Loyola of Los Angeles
Entertainment Law Review

Volume 6 | Number 1 Article 1

1-1-1986

A Memorial Tribute to Melville B. Nimmer (1923-1985)

Lionel S. Sobel

A MEMORIAL TRIBUTE TO MELVILLE B. NIMMER (1923-1985)

*By Lionel S. Sobel**

The legal profession has suffered an enormous loss. And for those of us who work in the copyright, free speech, and entertainment sectors of the profession, the loss is personal and acute.

On November 23, 1985, Professor Melville B. Nimmer passed away, following a brief battle with cancer. Though he was only 62 years of age, he left behind a vast body of scholarly and influential work that will stand forever as a monument to his intellect.

Mel is best known for his four-volume treatise *Nimmer on Copyright*. First published in 1963, the treatise became the "bible" for, and Mel became the "dean" of, American copyright lawyers. For years, *Nimmer on Copyright* has been cited in virtually every reported copyright decision. And not infrequently, the citations are preceded by a phrase describing Mel as "the leading authority."[1] The *National Law Journal*, too, had praise for him, calling him the "King of Copyright" and one of the nation's 100 "most powerful lawyers."[2]

Mel earned these accolades, and the respect they reflect, with his scholarship and the quality of his writing. He had the ability to clearly explain a conceptual and theoretical body of law that consists of an ephemeral blend of statutory language, legislative history, and judicial decisions. Indeed, he did this so well that citations to *Nimmer on Copyright*—by judges as well as lawyers—are more useful, and frequently more conclusive, than citations to the underlying cases and code sections.

Mel also had a keen ability to anticipate as yet unanswered questions that were likely to arise, and he had the willingness to address such questions in advance, when he felt they ought to be answered in a particular way. This happened, for example, in the "Maxwell's Video Showcase" case[3] where the issue was whether the in-store viewing of rented videocassettes constituted a "public" performance, even if done in very small viewing rooms that are never shared by strangers. The district

---

* Associate Professor, Loyola Law School; Editor, Entertainment Law Reporter.

1. *See, e.g.*, L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489 (2d Cir. 1976).

2. Nat'l Law Journal, Dec. 9, 1985, at 2, col. 1.

3. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 568 F. Supp. 494, 500-01 (W.D. Pa. 1983), *aff'd*, 749 F.2d 154, 159 (3d Cir. 1984).

court noted that by "foreseeing an operation similar to" the defendant's, Professor Nimmer had provided a "remarkably prescient discussion" of this very issue in his treatise. Similarly, the court of appeals wrote that "Professor Nimmer would seem to have envisaged" the defendant's operation when he anticipated the case in his treatise and explained how it ought to be decided. Mel's conclusion was that such performances "should obviously be regarded as public performances within the underlying rationale of the Copyright Act."[4] And the district court and court of appeals both agreed.

Mel was born in Los Angeles in 1923 and graduated from Los Angeles High School in 1941. He attended UCLA for two years, served in the Navy, and then graduated from the University of California at Berkeley in 1947. Mel's interest—and accomplishments—in copyright date from his years as a Harvard Law School student. Though Harvard did not then offer a formal copyright course, in his senior year there he wrote a paper entitled *Inroads on Copyright Protection*, which was awarded first place in the ASCAP Nathan Burkan Competition.[5]

Following his graduation from Harvard in 1950, Mel took a job in the legal department of Paramount Pictures. While there, he continued to do legal research of a scholarly sort, and in 1954 he published an article entitled *The Law of Ideas*.[6] Though his work on this topic was scholarly, it may not have been entirely "academic," because in 1949, a man named Victor Desny had submitted an idea to Billy Wilder, which (according to Desny) Paramount and Wilder made into the movie *Ace in the Hole*, without compensating Desny. A lawsuit followed, and Mel was one of the lawyers for the defense. Paramount and Wilder were successful at first, as the superior court granted their motion for summary judgment and dismissed Desny's suit. The California Supreme Court reversed, however, in an opinion which became (and remains) a landmark in the field of idea protection law.[7] Though Mel's side lost, the decision must have given him some pleasure, for it twice cited his article.

After six years as a studio lawyer, Mel went into private practice in partnership with Paul Selvin. Among Mel's clients in those years was a Navy commander named Kenneth Strickler. In 1956, Strickler had been a passenger on a commercial airliner flying from Honolulu to San Francisco. The plane developed engine trouble and made an emergency landing, from which Strickler and the other passengers were rescued by the

4. 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.14(C)(3) at 8.142.1 (1985).
5. 4 COPYRIGHT LAW SYMP. (ASCAP) 3 (1952).
6. 27 S. CAL. L. REV. 120 (1954).
7. Desny v. Wilder, 46 Cal. 2d 715, 299 P.2d 257 (1956).

Coast Guard. The following year, NBC televised a dramatized version of the rescue and, in so doing, portrayed Strickler in a manner that caused him humiliation, embarrassment, and great mental pain and suffering. Mel filed a complaint on Strickler's behalf alleging that the telecast invaded Strickler's right of privacy and misappropriated his right of publicity.

In fashioning Strickler's right of publicity cause of action, Mel relied on research he had done in writing an article entitled *The Right of Publicity*.[8] At the time the case was filed, this right had been recognized in Pennsylvania and by the Second Circuit, but had not yet been recognized in California. In response to an NBC motion, the court dismissed the publicity claim, saying, "This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity." On the other hand, the court refused to dismiss the privacy cause of action, ruling that it was up to the jury to decide whether the manner in which Strickler had been depicted in the telecast was "offensive to a person of ordinary sensibilities," because if so, Strickler had a right to recover.[9] Thus, Mel won that hearing; and eventually, California did come to recognize the right of publicity that he had argued for back in 1958.[10]

While in private practice, Mel also represented the Writers Guild of America. He was the Guild's chief negotiator during the five-month strike in 1960 that resulted in residuals being paid to screenwriters for the television broadcasts of movies that they had written for theatrical distribution. By that time, Mel had already spent two years working on the manuscript of what was to become his copyright treatise. Though he continued to work on it during the Writers Guild strike by waking up especially early—it was his "one touch with sanity," he later recalled—it eventually became clear that he would need more time to finish it. And within a year after the strike was settled, he decided to teach law rather than practice it.

In 1962, Mel joined the faculty at UCLA Law School. Although he withdrew from full-time practice when he began to teach, he did keep a "toe" in the practical world by becoming "Of Counsel" to the Beverly Hills firm of Kaplan, Livingston, Goodwin, Berkowitz & Selvin and later to the Los Angeles office of Sidley & Austin. In that role, he served as a consultant to entertainment industry clients and lawyers on libel, privacy, and copyright matters, and handled numerous appeals. His last

8. 19 LAW & CONTEMP. PROBS. 203 (1954).
9. Strickler v. National Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958).
10. CAL. CIV. CODE § 3344 (West 1971).

oral argument was before the Eleventh Circuit Court of Appeals in the *Gone With The Wind* sequel case, which he won just weeks before his passing.[11] Mel also served as Vice-Chairman of the National Commission on New Technological Uses of Copyrighted Works. He authored a law school casebook, entitled *Cases and Materials on Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works*, the third edition of which was published in 1985. And over his years in teaching, at least nine of his own students won national prizes in the ASCAP Nathan Burkan Competition, which had started his own copyright career.

Although Mel was best known for his work in the copyright field, he also was a first amendment scholar of renown. In 1984, he published *Nimmer on Freedom of Speech.* The book deals primarily with the theory of first amendment analysis, and was the first volume of what Mel had projected as a two-volume work on first amendment theory and its application in a wide variety of contexts, from national security to commercial advertising.

Mel was not only a first amendment scholar, but a civil liberties advocate as well. As a volunteer lawyer for the American Civil Liberties Union, he handled cases in almost every kind of court, from the justice court of Santa Barbara County in California to the California Supreme Court and the United States Supreme Court. In the justice court he argued, but lost, a case attacking the constitutionality of an ordinance prohibiting nude sunbathing. In the California Supreme Court, he argued, and won, a case which held that the Board of Education could not revoke a public school teaching credential simply because the teacher had been involved in a homosexual relationship.[12] In the United States Supreme Court, Mel argued, and won, a case which held that his client had a first amendment right to wear a jacket bearing the words "Fuck the Draft."[13] The Court's decision in that case now appears in most constitutional law casebooks, and Mel once said that it was the most satisfying case of his career.

At the time of his passing, Mel was at work on a new treatise he had begun some years before with the late Alan Latman, to be entitled *World Copyright Law.* The book will contain chapters on the significant copyright laws of the world, each chapter to be written by a copyright expert in each nation represented. To assure uniform style and content, Mel and Professor Latman prepared the chapter outline that all the contribut-

11. Trust Co. Bank v. MGM/UA Entertainment Co., 772 F.2d 740 (11th Cir. 1985).
12. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).
13. Cohen v. California, 403 U.S. 15 (1971).

ing authors are following. Mel and Professor Latman also were to co-author the treaty chapters and were to co-edit the entire work. When Professor Latman died in 1984, Mel wrote that it would be "difficult to accept the fact that Alan will not be here to see this project through to fruition. It will at least serve as a memorial to him."[14] The same must now be said of Mel. Following Professor Latman's death, Los Angeles lawyer Paul Edward Geller joined Mel as co-author of *World Copyright Law*, and Geller will see the book through to completion. Publication is expected in early 1987.

Those of us who rely so heavily on *Nimmer on Copyright* in our day-to-day work will be pleased to know that it will be kept up to date by Mel's son, David Nimmer. David is a graduate of Stanford University and received his juris doctor degree from a law school that Mel (ever the Harvard graduate) used to refer to as "an institution in New Haven." David was admitted to the California bar in 1981, practiced law privately with the Los Angeles firm of Hufstedler, Miller, Carlson & Beardsley, and is now an Assistant United States Attorney.

In the Preface to the 1978 Comprehensive Revision of his treatise, Mel wrote that "David was weaned on copyright," and so he was. I first met David in 1968 in a class session of Mel's copyright course at UCLA Law School. I was then a law student and was enrolled in the course. David was a thirteen-year-old junior high school student. The topic for the day was "substantial similarity." After discussing the "abstractions" and "pattern" tests for substantial similarity, Mel asked the class to consider whether *West Side Story* was substantially similar to *Romeo and Juliet*.[15] The question is not an easy one, and the class hesitated before answering. A hand went up in the back of the room, however, and Mel called on the volunteer, though not by name. The answer offered was excellent, but the voice was unfamiliar to me and sounded especially young. When I turned around to see who had spoken, I did not recognize the speaker—at first. Even at thirteen, David bore an uncanny resemblance to his father, and it was soon evident to the entire class that we had witnessed a pre-planned father/son performance which entertained—and informed—us all enormously.

Mel's wife, Gloria, and his son-in-law, Paul Marcus (Dean of the University of Arizona College of Law), have honored me by asking that I author the supplements to *Nimmer on Freedom of Speech*, and I shall be doing so. Mel played an especially important part in my own life and

14. 32 J. COPYRIGHT SOC'Y U.S.A. 11 (1984).

15. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03, at 13-25 to 13-27 (1985), for Nimmer's own analysis.

career. Over a period of nineteen years, he was my teacher, colleague, and friend. His course and seminar in copyright sparked and then fanned my own interest in the subject. His career as a law teacher was the model I imagined when I myself decided to leave practice to teach. And when, in 1978, I first talked with him about my thoughts of starting the *Entertainment Law Reporter*, he encouraged me to do so.

I miss him and will forever more. In this respect, though, I am not alone. A memorial service held in December was attended to overflowing by family, by friends, some of whom had known him since high school, by law school colleagues and students, past and present, by members of the law firms with which he had been affiliated, and even by opposing counsel in cases he had argued.

Mel is survived by his wife, Gloria; daughter, Rebecca Marcus; sons, Larry and David; son-in-law, Paul Marcus; daughters-in-law, Melissa and Marcia; and grandchildren, Beth and Emily Marcus, and Andrew, Steven and Jacob Nimmer.

A Melville B. Nimmer Memorial Fund has been established at the UCLA School of Law.