

Copyright Law

Copyright Law

TWELFTH EDITION

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*For Will (39), Matt (36),
and Molly (ageless),
and for my parents, whose memory I cherish*

*In memory of my mother, Rosanne, and
for Marisa, Erik, and Elizabeth*

For Kristy, Madeleine, and Vivian

Annæ Reginae.

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

ICER

The Statute of Anne

When Anne was Queen of England, Parliament passed An Act . . . [M]en of letters and booksellers [had begun] to complain loudly of the evils of piracy. . . . It was in answer to these appeals that the [Act of] 8 Anne, c. 19, became a law, in 1710. This was the first English statute distinctly affirming copyright and providing for its protection. It was entitled “An Act for the Encouragement of Learning by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned.” The preamble declares that “printers, booksellers and other persons have of late frequently taken the liberty of printing, reprinting, and published, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families;” and that the object of the act is to prevent “such practices for the future, and for the encouragement of learned men to compose and write useful books.”

EATON S. DRONE,
A Treatise on the Law of Property in Intellectual
Productions in Great Britain and the United States (Boston, 1879)

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Preface

Time flies — not just in the publishing business, but in the history of the law. More than three hundred years have passed since April 10, 1710, the date on which the great-grandparent of all copyright laws — the Statute of Anne — became effective in England, the home of Anglo-American copyright. Now the United States, England, and the world have entered a new, distinctly high-tech, third millennium.

As always, in this edition of the casebook as in all of its predecessors, the one constant in copyright law is change. Speaking of history, even instructors who remember the advent of the present U.S. statute, the Copyright Act of 1976 (let alone those who have entered teaching or, like their students, been born since its passage!), must feel a degree of wonderment at how much, and how dramatically, copyright has evolved in the four-plus decades that have followed. Since 1976, the United States has joined enthusiastically — and, indeed, taken a leadership role — in the process of internationalizing copyright protection. Congress has moved to harmonize U.S. domestic law with international norms. For the first time, the United States recognized explicitly the existence, as to certain works at least, of authors' moral rights in the future and fate of their creations. And, most notably, new technologies have revolutionized the means of exploiting copyrighted works and challenged severely the theoretical integrity of the laws that protect them. Never has the study of copyright law been more challenging, or more enjoyable.

This casebook, then, is about copyright yesterday, today — and tomorrow. We have tried to locate the book in the midst of that dynamic tension that exists between copyright's history, including its most fundamental doctrines, and the future unfolding even as the students who use this work embark upon their careers as practitioners. The book deals comprehensively with the technologies, particularly digital technologies (the focus of the mammoth Digital Millennium Copyright Act of 1998), that are reshaping every aspect of our lives, from legal research to entertainment to the national economy. It integrates fully into traditional materials concerning domestic law the changes wrought by the globalization of copyright law, most notably (from this country's own perspective) through U.S. adherence to or adoption of the Berne Convention in 1989, NAFTA (the North American Free Trade Agreement) in 1994, TRIPS (the Agreement on Trade-Related Aspects of Intellectual Property Rights) in 1995, and the two World Intellectual Property Organization treaties in 1996. In addition,

the book attempts to identify for students the variety of philosophical and practical approaches that today characterize our discourse about copyright and related bodies of law. And, as always (in combination with frequent supplementation), this resource provides the most up-to-date information available on developments in the courts and in Congress that affect this ever-fascinating, ever-evolving field of study.

The book is organized in a straightforward way. Chapter 1 surveys the “landscape of copyright”: it introduces the history and philosophy of copyright, differentiates copyright from related bodies of law (patents, trademarks, and state intellectual property law), and provides an overview of the international framework and the digital challenges (two closely related topics) to which the ancient body of copyright law must now adapt if it is to survive and prosper. Chapters 2 and 3 deal with the prerequisites (i.e., originality and fixation in a tangible medium of expression) that any work must satisfy in order to be copyrightable, and with what types of works (literature, music, etc.) are copyrightable. Chapters 4 through 6 explore what might be called the “mechanics” of copyright: ownership and transfer; duration and terminations; and publication and the statutory formalities. Chapter 7 considers the exclusive rights, and the statutory limitations on them, recognized by Title 17, United States Code, which includes the 1976 Act and subsequent legislative enactments. Chapters 8 and 9 canvass actions for infringement and the increasingly important issue of secondary liability. Chapter 10 explores fair use and affirmative defenses, while Chapter 11 focuses on remedies under federal and state law (if the latter remedies are not preempted). Finally, Chapter 12 attempts a look into copyright’s future — its “horizon,” so to speak — as we move well into the Digital Revolution and the Third Millennium.

Within each of the chapters other than 1 and 12 (the two “bookend” chapters), each major topic is introduced first by a concise scope note outlining the nature of the inquiry, followed by a specification of the relevant statutory provisions to be read in the Supplement, and finally an excerpt from the pertinent legislative history. The cases, with extensive notes and questions, follow this introductory material. The supplementary materials, both printed and online, provide constitutional, statutory, legislative and regulatory materials, recent cases, treaties, and materials concerning digital developments.

Both the selection of cases and the purpose of the notes and questions require special comment. Over 85% of the principal cases have been decided since January 1, 1978, the effective date of the Copyright Act of 1976. In most instances, we have deleted doctrinal matter not germane to the topic at hand; but the facts of each case generally have been left to speak for themselves, on grounds that they assist in the learning process, are entertaining, and read rather quickly. Like the cases, the notes and questions emphasize heavily issues that have arisen, or may arise, under the present governing statute. We have made no attempt to “hide the ball.” We hope that readers will find the notes to be systematic and informative in their exploration of current law. They should serve both to stimulate classroom discussion and to afford understanding of details that cannot be treated in class, due to time limitations.

Beyond this casebook, students will find many opportunities for further reading, including several multi-volume treatises: David and Melville Nimmer's *NIMMER ON COPYRIGHT*; William F. Patry's *PATRY ON COPYRIGHT*; Paul Goldstein's *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE*; and Howard Abrams' and Tyler Ochoa's *THE LAW OF COPYRIGHT*. A number of fine shorter treatises and handbooks are available, including Marshall Leaffer's *UNDERSTANDING COPYRIGHT LAW*, Robert Lind's *COPYRIGHT LAW*, and David Fagundes & Robert Lind's *COPYRIGHT LAW: QUESTIONS AND ANSWERS*. The Copyright Society of the U.S.A. publishes its *Journal* on a bimonthly basis. Among the commercial services, CCH's *Copyright Law Reports* appears monthly, and BNA's *Patent, Trademark and Copyright Journal*, weekly.

Also, for those concerned to obtain an in-depth understanding of the revision process which led to the adoption of the Copyright Act of 1976, the two indispensable resources are the *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY* (G. Grossman ed. 1976-77), which provides the official documents, and the *KAMENSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976* (A. Latman & J. Lightstone eds. 1981), which provides a roadmap through the process. Subsequent amendments to the 1976 Act are, of course, the subject of their own (but less extensive) legislative histories, portions of which are reprinted in this casebook and supplement as warranted.

One other learning resource should be mentioned here: vigorous, informed interaction with others engaged in the study of this complex and fascinating subject. In that spirit, we look forward to receiving whatever comments or suggestions for improvements in these materials you may have to offer, based on your own experiences in using them.

CRAIG JOYCE

TYLER OCHOA

MICHAEL CARROLL

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