Stewarding the Common Law of Copyright

STEWARDING THE COMMON LAW OF COPYRIGHT

by Shyamkrishna Balganesh*

INTRODUCTION

Copyright law is today perceived as principally statutory in origin. The Copyright Act of 1976 is thought to have codified most questions of copyright policy and doctrine, and delegated a fairly limited set of questions to courts for them to resolve incrementally on a case-by-case basis.¹ This is in contrast to prior copyright enactments, which were brief and open-ended in structure, and seemingly envisaged a more active role for courts in rule- and policy-making. Judge Leval thus notes how over time, the idea of a constructive “partnership” between the legislature and courts in making and developing copyright law that once existed, has all but disappeared, and that today “[c]ourts are regarded with suspicion” in the belief that they ought to defer to the intentions of Congress.² On the face of things then, courts are today believed to have a fairly minimal role to play in the copyright system, restricted to interpreting the statute and applying it to individual cases.³ Broader questions — including ones about copyright’s proper goals and scope — are thought to be within the sole purview of Congress, except when expressly delegated to courts,⁴ or when infused with constitutional significance.⁵ Justice Brandeis’s famous claim that “[c]ourts are ill-equipped to make the investigations” needed to determine the scope and extent of exclusive rights in information is in many ways the dominant way of thinking about copyright law and reform.⁶

The downsides to this approach are multiple. First, it commits copyright doctrine to a uni-dimensional justificatory account, as determined by

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¹ See Joseph P. Liu, Regulatory Copyright, 83 N.C. L. Rev. 87, 103 (2004) (discussing the regulatory turn that the copyright law has taken since 1976, and noting how this approach “seeks to specify the precise results and lay them out in the statute itself”).


³ Id.


Congress in its legislative fact-finding. As a result, copyright is today routinely justified almost exclusively as an incentive to create, despite the lack of empirical support for the idea and indeed the deep disconnect between its theory of incentives and its actual structure. Second, it ensures that copyright law reform is slow, broad-based, and premised on a one-size-fits-all approach, rather than cautious, incremental, and temporally responsive to technological change. New technologies and developments necessitate new solutions, and the idea of legislative supremacy in the area of copyright law impedes courts’ willingness and ability to develop them contextually and experimentally. Third, and perhaps most perniciously, it ensures that the copyright system (and as a result, copyright doctrine) is almost entirely the product of political compromises between industry actors; with the public and courts relegated to bearing the externalities of those compromises and/or alleviating their unforeseen burdens.

For a variety of reasons then, copyright law and policy would be better off if courts were active participants in the law-making process. I have elsewhere developed a fuller account of how and why courts’ greater involvement would benefit law-making in the copyright (and overall intellectual property) context, in pragmatic terms. Yet in relation to copyright law at least, the fact of the matter is that courts have indeed remained directly involved, even in the face of heightened congressional activity in the area. Despite the illusory dominance of the belief that courts ought to defer to Congress with regard to copyright policy, federal

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8 See Jessica Litman, Real Copyright Reform, 96 IOWA L. REV. 1, 3 (defining the current copyright statute as a “swollen, barnacle-encrusted collection of incomprehensible prose”). For an account of the problems with copyright’s one-size-for-all approach, see Michael W. Carroll, One for All: The Problem of Uniformity Cost in Intellectual Property Law, 55 AM. U. L. REV. 845, 875 (2006).

9 See generally Christopher S. Yoo, The Impact of Codification on the Common Law Development of Copyright, in INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyam Balganesh ed. forthcoming 2013).

10 For general overviews of the copyright law-making process, see Jessica Litman, Digital Copyright (2006); William F. Patry, Copyright and the Legislative Process: A Personal Perspective, 14 CARDOZO ARTS & ENT. L.J. 139 (1996).

courts across the country have continued to have their say in the direction that the copyright system and copyright policy more generally ought to take, through a dialectic and pragmatic interaction with copyright doctrine. Reminiscent of the now-disbanded “declaratory theory” of common law decision-making, wherein judges asserted that they were merely declaring or applying the law, rather than actively making it, courts in copyright law cases continue to mold and refine copyright rules and principles that facially at least, have their origins in the copyright statute. In practice then, copyright adjudication today is (and attempts to be) palpably hyperrealist, despite its superficial and rhetorical adherence to formalist textualism. Judge Boudin’s concurring opinion in *Lotus v. Borland* is perhaps the best example of this realism in action, wherein after examining the consequences of allowing either side to prevail, he introspectively and with full candor, conceded that in the dispute at hand “the question is not whether Borland should prevail but on what basis.”

While doctrine thus forms a formal constraint on courts in copyright cases, it is routinely overcome by a realist mindset that is nonetheless rarely ever articulated in express terms. All the same, it manifests itself in copyright opinions on a fairly routine basis. It is this body of law, developed in realist and pragmatic fashion, and often times underneath the formalist cloak of textualism, that I refer to here as the common law of copyright. As a preliminary matter, it is important to emphasize that the common law of copyright that I have in mind isn’t just interstitial common law, a term that refers to judicial law-making that is used to fill interpretive gaps in statutory enactments; it is more than that. Whereas interstitial common law is seen as perfectly legitimate, and on occasion as a form of actual delegation of law-making power to courts, the common law of copyright isn’t an exercise of delegated power. As a structural matter, it is on the other hand mildly subversive, originating in a judicial unwillingness to let the reins of the copyright system fall completely into the hands of the legislature. Among other strategies, it thus involves imbuing ideas and concepts expressly mentioned in the copyright statute with additional (and contextual) meaning, consciously supplementing the statute with new

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12 See 1 WILLIAM BLACKSTONE, COMMENTARIES 69 (15th ed. 1809); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (University of Chicago Press 1971) (1713); Linkletter v. Walker, 381 U.S. 618, 623 (1965) (stating that under the declaratory theory, “rather than being the creator of the law [the judge] was but its discoverer”); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (judges make law “as though they were ‘finding’ it- discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be”).


forms of liability or defenses, or indeed interpreting the structure of the copyright statute to stand for a policy position when its specific provisions are silent or ambiguous on the matter. In short then, despite Congress’s efforts to codify the core of copyright’s fundamental rules and principles in legislation, courts continue to be active participants in developing copyright law and policy, except that unlike in the past, their involvement is characterized by a marked reluctance to acknowledge its existence.

The common law of copyright is thus as resilient as ever, having survived the onslaught of the codification effort of 1976. In this Essay, I explore a hitherto under-appreciated aspect of the common law of copyright and its survival over the last several decades: the role that Nimmer on Copyright, the single-most influential treatise on U.S. copyright law, has had on its evolution, legitimacy, transparency, and robustness. Originally published in 1963, the Nimmer Treatise has since been continuously updated — first by Mel Nimmer, and later by his son, David Nimmer. By no means the only treatise on copyright law, its influence has nonetheless far exceeded that of its competitors — to about 3,000 citations among courts the world-over. Rarely does a federal court deliver a copyright opinion, especially in a case where the law isn’t completely settled, without citing to the Nimmer Treatise (even if only to disagree with it), and indeed this has prompted some to characterize it as a “hegemon” in the field.

The focus of my Essay is less with the substantive contributions of the Nimmer treatise, of which there are indeed many, and more with the structural role that it plays in the development of the common law of copyright. In addition to undertaking a comprehensive survey of the case law on copyright, and discussing or citing every last copyright case decided by a federal court in the country, the treatise performs the important role of synthesizing these cases in the search for some semblance of coherence in the doctrine. Yet, what is to be appreciated though is that in undertaking this synthesis, the treatise never claims to be either positive or neutral in both orientation and outlook. Instead, the treatise is both supportive and critical of courts and their reasoning in cases, and at times explicitly suggests how courts ought to approach certain questions. In blending the positive and the normative into a single narrative, without claiming to be neutral, the treatise avoids the formalistic trap of appearing to merely “restate” the law. The treatise is much more than a simple positive restatement of existing copyright law; rather, it remains an active participant in the law-making debate.

15 See infra Part I, for a discussion of how courts have employed these strategies.
16 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (2013).
Understanding the role that the treatise plays in stewarding the common law of copyright requires appreciating the somewhat subtle mechanisms and techniques that it employs in its discussion and analysis of copyright doctrine and opinions. In this Essay, I unbundle three such critical mechanisms, to show how they are crucial to the treatise’s role in facilitating the development of a common law of copyright. The first, and perhaps most important of these, is the idea of *reflexive transparency*. It entails the treatise’s express recognition that courts are engaged in law-making when deciding copyright cases, and its willingness to encourage the process along by offering its own commentary on the law developed by courts, and then dialogically highlighting judicial opinions that adopt the treatise’s synthesis and analysis. In so doing, it thus opens up a chain of communication with courts, moderates the conversation between different courts, all while openly acknowledging that courts are being normative even if only incrementally. Second, the treatise consciously avoids any significant discussion of copyright theory, and instead takes the institution as a given. This pragmatic refusal to engage in a justificatory endeavor is important, for it aligns itself with courts that have very little say in existential questions involving copyright, and must instead set their theoretical curiosities aside in working with the institution and its doctrines. This isn’t of course to suggest that either the treatise or indeed the common law of copyright are in some sense anti-theoretical. To the contrary, it emphasizes that the theoretical ambitions of both are intertwined with the fortunes of various doctrinal questions, with the latter forming the basis of the former. I call this mechanism, the treatise’s *justificatory agnosticism*. The third feature is the treatise’s open adoption of a prescriptive and normative approach in both its synthesis and analysis, its *explicit normativity*, so to speak. Instead of purporting to remain purely descriptive, and then undermining its own credibility, the treatise readily adopts a normative approach, both in its synthesis of case-law, and in advocating a vision for individual doctrinal questions. What distinguishes this explicit normativity from the treatise’s justificatory agnosticism is that the former applies at a much more granular and analytical level, while the latter pertains to the overall functioning of the institution.

These three features, when put together, have played an important role in shepherding the common law of copyright, and judge-made copyright law, through the years. While their influence has varied from one substantive area of copyright law to another, in the aggregate they have undoubtedly had an important role in enabling the common law of copyright to exist, and grow. The argument of this Essay will proceed in two parts. Part I sets out the idea of a federal common law of copyright, traces its origins, and shows how it has continued to thrive despite repeated Congressional activity in the area. It illustrates the claim by examining three
important areas where courts have played an all-important role in the lawmaking process: the exclusion for useful articles, the work made for hire doctrine, and the award of reasonable attorney’s fees. Part II then shows how the treatise has developed mechanisms to facilitate courts’ development of the common law of copyright, and illustrates its use of the mechanisms using some of the same areas discussed in Part I. It highlights three important mechanisms that the treatise employs, which enable it to be an active participant in the development of the common law of copyright: its reflexive transparency in purpose, its refusal to engage in justificatory debates about copyright, and its conscious normative orientation.

I. THE FEDERAL COMMON LAW OF COPYRIGHT

As a purely historical matter, copyright’s origins are entirely statutory. The Statute of Anne, the first copyright statute is taken to have been the first source of law on the subject, and later courts interpreted it as abrogating any “common law copyright” that might have pre-existed its enactment. Ever since, the principal source of law for copyright has remained legislation. In the U.S., the Copyright Act of 1790 formed the first federal copyright statute. The federal copyright statute has since been comprehensively revised in 1831, 1870, 1909, and most recently in 1976.

In contrast to prior copyright acts, which contained loosely worded rules and were characterized by their “brevity and simplicity,” the Copyright Act of 1976 sought to undertake a comprehensive codification of copyright law. Rules that had previously been the creation entirely of courts were under the Act statutorily codified. Even in domains where Congress recognized the importance of common law-like incremental rule development for a principle, it thought it necessary to assert its law-making power by codifying the principle into a common law provision. The fair use doctrine is a prime example. Entirely the creation of courts in the nineteenth century, the doctrine found no mention whatsoever in copyright legislation through the Copyright Act of 1909. The 1976 Act, however, thought it necessary to depart from this. While the legislative history accompanying the Act acknowledges that it wasn’t meant to “freeze the

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18 See Lyman Ray Patterson, The Statute of Anne: Copyright Misconstrued, 3 Harv. J. Legis. 223, 223 (1965).
20 Patterson, supra note 18, at 223.
22 See Liu, supra note 1, at 94, 98-102.
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...that “courts must be free to adapt” it to changing circumstances, and that the codification was merely “intended to restate the present judicial doctrine.” Congress nonetheless sought to give it some certainty — in the form of four fair use factors. Implicit in this codification, and despite assertions to the contrary, was the belief that the common law process of rule development provided insufficient guidance to actors, and that Congress had to weigh in on the issue to remedy this, even if only in a non-binding fashion. The comprehensive codification was thus a reassertion of legislative supremacy in the domain of copyright law-making, which echoes Judge Leval’s suggestion that Congress consciously intended to minimize the independent role of courts in copyright law-making.

The comprehensive codification certainly had some effect on the way that courts approached copyright cases. Even palpably common law doctrines — such as fair use — had to now be understood through the four factors prescribed by the statute, even if they were non-binding; and courts began referring more directly to statutory provisions during their analyses. What is often unappreciated though is that despite the codification, courts in copyright cases nonetheless went about developing the law incrementally. Unlike in the past though, they now had to weave their incremental rule development into a narrative that took the statute as its starting point, but nonetheless recognized the statute to be non-exhaustive of the rule and principle in question. This often meant re-interpreting terms in the statute to imbue them with new meaning, taking Congress to have been silent on an issue by interpreting a provision as not applying to the situation in question, or at times simply recognizing the inadequacy of the statute.

Unlike simple interstitial common law, which is created through statutory interpretation and extension to situations not contemplated by the statute, what courts did (and continue to do) with the Copyright Act was thus mildly subversive. This subversive element was often called out by strong dissenting opinions that accused the majority — which was developing the law — of overriding, or failing to defer to, Congress on the issue. The net result has been the flourishing of a federal common law of copyright, quite independent of the copyright statute, but of deep functional

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25 For an example, see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (developing the test of “transformative use” but cabining it using the four fair use factors). While it is certainly true that the Act itself doesn’t compel courts to rely only on these factors, it nonetheless compels them to begin their analysis through them. See 17 U.S.C. § 107 (2005) (noting that the factors “shall include”).
significance. Congress, it would seem, has acquiesced in this practice as well, having not once sought to step in, even in the face of conflicting interpretations — preferring to leave it to the Supreme Court to resolve the matter. Implicitly then, Congress seems to be a willing partner in the exercise. This pattern — of common law development — can be seen in most areas of copyright law, and I have chosen three to illustrate the point. The three areas that I have chosen aren’t the most obvious ones (in contrast to areas such as fair use, or substantial similarity), but instead represent some of the more bread-and-butter instances of copyright doctrine. Two relate to substantive doctrinal areas, while one concerns a copyright-specific remedy. That courts have had a major say in the development of rules here, is a testament to the overall pervasiveness of the common law method of rule development in copyright.

A. Exclusion for Useful Articles

The Copyright Act grants protection for “pictorial, graphic, and sculptural works.” In defining this category of works, the statute additionally provides that the design of a useful article is protectable only to the extent that its pictorial, graphic or sculptural features “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the work.” This definition is thought to embody the principle of “separability.” The legislative history of the provision additionally indicates that Congress intended such separability to have either a physical and conceptual element. Yet, when presented with the question of what separability actually means in practice, and how it ought to be operationalized as an exclusionary concept — we see courts having to add new meaning to the concept, and indeed take the law in directions very likely not contemplated by Congress.

The Second Circuit’s series of opinions on the question are a perfect illustration. In the first of these cases, *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the question considered by the court was whether a unique belt buckle design, which its creator described as a sculpture, but which was used as a fashion accessory, would qualify for copyright protection as

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27 *Id.* § 101 (definition of “pictorial, graphic, and sculptural works”).
29 H.R. REP. NO. 94-1476, supra note 24, reprinted in 1976 U.S.C.C.A.N. at 5668 (“Unless the shape . . . contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.”) (emphasis supplied).
30 632 F.2d 989 (2d Cir. 1980).
a pictorial, graphic, or sculptural work. Answering this question obviously necessitated determining whether its protectable elements were separable from its useful elements. The court readily recognized that the statute and its legislative history both provided insufficient guidance on the issue—and that it needed to come up with an approach of its own.\(^{31}\) Looking at evidence of how consumers actually used the products, as body ornamentation, the court concluded that the buckles’ “primary ornamental aspect” was “conceptually separable from their subsidiary utilitarian function.”\(^{32}\) The court in effect recognized the products to be a form of “body ornamentation,” which as long as it rose to the level of creative art, could indeed qualify for copyright protection.\(^{33}\)

Despite the brevity of the majority’s opinion, it produced a dissent.\(^{34}\) The dissent reached the opposite conclusion on the facts, but in so doing seemed to call the majority out for taking the law in a new direction. It thus openly accused the majority of “twist[ing] the law to achieve a result” and taking it in a direction that Congress had chosen not to go.\(^{35}\) The court got to revisit the issue of separability again in \textit{Carol Barnhart, Inc. v. Economy Cover Corp.},\(^{36}\) where the question was whether mannequins used to display articles of clothing had features that were separable from their utilitarian elements. This time, the court answered the question in the negative.\(^{37}\) Yet, in so doing, it chose to distinguish the case from its decision in \textit{Kieselstein-Cord}, and in the process clarified its own reasoning in the previous case. Observing that the mannequin’s unique form was “required by [its] utilitarian function” whereas the buckle design in the previous case was not, the court thus affirmed its previous holding, while denying protection to the mannequins in the case at hand.\(^{38}\) Once again, the opinion elicited a dissent.\(^{39}\) Yet, very interestingly, the dissent this time chose not to defer to Congress’s purported intent, but instead sought to advance a test of its own to solve the problem (which the majority described as a “non-test”).\(^{40}\) While they thus disagreed in outcome, both opinions seem to have agreed that it was up to the court to develop a “test” to apply the principle of separability, rather than defer to Congress.

\(^{31}\) \textit{Id.} at 993.
\(^{32}\) \textit{Id.}
\(^{33}\) \textit{Id.} at 994.
\(^{34}\) \textit{Id.}
\(^{35}\) \textit{Id.} (“[I]t is not for this court to twist the law in order to achieve a result Congress has denied.”) (Weinstein, J., dissenting).
\(^{36}\) 773 F.2d 411 (2d Cir. 1985).
\(^{37}\) \textit{Id.} at 419.
\(^{38}\) \textit{Id.}
\(^{39}\) \textit{Id.} (Newman, J., dissenting).
\(^{40}\) \textit{Id.} at 423-24 (describing the test); \textit{see also id.} at 419 n.5 (describing the dissent’s test as “so ethereal as to amount to a ‘non-test’”).
A third case, Brandir International, Inc. v. Cascade Pacific Lumber Co., moved the issue along even further. Examining whether the aesthetic elements of a bicycle stand would qualify for protection under copyright, the court revisited its previous decisions, and synthesized them to conclude that “‘conceptual separability’ is thus alive and well, at least in this circuit.” Again, in search of a workable test, the court looked to different sources, and this time found solace in a law review article, which it argued might have solved the problem a long time before, if only prior courts had looked to it. The court then applied the test to the bicycle stand in issue, to deny the plaintiff protection in the end. It nonetheless expounded on the test in some detail, in the hope that it would guide future courts. Yet again, the majority opinion produced a dissent. This time, the dissent concluded that the majority’s test “diminise[d] the statutory concept” of separability to “the vanishing point.” Putting aside the disagreement between the opinions for a moment though, this observation effectively recognizes that in formulating a test for the question, the court (or to be more accurate, the courts) had moved well beyond the statute, and were completely unapologetic about it.

Leaving aside the reality that there appears to be no one dominant test on the question, what this line of cases reveals is the willingness with which courts have taken the law in new (and at times, interesting) directions, despite Congress’s codification of the idea, and its explicit attempt to “draw as clear a line as possible.” The recurring observation (in dissents) that the new direction might be one that Congress decided against, has had little effect on courts’ motivation to develop the law on its own, and to draw a thread through their past cases to produce the kind of inter-temporal coherence one sees in the common law, as opposed to the bright line certainty one envisions in statutory regimes.

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41 834 F.2d 1142 (2d Cir. 1987).
42 Id. at 1144.
43 Id. at 1145.
44 Id. at 1146-47.
45 Id. at 1150 (Winter, J. dissenting).
46 Id. at 1151.
48 I bracket for now the obvious question of whether the structure of the federal judiciary, the jurisdictional limits of individual circuits, and the shrinking docket of the Supreme Court, all together lend themselves to common law decision-making after all. For leading accounts of federal common law, see Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1 (1985); Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881 (1986).
B. Works Made for Hire

The Copyright Act of 1976 for the first time provides a definition of a “work made for hire” — a category of works where the initial ownership of copyright vests with the employer or other person ordering the work, rather than with the author.49 While describing it as a “basic principle” of existing law, the legislative history accompanying the definition makes it abundantly clear that Congress intended to provide an exhaustive definition of the phrase for copyright purposes.50 The legislative history thus notes that the definition represents a “carefully balanced compromise,” and that many proposals and amendments were consciously omitted from the definition, as finally enacted.51 Once again, this seems to have done little by way of impeding courts from giving the idea their own understanding.

The principal common law modification this time around came from a unanimous Supreme Court. In Community for Creative Non-Violence v. Reid,52 the Court examined the first prong of the statute’s definition, which defines a work made for hire as “a work prepared by an employee within the scope of his or her employment.”53 While it began its discussion of the law with the statute, the Court’s opinion rather quickly concluded that the Act’s failure to define the terms contained in the definition necessitated developing an independent test to give effect to the idea.54 The Court then went on to note that even though its analysis took as its “starting point” the statute’s “language,” Congress’s failure to define certain terms required (as opposed to merely permitted) it to look to the “common law.”55 And in this context, it meant looking to the common law of agency, where the employer-employee relationship was well defined and parsed out analytically.

What is interesting about this move though, is that unlike in the cases previously discussed, the Court here provided a justification for its recourse to the common law — by invoking an interpretive principle that scholars have referred to as the rule of “common law conformity,” the idea that Congress should be presumed to have used common law terms in their original common law understanding, unless it expressly states otherwise.56 Referencing the statute’s use of the phrase “scope of employ-

51 Id.
54 In Community for Creative Non-Violence v. Reid, 490 U.S. at 739.
55 Id.
“work made for hire,” the opinion thus concluded that Congress must have been alluding to the general common law of agency.\footnote{Community for Creative Non-Violence v. Reid, 490 U.S. at 740.} Even after this groundwork though, the Court didn’t simplicistically incorporate principles of agency law into its interpretation of the definition. Instead, it examined four possible “test[s]” to see which one fit best with the purpose, language, structure, and background of the Act — and concluded that no test other than the common law agency one worked well with the statute.\footnote{Id. at 741.}

The genius of the opinion is hardly in its substantive outcome; but is rather in the subtlety with which it realizes its subversive goal. Despite its deferential language to Congress, the recognition that Congressional “intent” was guiding its interpretation, and the concession that Congress’s codificatory goals were central to its decision, the Court in reality added its own imprint on the law. Consider for example, the Court’s observation that it was seeking to enhance the “predictability and certainty of copyright ownership” through its interpretation, which was also Congress’s “paramount goal” during the codification in 1976.\footnote{Id. at 749.} While the common law principles of agency may be cogent and comprehensible, the common law is hardly thought of as the embodiment of predictability and certainty. Indeed, if that were indeed the Court’s real (or paramount) goal, it might have much preferred one of the bright-line approaches that the petitioner suggested in its briefs, and which it expressly rejected. The Court was, unquestionably then, developing an approach to the question as a matter of federal common law, despite its deferential rhetoric.

C. Attorney’s Fees

In addition to overhauling and codifying a good chunk of substantive copyright law, the Copyright Act of 1976 also carried forward the prior Act’s provisions on remedies that courts could award litigants in copyright infringement suits.\footnote{See 17 U.S.C. §§ 502–505 (2006).} One such remedy is the award of “attorney’s fees,” which usually constitutes a major portion of a party’s litigation costs. The statute provides that a “court may award a reasonable attorney’s fee to the prevailing party as part of the costs.”\footnote{Id. § 505 (“Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”).} It seeks to accord courts discretion on the question, and is therefore structured as a permissive provision.\footnote{H.R. Rep. No. 94-1476, supra note 24, reprinted in 1976 U.S.S.C.A.N at 5779 (“Under section 505 the awarding of costs and attorney’s fees are left to the court’s discretion”).}
All the same, giving courts discretion on the question of whether to award litigants such fees is different from delegating the question of developing standards for such awards to courts. Not unsurprisingly though, courts took the latter approach and built an entire body of law on the issue.

One set of courts adopted an approach that awarded attorney’s fees to prevailing plaintiffs as a matter of course, but refused to make such awards in favor of defendants unless it was shown that the plaintiff’s suit was frivolous or brought in bad faith.\(^63\) Their logic was that awarding defendants such fees as well would diminish a copyright owner’s incentive to sue, which was the Act’s primary purpose.\(^64\) Another set of courts, however, treated both prevailing plaintiffs and defendants in a similar manner.\(^65\) What is to be noted about both these positions though is that nothing whatsoever in the Act or indeed in the legislative history suggested that one approach had to be preferred to the other, or more fundamentally, that any systematic “rule” had to be followed. The discretion had in effect been turned into a basis for rule-making.

This division in approach soon reached the Supreme Court, in Fogerty v. Fantasy, Inc.\(^66\) In rejecting the rule that treated successful defendants differently from prevailing plaintiffs, the Court sought to unbundle the “policies served by the Copyright Act” and found them to be “more complex, more measured, than simply maximizing the number of meritorious suits.”\(^67\) It then went on to note — seemingly justifying its own rule-development — that “[b]ecause copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.”\(^68\) Implicit in this observation is that the boundaries of copyright law need to be clear, and that courts should play a role in effecting this clarity. Much like its opinion in Reid, the Court purports to find nothing in the legislative history of the Act to support one position over the other, and thereupon attempts to give effect to the purposes of the Act by developing its own standard: that prevailing parties are to be treated in

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\(^63\) See, e.g., McCulloch v. Albert E. Price, Inc., 823 F.2d 316, 323 (9th Cir. 1987); Diamond v. Am-Law Publ’g Corp., 745 F.2d 142, 148-149 (2d Cir. 1984); Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1022 (7th. Cir. 1991); Reader’s Digest Ass’n, Inc. v. Conservative Digest, Inc., 821 F.2d 800, 809 (D.C. Cir. 1987).

\(^64\) Fantasy, Inc. v. Fogerty, 984 F. 2d 1524, 1532 (9th Cir. 1993).

\(^65\) See, e.g., Sherry Mfg. Co. v. Towel King of Florida, Inc., 822 F.2d 1031, 1034-1035 (11th Cir. 1987); Lieb v. Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986).

\(^66\) 510 U.S. 517 (1994).

\(^67\) Id. at 526.

\(^68\) Id. at 527.
like manner, but only as a matter of the court's discretion and not as a matter of rule.

Once again, the Court's narrative begins with the Act and a reference to the legislative history of the provision in question. Yet, in so doing the Court falls back on its account of the purposes of copyright law, at one point even referring to its own justificatory understanding of copyright, and noting that "[w]e have often recognized the monopoly privileges [of copyright to be] . . . limited in nature and [that they] must serve the public good." The courts — both circuit courts and the Supreme Court — were thus clearly engaged in rule-development, despite the existence of a statutory provision. The absence of clear legislative guidance, even if unintentional, formed the basis for courts’ construction of the institution’s purpose, and the adoption of a rule to give effect to this purpose. Indeed, the law concerning attorney's fees in copyright cases is today to be extracted almost entirely from these cases, rather than from the statute.

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Each of the areas just described is fairly typical of the manner in which courts undertake the process of interpreting, applying, and thereby developing the common law of copyright. All the same, only rarely do they openly acknowledge what they are doing; routinely preferring instead to articulate their approach as being necessitated by the structure, purpose, and history of the Act, or indeed Congress's goals and intention behind its enactment. It is indeed in this latter respect that the approach has strong undercurrents of the now defunct declaratory theory of common law. Paying lip service to the idea of legislative supremacy in the area, courts thus continue to play an integral role in formulating, developing, and adapting the rules and doctrines of copyright law to new circumstances — in effect converting the Copyright Act into a “common law statute.”

II. THE NIMMER TREATISE AND THE COMMON LAW OF COPYRIGHT

As the single most influential treatise in the area of copyright law, and one that is routinely referenced by courts at all levels, the Nimmer treatise plays an underappreciated behind-the-scenes role in facilitating the continued development of the common law of copyright among courts across the country. Several of its mechanisms openly contribute to this phenomenon,
producing a coherent conversation among courts on the topic of copyright
law.

The coherence of the common law of copyright necessitates a com-
prehensive synthesis of copyright doctrine for courts to have a coherent
conversation amongst themselves, and learn from each other’s approaches
to similar questions. At the same time though, the synthesis needs to be
fully aware of what courts are in reality doing, and their nascent reliance
on the declaratory theory of law-making. The conversation thus necessi-
tates more than just rote, descriptive, synthesis of case law. It instead ne-
cessitates an approach that adopts the same assumptions about the
copyright system, its origins, and its institutional dynamics as the courts
themselves have. This certainly doesn’t imply an overtly uncritical engage-
ment with the law or with individual courts’ decisions. To the contrary, it
entails an engagement that is either supportive or critical, dependent on
context; but at the same time sees the need to move the conversation
along incrementally — much like a good moderator during a panel discus-
sion, who must cover a set of issues, but looks for hidden transition points
in the conversation to realize this end. It is precisely by adopting an ap-
proach along these lines that the treatise has over time become an impor-
tant participant in the conversation about the common law of copyright.
In this Part, I unpack three specific mechanisms that the treatise employs,
each of which forms an integral part of this approach just alluded to.

A. Reflexive Transparency of Purpose

The first mechanism that the treatise employs towards facilitating the
development of a common law of copyright is its practice of recognizing
judge-made law for what it is, synthesizing this law and contributing to its
development, and then engaging courts in a direct dialogue by indicating
the various opinions that cite to the treatise. Each of these steps requires
some elaboration.

To begin with, the treatise in numerous places both implicitly and ex-
plicitly recognizes that courts deciding copyright cases are doing much
more than just interpreting and applying the statute, and that they are
indeed making copyright law. To be sure, the recognition is most often
implicit, but it is fairly widespread rather than isolated. In discussing case
law on a topic, the treatise thus explicitly notes that courts are routinely
moving the law in new directions, often in furtherance of their vision of
what copyright policy demands. While the treatise then engages this case
law critically — highlighting its upsides and downsides, and routinely of-
fering refinements — it seems to routinely abjure a heavy-handed reliance
on the idea of separation of powers that would emphasize legislative
supremacy in the domain of copyright law. The treatise, in other words,
recognizes judge made copyright law for what it is, and remains willing
and able to play along with courts in this narrative, i.e., that takes the statute as a starting point, but fills it with new (and potentially different) considerations.

In engaging the case law, the treatise is at times complimentary and at other times critical. In addition, and perhaps more importantly though, its basis for such criticism is often the inconsistency that it produces across courts or circuits. The synthesis that it attempts is therefore one that emphasizes the need for a uniform, copyright law — even at the level of judge-made law. In the process, the treatise routinely offers its own attempts at refining and synthesizing such inconsistencies, to produce its own tests or approaches for different doctrinal questions. The criticism and synthesis is thus more than a fault-finding mission, but is always followed up by a constructive effort to suggest a better, and alternative approach. Once these suggestions are made in different areas, the frequency with which courts look to the treatise when deciding cases very often results in the treatise’s own test or approach to a question being reviewed or applied by a court in its decision. Courts at various levels routinely refer to the treatise’s position, even if only at times to disagree with it. On several occasions though, the court — on examining the reasons for the Nimmer treatise’s synthesis and new approach — decides to adopt the treatise’s test as its own, effectively thereby incorporating the treatise’s synthesis and refinement into the common law of copyright.

During this process, the treatise also does something that other scholars have derided it for: it highlights the opinion that uses, relies on, quotes, or cites to, the treatise. Ann Bartow thus identifies this practice as “self-referential and self-congratulatory,” and argues that it entices federal judges to “game the system,” by referring to the Nimmer treatise solely in order to find special mention in it. Even if there is a self-congratulatory element to this practice, Bartow’s explanation completely ignores the possibility that it might indeed serve the purposes of common law development, and comport with how judges interact with one another during the process of common law development. Why might judges care whether their opinion is cited in the treatise with special mention, i.e., with a parenthetical stating “treatise quoted” or “treatise cited”? Bartow observes that judges care about the “visibility” of their opinions. Yet, there isn’t a single copyright opinion reported in the federal reporters that the treatise doesn’t eventually cite to, in its quest to be comprehensive. The visibility

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72 See, e.g., 4 NIMMER & NIMMER, supra note 16, § 14.10[D][2][a].
73 As of 2004, this number was over 2,000. See Bartow, supra note 17, at 589.
74 Id. at 595.
75 Id.
76 Id. (noting that it “gives judges eager to elevate the visibility of their opinions an added incentive to cite the Nimmer treatise”).
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that judges care about then certainly isn’t one of simply being carried in
the treatise, as Bartow’s explanation assumes. The visibility, if any, that
judges do care about is that of their opinions being cited to, or discussed,
in other opinions even where they aren’t binding as such. This is known to
be true of the common law’s accretive process of development more gen-
erally, and is hardly surprising. What the special mention in the treatise
does on the other hand is something quite different.

In synthesizing different opinions and identifying inconsistencies, the
treatise invariably takes a particular position on the issue — often in the
form of a reconciliation of different positions, or an altogether new test or
approach. Its basis for this new test/approach very much remains the
methodological incrementalism of the common law, i.e., it remains
grounded in prior opinions and is in some sense “derived” from there as
an analytical matter, rather than from entirely exogenous sources (e.g.,
economic or philosophical analysis). As it reflects this position back to
judges who are actively engaged in doctrinal development, the treatise too
seeks to build greater salience for its position, in order to move the law
along incrementally and accretively. And as courts come to accept — by
discussing, quoting, or citing — its position, the treatise in turn emphasizes
this in an attempt to ensure that its observations aren’t purely academic in
nature, but are instead a blend of the descriptive and prescriptive. The
common law has long been known to operate by fusing the positive with
the normative, by converting the quantum and extent of reliance on a pro-
position, into a reason to accept that proposition as the law. Indeed, this
remains the very premise of stare decisis.

The treatise’s seemingly “self-congratulatory” practice can be seen as
fitting into precisely this framework. It builds its own position up incre-
mentally, and then seeks to build support for it in similar case-by-case
fashion. The practice then raises the salience of the treatise’s own incre-
mental rule development for other courts, who either engage it, reject it,
or refine it, in developing their own positions. The practice assumes spe-
cial importance especially given that the conversation so to speak is among
court opinions that aren’t necessarily binding on each other. The treatise’s
attempted synthesis and self-referential practice forms a focal point that
enables such cross-jurisdictional dialogue among courts engaged in the
common law process.

The Nimmer treatise’s involvement in an area discussed previously —
the exclusion for useful articles — is an excellent illustration of this mech-

77 See Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern
of Legal Change in a Common Law System, 86 IOWA L. REV. 601, 621

78 Id. at 621-22; Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L.
anism. In its discussion of the topic, the treatise sets out to provide a comprehensive synthesis of the case-law. It is complimentary in parts, and indeed openly critical when it chooses to be, in one case describing a court’s actions as a “neat bit of judicial legerdemain.” Upon analyzing the various issues involved in the area, it identifies a conflict among circuits on the question of conceptual separability, and elaborates on the problems posed by the conflict. Instead of just identifying the conflict though, it proffers its own answer to the problem and suggests a test, noting that “it may be concluded that conceptual separability exists where there is any substantial likelihood that even if the article had no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities.”

In setting up this test, the treatise makes clear that its objective is incremental, in observing that its test “has the virtue of harmonizing various holdings in this fractured field.” Not surprisingly, one circuit — the Fifth Circuit — chose to adopt the treatise’s test, and indeed the treatise highlights this point. Yet, during this adoption, the Fifth Circuit itself makes clear that the reason for its adoption is because the Nimmer treatise’s test was itself an incremental synthesis of existing law. It thus notes that the test it is adopting (the “likelihood of marketability” standard) “might most accurately be described as the Poe standard, even though the relevant language is found in [the Nimmer treatise]” and is “firmly rooted as the implicit standard courts have been using for quite some time.” The court was thus referring to the Ninth Circuit’s opinion in Poe v. Missing Persons and other courts’ implicit reliance on it as the normative basis of the test, and to the Nimmer treatise as effecting that normative position through its synthesis. This explains why it eventually characterizes the test as the “Nimmer/Poe test.” Whether, and to what extent, this test becomes the dominant one in the area is of course an empirical question that is hard to assess at this stage. Yet, what it shows us rather well is the precise pattern that the treatise follows in influencing the development of the common law of copyright by engaging courts in their incremental rule development and contributing to it as part of the same conversation. By being transparent about its goals and intent (of contrib-

79 See supra Part I.A.
80 1 NIMMER & NIMMER, supra note 16, § 2.08[B][3].
81 Id.
82 Id.
83 Id.
84 Galiano v. Harrah’s Operating Co., 416 F.3d 411, 421 (5th Cir. 2005); 1 NIMMER & NIMMER, supra note 16, § 2.08[B][3] n.112.6.
85 416 F.3d at 421, 422 n.25.
86 745 F.2d 1238 (9th Cir. 1984).
87 Galiano, 416 F.3d at 421.
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uting to rule development), the treatise allows courts to be clear and explicit about their own goals too, which moves the law along — one case at a time.

B. Justificatory Agnosticism

Opinion on the value, purposes, and bases of the U.S. copyright system is today deeply divided. Given its recent expansions, and the absence of empirical support for its principal justification, the theory of incentives, many scholars and commentators commonly adopt what is best described as a minimalist attitude towards the institution and its purposes.88

What is unique about the Nimmer treatise though is that despite the fragmented nature of the discussion about copyright law, it seems to consciously remain agnostic about the goals of the institution, the purposes it serves, and thus its very justification. Existential questions about the institution are consciously placed to one side, in its exposition of various copyright doctrines, and in its refinements of the same.

In one of the introductory chapters of the treatise, the authors thus address the issue of copyright’s status as a form of property, a well-known and fairly contentious topic in the literature.89 The treatise consciously avoids taking a side in this debate, noting that copyright does at times seem property-like, while at others, it seems more regulatory and less property-like in both structure and functioning.90 It then consciously concludes its brief foray into the area with the following statement, which partakes of the agnosticism referred to here:

In any event, the enactments of Congress on the subject are too diffuse in time and purpose to fall under any one overarching framework. Copyright serves many masters, and is designed to accommodate a welter of interests.91

It is crucial to separate the treatise’s justificatory agnosticism from its willingness to remain normative in orientation. While the latter entails a willingness to offer refinements in doctrine and reflect critically on the possible costs and benefits of different doctrinal approaches adopted by courts in their development of copyright jurisprudence, the former involves searching for a grand unifying theory that explains, justifies, and indeed legitimizes the institution of copyright. It might be understood as a

88 See Neil Weinstock Netanel, Copyright in a Democratic Civil Society, 106 YALE L.J. 283, 336-41 (1996) (detailing the various forms that this minimalist approach has taken).
89 1 NIMMER & NIMMER, supra note 16.
90 Id.
91 Id.
“foundationalist” approach, to use a term from philosophy.\textsuperscript{92} It would thus entail answering questions such as: Why do we have copyright to begin with? What overall purpose does the institution serve, and what purpose should it serve? It is questions such as these that the treatise avoids answering. Its orientation is thus distinctively “pragmatic,” as the term has come to be understood in the legal and philosophical contexts.\textsuperscript{93}

Depending on one’s view of the institution, this pragmatic agnosticism can of course be either a virtue or a vice. To those unhappy with its current framework and functioning, the treatise’s reluctance will all too easily come to be seen as a form of willful blindness, while to those more complimentary of the system, it will be seen as perfectly acceptable. Leaving that issue to one side though, it remains true nonetheless that this agnosticism has allowed the treatise to play a meaningful and influential role in moving the common law of copyright law along, indeed one that it might have otherwise been unable to do had it taken a justificatory position on the institution.

A large part of the reason why this justificatory agnosticism has contributed to the treatise’s influence on the common law of copyright, is because that body of law is entirely judge-made, and was long recognized to be intensely pragmatic in orientation. Judge Posner provides a particularly good defense of pragmatic adjudication, and observes that a central feature of the approach entails its willingness to abjure foundational, or universalist explanations for an institution, or body of doctrine.\textsuperscript{94} It emphasizes a situation-sensitive, contextual approach over a broad overarching one. This certainly doesn’t mean that the pragmatic judge (or scholar) has to limit himself or herself to the positive as opposed to normative realm, or indeed remain content with the status quo. To the contrary, it entails deploying a host of lawyerly sources — “precedent, statutes, and constitutions,” together with policy and domain-specific theoretical concerns — in order to generate a tailored solution to the area.\textsuperscript{95} It is precisely in this manner that the common law of copyright has developed, and in relying on the very same methodological orientation, the treatise has succeeded in contributing to that development.\textsuperscript{96}

\textsuperscript{92} See Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331, 1334 (1988) (using the term to describe an approach that seeks a grand unifying theory for an area or question).

\textsuperscript{93} Id. at 1337; Richard A. Posner, Legal Pragmatism Defended, 71 U. Chi. L. Rev. 683 (2004); Thomas C. Grey, Freestanding Legal Pragmatism, 18 Cardozo L. Rev. 21 (1996).


\textsuperscript{96} In keeping with this observation that the treatise adopts the same methodological orientation as judicial opinions, it is worth noting that the treatise also
C. Conscious Normativity

The treatise’s justificatory agnosticism should not however be taken to indicate an unwillingness to engage in a normative analysis of copyright doctrine, or of specific doctrinal questions. While consciously distancing itself from a grand unifying project for the entire area, the treatise is fairly explicit about offering its own opinion on copyright doctrine, and where it should head in its evolution. This isn’t to suggest that the treatise doesn’t have a large descriptive dimension, which it does. Yet, in most areas, the treatise separates out the descriptive from the normative, and willingly engages the process of moving the law along incrementally.

Prior to engaging in any critique, the treatise surely enough offers a synthesis and overview of existing case-law. Yet even there, it hardly purports to be purely descriptive in outlook and analysis, instead explicitly offering its own views on opinions and outcomes. Once it provides this synthesis, the treatise then routinely moves to an overt evaluation of the position it just synthesized. Its evaluative approach is thus incremental, given its connection to the synthesis of existing case law that it is accompanied by. Yet it is hardly indistinct or functionally marginal. Indeed, it is precisely because of the treatise’s willingness to be normative in this incremental fashion that it has succeeded in moving the law along. Had it refused to be normative, hidden its normativity within its descriptive elements, or instead adopted a wholesale critique of the institution, the treatise is unlikely to have been seen by courts as contributing to the common law conversation and moving the law along — through synthesis, refinement, and critique. Revisiting each of the doctrinal areas discussed in the previous section highlights this point.

We have already noted how the treatise developed its own test from existing cases on the question of conceptual separability — which it described as the likelihood of marketability test, and which the Fifth Circuit explicitly attributed to its synthesis.97 Had the normative source for the test been just the Poe decision from the Second Circuit, there would have indeed been little reason for the Fifth Circuit to acknowledge the treatise. The Fifth Circuit thus explicitly validates the treatise’s normativity on the issue. The same is true on the question of attorney’s fees. In its discussion of the topic, the treatise first sets out the two different approaches to awarding attorney’s fees and then explicitly attempts to synthesize them, noting that “these two seemingly antagonistic views can be reconciled, and doesn’t seek to explain copyright doctrine, even in specific parts, as the bare result of interest group efforts. Much like courts, that take the legitimacy of statutes and doctrine as a given, without examining the politics of its creation, the treatise too seems to consciously avoid digressing into these discussions. I am indebted to Joe Liu for this point.

97 Galiano v. Harrah’s Operating Co., 416 F.3d 411, 421 (5th Cir. 2005).
that the discussion of culpability in the preceding subsection can serve as
the vehicle for this reconciliation.\textsuperscript{98} It then explicitly sets out its own test,
using the element of culpability to decide when attorney’s fees are to be
awarded.\textsuperscript{99} We see this pattern repeated again in the treatise’s discussion
of the work-made-for-hire doctrine. After setting out the various cases,
and the Supreme Court’s reasoning in \textit{Reid}, the treatise proceeds to point
out “[t]wo ironies from the Court’s opinion,” hardly a subtle attempt at
critiquing the opinion.\textsuperscript{100} Indeed later on in the section too, after describ-
ing post-\textit{Reid} decisions, it goes on to observe “that a better approach
emerges from authority outside the Second Circuit.”\textsuperscript{101}

The treatise is thus consciously and explicitly normative in every last
area that it analyzes and discusses. True, this normativity isn’t a founda-
tional, or fundamentally critical one. It is instead a pragmatic one, committed
to the style and methodology of incremental rule development, in
almost the exact same fashion as courts are themselves. Whether this is
good for copyright scholarship or not, it has certainly allowed the treatise
to remain an interlocutor in the common law development of copyright
doctrine. It remains rooted in synthesis, reconciliation, and workability —
rather than a broad philosophy or theory — considerations that courts
engaged in common law rule development themselves are committed to in
innumerable ways.

On the face of things, the treatise may appear to perform the same
role as that of restatements of law, produced by the American Law Insti-
tute (ALI) for various common law areas.\textsuperscript{102} Indeed, the frequency with
which courts cite to the treatise for various aspects does give the treatise
the same kind of salience that restatements obtain in other areas. Yet, as
an analytical matter, it performs a vastly different role, which is crucial to
understand. First, the restatements of law are consciously unclear about
the extent to which they purport to merely “restate” the law, and indeed
when they are attempting to consciously change the direction of the
law.\textsuperscript{103} While the answer to this question has varied from one subject area

\textsuperscript{98} 4 \textsc{Nimmer & Nimmer, supra} note 16, § 14.10[D][2][a].
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.} § 5.03[B][1][a][iii].
\textsuperscript{101} \textit{Id.} § 5.03[B][1][a][iv].
\textsuperscript{102} For a general overview of the restatements and their role in developing the
common law, see Kristen David Adams, \textit{Blaming the Mirror: The Restate-
ments and the Common Law}, 40 \textsc{Ind. L. Rev.} 205 (2007); Alan Milner, \textit{Re-
statement: The Failure of a Legal Experiment}, 20 \textsc{U. Pitt. L. Rev.} 795
(1959); G. Edward White, \textit{The American Law Institute and the Triumph of
\textsuperscript{103} See Henry M. Hart, Jr. & Albert M. Sacks, \textit{The Legal Process: Basic
Problems in the Making and Application of the Law} 737, 740 (William N.
Eskridge, Jr. & Philip P. Frickey eds., 1994).
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to another, and across time, the bulk of any restatement project is consciously positive in outlook and orientation, given its attempt to reflect the law accurately back at courts actively making them. Only rarely is a restatement consciously prescriptive, since in so doing it strays from its function as a re-statement of the law. Second, and as a result, when courts cite to restatements in their opinions, they do so primarily in reliance on the restatements’ descriptive — rather than normative — content, culled from and supported by case law. When looking for normative propositions, i.e., those that seek to change the law, courts are far more inclined to look to other sources, including treatises. Restatements are thus less about who restated them, or the process by which it was produced.

Related to both these analytical points, the Nimmer treatise simply cannot (and does not purport to) perform the same role as a restatement. Even when it sets out existing copyright law as a descriptive matter, its goal is consciously teleological, unlike the restatement. It is directed at a synthesis and critique of the law — a consciously evaluative approach, so to speak. Its analysis of cases is thus hardly systematic, chronological, or indeed jurisdictional — but is instead based on principle. In discussing cases, it uses them to get to its own point in the argument. As a result, when courts rely on the treatise and cite to it, they are doing so not for a simple reflection-back of existing doctrine, but for “Nimmer’s” (i.e., the person’s) views on the subject, even if those views are merely incremental modifications of existing doctrine. Courts thus engage the treatise because of its explicit normativity — which is a combination of both the treatise and its author. This need not always be the treatise’s own test or position on the subject, it often extends even to the treatise’s interpretive analysis — which courts always see as normative. The court’s use of the treatise in *Kieselstein-Cord* is a good example. The court was clearly looking for support to treat the question presented as an issue of first impression, and develop the law on its own. For this, it relied on the treatise’s synthesis of existing authorities and its conclusion thereafter that they do not offer “any ‘ready answer’” to the problem. Its reliance on the treatise was thus for both a descriptive point, i.e., that the authorities were silent on the point, and a normative one, i.e., that the treatise author’s opinion corroborated the court’s. In so doing, the court was thus clearly treating the treatise as more than a simple restatement of the law, but instead as an embodiment of a particular opinion.

Now it may well be that there is a counter-majoritarian issue inherent in courts’ reliance on the treatise in just about any way or form. Yet, this is unlikely to be solved altogether by a restatement, and is endemic to the very process of common law rule-making. In the end, complaints about

104 *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 992 (2d Cir. 1980).
the role that the treatise plays in the courts' copyright analysis, much like complaints about the restatements' role elsewhere, is likely a "disguised criticism of the American common-law court system."\(^{105}\) In being explicit about its normative and evaluative leanings, the treatise is but a participant in that system.

**CONCLUSION**

It is hard to think of another area that has seen a treatise play as pervasive and influential a role in the development of the law, along the lines that the Nimmer treatise has played in copyright. A large part of the reason for this, I have argued, originates in the intrinsic role that courts and judges see themselves playing in the development of copyright law and policy. The treatise’s early recognition of this role, its willingness to encourage the realist method that courts employed (rather than adhere to a model of legislative supremacy), and perhaps most importantly its ability to develop a set of analytical techniques to shepherd the process along — have together contributed to its enduring influence on the corpus of copyright law for the last five decades. As we look back on what the treatise has succeeded in doing for copyright law and law-making over these years, we will no doubt find room for improvement, and indeed for the introduction of safeguards against the vagaries of judicial law-making, and the treatise’s role therein. Yet in so doing, we shouldn’t lose sight of the fact that the treatise epitomizes the ideal form of what one scholar describes as "practical scholarship,"\(^ {106}\) a reality that has seen it move from the role of outside commentator on the law to an inside participant in the process of law-making. And in so doing, it has very ably ensured that the common law of copyright is alive, well, and kicking.

\(^{105}\) Adams, *supra* note 102, at 265.