COMMUNICATIONS LAW BULLETIN
The Official Publication of the Australian Communications Law Association (ACLA)
ISSN 0272-1301 Edited by John Mancy Vol 3 No 4 December 1983

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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ROYALTIES FAVOURED ON BLANK

"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.

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"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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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.

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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.

Typeset by QMS Pty Ltd. Printed by Planet Press Pty Ltd