

KEYNOTE

The Uneasy Case for Copyright: A Look Back Across Four Decades

*The Honorable Stephen G. Breyer**

In preparation for this talk, I reread my article, *The Uneasy Case for Copyright*,¹ and I was thinking, “Why did I write this?” And the reason’s obvious. I wanted tenure, and I was pretty nervous about it. Those were the days when you just had to write one article, and actually, I was the first person to whom Harvard ever applied the requirement that you have to write at least one. Erwin Griswold, who had been the Dean of Harvard Law School, had the theory that he knew which people were geniuses. If he approved of them, they would certainly do good work over time, and therefore they had to write nothing. After a while, however, people realized that was not such a wise idea, because someone has to push you to write something so that you see that you can do it. And probably everybody here has gone through that stage, and that’s not a pleasant stage. “How can I possibly write an article?” Everyone goes through that. Oh, they all think that I can, but they do not really understand.

Well, there it was, and moreover, they had a very exalted idea of themselves at Harvard and so it had to be a pretty good article. And I

* Associate Justice, United States Supreme Court. This piece is based on my keynote address delivered at The George Washington University Law School symposium entitled “Celebrating the Fortieth Anniversary of Justice Breyer’s Article *The Uneasy Case for Copyright*,” on November 4, 2010.

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

didn't know a thing about copyright—although that's exactly the kind of thought I couldn't dwell on, because it would lead to the temptation to give up. But the fact was that Ben Kaplan encouraged me to write this article, and he was a wonderful, wonderful professor, just terrific. He was a brilliant man, the kindest, most gentlemanly man, and he was careful and accurate and a wonderful member of the faculty. He had written a book called *An Unhurried View of Copyright*.² And when you see why I picked this topic and what the idea was, you'll see why Ben Kaplan was interested in getting me to do this.

I had been working in the Antitrust Division at the Department of Justice. Ben Kaplan thought, quite correctly, that antitrust, as taught by Phil Areeda and Don Turner,³ was an effort to apply economics to what previously had been a subject which often went without any economics, even though it was antitrust. This was back in the 1950s and '60s. And when Bobby Kennedy was Attorney General he would get complaint after complaint from the business community that the Antitrust Division had no idea of the economic impact of its actions. So Kennedy thought that they better find out, and Nicholas Katzenbach thought they needed an academic, and so they brought in Don Turner, who taught at Harvard. That's how it turned out that, when I worked at the Antitrust Division under Turner, I was subjected to two years of law and economics, and that experience has been terribly valuable to me.

When I sat down to write what became *The Uneasy Case for Copyright*, the first thing I wanted to do was to show that economics has a use in a field like copyright. And I mean a serious use, because most people would have said that they know what economics tells you about copyright, it tells you that there's a high fixed cost to create a copyrighted work and a very low variable cost to distribute it, and that's it. But I wanted to show that it was more complicated than that.

What I was actually trying to do with the article was to use something that was very popular at the time, and that probably still is popular, which is called the Coase Theorem.⁴ The Coase Theorem, which at that time was new, stated that if there were no costs of distributing property rights, and no costs of engaging in transactions with regard to those property rights, then the initial distribution of rights would not matter, because no matter what that was, people would exchange

² BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967).

³ See generally Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

⁴ See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

rights to get what they wanted. I wanted to take that idea and examine what application it had to the field of copyright, because I thought it might have one.

So there we are, and maybe I've already wrecked this whole article in your mind. Nonetheless, it was an effort to show that economics matters to copyright in a way that Phil Areeda showed that economics matters to antitrust. And his advice was this: "Do not tell the class you are talking economics. Anyone who does not understand economics and applies it in antitrust is not properly teaching the course. But anyone who lets the class know that they're talking economics is not a law school professor." So that's why I did not think I actually had to talk about the Coase Theorem in the article, but I did think that it had tremendous application to the field of copyright, and I wanted to show that. Economics does have an application to law and you do not need to go draw diagrams and write out equations in order to show that.

Second, I wanted to show that law professors—all of us—can do at least one thing, and that is to gather some of the facts that are relevant to how the law should be shaped. Most of us realize that we're not Immanuel Kant or John Stewart Mill. I was convinced, however, that there is still useful work we can do. Instead of sitting in the office trying to dream up things, we can go out and find some useful facts, and I was trying to demonstrate that with this article.

That is of course a general lesson, but at the time I thought it was particularly important to know what the facts were about computers. So I went to Tony Oettinger's class across the street in the computer center and tried to learn how to write a computer program.

And then I was wandering around the copyright section of the Widener Library and I saw a volume that looked quite old, and I took it out and it happened to be the 1879 British hearings on the extension of the Copyright Act in Britain in 1880. And it was a thin book, but I read through it and cited a few things from it, because it was so clear and presented things in a way that I thought the nineteen volumes of legislative history of the 1976 Copyright Act⁵ could have done a little bit better.

For example, the drafters of the 1976 Act wanted to show that copyright protection should be extended from fifty-six years to the life of the author plus fifty years. And they were a little hard pressed to find somebody who was actually hurt by the fifty-six-year copyright

⁵ Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2006).

term. But they did; they found one person. His name was Will Dillon. Will Dillon was the author of the song *I Want a Girl Just Like the Girl Who Married Dear Old Dad*.⁶ And he had written that song when he was twenty years old and there he was, eighty years old, and they found him and brought him in to testify.⁷ Now compared to that, if you looked at the British hearings, they had serious and thoughtful papers—if my recollection is correct, papers by Matthew Arnold and maybe George Eliot and Thomas Hardy.

In any case, I was trying to show that facts matter. And of course they do matter. And this must be obvious to some of you who are participating in the Symposium, because you're trying to work out what kind of intellectual property protection, if any, should apply to industries that are so different from anything that was around in 1970. Of course, if you're looking to me to know what the answer is to that, I do not. But I think that finding out what the facts are and trying to apply some kind of reasonable framework of analysis to them will get you to an answer.

That's what I thought law professors should be doing, and I hoped I could show that it was useful. You get some facts, you know a little bit of economics. You learn something about the field and then you try to work out a somewhat useful framework that others will be able to use when they have more facts.

Of course, there are other useful things that law professors can do. They can work on grand theories, or read an enormous number of cases and try to analyze them. But those were not things I wanted to do. Indeed, I suspect that the reason I went into the field of antitrust was that there were relatively few cases you had to read. Compare antitrust to contracts, for example, in which it's just impossible to read everything! But I thought that gathering facts and analyzing them within an economic framework was one useful thing that a person could do. And of course Ben Kaplan thought that, and Derek Bok, who was at the time the Dean of the Law School, also thought that, and that led to the article.

And so here we are, forty years later. My goodness! I can't tell you how satisfying it is to me that somebody still finds this article useful. That's another thing you learn over time—you learn what it is that will ultimately give you satisfaction. Derek Bok was very wise.

⁶ See AMERICAN QUARTET, *I Want a Girl Just Like the Girl Who Married Dear Old Dad* (Vintage 1911) (William Dillon lyricist), for a version of the audio recording.

⁷ See *Hearings on the Copyright Law Revision Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong., 228–29 (1965).

He told me lots of things that I go back and think about. He said, “You know, you’ve graduated high in your law school class. Well, I’ll tell you something, every year there are quite a few people who do, in quite a few law schools. And you were a clerk on the Supreme Court. Well, every year there are thirty-six of those. But,” he said, “that is not the point. There are a lot of bright people. It’s lucky if you’re bright. Ultimately, however, people will judge you professionally not by your IQ score, but by what you give to them.”

I think that’s also how people ultimately judge their own professional lives. It’s by what you can give to some other person, so that when you do something that turns out to be useful for some other group of people, that is emotionally very satisfying. That’s what Derek Bok was trying to tell me forty years ago, and all I can say is that as I get older, that becomes more and more true.

Now, what should I say about the article? I think it reflected a lot of work. One of the less pleasant days of my life was after I’d handed Derek Bok my 200-page manuscript to give to the Appointments Committee. He came back and said, “You know, when you write something”—and I didn’t like the tone of his voice—“sometimes it’s worth going over it again before handing it in. Marshal your arguments,” he said, “and use the most interesting points, but do not put in all the less interesting ones.” And that was very good advice. So what ended up being published as *The Uneasy Case for Copyright* was the expurgated version of something that had all kinds of rambling in it. And I’ve learned that lesson by heart. I can’t help that. As a judge, I’ll write lots of drafts of opinions and we’ll go over it again and again. And it isn’t really until you get to that fourteenth draft, or at least the fifth, that you’re going to have something that’s reasonable to give to some other people to look at, because their time is valuable, and they do not have time to read a 200-page article. If you’re going to give somebody a 200-page article, every sentence in those 200 pages better contain something. So I think I learned from that heart-stopping experience, and I rewrote the article several times. I picked out those things that I thought were the most interesting for the text, and put the second most interesting in the footnotes, and the third most interesting in the wastebasket.

Now, what do I think there is in the article that might last, that might interest you? I think it provided a framework, and I think that framework did follow an economic base. I summarized that framework in a very short subsequent piece that I wrote in reply to a criti-

cism.⁸ When I look back at that and ask what are the things that I think were most significant about that framework, probably one of them was the way in which industries that have copyrights—publishers or others—might make money even in the absence of the copyright. And sometimes that's useful. In trying to figure out what kind of intellectual property right you want to give, you probably want to take into account the actual or likely cash value of the right, and the need for the publisher to have it.

I also think it was valuable to consider all of the things that weigh against protection, because there obviously are many that argue for it. The things that I think are most likely to be overlooked today are what Coase called transaction costs. For example, now that they're extending copyright to 100 years, has anybody thought that it's going to cost a lot of money to contact people to get permission? Or that many of the people who you need permission from are dead, or no one knows where they are, because nobody cares about their work? Sure, you care, because you're a scholar, or because you're a library. But then you say, what am I supposed to do if I can't find them? Now that wasn't why they wanted to extend the copyright term to 100 years. They had in mind those works whose authors were known. But the effect of extension is broader.

I once had dinner with Michael Eisner, and we were discussing this subject. He's a very bright man. He had read the article and my dissent in *Eldred v. Ashcroft*,⁹ and he was good about it and he realized that the point was not to say you shouldn't have copyright in publishing, the point was to say that there are arguments pro and con. Eisner said to me, "I got a call from the president of Exxon. And the president of Exxon said, 'Michael, your lawyers are suing us because some of the people on our oil rigs, when they go out there, give each other copies of your videos. And the suit is ridiculous, really, because these are people who serve a valuable social function, and they have a terribly boring life out there and do not always have time to get into the video store. Why are you making them go through this? I think you should call the suit off.'"

And Eisner says, "Okay, I'll call it off. You're right. I think they are decent people, and I do not think it's that serious. Now, I have a favor I'd like to ask you. I have a lot of people who have to come to work at the Disney studio all the time and they have to drive in cars and go to gasoline stations. It's really boring for them to have to go in

⁸ Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972).

⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 242–69 (2003) (Breyer, J., dissenting).

and pay for all of their gasoline, and so I was wondering whether you could” Well, you see the point.

I thought it was a good point. But then I got to make a point. “Suppose,” I said, “that people make an effort to obtain permission to use copyrighted material and they get no answer for some period of time. Would you object if there is an exception that would allow those people to use the material, without fear of being sued for infringement, if they deposit a certain amount of money that would in five years be distributed to whoever turns up?” He said, “No, I wouldn’t object.” I said, “Good. You were able to get Congress to extend the term of copyright by passing what some have called the Mickey Mouse amendment.¹⁰ In return for that extension, why don’t you go out and lobby for an exception like the one I’ve described, something that lowers transaction costs? It could be done in dozens of ways.” And he said, “Fine, I will.” So if you see him, tell him that I remember his promise. But of course the point of all of this is that I think transaction costs are quite important and should not be overlooked.

The other thing I thought was fairly important is that people got mixed up in another way about why copyright existed and what the scope of protection is as a result. The original mixup, I think, started with King Dermott, who supposedly said, “to every cow her calf.”¹¹ Good point, as far as it goes. But many people somehow thought that could be their entire analysis of copyright. And you see that showing up even among the supporters of copyright term extension—people saying we own this work and therefore we have some kind of natural right to every penny that can be made from it. But of course no one else has that right. Teachers certainly do not; loads of people do not; hardly any worker does. And now I think that kind of logic is less prevalent.

That’s why I like the English so much, that’s why I used the quote from Thomas Macaulay as the first sentence of the article. Copyright “is a tax on readers for the purpose of giving a bounty to writers.”¹² Macaulay of course was a genius, and when you put it that way, you have to say what that bounty should be; and why we are giving it; and how much it should be; and what are the circumstances and under

¹⁰ See, e.g., Lawrence Lessig, Melville B. Nimmer Memorial Lecture, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001) (calling the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827, the “Mickey Mouse Protection Act”).

¹¹ RICHARD ROGERS BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 9 (1912).

¹² Thomas B. Macaulay, *The First Speech on Copyright, February 5, 1841*, in MACAULAY’S SPEECHES ON COPYRIGHT AND LINCOLN’S ADDRESS AT COOPER UNION 18, 25 (Charles Robert Gaston ed., 1914).

what conditions; and when does it expire. All those questions are questions of great detail, and luckily for those of us who are lawyers, that's how we make our living. We make our living by trying to figure out the details; by trying to work out the conditions; by trying to see, step by step, industry by industry, what sort of protection should this get, how long, and under what circumstances.

Back when I was writing the article, Anthony Oettinger and all the other computer people thought that everyone would have a PC that would be connected to one central computer which would be in the center of downtown Boston or somewhere. Under those circumstances, copyright wouldn't be that important because no one would put his material into the central computer unless he got paid for it. What you have to have in that case is a point at which the owner of the material can assess a toll. And you can call the toll a copyright or you can call it patent or you can call it something else, but all you need to have is a point where you can assess the toll. Once that's there, the creator or the publisher or whatever business person owns the material will probably be safe. He will be able to get some money back, some revenue from his investment.

But luckily I realized that it may not turn out that way. So what I said in the article is that it isn't true that you won't need copyright if it turns out that in the future, computer programs are generally usable on many computers, and are produced by independent software companies and selling off the shelf at low prices to large numbers of widely dispersed buyers. Well, here we are. Of course, maybe we won't be here anymore in five years' time, because maybe what will happen—I gather this from reading the newspapers; you'll know better than I—is that everything that we now have inside our computer will no longer be there, it will be in some central location in cyberspace or in Antarctica or somewhere. And if that happens, then we'll be back to where Anthony Oettinger thought we might be.

I have no idea if that's where we're going to be or not, but what I'm reasonably sure of is that the framework will be of central importance either way, because our job as professors, and as judges, is to worry about the details, and you cannot worry about the details without a framework. And I think in a field like intellectual property law you cannot understand the framework and develop it without knowing the facts about the industry and the particulars of production, and you cannot understand the relevance of those facts without some kind of economic theory.

That's all I said in the article. Did I put anything else of great importance in it? No, but it had a happy ending, because I did get tenure. And the reason that I have not taught copyright since is not from lack of interest. It's a fascinating subject. It has only become more important over time; much more important. But there we are. Happy ending. Got tenure. Went on to other things. And this is a very happy day for me because of your appreciation, showing me that what I wrote forty years ago still has some usefulness. Thank you.