CONGRESSMAN ROBERT KASTENMEIER AND PROFESSOR JOHN STEDMAN: A THIRTY-FIVE YEAR RELATIONSHIP

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I
INTRODUCTION

We expect our elected officials to be good talkers. In fact, people often associate famous political figures with their gift for speech-making. Abraham Lincoln, William Jennings Bryan, Winston Churchill, and Franklin Roosevelt come to mind. Members of the House and Senate often seek to emulate such speakers, no doubt dreaming of higher office. There are also times when a rousing speech is needed to rally others to an important cause. Therefore, a certain amount of public oratory can be useful, and when not useful, is at least harmless.

The true work of government, however, is in the creation and modification of institutions for achieving the ends of government. In order to do that work a legislator must exercise sound judgment; the oratorical flourish is of little value. It is unlikely that legislators have ever solved important problems by deduction from political epigrams. What is needed instead is a sense of right ends, and an understanding of how to achieve those ends.

It is impractical, however, to expect our elected officials to know enough, when elected, to answer all of the questions they must answer in the course of their work. Legislators must learn on the job. They must supplement their instincts and knowledge by relying on congressional mechanisms for marshalling the expertise of others. Therefore, although one might be elected to Congress with a fully developed talent for speech-making, that talent is insufficient. Successful legislators must be good listeners as well.

II
KASTENMEIER THE LISTENER

This symposium, in part, recapitulates the legislative accomplishments of Congressman Kastenmeier, a legacy founded significantly upon his talent as a listener. That talent was evident in his respect for the legislative process and

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I would like to express my appreciation to the people who spoke to me about Congressman Kastenmeier, and especially to my research assistant, Kendra Loomis, for her assistance and suggestions in preparing this comment.

in his ability to elicit the advice of others. While Kastenmeier did not always follow the opinions of those to whom he listened, before forming his own opinions he did listen, seriously, to his staff, his constituents, representatives of groups affected by legislation being considered by his subcommittee, and to others whose judgment he trusted. Thus, by listening to others, Kastenmeier generally made sound legislative judgments, and in the process earned the loyalty of his staff and the respect of those with whom he worked.

There is ample evidence to support the conclusion that Kastenmeier was a gifted listener in his role as Congressman. Kastenmeier's body language was that of a person actively listening. By my recollection, he often stood with his left arm across his body, holding his right elbow, and with his right hand near his chin. His posture made it clear that he was not merely waiting for you to finish so that he could take his turn. If anything, his posture suggested that he was quite comfortable listening, at least for the moment. It invited you to speak, or to continue if you were already speaking. Most people who dealt with Kastenmeier share my belief that he not only listened to what they said, but also that he took their views into account when determining policy (even though he may have decided against their cause). One begins to wonder how they could tell. How did Kastenmeier convey that impression so uniformly? Professor Willard Hurst, who has known Kastenmeier from the beginning of his political career, answered these questions with his characterization of Kastenmeier as a "receptor" rather than a "projector"—and contrasted this with most politicians, who seek to project themselves whatever the setting.[1]

James Lardner, in his book about the economic, judicial, and legislative battle over the introduction of the VCR,[2] commented on the hearings held by Kastenmeier concerning the way in which copyright law should treat the new technology. Lardner's remarks portray Kastenmeier as a master listener:

> Although not associated with any cause or bill that had gained national attention, Kastenmeier's name was linked to a way of conducting congressional business that had enjoyed some success by example. He operated in the open. He had been one of the first subcommittee chairmen to invite the press and public to watch a bill being "marked up." *He listened to what witnesses said at hearings, asked them questions that seemed to be intended to elicit information, and gave every indication of taking the answers into account.* His own views were slow to develop—annoyingly so, to some tastes—and when they did, he rarely bothered to announce them.[3]

Still a third example of the centrality of listening to Kastenmeier's legislative approach is an article co-authored by Congressman Kastenmeier and Michael Remington, chief counsel to Kastenmeier's committee.[4] The article presents what Kastenmeier and Remington call a "political test" for

1. Telephone interview with Emeritus Professor Willard Hurst, University of Wisconsin Law School (Aug 8, 1991).
2. James Lardner, *Fast Forward: Hollywood, The Japanese, and the VCR Wars* (New Am Library, 1987).
3. Id at 248 (emphasis added).
4. Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 Minn L Rev 417 (1985). Although it is quite likely that Remington produced a draft of the article, it is also appropriate to assume that Kastenmeier had "final edit" and that the article thus summarizes his views.

intellectual property legislation, a test that is arguably conservative and based on a principle of receptivity. They begin by quoting Harvard Law Professor Benjamin Kaplan's view that "wise legislation will not proceed by deduction from a monistic premise but upon a series of judgments about ends served and disserved by particular measures."[5] They then argue that a type of "civil procedure" should be applied to legislative proposals. They suggest four criteria: the proponent (1) must establish that the proposal is consistent with the existing legislative framework; (2) must ensure that the proposal is clear; (3) should offer a candid assessment of both the positive and negative effects of the change; and (4) must show on the record that the proposal will enrich or enhance the public interest.

Two points are implicit in this test. First, some party or interest must promulgate a proposal for the legislature to consider. Second, legislators need to listen to evidence in order to judge such proposals. Thus this theory of legislation embodies Kastenmeier's commitment to listening, and not the notion that legislators themselves are the principal sources of legislation.[6] Lardner was apparently correct when he suggested that Kastenmeier actually listened at the hearings.

A fourth example is also inferable from a close reading of Kastenmeier's and Remington's article. One skilled in the modern art of literary deconstruction could, I believe, show the article to have been written by one holding the values I have ascribed to Kastenmeier; the content and form of the article embody the virtues of active listening. The article rarely refers to Congressman Kastenmeier himself, suggesting that he saw his own role in the process as that of an evaluator or an observer, rather than an initiator.[7] In places where one might expect a reference to Kastenmeier the legislator, one finds instead a reference to Congress, the collegial body. The extensive footnoting reflects the view that the case is made, or unmade, in the facts and not in the argumentation; the proof is in the evidence, and one convinces another with evidence, not by deductions from abstract principles. This respect for proof is the method of a judicious listener. The numerous references in the text and the footnotes to statements made at congressional hearings provide further evidence that the authors believed those statements were critical to the judgments that followed.

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5. Id at 439, quoting Benjamin Kaplan, *An Unhurried View of Copyright; Proposals and Prospects*, 66 Colum L Rev 831, 854 (1966).

6. For those intrigued by self-referential irony, Kastenmeier and Remington do not claim themselves to have authored the theory, but frankly ascribe it to Professor David Lange, who offered it in congressional hearings devoted to a consideration of copyright and technological change. Kastenmeier & Remington, 70 Minn L Rev at 442 n105 (cited in note 4) (acknowledging Statement of David Lange, Copyright and Technological Change, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 98th Cong, 1st Sess 23 (1983)). Professor Lange, of course, is one of those responsible for this symposium.

7. The absence of references to his own role almost certainly displays a measure of modesty, another Kastenmeier characteristic.

III

TO WHOM DID KASTENMEIER LISTEN?

Having argued that Kastenmeier had confidence in the process by which Congress gathered evidence and acted upon that evidence, the questions remain to whom did Kastenmeier listen, and how did that advice influence him? It is certainly not the case that good listeners listen indiscriminately. A comprehensive survey of Kastenmeier's sources of information is clearly beyond the scope of this short comment. Such a task might include interviewing Kastenmeier and his staff to determine who testified frequently at hearings over which he presided, and examining the footnotes of articles and speeches to see which names recur.[8] One also would have to include the names of those who served, at one time or another, on Kastenmeier's own congressional staff or who worked for a related committee, including Michael Remington, David Beier, Bruce Lehman, Tim Boggs, and Charles O'Shiki. I will eschew such an effort and discuss just one name.

At least one person with whom Kastenmeier frequently discussed intellectual property issues was Professor John Stedman of the University of Wisconsin Law School. It seems clear that Stedman influenced Kastenmeier's views on intellectual property issues. It may be asked why Kastenmeier valued Stedman's contribution and exactly what substantive values Stedman conveyed to Kastenmeier. A short tribute written by Kastenmeier on the occasion of Stedman's death in 1984 suggests an answer:

> I knew John Stedman for more than thirty years: first as my law teacher and second as a fellow lawyer. During that time, John became a cherished and dear personal friend. I grew to know and respect him not only as a legal scholar, but also as a trusted confidant. . . . I would be hard pressed to list the countless times that I sought his professional and personal advice. John testified on numerous occasions, he corresponded regularly, he was always available on the telephone, and when in Washington, D.C., he usually stopped by my office.
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> John . . . was more than just a legal advisor to be asked a question about a judicial decision or a proposed legislative reform. He was a fresh and independent thinker, a trait particularly unusual in a world of special interests and pressure to conform.[9]

In addition, conversations with Kastenmeier and his staff convince me that Kastenmeier valued Stedman's intelligence and independence equally.[10] The combination of these traits, along with Stedman's familiarity with the legislative process, made him, in Kastenmeier's words, "a unique resource."[11]

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8. Professors Lange and Patterson, Judge Abner Mikva, and Registers of Copyright Ralph Oman and David Ladd are names that frequently recur, which suggests that Kastenmeier often found their views particularly helpful.

9. Robert W. Kastenmeier, *John Stedman—In Remembrance*, 1984 Wis L Rev 578, 578-79.

10. Kastenmeier himself had a well-deserved reputation for independence. He often took politically risky positions, such as early opposition to the U. S. involvement in the Vietnam war and skepticism about President Bush's reactions to Iraq's invasion of Kuwait.

11. Id at 579. Kastenmeier also notes that "John possessed all the skills necessary for a policymaker. Most importantly, he was always practical and realistic in terms of what was politically achievable. This skill made him particularly helpful to the legislative process." Id.

Kastenmeier first encountered Professor Stedman when Kastenmeier was a student at the University of Wisconsin Law School, where he received his bachelor of laws degree in 1952. Stedman, a Wisconsin native and 1934 graduate of the law school, joined the faculty in 1935. In 1939 he pursued a master of laws degree at Columbia University, where he became interested in patent law, writing a thesis entitled "Licensing of Patents and the Competitive System." In 1941 Stedman went to Washington, where he spent the next eight years. After a stint with the Office of Price Administration, he served in four divisions of the Justice Department: Alien Property, Lands, Claims, and Antitrust.[12] While in the Claims Division, Stedman headed the Patent Section. He then moved to the Antitrust Division and in 1949 became the chief of the Legislative and Clearance Section.[13] Stedman returned to teaching at the University of Wisconsin Law School in 1950, just in time to encounter Robert Kastenmeier as his student. Therefore, when Kastenmeier was his student, Stedman had a significant amount of Washington experience and was intimately familiar with the legislative process from the viewpoint of the Justice Department.

What were Stedman's views on intellectual property at the time? What substantive perspective did he bring to his relationship with Kastenmeier, then and in the years that followed? By 1950, Stedman had testified about patent law or antitrust policy eleven times before congressional committees.[14] He had also written a 175-page master's thesis on patent licensing and competition[15] and published seven law review articles, four of which dealt with patent and antitrust issues.[16] The views he expressed in his written work and in his testimony were undoubtedly conveyed to his students in and out of the classroom. Interestingly, Stedman's first major law review article, *Invention and Public Policy*, appeared in 1947 as part of a symposium on the patent system published by the journal in which this comment appears.[17] The article constitutes a thoughtful and concise summary of Stedman's analysis of the strengths and weaknesses of the patent system and is entirely consistent with the views he held on those issues for the rest of his scholarly career. The article begins with a lively call to be open-minded about the patent system:

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12. See Wilbur L. Fugate, *John Stedman's Government Career*, 1976 Wis L Rev 12.

13. Id.

14. See Nancy Paul & John A. Kidwell, *John Stedman—His Bibliography*, 1984 Wis L Rev 581, 586-87.

15. Although it cannot be determined exactly when the work was done, upon Stedman's death his unpublished papers included a 569-page manuscript entitled "Patent Agreements and the Competitive System. The Relation Between Patent Practices and the Anti-Monopoly Laws: the Situation in the Past, Present Trends, and Future Possibilities." This was an elaboration on the Columbia master's thesis, and it is likely that it was done early in Stedman's career. Both the master's thesis and the elaboration on it are in the Faculty Archive Collection at the University of Wisconsin Law School.

16. For a list of the articles, see Paul & Kidwell, 1984 Wis L Rev at 581 (cited in note 14). Stedman had also published seven book reviews, including reviews of books on drafting patent claims and on competition in the public utility industry. Id.

17. John C. Stedman, *Invention and Public Policy*, 12 L & Contemp Probs 649 (Autumn 1947). More self-reference!

> Despite an occasional mystic who persists in viewing our patent system as a sacred cow, not to be touched, much less slaughtered, I take it there is no serious challenge today of the proposition that the patent system has for its primary purpose the advancement of the public interest and that it must be evaluated in the light of that interest—and, if necessary, changed to promote it.
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> In the many and, at times, acrimonious debates and arguments concerning the merits of the patent system, the furtherance of the public interest has been a basic premise. While protagonists and antagonists both, like thunder at dawn, have often produced much noise but little light, the issues have been clear, if the answers have not: Does our present system further or retard the public interest? Would proposed changes make matters better or worse?[18]

Stedman proceeds to argue that, in order to obtain those benefits to the public interest, the government had made a deal with inventors—a seventeen-year privilege of excluding others from exploiting the invention in exchange for public disclosure of the invention.[19] The issue is whether both sides have substantially performed their sides of the bargain, and whether the price is an appropriate one. After recapitulating how the patent system might have been failing to accomplish its avowed objectives, Stedman concludes that

> [t]he extent to which our patent system operates for good or evil in our present economy and the extent, if any, to which it should be modified to accomplish the greatest good, and the ways in which it can be adapted to carry out the constitutional purpose and still accommodate itself to the broader and overriding concept of a free competitive enterprise, are matters which cannot be determined by futile references to the past or broad generalities. They can only be determined by hard grubbing into the facts.[20]

Stedman then poses a series of factual questions that he believes should be answered before undertaking any modification of the patent system.[21]

I have quoted the above passages for three reasons. First, they exemplify Stedman's perspective. His touchstone was the public interest, and he sought factual justification for the features of the patent system. He believed that the patent system was an appropriate, though imperfect, mechanism for achieving desired ends, but he was insistent that we realize the price we paid for the benefits received, and that we remain constantly ready to re-evaluate the balance of cost and benefit. He believed that it was too easy to slip from a "public benefit" rationale to a "natural right" justification, and equally easy to underestimate the anti-competitive consequences of extensions of lawful monopoly. Stedman's sensitivity to the functional effect of the patent system in a competitive economy matured during his time with the Justice Department and deepened over the period of his scholarly career.[22]

Stedman's conversations with Kastenmeier may have also tempered the perspective of others familiar enough to offer advice about copyright and

18. Id at 649.

19. Id at 656.

20. Id at 678.

21. Id at 679.

22. The reconciliation of antitrust law and principles with a healthy and effective patent system were issues that occupied Stedman for much of his career. For a brief recapitulation of this scholarship, see John A. Kidwell, *John Stedman's Scholarship*, 1976 Wis L Rev 1; Paul & Kidwell, 1984 Wis L Rev at 581 (cited in note 14).

patent law, who may have emphasized the virtues of strengthening and expanding the nature of proprietary interests while downplaying the costs to competition. Stedman never questioned the value of patents and copyrights but had a sense of the limits beyond which stronger proprietary interests began to retard rather than advance the public interest.[23]

Next, note the echo of Stedman's 1947 call for grubbing for answers in the hard facts rather than deduction from broad generalities in Kaplan's reminder[24] that wise legislation would not proceed by "deduction from a monistic premise." Stedman, like Kastenmeier, had an abiding respect for the evaluation of evidence as a source of enlightenment, rather than reliance on deduction from general statements of principle. Stedman showed a social scientist's respect for data, and a healthy suspicion of the time-honored truths that often turn out to be mere folklore.

Finally, and equally relevant to the purpose of this comment, Kastenmeier quoted the passage above which begins "[d]espite an occasional mystic" as exemplifying Stedman's attitude toward both the patent and copyright systems.[25] He apparently believed, as I do, that the passage captured both Stedman's insistence on the public interest as a touchstone for intellectual property law and his healthy skepticism about the extent to which the system was achieving that end. By choosing the passage as exemplifying the view of one whom he admired, and by asking "Stedman's questions"[26] of witnesses at

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23. Although Stedman had, during the early and middle parts of his career, devoted most of his energy to the patent system, he later brought to copyright issues the same critical eye. As chairman of the American Association of University Professors Copyright Revision Committee, consultant to the National Science Foundation, and advisor to the American Library Association, Stedman was a central figure in the development of the positions taken by librarians and educators in the debates over copyright revision in the early 1970s.

> The American Library Association, the Association of Research Libraries, and the American Association of University Professors, among others, often called on him in his later years to brainstorm on the legal intricacies of the copyright law, and it is John Stedman's philosophies more than anyone else's which form the basis of the national library and higher education communities' positions on fair use and library photocopying.

Nancy H. Marshall, *John Stedman—Activist Retiree*, 1984 Wis L Rev 572. The American Library Association dedicated its June 1983 session on copyright law to Professor Stedman. His bibliography discloses that he testified before Congress three times on copyright issues, published four articles, and wrote at least three articles or speeches that remained unpublished but that focus on copyright law issues. Paul & Kidwell, 1984 Wis L Rev 582-90 (cited in note 14).

24. Stedman, 12 L & Contemp Probs at 649 (cited in note 17); Kaplan, 66 Colum L Rev at 854 (cited in note 5), quoted in Kastenmeier & Remington, 70 Minn L Rev at 439 (cited in note 4).

25. Kastenmeier, 1984 Wis L Rev at 579 (cited in note 9). Kastenmeier quoted the same words in Stedman's memory at a hearing before Kastenmeier's subcommittee. In addition to dedicating the hearing to Stedman, Kastenmeier "put to each and every witness the two questions Stedman would have asked: 'Does our present system further or retard the public interest?' and 'Would proposed changes make matters better or worse?' " See Innovation and Patent Law Reform, Hearings on HR 3285, 3286 & 3605 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 98th Cong, 2d Sess 1 (1984) (opening statement of Subcommittee Chairman Kastenmeier)("Innovation Hearings"). The use of those questions, and his sense that their use would be both a fitting tribute to Stedman and an implementation of his role as chair, strongly suggest Kastenmeier's belief that the reconciliation of each change in the law with the public interest was heart and soul of the subcommittee's task.

26. Innovation Hearings at 1-2 (cited in note 25).

a hearing dedicated to Stedman, Kastenmeier also must be seen as endorsing it himself.

Although empirical analysis of Kastenmeier's legislative work to prove he held and implemented such a view is beyond the scope of this short comment, I believe Kastenmeier did share Stedman's concerns, and Kastenmeier's leadership of the House subcommittee reflected great sympathy for Stedman's approach. Some might object that the quotations I have presented are insufficient to demonstrate any functionally significant opinions because they would be subscribed to universally. I disagree. Although it is true that few would subscribe to the converse of the quoted statement—that the purpose of patent law is to benefit the patentees, which may produce incidental benefits to the public—it is significant to begin an article with an expression of skeptical support for a flawed system rather than with a more enthusiastic endorsement of the patent system as the engine of innovation. Listing one value first among many indicates its priority. The quotations are also significant because they reflect Stedman's and Kastenmeier's view that each and every marginal adjustment to the regime of intellectual property must be justified in terms of its consonance with first principles; it is all too easy to consider "technical" changes in their local context only and not in light of whether they forward the statutory purpose of the entire structure of the law.

The ultimate test of Stedman's influence would be to attempt to find specific instances in which Stedman's testimony led to changes in Kastenmeier's positions on specific pieces of legislation. This comment offers no such proof. The task would require more time and pages than are available and is probably impracticable in any event. Stedman's advice was often embodied in conversation, of which no record remains, or in correspondence that has not survived or that would be extremely difficult to find in legislative files. Even the testimony, which is more easily available, is difficult to match with specific outcomes. Stedman sometimes testified before the Senate Judiciary Subcommittee (which he served as associate counsel even after he returned to teaching[27]). Though it is likely Stedman provided Kastenmeier with a copy of his remarks, the House version of the bill might have been sufficiently different from the Senate bill to reduce Kastenmeier's ability to profit from Stedman's analyses. In addition, bills on which Stedman testified were often extensively amended before they emerged as legislation, and many, of course, did not emerge at all.[28] Finally, Stedman was often

27. After returning to the University of Wisconsin Law School, Stedman continued to serve as special counsel or consultant to congressional committees. He was associate counsel to the Subcommittee on Patents of the Senate Judiciary Committee, for example, and between 1956 and 1963 served as the editor of a series of 30 patent studies for the Subcommittee.

28. I cannot resist noting here that some legislators' most important moments come not in sponsoring legislation, but in defeating legislation sponsored by others. It would be interesting to evaluate Kastenmeier's legislative legacy in terms of the wrong-headed or hastily prepared bills that died, quietly and appropriately, in committee, or in terms of proposals that, as the result of study by subcommittee and staff, were never even embodied in draft legislation.

joined in his opinions by others; his independent influence is therefore impossible to measure in all cases.[29]

IV
CONCLUSION

I had the privilege to vote for Bob Kastenmeier for Congress ten times. I admired his independence. My own interest in intellectual property led me to appreciate his dedication to a legislative method that gave appropriate attention to the principles underlying intellectual property law and due recognition to the delicate balance between long- and short-term competitive costs and benefits. I had the privilege of working with John Stedman for more than ten years. He shared Kastenmeier's taste for independence. Although I certainly do not want to exaggerate Stedman's role in Kastenmeier's thinking on patent and copyright issues, I think he was influential and that his influence reinforced Kastenmeier's inclination to extend proprietary protection reluctantly, and only when it could be shown that such an extension served the broader public interest.

29. Kastenmeier and Stedman did not always agree. Stedman, for example, testified against a proposal for the creation of a Court of Appeals for the Federal Circuit ("CAFC"). Industrial Innovation and Patent and Copyright Law Amendments, Hearings on HR 6033, 6933, 3806 & 2414, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 96th Cong, 2d Sess 180-85 (1980). He was not convinced of the severity of the problems the new court was designed to solve or that the new court would in fact solve those problems. He also worried that the new court would be captured by the "technical expertise" of the patent bar and lack what he termed "general expertise." (Stedman testified that he was "concerned that there would be a tendency on the part of the judges themselves [on the new CAFC] to emphasize the technical specialized aspects of the cases before them to the possible de-emphasis of the important public considerations that may be involved." Id at 183.) He believed that the lack of uniformity between venues was a problem that arose primarily at the trial court level and the CAFC was unlikely to increase significantly the uniformity of standards and decisions. A review of Stedman's testimony and Kastenmeier's comments about the creation of the CAFC, however, suggests that although they ultimately disagreed about the wisdom of the proposal, they asked the same questions in reaching their respective judgments. Kastenmeier seemed simply to give more weight to the argument for uniformity and to the advantages to judicial administration of the new court. See, for example, Kastenmeier's remarks at the Ninth Annual Judicial Conference of the United States Court of Customs and Patent Appeals, 94 FRD 350, 358-59 (1982), as well as his remarks upon the introduction of HR 3806. Court of Appeals for the Federal Circuit Act of 1980, HR 3806, 96th Cong, 2d Sess (1980), reprinted in 126 Cong Rec H25364 (Sept 15, 1980) (remarks of Rep. Kastenmeier).