Chapter 5

Distinguishing between direct and indirect playing of music

Introduction

5.1 One of the main issues during the inquiry was the perception amongst those who use music of a difference in the commercial value of using recorded music compared with music heard via radio or television broadcasts. Copyright owners believed that they should be paid for the public performance of their work, regardless of the means through which the music was heard. During the course of the inquiry, a number of options were put to the Committee about ways to limit the licensing of small businesses playing a radio for the benefit of employees. The three main options are examined in this chapter. These options can be distinguished from the general exemptions sought by some businesses which were explored in the previous chapter.

Value of indirect playing of music

Value to the copyright user

5.2 The principal focus of the concern and anger expressed by small businesses was on having to pay a fee in order to listen to the radio.[1] For

1 Organisations making this representation include: APA, *Submissions*, p. S241; AMA (Vic), *Submissions*, p. S250; VACC, *Submissions*, p. S278; SRA (SA), *Submissions*, p. S296; COSBOA, *Submissions*, p. S302, QRTSA, *Submissions*, pp. S324–325; Ms Connell, SBDC (WA), *Transcript*, p. 4; Mr Azzopardi, Tasmanian

a number of reasons, business people believed that music played on the radio was far less likely to make a commercial contribution to their businesses than using recorded music.

Radios played for reasons other than the music

5.3 It was put to the Committee that many businesses tune in to talkback or news programs or listen to coverage of sporting events. These programs have little or no music content. It was argued that it was not fair that these businesses should have to pay a fee when their primary reason for having the radio on is not to listen to music, and that any music that is heard is incidental to the programs to which they are listening.[2]

5.4 Many people drew the Committee's attention to the importance of radio as a source of information. Retailers needed to be kept informed of product recalls. During times of natural disasters, such as cyclones or floods, staff and customers need to have access to the information that radio stations provide.[3] Paul Thompson of DMG Radio gave examples of

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Chamber of Commerce and Industry, *Transcript*, p. 77; Mrs Frost, Northern Territory Chamber of Commerce and Industry, *Transcript*, p. 376.

2 NMA (NSW), *Submissions*, p. S420; Tasmanian Chamber of Commerce and Industry, *Submissions*, p. S622; Ms Hempstead, Townsville Chamber of Commerce, *Transcript*, p. 126; Mr Pratt, QRTSA, *Transcript*, pp. 548–549; Mr Brownsea, SRA (SA), *Transcript*, p. 651.

3 Examples of the use of radio for information were given by a number of organisations, including: Australian Dental Association (ADA), *Submissions*, p. S38; RCMBA, *Submissions*, p. S79; VACC, *Submissions*, p. S275; SRA (SA), *Submissions*, p. S296; QRTSA, *Submissions*, p. S326; ASBA, *Submissions*, p. S337; FRA (NSW), *Submissions*, p. S411; Pharmacy Guild of Australia, *Submissions*, p. S576; Mr Reitano, Hinchinbrook Chamber of Commerce, *Transcript*, pp. 114–115.

situations where radio stations play a vital role in keeping the public informed, maintaining public safety, and on occasion, coordinating emergency services activites.[4]

5.5 The Committee was provided with examples of small family retail businesses where the one or two operators were alone in the business for long hours with a radio either on the counter or in the back room. The radio was seen as something which provided entertainment and vital information to people in these situations, and it was usually the case that customers were not on the premises long enough to listen to the music.[5]

No choice in what is played

5.6 It was pointed out that businesses tuned in to the radio had no control over the music which is played. They cannot control the programming of music to the same extent as a business using recorded music. A business which wants to use certain types of music to attract a certain type of customer is much more likely to use recorded music.[6] As discussed above, the Committee heard strong arguments from the business sector that the use of music to attract and entertain customers

4 Mr Thompson, DMG Radio Australia, *Transcript*, pp. 669–670.

5 RCMBA, *Submissions*, p. S79; Liquor Stores Association of Victoria, *Submissions*, p. S83; Mr Baldock, QRTSA, *Transcript*, p. 551.

6 Dr Elizabeth Fisher, *Submissions*, p. S4; Linley and Alison Maddick, *Submissions*, p. S237; Townsville Chamber of Commerce, *Submissions*, p. S504.

was more closely connected with the commercial activities of a business than playing music for the benefit of staff.

Double dipping

5.7 Many business people were aware that musicians had received royalties from radio stations. There was a firm belief that to ask for a fee merely for receiving a 'free to air broadcast' which was in addition to that paid by the broadcaster was 'double dipping'.[7]

Overseas comparisons

5.8 Business representatives drew the Committee's attention to overseas examples. In some countries businesses were exempt from paying royalties for public performances in some circumstances.

5.9 There are existing and potential new exemptions in the United States.[8] The 'Aiken' or 'homestyle' exemption exempts from infringement of copyright the playing of a single radio. This exemption is examined in more detail later in this chapter.

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7 APA, *Submissions*, p. S243; VACC, *Submissions*, p. S278; Ballina Chamber of Commerce and Industry, *Submissions*, p. S311; TCA, *Submissions*, p. S370; MTAA, *Submissions*, p. S403; FRA (NSW), *Submissions*, p. S411; NMA (NSW), *Submissions*, p. S419; RCIAA, *Submissions*, p. S434; SBDC (WA), *Submissions*, p. S482; NSW Department of Fair Trading, *Submissions*, p. S700.

8 ARA, *Submissions*, p. S212; Attorney-General's Department, *Submissions*, p. S775; Mr Azzopardi, Tasmanian Chamber of Commerce and Industry, *Transcript*, pp. 77–78; Mr Russell, VACC, *Transcript*, p. 420.

5.10 The Committee was also informed about the situations in Canada and Japan. It appears that in those countries, the use of radios in circumstances which amount to a public performance according to Australia's legislation and international treaties, does not require the payment of royalties.[9] The Canadian legislation is examined in greater detail below.

Value to copyright owners

5.11 Copyright owners believe they should continue to receive royalties for the public performance of their work via radio and television. Attributing a lower value to the music because it was being played on the radio rather than a CD or tape was considered to be inconsistent with the principle of copyright and unjust to composers.[10]

5.12 In response to the double dipping objections raised by small businesses, APRA argued that businesses should continue to pay royalties because they are deriving a benefit which is distinct and separate from the benefit derived by the radio stations:

> [the law gives] recognition that there are two levels of benefit. The radio station is gaining a benefit from broadcasting into people's homes. If someone at the point of reception chooses to gain a second commercial benefit by playing the music through the use

9 Dr Warwick Rothnie and Professor James Lahore, *Submissions*, pp. S150–S151; Attorney-General's Department, *Submissions*, p. S776; Mr Bastian COSBOA, *Transcript*, p. 252.

10 Arts Law Centre of Australia, *Submissions*, p. S713; Mr Fortescue, Musicians Union of Australia and Mr Blanch, Tasmanian Music Industry Association, *Transcript*, p. 97.

> of reception, then that is something that should attract some return for the author or composer.[11]

5.13 It was suggested that APRA's current licence fees already differentiate between music heard via a broadcast and recorded music.[12] The fees, which were outlined in Chapter 4, are lower for the use of a radio or television than for music played from a CD or cassette.

5.14 Many composers emphasised the importance of their public performance royalties in allowing them to continue to compose music. They reasoned that while their twice yearly APRA cheque was not always a large sum of money, it was often enough to 'get them by'. There was a strong feeling that the value of the royalty was not just in its quantum, but in the knowledge that they were receiving some sort of financial reward for their work. In many cases, the principle of reward was considered to be as important as the money.

Conclusion

5.15 The Committee believes that there are compelling practical and philosophical arguments in favour of relaxing the licensing requirements for those listening to radio. The Committee considers that businesses playing a radio for the benefit of small groups of employees should be exempt from having to pay a licence fee. This is consistent with the APRA's informal policy of not licensing certain common sense

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11 Mr Cottle, APRA, *Transcript,* p. 61.

12 Ms Louella Hill, *Submissions,* p. S373, Mr Fortescue, Musicians Union of Australia and Mr Blanch, Tasmanian Music Industry Association, *Transcript,* p. 97.

cases as discussed above. The Committee recognises the difficulties in making a subjective assessment of whether the music is being played for the benefit of staff or for the benefit of customers. However, the Committee believes that there are many situations where it would be clear that the radio was being used exclusively for the benefit of staff.

5.16 The Committee is of the view that it is not appropriate that small businesses should have to pay a licence fee to APRA in order to play a single radio for the benefit of a small group of employees.

Options

5.17 During the course of the inquiry, a number of different mechanisms for restricting APRA's licensing activities with respect to radio were put to the Committee. The main options discussed were that:

(a) broadcasters pay public performance fees;

(b) public performance be defined in the Copyright Act in a way which exempts from licensing requirements the use of a radio in certain situations; and

(c) APRA implement a system where complimentary licences are issued to those listening to the radio in certain situations.

5.18 The potential legal, practical and philosophical aspects of each of these options are examined below.

Broadcasters pay the fees

5.19 This option involves exempting all businesses from having to pay public performance licence fees and instead shifting the liability of these fees to the broadcasters. Both radio and television broadcasters already pay copyright collecting societies for the right to broadcast music. This option would require them to pay public performance royalties in addition to these broadcasting royalties. The option would require legislative change.

Background to the emergence of the option

5.20 The possibility of broadcasters taking responsibility for paying public performance fees was first suggested to the Committee by a representative from the Small Business Development Corporation of West Australia.[13]

5.21 In its submission to the Committee, COSBOA suggested that:

> ... the most appropriate mechanism to recover copyright royalties are the fees already paid by radio stations, and other organisations conducting commercial performances, for the right to broadcast.[14]

5.22 At the end of October 1997, APRA presented a submission to the Committee which expanded on this idea. APRA put forward a proposal that the Copyright Act be amended to exempt businesses playing radios from having to pay public performance licence fees and to make

13 Ms Connell, *Transcript*, p. 4.

14 COSBOA, *Submissions*, p. S305.

broadcasters liable for the payment of the royalties. It was suggested that when setting the licence fees to be paid by broadcasters, the Copyright Tribunal could 'take account of the nature and value of such communications to the public'.[15]

5.23 In discussing the proposal with the Committee, Mr Cottle, APRA's Chief Executive Officer, described it as:

> ... a sensible, pragmatic and commercial solution to this issue which has caused most concern.[16]

5.24 Mr Cottle continued:

> ... we whould say that it not only takes account of the practical issues that have concerned small business and, on the other hand, takes account of concerns that authors have about obtaining reward for the value of their property. It also has this advantage: it does not assume that the value of those performances would necessarily be the same as the fees that are currently paid.[17]

5.25 Some business representatives agreed that the proposal was a practical and effective solution.[18]

5.26 When discussing the likely fee that the Copyright Tribunal could set for broadcasters to pay, Mr Cottle told the Committee that the total revenue that APRA receives from the playing of radio and televisions throughout Australia is just over $2 million, and of that about $1 million

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15 APRA, *Submissions*, p. S705.

16 Mr Cottle, APRA, *Transcript*, p. 307.

17 Mr Cottle, APRA, *Transcript*, p. 315.

18 Miss Woolard, VACC, *Transcript*, pp. 420–421; Ms Harmer, VECCI, *Transcript*, p. 440; Mr Scarcella, LSA (Vic), Mr Baker, RCMBA (Vic), *Transcript*, p. 463; Mr Stafford, HMAA (Vic), *Transcript*, p. 473.

is derived from the playing of radios. APRA would argue that this $1 million should be factored into the royalties paid by broadcasters. This would increase the liability of broadcasters by around seven or eight per cent. In addition, Mr Cottle suggested that APRA may argue before the Copyright Tribunal that the total value of all radio performances be taken into account – not just those which are currently licensed.[19]

Canada as a precedent?

Section 69(2) of the Canadian Copyright Act

5.27 In its submission APRA referred the Committee to section 69(2) of the Canadian Copyright Act. Section 69(2) exempts those persons causing a radio to be heard from having to pay royalties. It goes on to provide that the Canadian Copyright Board shall 'in so far as possible', provide for the collection of the royalties from radio stations.

5.28 The section 69(2) exemption was introduced in 1938 after widespread concern arose over the perceived abusive exercise of monopoly rights by Canadian performing rights collecting societies, particularly in relation to 'small users' of music.[20]

5.29 Since it was introduced, the exemption has been reviewed in a number of reports. One of the major issues has been the perceived distinction between music being used in a way which is considered to be

19 Mr Cottle, APRA, *Transcript*, pp. 315–316.

20 Attorney-General's Department, *Submissions*, p. S937.

public, intentional and part of the primary purpose of the business, and those uses which are considered to be incidental and therefore akin to private use.[21]

5.30 One of these reports noted that:

> There are a number of significant uses of copyright works, which although they have a public aspect, are essentially private ... Examples are the owners or managers of small stores or barbershops who operate radios, television sets, cassette players or similar devices. The fact that the public enters these small establishments does not change the essentially private nature of the use.[22]

5.31 One of these reports made recommendations about replacing the exemption with one that applies to smaller businesses based on the number of employees.[23] One discussed the option of exemptions in cases where the music was primarily for the benefit of employees.[24]

5.32 The Committee notes that the philosophical and practical problems that Canada has faced in dealing with the public performance of music via radios are similar to the issues that the evidence suggests currently exist in Australia.

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21 Attorney-General's Department, *Submissions*, p. S943.

22 *Report by the Sub-Committee on the Revision of Copyright* - 1985 as quoted by Attorney-General's Department, *Submissions*, p. S946.

23 *Keyes and Brunet Report*, 1977, *From Gutenberg to Telidon* - 1984, as referred to in Attorney-General's Department, *Submissions*, p. S945.

24 *From Gutenberg to Telidon* - 1984, as referred to in Attorney-General's Department, *Submissions*, p. S945.

Implementation of section 69(2)

5.33 FARB's submission cast doubt on whether the policy behind section 69(2) had actually been implemented. According to FARB, despite the existence of section 69(2) in the Canadian Copyright Act, 'broadcasters in Canada do not pay, and have never paid, additional licence fees for the use of radio receiving sets by business proprietors.'[25]

5.34 APRA disagreed with FARB's understanding of the law in Canada. APRA stated that, while the broadcasters don't pay an additional licence fee, the royalties paid by broadcasters take into account the performance at the point of reception. APRA also points out that the royalties paid by Canadian radio stations are significantly higher than those paid by Australian radio stations. (In Australia, commercial radio stations pay between 2.33% and 2.6% of total revenue, compared with 3.2% of revenue in Canada.[26]

5.35 The Attorney-General's Department obtained advice from the Canadian Copyright Board about the implementation of section 69(2) of the Canadian legislation. The advice was that no royalties are currently being paid under section 69(2). Despite the intention expressed in the legislation that broadcasters pay for public performance royalties, in practice the provision has 'resulted in a de facto exemption from any payments from any source for the uses set out in the provision'.[27]

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25 Federation of Australian Broadcasters (FARB), *Submissions*, pp. S821–S822.

26 APRA, *Submissions*, p. S881.

27 Attorney-General's Department, *Submissions*, p. S949–S950.

Difficulties in setting the fees

5.36 After the provision was enacted in 1938, the Copyright Board attempted to set tariffs in accordance with the intention in the legislation. However, the Board faced difficulties in making an assessment of how much the broadcasters should pay. The Board's ruling in 1939 stated that:

> [the Board] recognises that it must endeavour to provide some compensation ... in respect to the public performances which are exempted but it finds the greatest difficulty in ascertaining the basis upon which compensation can be determined. There is no authentic information as to the number of sets in the places exempted which are in use in Canada.[28]

5.37 Between 1939 and 1941, the Board authorised the Canadian collecting society at the time (CPRS) to collect a total of $1000 from broadcasters in respect of the use of radios. By 1957, the copyright collecting society had abandoned the collection of even this notional amount without any explanation.

Legal ramifications of not collecting royalties

5.38 Failure to properly implement section 69(2) means that copyright owners are currently not compensated for public performances of music which occurs via radio broadcasts. With no royalties currently being paid for the public performance of music

28 Attorney-General's Department, *Submissions*, p. S950.

played on the radio, there is an issue as to whether Canada is fulfilling its obligations under TRIPS.[29]

Practical issues

5.39 Representatives from the broadcasting industry drew the Committee's attention to what they believed to be insurmountable practical barriers to implementing thisAPRA proposal.

5.40 Broadcasters who made submissions to the inquiry told the Committee that they already paid substantial licence fees to APRA for the right to broadcast.[30] FARB and FACTS both rejected any suggestion that television and radio broadcasters have an infinite capacity to pay licence fees.[31] Many commercial broadcasters have low profit margins, or do not make a profit at all.[32]

5.41 Commercial broadcasters disputed that they should, or could simply pass on extra costs to their advertisers. The advertising market was described as 'extremely competitive and price-sensitive',

29 *Illsley Report*, Attorney-General's Department, *Submissions*, p. S952.

30 Miss Preece, B105FM, *Transcript*, p. 526; Mr Rhys Holleran, RG Capital Radio, *Transcript*, p. 577; Ms Buddle, Austereo, *Transcript*, p. 641; Mr Thompson, DMG Radio Australia, *Transcript*, p. 668.

31 Mr Thompson, DMG Radio Australia, *Transcript*, p. 669. See also Federation of Australian Commercial Television Stations (FACTS), *Submissions*, p. S811.

32 Ms Buddle, Austereo, *Transcript*, p. 642; Mr Thompson, DMG Radio Australia, *Transcript*, p. 669.

particularly in regional areas.[33] It was argued to be unfair to expect advertisers to pay 'for a benefit received by some other business who enjoys the benefit of a public performance' of broadcast music.[34]

5.42 Community broadcasters pointed out that they are non profit organisations relying heavily on volunteers, donations, subscriptions and small amounts of public funding. Representatives from community radio argued that they would have great difficulty in meeting any increase in licence fees.[35]

5.43 Public broadcasters had similar funding difficulties – the ABC and SBS argued that they would require additional appropriations from the Government to accommodate such increases.[36]

5.44 It was seen as being impossible to establish a fair method of setting an amount for collection and then dividing this total amongst the different broadcasters. There seemed to be no method of identifying how many businesses tune into the various broadcasting stations. It was argued that there is no means of determining which, or how many

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33 Mr Thompson, *Transcript*, p. 669. See also FACTS, *Submissions*, p. S811; Miss Preece, B105FM, *Transcript*, p. 527; Mr Rhys Holleran, RG Capital Radio, *Transcript*, p. 577, Mr Paul Pirrie, Austereo Melbourne, *Transcript*, p. 678.

34 Mr Holleran, RG Capital Radio, *Transcript*, p. 577; See also, Miss Preece, B105FM, *Transcript*, p. 527; Mr Paul Pirrie, Austereo, *Transcript*, p. 678; Mr Thompson, DMG Radio Australia, *Transcript*, p. 669.

35 CBAA, *Submissions*, p. S868. See also, Mr Thorpe, Music Broadcasting Society of Queensland, *Transcript*, pp. 588–589; Ms Letch, Community Broadcasting Association of Australia (CBAA), *Transcript*, p. 695 and 697.

36 Australian Broadcasting Corporation (ABC), *Submissions*, p. S818; Special Broadcasting Services Corporation (SBS), *Submissions*, p. S864.

businesses listen to talkback, news or information based stations as opposed to music based stations. It was put to the Committee that there is no fair way to allocate liability amongst broadcasters and that the allocation could only occur on an arbitrary basis.[37]

5.45 The Committee notes the difficulty that the Canadian Copyright Board faced in determining the amount of fees to be collected from broadcasters in Canada.

Philosophical issues

User pays

5.46 Broadcasters objected to APRA's proposal on the grounds that it was contrary to the principle that those who use copyright material should pay for the benefit. Broadcasters argued that it was unjust that they be required to pay for a benefit which is accruing to a third party. It was pointed out that broadcasters have no control over or knowledge of the location and use of televisions or radios by small businesses.[38]

5.47 The Australian Copyright Council expressed a similar concern:

> In principle [APRA's proposal] is an odd situation because the person who is getting the benefit of the use, the small business, is

37 SBS, *Submissions,* p. S864; ABC, *Submissions,* p. S818; FARB, *Submissions*, pp. S832–833; Ms Letch, CBAA, *Transcript,* p. 697.

38 FACTS, *Submissions,* p. S811; ABC, *Submissions,* p. S831; Dr Langdon, University Radio 5UV, *Transcript*, p. 638; Mr Holleran, RG Capital Radio, *Transcript*, p. 577.

> not the person who is paying. Somebody else is paying for the small business's benefit.[39]

5.48 In 1959, the Spicer Committee[40] was confronted with similar arguments when it was deciding where the responsibility for paying royalties for public performance of music by radio should lie. The Spicer Report concluded at paragraph 66 that the person causing the public performance should be the party responsible for paying the fees:

> It seems to us that the person who causes the public performance of a work by operating a wireless or television receiving set should be the one to pay the fee. If the fee is collected from the broadcaster it would ultimately be passed on to persons who did not operate their sets so as to cause a performance in public. In the case of the Australian Broadcasting Commission, increased funds would have to come from the taxpayer and, in the case of commercial stations, from the advertisers. We think that our present law and the 1956 Act places the liability for the fee where it should rightly be, namely, on the person causing a performance in public.

An easy option?

5.49 Broadcasters objected to being targeted to make additional payments to APRA for music played by small business when, in their view, it was APRA's own licensing activities which had generated the problem in the first place.

5.50 FARB's view was that APRA's proposal:

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39 Ms Baulch, ACC, *Transcript*, p. 355. See also Mr Gock, Australian Guild of Screen Composers, *Transcript*, p. 268.

40 Committee appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable in the copyright law of the Commonwealth.

> is directed at abrogating its responsibilities and placing the onus on the broadcasters, rather than to address the issue properly...It is unacceptable that this issue should be reduced merely to one of convenience in licensing administration.[41]

5.51 The sentiment was that 'APRA should not be rewarded for its poor business and public relations practices in this way'.[42]

A partial solution

5.52 Witnesses reminded the Committee that even with the implementation of this proposal, small businesses would still be pursued by collecting societies for the payment of licence fees for the use of recorded music.[43] If APRA were to continue to use the same techniques it used in its national compliance campaign, most businesses in Australia would continue to receive correspondence from APRA about the public performance of music.

Constitutional issues

5.53 When addressing APRA's proposal, some submissions have referred to possible constitutional hurdles in adopting it.[44]

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41 FARB, *Submissions*, p. S824.

42 SBS, *Submissions*, p. S862.

43 FACTS, *Submissions*, pp. S812–S813.

44 FACTS, *Submissions*, p. S812; FARB, *Submissions*, p. S830.

Blank Tape Case

5.54 Relevant to the issue is *Australian Tape Manufacturers Association v Commonwealth of Australia* (1993) 25 IPR 1 (The Blank Tape Case).

5.55 This case involved a legislated blank tape levy scheme which attempted to address the problem of the domestic taping of sound recordings leading to a reduction in the sales of the original sound recordings. Collecting societies were to collect a levy from sellers of blank tapes and to distribute the royalties to the relevant copyright owners.

5.56 The scheme was challenged on the basis that the provisions of the legislation:

- did not constitute a law with respect to copyrights within the meaning of section 51(xviii) of the Australian Constitution;
- imposed a taxation within the meaning of section 51(ii) and were therefore invalid under section 55, as the law dealt with the imposition of taxation as well as other matters; or
- effected an acquisition of property from copyright owners or vendors of blank tapes either on unjust terms or for a purpose in respect of which Parliament does not have the power to make laws, and was therefore contrary to section 51(xxxi).

5.57 The High Court held by a majority of four to three that the amendments were invalid. The majority, Mason CJ, Brennan, Deane and Gaudron JJ held that the amendments were unconstitutional on the

second ground relating to an invalid tax. The remainder of the Court – Dawson, Toohey and McHugh JJ, upheld the constitutional validity of the provisions.

5.58 The majority found that the levy was not a 'royalty' in the true sense of the word. The essence of a true royalty is that the payments should be made in return for some right granted, and should be calculated by reference to some exercise of rights by the person who is paying the royalty.[45]

5.59 The majority then went on to find that the levy was a tax. The amending provisions were inserting tax imposition provisions into an existing Act, which was not a law dealing with taxation. The tax was therefore held to be invalid.

Would making the broadcasters pay impose an illegal tax?

5.60 According to the Attorney-General's Department, there are similarities between the Canadian option and the blank tape levy scheme found to be invalid by the High Court:

> Both involve a mechanism whereby copyright owners are compensated by a party that is not exercising the particular right in question.[46]

5.61 The Attorney-General's Department advised the Committee that if the proposal to make the broadcasters liable for public performance

45 *Australian Tape Manufacturers Association v Commonwealth of Australia* (1993) 25 IPR 1 at 4.

46 Attorney-General's Department, *Submissions*, p. S956.

royalties was implemented, it would be arguable that the broadcasters would not be obtaining any benefit or advantage from the payment of royalties in respect of the use of radios. The payment may not be a royalty according to the High Court's definition of a payment made in respect of a right granted.[47] The Department concludes that:

> ... it appears that there is at least a prima facie case for characterising the fees to be paid by broadcasters under the Canadian option as illegal impost, rather than a royalty.[48]

International obligations

5.62 Advice from Dr Warwick Rothnie and Professor James Lahore is that the proposal is consistent with Australia's obligations under TRIPS.[49] The reason for this is that the relevant provision in the Berne Convention, Article 11Bis (2), requires only that authors are paid equitable remuneration for the public performance of their work. It does not stipulate that the person making the payment must be the person responsible for bringing about the public performance.[50]

5.63 To copy the Canadian example in its practical form, whereby no party is paying the royalties, would mean Australia would be in danger of breaching its international obligations. The Attorney-General's

47 Attorney-General's Department, *Submissions,* p. S956.

48 Attorney-General's Department, *Submissions,* p. S956.

49 Dr Warwick Rothnie and Professor James Lahore, *Submissions,* p. S853.

50 Dr Warwick Rothnie and Professor James Lahore, *Submissions,* p. S857.

Department has advised the Committee that if it were to implement a provision similar to Canada's section 69(2):

> there would need to be appropriate mechanisms in place to ensure that copyright owners were in fact equitably remunerated by broadcasters for the public performance of their works ... Clearly, some means of identifying the value of the public performance right would need to be implemented in Australia.[51]

Legislative option - define public performance

5.64 A number of submissions to the inquiry called for the development of a clear definition of public performance in legislation. People were confused about what constituted a public performance and alarmed at some of the situations which appeared to fall within its scope.[52] Defining 'public performance' in the Copyright Act could have the dual advantage of clarifying the meaning of the term for both users and owners as well as excluding certain usages of music.

Is a definition necessary?

5.65 As noted in Chapter 2, the courts have developed a significant body of law on the meaning of 'public performance'. A 1997 discussion paper produced by the Attorney-General's Department examined the option of defining 'to the public' in relation to other existing and

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51 Attorney-General's Department, S954..

52 SBDC (WA), *Submissions*, p. S485; FACTS; *Submissions*, p. S814; FARB; *Submissions*, p. S838; SBS; *Submissions*, p. S866; Mr Azzopardi, Tasmanian Chamber of Commerce and Industry, *Transcript*, p. 80; Mr Slattery, Cairns Chamber of Commerce, *Transcript*, p. 163; Mrs Frost, Northern Territory Chamber of Commerce and Industry, *Transcript*, p. 378.

potential rights in the Copyright Act. The paper noted the 'solid line of case law' which interprets the expression, in particular the recent consideration by the Full Court in *APRA v Telstra*. In light of these authorities, it was considered unnecessary to define the term in legislation.[53] There is general agreement that the way in which Australian courts have defined public performance is consistent with the requirements of the Berne Convention.

International obligations

Berne Convention and TRIPS

5.66 It was argued that because the Berne Convention does not define public performance it is open to parliament to do so. However, as noted in Chapter 2, the Berne Convention does not provide much scope to introduce a restrictive definition of public performance. The exemptions allowable under the Berne Convention are minimal, applying only to religious and patriotic ceremonies. Defining public performance in a narrow sense would carry with it a risk of breaching the Berne Convention, and therefore Article 9.1 of TRIPS. This would leave Australia open to action through the dispute resolution and enforcement measures of the WTO.

53 *Copyright Reform and the Digital Agenda*, p. 26, para. 4.41.

European action in relation to United States provisions

5.67 APRA referred the Committee to a recent report to the European Commission Directorate which indicated the European Commission's intention to challenge a United States legislative provision which exempts certain usages of music heard by radio broadcast.[54]

5.68 Section 110 of the US Copyright Act makes public performances of music via radio exempt from infringement of copyright. The exemption applies to the playing of music 'by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes'. Known as the Aiken or homestyle exemption, the provision was introduced after a Supreme Court ruling that exempted from licensing requirements the owner of a small fast food restaurant who played a radio connected to four speakers in the ceiling.

5.69 According to the European Commission's report, the courts in the United States have interpreted section 110(5) broadly, to the extent that large chain store corporations have been found to be exempt from paying licence fees. A United States collecting society told the Commission that:

> what was intended to be a 'mom and pop' exemption has become an exemption for large corporations.[55]

54 Exhibit 31 - . *Examination Procedure Regarding the Licensing of Music Works in the United States of America*, 23 February 1996, European Commission, p. 6.

55 BMI, as quoted in Exhibit 31, p. 6.

5.70 Stores have adapted their music systems so as to take advantage of the section 110 (5) exemption. The Commission's report noted that the Courts looked at number of criteria when interpreting section 110(5). The criteria included the size of the premises, the number and set up of the speakers, the noise level in the area and the extent to which the device was considered as one commonly used in private homes. The Commission observed that:

> As a result of the ambiguous statutory language of section 110(5), the selective use of these criteria during a decade of litigation has given rise to often confusing, inconsistent, contradictory and unpredictable case law.[56]

5.71 The report of the European Commission analyses the US homestyle exemption in the context of the standards established in the Berne Convention and TRIPS. The report makes the following conclusions:

- section 110(5) is incompatible with the Berne Convention as it denies the rightholders the protection afforded by Article 11bis(iii) of the Berne Convention[57]
- the US can not justify the homestyle exemption as being a minor exception to the Berne Convention;[58] and

56 Exhibit 31, p. 6.

57 Exhibit 31, p.11.

58 Exhibit 31, p. 18.

- section 110(5) contravenes Article 9.1 of TRIPS and cannot be justified under Article 13 of TRIPS.[59]

5.72 The report concludes in stating that it intends to pursue the matter with the authorities of the United States. If necessary, it will enter into consultations within the framework of the WTO.[60]

5.73 The report notes that there is a risk of exemptions similar to the United States homestyle exemption being enacted in other countries. The concern seems to be that a failure to challenge the US law may be an incentive for other countries to introduce similar provisions with the knowledge that it will go undisputed by the international community. The report refers to Australia as 'the most important matter for concern', since there is a serious risk that this country may introduce legislation inspired by section 110(5) of the US Copyright Act.[61]

Voluntary system of complimentary licences

5.74 Unlike the previous two options, the complimentary licences option does not involve any legislative change. This option relies on APRA voluntarily implementing a policy whereby the use of radio by small business for the benefit of staff would not require payment of a licence fee.

59 Exhibit 31, p. 20.

60 Exhibit 31, p. 36.

61 Exhibit 31, p. 33.

Background

5.75 At the final hearing for the inquiry, APRA's Chief Executive, Mr Brett Cottle, proposed that complimentary licences be issued to people listening to the radio in their workplace under certain circumstances. This system would result in exempting certain businesses from having to pay a fee. A complimentary licence would be granted when a radio was played in the workplace and there 'is no evident objective intention that members of the general public, be they customers, clients or other people, hear the performances'.[62]

Arguments in favour of a voluntary solution

5.76 In correspondence with the Committee, APRA argued that this voluntary policy option would be preferable to a legislative solution for the following reasons:

(a) it would allow for greater flexibility in the event that changes over time were considered appropriate;

(b) it would allow for speedier introduction;

(c) it would preserve Australia's compliance with international obligations;

(d) it can be couched in language that is more in the nature of a guide to interested parties than legislation would be; and

62 Mr Cottle, APRA, *Transcript*, p. 770.

(e) it would be less likely to invite litigation over interpretation.

Development of the proposal

5.77 There was extensive negotiations between the Committee and APRA about the details of APRA's proposal. Following deliberations by the APRA Board, Mr Cottle was able to commit to the implementation of a complimentary licensing scheme.

The proposal

5.78 APRA has agreed to implement as soon as practicable after the release of this report a policy under which complimentary licences will be issued to small businesses causing public performances of music in the following circumstances:

(a) the means of performance is by the use of a radio or television set; and

(b) the business employs fewer than 20 people; and

(c) the music is not intended to be heard by customers of the business or by the general public. That is, neither the radio or television set nor any speakers are located in an area that is accessible to customers or the general public and any performance inadvertently heard by customers or the general public is manifestly unintentional.[63]

5.79 Mr Cottle provided a number of examples of situations in which APRA would grant a complimentary licence[64]:

- A family run milk bar or corner store which has a radio or television behind the counter or in the back room of a composite shop / dwelling. The volume is such that customers may hear

63 APRA, *Submissions*, p. S909.

64 APRA, *Submissions*, p. S911.

some music in the public access areas but the intention is to entertain staff during quiet trading periods.

- A chemist employing five staff with a radio located in the secure dispensing area for the benefit of the pharmacist. Some sound may be audible to customers.
- A service station with 12 employees playing the radio in a workshop and/or with a television behind the counter near the cash register. Customers fuelling cars, leaving vehicles for repair or paying for purchases may overhear music.
- A small hairdresser with a radio in the backroom of the salon which may at times be overheard by clients. The location of the radio shows that this is unintentional.
- A real estate agent where the receptionist has a radio on the desk. While the performance is audible to customers, the radio is for the receptionist's own enjoyment.
- A café playing a radio in the staff-only food preparation areas. The location of the radio and the volume indicate that, while music may sometimes be overheard by customers, it is not played for their benefit.
- A small hardware store with three employees where a radio is located in the storage/supply area behind the counter for the benefit of employees.

- A laundromat with five staff playing a radio in an open work area behind the counter. There are no additional speakers and the performance is intended for the benefit of employees.
- An owner/operator tailor with a television in the working area behind the counter. Performance is for the benefit of the owner.
- A doctor's surgery. The receptionist plays a radio at low volume. Music is not clearly audible to patients in the waiting room.

Conclusions

5.80 While the option of the broadcasters paying seems to provide a simple solution at first glance, there are significant legal, practical and philosophical barriers to its implementation which would be difficult to overcome. The Committee concurs with the views expressed on this matter in the Spicer Report of 1959 – if anyone is to be paying licence fees for public performance, it should be the person who is causing the public performance, rather than a third party.

5.81 The Committee believes that both the remaining options would lead to an appropriate result.

5.82 The Committee is of the view that a voluntary policy of issuing complimentary licences has many advantages over a legislative option. It allows flexibility, does not risk breaching international conventions and can be implemented sooner than any legislative scheme. The Committee believes that this scheme will ensure that common sense

prevails in the licensing of the public performance of music by small business.

5.83 The Committee therefore believes that the third option should be implemented by APRA as soon as possible. The implementation and operation of the system should be monitored by the Department of Communication and the Arts. The Department should review the system after it has been operating for 12 months and report its findings to Parliament. If the policy has not been implemented or has not been successful, the Committee believes that the legislative option should be reconsidered.

Recommendation 2

The Committee recommends that the Australasian Performing Right Association implement as soon as practicable after the release of this report a policy under which complimentary licences will be issued to small businesses causing public performances of copyright music in the following circumstances:

- the means of performance is by the use of a radio or television set; and
- the business employs fewer than 20 people; and
- the music is not intended to be heard by customers of the business or by the general public. That is, neither the radio or television set nor any speakers are located in an area that is accessible to customers or the general public and any performance inadvertently heard by customers or the general public is manifestly unintentional.