BOB KASTENMEIER AND THE LEGISLATIVE PROCESS: *SUI GENERIS* AND PROUD OF IT

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I

INTRODUCTION

As the U.S. Register of Copyrights, and as the former chief counsel of the Senate Subcommittee on Patents, Copyrights, and Trademarks—the sister subcommittee to Robert W. Kastenmeier's Committee—I have been in a unique position to observe the Chairman up close. From this experience, I can only admire a man whose contributions to intellectual property are unprecedented and pervasive. Reflecting upon Kastenmeier's achievements, I am reminded of the celebrated English architect Christopher Wren. He rebuilt the churches and public buildings of London after the Great Fire of 1666 and now lies buried in a simple grave in St. Paul's Cathedral, his masterpiece. After Wren's death, admirers approached his son and asked what kind of monument should be built to commemorate his father's legacy. Scoffing at the notion, his son instead installed a small plaque in St. Paul's near his father's grave, with the following inscription: "*Si monumentum requirs, circumspice*" ("Reader, if you seek his monument, look around you.").

Today, we have only to look around us to see the monuments to Bob Kastenmeier. I mention only a few: U.S. adherence to the Berne Convention,[1] the Satellite Home Viewer Act of 1988,[2] the Visual Artists Rights Act of 1990,[3] the Semiconductor Chip Protection Act of 1984,[4] the 1976 revision of the Copyright Act,[5] and something Christopher Wren would appreciate, the Architectural Works Copyright Protection Act of 1990.[6] Kastenmeier's legacy, however, goes beyond the statute books, and this is my principal theme: by eschewing dogma and philosophy and by virtue of his

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1. Berne Convention Implementation Act, Pub L No 100-568, 102 Stat 2853 (1988), codified as amended at 17 USC §§ 101, 104, 116, 205 (Supp 1989).

2. Pub L No 100-667, 102 Stat 3949 (1988), codified as amended at 17 USC §§ 101, 111, 119, 501, 801, 804 (Supp 1989).

3. Pub L No 101-650, 104 Stat 5089, 5128 (1990), codified at 17 USCA § 101, 101 note, 106A, 106A note, 107, 113, 301, 411, 412, 501, 506 (West Supp 1991) (effective June 1, 1991).

4. Pub L No 98-620, 98 Stat 3347, 3356 (1984), codified as amended at 17 USC §§ 901-904 (1988 & Supp 1989).

5. Act of October 19, 1976, Pub L No 94-553, 90 Stat 2541, codified as amended at 17 USC §§ 101-118, 201-205, 301-305, 401-412, 501-510, 601-603, 701-710 (1988 & Supp 1989).

6. Pub L No 101-650, 104 Stat 5133 (1990), codified at 17 USC § 101, 101 note, 102, 106, 120, 301 (West Supp 1991).

thoughtful, deliberate nature and devotion to the greater public interest, Kastenmeier put together compromises that enabled controversial legislation to pass. On the other hand, his jaw-boning often obviated the need for legislation. Kastenmeier's ability to avoid the necessity of legislating, to get the affected interests to solve their own problems and solve them in a way that also benefitted the larger public interest is another measure of his success as a legislator. This success can be seen in the historic guidelines for classroom copying found in the 1976 House report,[7] in the 1980 voluntary agreement on off-air taping for educational purposes,[8] in the voluntary jukebox agreement that helped pave the way for Berne adherence,[9] and in a 1990 agreement on the performance of videocassettes for elderly patients in nursing homes.[10]

Kastenmeier's influence may also be seen in legislative initiatives that have not passed, the principal one being *sui generis* design legislation.[11] Others include amendments to the fair use doctrine[12] and video home-taping royalty systems.[13]

Finally, the success of Kastenmeier's effort may be seen in the extent to which the structure set up in the 1976 Copyright Act has furthered the constitutional goal of promoting the progress of science. Today we have prospering copyright industries, a booming cable industry, and space-age technologies that bring the genius of America's creators to people all over the world and that help reduce our trade deficit. In the process, we have moved from the formality ridden system of the 1909 Copyright Act—mandatory notice, a manufacturing clause, a fifty-six year term of protection dependent on an arcane renewal provision, and dual federal-state protection—to a system that puts us in the mainstream of international copyright law. U.S. copyright law no longer contains a notice requirement or manufacturing clause, and has changed to a term of life of the author plus fifty years and a unified system of federal protection. Kastenmeier's career is the story of these profound changes in our copyright law. Of course, I speak of only one area of his accomplishments. Kastenmeier also made significant contributions to patent and trademark law, the courts, the prison system, civil liberties, and to the larger issues of the day that all members of Congress must face. Kastenmeier achieved the impossible: he was both a generalist *and* a specialist in an era when some people have a hard time being either.

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7. HR Rep No 94-1476, 94th Cong, 2d Sess 66-72 (1976).

8. Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes, HR Rep No 495, 97th Cong, 2d Sess 7 (June 11, 1982).

9. See 55 Fed Reg 11,428 (March 28, 1990).

10. *Nursing Homes/Hollywood Sign Private Video Movie Agreement*, 40 Patent, Trademark & Copyright J 309 (Aug 9, 1990).

11. HR 1790, 102d Cong, 1st Sess (April 16, 1991), in 137 Cong Rec H2259 (April 16, 1991).

12. HR 4263, 101st Cong, 2d Sess (March 14, 1990), in 136 Cong Rec H805 (March 14, 1990) (remarks of Rep. Kastenmeier); S1035, 102d Cong, 1st Sess (May 9, 1991), in 137 Cong Rec S5615, S5648 (May 9, 1991) (remarks of Sen. Simon).

13. See, for example, HR 1030, 98th Cong, 1st Sess (Jan 27, 1983).

In short, overwhelming evidence of Kastenmeier's legislative skills is all around us. Without his magic touch, we would still be operating under the 1909 Act while the battles over cable television and jukeboxes raged with the proponents on both sides seeking complete victory. Because he was a balanced, respected voice, however, and because he was a pillar of integrity, Kastenmeier could impose a compromise solution and get it enacted into law.

II

PHILOSOPHY AND COPYRIGHT: THE LESSONS OF BERNE ADHERENCE

At the risk of oversimplification, world copyright systems may now be divided into two[14] camps: continental countries, which view authors' rights as natural rights, and common law countries, which view copyright as a creature of statute.[15] Moreover, most continental countries have adopted a "unified theory of art," according to which it makes little practical difference whether the design of a useful article is protected under copyright, design legislation, or unfair competition. Rights granted to authors may depend upon whether the continental or common law system governs: for example, formal, explicit moral rights have traditionally been accorded in continental but not in common law countries. Common law countries have been receptive to using copyright to protect forms of expression, such as photographs, sound recordings, and broadcasts, that are technology-driven. They have also been willing to treat the juridical entity responsible for their creation as an author. Continental countries, by contrast, have protected such works under neighboring rights in order to preserve the *auteur* foundation of *droit d'auteur*.

Gallons of ink have flowed in grand philosophical dialectics over the relative merits of these two systems and whether the Berne Convention embodies the continental approach to a degree requiring common law countries to mend their ways. As with many learned debates, there can be no definitive answer. Nevertheless, during the deliberations on U.S. adherence to the Berne Convention, Congress was besieged by the copyright equivalent of Zola's famous "J'accuse!" The essence of the Berne Convention, some purists said, is moral rights and lack of formalities. According to these purists, the failure to provide French-style moral rights and the failure to abolish registration as a prerequisite to suit would constitute gross incompatibility. The essence of the Berne Convention, they concluded with a flourish, is . . . (just fill in the blank with any absolute, idealistic, high-falutin' notion that springs to mind).

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14. Before the historic changes in the Soviet Union and Eastern Europe, there was a third system in socialist countries that mixed the continental approach with socialist practices and what they called "labor" law. In the case of East Germany, its copyright law disappeared at the moment of reunification, with West German law governing. The laws of other Eastern countries are currently being revised. See Eric J. Schwartz, *Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe*, 38 J Copyright Society of USA 123, 124 (Spring 1991).

15. For a further discussion of this difference as it relates to the doctrine of fair use, see, L. Ray Patterson, *Understanding Fair Use*, 55 L & Contemp Probs 249 (Spring 1992).

Kastenmeier's response to this position was typical. First, he consulted with the best domestic experts and then with the leading European experts. He found out, to his satisfaction, what the Berne Convention actually *required*, consistent with the "minimalist" goal of the adherence. He then fought off attempts by those upset over colorization[16] to turn Berne adherence into a vehicle for their cause. He also fought off efforts to prevent adherence by those who argued that Berne compatibility would require expanding the scope of protection for moral rights, which would destroy the fabric of U.S. copyright law and the U.S. copyright industries. After many difficult meetings, compromises were nevertheless crafted to make sure that everyone's position was more-or-less preserved: opponents of colorization were promised (and given) a separate hearing and opponents of great moral rights received a declaration in the adherence legislation that adherence did not "expand or reduce" moral rights, whether under federal or state law.[17]

The compulsory license for juke boxes in the 1976 Act also posed a problem.[18] Juke boxes have long been a sore spot in copyright law; with deft strategy and well-placed political friends, juke box operators managed to escape royalty payments for the sixty-eight years of the 1909 Act. Passage of the 1976 Act was repeatedly stymied as disputes erupted over whether juke box operators should pay royalties and, if so, how much they should pay. After passage of the 1976 Act, disputes over the Copyright Royalty Tribunal's rate setting became savage. Kastenmeier called the parties together and convinced them that it was in their mutual interest to resolve the matter out of court and out of Congress. They did.

When Congress debated U.S. adherence to Berne, the juke box issue was raised again: all agreed that the compulsory license in section 116 was incompatible with Berne. Yet juke box operators opposed its abolition, fearing they would be subject to exorbitant license fees. The solution was vintage Kastenmeier: a voluntary license in a new section 116A, with existing section 116 retained as a safety net.[19]

In the case of both moral rights and the voluntary juke box license, an argument can be made that the solutions violated the spirit if not the letter of

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16. "Colorization," also known as computer color encoding, is a process by which black and white film prints are transferred to videotape and electronically encoded with color. Register of Copyrights, *Technological Alterations to Motion Pictures* ix (March 1989). The Copyright Office registers the colorized films as derivative works. See Copyright Registration for Colorized Versions of Black and White Motion Pictures, Final Rule, 53 Fed Reg 29,887-29,890 (1988).

17. Berne Convention Implementation Act, 17 USC § 101 (cited in note 1).

> The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law - (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

Sections 2 and 3(a) make crystal clear that Berne is not self-executing and that all rights are to be found in domestic law.

18. 17 USC § 116 (1988).

19. Id §§ 116, 116A.

the Berne Convention. The political reality was simple, though: without these innovative compromises, the United States would not have been able to adhere because of domestic opposition. To forge a compromise with the disputants, dry philosophy took a back seat to a clear-eyed analysis of what was politically required. Who would argue with the result? The United States joined the Berne Convention, the goal of copyright experts for over one hundred years.

Is it better to be in or out of the Convention? I have no hesitation in saying it is better for both the United States and other Berne members to be in the Convention. We will tinker with our law to improve it, as we have already done post-adherence with the Visual Artists Rights Act of 1990,[20] the Architectural Works Copyright Protection Act of 1990,[21] and, shortly, a bill to make renewal of pre-1976 Act works automatic.[22] Furthermore, if we had not joined Berne, we would not have abolished the notice requirement of the 1909 Act, long a burden to authors and of only marginal utility to the users of copyrighted works. It was Kastenmeier's dual sense of what was required and what was possible that made adherence a reality.

III

THE ROLE OF THE LEGISLATOR AS GATEKEEPER

In 1990, 6,973 bills were introduced in Congress. Of those 225, about 3 percent, were enacted into law. Many of these bills were introduced for discussion or out of a constituent obligation; their sponsors never expected them to pass. *Sui generis* design legislation[23] has been introduced time and again for the last seventy-five years. One might reasonably assume that such a perennial also-ran stood no chance of passage, like the seasonal effort of Everett Dirksen to enact the bill designating the marigold as the national flower. Such bills risk becoming an object of humor or ridicule. Design protection is always taken seriously, however, because it is so important. Last session, with strong bipartisan support from the leadership in the House, design legislation stood its best chance ever of enactment. Yet it failed again. It failed because of Kastenmeier's insistence that a number of key points be clarified, including (1) what the bill would cover, (2) what the bill would protect that is not protected under existing law, and (3) whether the benefits gained by protecting products such as mechanical spare parts and automobile crash parts would exceed the associated costs to the public.

Also in 1990, Kastenmeier introduced a bill[24] to clarify that section 107 applies equally to published and unpublished works in order to correct the

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20. See note 3.
21. See note 6.
22. HR 2372, 102d Cong, 1st Sess (May 16, 1991), in 137 Cong Rec S3929, S4042 (May 16, 1991) (remarks of Rep Hughes); S756, 102d Cong, 1st Sess (March 21, 1991), in 137 Cong Rec S3929, S4042 (March 21, 1991) (remarks of Sens. DeConcini and Hatch).
23. See note 11.
24. HR 4263, 101st Cong, 2d Sess (1990), reprinted in 136 Cong Rec D850-01 (July 11, 1990). For Kastenmeier's remarks, see 136 Cong Rec H807 (March 14, 1990).

uncertainty resulting from the Second Circuit's *Salinger*[25] and *New Era*[26] decisions. Although a joint hearing with the Senate was held,[27] the bill did not pass. While some blame the computer industry for defeating the bill,[28] Kastenmeier himself may have been responsible. Had he been convinced of the necessity of legislating, he could have, in my opinion, brought the parties together and worked out a compromise. After the hearing, however, questions were raised about the desirability of any legislation and about whether a proposed amendment would favor the computer industry. Therefore, despite his introduction of the bill, Kastenmeier did not pursue its passage, believing it best to wait.

Deliberation was a hallmark of Kastenmeier's style. He never introduced bills to get the limelight only to abandon the effort once the cameras were turned off. Conversely, he never insisted on the passage of a bill only for the sake of issuing a press release. In short, Kastenmeier "passed no bill before its time." This unique approach gave him great credibility with his fellow legislators, who counted not only on Kastenmeier's unparalleled expertise, but also on his wisdom and judgment. Many people do not realize how many difficult decisions members of Congress must make each year. Matters of war, peace, and great domestic import monopolize legislators' time, while special interests constantly argue that their interest is the *only* public interest. Because of time constraints, it is almost impossible to understand the facts in highly technical areas, much less figure out whose claim is greater than another's. Under these circumstances, it is indispensable to have someone whose judgment can be trusted. Because of his expertise and his careful, deliberate method of legislating, members of Congress knew Kastenmeier was not going to rush them pell-mell into some Serbonian bog that would swallow them.

IV

CONCLUSION: THE HEALTH OF THE COPYRIGHT INDUSTRIES

The true test of any legislative scheme is how it works in the field. The 1976 Copyright Act passes this test with flying colors. A grant of too many rights will inhibit both users and subsequent authors. A grant of too few rights will inhibit the creation of original works. The 1976 Act attempted to balance all the various interests by granting broad rights in section 106, but subjecting them to fair use in section 107 and a series of exemptions and compulsory licenses in sections 108 through 118. Even the Copyright Royalty

25. *Salinger v Random House, Inc.*, 811 F2d 90 (2d Cir 1987).

26. *New Era Publications v Henry Holt & Co.*, 873 F2d 576 (2d Cir 1989).

27. Fair Use and Unpublished Works, Hearings on S 2370 and HR 4263 before the Senate Subcommittee on Patents, Copyrights, and Trademarks of the Senate Judiciary Committee and the House Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Judiciary Committee, 101st Cong, 2d Sess (1990).

28. Roger Cohen, *Software Issue kills liberal amendment to Copyright laws*, NY Times A-1 col 1 (Oct 13, 1990).

Tribunal's rate-setting, the most controversial part of this arrangement, has been increasingly accepted.

We now have copyright industries whose importance is frequently mentioned by the President, the Secretary of State, and the United States Trade Representative as shining stars in our balance of payments.[29] Never before have we had such a wealth of works to choose from, whether it be books, movies, computer programs, or music. New technologies, many of them digital, bring us unprecedented quality. If the balances struck in the 1976 Act had not been correct, this would have been impossible. The balances themselves were possible because of Kastenmeier's commitment to the public interest, defined at its most inclusive: authors, distributors, users, and consumers. For Kastenmeier, the constitutional goal of promoting the progress of science was his lodestar, and he followed it faithfully. We are all the beneficiaries.

A poem written by Howard Nemerov, former Poet Laureate of the United States, seems to capture the essence of Kastenmeier's contribution.

To the Congress
Of the United States
Entering Its Third Century[30]

because reverence has never been
    america's thing
this verse in your honor will not begin
    "o thou."
but the great respect our country has to
    give
may you all continue to deserve, and
    have.

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29. See, for example, Hearings before the Subcommittee on International Trade of the Senate Committee on Finance, 102d Cong, 2d Sess (March 6, 1992) (statement of Senator Baucus) (stating that copyright industries "are really success stories of America. . . . [M]any other American industries have a trade deficit. In pharmaceuticals, in computer software, and recording industry and motion pictures we have a surplus"); Martin Crutsinger, *China-U.S. Agree, Avoiding Trade War* (AP wire service, Jan 16, 1992) (U.S. Trade Representative Carla Hills arguing that the U.S.-China trade accord on intellectual property covers "an area of critical importance to the U.S. economy"); Federal News Service, USIA Foreign Press Center Briefing (Dec 10, 1991) (U.S. trade official stating that intellectual property, copyright, and patents are "issues of critical importance to the U.S."); Hearings on Fast-Track Authority for the President Relating to the Intellectual Property Aspects of GATT Negotiations before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 102d Cong, 1st Sess 6 (May 14, 1991) (statement of Senator Leahy) (noting that "few people focus on this, but our core copyright industry has alone accounted for more foreign sales in 1989 than the entire U.S. aerospace industry. American movies and the sound recordings, computer software—they're the envy of the world but sometimes envious people take what's not theirs").

30. This poem is taken from Howard Nemerov, *Trying Conclusions* (U Chicago Press, 1991). It is used here by permission of Margaret Nemerov.

here at the fulcrum of us all,
the feather of truth against the soul
is weighed, and had better be found to
balance
lest our enterprise collapse in silence.

for here the million varying wills
get melted down, get hammered out
until the movie's reduced to stills
that tell us what the law's about.

conflict's endemic in the mind:
your job's to hear it in the wind
and compass it is opposites,
and bring the antagonists by your wits

to being one, and that the law
thenceforth, until you change your
minds
against and with the shifting winds
that this and that way blow the straw

so it's republic, as franklin said,
if you can keep it; and we did
thus far, and hope to keep your quarrel
funny and just, though with this moral:-

praise without end for the go-ahead zeal
of whoever it was invented the wheel;
but never a word for the poor soul's
sake
that thought ahead, and invented the
brake.

Howard Nemerov