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DAVID NIMMER

Copyright Illuminated:

REFOCUSING THE DIFFUSE U.S. STATUTE



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David Nimmer

UCLA School of Law and Irell & Manella LLP



E2010001012



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:

Kluwer Law International

P.O. Box 316

2400 AH Alphen aan den Rijn

The Netherlands

Website: <http://www.kluwerlaw.com>

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.

7201 McKinney Circle

Frederick, MD 21704

United States of America

E-mail: customer.care@aspenpubl.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.

Stratton Business Park

Pegasus Drive, Biggleswade

Bedfordshire SG18 8TQ

United Kingdom

E-mail: kluwerlaw@turpin-distribution.com

ISBN 978-90-411-2494-4

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Copyright Illuminated

Refocusing the Diffuse US Statute

for
Dick Borow and Morgan Chu

Preface

The Copyright Act of 1976—now spanning hundreds of pages, subject to dozens of revisions over the decades, interpreted by the courts on thousands of occasions—is indeed a daunting subject matter to approach. But many of my scholarly articles have tried to tackle it, whether taking its subject matter as a whole or focusing on select aspects.

The pages that follow pass a microscope over the entire Act and all its amendments. It is to be hoped that the reader will gain in depth and breadth from looking at all the parts and their interrelationship.

This volume serves as a companion to a previous anthology of my articles that Kluwer Law International published, *COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA* (2003). Again, light editing has taken place in this volume to conform divergent journal styles into a coherent whole, but the text and footnote numbers remain largely the same for ease of reference to those prior publications. Also, Afterwords following various chapters again update the treated material by recounting later developments, so that the discussion is current as of publication of this volume in 2007.

The chapters in this anthology were originally published on a standalone basis in the following law reviews.

Codifying Copyright Comprehensibly, 51 *UCLA L. REV.* 1233 (2004)

Refracting the Window's Light: Stewart v. Abend in Myth and in Fact, 39 *J. COPYRIGHT SOC'Y* 18 (1991)

Abend's Stepchild, 43 *J. COPYRIGHT SOC'Y* 139 (1996)

Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb, 49 *J. COPYRIGHT SOC'Y* 387 (2001)

Preexisting Confusion in Copyright's Work For Hire Doctrine, 50 *J. COPYRIGHT SOC'Y* 399 (2003)

Repeat Infringers, 52 *J. COPYRIGHT SOC'Y* 167 (2005)

InacSSibility, Benjamin Kaplan et al., AN UNHURRIED VIEW OF COPYRIGHT, REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) (2005)

“Fairest of them All” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263 (2003)

A Modest Proposal to Streamline Fair Use Determinations, 24 CARDOZO ARTS & ENT. L.J. 11 (2006)

Copyright Ownership by the Marital Community: Evaluating Worth,” 36 UCLA L. REV. 383 (1988)

Copyright’s ‘Staple Article of Commerce’ Doctrine: Patently Misguided, 53 J. COPYRIGHT SOC’Y 365 (2006)

The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off), 54 DEPAUL L. REV. 1 (2004)

A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases, 20 ARIZ. STATE L.J. 625 (1988)

Access Denied, 3 UTAH. L. REV. 769 (2007)

Promises! Promises!, 119 HARV. L. REV. F. 74 (2006)

Portions of the materials published herein have been incorporated into NIMMER ON COPYRIGHT. The publisher again extends its gratitude to Matthew Bender & Company for kind permission to reproduce the affected material herein.

Acknowledgments

As I wander again through the various articles of which this anthology is composed, I recall anew the many friends and colleagues who were kind enough to offer comments along the way. I have thanked each before, and am delighted to have the opportunity to do so again. Their ranks include:

Norm Abrams, Jon Bing, James Boyle, Elliot Brown, Tom Cotter, Sarah Deutsch, Dave Djavaherian, Séverine Dussollier, David Gerber, Daniel Gervais, Hugh Hansen, Marjorie Heins, Bernt Hugenholtz, Justin Hughes, Peter Jaszi, Craig Joyce, Rob Kasunic, Alex Kozinski, Bob Kreiss, Bobbi Kwall, Dick Lanham, Mark Lemley, Ken Liebman, Paul Marcus, Tom McCarthy, Diane McGimsey, Peter Menell, Neil Netanel, Chris Newman, Jon Newman, Peter Nolan, Shira Perlmutter, Lou Petrich, Malla Pollock, Richard Posner, Peggy Radin, Jennifer Rothman, Pam Samuelson, Chuck Sims, Lon Sobel, Bernie Sorkin, John Tehranian, Jon Varat, Eugene Volokh, Fred von Lohmann, Cindy Vroom, John Wiley, Neil Wilkof, Jeremy Williams, and Ed Zeldow.

Many of them gave input on multiple occasions. It is a blessing to have such loyal critics and friends.

Peter Menell has been not only critic but collaborator on several of the articles published herein. I am immeasurably richer for the innumerable trips I have taken to Berkeley to visit him and lecture together to federal judges, fine-tune a point of copyright law that needs attention, or witness one of his PowerPoint extravaganzas.

For John Wilson and the UCLA Library Staff, there is only one word: amazing. For Dzidra Freiman, whom I thanked last time for unstinting assistance, her

proofreading and rectifying all the materials throughout this volume merit another word: extraordinary.

This book is dedicated to Dick Borow and Morgan Chu, each of whom has offered the utmost in professional support to me over decades and during that time has served as a wonderful example to me. My profound thanks and best wishes will be with each of them always.

Gratitude to my five children is foremost in my thoughts as I put this volume to bed with special excitement on the recent news of our firstborn's engagement. Last time around, I ended by offering deepest thanks to my wife, Marcia, for constant love and support. Even after the passage of years, some sentiments require no editing.

Los Angeles
March 2008

Table of Abbreviations

Commerce Rep. (DMCA)	H.R. Rep. No. 105-551, Part 2, 105th Cong., 2d Sess. (1998)
Conf. Rep. (DMCA)	Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 105-796, 105th Cong., 2d Sess. (1998)
H. Rep.	H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976)
H. Rep. (BCIA)	H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988)
H. Rep. (DMCA)	H.R. Rep. No. 105-551, Part 1, 105th Cong., 2d Sess. (1998)
H. Rep. (URAA)	H.R. Rep. No. 103-826, 103d Cong., 2d Sess. (1994)
NIMMER ON COPYRIGHT	Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> (Matthew Bender & Company, Inc. 1963-2007)
S. Rep. (BCIA)	S. Rep. No. 100-352, 100th Cong., 2d Sess. (1988)
S. Rep. (DMCA)	S. Rep. No. 105-190, 105th Cong., 2d Sess. (1998)
S. Rep. (URAA)	S. Rep. No. 103-412, 103d Cong., 2d Sess. (1994)
SACRED TEXT	David Nimmer, <i>Copyright: Sacred Text, Technology, and the DMCA</i> (Kluwer Law International (2003) (1994)

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