MELVILLE B. NIMMER
1923–1985

The Editors of the *Cardozo Arts & Entertainment Law Journal* present this Tribute in memory of Melville B. Nimmer. The following remembrances attest to Professor Nimmer's lasting contributions to the fields of copyright and first amendment law.

MELVILLE NIMMER AND THE NEW GENERATION OF INTELLECTUAL PROPERTY SCHOLARS

DONALD S. CHISUM*

I did not know Melville Nimmer well. Nevertheless, his work was an inspiration to me and to numerous teachers and scholars who were interested in the field of intellectual property law, and who came of age during the 1960's and 1970's.

Prior to about 1980, few in the legal profession knew what the phrase "intellectual property" meant. The fields of patents and copyrights (and, to a lesser extent, trademarks) were viewed as being the province of specialized practitioners and of limited theoretical interest.[1] Few law schools had courses on even the elementary aspects of copyright, patent, and trademark law. (Those that did were concentrated in Los Angeles and New York, the centers of the entertainment industry, and Washington, the locus of the patent system.) Older faculty colleagues either ignored intellectual property law or, reflecting a bias fostered by the dominance in the 1950's and 1960's of antitrust thought over the generic field of the legal regulation of competition, viewed it with suspicion.

For a variety of reasons, young teachers and scholars did pursue intellectual property law. Published in 1963, Melville Nimmer's treatise on copyright provided the benchmark. In thinking, teaching, and writing about copyright, we could begin on a higher plain because Nimmer had covered the basics. Our raw material—reported copyright cases—reflected clearer reasoning because the judges (and their clerks) regularly relied on the wisdom of Professor Nimmer. Professor Nimmer was not the last word on a point of copyright law, but he was certainly the first word. Things were less tidy in patents and trademarks, where we lacked modern, systematic, professorial treatment. So, led by Nimmer, we labored in the vineyards. In addition to the

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[1] If one goes back far enough, one finds a higher level of interest in intellectual property law. *See, e.g.*, Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841). ("Patents and copyrights approach nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be very subtle and refined, and sometimes, almost evanescent.").

increasing output of quality articles, two major casebooks appeared—*Legal Regulation of the Competitive Process* by Kitch & Perlman in 1972 and *Copyright, Patent, Trademark, and Related State Doctrines* by Goldstein in 1973. In 1972, McCarthy's *Trademarks and Unfair Competition* appeared, followed in 1978 by my *Patents: A Treatise on the Law of Patentability, Validity and Infringement*. None of us succeeded in replicating in our own areas the work of Melville Nimmer in copyright. But the whip that drove us forward was—"what this area needs is a Nimmer on _____!!!"

Since 1980, the field of intellectual property law has flowered. Economic developments and new technologies, such as genetic engineering and computers, have challenged the traditional systems of patent and copyright law. In 1980, the Supreme Court sparked new interest in the patent system by ruling that genetically-altered microorganisms can be patented.[2] In 1985, a judge put Kodak out of the instant camera business, at the cost of hundreds of millions of dollars, because Kodak was found to have infringed on seven patents held by Polaroid.[3] Copyright became the primary protection scheme for a new multi-billion dollar industry—computer software.[4] Congress enacted punitive legislation to deter trademark counterfeiting.[5] With the "real world" importance of intellectual property law mushrooming, those of us who ventured into the field in the Nimmer era can count our lucky stars.[6]

I will relate one personal anecdote. In the early 1970's, I was invited to participate in a panel discussion on law and the visual arts. Professor Nimmer was the primary speaker. When my five minutes came, I boldly put forth what I considered to be some original thoughts about copyright infringement and the scope of protection. Professor Nimmer gently but firmly commented, in effect, that my thoughts might be original (in a copyright sense) but they certainly were not novel (in a patent law sense).

One thing we need not say about the unfortunate passing of Professor Nimmer is that "we will miss him." His works, the fruits of his mind, are still with us and will be as long as we have a

2 Diamond v. Chakrabarty, 447 U.S. 303 (1980).
3 Polaroid Corp. v. Eastman Kodak, 228 U.S.P.Q. (BNA) 305 (D. Mass. 1985).
4 *See, e.g.*, Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983).
5 Trademark Counterfeiting Act of 1984, 15 U.S.C. §§ 1110-1118 (Supp. II 1984).
6 Indicative of the fact that the field is becoming accepted in legal academic circles is the recent creation of the Intellectual Property Law Section within the American Association of Law Schools.

copyright system.[7] I suspect that that will extend for far more than fifty years after the death of one of the great legal authors of our time, Melville B. Nimmer.

7 Lest anyone doubt this prediction (or dismiss it as rhetorical), I note that a three-volume treatise on patent law published in 1890 by Professor William Robinson of Yale is still read and cited.

MELVILLE B. NIMMER AND THE NATHAN BURKAN MEMORIAL COMPETITION

HERMAN FINKELSTEIN*

Mel Nimmer's writings on copyright are so clear and fundamental that he has been cited by the judiciary at large as the most reliable authority on almost any phase of the subject. How did it all come about? Of course, it was his great interest in the field, hard work, and unusual skill. But I am sure he would have been successful in any branch of law. Why copyright? I do not know the answer, but at the outset, while he was still a student, our paths crossed. As Director of ASCAP's Nathan Burkan Memorial Competition, then in its thirteenth year, I requested a distinguished panel of judges[1] to select for publication the five best papers which had been certified as winning papers in the Competition at law schools throughout the country. They certified as the best, the Harvard Law School paper entitled *Inroads on Copyright Protection*,[2] written by Melville B. Nimmer, a third-year student. It was a critical examination of the leading cases dealing with the subject of plagiarism, pointing out the shortcomings of the courts' analyses—even in opinions written by our most eminent judges.

When I was ASCAP's General Counsel, I managed to keep in touch with many of the national winners of the Nathan Burkan Competition, and so, when Mel joined the U.C.L.A. faculty, he invited me to given an occasional lecture to his class, and we always had a reunion of some Nathan Burkan winners in the Los Angeles area. We started with the U.C.L.A. faculty itself. In addition to Mel, there was Monroe E. Price (now Dean of the Benjamin N. Cardozo School of Law), who had won the Nathan Burkan award at Yale,[3] and Arthur I. Rosett, who had won it at Columbia.[4] Mel would have his recent student winners of the Competition at U.C.L.A. join us for a Nathan Burkan reunion luncheon.

Many national Nathan Burkan winners went on to teach at

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[1] Judge Herbert F. Goodrich, Court of Appeals for the Third Circuit; Justice Roger J. Traynor, Supreme Court of California; Judge George T. Washington, Court of Appeals for the District of Columbia.

[2] Nimmer, *Inroads on Copyright Protection*, 4 COPYRIGHT L. SYMP. (ASCAP) 2 (1952).

[3] Price, *The Moral Judge and the Copyright Statute: The Problem of Stiffel and Compco*, 14 COPYRIGHT L. SYMP. (ASCAP) 90 (1966).

[4] Rosett, *Burlesque as Copyright Infringement*, 9 COPYRIGHT L. SYMP. (ASCAP) 1 (1958).

law schools, including Judge Charles W. Joiner,[5] who taught at University of Michigan and Wayne State before his appointment to the federal bench in Michigan; Judge Raya S. Dreben,[6] who taught at Harvard before her appointment to the Superior Court of Massachusetts; Professor Arthur R. Miller[7] of Harvard; Professor Robert A. Gorman[8] of the University of Pennsylvania; Professor Paul Goldstein[9] of Stanford; and Professor Joseph J. Beard[10] of St. Johns.

I watched Mel's rapid growth from an outstanding student to a practitioner and teacher at the top of his profession. He influenced the development of the law of copyright more than anyone outside the halls of Congress, and will continue to mold the law through his writings and his many students who will carry on his work. Though Mel will no longer be with us physically, his voice will be heard loud and clear for many years to come.

[5] Joiner, *Analysis, Criticism, Comparison and Suggested Corrections of the Copyright Law of the United States Relative to Mechanical Reproduction of Music*, 2 COPYRIGHT L. SYMP. (ASCAP) 43 (1940).

[6] Dreben, *Publication and the British Copyright Law*, 7 COPYRIGHT L. SYMP. (ASCAP) 3 (1956).

[7] Miller, *Problems in the Transfer of Interests in a Copyright*, 10 COPYRIGHT L. SYMP. (ASCAP) 131 (1959).

[8] Gorman, *Copyright Protection for the Collection and Representation of Facts*, 12 COPYRIGHT L. SYMP. (ASCAP) 30 (1963).

[9] Goldstein, *Copyrighting the New Music*, 16 COPYRIGHT L. SYMP. (ASCAP) 1 (1968).

[10] Beard, *Cybera: The Age of Information*, 19 COPYRIGHT L. SYMP. (ASCAP) 117 (1971).

MELVILLE B. NIMMER

GARY L. FRANCIONE*

I never met Melville Nimmer nor had I occasion to speak to him personally. I accepted the invitation to participate in this tribute because I attribute my original interest in copyright to Nimmer. On this account, I owe him gratitude different in kind from what *any* teacher of copyright owes to him and his indefatigable efforts to bring coherence to copyright law.

My only contact with Nimmer was, oddly enough, while I was an undergraduate philosophy student in 1974. I was doing research on the issue of legal moralism—the doctrine that maintains that it is morally justifiable for the state to use its coercive force to prohibit "immorality." In this context, I read my first Supreme Court case—*Cohen v. California*,[1] which contained Justice Harlan's condemnation of the prohibition of "offensive" conduct concerning draft protest. I was so impressed by *Cohen* that I wanted to read the briefs filed in the case to better understand how what I then thought of as the "scientific" doctrine of precedent functioned in that case. Melville Nimmer represented Cohen. I wrote to Professor Nimmer, and he sent me a copy of all the papers in the case. My ideas about precedent have changed dramatically since 1974, but my respect for Nimmer's brilliant defense of civil rights in *Cohen* has remained the same.

Several years later, when I was in law school, I was browsing through the periodicals section of the library and saw a copy of the *U.C.L.A. Law Review* that featured a symposium on copyright law. One of the articles was written by an author whose name I knew: "Melville B. Nimmer."[2] I remembered Nimmer's name from my work on *Cohen* and I read the Article. The Article concerned protectible subject matter under the Copyright Act of 1976,[3] and thus began for me a fascination that is still with me. The following year, I took Ernie Folk's course on "Law and the Arts," and, under Folk's guidance, which included reading generous sections of Nimmer's treatise[4]

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[1] 403 U.S. 15 (1971).

[2] Nimmer, *The Subject Matter of Copyright under the Act of 1976*, 24 U.C.L.A. L. REV. 978 (1977).

[3] 17 U.S.C. §§ 101-810 (1982, Supp. I 1983, & Supp. II 1984).

[4] *See generally* M. NIMMER, NIMMER ON COPYRIGHT (1985).

and Nimmer's other works, I began to think seriously and to write about this marvelous area of law.

Nimmer's work will continue to inspire and guide all who are interested in literary property, as well as those who seek to approach any area of the law with the passion and quest for understanding that Mel Nimmer obviously possessed and demonstrated throughout his career.

ENCOUNTERS WITH MEL NIMMER

PAUL GOLDSTEIN*

I first encountered Melville Nimmer, as so many lawyers have, through his writings. As I recall, the first piece by Mel that I read was his pathbreaking article, *The Right of Publicity*.[1] Astute and scholarly, imaginative but carefully analyzed, this piece bears all of the authoritative hallmarks that characterize Mel's subsequent scholarship, including his widely-cited treatise, *Nimmer on Copyright*[2]—doubtless the work through which most lawyers know Melville Nimmer best. One can occasionally argue with some of the positions that Mel took in his treatise. But no one can dispute the extraordinary intellectual capacity that enabled Mel to embrace all of United States copyright law, from its loftiest principles to its most technical features, to soar from grand theory to an almost talmudic analysis of individual decisions.

Several years passed before I met Mel Nimmer in person. We first met late in 1974 in Mel's office at the U.C.L.A. Law School. Not surprisingly, our conversation quickly turned from current issues in copyright law to Mel's treatise which had done so much to shape that law. I remember asking Mel how he had undertaken writing the treatise. As he took me through the treatise's early stages—to the best of my recollection, he began his work on it while still actively involved in law practice, and sandwiched his research and writing between a busy schedule of meetings—his eyes lit up. I sense that Mel realized even at the start that he was engaged in an important, pioneering journey.

I had many happy opportunities to see Mel after that first meeting. Although it was not the last time that I saw him, the occasion I remember most vividly was an encounter in Washington, D.C. in June 1984. We had both participated in a professional meeting during the day. Although we had gone our separate ways to dinner, serendipity brought us together later

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[1] 19 LAW & CONTEMP. PROBS. 203 (1954). It is, doubtless, some measure of the enduring qualities of Melville Nimmer's scholarship that, in tracking down the volume in which this piece first appeared, I found it not on the library bookshelves, but in the carrel of a law review candidate who was writing a note on the right of publicity. Obviously, he or she showed the good sense to begin at the source!

[2] M. NIMMER, NIMMER ON COPYRIGHT (1985).

that evening in the public rooms of my hotel where I was visiting with a former student, now an active member of the copyright bar. Mel joined us and regaled us with wonderful, and wonderfully wise, tales from his practice. When the time came to say goodbye, I offered to walk Mel back to his hotel. Somehow, we managed to take sufficient detours on the way for our walk to encompass many more than the two blocks from my hotel to his. And, as sometimes happens between colleagues, after dinner and far from home, our conversation turned from specific, current topics in our field to some wider issues. I remember asking Mel about his soon to be published treatise on free speech[3] and about another work on the boards, a treatise on international and comparative copyright law. From Mel's responses, I first got a glimpse, however brief, of the sources that nourished the vast energy of his undertakings: his conviction that the conditions of authorship and the care of our culture are concerns that transcend both the copyright statute and our national boundaries.

I have, both before these encounters and since, encountered Mel Nimmer in yet another way—through his former students. All speak of Mel in the most enthusiastic, almost reverential terms. Although I have met several of these young lawyers over the years, the two whose reminiscences I remember best are two U.C.L.A. Law School graduates who have served as teaching fellows at Stanford Law School. Both spoke of Mel as a great teacher. I cannot help but think that they have passed on to their students some of the gifts that, as a great teacher, Mel gave to them.

Melville Nimmer's contributions to copyright law will long outlive him. His many writings in the field will, for years to come, continue to shape the law, in Congress and in the courts. Mel's considerable personal qualities will continue to affect all of us who were fortunate enough to know him personally. But I expect, and as he doubtless would have wished, Mel's longest reach will be through the generations of students whom he touched with the qualities of his mind and who, through their own careers in practice and academe, will perpetuate those qualities, shaping future decisions and the lives of future lawyers.

[3] M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984).

MELVILLE NIMMER: A TRIBUTE AND APPRECIATION

ROBERT A. GORMAN*

As we approach the close of the twentieth century, our legal system has become so complex that it is rare to expect any one person to shape and dominate any given legal field. That is particularly true of a field like copyright, which deals with explosive developments in communications and intellectual property. Yet surely the law of copyright is synonymous with the name of Melville Nimmer.

My personal contacts with Mel were, regrettably, rather few. When I met him at a number of professional meetings, the man who was such a dominant presence at the speaker's platform was as warm and affable as could be imagined in personal interchange. Figures of his preeminence can sometimes intimidate, simply by virtue of professional accomplishment, if not by personal manner. But Mel was a delight to be with.

My most frequent contacts with Mel came through his writings—and how stimulating and rewarding those contacts were! His treatise is a work of breathtaking scope and depth. Surely it has had as profound an impact upon the shape of copyright law as have the earlier works of Wigmore, Williston, Corbin, Scott, and Prosser in the fields with which those names are indelibly identified. It is difficult to find very many copyright cases decided in the past quarter of a century that do not reflect Mel's analysis or do not pay Mel the compliment of citation. Even those relatively few judges who have reached conclusions different from Mel's automatically felt obliged to cite him and to carefully set forth their reasons for disagreeing!

I cannot recall a copyright issue—however arcane or perplexing—that Mel failed to identify and discuss in his treatise. He had a knack for exploring issues even before lawyers and courts were sensitive to their existence. His writing was clear, analytical, and persuasive. On those rare occasions when I disagreed with Mel's position, I presumed myself mistaken, and voiced my own views (to myself or in class) with great diffidence.

Even beyond the monumental treatise, Mel Nimmer was a

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scholar of wide-ranging vision. It was he who saw the significance and great expansive potential of the right of publicity at a time when it was barely a phrase in the jurisprudential lexicon. And it was Mel who pioneered exploration of the near-cosmic conflict (or, in today's phraseology, the "interface") between copyright and the first amendment.

Mel Nimmer has been, in a word, the major architect of the law of copyright, more so than any other luminous figure who is featured in that star-studded field. How tragic it is that he has been so suddenly taken from us—particularly so soon after the passing of my good colleague Alan Latman. Those of us who are versed in copyright lore know well that knowledge is advanced through dwarfs standing on the shoulders of giants. It will hardly be possible to replace those scholarly and humane giants. But given the seminal nature of their work, there will remain for the rest of us an opportunity and a responsibility to take up where they have so regrettably left off.

MELVILLE B. NIMMER

E. GABRIEL PERLE*

Melville B. Nimmer started practicing law in California three and one-half decades ago. In the years that followed, Mel became a man whose name was synonymous with copyright, a distinguished teacher, a respected practitioner, and a good friend to many of us.

When Mel began his practice as a motion picture lawyer, copyright law was a relatively unimportant discipline, centered in New York, and not the first choice of many law students as the field in which they wished to practice. No law school in the country regularly offered copyright law as part of its curriculum. In New York, the Copyright Circle Luncheons were sell-outs if fifty people showed up. Copyright was primarily concerned with matters between individual proprietors and users, involving comparatively small dollars and comparatively little public interest.

All that has changed and Mel was responsible for a large part of that change. He, more than anyone else, was responsible for making the two Coasts co-equals in a copyright context. As a teacher, he made U.C.L.A. a center of copyright learning. As a lecturer, he took his erudition and enthusiasm throughout the country. When Mel spoke to the Copyright Circle Luncheon last year, not fifty but almost 300 lawyers crowded into Sardi's to hear him. And copyright is now big business involving big dollars and major public policy considerations.

After Mel's death, I re-read the Inaugural Donald C. Brace Memorial Lecture on Copyright Law.[1] It was right that the first Brace Lecture should have been given by Mel, and the topic, *Copyright vs. The First Amendment*, was typically like Nimmer—provocative, original, and ahead of its time, signalling the future rather than reflecting the past.

As Mel delivered that lecture, I remembered some of us so-called experts in copyright thinking he was reaching for his subject matter. How wrong we were. Rather, Mel had once again

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1 Nimmer, *Copyright vs. The First Amendment: The Inaugural Donald C. Brace Memorial Lecture on Copyright Law, reprinted in* 17 BULL. COPYRIGHT L. SOC'Y 255 (1970) (lecture given Mar. 16, 1970); *see also* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970) (adaptation of the Mar. 16, 1970 lecture).

recognized and anticipated a development in copyright law which was to become real and ever more important, culminating last year in the *Nation* case before the Supreme Court.[2]

In 1970, Mel and I were just getting to know each other and becoming friends. Our friendship really solidified during the activities of CONTU, the National Commission on New Technological Uses of Copyright Works,[3] on which we both served. In early 1976, CONTU was considering what protection should be accorded to data bases. Most of us had never "met" a data base. CONTU made arrangements for the Commissioners to witness a demonstration of LEXIS, which was then a novel legal tool with which most lawyers were unfamiliar. On the day of the demonstration, the operator set up the terminal, turned to the Commissioners, and asked if there was a question about any matter in the federal courts during the then prior five years to which we would like the answer. One of the Commissioners looked at Mel, smiled, and asked "how many times during that period has *Nimmer on Copyright* been cited in those courts?" The demonstrator keystroked, the machine whirred and beeped, and the monitor displayed the answer, "28." "Twenty-eight," said the demonstrator. As one, we all turned to Mel who wore a puzzled expression. "I think it was thirty-one," he said.

It *was* thirty-one! What was significant, however, was neither that Mel knew the correct number nor that he had been cited so often. What was significant was that the question was appropriate.

What I have written may appear to be as much about copyright as about Mel. Perhaps that is inevitable because, in the minds of many of us, Mel and copyright are inseparable. Mel was, however, far more than copyright. He achieved so much in his profession—as a scholar, as a teacher, as a practitioner, and as a writer. He helped to shape the law in a significant way and part of it will always be his. He achieved so much as a person—as a husband, as a father, and as a friend.

[2] Harper & Row Pub., Inc. v. Nation Enters., 105 S. Ct. 2218 (1985).

[3] CONTU was created by the Act of Dec. 31, 1974, Pub. L. No. 93-573, Title II, §§ 201-208, 88 Stat. 1873, for the purpose of "making a thorough study of the emerging patterns in [the computer] field and [to] recommend definitive copyright provisions to deal with the situation." H. REP. No. 1476, 94th Cong., 2d Sess. 116, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 5659, 5731.

The Final Report of CONTU was delivered July 31, 1978, 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.08 n.4 (1985), and its recommendations were promulgated as the "Computer Software Copyright Act of 1980." Act of Dec. 12, 1980, Pub. L. No. 96-517 § 10, 94 Stat. 3015, 3028 (codified as amended at 17 U.S.C. § 117 (1982)).

Those of us who knew Mel in any of those roles are better for having known him. We share his loss with his family and with his larger legal family. At the same time, we celebrate his life and his achievements.

MEL NIMMER

HARRIET F. PILPEL*

Mel Nimmer was an outstanding person. He was also, and will always be, a distinguished legal institution.

It is difficult to think of any other person whose name has become synonymous with the learning content of a legal field to the extent that Mel's has. If you had a copyright issue which had never been the subject of a court case or even an official opinion, that really did not matter if Mel Nimmer in his monumental treatise on copyright had addressed it. No matter what the problem, the question always was "what does Nimmer say about it?" I do not think it is an exaggeration to state that what Nimmer said was at least as important as what the courts said, with the possible exception of the United States Supreme Court. Even so, the Court frequently asked itself the question "what does Nimmer say about it?" and relied heavily on his work in its final copyright decisions.

The number of specifics which Mel addressed in his great general treatise is unbelievable. Speaking as a practitioner in the copyright field, I know that Mel's treatise was constantly kept up to date and is there to help not only with the answers, but also with the history and analysis which lead to the answers. For this reason, Mel Nimmer covered all bases in the area of copyright law and his book is a beacon light into areas unexplored by others. On the rare occasion when the treatise did not address a specific point, you could call Mel and be certain that he would add an important dimension to your thoughts.

More recently Mel, without in any way lessening his supremacy in the copyright field, turned his attention to the first amendment. I lunched with him when he was contemplating this further work. He realized that the first amendment which, among other things, enshrines our guarantees of freedom of the press, was under increasing attack. In a way, it was not surprising that he wrote to dispel these attacks. The need for greater attention to be paid to our fundamental freedoms of expression, called by Justice Cardozo, the matrix and the indispensable condition of other freedoms, has become increasingly clear. This is so, because idealogues and those who profess to follow them

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have become more strident in their claim that their opinions must be accepted and should obliterate all others' right to express themselves. Mel responded to this threat with a study that will continue to enhance the weaponry to be used in our constant battle to preserve free expression. Mel knew, understood, agreed with, and supplemented what Justice Oliver Wendell Holmes, Jr. said in his classic statement:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[1]

Mel was also a wonderful human being, warm, ever interested in what you had to say even though you felt that he always had that much more to say which you wanted to hear. He was gifted with a kindly sense of humor and deeply concerned, notwithstanding his enormous contribution to the technical field of copyright and free speech, with the policy aspects of the important causes of our day. He was not only interesting to be with; he was fun to be with; he was very stimulating, so that after talking to him you saw things more in the round and realized more of their implications.

Finally, Mel had that ineffable quality that made people love him, want to be with him, listen to him, talk to him, and have a rewarding time in his presence. I am very happy that I had the opportunity to know him as a friend, and the privilege of seeing too the deep and quiet ties that characterized his relationship with his lovely wife, Gloria, and his children.

To Mel Nimmer, the person, I say hail and farewell. To Mel Nimmer, the legal institution, I say hail and never farewell. I shall always be deeply grateful that he lived to grace the fields of law which I care about so deeply and over which he exerted such a lasting and beneficial influence.

[1] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

MELVILLE BERNARD NIMMER, 1923-1985

MONROE E. PRICE*

What a delight: to work with the stuff of ideas, of books and song, of theater and art, of the underpinnings of the popular culture of a country. For many lawyers and scholars, the everyday life of the law is not so tied to national sensibilities and consciousness. But Melville Nimmer was fortunate to have found this lovely space in the law. And we—judges, clients, authors, and other creators and consumers of culture—are all lucky indeed that this great scholar gave intellectual property his dedicated attention.

When Professor Nimmer came to New York in January 1984 to teach a short copyright course at Cardozo, there was a sense of a visiting prince, in this case a prince of the mind who was celebrated and loved. For our students—as for any student who had ever studied with him—it was a wondrous experience to receive the word from such a master. And for those who practice law in New York, it was a significant event as well. Upstairs at Sardi's, the room was packed to the picture-covered walls with droves of lawyers, the army who each day and hour cite his treatise.

We were fortunate that Nimmer so nicely bridged scholarship and practice. He brought to his scholarship an unusual combination of experience in the field as well as academic devotion. As a result, much of Nimmer's thinking about copyright was contextual. He realized that the road from the author to the consumer of creative activity is filled with barriers and obstacles involving investments and middlemen, obstacles that make too simplistic the pure notion that protection is the way to encourage the arts and sciences. He recognized as well the genius of creativity, the way in which the sole and human process of contributing to the arts takes place. He had the benefit of the practical exposure to the operation of the carving up of intellectual property interests in the motion picture industry. He understood the national politics of change in the regime of intellectual property and how important it was to the motion picture industry that strange notions of moral rights did not interfere with the contractual arrangements that made complex transactions possible.

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Nimmer knew from his motion picture experience how much of a shared effort there is in much of the creative process; how the script—sometimes the initial copyrightable expression—is but one element; there are those countless participants, including the director, producer, actors, and editors who have some contributing function that may be the distinctive characteristic that assures success. In these modern collaborative enterprises, simple models of copyright might no longer avail; and Nimmer recognized the need to mediate between the protection of the author and flexibility required for the building of an industry on gossamer thoughts.

Los Angeles was important for Nimmer for reasons other than his familiarity with the motion picture industry. He was a product of the idealism, the simplicity, and the ambition of Los Angeles in the period around World War II. At his memorial service, two old friends, Dr. Saul Brown and Robert Zaitlin, talked of the clear days of the late 1930's when the boys of Los Angeles High formed their view of themselves and of the world. It was a vision in which talent and effort, coupled with idealism, were recognized as potent forces. It was a world in which ordered liberty, the achievement of commonly accepted goals, and the pursuit of creativity were harmonious. It was a world from which the copyright treatise, with its assumptions about the role of law in making creativity flourish, could have its roots.

Nimmer as a propounder and clarifier of copyright law was an extraordinary phenomenon. But he made it his special task to turn his attention from copyright to the first amendment and to the first amendment constraints on copyright. Why did this take place and how was it connected to his love of copyright and intellectual property? A great deal of it is the difference between Nimmer the theorist and Nimmer the practitioner, between Nimmer the restater of law and Nimmer seeking to reach beyond. He recognized that there had to be a limitation on the exclusivity of the ownership rights of a creator in the work of art. He understood and celebrated the immediate logic of copyright that yielded protectible rights in intellectual property, but he also sought to understand how those rights fit in a democratic society.

Nimmer's work on the first amendment and copyright demonstrates how certain principles have an elemental hold on our imagination. And it is the greatness of certain scholars that they can take these principles and show how they are strong enough to serve as fundamental underpinnings for comprehensive perceptions, for systems of thought, for structures that allow economic activity to take place. In looking back at the work of Melville Nimmer, and particularly the heroic work of his treatise on copyright, one can see how he tested and refined basic principles and then hewed to them as he looked at more and more complex legal questions.

Thus, while Nimmer's name is tied forever to the history of copyright, to the working out of the complexities of transfer, inheritance, infringement, copyrightability, definitions of authorship, and written works, what seemed, increasingly, to intrigue him, to capture his sense of what was significant, was the role of the first amendment and its relationship to copyright law and policy. Only one year before his death was his treatise on the first amendment published. And his treatise on copyright was increasingly concerned with questions of possible conflict between these two great signs of our constitutional commitment to creativity.

As an example, in the treatise, Nimmer wrestled with that most familiar of principles in copyright law—the idea-expression distinction—and found within it the kind of overarching element that, in his view, permitted the first amendment and copyright law to live in harmony. It allowed him solace against his deeply felt concern that the author's exclusive rights under copyright law might be inconsistent with the proscription on congressional passage of any law abridging the freedom of speech.

His analysis of this possible paradox was typically Nimmer-like: lucid, persuasive, and ameliorist. It was reflective of what seemed to be his abiding faith that no matter how complex the issue, a suitable arrangement could be achieved that would, without major dislocation, allow accommodation among competing doctrines.

Nimmer asked the question this way: "[d]oes the law of copyright . . . effectively serve the interests underlying the freedom of speech?"[1] He wanted to explore whether "the copyright prohibition on repeating or copying the 'expression' of ideas comport[s] with the underlying rationale for freedom of speech . . . ."[2] His resolution had that sense of comfort and security that makes the treatise so reassuring and quotable for the courts:

> On the whole, therefore, it appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it en-

[1] 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10[B][2] (1985).
[2] *Id.*

> croaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his works in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as a part of the democratic dialogue.[3]

Nimmer was increasingly concerned with free speech questions even beyond copyright. This concern found its flower in his second treatise, his new work committed to the first amendment and his theory of its evolution and application. It was expressed in his discussions of the *Nation*[4] case in a variety of settings, and in his effort to draw distinctions between pure first amendment constraints on copyright and the working out of the fair use provisions of the Act.

Much of Nimmer's interest, perhaps, arose from the crises on many campuses, including those of the University of California, in the 1960's. His representation in the famous case of *Cohen v. California*[5] and his increasing occupation with the definition of symbolic speech led to an increasing desire to master the field and to provide the kind of overarching sense of order in the speech area that he had provided for copyright.

There are so many other aspects of Nimmer's life and work that bear comment. His contribution to the National Commission on New Technological Uses of Copyrighted Works bears special mention. In his attitude toward new technology, Nimmer reflected the common-law tradition. There would be times, of course, when legislation would be necessary, but even there, he often found solace and models for action in the ways in which courts had developed doctrine in the past. Just because there were new modes, new devices did not mean that enduring principles and approaches should not apply.

Nimmer recognized how important it was to understand how other nations dealt with intellectual property issues. His was not a parochial perspective. In the late 1960's, he directed a multination study of rights not clearly found in the United States copyright regime. Characteristically, he thought that intense scholarship on these issues would make more fruitful future debate on whether or

[3] *Id.* at 1-76.

[4] Harper & Row, Pub., Inc. v. Nation Enters, 501 F. Supp. 848 (S.D.N.Y. 1980), *rev'd on other grounds*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 2218 (1985).

[5] 403 U.S. 15 (1971).

not the United States should join the Berne Convention. He was not an inveterate roamer of conferences and conventions; but still, in more recent years, his children grown and his treatises published, he was more committed to the expansion of experience that comes from sustained visits and travel.

Nimmer and his friend, scholar, and colleague, Alan Latman, two years ago, were working together on a book entitled *World Copyright*, which would have contained chapters on each of the most significant copyright laws in the world. On the occasion of Latman's death, in 1984, Nimmer wrote that "[i]t is difficult to accept the fact that Alan will not be here to see this project through to fruition. It will at least serve as a memorial to him."[6] Now the work will have to serve as a memorial to them both.

[6] Nimmer, *Alan Latman*, 32 J. COPYRIGHT SOCY 11 (1984).

THE ENDURING CONTRIBUTIONS OF PROFESSOR NIMMER

J.H. REICHMAN*

In the spring of 1980, Professor Melville Nimmer gave a two-day seminar in New York City that was designed to help the copyright bar comprehend the intricacies of the General Revision of Copyright Law enacted in 1976.[1] The lucidity of his presentation still stands out in my mind. It demonstrated once again the extent to which sheer knowledge and mastery of a discipline can foster almost transcendental powers of synthesis. It was also gratifying to learn from the questions posed that even the most experienced members of that audience were often as perplexed as this neophyte. Privately, I still sympathized with that panel of the Court of Appeals for the Third Circuit which had lately depicted copyright law as a set of "elusive and nebulous abstractions."[2] To Professor Nimmer, however, there was nothing arcane about it. Listening to him dispatch question after difficult question with calm precision, I found myself wondering whether his answers were so persuasive because they accurately reflected the state of the law or whether they were destined to become the law because *Nimmer on Copyright*[3] would persuade nearly everyone else that they were correct.[4]

A few years later, I was privileged to hear Professor Nimmer debate the issues presented by the *Betamax*[5] case with counsel for the manufacturers whose video recorders had elicited a charge of contributory infringement. The case was pending before the Supreme Court, and the audience was entirely composed of professors working in intellectual property law. In an elegant dissertation, based in part on historical research,[6] Nimmer illumi-

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1 The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1982, Supp. I, 1983, & Supp. II 1984) (entered into force on January 1, 1978).

2 Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 906 (1975) (Weiss, C.J.).

3 M. NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS, 4 vols. (1985) [hereinafter cited as NIMMER ON COPYRIGHT].

4 *See* Galante, *The man who wrote the book: Melville B. Nimmer is king of copyright*, NATIONAL L.J., October 10, 1983, at 1.

5 Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

6 *See* Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505, 1506-17 (1982).

nated several problems common to the new technologies of communication. With dignity he declined to allow complex issues to be reduced to a few aggressively simplified propositions that his adversary counted on to please the crowd and, eventually, the Court.[7] It was a revealing insight into the full stature of Nimmer as teacher, at work in an academic forum without the self-imposed constraints of the treatise writer.

In the spring of 1985, some of us awaiting the annual update of his treatise were surprised to receive a new chapter dealing with "mask works,"[8] that is to say, with the integrated circuit designs or "chip topography" covered by the Semiconductor Chip Protection Act of 1984.[9] Perhaps because Professor Nimmer's ability to give legally operative form to the murky domain of copyright law is something we all take for granted, the speed with which he could produce a coherent set of rules from such legislative patchwork[10] reminded us forcefully of his unique organizational skills.

This is not to say that his "copyright approach"[11] entirely succeeds in tidying up the many industrial property features this hybrid legislation contains. For example, section 902(b)(1) of the Semiconductor Chip Protection Act imposes an "originality" requirement, but section 902(b)(2) excludes any mask work that "consists of designs that are staple, commonplace, or familiar in

[7] *See id.* at 1514-17 (technical implications of revised structure of exclusive rights under 1976 Act), 1524-25 (inapplicability of fair use), 1525-34 (legal bases for imposition of reasonable royalties).

[8] 3 NIMMER ON COPYRIGHT, *supra* note 3, § 18, at 18-3 to -53 (concerning the Semiconductor Chip Protection Act of 1984 (SCPA)).

[9] The SCPA was added to the Copyright Act of 1976. However, Chapter 9 "stands alone as a new and sui generis form of intellectual property 'separate from and independent of the Copyright Act.'" 3 NIMMER ON COPYRIGHT, *supra* note 3, § 18.01, at 18-3 (quoting H.R. REP. No. 781, 98th Cong., 2d Sess. 5 (1984)); *see Symposium: The Semiconductor Chip Protection Act of 1984 and Its Lessons*, 70 MINN. L. REV. 263 (1985) (L. Raskind & R. Stern eds.). The editors dedicated their symposium to the memory of Melville B. Nimmer, whose writings "will stand as an enduring monument to a humane scholar and teacher." *Symposium, supra*, at 269.

[10] *See, e.g.*, Stern, *Determining Liability for Infringement of Mask Work Rights Under the Semiconductor Chip Protection Act*, 70 MINN. L. REV. 271, 313-15 (1985) (reviewing hybrid features of key provisions in SCPA); Kastenmeier & Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 445-52 (explaining hybrid features); Ladd, Leibowitz, & Joseph, *Protection for Semiconductor Chip Masks in the United States*, 17 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. (IIC) __ (1986) (forthcoming) (despite conceptual similarities to copyright law, mask work protection is regarded as an amalgam of patent and copyright principles that also contains new features).

[11] "[T]he protection afforded in Chapter 9 is sufficiently analogous to copyright protection . . . that discussion and analysis of SCPA would appear to be appropriate in this Treatise." 3 NIMMER ON COPYRIGHT, *supra* note 3, § 18.01, at 18-3. Tension between a "copyright approach" and a "patent approach" is characteristic of all design protection laws. *See* Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1145-74.

the semiconductor industry, or variations of such designs, combined in a way that, considered as a whole, is not original."[12] Nimmer interprets this to mean that "no stricter standard than that of originality in the copyright sense [is required]."[13] Stern, however, suggests that this "novelty or creativity requirement is a major departure from copyright law [and] a step in the direction of patent law."[14] Both Nimmer and Stern rely on *L. Batlin & Son, Inc. v. Snyder*,[15] a case that represented a turning point in United States copyright law.[16] Analogous tension existed within the eligibility provisions of the ornamental design bill attached as Title II to the copyright revision bills from 1969 to 1975, until the deletion of Title II by the Conference Committee in 1976.[17]

It seems clear that a new dialectic between artistic and industrial property law has been fueled by the barely successful efforts to prevent chip designs from entering copyright law.[18] The true shape of the Semiconductor Chip Protection Act is likely to depend on the future evolution of this dialectic at both the national and international levels.[19] Nevertheless, the working interpretation that Professor Nimmer provided is certain to sharpen the debate and may facilitate interim solutions of numerous problems, including some with international ramifications.[20]

The latest revision of *Nimmer on Copyright* arrived in the fall, along with a copy of his major new treatise on first amendment law.[21] The announcement of his untimely death followed soon after. Sadly, those of us who routinely consult the copyright trea-

[12] SCPA, § 902(b)(1), (2).

[13] 3 NIMMER ON COPYRIGHT, *supra* note 3, § 18.03[B], at 18-9; *see generally id.*, at 18-8 to -11.

[14] Stern, *supra* note 10, at 318; *see generally id.* at 317-21.

[15] 536 F.2d 486 (2d Cir.) (en banc), *cert. denied*, 429 U.S. 857 (1976).

[16] *See generally* Reichman, *Design Protection after the Copyright Act of 1976: A Comparative View of the Emerging Interim Models*, 31 J. COPYRIGHT SOC'Y 267, 297-324, 341-50, 375-76, 380-82 (1984); Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 240-243 (1983).

[17] *See* Reichman, *supra* note 11, at 1252-64; Reichman, *supra* note 16, at 321-24.

[18] *See, e.g.*, Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 600-09 (1985); Kastenmeier & Remington, *supra* note 10, at 424-30, 465-70; *see also* Wong, *The Semiconductor Chip Protection Act: New Law for New Technology* 67 J. PAT. OFF. SOC'Y 530, 544-45 (1985) (despite doctrinal barriers, "Congress pushed to include [chip designs] under the copyright laws").

[19] *See, e.g.*, World Intellectual Property Organization, Draft Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits, WIPO Doc. IPIC/CE/1/2, June 25, 1985; Ladd, Leibowitz, & Joseph, *supra* note 10, *passim*. For the latest view of the way this evolution should occur in domestic law, see generally Stern, *supra* note 10.

[20] *See* 3 NIMMER ON COPYRIGHT, *supra* note 3, § 18.04[D], at 18-18 to -20 (views concerning foreign owners); *see also* Ladd, Leibowitz, & Joseph, *supra* note 10 ("Protection for Non-U.S. Mask Works").

[21] M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984).

tise are reminded now more than ever of the strengths that brought him success. In addition to the lucidity and mastery previously mentioned, his work reflects a deep faith in the common-law tradition and a determination to place the technical apparatus of this tradition at the service of a copyright statute that suffered from the tugs of too many special interests. By weaving the pre-1976 cases and those interpreting the new Act into a web of doctrine that appealed to both logic and precedent, he presented his subject as a comprehensible whole that courts and practitioners believed they could manage. At the same time, his work conveys a solicitude for the interests of artists and authors that made him a spokesman on American soil for the great tradition we associate with the French *droit d'auteur*.[22] Unhappily, the most revered exponent of that tradition,[23] Professor Henri Desbois, also succumbed this past year.[24]

From a detached perspective, one could say that Nimmer's efforts to organize American copyright law on a more systematic basis from the 1950's on[25] may have over-succeeded. The predominance of his treatise sometimes acted as a magnet on judges and practitioners who increasingly mistook it for the law.[26] This said, Professor Nimmer's role in developing and shaping this

[22] *See, e.g.*, 1 NIMMER ON COPYRIGHT, *supra* note 3, § 1.03[A], at 1-30.1 (natural rights theory); *see also id.* § 2.08[B][3], at 2-87 to 2-96.6, which takes a position concerning the treatment of applied art that bears strong affinities to the French "unity of art" doctrine espoused by Pouillet. *See* Reichman, *supra* note 11, at 1153-58 (unity of art thesis in France), 1238-49 (unity of art heresy in the United States). Unlike some of Pouillet's followers, Nimmer retained an open mind and acknowledged his willingness to reconsider the case against copyright protection of ornamental designs if and when a special design law was adopted. *See* 1 NIMMER ON COPYRIGHT, *supra* note 3, § 2.08[B] at 2-96.5 to 2-96.6 nn. 117-117.1 and accompanying text. For a recent and authoritative hint that passage of the SCPA in 1984 has made it feasible (as well as logical) to reconsider an ornamental design law, see Kastenmeier & Remington, *supra* note 10, at 468-69 n.214.

[23] On the differences between the *droit d'auteur* or continental European systems and other systems of protection for literary and artistic works, see S. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 6-12 (1983). Nimmer's pro-creator bias was tempered by a commercial realism that made him cautious about the institution of moral rights. *See* Price, *Melville Bernard Nimmer, 1923-1985*, 5 CARDOZO ARTS & ENT. L.J. 19 (1986); Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 518-25 [hereinafter cited as Nimmer, *Implications of Berne*]. On balance, Nimmer thought that the new United States law could be reconciled with Berne standards and that it was in this country's interests to join the Berne Union. Nimmer, *Implications of Berne*, at 524, 552-54.

[24] *See* Françon, *Professor Henri Desbois*, 125 REVUE INTERNATIONALE DU DROIT DU AUTEUR (R.I.D.A.) 4-13 (1985). Professor Desbois's major works include H. DESBOIS, LE DROIT D'AUTEUR EN FRANCE (3d ed. 1978); H. DESBOIS, A. FRANÇON, & A. KEREVER, LES CONVENTIONS INTERNATIONALES DU DROIT D'AUTEUR ET DES DROITS VOISINS (1976).

[25] *See, e.g.*, Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125 (1951) [hereinafter cited as Nimmer, *Inroads on Copyright Protection*]; Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185 (1956); Nimmer, *The Nature of the Rights Protected by Copyright*, 10 U.C.L.A. L. REV. 60, 60 n.1 (1962) ("a chapter from a forthcoming treatise").

[26] *See, e.g.*, Galante, *supra* note 4. Nimmer himself began his scholarly career on a reformist note. *See, e.g.*, Nimmer, *Inroads on Copyright Protection, supra* note 25, at 1125-26 (judicial fear of unworthy plaintiffs weighs against real victims of infringement).

particular body of law ensures his place in that international pantheon of lawyers and scholars whose contributions are celebrated wherever the welfare of creative individuals remains of public concern.[27] As defender of the positivist tradition in a field that, until yesterday, was regarded with suspicion on these shores,[28] he made it possible for copyright law to come of age in the United States and even to enjoy the unprecedented respectability it has recently acquired.[29] Between 1954, when Register Arthur Fisher led the United States into a Universal Copyright Convention,[30] and 1976, when Congress enacted a general revision that Register Barbara Ringer had sought to imbue with the spirit of Berne,[31] Melville Nimmer's treatise had kept the unruly parts together.

Nimmer's loss occurs at a time when his calm presence is especially needed. The universalization of copyright law attendant upon the adherence of more countries to the multilateral conventions does not necessarily correlate with the effectiveness of international protection.[32] Efforts to balance the standards of protection at the international level with the needs of developing

[27] This pantheon will be remembered at ceremonies to commemorate the one hundredth anniversary of the signing of the Berne Convention for the Protection of Literary and Artistic Property, to be held at Berne, Switzerland, in the fall of 1986. In 1983, the centenary of the Paris Convention for the Protection of Industrial Property was similarly commemorated. *See, e.g.*, Bogsch, *The First Hundred Years of the Paris Convention for the Protection of Industrial Property*, 1983 INDUS. PROP. 187.

[28] *See, e.g.*, Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1051 (1968) [hereinafter cited as *International Copyright*].

[29] *See, e.g.*, UNITED STATES COPYRIGHT OFFICE, TO SECURE INTELLECTUAL PROPERTY RIGHTS IN WORLD COMMERCE, A REPORT TO THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE AND TO THE SUBCOMMITTEE ON WESTERN HEMISPHERE AFFAIRS OF THE COMMITTEE ON FOREIGN AFFAIRS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, September 21, 1984; Remarks of G. Mossinghoff, The Importance of Intellectual Property in International Trade, *reprinted in* 26 PAT. TRADEMARK & COPYRIGHT J. (BNA) 546 (1983); Ringer, *United States of America*, in S. STEWART, *supra* note 23, at 481 (it is now more generally realized that hostility to copyrights and intellectual property hurts the public and the nation).

[30] September 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132 (1955) (entered into force 1954), *revised at Paris*, July 24, 1971, 25 U.S.T. 1341 T.I.A.S. No. 7868, 943 U.N.T.S. 178 (1974). On the role of Register Fisher, see A. Kaminstein, *Arthur Fisher Memorial*, in 1 STUDIES ON COPYRIGHT xi, xiii (Arthur Fisher mem. ed. 1963).

[31] *See* Nimmer, *Implications of Berne*, *supra* note 23; *see also* Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPYRIGHT SOC'Y 202 (1979). *Compare Ringer, supra* note 29, at 480 (the United States is "still a long way from accepting the whole range of international ideals embodied in the Berne Convention.").

[32] *See, e.g.*, U.S. COPYRIGHT OFFICE, *supra* note 29, at 1-7 (problems of effective protection now require use of trade leverage and other forms of pressure); Stewart, *International Copyright in the 1980s*, 28 BULL. COPYRIGHT SOC'Y 351, 364-66 (1980) (radical improvement of enforcement procedures are necessary).

countries[33] have not solved the problem of organized piracy.[34] A pervasive uneasiness about the breadth of protection in an age of technology[35] has subtly undermined the historical foundations of the copyright paradigm even in the industrialized countries.[36]

With Professor Nimmer's premature demise we have lost the voice of continuity in a period likely to witness the formation of a new or at least different tradition from that handed down by the founders of the Great Conventions of the 1880's.[37] How Professor Nimmer would have responded to this challenge cannot be known. My guess is that he would have restrained those laboring to resolve our current problems from the twin evils of self-indulgence and futurism. He would have resisted the destructive tendencies that a need for change often sets in motion. He would also have continued to remind protectionists and anti-protectionists alike that creative works of the human imagination cannot be treated as "second-class" property without evoking corresponding limitations on the exercise of private property rights in general.[38] At the very least, he would have ensured that any fresh ideas that did win acceptance would be expounded in a manner that made them relevant to the legal tradition and thereby more accessible to courts and the practicing bar. Fortunately, all who work in this field must necessarily continue to engage with the doctrinal foundation that he handed down.

[33] *See, e.g.*, U.S. COPYRIGHT OFFICE, *supra* note 29, at 43-51; S. STEWART, *supra* note 23, at 159-73 (special provisions for developing countries under both the UCC and the Berne Convention as revised at Stockholm and Paris in 1967 and 1971); Ringer, *International Copyright*, *supra* note 28, at 1065-79.

[34] *See, e.g.*, U.S. COPYRIGHT OFFICE, *supra* note 29, at 67-113.

[35] "The last decade has seen a veritable revolution in technological means for the reproduction and dissemination of literary and artistic works . . . . [F]uture adjustments of copyright law will be essential if the community control we call law is to keep pace with the march of science." Nimmer, *Implications of Berne*, *supra* note 23, at 553-54; *see also* Stewart, *supra* note 32, at 353-62 (possible solutions to as yet unresolved problems of technology); Ringer, *supra* note 29, at 481 (ongoing revolutions in communications technology breaking down "supposed distinctions between copyright and neighboring rights").

Professor Nimmer's personal interest in resolving the problems posed by technology is evidenced throughout his writings. *See, e.g., Project—New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. REV. 931, 931-38 (1968) (funded by National Endowment of the Arts) (foreword by Nimmer); Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 U.C.L.A. L. REV. 1052 (1975).

[36] *See* Brown, *supra* note 18, at 600-09 (copyright must remain a body of law with fairly definite limits); Ladd, *To Cope with the World Upheaval in Copyright*, 1983 COPYRIGHT 289, 291 (historical domain of authors' rights and copyright in danger); Stewart, *supra* note 32, at 362-63, 369-72 (crisis of consumerism).

[37] *See supra* note 27 and accompanying text.

[38] 1 NIMMER ON COPYRIGHT, *supra* note 3, § 1.03[A] at 1-30.1 to 1-30.2 (framers did not intend "any higher standard of creation in terms of serving the public interest than that required for other forms of personal property").

The death of Professor Nimmer in California comes shortly after that of Professor Latman in New York, and it is barely a decade since Professor Derenberg, elder statesman of American copyright law, passed away.[39] Their silence adds up to a staggering loss for the copyright community as a whole. Even disciplines that rest on a firmer footing than ours would require time to recover from such sorrowful events. If Melville Nimmer and his mighty treatise have helped to ensure that United States copyright law would come of age, it must be acknowledged that the age is one of turmoil, one in which the limits of the copyright paradigm may occupy the forefront of attention.[40] As basic premises of the multilateral treaties that support world intellectual property law are increasingly challenged at both the domestic and international levels, it may become necessary to defend copyright law from some of its newest and most ardent defenders.[41] In this context, it seems fitting to reiterate that a genuine concern for the condition of authors and artists remains a unifying thread that binds together the entire corpus of Professor Melville Nimmer's enduring contributions to this field.

[39] The inspiration and legal statesmanship of Professor Walter J. Derenberg (1903-1975) were remembered by Barbara Ringer, then United States Register of Copyrights, in 23 BULL. COPYRIGHT SOC'Y 6 (1975). Derenberg is credited, among other things, with the formation of the Copyright Society of the United States. *Id.* at 7. Professor Alan Latman, also of New York University, became Executive Director of the Society. Latman died in 1984, and was remembered by Professor Melville Nimmer in 59 N.Y.U. L. REV. 242 (1984).

[40] *See, e.g.*, Brown, *supra* note 18; *see also* Dietz, *The Harmonization of Copyright in the European Community*, 16 IIC 379, 403 (1985) (copyright deteriorating into mere industrial property right that could self-destruct).

[41] *Accord* Kastenmeier & Remington, *supra* note 10, at 465-66 (philosophical and conceptual limits of copyright law emphasized).

MEL NIMMER: A TRIBUTE

BARBARA RINGER*

The loss of Mel Nimmer to the world of copyright is so painful that I have found it difficult to write this tribute. For over thirty years his great mind and voice, speaking through his teachings and writings, were instrumental in shaping today's copyright jurisprudence. More than those of the tractators of the past, his opinions and conclusions will form a permanent foundation upon which future copyright law and practice will be built. But in losing Mel we are bereaved of much more than ideas and analyses, no matter how brilliant. *Nimmer on Copyright* was a man, not just a treatise, and it is for the man that we must grieve.

There are few people still active in the field who remember what an insignificant and esoteric legal backwater copyright law was considered in the 1950's when Mel and I first met. I remember particularly an American Bar Association convention in Dallas where, in an atmosphere blue with cigar smoke and filled with endless disputes over technical patent questions, Mel Nimmer stood out like the star he was. I will never forget our discussions of the then-recent *Capitol Records*[1] decision and Mel's extraordinary grasp of its intricacies and implications. One could see even then that here was someone destined to influence the course of copyright law; someone who had the brains and energy to make people realize the fundamental significance of copyright and to reveal its interrelationships with technology and freedom of speech.

In the years that followed we cemented a relationship which, at least to me, was unfailingly stimulating and enlightening. I was honored that Mel sent me drafts of chapters of his treatise for comment, and gratified that he accepted some of my suggestions. I was impressed to discover that his text dared to venture into some of the murkier corners of the copyright law—territories that previous commentators lacked either the insight or the courage to explore. The treatise not only illuminated these areas for the first time, but provided incisive analyses and well-considered opinions on the many unsettled questions they presented.

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* Former Register of Copyrights.

[1] Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).

In the history of copyright law, the publication of *Nimmer on Copyright* represented one of the true milestones.

Mel Nimmer's influence on the 1976 revision of the Copyright Act was far greater than his formal congressional testimony and submissions may suggest. For twenty years he spoke to the drafters through his book, which we consulted constantly and at every turn. On some of the most difficult and explosive questions we consulted him directly, and his informal advice was generously given and invariably helpful.

Mel also played a little-known but important role in the evolution of international copyright. In the mid-1960's he served for some months as a consultant to the Berne Bureau in Geneva (now the World Intellectual Property Organization), and his seminal study of the compatibility of the Berne Convention and United States copyright law remains one of the fundamental documents in the current study of that issue. As a member of the Berne Secretariat, he attended the famous Stockholm Conference of 1967, and during the five weeks of that unforgettable drama we had many occasions to compare notes on a deteriorating situation that actually threatened the existence of the Berne Union.

At Stockholm, I was again impressed by the profound respect with which Mel was held by all of the foreign copyright experts, which in turn reflected great honor on the United States. This was graphically demonstrated during the conference when he was singled out by the Soviet delegation as the person through whom to approach the United States delegates for informal copyright discussions. Through Mel's good offices, these discussions—the first official contacts on international copyright relations between the two great powers—were held in a friendly atmosphere, and undoubtedly played a part in the adherence by the Union of Soviet Socialist Republics to the Universal Copyright Convention some six years later.

Like every other discipline, copyright has its town and gown and the spitting contests between the two have produced some Olympic records. It is to Mel Nimmer's credit that he never engaged in this debasing and unprofitable sport. He was universally respected not only as a teacher and scholar but also as a practicing copyright attorney. No one combined a knowledge of copyright theory and of the "real world" better than he, and people realized it.

It is no secret that, mainly because of the technological revolution in communications, copyright law is going to have to

undergo some fundamental changes to survive. Through his teachings and writings Mel Nimmer has made an immortal contribution to the search for solutions to the challenges of the next few decades. But to be deprived of his unique human presence during this difficult period is a tragedy which, as one who cares about the future of authors' rights, I find hard to bear.