



# Copyright Law Deskbook

Robert W. Clarida

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*With Cumulative Case Digest on CD-ROM*

Robert W. Clarida  
*Cowan, Liebowitz & Latman, P.C.*  
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# Foreword

I would like to suggest a subtitle to this foreword, and that is “Answered Prayers.” For many years, I have sat in the audience at the annual meeting of the Copyright Society of the United States as Bob Clarida walked us through, in his learned and witty manner, the past year’s copyright developments. He had assumed that role after illness forced the retirement of his mentor—the copyright legend, David Goldberg. Even in his heyday, David was always eager to acknowledge the major contribution that Bob had made to the yearly recap. Full of admiration after each of David’s, and then Bob’s, tour-de-force performances, I always left with one lingering regret, and that was the ephemeral nature of their presentations. True, they did circulate a photocopied summary of the cases they discussed, but it was unwieldy, physically fragile, difficult to use, and impossible to cite.

Happily for all of us, that cause for regret is now rectified with the publication of Bob’s new book, *Copyright Law Deskbook*. Many copyright practitioners, toilers in the copyright industries, and copyright mavens and groupies generally, have fervently hoped that Bob’s insightful commentaries would reach a broader audience in a more permanent format. Hence, my subtitle, “Answered Prayers.” This is the day we have all been waiting for. While some members of the Copyright Society may secretly resent having to share their private treasure with the world-at-large, Bob was always destined for a bigger stage. With the publication of *Copyright Law Deskbook*, he is reaching that larger readership, and he is enriching the copyright dialogue. Best of all, he is now officially the strong, fresh voice of the new generation of copyright experts, and he will help us all reconfigure copyright for the digital age.

I could name a few of the veteran treatise authors who must be a little nervous about the arrival of this new competitor on the block. I recall a story about two former child prodigies—Yasha Heifetz, the violinist, and Arthur Rubinstein, the pianist—then both middle aged. Together, they attended the 1935 San Francisco debut of 15-year-old Isaac Stern, also a violinist. During the brilliant performance, Heifetz fidgeted, he squirmed in his seat, he fanned himself with his program, and he tugged at his shirt collar. Midway through the performance, he leaned

over and whispered in Rubinstein's ear "It's terribly warm in here, isn't it?" Rubinstein whispered back "Not for pianists, it isn't." With the publication of Bob's book, it might be getting a little warm for some of the most famous names in copyright.

With good reason. The book is extraordinary. It has rigor and tautness. The authoritative case summaries form the substantive core of the book. Building on that core, Bob has produced a volume that has the feel of a carefully polished and well-organized whole. It is not an agglomeration of random paragraphs or chapters that have been written at different times for different purposes and then hem-stitched together. While Bob acknowledges the assistance of his colleague, Tom Kjellberg, the book reads like one written from start to finish by a single author, working alone, using the freshest source material, with the whole construct clearly in his head. It all hangs together, and it has the added advantage of Bob's excellent writing style, his erudition, and his good judgment.

The book is a wonderful addition to the literature, and it will be of great use to all people with an interest in copyright, be they jurists, legal practitioners, law professors, or business executives in the copyright industries. And the fact that it will be updated every year with a CD-ROM means that it will remain fresh as the years pass. With its emphasis on judicial opinions rather than personal commentary on the correctness of those opinions, the book is especially valuable to litigators, legal brief writers, and trial judges.

In another context, my George Washington colleague, Roger Schechter, quotes the cliché Hollywood trailer—"I laughed, I cried, it became a part of me!" So I will faithfully continue to attend Bob's yearly talk to the Copyright Society, and it will still be the highlight of my copyright year. But now I know that I can take it home with me, and that prospect gives me great pleasure. His Copyright Law Deskbook will be front and center on my desk at the Law School, and it will help me teach my classes and answer the tough questions posed by my bright and web-savvy students.

"Answered Prayers" indeed.

Ralph Oman

Pravel Professorial Lecturer

The George Washington University Law School

The former U.S. Register of Copyrights  
(1985–1993)

# Preface

Oliver Wendell Holmes once wrote that the law is nothing more and nothing less than what the courts will, in fact, do. There is no grand abstraction or Platonic ideal to be revealed; only particular disputes resolved in particular ways. This book tries to embody that principle. It sets out to help the practitioner determine what the courts have, in fact, done in resolving a very wide range of particular copyright disputes, with a minimum of speculation about whether they should have resolved those disputes differently. It is intended for the attorney who needs to advise a client about what the law is. This counsel ultimately derives from, first, reading the statute, and second, reviewing how the courts have applied the statute in similar cases. Each chapter or subchapter therefore begins with the relevant statutory language, and proceeds to a discussion of the cases, organized to highlight the issues of greatest interest to practitioners: What is the applicable standard? Where has it been found satisfied, and where has it not?

Because the focus is on particular disputes, the case law discussions are not limited to simple declarative sentences referenced with string cites. I have tried to provide more detail about the cases in the body of the text so that practitioners can determine, even before pulling the cases, which ones are likely to be most germane to the question at hand. The result is not so much a treatise or hornbook, in the conventional sense, but a professional reference that seeks to be useful rather than monumental.

Still, the book has been at least 15 years in the making. The firm at which I practice, Cowan, Liebowitz & Latman, P.C., has for many years assembled an annual review of significant copyright decisions, which has become increasingly comprehensive over time. These annual reviews are published each year in the *Journal of the Copyright Society of the USA*, and since I joined the firm in 1993 I have come to rely on them as my own best resource for current copyright case law. Many clients and colleagues around the country have reported finding them equally helpful, consulting them to locate the most up-to-date citation for a point or even to construct an entire brief (so I'm told). The complete text of all of these annual reviews dating back to 1993 is included



as a CD-ROM appendix to this volume, and served as the basic raw material for the body of the book as well.

Using the annual review summaries as the basis of the text yields two significant benefits. First, it provides a “bottom-up” structure whereby the focus always remains on what courts have actually done, as Holmes counseled. The book did not start with a list of abstract topics to be filled in, but a body of concrete cases to be sorted and described. This manner of working has kept my own speculative, prescriptive urges largely in check. Readers have thus been spared my personal musings on many statutory ambiguities and stray judicial remarks that have not yet led to court decisions. Second, because the discussion is based on the case summaries, and because the summaries themselves only address the one or two most significant issues in a given case, readers can generally be assured that a case cited for a particular point actually deals in some substantive way with that point. Working from the summaries, in the first instance, therefore helps avoid the problem of citations that look promising in the footnotes but prove disappointing when read in full text.

Because the annual case summaries are so integral to this book, I must acknowledge the dozens of talented intellectual property attorneys who have contributed to the annual review over the last 15 years, with a particular thanks to Thomas Kjellberg, who has been managing editor of the annual review for much of that time. Above all, I must note that this book would never have been possible without the vision and energy of the late David Goldberg, the father and guiding spirit of the annual review project. The table of contents of this book is essentially the same as the table of contents David established for the annual review long before my time, and in writing the text I included many passages that I remember discussing with David when the cases were hot news. David set imposingly high standards for all of us. I’d like to think that he would have found this book useful.

Because the annual review project is ongoing, this book will be updated annually, and the CD-ROM will grow by roughly 100 single-spaced pages per year. There are no doubt many improvements to be made, and I hope to make them all as the book evolves through successive updates and editions. I invite readers with constructive comments and suggestions to communicate them to me by email at [rwcl@cll.com](mailto:rwcl@cll.com).

Robert W. Clarida  
June 2009

# Acknowledgements

I gratefully and humbly acknowledge the contributions of the following individuals, without whose involvement this book would truly have been impossible.

To Tom Kjellberg, my colleague at Cowan, Liebowitz & Latman, P.C. and the managing editor of the firm's Annual Review of copyright decisions, whose importance to this project cannot be overstated. Without Tom there would be no Annual Review, and without the Annual Review this book would not exist. Q.E.D. He is also an excellent musician and a true friend.

To Daniel Gould and Peter Shapiro, two wonderfully helpful, skillful, imaginative and hard-working summer interns whose contributions to the research, organization and drafting of this volume were inestimable.

To Robert J. Bernstein, my longtime collaborator on the bi-monthly Copyright Law column for the New York Law Journal, whose invaluable insights into many issues have found their way into this book. (He, too, is an excellent musician and a true friend). In particular, I must note that portions of the following columns, first published in the New York Law Journal, appear in various guises in this book:

- "Peer-to-Peer and the Distribution Right" (Mar. 21, 2008)
- "Tenth Circuit Revisits Copyright and the First Amendment" (Nov. 16, 2007)
- "Return of the Trolls" (May 18, 2007)
- "Extrinsic-Intrinsic Test: Mountain Lions and Hula Dancers" (Jan. 19, 2007)
- "Grokster Remand Clarifies Inducement Liability" (Nov. 17, 2006)
- "Court Nixes 'Fixed' Flicks" (July 21, 2006)
- "Transforming 'The Dead'" (May 19, 2006)
- "Winnie Plays the End Game" (Jan. 20, 2006)
- "Fair Use 2005: Fine Art, Monster Movies and Karaoke" (Nov. 18, 2005)
- "Photography and Copyright" (Sept. 16, 2005)
- "A Blast from the Past" (May 15, 2005)
- "Does Copyright Preempt the Right of Publicity?" (Mar. 18, 2005)
- "Damages for Copyright Infringement: Punitive or Statutory?" (Nov. 18, 2004)
- "Boomerang Barbie" (July 23, 2004)
- "Legal Abstraction Meets Rap-Music Reality" (May 21, 2004)
- "Fair Use Roundup" (Mar. 19, 2004)

“Defendants Win Musical Sampling Case—Now What?” (Nov. 21, 2003)  
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“Art Reproductions: What’s Wrong With This Picture?” (Mar. 19, 1999)  
“Is Contract Preemption Dead After *ProCD*?” (Nov. 15, 1996)  
“Woods: Second Circuit Addresses Music and Recording Issues” (Sept. 15, 1995)

To all of the associates of Cowan, Liebowitz & Latman, past and present, who have contributed the Annual Review of copyright cases since 1993: Sheri L. Gelfond, Elizabeth Dixon Herrington, Wendy R. Liebowitz, Jonathan Z. King, Felicia G. Traub, Andrea Lewis, Robin J. Adelson, Denise L. Bricker, Deborah K. Squiers, Alison R. Kelly, Anna Kraske, David G. Sternbach, Sandra Covington, Susan R. Schick, Lawrence W. Greene, Kieran G. Doyle, Benjamin T. Orifici, Sujata Chaudhri, Lindsey F. Jones, Joel K. Schmidt, Anna M. DePalo, Antonio Borrelli, Heather L. Jensen, Hannah Y. Chung, Jason D. Sanders, Anastasia Zhadina, Maryann Licciardi, Eric J. Shimanoff, Brian H. Buck, John Laurence, Roberto Ledesma, Avi Rosengarten, Jane Shih, Jill K. Tomlinson, and Elise C. Kasell.

To my partners and colleagues at Cowan, Liebowitz & Latman, who supported the project from the very beginning because they recognize, as I do, the high honor of being allowed to follow in the footsteps of our founding partner, the late Alan Latman, whose classic work, *The Copyright Law*, was first published by BNA more than thirty years ago.

To the memory of our late partner David Goldberg, a true lion of the copyright bar, who started the Annual Review project that led to this book. David set a standard for scholarship, wit and insight that none of us will ever be able to match, but we are grateful for the chance to keep trying. David’s words, ideas, and spirit can be found on every page of this book, and we are all the richer for it.

To my copyright professor, Jane C. Ginsburg of Columbia Law School, who not only taught me about copyright but also introduced me to David Goldberg and Cowan, Liebowitz & Latman (where she had worked with David on the first Annual Review, long before my time).

To Jim Fattibene and Wendy Liebowitz of BNA for proposing the project and for their unfailing patience, courtesy, good humor, and professionalism in keeping it going over several long years.

To Bill and Edith Clarida, my parents, forever loving and gracious and impossible to thank profusely enough.

And finally to my family—my unbelievably beautiful, generous, wise and patient wife, Annie Thurow, and my inexpressibly wonderful twins, Helen and Paul. They make life a joy.

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