

CASES AND MATERIALS
ON COPYRIGHT
AND OTHER ASPECTS OF
ENTERTAINMENT
LITIGATION
INCLUDING UNFAIR
COMPETITION, DEFAMATION,
PRIVACY
ILLUSTRATED

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Eighth Edition

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MATTHEW  BENDER

Dedications

For
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Becca, and Paul
Larry and Melissa
David and Marcia
— M.B.N.

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Emily, Larry, Beth, and Danny
— P.M.

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Jonathan and Katie
— D.A.M.

Marcia
Jacob, Avi, Talia, Yonah, and Leora
— D.N.

Preface to the Eighth Edition

The legal profession lost one of the giants when Professor Melville B. Nimmer died in 1985. His works in the copyright, entertainment law, and constitutional law areas have had major impacts on students, lawyers, judges, and legal educators throughout the United States. He continues to be sorely missed by all those who came into contact with him during his all-too-brief lifetime.

The three of us were given the privilege of preparing new editions to Professor Nimmer's casebook so as to include the many recent developments which had occurred both in the copyright area and in the other subjects relating to entertainment litigation. We have attempted here to remain faithful to Professor Nimmer's notions regarding the interplay between copyright law and entertainment litigation matters.

We acknowledge the fine support of the clerical staff at the William and Mary School of Law and the Valparaiso University School of Law. We also thank the many students for their excellent assistance on various editions of the book.

Paul Marcus
David A. Myers
David Nimmer
Williamsburg, Virginia
Valparaiso, Indiana
Los Angeles, California

February, 2012

Preface to the Seventh Edition

The legal profession lost one of the giants when Professor Melville B. Nimmer died in 1985. His works in the copyright, entertainment law, and constitutional law areas have had major impacts on students, lawyers, judges, and legal educators throughout the United States. He continues to be sorely missed by all those who came into contact with him during his all-too-brief lifetime.

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We acknowledge the fine support of the clerical staff at the William and Mary School of Law (especially Della Harris) and the Valparaiso University School of Law. We also thank these students for their excellent assistance on this edition of the book. The College of William and Mary: Christina Eberhart, Andrea Mose, Virginia Vile, and Kristine Wolfe. Valparaiso University: Rachel Eichinger, Angela Kinley, Samantha Ahuja, Cara Fisher, Brad Fisher, and Michelle Masoncup.

Paul Marcus
David A. Myers
David Nimmer
Williamsburg, Virginia
Valparaiso, Indiana
Los Angeles, California

October, 2005

Preface to the Third Edition

The current update of the statutory and case materials speaks for itself, and requires no further comment. It may be added, however, that the ambivalence which I have previously expressed (see Preface to First Edition) as to the phrase “entertainment law” continues. That phrase has gained a wider acceptance both in the profession and in academia. Increasingly, it has come to refer to the form and substance of contractual arrangements with the entertainment industries. In this sense, entertainment law refers to deal making. A course devoted to this subject might more accurately be referred to as Entertainment Transactions. In contrast, the subject matter of this work deals with the substantive causes of action likely to arise in the entertainment context in the absence of an applicable contract. This may be referred to as Entertainment Litigation. To be sure, breach of contract in entertainment context may also be viewed as entertainment litigation. But for pedagogical reasons, it seems best to leave such problems to courses in contract law. The above is by way of explanation of the new subtitle of this work, which employs the phrase entertainment litigation.

I should like to incorporate by reference and repeat here the acknowledgments and thanks contained in the Prefaces to the first two editions. In addition, I wish to thank Wayne Williams, UCLA Law Class of ‘84, for his valuable research assistance. Finally, my thanks to my secretary, Margaret Kiever, who as usual, proved invaluable, in helping to obtain the new illustrations, and generally in putting everything together.

MELVILLE B. NIMMER
Los Angeles, California
May, 1985

Preface to the Second Edition

The long-heralded general revision of the copyright law has at last become a reality. The Copyright Act of 1976 was enacted on October 19, 1976, and for most purposes, became effective January 1, 1978. This first general revision of copyright law since 1909 obviously required profound reworking of the casebook, hence the present second edition. Preparation of this edition offered the pedagogical challenge of how to deal in a casebook with a body of law so new as to lack any cases. It is believed that an in-depth understanding of many of the new provisions in the Copyright Act of 1976 may be attained through the combination of notes, problems, and questions which are contained herein. Of course, any of the pre-1978 cases are included in this edition because they remain relevant to an understanding of the new law. In addition, some older cases are retained even if the substantive law which they expound has been repealed. This is done not out of antiquarian interest, but because the law of these cases resulted in many works having been injected into the public domain. Once a work enters the public domain it is ineligible for further copyright protection under the current Act, even if that aspect of the pre-1978 law which caused the work to be injected into the public domain has itself been repealed by the Act of 1976. Such older cases therefore retain a very practical significance presently dealing with works which were first created pre-1978.

This edition also up-dates judicial developments both in copyright, and in those areas of entertainment law which form the subject matter of this casebook. Such developments have been particularly notable with respect to First Amendment aspects of the law of defamation and right of privacy. Perhaps, most striking of all is the rapidly increasing judicial recognition of the right of publicity. The chapter revisions have been somewhat altered. Authors' moral rights, for example, are now treated in a separate chapter. So too is the general question of federal preemption. The defamation and privacy cases have been re-ordered so that each substantive area is treated separately.

One innovation contained in this edition is the addition of numerous pictures illustrating many cases. It is believed that many of these pictures contribute to a fuller understanding of the bases for the courts' decisions. Even where this may not be true, the illustrations are pedagogically useful in that they help flesh out and make more vivid the facts before the courts.

Special thanks are due to Matthew Bender & Co. for permission to reproduce here a number of passages from the 1978 edition of *Nimmer on Copyright*. I am grateful to Mary Moline and to Robert Kunstadt for their respective efforts in locating certain of the illustrations contained herein. The abbreviation "H.Rep." will be found throughout the copyright chapters in the casebook. This refers to H.R.Rep. No. 94-1476, 94th Cong., 2nd Sess. (1976).

The cartoons by Bion Smalley at pages 473 and 499 are reprinted by permission of the American Library Association from "Living in the Gap of Ambiguity; An Attorney's Advice to Librarians on the Copyright Law" by Lewis I. Flacks, in *American Libraries*, May, 1977, pp. 249 and 255, copyright © 1977 by permission of the American Library Association.

MELVILLE B. NIMMER
Los Angeles, California, June, 1979

Preface to the First Edition

The practice of law, no matter how specialized, is never limited to the subject matter of any one of the traditional conceptual branches of law. There is no such thing as a “contracts lawyer” or a “procedure lawyer” or a “conflicts lawyer”. Even those whose practice is devoted to particular fields, such as taxation, patents, personal injury, and criminal law, soon find that the “seamless web” cliché about the law is quite accurate. Still, the conceptual branches of law often do constitute convenient boundaries in determining the subject matter of law school courses. Where feasible, however, it seems obviously desirable for a given law school offering to cut across conceptual boundaries so as to encompass the primary related fields in a given commercial or industrial context. This casebook is an attempt to do just that for the student who may find himself in a practice consisting mainly of clients who write or publish books, magazines, or newspapers, or who are connected with the legitimate stage, motion pictures, radio or television, or who are in the fields of the musical or graphic arts. Neither legal terminology nor the English language contains a term to encompass the legal substance of these diverse, but related, endeavors. The best we have is the phrase “entertainment law”. It is not an entirely satisfactory designation since ordinarily one does not think, for example, of book publishing or the graphic arts as forms of “entertainment”. Still, “entertainment law” seems to be increasingly accepted as descriptive of the general field.

Basic contract law is, of course, vital to the entertainment lawyer, and on occasion he will enter diverse other areas of the law. But in the main, in his day to day work, apart from contract law, his practice is confined to the substantive areas of law explored in this casebook. There is an obvious utility in dealing with these areas in a single course. Real life facts are not conceptually air-tight. A given work may, for example, raise questions of copyright, unfair competition, right of privacy, and defamation. Advice to the client will require an understanding of all of these fields, and of the manner in which they interact. Copyright is, however, the heart of entertainment law, though it and the other areas of law encompassed in this casebook, have non-entertainment components. It is the entertainment aspects that are here treated in greatest depth. Some instructors may wish to limit a given semester or quarter offering to copyright alone, and perhaps devote a second semester or quarter to the non-copyright aspects of entertainment law, as contained in Chapters Nine through Twelve. Such a dual offering could be designated, as it is at U.C.L.A., Entertainment Law I and II.

As to editing technique. Although I have deleted extraneous portions of the judicial opinions that are here reproduced, I have avoided the sort of tightly digested extract of opinions found in many casebooks. The digested opinion seems to me to be pedagogically unsound. Either an opinion should be read as an opinion, with all the ambiguity and limitations inherent therein, or the principles contained in a case may be synthesized and generalized in textual material. The digested opinion serves neither of these purposes. It is, moreover, an unreal and misleading law school device that has no counterpart in the research necessary in actual practice. As to textual material, although there is a somewhat substantial amount of it contained herein, I think it is a mistake for a given work to attempt to be both a casebook and a treatise. It is unlikely to be satisfactory as either. The primary reliance here is on the reading of cases. This is not to denigrate the importance of treatises and other textual material, and references to such materials may

Preface to the First Edition

be found throughout. But with all that has been said against the case method in recent years, it remains a fact that the practicing lawyer worth his salt when faced with a problem reads the cases, and not merely what others have said about the cases. No less should be expected of students.

Acknowledgment and thanks are due to Matthew Bender & Co. who have permitted extensive portions of Nimmer on Copyright to appear herein. Thanks for permission to reproduce materials are also due to The American Law Institute, the California Law Review, Law and Contemporary Problems, and the Columbia Law Review.

MELVILLE B. NIMMER.
Los Angeles, California

June, 1971

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