INTRODUCTION

From our present perspective in 2013, Nimmer on Copyright by Melville B. Nimmer and David Nimmer has become a monument of legal scholarship: eleven volumes cited almost 3,100 times by the courts since it was published in 1963. But all enduring monuments must first be carved out of stone, in a painstaking process where every chisel stroke must follow the grand design. And all legal treatises, no matter how authoritative on the law, must begin and end with words. The better the words, the better the law.

In honor of the fiftieth anniversary of the publication of Nimmer on Copyright, we return to the original source, the one-volume 1963 first edition written by Melville B. Nimmer, to consider how a consummate legal writer used words to express himself on the topic of copyright law, and in so doing created a style of writing, philosophy of enquiry, and standard of uncompromising questioning about the law that still resonates. After fifty years, we best honor the work of a legal writer the way we best honor any author, by reading his words as they were first offered to the world.

I. REVIEW


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infringement case under the 1909 Copyright Act. Unwittingly, Judge Cooper thus became the first jurist to not only cite to, but to also quote from, a new copyright law treatise published the previous year on July 31, 1963: Melville B. Nimmer’s *Nimmer on Copyright*.3

Judge Cooper also became the first “Post-Nimmer” jurist to have the mixed pleasure of later reading a critique of his holdings in the very treatise that he previously cited with approval. In the 1964 Supplement, after explaining some problems with Judge Cooper’s reasoning, Nimmer pronounced that the holding would nevertheless “appear to be defensible.”4 The case also afforded Nimmer the pleasure of using for the very first time the circular citation parenthetical, whereby case cites in *Nimmer on Copyright* note that the judicial opinion, in turn, cited to *Nimmer on Copyright*, thusly: Nom Music, Inc., v. Kaslin 227 F. Supp. 922 (S.D.N.Y. 1964) (citing this treatise).5

2 See Nom Music, Inc., v. William Kaslin, 227 F. Supp. 922, 924-25 (S.D.N.Y. 1964). Holding for the plaintiff on summary judgment, Judge Cooper found that the composer of the 1957 doo-wop song *A Thousand Miles Away*, which had reached number 5 on the Billboard R&B charts in a recording by The Heartbeats, was liable for copyright infringement because after conveying the copyright in the song to the plaintiff, the songwriter reissued virtually the same song under a new title, *Daddy’s Home*. At issue in the case was whether the plaintiff, who had been assigned copyright in the song, had injected the song into the public domain by publishing the sheet music with a copyright notice in the name of the plaintiff prior to the plaintiff's official recordation of the assignment at the Copyright Office in Washington, D.C. Under the 1909 Copyright Act, the notice had to indicate the owner of record of the copyright, thus the defendant alleged that prior to recordation, the plaintiff was not yet the “owner of record,” and therefore the notice was defective. *A Thousand Miles Away* is included in the soundtrack for the 1973 film *American Graffiti*. See also *A Thousand Miles Away*, WIKIPEDIA, http://en.wikipedia.org/wiki/A_Thousand_Miles_Away (last visited Nov. 26, 2012). Judge Cooper later decided high-profile cases involving Jacqueline Kennedy Onassis’s right of privacy (*Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), aff’d, 487 F. 2d 986 (2d Cir. 1973)); and Curt Flood’s unsuccessful challenge against the major league baseball reserve clause (aff’d in *Flood v. Kuhn*, 407 U.S. 258 (1972) (extensively quoting with approval Judge Cooper’s lower court opinions)).


4 See Nimmer 1963/64, supra note 3, § 123.4, at 537.

5 See id. § 139.4 n.255.
Melville Nimmer the Writer

In the Preface to the treatise, Nimmer explained the “reasons which impelled me to undertake the writing of this treatise:”

It is not just that I believed there to be a need for a study in both depth and breadth of the manifold problems which confront lawyers and judges in copyright matters. More than that, the inordinate number of “open questions” which pervade the law of copyright offer both a challenge and a charm to this area of the law which is almost, if not entirely, unique. This, it seems to me, is in part due to the fact that copyright represents an application of one of the oldest branches of the law, property, to one of the more striking recent developments of our contemporary culture, the phenomenon of mass communications. Moreover, this sophisticated concept of property in intangibles is fascinating and elusive in part because of the origin of its subject matter. Here the law comes to grips with what William Faulkner has described as the process of “creating out of the materials of the human spirit something which did not exist before.”

Here, Nimmer sets forth the duality of opposing forces that so often guide his enquiry: the “challenge and charm” in writing about the tension between copyright law and disruptive new technologies. Yet he also acknowledges fascination with, and indeed inspiration from copyright law’s unique quality: it seeks to regulate the works of the human imagination.

_Nimmer on Copyright_ was not the first treatise on the subject of copyright law in the United States, but by the time it was published in 1963, its several antecedents were badly outdated, having been published in the format of hard bound books not subject to the annual updates we now take for granted as a way to keep a legal treatise current. But they were impressive publications none the less, with their size, scope and sheer heft as gigantic volumes setting the standard for any treatise that followed.

We know Nimmer was familiar with these antecedents because he cites to them, including what was then known as _Drone on Copyright_ by Eaton S. Drone, a 774-page work published in 1879, still cited by Nimmer in 1963 in a footnote that uses Drone to illustrate a point about another literary giant of the past, Homer: in a discussion on whether works must be in a tangible format in order to qualify for copyright, Nimmer notes that “Drone states that according to Greek scholars _The Iliad_ was handed down in oral form from generation to generation “for ages” before it was ever reduced to written form.”

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6 See _Nimmer 1963/64_, supra note 3, at v.
7 Most of the pre-Nimmer copyright treatises discussed here can be viewed in the UCLA Law Library.
In 1987, The Legal Classics Library reprinted Drone’s treatise as a historical paragon of copyright scholarship, accompanied by an essay pamphlet by copyright scholar L. Ray Patterson imparting the otherwise forgotten information that Drone was considered authoritative in its time, earning the unofficial title *Drone on Copyright*. It was this linking of author and topic, along with the examples of *Wigmore on Evidence* and *Prosser on Torts*, which encouraged Nimmer to insist on a similar eponymous title for his treatise.10

Other copyright treatises cited by Nimmer include *American Copyright Law* by Arthur W. Weil (1917, cited at p. 14, note 63); *An Outline of Copyright Law* by Richard C. DeWolf (1923, cited at p. 3, note 11); and *Copyright Law and Practice* by Leon H. Amdur, a massive 1,332 page tome (1936). Also in existence prior to *Nimmer on Copyright* were *The Law of Copyright and Literary Property* by Horace G. Ball (Matthew Bender & Co., 1944, 976 pages); and the beautifully written *Copyright: Its History and Its Law* by Richard Rogers Bowker (Houghton Mifflin Co., Boston & New York, 1912).11

While Nimmer had the opportunity to learn from the above antecedents regarding how a copyright law treatise might be organized, his own original solution is evident in the overall structure of the treatise, which begins and ends at two opposite extremes, as if part of a continuum.

First, on the “micro” level, *Nimmer on Copyright* immediately announces its intention to derive all analysis and rationale from precedent with an opening chapter that is startlingly devoted entirely to a thirty-page analysis of the twenty-seven words that make up the Copyright Clause of the United States Constitution. At the opposite extreme, the “macro” level, Nimmer concludes the treatise with an entire chapter devoted to “The Law of Ideas,” strictly speaking a topic beyond the borders of copyright law.12

10 Anecdote provided courtesy of David Nimmer.

11 R.R. Bowker later founded the well-known bibliographic services company, “R.R. Bowker,” as well as Publisher's Weekly and Harper magazines, but his role as a non-lawyer copyright law scholar has been largely forgotten. Of all the treatises that existed prior to Nimmer, Bowker’s was the most beautifully written, filled with references to Homer, Milton, Shakespeare, etc.

12 Every treatise author must divide a vast topic into chapters that best express the legal principles, and no two treatises take the same approach. Nimmer’s solution to the problem of how to best organize copyright law into separate chapters was as follows: 1: The Constitutional Basis of Copyright; 2: The Subject Matter of Copyright; 3: Derivative Works; 4: Publication; 5: Persons Entitled to Copyright; 6: Co-Ownership of Copyright; 7: Statutory Formalities; 8: The Nature of the Rights Protected by Copyright; 9: Duration and Renewal of Copyright; 10: Assignments, Licenses, and Other Transfers of Rights; 11: Infringement Actions–Procedural Aspects; 12: Infringement Ac-
In Chapter 1, a tour de force of legal writing and scholarship, Nimmer breaks down the copyright clause of the Constitution\textsuperscript{13} into sub-sections that consider each of the relevant terms, comparing them to the 1909 Act’s detailed provisions, and analyzing the extent to which the 1909 Act approached the boundaries set in the Constitution\textsuperscript{14}. The organizational layout for Chapter 1 is so original in its focus on each phrase as to merit listing it here:

Chapter 1: The Constitutional Basis of Copyright

§1. Introduction
§2. The Copyright Clause
§3. “To promote the progress of science and useful arts. . .”
§4. “. . .by securing. . .”
§5. “. . .for limited times. . .”
§6. “. . .to authors. . .”
§7. “. . .the exclusive right. . .”
§8. “. . .to their respective writings. . .”
§9. An Alternative Constitutional Basis: The Commerce Clause

In another telling example of how Nimmer’s devotion to detail is reflected in the overall organization of the treatise, Chapter 10 on “Assignments, Licenses, and other Transfers of Rights” offers the following subsections, each of which devotes several paragraphs to analysis of a single “recurring phrase” in contractual terms:

§129. Judicial Interpretation of Recurring Phrases
129.1 “assign the copyright”
129.2 “big time”
129.3 “book form”
129.4 “every printed copy”
129.5 “net proceeds”
129.6 “remake rights”
129.7 “sketch”
129.8 “writer”

\textsuperscript{13} U.S. Const. art. I, sec. 8, cl. 8, cited at § 3.1, at 3, Stating that Congress shall have the power “To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

\textsuperscript{14} As compared to the present day and the 1976 Copyright Act, the 1909 Copyright Act discussed in *Nimmer on Copyright* arguably lived in a greater tension between the scope of the Constitutional provision and the scope of the legislation itself. Thus, Nimmer’s focus on each word of the Copyright Clause was insightful because it provided perspective on the gulf between copyright legislation as enacted and the potential scope of rights under the Constitution.
At the opposite end of the spectrum, the last chapter of the treatise, Chapter 15, goes beyond the boundaries of copyright law *per se* to consider “The Law of Ideas,” basing the chapter on Nimmer’s own 1954 influential article published in the Southern California Law Review.\(^{15}\)

In *Nimmer on Copyright*, everything is questioned, everything is examined, and nothing is taken at face value without thorough research, analysis, and context. Question marks abound in the text, followed by thorough answers. This classic Socratic method of legal writing informs the overall structure of the treatise via sub-sections whose title announces their purpose to offer criticism of a doctrine, or examination of the rationale behind the law. Examples include sub-sections entitled “Criticism of Baker v. Selden;”\(^{16}\) “The Rationale Underlying the Theory of Joint Authorship;”\(^{17}\) “Rationale and Criticism of the Manufacturing Clause;”\(^{18}\) “Criticism of the Multiple Performance Doctrine;”\(^{19}\) and “The Rationale of the Renewal Concept.”\(^{20}\)

In a work of over 1,000 pages, examples of exemplary legal writing in service to explaining the law abound. But Nimmer never misses an opportunity to exhibit leadership, to set forth his view of how the law should proceed in future cases, inviting judges to follow his lead. For example, in discussing the copyrightability of the then “new technology” of magnetic video tape in Section 25.3, part of Chapter 2 on The Subject Matter of Copyright, Nimmer devotes six pages to review of technological facts, industry custom and usage, statutory construction, Copyright Office regulations, and legal precedent in establishing what Nimmer hopes will become persuasive legal precedent in the future, concluding that “For the reasons suggested above, it seems probable that the courts will endorse this view when the issue is presented for adjudication.”\(^{21}\)

In another example of Nimmer offering his own rationale “not found in the [legislative] Committee Report” yet based solidly on precedent and comparison of industry custom to copyright law, a discussion of the difference between statutory damages for newspapers and magazines in the 1909 Copyright Act concludes with the following observation:

> A more cogent basis for singling out newspapers in the statutory damages provision may be found in a rationale not reflected in the Committee Report. The exigencies of time attendant to the publishing of a daily newspaper may render an adequate check of the copyright status of photographs to be reproduced therein much more difficult than in the case of

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\(^{16}\) Nimmer 1963/64, *supra* note 3, ch. 2, §37.3.

\(^{17}\) Id. ch. 6, § 72.

\(^{18}\) Id. ch. 7, § 96.5.

\(^{19}\) Id. ch. 8, § 107.45.

\(^{20}\) Id. ch. 9, § 113.

a weekly or monthly magazine. This factor when viewed in conjunction with the public interest in full and prompt news reports would seem to justify reducing the newspaper publisher’s risk of incurring statutory damages for copyright infringement.\textsuperscript{22}

While Nimmer is skilled at applying legal precedent in making his arguments about the law, some of the finest moments in the treatise occur when he simply uses examples from the real world of the creative arts to illustrate a copyright point. The references include mention of Thornton Wilder, Shakespeare, Hemingway, Mark Twain, and other greats. For example, in discussing the copyrightability of “Dramatic Compositions” under the 1909 Copyright Act, Nimmer mentions Thornton Wilder’s work as well as Shakespeare’s, noting that “Verisimilitude in representation is not required, since a work is no less a drama though presented without scenery (as in Thornton Wilder’s ‘Our Town’) or without costumes (as in the Mercury Theater production of ‘Julius Caesar’).”\textsuperscript{23} And in a section discussing protection for fictional or other original elements contained in factual works, Nimmer discusses a case involving an allegedly factual account of interplanetary spirits, noting “one wonders whether the [court] would have invoked the same defense against Sir Arthur Conan Doyle on the grounds his Sherlock Holmes stories are presented as factual accounts by Dr. Watson.”\textsuperscript{24}

In discussing the rationale for the rule that public performances do not constitute publication, Nimmer discusses the mechanics of producing a play, citing for his authority to \textit{Act One}, the 1959 autobiography of Broadway director Moss Hart: “The practice of making numerous revisions in a play during the period of public performance is well known. To require a deposit in the Copyright Office before permitting a revision to be performed in the pre-Broadway runs or even thereafter would obviously seriously hamper the development of a play.”\textsuperscript{25} And in discussing the types of works subject to the right of public performance for profit, Nimmer notes the distinction between musical and literary works, noting:

“it may well be questioned, however, whether this rationale is equally applicable to nondramatic literary works. A public reading of selections from Hemingway or Mark Twain even if not for profit is very likely to reduce the potential audience available for a subsequent for profit reading of the same work. The same would be true in some, but probably in a lesser degree with respect to the reading of poetry.”\textsuperscript{26}

\textsuperscript{22} \textit{Id.} § 14.3, at 60.

\textsuperscript{23} \textit{Nimmer} 1963/64, \textit{supra} note 3, § 16.1, at 66.

\textsuperscript{24} \textit{Id.} § 29.4, at 131.

\textsuperscript{25} \textit{Id.} § 53.2, at 211.

\textsuperscript{26} \textit{Id.} § 107.32, at 403.
Perhaps the publication date of 1963 had some influence on Nimmer’s discussion of substantial similarity, in the sub-category of “Comprehensive Nonliteral Similarity,” where Nimmer extensively analyses the similarities between the “recent Broadway production and motion picture, West Side Story with Shakespeare’s Romeo and Juliet upon which it was based,” noting that the following elements (among others) are found in both works:

1. The boy and girl are members of hostile groups.
2. They meet at a dance.
3. They acknowledge their love in a nocturnal balcony (fire escape) scene.
4. The girl is betrothed to another.
5. The boy and girl assume the marriage vows.
6. In an encounter between the hostile groups the girl’s cousin (brother) kills the boy’s best friend.
7. In retaliation the boy kills the girl’s cousin (brother).
8. As a result the boy goes into exile (hiding).
9. A message is sent to the boy at his retreat, explaining a plan for him to meet the girl.
10. The message never reaches the boy.
11. The boy receives erroneous information that the girl is dead.
12. In grief the boy kills himself (or permits himself to be killed). 27

Nimmer further opines that West Side Story is “inspired” in a footnote: “Since Romeo and Juliet is in the public domain it was not only permissible but indeed an inspired idea to adapt the classic tale to . . . New York City.”

Such observations on creative works and his enthusiasm for using them to illustrate copyright principles give the treatise depth, character, and conviction. In one delightfully vivid and original passage in the chapter devoted to The Law of Ideas, we encounter perhaps the only page in the treatise that does not have a single footnote, in a section entitled “Unsolicited Submission Voluntary Received.” Here, in order to illustrate a point about formation of contract in idea submission cases, Nimmer creates an extensive and original example, humorously but effectively evocative of an encounter in Central Park in New York:

Some perspective on this problem may be gained by analogizing to another form of public domain property. Suppose, for instance, Mr. A. wandering through the vast expanse of Central Park (or any other public park) becomes exhausted and wishes to rest but sees no available benches. At that point Mr. B emerges from behind nearby foliage and states, “I expect to be paid for what I’m about to disclose unless you tell me not to make the disclosure.” A says nothing, and so B goes on to say, “There is an unoccupied bench behind yonder hedge. You may use it.”

27 Id. § 143.11, at 624.
If, acting upon this suggestion, A does in fact sit on the indicated bench, is this conduct which should imply a promise by A to pay B?" 28

Nimmer also enjoys quoting, and praising, “felicitous” legal writing, for example in a discussion of originality distinguished from novelty, he turns to Judge Learned Hand’s opinion in Sheldon v. Metro-Goldwyn Pictures Corp., introducing the quote with praise of Hand’s writing style:

With his characteristic felicity of phrase, Learned Hand articulated this principle as follows:

“. . . if by some magic a man who had never known it were to compose a new Keats’ Ode On a Grecian urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats.” 29

In a discussion of the Copyright Clause of the Constitution and the context of a liberal construction of the term “writings,” Nimmer again quotes Hand:

Judge Hand . . . denied the proposition that the Constitution “embalms inflexibly the habits of 1789.” Rather, he stated: “its grants of power to Congress comprise not only what was then known, but what the ingenuity of men should devise thereafter . . . [I]t is not a strait-jacket, but a charter for a living people.” 30

Justice Oliver Wendell Holmes, who famously presided over Supreme Court copyright cases such as Bleistein v. Donaldson Lithographing Co.;31 Kalem Co. v. Harper Brothers;32 White-Smith v. Apollo;33 and Herbert v. Shanley Co.34 is quoted extensively, as are Holmes’ other writings on the law. Holmes’ eloquence and common sense is a recurring inspiration for Nimmer. In a discussion regarding whether publication of phonograph records also constitutes publication of the underlying musical composition as seen from the perspective of 1963 (an issue settled only decades later via legislation35), Nimmer seems frustrated by holdings in the courts, and ever the champion of logic, takes solace by quoting from Justice Holmes’

28 Id. § 170.3, at 739
29 Id. § 10.1, at 32-33 (citing Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 54 (2d Cir. 1936), aff’d, 309 U.S. 390 (1940)).
30 Id. § 8.1, at 15 (citing Reiss v. National Quotation Bureau, 276 Fed. 717 (S.D.N.Y. 1921)).
31 188 U.S. 239 (1903) (circus poster art worthy of copyright protection).
32 222 U.S. 55 (1911) (motion picture infringed book on which it was based without permission).
33 209 U.S. 1 (1908) (musical compositions not infringed by unlicensed mechanical devices embodying the composition such as piano rolls; later superseded by statute creating compulsory mechanical licenses) (Holmes, J., concurring).
34 242 U.S. 591 (1917) (rights reserved to copyright owner of song include nondramatic public performance).
1881 book entitled *The Common Law* which included the maxim “The life of the law has not been logic; it has been experience.”36

Nimmer’s own experience as a lawyer informed his interests in copyright law, including a position at Paramount Studios, followed by private practice from an office near the studio, and then a position as General Counsel for the Writers Guild of America, prior to joining the UCLA Law School faculty in 1962. Given his work experience in the studios and with copyright creators in Hollywood, he had valuable real-world experience to inform his judgments, but wielded that sword subtly, as in the following footnote in a section discussing “The Value of Renewal Right to Authors,” in which Nimmer mentions Writers Guild agreements that Nimmer may have indeed written himself:

Collective bargaining agreements of labor unions such as the Writers Guild of America do not reserve the renewal copyright term to writers since as employees for hire both the original term and the renewal term of copyright are owned by the employer. However, such agreements do provide for the reservation of certain rights to writer-employees but these are not framed in terms of the renewal copyright term. See Art. 35 of the Producer-Writers Guild Theatrical Basic Agreement of 1960 and Art. 20 of the 1960 Writers Guild of America Television Film Basic Agreement.37

Also a Nimmer favorite was the famous quote from Blackstone’s 1769 *Commentaries on the Laws of England*, that the common law: “hath been used so long whereof the memory of man runneth not to the contrary.” This resonating, Biblical-toned quote is used in the text, and is paraphrased in the Preface as part of a dedication to Nimmer’s children, “whose memory almost runneth not prior to the injunction, “Don’t bother Daddy. He’s working on the book.”

II. POSTSCRIPT

By 2013, the Fiftieth Anniversary of *Nimmer on Copyright*, the treatise has grown to eleven volumes, including four volumes of text and seven volumes of appendices. Melville Nimmer lived until 1985, thus his sole authorship endured only for a curtailed “first term” of twenty-two years. Subsequently, his son David Nimmer has been the sole author for a fruitful “renewal term” of twenty-eight years, and counting.