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THE HEGEMONY OF THE COPYRIGHT TREATISE

Ann Bartow*

Unthinking respect for authority is the greatest enemy of truth.
- Albert Einstein

I. INTRODUCTION

Copyright laws do not reflect or support the social norms associated with authorship and the creative process, or the actual use of copyrighted works by consumers. Wealthy large-scale content owners engage in "deal-making, log-rolling, interest-pandering, pork-barrelling, horse-trading, and Arrovian cycling" with respect to Congress, and undertake extensive public relations campaigns and serial law suits, a multi-pronged strategy of "legislation, litigation and leg-breaking," to remold copyright laws, policies, and practices in their favor. Authors,

* Assistant Professor of Law, University of South Carolina School of Law. The author thanks Diane Zimmerman, Peter Yu, Susan Scafidi, Pam Samuelson, Peggy Radin, Jacqui Lipton, Peter Jaszi, Cynthia Ho, Paul Heald, Jane Ginsburg, Llew Gibbons, Ed Baker, and Margo Bagley for advice, comments, and encouragement. The author also benefited from remarks and questions by the faculty of the American University Washington College of Law after this paper was presented to a faculty colloquium on January 30, 2004, and from helpful feedback at the Intellectual Property Scholars Works in Progress Colloquium hosted by the Boston University School of Law on Sept. 10-11, 2004. This Article is dedicated to Casey Brennan Bartow-McKenney.


5. For a discussion of the legislative history of copyright laws, see, for example, Jessica Litman, Copyright Legislation and Technological Change, 68 OR. L. REV. 275 (1989) [hereinafter Litman, Copyright Legislation and Technological Change], and Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 CORNELL L. REV. 857 (1987) [hereinafter Litman, Copyright, Compromise, and Legislative History].


7. See, e.g., Brad King, DC Anarch in Entertainment Cash, WIRED NEWS, Sept. 6, 2000, ("The entertainment industry is pumping millions of dollars into the war chests of both major political parties, vastly outspending both technology startups and individual artists. That could make it difficult for those 'little guys' to get their messages across to legislators." at http://www.wired.com/news/politics/0,1283,38407,00.html?tw=wn_story_related.

academics, librarians and public interest organizations offer countervailing pressure, sometimes successfully loosening the mechanisms of control over information that content owners deploy, but generally lack the financial resources and political influence needed to significantly and permanently alter critical aspects of the copyright laws.

Meanwhile, there is another small cohort of players that wield tremendous power over the substance and meaning of the copyright laws: the authors of copyright treatises, whose unilateral ministrations are not adequately noticed or appreciated. This Article asserts that major conceptions about the appropriate structure, texture, and span of copyright protections and privileges have been fashioned by copyright treatises, particularly the various editions of Nimmer on Copyright. Copyright treatises function in concert with the machinations of Congress, the courts, and custom, but their role is not often scrutinized.

Because copyright treatises typically do a far better job than Congress or the courts of explicating copyright law in straightforward and accessible language, such treatises can not only communicate the copyright law, but also influence its development and direction. Policy makers no doubt understand that content owners and interest groups propose self-serving agendas, and courts are well aware that the parties to litigation all want to prevail when they advocate for particular legal conclusions. A copyright treatise editor could similarly have an economic interest in promoting particular interpretations of the law over others, but has no obligation to disclose this. Because no goal beyond articulating copyright doctrine in a manner that invites further uses and purchases of the pertinent treatise is facially evident, the tome has an appearance of objectivity and detachment.

This Article critiques the excessive reliance placed on copyright treatises by judges, lawyers, and even scholars and policy makers; explains why treatises in principle are not a legitimate source of positive

9. See, for example, the scholarship and advocacy work of academics such as Julie Cohen, Jessica Litman, Pamela Samuelson, Larry Lessig, Margaret Jane Radin, Margaret Chon, Yochevi Benkler, Jonathan Zittrain, Keith Aoki, Siva Vaidhyanathan, Peter Jaszi, Mark Lemley, Dan Burk, Jamie Boyle, Sonia Katyal, Rebecca Tushnet, Diane Zimmerman, Lydia Loren, and Malla Pollack.


13. E.g., 1-10 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (updated through 2004) (hereinafter NIMMER ON COPYRIGHT).
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describes the potentially undemocratic consequences of incorrectly perceiving treatises as nonpartisan, status quo baselines of extant copyright jurisprudence; and recommends an alternative approach to charting and cataloging developments in copyright law—the establishment and maintenance of a Restatement patterned after those promulgated by the American Law Institute in common law subject areas.

Additionally, though the primary focus of this Article concerns the impact of copyright treatises on copyright law, many of the concerns and criticisms raised in the copyright context here are equally applicable to any legal subject area in which one treatise or other privately authored secondary source is dominant, or in which a small group of secondary sources receives large numbers of citations. While treatises can be quite valuable, their impact on the law can actually be negative if they are too heavily and unquestioningly relied on by judges, lawyers, scholars, and policy makers. Effective and appropriate utilization of any given treatise requires an overt and deliberate assessment of the substance and wisdom of the value choices it promulgates.

Part II of this Article describes the astounding and growing ubiquity of the Nimmer treatise in modern copyright law-making and jurisprudence, and the ways in which the treatise reinforces its own preeminence. Part III asserts that uncritical, overwhelming use of a treatise undermines the legitimacy of any legal norms that the treatise helps to instantiate, by discouraging democratic debate and a more participatory evolution of legal doctrine. Part IV argues that widespread adoption of principles contained in the Nimmer treatise creates a normative illusion of coherence in copyright law that too many lawyers and judges rely upon unthinkingly. Part V suggests that the Nimmer treatise functions as a de facto Restatement of Copyrights, despite the fact that it is produced quite differently, and has dissimilar goals, than Restatements drafted by the American Law Institute. Part VI emphasizes the deleterious effect that a hegemonic treatise has upon the profile of legal scholarship in the copyright law area. Part VII asks whether the hegemonic treatise phenomenon is exceptional to copyright, or observable in other legal subject areas as well. Finally, in Part VIII the Article concludes that courts, lawyers, and policy-makers need to rely less on the Nimmer
treatise, or any treatise, and that copyright law is worthy of its own Restatement.

II. THE PREEMINENCE OF NIMMER ON COPYRIGHT

In 1963 Melville Nimmer, a professor at the UCLA School of Law with extensive practice experience in the entertainment industry, published what later became a multi-volume treatise entitled Nimmer on Copyright. This work has had a profound effect on the development of copyright law. One group of commentators stated:

[Melville Nimmer's] Treatise on Copyright is the definitive text; it is relied upon by all whose activities take them into the world of publication—authors, producers, lawyers, professors and all levels of the judiciary, up to and including the Supreme Court of the United States. His seminal work in the fields of intellectual property and right of publicity determined the course of development of those areas of the law.

Though the occasion of these observations was to memorialize Melville Nimmer after his untimely death, it is neither exaggeration nor puffery. Nimmer on Copyright is broadly viewed as "a comprehensive and up-to-date treatise dedicated to copyright law," and is frequently referred to as "the leading treatise on copyright law." An annotated


16. As described in one commentary:
In 1962 [Melville Nimmer] joined the law faculty at the University of California, Los Angeles. Although he was no longer in private practice on his own he continued to practice law and was "of counsel" to other law firms. The year after becoming an academic, he published what later became a four volume treatise Nimmer on Copyright. The treatise became the "Bible" for copyright lawyers. The National LawJournal praised Mel Nimmer as the "King of Copyright." For years Nimmer on Copyright has been cited in virtually every reported copyright decision.

Professor Melville Bernard Nimmer, supra note 15.


19. E.g., Michael Found. v. Urantia Found., 61 Fed. Appx. 338, 345 (10th Cir. 2003); Mackie v. Rieser, 296 F.3d 909, 915 (9th Cir. 2002); TransWestern Publ'g Co. LP v. Multimedia Mktg. Assocs., 133 F.3d 773, 782 (10th Cir. 1998); MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 778 (3d Cir. 1991); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990); Loece Rodkin Mgmt. Corp. v. Ross-Simons, Inc., 315 F. Supp. 2d 1053, 1054 (C.D. Cal. 2004); In re Golden Books Family
legal bibliography describes the work, quite typically, as follows: "Considered an authoritative source for information on copyright . . . . Nimmer is the field's standard reference treatise and is frequently cited by United States and foreign courts at all levels (including the U.S. Supreme Court) as an authority to justify their opinions." The Nimmer treatise itself boasts:

The present four-volume work attests to the subtle rapture that Professor Nimmer derived from mastering and dominating his field. The wealth of judicial citations to his name pays tribute to the power, barely postponed, that he wielded. The Supreme Court's last major copyright decision during Mel Nimmer's lifetime proves the point—the majority opinion in Harper & Row v. Nation though disagreeing with his position, contains a score of citations to Professor Nimmer; its dissent invokes his name a half-dozen times. (Another Supreme Court decision from last term, Mills Music v. Snyder even cites to the 1978 Preface, so definitive did Mel Nimmer's every word become.)

The explicit focus on the Nimmer treatise here and throughout this commentary is not intended to suggest that this particular treatise is qualitatively better or worse than any other copyright treatise, or any secondary source generally. Its popularity and omnipresence simply render it totemically illustrative of the powerful impact a treatise can have on the legislation and jurisprudence of a complicated area of the law.

A. Nimmer and Congress

Congressional affection and respect for treatise originator Melville Nimmer is apparent from the fact that his death was reported on the floor of the U.S. Senate with the sobriquet: "Like Prosser, Wigmore, and Williston, Professor Nimmer's name is synonymous with an entire body of law. His four-volume treatise, 'Nimmer on Copyright,' has been cited countless times by the courts, and is universally regarded as


an indispensable reference by virtually every practitioner in this field.\(^{22}\)

The *New York Times* obituary of Melville Nimmer was reprinted in the Congressional Record.\(^{23}\) His influence on congressional copyright policy makers is evident. A law review article by Melville Nimmer was cited in the legislative history of what eventually became the Audio Home Recording Act of 1992,\(^{24}\) and a legal memo he wrote on behalf of the National Music Publishers’ Association and Recording Industry Association of America was cited in the legislative history of this Act as well.\(^{25}\)

The Nimmer treatise is a resource Congress recurrently references when making and evaluating changes to copyright legislation. In recent years the Nimmer treatise provided the definition of “joint authorship” in a failed attempt to clarify the “work for hire” doctrine\(^{26}\) and was cited for the proposition that U.S. copyright terms were too short to comply with treaty obligations under the Berne Convention, lending support for

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22. 131 CONG. REC. 35,378 (1985) (statement of Sen. Mathias). The entire speech was as follows: Mr. President, on November 23, the field of copyright law lost its most authoritative scholar and commentator. Prof. Melville B. Nimmer, who died last month in Los Angeles at the age of 62, was the undisputed giant of American copyright law.

Like Prosser, Wigmore, and Williston, Professor Nimmer’s name is synonymous with an entire body of law. His four-volume treatise, “Nimmer on Copyright,” has been cited countless times by the courts, and is universally regarded as an indispensable reference by virtually every practitioner in this field. Although Professor Nimmer was an acknowledged expert on the first amendment, and on entertainment law matters, it is in copyright above all that his passing leaves a void that can never be entirely filled.

His stature is aptly summarized by the headline that accompanied a profile of Professor Nimmer in the October 10, 1983 edition of the “National Law Journal”: “The Man Who Wrote the Book: Melville B. Nimmer is the King of Copyright.”

As chairman of the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary, I know that Mel Nimmer will be missed. I speak for all Senators in extending my condolences to Mrs. Nimmer and to the rest of his family.

Id.

23. Id.


25. Id.


The fundamental characteristic of joint authorship is “a joint laboring in furtherance of a preconcerted common design.” *Nimmer on Copyright*, § 6.03 (1988).

As joint authors are considered to be coowners in the work, 17 U.S.C. § 201(a) (1982), they are treated as tenants in common. They own an undivided interest in the whole of the work in proportion to the number of co-owners and not in relation to the relative importance of their respective contributions, and may independently use or license the work, subject only to a duty to account to the other coowner for any profits earned thereby. *Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984). While a joint author may not transfer all interest in the work without the express written consent of the other joint author(s), he or she may transfer all of his or her undivided interest to a third party who then stands in the shoes of that joint author for all purposes.
ultimate passage of the Copyright Term Extension Act. While most observers would credit large content owners with convincing Congress to extend the term of copyright protections rather than any treatise, the Nimmer treatise offered tacitly "neutral" support to the pro-extension arguments proffered by obviously self-interested copyright holders and was explicitly referenced by Congress as a legitimizing basis for term extension.

According to his son David, Melville was a productive legislator:

For on one important occasion when Congress was deliberating the Copyright Act of 1976, it heard testimony from Professor Nimmer and engaged him in fruitful colloquy—as had the Copyright Office in its time before that. In addition, from 1975 to 1978, he served as vice-chairman of the National Commission on New Technological Uses of Copyrighted Works (CONTU). That blue-ribbon panel issued a Final Report bringing U.S. copyright law into the computer age. Its handiwork continues to set the stage for cases being litigated and for new legislative initiatives. In fact, properly viewed, the contribution of CONTU to copyright lawmaking is nothing less than epochal.

On behalf of his clients, the Turner Broadcasting System and the National Association of Broadcasters, David Nimmer, the current editor of the treatise, testified before Congress concerning a proposed amendment of the fair use provisions of the Copyright Act to permit the commercial monitoring of news programming. He similarly represented the U.S. Telephone Association during congressional

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Since the Stockholm Act of July 14, 1967, the Berne Convention has recognized the need for an outer limit on the protection of anonymous and pseudonymous works by providing that, "The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years." Art. 7(3). It has been argued that the American provision setting an outer limit of 100 years of protection for anonymous and pseudonymous works is in violation of the Berne Convention, see Nimmer, "Copyright" §9.01[D], at least with respect to works whose country of origin is not the United States. By increasing the maximum protection from its current 100 years to a period of 120 years, the Copyright Term Extension Act will at least serve to reduce greatly the number of potential situations in which our law may operate in violation of the Berne Convention. This for the reason that it is far more reasonable to presume that an author who created a work 120 years ago may have been deceased for 50 years, than it is to presume that the author of a work created only 100 years ago may have been deceased for at least 50 years.


hearings on the No Electronic Theft Act. It is reasonable to assume that part of his value to his clients in the context of congressional hearings is derived from his authorship of, and association with, his treatise. In one telling bit of reductive circularity, David Nimmer wrote in a scholarly article that, "[i]t is reasonable to assume that part of his value to his clients in the context of congressional hearings is derived from his authorship of, and association with, his treatise. In one telling bit of reductive circularity, David Nimmer wrote in a scholarly article that, "[i]t is reasonable to assume that part of his value to his clients in the context of congressional hearings is derived from his authorship of, and association with, his treatise. Moreover, even if David Nimmer chooses to represent only clients whose interests are in harmony with the normative proscriptions of the treatise, his dynamic legal practice arguably complicates and inhibits

33. Id. at 267 n.24: "Fair use may be unique among copyright doctrines in having inspired numerous Second Circuit judges to join battle on the issue not only in their judicial opinions, but also in the pages of the reviews. See, e.g., Pierre N. Leval, Commentary: Toward a Fair Use Standard, 103 HARV. L. REV. 1105 (1990); Roger J. Miner, Explaining Stolen Text: Fair Use or Foul Play?, 37 J. COPYRIGHT SOC'Y 1 (1989); Jon O. Newman, Not the End of History: The Second Circuit Struggles with Fair Use, 37 J. COPYRIGHT SOC'Y 12 (1989); James L. Oakes, Copyrights and Copyrighthed: Unfair Use and Injunctions, 38 J. COPYRIGHT SOC'Y 63 (1990). As the Second Circuit itself notes about its members' scholarly contributions: "Some of these articles are highly critical of the state of the law with respect to the fair use doctrine and offer suggestions for improvement." New Era Publ'ns Int'l, ApS v. Carol Publ'g Group, 904 F.2d 152, 155 (2d Cir.), cert. denied, 498 U.S. 921 (1990). In that spirit, Second Circuit Judges Oakes, Leval, and Miner were among the witnesses to testify before Congress regarding an amendment to the fair use doctrine. See H.R. REP. NO. 102-836 (1992)."
35. Id. at 267 n.25 ("My own opinion is that the fourth factor is the most important. 4 NIMMER, supra note 1, § 13.05[A][4]. But 'even if viewed as central, this factor cannot substitute for an evaluation of each of the four statutory factors.' Id. at 15-182. To flesh out application of the fourth factor, my father proposed application of the 'functional test' to determine if a given usage is fair. See id. § 13.05[B].")
making any substantive changes to the treatise that he might otherwise contemplate. This criticism would apply equally to any treatise author actively representing clients.

B. Copious Citations by Courts

Quantification of the number of times the Nimmer treatise has been cited by federal courts in published opinions via online legal databases is inexact at best, but conservatively exceeds 2000 citations, by the Supreme Court alone. One might assume that quantity of copyright cases has escalated in the past decade or so, given the increasing prominence that copyright litigation has received in the media, but in fact the number of copyright cases filed in U.S. district courts has remained relatively constant over the past 15 years, as the following list reveals:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Copyright cases filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>2,264</td>
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<tr>
<td>1989</td>
<td>2,253</td>
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<tr>
<td>1990</td>
<td>2,078</td>
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<tr>
<td>1991</td>
<td>1,795</td>
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<tr>
<td>1992</td>
<td>2,080</td>
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<tr>
<td>1993</td>
<td>2,588</td>
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<tr>
<td>1994</td>
<td>2,828</td>
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<tr>
<td>1995</td>
<td>2,417</td>
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<tr>
<td>1996</td>
<td>2,263</td>
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<tr>
<td>1997</td>
<td>2,258</td>
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<tr>
<td>1998</td>
<td>2,082</td>
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<td>2002</td>
<td>2,084</td>
</tr>
<tr>
<td>2003</td>
<td>2,448</td>
</tr>
</tbody>
</table>

However, the number of judicial citations to the Nimmer treatise has demonstrably risen substantially over time. In the first five years of its

36. David Nimmer discusses a few of the clients he has represented in copyright cases. Id. at 263.
37. The Boolean search "Nimmer w/5 copyright!" and then configured to exclude unrelated citations concerning scholarly works of University of Houston School of Law Professor Raymond Nimmer e.g. by using the command "and not (Ray! w/3 Nimmer)" in the federal courts database on LexisNexis uncovered 2,067 results on January 12, 2005. Admittedly some of these citations may reference David Nimmer’s scholarly works that have the work "copyright" in the title or nearby, but few law review articles are cited by courts in this area generally, so that number is likely to be small.
38. Searched performed on Westlaw on January 12, 2005.
publication, 1963 to 1967, the Nimmer treatise was cited 46 times. The following five-year period, 1968 to 1972, saw 56 citations. Citations in the federal courts over the next thirty years, broken into five-year intervals, increased as follows:

- 1973 through 1977: 111 citations
- 1978 through 1982: 194 citations
- 1983 through 1987: 325 citations
- 1988 through 1992: 359 citations
- 1993 through 1997: 398 citations
- 1998 through 2002: 451 citations

There have been 236 additional citations since January 1, 2003 alone. Similarly high citation figures are obtained when the law reviews and bar journals databases are separately searched, suggesting that legal scholars and practitioner authors also rely on, or at least refer to, the Nimmer treatise quite extensively. Though citation rates may not be perfectly, or even closely correlated with the qualitative importance of a treatise, at least as a quantitative matter Nimmer on Copyright appears to exert a pervasive influence upon everyone who comes into contact with copyright law, far surpassing the citation levels of competing treatises by tremendous margins, almost tenfold in federal case law, and almost threefold in law reviews and legal periodicals.

40. Numbers ascertained and confirmed by multiple date-restricted Boolean searches on LexisNexis and Westlaw legal databases using the search terms Nimmer and copyright, excluding the works of the unrelated Professor Raymond Nimmer.

41. By contrast, the competing Goldstein treatise was cited 17 times during this interval, and 69 times between 1998 and 2003. Numbers based on a Westlaw search conducted on January 12, 2005.

42. The Boolean search "Nimmer w/5 copyright!" returned 1,767 results on January 12, 2005, on Lexis. As with the search of federal case law, the search was configured to exclude unrelated citations concerning scholarly works of University of Houston School of Law Professor Raymond Nimmer, for example, by using the command "and not (Ray! w/5 Nimmer)." On January 12, 2005 searches on LexisNexis returned the following results:
   - US & Canadian Law Reviews: 1737;
   - US Law Reviews, CLE, Legal Journals & Periodicals, Combined: 2227;
   A search within the Westlaw databases for all federal cases and all law reviews, texts, and bar journals produced 5,696 documents on January 12, 2005.

43. See, e.g., Wendy J. Gordon, Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship, 57 U. Chi. L. Rev. 1009, 1010:

   In my view at least three pre-1976 works mark the transition to a broader sort of copyright scholarship. One was Benjamin Kaplan's An Unhurried View of Copyright, an exploration simultaneously leisurely and incisive of copyright's history, context, and policies. Another was Stephen Breyer's important investigation of copyright's economic justifications. A third was Melville Nimmer's treatise, which better than any reference work before it provided a thorough and analytic guide to the area.

   (footnotes omitted).

44. For example, searches in the federal case database on January 26, 2004 suggest that while Nimmer has been cited 2097 times, the next, Goldstein, was cited only 218 times; the Latman/Patry
The Copyright Act\(^{45}\) is a long and dense body of statutory law. Despite its length and complexity and the wide range of issues it addresses, however, the statute does not answer many questions or create much predictability when disputes about copyrights arise.\(^{46}\) As a result, judges must either read extensive amounts of copyright case law and distill from it nuanced rules and complicated principles, or they can expeditiously choose to rely on the formulations that are conveniently and accessibly set out in a treatise, and confidently apply them to the often thorny facts of a particular dispute. The considerable number of citations to the Nimmer copyright treatise suggests it is widespread and commonplace for federal judges to depend on the treatise to articulate and support copyright law decisions.\(^{47}\) It is possible, of course, that judges decide cases before even opening a treatise and simply augment their own reasoning with the canned analyses that treatises provide by plugging in treatise citations as matters of efficiency and convenience. Judges function as a lawmaking community that shares a set of interpretive strategies in common, however, and if nothing else, extensive citations signal to other jurists and the legal community at large that copyright treatises, Nimmer in particular, warrant foundational and dispositional reliance.\(^{48}\)

In their essay on the ecology of citation practices by academics in the context of legal scholarship, Jack Balkin and Sanford Levinson observed that frequent citation or quotation is more than simple repetition, it "is a 'recommendation of value' that 'not only promotes but goes some distance toward creating the value of that work.'"\(^{49}\) Citations and quotations, they noted, not only draw attention to a work, but also make

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\(^{46}\) See generally LITMAN, supra note 2; Bartow, supra note 3; Llewellyn, Joseph Gibbons, Sup Mucking Up Copyright: A Common Law Solution, 35 Rutgers L.J. 959 (2004).

\(^{47}\) See supra notes 37-41 and accompanying text.

\(^{48}\) For example, in Playboy Entertainment, Inc. v. Frena, 839 F.Supp. 1552 (M.D. Fla. 1993), Judge Harvey E. Schlesinger cited the Nimmer treatise seven times in a relatively short opinion and actually quoted the treatise for language that the treatise itself was quoting from the Copyright Act of 1976, rather than quoting or citing to the statute itself. See id. at 1557 ("A 'public display' is a display 'at a place open to the public or . . . where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered.' 2 MELVILLE B. NIMMER, Nimmer on Copyright § 8.14[C], at 8-169 (1993)."

Consider also the concise Second Circuit opinion in Eli Attia v. Society of the New York Hospital, 201 F.3d 50 (2d Cir. 1999), which cited the Nimmer treatise six times to support fundamental tenets of copyright law, such as the principles that facts and ideas cannot be copyrighted. Although case law, the copyright statute, and another treatise were also cited, the Nimmer treatise is the most heavily relied upon authority.

the work more likely to be perceived and experienced as valuable.⁵⁰ Works gain status from frequent citation and quotation and also "start to affect the very environment in which they are reproduced, like a particularly successful biological species."⁵¹ Space in the minds of the members of an interpretive community is a limited and valuable resource, they argue, and when a canonical work gains a substantive presence in that space, it creates an increasingly hospitable environment for its own reproduction in the minds of future community members, "whose own minds are constructed and stocked through cultural transmission from their colleagues and elders."⁵² In consequence, "the canonical work begins increasingly not merely to survive within but to shape and create the culture in which its value is produced and transmitted and, for that very reason, to perpetuate the conditions of its own flourishing."⁵³ Abundant citations in judicial opinions signal that a treatise is beneficial, which in turn leads to even more bountiful citations and supplementary reputation enhancement in the courts and among practicing attorneys.

C. The Information Infrastructure Task Force

When the Clinton Administration issued its controversial "White Paper" on the National Information Infrastructure in 1995, the final report cited Nimmer on Copyright 11 times. The Nimmer treatise was used to substantiate an exposition of the "doctrine of limited publication"; to provide an endorsement of the assertion that "[i]t has long been clear under U.S. Law that placement of copyrighted material into a computer's memory is a reproduction of that material"; to supply the sole

50. Id. at 844-45.
51. Id. at 845.
52. Id.
53. Id. (quoting BARBARA HERNSTEIN SMITH, CONTINGENCIES OF VALUE 50 (1988)).
56. See WHITE PAPER, supra note 54, at 31 & n.80-81.
57. Id. at 64-65 & n.202. This arguably became the law afterwards, receiving legislative affirmation in the DMCA. As one commentator stated:

In 1995, a Working Group appointed by the Clinton administration issued a White Paper that set forth a proposed framework for adapting intellectual property rights to the online environment, what the White Paper called the "National Information Infrastructure" (NII).
support for the statement that whatever the nature of an unauthorized use of a copyrighted work, "generally it may not constitute a fair use if the entire work is reproduced",\textsuperscript{58} to validate, in concert with the Goldstein treatise,\textsuperscript{59} a definition of substantial similarity that broadly encompassed non-literal copying and paraphrasing;\textsuperscript{60} to emphasize, again together with the Goldstein treatise, the importance of a strict liability approach to copyright infringement;\textsuperscript{61} to reinforce the contention that nonexclusive licenses can be implied from conduct,\textsuperscript{62} a legal principle that the Nimmer treatise arguably actually created itself, as is explained below;\textsuperscript{63} and to provide confirmation for a claim that in the United States, authors' "moral rights" were protected, as required by the Berne Convention, via provisions of the Copyright Act, Lanham Act, and the common law of privacy, defamation and "the like."\textsuperscript{64} All of these contentions are, to varying degrees, contested, both by other commentaries and by contrary case law; at a minimum the issues are more nuanced and complicated than they are made to appear.\textsuperscript{65} One

Citing the MAI decision, the White Paper asserted that it has "long been clear under U.S. law" that RAM copies of copyrighted works, as well as any other incidental copies made during the transmission of such works through the Internet, implicated the copyright owner's exclusive right of reproduction. The White Paper then went on to suggest "minor clarification[s] and limited amendment[s]" to copyright law that would merely reinforce the settled view.

Reflecting the view of the White Paper, the result in MAI now appears to have received legislative affirmation in the recently enacted DMCA.


58. WHITE PAPER, supra note 54, at 79 & n.249.


60. WHITE PAPER, supra note 54, at 102-03 & n.321-22.

61. Id. at 120 & n.385. In addition to providing supplemental support for the Nimmer treatise, the Goldstein treatise was independently referenced in conjunction with assertions about the impact of strict liability for copyright infringement upon intermediaries such as Internet Service Providers. See id. at 117, n.375, 123 n.393.

62. Id. at 129 n.424.

63. See infra notes 190-92 and accompanying text.

64. WHITE PAPER, supra note 54, at 133-34 & n.428.

65. See, e.g., John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26 (1st Cir. 2003) (discussing doctrine of limited publication and stating that case law before 1976 concerning the definition of publication for copyright purposes "includes judicially crafted exceptions for limited publication: restricted distribution of the work that does not qualify as publication or trigger the notice requirement. Limited publication 'occurs when tangible copies of the work are distributed, but to a limited class of persons and for a limited purpose.'"). Several commentators have questioned or even strongly criticized the proposition that receipt in a computer's random access memory entails making a "copy." See, e.g., Jessica Litman, The Exclusive Right to Read, 13 CARDOZO ARTS & ENT. L.J. 29, 40 (1994) (protesting result in which all acts of reading or viewing a digitalized work with the use of computer involves "actionable reproduction"); David Post, New Wine, Old Bottles: The Case of the Eanescent Copy, AM. LAW., May 1995, at 103, (questioning); Pamela Samuelson, Legally Speaking: The NII Intellectual Property Report, COMMUNICATIONS OF THE ACM, Dec. 1994, at 21 (criticizing).
would never know that from reading the White Paper, however, as both the text of the report and its associative footnotes are linguistically structured to suggest balance, neutrality, and objectivity, not unlike a treatise itself in some respects. Like the judicial opinions, statutory language, and snippets of legislative history cited or quoted in the White Paper, the Nimmer and Goldstein treatises are referenced as if their authority was incontrovertible.

Courts have ruled that there is no per se rule against copying in the name of fair use an entire copyrighted work if necessary. See Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417 (1984); Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624 (5th Cir. 2003); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Ty, Inc. v. Pub'ns. Int'l Ltd, 292 F.3d 512 (7th Cir. 2002); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1516, 1525 (9th Cir. 1992).

Not even "actual copying" will always support a claim of substantial similarity. See, e.g., Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25 (1st Cir. 2001). A relatively narrow scope of copyright protection has been adopted by several courts. In Lotus Development Corp. v. Borland International, Inc., 851 F. Supp. 202, 209 (D. Mass. 1993) (Lotus IV), Judge Keeton referred to the scope of copyright protection as a sliding scale that changes with the availability of expressions for a given idea, and he impliedly accorded computer interfaces only a narrow protection. Noting that the menu commands and menu structure of the computer spreadsheet program in that case were highly functional, Judge Keeton emphasized that the defendant had infringed by copying verbatim Lotus’s entire command menu hierarchy despite the availability of many different command structures to perform the same functions. Id.; see also Eng’g Dynamics v. Structural Software, 26 F.3d 1335, 1348 (5th Cir. 1994); Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 840 (Fed. Cir. 1992) (determining infringement of nonliteral elements of computer program: “Even for works warranting little copyright protection, verbatim copying is infringement.”); Apple Computer, Inc. v. Microsoft Corp., 799 F. Supp. 1006, 1021 (N.D. Cal. 1992) (determining scope of infringement for user interface) (“If technical or conceptual constraints limit the available ways to express an idea . . . copyright law will abhor only a virtually-identical copy of the original.”); Digital Communications Assocs., Inc. v. Softklone Distrib. Corp., 639 F. Supp. 449 (N.D. Ga. 1987) (finding infringement in computer program’s status screen which was “virtually identical” with the plaintiff’s); Harcourt Brace & World, Inc. v. Graphic Controls Corp., 329 F. Supp. 517, 525 (S.D.N.Y. 1971) (according narrow scope of protection to answer sheet designed to be optically scanned by computers).

Even the Nimmer treatise argues for a narrow scope of copyright in some circumstances. See, e.g., 4 NIMMER ON COPYRIGHT, supra note 13, § 13.03[B][b] (2004) (“If the only original aspect of a work lies in its literal expression, then only a very close similarity, verging on the identical, will suffice to constitute an infringing copy.” (citing caselaw for support)). Commentators have argued that narrow constructions of substantial similarity best serve the goals of copyright law. See, e.g., Ann Bartow, Copyright and Creative Copying, 1 OTTAWA L. & TECH. J. 75 (2003-2004).

Courts have held that copyright infringement is not truly strict liability, unlike patent infringement, but requires at least intent to copy, although not intent to infringe. See, e.g., Ty, Inc. v. GMA Accessories, Inc., 192 F.3d 1167, 1169 (7th Cir. 1997); Pritikin v. Liberation Publs., Inc., 83 F. Supp. 2d 920 (N.D. Ill. 1999); see also Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 907 F. Supp. 1361 (N.D. Col. 1999) (“Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”)

D. Invisible Influence

Quantifying citations to a treatise does not gauge the number of times it is consulted as a behind-the-scenes analytic tool with which to launch research or confirm research results before arriving at a holding that is then bolstered with actual case law, which one suspects is sometimes cribbed from the treatise's citations and footnotes without much independent authentication. In consequence, the impact of copyright treatises is probably far greater than even the vast number of citations to them indicate. Treatise influence is likely to increase in the future as legal researchers continue to abandon paper for electronic sources and copyright treatises become increasingly accessible and fully searchable online.

E. An Infinite Loop of Logrolling

In addition to the perhaps rational and justifiable grounds on which courts turn to copyright treatises so frequently, there may be subsidiary and far less laudable reasons that a treatise is sometimes explicitly referenced. A number of former federal court clerks have privately observed that when copyright cases arose, they were encouraged by their judges to "game the system" and incorporate citations to the Nimmer treatise in written court opinions. This enhanced the possibility that these opinions would in turn be incorporated into the Nimmer treatise, with appended self-referential and self-congratulatory parentheticals such as "treatise cited" or "treatise quoted." In this context, citing to the Nimmer treatise serves dubious ego-related goals of blunt reputation enhancement of judges, rather than advancing the interests of copyright justice. It also gives judges eager to elevate the visibility of their opinions an added incentive to cite the Nimmer treatise, for reasons wholly unrelated to its analytical merits. The electronic version of the Nimmer treatise that is searchable on LexisNexis lists almost 200 "treatise citing" cases, and nearly as many "treatise quoting" cases.

68. Searches performed on LexisNexis on January 12, 2005. Search words of "treatise w/4 quotes or quoted (quot!)" retrieved "treatise quoting" 145 times. Search words of "treatise w/4 cites or cited (cit!)" retrieved "treatise citing" 191 times.
Nimmer is far from the only treatise guilty of this practice and is singled out here as an example simply because former federal clerks were specifically asked about the Nimmer treatise for the purpose of this section of the Article. Other copyright treatises, and treatises in many other subject areas, similarly appear to engage in and encourage circular logrolling of this sort. At a minimum, it creates jurisprudential “noise,” and fosters unappealingly self-serving behavior.

III. BROAD RELIANCE ON TREATISES UNDERMINES THE LEGITIMACY OF LEGAL NORMS

When putative lawmaking is actually a series of references to, and applications of, the dictates of a treatise, the process is flawed and the outcome is suspect. Though the effect of over-reliance on a treatise may appear to be as mundane as the facilitation of slovenly research and short-circuited analysis, if undertaken on a large scale treatise usage begins to supplant the democratic process, with destructive effects. This is not intentional on the part of treatise authors and it is not something treatise producers could easily prevent without undermining their own credibility and sales. The responsibility lies with those researchers who use treatises as a shortcut rather than a supplemental resource.

A. Facilitation of Facile Analysis

In the context of biology, the late Stephen Jay Gould warned of the detrimental tendency to equate the scientific method with abstract inquiry because one generally only undertakes substantive research when looking for something particular, and one’s goal is bound to affect one’s search.69 Science, Gould suggested, involves a “balancing act between objective methods and subjective goals.”70 Like scientific inquiry, the objectives of legal research may drive the scope and sophistication of the manner in which it is pursued.71 The anticipated complexity of the answers will govern the degree of intricacy with which doctrinal questions are formulated. If an expedient answer is sought, the question is apt to be superficially framed. The seemingly clean, clear, and straightforward explanations of copyright laws provided by a treatise such as Nimmer positively reinforce the framing of issues into

70. Id.
71. See, e.g., Barry Meier, Two Studies, Two Results, and a Debate Over a Drug, N.Y. TIMES, June 3, 2004, at C1.
treatise-compatible queries. Treatise formulas can be methodically adopted and applied to otherwise perplexing controversies, offering an irresistible shortcut through the prickly thicket of conflicting case law and exigent statutory interpretation. The hard slogging of distilling coherent principles and ascertaining socially beneficial outcomes is avoided, effectively outsourced to treatise authors.

One cannot vociferously criticize members of the judiciary for (some would say prudently) utilizing an apparently well-researched, very lengthy, and comprehensive treatise that is widely regarded as authoritative in the subject area. Given the range of diverse legal issues a federal judge must be familiar with, referencing a treatise for assistance in mastering a body of law as complicated as copyright is both reasonable and understandable. However, such pervasive use can also be insidious, not in the sense that a treatise author or publisher intends any malfeasance, but because dependence that approaches rote reliance transforms suggested normative interpretations into law and policy without adequate deliberation or consideration of countervailing views.

B. Discouraging Debate and Democracy

The legitimacy of a body of law such as copyright may be evaluated from substantive, procedural, and social policy perspectives. Substantive legitimacy concerns the fairness of the explicated laws themselves. Congress is charged with promulgating laws such as the Copyright Act, and the federal courts bear primary responsibility for interpreting and applying them. The Nimmer treatise is not written with the purpose of critiquing copyright legislation or court-made law, but it is suffused with Nimmer’s positivist visions of equity and justice in the copyright context. A competing treatise by Paul Goldstein has also correctly been deemed, “animated and unified by an explicit normative structure.”

To the extent treatise revelation goes unchallenged by competing evaluation and analysis in the policy-making context, any natural evolution toward alternative permutations of substantive fairness is impeded.

73. See, e.g., Waldron, supra note 4, at 655-56:

There is this to be said for the Many. Each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass—collectively and as a body, although not individually—the quality of the few best. Feasts to which many contribute may excel those provided at one man’s expense. In the same way, when there are many [who contribute to the process of deliberation], each can bring his share of goodness and moral prudence; and when all meet together the people may thus become something in the nature of a single person, who—as he has many feet, many hands, and many senses—may also have many qualities of character and intelligence. This is the reason
the principles expostulated by treatises may lead to substantively just outcomes, the substance itself is deficient in form and function because it is created outside what one might term the democratic evolution of law.

Procedural legitimacy embodies a concern with how laws are made. Congress decides how to protect, ignore, or burden the broad range of interests articulated by various interest groups, stakeholders, and commentators when drafting copyright laws. Courts subsequently generate the “common law” of copyright through statutory interpretation and gap filling in the context of balancing the interests of the parties to a particular dispute, which provides a much more limited universe of concerns and claims from which to craft copyright law.

Some observers have expressed grave concerns that congressional copyright lawmaking has been characterized by the limited participation of certain stakeholders. The absence of full participation and why the Many are also better judges [than the few] of music and the writings of poets: some appreciate one part, some another, and all together appreciate all. (quoting THE POLITICS OF ARISTOTLE 141 (Ernest Barker trans., Oxford 1958)).

74. They may also lead to bad outcomes, as is discussed below.

75. See, e.g., Waldron, supra note 4, at 655-56. Waldron states:

What lies behind this is the idea that a number of individuals may bring a diversity of perspectives to bear on issues under consideration, and that they are capable of pooling these perspectives to come up with better decisions than any one of them could make on his own. That, after all, is why Aristotle took it as the mark of man’s political nature that he was endowed with the faculty of speech. Each can communicate to another experiences and insights that complement, complicate or qualify those that the other already possesses; and when this happens in the deliberations of an assembly, it enables the group as a whole to attain a degree of practical knowledge that surpasses even the coherently applied expertise of the one excellent legislator.

We may or may not buy Aristotle’s view that the many can in this way come up with better results than the one. But the existence of diverse perspectives in the community and the helpfulness of bringing them to bear on proposed laws are surely important features in any account of why the task of legislating is entrusted to assemblies. I believe that these features in turn frame the way in which we should think about the deliberative process itself, and in particular how we should regard the relatively high level of formality associated with debate and action in a legislative assembly.

Id. (citations omitted).


The entire framework of the UCC is based on common law. While it is obviously a statute, and may even claim to be a code, it relies heavily upon the common-law models. Sometimes it follows these models slavishly, and sometimes it modifies them creatively, but common law has remained at the foundation of the vast majority of the Code’s provisions. As a result, the Code inherits the common law’s blindness to consumer concerns, the very blindness which led directly to the law reform efforts of the consumer movement.


But there is every reason to doubt that policy makers have ever been able to shape and reshape such powerful economic rights in a dispassionate, informed and objective manner
deliberative decisionmaking is an unacceptable means of developing copyright policies in a society comprised of diverse financial concerns, distributional interests, and cultural values. Elevation by Congress of the goals and mores of a few privileged interest groups above all others imperils the integrity of the entire copyright system. To the extent that the Nimmer treatise, or any other, is used by policymakers to a degree or in a manner that excludes alternative views—clearly the fault of those who use the treatise as a template or bible rather than the treatise itself—the procedural legitimacy of copyright law is undermined.

Courts that rely exclusively, or even primarily, on a copyright treatise as a prepackaged, comprehensible exposition of the common law of copyright will exclude alternative normative and interpretive views of copyright law, perhaps not even recognizing that contrary positions exist. Judges who engage in wholesale, unquestioning adoption of any single source of pre-synthesized copyright law, failing to draw on competing theories, will perform ostensibly independent analyses in application of law to fact with hidden and unrecognized but potentially tremendous biases. In the absence of countervailing resources of similar stature, the very existence of a hegemonic treatise potentially prevents the evenly matched battles of policy and doctrine necessary for the emergence of just outcomes.78

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First, even those of us who think law is politics in the Supreme Court acknowledge that the lower courts act as if they are constrained by doctrine. Thus, lower court judges faithfully peruse precedent, try to reconcile irreconcilable cases, look hard at history, and weigh competing policy concerns. For them, a treatise is extraordinarily valuable. It collects in one place relevant legal materials and it summarizes the range of arguments about disputed questions. In so doing, treatises save an enormous amount of time and guide courts' analyses.

Second, some questions, even in federal jurisdiction cases, have easy, noncontroversial answers. Yet, because an area of law is so vast that the typical lawyer, student, or judge can only know a slight portion of the law, treatises are vital to pulling together the grist of applicable legal principles. Having a source that sets forth what is not controversial is often far more important to the daily functioning of law than a source addressed only to those once-in-a-lifetime disputes that work their way the U.S. Supreme Court.

Id.
Concerns about social or empirical legitimacy pertain to the broad acceptance of a particular view of copyright law by the body politic. Based on its ubiquity, *Nimmer on Copyright* is perceived as having a degree of social and empirical legitimacy far beyond which any treatise, no matter how thorough, ought to be accorded. The result of investing a treatise with unwarranted social or empirical legitimacy is that the work can then have an inordinate impact on legislators, court decisions, and the ultimate evolution of copyright law. The rule of Nimmer can easily be mistaken for the rule of law.

C. Subsurface Social Norms

Copyright legislation and jurisprudence are comprised of, and affected by, an evolving set of social norms. One important premise of Robert Ellickson’s theories about the intersection between social norms and customs and formal law is the pervasiveness of “legal centralism.”

Ellickson defines legal centralism as the view that “the state functions as the sole creator of operative rules of entitlement among individuals.”

In an area of the law as complicated and sometimes contradictory as copyright law, government—in the form of statutory authority and case law—may be inaccurately viewed as the true source of copyright law, while the Nimmer treatise is mistakenly perceived as simply a primer on, guidebook to, or shorthand version of the evolving copyright law at large.

Whether treatise-driven and treatise-dependent attitudes existed prior to widespread adoption of the Nimmer treatise in particular, or evolved out of the precise practice of relying on the Nimmer treatise, the extraordinary level of reliance suggests that the normative belief that adhering to the teachings of the Nimmer treatise is a mode of conduct that ought to be followed. Without this normative belief, use of the treatise would be a lesser indulged habit or convenience, but the treatise could not influence or create “the law” to the extent it does. Judges, lawyers, congressional representatives, and even legal scholars who have internalized “Nimmer norms” exhibit convictions that this standard of behavior is obligatory, giving the customary copyright law promulgated by the Nimmer treatise profound power and authority. Widespread citation practices create and reinforce expectations that the Nimmer

79. ROBERT ELickSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4 (1991) (questioning legal centralism is one of the central purposes of this book).
80. Id.
treatise should be cited, rendering certain views about particularized copyright doctrines normalized, and others deviant.

The intention of this Article is not to challenge the entire contents of the Nimmer treatise per se, or to question or impugn the motives of its energetic and successful authors and publishers. The work’s popularity and widespread usage attest to its usefulness and worth. The concern raised here is that the Nimmer treatise is widely treated by lawyers and judges as though it is a neutral, impartial exposition of copyright law. It is not. To paraphrase literary theorist Stanley Fish, the objectivity of the treatise is an illusion, and a dangerous illusion because it is so physically convincing.

Melville Nimmer was a very prolific legal scholar who generally advocated strong copyright protections and expansive copyright policies.

81. STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 43 (1980) ("The objectivity of the text is an illusion and, moreover, a dangerous illusion, because it is so physically convincing.").

His son David, who has been editing Nimmer on Copyright since 1985, also has his own distinctly normative points of view about various aspects of copyright law, which some courts wholeheartedly

embracing.

David Nimmer is arguably not as consistently an advocate of "high protectionist" copyright policies as his father was. However, on at least two occasions he explicitly concluded that "Father knows best," apparently endorsing the Supreme Court's very high barrier holding in *Harper & Row Publishers, Inc. v. Nation Enterprises* in the first, and defending his father's position on the National Commission on New
Technological Uses of Copyrighted Works (CONTU) in the second. Additionally, he appears to have financial as well as personal motives not to change the high protectionist content of the treatise very much, given that he has written:

Later to grow to four volumes during his lifetime, *Nimmer on Copyright* became the gold standard that courts recognize as "the most authoritative treatise on copyright," "renowned," "eminent," "classic," "foremost," and "leading"—even "the great copyright treatise."

During the last fifteen years of the pendency of the 1909 [Copyright] Act and through the first dozen years after the 1976 Act took effect, that treatise stood alone as a comprehensive analysis of all U.S. copyright law. It therefore reached the status of a *summa*, which courts cited not merely for its convenient encapsulation of the holdings of disparate prior cases, but also for its own authorial pronouncements. The result is that Mel Nimmer became, notwithstanding his own private tendencies, an ersatz lawmaker promulgating copyright doctrine. But unlike any governmental official, he placed his stamp not simply on the few selected matters that came to him for decision, but across the alpha and omega of copyright doctrine—so much so that a recent case in Chicago referred to "Professor Nimmer's treatise, cited ubiquitously as authority in copyright cases."

Consider just a few instantiations. (1) The great metaphysical question in all of copyright law is where the line must be drawn beyond which appropriation becomes "substantial similarity," and hence actionable conduct. Prior to 1963, courts used that term in a bewildering plethora of senses. When the treatise came onto the scene, however, Professor Nimmer separated those applications into their appropriate pigeonholes throughout the law of copyright, some belonging to other realms (such as fair use) and others limning the contours of how much copying is required for liability. As to those, he further divided them into a dichotomy of his own invention, which he dubbed "comprehensive nonliteral similarity" and "fragmented literal similarity." As he recognized at the time, "[t]his distinction has received almost no express judicial recognition." Yet his own analysis set the standard, as courts began to adopt the treatise formulation. At present, dozens of cases have adopted this treatise terminology, making it as firmly rooted in copyright doctrine as most pronouncements by Congress in Title 17 of the United States Code.

It is the rare case indeed that strays from that framework. Indeed, only two examples come to mind—and their lesson is that courts abandon the Nimmer framework at their peril.  

90. *Id* at 1240-42 (footnotes omitted).
Well into his second decade as the treatise's marquee editor, David Nimmer is the public face of *Nimmer on Copyright*, and he frequently gives lectures on copyright topics domestically and around the world. Courts seem to blur Nimmer the treatise with Nimmer the person, as evidenced by a marked tendency to preface analysis from the treatise with phrases such as, "Professor Nimmer explains" or "Professor Nimmer suggests." It has been anecdotally reported that when they


Mr. Nimmer lectures widely in the copyright arena. Besides in-house seminars (such as for the legal staffs of Turner Broadcasting in Atlanta and Times Mirror in New York and Los Angeles), he has lectured around the world — at MILIA in Cannes, ALAI in Tel Aviv, LUISS in Rome, IMPRIMATUR in London, and the Copyright Society of Japan in Tokyo, and regularly to bar organizations in California and throughout the U.S. See also LexisNexis Bookstore, *Nimmer on Copyright*: About the Author, at http://bookstore.lexis.com/bookstore/catalog?action=author&author_pk=281:

David Nimmer is Of Counsel to Irell & Manella in Los Angeles, California. Since 1985, he has assumed responsibilities from his father, the late Professor Melville B. Nimmer of UCLA Law School, for updating and revising *Nimmer on Copyright*, the standard reference treatise in the field, routinely cited by U.S. and foreign courts at all levels in copyright litigation. Apart from his treatise, Mr. Nimmer authors numerous law review articles on domestic and international copyright issues.

Mr. Nimmer also lectures widely in the copyright area. He has delivered a number of lectures concerning multimedia: at MILIA in Cannes, at Digital World in Los Angeles, and at seminars for the in-house legal staffs of Turner Broadcasting System in Atlanta and Times Mirror in New York and Los Angeles.

In addition to writing and lecturing, Mr. Nimmer represents clients in the entertainment, publishing, and high technology fields. He gave Congressional testimony on behalf of the National Association of Broadcasters in 1992, and Parliamentary testimony on behalf of the Combined Newspaper and Magazine Copyright Committee of Australia in Sydney in 1993.


encounter him at professional conferences and gatherings, federal judges treat David Nimmer like a celebrity, nervously mentioning copyright opinions they have recently authored, and then deferentially asking “Did I get it right?” One would expect such questions to be asked the other way around, with Nimmer inquiring whether he had correctly reported the judges’ opinions in his treatise, since judges make the law and the treatise ostensibly simply reports it. No matter how highly knowledgeable, a treatise author should not be perceived as the nation’s primary authority on copyright law. No one should be. Melville Nimmer himself recognized this, as evidenced by his words in this excerpt from a 1983 biographical article published in the National Law Journal:

That’s not to say, however, that being generally regarded as the nation’s foremost authority doesn’t have its risks. While Mr. Nimmer can—and sometimes does—cite himself in briefs, opposing lawyers can quote his position with equal ease.

“He does trip on the treatise occasionally,” said David A. Gerber, a copyright lawyer with Loeb and Loeb in Los Angeles and a former student of Mr. Nimmer who has worked on several appeals with him. “Then someone will ask on oratorical fury, ‘Your honor, whom are we to believe? Nimmer the advocate? Or Nimmer the scholar?’”

Mr. Nimmer usually answers such verbal attacks by telling opponents they do not understand his treatise, then referring them to sections in his work.

“Or else think of what Wilt Williston is quoted as saying when the court called his attention to something in his contract treatise,” said Mr. Nimmer, “He answered, ‘Your honor, since I wrote that, I’ve learned a great deal.’”

Nonetheless, Mr. Nimmer bristles at the idea that he would cite his treatise to support a point of law. He quickly points out that he only refers to the work as a shorthand abbreviation for a long string of cases or a complex argument, “I hope I never say that something should be the law because I say so,” he added.94

turned up 284 instances of these phrases.

93. Reports of this have been orally repeated to this author and those practicing attorneys making these claims have understandably requested anonymity.

IV. NORMATIVE ILLUSIONS OF COHERENCE

The goal of any legal treatise is to articulate the empirical state of the law, and authorship of a treatise is generally not explicitly undertaken as a normative exercise. The constructive acts of both Congress and the federal courts provide direction as to what copyright law is, and what those who desire to comply with various dictates of copyright law are required to do. However, any advocate or scholar who is informed about and interested in copyright cannot help but report these empirical sources of law in a manner that articulates preferred norms. In a treatise this is accomplished within the structured, objective-seeming format that may seem necessary to bring something approaching coherence and consistency to a complicated subject area. In fact, at least one intellectual property law scholar has suggested that exposition of normative analytical modes is a positive attribute in a treatise, asserting:

The treatise writer's dilemma is that while reliability requires faithful interpretation of the law as it stands, he or she must also remain sufficiently detached and forward-looking to assist decision-makers in shaping the law as it ought to be. The better treatise writers resolve this tension by devising jurisprudential and methodological approaches that broaden the horizons of experienced practitioners in the field.  

The common law of copyright is a set of rules and norms derived and distilled from germane judicial opinions, a normative order consisting of rights and duties abstracted from prior decisions. Repetitive adoption of treatise expostulations forms a cognizable series of customary legal obligations that can be invested with close to binding authority by the relevant community. Attributing the composition and structure of the treatise to "a thirst for legal order," one observer articulated, "Nimmer's treatise artfully blended logic, case precedent, and statutory interpretation into a seemingly coherent body of law that courts and practitioners found manageable." The Nimmer treatise provides a valuable overview of a complicated and at times counterintuitive subject area, but one with an editorial viewpoint that is largely obscured. Though mainly purporting to be merely descriptive, it promulgates a particular normative view of specific copyright law issues, as does any copyright treatise. This may be unrecognized by decisionmakers, who then fail to weigh opposing views before rendering conclusions.

96. Id. at 944-45.
Many people who study copyright law develop an overarching philosophy about the proper scope of copyright protections. A copyright treatise with a subtle editorial slant toward high, medium, or low copyright protectionism could affect development of the law if the treatise has a causal effect on the outcome of a policy debate or litigation dispute. Unreflective adherence to the mores of a copyright treatise subverts the formalism required by "the rule of law," and undermines democratic principles. One articulation of elements of the rule of law is as follows:

1. Generality. Roughly, there must be rules, cognizable separately from (and broader than) specific cases, such that the rules can be applied to specific cases, or specific cases can be seen to fall under or lie within them.
2. Notice or publicity. Those who are expected to obey the rules must be able to find out what the rules are.
3. Prospectivity. The rules must exist prior in time to the actions being judged by them.
4. Clarity. The rules must be understandable by those who are expected to obey them.
5. Non-contradictoriness. Those who are expected to obey the rules must not simultaneously be commanded to do both A and not-A.
6. Conformability. The addressees must be able to conform their behavior to the rules.
7. Stability. The rules must not change so fast that they cannot be learned and followed.
8. Congruence. The explicitly promulgated rules must correspond with the rules inferable from patterns of enforcement by functionaries (e.g., courts and police).

97. See, e.g., Bartow, supra note 3, at 38-41 & nn.82-88.
98. Robert S. Summers, The Principles of the Rule of Law, 74 NOTRE DAME L. REV. 1691, 1701 (1999): Each principle of the rule of law is affirmatively "formal" in one or more of four ways: methodologically, procedurally, accommodatively, and authorizationally. Many principles are methodologically formal. That is, many have to do with the manner or way in which law is created and brought to bear, with how that very law itself is to take shape, and with what that shape is. The requirements of rule-like shape, of clarity, and of prospectivity, are illustrative of such methodological requirements.

[Although not included on Fuller's list, it is clear that there must be a ninth and tenth requirement: (9) addressees of rules must be rational choosers; (10) addressees must be suitably motivated, perhaps by penal sanctions, perhaps by opportunities for reward. The addressees must be such as can respond by following the rules, if the rules have the two characteristics of know-ability and perform-ability. The addressees must further be such as will respond, if they are motivated to do so by their desires to obtain rewards or avoid punishment.

Id. at 787; see also James W. Torke, What is This Thing Called the Rule of Law?, 34 IND. L. REV. 1445 (2001).
Most intellectual property scholars agree that copyright law generally lacks the first four listed elements: generality, clarity, stability, and congruence. At times notice or publicity and conformability are in doubt as well. Copyright laws are inconsistent across media and technologies, challenging to comprehend, frequently amended, and difficult to extrapolate across disparate technologies and factual situations. Unless they are (or employ) attorneys, copyright actors are unlikely to know where to find out what the rules are, and even if they do, can have a justifiably hard time conforming to rules they do not understand. When the involved parties are lawyers, lawmakers, or judges, they are likely to gravitate to a treatise if it appears to fulfill the rulebook function. The inclination is understandable, but those who submit to the rule of the treatise conflate it with the rule of law. In a review of a different treatise on another subject altogether, one legal scholar wrote:

Students “learn” from treatises, lawyers cite them for authority, and judges use them to justify their opinions. Even if one believes that these instrumental uses of treatises are no more than covers for the actual political motivations of legal actors, one should not dismiss treatises as unimportant. That treatises are being used to persuade suggests power in the positions being taken by authors.

A web site maintained by the University of Tennessee’s Office of the General Counsel refers those interested in “sources of information about copyright” to the Nimmer treatise with the admonition: “The classic text and very useful for understanding the basic principles. Not as useful in the application of the principles to technology.” Perhaps this is because the Internet poses challenges to content distributors that they do not trust traditional copyright principles to resolve satisfactorily. One can assume, however, that all of the copyright treatise authors and publishers are working on meeting the demand for a normative illusion of coherent copyright principles in cyberspace. Open, informed debate is not likely to be part of the development process because treatises are not compiled or edited by committee.


101. See, e.g., Nat’l Research Council, supra note 100, at 125-29. See generally Halpern, supra note 100.

102. For example, compare copyright in sound recordings such as VARA and digital audio tapes with copyright in musical compositions.

103. See generally Bartow, supra note 3.

104. Matasar, supra note 78, at 1516-17.

105. See University of Tennessee, Office of General Counsel, Copyright Information, at http://www.lib.utk.edu/~geo/copyright.html (last visited Feb. 10, 2005).
V. THE NIMMER TREATISE AS A DE FACTO RESTATEMENT OF COPYRIGHTS

The American Law Institute (ALI) is an organization comprised of judges, law professors, and attorneys, founded in 1923 with the goal of bringing "coherence, reason, and consistency" to specific areas of the common law. Lawyers affiliated with the organization review state court case law and distill it "into a series of 'black letter' rules, followed by explanatory 'Comments,' which are, in turn, followed by 'Reporters' Notes,' which show the case law basis for the rule itself."\(^{106}\)

ALI publishes and updates Restatements in various areas of law, including Agency Law, Conflict of Laws, Contracts, Property, Restitution, Torts, Trusts, and Unfair Competition.\(^{107}\) Whatever one's view of the final products, at the very least the ALI Restatements are "vetted" by a diverse array of scholars in the field. Published criticisms of the works and their evolutionary progressions are both frequent and freely accessible. The editorial processes are far more democratic and transparent than is treatise drafting.

Like treatises, Restatements can be credited with too much authority. As one legal scholar admonishes:

> It is important to remember that no restatement is ever "law." It has no legal force. It is, in theory, an educated analysis of what past judicial decisions or legislation say the law ought to be. This is particularly true in an area in which the common law method still functions as the principal guide to decisionmakers. A restatement never becomes law. It can never be anything more than a guide because, whatever the expertise, acumen, brilliance, or dedication of those who draft a restatement, they carry no authority to decide what the law is in a controversy between parties. Restaters are not authoritative decisionmakers. If the words and policies of the restatement become law, they do so because authoritative lawmakers adopt them, not because they receive the affirmative vote of the ALI.\(^{108}\)

When teaching courses to law students, one notices that some of them, particularly first-year law students, can cling to Restatements as irrefutable statements of the law, a resource that provides something approximating certainty in a frightening sea of ambiguity. The author

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108. Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference is Due to the Restaters or "Who are these guys, anyway?"
75 Ind. L.J. 541, 548 (2000).
has observed this while teaching Property and is informed by colleagues that similar phenomena occur in Contracts and Torts. These students often obstinately believe that any judge that disagrees with a Restatement has written an opinion that is "wrong."

One way to combat unholy Restatement respect and reliance is to explain the Restatement drafting process to students as something akin to reaching a resolution short of trial in a litigated dispute: The hallmark feature of a fair and optimal settlement is that every party is a little unhappy with the negotiated result. One recent example of the controversy and compromises embedded in Restatement drafting is aptly communicated by the tone and content of the scholarly works published in Volume 54 of the Vanderbilt Law Review, which in April 2001 published an entire symposium issue of scholarly articles which sharply critiqued the Restatement (Third) of Torts on a range of issues, and from a variety of angles. Contrast this with the comparatively anemic critical inspection treatises receive by way of occasional book reviews and critical but self-serving policing by competitors.

In addition to being the subject of three iterations of ALI’s Restatement of Torts, tort law is the subject of several treatises, including the very influential Prosser on Torts. Although ALI Restatements have no force of law on their own, they have had a substantial impact on the development of the common law and, one would expect, on related treatises, which are free to embrace or reject Restatement teachings. Courts are empirically far more likely to cite to the Restatement than to any tort law treatise. Though tort law treatises are cited with great frequency, the viewpoints they espouse can at least be evaluated against those in the Restatement, as well as those proffered by competing treatises.

A. Competing Copyright Treatises are Ineffectual at Offering Diverse Views

The legal profession is curiously riddled with longstanding practices that are inefficient but difficult to dislodge. Consider the Uniform System of Citations. Accepted as the standard for legal citations, its


110. For example, a LexisNexis search performed on January 12, 2005 suggested that since Jan. 1, 2003, the Restatement on Torts has been cited 2,999 times in federal and state case law while Prosser on Torts was cited 881 times in the same database during the same interval.

dictates are largely unquestioned, but similarly they are often ponderous and unjustified. Why, for example, do lawyers waste words by adding the words “cert. denied” to federal case citations? Considering how few cases the Supreme Court hears each year, one could


The Court's caseload has increased steadily to a current total of more than 7,000 cases on the docket per Term. The increase has been rapid in recent years. In 1960, only 2,313 cases were on the docket, and in 1945, only 1,460. Plenary review, with oral arguments by attorneys, is granted in about 100 cases per Term. Formal written opinions are delivered in 80-90 cases. Approximately 50-60 additional cases are disposed of without granting plenary review. The publication of a Term's written opinions, including concurring opinions, dissenting opinions, and orders, approaches 5,000 pages. Some opinions are revised a dozen or more times before they are announced.

The total number of case filings in the Supreme Court increased from 7,852 in the 2000 Term to 7,924 in the 2001 Term -- an increase of 1%. Filings in the Court's in forma pauperis docket increased from 5,897 to 6,037 -- a 2.4% rise. The Court's paid docket decreased by 68 cases, from 1,954 to 1,886 -- a 3.5% decline. During the 2001 Term, 88 cases were argued and 83 were disposed of in 76 signed opinions, compared to 86 cases argued and 83 disposed of in 77 signed opinions in the 2000 Term. No cases from the 2001 Term were scheduled for re-argument in the 2002 Term.

The total number of case filings in the Supreme Court increased from 7,377 in the 1999 Term to 7,852 in the 2000 Term -- an increase of 6.4%. Filings in the Court's in forma pauperis docket increased from 5,282 to 5,897 -- an 11.6% rise. The Court's paid docket decreased by 83 cases, from 1,954 to 1,871 -- a 4.7% decline. During the 1999 Term, 83 cases were argued and 84 were disposed of in 77 signed opinions, compared to 83 cases argued and 79 disposed of in 77 signed opinions in the 1999 Term. No cases from the 2000 Term were scheduled for re-argument in the 2001 Term. Although the closing of our building did not delay any scheduled arguments, the interruption in mail delivery in the Washington area may have an impact on the number of cases heard by the Court this Term.

The total number of case filings in the Supreme Court increased from 7,109 in the 1998 Term to 7,377 in the 1999 Term -- an increase of 3.8%. Filings in the Court's in forma pauperis docket increased from 3,047 to 3,282 - a 4.7% rise. The Court's paid docket increased by 31 cases, from 2,061 to 2,092 - a 1.5% increase. During the 1999 Term, 83 cases were argued and 79 were disposed of in 74 signed opinions, compared to 90 cases argued and 84
reasonably assume that in the vast majority of federal cases certiorari either was denied or never even pursued. Rather than noting the cases for which certiorari was denied, a time-and-ink saving alternative custom could be to annotate case citations only when a decision about certiorari was pending (e.g. "decision on cert. pending"), or a Supreme Court ruling itself was either expected (e.g. "S. Ct. ruling expected") or had issued, as is indicated presently. This substitute practice would represent a complete paradigm shift, because notations would be strictly reserved for periods of uncertainty or substantive actions, rather than the absence of them, and more information would be conveyed. Yet it is unlikely to be adopted, as it contravenes longstanding inefficient practice.

Similarly, one wonders why student-run law journals adopt the inefficient practice of rendering law review names in large and small capital letters, or lawyers tolerate awkward and counterintuitive abbreviations such as "Publ'g" for "Publishing," "Ref." for "Refining," "Sec." for both "Section" and "Securities," and "Tchrs." for "Teachers." For that matter, in legal periodical titles, it seems odd and inexplicable that lengthy city names such as "Syracuse," "Toronto," and "Willamette" are required to be completely spelled out, but shorter words such as "Texas" and "Boston" are abbreviated.

Intense reliance upon copyright treatises facially seems like a useful and efficient practice, and so curtailing it seems implausible at best in an environment in which even obtuse and irrational citation practices are intractable. And yet, as discussed above, there are substantive areas of the law that receive regular, thorough scrutiny and assessment when Restatements are updated. Copyright is simply not one of them. One commentator who was involved with production of ALI's Restatement (Third) of Torts asserted that while the respective Reporters may not have been correct at every turn:

[T]he Reporters and the ALI review process were fair, deliberative, and democratic. Any careful analysis of the project, from beginning to end, shows this to be true. A review of the ALI processes and procedures, from the inception of restatements of law in 1923 to the latest Restatement (Third) in 1998, indicates that such an approach was and always will be the hallmark of The American Law Institute.
In contrast, the process of drafting and updating any given treatise is unlikely to be either deliberative or democratic. Rather, a treatise author strives for a clear, coherent, comprehensive and consistent voice. The treatise primarily referenced here due to its preeminence is called *Nimmer on Copyright* rather than *Reflections and Debates on Copyright* for a reason: It is formulated to provide a clear, concise overview of copyrights, rather than to provoke contemplation or present any sort of learned consensus. Perhaps that is as it should be, but consumers of the treatise need to understand the limitations of the treatise, particularly its focus on doctrine over realism and the politics of law. Even those seeking only unadorned doctrine should be cognizant of the *ex parte* choice-of-doctrine decisions that a treatise author has potentially made. As one intellectual property scholar warned:

> When a leading authority pens a treatise, we have the opportunity to learn not only what that person thinks the state of the law is, but also what he thinks it should be. The concomitant danger is that the author might confuse prescription with description, might make errors of ascription (inadvertently attributing his own views to the courts or to Congress), or might mar an otherwise sound discussion by advocating only one side of the issue.\(^{118}\)

Paul Goldstein first published a competing copyright treatise, *Copyright: Principles, Law and Practice*, in 1989. It was reviewed fairly favorably by two legal scholars, and somewhat less so by one copyright attorney, who wrote in 1990:

> [Goldstein] describes this large body of statutory and case law in a highly professional manner. In so doing, however, he invites a comparison with the long established reference work, *Nimmer on Copyright*. As an intellectual property lawyer, my professional library includes many other books on copyright and computer law, but none has, to date, been more indispensable than Nimmer. With the rising cost of legal publications, the practitioner must seriously consider whether a new treatise is worth purchasing. Goldstein’s Copyright attempts to expound upon a field already dominated by a recognized classic.

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117. *But see Matasar, supra note 78, at 1517-18:*

As authority, treatises are used to make arguments, to do justice and injustice, and to influence others. For a treatise writer to assert neutrality, when others will use the work in ways that the writer would find abhorrent, is a forsaking of professional responsibility. Treatise writers and other legal scholars ought to take the next logical step: they must take explicit positions on legal issues, justify them under conventional analysis, explore competing policies, make clear the underlying political or ideological issues involved, and state their own positions on those issues.


119. *See id.; Reichman, supra note 95.*
Only time will tell whether it will replace Nimmer as the reference work of choice in the field of copyright law.\textsuperscript{120}

Theoretically, these two copyright treatises offer competing analyses of substantive areas of the law. If both are consulted, jurists would arguably be forced to choose between the conflicting positions espoused by them and, one hopes, make an independent assessment of the meaning and requisites of the pertinent statutory authority and previous on-point case law in the process. However, doctrinal disagreements between treatises are rarely discussed by the courts. The Goldstein copyright treatise has been cited by the federal courts roughly 200 times, but in approximately 130 of these cases, the Nimmer treatise is referenced as the primary citation and the Goldstein treatise is treated as both supplemental to, and in accordance with, the statement or position contained in the Nimmer treatise. In 20 or so other cases the Nimmer treatise is a “see also” citation following a reference to the Goldstein treatise, or both treatises are cited for independent but non-contradictory propositions.

It is not clear that two treatises in agreement are necessarily correct, or that when two treatises disagree on a matter of doctrine all of the doctrinal possibilities and interests have been considered. One cannot leave the task of making sound copyright law to copyright dispute litigants, because that is neither their responsibility nor reason for going to trial. While judges ought to refer to competing treatises as one component of their deliberations, they should not abdicate decisionmaking power to either of them.

A third treatise, William F. Patry’s \textit{Copyright Law and Practice} (previously known as \textit{Latman’s the Copyright Law})\textsuperscript{121} is also available for consultation, as well as a fourth, Howard B. Abrams’s \textit{The Law of Copyright},\textsuperscript{122} which has not been updated recently. A fifth treatise, \textit{Boorstyn on Copyright},\textsuperscript{123} is accessible to some extent, though it is currently out of print. There are undoubtedly other treatise contenders as well.\textsuperscript{124} Rivalrous treatise authors do publicly expose perceived weaknesses in their competitors’ products. The editor of the Latman/Patry treatise, William F. Patry, on occasion has been very critical of the Nimmer


\textsuperscript{121} WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE (1994) (formerly ALAN LATMAN, LATMAN’S THE COPYRIGHT LAW (William F. Patry ed., 6th ed. 1986)).


\textsuperscript{123} NEIL BOORSTYN, BOORSTYN ON COPYRIGHT (2d ed. 1994).

\textsuperscript{124} A comparatively pithy single volume contender is MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW (3d ed. 1999).
treatise. For example, Patry has asserted that the Nimmer treatise led one federal judge to erroneously base a jurisdictional holding upon the treatise's incorrect definition and analysis of the concept of "transitory torts." 125 Nimmer was wrong, Patry argued, but after one court

125. William Patry, Choice of Law and International Copyright, 48 AM. J. COMP. L. 383, 467-69 (2000). Patry's exact words are:

In cases where under both a conflicts and contributory infringement analysis, the United States lacks sufficient contacts with either the subject matter or the acts of infringement to assert jurisdiction, some courts have, nevertheless, been unable to resist the temptation to act as a world forum for copyright infringement. The first court led astray was *London Film Prod., Ltd. v. Intercontinental Communications, Inc.*, which asserted diversity jurisdiction under 28 U.S.C. § 1332(a)(2) over foreign acts of copyright infringement. In *London*, Judge Carter adjudicated alleged infringement by an American corporation in South America of a British corporation's copyright. The work was in the public domain in the United States. Judge Carter, citing only the late Professor Nimmer, based jurisdiction on copyright being a "transitory tort." Unfortunately, Professor Nimmer had not the slightest idea what a "transitory tort" is, an ignorance that no doubt misled Judge Carter to the [sic] offer the following inconsistent policy justifications for asserting jurisdiction:

The Court has an obvious interest in securing compliance with this nation's laws by citizens of foreign nations who have dealings within this jurisdiction. A concern with the conduct of American citizens in foreign countries is merely the reciprocal of that interest. An unwillingness by this Court to hear a complaint against it [sic] own citizens with regard to a violation of foreign law will engender, it would seem, a similar unwillingness on the part of a foreign jurisdiction when the question arises concerning a violation of our laws by one of its citizens who has since left our jurisdiction.

Taking these sentences apart in turn, the Court's interest in adjudicating copyright infringements by foreign citizens that occur in the court's district is statutorily provided for by Congress in title 17, [sic] U.S.C. Nothing a foreign court could or could not do would affect that power. Moreover, if an American infringes a British work in Britain, the British courts will hear the claim because they too would be doing so pursuant to a domestic statute. British courts certainly would not decline otherwise proper jurisdiction because a U.S. court refused to hear a case against an American citizen for infringement that occurred in England. *In London Film Productions*, there was no U.S. copyright violation because the work was in the public domain here. Should we expect a British court to hear a case brought by a U.S. citizen involving an alleged infringement of copyright in South America by a British citizen when the work is in the public domain in England, merely because the bad boy was British? If so, we would have been sorely disappointed: at the time of the *London Film Productions* decision, English courts declined jurisdiction over even British citizens' claims of overseas infringement.

Diversity jurisdiction was supposedly justified by copyright infringement being a "transitory tort." Why is copyright allegedly a transitory tort? Because, Professor Nimmer declared, copyright is an incorporeal form of property, and therefore "has no situs apart from the domicile of its proprietor." Presumably, if the proprietor moves, the situs of the property moves too. But if the proprietor doesn't move, the situs must remain with the proprietor, in the *London Film Productions* suit this meant in England. Under this reasoning a U.S. court would never have jurisdiction to hear a claim of infringement of a foreign copyright. In any event, the nature of copyright as an incorporeal property has nothing to do with transitory causes of action.

The history behind the local versus transitory distinction is an ancient one in Great Britain, the origins of which are thoroughly traced in *Pearce v. Ose Arup Partnership Ltd.* The distinction was originally drawn in order to determine whether a case should be brought in the county where the event occurred. Jurisdiction was mandatory in that county when the
followed the unsound teachings of the treatise, a number of subsequent courts did likewise, "citing [the first flawed opinion] for the transitory tort proposition as if that decision was based on a firm foundation." According to Patry, not only were federal courts led astray, but also the author of a competing copyrights treatise as well. In a footnote, Patry asserted, "[s]ubsequently, Professor Goldstein, with no research of his own, has aped Nimmer's position." Patry has also criticized the substance of the Goldstein treatise directly, once in a context in which suggests that when a treatise gets too far removed from actual law and practice, it will be disregarded. Patry wrote:

Professor Goldstein, in yet another of his pseudo-economic displacements of Congress's policy and statutory language, has argued that "courts can be expected to weigh the infringing or non-infringing nature of the foreign conduct in determining whether the economic impact on the domestic authorization right is sufficient to justify third-party relief."

Whatever their other faults may be, fortunately courts have not lived up to Professor Goldstein's expectations for them. There is no basis in the statute or legislative history for Professor Goldstein's jurisdiction-based-on-the-amount-of-money-lost theory: if a copyright owner loses x percentage of sales, a court should award relief for foreign conduct, but if it loses less than that percentage jurisdiction should be declined. Such a proposal gives even Law & Economics a bad name.

...jury needed to have knowledge of particular facts; where no such knowledge was necessary, plaintiff was permitted to bring suit in any county over which jurisdiction against the defendant would lie. Although fictions were later developed permitting suits to be brought even where local knowledge was required, this was not extended to causes of action that arose outside of England. Until England's adherence to the Brussels Convention on Jurisdiction and Enforcement in Civil and Commercial Matters in 1982 and subsequent English acts that implemented that convention, English courts routinely refused to hear cases of infringement that occurred overseas, based on the position that copyright infringement was a local and not a transitory tort. It is noteworthy that the change came for reasons associated with adherence to the Brussels Convention, not because of a change in the characterization of the cause of action. Professor Nimmer was simply wrong in asserting that copyright is a transitory tort.

Regrettably, a number of subsequent courts have been also misled by Professor Nimmer's singular lack of scholarship, citing London Films for the transitory tort proposition as if that decision was based on a firm foundation. It is well-past time to reveal that the transitory tort emperor has no clothes. Either a federal court has jurisdiction under title 17 U.S.C., [sic] or it has no jurisdiction at all over a claim of copyright infringement.

Id. (citations omitted).
126. Id. at 469.
127. Id. at 467 n.373.
128. Id. at 456 n.338 (citations omitted).
Yet there is nothing in the case law to suggest that any judges have affirmatively rejected the Goldstein treatise's view on this topic. They may simply be unaware of it. The Nimmer treatise is shelf-consumingly large (by one account sixteen and one-quarter linear inches) and expensive, and if one thinks of it as authoritative, there is no reason to consult a second copyright treatise such as Goldstein, much less a third. This is especially true when fellow judges frequently refer to the Nimmer treatise in their opinions "as 'the most authoritative treatise on copyright,' 'renowned,' 'eminent,' 'classic,' 'foremost,' and 'leading'—even 'the great copyright treatise.'"

1. Disjointed Works

In one specific instance, in an area of copyright law in which Nimmer On Copyright and Goldstein's Copyright: Principles, Law and Practice express opposing views, the resolution reached by a court facing this split in the treatises is not encouraging. It suggests that the judge decided between the two treatise positions based on intuition or internal proclivities rather than undertaking his own deliberative legal research.

The Nimmer and Goldstein treatises differ on whether a copyrightable "joint work" requires that the contribution of each joint author be independently copyrightable, or only that the combined result of their joint efforts be copyrightable. Unable to blend or reconcile these

129. See id. Searches utilizing various forms of the concepts and key terms yielded no relevant results.
131. Id.: My shelf devoted to copyright law books keeps growing. Nimmer on Copyright now holds the record at 16 1/4 linear inches, followed by a tie between Goldstein's Copyright and Geller's International Copyright Law and Practice (6 1/2 linear inches each), with Abram's The Law of Copyright (5 1/2 linear inches) taking up the rear. Now William Patry's newest contender, Copyright Law and Practice, neatly moves into third place at 6 1/4 linear inches. The sum of these parts (41 linear inches)—not to mention my CCH set and other individual volumes—appears overwhelming at times. Two sets seem just right for most copyright problems: Nimmer on Copyright, obviously, and Patry's Copyright Law and Practice fill the bill.

The reputation and strength of Nimmer on Copyright inevitably invites comparison to any newcomer covering copyright law. I have succumbed to that temptation only because most entertainment and intellectual property attorneys have an intimate familiarity with Nimmer on Copyright. Comparison with a known work hopefully will help the reader evaluate Copyright Law and Practice.

disparate directives, in a case captioned *Childress v. Taylor*, Judge Newman of the United States Court of Appeals for the Second Circuit noted, "The Nimmer treatise argues against a requirement of copyrightability of each author's contribution, see 1 Nimmer on Copyright § 6.07; Professor Goldstein takes the contrary view, see 1 Paul Goldstein, Copyright: Principles, Law and Practice § 4.2.1.2 (1989), with the apparent agreement of the Latman treatise, see William F. Patry, Latman's The Copyright Law 116 (6th ed. 1986).")

One hopes that his decision to go with the Goldstein approach was not unduly influenced by the fact that the Latman/Patry treatise concurred, creating a consulted-treatise majority. Judge Newman ultimately concluded that, "[t]he case law supports a requirement of copyrightability of each contribution," citing a string of nine cases purportedly supporting this position, and distinguishing two cases proffering alternative views in an appended footnote. Oddly, however, the very first case Judge Newman cites as supporting the Goldstein and Latman/Patry construction of joint authorship, *M.G.B. Homes*, actually cites the Nimmer treatise with approval, apparently adopting the Nimmer view. The *M.B.G. Homes* opinion also cites *Melzer v.*
Zoller, the sixth case cited by Judge Newman as ostensible precedent for the Goldstein and Latman/Patry position, for support of the Nimmer analysis it adopts.

The second case, S.O.S., Inc. v. Payday, Inc., does appear to support Judge Newman’s assertion, citing and relying primarily on the fourth case that Newman cites, Whelan Assocs. v. Jaslow Dental Laboratory, rather than any treatise and also, more incidentally, relies upon a Supreme Court case. However, upon review it is apparent that this fourth case,
Whelan,\textsuperscript{143} does not actually address either side of the interpretive dispute directly, no less support one or the other. Instead, citing to Aitken (the seventh case Newman cited in Childress v. Taylor) and urging that Meltzer (the sixth case Newman cites) be "compared," the opinion primarily relies on the wording of the definition of "joint works" in Section 101 of the Copyright Act,\textsuperscript{144} stating that it is a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary work."\textsuperscript{145} The Whelan court determined that there was "not a scintilla of evidence that the parties ever intended" that one individual's insignificant contributions should merge into the finished work, and that was the basis for the holding.\textsuperscript{146}

The third case cited by Judge Newman, Ashton-Tate Corp. v. Ross,\textsuperscript{147} rejected an assertion of joint authorship based on a factual finding that the individual claiming joint authorship contributed only ideas, and not expression.\textsuperscript{148} This case does not cite to any treatise directly, but references a pertinent passage in the United States Court of Appeals for the District of Columbia Circuit's opinion in another copyright case, Community for Creative Non-Violence v. Reid, which in turn cites the Nimmer treatise's position on joint authorship in dicta, though falls short of wholeheartedly approving the Nimmer view by prefacing a tentative application of the Nimmer approach to the facts with the words "If Nimmer is correct."\textsuperscript{149} While the Nimmer position is not embraced,

\textsuperscript{145} Whelan Assocs., Inc., 609 F. Supp. at 1319.
\textsuperscript{146} Id.: In 17 U.S.C. § 101 the definition of a "joint work" is a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary work." There is not a scintilla of evidence that the parties ever intended that Rand Jaslow's contributions, whatever they may have been, should merge into the final computer design and system. The only suggested merger into the whole might be the wording and the abbreviations contained on some of the visual screens. His contributions were not of sufficient significance to constitute him a co-author of the system. Compare Meltzer v. Zoller 520 F. Supp. 847 (D.N.J. 1981).
\textsuperscript{147} Ashton-Tate Corp. v. Ross, 728 F. Supp. 597 (N.D. Cal. 1989).
\textsuperscript{148} Id. at 601:

The foundation of federal copyright law is that only expressions of ideas, not the ideas themselves, give rise to protected interests. Frybarger v. International Business Machines Corp, 812 F. 2d 525, 530 (9th Cir. 1987); Landsberg v. Scrabble Crossword Game Players, Inc. 736 F.2d 485, 488 (9th Cir.); cert. denied, 469 U.S. 1037, 83 L. Ed. 2d 403, 105 S. Ct. 513 (1984); 17 U.S.C. § 102 (b) (1977). Accordingly, when an author contributes only ideas to the development of a work, whether or not it is a "joint work," without reducing those ideas to an expression, that author does not obtain an interest in the work.
\textsuperscript{149} Community for Creative Non-Violence v. Reid, 846 F. 2d 1485, 1496 (D.C. Cir. 1988): [T]he standard for determining whether a creation is an "original work of authorship" is not
neither is it overtly rejected. Nor is the contrary Goldstein and Latman/Patry view explicitly adopted; indeed, it is not even mentioned.

The district court opinion in *Ashton* was appealed and affirmed. In this decision, the United States Court of Appeals for the Ninth Circuit noted that "[a]cademic authorities split on what type of 'contribution' the copyright law requires for joint authorship purposes," and after asserting that "[t]he rule expressed by the district court—that only contributors of copyrightable material can be authors of a work—is not entirely settled," made the rather surprising statement that, "[t]he district court adopted the view championed by Professor Goldstein." Perhaps this was the opinion that Judge Newman meant to cite.

The fifth case in the string citation, *Kenbrooke Fabrics v. Material Things*, like the fourth, turns on findings that there was no intention to create a joint work and that one party's contribution was insignificant. The sixth case, *Meltzer*, mirrors the third, *Ashton-Tate Corp.*, in that it is premised on a finding that an individual contributed ideas only, rather than anything that could be considered a "contribution" in a copyright context.

"It suffices if the author refrains from copying from prior works and contributes more than a minimal amount of creativity." A. LATMAN, R. GORMAN & J. GINSBURG, supra, at 29; see also 1 M. NIMMER & D. NIMMER, supra note 7, § 6.03, at 6-6 and § 6.17, at 6-18 (joint authors need not "work in physical propinquity"; their contributions need not be equal either quantitatively or qualitatively; though contribution of each must be more than de minimis, one may qualify as a joint author even if his contribution, "standing alone would not be copyrightable."

The court also makes a note that:

If Nimmer is correct on the point that the contribution of a joint author need not be copyrightable "standing alone," even CCNV's choice of the title "Third World America" and the legend for the pedestal, 652 F. Supp. at 1454, while not independently copyrightable, see W. PATRY, supra, at 45-47, may count, along with other CCNV contributions, toward meeting the "more than de minimis" threshold required for joint authorship.

*Id.* at 1496 n.15.

150. Ashton-Tate Corp. v. Ross, 916 F.2d 516, 517 (9th Cir. 1990).

151. *Id.* at 521.

152. *Id.*

153. *Id.*


155. *Id.* at *19-20:

Bonnici's only contribution prior to creation of the fabric was the general request that Hargittai create a design incorporating a floral border and stripes, a suggestion that gave rise to several variations on that theme. In my view, Bonnici and Hargittai cannot be viewed as proceeding with 'the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole,' so as to render them authors and coowners of a joint work. Bonnici made no tangible contribution prior to creation of the Hargittai painting, and it is doubtful that Hargittai was aware of the changes made thereafter. This is not, in other words, a situation where Bonnici 'played a significant role' in the creation of the design.
than any copyrightable expression. The seventh and final case, Aitken, rested on findings that one party primarily contributed ideas, any expression that was contributed was de minimis, and the parties never had the statutorily required intention to create a joint work of authorship. It cites Meltzer for support.

In the final analysis, though his decision to favor the Goldstein and Latman/Patry position over Nimmer's on this issue may have been correct (this article takes no position on that issue), the incestuous mélange of cases cited by Judge Newman do not straightforwardly or effectively support the conclusion for which he cites them, not even close. Where did he get the idea that they did? It is possible he or

156. Meltzer v. Zoller, 520 F. Supp. 847, 857 (D.C.N.J. 1981): The Chirgotis firm, by fixing the ideas for the Meltzer home in a tangible medium, "created" those plans, for pursuant to 17 U.S.C. § 101, a "work" is "created" when "it is fixed in a copy . . . for the first time." It logically follows, then, that the Chirgotis firm is the author of these plans for the purpose of copyright interests. In contrast, ideas are not, as a matter of law, copyrightable. Mazer v. Stein, 347 U.S. 201, 217-18, 74 S.Ct. 460, 470-71, 98 L.Ed. 630 (1954); Hoehling v. Universal Studios, Inc., 618 F.2d 972, 978 (2d Cir.), cert. denied, 449 U.S. 841, 101 S.Ct. 121, 66 L.Ed.2d 49 (1980). The ideas and sketches contributed by plaintiff do not sufficiently constitute fixed expressions of ideas; therefore, plaintiff is not the "creator" of the plans for his house for copyright purposes. Without authorship, the "sine qua non of copyright, plaintiff has no cause of action.

Nor can the plaintiff be considered a "joint author" of the plans with the Chirgotis firm. Under the 1976 Act, a joint work is one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. Of course, this would be a fiction here, since plaintiff's failure to have "created" or "prepared" the work within the meaning of the statute bars his asserting a copyright interest even as a joint author of the plans.


158. Id. at 257-58.

159. See supra notes 136-58 and accompanying text; see also, e.g., Lape, supra note 133, at 51-52: Given the courts' wariness about joint work doctrine, it is not perhaps surprising that the very tone in which courts discuss the existence of a joint work is at times inhospitable to the doctrine. A striking example was the Second Circuit's decision in Childress v. Taylor, in which the court affirmed a grant of summary judgment to the plaintiff, a professional writer, on the grounds that an actress was not a co-author of a play. The Second Circuit justified its decision to require that each co-author make a copyrightable contribution by arguing that this requirement "might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author." Aside from the circularity of the reasoning (it is the court's requirement which makes certain otherwise valid claims spurious), the picture drawn by the court is of a dishonest interloper trying to horn in on the hard-won product of another's labors. The court struck the same righteous tone in concluding that "[a] playwright does not so easily acquire a co-author."

(footnote omitted).

Mary LaFrance stated:

Although, as noted above, Judge Leval's analysis of the architecture cases fails to note that the putative co-authors' contributions in both of those cases were de minimis, and that the architect's plans in Aitken were prepared largely without the requisite "common design,"
there is language in Aitken which suggests that the court's finding of a lack of joint authorship intent was partly influenced by the conventional perception of the architect/client relationship:

It is true that throughout the evolution of the 1820-22 architectural plans [the client] Belmont contributed ideas, directed certain changes be made, and exercised approval power at the completion of each stage of development of the plans. Such involvement by a client in the preparation of architectural plans is normally expected. See Meltzer v. Zeller, supra. Such involvement does not, however, ordinarily render the client an "author" of the architectural plans . . . .

... [I]t was intended that the "general client and engineer relationship" exist between the plaintiff and Belmont. In this relationship, it is quite normal for the client to supply the engineer or architect with general design features which the client expects to be incorporated into the architectural plans and for the professional then to create the design drawings incorporating those features.

Aitken, 542 F. Supp. at 239. Indeed, a district court later cited Aitken for the extraordinary proposition that "architectural drawings are not co-authored by the owner, no matter how detailed the ideas and limitations expressed by the owner." Whelan Assoc. v. Jaslow Dental Lab., Inc., 609 F. Supp. 1307, 1319 (E.D. Pa. 1983) (dicta), aff'd, 797 F.2d 1222 (3d Cir. 1986). Note, however, that both passages in Aitken could also be read simply as elaborating on the "de minimis" or non-copyrightable nature of the client's contribution (general design features which arguably were more like "ideas" than copyrightable expression); indeed, the first passage appeared within a paragraph discussing "authorship," and only the second passage appeared in the discussion labeled "intention."


These cases of Aitken and Meltzer are cases that involve architects and architecture. In many forms of art, and very characteristically in architecture, the client of the architect makes suggestions to the architect about how architectural plans should be modified: "Let's add a window here." "Let's change this this way." And characteristically architects adopt their client's suggestions. The same can happen in many other forms of authorship and art.

An artist who paints a picture can show it to a friend as critic and the friend can say, "I think it would be better if you made certain changes," and the artist can make those changes. It does not follow that because suggestions are made and adopted that a joint copyright has been created, because there is this additional requirement of the shared intention that the contributions be merged into a unitary whole, that is to say, into a work of joint authorship. It is only where that dominant author intends to be sharing authorship that joint authorship will result. It is not, as I said previously, every time a sculptor, author, painter, composer, architect, writer, whatever, it is not every time one of those accepts suggestions from some other person that joint authorship has resulted. But if the shared intention of merged contributions exists, and there is in fact a contribution by the second person to the work, then joint authorship has resulted.

And it is on this basis that the case is clearly distinguishable from cases like Aitken and Meltzer, which have been cited by the plaintiff. The basis being that I find at the time of the creation of these works Mr. Fisher saw this as a creative collaboration, notwithstanding that he was, far away, the dominant contributor to the creative collaboration.

But see VerSteeg, supra note 133, at 1331:

Both Childress and Erickson seem appealing. The basic copyright doctrine they espouse is that an author is the person who creates a copyrightable work. And, in order to be copyrightable, a work must be "original" and "fixed" in a "tangible medium of expression." Thus, if a putative author produces something that is not fixed — in other words, something that is an intangible idea—he is not an "author" for copyright purposes.
Although many cases prior to Childress and Erickson had championed this approach, two groups of cases (with facts similar to one another) had firmly established this copyrightability requirement. Melzer v. Zoller, Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co., and M.G.B. Homes, Inc. v. Ameron Homes, Inc. are cases involving homeowners who drew sketches and made suggestions for their architects. Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc., S.O.S., Inc. v. Payday, Inc., and Ashton-Tate Corp. v. Ross are cases where individuals provided a list of specifications and made suggestions to a computer programmer. In both of these situations, the outcomes are consistent. The architects and programmers successfully argued that the parties who had provided only sketches, specifications, and suggestions could not be considered "authors" because they had contributed merely intangible ideas that were uncopyrightable. The Ninth Circuit's holding in S.O.S. is representative of this approach. The S.O.S. court, relying on Justice Marshall's dictum in Community for Creative Non-Violence v. Reid, held that "[t]o be an author, one must supply more than mere direction or ideas; one must translate an idea into a fixed tangible expression entitled to copyright protection." (footnotes omitted) (alteration in original). Brophy, supra note 133, at 469-70:

In S.O.S., Inc. v. Payday, Inc., the Ninth Circuit ruled that a person who described the needs of her company to a software programmer, and who told the programmer what tasks the software should perform and how to sort data, was not a joint author of the software. The court, relying on Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., held that "a person who merely describes to an author what the commissioned work should do or look like is not a joint author for purposes of the Copyright Act." The court also cited the Supreme Court's definition of author as the definition required by the Copyright Act's "joint work" definition.

It was in Ashton-Tate Corp. v. Ross, however, that the Ninth Circuit explicitly held that joint authorship requires each author to make a copyrightable contribution. In this case, the defendant, Ross, and a man by the name of Wigginton agreed to write a computer program. The program was a spreadsheet to be called "MacCalc." Ross was to work on the "engine" of the program, and Wigginton was to work on the program interface. To assist Wigginton, Ross contributed a list of handwritten commands to use in the interface. Eventually the two had disagreements and split up. Wigginton took his interface to Ashton-Tate, the plaintiff, for use in a spreadsheet program. Together they developed "Full Impact." Ross created "McCabe," also a spreadsheet program. Ashton-Tate sought a declaratory judgment asking that it be declared the copyright owner of all the "Full Impact" software. Ross counter-claimed damages for Ashton-Tate's use of his commands in their program.

The Ninth Circuit held that Ross was not a joint author of the "Full Impact" program. The court held that the commands were mere ideas, not expression; therefore Ross could not be considered an author entitled to copyright protection. The court used rationale similar to that used by the court in S.O.S., Inc. It compared the Nimmer and Goldstein points of view and concluded that Goldstein's was the better view. The court concluded that although "this issue is not completely settled in the case law, our circuit holds that joint authorship requires each author to make an independently copyrightable contribution."

The Tenth Circuit has yet to rule on the issue, but the Eleventh Circuit's holding in M.G.B. Homes, Inc. v. Ameron Homes, Inc. supports the majority position. In this case, M.G.B. claimed that Ameron copied one of its floor plans for a home design. M.G.B. distributed an advertising flyer depicting the floor plan and measurements. M.G.B. claimed that Ameron used the flyer to design a similar home. The actual floor plan was drafted by Unlimited Drafting Services, and the copyright was listed under M.G.B.'s name as a work-made-for-hire.

The Eleventh Circuit held that the work was not a work-made-for-hire. Although M.G.B. exercised control and direction over the finished product, the facts showed that Unlimited was an independent contractor. The court then discussed whether M.G.B. and Unlimited could be considered joint authors due to the control and direction of the product.
his clerks read the cited cases but somewhat misunderstood them. It is much more likely that he did not read them in full text, but rather cribbed the string citation from the Goldstein treatise after deciding to adopt its reasoning. In so doing, he relied upon the accuracy of that treatise, a reliance that in this instance was clearly and demonstrably misplaced. The Goldstein treatise used these cases to create the facade of stare decisis in support of the treatise’s position on this issue, to generate the appearance that this was settled, rather than suggested, legal doctrine. Further evidence suggesting that the citations were lifted without careful scrutiny from the Goldstein treatise comes from Judge Newman’s otherwise somewhat startling reference (paralleling one in Goldstein160) to the fact that “[t]he Register of Copyrights strongly supports this view” as his only reference to anything resembling legislative history on this point.161 In the final analysis, Judge Newman or his clerks arguably failed to heed one legal academic’s explicit admonition to law students, “Never rely on a secondary source (an article, a book), for the holding of a case. Cite the case directly. Read the case yourself. The alternative is malpractice. And low grades too.”162

One might conclude that in this battle of the copyright treatises, the losers were accuracy and coherence in the copyright law.163 Ironically and somewhat surprisingly, after discussing the matter so extensively, and then unequivocally picking the Goldstein approach over the Nimmer view, Judge Newman concluded this portion of his opinion by stating that given the facts of the Childress v. Taylor dispute, whether the

that M.G.B. exhibited. The court held that M.G.B. was not a joint author of the floor plan. To be considered a joint author, the court would require the author to be a “creator.” To be a creator, the author must fix his expression in a copy. It is the “preparer” of the work who is considered the author. In this case, however, M.G.B. just provided Unlimited with rough sketches of how the home should look. The sketch did not form an inseparable part of the finished work, so it was clear that M.G.B. could not be considered a creator.

(footnotes omitted).

160. 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 4.2.1.1 & n.23 (1989).
   Not all authority is of equal weight.
   1. A no-name is less persuasive as an authority than a major treatise by a famous author, or a decision by the Supreme Court. Some lower court judges have a reputation that makes their decisions more significant; but most do not. If you rely on Prof. Joe Schmoe as your main authority, do not trumpet Schmoe’s name throughout your text. Schmoes belong in footnotes. Justices Brennan and Scalia belong in the text.
   2. Never rely on a secondary source (an article, a book), for the holding of a case. Cite the case directly. Read the case yourself. The alternative is malpractice. And low grades too.
163. To Judge Newman’s credit, he has been critical of over reliance on the Nimmer treatise by courts. See infra notes 209-11 and accompanying text.
contribution made by the party seeking joint authorship status was
independently copyrightable did not even have to be reached.164

The current version of the Nimmer treatise processes and explains
Newman’s words in Childress v. Taylor, and the later cases that follow
Newman’s reasoning,165 by forthrightly acknowledging that “the
prevailing view in the case law flatly rejects the notion that contribution
of ideas may suffice to qualify a contributor as a joint author,”166 but
asserts that this conclusion is incorrect, and in conflict with the language
and legislative history of the Copyright Act. The Nimmer treatise
steadfastly maintains that “copyright’s goal of fostering creativity is best
served . . . by rewarding all parties who labor together to unite idea with
form, and that copyright protection should extend both to the
contributor of the skeletal ideas and the contributor who fleshes out the
project,”167 and explicitly and correctly (if somewhat defensively) notes:

In the Second Circuit, the issue has been called both “open” and
“troublesome.” Childress v. Taylor, 945 F.2d 500, 506 (2d Cir. 1991)
(Treatise cited). Childress sides with the prevailing view, id. at 507;

164. Childress, 945 F.2d at 509:
We need not determine whether we agree with [the District Court Judge’s] conclusion that
Taylor’s contributions were not independently copyrightable since, even if they were
protectable as expression or as an original selection of facts, we agree that there is no
evidence from which a trier could infer that Childress had the state of mind required for joint
authorship.

165. One cannot accurately say “follow its holding” since in fact the resolution of this issue and
everything that precedes it in the opinion is arguably dicta.

166. 1 NIMMER ON COPYRIGHT, supra note 13, § 6.07 (2004):
It must be admitted that this proposition has been soundly rejected in the architectural
context, holding that a client who contributes ideas to be used in plans is not a joint author
with the architect in the final plans. In addition, even outside the architectural context, the
prevailing view in the case law flatly rejects the notion that contribution of ideas may suffice
to qualify a contributor as a joint author, although in some courts, the question remains open
“whether each author of a joint work must make an independently copyrightable
contribution.”

Notwithstanding the foregoing trend in the cases, neither the text nor legislative history
of the Act supports that conclusion. The definition in the Act adverts to a “work prepared by
two or more authors with the intention that their contributions be merged . . . ” That
language contains no requirement that each contribute an independently copyrightable
component to the joint work. The legislative history similarly elevates intention as the
touchstone, without placing any further parsing as to the copyrightable status of each
individual component that the parties intend to contribute to the work as a whole. It is
submitted that copyright’s goal of fostering creativity is best served, particularly in the motion
picture context, by rewarding all parties who labor together to unite idea with form, and that
copyright protection should extend both to the contributor of the skeletal ideas and the
contributor who fleshes out the project. On the other hand, if A and B are not collaborators,
i.e., do not work in furtherance of a common design, then the fact that B writes a work based
upon A’s nonprotectible idea, will not render A a joint author with B.

(footnotes omitted).

167. Id.
but its discussion is dictum, given that it did not reach the issue as to whether the subject contribution was independently copyrightable, id. at 509.\footnote{168}

Nevertheless, the \textit{Childress} dictum was adopted as law by the United States Court of Appeals for the Seventh Circuit,\footnote{169} and by two district courts in Louisiana,\footnote{170} explicitly on the strength of the Newman and Goldstein analysis.

2. An Irresolvable Split in the Treatises

Neil Shauman has recently written that both he and Marshall Leaffer agree that an underlying theme in recent copyright decisions by the Supreme Court is “the Court's remarkable deference to Congress.”\footnote{171} Equally astounding to this author is the degree of deference often exhibited by the federal courts to the Nimmer treatise. In one fairly recent case a court felt compelled to “clarify” part of an opinion that had been premised upon analysis in the Nimmer treatise subsequently found to be flawed, writing:

In saying that “an owner of a particular right—as opposed to the copyright itself—would not be a copyright owner,” \textit{Morris v. Business Concepts, Inc.}, 259 F.3d 65, 69 (2d Cir. 2001), \textit{We relied upon the great copyright treatise, 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 10.02[C][2], at 10-28 (2000)}:

\textit{“[T]here is never more than a single copyright in a work, notwithstanding the author’s exclusive license of certain rights.”}

While Nimmer is supported by at least one other treatise, \textit{Boorstin on Copyright}, others are not so clear or perhaps are even contrary.\footnote{172}

The short opinion goes on to reference the Boorstin, Goldstein, Abrams, and Latman/Path treatises in the text and footnotes. Ironically, after referring to the Nimmer treatise as “great,” (although demonstrably wrong in this instance), and having indicated that it consulted four other copyright treatises as well, the court adopted the

\footnotesize{\begin{itemize}
\item \footnote{168} Id. § 6.07 n.6.
\item \footnote{169} Erickson v. Trinity Theatre, 13 F.3d 1061, 1068-69 (7th Cir. 1994) (“On this point, we find ourselves in agreement with the analysis of Judge Newman writing for the Second Circuit in \textit{Childress}... Like the Second Circuit in \textit{Childress}, we believe that the statutory language clearly requires that each author intend that their respective contributions be merged into a unitary whole.”).
\item \footnote{171} Neil Shauman, \textit{Copyright, Containers, and the Court: A Reply to Professor Leaffer}, 30 WM. MITCHELL L. REV 1617, 1617-18 (2004).
\item \footnote{172} Morris v. Business Concepts, Inc., 283 F.3d 502, 503-04 (2d Cir. 2002) (emphasis added) (alteration in original) (footnote omitted).
\end{itemize}}
reasoning of the Copyright Office on the disputed issue only after explicitly noting, "[w]e recognize that 'the Copyright Office has no authority to give opinions or define legal terms, and its interpretation on an issue never before decided should not be given controlling weight."" The court obviously believed that Copyright Office publications, unlike for-profit copyright treatises, should be viewed warily and with extreme caution. Perhaps the judges would have been reassured by the fact that the Copyright Office periodically relies on the Nimmer treatise as well, as it did, for example: When crafting exceptions to the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA); when declining to establish a group registration procedure for collections of both published and unpublished photographs; when amending its regulations to permit copyright registration for pictorial, graphic, and sculptural works for which a design patent had issued;

173. Id. at 505-06:
We recognize that "the Copyright Office has no authority to give opinions or define legal terms, and [that] its interpretation on an issue never before decided should not be given controlling weight," Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 946-47 (2d Cir. 1975) (footnotes omitted). In this case, however, we find the Office's interpretation persuasive. Cf. United States v. Meat Corp., 333 U.S. 218, 121 S. Ct. 2164, 2175, 150 L.Ed.2d 292 (2001) (noting that even where an agency's interpretation of law is not entitled to highly deferential treatment pursuant to Skidmore v. United States v. Swift & Co., 323 U.S. 134, 139, 65 S. Ct. 161, 89 L. Ed. 124 (1944)). Accordingly, we hold that unless the copyright owner of a collective work also owns all the rights in a constituent part, a collective work registration will not extend to a constituent part.


A leading treatise draws the following conclusion from this language:

It would seem, therefore, that the language should be applied to discrete subgroups. If users of physics textbooks or listeners to Baroque concerti, for example, find themselves constricted in the new Internet environment, then some relief will lie. If, on the other hand, the only unifying feature shared by numerous disgruntled users is that each is having trouble accessing copyrighted works, albeit of different genres, then no relief is warranted. 1 Nimmer on Copyright § 12A.03[A][2][b] (Copyright Protection Systems Special Pamphlet).

175. See Registration of Claims to Copyright, Group Registration of Photographs, 65 Fed. Reg. 26,162, 26,164 (May 5, 2000):

Notwithstanding such concerns, the Office has concluded that it cannot establish a group registration procedure that permits claimants to include both published and unpublished photographs within a single group registration due to their inability to determine whether a particular photograph has been published. A procedure permitting inclusion of both published and unpublished works in a single registration would be unprecedented and would ignore critical distinctions between the copyright law's treatment of published works and its treatment of unpublished works. See, e.g., 1 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 4.01[A] (1999).

176. See Registrability of Pictorial, Graphic, or Sculptural Works Where a Design Patent Has Been
when documenting U.S. adherence to the Berne Convention; and, in the context of deciding that "colorized" versions of motion pictures could be registered, three separate times for the proposition that, "[c]ourts have held that while color \textit{per se} is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection." In the final example, the Copyright Office obviously found it more efficient to repeatedly cite only the Nimmer treatise, rather than to the referenced "courts" themselves. In a very important case concerning the impact of copyright laws on consumer goods, the United States Court of Appeals for the Sixth Circuit wrote:

In our view, the district court committed three related legal errors in determining that Lexmark had a likelihood of prevailing on its copyright claim with respect to the Toner Loading Program. First, the district court concluded that, because the Toner Loading Program "could be written in a number of different ways," it was entitled to copyright protection. In refusing to consider whether "external factors such as compatibility requirements, industry standards, and efficiency" circumscribed the number of forms that the Toner Loading Program could take, the district court believed that the idea-expression divide and accompanying principles of merger and scènes à faire play a role only in the "substantial similarity" analysis and do not apply when the first prong of the infringement test (copyrightability) is primarily at issue. In taking this path, the district court relied on cases invoking Nimmer's pronouncement that the
idea-expression divide "constitutes not so much a limitation on the copyrightability of works, as it is a measure of the degree of similarity that must exist between a copyrightable work and an unauthorized copy." Nimmer § 2.03[D]. And in concluding more generally that the copyrightability of a computer program turns solely on the availability of other options for writing the program, the court relied on several cases from other circuits. ¹⁸⁰

The court concluded that the erroneous reasoning of "cases invoking Nimmer's pronouncement" on "the idea-expression divide" concerning the measure of similarity, conflicted with the Supreme Court's holding in the Feist¹⁸¹ case.¹⁸² In the very next paragraph, with respect to the "number of different ways" analysis, the court somewhat confusing asserted that that the district court was not supported by Nimmer, writing:

As a matter of practice, Nimmer is correct that courts most commonly discuss the idea-expression dichotomy in considering whether an original work and a partial copy of that work are "substantially similar" (as part of prong two of the infringement test), since the copyrightability of a work as a whole (prong one) is less frequently contested. But the idea-expression divide figures into the substantial similarity test not as a measure of "similarity"; it distinguishes the original work's protectable elements from its unprotectable ones, a distinction that allows courts to determine whether any of the former have been copied in substantial enough part to constitute infringement. Both prongs of the infringement test, in other words, consider "copyrightability," which at its heart turns on the principle that copyright protection extends to expression, not to ideas.¹⁸³

In ultimately reaching its decision to reverse the district court opinion, the Sixth Circuit seemed to disagree with the Nimmer treatise, the district court's interpretation of the Nimmer treatise, and the district court's decision to follow cases that either adopted or failed to correctly interpret various directives of the Nimmer treatise. In this author's view, in the interests of both clarity and democracy, the court should have jettisoned its discussion of the Nimmer treatise altogether, and instead focused on the facts, issues and preceding case law before it.

¹⁸² Lexmark Int'l, Inc., 387 F.3d at 538.
¹⁸³ Id.
It is also worth noting that the Sixth Circuit majority opinion unambiguously relied on the Nimmer treatise five times, and also relied on a case that it parenthetically noted quotes Nimmer. The dissent cited approvingly to Nimmer as well. Though the court strongly implied that the Nimmer treatise lead courts astray with respect to the legal issue before it, the court continued to view and treat other provisions of the treatise as unequivocally authoritative.

3. Authoring the Writing Requirement

When treatises do not conflict, or perhaps when only one is consulted, treatise authors can make law rather seamlessly. Consider that Section 204(a) of the Copyright Act states rather unambiguously that, "[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." Section 101 defines "transfer of copyright ownership" as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." One way to interpret the exemption of nonexclusive licenses is as an effort to emphasize the fact that a nonexclusive license does not convey an ownership interest in the underlying copyright. The Nimmer treatise reads into the confluence of these statutory provisions the idea that the writing requirement applies only to exclusive licenses, writing:

It will be recalled that the requirement of a written instrument applies solely to a “transfer of copyright ownership,” which by definition does not include nonexclusive licenses. By negative implication, nonexclusive licenses may therefore be granted orally, or may even be implied from conduct. When the totality of the parties’ conduct indicates an intent to grant such permission, the result is a nonexclusive license.

In reliance on Nimmer’s interpretation, courts have upheld “implied nonexclusive licenses” that are not in writing. For example, in Effects Associates, Inc. v. Cohen the Ninth Circuit wrote, “[t]he leading treatise

184. Id. at 534, 535 (twice), 543, 549.
185. Id. at 545.
186. Id. at 559 (Feikens, J., dissenting in part).
188. Id. § 101.
189. 3 NIMMER ON COPYRIGHT, supra note 13, § 10.3[A][7] (2004).
190. 908 F.2d 555 (9th Cir. 1990).
on copyright law states that '[a] nonexclusive license may be granted orally, or may even be implied from conduct,' and cites to the Nimmer treatise. Later editions of the Nimmer treatise in turn cite Effects Associates, Inc. as support for this proposition, in addition to numerous other cases, almost all of which carry the appended parenthetical notations of "Treatise cited" or "Treatise quoted." In this way the

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191. Id. at 558 (citing 3 NIMMER ON COPYRIGHT, supra note 13, § 10.03(A) (1989)). The court also relied on Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984), in which the contribution to a partnership venture was at issue.

192. The four footnotes giving authority to the above quotation from the treatise are as follows:


[Footnote] 69.1. Lulirama Ltd., Inc. v. Acess Broadcast Services, Inc., 128 F.3d 872, 879 (5th Cir. 1997) (Treatise cited); Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 829, 831 (C.D. Cal. 1998) (Treatise quoted) (totality of circumstances indicate no license, where evidence shows that copyright owner turned down $1 million offer, and was claimed to have agreed six months later to accept $31,500). See SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 317-18 (S.D.N.Y. 2000) (construing sale of photos to convey no implied copyright license, but rather so that the photos themselves may serve as sales tools).

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treatise's position on this issue has become entrenched and seemingly authoritative. It is so authoritative that in reliance on the treatise's statements on this issue and the impressive list of cases that have followed it, a court might not even consider an alternative approach, despite the fact that there may be persuasive justifications in favor of requiring a writing for enforceable nonexclusive licenses. These arguments might include: Ensuring that authors will not give away their copyrights inadvertently; forcing the parties to determine precisely what rights are being transferred and at what price; and serving "as a guidepost for the parties to resolve their disputes" so they will less readily need to turn to courts when there are disputes about the nature of the agreement. Perhaps the Nimmer view is, on balance, the correct one.

193. Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994) (explaining writing requirement of 204(a)); see also Robert Kreiss, The "In Writing" Requirement for Copyright and Patent Transfers: Are the Circuits in Conflict?, 26 DAYTON L. REV. 43 (2000). The full text of this section of the treatise, denoted "Nimmer at 10.03 [A][7] — Grants of Nonexclusive Licenses," reads as follows:

It will be recalled that the requirement of a written instrument applies solely to a "transfer of copyright ownership," which by definition does not include nonexclusive licenses. By negative implication, nonexclusive licenses may therefore be granted orally, or may even be implied from conduct. When the totality of the parties' conduct indicates an intent to grant such permission, the result is a nonexclusive license. This principle continues the provisions of the 1909 Act, which similarly validated licenses even if oral or implied.

It has been held that an implied license requires more than a general intent of the author regarding disposition of his work. As with any other license, the terms—including identity of the licensee—should be reasonably clear. Courts have tried to lay down the various factors that determine when an implied nonexclusive license has been granted. The Fourth Circuit, in particular,

["suggests that the existence of an implied nonexclusive license in a particular situation turns on at least three factors: (1) whether the parties were engaged in a short-term discrete transaction as opposed to an ongoing relationship; (2) whether the creator utilized written contracts, such as the standard AIA [architectural] contract [there at issue], providing that copyrighted materials could only be used with the creator's future involvement or express permission; and (3) whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible."]

Other courts have also followed this non-exhaustive "list of factors to be considered."

What if the oral contract between the parties itself provides unambiguously for the transfer to be exclusive? In that event, the statutory bar on exclusive grants being executed orally invalidates the subject contract from taking effect. But the further question arises: May a court accord partial significance to the attempted grant by construing it as an effective, albeit nonexclusive, license? To do so would raise serious questions under contract law, as the enterprise would plainly contravene the mutual intent of the parties. Yet the Eleventh Circuit has answered that question in the affirmative, without paying much heed to those aspects of contract law. The Fifth Circuit has agreed, citing the proposition that courts should "sever the illegal portion of the agreement and enforce the remainder if the parties would have entered the agreement absent the illegal portion of the original bargain."

One case holds that such implied licenses are legal, rather than equitable. On the facts of that case, the court rejected the equitable argument that full payment was a condition precedent for the license to be effective, given that such condition was not spelled out in "plain, unambiguous terms." This reasoning is peculiar, inasmuch as oral and implied
but it would be reassuring if competing approaches were explicitly ruled out by the courts, rather than seemingly ignored.

4. Myriad Areas of Unilateral Impact

Even a casual perusal of any major copyright treatise reveals numerous additional instances of the treatise author choosing between copyright doctrines and policies, anointing some judicial opinions as "the law" and relegating others to the "but see" category. For example, the position of the Nimmer treatise on the correct application of the merger doctrine relies on the rationale that it helps prevent anti-competitive behavior. This interpretation has been adopted by several courts, while a scholarly critique of the Nimmer view has received substantially less judicial traction. The Nimmer treatise may be correct to the extent there is an objectively right way to apply the merger doctrine, but there is little indication that the contrary views of legal scholars are even considered by the courts that adopt the Nimmer treatise approach.

The doctrine of fair use is always controversial and of acute interest to academics, especially in the context of nonprofit educational uses. In *Princeton University Press v. Michigan Document Services*, the Sixth Circuit decided that commercial copy shops could not stand in the shoes of professors and students and assert the third parties’ statutory fair use rights to make "multiple copies for classroom use." The authority cited by the court on this point was the Latman/Patry copyright treatise, which in turn relied on only one solitary, controversial district court case to support this exposition of the law, treating what is arguably quite gray as well established black letter law. Once this

licenses, by their very nature, can seldom specify unambiguously the pertinent payment obligations.

It should not be concluded that writings are therefore utterly without consequences in the sphere of nonexclusive licenses. Beyond the greater ease of proving such a license when it is evidenced by a writing rather than though possibly conflicting testimony, written grants of nonexclusive licenses can also exert significance in the event of a conflicting transfer of copyright ownership.

3 NIMMER ON COPYRIGHT, supra note 13, § 10.3[A][7] (2004).
195. 99 F.3d 1381 (6th Cir. 1996) (en banc).
197. *See Princeton Univ. Press*, 99 F.3d at 1389 (quoting WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW, 420 n.34. (2d ed. 1995)).
approach was adhered to by the Sixth Circuit, however, it certainly gained gravitas.

When making a critical determination about whether fair use applied to manufacturers or distributors of circumvention devices,\(^{199}\) one federal court summarily relied on the Nimmer treatise’s assertion that it did not, rather than making an independent assessment of the plain and actual meaning of the DMCA, or of congressional intent.\(^{200}\) The court did not even mention the specific applicable statutory provision arguably at issue, §120(c)(1), deeming the citation to the Nimmer treatise completely dispositive despite the fact that this was one of the first cases brought under the DMCA, and the issue was one of first impression.\(^{201}\) The court wrote:

Under the DMCA, product developers do not have the right to distribute products that circumvent technological measures that prevent consumers from gaining unauthorized access to or making unauthorized copies of works protected by the Copyright Act. Instead, Congress specifically prohibited the distribution of the tools by which such circumvention could be accomplished. The portion of the Streambox VCR that circumvents the technological measures that prevent unauthorized access to and duplication of audio and video content therefore runs afoul of the DMCA.

... THIS POINT IS UNDERSCORED BY THE LEADING TREATISE ON COPYRIGHT, which observes that the enactment of the DMCA means that “those who manufacture equipment and products generally can no longer gauge their conduct as permitted or forbidden by reference to the *Sony* doctrine. For a given piece of machinery might qualify as a stable item of commerce, with a substantial noninfringing use, and hence be immune from attack under *Sony*’s construction of the Copyright Act- but nonetheless still be subject to suppression under Section 1201.” 1 Nimmer on Copyright (1999 Supp.) § 12A.18[B]. As such, “equipment manufacturers in the twenty-first century will need to vet their products for compliance with Section 1201 in order to avoid a circumvention claim, rather than under *Sony* to negate a copyright claim.” \(^{202}\)

In the context of “improper appropriation,” a touchstone of copyright infringement culpability, the Nimmer treatise makes the somewhat

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200. Id. at *22.
201. Id. at *22. This was pointed out in a somewhat different context in Eddan Elizafon Katz, Anti-Circumvention Provisions: RealNetworks, Inc. v. Streambox, Inc. & Universal City Studios, Inc. v. Reimerdes, 16 BERKELEY TECH. L.J. 53, 66-67 (2001).
stunning assertion that Shakespeare's *Romeo and Juliet* and the musical *West Side Story* are substantially similar in expression. The treatise acknowledges that some courts might fail to "accept the above pattern as a sufficiently concrete expression of an idea so as to warrant a finding of substantial similarity," but strongly implies that this alternative view would be incorrect. It also articulates the dubious concepts of

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Because it involved a romance between members of two warring juvenile gangs in contemporary New York City, at first glance it might appear that *West Side Story* would no more constitute an infringement of "Romeo and Juliet" than does "Abie's Irish Rose." Certainly, the dialogue and setting, and even much of the characterization, story line and action, are far removed from the Shakespeare play. Yet, applying the pattern test, it will be seen that not merely the basic idea, but the essential sequence of events, as well as the interplay of the characters, are straight out of "Romeo and Juliet." Thus, the following elements (among others) are found in both works:

1. The boy and girl are members of hostile groups.
2. They meet at a dance.
3. They acknowledge their love in a nocturnal balcony (fire escape) scene.
4. The girl is betrothed to another.
5. The boy and girl assume the marriage vows.
6. In an encounter between the hostile groups, the girl's cousin (brother) kills the boy's best friend.
7. This occurs because the boy attempts to stay the hand of his best friend in order to avoid violence.
8. In retaliation, the boy kills the girl's cousin (brother).
9. As a result, the boy goes into exile (hiding).
10. A message is sent to the boy at his retreat, explaining a plan for him to meet the girl.
11. The message never reaches the boy.
12. The boy receives erroneous information that the girl is dead.
13. In grief, the boy kills himself (or permits himself to be killed).

The 13 points enumerated above constitute a description that is, in some degree, abstract in that many dissimilar details and some important story points in one or the other of the two works under comparison have been omitted. Still, this description is far from the highest possible level of abstraction, wherein only the basic idea... could be stated. These 13 points are sufficiently concrete to state the essential sequence of events and character interplay in each of the two works. Because this pattern is common to both works, it may be concluded that they are substantially similar.

205. *Id.*:

It must be said that not all courts would accept the above pattern as a sufficiently concrete expression of an idea so as to warrant a finding of substantial similarity. Indeed, some courts have said that a plot as such is not protectible, and that "an author's exclusive rights are largely confined to the details in the manner and method of his own presentation..." In most instances, however, those courts that have denied protection to a "plot" have so defined it as to be the equivalent of an abstract idea. Where plot is more properly defined as "the sequence of events" by which the author expresses his 'theme' or 'idea,,' it constitutes a pattern that is sufficiently concrete so as to warrant a finding of substantial
"fragmented literal similarity," and "comprehensive nonliteral similarity," rhetorical mechanisms courts use to find copyright infringement through the doctrines of substantial similarity or unauthorized derivative works, even when the plaintiff and defendant works are quite facially dissimilar. Widespread judicial application of the analysis contained in this portion of the treatise has severely limited the ability of authors to take inspiration from or reflect the influence of others' creative works without fear of triggering copyright infringement liability. Risk-averse attorneys are likely to counsel their clients against taking on the Nimmer treatise and potential plaintiffs simultaneously by creating art that is even mildly similar to pre-existing copyright protected works.

Ironically, the ease or difficulty with which substantial similarity can be proven is something that large scale content owners are probably ambivalent about in a global sense. When they are the plaintiffs in a copyright infringement suit, certainly they pragmatically favor an easily met test for substantial similarity for the purposes of the specific litigation. However, when they find themselves defending against copyright infringement claims, they are temporarily in favor of imposing difficult substantial similarity proof obligations upon their opponents. The test for substantial similarity is therefore not a policy determination that many large scale content owners are likely to have a consistent view about, and they are not likely to invest resources in permanently setting any sort of rigid standard. In consequence, it is an area of copyright law in which activists who favor low levels of copyright protections are likely to be more effectively thwarted by the teachings of the Nimmer treatise than by large media corporations.

One jurist, Judge Jon O. Newman of the Second Circuit, went on record as opposed to the over reliance by courts on the Nimmer treatise in one particular context, the treatise's promotion of the "abstractions

(footnotes omitted).

206. Id. § 13.03[A][3]. The Nimmer treatise suggests these tests for substantial similarity, "fragmented similarity" focusing upon copying of direct quotations and direct paraphrasing, and "comprehensive nonliteral similarity" upon whether the fundamental essence or structure of a work has been duplicated. Id. § 13.03[A][1], [2]; see also Castle Rock Entm't, Inc. v. Carol Publ'g Group, 150 F.3d 132 (1998); Twin Peaks Prods., Inc. v. Publ'ns. Int'l Ltd., 996 F.2d 1366 (2d Cir. 1993). The latter concept sounds alarming like copyright's "doctrine of equivalents."

207. See, e.g., Bartow, supra note 65.

208. See id.
test" as a tool for ascertaining the copyright protectable aspects of computer programs. In a scholarly article, Judge Newman wrote:

Regrettably, Judge Hand's careful expression has not been sufficiently read, and his idea has been often misunderstood. Starting in 1971, courts began referring to an "abstractions test," thus perverting Judge Hand's sensible thought that the boundary between idea and expression cannot be fixed—not by judges and surely not by anything to be called a "test." Next, courts applied *Nichols* and what they unfortunately called an "abstractions test" to areas of intellectual achievement wholly different from plays, indeed, wholly different from writings. Thus, courts have tried to apply an "abstractions test" to copyright issues beyond the context of written texts and are now trying to apply it to computer programs. IN DOING SO, THEY HAVE VERY LIKELY BEEN INFLUENCED BY THIS SWEEPING ASSERTION IN NIMMER ON COPYRIGHT: "Although the abstractions test was created for use with literary works, it is readily adaptable to analyzing computer software."209

It is to his great credit that Judge Newman recognized the role a treatise may have had in shaping what he characterized as bad law. However, his concern appears limited to the widespread treatise-driven adoption of a particular approach to assessing the content of computer programs only. Earlier in the article he rhetorically positions the Nimmer treatise as almost an embodiment of copyright law, writing:

[Copyright law has enunciated two somewhat opposing propositions—that differences between an allegedly infringing work and a copyrighted work will not preclude infringement, and that, as Nimmer puts it, "a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to that of the plaintiff's."210

He even tempers his critique of the treatise's position on the abstractions test issue by later noting:

Indeed, the Nimmer treatise, despite its fondness for an "abstractions test" and an "abstraction-filtration-comparison test," has usefully recognized that in the area of computer programs the line for distinguishing an unprotectable idea from a protectable expression "is a pragmatic one, drawn not on the basis of some metaphysical property of 'ideas,' but by balancing the need to protect the labors of authors


210. *Id.* at 697.
with the desire to assure free access to ideas.” That sensible thought has been embraced by our Court in *CCC Information Services.* 211

Newman appears to endorse a paradigm within which the Nimmer treatise speaks for the copyright law when it is “correct,” but should be ignored or contravened when it is not. Though reinforcing the primacy of the Nimmer treatise unnecessarily, this is a laudably contemplative approach to treatise use to the extent that it compels independent analysis of issues and of the consequences of adopting any given treatise position.

VI. MINIMIZATION OF THE IMPACT OF LEGAL SCHOLARSHIP

*Nimmer on Copyright* is cited extensively in judicial opinions, as is discussed above. 212 Law review articles on copyright topics are not. 213 A series of searches performed on LexisNexis and Westlaw suggested that while the Nimmer treatise has been cited by federal courts well over 2,000 times, few law review articles on copyright topics are cited by courts at all, ever. Broadening the search to encompass entire bodies of copyright oriented scholarship authored by even the most prolific and well-regarded law professors 214 still revealed a paucity of citations compared with what the Nimmer treatise receives. Perhaps in the expectation that legal scholarship generally appraises the legal environment for the purpose of positing avenues of improvement, it is assumed that law review articles will therefore be unhelpful in illuminating copyright law as it is. However, if judges and their clerks do not read legal scholarship on copyright topics, they forgo the big picture case law assessments and diverse policy critiques that copyright treatises do not provide, which

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211. *Id.* at 699.
212. *See supra* Part V.A.3.
213. *Cf.* Craig Allen Nard, *Toward a Cautious Approach to Obedience: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence,* 39 HOUSTON L. REV. 667, 681-82 (2002) (“I looked at the trademark and copyright jurisprudence of the Second and Ninth Circuits. During the years 1996-2002, these courts of appeals, in their copyright and trademark opinions, have cited to scholarship considerably more often than the Federal Circuit has in its patent law opinions. But, like the Federal Circuit, the Second and Ninth Circuits are more inclined to cite to a treatise than a law review article.”).
214. For a listing of the “Top Ten Most Cited Law Faculty in the Intellectual Property Area” together with number of citations for all Intellectual Property scholarly writings (including those on patent and trademark topics), in other scholarly writings see, for example, New Educational Quality Rankings of U.S. Law Schools, Most Cited Law Faculty: Top Ten Most Cited by Areas (2002-03), at http://www.utexas.edu/law/faculty/bleiter/rankings02/top10_most_cited.html (last visited Feb. 10, 2005).
could lead to more informed and potentially improved judicial decision-making.\textsuperscript{215} The dearth of law review article citations in case law also suggests either that judges do not appropriate cites from pleadings filed by counsel, or that such citations are not present in prevailing briefs and motions.

One troubling aspect of some of the numerous citations judges make to the treatise is their collective tendency to frame the treatise as a scholarly (rather than practitioner oriented) resource. Melville Nimmer was on the full-time faculty of the UCLA School of Law, and David Nimmer is affiliated with this institution as well.\textsuperscript{216} In consequence, the expostulations of the treatise are often referenced as the words and ideas of "Professor Nimmer."\textsuperscript{217} The Goldstein treatise is similarly anthropomorphized as "Professor Goldstein." The notion that legal scholars need to author treatises to obtain the interested attention of the courts is discouraging.

More surprising than the numerous citations to \textit{Nimmer on Copyright} within federal case law are the abundant citations to the treatise in law review articles. Though the Nimmer treatise and those who use it may not often cite law professors, law professors and other authors of legal scholarship certainly cite \textit{Nimmer on Copyright}. LexisNexis searches demonstrate that \textit{Nimmer on Copyright} has been cited in law review articles almost 2,000 times,\textsuperscript{218} while a comparable Westlaw search uncovered over 3,000 such citations.\textsuperscript{219} There is not a single law review article on a copyright topic that comes anywhere near this level of citation. There isn't even a copyright scholar that comes close to this level of citation of his or her entire body of copyright-related legal scholarship.\textsuperscript{220}

\begin{footnotes}
\item[216] See UCLA School of Law, Faculty Biographies: David Nimmer, at http://www.law.ucla.edu/faculty/bios (last updated Sept. 22, 2004).
\item[217] See supra notes 37-41 and accompanying text.
\item[218] A search on LexisNexis within the US and Canadian Law Reviews database composed of "Nimmer w/25 copyright" on January 12, 2005 turned up 2,097 results, while a search composed of "Nimmer w/5 copyright" turned up 1,912 in the same database.
\item[219] A Westlaw search composed of "Nimmer w/25 copyright" in "Journals and Law Reviews" database on January 12, 2005 turned up 3,417 results, while a search composed of "Nimmer w/5 copyright" turned up 3,107 in the same database.
\item[220] See, e.g., New Educational Quality Rankings of U.S. Law Schools, supra note 214 (listing the "Top Ten Most Cited Law Faculty in the Intellectual Property Area" together with number of citations for all Intellectual Property scholarly writings (including those on patent and trademark topics), in other scholarly writings, as follows: 1. Paul Goldstein with 970 citations, 2. Pamela Samuelson with 950 citations, 3. Donald Chisum with 940 citations, 4. Robert Merges with 880 citations, 5. Mark Lemley with 860
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VII. EXCEPTIONAL OR COMMONPLACE?

The hegemonic treatise phenomenon can arise with any sort of treatise, and it is possible that there is nothing special (or especially pernicious) about the manner in which copyright treatises are employed relative to the influence and utilization rates of "leading" or "pre-eminent" treatises in other subject areas. The impact of the Nimmer treatise on copyright law may well pale in comparison to the effect that perhaps Professor Laurence Tribe's treatise has had upon the evolution of constitutional law,221 or the extent to which Bernard Witkin's treatise has captured and controlled the state law of California.222 Whether the jurisprudential concerns raised in this Article are widely applicable remains an open and interesting question.

VIII. CONCLUSION

At some level it seems unfair to criticize the Nimmer or Goldstein treatise, or any copyright treatise for that matter, for containing a few mistakes, given the magnitude of the task of assembling copyright law into a coherent and accessible narrative. This author concedes it is unlikely that she could produce an equally comprehensive treatise that is objectively more accurate. However, rather than being an argument in favor of withholding criticism from treatises, it suggests that they need to be extensively vetted, tested, and verified so that they are formulated with the highest possible levels of reliability. In addition, treatise authors should drop any pretense of objectiveness and neutrality. As one scholar has observed:

Facial neutrality in treatise writing has had a long and important life. It was the only permissible stance of formalists who thought of law as science and who believed in right answers to legal problems. It was also a sensible stance for legal realists who used process as a security against unbridled discretion, and who sought "neutral principles" to guide decisionmaking. It is hard to imagine, however, that treatises can sustain neutrality in face of our current understanding of the political nature of law.223

223. Matasar, supra note 78, at 1516-17.
The hegemony of any treatise poses grave but generally unrecognized dangers to transparent and fully participatory judicial decisionmaking. Though federal judges are not vulnerable to the sort of campaign contribution-related influence peddling that plagues Congress, they are susceptible to the lure of streamlined, prepackaged jurisprudence a treatise can provide. That a treatise espouses certain normative views and criticizes or excludes others may not be apparent to the harried jurist and her clerks. When the treatise at issue is frequently cited, seemingly straightforward, and carries with it the patina of long stable authority, the temptation to utilize it industriously and repeatedly may be irresistible, to judges and lawyers alike. Vigorous usage generates ever more citations, which in turn further increase the visibility and positive reputation of the treatise well beyond the bounds of legitimacy for any secondary authority. All members of the legal profession need to rely less on copyright treatises and focus more attention on the actual cases that are changing or defining copyright laws and policies.

Alternatively, perhaps copyright law is now important enough to warrant its own Restatement. The Restatement drafting process could lead to some consensus and more consistency in copyright laws, or, at a minimum, could air and publicize doctrinal disputes and the substance of conflicting interpretations. Cases would be studied to discern what courts were actually doing, whether independently or in reliance on secondary authorities, and the reasoning underpinning these decisions could be critiqued and reformulated.\textsuperscript{224}

Treatise drafting by committee undoubtedly has drawbacks, and policy choices developed by organized and interested groups of attorneys do not always favor the public interest.\textsuperscript{225} Edward Rubin, who served as Chair of the American Bar Association’s Ad Hoc Committee on Payment Systems from 1986 to 1990, asked, in an excellent law review article about the anti-consumer animus of the Uniform Commercial Code (UCC): “[W]ould it not be wonderful if the

\begin{itemize}
  \item Conventional wisdom holds that Restatements of Law gather common-law judicial decisions, distill their wisdom, and articulate that wisdom in a way that will yield more clarity and predictability in the law. A traditionalist can view Restatement projects as Legal Realism in action — reformers study the cases to ascertain what courts actually do and then they reformulate the reasoning to give a better voice to those actions. While Restatement projects often choose a ‘better’ rule from conflicting decisions, at a fundamental level, the enterprise is anchored in the judicial decisions. It is the direct and necessary connection to those underlying judicial decisions that gives the Restatement process its legitimacy.
\end{itemize}

(footnotes omitted).


prestigious institutions that sponsored the UCC had placed themselves at the forefront of legal developments and showed some sympathy for ordinary people, rather than being the most retrograde force in their field, and sympathizing only with commercial parties? He wrote in the introductory footnote to this essay, "It is an understatement to say that my views about the UCC do not reflect those of the ABA." 

Nevertheless, at least dissenting views have some ability to participate in the Restatement drafting process and to publicly articulate their criticisms of the resultant document, as Rubin was able to air his concerns about the UCC. Whatever the shortcomings of the final product, it would still serve to inexorably draw attention to the diverse range of normative views of copyright law and policy and slowly deflate the hegemony of the Nimmer treatise.

Finally, it would be disingenuous at best to pretend that this critique of the use and abuse of copyright treatises was not rooted in sharp differences of opinion with the treatment that specific treatises accord particular copyright issues. Indeed, the very genesis of this scholarly endeavor was sparked by one such passionate doctrinal disagreement. Nevertheless, it is with those who engage in the unreflective adoption of treatise recommendations that culpability for any resulting copyright calamity resides.

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227. Id. at n.*.