A Story of Two Anniversaries


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We are honored to assemble this group of essays relating to Nimmer on Copyright (the “Treatise”) to commemorate its fiftieth anniversary. Astute readers will have noted that this is Volume 60 of the Journal of the Copyright Society of the USA, and, hence, it is also the Journal's sixtieth anniversary. I would like to celebrate both occasions by discussing the relationship between Mel Nimmer, the Journal (which was the Bulletin of the Copyright Society of the USA for its first twenty-eight volumes, becoming the Journal for Volume 29) and the Treatise. We have a complete set of the Bulletin/Journal in the Loyola Law School Law Library, so I conducted some casual research as to when Mel first appeared in the Bulletin, his involvement with the Society and the Bulletin, and the relationship between the original Treatise and the Bulletin. By focusing on Mel Nimmer I don’t want to ignore the incredible work his son, David Nimmer, has done on the treatise. Indeed, David has been responsible for the treatise for longer than his esteemed father was! But for this brief essay, I want to focus on historical origins, so will primarily reference Nimmer père’s connections with the Bulletin.

Before I describe the results of my review of the early Bulletins, I would like to make a personal comment. I was fortunate to have met Professor Nimmer in early 1985, when he, his wife, Gloria, and UCLA were gracious hosts of the Mid-Year Meeting of the Copyright Society. I had been a member of the Society since law school days in New York, and had moved to California only months before that meeting. After the program at UCLA, everyone was invited to the Nimmer’s house to socialize, and for me, as a young lawyer with a love of copyright, it was as memorable as the time I bumped into John Lennon and Yoko Ono walking down 72nd Street in New York a week after moving to the City from New Haven. One of my first tasks at Paul, Weiss a few years later was to assess the status of the Lennon/McCartney publishing catalogue, which had become complicated by the untimely death of John a year or so earlier. Of course, my first reference in digging into arcane questions of work made for hire and “corporate body” works under the 1909 Act was Nimmer on Copyright. When I first taught copyright and entertainment law at USC Law Center in 1987, I used the Nimmer casebook and of course the treatise was

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essential to the self-education one requires to teach the subject. Now, in my twenty-sixth year teaching copyright law, I continue to look to the treatise on a regular basis, and have treasured working with David in various capacities ever since. So both the Treatise and the Society mean a lot to me.¹

I. NIMMER AS EDITORIAL BOARD MEMBER AND COPYRIGHT SOCIETY TRUSTEE

Mel Nimmer was an important participant in the Society and the Bulletin for most of his professional life. The Bulletin was first published in June 1953, three years after Mel graduated from Harvard Law School. Mel was first listed as a member of the Editorial Board of the Bulletin in Volume 5, Issue 1, of the 1957–58 volume. It is possible he was involved earlier, but Volume 1 did not list him, and there was no listing of the Editorial Board in our copy of Volumes 2 through 4. He would have only been a lawyer for about seven years when he became a member of the Editorial Board. Mel is first listed as a Trustee of the Copyright Society in Volume 10 (1963–64), just as the treatise was being published. After having been listed as a member of the Editorial Board in each volume after Volume 5, in Volume 11, he is not listed as such, but continued to be a Trustee of the Society. Perhaps he needed a breather after that no doubt Herculean effort. In Volume 12, he was back on the Editorial Board, but not listed as a Trustee. In Volumes 13 through 15, he is again both an Editorial Board member and a Trustee. I noticed that my first copyright mentor, Columbia Law School’s John Kernochan, joined Mel as a Trustee of the Society. In Volume 16, Mel is on the Editorial Board, but not a Trustee. In Volumes 17 through 19 he is again both, and in Volume 20 (1973–74), he is an editor but not a Trustee. He continued to be a Trustee and/or member of the Editorial Board until at least Volume 29 (1981-82). Subsequent volumes until his death in 1985 don’t list the Trustees or Editorial Board, but it seems likely that he remained involved in that capacity until at or near the end, since he hosted the Mid-Year Meeting in early 1985. Mel passed away in November 1985.

II. REFERENCES TO NIMMER’S WRITINGS IN THE BULLETIN

In its early years, the Bulletin was quite different from what it is now. Instead of law review-style articles, it was initially truly a “bulletin,” intended to provide timely information on copyright. It listed numerically “digests of domestic and foreign legislation, conventions and proclama-

¹ This is of course not to denigrate any of the other learned treatises on copyright, or to suggest that I never disagree with the Nimmer Treatise’s positions on some points.
A Story of Two Anniversaries

tions, important court decisions both here and abroad and . . . a current bibilography of books, law review articles and other writings pertaining to copyright . . . editorials and data from trade magazine which related to problems resulting from the use of copyrighted works in literature, drama, art, music, motion pictures, radio, and television."²

The first references I found to Mel Nimmer’s writings were both in Volume 1, No. 5. They digested his article, *The Right of Publicity*, in *Law and Contemporary Problems*³ and his article, *The Law of Ideas*, in the *Southern California Law Review*,⁴ both published in 1954. Mel was already becoming a prolific scholar, and not just in relation to copyright. It also appears that he was probably doing those difficult “year in review” programs about copyright decisions. The next citations to his works are two digests in Volume 3, No. 4 (1956): *Copyright 1955* in the *California Law Review*⁵ and *Copyright Publication*, in the *Columbia Law Review*.⁶ Volume 4, No. 6, digests his *Copyright 1956: Recent Trends in the Law of Artistic Property*, published in the *UCLA Law Review*.⁷ Perhaps these “year in review” articles were at the root of what became the Treatise.

There are no references to Nimmer in Volumes 5 through 7. His first short article appears in Volume 8 (1960–61). Interestingly, it is entitled *Copyright Correspondence* (with a single “c in the circle” symbol standing in for the initial consonants), and commences with an “Editor’s Note” from Walter Derenberg announcing that “Mr. Nimmer, of the California Bar, a member of our Editorial Board, has agreed to serve as West Coast Editor of the BULLETIN and regularly to furnish news and information concerning copyright and entertainment law.”⁸ Professor Nimmer displays his signature humor in his opening paragraph: “This column will be devoted to the enlightenment of our Eastern brethren as to copyright activities in what they regard as the second most important copyright center

² Samuel W. Tannenbaum, *From the President of the Copyright Society of the United States of America*, 1 BULL. COPYRIGHT SOC’Y 1 (1953). Although there were a few longer pieces in prior issues, the official decision of the Society to publish articles is announced in Volume 4 (1956). There is a note in Issue No. 1 introducing a short article entitled *The New Copyright Office Regulations*, saying “This article is published in accordance with the Society’s recently adopted policy to publish from time to time informative articles written by leading authorities in the field of copyright. Our readers and subscribers are invited to submit appropriate materials of this kind to the Editorial Board.” 4 BULL. COPYRIGHT SOC’Y 32 (1956). The table of contents for Volume 5 is the first to list a separate section for “Articles.”

⁶ 56 COLUM. L. REV. 185 (1956).
⁷ 4 UCLA L. REV. 323 (1957).
⁸ 8 BULL. COPYRIGHT SOC’Y 25 (1960).
— and in what we in our cheerfully provincial ignorance know to be the hub of the copyright world.”

He proceeds to describe the “most significant copyright decision to emanate from our courts during the past few months” (dealing with remedies for infringement of musical works), the “most interesting — if not significant” case (denying neighboring and moral rights to the Three Stooges), and the first TV series to be produced on tape, Wrangler. He senses trouble a-brewing with that, based on the infamous White-Smith v. Apollo decision, and makes a practical suggestion for producers who want a better chance at copyright protection for such works. That issue also lists his An Introduction to Copyright published in the L.A. Bar Bulletin in 1961. Volume 9 (1961–62) lists another year-in-review piece, Significant Copyright Decisions and Legislation of the Past Year. The “Copyright Correspondence” feature never appeared in future issues subsequent to the first one, so someone must have rethought that idea, or perhaps Mel was too involved in preparing the Treatise to be the correspondent from the Left Coast six times a year. I was pleased to note that Professor Nimmer was the first “West Coast Editor” of the Bulletin. I think that practice, at least as a formal matter, must have ceased, until my own appointment as co-editor in chief of the Journal for Volume 56 (2009), as the “West Coast” contact along with my co-editor in chief, Professor Stacey Dogan from the “East Coast.” The idea seems to have survived for now, with co-editor in chief, Professor Joe Liu of Boston College Law School, sharing the helm.

The researcher can almost feel the Treatise emerging from all this. In Volume 10, Nimmer’s The Nature of Rights Protected by Copyright is described as follows: “This article, which is a chapter with certain alterations from a forthcoming treatise, is concerned with an examination of the rights accorded to an owner of literary property under the Copyright Act.” Volume 11 of the Bulletin includes a two-page article by Nimmer, Recapture of Copyright from the Mexican Public Domain, warning U.S. copyright owners about an important development in Mexican copyright law and pointing out that if they don’t file a Mexican registration promptly, their works will lose the opportunity to be resurrected from the public domain there. No doubt the motion picture studios were pleased to have Professor Nimmer giving them a heads-up on that. Volume 11 also includes in an early issue an auspicious announcement. Among three “sig-

9 Id.
10 209 U.S. 1 (1908).
12 9 BULL. COPYRIGHT SOC’Y 442 (1962).
13 10 UCLA L. REV. 60 (1962).
14 10 BULL COPYRIGHT SOC’Y 201 (1963).
15 11 BULL COPYRIGHT SOC’Y 408 (1964).
nificant new publications in the field of copyright” that had been published in the prior few weeks is *Nimmer on Copyright*. The announcement, indicating that a review by a member of the Editorial Board will be forthcoming, states that the Treatise “would seem to be the most important treatise on the subject since the publication of Weil’s ‘American Copyright Law’ in 1917.”

Still in Volume 11, Stanley Rothenberg reviews the Treatise in February 1964. For the most part, he admires it, saying that “Nimmer’s countless citations of early and current cases and law review articles enable the practitioner to pursue the law of copyright on almost any particular point,” yet “Professor Nimmer also raises and considers many penetrating questions which elevate the work above the status of a day-to-day handbook . . . .” Rothenberg does note some areas in which he disagrees with Professor Nimmer, and, like some of the other contemporary reviews, wishes for a more detailed index and an index of cases and possibly the literature cited. He points out that Professor Nimmer “does not avoid controversy; for example, he has already succeeded in creating a stir with his thesis that publication of a derivative work constitutes publication of the basic work.” This must have been a fruitful era for treatises, as the next work reviewed is the first edition of Alexander Lindey’s “monumental” (1,248 pages) *Entertainment, Publishing and the Arts: Agreements and the Law*, an expansion into other entertainment branches from Lindey’s 1947 *Motion Picture Agreements Annotated*.

Volume 12 (1964–65) lists two other reviews of the Treatise, one in *Stanford Law Review* by Harry Henn, the other in the *Harvard Law Review* by the estimable Benjamin Kaplan. The Henn review is quite favorable, noting “The work is undoubtedly the most thoughtful and thought-provoking treatment of American copyright law. Well organized with ample cross-references, it combines imagination, scholarship, readability, and practicality. Many problems not previously litigated or even raised are discussed, time-honored assumptions are challenged, and hornbook generalizations are properly qualified.” The Kaplan review is for the most part favorable, though the Royall Professor seems compelled to quibble in several places. I’m not sure whether a comment like this is

16 11 BULL COPYRIGHT SOC’Y 57 (1963). The other two “significant publications” announced were a “concise monograph” by Barbara Ringer and Paul Gitlin published by the Practicing Law Institute, and the Arthur Fisher Memorial Edition of *Studies on Copyright*, an important step in the revision of the 1909 Act.


18 *Id.* at 208.


21 Henn, *supra* note 19, at 1149.
praise or not: “Undeterred by the possibility that passage of a revision bill will render much of his work steeply obsolescent, Professor Nimmer presents a treatise analyzing the current statute and adjacent doctrine. Professor Nimmer hardly refers to the revision efforts, past or present, but his book is by necessary implication a brief for reform of the statute. He pulls apart the particulars of the law and demonstrates that many of them are aimless, stultifying, unclear, or otherwise inadequate.”

I note that David takes after his father in this latter respect; I have heard a number of his excellent presentations making similar accusations as to portions of the 1976 Act. Ultimately, Professor Kaplan concludes, “Well, if these are defects, they are mostly defects of omission, and Professor Nimmer can catch up with them in due time by means of more replacement pages which, one hopes, will some day not have to be disfigured by multitudinous copyright notices. Meanwhile, he deserves thanks and applause for a solid piece of work.”

Subsequent Volumes of the Bulletin continue to digest Mel’s scholarship. Volume 13 cites The U.S. Copyright Law and the Berne Convention, presciently noting that the U.S. joining Berne is “well worth the effort.” Four Nimmer articles are digested in Volume 16. Volume 17 (1970) is notable in at least two respects. First, Professor Nimmer delivered the first Donald C. Brace Memorial Lecture in 1970 and of course it was published in the Bulletin, a practice that continues to this day. Second, that lecture is entitled Copyright vs. the First Amendment, illustrating one of Professor Nimmer’s other passions, freedom of speech, which of course led to another treatise on that topic. But that’s a story for another day. Volume 18 (1970–71) cites another important Nimmer article on that topic, Does Copyright Abridge the First Amendment Guaranty of Free Speech & the Press, adapted from his Brace lecture. Volume 19 (1971–72) includes Nimmer’s short but muscular Comment on the Douglas Dissent in Lee v. Runge, a critical assessment of some aspects of that dissent. That Volume also announces the publication of Nimmer’s casebook, described as “an up-to-date casebook on copyright and related rights,” and Volume 20 (1972–73) announces the publication of a supplement to the casebook. It also includes the penultimate reference to one of Professor Nimmer’s writings, an article on Proprietary Rights, Residual Rights and Copyright in Cartridge TV in the U.S. and Canada.

22 Kaplan, supra note 20, at 1095.
23 Id. at 1097.
24 2 Copyright 94 (1966).
A Story of Two Anniversaries

Sadly, Professor Nimmer’s last writing for what was by then called the *Journal of the Copyright Society of the U.S.A.* was a memoriam for Alan Latman in Volume 32 (1984–85), and, finally, Volume 33 (1985–86) includes a set of memorial essays for Professor Nimmer himself.

### III. CITATIONS BOTH DIRECTIONS

Having observed the birth of the Treatise, articles in the *Bulletin* soon included citations to the Treatise. The first such citation was in Volume 11 (1963–64), by Robert Hadl entitled *Parody Lyrics – The ‘Mad’ Magazine Case.* Footnote 20 cited the Treatise for a discussion of “access” in copyright law. There were four more citations to the Treatise in articles in that Volume of the *Bulletin*; one to Nimmer’s discussion of *Baker v. Selden,* in an article by John Schulman entitled *The Copyright Law – Is It a Roadblock to Information Retrieval?*, and three citations in an article by Reed Lawlor entitled *Aspects of Computer Usage.* So in the same volume that announced the publication of the Treatise and contained its first review, the Treatise had taken off, cited five times in three articles.

Similarly the Treatise cited articles from the *Bulletin*. Corey Field, who also has an essay in this Issue, owns a copy of the first edition of the Treatise, (with a few substituted 1964 updated pages), and he kindly checked for me whether that edition cited to the *Bulletin*. He told me that it contains cites to four *Bulletin* articles in two footnotes. The first was in a portion of the Treatise dealing with the complex problem of the notice requirement in foreign publications. It cited a notice about new Copyright Office Regulations in Volume 6 (1956–57) of the *Bulletin*. I believe the regulations about notice on foreign editions changed after the U.S. adhered to the Universal Copyright Convention about that time, and the *Bulletin* was a timely source for new developments. The other reference is in a footnote dealing with library and educational photocopying as fair use. Corey found it notable for citing three articles on fair use in this connection from the same publication in one footnote. The articles cited were in Volumes 5, 9 and 11. As noted above, Mel was on the Editorial Board, including for Volumes 5 and 9, so he would have been quite familiar with the contents of those Volumes. He was a Trustee, but apparently

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32 101 U.S. 99 (1879).
33 11 *Bull. Copy. Soc’y* 369 (1964)
34 *Id.* at 380
35 Note that citation is to the first official “article” published in the *Bulletin.*

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not on the Editorial Board for Volume 11. As also noted above, Volume 11 holds a special place in this history. It included the announcement of the publication of the Treatise, the first review, and the first article citing the Treatise. Yet Professor Nimmer also cited an article from that Volume in the Treatise.36 The symbiotic relationship was perfected, and continues in the twenty-first century. My library assistant, Lisa Schultz, kindly checked for me how many citations to the *Bulletin or Journal* there are in the current version of the Treatise. Her research disclosed eighty-three citations. Interestingly, twenty-one of them are in the Treatise § 8C.04, dealing with droit de suite and the California Art Resale statute.

Reviewing these thirty-two volumes of the *Bulletin/Journal* illustrated the arc of a remarkable career, including the birth of the Treatise whose fiftieth anniversary we celebrate in this sixtieth volume of the *Journal*. I am sure there are countless citations to the Treatise in each issue of the *Journal*. We are also fortunate to publish some of David Nimmer’s fine articles. As co-editor-in-chief, a long-time member of the Editorial Board, and former Society Trustee, I look forward to the next fifty years together.

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36 Although we think it is possible that Mel knew of the article before its publication and cited it in his Treatise, published before the article cited, it may be that this was added in the first 1964 revised pages.