Nimmer on Copyright

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NIMMER ON COPYRIGHT®

VOLUME 1

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MATTHEW BENDER

Volume 1 Table of Contents

A COMPLETE SYNOPSIS FOR EACH CHAPTER APPEARS AT THE BEGINNING OF THE CHAPTER

CHAPTER 5 PERSONS ENTITLED TO COPYRIGHT

CHAPTER 6 CO-OWNERSHIP OF COPYRIGHT

CHAPTER 6A COMMUNITY PROPERTY

Dedication and Tribute

A DEDICATION:

To my wife, Gloria . . .

sine qua non

A TRIBUTE:

To the memory of Abraham L. Kaminstein, Eighth Register of Copyrights, whose devotion to copyright revision transcended considerations of his own well-being, and who exemplified the humanistic values that copyright is intended to serve.

In Memoriam

IN MEMORY OF MELVILLE B. NIMMER
(1923-1985)

Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army.

Oliver Wendell Holmes, Jr.,
The Profession of the Law (1886)

Justice Story has called copyright "the metaphysics of the law." Twenty-two years after his emergence as the preeminent scholar in the field, the law's metaphysician is no more. His voice, so vibrant, so resonant with integrity, so clear in its exposition of reason and unmasking of pretense, is still. Yet his legacy—a treasury of incisive analysis tightly wrapped in pellucid prose—will long outlive him, reflecting his lifelong love of the law, his solicitude for the rights of authors.

No mere "secret isolated joy" did Melville Nimmer derive from the law of copyright. His boyhood attraction to the backlots of MGM and Fox remained with him at Harvard Law School, where he read scattered copyright cases in the absence of any organized course. Winning the national prize in the Nathan Burkan copyright writing competition, he returned to his native Los Angeles as house counsel for Paramount Pictures, with the chance to apply to actual cases his already blossoming theories of copyright law. There followed a stint representing the Writers Guild of America, where he pioneered several then-novel concepts that continue today to enrich the well-being (and coffers) of Hollywood's creative talent.

But the rewards of practicing law—even toiling in his own favored vineyard—could not sate an appetite for conceptual order. Thus did Mel Nimmer become Professor Nimmer, foregoing the remunerations of the litigator for "the subtle rapture of a postponed power." The present four-volume work attests to the subtle rapture that Professor Nimmer derived from mastering and dominating his field. The wealth of judicial citations to his name pays tribute to the power, barely postponed, that he wielded. The Supreme Court's last major copyright decision during Mel Nimmer's lifetime proves the point—the majority opinion in *Harper & Row v. Nation* though disagreeing with his position, contains a score of citations to Professor Nimmer; its dissent invokes his name a half-dozen times. (Another Supreme Court decision from last term, *Mills Music v. Snyder* even cites to the 1978 Preface, so definitive did Mel Nimmer's every word become.)

Writing in another context, Justice Jackson stated that "thought control is a copyright of totalitarianism." Mel Nimmer's copyright was freedom of thought, and through free thought he exposited the law of copyright as has never been done before. Ever vigilant to champion the rights of authors, he molded the law to meet his vision of securing to them just recompense for the fruits of their creativity. And he applied the creativity of his authorship as well to the realm of free thought and freedom of expression. Apart from this copyright treatise, Professor Nimmer authored *Nimmer on Freedom of Speech*, won a landmark First Amendment case before the Supreme Court, and wrote extensively about civil liberties. For he combined with

his belief in legal limitations on unauthorized copying of another's words the unshakable conviction that free expression of ideas reflecting every shade of belief is essential to the healthy functioning of our democracy. Thus in his vast creative output did Professor Nimmer bring harmony to two disparate and superficially colliding areas of law.

Just as Mel Nimmer harmonized conflicting lines of cases, smoothing rough edges out of the law, so did he live a life, albeit too brief, in which corners were rounded to form a perfect circle. *Harper & Row v. Nation* once again illustrates. The factual milieu of the *Nation* case forced the Court to address the relationship between copyright protection and freedom of speech—both fields ploughed exhaustively by Mel Nimmer's probing intellect. Moreover, anticipating the issues in the *Nation* case, Professor Nimmer's pen years earlier was the first to call attention to the fine interplay between copyright protection and freedom of speech, and predicted that the Supreme Court one day would have to address the relationship. Ironically further rounding the circle, one of his articles on the subject, *National Security v. Free Speech: The Issues Left Undecided in the Ellsberg Case,* grew out of Professor Nimmer's involvement in a criminal case left in the wake of the Watergate scandal; the Nation case treated a further sequel to the Watergate chapter in American history.

The vast crowd assembled to pay homage to Mel Nimmer at the U.C.L.A. memorial service held in his honor heard numerous other instances, private and professional, of the smoothing out of rough spots, the reconciling of opposites, the tying of loose ends, the rounding of the circle that was his life. Only one more example need be recounted here. A youngster "who was weaned on copyright," who later learned to prize the rights of authors and to value crisp analysis but who learned so much more from this man, now carries on his father's work. That I can attempt the task, beyond being a tribute to my father's comprehensive categorization of the vast corpus of copyright law, calls to mind an adage he often fondly quoted: "A dwarf standing on the shoulders of a giant can see farther than the giant himself." Though the entire legal world mourns the loss of that giant, his death falls most heavily on his family. For he was a lecturer extraordinaire, an intellect without peer, and a scholar nonpareil; he was a better father.

David Nimmer

Los Angeles, California
April 1986

(Rel. 83-12/2010 Pub.465)

Preface

PREFACE TO THE 1978 COMPREHENSIVE TREATISE REVISION

So it has finally come. What many in the copyright community began to believe could never be achieved is now reality. The 1909 Act has been supplanted by a general revision known as the Copyright Act of 1976. Revision of the law has in turn necessitated a comprehensive revision of this treatise. It would not do simply to add a volume or two relating to the new law. In many ways the new law and the old law are inextricably bound, so that the new law can be understood only in the context of a discussion of the old. This means that the 1978 comprehensive treatise revision required an integration of the old and the new in what essentially a new work, with hardly a single page of the pre-1978 edition untouched. There are, of course, a great many entirely new sections, which deal only with the Copyright Act of 1976 and its numerous innovative provisions. Other sections are virtually a restatement of the 1909 law, but with subtle changes which must be noted in applying that law under the regime of the new Copyright Act. There are some aspects of the pre-1978 law (both common law and federal) which were conclusively terminated on January 1, 1978, the effective date of the Copyright Act of 1976. But even many of these provisions retain more than a mere antiquarian interest. They continue to have a practical significance insofar as their pre-1978 application may have caused a work to enter the public domain. Once a work enters the public domain it is ineligible for further copyright protection under the current Act even if that aspect of the pre-1978 law which caused the work to be injected into the public domain has itself been repealed by the Act of 1976. For this reason even while copyright lawyers master the intricacies of the new law they must retain (or acquire) a knowledge of the arcane aspects of the old law which caused many a work to stumble into public domain status.

Is the new law an improvement over the old? Some may differ, but for me the answer is clear. Any law which eliminates the artificial distinction between common law and statutory copyright, which brings the term of copyright protection into line with the prevailing international measure, which provides authors with a termination provision not tied to the renewal term of copyright, and which explicitly recognizes the application of copyright to technological advances not dreamed of in 1909, must be counted an improvement. These are, of course, but a few of the salutary innovations to be found in the new law. Naturally, there are some provisions in the new Act with which one may disagree, as indicated in the pages which follow. That is inevitable in any legislative undertaking of this magnitude. Still, it seems clear that substantively the pluses easily outweigh the minuses. But there is another kind of criticism which may be more telling. In the preface to the original edition of this treatise I quoted one court as complaining of "an almost complete absence of guidance from the terms of the Copyright Act." That particular defect has been remedied, but with a vengeance. Where previously the statute had too little to say in many vital copyright areas, it may now be argued that it says too much. I for one regret this departure from the flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles. This has now been replaced with a body of detailed rules reminiscent of the Internal Revenue Code. Once suspects that many of the more complicated provisions are not so much an expression of anyone's ideal as to how to draft legislation, but are rather the product of hard-fought compromises between conflicting interest groups. Viewed in this light, the intricacies of the Copyright Act of 1976, if not embraced as a model of the legislative art, are nevertheless acceptable as an expression of the democratic process. Still, one must

conclude that if the Copyright Act of 1976 is an improvement over the 1909 Act, it is very far from a simplification of the old law. At the same time, certain of the less controversial (but not necessarily less important) sections of the new law bear the fine hand of the Copyright Office, and for the most part are models of draftsmanship. Barbara Ringer, the Register of Copyrights, more than any other single person, is responsible for the content of the new law, and for the even more remarkable political—one might say diplomatic—feat of achieving a sufficient consensus among diverse interest groups so as to render possible enactment of the new law. Ms. Ringer deserves the gratitude and admiration of all who occupy the world of copyright. This is not to deprecate the contributions of the House and Senate Sub-Committees charged with formulating the new law. The conscientious congressional effort to master and deal with this esoteric body of law stands as a model of the legislative process. Particular mention should be made of Representative Robert Kastenmeier, who as chairman of the House Sub-Committee during the many years of the revision process, displayed a profound insight and judgment that were indispensable to the final legislative achievement.

A casual perusal of the treatise footnotes will indicate repeated references to the Report of the House Committee. This Report contains much material vital to an understanding of the new law. It repeats most of the material contained in the earlier Senate Report, while also adding substantial new material. Where material is duplicated in both Reports, reference is made to the House Report. In some instances "interpretations" of the law are contained in the House Report which one would have preferred to be stated in the statutory text. At times it almost seems that it was intended to reverse the conventional canon of construction, so that reference is to be made to the terms of the statute only when the legislative report is ambiguous. Presumably it was thought easier to deal with some controversial matters in the Report rather than in the statutory text. Still, as is indicated in the following pages, this has produced difficulties where there are arguable contradictions between the statute and the Report. The House Report, and the subsequent House and Senate Conference Report are reproduced in the Appendix.

My profound thanks are due to Dean William Warren of the U.C.L.A. Law School, who in various ways enabled me to devote much of the past two years to this treatise revision. Beyond administrative assistance, Dean Warren and my other colleagues at U.C.L.A. supported my efforts by continuing to provide an academic atmosphere conducive to scholarship. My thanks also to Vera Masur, of the U.C.L.A. Law School secretarial staff, for her prompt, efficient, and cheerful work in manuscript preparation.

My gratitude to Jon Baumgarten, General Counsel of the Copyright Office, who graciously read and commented upon some of the manuscript. I derived considerable benefit from his suggestions, even in those few areas where we disagreed.

In the fifteen years which have elapsed since the original edition of this work was written, the horizon of my children has extended far beyond Disneyland. Becca has become the "author" of two lovely girls. Her husband, Paul, is a law professor and has become my son not only in law, but in all other aspects of life. Larry and his wife Melissa both labor in the vineyards of creative artistry, and have helped to make the artist's perspective vivid for me. David, who was weaned on copyright, is now a first year law student at an institution in New Haven. All of them have helped me in this effort, perhaps more than they are aware. One does not undertake a project of this scope without some optimism about the human condition.

The past fifteen years have seen many changes in the world. I am exceedingly fortunate that for me one factor has remained constant. The one passage in the original treatise that requires

not the slightest change is the dedication. My wife Gloria remains my strongest support, my sine qua non . . .

Melville B. Nimmer

Los Angeles, California
May, 1978

Preface to the Original Edition

A recent opinion* from the Court of Appeals for the Second Circuit begins: "This action for copyright infringement presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act." This generally accurate appraisal of the present status of copyright law suggests the reasons which impelled me to undertake the writing of this treatise. It is not just that I believed there to be a need for a study in both depth and breadth of the manifold problems which confront lawyers and judges in copyright matters. More than that, the inordinate number of "open questions" which pervade the law of copyright offer both a challenge and a charm to this area of the law which is almost, if not entirely, unique. This, it seems to me, is in part due to the fact that copyright represents an application of one of the oldest branches of the law, property, to one of the more striking recent developments of our contemporary culture, the phenomenon of mass communications. Moreover, this sophisticated concept of property in intangibles is fascinating and elusive in part because of the origin of its subject matter. Here the law comes to grips with what William Faulkner has described as the process of "creating out of the materials of the human spirit something which did not exist before."

My thanks are due to the California, Columbia, Harvard, Southern California, and U.C.L.A. law reviews as well as the American Society of Composers, Authors and Publishers for their gracious consent to reprint here, in revised form, articles or portions of articles which originally appeared in their respective publications. However, much the greater portion of this work has never before appeared in published form.

I am most grateful to the Register of Copyrights Abraham L. Kaminstein for reading and having other members of the Copyright Office read various portions of this work in manuscript form. Most particularly, I wish to express profound appreciation to Barbara A. Ringer, Chief of the Examining Division, for her careful reading and very perceptive and valuable comments with respect to most of the manuscript. Needless to say, the views expressed in this work do not necessarily (and as the text suggests, occasionally quite definitely do not) coincide with the views of the Copyright Office. I should also like to take this occasion to express the very great admiration which I am sure everyone connected with copyright must feel for the magnificent manner in which Mr. Kaminstein has administered the office of Register. I have no doubt that in the annals of copyright history he will be numbered among the most outstanding Registers of all time.

My gratitude to Dean Richard C. Maxwell of the U.C.L.A. Law School who is chiefly responsible for an academic atmosphere in which scholarship and the spirit of inquiry may flourish. My thanks also to my colleague Professor Addison Mueller for many hours of delightful and enlightening copyright discussions.

To my children, Becca, Larry, and David, whose memory almost runneth not prior to the injunction, "Don't bother Daddy. He's working on the book." I am grateful for their thoughtful forbearance, as well as for their acceptance on faith that weekends devoted to the book took priority over visits to Disneyland and other family excursions.

* Shapiro, Bernstein & Co., H. L. Green Co., 316 F.2d 304 (2d Cir. 1963)

The judge who issued the above injunction, my wife Gloria, has an importance in the writing of this book far beyond what I can here express. I can, however, gratefully record not only the fundamental fact of her constant encouragement, but also the vital if more mundane contributions of efficient management of the household so as to permit my devotion of untold hours to research and writing, as well as her tireless and cheerful assistance in proofreading and typing of manuscript.

Finally, my thanks to Eunice Ross who typed most of the rough draft manuscript, as well as to Helen Jeffares, Zillah Cuevas, Ruth Mowry, and Esther Duke of the U.C.L.A. Law School secretarial staff who typed most of the final draft.

Melville B. Nimmer

Los Angeles, California
May, 1963

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GLOSSARY OF ABBREVIATIONS AND OTHER REFERENCES

Certain references in the text, not otherwise identified, are as follows:

Reference	*Identification*
BCIA	Berne Convention Implementation Act of 1988 (see Overview) (see also Appendix 2A *infra*)
Commerce Rep. (DMCA)	H.R. Rep. No. 105-551, Part 2, 105th Cong., 2d Sess. (1998) (see Appendix 53 *infra*)
Conf. Rep.	H.R. Rep. No. 94–1733, 94th Cong., 2d Sess. (1976) (see Appendix 5 *infra*)
Conf. Rep. (DMCA)	Joint Explanatory Statement of the Committee of Conference. H.R. Rep. No. 105-796, 105th Cong., 2d Sess. (1998) (see Appendix 57 *infra*)
Current Act (1976 Act)	17 U.S.C. § 101 *et seq.* (Pub. L. 94–553, 90 Stat. 2541) (see Appendix 2 *infra*)
Decennial	January 1, 1978 — March 1, 1989 (see Overview *infra*)
DPRA	Digital Performance Rights in Sound Recordings Act of 1995 (see Appendix 2H)
Hearings on GATT Intellectual Property Provisions	*General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions*, Joint Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary and the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary, 103d Cong., 2d Sess. (August 12, 1994)
H. Rep.	H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. (1976) (see Appendix 4 *infra*)
H. Rep. (AHRA)	H.R. Rep. No. 102-873 Part 1, 102d Cong., 2d Sess. (1992). (see Appendix 37 *infra*)
H. Rep. (BCIA)	H.R. Rep. No. 100–609, 100th Cong., 2d Sess. (1988) (see Appendix 32 *infra*)