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A-G FAVOURS ROYALTIES ON TAPES

Royalties on blank audio and video tapes, as a trade-off for removing the legal restrictions on non-commercial home copying, are favoured by the Federal Attorney-General.

Senator Gareth Evans told this to a seminar organised by the Australian Communications Law Association (ACLA) and the Copyright Society of Australia in Sydney on 11 November, 1983. The Federal Attorney-General said (edited address):

"In considering changes to copyright law it is necessary to keep in mind its purpose.

"In the Anglo-American legal system copyright is seen generally as a means of encouraging creation of original materials by providing the creators with a means for securing economic rewards so that copyright serves the public interest by encouraging creativity.

"In continental Europe a different approach is taken: works of the mind are regarded as emanations of the author's personality, respect for which requires respect for his or her creations. It is thus not surprising that the laws of those countries place a higher emphasis on moral rights than do those of the Anglo-Amercian system.

"Finally, in socialist countries such as the Soviet Union, original works are regarded as the property of society as a whole: individual authors have relatively little personal control over the use of their works and their rewards tend to come more by way of commission, salary or prize.

"Australian copyright law mostly follows the Anglo-American system though aspects of other systems can also be seen. In this context you may recollect that I have asked the newly-created Copyright Law Review Committee to advise me on the question of moral rights legislation.

"Although our law largely accepts the premise that the granting of economically valuable rights will encourage creativity, this policy has always been tempered by the fact that there is little point in encouraging creativity if its results are not readily available for use. After all, copyright does confer a monopoly and, as in the broader area of trade practices law, there is a need to regulate that monopoly in the public interest.

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Contempt of Court

Whether the law of contempt should be used to deal with imputations of judicial corruption and impropriety was among the issues addressed by Mr Justice Samuels of the NSW Supreme Court in a speech to an Australian Communications Law Association (ACLA) luncheon in Sydney on 26 October, 1983. Here is an edited version of that speech:

"Proceedings for contempt of court are intended to prevent interference with the administration of justice. That is their sole purpose. They are not designed to preserve the dignity of judges. It is a power to be exercised in protection of the public interest and not otherwise. ...."

"Fundamentally, there are two kinds of contempt: contempt in the court and contempt out of court.

"Contempt in the court consists of a course of conduct which disrupts court proceedings, including an organized demonstration in court, the scattering of pamphlets and the waving of banners, abusive language, threatening a witness or a party, or throwing missiles at a judge. ..."

As for contempt out of court, Mr Justice Samuels said there were two aspects which attracted most interest and controversy:

- contempt constituted by conduct liable to interfere with the course of justice in particular proceedings current in a court; and

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"Technological change frequently alters the balance between creators and users of copyright materials: restoration of this balance generally requires introduction of new rights or redefinition of existing rights. Thus the developments of photography, records, films and broadcasting all led to the introduction of new rights, whilst the 1980 amendments responded to the widespread use of photocopiers by redefining limits on the right of reproduction.

"It is not surprising, then, given the present extremely high rate of technological development, that copyright law is faced with many challenges. Computers, satellites, and cable television are three prime examples.

"The immediate challenge is this. When my predecessor announced in July 1981 that the Attorney-General's Department would review the audiovisual copying provisions of the Copyright Act, he drew attention to the fact that the recent development of simple audio and video recorders had greatly diminished copyright owners' control over the use of their products.

"I share his general concern about that and consider that it is necessary to find a fair balance between the current interests of copyright owners and the current needs of users of audiovisual materials — not only for entertainment but also for the important areas of education and research. For this reason, after assuming office in March 1983, I approved continuation of the Departmental review which I am pleased to note is now nearing completion. **(See Generally 3CLB 17).**

"The Departmental review, with its open publication of submissions and its extensive series of consultations and meetings, has allowed full opportunity for examination and debate of issues, arguments and evidence. At the same time, by helping all groups involved to learn about the difficulties and concerns of others, it has provided a climate far more conducive to compromise than any formal inquiry could have done.

"By way of illustration, during the early stages of the audiovisual review many copyright owners took the traditional position that their permission should be sought each time their materials were to be used. This failed to recognise that the difficulties of obtaining such permissions might far outweigh any royalties which might be payable.

"Some teachers, faced with these difficulties, argued that because of the social value of teaching there should be no financial or other restrictions on the use of copyright material. This overlooked the danger that many materials produced specifically for the educational market could not be produced at all in the absence of remuneration from that market."

However, Senator Evans said there had been changes in these positions. Copyright interests were recognising that old rules and procedures might not cope well with the newly-developed uses and that conventional commercial royalty rates might not be appropriate for institutional uses.

And, educators were accepting that copyright owners should receive fair reward for the use of their material and that the continuing production of this material was important to them.

These shifts in attitude were of great importance as they could form a foundation for new systems for the administration of copyrights.

The Federal Attorney-General went on:

"Looking at this from a slightly different perspective, it is clear that over the centuries efficient legal and administrative procedures for licensing commercial uses of copyright material have been developed.

"Schools, libraries and other institutional users, however, are newcomers to the copyright system, having only recently acquired the ability to reproduce audiovisual works for themselves, and there is a corresponding need to establish procedures by which those institutions' practices can be integrated with those of the rest of the copyright industry.

"Turning to more specific issues, there will obviously not be time for me to refer to every significant matter that has been raised in the review. In the Appendix (See 3CLB 00) to my speech, I deal with those issues which will not be covered in the course of my allotted time."

On the issue of private audio copying, Senator Evans said:

"The acknowledged prevalence of domestic copying of sound recordings and broadcasts demonstrates the value which the community attaches to audio copying facilities. Indeed, surveys in Australia and overseas indicate that home taping is comparable in volume to record sales and that a significant amount of taping is a substitute for purchase.

"It is equally evident that existing copyright restrictions on these activities cannot be enforced.

"Given these facts it seems clear, and is widely accepted, that those restrictions on taping should be removed. However, given the economic threat to copyright owners if all remuneration is denied for home taping and if technological development encourages further erosion of sales, the problem is to ensure the continued creation of material.

"Various solutions to this problem were put forward during the review. Some of these can be quickly dealt with:

- The suggestion that record prices should be increased to allow for the possibility of home audio taping would merely exacerbate the problem by increasing the incentive to copy at home.
- A proposal that royalties to cover off-air recording should be claimed by copyright owners from broadcasters overlooks both the weak bargaining position of record producers as against broadcasters under our Copyright Act and the lack of any direct relationship between the value of records to broadcasters and the amount of home recording.
- A suggestion that the Commonwealth should pay direct subsidies to artistic creators ignores not only present financial constraints but also the need to relate payments to actual use of copyright material.
- Finally, despite many attempts in recent years, no "technological" means of controlling home taping has emerged.

TAPES — ATTORNEY-GENERAL

"The only other solution proposed is collection of a royalty on blank audio recording tape or recording equipment for distribution to copyright owners.

"A royalty on recording equipment would seem to bear little relationship to the amount of recording done and has not been pressed by copyright interests.

"A royalty on tape would spread total payments out over a period of time and, on the assumption that those who buy more tapes do more recording, would also be more equitable as between different users.

"While I have not yet made a final decision, I do see considerable attractions in the proposal for a royalty on blank audio tape as a trade-off for removing the existing legal restrictions on non-commercial home taping.

"It seems, for example, that over 80 per cent of blank tape purchased is used for taping copyright material from records, prerecorded tapes and broadcasts.

"Although it is sometimes argued that some tapes may never be used for recording copyright material, it is well known that any tape may be used many times over, and that the initial intentions of the purchaser do not necessarily determine all the subsequent uses.

"Collection of a royalty at the wholesale level would seem feasible and efficient and the principle of distribution on the basis of surveys of broadcasts, record sales, etc. has been well established by the performing right societies.

"It has been suggested that such a royalty would be a burden on consumers and on manufacturers of tapes. Against this, however, it will be recognised that consumers would be freed from copyright restrictions on home taping and that manufacturers would be able to promote the use of their products for this purpose.

"As you will see from the Appendix to this Speech, I have in mind that the Copyright Tribunal would determine the royalty rate. It would accordingly be inappropriate for me to speculate here on what the rate might be.

"I merely mention that in those countries that have already imposed a royalty on blank audio tape, it ranges from the equivalent of 2¢ to 30¢ Australian per hour of tape. There has been nothing in submissions to date to suggest that a royalty in Australia should lie outside this range.

"The evidence is that people use video recorders mainly to record television programs for viewing at a more convenient time and to play hired video cassettes. Because of the nature of films and television programs, people do not generally wish to replay them repeatedly to the same extent as audio material such as music.

"Children may be an exception — . . . . . but the general rule does seem to apply.

"These factors, together with the relatively high cost of video tapes and the rapid growth of video rental outlets, would offer little incentive for the accumulation of extensive and expensive domestic libraries of copied material. Home video taping thus differs significantly from home audio taping and the need for additional copyright remuneration is far less obvious.

"The situation may of course change in the future but, at present, it may well be that time-shift recording is such an insubstantial exercise of the copyright owners' rights that it would, at most, attract a nominal payment.

"As in the case of home audio copying, many proposals for compensation of copyright owners in return for relaxation of restrictions on domestic video copying have been put forward, and for broadly similar reasons only the royalty on blank video tape approach seems suitable.

"The legislation could thus provide that non-commercial home video copying of films and telecasts would be non-infringing and the Copyright Tribunal would be empowered to fix a royalty on blank video tape for distribution to copyright owners.

A 33-page Appendix to the Attorney-General's speech was circulated at the seminar. Space permits only a very small part to be reprinted here, and that is in relation to royalties on blank audio tape or equipment (paragraphs 3.1 and 3.2):

3.1 Amount of Domestic Audio Copying

The main source of information on domestic audio copying in Australia is the survey by Reark Research dated May 1982 which was commissioned by ARIA (Australian Record Industry Association) to measure the incidence and other aspects of home taping, both audio and video.

The survey produced information concerning purchases of blank audio tapes, the amount of domestic copying and recording, lost sales of records, nature of materials used, reasons for copying, and age, sex and geographical variations.

A second survey by Reark dated October 1982 provided supplementary information concerning the incomes and socio-economic status of tapers, their reasons for taping, the price-demand elasticity of blank tape, and lost sales due to taping from radio.

Some of the main results of the Reark surveys, projected to annual figures for the whole population, may be expressed as set out:

	Millions of hours per year
Blank tape purchases	69
Records taped	50
Non-record taping	11
Records sold*	18
Lose sales (NOT INCLUDING BROADCAST SOURCES)	6.3

Other figures of interest are:

Average length of blank tape purchased:		1.34 hours
Average number of times tape used:		1.7
Records as percentage of all taping:		82%
Taping sources:	Records	45%
	Cassettes	5%
	Broadcasts	50%

* For 1981 — see Deloitte, Haskins and Sells letter of 12 May 1982 with submission 194.

The Reark surveys have been examined by the Australian Bureau of Statistics which has indicated a number of difficulties. Generally

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EXTRACTS FROM CONTEMPT OF COURT SPEECH BY MR JUSTICE SAMUELS

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- the kind of contempt known as scandalizing the court [See the report of the Committee on Contempt of Court (the Phillimore Committee) made in December 1974, Cmnd. 5794 para. 14].

His Honour continued:

"I confine my remarks to cases of contempt which do not also constitute independent crimes, and which involve the effect of material addressed to the public at large in the form of statements or comments in the media — what I will call publications."

Mr Justice Samuels rated that the elements of the contempt rule had been defined by the NSW Court of Appeal in this way: A publication will amount to a contempt if, because of its form or content, it has a tendency to interfere with particular proceedings. It is the nature of the publication which is critical and not its actual effect. It is enough that the publication is of such a character that it might have an effect on the proceedings, unless the possibility of interference is so remote or theoretical that the risk of influence is trivial enough to be ignored. [**Attorney-General v. John Fairfax & Sons Ltd.** (1980) 1 N.S.W.L.R. 362 at 368].

"Compression often breeds inaccuracy," His Honour continued, "but I think I can state the definition more compendiously by saying that a publication will constitute contempt if it is of such a character that it offers a real risk of influencing the course of proceedings in a court and the publisher's intention is irrelevant." [See **Attorney-General v. Times Newspapers Ltd.** (1974) A.C. 273 per Lord Reid at 299 and Lord Diplock at 312].

Mr Jutice Samuels went on to say that the requirements of the rule about contempt could be violated in a variety of ways, most obviously by revelations in the media concerning pending proceedings or those involved in them which might affect the minds of the tribunal or potential witnesses. Whether a publication presented a real risk of interference depended upon its nature and the character of those exposed to it.

"Suppose the publication of an arrested man's previous criminal record or other highly prejudicial information inadmissible in proceedings in the court [see (1982) Public Law 574 at 592]. Is there a real risk that such revelations might affect a judge's mind?

"It is often assumed that no comment, or criticism, in the media will affect a professional judge. On the other hand, Viscount Dilhorne, a former Lord Chancellor, has taken a somewhat different view. (**Attorney-General v. British Broadcasting Commission** [1981] A.C. 303 at 335). He said: 'It is sometimes asserted that no judge will be influenced in his judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of the case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of the judicial office does his utmost not to let his mind be affected by what he has seen or heard or read outside the court and he will not knowingly let himself be influenced in any way by the media, nor, in my view, will any layman experienced in the discharge of judicial duties. Nevertheless it should, I think, be recognised that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it.'

As far as jurors were concerned, the general consensus, according to Mr Justice Samuels, was that the risk of a lay person being influenced by matter published by the media was considerably higher.

Witnesses were most likely to be affected by influence of the kind under discussion. They could be discouraged from coming forward by media reports which were hostile, either to themselves or to the account which they would otherwise have been prepared to give, or they could be led to suppress or distort part of their evidence in order to accommodate media reports which might appear from their source to possess a high degree of authenticity. They could be led to prefer the reported version to their own recollection [Phillimore Report, para. 53].

If witnesses were interviewed by reporters, they might be led into making statements which were inaccurate, but to which they felt they had to adhere when later giving their evidence in the court. If the interview had been published or telecast before the trial, they could be cross-examined about discrepancies between the published account and the account given in the witness box. Moreover, the interview would not have been conducted according to legal rules and would lack the safeguards applied in court. It would have been conducted under conditions as unfamiliar as those obtained in court and perhaps productive of even greater strain. [Phillimore Report, para. 55].

The courts in New South Wales had been very ready to regard publications of this kind as offering a real risk of prejudice. Examples included [**Attorney-General v. John Fairfax** (1980) 7 N.S.W.L.R. 362; **Attorney-General v. Mirror Newspapers Ltd.** (1980) 1 N.S.W.L.R. 374, and **Attorney-General v. Willesee & ors.** (1980) 2 N.S.W.L.R. 143].

Mr Justice Samuels continued:

"So far I have examined the contempt rule as a means of vindicating the public interest in the administration of justice. . . . another public interest to be accommodated is the public interest in freedom of expression or, perhaps more to the point, in freedom of communication.

"In the examples I have cited the dangers to the administration of justice were so great and the benefit to the public in receiving the information so small, that any potential conflict was rightly resolved against the publications.

"They fall into the category described as information which "may interest the public very much but yet not raise any issues of legitimate public concern" [**Attorney-General v. Times Newspapers Ltd.** (1974) A.C. 273 at 323 per Lord Cross]. Thus 'much information which is passed to the press or others will be too trivial to merit protection under the guise of a public interest in freedom of expression where other public interests may be jeopardised'.

"But where some matter of legitimate public concern is also the subject of proceedings in the courts a more serious conflict may arise, and it is necessary to consider whether in a particular case the claims of freedom of communication may outweigh the needs of justice [(1982) Public Law 574 at 593]. A question of this kind arose very distinctly in **Attorney-General v. Times Newspapers,** *the Thalidomide* case. . ."

Mr Justice Samuels said that the speeches of the five members of the House of Lords had reached the ultimate conclusion, in which all agreed, by somewhat different routes. Some speeches recognised that the public interest in freedom of discussion could be a countervailing interest to that which informed the contempt rule and had to be considered [at 302 per Lord Morris, at 294 per Lord Reid and at 319 per Lord Simon], but their Lordships appeared to have considered that it could not be permitted to prevail in any case "where there would be *any real prejudice to the administration of justice*" [per Lord Reid at 294 and per Lord Cross at 323-4].

The prejudice was found by invoking the doctrine of "pre-judgment".

The projected article contained a detailed examination of an issue in the proceedings pending and a conclusion adverse to Distillers Ltd (the company that marketed Thalidomide). It was thus a contempt, because the rule forbade the publication of material which prejudiced the issue of pending litigation or was likely to cause public pre-judgment of that issue.

Mr Justice Samuels noted that, "this was, I think I can say, a novel formulation of doctrine."

"It did not commend itself to the European Court of Human Rights to which the Sunday Times took the case, and which, in 1979, by 11 votes to 9 held that the restriction was a breach of the guarantee of freedom of speech contained in Article 10 of the European Convention on Human Rights, to which the United Kingdom was an adherent. But not much turns on this because the European Court was concerned only with the interpretation of Article 10, and not with a choice between two conflicting principles [**Sunday Times v. United Kingdom** (1979) 2 E.H.R.R. 245 at 281].

"The Sunday Times decision appears to depend upon two propositions. First, that the public interest in freedom of discussion or communication cannot prevail where there is "real prejudice to the administration of justice" [per Lord Reid at 294]. Secondly, that the community has delegated to the courts the function of making decisions in disputes brought before them and that function cannot be usurped by the making of public judgments before the court has authoritatively determined the matter.

"The decision has been much criticized. The first proposition would seem to preclude the even balancing of contending public interests. The second seems to be more concerned with repelling a challenge to authority than with assessing the reality of the threat to the administration of justice which the challenge may represent; although it must be remembered that the proposed article was a deliberate attempt to influence the company in its conduct of the dispute.

"The *prejudgment doctrine, however,* has not been long lived. It was rejected in the Report of the Phillimore Committee on Contempt of Court [para. 111] and has no place in the United Kingdom Contempt of Court Act 1981 which was passed in order to clarify the law of contempt — a laudable aim in which it has only partially succeeded.

"But although the courts of our States are not technically bound by decisions of the House of Lords, they almost always follow them in the absence of any determination of the point by the High Court of Australia.

"Accordingly, in an appropriate case *our courts may well be pressed to* apply the pre-judgment doctrine which presents a formidable obstacle to what has been called "investigative journalism".

"The United Kingdom Contempt of Court Act contains a statutory definition of contempt which now means that a publication (which includes any communication addressed to the public at large) will constitute a contempt (regardless of intent) if there is a substantial risk that it will cause current proceedings in a court to be seriously impeded or prejudiced. There is a statutory defence which exculpates a publication made as, or as part of, a discussion in good faith of public affairs or other matters of general public interest if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion. This defence, which derives in large measure from a judgment of Jordan C.J. in **Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd. & anor.** (1937) 37 S.R. 242 at 249-50, was considered by the House of Lords in **Attorney-General v. English & ors.** (1983) A.C. 116. . . . ."

Mr Justice Samuels continued:

"How then does the law not stand in Australia, or at least, in New South Wales? I preface this part of my remarks with a massive disclaimer. You should not take what I say as authoritative; nor, indeed, as the expression of my considered opinion. But it is, shall we say, an informed view!

"The contempt doctrine applies to publications which tend to influence the minds of a tribunal or of witnesses by, for example, revealing prior misconduct by an accused or statements allegedly made by witnesses before they give evidence. I have discussed some examples of this kind of contempt. I do not believe that it presents great difficulties for the media. An attempt to influence a party in the conduct of litigation, even though intentional, is probably not contempt; there was some difference of opinion upon this point in the Sunday Times case.

"The difficult question relates to whether the pre-judgment rule would be applied here if an appropriate case arises. Subject to that, a risk of prejudice which arises as an unintended and incidental consequence of a bona fide discussion of public affairs will probably not be regarded as contempt.

"Finally, I turn to the species of

contempt which is known as scandalizing the court or in Scotland, murmuring a judge.

"The common law has long recognised as falling within the category of contempt imputations on courts or judges which are calculated to bring the court into contempt or to lower its authority.

"There is a line of cases in the High Court of Australia — **Bell v. Stewart** [1920] 28 C.L.R. 419; **Rex v. Fletcher; Ex parte Kisch** [1935] 52 C.L.R. 248 and **Rex v. Dunbabin; Ex parte Williams** [1935] 53 C.L.R. 434 — which culminated in the recent decision in **Gallagher v. Durack** [1983] 57 A.L.J.R. 191.

"The purpose of this aspect of the doctrine of contempt is again to protect the administration of justice and to preserve public confidence in the judicial process.

"As the Phillimore Committee pointed out (para. 159) in virtually every case of contempt of this kind, the courts have stressed that bona fide criticism of judicial conduct is permissible.

"But this freedom to criticize has not extended to the imputation of improper motives to those taking part in the administration of justice, such as dishonesty, or bias or yielding to external pressure in reaching a decision — in short, corrupt conduct.

"It is perhaps curious that whereas in England proceedings for contempts of this sort are rare, the last successful application having been made in 1930, they have been a good deal less uncommon in Australia.

"In England distinguished judges have endeavoured to stress that judicial acts which must be done in public may be criticized in public and that since the conduct of judges as judges and the decisions of the courts are matters of legitimate public concern, there must obviously be freedom to comment or criticize within reasonable limits (Phillimore, para. 159).

"And the limits have been very widely drawn. In 1893 a very distinguished array of judges, including the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls, held that it was not contempt to ridicule the Chief Justice of the Bahama Islands "in the grossest manner", representing him as an utterly incompetent judge and a shirker of his work who would be better off dead. [**In the Matter of a Special reference from the Bahama Islands** (1893) A.C. 138].

"In Australia, in 1911, the High Court refused to find contempt in respect of a newspaper article which had described one of their number as a political judge appointed because he had well served a political party whose reputation he continued to protect from the bench [**R. v. Nicholls** (1911) 12 C.L.R. 280].

"Despite this, there remains, in principle, a prohibition against the "scurrilous abuse" of a judge as a judge, or of a court, and against attacks upon the integrity or impartiality of a judge or of a court.

"The most recent example of this type of contempt is . . . found in Gallagher's case. The facts, so far as they are relevant, were:

"Mr. Gallagher, the Federal Secretary of the Builders Labourers Federation, was found guilty of a contempt of court for conduct arising out of industrial disputes.

"He was sentenced to two months in prison and appealed to the Full Court of the Federal Court, which allowed the appeal.

"On the same day, and after that judgment had been given, Mr. Gallagher was interviewed by a large number of media representatives and later distributed copies of a resolution passed by the Federal Management Committee of the Federation.

"The first sentence of the resolution read "The decision of the Federal Court is a credit to the rank and file of the Federation whose significant stand, alongside their elected representatives, is the key to the reversal of the decision to jail Norm Gallagher".

"At the request of a representative of a television channel, the applicant consented to a second interview and to answer further questions.

"One of the questions was as follows: 'Mr. Gallagher, what is your reaction (or response) to the court's decision?' to which Mr. Gallagher replied, 'I am very happy to the rank and file of the Union who has shown such fine support for the officials of the Union and I believe that by their actions in demonstrating, in walking off jobs . . . . . I believe that that has been the main reason for the Court changing its mind'.

"The Attorney-General then instituted proceedings against Mr. Gallagher for contempt in respect of that statement on the footing that it asserted that he believed that the Federal Court was largely influenced in reaching its decision by the action of the members of the union in demonstrating as they had done.

"In other words, as the High Court observed, Mr. Gallagher was insinuating that the Federal Court had bowed to outside pressure in reaching its decision.

"In concluding that this amounted to a contempt, the majority of the High Court (at 193) said:- 'It is fundamental that a court must decide only in accordance with the evidence and argument properly and openly put before it, and not under any outside influence. What was imputed was a grave breach of duty by the court"; and it was held that the offending statement amounted to a contempt of court and "if repeated was calculated to undermine public confidence in the Federal Court'.

"The rationale of this conclusion is that the authority of the law rests on public confidence and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges (at 192).

"It is important to bear in mind that Mr. Gallagher's application to the High Court was for special leave to appeal from the judgment of the Full Court of the Federal Court.

"It was not a full appeal therefore, and the High Court was not primarily concerned to make a definitive pronouncement about the law, but merely to determine whether there were any grounds upon which it would hear an appeal challenging the decision below. In the event, it decided that the offending statement clearly amounted to a contempt of court; and that, although the question whether it was necessary, in order to vindicate and protect the court's authority to imprison the applicant, was a matter for the most anxious consideration, no ground had been shown to justify granting special leave in order to interfere with that decision.

"Mr Justice Murphy, in a strong dissent, said at 194: 'As stated by this Court, the law of criminal contempt in scandalising the courts is so vague and general that it is an oppressive limitation of free speech. No free society should accept such censorship. The absence of a constitutional guarantee does not mean that Australia should accept judicial inroads upon freedom of speech which are not found necessary or desirable in other countries. At stake is not merely the freedom of one person; it is the freedom of everyone to comment rightly or wrongly on the decisions of the courts in a way that does not constitute a clear and present danger to the administration of justice'.

"The reference to clear and present danger is to the doctrine which is current in the United States of America where, however, with every respect to Mr Justice Murphy, the existence of an entrenched Bill of Rights compels an approach which has no counterpart in Australia.

"But, nonetheless, the Phillimore Committee expressed the view that while there remains the need for an effective remedy against imputations of improper or corrupt judicial conduct, it should not form part of the law of contempt.

"Rather, it should form a new and strictly defined criminal offence constituted by the publication in whatever form of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice. It would be triable only on indictment and criticism, even if scurrilous, should only be punishable if it fulfilled these two requirements.

"Furthermore, it should be a defence to show that the allegations were true and that the publication was for the public benefit. As far as I am aware, no such statutory provision has yet been enacted.

"This branch of the law of contempt presents considerable difficulties. One may start with the propositions that our society has vested in the judges, and the courts, the task of determining disputes according to law which we call the administration of justice, and which is vital to any ordered system of government. the authority of this system depends, as the High Court observed in Gallagher's case, upon public confidence. To a large extent the stability of society rests upon that confidence remaining undisturbed.

"It is the next step in the argument which is questionable, that is, that public confidence will be undermined by attacks on the integrity or impartiality of the judiciary. So stated, the assertion is probably beyond dispute. But if it is, the adverse public reaction which it postulates stems not from the fact that an attack has been made, but from the apprehension that the allegations may be true. Otherwise, there could be no possible threat to public confidence and no occasion for the use of the contempt power.

"The application of the contempt rule, in this area, depends upon two assumptions. First, that the imputation of misconduct was untrue; and, secondly, that it was calculated to lower the authority of the Court. The consequence follows from the premise only if it is assumed further that some people might believe the imputation to be true or that the mere making of the imputation, is likely to have the effect suggested. I do not myself accept the validity of the second of these further assumptions.

"As to the first it may be that some people would be prepared to believe that the allegation was true. This would depend upon the nature of the allegation. If that were so, then the only way to vindicate the system to be defended, that is, the administration of justice, would be to set about disproving the allegation. This would entail an inquiry of some kind, probably lengthy and expensive, which would pursue, in some cases, an impossible objective.

"It might well be feasible to decide whether a judge had been taking bribes; it would be very difficult indeed to determine whether a decision had been influenced by external pressure. But such a procedure has never been suggested, and I do not know of any case of this kind in which the contemnor has sought to justify his allegation.

"I am inclined to think, therefore, that to exercise this aspect of the contempt power on the footing of a presumption that the allegation in question is untrue, tends at the outset to destroy the conceptual basis for its justification. If so, it would seem to follow that the rule is applied either because the making of an untrue allegation does strike at the administration of justice (which I doubt) or because it represents an affront to the dignity of the court or judge, or courts or judges in general, which must be punished. I would myself reject the necessity for any power of that kind.

"There is a further point, to which Murphy J. referred in Gallagher's case [at 196]. Classic marxist teaching regards courts and judges and, for that matter, the media and its representatives, with few exceptions, as instruments of the ruling class in its struggle with the workers. Hence, any marxist who subscribes to party doctrine must reject the possibility of an unbiased decision from any Australian court, at least in any case in which an aspect of the class struggle is an element.

"Assertions of this general kind, in perhaps more limited form, are advanced by other sections of the political left, and are to be found in many publications. They constitute, presumably, a contempt, because they impute a gross breach of judicial duty. Most would reject them, as I do. But any citizen may advocate any political doctrine, provided he does so lawfully and does not urge the overthrow of the constitutional government of Australia by force, violence or other unlawful means. An obvious conflict arises if the legitimate exercise of this freedom is also seen as a criminal contempt.

"In order to resolve dichotomies of this kind, it is necessary to consider whether this application of the contempt power should be retained. The matter is included in the reference recently made to the Australian Law Reform Commission, and there, for the time being, it rests," Mr Justice Samuels concluded.

BOOKS IN BRIEF

CONSUMER PROTECTION LAW IN AUSTRALIA (2nd Edition)
By J.L. Goldring and L.W. Maher
(Butterworths)

The 2nd edition of this first Australian textbook exclusively devoted to consumer law is mainly of interest to communications lawyers through its detailed treatment of Section 52 of the Trade Practices Act which, as the authors point out, reaches well beyond existing State curbs on false and misleading advertising. Also noteworthy are the sections on defences available to printers, publishers and advertising agents under the Trade Practices Act (S.85(3)), remedial advertising orders (S.80A) and general restrictions on advertising of availability of credit (S.125 Consumer Credit Acts 1981 (NSW) and (Vic.); S.54 in SA counterpart legislation).

The potential of (S.6(3)) the Trade Practices Act to extend the operation of the "unfair practices" (Part V Div 1) sections to the electronic media is briefly mentioned in the observation that, given the wide powers of the Commonwealth Parliament to regulate the use of . . . airwaves, "there is no reason to imagine that the Courts will strike down a provision which purports to prevent the use of communications facilities in a manner which is misleading or deceptive."

TRADE PRACTICES AND CONSUMER PROTECTION (3rd Edition)
By G.G. Taperell, R.B. Vermeesch & D.J. Harland
(Butterworths)

Heavier fare for lay readers than Goldring & Maher (above) but accessible nevertheless to determined marketing specialists, wary advertising agents and worried journalists (see, for example, 3 CLB-1).

BROADCASTING LAW AND POLICY IN AUSTRALIA
By Mark Armstrong
(Butterworths)

Indispensable guide to radio and TV law.

AUDIOVISUAL COPYRIGHT & TAPE ROYALTIES

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speaking, the surveys were thought likely to over-estimate lost sales though no quantitative measure of the overestimate could be provided.

Not many independent checks of the Reark results are currently available though AAVTA (Australian Audio Video Tape Association) has provided some **confidential** figures for sales of blank tapes.

The draft IAC report estimates sales of blank and pre-recorded audio tapes at about 37.5-45 and 22.5 million hours per year, respectively.

Some information is available from foreign surveys: for example Jim Keon's analysis of the results of surveys in Canada, U.K. and U.S.A. (Audio and Video Home Taping: Impact on Copyright Payments, Consumer and Corporate Affairs Canada, 1982) and the IFPI figures published in 'Copyright' (WIPO, July-August 1982, p. 227). The latter article contains information from surveys in other countries indicating over 80% use of blank tape for recording copyright materials and indicating that most persons record on a tape at least twice. These accord with the corresponding Reark figures.

3.2 Royalty on Blank Audio Tape or Equipment

Home taping generally infringes copyright in both the music and the sound recording (though not the broadcast) under the existing law, but the law is clearly unenforceable.

Further, although they have no copyright as such in their performances, home taping also affects the income of the recording artists which depends on record sales. These groups propose that a royalty be levied on blank audio tape which could be distributed to them in lieu of royalties from sales of records.

The alternative possibility of a royalty on recording equipment is not being pressed by those groups because it would cause a substantial increase in equipment price which could reduce sales and be strongly opposed by consumers and manufacturers.

It would also not reflect the level of use of the equipment by any particular owner. A levy on tape, however, would spread payments out over a period of time and, on the assumption that those who buy more tapes do more recording, be more equitable as between different users.

Collection of such a levy at the point of manufacture or importation seems feasible and efficient. The principle of distribution on the basis of surveys of broadcasts, record sales, etc. has been well established by the performing right societies.

Objections to the royalty proposal come from the importers and manufacturers of tapes and equipment. One would expect, however, that a small royalty such as would not greatly affect sales would not be strongly opposed provided the collection mechanism was not a burden. The supplementary Reark Survey indicated that the mean retail prices paid for C60 and C90 cassettes were $2.59 and $3.27 respectively, and that small increases in these prices would only cause small sales reductions.

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