



■

UNDERSTANDING COPYRIGHT LAW

FOURTH EDITION

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Marshall Leaffer



LexisNexis

UNDERSTANDING COPYRIGHT LAW

FOURTH EDITION

Marshall Leaffer

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in Intellectual Property Law

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ISBN#: 0-8205-6233-5

Library of Congress Cataloging-in-Publication Data

Leaffer, Marshall A., 1943-

Understanding copyright law / Marshall A. Leaffer.--4th ed.

p. cm.

ISBN 0-8205-6233-5 (perfectbound)

1. Copyright--United States. I. Title.

KF2994.L43 2005

346.7304782--dc22

2005026529

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DEDICATION

To Nana, My Parents, Joelle, and Sarah

PREFACE TO THE FOURTH EDITION

Since the Third Edition appeared in 1999, copyright case law has proliferated and copyright statutes have been repeatedly retooled by Congress. In other words, the time is ripe for a new edition of UNDERSTANDING COPYRIGHT LAW. As in the previous three editions, my goal is two-fold. First, I have updated the text to reflect the case law and statutory developments that have taken place since the previous edition was completed over five years ago. The Fourth Edition incorporates discussions of the “new millennium” case law including the Supreme Court cases *New York Times Company, Inc. v. Tasini*, *Eldred v. Ashcroft*, *Dastar v. Twentieth Century Fox Film Corporation*, and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* I have also integrated important post-1999 legislative developments such as the TEACH Act, The Copyright Royalty and Distribution Reform Act (revising the CARP system), and the Family Entertainment and Copyright Act. Second, the process of creating each new edition has given me the opportunity to rethink copyright law in certain basic ways. Not only does the Fourth Edition encompass the major developments in the case law and legislation of the past five years, but it also mirrors my own reassessment of such basic concepts as the originality doctrine, the idea/expression dichotomy, the meaning of authorship, and the nature of copyright infringement.

As always, my knowledge of the field has been greatly enriched by my association with Craig Joyce, Peter Jaszi, and our newest member, Tyler Ochoa, on another Lexis/Nexis publication, COPYRIGHT LAW: CASES AND MATERIALS, soon to be in its Seventh Edition. My collaboration with these brilliant copyright scholars has been a professional and personal gratification.

The following persons were particularly important in producing the Fourth Edition. I wish to give special thanks to my secretary, Marian Conaty, for her invaluable help with the entire text and her ability to spot grammatical anomalies and misused punctuation. I am grateful to Stacey Drews, Christina Finn, and Hilary Reinhardt for their research assistance and meticulous cite checking. My thanks also to Cristina Gegenschatz for her encouragement and professional assistance in preparing this new edition, and to Jennifer Beszley for her outstanding work in making the last minute corrections.

Marshall Leaffer
September 2005

PREFACE TO THE THIRD EDITION

In the four years since the Second Edition, the digital revolution has arrived full force. In 1994, many of us (myself included) were just beginning to familiarize themselves with the Internet. Today, for those same people, the “net” has become an indispensable part of their daily existence. Its a commonplace to say that digital revolution has affected, sometimes profoundly, all aspects of life and the law, particularly copyright law. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), the first comprehensive attempt to accommodate the consequences of digital information technology into the law of copyright. For the Third Edition, I have given special attention to the digital challenge and its influence on all aspects of copyright law.

Even if the Congress had not passed the DMCA, other changes that have occurred in copyright law would merit a new edition. In 1998, Congress passed the Sony Bono Copyright Extension that extended the term of copyright another 20 years. These two Acts, term extension and the DMCA, are perhaps the most far reaching pieces of legislation enacted by Congress since the passage of the 1976 Act. But they are only part of part of story. American law continues to be influenced by developments abroad. In a world where information is disseminated by couple of clicks on the mouse, one can no longer concentrate on an Americo-centric view of the subject. In addition to legislative developments and the proliferating case law, I have tried to integrate these international developments throughout the text.

My views on copyright continues be influenced by my co-authors Craig Joyce, William Patry, and Peter Jaszi, *COPYRIGHT LAW: CASES AND MATERIALS* (4th ed. 1998). My collaboration with three such scholars on four editions of our casebook, has greatly enriched my knowledge and appreciation of copyright law. I am particularly grateful to Peter Jaszi, co-founder of the Digital Future Coalition, for his insights on digital age matters, which are reflected throughout this Third Edition of *UNDERSTANDING COPYRIGHT LAW*.

I wish to thank Manisha Desai, and Sandy Maklin for their research assistance and my secretary Jeanine Hullinger for all her help. My thanks also to Shawn P. Meehan of Matthew Bender for his support and professional editorial advice in preparing this Edition.

Marshall Leaffer
June 1999

PREFACE TO THE SECOND EDITION

In their prefaces, most authors justify a new edition by pointing out the significant changes that have occurred since the previous edition. I am no exception. Indeed, since this book appeared in 1989, there have been important changes in the world of copyright. The trends that I noted in the First Edition have progressed in ways unpredictable five years ago. The spreading interest in copyright continues to be driven by the new digital technologies that affect the way we create and use information. Imagine, just five years ago — for better or worse — we did not have to read about the “information superhighway.”

Since the First Edition, legislation has considerably altered the 1976 Act. In 1990, Congress granted “moral rights” to visual artists and conferred protection on architectural works, banned the unauthorized rental of computer software, and abrogated the states’ sovereign immunity for copyright infringement. Significant new legislation appeared in 1992: copyright renewals were made automatic, the fair use defense was clarified for unpublished works, new criminal penalties were imposed, and special provisions were added to deal with home audio taping using digital media. In 1993, Congress abrogated all vestiges of the jukebox compulsory license, and abolished the Copyright Royalty Tribunal, replacing it with ad hoc arbitration panels. 1993 was a pivotal year for international relations in copyright. In that year, the United States, along with Canada and Mexico, signed the North American Free Trade Agreement (NAFTA), and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) was finally completed. Both agreements, one regional, the other multilateral, contain important provisions on copyright and intellectual property whose effects are yet to be seen. I have incorporated these legislative and international developments in this new edition.

Developments in the case law have kept up with legislative activity. Since 1989, important Supreme Court decisions have treated such diverse issues as the work-made-for-hire doctrine (*CCNV v. Reid*); the effect of the renewal term on derivative works (*Stewart v. Abend*); the standard of originality in the protection of databases (*Feist Publications, Inc. v. Rural Telephone*); parody as fair use (*Acuff-Rose v. Campbell*); and the right of a defendant as a prevailing party to recover attorneys’ fees (*Fogerty v. Fantasy*). This edition also includes significant case law developments in the lower courts, such as important decisions on computer software infringement (*Computer Associates v. Altai*) and reverse engineering as fair use (*Sega v. Accolade*).

Since the First Edition, my knowledge of copyright has been greatly enriched by collaboration with three co-authors on two editions of a copyright law casebook published by Matthew Bender. (Craig Joyce, William Patry, Marshall Leaffer and Peter Jaszi, COPYRIGHT LAW (3d ed. 1994)). My work on the casebook and the insights of my co-authors are

reflected throughout this Second Edition of UNDERSTANDING COPYRIGHT LAW.

I extend special thanks to my assistant Debbie Levine and Jodi Booth for their help in researching and proofing the text, and to my secretary, Donna Hunt, who helped me in countless ways in completing the manuscript. I also want to thank Mary Gallagher of Matthew Bender for her editorial expertise and professional competence.

Marshall Leaffer
January 1995

PREFACE TO THE FIRST EDITION

At one time copyright law was an esoteric field, taught at a few law schools and usually by adjunct faculty. Today, courses on copyright and related areas of intellectual property are part of the regular curriculum in virtually all law schools. Why the increasing interest in copyright law? The reason lies in the ever growing importance of information in our lives. Copyright law, which concerns the right to certain kinds of intangible products called works of authorship, is *the* law for the age of information. The subject touches not only the traditional concerns of artists, writers, and musicians, but reaches the cable television and computer software industries as well. These are industries vital to the economic health of the nation. Exportation of movies, music, databases, and computer software have been a bright spot in the overall dismal balance of trade statistics during the 1980's. Adequate protection of American copyright interests abroad has become an important trade issue. The vital role played by copyright law in global affairs has been recognized in recent international trade legislation and the United States' long awaited entry into the Berne Convention, the most important of the international copyright treaties.

UNDERSTANDING COPYRIGHT LAW is intended as a comprehensive overview of copyright law for the student. It can be used in conjunction with the several nationally published casebooks focusing on the law of copyright. These excellent casebooks reflect two general approaches in teaching the subject. Some professors, who might be labeled "purists," teach copyright law as a self-contained subject. These persons would concentrate on the Copyright Act of 1976, its legislative history and case law, and their courses would follow the basic structure of the 1976 Act. Other teachers and scholars in the field, however, view copyright law as the centerpiece in the larger field of entertainment law. To these individuals, copyright law should be firmly situated in context, *e.g.*, movie and music industries, and a greater portion of their courses would be concerned about how copyright interacts with other bodies of related law such as unfair competition and the right of publicity. These two approaches, of course, are not mutually exclusive, nor should they be, but seem to describe the dominant tendencies in the teaching of copyright law.

Organized around the Copyright Act of 1976, this text follows the "purist" approach to the subject but tries, when appropriate, to situate the legal issue in an industry context and to relate copyright with other areas of intellectual property law. Chapter I provides an historical overview of copyright law and situates copyright in the larger field of intellectual property law. This chapter also evaluates the economic justification for protecting intangible property rights. Chapters 2 through I I treat the traditional aspects of copyright law: subject matter (Chapters 2 and 3); publication and notice (Chapter 4); ownership (Chapter 5); duration, renewal and termination of transfers (Chapter 6); registration (Chapter 7);

exclusive rights (Chapter 8); infringement and remedies (Chapter 9); fair use and defenses (Chapter 10); and preemption of state law (Chapter 11). The book ends with an overview of international copyright matters (Chapter 12).

Many people have encouraged and helped me in writing this book. My colleagues Bill Richman, Bruce Campbell, Henry Bourguignon, Richard Edwards, Howard Friedman, and Dan Steinbock generously read and evaluated various chapters of the text. Their comments were always incisive, challenging, and supportive. I want to express my appreciation to Pat Sinn who assisted me from the outset in researching and proofing the text. My thanks to Scott Schockling, Ken Egbert, and Rebecca Howard who provided invaluable research assistance throughout. I am especially grateful to Donna Hunt, for her patient and kind assistance in typing the text during the more than two years that this book took to complete. I also want to thank Richard Adin of Matthew Bender for his support and professional editorial judgment.

Marshall A. Leaffer
December 1988

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