Annotation of Justice Breyer’s Dissent

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Stephen Breyer was the only Justice on the 2002 Court with a background in copyright law. He earned tenure at Harvard Law School with a lengthy article, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs,” *Harvard Law Review* 84 (Dec., 1970) 281–351. You have free access to this article through JStor; although I have downloaded the article, I have yet to plow through it.

Breyer highlights *promote*, *limited*, and *Authors* in the Copyright Clause of the Constitution, focusing on the purpose of the clause and the intended beneficiaries of copyright protection (authors, not corporations).

Breyer argues that the Sonny Bono Copyright Term Extension Act is "the longest blanket extension since the Nation’s founding. It grants benefits not to authors but to their estates and heirs. And its practice is to *inhibit*, not promote, the progress of learning and knowledge.

Although the majority may believe that Congress’s decision to grant this extension is unwise, Breyer argues it goes beyond a failure of judgment and awards to undeserving parties something that rightfully belongs to the public. The CTEA violates the entire premise of the Copyright Clause, and is therefore unconstitutional.

Quoting language from the *Sony* case,¹ The purpose of the “monopoly privileges” granted by copyright is not primarily private benefit.

²⁴⁴ The Copyright Clause and the First Amendment seek related objectives: to stimulate authors to create and disseminate “information.” [his word, not mine] Together, they serve as an “engine of free expression.” Because these principles are stated in the Constitution (and not merely in lesser laws), laws that potentially impact these principles should be subject to more careful scrutiny. We should recognize that “…this statute involves not pure economic regulation, but regulation of expression” and therefore deserves more careful scrutiny “in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture.”

²⁴⁵ Summing up the argument:

Thus, I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2)

¹This case established that owners of copyrights could not prevent video cassette recorders from being sold in the United States simply because they had the potential to permit users to violate copyright protection of television broadcasts. Rather, the Court held that there were many legitimate uses of this technology, including recording for later viewing (time shifting). The entertainment industry also argued that VCRs would permit users to fast-forward through commercials, jeopardizing their source of revenue. The *Sony* decision found this an insufficient reason for suppressing VCR technology. Similarly, the photocopier has many legitimate uses, in addition to the potential to violate copyright protection of printed documents. Its use has not been suppressed, either. For a different outcome, see the *Grokster* case, in which the Court held that the specific aim of the file-sharing software, from its design to its marketing campaign, was aimed at pirating copyrighted works.
if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective. Where, after examination of the statute, it becomes difficult, if not impossible, even to dispute these characterizations, Congress' "choice is clearly wrong." _Helvering v. Davis_, 301 U. S. 619, 640 (1937).

II, A, begins a more detailed discussion of the precedents and arguments. I cannot help feeling that Breyer is tweaking the right wing of the Court, which very frequently bases its positions on ferreting out the "original intent" of the Framers. Somehow in this issue, they seem content to rely on subsequent behavior of Congress.

Breyer lists a number of precedents, including recent ones, in which the Court upholds the original purpose of copyright. He speaks of both Jefferson's and Madison's warning against the dangers of monopolies.

Quoting from a "House Report that implemented the Berne Convention for the Protection of Literary and Artistic Works," he stresses the public goals of American copyright law:

Under the U. S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and...when the limited term...expires and the creation is added to the public domain.

In contrast to the majority spin on the term "limited," which seems to be "anything less than perpetual," Breyer offers definitions of restrained and circumscribed from Samuel Johnson's dictionary of 1773.

Breyer describes two costs borne by the public: (1) greater royalties than would be necessary to inspire the author to create the work in the first place, and (2) the burden of obtaining permission to reproduce a copyrighted work. It is frequently difficult to locate the copyright owner of a work (i.e., 50 years after her death, it may be tough to figure out who owns the copyright to an author's work). [Furthermore, the burden to do so carries a strict liability. If, after investing many hours of time fruitlessly seeking to identify the copyright owner, a publisher produces and sells copies of the work, he is liable for damages when the owner comes forward. This has a chilling effect on the republication of a great many works.]

United Airlines has had to pay $500,000 for the right to play George Gershwin's 1924 Rhapsody in Blue. Ultimately, this comes out of ticket prices.

Modern technology could make available a wealth of information and culture at very low cost (imagine the Library of Congress collection freely available to anyone with a net connection). However, the costs of obtaining copyright clearance stymie this great benefit to the public.

Thus, the American Association of Law Libraries points out that the clearance process associated with creating an electronic archive, _Documenting the American South_, "consumed approximately a dozen man-hours" _per work._

Some copyright holders have "used their control of copyright to try to control the content of historical or cultural works."

The CTEA provides an exemption during the last 20 years of a copyright term to produce "fac-
“Simile or digital” reproduction by a “library of archives.” Breyer points out that this does not permit a user to make a copy, only the library.

Although copyright law has a “fair use” exemption that permits academic and other non-profit use of copyrighted materials, Breyer argues that this would not “necessarily help those who wish to obtain from electronic databases material that is not there—say, teachers wishing their students to see albums of Depression Era photographs, to read the recorded words of those who actually lived under slavery, or to contrast, say, Gary Cooper’s heroic portrayal of Sergeant York with filmed reality from the battlefield of Verdun.”

Against movie claims that they need extended protection terms to preserve early films, Breyer describes that they have spent precious little effort to preserve early films. On balance, copyright protection harms the prospects of preserving old films.

“[N]o one could reasonably conclude that copyright’s traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works.”

Breyer cites a calculation from an amicus brief submitted by a group of economists, including five Nobel prize winners, which argues that the average value of a copyrighted work between 75 and 95 years after initial publication is something like $100 annually, which in present terms is worth less than 7 cents. “What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum?”

Congress may have sought to test constitutional limits. “After all, the statue was named after a Member of Congress, who, the legislative history records, “wanted the term of copyright protection to last forever.”

A stated reason for the CTEA was to make U.S. copyright law uniform with European law. “Despite appearances, the statute does not create a uniform American-European term with respect to the lion’s share of the economically significant works that it affects—all works made ‘for hire’ and all existing works created prior to 1978.”

Publishers and filmmakers argue that the statute provides incentives to those who act as publishers to republish and to redistribute older copyrighted works.” However, this flies in the face of the rationale for copyright and the historical record. He then goes on to cite many sources to support this argument.

Breyer addresses trade issues used to support the CTEA, and dismisses the final “demographic, economic, and technological changes” justifications mentioned in Ginsburg’s opinion as possible reasons Congress had for extending copyright terms.

Breyer claims to share the Court’s initial concern about intrusion upon the decision-making authority of Congress. However, he argues that the Court must be vigilant to protect the public interest from monopoly abuse, and all the more so in a new century “that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation’s economy and the lives of its citizens.”

He denies, however, that declaring the CTEA unconstitutional necessarily jeopardizes the 1976 law (as claimed by Ginsburg). After offering a number of reasons why, he drops it, since the issue being decided in *Eldred v. Ashcroft* is the constitutionality of the CTEA, only.

Somehow he manages to insert references to Tom Thumb and Paul Bunyan’s ox\(^1\) while dismissing the argument that extending the term for existing works is only fair, since it treats them the same.

\(^1\)Why he did not refer to Babe the blue ox by name is unclear, and is unaddressed in Ginsburg’s opinion.
But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.

In an appendix, Breyer fleshes out an argument made by the economists in their amicus brief mentioned above. Only about 2% of copyrights can be expected to retain commercial value at the end of 55 to 75 years. Furthermore, those that do become progressively less valuable as time goes on. Using a decay rate of 3.8% (the fraction that lose commercial viability per year), which is a quite conservative estimate, Breyer calculates that “a 95-year copyright is more realistically estimated ... as 99.996% of the value of a perpetual copyright.” It is difficult to support the contention that such terms are “limited” in any meaningful economic sense of the term.

In support of the claim made on p. 25x that the CTEA largely failed to achieve uniformity of copyright terms with the European Union, Breyer points out that most works at issue are (a) pre-1978 copyrighted works nearing the end of the pre-extension terms, and (b) works “made for hire,” which are still treated differently on either side of the Pond.