

ROBERT W. KASTENMEIER: COPYRIGHT LEGISLATOR *PAR EXCELLENCE*

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I

INTRODUCTION

The 1990 congressional elections may amount to little more than a momentary blip on the radar screen of American political history. Not very much changed. Only one incumbent senator was defeated. Only a small group of the more than 400 members of the House of Representatives who ran for re-election were told by the voters to retire or look for another job. One of them was Democrat Bob Kastenmeier, who for thirty-two years of uninterrupted service represented the Second Congressional District of Wisconsin. For nearly two decades of his tenure, he held a coveted congressional post, sitting at the helm of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice. Bob Kastenmeier steered the Subcommittee, in the words of Walt Whitman, with a “good strong hand and wary eye.”¹

It was in the immediate wake of the electoral mutiny that Kastenmeier was given due public recognition for his diverse accomplishments, most of which—such as the many copyright law reforms that he authored—emanated from his subcommittee. Even after dissipation of the wake, the accolades follow like sea gulls drifting effortlessly in the wind.

Writing a tribute to Bob Kastenmeier, with emphasis on his contributions to copyright law, is a daunting task, particularly for one who worked in close proximity to him for many years. I had the good fortune to serve on his crew, as the Subcommittee Chief Counsel for eight years, and prior to that, as Subcommittee Counsel for four years.²

The encomiologic task is difficult because the man was an uncommon politician, humble and full of humility. He rarely sought publicity or praise. He was averse to blowing his own horn and never directed attention to himself. He even chastised his staff for drafting press releases that were too laudatory. A visit to his congressional office revealed walls adorned with

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1. Walt Whitman, *Songs of Democracy* 143 (David McKay, 1919).

2. These jobs were separated by a stint as Deputy Legislative Affairs Officer for the federal judiciary under the then-leadership of Chief Justice Warren E. Burger.

photographs of family and friends, memorabilia from Wisconsin interspersed among occasional plaques of special significance. Nowhere in sight were the many signature pens used by seven American Presidents to sign Kastenmeier bills. Congressman Kastenmeier was not the slightest bit interested in White House bill signing ceremonies; in 1988, during the Reagan Administration, he turned down an invitation to travel by Air Force jet to Hollywood, California, for the Presidential signing of Kastenmeier's Berne Convention Implementation Act.

Congressman Kastenmeier even got upset about the growth in popularity of his subcommittee with members of Congress, causing it to grow in size from seven members in the mid-1970s to fifteen in his final term. The political cachet of the Subcommittee on Intellectual Property signaled the maturation of American copyright and patent industries. The envy of his peers for chairing a "money subcommittee,"³ Bob Kastenmeier viewed this new-found popularity "as the guardian of a homely heiress might view a porchful of handsome suitors."⁴

II

THE OUTSIDE VIEW

A preliminary estimation of Bob Kastenmeier's accomplishments, particularly his impact on legislation, can best be plumbed by those who worked with him—his colleagues and his staff. In politics, such seemingly partisan comments are verified by reviewing comments of adversaries on the other side of the aisle or representatives of the other branches who speak with independence and impartiality. These, too, attest to Kastenmeier's unique accomplishments.

Shortly after the 1990 election, the first to praise Congressman Kastenmeier were federal and state judges. The Chief Justice of the United States, William H. Rehnquist, in an unprecedented statement issued to the press from the Supreme Court, expressed sadness about the defeat, referring to Kastenmeier as "a good friend of the federal judicial system."⁵ "Congressman Kastenmeier has been an outstanding supporter of the needs of the judicial branch of government," said former Chief Justice Warren E. Burger in a separate statement, "and we must hope that his successor will exhibit the same interest in that important field."⁶ A federal judge who served with Kastenmeier before being named to the bench, Judge Abner Mikva, now Chief Judge of the U.S. Court of Appeals for the District of Columbia, was even more effusive: "He's probably the best friend the federal judges have ever had on the Hill."⁷

3. David Corn, *A Non-rascal Thrown Out*, *The Nation* 768 (Dec 17, 1990).

4. James Lardner, *Fast Forward* 255 (Norton, 1987).

5. Fred Strasser, *Federal Bench Mourns Loss of Kastenmeier*, *Natl L J* 5 (Nov 26, 1990).

6. *Id.*

7. Tom Watson, *Election Costs Federal Judges a Champion*, *Legal Times* 20 col 1 (Nov 12, 1990).

In a ceremony and reception at the Supreme Court—again without precedent—that was attended by five justices, numerous federal judges, and many members of Congress, Chief Justice Rehnquist presented Kastenmeier with a resolution of the Judicial Conference of the United States. The resolution noted that Kastenmeier had “tirelessly dedicated himself to working with members of the federal judiciary to improve the delivery of justice in this country” and had “demonstrated an unwavering faith in the judicial process as a protector of individual rights under the Constitution and a guarantor of equal justice for all.”⁸

The Conference of Chief Justices, which consists of the chief judicial officers of all the state court systems, similarly recognized Kastenmeier’s contributions, stating in part that although his principal responsibilities involved federal law and the federal judicial system, “he never lost sight of the critical role played by state courts in the nation’s justice system.”⁹

The intellectual property community was not far behind in tribute. The Librarian of Congress, Dr. James H. Billington, wrote:

Throughout your distinguished career, you sought balance in the drafting of the copyright law, and in its enforcement. This approach worked not only to the benefit of the library community, but to the world of learning at large. The entire country benefitted from your broad vision, and that is a legacy that will endure for a long time.¹⁰

The Register of Copyrights, Ralph Oman, observed that Chairman Kastenmeier had “authored or shaped all the major (and minor) amendments to the copyright law over the past 30 years, and . . . marched us into the Berne Convention.”¹¹ In a ceremony hosted by the Intellectual Property Owners, Inc., the Register was joined by distinguished leaders of the patent, trademark, and copyright bars in public recognition of Kastenmeier’s contributions.

Intellectual property accolades were rendered by diverse entities, ranging from the New York State Bar Association (Entertainment, Arts, and Sports Section) to the Copyright Society of the United States, and from the U.S. Court of Appeals for the Federal Circuit to the Federal Bar Association. Commendations also flowed from the public interest and civil liberties communities, including the Americans for Democratic Action, the National League and Defender Association, the Alliance for Justice, and the American Civil Liberties Union.

Although temporary amnesia hit many Wisconsin voters on election day, immediately thereafter the national press underlined Congressman Kastenmeier’s accomplishments with particular emphasis on intellectual

8. Resolution of the Judicial Conference of the United States (March 12, 1991), referred to in Proceedings of the Judicial Conference of the United States (March 12, 1991).

9. Fourteenth Mid-year Meeting of the Conference of Chief Justices, Resolution IX (Scottsdale, Arizona, Jan 31, 1991).

10. Letter to Robert W. Kastenmeier from Dr. James H. Billington (Nov 27, 1990).

11. Letter to Robert W. Kastenmeier from Mr. Ralph Oman (Nov 20, 1990). See also Ralph Oman’s contribution to this symposium: *Bob Kastenmeier and the Legislative Process: Sui Generis and Proud of It*, 55 L & Contemp Probs 241 (Spring 1992).

property law. An editorial in the *Washington Post* identified Kastenmeier as a member who would be particularly missed: "the House will be poorer in wisdom and experience."¹² The *Post* further applauded him for taking on complicated issues that almost never make newspaper headlines, "becoming the leading House expert on patents and copyrights."¹³ The *New York Times* reported that it would be hard to overstate the significance of the defeat, stating that "although neither [Kastenmeier] nor his projects got much public attention, he pushed through a host of technical but important [patent, trademark, and copyright] legislation and stubbornly blocked proposals he disliked."¹⁴

Interestingly enough, one of the reasons for Kastenmeier's electoral defeat may have been precisely his expertise on copyright and patent matters, and the fact that he had become a national legislator on these issues, something not appreciated on a local level. In political campaigns of the 1980s, he repeatedly was attacked as too much of an expert on "unimportant" subjects like intellectual property law. In a published letter to Scott Klug, the victor of the 1990 election, the candidate that Bob Kastenmeier vanquished in the 1986 and 1988 elections sarcastically observed:

For decades, our district's needs have taken the back-burner to the plight of patent laws and copyrights. Scott, may I ask you to please retire the line that "a congressman only has time to deal with one specialty"?¹⁵

During the 1988 campaign, this same opponent blamed Kastenmeier for deterioration of the Patent and Trademark Office, arguing that

[o]ur patent system was once the envy of the world, making it possible to reward the innovation and ingenuity that invigorated our economy. On Mr. Kastenmeier's watch, we have reached the stage where the patent office is actually an obstacle of progress.¹⁶

Although clearly without foundation, these attacks may have had some effect on the outcome of the 1990 election. A knowledgeable local observer, Erwin Knoll, the editor of *The Progressive*, explained the 1990 defeat by observing that it "was a case of 'what have you done for me lately,' and copyright law just didn't do it for them."¹⁷

Washington insiders certainly knew better about the importance of patents and copyrights. During the years preceding the 1990 congressional election, Republican members of Congress did not hesitate to make positive, public statements about Bob Kastenmeier and the state of intellectual property law. The House Republican Leader, Robert Michel of Illinois, observed that the Kastenmeier Subcommittee "pioneered a number of new initiatives in patent

12. *Three Major Losses*, Wash Post A24 (Nov 15, 1990).

13. *Id.*

14. Edmund L. Andrews, *A Crucial Legislator is Leaving*, NY Times § 1, at 32 col 5 (Nov 17, 1990).

15. Ann Haney, *Isthmus* 11 col 2 (Dec 7, 1990).

16. *Patent office declined under Kastenmeier, Haney charges*, The Waunakee Tribune 12 (Sept 22, 1988).

17. Robert W. Apple, *Quiet Service Since '59, Then a Stunning Defeat*, NY Times B9 col 5 (Nov 12, 1990).

and copyright policy.”¹⁸ Carlos Moorhead of California, the long-time ranking Republican member of the Subcommittee, observed that when it comes to patents, trademarks, and copyrights, Kastenmeier “knows more about these issues than any Member of Congress.”¹⁹ Clayton Yeutter, then the United States Trade Representative, later head of the Republican National Committee, and now counselor to the President for Domestic Policy, applauded Kastenmeier for his “outstanding legislative performance” and “terrific job” on legislation to allow the United States to join the world’s most prestigious copyright treaty, the Berne Convention.²⁰

Off-the-record, a senior Republican representative inquired of staff whether Kastenmeier was using the laudatory remarks in his political campaigns, a clear signal that the communications were intentional.

III

THE RECORD

Was the applause merely a part of the Washington, D.C., political subculture, a form of back-scratching, or was it earned? A glance at Kastenmeier’s record in the area of copyright law reform provides a ready answer.

One need look no further than the contents of the Copyright Act itself. Set forth in Title 17 of the United States Code, virtually the entire Act is the handiwork of Chairman Kastenmeier and his Subcommittee. Like a secretive philanthropist whose charitable works are finally unveiled, Bob Kastenmeier deserves public accreditation of his contributions.

Copyright is a big success story in the United States. Bluntly put, copyright law works. On the recent occasion of the bicentennial of the first copyright law, President George Bush proclaimed that legislative expansions of American copyright laws have “enabled fledgling enterprises to become enduring industries”²¹ and “the success of new industries has, in turn, given aspiring authors, inventors, and artists greater faith in their dreams and

18. Hearing on Protection of Industrial Designs of Useful Articles before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of the House Committee on the Judiciary, 100th Cong, 2d Sess 69 (1988). In 1989, the long-time name of the Subcommittee—Courts, Civil Liberties, and the Administration of Justice—was amended to read “Courts, Intellectual Property, and the Administration of Justice” in order to reflect the growing political importance of copyrights, patents, trademarks, and semi-conductor chips in American society. The name change, as Kastenmeier joked, hopefully did not signify any diminished respect for the Bill of Rights.

The current name of the Subcommittee is “Intellectual Property and Judicial Administration,” denoting the continuing ascendancy of intellectual property and the transfer of certain jurisdiction (relating to civil liberties), in the wake of Kastenmeier’s retirement, to another subcommittee on the House Judiciary Committee.

19. Oversight Hearings on Intellectual Property and Trade before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of the House Committee on the Judiciary, 100th Cong, 1st Sess 6 (1987).

20. Letter to Robert W. Kastenmeier from Clayton Yeutter (Oct 14, 1988).

21. Proclamation 6013: The Bicentennial Anniversary of the First U.S. Patent and Copyright Laws, 25 Weekly Comp Pres Docs 1251 (Aug 15, 1989).

further incentive to share the fruits of their talents with others."²² The accomplishment of copyright is all the more graphic when compared to the efficacy and fairness of various of this nation's laws that, in the opinion of most, have failed to serve the public interest, such as those relating to the banking and savings and loan industries, criminal justice administration, and the health care system. The American copyright industries are among the largest and fastest growing segments of the economy. Between 1977 and 1989, the total copyright industries' share of the Gross National Product increased from 3.7 percent in 1977 to 5.8 percent in 1989. The core copyright industries are now larger than the U.S. agricultural, fishing, mining, or energy extraction industries.²³

Copyright produces a positive balance of trade in the United States, and is one of the brightest spots on the deficit horizon. Current American copyright law is touted as a model for the rest of the world to follow.

Users are the beneficiaries. The United States, as a society, has literally entered a new age. We have shifted from an industrial to an informational and electronically controlled society. Americans have a bewildering array of alternatives. We watch movies in the theater or at home with rented videocassettes; we listen to music sold to us in the form of records, cassettes, compact disks, and, soon, digital audio tapes; we obtain information from books, magazines, or newspapers; our children play video games and adults listen to jukeboxes in commercial establishments; we visit museums, attend the theater, and use public libraries; integrated circuits are ubiquitous and the computer has become an essential feature of the home and office.

To be sure, Bob Kastenmeier does not deserve singular credit for expressions of the American creative genius, technological changes spawned by the intellectual property incentive, or the positive balance of trade. Moreover, he would be mortified by any commendations of this sort. Minimally, however, he should be congratulated for presiding over a legal system that has successfully promoted the progress of science and the useful arts for the benefit of the public at large. The Kastenmeier work-product has operated, in a constantly changing atmosphere, to reward authors for their works, to balance all the competing demands, and to promote the public interest.

The work-product is an impressive one. During his tenure as subcommittee chair, between 1969 and 1990, Kastenmeier authored forty-eight laws that provided improvements to this country's intellectual property system. Of these, twenty-one amended the Copyright Act.

Some of the public laws were major in scope and importance; others were minor and technical. Analysis of the work-product is best left to the academic community and the marketplace. Once, having shown Kastenmeier a list of public laws that he had authored, I asked him to rank in the order of

22. Id.

23. Stephen E. Siwek & Harold W. Furchtgott-Roth, *Copyright Industries in the U.S. Economy* vii (Economists Inc., Nov 1990).

importance his accomplishments. Kastenmeier complied, underlining four of them.

The first law, not surprisingly, was the Copyright Revision Act of 1976.²⁴ The 1976 Act was a bipartisan legislative achievement of the first magnitude. It took decades of work—starting in the early 1950s, continuing through the 1960s, and culminating with seventeen days of hearings and twenty-five days of mark-up in 1975-76. In his own words, Kastenmeier “committed much of [his] first 18 years in Congress to this endeavor.”²⁵

Kastenmeier’s work started in the early 1960s when, as an unseasoned Member of the Judiciary Committee, he was asked to chair a series of hearings on the outdated 1909 Copyright Act. He had given little thought to copyright. Before his election to Congress, he had been a lawyer and justice of the peace. Copyright was then considered to be a somewhat brackish, backwater subject, certainly in comparison to the civil rights and nuclear proliferation battles of the day. The then-Chairman of the Subcommittee, Edwin Willis of Virginia, was more than pleased to yield to a young, progressive liberal from Wisconsin while he centered his energies on the more interesting duties of chairing the House Un-American Activities Committee.

The Revision Act showed how much work copyright reform can be. It also illustrated that copyright, while a relatively obscure discipline, still touches all Americans in their homes, schools, libraries, and workplaces. Copyright additionally conjoins the creative genius of the nation. Determining the scope and content of a legal regime that affects how Americans enjoy books, films, television programs, music, drama, computer software, information products and services, and the visual arts requires great caution, particularly in a rapidly changing society. The omnibus 1976 revision presaged that future reforms would have to undergo a rigorous examination of costs and benefits. Finally, with its deferral of certain issues—such as library photocopying and computer software protection—the Act sent an ominous warning about the intersection of intellectual property and technological change.

Congressman Kastenmeier’s second noted accomplishment, the Computer Software Copyright Amendments Act of 1980,²⁶ followed shortly on the heels of the 1976 Copyright Revision Act which, instead of definitively disposing of questions related to the protectability of computer programs, established a commission—the National Commission on New Technological Uses of Copyrighted Works (“CONTU”)—to study and file a report about the subject. Based on CONTU’s recommendations and legislation introduced by Kastenmeier, Congress moved with dispatch to enact the 1980 computer

24. Act of October 19, 1976, Pub L No 94-553, 90 Stat 2541, codified at 17 USC §§ 101 et seq (1977 & Supp 1992).

25. 133 Cong Rec H1293 (March 16, 1987).

26. Computer Software Amendments Act of 1980, Pub L No 96-517, 94 Stat 3015. The copyright amendments can be found in the House Bill § IV.

software copyright clarifications, which specified that a computer program is protectable subject matter provided that certain conditions are met.

Today the United States leads the world in software creativity, and copyright protection for software is often identified as an explanation for our success. Oversight hearings held by the Intellectual Property Subcommittee in 1989 and 1990 reveal that the 1980 Act has been effective, although not without significant problems.²⁷ The question of what sort of protection is best suited to software, first discussed in the 1970s, continues to be debated in the corridors of Congress, courtrooms, and the international community.

The 1980 amendments were deemed so pressing at the time that they were processed without congressional hearings and very little legislative debate.²⁸ Kastenmeier later expressed regret about the process, observing that the sparseness of legislative history and the generality of statutory language have resulted in a delegation of authority to the federal courts and copyright administrators. He conveyed an important and fundamental message: "neither the federal courts nor the Copyright Office should make policy to fill in the interstices of the law. That role is constitutionally assigned to the Congress."²⁹

Congressman Kastenmeier's third signal achievement was the Semiconductor Chip Protection Act of 1984.³⁰ The integrated electronic circuit, with its incredible array of combinations of electrical components located on a single substrate (like silicon), represents a new form of intellectual property. In 1984, after five years of hard work, Congress enacted legislation to confer freestanding (or *sui generis*) protection, outside the traditional copyright or patent laws but borrowing from both, on semiconductor chip products.

The 1984 Act showed that "[c]opyright is not a large circus tent equipped to cover diverse and unrelated rings."³¹ Tailored to the unique requirements of the semiconductor industry and the needs of the public, the Act provides ten years of protection on the mask works³² used to design semiconductor chips. In order to promote research and development, the Act also

27. See Copyright Remedy Clarification Act, Hearings on HR1131 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 101st Cong, 1st Sess 5 (1989) (statement of Ralph Oman); Hearings on Computers and Intellectual Property before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House committee on the Judiciary, 101st Cong, 2d Sess 100, 161 (1990) (statements of Leo J. Raskind and Ronald T. Reiling).

28. Robert W. Kastenmeier, *Copyright in an Era of Technological Change: A Political Perspective*, 14 Col-VLA J L & Arts 1, 9 (1989).

29. *Id.*

30. Pub L No 98-620, 98 Stat 3335, 3347, codified at 17 USC §§ 901-914 (1988).

31. Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 Minn L Rev 417, 465 (1985).

32. "Masks" are stencils or templates used in the semiconductor manufacturing process. A "mask work" is defined in the Act as a "series of related images, however fixed or encoded (A) having or representing the predetermined, three dimensional pattern of metallic, insulating or semiconductor material present or removed from the layers of a semiconductor chip product; and (B) in which series the relation of the images to one another is that each image has the pattern of the surface of one form of the semiconductor chip product" 17 USC § 901(a)(2) (Supp 1992). For

legitimizes certain forms of reverse engineering, a scientific approach used by the industry to create a new semiconductor chip product by detailed analysis of another chip. The concept of reverse engineering is sometimes compared to the copyright law's concepts of "fair use" and of copying "ideas" rather than "expression." Finally, the Act paved the way for international protection of semiconductor chip designs. As Kastenmeier observed, "the legislation represents the first expansion in a century of the legal protection of intellectual property in [the United States]."³³

Finally, atop these attainments is the Berne Convention Implementation Act of 1988.³⁴ In 1988, the United States, after thinking about it for close to a century, fulfilled its "manifest copyright destiny"³⁵ and joined the world's oldest and most prestigious copyright treaty. By virtue of membership in the Berne Union, the United States joined more than eighty other nations, some twenty-five with which we did not previously have copyright relations. More importantly, this country improved its ability to insist on Berne-level standards for a modern, international copyright order. Today, there is a constructive synergy between the Berne Union and the General Agreement on Tariffs and Trade ("GATT"), the charter of the world's trading system.

The first visible sign of congressional interest in the Berne Convention emerged in 1985 after a fifty-year hibernation when Mr. Kastenmeier's counterpart chairman in the Senate—Senator Charles McC. Mathias, Jr., of Maryland—held a hearing on the subject and ultimately introduced implementing legislation. Shortly thereafter, Mathias retired and handed the tiller to Kastenmeier.

The political winds were favorable. Kastenmeier developed a bill with the ranking minority member of his subcommittee (Carlos Moorhead), introduced it, and held extensive hearings on the subject.³⁶ In a precedent-setting move, the Subcommittee held two days of foreign consultations at the World Intellectual Property Organization in Geneva, Switzerland, and heard from international experts. The Subcommittee learned that the price for U.S. membership in the Berne Union was quite low.³⁷ A minimalist approach, as contemplated in the Kastenmeier bill, could work. And it did.

Kastenmeier ranked other statutory reforms high on his list of legislative accomplishments: prohibition of piracy of sound recordings;³⁸ extension of

more information about semiconductor technology and the Act, see Richard H. Stern, *Semiconductor Chip Protection* § 1.1 (Law and Business, 1986).

33. *Intellectual Property*, Wash Post A14 (Jan 8, 1985).

34. Berne Convention Implementation Act of 1988, Pub L No 100-568, 102 Stat 2853.

35. Ralph Oman, *First Thoughts on United States Entry into the Berne Union* 1 (address to the U.S. Copyright Society, Dec 9, 1988).

36. Berne Convention Implementation Act of 1987, Hearings on HR1263 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 1st & 2d Sess, 100th Cong (1987-88).

37. *Id* at 1135-1217 (roundtable discussion with representatives of member nations of the Berne Convention).

38. Act of October 15, 1971, Pub L No 92-140, 85 Stat 391.

the manufacturing clause of the copyright law;³⁹ Record Rental Amendments Act of 1984;⁴⁰ low power television copyright amendments;⁴¹ Satellite Home Viewer Act of 1988;⁴² Copyright Sovereign Immunity;⁴³ Visual Artists Rights Act of 1990;⁴⁴ Architectural Works Copyright Protection Act;⁴⁵ and the Computer Software Rental Amendments Act of 1990.⁴⁶

Legislative successes should not merely be measured in terms of public laws, however. Some of Congress' greatest achievements come in the form of what it does not do, the mistakes it does not make. During the past two decades, the Subcommittee considered, but did not enact, proposals relating to cable television reform, performers' royalties, source licensing, video first sale reform, moral rights, works-made-for-hire, and industrial design protection, fair use, and renewal.

It is in the political nature of things that there will always be an unfinished legislative agenda. Kastenmeier left work to his successors on these measures and others caused by the busy intersections of trade policy and intellectual property, and technological change and copyright.⁴⁷

IV

THE LEGACY

Instructive as are express compliments and palpable accomplishments, they still fail to reveal the essence of the man. To my mind, what so distinguished Kastenmeier was his commitment to several core procedural principles—balance, thoughtfulness, and fairness—which, in combination, contributed to the effectuation of a solid substantive work-product.

Nothing characterizes the Kastenmeier style more than the phrase "deliberate and evenhanded."⁴⁸ It is not surprising that Kastenmeier embraced the thinking of Professor David Lange of the Duke University School of Law about the establishment of a "civil procedure" for copyright law reform: a methodology imposing the legislative equivalent of burdens of proof to be met by the proponents of increased protection or protection of a new interest.⁴⁹

39. Act of July 13, 1982, Pub L No 97-215, 96 Stat 178 (overriding a Presidential veto). With Mr. Kastenmeier's agreement, the manufacturing clause was allowed to lapse on July 1, 1986.

40. Act of October 4, 1984, Pub L No 98-450, 98 Stat 1727.

41. Act of August 27, 1986, Pub L No 99-397, 100 Stat 848.

42. Act of November 16, 1988, Pub L No 100-667 (Title II), 102 Stat 3949.

43. Act of November 15, 1990, Pub L No 101-553, 104 Stat 2749.

44. Act of December 1, 1990, Pub L No 101-650 (Title VI), 104 Stat 5089.

45. *Id* at Title VII, 104 Stat at 5133.

46. *Id* at Title VIII, 104 Stat at 5134.

47. See, for example, Hearings on Copyright and Technological Change before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 98th Cong, 1st Sess (1983); Hearings on Intellectual Property and Trade before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 100th Cong, 1st Sess (1987); Hearings on Computers and Intellectual Property (cited in note 27).

48. Lardner, *Fast Forward* at 212 (cited in note 4).

49. Hearings on Copyright and Technological Change (cited in note 47).

Imposition of a series of questions—lobbyists called them “hoops”—inevitably led commercial interests to confront the proposition that copyright reform must balance the equities between the proprietary rights of authors and the distribution rights of entrepreneurs, on one hand, and the public interest, on the other.⁵⁰

Kastenmeier observed on more than one occasion that “copyright is a body of law which must accommodate the interests of three groups in our society: authors, distributors (including publishers), and consumers.”⁵¹ A three-legged stool is the result. The creative and personal use of copyrighted materials (one leg) may come into conflict with the goal of distributors and entrepreneurs to control commercial use (another leg). If one leg is to be dramatically shortened, then the stool will tip or fall. To complicate matters further, members of the various groups sometimes have different positions at different times. A history writer, for example, may wish to be free to quote others liberally but may not want to be so quoted without compensation. A distribution interest, such as cable television, may wish to transmit another’s work pursuant to a compulsory licensing scheme but may not want to be subjected to a price discrimination scheme. Only the consumer’s position is consistent: he or she wishes to have access to a wide variety of materials at the lowest possible price.

The three-legged stool approach is a departure from the traditional binary view of copyright as being the allocation of rights between authors and users.⁵² The political problem of considering disparate views, of course, is made all the more complicated by the fact that copyright law deals with the flow of information, the lifeline of a free society. And, all the while, the economic implications are expanding rapidly in a global village. Like a lighthouse beacon, one thing remained clear under the guiding hand of Kastenmeier: copyright is a grant of a limited statutory monopoly designed to stimulate good for the public.

In order to achieve sound public policy results, Chairman Kastenmeier often sought advice from individuals who did not belong to any of the interest groups, but stood above the fray. Copyright law professors were often solicited to testify in person or at least share their thoughts in writing. As an integral part of their service to the public, many of these professors testified in person before the Subcommittee.⁵³ The printed record for virtually all of the House hearings on copyright matters reveals the thinking of copyright experts who were not paid for their thoughts.⁵⁴ Confidentially to staff, however,

50. See generally L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (U Georgia Press, 1991).

51. Robert W. Kastenmeier, *Foreword* to *id* at xi.

52. Craig Joyce, et al, *Copyright Law* 19-20 (Mathew Bender, 2d ed 1991).

53. Interestingly enough, many of these academics have contributed articles to this issue of *Law and Contemporary Problems*, including David Lange, Ralph Brown, Paul Goldstein, Leo Raskind, Ray Patterson, Peter Jaszi, and Pamela Samuelson.

54. Under the strong leadership of the Register of Copyrights, the Copyright Office has always played a significant role in the Subcommittee’s decisionmaking process.

Kastenmeier bemoaned the fact that law professors increasingly are offered financial recompense and are lured into becoming hired guns for private interests, being paid for their congressional testimony and arguably tailoring their views for the client.

One of Congressman Kastenmeier's lasting legacies will be the open process that he utilized in considering legislative proposals. In 1970 he stimulated and presided over the first open mark-up (drafting) of a bill in the history of the United States Congress. Kastenmeier personally convinced the then-chair of the House Judiciary Committee, Emanuel Celler—a formidable obstacle to innovations by Subcommittee chairs—to permit an open drafting session. “[D]espite the special preparation of wearing blue shirts for television cameras, the first great open American mark-up was a bust.”⁵⁵ Except for a few staffers, the committee room was empty. Even the press missed the historic precedent, which today is taken for granted and considered to have always been part-and-parcel of the congressional process. Imagine the uproar in the trade press and the private sector that would ensue today if a controversial copyright measure were marked-up in closed session.

The Subcommittee, under Kastenmeier's guiding hand, was always scrupulously fair. The rules were obeyed even when, as was sometimes the case, invocation of a rule inured to the benefit of the minority (the Republican Party during Kastenmeier's entire tenure in the House Of Representatives). To the point of being maddening, Kastenmeier refused to gavel to order Subcommittee hearings without the presence of a minority member, even if in the spirit of cooperation the Republican counsel sought to waive procedural rights.

Anyone who knows Congressman Kastenmeier well is aware of his propensity to root for the underdog, be it in the World Series, the National Basketball Association, or in society at large. His empathy for the downtrodden is legendary. His exercise of political power invariably reflected a scrupulous awareness and respect for minority rights. A former Republican member of his Subcommittee and now U.S. Senator, William Cohen, once paid tribute to Kastenmeier by referring to him as the fairest man that he had ever met.⁵⁶

An integral part of fairness is patience, and Kastenmeier was never in a hurry. He has been applauded for having an “iron derriere.”⁵⁷ His ability to sit patiently before witnesses, listening attentively, literally knew no bounds. As a general proposition, he refused to enforce the five-minute rule both for the presentation of oral statements by witnesses and for member questioning of the witnesses. I have a vivid memory of an incensed Subcommittee

55. Abner J. Mikva & Patti B. Saris, *The American Congress: The First Branch* 129 (Franklin Watts, 1983).

56. Conversation with the Honorable William Cohen, United States senator and former member of the House Judiciary Committee.

57. Conversation with the Honorable Abner J. Mikva, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and former member of the House Judiciary Committee (March 1992).

member (Father Robert Drinan) pointing to his wrist watch, to no avail, then removing the watch and conveying it down the dais to the Chairman's side, again without success.

Courtesy, kindness, and gentility are also components of Congressman Kastenmeier's personality and were daily reflected in the Subcommittee's operation.

It would, however, be wrong to conclude that Kastenmeier was all process and no substance. He worked long and hard to understand every subject before the Subcommittee, mastering the legal, technological, and economic ramifications of proposals before allowing them to move forward, and complaining only about getting too much paper from his staff. His self-imposed challenge was to be capable of explaining the "nuts and bolts" of any technical measure or legal issue to his generalist colleagues on the House floor. Kastenmeier was old-fashioned in his belief that staff, notwithstanding their expertise, should not be allowed to participate in activities reserved for elected representatives, be it the questioning of witnesses, convening of caucuses, offering of amendments, or voting. Hearings were designed to teach the members and not the staff. This is the way it should be.

Democracy is a matter of principles, not just procedures and rules. Kastenmeier was a true democrat with vision and values. Procedure and substance merged in the man to form a core commitment to public service as a lofty calling, a calling of his lifetime. Service to the public is instrumental to this country's future. But to be successful, public service must be responsive to the political will of the people, preserve and protect core constitutional values, maintain the highest ethical standards, cope with increasing societal complexity and conflict, attract young and talented individuals, and promote a partnership between public and private interests. Congressman Kastenmeier, as teacher and boundary setter, provided a formula for success. He can leave no greater legacy than his example.

The copyright mantle has now passed to a new Subcommittee chair, William J. Hughes, who is diligent, dynamic, intelligent, and industrious. He has expressed a clear understanding of his predecessor's record, stating that "like Rickey Henderson's stolen base record, [it] will be hard to beat."⁵⁸ More importantly, he placed the copyright community on notice that "under Bob Kastenmeier's leadership, the Subcommittee compiled a record of balance and diligence that I intend to continue."⁵⁹

V

CONCLUSION

It is a sad fact about contemporary life that we tend to celebrate achievements of friends and colleagues only when they retire or die. These

58. William J. Hughes, *Computer Software and Intellectual Property: Climate for Innovation for the 1990s* 4 (transcribed remarks to the Annenberg Washington Program, May 21, 1991).

59. *Id.*

often are sad occasions. In comparison, a political defeat can and should be the subject of celebration because at least it can be said that the honoree fell on the political battlefield with flags flying proudly and principles intact.

Members of Congress live with the flush of victory but also with the specter of defeat. In the words of Congressman Henry Hyde, the best members are those who "look beyond the biennial contest of power"⁶⁰ and are "more committed to public service as a vocation . . . than merely a career."⁶¹ Bob Kastenmeier was such a member.

60. *Things Worth Losing For*, Wash Post § 1 A13 (Dec 3, 1990).

61. *Id.*