Vanderbilt Law Review

Volume 40
Issue 6 *Issue 6 - November 1987*

Article 8

11-1987

Copyright Law: Cases and Materials

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BOOK REVIEW

COPYRIGHT LAW: CASES AND MATERIALS. By Craig Joyce. New York, N.Y.; Oakland, Calif.: Matthew Bender, 1986, Pp. 723.

*Reviewed by Marshall A. Leaffer**

Interest in copyright law is on the upswing. The reason is simple: copyright law, and more generally, intellectual property law, is *the* law for the information age. The subject touches not only the traditional concerns of artists, writers, and musicians, but also reaches the cable television and computer industries as well as future technologies not yet thought of. I predict course offerings on copyright and intellectual property law will proliferate. Before publication of Craig Joyce's *Copyright Law*, the growing market for copyright casebooks was already well served by three excellent and diverse works[1] that would satisfy all tastes and approaches to the subject.[2] With this fourth major work in the field, a copyright law professor's choice of casebooks becomes more difficult.

Every major casebook publisher now has published its copyright law casebook except for Little, Brown & Company.[3] Each work has its own strong personality, and each brings a unique approach to the study of copyright law. Most recently I have used

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1. These are: A. LATMAN, R. GORMAN & J. GINSBERG, COPYRIGHT FOR THE EIGHTIES: CASES AND MATERIALS (2d ed. 1985) [hereinafter LATMAN, GORMAN & GINSBERG]; M. NIMMER, CASES AND MATERIALS ON COPYRIGHT (3d ed. 1985) [hereinafter NIMMER]; R. BROWN & R. DENICOLA, CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS (4th ed. 1985) [hereinafter BROWN & DENICOLA].

2. I am limiting my discussion to casebooks devoted solely to copyright. Survey courses on intellectual property are well provided for by a number of other works combining copyright law with other subjects such as trademark, patent, trade secret, right of publicity, and other areas of trade regulation.

3. This publishing company has totally avoided the entire subject of intellectual property.

Joyce's book for my two-hour copyright law course, although I have used the other three casebooks in one or more of their editions in the past. Apart from a few inevitable disagreements about coverage and organization, I have been basically pleased by all four casebooks. My purpose here is not only to introduce Joyce's casebook but to situate his work in this already crowded and competitive field. I plan to do this by first presenting Joyce's book and then by discussing the three other casebooks: Latman, Gorman, and Ginsberg; Nimmer; and Brown and Denicola.

The teaching of copyright law generally follows one of two approaches. Some professors, who might be labeled "purists," wish to concentrate almost exclusively on copyright law as a self-contained body of law and lore. These "purists" would select a casebook systematically covering copyright law from "A" to "Z." Because their focus is on The Copyright Act of 1976,[4] its legislative history, and the latest case law under the Act, professors who espouse the "purist" approach may wish to adopt a casebook that follows the sequence of the 1976 Act. Other teachers and scholars in the field, on the other hand, view copyright law as the centerpiece in the larger field of entertainment law. To these individuals, copyright law should be firmly situated in context; the emphasis of copyright should not be on the comprehensive coverage of copyright law, but rather on the application of copyright to certain industries—for instance, the music and motion picture industries—and the interrelation of copyright with other bodies of related law. The ideal casebook for these teachers and scholars would include bodies of related law such as unfair competition law, the right of publicity, defamation, privacy, and idea protection. These approaches, of course, are not mutually exclusive, nor should they be, but seem to describe certain tendencies in the teaching of copyright law. Joyce shares with Latman, Gorman, and Ginsberg the purist tendency; whereas Nimmer, and Brown and Denicola, take a more entertainment law oriented approach to copyright.

Craig Joyce's casebook in Matthew Bender's Cases and Materials Series is the latest addition to the field and the only casebook in its first edition.[5] The focus of the work is on the 1976 Act, but Joyce, who is a legal historian[6] and an associate professor of law at

4. 17 U.S.C. §§ 101-800 (1982) [hereinafter the Act].

5. C. JOYCE, COPYRIGHT LAW: CASES AND MATERIALS (1986).

6. Professor Joyce's expertise in copyright law and legal history is demonstrated in his article, Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985).

the University of Houston, does not ignore the heritage of the past. The casebook comes with a separate statutory supplement that includes the 1909 and 1976 Acts.[7]

The casebook is tightly organized and generally follows the structure of the 1976 Act. Beginning with chapters on copyrightability, formalities, and ownership, the book proceeds with a discussion of exclusive rights, infringement, fair use, and preemption. Joyce has not used a hide-the-ball approach to the material and has avoided the problem method.

Joyce imposes a common organizational format throughout the book from which he rarely deviates. Chapters begin with statutory references and an appropriate and comprehensive selection from the House Report,[8] followed by the case law in chronological order. Each case is succeeded by tightly drafted, programmatic notes and questions, which provide historical background, refer to other sources, summarize difficult and technical aspects of the law, and point out various ironies and inconsistencies in the law of copyright. The notes and questions are not random reflections and insights but rather display a logical continuity whose sequence is planned in minute detail. Extremely well written and with an appropriate touch of humor, these notes could be used as a model for any aspiring casebook author.

Joyce's chapter four, entitled "Duration, Renewal and § 304(c) Terminations," is typical. Although treating difficult, sometimes dry subject matter, the chapter makes the material both understandable and palatable for students. The chapter worked in my classroom, and the students did not seem overwhelmed by either the difficult interplay between the 1909 and 1976 Acts or the technicalities of terminations of transfers. Joyce's organizational mechanism lays the foundation with the legislative history, proceeds to relevant 1909 Act cases treating the renewal issues, and summarizes the technical aspects in the notes. Joyce follows the same pat-

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7. All copyright casebooks have separate statutory supplements containing the relevant acts except for NIMMER, whose statutory supplement is an appendix included in the casebook. The copyright professor should take special notice of Foundation Press's superb statutory supplement covering the entire range of intellectual property, both national and international. *See* P. GOLDSTEIN, E. KITCH & H. PERLMAN, SELECTED STATUTES AND INTERNATIONAL AGREEMENTS ON UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT (1987).

8. H.R. REP. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659. The House Report of the 94th Congress constitutes perhaps the single most important document for purposes of interpreting the legislative history of the 1976 Act.

tern in treating transfers under section 304(c).[9] This chapter of sixty-two pages is a gold mine of information and could double as a reference work on the subject. Despite the intensity of the information presented, my students appeared to assimilate the information and enjoy the process.

Joyce's casebook will appeal to a wide variety of tastes, but particularly those who wish to examine intensely copyright law on its own terms. The focus of the casebook is on the 1976 Act, and it contains more cases under the Act than any other casebook under consideration.[10] It will satisfy the purists who want a comprehensive, tightly organized, and up-to-the-minute work.

Before publication of Joyce's casebook, the only other truly "1976 Act" casebook was *Copyright for the Eighties* written by Alan Latman, Robert Gorman, and Jane Ginsberg, and published by the Michie Company as part of its Contemporary Legal Education Series. The casebook originated from materials developed by the late Alan Latman, a renowned copyright scholar, for his courses at New York University in the early 1970s. For the second edition, Jane Ginsberg, copyright expert and professor at Columbia University Law School,[11] joined Robert Gorman, professor of law at the University of Pennsylvania, and perhaps even better known for his work in labor law.[12]

Much like Joyce's casebook, the Latman, Gorman, and Ginsberg text is designed for the professor who wants to teach an intensive copyright course that concentrates on the 1976 Act. The second edition has retained the positive features of the 1981 edition, but is a much improved, more teachable version. A wealth of new

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9. 17 U.S.C. § 304(c) (1982).

10. Of the four works, Joyce's text is by far the most 1976 Act intensive; 60% (48 of 80) of its cases were decided in or after 1978, compared with 40% (24 of 60) of the cases in LATMAN, GORMAN & GINSBERG. For BROWN & DENICOLA and NIMMER, the percentage drops considerably, as only 24.5% (15 of 61) and 18.9% (24 of 80) respectively are generally cases decided under the 1976 Act.

11. Jane Ginsberg might be known to some as the author of a series of articles on copyright written with Alan Latman for the *New York Law Journal*. *See, e.g.*, Latman & Ginsberg, *Fair Use Doctrine After 'Betamax,'* N.Y.L.J., Mar. 30, 1984, at 1, col. 1. Some of this material has been integrated with good effect into the second edition of the casebook.

12. Robert Gorman will be known to students and educators in labor law for his *Basic Text on Labor Law, Unionization, and Collective Bargaining* published in 1976 by West Publishing Company and for the tenth edition of his casebook, *Cases on Labor Law*, coauthored with Archibald Cox and Derek Bok, and published by Foundation Press in 1986. In copyright circles, Gorman's two articles on factual works are classics in the field. *See* Gorman, *Fact or Fancy?: The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560 (1982) and *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963).

material has been added, including new cases, notes, and textual matter, plus a bibliography of articles on copyright. It also looks better on the page, and includes new, well-selected visual materials. Copyright casebooks are greatly improved by any visual or graphic materials, because they not only improve the aesthetics of the casebook, but have a didactic value as well on issues such as originality and infringement. All copyright casebooks now use this technique, but Latman, Gorman, and Ginsberg's casebook uses this technique exceptionally well.[13]

The casebook begins with a strong first chapter, entitled "The Concept of Copyright," that provides an historical overview of copyright and presents materials from other authors discussing basic notions and justifications for granting a property right to "writings of authors."[14] This first chapter also includes a set of well-selected cases and materials that distinguish other forms of intellectual property from copyright. I like to situate copyright in the larger context of intellectual property and spend two class sessions in so doing. Latman, Gorman, and Ginsberg's initial chapter makes this task a profitable experience.

The Latman, Gorman, and Ginsberg casebook shares with Joyce's text an organization of the subject matter as well as a basic focus on the 1976 Act. The style of presenting the material differs, however, as the organizational pattern is more varied in the Latman, Gorman, and Ginsberg casebook. For example, the Latman, Gorman, and Ginsberg casebook uses longer textual excerpts from other authors, although the use is not excessive. But more significantly, the authors have developed extensive sets of questions presented periodically after cases and other material. These incisive, provocative, and comprehensive questions will challenge the best of students and professors. I would hope that the authors eventually will write a teacher's manual that would pro-

13. For example, the sequence of illustrations on page 121 of LATMAN, GORMAN & GINSBERG from Gracen v. Bradford Exchange, 698 F.2d 300 (7th Cir. 1983), offers a useful aid to understanding the issue of originality presented in that case. Actually, the second edition of NIMMER started the use of illustrations in copyright casebooks, a trend that has been continued in all the casebooks considered in this Review. *See* JOYCE, *supra* note 5, at 126-27 (photographs of the snowmen, subject of the infringement issue in Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498 (2d Cir. 1982)). Photographs like these bring home the concept of substantial similarity like nothing else can.

14. For the second edition, the authors unfortunately have deleted the excerpt from Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1980), which makes a strong argument against expansive copyright protection. This provocative article always has stimulated excellent discussions in my classes.

vide answers to their questions, even at the risk of taking some "fun" (for professors) out of the process. I found Latman, Gorman, and Ginsberg's book a pleasure and challenge to use, if somewhat difficult to do justice to in my two-hour course.

Both the Joyce and the Latman, Gorman, and Ginsberg texts, the "purists" of the group, can be clearly contrasted with Nimmer's casebook entitled *Cases and Materials on Copyright*, which is published by West Publishing Company. The subtitle of Nimmer's casebook, "Other Aspects of Entertainment Litigation Illustrated: Including Unfair Competition, Defamation, Privacy," tells much about the book's approach. It is principally, though not exclusively, a casebook on copyright edited by the late Melville Nimmer, author of *Nimmer on Copyright*.[15] Nimmer, however, has devoted little more than one-half of his casebook to copyright. Consistent with his view that copyright should be taught in the larger context of entertainment law, Nimmer has devoted much space to what he believes are related subjects.

The copyright part of the casebook differs from the Joyce and the Latman, Gorman, and Ginsberg texts in style, organization, and content. The cases in Nimmer's text are less rigorously edited. Nimmer prefers to provide fewer cases but more complete ones. In addition, the percentage of 1976 Act cases accounts for less in the Nimmer text than in any of the other casebooks.[16] In the copyright part of the text, Nimmer generally follows the organization of his famous four volume treatise. Nimmer uses a consistent organization whereby most sections are introduced by a textual note adopted from the relevant part of his treatise. The case is then followed by questions that invariably can be answered by turning to the cited section of his treatise dealing with the subject. Nimmer does list after each section, however, a few collateral references from other authors. Unlike the other casebooks, Nimmer's text includes the 1909 and 1976 Act rather than making them a separate statutory supplement, which is convenient for those students and professors who are prone to misplace their statutory supplements just before class.

Nimmer's casebook will appeal to those who do not wish to be overwhelmed by a proliferation of cases, citations, and other secondary materials. I chose the second edition the first time I taught

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15. M. NIMMER, NIMMER ON COPYRIGHT (1987). This four volume treatise, known as the bible of copyright, underwent a major revision for the 1978 edition and has been updated yearly since that time.

16. *See supra* note 10.

copyright law and felt reassured because I could easily look up in his treatise the answers to the questions posed in the casebook. The students related to the work because of its clear presentation, limited number of cases, clear textual notes, and well-chosen illustrations. Using the book in a two-hour copyright course, I felt grateful, sometimes, in being able to teach fewer cases while being able to delve into them at somewhat greater depth. I did not reach, nor did I plan to reach, the second half of the book dealing with unfair competition, defamation, and privacy. Today, if I adopted the book in its third edition, I would be tempted to assign other materials, especially more 1976 Act case law of which there is surprisingly little, when compared to the Joyce and the Latman, Gorman, and Ginsberg texts.[17]

Also in sharp contrast to the Joyce text in its entertainment and related law approach is *Cases on Copyright* by Ralph Brown and Robert Denicola. Now in its fourth edition, this casebook initially was published by Foundation Press in 1960, the first work of its kind devoted to copyright. For the fourth edition, Robert Denicola, professor of law at the University of Nebraska,[18] joined Ralph Brown, Professor Emeritus at Yale University,[19] as editors. Benjamin Kaplan, the previous co-author, has left the project and is now a justice on the Massachusetts Supreme Court. In this edition, as in the earlier ones, copyright is placed within a larger context. More than one-third of the book is devoted to topics such as unfair competition, privacy, publicity, and idea protection.

Although the casebook contains an enormous wealth of information, its focus is more on the larger themes, continuities, and interrelationships presented by the subject of copyright, rather than on a programmatic study of copyright law and the 1976 Act. Brown and Denicola use few excerpts from the House Report, and

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17. *Id.* For example, chapter nine of NIMMER, "Federal Preemption of State Law," includes no cases decided under the 1976 Act interpreting § 301. In a 20-page chapter on preemption, only three pages of text cover preemption under the 1976 Act. The chapters on preemption in both JOYCE and LATMAN, GORMAN & GINSBERG are much more extensive in their coverage of pre-1976 preemption, but especially preemption under the 1976 Act.

18. Rohert Denicola has authored a number of leading articles on copyright including the following: *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981).

19. Ralph Brown has been a major figure in the field of copyright for years. His latest article always seems to be his best. I assign as required reading his recent article, *Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition*, 33 J. COPYRIGHT SOC'Y 301 (1986), which discusses, among other things, the houndaries hetween bodies of intellectual property law and the importance of recognizing the role of the public domain.

fewer long textual notes synthesizing the subject than do Joyce and the other authors.

The copyright aspect of the book is broken down into two parts, the first entitled "Copyright" and the second part called "Contract and Combination." Each part is divided into topics. Unlike the Joyce and the Latman, Gorman, and Ginsberg texts, neither part of Brown and Denicola's book tries to lead the student through the 1976 Act.

The first topic, entitled "The Boundaries of Copyright," sets the unique perspective of the book. Unlike the other casebooks, which generally begin with originality or historical perspectives, Brown and Denicola immediately introduce the student to the larger context of copyright before focusing on the particulars of the subject. The authors do this by beginning the book with a long excerpt from the *Betamax* case,[20] which is an excellent teaching device that forces the student to consider the essential nature of copyright before embarking on the technicalities of the law. After consideration of this first section, the student is able to see the boundaries of the subject and separate copyright from its federal, statutory, and common-law aspects. Here, the book properly introduces the place and importance of the public domain, a concept that reappears with good effect throughout the work, and one that I believe is not given enough emphasis in copyright and intellectual property casebooks in general.

In this initial topic, Brown and Denicola also introduce basic concepts such as fixation, publication, and the place of statutory formalities. Other topics that comprise the first part of the casebook cover the basics of copyright such as subject matter, infringement, and fair use. Like Latman, Gorman, and Ginsberg, but unlike Joyce and Nimmer, Brown and Denicola integrate the subject of infringement into treatment of exclusive rights instead of treating each right independently (*i.e.*, performance right) before proceeding to the infringement issues.[21] Separate sections consider infringement as applied to literary works, music, and rights in characters. The first part of the book concludes with a chapter on ownership issues, which considers copyright renewal, duration of copyright, termination of transfers, assignments, licenses, and derivative and joint works.

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

21. My personal view is that general infringement issues (substantial similarity, access, etc.) are less confusing to the students after a thorough examination of exclusive rights in 17 U.S.C. § 106 (1982).

The second part of the Brown and Denicola casebook provides innovative coverage of issues involving the entertainment industries and is quite unlike anything found in the other casebooks. Topics include: "Contract Interpretation with Respect to New Uses" and "The Organized Protection of Performance Rights." A final topic, entitled "Some Other Aspects of the Entertainment Industry," interweaves copyright, labor, and antitrust law and ends with a section on compulsory licenses. Part two of the casebook integrates a wealth of information while showing a variety of interrelationships between copyright law and the entertainment industries. These perspectives might be lost in an approach based more on the Copyright Act itself.

The Brown and Denicola text will not appeal to the same persons attracted to Joyce's programmatic study of copyright and its strong focus on the 1976 Act. But this obviously was not the editors' intent. Instead, Brown and Denicola have created a work that reveals the grand themes, policies, and continuities of copyright law and their interplay with the pertinent copyright industries.

CONCLUSION

Craig Joyce has now joined a competitive field of well-edited casebooks that provide something for everyone. In my own classes, I prefer to stay close to the law of copyright with a focus on the 1976 Act. As a result, Joyce's text as well as that of Latman, Gorman, and Ginsberg works best for me, given my approach, the constraints of a two-hour course, and the limited background of some of my students in intellectual property law. But as I hope to have indicated, there is a casebook to suit any style, and I expect future editions will continue to improve.

One aspect of Joyce's text and the other copyright casebooks that I would like to see treated in more depth is the international dimension of copyright.[22] The casebooks give this subject varying degrees of attention and concentrate mainly on the manufacturing clause[23] and the international conventions. Subjects that merit more attention include the United States' entry into the Berne Union, the largest and oldest international copyright convention. In addition, various trade regulation legislation,[24] used as a means

22. BROWN & DENICOLA and LATMAN, GORMAN & GINSBERG have short chapters on international copyright. Neither NIMMER nor JOYCE have separate chapters, although they make reference to international aspects of copyright.

23. 17 U.S.C. § 601 (1982). The manufacturing clause was repealed as of July 1, 1986.

24. For example, see the International Trade and Investment Act of 1984, Pub. L. No.

of persuading foreign countries to protect adequately United States' copyright interests, should be considered, as well as the role of the Customs Service[25] and the United States Trade Commission[26] in excluding the unauthorized importation of copyright works into this country. Increased attention to these subjects would reflect the growing awareness that a growing proportion of international trade involves copyright and other intellectual property.

98-573, 98 Stat. 3000 (1984). Concern over organized piracy of United States' intellectual property law will no doubt lead to further similar legislative efforts.

25. *See* 17 U.S.C. §§ 602, 603 (1982).

26. *See* 19 U.S.C. § 1337 (1982).