Committee then heard evidence of a battle between the record companies and performers. For several years, the record companies

and the Musicians' Union jointly administered Phonographic Performance Ltd, the society that issued licences, and collected fees, for the public performance of records. The PPL, arguing that restrictions preserved the supply of studio performers, pursued a policy of withholding performance licences from venues that refused to employ performers to play live music.

By 1951, the PPL's policy, strongly supported by the Musicians' Union, had become irksome to the recording industry. Once hostile to the unconstrained public performance of recorded music, the industry now adopted a permissive attitude. Record labels rejected arguments in favour of licensing restrictions and instructed the PPL to stop policing the hiring of musicians.

Industry executives now believed that the public performance of music stimulated the increasingly voracious demand for records. The labels saw no benefit in refusing licences to maintain the supply of performers since demand for records ensured the continued supply of performers. Better, they argued, to freely issue performance licences – the more music played in public, the more money made.

The Musicians' Union reacted furiously. One Union representative, reported *The Times*, said musicians were not going "to play the music at their own funeral". Musicians, he declared, wanted employment, and unless limits were placed on the public performance of music, opportunities for performers would dry up. Soon enough, the Union alleged, the ranks of performers would thin and those that remained would refuse to record music. The record companies were unmoved and insisted that the PPL must not refuse performance licences to clubs.

Their change of heart pointed to an ironic reversal of attitude. In the 1930s in both Britain and Australia, the recording industry attacked radio stations for supposedly broadcasting popular music continuously. Broadcasting, they argued, caused catastrophic declines in record sales. Now, armed with the common law mechanical performing right, the labels considered the public performance of music a blessing.

Public performance actually boosted the sales of records and the more that users played records in public, the more the companies collected in performance fees. The Musicians' Union could not hope to win its battle with the record companies. Sure enough, the Gregory Committee rejected arguments in favour of restrictive licensing and its report criticised the PPL's restrictive approach to licensing.

Though the Committee showed little sympathy for performers, musicians did not give up. The composers organised themselves to press other matters before Parliament and the public. They wrote to *The Times* and lobbied legislators, on their own behalf and through the offices of the Performing Rights Society. They asked for repeal of the compulsory recording licence, the exemption of the BBC from paying fees for broadcasting music and the exemption of diffusion service providers from paying fees for relaying broadcasts.

During the debates over the Copyright Bill in 1956, 397 petitioners signed a memorandum to Parliament and letter writers included a multitude of famous names: Vaughan Williams, Compton Mackenzie, Benjamin Britten, Arthur Bliss and Eric Coates. A larger group of signatories petitioned Parliament on behalf of the Performing Right Society. To no avail. In the contest for political favour, the recording industry crushed the Music Union and the PRS.

The longstanding advocates of the performing right made way before the irresistible force – the new copyright compact that gave preference to the demands of industries. In 1911, George Bernard Shaw wrote of the leaders of the recording industry: “They, being industrialists, are rich and can bully Governments.” Whether or not the industry bullied governments, in 1956 it defeated its opponents more comprehensively than in 1911, when Bernard Shaw protested the introduction of the compulsory recording licence.

### ***Manufacturers copyright and the mechanical performing right***

After skirmishing with the musicians, the record companies went on the attack. Their industry association, the British Phonographic Industry, told the Gregory Committee that the demands of the film and broadcasting industries “transformed” the “whole situation” of the recording industry. The BPI made clear that if the Government recognised distinct copyrights in films and broadcasts, it must also grant copyrights to the oldest of this trio of industries.

A compulsory licence to make records no longer sufficed. The industry demanded positive rights. To add to the negative right to prohibit the reproduction of recordings, manufacturers now demanded rights to authorise broadcasts and the public performance of records. The BPI pointed out that radio stations, film soundtracks and places of public entertainment used sound recordings. An expanded copyright that

allowed the industry to control the performance of records confirmed a common law right and fairly recognised the investment and expertise that made the production of records possible.

Composers and the Performing Right Society opposed arguments for the mechanical performance right out of economic self-interest. They feared that once record companies were permitted to collect income for public performance, the BBC would cavil at paying dual performance fees. The worst result, they felt, would be that the BBC, and future independent broadcasters, insisted on paying lower fees to both. To the PRS, and those for whom it collected fees, the mechanical performance right represented a threat to revenue.

The BBC opposed the mechanical right for the opposite reason. Its executives first expressed alarm at the prospect of paying two fees in 1930, when the gramophone industry declared its right to prohibit the broadcasting of music. Twenty years later, the BBC feared overpayment as much as the PRS feared underpayment. The authors' rights proponents also forcefully opposed an enlarged copyright in recordings. They wanted abolition of the compulsory licence and by analogy the extinguishing of a copyright in records.

After listening to lengthy arguments, the Gregory Committee eventually gave way to the recording industry. It did so because, as its report noted, compulsory licensing provisions were, "the law of the land for forty years". As the report said, during that time "*trade interests have grown up*" [italics added]. The Committee did not intend to disturb those trade interests. It reported blandly that, "we do not feel that a sufficiently strong case has been made out for making a fundamental change now". The Spicer Committee repeated this endorsement, though both committees damned the compulsory licence with faint praise.

Its longevity, they said, justified its continuance. In principle, neither committee supported an exception to authors' rights that was nakedly economic in function. By contrast, neighbouring rights were supportable in principle because they conferred a distinct benefit and did not directly undermine the author's exclusive rights. Each committee decided that abolition of the exception would be economically more unjust than retention. Retention of the compulsory licence pointed the way to support for extended copyright in sound recordings. Again, the industrial interest trumped the individual private interest.

## ***Endorsement of the Brussels Conference amendments***

The Gregory Committee's terms of reference required that it pay "particular regard" to the effect of the amendments agreed at the Brussels Revision Conference. The Committee reported on the amended Convention in six paragraphs dominated by platitudes that supported an inevitable conclusion. "Our general attitude", the report said, "is that we are strongly of the opinion that Her Majesty's Government should accede to the latest text."

The reasons were simple:

*We have indicated our appreciation of the high standards of the Union. We believe that is in the interests alike of the general public and of authors, composers and artists, that the rights of the latter in the works of their brain should not merely enjoy protection in the country of origin, but also that wider protection to be gained only in association with other countries ... There are of course trade interests ... We believe that this trade, based on the interchange of ideas between countries, is one which is important entirely beyond its value in money.*

The brief treatment of the Brussels amendments suggested that the Committee wanted to fry bigger fish. The amended Convention it considered important, so far as it went, but it offered no theoretical solution to the problem that brought the Committee into existence: the impasse between the sporting promoters and the BBC. Their dispute captured the public's attention because millions of television viewers demanded televised sport. Refinements in authors' rights could be considered and approved without great difficulty. The argument over broadcasting copyright alarmed the Government and every day provoked the ire of voters.

Everything else to be decided by the Gregory Committee followed from reconciling conflicting commercial interests to ensure that entertainment of all varieties could be shown on television. The difficulty confronting the Committee should not be underestimated. The most pressing issue confronting its members could be neatly distilled in one question – should copyright subsist in sporting spectacles?

## ***Copyright in broadcasts***

The Committee gave straightforward reasons for proposing that copyright subsist in the broadcasts of performances rather than performances themselves. Copyright law is intended to benefit the

creators of works. The criterion for copyright subsistence is reduction of the work to a material form. Performances are reducible to a material form (by recording) but they are not themselves works. In the case of drama or ballet, for example, they are interpretations of works. Broadcasts, on the other hand, like sound recordings or films, provide the means for transmitting and fixating works. They are not mere interpretations, but the means of translating works into a form that can be appreciated by an audience.

So far as broadcasts were concerned, the weakness in the Committee's reasoning lay in the fact that many broadcasts are concerned with spectacles – “performances” – not works, meaning that in many instances of broadcasting, the supposedly essential connection between authorship and material fixation does not exist. The Committee did not stop to consider this break in the chain of its logic. Instead, it clinched the argument in favour of broadcast copyright by drawing an analogy between broadcasters and the makers of records and films:

*The position of the BBC, as we see it, is not in principle, very different from that of a gramophone company or film company. It assembles its own programmes and transmits them at considerable cost and skill. When using copyright material it pays the copyright owner, and it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.*

While sports promoters might claim that they wished to protect the products of their skill and investment, the Committee found a compelling reason, apart from the transient nature of performances, for rejecting copyright in sporting spectacles. If copyright applied to sporting performances, then, in principle, it must apply to all performances, with the result that a multiplicity of licence fees could be demanded for broadcasting a spectacle involving a number of performers.

In its report, the Committee declared itself “convinced” that if public performance were copyright, “before long, there would grow up around the public performance of television a thick hedge of licences which would be required from many associations of copyright owners (as well as from individuals) with inevitable complaints and confusion in the minds of the public.”

So broadcasts were to join sound recordings and cinematograph films as copyright subject matter, even though, unlike records and films, they involved the transmission, rather than fixation, of works. The report

recommended that broadcasters enjoy the right to prevent the unauthorised reuse of broadcasts, either by rebroadcasting, or by the making of records for sale and subsequent performance. The positive right to authorise the broadcasting of a work accrued to the owner of the work.

By recommending broadcast copyright, the Gregory Committee materially aided the growth of the developing television industry. The BBC, for the time being the exclusive holder of broadcast copyright, had won its copyright battle with sports promoters. But it knew that it would have to strike contractual bargains with the all the suppliers of television content.

In the case of some sporting associations, television broadcasting, far from destroying audiences at sporting venues, delivered television audiences of millions and eventually hundreds of millions, and poured undreamt of sums into their coffers. On the cusp of a new world, the BBC and sports associations continued to fight over rights of access and the broadcasting of events. Within a decade, their conceptions about the value of sports broadcasting were changed beyond reckoning.

In the meantime, they inched blindly towards accommodation. The Committee's seminal recommendation resulted, four years later, in copyright in broadcasts. But the Committee also proposed other far-reaching changes that eventually helped to reshape the copyright world.

### ***Copyright term***

The Gregory Committee accepted that Britain's ratification of the Berne Convention as recently amended would require abolition of legislative provisions that compelled copyright owners to permit reproduction of works after elapse of half of the posthumous term. It also insisted that the 50 year posthumous term for works must remain undisturbed. When it came to propose the period of copyright in recordings and films, the Committee settled on a subsistence period of 25 years from production. The reasons it gave for proposing a 25 year term pointed to a shift in official thinking.

The new approach, less sacerdotal and more blunt, slowly entrenched the idea that as the copyright industries generated more and more revenue, so they deserved more and more legal protection. Even though, applied to the question of copyright subsistence, it resulted in a recommendation that did not please the industries, they had reason to take heart. They could, and in 1956 did, influence legislators to adopt a

50 year term. And they could celebrate the fact that even the inferior period proposed by the Gregory Committee offered a significant benefit to film and record producers.

Though the Committee sought an “empirical” solution to the question of how long copyright in films and sound recordings should subsist, it settled arbitrarily on a period of 25 years from production. However, its reasons revealed a willingness – apparent throughout its report – to substitute for traditional arguments about moral entitlement declarations about business investment and the expectations of business.

The Committee made clear its opinion that authors, the primary beneficiaries of copyright protection, must always receive legislative benefits superior to those conferred on the industries, the prospective holders of analogous copyrights. But it also intended that the industries’ copyright confer real economic benefits. The arguments in the report, though, were ambiguous and confused. In the end, the Committee wrote simply that:

*We are by no means satisfied that a term of 50 years’ protection is justified for either a gramophone record or a cinematograph film, and we consider that this period gives them an excessive period of protection in comparison with other articles produced commercially. We accordingly recommend that the period of protection should be reduced to one of 25 years.*

### ***Fair dealing, publishers, libraries, Crown copyright and the Tribunal***

The Gregory Committee recommended that fair dealing for the purpose of criticism or review be added to the statutory list of fair dealings. In addition, it proposed legislative provisions that would permit libraries to copy, at the request of students or researchers, for the purpose of research or study, whole articles from periodicals. Subject to conditions, any fair dealing by a student would be regarded as done by a librarian acting on the student’s behalf.

Publishers were vociferous in public debate as they were in 1911. In 1951, they denied reducing royalties to preserve margins,<sup>10</sup> renewed

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<sup>10</sup> In letters to the *The Times* (April 1951), S Curtis Brown and Stanley Unwin argued that rising production costs compelled publishers to either reduce the royalty paid to authors, or increase the price of books. According to Unwin, authors typically preferred a lower royalty and static prices on the basis that more books would be

their time-honoured attacks on statutory deposit, and demanded typography copyright protection. Their opponents of 1911, the libraries, organised themselves effectively for the first time. The Library Association made successful representations to the Committee concerning library copying of books and manuscripts, as well as the reproduction of journal articles.<sup>11</sup>

The Committee proposed a modest extension to the ambit of the Crown copyright provision in the existing legislation. The 1911 British Copyright Act vested in the Crown copyright in works produced by its employees, or under its direction or control. The original provision seems to have been inspired by the Treasury's classification of government publications into seven categories.<sup>12</sup> Treasury decreed that the first four categories of works were issued for the use and information of the public and the last three for more restricted purposes.

The Crown copyright provision formalised Crown ownership of these categories of works and enabled government to more efficiently control the dissemination of its output. The Committee's report stated that the Crown should be empowered to reproduce copyright material relating to the equipment of the Armed Forces, and possibly also for civil defence and essential communication, "subject to compensation". The 1956 Act enlarged the Crown copyright provision and extended Crown ownership to unpublished works.

The Committee next proposed a measure that promised to draw to a close the wars of the 1920s and 1930s: the introduction of a Copyright

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sold and total royalties would be greater. On the same day as Unwin, *The Times* published a letter from Alex Miller: he stated that discounting the royalty would only marginally offset the purported increased production costs – in short, unless publishers proposed to substantially discount their own margins to attack rising costs, the argument for a reduced royalty was a ruse.

<sup>11</sup> An illustration of the libraries' willingness to engage in controversy came in 1956, when the Standing Conference of National and University Libraries protested in *The Times* against the requirement in the Copyright Bill to charge researchers the full cost of library reproduction.

<sup>12</sup> The categories were: (1) Reports of Select Committees and Royal Commissions (2) Statutory Papers laid before Parliamentary (3) Parliamentary Command Papers (4) Acts of Parliament (5) Official books (6) Literary or quasi-literary works (e.g. departmental journals, reports) (7) Charts and Ordnance Maps. Treasury Minute 28 June 1912 said: "My Lords see no reason why such works – often produced at considerable cost – should be reproduced by private enterprise for the benefit of individual publishers."

Tribunal to arbitrate disputes between the collecting societies and the “users” of copyright material, the persons or entities charged fees for the right to play sound and television broadcasts, and music, in public. The report recommended that wide-ranging powers be vested in the Tribunal, allowing it to rewrite the terms of licences, to compel the grant of a licence and to fix the annual fees charged for different classes of licence. The Tribunal was to consist of a number of Government appointees and be chaired by a judge, former judge, or senior barrister.