FOREWORD

The Uneasy Case for Copyright: Lessons of Approach and Attitude

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On November 4, 2010, *The George Washington Law Review*, the George Washington University Intellectual Property Law Program, and the Munich Intellectual Property Law Center brought together more than a dozen leading law professors and economists for a symposium to celebrate the fortieth anniversary of a seminal article on copyright law by the Honorable Stephen G. Breyer: *The Uneasy Case for Copyright*.[1]

Over his academic and judicial career, Justice Breyer has written brilliantly on regulation, both in particular industries, such as the energy industry,[2] and more generally, on improving regulation of risks.[3] As Chief Counsel to the Senate Judiciary Committee, Justice Breyer played a crucial role in airline deregulation. Once again combining academic inquiry and practical action, he turned his attention to criminal sentencing and the development of federal sentencing guidelines. He has written about statutory and constitutional interpretation in

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1 Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

2 STEPHEN G. BREYER & PAUL W. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION (1974).

3 STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

light of the purpose of promoting a goal that he has articulated as "active liberty."[4] Most recently, he has become the first Supreme Court Justice ever to make *The New York Times* bestseller list with a book that is not a memoir, but a substantive work—a sustained argument about the role of judicial decisionmaking in supporting democracy.[5]

In light of all these accomplishments, it might seem odd that the Symposium's sponsors chose to focus on *The Uneasy Case for Copyright*. The article was, in fact, the first that Justice Breyer published as a law professor. It was his tenure piece, at a time when a law professor could obtain tenure with a single article. Justice Breyer had gone straight from Harvard Law School, from which he graduated in 1964, to a one-year clerkship with Justice Goldberg on the Supreme Court, and had then spent two years as a special assistant to Donald Turner—at that time the Assistant Attorney General for the Antitrust Division of the Department of Justice—before joining the Harvard Law faculty in 1967. Assistant Professor Breyer was teaching antitrust law, evidence, and a course called "Development of the Law and Legal Institutions." He was not teaching copyright law, which was still the province of his own copyright professor, Benjamin Kaplan.

Yet *The Uneasy Case for Copyright*, though an early work, turns out to have continuing significance in the field. It certainly gets cited frequently in academic articles; a search on Westlaw at the time of the Symposium came up with 467 references, and there are others not in the Westlaw database. Some of those references are to the article's conclusions, namely, that the case for copyright—in the publishing industry in particular, and under particular economic conditions in the late 1960s—is uneasy. As many have recognized, however, what really makes the article of lasting value, and what the article itself asks us to pay most attention to, are not its conclusions, but its approach. The conclusions, it turns out, are valid for only a few of the many copyright industries and for the cost and revenue structures of those industries that existed four decades ago, which in the meantime have obviously undergone vast changes. But the approach the article takes remains important, and it also links the article to the Justice's subsequent work.

The two principal components of the article's approach are a transparent, pragmatic theoretical framework, and an insistence on

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4 STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

5 STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010).

gathering empirical evidence and following it where it leads. As Justice Breyer himself stated, his article "started from the premise that copyright restrictions are justified only when necessary to achieve some important social benefit."[6] That benefit might be rewarding the labor of authors, or it might be establishing an incentive to create and disseminate works. In the end, he concluded, the arguments about rewarding labor do not work, and the incentive arguments deserve to be investigated skeptically.[7] He is candid and clear about his pragmatic attitude, and if you disagree with him, you see exactly how he is framing the issues and constructing the arguments, and you know exactly where your disagreement lies. If you examine his writings over the subsequent four decades, you will see that this transparent pragmatism persists.

As for the article's insistence on an empirical approach, one need only glance at its tables of data on revenues and costs[8] to see how unusual it was for a law review article of its time. Justice Breyer was over three decades ahead of the recent trend of empirical research in the legal academy. But of course it is not just the inclusion of a lot of data that makes an empirical investigation valuable. Rather, it is the understanding of what data would be relevant and where one might get it; the ability to analyze and draw conclusions from that data; the willingness to go wherever the data leads; the humility to understand that the data is incomplete; and the prescience to comprehend how circumstances may change over time. All five of those virtues are on display in this article.

To take just the last of those, prescience about future changing circumstances, consider two statements from the article. The first addresses a possible change in the relative cost structure of initial publishers and copiers:

> [O]ther developments, possibly in the most distant future, may widen the cost gap[between initial publishers and copiers]. It may, for example, prove possible to store word images in inexpensive "cassettes" that can be "read" when inserted into home television sets; authors' royalties may account for an enormous share of initial "cassette" costs, providing a large cost advantage for any copier who need not pay royalties.[9]

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6 Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. Rev. 75, 75 (1972).

7 *See* Breyer, *supra* note 1, at 291, 321–22.

8 *See id.* at 295.

9 *Id.* at 299 n.72.

The second statement contemplates the possibility that someday, well in the future, a person might "use a computer terminal in his home or office to seek relevant information; the computer would automatically contact the appropriate library, and the librarian would insert the appropriate microfiche in a device that would cause its contents to appear on the subscriber's home or office viewing screen."[10]

From one perspective, these two statements seem quaint. Although Justice Breyer demonstrates an understanding that electronic media and networking technologies would dramatically change the publishing industry, he does not manage to predict the exact form that technological development would take. Yet ultimately, that quaintness reminds us of just how long ago 1970 was. It reminds us that no one could have envisioned the precise form of the digital revolution at that time. And it only strengthens our appreciation of the imagination that Justice Breyer managed to muster, and of his understanding that things could change a great deal.

We now stand well beyond that "most distant future" imagined in *The Uneasy Case for Copyright*. In spite of that, the article still imparts extremely valuable lessons of approach and attitude. Moreover, as the six articles published in this volume demonstrate, it still manages to inspire a wide variety of scholarship on copyright law and policy. Exceedingly few articles ever manage to do that, and that, in the end, is why its fortieth anniversary is worth commemorating.

On behalf of all three cosponsors of the Symposium, I want to thank all of the participants for their contributions to a successful day and to an important issue of *The Law Review*. In particular, I want to thank Justice Breyer for his own participation in the Symposium, and for the keynote address in which he gave us further insight into the background of his article.[11] We hope that the Justice and many other readers will find these pieces to be worthy tributes to a forty-year-old masterpiece.

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10 *Id.* at 333 n.214.

11 *See* Stephen G. Breyer, Keynote Address, The Uneasy Case for Copyright: *A Look Back Across Four Decades*, 79 GEO. WASH. L. REV. 1635 (2011).