

---

# COPYRIGHT FOR THE EIGHTIES

---

Cases and Materials

---

SECOND EDITION

---

Alan Latman  
Robert Gorman  
Jane C. Ginsburg

---

CONTEMPORARY  
LEGAL EDUCATION SERIES



# **COPYRIGHT FOR THE EIGHTIES**

**Cases and Materials**  
**SECOND EDITION**

**Alan Latman**

Late Walter J. Derenberg Professor of  
Copyright and Trademark Law  
New York University

**Robert Gorman**

Kenneth W. Gemmill Professor of Law  
University of Pennsylvania

**Jane C. Ginsburg**

Member, New York Bar

THE MICHIE COMPANY  
*Law Publishers*  
CHARLOTTESVILLE, VIRGINIA

COPYRIGHT 1981, 1985

BY

THE MICHIE COMPANY

---

Library of Congress Catalog Card No. 85-61166

ISBN 0-87215-881-0

---

Printed in the United States of America

All rights reserved.

# **COPYRIGHT FOR THE EIGHTIES**

**CONTEMPORARY  
LEGAL EDUCATION SERIES**



## CONTEMPORARY LEGAL EDUCATION SERIES

### EDITORIAL ADVISORY BOARD

Murray L. Schwartz, Chairman

James E. Krier

A. Kenneth Pye

Maurice Rosenberg

Stephen A. Saltzburg

To the memory  
of  
Alan Latman

## Preface

The preparation of this second edition began in the early fall of 1983, barely two years after the publication of the first edition. Alan Latman, despite his debilitating illness, invested great energy in the endeavor, along with several other significant ventures in the copyright field. The revision was essentially completed in the summer of 1984, which was marred by Alan's untimely passing. Alan's extraordinary personal and intellectual qualities, and his professional achievements, have been recounted — at length, but all too inadequately — in two journals that were close to his heart. See 59 N.Y.U. L. Rev. 241 (1984), and 32 J. Copyright Soc'y 1 (1984). We were fortunate to have benefited so greatly from his friendship, his tutelage, and his example. We hope that this volume will stand as a fitting tribute to him and to the extraordinary contributions he made to the field which we all enjoyed and found so stimulating, copyright law.

When the first edition was prepared, the new Copyright Act had been effective for little more than three years. Since then, a number of the problems that the casebook authors foresaw have become reality, and many more have been generated. The new material in this second edition derives principally from the expansion of new technologies. The Supreme Court has considered the validity of home videotaping of copyrighted television programs and of the manufacture of videotape recording machines. Congress has made a narrow but significant break with the "first sale" doctrine by imposing liability for renting phonorecords for profit, as a curb upon home recording. It has also extended *sui generis* short-term protection to the configuration of circuitry on semiconductor chips used in computers. The Copyright Royalty Tribunal has changed rates and/or made royalty distributions in the cable television, jukebox, music recording, and public broadcasting industries. The new technologies have also tested the applicability of statutory provisions concerning originality and fixation of copyrighted works, useful articles and systems, public performances, other forms of infringement, and fair use. This new edition also includes expanded material on state theories adjacent to copyright and on preemption of state law under § 301 of the Copyright Act.

We have benefited from using the First Edition in the classroom, and from the suggestions of our students and of faculty colleagues at other schools. We have made some changes in organization and even in the physical composition of the book, to make it more teachable and readable. We continue to be interested in the comments and suggestions of teachers and students of copyright law. We also wish to extend our deepest thanks to Susie Satterfield of the University of Pennsylvania Law School staff for her flawless and good-natured service in the secretarial and technical aspects of the preparation of this book.

Much of what was said in the foreword to the first edition is still pertinent, and we have included a slightly abridged version of the foreword immediately below. Alan Latman's superb one-volume treatise is presently being brought up to date by William Patry, Esq. The principal sources for research in copyright remain that work, the multi-volume treatise of Professor Nimmer, the *Journal of the Copyright Society of the United States of America*, the ASCAP collections derived from the Nathan Burkan Competition, and the up-to-the-minute services published by Commerce Clearing House and the Bureau of National Affairs. The names of Benjamin Kaplan and the late Walter Derenberg are still before us as exemplars in

their scholarship, teaching, and friendship. To those names we add that of another luminary who will be deeply missed but whose influence will be lasting — Alan Latman.

February 1985

Robert A. Gorman  
Jane C. Ginsburg



## Foreword to the First Edition

This casebook was first fixed in a tangible medium of expression after the new copyright law was passed. Its component materials nevertheless predate 1976 to a significant degree because the new statute directly and indirectly enacts or incorporates so much that preceded it. Accordingly, the authors emphasize the problems and background that gave rise to particular provisions of the new statute. We do so to facilitate understanding and discussion of the provisions. We think this is necessary for students who know not the 1909 statute.

We are also convinced of the need to set forth pertinent legislative history of the 1976 Act at appropriate places in the casebook. The glimpses into this comprehensive and purposeful history are most frequently furnished by the reports of the 94th Congress, H.R. Rep. No. 94-1476 (1976) ("the House Report"), S. Rep. No. 94-373 (1975) ("the Senate Report"), and H.R. Rep. No. 94-1733 (1976) ("the Conference Report"). Copyright law has always been fascinating to many students because of its philosophical aspects. Exposure to the substantial amounts of legislative materials in this book should add other challenging dimensions, particularly a better understanding of the socioeconomic aspects of the subject, and an appreciation of the legislative process in action with its clash of interest groups being manifested in the shifting intricacies of draftsmanship.

The materials have been assembled and produced in recognition of the increasing number of courses focusing on copyright alone, as opposed to surveys including patents, trademarks and unfair competition, as well. They permit assignments of approximately fifteen pages per class for a three-credit course and, one hopes, convenient selection for a two-credit course.

....  
The student using this book can supplement his or her learning with other works from a rich and diverse literature. Professor Nimmer's monumental treatise is consulted by all lawyers and judges faced with a copyright problem. The one-volume book by Professor Latman [*The Copyright Law*] has long been considered a standard. Specific topics are explored in depth in periodical literature expanded through the efforts of the American Society of Composers, Authors and Publishers in its Nathan Burkan Memorial Competition. A bimonthly journal devoted exclusively to copyright is published by The Copyright Society of the U.S.A., which has also co-sponsored with New York University Law School a unique compendium and analytical index for use with the 1976 Act called the Kaminstein Legislative History Project. Even more current material is offered by the weekly BNA Patent, Trademark & Copyright Journal and the monthly CCH Copyright Law Reports.

All of this material, as well as the present work, emanates from a broad-based instinct to spread knowledge about a fascinating and challenging subject. The spiritual forebears of this effort have been many, but two must be mentioned here. The path was initially blazed by the legendary Walter Derenberg who inspired generations of students from all over the world. We valued his leadership and his friendship. Each of us also had the extraordinary good fortune to begin learning about this subject from that brilliant scholar and masterful instructor, Benjamin Kaplan, recently retired as a Justice of the Massachusetts Supreme Judicial Court and happily rejoining us in our common love — the teaching of copyright.

AL  
RAG

March 1981

---

---

Anno Octavo

# Annæ Reginæ.

---

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.



Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the

Encouragement of Learned Men to Compose and Write useful Books: May it please Your Majesty, that it may be Enacted, and be it Enacted by the Queens most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That from and after the Tenth Day of April, One thousand seven hundred and ten, the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years, to Commence from the said Tenth Day of April, and no longer; and that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Four-

## Summary Table of Contents

	<i>Page</i>
<i>Preface</i> .....	vii
<i>Foreword to the First Edition</i> .....	ix
<i>Table of Contents</i> .....	xiii
CHAPTER 1. THE CONCEPT OF COPYRIGHT .....	1
A. Historical Perspective .....	1
B. General Principles .....	11
C. Overview of Copyright Law .....	28
D. Distinctions: Patents .....	38
E. Distinctions: Trademarks .....	51
F. Distinctions: Chattels .....	65
CHAPTER 2. COPYRIGHTABLE SUBJECT MATTER .....	69
A. In General .....	69
B. Facts and Ideas as Distinguished from Their Expression .....	76
C. Compilations and Derivative Works .....	99
D. Computers .....	126
E. Pictorial, Graphic and Sculptural Works .....	147
F. Characters .....	171
G. Government Works and Other Public Policy Issues .....	180
CHAPTER 3. DURATION AND RENEWAL .....	191
A. Duration .....	191
B. Renewal .....	206
C. Renewals and Derivative Works .....	216
CHAPTER 4. OWNERSHIP .....	227
A. Initial Ownership .....	227
B. Transfers and Their Recordation and Termination .....	243
CHAPTER 5. FORMALITIES .....	265
A. Publication and Notice Before the 1976 Act .....	265
B. 1976 Act Solutions as to Publication and Notice .....	276
C. Deposit and Registration .....	288
CHAPTER 6. INTERNATIONAL DIMENSION OF COPYRIGHT .....	297
A. International Conventions .....	297
B. Manufacturing Clause .....	299
C. Protection of Alien Authors .....	305
CHAPTER 7. RIGHTS, LIMITATIONS AND REMEDIES .....	307
A. The Right to Reproduce the Work in Copies and Phonorecords Under § 106(1) .....	307
B. Right to Prepare Derivative Works Under § 106(2) .....	364
C. The Right to Distribute Under § 106(3) .....	378
D. Rights of Public Performance and Display Under § 106(4), (5) .....	387
E. Fair Use .....	432
F. Remedies .....	510

	<i>Page</i>
CHAPTER 8. FEDERAL PREEMPTION OF STATE LAW .....	527
A. Rights Outside Copyright .....	527
B. The Supremacy Clause .....	562
C. Supreme Court Preemption Decisions in Intellectual Property Cases .....	563
D. Copyright Preemption Under Section 301 of the 1976 Act ....	594
<hr/>	
<i>Bibliography</i> .....	609
<i>Table of Cases</i> .....	615
<i>Index</i> .....	621

## Table of Contents

	Page
<i>Preface</i> .....	vii
<i>Foreword to the First Edition</i> .....	ix
<i>Summary Table of Contents</i> .....	xi
<hr style="width: 20%; margin: 10px auto;"/>	
CHAPTER 1. THE CONCEPT OF COPYRIGHT .....	1
A. Historical Perspective .....	1
1. England and the Statute of Anne .....	1
2. The Colonies and the Constitution .....	4
3. The First United States Copyright Statute .....	4
4. Statutory Revision .....	6
5. The 1909 Act .....	7
6. The Universal Copyright Convention .....	8
7. The 1976 Act .....	9
B. General Principles .....	11
Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 3-6 (1961) .....	11
Chafee, Reflections on the Law of Copyright, 45 Columbia Law Review 503, 506-11 (1945) .....	14
United States Constitution, Article I, Section 8 .....	17
Mazer v. Stein .....	17
Sony Corp. of America v. Universal City Studios .....	17
Ladd, The Harm of the Concept of Harm in Copyright, 30 Journal of the Copyright Society 421 (1983) .....	18
Burrow-Giles Lithographic Co. v. Sarony .....	19
Bleistein v. Donaldson Lithographing Co. ....	23
Questions .....	27
C. Overview of Copyright Law .....	28
1. Nature of Copyright .....	28
2. Subject Matter of Copyright .....	28
3. Duration, Ownership, and Formalities .....	29
a. Duration of Copyright .....	29
b. Ownership .....	30
c. Notice of Copyright .....	31
d. Registration .....	31
4. Scope of Exclusive Rights Under Copyright .....	31
a. Reproduction Right: 17 U.S.C. § 106(1) .....	31
b. Right to Make Derivative Works: 17 U.S.C. § 106(2) ...	32
c. Distribution Right: 17 U.S.C. § 106(3) .....	32
d. Public Performance and Display Rights: 17 U.S.C. §§ 106(4), 106(5) .....	33
5. Statutory and Constitutional Limitations on the Exclusive Rights Under Copyright .....	33
a. Compulsory Licenses .....	33
b. Other Statutory Limitations on the Performance and Dis- play Rights .....	34
c. Library Photocopying .....	34

	<i>Page</i>
d. Fair Use .....	35
e. First Amendment .....	35
6. Remedies for Copyright Infringement .....	36
Note: Structure and Operations of the Copyright Office .....	36
D. Distinctions: Patents .....	38
Patent Statute .....	38
Graham v. John Deere Co. ....	40
Questions .....	45
Alfred Bell & Co. v. Catalda Fine Arts, Inc. ....	46
Questions .....	50
E. Distinctions: Trademarks .....	51
Trade-Mark Cases .....	51
Questions .....	53
Trademarks and the Lanham Act .....	54
Lanham Act .....	54
Questions .....	57
Titles in the Law of Unfair Competition .....	57
Questions .....	59
Frederick Warne & Co. v. Book Sales, Inc. ....	60
F. Distinctions: Chattels .....	65
Chamberlain v. Feldman .....	65
Questions .....	67
House Report .....	68
CHAPTER 2. COPYRIGHTABLE SUBJECT MATTER .....	69
A. In General .....	69
§ 102. Subject Matter of Copyright: In General .....	69
House Report .....	69
Videogames and the “Fixation” Requirement .....	72
Questions .....	72
B. Kaplan, An Unhurried View of Copyright 45-46 (1967) ....	73
Questions .....	74
House Report .....	74
Question .....	76
B. Facts and Ideas as Distinguished from Their Expression .....	76
Baker v. Selden .....	76
Questions .....	80
§ 102. Subject Matter of Copyright: In General .....	81
House Report .....	81
Continental Casualty Co. v. Beardsley .....	82
Donald v. Zack Meyer’s T.V. Sales & Service .....	85
Questions .....	88
Morrissey v. Procter & Gamble Co. ....	89
Questions .....	90
Miller v. Universal City Studios, Inc. ....	91
Wainwright Securities v. Wall Street Transcript Corp. ....	97
Questions .....	98
C. Compilations and Derivative Works .....	99
§ 103. Subject Matter of Copyright: Compilations and Derivative Works .....	99
House Report .....	100
1. Compilations .....	101

	<i>Page</i>
Roth Greeting Cards v. United Card Co. ....	101
Questions .....	104
Compilations of Facts: Maps .....	104
National Business Lists, Inc. v. Dun & Bradstreet, Inc. ....	106
Questions .....	112
2. Derivative Works .....	113
Kuddle Toy, Inc. v. Pussycat-Toy, Inc. ....	113
Question .....	114
L. Batlin & Son v. Snyder .....	115
Originality in Derivative Works .....	120
Questions .....	124
D. Computers .....	126
1. Introduction .....	126
2. Computer Programs .....	127
3. Copyrightability of Data Bases .....	131
4. Computer-Authored Works .....	131
5. The Input Issue [Infringement by Computer] .....	132
6. Recommendations for Statutory Change .....	134
Questions .....	136
7. Development of the Case Law .....	137
Apple Computer, Inc. v. Franklin Computer Corp. ....	138
Questions .....	146
E. Pictorial, Graphic and Sculptural Works .....	147
Baillie v. Fisher .....	147
Kitchens of Sara Lee, Inc. v. Nifty Foods Corp. ....	148
Questions .....	149
Draft, Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Chapter VII, 4-13 (1975) .....	150
§ 101. Definitions .....	153
§ 113. Scope of Exclusive Rights in Pictorial, Graphic, and Sculp- tural Works .....	154
House Report .....	154
Kieselstein-Cord v. Accessories by Pearl, Inc. ....	154
Questions .....	162
Architecture and Typeface Designs .....	166
Semiconductor Chip Protection .....	168
F. Characters .....	171
Nichols v. Universal Pictures Corp. ....	171
Warner Brothers, Inc. v. Columbia Broadcasting System ....	171
Wincor, Book Review of Kaplan, An Unhurried View of Copyright, 76 Yale Law Journal 1473, 1478-83 (1967) .....	174
King Features Syndicates v. Fleischer .....	177
Questions .....	178
Detective Comics, Inc. v. Bruns Publishing, Inc. ....	178
Questions .....	179
Walt Disney Productions v. Air Pirates .....	179
Questions .....	180
G. Government Works and Other Public Policy Issues .....	180
§ 105. Subject Matter of Copyright: United States Government Works .....	180
House Report .....	181

	<i>Page</i>
Questions .....	182
Mitchell Brothers Film Group v. Cinema Adult Theater .....	184
CHAPTER 3. DURATION AND RENEWAL .....	191
A. Duration .....	191
Chafee, Reflections on the Law of Copyright, 45 Columbia Law	
Review 719-21, 725-27, 729-30 (1945) .....	191
House Report .....	195
§ 302. Duration of Copyright: Works Created on or After January	
1, 1978 .....	197
House Report .....	198
Questions .....	201
§ 303. Duration of Copyright: Works Created but not Published	
or Copyrighted Before January 1, 1978 .....	201
House Report .....	201
§ 304. Duration of Copyright: Subsisting Copyrights .....	202
House Report .....	202
§ 305. Duration of Copyright: Terminal Date .....	203
House Report .....	203
Questions .....	204
Works in the Public Domain Prior to January 1, 1978 .....	204
Private Law 92-60 .....	204
Notes and Questions .....	205
B. Renewal .....	206
Ringer, Renewal of Copyright, in Studies on Copyright (Fisher	
mem. ed. 1960) (Study No. 31) .....	206
Questions .....	208
Epoch Producing Corp. v. Killiam Shows, Inc. ....	209
Question .....	210
Bartok v. Boosey & Hawkes, Inc. ....	210
Questions .....	214
Note: Renewals and Legislative Intent .....	215
C. Renewals and Derivative Works .....	216
G. Ricordi & Co. v. Paramount Pictures, Inc. ....	217
Questions .....	218
Rohauer v. Killiam Shows, Inc. ....	218
Questions .....	220
Russell v. Price .....	221
Questions .....	225
Filmvideo Releasing Corp. v. Hastings .....	226
Question .....	226
CHAPTER 4. OWNERSHIP .....	227
A. Initial Ownership .....	227
1. Divisibility .....	227
2. Joint Works .....	228
3. Works Made for Hire .....	230
§ 101. Definitions .....	230
§ 201. Ownership of Copyright .....	230
House Report .....	231
Meltzer v. Zoller .....	231
Roth v. Pritikin .....	237
Aldon Accessories Ltd. v. Spiegel, Inc. ....	238



	<i>Page</i>
Questions .....	242
B. Transfers and Their Recordation and Termination .....	243
1. Transfer of Ownership .....	243
§ 201. Ownership of Copyright .....	243
§ 204. Execution of Transfers of Copyright Ownership ...	243
House Report .....	244
Questions .....	245
Bartsch v. Metro-Goldwyn-Mayer, Inc. ....	245
Questions .....	250
§ 201. Ownership of Copyright .....	250
House Report .....	251
2. Recordation of Transfers and Other Documents .....	252
3. Termination of Transfers .....	254
House Report .....	254
Summary of Termination Provisions Under § 203 .....	257
Summary of Termination Provisions Under § 304(c) .....	259
Comparison of Termination Provisions .....	260
Transfers, Renewals and Terminations .....	261
Questions .....	262
CHAPTER 5. FORMALITIES .....	265
A. Publication and Notice Before the 1976 Act .....	265
1. “Divestitive” Versus “Investitive” Publication .....	266
2. Definition of “Publication” .....	267
3. Limited Publication .....	267
4. Publication and Performance .....	268
5. Publication and the Distribution of Phonograph Records ...	269
6. Publication of Derivative Works .....	270
7. The Notice Requirement .....	270
Burke v. National Broadcasting Co. ....	271
Questions .....	276
B. 1976 Act Solutions as to Publication and Notice .....	276
1. The Statutory Definitions .....	276
2. The Contexts of Publication .....	277
Questions .....	278
§ 401. Notice of Copyright: Visually Perceptible Copies .....	279
House Report .....	279
§ 402. Notice of Copyright: Phonorecords of Sound Recordings	280
House Report .....	281
§ 404. Notice of Copyright: Contributions to Collective Works	282
Questions .....	282
§ 403. Notice of Copyright: Publications Incorporating United	283
States Government Works .....	283
House Report .....	283
Questions .....	283
§ 405. Notice of Copyright: Omission of Notice .....	284
House Report .....	284
Questions .....	286
§ 406. Notice of Copyright: Error in Name or Date .....	287
House Report .....	287
Questions .....	288
C. Deposit and Registration .....	288