Marquette Intellectual Property & Innovation Law Review

Volume 26 | Issue 2 Article 6

Summer 2022

Justice Breyer and Intellectual Property Law

JUSTICE BREYER AND INTELLECTUAL PROPERTY LAW

DANIEL SIEVERT

I. INTRODUCTION

When President Bill Clinton nominated Stephen Breyer to the Supreme Court, the collective American public became optimistic that a justice with an intellectual property background would provide greater clarity in resolving—or appropriately refraining from intervening in—issues involving intellectual property law. In particular, academics were encouraged by Breyer's approach to statutory review, an approach expected to serve as a "Clinton counterweight to President Reagan's appointment of Justice Antonin Scalia."[1] Breyer's pragmatic approach to, and view, of administrative law allowed for the belief in a renewed agency state, a thought perverse to the Reagan and Bush Administrations.[2]

But while the America that existed at the time of Justice Breyer's confirmation shares many similarities with the America of today, much has changed. The 21st century economy provokes the consideration of issues facing consumers that require logical and sound judicial decisions. In the years since his confirmation in 1994, Justice Breyer has authored numerous decisions,

1. *See* Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755 (1995).

2. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); *See also* Walter E. Joyce, *The Early Constitutional Jurisprudence of Justice Stephen G. Breyer: A Study of the Justice's First Year on the United States Supreme Court*, 7 SETON HALL CONST. L. J. 149, 162–63 (1996).

several of which claim an influential status. Also in that time, the Supreme Court has shown a greater interest in granting certiorari on matters involving intellectual property, giving Justice Breyer an opportunity to apply his philosophy.

However, a question exists if Justice Breyer's intellectual property background has contributed to a coherent intellectual property jurisprudence, and if so, how will Justice Breyer's written contributions influence future decisions when his voice has left the court?

Despite a lack of cohesion on the bench, Justice Breyer, as one of intellectual property law's most prominent jurists, has written sound decisions that have and will continue to shape intellectual property law. Moreover, the weight of Justice Breyer's arguments are sufficient to overcome any type of ideological schism, and Justice Breyer will continue to articulate valuable opinions addressing new complexities in intellectual property law.

In this Comment, I will first survey Justice Breyer's non-judicial writings to establish his background in intellectual property law and judicial philosophy. Section III will then survey Justice Breyer's contributions through his majority opinions, while Section IV will articulate Justice Breyer's influence on intellectual property law with these opinions.

II. NON-JUDICIAL WRITINGS

Before appointment to the Court, Breyer worked in academia,[3] crafting a judicial philosophy in the theoretical sense. His most important contribution during this time was a law review article titled *The Uneasy Case for Copyrights: A Study of Copyright in Books, Photocopies, and Computer Programs*,[4] wherein he introduces his skepticism of the institution of copyrights and warns against future expansions.[5]

Written in the context of the 1909 Copyright Act,[6] Breyer was concerned copyright law impeded economic and social progress by stemming the flow of information.[7] Discussions of reforms at the time did not adequately address this concern, leading to his belief that an alternative system would better promote social welfare.[8] Although the article does not mention the Constitution, Breyer

3. *See Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (last visited March 24, 2021).

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

5. *Id.* at 284, 321–23, 350–51.

6. Congress would pass copyright reform six years later in the Copyright Act of 1976.

7. Breyer, *supra* note 4, at 286–87.

8. *See id.* at 316–18.

articulates that the operative effect of the Copyright Clause[9] is the "creation and dissemination of information"[10] which had "various spillover benefits similar to those provided by the original distribution of the works copied."[11] This skepticism extended to patent law, as patents prevented the dissemination of knowledge about the underlying invention.[12] Therefore, Breyer believed copyright law threatened to impose a heavy transactional-costs burden, which extended beyond the immediate parties to unknown members of society as a whole.[13]

Even after transitioning out of academia, Breyer continued to articulate concern over the application of the Copyright Clause. *Active Liberty*, a book written in 2005 and revised in 2008, perhaps best articulates the basis for such concern.[14] As Breyer understands, courts should incorporate the Constitution's democratic nature when interpreting constitutional and statutory text.[15] This democratic nature did not simply protect individuals from a tyrannical government[16] but also provided for "an active and constant participation in collective power."[17] This is what Breyer refers to as "active liberty."[18] Thus, when courts consider constitutional or statutory texts, a more accurate interpretation will incorporate the theme of active liberty.[19]

Breyer demonstrates this principle by articulating its implications on the First Amendment. Often a court's first step when interpreting a statute, particularly one that relates to speech, is to apply the appropriate standard of review. Breyer argues that understanding a standard of review's implications on active liberty can more accurately interpret a statute and justify a court's decision.[20] For example, statutes limiting campaign contributions naturally affect the political speech opportunities of anyone seeking to contribute in excess of those limits. But do these statutes negatively impact an individual's

9. U.S. CONST. art. I, § 8, cl. 8. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

10. *Eldred v. Ashcroft*, 537 U.S. 186, 244 (2003) (Breyer, J., dissenting).

11. Breyer, *supra* note 4, at 318.

12. Dmitry Karshtedt, *Photocopies, Patents, and Knowledge Transfer: 'The Uneasy Case' of Justice Breyer's Patentable Subject Matter Jurisprudence*, 69 VANDERBILT L. REV. 1739, 1751 (2016).

13. Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75, 80 (1972).

14. *See generally* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* (Oxford Univ. Press ed. 2008).

15. *Id.* at 11.

16. *See id*. (Breyer refers to this type of liberty as modern liberty).

17. *Id.* at 10.

18. *See id.* at 25-26.

19. *Id.* at 27.

20. *Id.*at 37.

First Amendment rights? Certainly, so Breyer argues a court must consider the statute's impact on individuals informed participation in the electoral process[21] in addition to the negative impacts on wealthier citizens.[22]

As statutory and constitutional texts are ambiguous,[23] courts are best served by balancing a decision against the Constitution's theme of protecting against government intrusion (i.e., negative liberty) and preserving individuals' participation in government (i.e., active liberty).[24] In so doing, a court's precedent is strengthened and America's democratic form of government is better equipped to more effectively deal with modern regulatory problems.[25] Breyer's written decisions applied this philosophy and left an indelible mark on the Supreme Court's intellectual property jurisprudence.

III. MAJORITY OPINIONS

A. *Patents*

Justice Breyer wrote several Court decisions involving patent issues in which he clarified various matters through his pragmatic interpretative methodology while incorporating his general skepticism of patent law. In *Mayo Collaborative Services v. Prometheus Laboratories Inc.*, the Court reasserted its long-held contention that "laws of nature, natural phenomena, and abstract ideas" are not patentable[26] unless additional steps transformed the process into an inventive application.[27] In this way, Justice Breyer is balancing a fine line as all inventions, on some level, rely on laws of nature, natural phenomena, or abstract ideas.[28] To balance this concept, Justice Breyer posited a two-part test. First, one must determine if the claim is directed to a patent-ineligible concept—law of nature, natural phenomena, or abstract ideas.[29] If so, one must move to the next step and begin a search for an inventive concept sufficient to transform the ineligible concept into an eligible application.[30] In order to

21. *Id.* at 41.

22. *Id.* at 43.

23. Terry Gross, *Justice Breyer: The Court, the Cases and Conflicts*, NPR (Sept. 14, 2010), http://www.npr.org/templates/story/story.php?storyId=129831688. In an interview with Terry Gross, Justice Breyer remarked that "[m]uch in the Constitution is written in a very general way. Words like 'freedom of speech' do not define themselves. Nor does the word 'liberty.'"

24. *See* Breyer, *supra* note 14, at 49.

25. *Id.* at 50.

26. *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).

27. *See Generally Mayo Collaborative*, 566 U.S. at 71.

28. *Mayo Collaborative*, 566 U.S. at 71; *See also Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

29. *See Mayo Collaborative*, 566 U.S. at 77.

30. *Id*. at 72, 80.

sufficiently transform an ineligible concept, Justice Breyer hesitates to endorse a bright line test but rather clarifies what will fail to accomplish this task.[31] In this way, Justice Breyer gives the United States Patent and Trade Office (USPTO) and courts a template for future deliberation beyond the facts contemplated by the Court in *Mayo*.[32]

The Court justified this test because to allow such a monopolization of essential information would "impede innovation more than it would promote it,"[33] as the patent would merely append conventional steps limited to that which is well-understood.[34] Justice Breyer expresses his skepticism of patent law when the court emphasized the patent's impact on future discoveries.[35] If a patent with insufficient inventive application may assume "the basic tools of scientific and technological work," the consequences would severely impede the flow of information to generate an advancement of social welfare.[36] This concern for the singular control of an essential building block is repeated by future courts in settling claims beyond the medical processes described in *Mayo*.[37]

Despite widespread criticism,[38] Justice Breyer's emphasis on a patent's impact to future discoveries has forced subsequent patent claimants to more narrowly draft claims.[39] Additionally, the *Mayo* opinion demonstrates Justice Breyer's impact on copyright philosophy as the concern for the flow of information is paramount when balancing the right to protect one's innovation and the benefit to a community. Justice Breyer acknowledges and promotes

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31. *See id.* at 72, 77–78.

32. *See* USPTO, MANUAL OF PATENT EXAMINING PROCEDURE, 2106.01 SUBJECT MATTER ELIGIBILITY ANALYSIS OF PROCESS CLAIMS INVOLVING LAWS OF NATURE R-9 (June 2020).

33. *Mayo Collaborative*, 566 U.S. at 71; *See also* U.S. CONST. art. I, § 8, cl. 8.

34. *Mayo Collaborative*, 566 U.S. at 82.

35. *See id.* at 85–87.

36. *Id.* at 86 (quoting *Gottschalk v. Benson*, 93 S. Ct. 253, 255 (1972)).

37. *See Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 217 (2014) (applying to a patent for a computer-implemented scheme for mitigating settlement risk); *See Voter Verified, Inc. v. Election Sys. & Software, Inc.*, 2017 U.S. Dist. LEXIS 215091, 3-4.

38. *See* Gene Quinn, *Killing Industry: The Supreme Court Blows Mayo v. Prometheus*, IP WATCHDOG (March 20, 2012), www.ipwatchdog.com/2012/03/20/supreme-court-mayo-v-prometheus/id=22920/; *See* Kevin Noonan, *Mayo Collaborative Services v. Prometheus Laboratories—What the Court's Decision Means*, PATENT DOCS (March 22, 2012), www.patentdocs.org/2012/03/mayo-collaborative-services-v-prometheus-laboratories-what-the-courts-decision-means.html; *See* Robert R. Sachs, *Punishing Prometheus: The Supreme Court's Blunders in Mayo v. Prometheus*, PATENTLY-O (March 26, 2012), www.patentlyo.com/patent/2012/03/punishing-prometheus-part-ii-what-is-a-claim.html.

39. *See* Ayush Verma, *Patent-eligible matter after Mayo v. Prometheus case in the US*, IPLEADERS (Sept. 17, 2020), https://blog.ipleaders.in/patent-eligible-matter-mayo-v-prometheus-case-us/.

entrepreneurship but not at the expense of an individual absconding the direct and indirect benefits to a community for oneself.

In *Teva Pharmaceutical USA, Inc. v. Sandoz, Inc.*, the Court held that an appellate court must apply a clear error standard when reviewing the resolution of subsidiary factual matters in the course of a patent claim's construction.[40] The Court's reasoning relied heavily on analogous precedent with an acknowledgement that practical considerations support a clearly erroneous standard as well.[41] Patent law depends on a familiarity with specific principles "'not usually contained in the general storehouse of knowledge and experience.'"[42] Therefore, courts should be deferential to those with greater familiarity.[43]

However, the dissent stated more explicitly what Justice Breyer's majority opinion only does so implicitly.[44] Justice Thomas articulated that the court's decision is determined by appropriately defining the terms "findings of fact" and "conclusions of law."[45] To do so, Justice Thomas inquired of the terms original intent or how they were defined at the time of their creation—a statutory interpretation method called "originalism."[46]

Justice Breyer rejected this approach because the proclaimed objectivity of originalist statutory intepretation is often rather subjective.[47] By narrowly focusing on the original intent, courts transform themselves from judges into historians, embedded in a field with only limited instances of historical agreement.[48] Instead, Justice Breyer embraced a pragmatic approach that incorporates a host of factors to interpret ambiguous text; such as, "textual language, history, context, relevant traditions, precedent, purposes, and consequences."[49] That the majority opinion in *Teva Pharmaceutical* was joined by Justice Scalia demonstrates Justice Breyer's ability to form a consensus around an interpretative methodology not otherwise expressly embraced by other justices.[50] By implicitly stating a concern for the consequences of interpretation, Justice Breyer established that in at least some instances, a

40. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 322 (2015).

41. *Id.* at 327.

42. *Id.* (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 610 (1950)).

43. *See id.*

44. *See id.* at 337 (Thomas, J., dissenting).

45. *Id.*

46. *See id.* at 337–338.

47. *See Generally* STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 76 (Alfred A. Knopf ed. 2010).

48. *Id.* at 77.

49. *Id.* at 81.

50. *See Teva Pharms.*, 574 U.S. at 318.

pragmatic interpretation of ambiguity is a necessary tool in patent law jurisprudence.[51]

Justice Breyer applies this pragmatic interpretive methodology again in *Cuozzo Speed Technologies, LLC v. Lee*, while again demonstrating his skepticism of patents as a whole.[52] In *Cuozzo Speed*, the Court held that the Patent Office's inter partes review under section 35 U.S.C. § 314(d) shall be final and non-appealable.[53] The Court cited in its reasoning the "overall statutory scheme, its role alongside the Administrative Procedure Act, the prior interpretation of similar patent statutes, and Congress' purpose in crafting inter partes review."[54] While acknowledging the strong presumption of judicial review, Justice Breyer maintained that a strong legislative intent may overcome such precedent.[55]

The pragmatism of this approach demonstrates Justice Breyer's belief in a democratic system that enables institutions to achieve objectives a society deems important.[56] In this instance, the objective being the narrowly created process wherein the Patent Office's decision to reexamine a patent claim is barred from judicial review.[57] Although Justice Breyer does not have the authority to dictate public policy in the same way Congress does, the consequences of inter partes review aligns with Justice Breyer's concerns over patent law.

By effectuating an expedited and less expensive alternative to litigation, the threat of an inter partes review forces patent owners to either strengthen their claims or forgo weak patents altogether.[58] In this way, the flow of information may continue its beneficial current across society.[59]

But the majority opinion also held the standard of review developed by the Patent Office was a reasonable exercise of rulemaking authority.[60] The broadest reasonable construction standard is appropriate because it encourages

51. *See id.* at 327.

52. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142, 2144–2145 (2016).

53. *Id.* at 2139.

54. *Id.* at 2141. The reasoning perfectly follows the factors Breyer articulates as the basis for his pragmatic interpretation in *Making Our Democracy Work*. Breyer, *supra* note 47, at 81.

55. *Cuozzo Speed*, 136 S. Ct. at 2140.

56. Breyer, *supra* note 14, at 49.

57. *See Cuozzo Speed*, 136 S. Ct. at 2137.

58. Barbara Jones, *Supreme Court Upholds Patent Agency's Rules*, AARP, https://www.aarp.org/aarp-foundation/our-work/legal-advocacy/info-2016/Cuozzo-Speed-Technology-v-Lee.html (last visited Mar. 13, 2021).

59. *See* Brief for AARP as Amicus Curiae Supporting Respondent at 11–14; *also see generally Cuozzo Speech*, 136 S. Ct.

60. *Cuozzo Speed*, 136 S. Ct. at 2144.

applicants to narrowly draft claims, thereby limiting the knowledge monopoly and allowing a flow of information to the public as a whole.[61]

This agency-deference is a continuation of the precedent created in *Dickinson* several years earlier where a Justice Breyer written-decision established a court-agency standard of review for the USPTO.[62] Furthermore, Justice Breyer wrote for a unanimous court when articulating the reasons for supporting the agency's standard of review.[63] This unequivocal adoption further demonstrates Justice Breyer's ability to extend the presiding academic skepticism of patents to mainstream judicial precedent.

Justice Breyer's consequential decisions in *Mayo*, *Teva*, and *Cuozzo* demonstrate his ability to affect patent law jurisprudence with elements of his general skepticism. The opinions articulate how, despite so-called "originalist" claims to the contrary,[64] Justice Breyer does not unilaterally craft public policy but rather utilizes a host of factors to establish logically sufficient jurisprudence that clarifies existing disputes. True to his arguments in various writings,[65] the holdings and reasonings better enable democratic institutions to respond to issues while functioning more efficiently.

B. *Trademark*

Justice Breyer wrote for a unanimous Court in *Qualitex v. Jacobson Products. Inc.*, where trademark law seemingly expanded in profound ways—embracing the legitimacy of a new mark on the basis of color.[66] The question then becomes, how does such an intellectual property law skeptic not only support but come to write a unanimous decision of this magnitude? By analyzing the holding and subsequent reasoning, one may see application of Justice Breyer's respect for the limited authority of the judiciary, while at the same time preserving his prior skepticism of intellectual property law.

Justice Breyer wrote *Qualitex* in 1995, seven months after his Senate confirmation, where the Court held that a color may sometimes meet the basic legal requirements for use as a trademark.[67] In his reasoning, Justice Breyer referred to the textual language of the Lanham Act as well as the underlying

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61. *Id.* at 2145; *See Eldred v. Ashcroft*, 537 U.S. 186, 244 (Breyer, J. dissenting); BREYER, *supra* note 4, at 318.

62. *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999).

63. *See Cuozzo Speed*, 136 S. Ct. at 2149, n.1 (J., Alito, dissenting).

64. *See* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 76 (2006).

65. *See* BREYER, *supra* note 14; *See* BREYER, *supra* note 2; *See also* BREYER, *supra* note 47.

66. *Qualitex Co., v. Jacobson Prods. Co.*, 514 U.S. 159, 161 (1995).

67. *Id.* at 174.

principles of trademark law.[68] Since the Lanham Act described trademarks as including "any word, name, symbol, or device, or any combination thereof," the proper reading was certainly an expansive interpretation.[69] Moreover, Justice Breyer's consideration of an interpretation's consequences was made clear by the progression of his reasoning. By utilizing deductive reasoning, he tests the logical sufficiency of a color-based trademark on previously established marks.[70] In this, Justice Breyer inquires if a color is any different than previously established trademarks, such as shapes, sounds, and fragrances.[71] Or in other words, if a color met the statutory definition, would the consequences be any different than the impact that shapes, sounds, and fragrances have had on trademark law?[72] Unanimously, the Court answered no.

Despite his reservations on other components of intellectual property law, Justice Breyer implicitly endorses several doctrines as protections against the monopolization of information, which serves to protect community benefits. The functionality doctrine would act to prevent a trademark holder of depriving the public of useful features.[73] A product attaining secondary meaning serves to empower the public to be more assured of their desired purchase by removing disguised imposters.[74] In this same way, consumers are rewarded because businesses are incentivized to consistently produce quality products. "In principle, trademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions,' for it quickly and easily assures a potential customer that this item-the item with this mark-is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past."[75]

This balance between protecting both a mark-holder and a community is achieved by shaping trademark law on a First Amendment foundation. *Qualitex* recognizes this and protects a "mark-holder's investment of time, energy, and money in advertising and selling a quality product under a source-identifying

68. *Id.* at 162.

69. *Id.*

70. *Id.* at 162–163.

71. *Id.* at 162.

72. *See id.*

73. *Id.* at 164; *See also* Vanja Vidackovic, *Christian Louboutin v. Yves Saint Laurent: "Trademark Use" Stomps its Red Heels on "Likelihood of Confusion"*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 463, 468-69 (2013).

74. *Id.* at 163-64; *See also* Kristi L. Davidson, *Supreme Court Says Yes to Color, Pure and Simple: Qualitex Co. v. Jacobson Products Co., 115 S. Ct. 1300 (1995)*, 21 U. DAYTON L. REV. 855, 871 (1996).

75. *Id.* at 163–64; *See also* Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1105 (2005).

mark" but conditions that protection on its source-distinguishing ability and not on its ontological status.[76]

When *Qualitex* is viewed through this frame, it demonstrates how Justice Breyer can incorporate the public policy reasons for his skepticism while still articulating a logically sufficient decision.[77] This fidelity to the progress of society as a whole is a theme carried through the majority decisions written by Justice Breyer.[78]

Justice Breyer demonstrated his pragmatism again several years later in *Dickinson v. Zurko*. The Court held that the proper standard of review for the Federal Circuit in reviewing findings of fact made by the USPTO is specified in 5 U.S.C. § 706.[79] This court–agency review differed from the standard of review specified by Federal Rule of Civil Procedure 52(a), a stricter standard normally applied in court–court review. In reversing the lower court's acceptance of the "clearly erroneous" standard found in FRCP 52(a), Justice Breyer reasoned that the USPTO is an "agency" as defined by the Administrative Procedure Act (APA).[80] Therefore, unless an exemption exists, the appropriate standard of review is that which is specified in the APA.[81]

Justice Breyer found no exception could overcome the strong deference given to a statutory intent despite reviewing 89 cases which embody the pre-APA standard of review.[82] Those cases, instead, demonstrated the greater deference given to agency fact-finding.[83] While the cases may utilize phrases such as "manifest error" or "clearly wrong," the linguistic context of those phrases point to a deference to institutions where technical complexity is resolved appropriately.[84]

Justice Breyer produced policy arguments for preserving such deference, reasoning that the value of patent-related review experience will ensure proper

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76. Ramsey, *supra* note 75, at 1105.

77. *See, e.g., I.P. Lund Trading Aps & Kroin v. Kohler Co.*, 163 F.3d 27, 36 (1st Cir. Mass. 1998); *Bern Unlimited, Inc. v. Burton Corp.*, 2013 U.S. Dist. LEXIS 69012, 108 U.S.P.Q.2d (BNA) 1078, 1081; *Flexible Steel Lacing Co. v. Conveyer Accessories, Inc.*, 2019 U.S. Dist. LEXIS 74469, P15.

78. *Compare Qualitex* Co., 514 U.S. 159, *with United States PTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2309 (2020) (arguing that granting trademark status to a generic term violates sound trademark policy).

79. *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999). It should be noted Breyer concedes the use of either standard would not change the outcome of any reviewed decision.

80. *Id.* at 154.

81. *Id.*

82. *Id.* at 155.

83. *Id.* at 160.

84. *Id.* at 160–161.

review.[85] Additionally, the APA standard of review places a greater emphasis on recorded facts; thereby, encouraging litigants to submit more evidence.[86] An emphasis on the weight of evidence will facilitate subsequent determinations of whether a decision was "arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence."[87] This less strict standard of review for agency decisions demonstrates Justice Breyer's affinity for supporting institutions designed to respond to issues of the day and empowering those institutions to safeguard the flow of information.[88] Justice Breyer's application of comparative expertise recognizes which institution is best positioned to understand the complexities that underlie a particular matter.[89] To justify this "attitude,"[90] Justice Breyer seeks to appropriately balance the authority granted to an agencies' decision making structure with citizens' duly elected representatives, Congress.[91]

C. *Copyright*

As foreign trade and the intermingling of global societies further develop the landscape of American intellectual property law, Justice Breyer has played a key role in maintaining the constitutionally granted objective of "promot[ing] the Progress of Science and useful Arts."[92]

More specifically, his decisions have curated the exclusive rights granted to copyrights and the geographic restrictions on applicable limitations of those rights. In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court held the Copyright Act's statutory language was not limited in geographic scope.[93] In a point of irony, Justice Breyer's majority opinion holds against an academic book publisher.[94] To justify this quasi-betrayal, Justice Breyer analyzed the language,

85. *Id.* at 163.

86. David J. Kera, *The Potential Effect of Dickinson v. Zurko on Appeals from the Trademark Trial and Appeal Board*, OBLON (June 1, 1999), https://www.oblon.com/news/the-potential-effect-of-dickinson-v-zurko-on-appeals-from-the-trademark-trial-and-appeal-board.

87. *Id.*

88. Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L. J. 269, 270 (2007); *See also* BLEICH ET. AL., THE CLINTON COURT 11 (2001).

89. BREYER, *supra* note 47, at 110.

90. *Id.* at 111. Breyer uses the word "attitude" to describe the standard of review. The choice of word is interesting because the word connotes a subjective choice courts make when applying a certain standard of review. A symptom of a pragmatic interpretative methodology, Breyer is implicitly demonstrating a conscious awareness of purpose and its role in his decisions.

91. *See id.* at 116.

92. U.S. CONST. art. I, § 8, cl. 8

93. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530 (2013).

94. The context is ironic because Justice Breyer's criticism of copyright law centered around its implications for academia.

context, and common-law history of the "first sale" doctrine, but he did not stop there.[95] Justice Breyer also considered if Congress would have intended to inflict copyright-related harms on his seemingly treasured institution, academia.[96]

Justice Breyer advanced a non-geographical reading of Section 109(a) because it is simple, promotes a traditional copyright objective, and makes linguistic sense.[97] Justice Breyer continued his defense by applying a canon of statutory interpretation—if a statute covers an area that was previously governed by common law, there is a presumption that "Congress intended to retain the substance of the common law."[98]

These defenses all help Justice Breyer preserve the simple purpose behind the Constitutional mandate in Article I, section 8, clause 8, and in so doing, protect against downstream control that could effectively curtail the flow of information.[99] If the Court were to adopt a geographical limitation on the "first sale" doctrine, the consequences could severely disrupt free trade and the distribution of information through academic institutions, museums, and second-hand book stores.[100] While Justice Breyer acknowledged the consequences of this alternative reality, he paired his defense of a non-geographical interpretation with established Supreme Court precedent. This reasoning helps explain the makeup of the 6–3 split (Justices Ginsburg, Kennedy, and Scalia dissented).

The dissent in *Kirtsaeng*, written by Justice Ginsburg, highlighted an important philosophical divide among the Court, even among individuals considered ideologically akin. Though both Justices Breyer and Ginsburg were acknowledged as members of the liberal wing, nominated by President Clinton within a year of each other, they shared different ideologies on the purpose of intellectual property. Justice Ginsburg made her philosophy known within the second sentence, writing that in this particular circumstance, the Congressional intent was "to protect copyright owners against the unauthorized importation of low-priced, foreign-made copies of their copyrighted works."[101] Although the majority and dissent chose to emphasize different exclusive rights,[102] the divergence highlighted a repeated theme in copyright cases.

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95. *Id.* at 529.

96. *Id.* at 530; BREYER, *supra* note 4, at 292–99.

97. *Kirtsaeng*, 568 U.S. at 530.

98. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010).

99. *Kirtsaeng*, 568 U.S. at 544.

100. *Id.* at 541–543.

101. *Id.* at 557 (Ginsburg, J., dissenting).

102. *See generally Id.* (Justice Breyer emphasizing 109(a) and Ginsburg emphasizing 602(a)(1)).

This Comment has attempted to define Justice Breyer's jurisprudence and discern if that jurisprudence can apply intellectual property law principles to emerging issues. An example of Justice Breyer's ability to apply copyright law to an admittedly ubiquitous technology in 2021, but a rather innovative service in 2012, was demonstrated in *ABC, Inc. v. Aereo*. Here the Court sought to apply the Copyright Act of 1976 and the Act's grant of an exclusive right to "perform the copyrighted work publicly" to an internet streaming service.[103] Justice Breyer simplified the issues in light of the complicated schema Aereo had devised.[104] The Court merely had to answer whether transmitting broadcast television over the internet constituted a "performance," and if that performance was public.[105] To Justice Breyer, the purpose of Congress's action in amending the Copyright Act in 1976 provided the contextual glue for the conclusion that Aereo was functioning effectively the same as a cable provider.[106]

While differences existed between the two technologies, the similarities they shared were too strong for an "invisible" technological difference to excuse copyright infringement.[107] The majority and dissent offered a contrast of interpretative methodologies, as Justice Breyer relied on a functionalist approach and Scalia claimed the formalist position. Justice Breyer's functionalism emphasized the pragmatic consequences, whereas Scalia's formalist approach focused on the technical details.[108]

While Justice Breyer ceded to Congress the authority to define the reaches of the Copyright Act on emerging technologies,[109] his functional methodology integrated "common law pragmatism to evaluate new technology under old laws."[110] Although failing to articulate a bright-line rule, much to the chagrin of critics,[111] Justice Breyer's holding gave weight to Congressional action while respecting the lines against policy making. A decision rooted in the intricacies of technical detail may provide greater predictability; however, Justice Breyer recognized that this type of decision may be rendered moot by the break-neck evolution at which technology is progressing. Therefore, *ABC v. Aereo*

103. *Id.*

104. *Id.*

105. *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 438 (2014).

106. *Id.* at 444; The Supreme Court 2013 Term, *Copyright Act of 1976-Transmit Clause-ABC, Inc. v. Aereo, Inc.*, 128 HARV. L. REV. 371, 374 (2014).

107. *Id.*

108. *Id.*.

109. *Id.*

110. The Supreme Court 2013 Term, *supra* note 105, at 378.

111. The Supreme Court 2013 Term, *supra* note 105, at 379.

demonstrated Justice Breyer's ability to establish foundational concepts for the integration of 20th century law with 21st century technology.

IV. BREYER'S INFLUENCE

In 1998, Gordon Shea inquired if Justice Breyer's intellectual property law background would shape Supreme Court jurisprudence (*Cite?*). Now, twenty years and dozens of opinions later, Justice Breyer's influence can be measured, albeit with an asterisk. Notably, his majority opinions demonstrate the Court's embrace of his pragmatic skepticism of intellectual property law. And even more importantly, this skepticism is embraced by individuals not considered ideological colleagues.

One of Justice Breyer's enduring legacies is the emergence of the USPTO as an agency, and its corresponding power.[112] Prior to joining the court, Justice Breyer wrote *Breaking the Vicious Circle: Toward Effective Risk Regulation*, where he argued against the notion that government was inherently flawed and nothing but a stumbling-block to the answers needed by American society.[113] While America was stuck in a vicious circle shaped by "public perception, Congressional reaction, and the uncertainties of the regulatory process"[114], the problem called for a more effective, predictable agency state.[115] This coordinated agency state would not necessarily be a bigger government, but rather it would be a smarter government, one that individuals could trust.

Justice Breyer effectuated a version of this by transforming the USPTO into an active regulatory-body—an important transformation for two reasons. First, as technologies emerge at a rapid pace, the associated regulations must be equal to the changes lest the purpose of trademark law be diminished. An agency is more nimble than other regulatory means, such as Congress, and can adapt to this changing environment. Second, and as established in *Cuozzo*, a Patent Office's decision to reexamine a patent claim is barred from judicial review. While the source of this review ultimately arrived from statute, the conferred power gives the USPTO greater authority in patent applications. The establishment of an agency state is perhaps what President Clinton had in mind

112. *See Cuozzo Speed*, 136 S. Ct. at 2131.

113. *Reagan Quotes and Speeches,* RONALD REAGAN PRESIDENTIAL FOUND. & INST., https://www.reaganfoundation.org/ronald-reagan/reagan-quotes-speeches/news-conference-1/(last visited January 13, 2022). This is in contrast to President Reagan's belief that the nine most feared words in the English language were "I'm from the government and I'm here to help."

114. BREYER, *supra* note 2, at 50.

115. *See* Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer's Fluid Conceptions of Freedom of Speech*, 79 ALB. L. REV. 403, 418–19 (2016); *See also* Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L. J. AM. U. 747, 749 (Winter 1995).

when he appointed Justice Breyer, a counterweight to the President Regan appointments.[116]

Save for this emerging agency state, Justice Breyer's legacy may rest in his convergence of intellectual property law with the First Amendment. Perhaps this is best summarized by his semi-reflective work *Active Liberty*, where he espoused a theme of his decisions and how they have addressed constitutional issues. Although not a theory of interpretation, Justice Breyer nonetheless adopted an attitude he believes the Constitution advances—the protection against government intrusion (i.e., negative liberty) and the preservation of citizen involvement (i.e., active liberty).[117] He intertwined active liberty with the First Amendment to suggest that a purpose of the amendment is "to encourage the exchange of information and ideas necessary for citizens themselves to shape that 'public opinion, which is the final source of government in a democratic state.'"[118]

While not ignoring the more well-understood meaning of the amendment,[119] Justice Breyer used this attitude of the First Amendment to shape intellectual property law. But the jurisprudence created by this approach is best understood as a template for addressing future intellectual property law issues. The convergence of new litigated issues with the attitude that the First Amendment protects both negative and active liberty will allow the Constitution to be not only relevant but less of a clumsy stumbling-block preventing future societal progress.

Justice Breyer is able to curate this template for intellectual property law issues because he remains faithful to an underlying statutory interpretive ideology—purposivism. Justice Breyer's articulated opinions rely on a purposivist interpretation, a technique that incorporates elements of Justice Scalia's originalism but also forgoes relying on inherently subjective historical tests. While purposivism can sometimes fail to be an objective interpretive method, by appropriately articulating the "why" when evaluating ambiguous text, Justice Breyer's decisions will have more lasting effect while remaining within the established limits required of Supreme Court decisions. As technologies continue to evolve and the issues become more nuanced, a purposivist interpretative methodology and an emphasis on active liberty can allow future courts to merge 20th century precedent with 21st century issues.

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116. Bleich et al., *supra* note 88, at 11.

117. *See* Breyer, *supra* note 14; James E. Ryan, *Does it Take a Theory: Originalism, Active Liberty, and Minimalism*, 58 STANFORD L. REV. 1623, 1625–26 (2006).

118. Breyer, *supra* note 14, at 42.

119. The more well-understood meaning being the protection against government restrictions on speech.

However, not all of Justice Breyer's opinions were joined by like members of his ideological wing. Indeed, his coalition-building often included the late-Justice Scalia, an interesting partner as the two sat on different sides of the bench, both literally and figuratively. Perhaps a student of the late-Justice Scalia may find Justice Breyer's arguments equally as persuasive.

Justice Amy Coney Barrett, a former clerk to Justice Scalia, now sits on the Court, filling the vacancy left by the passing of Justice Ruth Bader Ginsburg.[120] Although the balance of the Court favors conservative minded justices, the replacement of Justice Ginsburg with Justice Barrett actually may favor Justice Breyer's intellectual property law jurisprudence. Despite being categorized as liberal justices, Justices Breyer and Ginsburg did not agree on several paramount intellectual property law holdings. The replacement of Justice Ginsburg with Justice Barrett implicates a host of other constitutional questions, but for matters concerning intellectual property law, Justice Breyer's legacy may be better served with the addition of a former Justice Scalia clerk. Of course, the natural consequence would serve concerns over the flow of information and the related societal benefits generated.

V. CONCLUSION

In conclusion, over the course of his time on the bench, Justice Breyer has articulated a coherent intellectual property law jurisprudence with sound underlying principles and logical reasoning for future courts and litigants. His opinions validate the optimism many had when President Clinton first nominated Breyer in 1994. By remaining committed to a principled concern for the flow of information and the consequences such information may have on the community at large, Justice Breyer provides the intellectual property law community with respected Supreme Court precedent to address future issues.

120. Michael Tarm, *Amy Coney Barrett, Supreme Court nominee, is Scalia's heir*, AP (Sept. 26, 2020), https://apnews.com/article/election-2020-ruth-bader-ginsburg-chicago-us-supreme-court-courts-547b7de5b6ebabedee46b08b5bb37141.