

RUTH BADER GINSBURG’S COPYRIGHT JURISPRUDENCE

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When Justice Ruth Bader Ginsburg died on September 18, 2020, the world lost a trailblazer for gender equality, a pop culture icon, a feisty liberal luminary who fought on behalf of the disenfranchised in the areas of civil rights and social justice, and an inspiration to millions of people. She will long be remembered for the social changes she helped effectuate as an advocate, scholar, and jurist.

Her amazing civil rights legacy overshadows other areas where Justice Ginsburg’s contributions have been substantial. This Article discusses one of the most interesting: copyright law. During her time as a jurist on the Supreme Court and D.C. Circuit, she authored sixteen opinions in copyright cases and joined her colleagues’ opinions in eleven others. But unlike her gender equality and social justice opinions, in which she predictably sided with rock-slinging Davids, Justice Ginsburg tended to favor Goliath content owners in copyright cases. This Article offers possible explanations for why this was so, by holistically evaluating Justice Ginsburg’s copyright writings. It identifies several themes running through her copyright opinions—incrementalism, intergovernmental deference, a preference for alternative mechanisms for relief, and stoicism—and juxtaposes her copyright jurisprudence with her approaches to gender equality and reproductive rights.

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INTRODUCTION

On September 18, 2020, the world lost an irreplaceable leader. Justice Ruth Bader Ginsburg did not simply serve as the 107th Justice on the U.S. Supreme Court. She was a pioneer in the fight for gender equality both before and during her time on the bench.¹ She was an inspiration to millions of women, girls,

¹ See generally THE WAY WOMEN ARE: TRANSFORMATIVE OPINIONS AND DISSENTS OF JUSTICE RUTH BADER GINSBURG (Cathy Cambron ed., 2020). See also Rebecca L. Barnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y.C. L. REV. 275, 309, 312–13 (2004); Martha Chamallas, Ledbetter, Gender Equity and Institutional Context, 70 OHIO ST. L.J. 1037, 1037 (2009); Shira Galinsky, Note, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg’s Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 N.Y.C. L. REV. 357, 361 (2004); Linda Greenhouse, *Introduction: Learning to Listen to Ruth Bader Ginsburg*, 7 N.Y.C. L. REV. 213, 217 (2004); Sidney Harring & Jeffrey L. Kirchmeier, *Scrupulous in Applying the Law: Justice Ruth Bader Ginsburg and Capital Punishment*, 7 N.Y.C. L. REV. 241, 243 (2004); Jill Elaine Hasday, *The Principle and Practice of Women’s “Full Citizenship”*: A Case Study of Sex-Segregated Public Education, 101 MICH. L. REV. 755 (2002); Catharine A. MacKinnon, *A Love Letter to Ruth Bader Ginsburg*, 31 WOMEN’S RTS. L. REP. 177, 183 (2010); Serena Mayeri, “When the Trouble Started”: The Story of *Frontiero v. Richardson*, in WOMEN AND THE LAW STORIES 57, 90 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011); Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008); Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMANS. 187, 229 (2006); M. Isabel Medina, *Real Differences and Stereotypes—Two Visions of Gender, Citizenship, and International Law*, 7 N.Y.C. L. REV. 315, 316 (2004); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 182

men, boys, and those falling outside the traditional gender boundaries.² And during her later years, through her fiery dissents, she became known as The Notorious RBG, an unlikely but widely beloved pop culture icon.³ The astonishing outpouring of grief immediately after her death reflected the enormity of her contributions to the nation.⁴

Undoubtedly, Justice Ginsburg will be primarily revered for her work on women's rights and equality. As a lawyer and law professor, she advocated for

(2020) [hereinafter Siegel, *Pregnant Citizen*]; Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 63 (2013); Reva B. Siegel & Neil S. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 798 (2010); Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y.C. L. REV. 391 (2004); Serena Mayeri, *Ruth Bader Ginsburg Made the Impossible Look Easy*, PHILA. INQUIRER (Sept. 19, 2020), <https://www.inquirer.com/opinion/commentary/ruth-bader-ginsburg-death-legacy-replacement-supreme-court-20200919.html> [https://perma.cc/SZ2F-39CK]; Mark Joseph Stern, *Ruth Bader Ginsburg Changed the World*, SLATE (Sept. 18, 2020, 8:47 PM), <https://slate.com/news-and-politics/2020/09/ruth-bader-ginsburg-changed-the-world.html> [https://perma.cc/6AWW-M4PU]; Melanie O'Brien, *The RBG Legacy: Equality and Inspiration*, OPINIOJURIS (Sept. 23, 2020), <http://opiniojuris.org/2020/09/23/the-rbg-legacy-equality-and-inspiration> [https://perma.cc/BE5D-ELXZ]; Michelle Travis, *Justice Ginsburg's Insights on Male Allyship, Fatherhood, and Dads of Daughters*, FATHERING TOGETHER (Sept. 24, 2020), <https://www.fatheringtogether.org/justice-ginsburgs-insights-on-male-allyship-fatherhood-and-dads-of-daughters> [https://perma.cc/BL2F-Y77L].

² Jay Cannon, *RBG Is Still Inspiring Young Girls to Be a 'Superhero,' Dream Big. These Photos Prove It.*, USA TODAY (Sept. 24, 2020, 12:57 PM), <https://www.usatoday.com/story/news/nation/2020/09/24/ruth-bader-ginsburg-hero-these-girls-wearing-super-costumes/3515835001> [https://perma.cc/4WYV-Y7PB]; Grace Hauck, *'A Leader of All Humanity': Ruth Bader Ginsburg Was a Hero, Icon, Fighter for Women and Girls Across the Nation*, USA TODAY (Sept. 20, 2020, 2:23 PM), <https://www.usatoday.com/story/news/nation/2020/09/20/ruth-bader-ginsburg-women-girls-legacy/5839221002> [perma.cc/MGA9-QNWX]; Jocelyn Noveck, *Ruth Bader Ginsburg's Impact on Women Spanned Age Groups, Backgrounds*, DENVER POST (Sept. 20, 2020, 2:09 PM), <https://www.denverpost.com/2020/09/20/ruth-bader-ginsburg-life-death-impact-women-supreme-court> [perma.cc/9BUM-XZC9].

³ See Samantha Cooney, *How Ruth Bader Ginsburg Became an Unlikely Pop Culture Icon*, TIME (Nov. 12, 2018, 5:59 PM), <https://time.com/5386238/ruth-bader-ginsburg-pop-culture-icon> [https://perma.cc/A2JR-PH9T]; Patrick Ryan, *'RBG': How Ruth Bader Ginsburg Became a Legit Pop-Culture Icon*, USA TODAY (Dec. 22, 2018, 4:28 PM), <https://www.usatoday.com/story/life/movies/2018/05/01/rbg-documentary-shows-how-ruth-bader-ginsburg-became-pop-icon/562930002> [https://perma.cc/S5SF-352R]. Two films about her life were released in 2018. See RBG (Participant Media 2018); ON THE BASIS OF SEX (Focus Features 2018).

⁴ Jenny Gathright & Christian Zapata, *Hundreds Gather to Honor and Grieve Ruth Bader Ginsburg Outside Supreme Court*, WAMU (Sept. 21, 2020), <https://wamu.org/story/20/09/21/hundreds-gather-outside-supreme-court-to-honor-ruth-bader-ginsburg> [perma.cc/5DHB-3QSA]; Rachel Jones, *See How Americans Are Mourning Ruth Bader Ginsburg in the Nation's Capital*, NAT'L GEOGRAPHIC (Sept. 21, 2020), <https://www.nationalgeographic.com/history/2020/09/americans-mourn-ruth-bader-ginsburg-celebrate-legacy> [perma.cc/724U-XMSS]; Dominique Mosbergen & Lee Moran, *Outpouring of Grief as Nation Mourns 'Hero' and 'Titan' Ruth Bader Ginsburg*, HUFFPOST (Sept. 19, 2020), https://www.huffpost.com/entry/ruth-bader-ginsburg-dead-reactions-mourning_n_5f654884c5b6b9795b10875c [https://perma.cc/NY7C-U8H7].

these causes and shifted a nation's way of thinking about gender.⁵ As a jurist, she built on these foundations and helped effectuate important legal changes.⁶ She fought for the things she cared about, stating:

[I would like to be remembered as] someone who used whatever talent she had to do her work to the very best of her ability, . . . [a]nd to help repair tears in her society, to make things a little better through the use of whatever ability she has. To do something, as my colleague David Souter would say, outside myself. 'Cause I've gotten much more satisfaction for the things that I've done for which I was not paid.⁷

Justice Ginsburg will be remembered as a feisty liberal luminary who fought on behalf of the disenfranchised in areas of civil rights and social justice.⁸ She was an amazing inspiration.

But Justice Ginsburg also played a significant role in copyright law developments.⁹ During her time as a judge on the D.C. Circuit and as a Justice on the Supreme Court, she authored sixteen opinions in copyright cases¹⁰ (ten majority, four concurrences, and two dissents) and joined the opinions of others in

⁵ See generally *Duren v. Missouri*, 439 U.S. 357 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Moritz v. Comm'r*, 469 F.2d 466 (10th Cir. 1972). See also Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251 (2009); Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41 (2013).

⁶ See *United States v. Virginia*, 518 U.S. 515 (1996). Compare *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643–61 (2007) (Ginsburg, J., dissenting) (calling for Congress to change the law) with *Lilly Ledbetter Fair Pay Act of 2009*, PUB. L. NO. 111-2, 123 STAT. 5 (overruling the Supreme Court's decision in *Ledbetter*).

⁷ Jamie Ducharme, *How Cancer Shaped Justice Ruth Bader Ginsburg's Life and Work*, TIME (Sept. 18, 2020, 8:17 PM), <https://time.com/5507530/ruth-bader-ginsburg-cancer-history/> [<https://perma.cc/B85D-5CFA>] (alteration in original) (quoting *The Rachel Maddow Show: Exclusive Justice Ruth Bader Ginsburg Interview* (MSNBC television broadcast Feb. 17, 2015, 9:00 PM)).

⁸ See *Shelby County v. Holder*, 570 U.S. 529, 559–94 (2013) (Ginsburg, J., dissenting); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 334–37 (2013) (Ginsburg, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 169–91 (2007) (Ginsburg, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 298–305 (2003) (Ginsburg, J., dissenting).

⁹ There are, of course, other areas where Justice Ginsburg made significant contributions, including civil procedure. See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); Tobias Barrington Wolff, *Ruth Bader Ginsburg and Sensible Pragmatism in Federal Jurisdictional Policy*, 70 OHIO ST. L.J. 839, 840 (2009) (summarizing Justice Ginsburg's contributions to civil procedure on the Court and her love of the subject). This is no surprise given her research and teaching interests early in her career as a law professor—Swedish civil procedure and civil procedure courses. *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009*, 70 OHIO ST. L.J. 805, 805–06, 819–20 (2009) [hereinafter *Interview Transcript*].

¹⁰ Four opinions were authored while on the D.C. Circuit and twelve from when she was on the Supreme Court.

eleven cases (ten majority, five of which were unanimous, and one concurrence).¹¹ Those who benefitted from or simply applaud Ginsburg's progressive approach toward social justice issues may be startled by some seeming incongruities within her copyright jurisprudence. Surprisingly, she did not predictably side with the underdog in copyright disputes.¹² In fact, most of her written opinions and many of her votes could be fairly categorized as promoting "strong copyright," and favoring Goliath over David.¹³

One of the many fascinating aspects of copyright law is that the competing views sparking its doctrinal flashpoints do not settle easily into liberal versus conservative terrain. Copyright protections have a different political valence. Neither political party has fixed positions on copyright law, and jurists can be unpredictable.¹⁴ For example, Justices Thurgood Marshall and William Brennan voted together very frequently. But one of the most important copyright cases of all time,¹⁵ *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁶ saw Justices Marshall and Brennan on opposite sides. Justice Brennan voted with the majority, endorsing the view that using a personal video tape recorder for "at home" taping of television shows, so the shows could be watched at more convenient times, was fair use rather than copyright infringement.¹⁷ The reasoning reflected a strong pro-freedom-of-speech orientation¹⁸ that Justice Brennan is deservedly famous for.¹⁹

Justice Marshall, however, co-signed a dissent asserting that even the home taping of a copyrighted television program so it could be watched later was an

¹¹ She joined four opinions while on the D.C. Circuit and seven while on the Supreme Court.

¹² See *infra* Part I.

¹³ But see *infra* Section I.C.

¹⁴ For a broader explication of this topic, see Ann Bartow, *When Bias is Bipartisan: Teaching About the Democratic Process in an Intellectual Property Law Republic*, 52 ST. LOUIS U. L.J. 715 (2008).

¹⁵ Bruce E. Boyden, *The Most Important Supreme Court Case in Copyright Law: Sony Corp. v. Universal City Studios (1984)*, MARQ. UNIV. L. SCH. FAC. BLOG (Nov. 1, 2010), <https://law.marquette.edu/facultyblog/2010/11/the-most-important-supreme-court-case-in-copyright-law-sony-corp-v-universal-city-studios-1984/> [<https://perma.cc/R5NU-LTCE>].

¹⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁷ *Id.* at 456.

¹⁸ *Id.* at 425 ("The District Court concluded that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement. It emphasized the fact that the material was broadcast free to the public at large, the noncommercial character of the use, and the private character of the activity conducted entirely within the home. Moreover, the court found that the purpose of this use served the public interest in increasing access to television programming, an interest that 'is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves.'" (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973))).

¹⁹ See generally Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333 (1991).

infringement.²⁰ The dissenting opinion by Justice Blackmun that Justice Marshall joined also argued that Sony could be liable for inducing and materially contributing to the infringement by manufacturing video cassette players with recording capabilities.²¹ This reflected an “exclusive [property] rights” instinct about broadcast television programs shared by many copyright maximalists.²² Yet no one seriously questioned Justice Marshall’s otherwise stellar liberal credentials simply because he joined the *Sony* dissent.

The breakdown of votes in *Georgia v. Public.Resource.Org*,²³ Justice Ginsburg’s final copyright opinion, was similarly unusual. The case required the Court to decide whether copyright laws appropriately protected annotations that described court decisions interpreting Georgia’s statutory laws, which were incorporated into Georgia’s official code.²⁴ Framed slightly differently, the question presented was could Georgia use copyright law to limit the public’s ability to access the annotations that Georgia chose to incorporate into its written code in an effort to provide meaning and context for the laws of the state that bind its citizenry?

The majority opinion, authored by Chief Justice Roberts and joined by Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh, held that copyright protection did not extend to the annotations.²⁵ The majority opinion engaged in economic class analysis and expressed concern for those denied access to the annotations for financial reasons.²⁶ Chief Justice Roberts, generally considered part of the Court’s conservative block, wrote:

Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.²⁷

Justice Ginsburg was not persuaded by these access concerns. Instead, she penned a dissent, joined by Justice Breyer, arguing that copyright protection was proper because of the different roles played by judges and the timing of the

²⁰ *Sony*, 464 U.S. at 485–86.

²¹ *Id.* at 492–93.

²² Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996, 12:00 PM), <https://www.wired.com/1996/01/white-paper/> [<https://perma.cc/9P6C-5TA4>].

²³ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

²⁴ *Id.* at 1503–04.

²⁵ *Id.*

²⁶ *Id.* at 1512–13.

²⁷ *See id.* at 1512 (citations omitted).

annotations vis à vis the code.²⁸ For those who saw Justice Ginsburg as consistently protecting David from Goliath, her dissent was shocking. In fairness, so was Justice Breyer's decision to sign on to it.

Irrespective of which understanding of the government edicts doctrine one deems "correct," the colloquy between the majority and the dissenters demonstrates that traditional political alignments have little to do with how Supreme Court Justices interpret copyright law. Political leanings cannot explain Justice Ginsburg's copyright jurisprudence. This Article will undertake a holistic evaluation of Ginsburg's copyright jurisprudence—identifying several themes running through her opinions in copyright cases and situating these themes within Justice Ginsburg's broader approach to judging.

Part I describes the most common aspect of Ginsburg's copyright opinions—that she favored copyright owners—and critiques a few commonly proffered explanations for this. The next several Sections introduce and examine the multiple themes running through Ginsburg's copyright opinions. Part II focuses on her incremental approach to resolving copyright disputes and how this incrementalism parallels her approach to gender equality litigation. Part III examines intergovernmental deference as part of a dialogue about legal developments and as a consequence of the judiciary's institutional capacity limitations. Part IV studies the role that alternative avenues of relief played in shaping Ginsburg's opinions. Part V explores Ginsburg's stoicism and restraint, noting that her frustration with her fellow Justices was sometimes evident, especially toward the end of her career.

I. FAVORING STRONG COPYRIGHT

The perception that Justice Ginsburg's copyright opinions favored authors and copyright owners is widespread and understandable.²⁹ Of the sixteen opinions she authored (ten majority opinions, four concurrences, and two dissents), eight favored copyright owners and five favored authors. However, when copyright opinions she joined but did not write are considered, the picture is a bit less stark. She was clearly not a strong copyright absolutist and joined several majority opinions in favor of accused copyright infringers. Most of these ver-

²⁸ *Id.* at 1522–24 (Ginsburg, J., dissenting).

²⁹ See Ryan Davis, *Ginsburg Remembered as Steadfast Pro-Copyright Voice*, LAW360 (Sept. 21, 2020, 11:26 PM), <https://www.law360.com/articles/1312244/ginsburg-remembered-as-steadfast-pro-copyright-voice> [https://perma.cc/SL4P-NKXJ] ("Justice Ruth Bader Ginsburg's steadfast support for copyright owners was one of the hallmarks of her U.S. Supreme Court tenure . . ."); Eriq Gardner, *A Supreme Court Without RBG May Impact Hollywood's Grip on Intellectual Property*, HOLLYWOOD REP. (Sept. 21, 2020, 2:18 PM), <https://www.hollywoodreporter.com/business/business-news/a-supreme-court-without-rbg-may-impact-hollywoods-grip-on-intellectual-property-4064367> [https://perma.cc/CRF4-6Q8F] (describing Ginsburg as the most "pro-copyright voice" on the Supreme Court); Ruth Vitale, *RBG Was a Champion for Creators, Too*, THE HILL (Oct. 1, 2020, 1:30 PM), <https://thehill.com/blogs/congress-blog/judicial/519152-rbg-was-a-champion-for-creators-too> [https://perma.cc/J8MX-G2Z2].

dicts were unanimous by vote; some included concurring opinions, but there were no dissenters, so perhaps they were easy cases. Or possibly, Justice Ginsburg felt the gentle pull of peer pressure to go the way of her colleagues. In any event, she was not always on the sides of copyright owners or authors.

The following Section catalogues Ginsburg's copyright cases, evaluates the claim that she favors copyright owners, and considers common explanations for her "strong copyright" orientation.

A. *Opinions in Favor of Authors*

Five opinions Justice Ginsburg penned favored authors—four majority opinions and one concurring opinion. These include *New York Times Co. v. Tasini*,³⁰ which featured authors who were fighting for their ownership rights against publishers; *Eldred v. Ashcroft*,³¹ in which the constitutionality of the Copyright Term Extension Act was challenged; *Golan v. Holder*,³² in which the constitutionality of the Uruguay Round Agreements Act was challenged; *Community for Creative Non-Violence v. Reid*,³³ where an author argued he was not subject to the work-made-for-hire doctrine; and, arguably, *Reed Elsevier, Inc. v. Muchnick*,³⁴ which raised questions about whether copyright registration was jurisdictional.

1. *Majority Opinions*

In *New York Times v. Tasini*,³⁵ Ginsburg penned the majority opinion, which empowered freelance journalists to collect copyright royalties that had been wrongfully denied to them by corporate publishers and information distributors.³⁶ The print publishers placed the journalists' articles in electronic publishers' databases, such as Lexis/Nexis, without payment or permission.³⁷ The publishers claimed that the privileges accorded to collective work copyright owners by § 201(c) applied to them.³⁸ Justice Ginsburg rejected the publishers' argument and explained:

The publishers are not sheltered by § 201(c), we conclude, because the databases reproduce and distribute articles standing alone and not in context, not "as part of that particular collective work" to which the author contributed, "as part of . . . any revision" thereof, or "as part of . . . any later collective work in the

³⁰ *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

³¹ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

³² *Golan v. Holder*, 565 U.S. 302 (2012).

³³ *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988).

³⁴ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

³⁵ *Tasini*, 533 U.S. 483.

³⁶ *See id.* at 488.

³⁷ *Id.* at 489.

³⁸ *Id.* at 492.

same series.” Both the print publishers and the electronic publishers, we rule, have infringed the copyrights of the freelance authors.³⁹

Her majority opinion was joined by every conservative Justice. Justice Thomas, who has a well-known penchant for explicitly grounding his opinions in statutory texts,⁴⁰ was likely particularly pleased by Justice Ginsburg’s framing of the issue. Only Justices Stevens and Breyer dissented.⁴¹ The dissenters were concerned that if the authors prevailed, any effective remedy could result in the removal of a tremendous number of articles from public access.⁴² Justice Ginsburg and the other majority members focused instead on the importance of the authors getting the full benefit of their copyrights.⁴³

Another author-friendly, “strong copyright” leaning decision by Justice Ginsburg is her majority opinion in *Eldred v. Ashcroft*.⁴⁴ *Eldred* addressed the question of whether the Copyright Term Extension Act (CTEA) failed constitutional review under the IP Clause of the U.S. Constitution’s “limited Times” prescription, and under the First Amendment’s free speech guarantee.⁴⁵ The lead plaintiff, Eldred, was a book publisher who specialized in distributing textual works that were in the public domain.⁴⁶ Eldred asserted that Congress erred by enlarging the term for existing published works with subsisting copyrights because “[t]he ‘limited Tim[e]’ in effect when a copyright is secured . . . becomes the constitutional boundary [for the length of copyright protection], a clear line beyond the power of Congress to extend.”⁴⁷ Eldred also argued that the CTEA was “a content-neutral regulation of speech that fail[ed] inspection under the heightened judicial scrutiny appropriate for such regulations,” and therefore violated the First Amendment.⁴⁸ Justice Ginsburg concluded that the CTEA did not violate either provision of the Constitution and that Congress was authorized to extend protection to copyright owners.⁴⁹ Her

³⁹ *Id.* at 488. Ginsburg’s focus on an authorial rights theory rather than an incentive theory has been noticed by others. See Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 465 (2007) (“In 2001, this sentiment made its way into the majority opinion in *New York Times Co. v. Tasini*, in which Justice Ginsburg made no mention of incentives, focusing exclusively on the idea of authorial right.”).

⁴⁰ See John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1311 (2010) (describing Justices Thomas and Scalia as the Court’s most committed textualists); see also H. Brent McKnight, *The Emerging Contours of Justice Thomas’s Textualism*, 12 REGENT U. L. REV. 365, 365–77 (2000); see, e.g., *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (Thomas, J.) (articulating the separability test with heavy emphasis on the statutory text or ordinary meaning).

⁴¹ *Tasini*, 533 U.S. at 506 (Stevens, J., dissenting).

⁴² *Id.* at 519–20.

⁴³ *Id.* at 497–99 (majority opinion).

⁴⁴ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁴⁵ *Id.* at 193 (quoting U.S. CONST. art. I, § 8, cl. 8).

⁴⁶ *Id.*

⁴⁷ *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

⁴⁸ *Id.* at 193–94.

⁴⁹ *Id.* at 194.

reasoning can be sardonically paraphrased as, “It is not unconstitutional for Congress to make dumb policy decisions.”

Golan v. Holder asked whether the URAA, which restored copyright protection to foreign works that had fallen into the public domain in the United States, violated the IP Clause and First Amendment because it was removing material from the public domain.⁵⁰ The plaintiffs, orchestra conductors, educators, performers, publishers, film archivists, and distributors,⁵¹ sought to distinguish *Eldred*, which had affirmed Congress’s power to extend existing copyrights. Justice Ginsburg, writing for the majority, concluded that the URAA did not violate either constitutional provision and that Congress had the power to restore copyright protection to foreign works.⁵²

The majority opinion in *Community for Creative Non-Violence v. Reid*,⁵³ which Ginsburg wrote as a judge on the D.C. Circuit, also favored an author. James Earl Reid was a sculptor, hired by CCNV to create a sculpture that dramatized the plight of homelessness.⁵⁴ Following completion of the sculpture, entitled “Third World America,” CCNV and Reid each claimed ownership of the work’s copyright.⁵⁵ CCNV asserted that it owned the copyright because it was a work made for hire.⁵⁶ Then-Judge Ginsburg rejected CCNV’s argument and held that the sculpture was not a work made for hire, thus entitling Reid, the author, to ownership of the copyright.⁵⁷

2. *Concurring Opinion*

Finally, *Reed Elsevier v. Muchnick*⁵⁸ can be interpreted as favoring authors, but not emphatically so. The Copyright Act generally requires copyright holders to register their works before they can sue for copyright infringement.⁵⁹ *Muchnick*, an offshoot of the litigation in *Tasini*,⁶⁰ was a consolidated, class-action copyright infringement suit. The plaintiff authors alleged that they “each own[ed] at least one copyright, typically in a freelance article written for a newspaper or a magazine, that they had registered in accordance with § 411(a)” of the Copyright Act.⁶¹ “The class, however, included both authors who had registered their copyrighted works and authors who had not.”⁶² The Court ma-

⁵⁰ *Golan v. Holder*, 565 U.S. 302, 307–08 (2012).

⁵¹ *Golan v. Gonzales*, 501 F.3d 1179, 1181 (10th Cir. 2007).

⁵² *Golan*, 565 U.S. at 308.

⁵³ *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988).

⁵⁴ *Id.* at 1487.

⁵⁵ *Id.* at 1488 (showing the parties disputed who owned the statue itself).

⁵⁶ *See id.*

⁵⁷ *Id.* at 1494.

⁵⁸ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

⁵⁹ 17 U.S.C. § 411(a).

⁶⁰ *Muchnick*, 559 U.S. at 158.

⁶¹ *Id.*

⁶² *Id.*

jurisdiction held that § 411(a)'s registration requirement is a precondition to filing a copyright infringement claim but that a copyright holder's failure to comply with that requirement did not restrict a federal court's subject-matter jurisdiction over infringement claims involving unregistered works.⁶³

Justice Ginsburg concurred but wrote separately to clarify how two prior cases that established a jurisdictional requirement could be reconciled.⁶⁴ Although *Muchnick* favored the settling authors over the authors who objected to the settlement, we classified *Muchnick* as favoring authors because the vast majority of authors chose to settle.⁶⁵

B. Opinions in Favor of Owners

Many of Justice Ginsburg's written opinions came in cases that were decided in favor of copyright owners. In addition to *Eldred* and *Golan*, which are beneficial to both authors and owners, Ginsburg authored eight opinions in which copyright owners prevailed. She authored the majority opinions in four: *Petrella v. Metro-Goldwyn-Mayer, Inc.*,⁶⁶ *National Cable Television Ass'n v. Copyright Royalty Tribunal*,⁶⁷ *Atari Games v. Oman I*,⁶⁸ and *Atari Games v. Oman II*.⁶⁹ She wrote concurring opinions in two: *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*⁷⁰ and *Star Athletica, LLC v. Varsity Brands, Inc.*⁷¹ And she penned dissenting opinions in two: *Kirtsaeng v. John Wiley & Sons, Inc. I*⁷² and *Georgia v. Public.Resource.Org., Inc.*⁷³ In addition, Ginsburg joined four other opinions in favor of copyright owners: *American Broadcasting Cos. v. Aereo, Inc.*,⁷⁴ *Kirtsaeng v. John Wiley & Sons, Inc. II*,⁷⁵ *Walt Disney Co. v. Powell*,⁷⁶ and *Cablevision Systems Development Co. v. Motion Picture Ass'n of America II*.⁷⁷

⁶³ *Id.* at 169, 171.

⁶⁴ *Id.* at 171–74.

⁶⁵ *See id.* at 159 (noting that only ten freelance authors objected).

⁶⁶ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014).

⁶⁷ *Nat'l Cable TV Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983).

⁶⁸ *Atari Games Corp. v. Oman (Atari I)*, 888 F.2d 878 (D.C. Cir. 1989).

⁶⁹ *Atari Games Corp. v. Oman (Atari II)*, 979 F.2d 242 (D.C. Cir. 1992).

⁷⁰ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005) (Ginsburg, J., concurring).

⁷¹ *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1018 (2017) (Ginsburg, J., concurring).

⁷² *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng I)*, 568 U.S. 519 (2013) (Ginsburg, J., dissenting).

⁷³ *Georgia v. Public.Resource.Org., Inc.*, 140 S. Ct. 1498, 1522 (2020) (Ginsburg, J., dissenting).

⁷⁴ *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014).

⁷⁵ *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng II)*, 579 U.S. 197 (2016).

⁷⁶ *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990).

⁷⁷ *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am. (MPAA II)*, 836 F.2d 599 (D.C. Cir. 1988).

1. Majority Opinions

Justice Ginsburg's majority opinion in *Petrella v. Metro-Goldwyn-Mayer, Inc.*⁷⁸ illustrates a strong commitment to copyright holders. The Court was asked to decide whether the equitable defense of laches was available as a defense to damages for copyright infringement.⁷⁹ Justice Ginsburg was joined by another unconventional grouping of Justices when she wrote that laches was not available to preclude a claim for damages brought within the three-year statute of limitations period.⁸⁰ Justices Scalia, Thomas, Alito, Sotomayor, and Kagan signed on to her majority opinion, which concluded that laches is not available to copyright defendants in claims for damages.⁸¹ This means that accused infringers cannot not use laches to escape litigation before the statute of limitations period expires.⁸² *Petrella's* holding is therefore very favorable to copyright owners who have delayed filing infringement suits for strategic or other reasons.

Chief Justice Roberts joined Justices Breyer and Kennedy in dissent, asserting that laches was available as a remedy because when Congress enacted a uniform statute of limitations for copyright claims in 1957, it did not indicate that it also sought to bar the operation of laches.⁸³ The Copyright Act is silent on the subject, and the dissenters believed that this "silence [was] consistent, not inconsistent, with the application of equitable doctrines."⁸⁴

The Copyright Act protects works that were published before 1978 for an initial twenty-eight-year term, which is renewable for another sixty-seven years.⁸⁵ If an author who assigned her copyrights died during the initial copyright term, the assignee could only continue to use the work if the author's heirs or successors transferred the renewal rights to the assignee.⁸⁶ The *Petrella* dispute concerned the movie *Raging Bull*, which was based on the life of boxer Jake LaMotta.⁸⁷ *Petrella* and LaMotta co-authored a screenplay that was copyrighted in 1963.⁸⁸ In 1976, they assigned their rights and renewal rights, which were later acquired by Metro-Goldwyn-Mayer (MGM).⁸⁹ In 1980, MGM released, and registered a copyright in, *Raging Bull*.⁹⁰ *Petrella* died during the initial copyright term, so his renewal rights reverted to his daughter, who renewed

⁷⁸ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014).

⁷⁹ *Id.* at 667.

⁸⁰ *Id.*

⁸¹ *Id.* at 666–67.

⁸² *Id.* at 667.

⁸³ *Id.* at 688, 693–94 (Breyer, J., dissenting).

⁸⁴ *Id.* at 694.

⁸⁵ 17 U.S.C. § 304(a).

⁸⁶ *Stewart v. Abend*, 495 U.S. 207, 221 (1990).

⁸⁷ *Petrella*, 572 U.S. at 673.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

the 1963 copyright in 1991.⁹¹ Seven years later, she advised MGM that it was violating her copyright.⁹² Nine years later, she filed suit, seeking damages and injunctive relief for violations occurring after January 5, 2006.⁹³ The district court dismissed the case, citing laches,⁹⁴ and the Ninth Circuit affirmed.⁹⁵ But the Supreme Court reversed, holding that laches cannot bar a claim for damages brought within the three-year statute of limitations.⁹⁶ Noting the “essentially gap-filling, not legislation-overriding,” nature of laches, Justice Ginsburg declared that the Court had “never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period” before, and was not going to do so in *Petrella* either.⁹⁷

There are also three “strong copyright,” owner-friendly Ginsburg majority opinions that arose during her time on the D.C. Circuit. In *National Cable Television Ass’n v. Copyright Royalty Tribunal*,⁹⁸ then-Judge Ginsburg had to decide whether the Copyright Royalty Tribunal (CRT) abused its discretion in setting rates for cable TV compulsory licenses.⁹⁹ The CRT was empowered by Congress to adjust royalty rates paid by cable TV operators to copyright owners for carrying broadcasts of the copyrighted programs.¹⁰⁰ The CRT determined the rates for the compulsory license, but the cable TV operators were dissatisfied and appealed.¹⁰¹ Judge Ginsburg affirmed the CRT’s royalty rates, which were beneficial for the copyright owners.¹⁰²

Then-Judge Ginsburg also penned copyright-owner-friendly opinions in *Atari I*¹⁰³ and *Atari II*.¹⁰⁴ The *Atari* cases involved the copyrightability of the videogame Breakout.¹⁰⁵ Atari attempted to register a copyright in Breakout, but the Copyright Office refused to issue a registration.¹⁰⁶ Atari appealed to the D.C. Circuit, and then-Judge Ginsburg reversed the Copyright Office’s decision.¹⁰⁷ She also remanded for further consideration because the Copyright Of-

⁹¹ *Id.* at 673–74.

⁹² *Id.* at 674.

⁹³ *Id.* at 674–75.

⁹⁴ *Id.* at 675.

⁹⁵ *Id.*

⁹⁶ *Id.* at 667, 686.

⁹⁷ *Id.* at 680.

⁹⁸ *Nat’l Cable TV Ass’n v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983).

⁹⁹ *Id.* at 179.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 181.

¹⁰² *See id.* at 190.

¹⁰³ *Atari I*, 888 F.2d 878 (D.C. Cir. 1989).

¹⁰⁴ *Atari II*, 979 F.2d 242 (D.C. Cir. 1992).

¹⁰⁵ *Atari I*, 888 F.2d at 879.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

office had failed to adequately explain how it was evaluating originality.¹⁰⁸ This decision let the copyright owner continue its fight for registration.

Upon remand, the Copyright Office again determined that Breakout was uncopyrightable.¹⁰⁹ Ginsburg again reversed and remanded the case to the Copyright Office for further consideration in light of the Supreme Court's intervening decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*¹¹⁰ In *Feist Publications*, the Supreme Court explained that the amount of originality required for a work to be copyrightable was very small.¹¹¹ The message then-Judge Ginsburg sent to the Copyright Office was not subtle.

Next, we turn to four copyright cases in which Ginsburg did not author an opinion. Instead, she joined four majority opinions in favor of copyright owners. First, in *American Broadcasting Cos. v. Aereo, Inc.*,¹¹² the Court had to determine whether a company publicly performs a copyrighted television program when it retransmits a broadcast of that program to individual subscribers over the internet.¹¹³ Justice Ginsburg joined the majority opinion holding that the rebroadcasting company had infringed the owners' copyrights.¹¹⁴

Second, in *Kirtsaeng II*,¹¹⁵ the Court addressed the standards for determining whether attorney's fees should be awarded to a prevailing party in a copyright infringement case.¹¹⁶ Under § 505, a court may in its discretion award a reasonable attorney's fee to the prevailing party.¹¹⁷ Courts are supposed to make case-by-case assessments and look at various relevant factors, such as whether a claim was frivolous; what a party's motivation was; a claim's objective unreasonableness; and considerations such as compensation and deterrence.¹¹⁸ In *Kirtsaeng II*, a unanimous Court held that substantial weight should be given to the objective reasonableness of the losing party's position, but that other factors also need to be considered.¹¹⁹ Although this decision was favorable to the copyright owner as applied, the general approach established by the Supreme Court is even-handed because both copyright owning plaintiffs and accused infringers may be prevailing parties for purposes of recovering attorney's fees.

¹⁰⁸ *Id.* at 881.

¹⁰⁹ *Atari II*, 979 F.2d at 243.

¹¹⁰ *Id.* at 247.

¹¹¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991) (“[T]he originality requirement is not particularly stringent.”).

¹¹² *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014).

¹¹³ *Id.* at 436.

¹¹⁴ *Id.* at 434, 451.

¹¹⁵ *Kirtsaeng II*, 579 U.S. 197 (2016).

¹¹⁶ *Id.* at 199–200.

¹¹⁷ 17 U.S.C. § 505.

¹¹⁸ *Kirtsaeng II*, 579 U.S. at 202.

¹¹⁹ *Id.* at 209.

The third case is *Walt Disney Co. v. Powell*.¹²⁰ The defendant in *Powell* sold souvenirs to local tourists through street vendors.¹²¹ Included in his wares were shirts with unauthorized depictions of Mickey and Minnie Mouse.¹²² After being sued for copyright infringement, he admitted liability.¹²³ But he asserted on appeal that because he had voluntarily ceased his activities, an injunction should not issue, attorney's fees were improper, and statutory damages had been improperly calculated.¹²⁴ Then-Judge Ginsburg joined Judge Wald's opinion for a unanimous panel, affirming the district court's injunction and award of attorney fees.¹²⁵ Once again, a copyright owner prevailed thanks in part to then-Judge Ginsburg.

The final case in which Ginsburg voted for copyright owners is *MPAA II*.¹²⁶ This case, like *National Cable Television*, involved compulsory royalties for cable TV stations.¹²⁷ The *MPAA II* dispute concerned standards for calculating compulsory license payments.¹²⁸ The cable companies argued that revenues from non-broadcast channels or tiers should not count toward the gross receipts calculation, thus lowering the amount the cable TV stations needed to pay.¹²⁹ The court, in a unanimous opinion written by Judge Silberman, held that the Copyright Office's regulation, which required inclusion of all revenue from a tier containing at least one retransmitted broadcast signal, was reasonable.¹³⁰ The court's rejection of a prorated approach benefitted copyright owners in the calculation of license fees.

2. Concurring Opinions

Justice Ginsburg's concurring opinion in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*¹³¹ also benefits copyright owners. A group of motion picture studios, recording companies, music publishers, and songwriters brought a lawsuit against the makers of the Morpheus, Grokster, and KaZaA online file-sharing software.¹³² The plaintiff content owners wanted to shut down distribution of this software, and to set a precedent to use against other technology

¹²⁰ *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990).

¹²¹ *Id.* at 567.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 568–69.

¹²⁵ *Id.* at 566.

¹²⁶ *MPAA II*, 836 F.2d 599 (D.C. Cir. 1988).

¹²⁷ *Id.* at 602.

¹²⁸ *Id.*

¹²⁹ *Id.* at 605.

¹³⁰ *Id.* at 614.

¹³¹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005) (Ginsburg, J., concurring).

¹³² *Id.* at 920–21 (majority opinion).

companies.¹³³ The Justices were unanimous in their belief that the online file-sharing services could be liable for copyright infringement.¹³⁴ Justice Ginsburg wrote separately to assert that the Court's watershed opinion in *Sony* should be narrowly interpreted so as to not extend its protection to new technologies and services where significant non-infringing uses have not yet been established.¹³⁵

Another opinion in which the copyright owner triumphed is *Star Athletica, LLC v. Varsity Brands, Inc.*¹³⁶ In *Star Athletica*, the Court was tasked with explaining how to determine whether the design of a useful article was conceptually separable from its utilitarian aspects.¹³⁷ The plaintiff asserted copyright ownership over the lines, chevrons, and colorful shapes appearing on cheerleading uniforms that it designed, made, and sold.¹³⁸ The Court held that the designs were separable and entitled to protection, affirming the validity of Varsity Brands' disputed copyright registrations.¹³⁹ Justice Ginsburg penned a concurrence to explain that the thorny question of separability need not have been addressed because the designs at issue appeared *on* the cheerleading outfits and thus were not useful articles.¹⁴⁰

3. *Dissenting Opinions*

Two cases in which copyright owners lost—leading to strong dissenting opinions by Justice Ginsburg—are *Kirtsaeng I*¹⁴¹ and *Georgia v. Public.Resource.Org, Inc.*¹⁴²

Copyright law's first sale doctrine, codified in § 109, provides that an individual who purchases a copy of a copyrighted work from the copyright holder has the right to sell, display, or otherwise dispose of that particular copy, notwithstanding any interests of the copyright owner.¹⁴³ In *Kirtsaeng I*,¹⁴⁴ the Court had to decide whether the first sale doctrine was limited to works that were lawfully made in the United States.¹⁴⁵ If the first sale doctrine were geographically unrestricted, lawful copies manufactured and sold abroad could be imported into the United States and sold domestically without violating any of

¹³³ *See id.* at 921.

¹³⁴ *Id.* at 941; *id.* at 941–42, 949 (Ginsburg, J., concurring).

¹³⁵ *Grokster*, 545 U.S. at 945 (Ginsburg, J., concurring).

¹³⁶ *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1016 (2017).

¹³⁷ *Id.* at 1007.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1018 (Ginsburg, J., concurring).

¹⁴¹ *Kirtsaeng I*, 568 U.S. 519, 525 (2013) (Ginsburg, J., dissenting).

¹⁴² *Georgia v. Public.Resource.Org., Inc.*, 140 S. Ct. 1498, 1522 (2020) (Ginsburg, J., dissenting).

¹⁴³ 17 U.S.C. § 109(a).

¹⁴⁴ *Kirtsaeng I*, 568 U.S. 519.

¹⁴⁵ *Id.* at 525.

the copyright owner's rights.¹⁴⁶ The defendant, Supap Kirtsaeng, imported comparatively inexpensive English language textbooks from Thailand and sold them in the United States.¹⁴⁷ One copyright owner, publisher John Wiley & Son, sued Kirtsaeng for violating its exclusive right to distribute its copyrighted works.¹⁴⁸ Kirtsaeng defended on the basis of the first sale doctrine.¹⁴⁹

The Court adopted the concept of international exhaustion, which shields importers of foreign-manufactured copies, like Kirtsaeng, from copyright liability.¹⁵⁰ Justice Ginsburg dissented.¹⁵¹ She believed that the scope of the first sale doctrine should be limited to works that were originally produced in the United States and not extended to foreign-made copies.¹⁵² She would have held that Kirtsaeng infringed John Wiley & Son's distribution rights.¹⁵³

Finally, in *Georgia v. Public.Resource.Org, Inc.*,¹⁵⁴ Justice Ginsburg wrote a dissent in which she opined that Georgia was entitled to copyright protection for the annotations accompanying its official statutory code.¹⁵⁵ Justice Ginsburg believed that Georgia should be able to enjoin a public interest organization from copying and distributing copies of the Georgia Code that included the annotations.¹⁵⁶

C. Opinions in Favor of Accused Infringers

Ginsburg has also written and voted in favor of parties accused of copyright infringement rather than authors or owners. She authored the majority opinions in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*¹⁵⁷ and *OddzOn Products, Inc. v. Oman*,¹⁵⁸ as well as a concurring opinion in *Quality King Distributors, Inc. v. L'anza Research International, Inc.*¹⁵⁹ She also joined seven opinions in which accused infringers prevailed: *Campbell v. Acuff-Rose Music, Inc.*,¹⁶⁰ *Fogerty v. Fantasy, Inc.*,¹⁶¹ *Feltner v. Columbia Pictures Televi-*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 527.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 525.

¹⁵¹ *Id.* at 557 (Ginsburg, J., dissenting).

¹⁵² *Id.* at 587.

¹⁵³ *Id.* ("Kirtsaeng's unauthorized importation of the foreign-made textbooks involved in this case infringed Wiley's copyrights.")

¹⁵⁴ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

¹⁵⁵ *Id.* at 1522–24.

¹⁵⁶ *Id.*

¹⁵⁷ *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC (Fourth Estate)*, 139 S. Ct. 881 (2019).

¹⁵⁸ *OddzOn Prods., Inc. v. Oman*, 924 F.2d 346 (D.C. Cir. 1991).

¹⁵⁹ *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 154 (1998) (Ginsburg, J., concurring).

¹⁶⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁶¹ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

sion, Inc.,¹⁶² *Allen v. Cooper*,¹⁶³ *Rimini Street, Inc. v. Oracle USA, Inc.*,¹⁶⁴ *Cablevision Systems Development Co. v. Motion Picture Ass'n of America I*,¹⁶⁵ and *National Broadcasting Co. v. Copyright Royalty Tribunal*.¹⁶⁶

1. Majority Opinions

Under § 411(a) of the Copyright Act, a civil action for copyright infringement cannot be lawfully instituted until preregistration or registration of the copyright at issue has been made.¹⁶⁷ In *Fourth Estate*, the question presented was whether the copyright registration requirement was met by filing an application with the Copyright Office, or only upon actual registration by the Copyright Office.¹⁶⁸ When *Fourth Estate*, a news organization, sued Wall-Street.com for copyright infringement, *Fourth Estate* had applied to register the disputed articles with the Copyright Office, but the Register had not yet acted on those applications.¹⁶⁹ Justice Ginsburg wrote for the majority, which held that registration occurs when the Copyright Office registers a copyright, not upon the filing of an application.¹⁷⁰ This holding means that there are no shortcuts. Copyright holders can no longer simply apply for a copyright registration at the same time they file an infringement claim with respect to the same copyrighted work. Now, they need to complete the registration process first. The ruling therefore has the potential to harm copyright owners, and consequently benefit accused infringers, by delaying their ability to file suit for infringement when they have not previously registered the copyright in a contested work.

OddzOn v. Oman addressed whether the Copyright Office erred in refusing to register the copyright of a KOOSH ball.¹⁷¹ According to then-Judge Ginsburg, a “KOOSH ball is a patented, trademarked product formed of hundreds of floppy, wiggly, elastomeric filaments radiating from a core.”¹⁷² Given the KOOSH ball’s patented and trademarked nature, perhaps it is no surprise that its manufacturer would go for an intellectual property hat trick and attempt to obtain a copyright registration for it as well. However, the Copyright Office concluded that the KOOSH ball did not reflect the minimal degree of creativity

¹⁶² *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

¹⁶³ *Allen v. Cooper*, 140 S. Ct. 994, 1008 (2020) (Breyer, J., concurring).

¹⁶⁴ *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019).

¹⁶⁵ *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am. (MPAA I)*, 808 F.2d 133 (D.C. Cir. 1987).

¹⁶⁶ *Nat'l Broad. Co. v. Copyright Royalty Tribunal (NBC v. CRT)*, 848 F.2d 1289 (D.C. Cir. 1988).

¹⁶⁷ 17 U.S.C. § 411(a).

¹⁶⁸ *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC (Fourth Estate)*, 139 S. Ct. 881, 886 (2019).

¹⁶⁹ *Id.* at 887.

¹⁷⁰ *Id.* at 892.

¹⁷¹ *OddzOn Prods., Inc. v. Oman*, 924 F.2d 346, 347 (D.C. Cir. 1991).

¹⁷² *Id.*

required for a copyright.¹⁷³ Then-Judge Ginsburg agreed with the district court and held that it was not an abuse of discretion for the Copyright Office to decide that the KOOSH ball's purportedly expressive elements were dependent upon, and inseparable from, the utilitarian features of the object, and hence not protectable by copyright.¹⁷⁴ But even in this case, which clearly disadvantaged the creator of the KOOSH ball, Ginsburg kept her opinion narrow. She concluded by emphasizing that the court was only deciding whether refusal to register was an abuse of discretion, and that the court was not deciding the copyrightability of the product, carefully writing:

[W]e again emphasize that we decide simply and only that the refusal of the Copyright Office to register the KOOSH ball, in the circumstances here presented, does not constitute an abuse of discretion. We do not decide on the copyrightability of the item, and we intimate no opinion on the decision we would reach if the matter came before us in an infringement action.¹⁷⁵

Thus, OddzOn was left without a copyright registration for its KOOSH ball,¹⁷⁶ but then-Judge Ginsburg avoided holding that the work lacked sufficient originality to be copyrightable.¹⁷⁷

Justice Ginsburg also joined opinions in several copyright cases where accused infringers prevailed. Justice Ginsburg's first copyright case on the Supreme Court bench was *Campbell v. Acuff-Rose Music, Inc.*¹⁷⁸ *Campbell* was a dispute over a parodic rap version of the Roy Orbison/William Dees song *Oh Pretty Woman* by the band Two Live Crew, which was part of a commercially distributed album called *As Clean as We Wanna Be*.¹⁷⁹ Accused of copyright infringement, the defendants successfully convinced the Court that making a parody of *Oh Pretty Woman* using different lyrics and just enough of the melody to make the parody recognizable was a fair use of the song and therefore not infringing.¹⁸⁰ Justice Ginsburg joined the unanimous-by-vote opinion authored by Justice Souter.¹⁸¹

In *Fogerty v. Fantasy, Inc.*,¹⁸² musician John Fogerty was accused of writing a new song that infringed the copyright in a previous song he authored.¹⁸³ Fogerty wrote a song called *Run Through the Jungle* in 1970 and sold the pub-

¹⁷³ *Id.* at 348.

¹⁷⁴ *Id.* at 350 ("We are satisfied, however, that the Copyright Office was not arbitrary in adhering to a line similar to the one taken by our sister circuit.").

¹⁷⁵ *Id.*

¹⁷⁶ See Dotan Oliar et al., *Copyright Registrations: Who, What, When, Where, and Why*, 92 TEX. L. REV. 2211, 2215–16 (2014) (describing the benefits of copyright registration).

¹⁷⁷ *OddzOn Prods.*, 924 F.2d at 350.

¹⁷⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁷⁹ *Id.* at 572–73.

¹⁸⁰ *Id.* at 594.

¹⁸¹ See *id.* at 571.

¹⁸² *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

¹⁸³ *Id.* at 519–20.

lishing rights to Fantasy's predecessor-in-interest.¹⁸⁴ In 1985 he wrote the song *The Old Man Down the Road* and was sued by Fantasy for infringing the copyright in *Run Through the Jungle*.¹⁸⁵ Fantasy alleged that the songs were substantially similar.¹⁸⁶

A jury found in favor of Fogerty, and he sought attorney's fees as the prevailing party.¹⁸⁷ The district court denied him attorney's fees, and the Court of Appeals affirmed.¹⁸⁸ The Supreme Court reversed and remanded, holding that it was incorrect to apply different standards to prevailing plaintiffs and prevailing defendants.¹⁸⁹ Instead, the Court explained that courts should apply the same standard for awarding attorneys' fees, and prevailing plaintiffs should not be given preferential treatment.¹⁹⁰

*Feltner v. Columbia Pictures Television, Inc.*¹⁹¹ addressed whether the Seventh Amendment provides a right to a jury trial on statutory damages.¹⁹² The accused infringer, Feltner, owned three television stations that had licensed several shows.¹⁹³ After Feltner failed to make payments, the licenses were terminated, but Feltner continued to broadcast the shows.¹⁹⁴ Columbia sued Feltner and sought statutory damages.¹⁹⁵ Feltner requested a jury trial on the issue of statutory damages, but the district court refused,¹⁹⁶ and the Court of Appeals affirmed.¹⁹⁷ The Supreme Court reversed and held that the Seventh Amendment provides a right to a jury trial on statutory damages.¹⁹⁸ Although this decision was favorable to the accused infringer, the general approach established by the Supreme Court is even-handed because both copyright owners and users may request a jury trial on statutory damages.

*Rimini Street, Inc. v. Oracle USA, Inc.*¹⁹⁹ is another unanimous Supreme Court opinion decided in favor of an accused infringer that was joined by Justice Ginsburg. *Rimini* required the Court to decide what the correct meaning was of the term "full costs" in § 505 of the Copyright Act.²⁰⁰ Oracle sued Rimini for making unlawful copies of its software while providing support ser-

¹⁸⁴ *Id.* at 519.

¹⁸⁵ *Id.* at 519–20.

¹⁸⁶ *Id.* at 520.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 533, 535.

¹⁹⁰ *Id.* at 534.

¹⁹¹ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

¹⁹² *Id.* at 342.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 342–43.

¹⁹⁵ *Id.* at 343.

¹⁹⁶ *Id.* at 344.

¹⁹⁷ *Id.* at 344–45.

¹⁹⁸ *Id.* at 355.

¹⁹⁹ *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019).

²⁰⁰ *Id.* at 876.

vices to Oracle customers.²⁰¹ The jury found in favor of Oracle and awarded it \$35.6 million in damages.²⁰² The district court then awarded \$4.95 million in costs and \$12.8 million for litigation expenses, including expert witnesses, e-discovery, and jury consulting.²⁰³ Rimini challenged the \$12.8 million in litigation expenses as going beyond the list of permitted costs recoverable against a losing party.²⁰⁴ The Court of Appeals affirmed the district court's litigation expenses award, but the Supreme Court reversed.²⁰⁵ The Supreme Court held that the Copyright Act's provision permitting recovery of costs is limited to the same costs specifically described in the general cost recovery statute.²⁰⁶ Thus, Oracle was unable to recover the \$12.8 million for litigation expenses.

The final cases decided in favor of an accused infringer are from Ginsburg's time on the D.C. Circuit. The first arose out of disputes between Cablevision Systems Development Company and the Motion Picture Association of America over the rate-setting procedures and compulsory license distribution scheme under § 111 for cable TV stations.²⁰⁷ Cablevision, a cable TV company, filed two lawsuits challenging the required royalty payments.²⁰⁸ The National Cable Television Association (NCTA) filed a third lawsuit with similar allegations.²⁰⁹ In the third case, the district court ordered the NCTA to join the Copyright Office and Register of Copyrights as necessary parties.²¹⁰ The lawsuits were consolidated, and the district court issued a final order disposing of all three cases together.²¹¹ Cablevision, a party to all three cases, filed a notice of appeal sixty days after the final order.²¹²

Initially the D.C. Circuit needed to determine whether the notice of appeal for Cablevision's first two cases needed to be filed within thirty or sixty days.²¹³ Rule 4(a)(1) of the Federal Rules of Appellate Procedure requires thirty days, but this is extended to sixty days if a federal agency is a party.²¹⁴ Because the Copyright Office was a party in one of the three cases, the D.C. Circuit held that the sixty-day period applied to all three appeals.²¹⁵ Thus, Cablevision's ap-

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 876, 881.

²⁰⁶ *Id.* at 881.

²⁰⁷ *MPAA I*, 808 F.2d 133, 133–34 (D.C. Cir. 1987).

²⁰⁸ *Cablevision Co. v. Motion Picture Ass'n of Am., Inc.*, 641 F. Supp. 1154, 1154–55 (D.D.C. 1986).

²⁰⁹ *MPAA I*, 808 F.2d at 134.

²¹⁰ *Id.* at 134–35.

²¹¹ *Id.* at 135.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* (quoting FED. R. CIV. P. 4(a)(1)).

²¹⁵ *Id.* at 135–36.

peal could move forward on the merits.²¹⁶ Although the accused infringer prevailed, the interpretation of Rule 4(a)(1) is even handed because either copyright owners or accused infringers could be the appellant.

The remaining opinion decided in favor of an accused infringer and joined by then-Judge Ginsburg is *NBC v. CRT*,²¹⁷ another cable TV compulsory licensing case. NBC had licensed Worldvision Enterprises to retransmit NBC's popular TV show, *Little House on the Prairie*.²¹⁸ When compulsory license fees were collected, both NBC and Worldvision asserted claims to the fees.²¹⁹ The CRT awarded the fees to Worldvision.²²⁰ NBC appealed and asserted that the CRT erred by distributing royalties to the syndicator of a TV program rather than the creator of the program.²²¹ The D.C. Circuit, in an opinion by Judge Silberman, held that the CRT did not err in distributing the royalties to the syndicator, thus favoring the user over the copyright owner.²²²

2. *Concurring Opinions*

*Quality King Distributors, Inc. v. L'anza Research International, Inc.*²²³ addressed whether copyright law's first sale doctrine applied to imported copies.²²⁴ Plaintiff L'anza sold its hair care products in the United States exclusively to distributors who agreed to resell within limited geographic areas and only to authorized retailers.²²⁵ The company promoted its domestic sales with extensive advertising.²²⁶ In foreign markets, however, it did not engage in comparable advertising or promotion, and charged prices that were substantially lower than its domestic prices.²²⁷ L'anza was using copyright law to segment the market and engage in price discrimination.²²⁸

L'anza's United Kingdom distributor sold several tons of L'anza products, affixed with copyrighted labels, to a distributor in Malta, which sold the goods to Quality King.²²⁹ Quality King then imported the goods back into the United States without L'anza's permission and resold them at discounted prices to unauthorized retailers.²³⁰ L'anza filed suit, alleging that Quality King's actions

²¹⁶ See *id.* at 136.

²¹⁷ Nat'l Broad. Co. v. Copyright Royalty Tribunal (*NBC v. CRT*), 848 F.2d 1289 (D.C. Cir. 1988).

²¹⁸ *Id.* at 1290.

²¹⁹ *Id.*

²²⁰ *Id.* at 1291.

²²¹ *Id.*

²²² *Id.*

²²³ *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998).

²²⁴ *Id.*

²²⁵ *Id.* at 138.

²²⁶ *Id.* at 139.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

violated L'anza's distribution rights for the copyrighted labels.²³¹ The Supreme Court majority, however, concluded that the first sale doctrine was applicable to imported copies.²³² Justice Ginsburg concurred that the shampoo labels in *Quality King* were subject to the first sale doctrine, thus enforcing statutory limits on the copyright in that case.²³³ However, she explicitly argued in her short concurrence that the first sale doctrine was limited to situations in which the copyrighted works were produced in the United States and made round-trip voyages—exported before returning to the United States for subsequent sale.²³⁴ This restrictive view of the first sale doctrine would be very favorable to copyright owners seeking to control the international distribution of their works, if adopted.

In *Allen v. Cooper*,²³⁵ the question was whether the Copyright Remedy Clarification Act of 1990 (CRCA), which abrogated states' sovereign immunity for infringement, violated the Eleventh Amendment.²³⁶ Allen, a videographer, created videos and photos of efforts to recover the pirate Blackbeard's ship, *Queen Anne's Revenge*.²³⁷ North Carolina published some of Allen's videos and photos on its web site without permission, and used a photo in a newsletter.²³⁸ Allen sued North Carolina, but North Carolina moved to dismiss the suit based on sovereign immunity.²³⁹ Allen relied on the CRCA,²⁴⁰ and the district court agreed with Allen that the state could not invoke sovereign immunity.²⁴¹ However, the Fourth Circuit reversed and held that the CRCA had no valid constitutional basis and therefore violated the Eleventh Amendment.²⁴² A unanimous-by-vote Supreme Court held that Congress lacked authority to abrogate the states' sovereign immunity from copyright infringement suits in the CRCA.²⁴³ In consequence, North Carolina was immune from an infringement suit.²⁴⁴

In addition to joining all of her colleagues by voting with the majority opinion, Justice Ginsburg joined Justice Breyer's concurrence, in which he wrote:

In [the majority's] view, Congress' power under the Intellectual Property Clause cannot support a federal law providing that, when proven to have pirated intel-

²³¹ *Id.* at 139–40.

²³² *Id.* at 145.

²³³ *Id.* at 154 (Ginsburg, J., concurring).

²³⁴ *Id.*

²³⁵ *Allen v. Cooper*, 140 S. Ct. 994 (2020).

²³⁶ *Id.* at 998–1000.

²³⁷ *Id.* at 999.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1000.

²⁴² *Id.*

²⁴³ *Id.* at 1007–08.

²⁴⁴ *Id.* at 1007.

lectual property, States must pay for what they plundered. To subject nonconsenting States to private suits for copyright or patent infringement, says the Court, Congress must endeavor to pass a more “tailored statute” than the one before us, relying not on the Intellectual Property Clause, but on § 5 of the Fourteenth Amendment. Whether a future legislative effort along those lines will pass constitutional muster is anyone’s guess. But faced with the risk of unfairness to authors and inventors alike, perhaps Congress will venture into this great constitutional unknown.

That our sovereign-immunity precedents can be said to call for so uncertain a voyage suggests that something is amiss.²⁴⁵

Justices Breyer and Ginsburg were clearly unhappy that the copyright owner could not enforce its copyright against North Carolina, but they felt bound by precedent to vote with the majority.²⁴⁶ Justice Breyer ruefully noted:

[W]e went astray in *Seminole Tribe of Fla. v. Florida*, as I have consistently maintained. We erred again in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank* by holding that Congress exceeded its § 5 powers when it passed a patent counterpart to the copyright statute at issue here. But recognizing that my longstanding view has not carried the day, and that the Court’s decision in *Florida Prepaid* controls this case, I concur in the judgment.²⁴⁷

In sum, Justice Ginsburg was an important voice in twenty-seven copyright law cases. Of the sixteen copyright opinions authored by Justice Ginsburg and eleven opinions she joined, five were decided in favor of authors, twelve were decided in favor of copyright owners, and ten were decided in favor of accused infringers.²⁴⁸ Although it is probably fair to say that Justice Ginsburg generally favored copyright owners and strong copyright protection, it is inaccurate to claim that she overwhelmingly did so.

On balance, Justice Ginsburg was more conservative in her approach to copyright law than she was with respect to gender equality and racial discrimination and social justice generally. It’s worth noting that not all copyright cases can be styled as David versus Goliath battles. Many are more appropriately categorized as Goliath versus Goliath.²⁴⁹ But overall, she could fairly be characterized as at least a moderate fan of strong copyright protections.

²⁴⁵ *Id.* at 1009 (Breyer, J., concurring) (citations omitted).

²⁴⁶ *Id.*

²⁴⁷ *Id.* (citations omitted).

²⁴⁸ As noted, some interpretations of the law in these opinions are even-handed as a general matter and could be classified otherwise given different facts.

²⁴⁹ *See, e.g.*, *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC* (*Fourth Estate*), 139 S. Ct. 881 (2019); *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017); *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913 (2005).

D. Common, but Unpersuasive, Explanations for Justice Ginsburg's "Strong Copyright" Tendencies

What drove Justice Ginsburg's inclination toward strong copyright protections? Two possible explanations have been raised previously in the literature. Neither are persuasive.

The first is that Ginsburg's widely known love of opera and art caused her to be sympathetic and protective toward composers and other creators.²⁵⁰ This is a superficial explanation and unconvincing. Other Supreme Court justices enjoy music, art, and literature, but we do not see this driving their opinions in copyright law cases. Justice Breyer has a love of literature, for example,²⁵¹ but is the jurist most critical of copyright's expansionism and is often on the opposite side of copyright disputes with Ginsburg.²⁵² His skepticism of strong copyright protection can be charted from his famous law review article, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*.²⁵³

For a jurist as principled as Ruth Bader Ginsburg, it is difficult to believe she would consciously or intentionally interpret the law simply to favor those responsible for a favorite pastime. This is also an unsatisfying explanation because surely she was aware of the research demonstrating how weak the links are between copyright law and the ways human authors behave. While a study by Michela Giorcelli and Petra Moser demonstrated that copyright protections appeared to positively influence the quantity and quality of Italian operas, it also showed that increasing the duration of copyright protections beyond the life of opera creators did not have a similar effect.²⁵⁴ Ironically, Justice Ginsburg's opinion in *Eldred* affirmed Congress's decision to extend most copyright protections by twenty years, even though extending copyright protections decades further beyond the deaths of authors keeps existing operas under copyright restrictions for a much longer time, without offering effective incentives to compose new ones. Lengthening the copyrights in works created by deceased au-

²⁵⁰ See Davis, *supra* note 29 ("Some speculate that her renowned love of opera and the arts gave her a sense that copyright is an important part of the cultural landscape . . .").

²⁵¹ *On Reading Proust: Stephen Breyer, Interviewed by Ioanna Kohler*, N.Y. REVIEW (Nov. 7, 2013), <https://www.nybooks.com/articles/2013/11/07/reading-proust/> [perma.cc/74N9-8GZJ] (interview with Justice Breyer describing his love of literature).

²⁵² See, e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) (Justice Ginsburg for the majority and Justice Breyer dissenting); *Kirtsaeng I*, 568 U.S. 519 (2013) (Justice Breyer for the majority and Justice Ginsburg dissenting); *Golan v. Holder*, 565 U.S. 302 (2012) (Justice Ginsburg for the majority and Justice Breyer dissenting); *Grokster*, 545 U.S. at 942–49 (Justice Ginsburg arguing for a narrow interpretation of *Sony* and Justice Breyer arguing for maintaining the status quo understanding of *Sony*); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (Justice Ginsburg for the majority and Justice Breyer dissenting).

²⁵³ See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

²⁵⁴ Michela Giorcelli & Petra Moser, *Copyrights and Creativity: Evidence from Italian Opera in the Napoleonic Age*, 128 J. POL. ECON. 4163, 4165–67 (2020).

thors simply failed to incentivize dead people to produce more saleable creative products from beyond the grave.

The second commonly proffered explanation for Justice Ginsburg's proclivity for strong copyrights is that she was influenced by her daughter, Professor Jane Ginsburg's, expertise in copyright.²⁵⁵ It is not clear from anything she has written whether or how much Jane Ginsburg may have shaped Justice Ginsburg's views about copyright law. Anyone gifted by life with a brilliant law professor daughter who specialized in copyright law would likely be familiar with her legal scholarship, especially if it were as well regarded and frequently cited as Professor Jane Ginsburg's is. Though obviously and very openly proud of her daughter, Justice Ginsburg has cited Jane Ginsburg's legal scholarship only occasionally in her copyright opinions.²⁵⁶ Amusingly enough, once when Justice Souter was on the opposite side of a copyright dispute from Justice Ginsburg, he cited Jane Ginsburg's work against her in what was perhaps a friendly bit of trolling.²⁵⁷

Both women appear to have been private and circumspect about ways they may have influenced each other's legal positions during Justice Ginsburg's lifetime. It would be fascinating and wonderful to learn the details of any discussions they had about particular copyright cases, or about copyright law generally, if Jane Ginsburg is ever inclined to share these stories in the future.²⁵⁸

Because neither generalization satisfactorily explains the arguably conservative bent of Justice Ginsburg's copyright jurisprudence, we raise alternative theories. The remainder of the Article identifies several themes running through her judicial writings on copyright law, and links them to her jurisprudence in other subject areas.

²⁵⁵ Jess Bravin, *Liberal Icon Was a Pioneer in Pursuit of Women's Rights*, WALL ST. J., Sept. 19–20, 2020, at A6 (“Justice Ginsburg was the court’s most aggressive defender of copyright, for example, an interest she said she adopted from her daughter, Jane, herself an expert in intellectual property at Columbia Law School.”); Davis, *supra* note 29 (“Some speculate . . . that her views were informed by conversations with her daughter Jane Ginsburg, a Columbia Law School professor who specializes in copyright law.”).

²⁵⁶ Within Justice Ginsburg's sixteen opinions in copyright law cases, she cites Jane Ginsburg in four. See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1018 n.1 (2017) (Ginsburg, J., concurring); *Golan*, 565 U.S. at 318; *Atari I*, 888 F.2d 878, 884 n.6 (D.C. Cir. 1989); *Cmty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1492–93 (D.C. Cir. 1988). Because citation counts are not necessarily an accurate measure of influence, we should not read too much into the citations or lack thereof.

²⁵⁷ See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005).

²⁵⁸ The best anecdote Justice Ginsburg told during her Supreme Court nomination speech was about Jane: “In her high school yearbook on her graduation in 1973, the listing for Jane Ginsburg under ‘Ambition’ was: ‘To see her mother appointed to the Supreme Court.’ The next line read: ‘If necessary, Jane will appoint her.’” Ruth Bader Ginsburg, U.S. Supreme Court Justice Nomination Acceptance Address (June 14, 1993), in RUTH BADER GINSBURG ET AL., *MY OWN WORDS* 175 (2016).

II. INCREMENTALISM

Justice Ginsburg was an incrementalist. Though she helped reform important laws in a number of dramatic ways, she seemed to prefer instituting radical changes in a methodical manner.²⁵⁹ The first major theme we found in Justice Ginsburg's copyright jurisprudence is incrementalism, an approach that informed her positions on many legal subjects.

Justice Ginsburg explicitly identified herself as an incrementalist at her confirmation hearing for the Supreme Court. In describing how she viewed the work of judging, she explained:

I would add that the judge should carry out that function without fanfare, but with due care. She should decide the case before her without reaching out to cover cases not yet seen. She should be ever mindful, as Judge and then Justice Benjamin Nathan Cardozo said, "Justice is not to be taken by storm. She is to be wooed by slow advances."²⁶⁰

Her concern was that if judges interpreted laws too quickly or reached unnecessary issues, this would create instability and place undue stress on the judiciary.²⁶¹

Justice Ginsburg's incremental approach to change was clearly something that President Clinton valued when he nominated her to the Supreme Court.²⁶² Clinton, too, believed that taking "small incremental steps," rather than "bold assertions of judicial power," was the key to restraining conservatives on the Court who were striking down progressive legislation.²⁶³ He also appreciated that incrementalism "encouraged justices to focus on the particularities of the case at hand rather than make sweeping pronouncements that get too far ahead of elected branches of government and the public in making law."²⁶⁴

This next Section traces Justice Ginsburg's use of incrementalism in her gender equality work as a lawyer, and her critiques of reproductive rights litigation based on a lack of incrementalism.²⁶⁵ It then elucidates the ways incremen-

²⁵⁹ See Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 867 (2009) ("Justice Ruth Bader Ginsburg's preference for narrow rulings that adhere closely to precedent and that avoid grand pronouncements is well-known."); see also Jason J. Czarnecki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 140 tbl.B (2007) (finding that Justice Ginsburg voted to alter precedent in 1.5% of the cases decided between 1994 and 2004, with only Justice Souter demonstrating less willingness to do so at 1.3%).

²⁶⁰ *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103RD CONG. 51 (1993) [hereinafter *Confirmation Hearing*] (statement of Hon. Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States).

²⁶¹ GINSBURG ET AL., *supra* note 258, at 196.

²⁶² JANE SHERRON DE HART, *RUTH BADER GINSBURG: A LIFE* 307–08 (2018).

²⁶³ *Id.*

²⁶⁴ *Id.* at 308.

²⁶⁵ See *infra* Section II.A.

talism played a frequent role in her copyright opinions on the Supreme Court and D.C. Circuit.²⁶⁶

A. Incrementalism in Gender Equality and Reproductive Rights

Ruth Bader Ginsburg was not a stereotypical radical. Her legacy only seems radical because she was a pioneer. And she was a successful pioneer largely because she was not seen as a radical. She made gender equality under the law seem rational, fair, inevitable, and at times, even banal. Recognizing, as Martin Luther King, Jr. told us, that “the arc of the moral universe is long, but it bends toward justice,”²⁶⁷ Justice Ginsburg embraced the concept of incrementalism in her fight for gender equality and adopted it as her preferred method for advancing reproductive rights.

Ruth Bader Ginsburg used incrementalism as an effective tactic, at a time when many feminist activists sought fast and dramatic changes.²⁶⁸ Without overt bomb throwing or public outbursts of anger,²⁶⁹ Justice Ginsburg slowly and surely convinced people with power that equality under the law was good for everybody, by serially litigating cases that slowly chipped away at facial and structural gender inequality.²⁷⁰ She accomplished this by strategically choosing cases in which men, as well as women, were victims of gender-based discrimination.²⁷¹ As one commentator noted, “Crucial to her approach was the principle that not only rules that discriminate against women, but also ones that appear to treat women better than men are bad for women, bad for all of us.”²⁷² Ruth Bader Ginsburg’s decision to litigate cases for male plaintiffs harmed by sexist laws was genius. Everyone wants to be treated fairly. By stealthily but consistently demonstrating that men also suffered from gender discrimination, she gave her advocacy an air of credibility within the patriarchy that she could later leverage, reaping the rewards of her incrementalism. If one sees human rights as a pie, rights get divided, and when women get more, men have fewer. Justice Ginsburg characterized human rights differently, more as a public good

²⁶⁶ See *infra* Section II.B.

²⁶⁷ Martin Luther King, Jr., Where Do We Go from Here?, Address at the Annual Convention of the Southern Christian Leadership Conference (Aug. 16, 1967), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 165, 199 (Clayborne Carson & Kris Shepard eds., 2001).

²⁶⁸ Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 121 (2010).

²⁶⁹ Justice Ginsburg mostly embraced her mother’s advice to “be a lady,” which meant conducting herself civilly and not letting emotions like anger or envy get in her way. GINSBURG ET AL., *supra* note 258, at 5.

²⁷⁰ Henry J. Reske, *Two Paths for Ginsburg: The Trailblazing Women’s Right Litigator Became a Moderate Judge*, 79 A.B.A. J. 16, 18 (1993).

²⁷¹ Franklin, *supra* note 268, at 84.

²⁷² *Justice Ruth Bader Ginsburg: A “Lady” Who Led the Fight for Gender Equity*, DUKE L., <https://web.law.duke.edu/features/2005/ginsburg/> [<https://perma.cc/6L9G-V7N4>] (quoting Duke Law School Dean Katharine Bartlett).

that did not have to be rationed and was available to everyone. One small step at a time, Justice Ginsburg convinced the powerful that the pie could be made larger, big enough to serve gender equality to everyone who was hungry for it.²⁷³

Justice Ginsburg realized while she was still a litigating attorney that maximizing success required not only the optimal party as plaintiff, but also selecting the right cases in the right order.²⁷⁴ She chose her battles carefully, because the cases she proceeded with needed “to be specific and narrowly defined, yet incrementally more demanding, so as to [move the Supreme Court towards using strict scrutiny in gender equality cases].”²⁷⁵ Early on in her legal activism, Justice Ginsburg benefited when then-Solicitor General Erwin Griswold, in a petition for certiorari to the Supreme Court, used the Department of Defense computer system to generate a list of federal statutes that differentiated between men and women, and he attached this as an appendix to his petition.²⁷⁶ This fortuitous appendix provided a roadmap that helped Ginsburg determine which cases would best facilitate her incremental strengthening of gender equality.²⁷⁷

Justice Ginsburg’s incrementalist approach to gender equality began when she was a practicing lawyer in the 1960s and 1970s, and was inspired by the civil rights movement.²⁷⁸ Thurgood Marshall and the NAACP adroitly curated cases to challenge Jim Crow laws and developed a strategy of establishing small victories that would serve as precedents for more difficult future cases.²⁷⁹ This series of victories eventually culminated in *Brown v. Board of Education*, which finally recognized that “separate but equal” was unlawful.²⁸⁰ Although Justice Ginsburg faced different challenges in her fight for gender equality, she followed the civil rights movement’s incrementalist path to success, which suited her temperament and ultimately helped her win critical victories.

But it was also her incrementalism that caused her to be surprisingly critical of judicial efforts to protect reproductive rights, particularly *Roe v. Wade*, the landmark 1973 Supreme Court decision establishing a constitutional right to abortion.²⁸¹ The legality of abortion is a politically divisive issue, to make an

²⁷³ Franklin, *supra* note 268, at 92–96 (describing John Stuart Mill’s explanation of how gender inequality harms both women and men and noting that Justice Ginsburg relied on Mill in developing her litigation campaign).

²⁷⁴ DE HART, *supra* note 262, at 173.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 172.

²⁷⁷ *Id.*; *Interview Transcript*, *supra* note 9, at 816.

²⁷⁸ DE HART, *supra* note 262, at 170 (“[S]he would rely on the example set by [Thurgood] Marshall, whose efforts ‘inspired.’”).

²⁷⁹ *Id.*

²⁸⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

²⁸¹ See Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 460–61 (1978) [hereinafter Ginsburg, *Sex Equality*]; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 379–83 (1985)

obvious point. Ruth Bader Ginsburg understood firsthand the importance of reproductive freedom to women. She was demoted at her job during her first pregnancy expressly for being pregnant, and at the time, this demotion was perfectly legal.²⁸² She hid her second pregnancy under baggy clothes because she was afraid she would be fired for it.²⁸³ Yet from Ruth Bader Ginsburg's memoir, *My Own Words*, one learns that Justice Ginsburg was not really fond of *Roe v. Wade* because she did not like how it was structured.²⁸⁴ She felt the ruling tried to do too much, too fast, which would lead to doctrinal instability.²⁸⁵

In 1992, Ginsburg articulated her concerns about *Roe v. Wade* as follows:

The seven to two judgment in *Roe v. Wade* declared “violative of the Due Process Clause of the Fourteenth Amendment” a Texas criminal abortion statute that intolerably shackled a woman’s autonomy; the Texas law “except[ed] from criminality only a *life-saving* procedure on behalf of the [pregnant woman].” Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in *Roe*, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court’s splintered decision in *Planned Parenthood v. Casey*? A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, I believe and will summarize why, might have served to reduce rather than to fuel controversy.²⁸⁶

This and her earlier, similar critiques of *Roe* led some feminist activists to be initially skeptical of President Bill Clinton’s nomination of Judge Ruth Bader Ginsburg to the Supreme Court.²⁸⁷ But they were persuaded of her com-

[hereinafter Ginsburg, *Some Thoughts*]; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1206 (1992) [hereinafter Ginsburg, *Judicial Voice*].

²⁸² Siegel, *Pregnant Citizen*, *supra* note 1, at 182 (“I told the head of the office when I started that I was 3-months pregnant. He said, ‘Well, we can’t place you as a GS-5 because you won’t be able to go to Baltimore for training. So, we will list you as a GS-2 and you’ll do the work of a GS-5.’”); *see also* DE HART, *supra* note 262, at 93 (same).

²⁸³ DE HART, *supra* note 262, at 93 (“Until the renewed contract was in hand, she would disguise her expanding figure in oversize clothes borrowed from her mother-in-law. And she certainly would not tell her colleagues that she was expecting.”); *Interview Transcript*, *supra* note 9, at 807.

²⁸⁴ GINSBURG ET AL., *supra* note 258, at 239; *see also* Alisha Haridasani Gupta, *Why Ruth Bader Ginsburg Wasn’t All That Fond of Roe v. Wade*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2020/09/21/us/ruth-bader-ginsburg-roe-v-wade.html> [perma.cc/Q337-9UY3].

²⁸⁵ GINSBURG ET AL., *supra* note 258, at 239.

²⁸⁶ Ginsburg, *Judicial Voice*, *supra* note 281, at 1199 (alteration in original) (footnotes omitted).

²⁸⁷ DE HART, *supra* note 262, at 310; *see also* Olivia B. Waxman, *Ruth Bader Ginsburg Wishes This Case Had Legalized Abortion Instead of Roe v. Wade*, TIME (Aug. 2, 2018, 11:00 AM), <https://time.com/5354490/ruth-bader-ginsburg-roe-v-wade/> [perma.cc/N9DX-WJY2]; Gupta, *supra* note 284. In 1992, long after Justice Ginsburg became a judge on the D.C. Circuit and ceased working as an attorney, in-house ACLU lawyers involved with reproductive freedom issues left the ACLU to form the Center for Reproductive Rights. The

mitment to reproductive freedom in part when she explained that she thought protection of the right to abortion should have been based on the reasoning that restricting abortion impeded gender equality.²⁸⁸ She thought this was a better legal foundation than *Roe v. Wade*'s right to privacy.²⁸⁹ She definitely embraced the rights of women to control their own bodies wholeheartedly.

Is there merit in Justice Ginsburg's critique of *Roe v. Wade*? That is hard to say. One might fairly say of *Roe* that the Supreme Court majority decided to act first and apologize later, rather than to ask permission. There was certainly nothing incremental about that opinion. The speed at which *Roe v. Wade* created nationwide access to abortions could not have been matched by an incremental approach. It is not even clear that nationwide access would have occurred at all without such a sweeping opinion from the Supreme Court. At least during the pendency of what Justice Ginsburg described in 1992 as "the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court's splintered decision in *Planned Parenthood v. Casey*,"²⁹⁰ legal abortions were available in every state, and still are, though perhaps not for much longer.²⁹¹

reasons for the organizational split are not completely clear, but one gets a sense that a culture of incrementalism may have been part of the problem. In 1992, many believed that *Roe v. Wade* would be overturned imminently. People invested in reproductive rights litigation wanted to gear up quickly to take the abortion rights battle state by state. The ACLU remained active in reproductive rights litigation through its Reproductive Freedom Project and now often coordinates activities with those of the Center for Reproductive Justice. See David Margolick, *Seeking Strength in Independence, Abortion-Rights Unit Quits A.C.L.U.*, N.Y. TIMES (May 21, 1992), <https://www.nytimes.com/1992/05/21/us/seeking-strength-in-independence-abortion-rights-unit-quits-aclu.html> [<https://perma.cc/8EFK-84BK>].

²⁸⁸ Gupta, *supra* note 284; Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, UNIV. CHI. L. SCH. (May 15, 2013), <https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit> [<https://perma.cc/U5LJ-XVUQ>].

²⁸⁹ Ginsburg, *Judicial Voice*, *supra* note 281, at 1200; see also Ginsburg, *Sex Equality*, *supra* note 281, at 460; Gupta, *supra* note 284.

²⁹⁰ Ginsburg, *Judicial Voice*, *supra* note 281, at 1199.

²⁹¹ Abortion rights cases continued to arrive at the Supreme Court, reflecting staunch persistence on the parts of those who would legalize abortion. Recognizing that it was not the time for incrementalism, Justice Ginsburg strongly dissented from the five-Justice majority in *Gonzales v. Carhart* in 2007, also displaying a rhetoric flash of anger. *Gonzales v. Carhart*, 550 U.S. 124, 169–91 (2007) (Ginsburg, J., dissenting). It was the first time the Supreme Court upheld a law restricting a method of abortion that did not offer an exception that would safeguard not only a woman's existence—her life—but her health as well. *Id.* at 171–72. She described the majority opinion as an alarming decision that "tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists" and for the first time "blesses a prohibition with no exception safeguarding a woman's health." *Id.* at 171.

After Justice Ginsburg's death and her fast replacement by Amy Coney Barrett, it has become very likely that *Roe v. Wade* will be overturned soon. If that occurs, we will see if there are adequate legal methods, incremental or otherwise, to preserve or restore access to safe and legal abortions. When Barack Obama first ran for President, he said that if he were elected, one of the first things he would do was work with Congress to get the Freedom of

Professor Mary Hartnett, who coauthored Justice Ginsburg's autobiography, asserted that

[i]n a way, Justice Ginsburg's opinion on *Roe* perfectly encapsulates how she functioned. She was passionate about equality for women, L.G.B.T.Q. people and minority groups, and fiercely devoted to human dignity and respect But she was also deeply thoughtful and measured on how to bring those conditions about, and her decisions—shaped by nuanced legal reasoning—sometimes ran counter to what many of her fans might have expected.²⁹²

Whether a slower phase-in of nationwide abortion rights or grounding reproductive freedom in an alternative legal theory such as gender equality would have created less social and political conflict is ultimately unknowable.²⁹³ But Justice Ginsburg's incrementalism remained extant throughout her judicial career and across subject areas. For example, Justice Ginsburg was passionately

Choice Act passed to protect nationwide access to legal abortions. Will Evans, *When Speeches Come Back to Haunt*, NPR: SECRET MONEY PROJECT (Oct. 16, 2008, 5:01 PM), https://www.npr.org/sections/secretmoney/2008/10/family_research_council.html [<https://perma.cc/8XGK-QMGB>]. He never executed on that promise, and it seems unlikely that President Biden will make passage of such a controversial law a priority given his ambitions of bringing more unity to the nation. Unlike *Ledbetter*, the conflict is unlikely to be resolved with the passage of a new law. The fate of abortion access clearly lies with the courts of the nation, both federal and state. If *Roe v. Wade* is overturned, a majority of states are likely to prohibit abortions immediately. When activist feminist lawyers attempt to restore national access to abortion, they will have to choose between Ruth Bader Ginsburg's preferred incremental approach and more radical options.

But even if *Roe* remains intact, access to abortion in many parts of the United States is already extremely limited. Over eleven million women of reproductive age in the United States live more than an hour's drive from an abortion facility. See K.K. Rebecca Lai & Jugal K. Patel, *For Millions of American Women, Abortion Access is Out of Reach*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/interactive/2019/05/31/us/abortion-clinics-map.html> [<https://perma.cc/AVK9-9AVP>]. Missouri is likely to become the first state that does not host any clinics that perform abortions at all, if it is not already. See Sarah McCammon, *As Missouri Clinic Awaits Its Legal Fate, Abortions in State Have Virtually Halted*, NPR (Mar. 12, 2020, 6:03 AM), <https://www.npr.org/2020/03/12/814768754/as-missouri-clinic-awaits-its-legal-fate-abortion-in-state-have-virtually-halte> [<https://perma.cc/YCK3-KQRD>]. Eight states—Arkansas, Alabama, Iowa, Louisiana, Ohio, Oklahoma, Tennessee, and Texas—have tried to stop abortions altogether during the pandemic “by classifying it as an elective procedure and citing the need to conserve personal protective equipment for healthcare workers treating COVID-19 patients.” Pavithra Mohan, *For Many Women, Abortion Access Was Already Limited. Then COVID-19 Hit*, FAST COMPANY (Apr. 28, 2020), <https://www.fastcompany.com/90496986/for-many-women-abortion-access-was-already-limited-then-covid-19-hit> [<https://perma.cc/UU5S-3UMT>]. Challenges to abortion rights tend to be both dramatic and opportunistic, but not at all incremental.

²⁹² Gupta, *supra* note 284.

²⁹³ In fact, Justice Ginsburg herself expressed some skepticism. See Ginsburg, *Some Thoughts*, *supra* note 281, at 383 (“I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious.”).

in favor of the Equal Rights Amendment.²⁹⁴ Getting a constitutional amendment passed is the epitome of incrementalism; these do not happen overnight, to put it lightly.

At her Supreme Court confirmation hearings, Ruth Bader Ginsburg stated, “I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter.”²⁹⁵ She believed that passage could happen eventually, even if it took a long time. Justice Ginsburg has described herself as standing on the shoulders of people who “kept dreams of equal citizenship alive in days when few would listen,” such as Susan B. Anthony, Elizabeth Cady Stanton, and Harriet Tubman.²⁹⁶ Many women now stand on Justice Ginsburg’s deceptively fragile looking shoulders made of steel, hoping to continue her progress, perhaps in an equally incremental manner.

B. Incrementalism and Copyright Law

Justice Ginsburg’s incrementalistic tendencies are observable throughout her copyright law jurisprudence, but are more subtle than in the equal rights and reproductive rights cases.²⁹⁷ These instances of incrementalism arise in several cases in big and small ways, but reflect her consistent cautiousness and

²⁹⁴ *Confirmation Hearing*, *supra* note 260, at 189–90. In 1973, she published an article about the ERA that, in pertinent part, reassured readers that after it was passed, restrooms in public places could still be “sex separated.” Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A. J. 1013, 1018 (1973). She noted that ERA proponents were curious about whether the actual concern was that men would want to use the women’s restrooms, or that women would want to use the men’s restrooms and suggested single-stall restrooms would be a creative solution. *Id.* Though most of us make the bathrooms in our homes available to all genders, conflicts around gendered public restrooms persist to this day. Most recent ones involve the attempted exclusion of transgendered or nonbinary people. Emanuella Grinberg & Dani Stewart, *3 Myths That Shape the Transgender Bathroom Debate*, CNN (Mar. 7, 2017), <https://www.cnn.com/2017/03/07/health/transgender-bathroom-law-facts-myths/index.html> [<https://perma.cc/9QSP-7SL2>]. And almost fifty years later, Justice Ginsburg’s proposed solution is still an excellent one: all-gender single-stall bathrooms. Everyone is welcome to use them, and everybody gets privacy. This approach is also slowly catching on.

²⁹⁵ *Confirmation Hearing*, *supra* note 260, at 190.

²⁹⁶ *Id.* at 50.

²⁹⁷ One reason (if not the primary reason) for Ruth Bader Ginsburg’s incremental approach in gender equality litigation was that she was trying to change long-held social norms and make this change more palatable to the nine men on the Supreme Court, so they would eventually declare that these traditional views of gender roles were inaccurate and unfair. The same was true for racial justice during the Civil Rights Movement. However, copyright law does not have a similar long-held social norm that unfairly prejudices one side of copyright disputes. Although it seems clear that an incremental approach was necessary for effective gender equality litigation, it’s not clear that such an approach is necessary in the copyright context. This is not to say that Justice Ginsburg was just blindly following her well-paved gender equality approach. Although not driven by cultural attitudes and bias, her preference for incrementalism was likely driven by her belief in intergovernmental dialogue. *See infra* Part III.

restraint in interpreting the law.²⁹⁸ The next Sections address three variations of Justice Ginsburg's incrementalism: (1) writing narrow opinions that slowly move the law in her desired direction; (2) recognizing, but not precipitously deciding, extraneous legal issues for which she planted analytical seeds for the future; and (3) reinterpreting precedent.

1. *Limited Holdings and Accretion*

Justice Ginsburg's cautious incrementalism is visible within three linked copyright cases that can be called the "First Sale Doctrine Abroad Trilogy." The three relevant cases, in chronological order, are *Quality King Distributors, Inc. v. L'anza Research International, Inc.*,²⁹⁹ *Costco Wholesale Corp. v. Omega, S.A.*,³⁰⁰ and *Kirtsaeng I*.³⁰¹

The first sale doctrine is articulated in § 109 of the Copyright Act. It plays an important role in United States copyright law by limiting the rights of an intellectual property owner to control resale of products embodying its intellectual property. Under the first sale doctrine, an individual who purchases a copy of a copyrighted work from the copyright holder receives the right to sell, display, or otherwise dispose of that particular physical copy any way they choose, notwithstanding the interests or preferences of the copyright owner.³⁰² Owners can bend, fold, spindle, or mutilate their copies; they just cannot copy them. The first sale doctrine does not allow reproductions.

²⁹⁸ Notwithstanding the overwhelming evidence of Justice Ginsburg's incrementalism, there is at least one incident where she clearly questioned the wisdom of an incremental approach. *Allen v. Cooper*, 140 S. Ct. 994, 997 (2020), was a case involving whether Congress could waive a state's sovereign immunity for copyright infringement claims. The Court in a previous case, *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996), held that Congress could not use its Article I powers to circumvent state sovereign immunity. Following *Seminole Tribe*, the Court in *Central Virginia Community College v. Katz*, 546 U.S. 356, 356 (2006), held that Congress could rely on its Article I powers in bankruptcy to strip state sovereign immunity. A question in *Allen* was whether the Court needed to address each specific Article I power to determine whether Congress could abrogate sovereign immunity or whether *Seminole Tribe* was the general rule and *Katz* a mere exception thereto. During oral argument in *Allen*, Justice Ginsburg asked counsel:

[I]n *Katz*, the—the Court concentrated on the bankruptcy authority as a unique authority. We have *Seminole*, which is across the board, and then we have the exception for the Bankruptcy Clause. Now are you asking us to go through all of the Article III [sic] authority and take them one by one? Isn't *Katz* more properly read as a bankruptcy exception to the *Seminole Tribe* rule?

Transcript of Oral Argument at 6, *Allen*, 140 S. Ct. 994 (No. 18-877). One would expect Justice Ginsburg, with her focus on incrementalism, to prefer a limited power-by-power approach rather than a blanket rule covering numerous powers not yet exercised by Congress or addressed by the Supreme Court.

²⁹⁹ *Quality King Distrib., Inc. v. L'anza Rsch. Int'l, Inc.*, 523 U.S. 135 (1998).

³⁰⁰ *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010).

³⁰¹ *Kirtsaeng I*, 568 U.S. 519 (2013).

³⁰² 17 U.S.C. § 109(a).

Content owners dislike the first sale doctrine because it generally allows purchasers to lend, rent, or resell their copies,³⁰³ with limited exceptions for phonorecords and computer software.³⁰⁴ As a result, it interferes with copyright holders' ability to prevent arbitrage.³⁰⁵ Without the first sale doctrine, the copyright owner could segment the market by charging a higher price for copies in the United States and lower prices in foreign markets without fear that the lower-priced foreign copies would make their way into the United States and directly compete with the higher priced domestic copies. But until the conclusion of the trilogy, it was unclear whether the first sale doctrine allowed the importation of lawfully produced copyrighted goods without the copyright holder's permission.

The trilogy addressed one fundamental question three times: Do lawfully made objects suddenly infringe when they cross national boundaries? The first case in the trilogy, *Quality King v. L'anza*, was a dispute about the labels on shampoo bottles.³⁰⁶ The plaintiff was a company that manufactured "luxury" shampoo in the United States, and sold it domestically at premium prices.³⁰⁷ It also sold the shampoo abroad at much lower prices.³⁰⁸ The defendant distributor noticed and began purchasing the shampoo abroad at the lower prices and bringing cases of it back to the United States to sell.³⁰⁹ To try to stop this, the plaintiff sued the defendant for copyright infringement and obtained an injunction to prevent the continued importation of its shampoo by the defendant.³¹⁰ Shampoo itself cannot be copyrighted, but the decorative features on the outside of the bottle were copyrightable.³¹¹ The defendants did not copy, and were not accused of copying, the shampoo bottle labels, or illicitly copying anything at all.³¹² Just the act of bringing the original, unmodified shampoo bottles back into the United States from abroad without the copyright holder's permission was alleged to infringe the plaintiff's copyrights in the copyrightable elements of the shampoo labels under § 602(a) of the Copyright Act.³¹³ The plaintiff L'anza claimed that when properly construed, § 602(a) prohibited foreign dis-

³⁰³ *Id.*

³⁰⁴ *Id.* § 109(b); see also Ryan Vacca, *Expanding Preferential Treatment Under the Record Rental Amendment Beyond the Music Industry*, 11 LEWIS & CLARK L. REV. 605, 612–16 (2007) (explaining the history of the exception to the first sale doctrine for phonorecords and software).

³⁰⁵ Lorie M. Graham & Stephen M. McJohn, *Intellectual Property's First Sale Doctrine and the Policy Against Restraints on Alienation*, 7 TEX. A&M L. REV. 497, 511 (2020).

³⁰⁶ *Quality King Distribs., Inc. v. L'anza Rsch. Int'l, Inc.*, 523 U.S. 135, 138 (1998).

³⁰⁷ *Id.* at 138–39.

³⁰⁸ *Id.* at 139.

³⁰⁹ *Id.*

³¹⁰ *L'anza Rsch. Int'l, Inc. v. Quality King*, No. CV-94-00841, 1995 WL 908331, at *4 (C.D. Cal. July 7, 1995).

³¹¹ *Quality King*, 523 U.S. at 140.

³¹² *Id.*

³¹³ *Id.* at 139–40.

tributors from reselling its products to American vendors who were unable to buy from its domestic distributors.³¹⁴ The case turned on how the Court resolved the conflicts between the importation restrictions of § 602(a) and the first sale doctrine. The Court decided that the relevant statutory language demonstrated that the right granted by § 602(a) was subject to § 109(a).³¹⁵

In her concurrence, Justice Ginsburg, ever the incrementalist, wrote: “This case involves a ‘round trip’ journey, travel of the copies in question from the United States to places abroad, then back again. I join the Court’s opinion recognizing that we do not today resolve cases in which the allegedly infringing imports were manufactured abroad.”³¹⁶ Because L’anza had manufactured the shampoo bottles in the United States and then sent them abroad, they were “lawfully made under this title” as required by § 109(a).³¹⁷ She explicitly withheld judgment about whether a copy produced abroad was equally protected by the first sale doctrine.³¹⁸

It was not long before the identical issue arose for “one way” goods. In *Costco Wholesale Corp. v. Omega*, the dispute arose because Costco sold watches in the United States that were manufactured in Switzerland by Omega, having imported and sold them without Omega’s authorization.³¹⁹ Omega sued Costco for copyright infringement under § 602(a).³²⁰ Again, nothing had been copied. Only the distribution right, in the context of international trade, was implicated.³²¹ But Omega had a registered copyright in a tiny design element duly imprinted on its watches, and believed this provided a vector of control over unauthorized importations.³²² Costco argued that the first sale doctrine applied to lawfully made foreign-manufactured goods as well as domestic ones, superseding § 602(a).³²³ The Supreme Court split four to four over this question because Justice Kagan recused herself due to prior involvement with the case while she was Solicitor General, before she joined the Court.³²⁴ So there was no resolution to the issue of the first sale doctrine’s impact on § 602(a) when goods were lawfully made abroad rather than in the United States. As is typically done with ties, the Court did not release the names of the Justices on ei-

³¹⁴ *Id.* at 143.

³¹⁵ *Id.* at 143–45.

³¹⁶ *Id.* at 154 (Ginsburg, J., concurring).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 983–84 (9th Cir. 2008).

³²⁰ *Id.* at 984.

³²¹ *Id.* at 983–84.

³²² *Id.* at 983.

³²³ *Id.* at 984.

³²⁴ *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010); Eric Engleman, *Supreme Court Split on Costco-Omega Case*, PUGET SOUND BUS. J. (Dec. 13, 2010, 11:26 AM), <https://www.bizjournals.com/seattle/blog/2010/12/supreme-court-split-on-costco-omega-case.html> [https://perma.cc/J64R-BL3N].

ther side of the evenly divided split.³²⁵ But based on her concurrence in *Quality King* and her eventual dissent in *Kirtsaeng v. John Wiley & Sons*, it seems very likely that Justice Ginsburg would have favored Omega's position in the dispute.

The third and final trilogy case was *Kirtsaeng I*. Unlike a shampoo bottle or tiny design element on a watch, the subject matter of the dispute was textbooks, literary works that sit squarely within the zone of what copyright law is intended to incentivize and protect.³²⁶ Kirtsaeng was an enterprising foreign graduate student studying in the United States.³²⁷ After realizing that textbooks cost significantly more money in the United States than the virtually identical books did in Thailand, he encouraged his friends and family to send him lawfully made textbooks from Thailand to sell.³²⁸ The textbooks were purchased at substantially lower prices in Thailand, and even after covering shipping costs, Kirtsaeng could make money by reselling these books more cheaply than textbook vendors in the United States.³²⁹ He was eventually sued for copyright infringement by book publishers.³³⁰ Once again, no unauthorized copies had been made. The publishers accused Kirtsaeng of violating their § 602(a) importation rights.³³¹ He asserted the first sale doctrine in defense and prevailed by a 6–3 vote.³³² Justice Breyer, writing for the majority, concluded that the first sale doctrine, which allows the owners of copyrighted works to sell or otherwise dispose of their copies as they wish, applies to copyrighted works lawfully made abroad as well as domestically.³³³

It is probably no surprise to learn that Justice Ginsburg dissented.³³⁴ She was joined in her dissent fully by Justice Kennedy and in part by Justice Scalia.³³⁵ She railed against enemies of incrementalism, and her words were blistering:

Instead of adhering to the Legislature's design, the Court today adopts an interpretation of the Copyright Act at odds with Congress' aim to protect copyright

³²⁵ Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 254 (2016) ("Typically, the Court also avoids identifying who among the Justices cast which votes, because this cloak of anonymity 'may well enable the next case presenting [a legal issue] to be approached with less commitment.' At times, however, the Court has diverged from this practice and identified precisely how the votes broke down in a particular case. At other times, particular Justices have written at length about their views of the lower court's opinion notwithstanding the fact that a tie vote has disabled the Supreme Court from resolving the case." (citations omitted)).

³²⁶ *Kirtsaeng I*, 568 U.S. 519, 525–27 (2013).

³²⁷ *Id.* at 527.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 554.

³³³ *Id.* at 525.

³³⁴ *Id.* at 557 (Ginsburg, J., dissenting).

³³⁵ *Id.*

owners against the unauthorized importation of low-priced, foreign-made copies of their copyrighted works. The Court's bold departure from Congress' design is all the more stunning, for it places the United States at the vanguard of the movement for "international exhaustion" of copyrights—a movement the United States has steadfastly resisted on the world stage.³³⁶

Justice Ginsburg asserted that "[s]ection 109(a), properly read, afford[ed] Kirtsaeng no defense against Wiley's claim of copyright infringement."³³⁷ The Copyright Act, she claimed, did not apply extraterritorially.³³⁸ While her entire dissent was fierce, what she claimed to be arguing for was no change at all in how the relevant portions of the Copyright Act were interpreted. As an incrementalist, she saw the majority's approach as modifying copyright law too quickly—moving the United States from a staunch opponent of international exhaustion for several decades³³⁹ to "solidly in the international-exhaustion camp."³⁴⁰

Another instance of Justice Ginsburg's incrementalist restraint in the judicial law-making process was her concurrence in *Varsity Brands v. Star Athletica*.³⁴¹ Her approach in *Star Athletica* bears substantial similarity to her concurrence in *Quality King*. This case involved copyright protection for cheerleading uniforms.³⁴² The plaintiffs had copyright registrations for two-dimensional designs consisting of lines, chevrons, and colorful shapes, which appeared on cheerleading uniforms that they designed, made, and sold.³⁴³ They sued a competitor for infringing these copyrights, and the competitor challenged the validity of their copyrights.³⁴⁴

The legal issue in *Star Athletica* was how to determine whether the design of a useful article "can be identified separately from, and [is] capable of existing independently of, the utilitarian aspects of the article."³⁴⁵ The relevant legal analysis, articulated within the Copyright Act, is known as the separability doctrine.³⁴⁶ The separability doctrine channels intellectual property protections in

³³⁶ *Id.*

³³⁷ *Id.* at 562.

³³⁸ *Id.*

³³⁹ *Id.* at 576 ("[T]he United States has steadfastly 'taken the position in international trade negotiations that domestic copyright owners should . . . have the right to prevent the unauthorized importation of copies of their work sold abroad.'" (alteration in original) (quoting Brief for United States as Amicus Curiae, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998) (No. 96-1470))).

³⁴⁰ *Id.* at 575. As described *infra* Section III.A, her dissent also fits within her jurisprudential theme of intergovernmental dialogue.

³⁴¹ *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1018–19 (2017) (Ginsburg, J., concurring).

³⁴² *Id.* at 1007 (majority opinion).

³⁴³ *Id.*

³⁴⁴ *Id.* at 1007–08.

³⁴⁵ *Id.* at 1007 (quoting 17 U.S.C. § 101).

³⁴⁶ See 17 U.S.C. § 101 (defining "pictorial, graphic, and sculptural works" to include "two-dimensional and three-dimensional works of fine, graphic, and [other types of] applied art")

useful articles toward patents, and away from copyright law, which is doctrinally forbidden from facilitating the monopolization of purely utilitarian goods, or of the functional aspects of pictorial, graphic, or sculptural works.³⁴⁷ Only when the useful aspects of creative designs are separable is the design entitled to copyright protection.³⁴⁸ But the precise method of determining separability involved confusing and irreconcilable inter- and intra-circuit splits.³⁴⁹

The Supreme Court concluded that a feature incorporated into the “design of a useful article is eligible for copyright protection if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work . . . if imagined separately from the useful article.”³⁵⁰ In setting out its own two-part test, the Court rejected all of the previously proffered tests for determining separability.³⁵¹ This test has been criticized on multiple grounds, including that it “fundamentally altered the nature of copyright law’s functionality screen,”³⁵² “charted an entirely new path through copyright law,”³⁵³ failed to clarify how copyright law treats functionality,³⁵⁴ “produce[d] uncertainty for creators litigants, and judges,”³⁵⁵ and did not undertake the important first step of identifying whether the articles in question—here, several cheerleading uniforms—were useful articles.³⁵⁶ As many law professors are painfully aware, the majority opinion is so confusingly written that it is extremely difficult to teach.

and considering the design of a useful article to be “a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article”); see also Sanja Wolf Sahlsten, Note, *I’m a Little Tree-pot: Conceptual Separability and Affording Copyright Protection to Useful Articles*, 67 FLA. L. REV. 941, 941 (2016) (“To determine if a useful article—generally ineligible for copyright protection—has pictorial, graphic, or sculptural features that are copyrightable, the Copyright Act and the legislative intent expressed through the Act’s legislative history require that those artistic features be identified separately and capable of existing independently of the utilitarian function of the work.”).

³⁴⁷ Christopher Buccafusco et al., *Intelligent Design*, 68 DUKE L.J. 75, 98, 105, 109 (2018); Peter S. Menell & Daniel Yablon, *Star Athletica’s Fissure in the Intellectual Property Functionality Landscape*, 166 U. PA. L. REV. 137, 139 (2017).

³⁴⁸ See 17 U.S.C. § 101 (defining “pictorial, graphic, and sculptural works”).

³⁴⁹ Menell & Yablon, *supra* note 347, at 139; Tyler T. Ochoa, *What Is a “Useful Article” in Copyright Law After Star Athletica?*, 166 U. PA. L. REV. 105, 105 (2017) (“The Supreme Court likely granted certiorari because the Sixth Circuit identified no fewer than *nine* different tests that courts and commentators had proposed for resolving the issue, and the Sixth Circuit adopted a tenth.”).

³⁵⁰ *Star Athletica*, 137 S. Ct. at 1016.

³⁵¹ *Id.* at 1013–15; Ochoa, *supra* note 349, at 105–06.

³⁵² Buccafusco et al., *supra* note 347, at 111.

³⁵³ Christopher Buccafusco & Jeanne C. Fromer, *Fashion’s Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51, 85 (2017).

³⁵⁴ Christopher Buccafusco & Jeanne C. Fromer, *Forgetting Functionality*, 166 U. PA. L. REV. 119, 119 (2017).

³⁵⁵ *Id.*

³⁵⁶ Ochoa, *supra* note 349, at 106.

Justice Ginsburg's approach to determining whether an object was a useful article illustrates her abiding incrementalism, even when abject clarity would be very helpful to stakeholders. In her concurring opinion, she wrote that she would not take up the separability test in this case "because the designs at issue are not designs *of* useful articles," but "copyrightable pictorial or graphic works *reproduced on* useful articles."³⁵⁷ In drawing the "of" versus "on" distinction, Justice Ginsburg declaimed that there was no need to address the thorny separability question and that doing so with these facts only complicated the issue.³⁵⁸ Unfortunately, addressing the separability test as articulated in *Star Athletica* with almost *any* facts greatly complicates the issue because the *Star Athletica* approach is extremely obtuse. Justice Ginsburg noted in the context of reproductive rights that "[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable."³⁵⁹ Perhaps she did not recognize how radically *Star Athletica* would impact the scope of copyrightability in pictorial, graphic, and sculptural works, and in such a destabilizing fashion. As one observer trenchantly noted, "the opinion may not eliminate lower courts' variations in separability analysis because it contradicts itself regarding the inherent separability of surface designs, does little more than restate the statute, and flinches from delving into the visual nature of the question."³⁶⁰ It is a perilously difficult case to interpret, and therefore it is impossible not to feel sympathy for lawyers who must litigate cases involving the separability doctrine.³⁶¹

³⁵⁷ *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1018 (2017) (Ginsburg, J., concurring). Interestingly, after certiorari was granted, but before the case was heard, Jane Ginsburg published an article noting that *Star Athletica* was a poor vehicle for addressing separability because the cheerleading outfits did not involve the design of a useful article. Jane C. Ginsburg, "Courts Have Twisted Themselves into Knots": *U.S. Copyright Protection for Applied Art*, 40 COLUM. J.L. & ARTS 1, 1 (2016).

³⁵⁸ *Star Athletica*, 137 S. Ct. at 1018 (Ginsburg, J., concurring); see Buccafusco & Fromer, *supra* note 354, at 119 ("[T]he U.S. Supreme Court had an opportunity to clarify copyright law's treatment of product designs that incorporate functionality. Its opinion failed to do so in a host of different ways."); see also Martin Tartre, *Useful or Useless?: A Modern Perspective on the Protectability of Useful Articles in Domestic & Foreign Copyright Law*, 45 AIPLA Q.J. 467, 489–90 (2017) ("[T]he test remains complicated and offers little certainty to designers and artists who might wish to engage in commercialization of their artwork.").

³⁵⁹ Ginsburg, *Judicial Voice*, *supra* note 281, at 1198.

³⁶⁰ *Copyright Act of 1976—Useful Articles—Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 131 HARV. L. REV. 363, 363 (2017).

³⁶¹ Incrementalism was also on display in the majority opinion in *Aereo*, which Justice Ginsburg joined. *Aereo* and many amici expressed concern that if *Aereo*'s conduct counted as an infringing public performance, then such liability would also extend to similar and future technologies such as cloud computing, remote storage DVR, and the like. *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 449–51 (2014). The Court explained that it agreed with the Solicitor General that such questions were not before the Court and "should await a case in which they are squarely presented." *Id.* at 450–51. Instead, the Court declared that its holding was limited and would not discourage the emergence or use of other technologies. *Id.* at 449.

It is also worth noting that Justice Ginsburg did not always adhere to incrementalism in copyright cases. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), which

2. *Acknowledgement, Refusal, and Seed Planting*

Justice Ginsburg's incrementalism also surfaced, though in more minor ways, in several copyright opinions while she served on the Supreme Court and the D.C. Circuit Court. In these cases, she acknowledged unresolved questions that accompanied the specific issues being litigated, but she declined to resolve those extra issues. Instead, she noted the extra issues and left them for future clarification. This type of incrementalism is observable in four of her copyright opinions.

First, in *Petrella*, a case involving whether laches was available as a defense to damages for copyright infringement, Justice Ginsburg explained that a copyright claim accrues when an infringing act occurs.³⁶² And in a footnote she stated:

Although we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a "discovery rule," which starts the limitations period when "the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim."³⁶³

By refusing to decide the propriety of the discovery rule, she left the issue to percolate in the lower courts so the Supreme Court could address it later, in due course.³⁶⁴

concerned whether a party is entitled to a jury trial on the amount of statutory damages, Justice Ginsburg joined Justice Thomas's majority opinion holding that the Copyright Act does not provide for a jury trial, but the Seventh Amendment does. *Id.* at 340–42. Interestingly, Justice Scalia wrote a concurring opinion where he opined that the Copyright Act's language on statutory damages could be interpreted to provide a jury trial and because of this, the Court should have avoided the constitutional question and left it for another day. *Id.* at 355–59 (Scalia, J., concurring). Justice Ginsburg did not join Justice Scalia's concurrence despite its strong incremental approach. *Id.*

³⁶² *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014).

³⁶³ *Id.* at 670 n.4 (quoting *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009)).

³⁶⁴ Most of the lower courts addressing whether *Petrella* abrogates the discovery rule have held that the discovery rule survives. *See Design Basics, LLC v. Quality Crafted Homes Inc.*, No. 16-CV-50, 2017 WL 1301465, at *2–3 (N.D. Ind. Apr. 7, 2017); *Design Basics, LLC v. Lancia Homes, Inc.*, No. 16-CV-47, 2017 WL 228196, at *2–3 (N.D. Ind. Jan. 19, 2017); *Boehm v. Heyrman Printing, LLC*, No. 16-CV-305, 2017 WL 53296, at *1–2 (W.D. Wis. Jan. 4, 2017); *Design Basics, LLC v. Best Built, Inc.*, 223 F. Supp. 3d 825, 836 (E.D. Wis. 2016); *Seide v. Level-(1) Global Sols., LLC*, No. 16 C 2975, 2016 WL 4206076, at *3 (N.D. Ill. Aug. 10, 2016); *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, LP*, No. H-14-1903, 2016 WL 1203763, at *4 (S.D. Tex. Mar. 22, 2016); *Wolf v. Travolta*, 167 F. Supp. 3d 1077, 1092–93 (C.D. Cal. 2016); *Design Basics, LLC v. Carhart Lumber Co.*, No. 13CV125, 2016 WL 424974, at *3 (D. Neb. Feb. 3, 2016); *Design Basics, LLC v. J & V Roberts Invs., Inc.*, 130 F. Supp. 3d 1266, 1281–82 (E.D. Wis. 2015); *Design Basics, LLC v. Campbellsport Bldg. Supply Inc.*, 99 F. Supp. 3d 899, 919 (E.D. Wis. 2015); *Wu v. John Wiley & Sons, Inc.*, No. 14 Civ. 6746, 2015 WL 5254885, at *4 n.4 (S.D.N.Y. Sept. 10, 2015); *Oracle USA, Inc. v. Rimini St. Inc.*, No. 10-CV-00106, 2015 WL 5089779, at *6 (D. Nev. Aug. 27, 2015); *Panoramic Stock Images, Ltd. v. John Wiley & Sons, Inc.*, No. 12 C 10003, 2014 WL 4344095, at *7 (N.D. Ill. Sept. 2, 2014); *Frerck v. Pearson Educ., Inc.*, 63 F. Supp. 3d 882, 887 n.3 (N.D. Ill. 2014); *Beasley v. John Wiley & Sons, Inc.*, 56 F. Supp.

Second, in *New York Times Co. v. Tasini*,³⁶⁵ a case deciding whether § 201(c) of the Copyright Act privileged publishers who placed freelance journalists' articles in electronic databases, Justice Ginsburg acknowledged that there were several associated legal issues that needed clarification, but she exercised judicial restraint and refused to resolve them. One issue was whether the § 201(c) privilege was transferrable from the owner of the collective work to a third party, such as the electronic publishers.³⁶⁶ Although there is some authority for assignability, it was unnecessary for Justice Ginsburg to address this issue to resolve *Tasini*, so she opted not to.³⁶⁷

Justice Ginsburg also refused to address an issue vigorously argued by the Register of Copyrights: that the electronic publishers publicly displayed the copyrighted articles, and because § 201(c) does not apply to public displays, the electronic publishers' conduct was not privileged.³⁶⁸ Instead, Justice Ginsburg limited the Court's holding to the conclusion that the publishers exercised reproduction and distribution rights.³⁶⁹ She left the issue raised by the Register of Copyrights to wait until another day.

Another issue raised, but not addressed by Ginsburg in *Tasini* was whether electronic databases can qualify as libraries and take advantage of special protections afforded to libraries in § 108 of the Copyright Act, among other places.³⁷⁰ Because those special protections would not absolve the publishers of liability, there was no need for Justice Ginsburg to resolve this question,³⁷¹ so she chose not to do so.

The final issue that Ginsburg noted but sidestepped in *Tasini* was whether the publishers were able to take advantage of § 201(c) only if the electronic databases preserved the original selection, coordination, and arrangement of the print publishers' collective works.³⁷² After raising this question and discussing how the Second Circuit resolved it, Justice Ginsburg explained that the Court would pass on the issue because the electronic databases did not contain revisions of the print collective works.³⁷³

3d 937, 945 n.5 (N.D. Ill. 2014); *Frerck v. John Wiley & Sons, Inc.*, No. 11-CV-2727, 2014 WL 3512991, at *6 n.5 (N.D. Ill. July 14, 2014); *Grant Heilman Photography, Inc. v. McGraw-Hill Cos., Inc.*, 28 F. Supp. 3d 399, 411 (E.D. Pa. 2014); *Lefkowitz v. McGraw-Hill Global Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 357 n.11 (S.D.N.Y. 2014).

³⁶⁵ *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

³⁶⁶ *Id.* at 492–93.

³⁶⁷ *Id.* at 493 (“[W]e find it unnecessary to determine whether the privilege is transferable.”). In fact, she repeated it again later in the opinion. *See id.* at 496 n.5 (“It bears repetition here . . . that we neither decide nor express any view on whether the § 201(c) ‘privilege’ may be transferred.”).

³⁶⁸ *Id.* at 498 n.8.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 503 n.12 (“We need not decide whether the Databases come within the legal coverage of the term ‘libraries’ as used in the Copyright Act.”).

³⁷¹ *Id.* at 503.

³⁷² *Id.* at 502 n.10.

³⁷³ *Id.*

None of these unresolved issues in *Tasini* were earth-shattering. But all of them evidence Justice Ginsburg's reluctance to decide more than what was absolutely necessary to dispose of the dispute. Understanding that future cases might provide new or more developed theories and arguments addressing these issues, she expansively exercised judicial restraint. She allowed the wheels of change to remain in motion, but also kept them moving slowly.

The third and fourth copyright opinions of interest were written by Ruth Bader Ginsburg during her time on the D.C. Circuit. Then-Judge Ginsburg displayed her incrementalism in *Community for Creative Non-Violence v. Reid*³⁷⁴ and *OddzOn Products, Inc. v. Oman*.³⁷⁵ *Reid* concerned copyright law's work for hire doctrine.³⁷⁶ The question presented was whether a sculpture commissioned by a nonprofit was a work made for hire within the definition of § 101 of the Copyright Act,³⁷⁷ entitling the hiring party, rather than the sculptor, to authorship status and, consequently, to ownership of the disputed copyright.³⁷⁸ Although *Reid* would eventually make it to the Supreme Court and set forth the agency-law-based standard for distinguishing employees from independent contractors,³⁷⁹ Ginsburg's incrementalism was on display as an appellate judge with respect to two other issues raised by *Reid*.

First, because the dispute was between the original sculptor and the organization that commissioned the making of the sculpture, there was a dispute about ownership of and access to the finished product.³⁸⁰ *Reid*, the sculptor, was concerned about CCNV's travel plans for the sculpture and worried that it might be damaged as a result.³⁸¹ Because there was only one copy of the work, then-Judge Ginsburg expressed some concern about *Reid*'s ability to exercise his right under § 106(1) to reproduce the work.³⁸² Rather than addressing this tricky issue, Ginsburg, always the incrementalist, planted a seed for how this

³⁷⁴ *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988).

³⁷⁵ *OddzOn Prods., Inc. v. Oman*, 924 F.2d 346 (D.C. Cir. 1991).

³⁷⁶ *Reid*, 846 F.2d at 1486.

³⁷⁷ Section 101 of the Copyright Act states in pertinent part:

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101.

³⁷⁸ *Reid*, 846 F.2d at 1489.

³⁷⁹ *See* *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 736, 742–43 (1989); *see also* Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U. L. REV. 197, 218–22 (2014).

³⁸⁰ *Reid*, 846 F.2d at 1498.

³⁸¹ *Id.*

³⁸² *Id.* ("But singular works of art, we recognize, do not fit comfortably into a scheme centrally concerned with reproduction of the underlying work.").

could be resolved upon remand. She noted that CCNV had “once invited Reid to have a ‘master mold’ of the sculpture made at Reid’s own expense,” and said that she was unaware of any “current authority for a court to order renewal of that invitation.”³⁸³ However, she did manage to find and cite to a 1912 Supreme Judicial Court of Massachusetts case, which provided some support for this unique equitable relief.³⁸⁴

Ginsburg also urged a modest step toward expanding the concept of moral rights in *Reid*.³⁸⁵ Although she did not declare that Reid, as copyright owner, would have a claim against CCNV, she noted in her conclusion that if CCNV “publish[ed] an excessively mutilated or altered version of [the sculpture],” then Reid might have a claim under various statutory or common law doctrines.³⁸⁶ *Reid* was decided before the United States tepidly embraced moral rights in the Visual Artists Rights Act of 1990,³⁸⁷ so this suggestion in *Reid* was a modest proposal toward further protection of authors.

In addition, then-Judge Ginsburg illustrated a few minor instances of incrementalism in *OddzOn*, some of which also arose in *Star Athletica* twenty-five years later. *OddzOn* involved the copyrightability of the KOOSH ball, a toy with “hundreds of floppy, wiggly, elastomeric filaments radiating from a core.”³⁸⁸ Three instances of incrementalism appear in *OddzOn*.

First, a question was raised about whether the KOOSH ball was a useful article.³⁸⁹ Because the petitioner did not challenge this categorization during the application process or at the district court, then-Judge Ginsburg refused to review it.³⁹⁰ Second, because the KOOSH ball was classified as a useful article, it could only be protected to the extent it had conceptually separable features.³⁹¹ Ginsburg recognized the “notable lack of agreement among courts and commentators on the very meaning of ‘conceptual separability’”³⁹² and declined the invitation to “enter the ‘conceptual separability’ fray.”³⁹³ Again, Ginsburg moved cautiously and avoided unnecessarily interpreting or making new law. Finally, her incrementalism in *OddzOn* arose in her limited holding in the case. Although she held that the Copyright Office did not abuse its discretion in refusing to register the KOOSH ball, she made it exceedingly clear that this was all that was decided.³⁹⁴ In both the beginning and conclusion of her opinion,

³⁸³ *Id.*

³⁸⁴ *Id.* (citing *Baker v. Libbie*, 97 N.E. 109, 111–12 (Mass. 1912)).

³⁸⁵ *Id.* at 1498–99.

³⁸⁶ *Id.*

³⁸⁷ See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, sec. 603, § 106A, 104 Stat. 5128.

³⁸⁸ *OddzOn Prods., Inc. v. Oman*, 924 F.2d 346, 347 (D.C. Cir. 1991).

³⁸⁹ *Id.* at 350.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 349.

³⁹² *Id.* (citation omitted).

³⁹³ *Id.* at 350.

³⁹⁴ See *id.*

Ginsburg emphasized that the court's opinion only addressed whether the Copyright Office's refusal to register was an abuse of discretion, and that it was not deciding whether the KOOSH ball was entitled to copyright protection if the issue arose in the context of an infringement action.³⁹⁵

3. *Reinterpreting Precedent*

The final instance of Justice Ginsburg's incrementalism arises in the context of reinterpreting precedent. Her *Grokster* concurrence, which limited the impact of the Court's groundbreaking decision in *Sony v. Universal City Studios*, best exemplifies her role as a cautious copyright jurist, but one who still endeavors to make change.

Sony addressed a claim that secondary liability for infringement can arise from the distribution of a commercial product.³⁹⁶ Plaintiffs, companies that held copyrights in television programs and movies, sued Sony, the manufacturer of Betamax videocassette recorders, on a theory of contributory liability.³⁹⁷ They argued that because Sony made the machine that facilitated the copying, Sony was responsible for the infringement that occurred when Betamax VCR owners taped copyrighted programs.³⁹⁸

Borrowing the staple article of commerce doctrine from patent law, the *Sony* Court ruled that product distributors cannot be held liable for users' infringement so long as the product is "capable of substantial noninfringing uses."³⁹⁹ The evidence showed that the VCR's principal use was "time-shifting," taping a program for later viewing at a more convenient time, which the Court found to be a fair use.⁴⁰⁰ Consequently, the VCR was "capable of substantial noninfringing uses," and the Court held that Sony was not secondarily liable for infringing acts that might have been committed with a Sony Betamax by third parties.⁴⁰¹ This standard served as a baseline largely respected by innovators, the copyrighted content industries, and the public for more than twenty years.⁴⁰²

Then in the late 1990s and early 2000s, technological innovations in online file sharing disrupted the music industry, which greatly influences copyright law and policy.⁴⁰³ With massive numbers of users sharing massive amounts of

³⁹⁵ *Id.*

³⁹⁶ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

³⁹⁷ *Id.* at 434.

³⁹⁸ *Id.* at 420.

³⁹⁹ *Id.* at 442.

⁴⁰⁰ *Id.* at 454–55.

⁴⁰¹ *Id.* at 456.

⁴⁰² *See Pamela Samuelson, Three Reactions to MGM v. Grokster*, 13 MICH. TELECOMMS. TECH. L. REV. 177, 185 (2006).

⁴⁰³ *See Peter S. Menell, Envisioning Copyright Law's Digital Future*, 46 N.Y. L. SCH. L. REV. 63, 116–17 (2002–2003) ("The amount of content available over the Internet took a quantum leap in 1999 with the introduction of Napster's peer-to-peer network technology.").

copyrighted music, copyright owners began filing lawsuits against peer-to-peer file sharing companies, alleging that they were secondarily liable for their users' acts of direct infringement, distributing unauthorized electronic copies of copyrighted songs.⁴⁰⁴ How the *Sony* rule should be applied in the context of online file sharing was hotly contested.

In 2005, *MGM Studios, Inc. v. Grokster* reached the Supreme Court.⁴⁰⁵ A group of motion picture studios, recording companies, music publishers, and songwriters brought the lawsuit against the makers of the Morpheus, Grokster, and KaZaA software products, aiming to shut them down and set a useful precedent to use against other technology companies.⁴⁰⁶ The case raised fundamental questions about how extensively copyright laws should be allowed to slow and impair technological innovation, and how far *Sony's* staple article of commerce doctrine reached.⁴⁰⁷ All the Justices seemed to realize that it would be far too culturally disruptive to upend the compromise reflected by the *Sony* rule.⁴⁰⁸ Instead, the Court created a new (or at least reinvigorated⁴⁰⁹) theory of secondary liability in copyright law: "inducement."⁴¹⁰ The Supreme Court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement," going beyond mere distribution with knowledge of third-party action, "is liable for the resulting acts of infringement by third parties" using the device, regardless of the device's lawful uses.⁴¹¹

Grokster represented a shift in the balance between content owners and technology producers by effectively carving out an exception to *Sony's* substantial non-infringing use doctrine.⁴¹² The Court preserved the *Sony* rule by starkly distinguishing the facts of that case from those in *Grokster*. In *Sony*, the Court held that the manufacture and sale of the Betamax videotape recorder did not subject Sony to liability for contributory copyright infringement resulting from infringing uses by purchasers of the device because the Betamax was ca-

⁴⁰⁴ See, e.g., *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1010–11 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031 (C.D. Cal. 2003); *UMG Recording, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

⁴⁰⁵ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁴⁰⁶ *Id.* at 920–21.

⁴⁰⁷ See Samuelson, *supra* note 402, at 177–79 ("What MGM really wanted in *Grokster* was for the Supreme Court to overturn or radically reinterpret the *Sony* decision and eliminate the safe harbor for technologies capable of [substantial non-infringing uses].").

⁴⁰⁸ See *id.* at 180–81.

⁴⁰⁹ *Protecting Innovation and Art While Preventing Piracy: Hearing on S. 2560 Before the S. Comm. on the Judiciary*, 108th CONG. 134, 144, 146 (2004) (statement of Marybeth Peters, Register of Copyrights).

⁴¹⁰ *Grokster*, 545 U.S. at 936.

⁴¹¹ *Id.* at 919, 936–37.

⁴¹² Peter S. Menell & Ryan Vacca, *3D Printing and US Copyright Law: Implications for Software, Enforcement and Business Strategies*, in *3D PRINTING AND BEYOND: INTELLECTUAL PROPERTY AND REGULATION* 159, 176 (Dinusha Mendis et al. eds., 2019).

pable of “substantial noninfringing uses.”⁴¹³ Sony, the Court inaccurately claimed, had not advertised the copyright infringing uses a Betamax could be put to when it was marketing the machine.⁴¹⁴ Grokster, on the other hand, was alleged to have marketed its software to former users of peer-to-peer file sharing networks that had been shut down for infringing copyrights, such as Napster.⁴¹⁵

Besides the majority opinion, there were two competing concurrences: one written by Justice Ginsburg and joined by Chief Justice Rehnquist and Justice Kennedy, and the other penned by Justice Breyer and joined by Justices Stevens and O'Connor. These two concurrences are really a dispute over the scope of what remains of the *Sony* rule.⁴¹⁶

In her concurrence, Justice Ginsburg questioned whether the record provided sufficient evidence of significant non-infringing uses.⁴¹⁷ After quoting extensively from *Sony* and explaining that the key to Sony's triumph was that the Court recognized that private, non-commercial time-shifting by consumers was non-infringing,⁴¹⁸ she noted that the Court did not “give precise content to the question of how much [actual or potential] use is commercially significant.”⁴¹⁹ Under Justice Ginsburg's interpretation of *Sony*, she thought the defendants in *Grokster* could be liable under a contributory infringement theory even if the majority's newly recognized inducement standard was unsuccessful.⁴²⁰

Justice Ginsburg concluded that *Grokster* differed markedly from *Sony* because “there ha[d] been no finding of any fair use and little beyond anecdotal evidence of noninfringing uses.”⁴²¹ In drafting her concurrence, she expressly signed on to the Court's apparent long-term effort to eviscerate *Sony*'s effects, piece-by-piece, without unduly alarming the technology companies. The *Sony* majority had been a shaky one. The Court had the case argued twice because some Justices were confused or conflicted enough to need a second round of

⁴¹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

⁴¹⁴ See Tony Long, *June 7, 1975: Before Digital, Before VHS . . . There Was Betamax*, WIRED (June 7, 2011, 7:00 AM), <https://www.wired.com/2011/06/0607betamax-vcr-television-recorder/> [<https://perma.cc/H4PT-L7C8>] (displaying 1978 Sony advertisement urging customers to “Watch Whatever Whenever” and to “see any TV show you want to see anytime you want to see it”); see also Photograph of Sony Corp. Betamax Advertisement (1977), <https://clickamericana.com/wp-content/uploads/sony-betamax-ad-10-10-1977.jpg> [<https://perma.cc/BS4K-ZJP7>] (displaying an advertisement telling customers they can record television shows while sleeping, doing something else, or watching other shows).

⁴¹⁵ *Grokster*, 545 U.S. at 925.

⁴¹⁶ See Samuelson, *supra* note 402, at 183–84.

⁴¹⁷ *Grokster*, 545 U.S. at 944–45 (Ginsburg, J., concurring); see also Samuelson, *supra* note 402, at 183.

⁴¹⁸ *Grokster*, 545 U.S. at 943 (Ginsburg, J., concurring).

⁴¹⁹ *Id.* at 943–44 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984)).

⁴²⁰ *Id.* at 948–49; see also Samuelson, *supra* note 402, at 184.

⁴²¹ *Grokster*, 545 U.S. at 945 (Ginsburg, J., concurring).

oral argument before they could reach a conclusion.⁴²² When the opinion finally issued, the splits were unusual. Chief Justice Burger and Justice Rehnquist were at odds, and so were Justices Brennan and Marshall, who almost always voted the same way.⁴²³ As explained earlier, copyright law has a different political valence than a simple liberal versus conservative divide,⁴²⁴ and it was very evident in the *Sony* division. Justice Ginsburg's *Grokster* concurrence advocated tightening the copyright constraints on distributive technologies.⁴²⁵ Though she ostensibly endorsed preserving *Sony*, her concurrence reads much more like the *Sony* dissent than the *Sony* majority opinion, and it deviates significantly from the values underlying *Sony*.⁴²⁶

Justice Breyer's concurrence worried that requiring the defendants to provide detailed business information would be helpful to copyright owners, but "would simultaneously increase the legal uncertainty that surrounds the creation or development of a new technology capable of being put to infringing uses."⁴²⁷ He described Justice Ginsburg's approach as a significant narrowing of *Sony*, writing: "[T]he real question is whether we should modify the *Sony* standard, as MGM requests, or interpret *Sony* more strictly, as I believe Justice Ginsburg's approach would do in practice."⁴²⁸

He further explained that "Justice Ginsburg's approach would require defendants to produce considerably more concrete evidence—more than was presented here—to earn *Sony*'s shelter. That heavier evidentiary demand, and especially the more dramatic (case-by-case balancing) modifications that MGM and the Government seek, would, I believe, undercut the protection that *Sony* now offers."⁴²⁹ Justice Breyer was concerned that inventors and entrepreneurs would increasingly have to fear expensive, lengthy trials as a cost of introducing new technologies⁴³⁰ and that the broad interpretation of *Sony* was working well to avoid discouraging innovative technologies while still protecting copyright owners.⁴³¹

⁴²² *Sony*, 464 U.S. at 42 ("[S]ince we had not completed our study of the case last Term, we ordered reargument.").

⁴²³ See generally *id.* See also *The Supreme Court, 1989 Term*, 104 HARV. L. REV. 40, 360 tbl.I(B) (1990) (showing Justices Brennan and Marshall voted together 94.2% of the time during the 1989 Term).

⁴²⁴ See *supra* note 14 and accompanying text.

⁴²⁵ *Grokster*, 545 U.S. at 942–49 (Ginsburg, J., concurring); see also Robert I. Reis, *The Sony Legacy: Secondary Liability Perspectives*, 3 AKRON INTEL. PROP. J. 223, 266 n.281 (2009).

⁴²⁶ Laura A. Heymann, *Inducement as Contributory Copyright Infringement: Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 37 INT'L REV. INTEL. PROP. & COMP. L. 31, 44 (2006).

⁴²⁷ *Grokster*, 545 U.S. at 959 (Breyer, J., concurring).

⁴²⁸ *Id.* at 956.

⁴²⁹ *Id.* at 959.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 956–66; see also Samuelson, *supra* note 402, at 184–85.

How does Justice Ginsburg's *Grokster* concurrence illustrate incrementalism? From one perspective, it appears as if her opinion is the most radical of the three. She went the furthest in disrupting the delicate balance achieved over twenty years ago. However, she did not choose to throw out *Sony*'s safe harbor as a failure. Instead, she read *Sony*'s holding very narrowly, taking the majority opinion at its word that it was not establishing a precise threshold for how much non-infringing use was significant. This interpretation (or re-interpretation), when framed in this manner, makes Justice Ginsburg's contribution seem like only a minor step beyond *Sony*'s limited holding. Justice Ginsburg criticized Justice Breyer's conclusion that *Sony* provided a clear rule for contributory liability only when the product "will be used *almost exclusively* to infringe copyrights,"⁴³² by pointing out a string of cases holding to the contrary.⁴³³ This was an effort to approach changing the law incrementally herself and to restrict how expansively her colleagues could effect change. Viewed in this light, her *Grokster* concurrence reflects her copyright law related incrementalism.⁴³⁴

III. INTERGOVERNMENTAL DEFERENCE

Another theme running through Justice Ginsburg's copyright jurisprudence is a marked deference to other government institutions.⁴³⁵ Driving this deference are two underlying and related beliefs. First, the evolution and interpretation of the law optimally occurs not as a diatribe against Congress, the President, administrative agencies, or the states, but as a dialogue with those other institutions.⁴³⁶ Second, and related to the first, is that courts have institutional capacity constraints and *must* engage in this cooperative intergovernmental dialogue to be effective. These two precepts cohered with her belief in incrementalism, a preference for evolving the law gradually and with due care.⁴³⁷

⁴³² *Grokster*, 545 U.S. at 957 (Breyer, J., concurring).

⁴³³ *Id.* at 944 n.1 (Ginsburg, J., concurring).

⁴³⁴ For a similar analysis in the context of Justice Ginsburg's jurisprudence on search and seizure law, see Slobogin, *supra* note 259, at 879.

⁴³⁵ Her consideration of institutional considerations is not limited to copyright law. Professor Brudney similarly observed this to varying degrees in Justice Ginsburg's criminal, labor, and civil rights cases. See James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg's Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889, 901 (2009).

⁴³⁶ Ginsburg, *Judicial Voice*, *supra* note 281, at 1186.

⁴³⁷ Ruth Bader Ginsburg, Opening Statement at the Hearing Before the Senate Judiciary Committee (July 20, 1993), in GINSBURG ET AL., *supra* note 258, at 184 ("I would add that the judge should carry out that function without fanfare, but with due care. She should decide the case before her without reaching out to cover cases not yet seen. She should be ever mindful, as Judge and then Justice Benjamin Nathan Cardozo said, 'Justice is not to be taken by storm. She is to be wooed by slow advances.'").

A. *Intergovernmental Dialogue*

In 1992 Ginsburg gave a Madison Lecture at NYU School of Law entitled “Speaking in a Judicial Voice.” In this speech, Ruth Bader Ginsburg expressed approval for a dialogic approach to civil rights.⁴³⁸ She observed that the Court generally invalidated discriminatory laws that had become obsolete.⁴³⁹ She also noted, however, that in what she called “a core set of cases” that concerned social insurance benefits for the spouse or family of a worker, rather than condemn discriminatory laws, “the Court, in effect, opened a dialogue with the political branches of government.”⁴⁴⁰ Ginsburg stated:

In essence, the Court instructed Congress and state legislatures: rethink ancient positions on these questions. Should you determine that special treatment for women is warranted, i.e., compensatory legislation because of the sunken-in social and economic bias or disadvantage women encounter, we have left you a corridor in which to move. But your classifications must be refined, adopted for remedial reasons, and not rooted in prejudice about “the way women (or men) are.”⁴⁴¹

She made the important and very Ginsburgian observation that men would gain, rather than lose, from these changes, noting, “[T]he Court’s decrees removed no benefits; instead, they extended to a woman worker’s husband, widower, or family benefits Congress had authorized only for members of a male worker’s family.”⁴⁴² She continued:

The ball, one might say, was tossed by the Justices back into the legislators’ court, where the political forces of the day could operate. The Supreme Court wrote modestly, it put forward no grand philosophy; but by requiring legislative reexamination of once-customary sex-based classifications, the Court helped to ensure that laws and regulations would “catch up with a changed world.”⁴⁴³

Her words reveal a belief that courts should interact with other government institutions as part of effecting changes in the law. Given the timing of the speech, she must have been aware that she was being considered for a seat on the Supreme Court, and her words may have been meant in part to reassure anyone listening that her approach to justice was not very radical, nor was she likely to be an activist judge. But these remarks were also entirely in character for Justice Ginsburg and sound even now quite sincere.

Justice Ginsburg favored intergovernmental dialogue in contexts other than gender equality. For example, in a series of dissenting opinions in disputes

⁴³⁸ Ginsburg, *Judicial Voice*, *supra* note 281, at 1204.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* (footnote omitted) (quoting Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 823 (1978)).

⁴⁴² *Id.*

⁴⁴³ *Id.* at 1204–05 (footnote omitted) (quoting Wendy W. Williams, *Sex Discrimination: Closing the Law’s Gender Gap*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986*, at 109, 123 (Herman Schwartz ed., 1987)).

about punitive damages, Justice Ginsburg thought the majority's approach to "nationalizing and constitutionalizing limits on punitive damages 'in the face of reform measures recently adopted or currently under consideration in legislative arenas'" was ill-advised and "boldly out of order."⁴⁴⁴

This belief in intergovernmental dialogue is also evident in her copyright opinions. Her *Petrella* opinion exemplifies a commitment to maintaining a dialogue with Congress. *Petrella* concerned the equitable defense of laches, and whether it was available as a defense to damages for particular acts of copyright infringement.⁴⁴⁵ Justice Ginsburg, writing for the majority, held that it was not.⁴⁴⁶ With respect to intergovernmental dialogue in *Petrella*, Ginsburg described the historical back and forth between Congress and the courts on the laches and statutes of limitation issues. She noted that "[u]ntil 1957, federal copyright law did not include a statute of limitations for civil suits. Federal courts therefore used analogous state statutes of limitations to determine the timeliness of infringement claims. And they sometimes invoked laches to abridge the state-law prescription."⁴⁴⁷ She further explained:

"When Congress fails to enact a statute of limitations, a [federal] court that borrows a state statute of limitations but permits it to be abridged by the doctrine of laches is not invading congressional prerogatives. It is merely filling a legislative hole." . . . In 1957, Congress addressed the matter and filled the hole; it prescribed a three-year lookback limitations period for all civil claims arising under the Copyright Act.⁴⁴⁸

Thus the statute of limitations issue shifted to the courts, who borrowed from analogous state statutes of limitation because Congress had given them nothing useful to work with.⁴⁴⁹ But because this caused a lack of uniformity, Congress stepped back in and remedied this omission in 1957 by enacting a three-year limitations period.⁴⁵⁰ Ginsburg cited Senate and House reports to explain what Congress's purposes were,⁴⁵¹ and pointed to Congress's awareness of the policy implications of its decision.⁴⁵² She concluded that "courts are not at liberty to jettison Congress' judgment on the timeliness of suit,"⁴⁵³ but im-

⁴⁴⁴ Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 1085, 1089 (2009) (first quoting *B.M.W. of N. Am. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting); and then quoting *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 438 (2003) (Ginsburg, J., dissenting)).

⁴⁴⁵ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014).

⁴⁴⁶ *Id.* at 668.

⁴⁴⁷ *Id.* at 669 (citation omitted).

⁴⁴⁸ *Id.* at 669–70 (citation omitted).

⁴⁴⁹ *Id.* at 669.

⁴⁵⁰ *Id.* at 669–70.

⁴⁵¹ *Id.* at 670.

⁴⁵² *Id.* at 683 ("Congress must have been aware that the passage of time and the author's death could cause a loss or dilution of evidence. Congress chose, nonetheless, to give the author's family 'a second chance to obtain fair remuneration.'" (quoting *Stewart v. Abend*, 495 U.S. 207, 220 (1990))).

⁴⁵³ *Id.* at 667.

plicitly suggested that if Congress were dissatisfied with the Court's interpretation or that the limitations period was causing unforeseen hardships, then Congress was free to carry on the conversation and change the law.⁴⁵⁴

Ginsburg's dialogic interests in copyright cases also extended to the Copyright Office. In a series of cases involving the registrability of particular copyrights, then-Judge Ginsburg deferred to the Copyright Office as part of an intergovernmental dialogue. The first case, *Atari I*,⁴⁵⁵ involved the videogame Breakout.⁴⁵⁶ The game displayed a wall of red, amber, green, and blue "bricks," and the player controlled a rectangular "paddle" to hit a square bouncing "ball" against the brick wall.⁴⁵⁷ When the ball hit the bricks, the bricks disappeared and the player earned points.⁴⁵⁸ Simple sound effects accompanied the graphics.⁴⁵⁹

Atari attempted to register a copyright in the game as an audiovisual work, but the Copyright Office refused to allow it.⁴⁶⁰ After several rounds of reconsideration, the Copyright Office refused registration on the grounds that the geometric shapes, colors, and individual tones were unoriginal and not copyrightable.⁴⁶¹ Atari appealed to the district court, which affirmed the Copyright Office.⁴⁶²

On appeal to the D.C. Circuit, then-Judge Ginsburg noted that the court reviewed Copyright Office decisions under an abuse of discretion standard.⁴⁶³ But because the Copyright Office had failed to clearly articulate what standard of originality it was applying and whether it was considering the work as a whole (as opposed to its component parts), she remanded the case for further consideration by the Copyright Office.⁴⁶⁴

The second case in this series is *OddzOn*, which asked whether the Copyright Office erred by refusing to register a copyright in a KOOSH ball.⁴⁶⁵ Like in *Atari I*, the Copyright Office refused to register the copyright.⁴⁶⁶ This time, the Copyright Office's reason for the rejection was that the shape of the ball was an uncopyrightable sphere, and that the tactile feel of the KOOSH ball fil-

⁴⁵⁴ *Id.* at 669–70.

⁴⁵⁵ *Atari I*, 888 F.2d 878 (D.C. Cir. 1989).

⁴⁵⁶ *Id.* at 879.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 879–80.

⁴⁶² *Atari Games Corp. v. Oman*, 693 F. Supp. 1204, 1206 (D.D.C. 1988).

⁴⁶³ *Atari I*, 888 F.2d at 881.

⁴⁶⁴ *Id.*

⁴⁶⁵ *OddzOn Prods., Inc. v. Oman*, 924 F.2d 346, 347 (D.C. Cir. 1991).

⁴⁶⁶ *Id.*

aments was a functional, and hence uncopyrightable, part of the work.⁴⁶⁷ The district court affirmed the Copyright Office's refusal.⁴⁶⁸

On appeal to the D.C. Circuit, OddzOn argued that *Atari I* required remand to the Copyright Office.⁴⁶⁹ But then-Judge Ginsburg rejected the analogy, explaining that the refusal in *OddzOn* was on different grounds, and that this interpretation of the law was not arbitrary.⁴⁷⁰

Most important for purposes of intergovernmental dialogue was Judge Ginsburg's discussion of the conceptual separability doctrine. Because the KOOSH ball was a "useful article," the only features eligible for protection were those that were conceptually separable from the utilitarian aspects of the article.⁴⁷¹ Until the Supreme Court expressly addressed the issue in 2017,⁴⁷² there was much judicial confusion over what the proper test for conceptual separability was.⁴⁷³ Rather than jump into the circuit split, Judge Ginsburg deferred to the Copyright Office's interpretation of the doctrine as a way to allow continued development of this area of the law.⁴⁷⁴

The final case in the series is *Atari II*.⁴⁷⁵ This case actually illustrates Ginsburg's willingness to conclude a dialogue when appropriate. Her opinion in *Atari II* ultimately concluded the conversation between the courts and the Copyright Office on the copyrightability of the video game Breakout. After Ginsburg remanded the case to the Copyright Office for further consideration in *Atari I*, the Copyright Office again refused to register Atari's copyright in the audiovisual aspect of the Breakout videogame.⁴⁷⁶ Importantly, between *Atari I* and *Atari II*, the Supreme Court had handed down its decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁴⁷⁷ *Feist* established the standard for copyrightability in compilations and emphasized that it was an extremely low standard that required very little in the way of creativity.⁴⁷⁸ Although the Copyright Office claimed to have considered the work as a whole, Judge Ginsburg

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 348.

⁴⁷⁰ *Id.* at 348–50.

⁴⁷¹ *Id.* at 349; 17 U.S.C. § 101 (defining "useful article").

⁴⁷² See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

⁴⁷³ *OddzOn*, 924 F.2d at 349 ("[T]here is a notable lack of agreement among courts and commentators on the very meaning of 'conceptual separability.'"); see also Ochoa, *supra* note 349, at 105 ("The Supreme Court likely granted certiorari because the Sixth Circuit identified no fewer than *nine* different tests that courts and commentators had proposed for resolving the issue, and the Sixth Circuit adopted a tenth.").

⁴⁷⁴ *OddzOn*, 924 F.2d at 350.

⁴⁷⁵ *Atari II*, 979 F.2d 242 (D.C. Cir. 1992).

⁴⁷⁶ *Id.* at 243.

⁴⁷⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

⁴⁷⁸ *Id.* at 345 ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily . . .").

thought the refusal letters indicated an inappropriate focus on the individual components.⁴⁷⁹

Under the *Feist* standard, Judge Ginsburg concluded that the Copyright Office's rationale for determining that Breakout was insufficiently creative was incorrect.⁴⁸⁰ Effectively cutting off the extended dialogue between her court and the Copyright Office on this issue, Ginsburg opined that "[i]t is not the Register's task to shape the protection threshold or ratchet it up" beyond what *Feist* commands.⁴⁸¹ Of course, the true end of the greater conversation was not of Judge Ginsburg's making; it was the Supreme Court, which she would join less than a year later, that ended the dialogue with its *Feist* holding.

The final and perhaps best example of Justice Ginsburg's desire to dialogically engage other governmental institutions arose in *Kirtsaeng I*. The Court in *Kirtsaeng I* was resolving a dispute about whether the first sale doctrine applied to imported products that were lawfully manufactured abroad.⁴⁸² Justice Ginsburg dissented and would have held that the first sale doctrine does not apply to foreign-manufactured products.⁴⁸³ Part of her rationale for rejecting international exhaustion relied on representations by other institutions. First, she spent part of her dissent tracing the history of the copyright reform efforts that took place in the 1960s and early 1970s.⁴⁸⁴ Surveilling the lengthy revision process involving the Copyright Office, various stakeholders, and Congress convinced her that everyone involved in the process had considered the issue and come to a resolution different from the majority's conclusion.⁴⁸⁵

In addition, Justice Ginsburg wanted to judicially acknowledge the executive branch's position in international trade negotiations.⁴⁸⁶ Justice Ginsburg noted that the government had concluded that international exhaustion "would be inconsistent with the long-term economic interests of the United States" and would be inconsistent with positions it had taken in international trade negotiations.⁴⁸⁷ Justice Ginsburg's approach to the issue, she asserted, would be consistent with the executive branch's approach in trade negotiation.⁴⁸⁸ In fact, Justice Ginsburg thought her conclusions were clearly supported, but might well have reached the same conclusion even if the text and history of the Copyright

⁴⁷⁹ *Atari II*, 979 F.2d at 245–46.

⁴⁸⁰ *Id.* at 247.

⁴⁸¹ *Id.*

⁴⁸² *Kirtsaeng I*, 568 U.S. 519, 525 (2013).

⁴⁸³ *Id.* at 557 (Ginsburg, J., dissenting).

⁴⁸⁴ *Id.* at 568–73.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 573.

⁴⁸⁷ *Id.* at 575–76.

⁴⁸⁸ *Id.* at 576 n.15 ("After *Quality King* . . . the United States reconsidered its position, and it now endorses the interpretation of the § 109(a) phrase 'lawfully made under this title' I would adopt.").

Act were ambiguous.⁴⁸⁹ She feared that the majority's interpretation would harm the United States' "role as a trusted partner in multilateral endeavors."⁴⁹⁰

In Justice Ginsburg's view, the intergovernmental dialogue on the first sale doctrine was in full swing, but the majority's approach cut it off mid-sentence. Though aware that Congress could always amend the Copyright Act to overrule *Kirtsaeng I* and restart the dialogue, Justice Ginsburg seemed concerned that the conversation was terminated prematurely.⁴⁹¹

B. Institutional Capacity Deference

Justice Ginsburg believed that courts are limited in their power and face institutional capacity constraints that sometimes require them to defer to other

⁴⁸⁹ *Id.* at 577 ("Even if the text and history of the Copyright Act were ambiguous on the answer to the question this case presents—which they are not—I would resist a holding out of accord with the firm position the United States has taken on exhaustion in international negotiations.").

⁴⁹⁰ *Id.* at 578 (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995)). Justice Ginsburg was concerned with interrupting this dialogue in *Quality King*. During oral argument, she asked the Deputy Solicitor General if the circuit courts' different approaches was important to the government. Counsel responded, "We do think it's important because it bears on positions we've been taking in international negotiations." Transcript of Oral Argument at 40–41, *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998) (No. 96-1470).

⁴⁹¹ Intergovernmental dialogue also arose in *Aereo*, an opinion Justice Ginsburg joined but did not author. Arriving at its decision, the Court traced the dialogue between Congress and the Court with respect to transmissions of over-the-air broadcasts. *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 439–42 (2014). In 1968, the Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), held that a community antenna television (CATV) system that retransmitted signals did not perform the copyrighted works and therefore was not infringing. *Aereo*, 573 U.S. at 439–40. Six years later in *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974), the Court held that a CATV provider that carried broadcast programming into subscribers' homes hundreds of miles away and exercised some choice over what to transmit was similarly not performing the copyrighted works. *Aereo*, 573 U.S. at 440–41. In the 1976 Copyright Act, Congress rejected *Fortnightly* and *Teleprompter* by broadening the definition of "perform," adding a transmission clause to the definition of "public performance," and adding a section to regulate cable companies' public performance of copyrighted works. *Id.* at 441–42. *Aereo* was the next exchange in this dialogue between Congress and the Court. The Court acknowledged that *Aereo*'s system differed from the systems in *Fortnightly* and *Teleprompter*, but this did not matter. *Id.* at 443–44. Instead, the Court recognized that the dialogue about how to regulate new technologies that broadcast copyrighted works could continue. The Court noted that interested stakeholders concerned about the issue were "free to seek action from Congress." *Id.* at 451.

Similarly, intergovernmental dialogue arose in *Allen v. Cooper*, 140 S. Ct. 994 (2020). The Court held that state sovereign immunity was not properly abrogated by Congress in the Copyright Remedy Clarification Act of 1990. *Id.* Justice Breyer wrote a short concurring opinion, which Justice Ginsburg joined, expressing their belief that the Court's precedent on this issue was incorrectly decided. *Id.* at 1008–09 (Breyer, J., concurring). Their concurrence described the unfairness to copyright owners and suggested that Congress may want to "venture into this great constitutional unknown." *Id.* at 1009.

governmental institutions.⁴⁹² She explained during her Madison Lecture at NYU School of Law that effective judges must persuade the political branches of government to endorse their judgments, opining:

The judiciary, Hamilton wrote, from the very nature of its functions, will always be “the least dangerous” branch of government, for judges hold neither the sword nor the purse of the community; ultimately, they must depend upon the political branches to effectuate their judgments. Mindful of that reality, the effective judge, I believe and will explain why in these remarks, strives to persuade, and not to pontificate.⁴⁹³

Several examples of institutional capacity deference appear in her copyright opinions. Her conclusions in the *Eldred* and *Golan* cases both demonstrate deference to Congress in determining the proper duration of copyright protection. *Eldred* tested the constitutionality of a specific piece of legislation, the Copyright Term Extension Act (CTEA), which added twenty years to most copyrights, both prospectively and retroactively.⁴⁹⁴ During oral arguments in *Eldred*, Justice Ginsburg asked the following questions with respect to whether life plus seventy years ran afoul of the “limited times” language of the IP Clause of the U.S. Constitution:

But there has to be a limit, as you acknowledge. Perpetual copyright is not permitted. Who is the judge of—within that line? Who is the judge of when it becomes unlimited? Is there, in other words, judicial review and, if there is, what standard will this Court apply to determine whether something short of perpetual is still unlimited?⁴⁹⁵

Her query expressed her curiosity about which institution was best positioned to determine how long is too long for copyright protections to subsist. If the judiciary took on this role, she did not know on what bases the courts would decide. She felt that there was nothing about judges that made them inherently superior in determining the outer limits of copyright duration, as long as those limits were outside the bounds of perpetual copyright protection, which is constitutionally prohibited by Article I, Section 8, Clause 8 of the U.S. Constitution fairly unambiguously.

In her majority opinion in *Eldred*, she criticized Justice Breyer’s argument that the economic incentives created by the CTEA’s additional twenty years of copyright protection were too insignificant to cause an author to create more new works or do anything differently.⁴⁹⁶ It was not that she believed that he was necessarily wrong in his analysis, but Justice Ginsburg thought the issue should not be a matter of the Court’s concern. She explained that “[c]alibrating

⁴⁹² Unlike Vanilla Ice, who declared, “If there was a problem, yo, I’ll solve it,” a judge relying on institutional capacity deference would say, “If there is a problem, yo, someone else should solve it.” See VANILLA ICE, *Ice Ice Baby*, on TO THE EXTREME (SBK Records 1990).

⁴⁹³ Ginsburg, *Judicial Voice*, *supra* note 281, at 1186 (quoting THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

⁴⁹⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003).

⁴⁹⁵ Transcript of Oral Argument at 40, *Eldred*, 537 U.S. 186 (No. 01-618).

⁴⁹⁶ *Eldred*, 537 U.S. at 207 n.15.

rational economic incentives . . . is a task primarily for Congress, not the courts.”⁴⁹⁷ She described how Congress had heard testimony from several witnesses in making its decisions about the content of the CTEA, and she stated that the Court should not “take Congress to task for crediting this evidence.”⁴⁹⁸ Similarly, she wrote that the Court was “not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”⁴⁹⁹ It was not just that the Court should give rational basis review to such decisions; the Court, she believed, had no legitimate way of determining what the proper duration of copyright protection should be.⁵⁰⁰ Her concluding sentences in *Eldred* highlight her position. She wrote, “[P]etitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA’s long terms. The wisdom of Congress’ action, however, is not within our province to second-guess. [We are s]atisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch.”⁵⁰¹

The *Golan* case concerned the 1994 decision by Congress to give “works enjoying copyright protection abroad the same full term of protection available to U.S. works” in order to perfect U.S. implementation of the Berne Convention and as part of the U.S. response to the Uruguay Round of multilateral trade negotiations.⁵⁰² Congress accomplished this in Section 514 of the Uruguay Round Agreements Act (URAA), which granted copyright protection to preexisting works of Berne member countries that were protected in their country of origin but lacked protection in the United States for one of three reasons: “[t]he United States did not protect works from the country of origin at the time of publication; the United States did not protect sound recordings fixed before 1972; or the author had failed to comply with U.S. statutory formalities,” which were no longer required as prerequisites to copyright protection.⁵⁰³

Justice Ginsburg’s jurisprudential approach to *Golan* mirrored her opinion in *Eldred*. Again writing for the majority, she explained that the decision by Congress to extend copyright protections to foreign works that had previously fallen into the public domain was not a decision the Court had “warrant to reject” because Congress had determined that doing so would further the IP Clause’s objectives.⁵⁰⁴ When framed as broadly as this, it is no wonder she

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 208 n.15.

⁴⁹⁹ *Id.* at 208.

⁵⁰⁰ Although Justice Breyer uses calculations by amici to show that life plus seventy years creates a term worth 99.8% of the value of a perpetual copyright, Justice Ginsburg responds that such calculations are unhelpful because prior acts’ shorter terms were demonstrated to be 99.4%, 97.7%, and 94.1% and do not provide the Court any way to draw the line between permitted and unpermitted durations. *Id.* at 209–10 n.16.

⁵⁰¹ *Id.* at 222.

⁵⁰² *Golan v. Holder*, 565 U.S. 302, 307 (2012).

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 327.

thought that the Court would be without the institutional capacity to resolve this question. In response to a question raised about orphan works, Justice Ginsburg specifically mentioned institutional capacity as a reason to leave it unaddressed.⁵⁰⁵ She explained that the issue was not “a matter appropriate for judicial, as opposed to legislative, resolution. Indeed, the host of policy and logistical questions identified by the dissent speak for themselves.”⁵⁰⁶

Justice Ginsburg’s majority opinion in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC* also illustrates her institutional capacity deference. *Fourth Estate* addressed the question of whether a copyright registration was made for the purposes of § 411(a) upon filing an application with the Copyright Office or upon actual registration or rejection by the Copyright Office.⁵⁰⁷ Arguing for the “application approach,” *Fourth Estate* asserted that copyright owners might lose their ability to enforce their rights if the Copyright Office did not act quickly enough to process a registration application, and the statute of limitations expired.⁵⁰⁸ Justice Ginsburg rejected this argument, noting that the current processing time for applications was seven months, which would leave ample time to file suit.⁵⁰⁹ Illustrating institutional capacity deference once again, she stated that although it was true that the registration scheme was not working as Congress envisioned (with processing times increasing from a couple weeks in 1956 to seven months today), the delays were “attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate, but courts cannot cure.”⁵¹⁰ Because of the judiciary’s inability to directly address the delay problem, she found this policy argument unpersuasive.

A final instance of institutional capacity deference vis à vis Congress appeared in *Lotus Development Corp. v. Borland International, Inc.*,⁵¹¹ a case in which the Court split four-four on the question of whether a computer program’s menu command was copyrightable in light of the functional aspects the menu command performs.⁵¹² The case went to the Court from the First Circuit, where Judge Boudin wrote a concurring opinion in which he asserted that perhaps menu commands should receive only short periods of protection under the Copyright Act.⁵¹³ During oral argument, Justice Ginsburg expressed deep concern about Judge Boudin’s suggestion, stating:

⁵⁰⁵ *Id.* at 334.

⁵⁰⁶ *Id.* at 334–35 (citations omitted).

⁵⁰⁷ *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC* (*Fourth Estate*), 139 S. Ct. 881, 888 (2019).

⁵⁰⁸ *Id.* at 892.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 516 U.S. 233 (1996).

⁵¹² *See id.*

⁵¹³ *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 822 (1st Cir. 1995) (Boudin, J., concurring).

What I was suggesting is that we are dealing with the statute and you've been featuring Judge Boudin who at the end says, some solutions, e.g., a very short copyright period for menus. So, that makes me wonder what is he doing. Menus maybe are protected too much and maybe they shouldn't be protected for as long. So, he's really struggling with this idea. But the notion that because there may be too much protection, the Court should then revise the statute is troubling.⁵¹⁴

What Judge Boudin actually said in his concurring opinion was that some solutions, such as a shortened period of copyright protection for menus, "are not options at all for courts but might be for Congress."⁵¹⁵ He continued, "In all events, the choices are important ones of policy, not linguistics, and they should be made with the underlying considerations in view."⁵¹⁶ Justice Ginsburg and Judge Boudin were actually on the same page. Both thought courts were ill suited to determine the proper scope of protection for menu commands, which was a policy decision that Congress was best equipped to address.

Justice Ginsburg exhibited institutional capacity deference not only toward Congress, but also deferred to administrative agencies on the basis of institutional capacity constraints. In 1983, then-Judge Ginsburg wrote her very first copyright opinion in *National Cable Television Ass'n v. Copyright Royalty Tribunal*.⁵¹⁷ The appeal to the D.C. Circuit was from Copyright Royalty Tribunal (CRT), a congressionally created agency established to adjust royalty rates and to allocate royalties among copyright owners for compulsory licenses related to cable television retransmissions.⁵¹⁸

In short, the CRT raised the royalty rates after the Federal Communications Commission repealed its distant signal and syndicated program exclusivity rules.⁵¹⁹ Unhappy with the newly established rates, the NCTA requested that the court vacate the CRT's decision.⁵²⁰ Ginsburg laid out the Administrative Procedure Act's standard for reviewing agency decisions and asserted that wide latitude should be granted to the CRT because Congress gave very little substantive guidance on how to determine "reasonable" rates.⁵²¹ She next described how the CRT determined the rates and how this process involved the CRT using its "best guess"⁵²² because the evidence submitted by the parties was either "useless" or "far from perfect."⁵²³ Although much of the opinion in-

⁵¹⁴ Transcript of Oral Argument at 48–49, *Lotus*, 516 U.S. 233 (No. 94-2003).

⁵¹⁵ *Lotus*, 49 F.3d at 822.

⁵¹⁶ *Id.*

⁵¹⁷ *Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 179 (D.C. Cir. 1983).

⁵¹⁸ *Id.*

⁵¹⁹ *Id.* at 182–83, 187.

⁵²⁰ *Id.* at 181.

⁵²¹ *Id.* at 181–82.

⁵²² *Id.* at 187.

⁵²³ *Id.* at 183–84.

vokes long-established deference to administrative agencies, Ginsburg, in her concluding comments about the distant signal carriage fees, wrote:

In sum, the Tribunal sought to estimate a market price in the absence of a functioning market. It used the best, indeed, the only, analogies available to it. It could not mathematically derive its ultimate decision. Inevitably, it used its expert judgment to make a “best guess”; *we are not positioned to offer a better one*.⁵²⁴

Ginsburg used the court’s lack of capacity to do a good job determining royalty rates as a reason for affirming the CRT’s decisions. She observed that because Congress provided “virtually no instruction as to the factors that bear on the reasonableness of the adjusted rates,” the CRT’s rate adjustments are subject to a “zone of reasonableness” review.⁵²⁵ And most relevant for purposes of institutional capacity deference is her final statement: “If the Tribunal turns out to have misjudged the impact its higher royalty rates will have on the cable industry or on copyright owners, it can reconsider and modify the changes it has ordered in 1985 when its next rate adjustment proceeding will almost certainly occur.”⁵²⁶

Because the court was in no better position to determine royalty rates than the CRT—the court would have the same evidence and most likely less expertise—Ginsburg deferred to the CRT for this rate setting process and concluded that error correction should also be within the CRT’s purview.

To be sure, the institutional capacity deference theme running through a number of Justice Ginsburg’s copyright opinions is more subtle than her incrementalism.⁵²⁷ But when combined with her commitment to intergovernmental dialogic exchanges, it adds a powerful example of Justice Ginsburg’s approach to developing the law in a thoughtful, restrained, and cooperative manner.

IV. SEEKING ALTERNATIVES

The next theme running through Justice Ginsburg’s copyright opinions is her willingness to seek alternative avenues of redress or relief in order to minimize the social disruptions caused by a particular outcome in a case. She explained her interest in seeking creative alternative approaches to justice during her confirmation hearings, stating, “It is much easier to criticize than to come up with an alternative. So, as a general matter, I would never tear down unless I am sure I have a better building to replace what is being torn down.”⁵²⁸ This Part first examines Ginsburg’s use of alternatives in copyright cases and then juxtaposes this practice with her critique of alternatives in gender equality cases.

⁵²⁴ *Id.* at 187 (emphasis added).

⁵²⁵ *Id.* at 190.

⁵²⁶ *Id.*

⁵²⁷ *See supra* Section II.B.

⁵²⁸ *Confirmation Hearing, supra* note 260, at 155.

A. Alternatives Galore in Copyright

Justice Ginsburg robustly demonstrated her interest in alternative remedies in the *Tasini* case. In *Tasini*, the Court ruled that the defendant publishers were not entitled to use the Copyright Act's § 201(c) privilege to avoid paying freelance authors the royalties they were entitled to after their articles were included in electronic publishers' databases without their permission.⁵²⁹ The publishers and many interested third parties worried that if the freelancers won, the enormous quantity of articles they had written might become difficult or even impossible for the public to access, leaving a veritable hole in the nation's journalistic history.⁵³⁰ Justice Ginsburg decided that the social disruption that resulted from the freelancers' victory in *Tasini* could be minimized if the Court declined to issue an injunction preventing inclusion of the disputed articles in databases and focused instead on creating a remedy that got the freelancers paid, drawing on mechanisms such as compulsory licenses and consent decrees.⁵³¹ She also pointedly reminded the parties that they had alternative methods of advancing their interests through private negotiation and contractual arrangements.⁵³² After remand, the parties entered into a class action settlement,⁵³³ which eventually made its way back to the Supreme Court and was affirmed in *Muchnick*.⁵³⁴

*Kirtsaeng v. John Wiley & Sons, Inc.*⁵³⁵ is another example of Justice Ginsburg seeking out or pitching creative alternatives to avoid or minimize social disruptions. *Kirtsaeng I* presented the question of whether the Copyright Act's first sale doctrine included the concept of international exhaustion.⁵³⁶ That is, if a copyrighted item is manufactured and sold abroad, did the copyright owner have the ability to prohibit subsequent sales of that item?⁵³⁷ The *Kirtsaeng I* Court held that international exhaustion applied, and the copyright owner had no power under the Copyright Act to restrict sales after an initial authorized sale abroad.⁵³⁸ The majority identified several problems that would result if an alternative, geographically restrained approach were adopted.

⁵²⁹ *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 492–93, 506 (2001).

⁵³⁰ *Id.* at 504–05.

⁵³¹ *Id.* at 505.

⁵³² *Id.* at 502 n.11. During oral argument, Justice Ginsburg also suggested two alternatives. First is that the three-year statute of limitations might reduce some of the risk for publishers. And second, that the authors want their works electronically published because they have an interest in exposure. Transcript of Oral Argument at 9–10, *Tasini*, 533 U.S. 483 (No. 00-201).

⁵³³ *In re Literary Works in Elec. Databases*, 509 F.3d 116, 119–20 (2d Cir. 2007), *rev'd*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

⁵³⁴ *Muchnick*, 559 U.S. at 159–60, 170–71.

⁵³⁵ *Kirtsaeng I*, 568 U.S. 519 (2013).

⁵³⁶ *Id.* at 525.

⁵³⁷ *Id.*

⁵³⁸ *Id.* at 530.

In her dissenting rebuttal, Justice Ginsburg articulated alternative approaches that reduced or eliminated those social disruptions. The majority referred to the Solicitor General's statement at oral argument that between international exhaustion and the geographic interpretation, the geographic interpretation would be worse because such goods would be subject to continuing licensing requirements, or as the majority phrased it, "perpetual downstream control."⁵³⁹ But Justice Ginsburg argued that this concern was that authorized sale, and further distribution, could occur without the copyright owner's permission.⁵⁴⁰ In short, she asserted that there was no risk of perpetual control because existing interpretations of the first sale doctrine would kick in.

The majority expressed additional concerns that a geographic interpretation of the first sale doctrine would limit libraries from circulating millions of foreign-produced books because they would have no practical way of obtaining permission.⁵⁴¹ The majority asked, "Are the libraries to stop circulating or distributing or displaying the millions of books in their collections that were printed abroad?"⁵⁴² Justice Ginsburg responded that the Copyright Act actually facilitated this type of activity⁵⁴³ because § 602(a)(3)(C) permitted "an organization operated for scholarly, educational, or religious purposes to import, without the copyright owner's authorization, up to five . . . copies of a [work] for library lending or archival purposes."⁵⁴⁴

The majority also worried about the effect on art museums.⁵⁴⁵ A geographical interpretation, the majority reasoned, "would require the museums to obtain permission from the copyright owners before they could display the work—even if the copyright owner has already sold or donated the work to a foreign museum."⁵⁴⁶ Again, Justice Ginsburg pointed out alternatives to minimize this concern.⁵⁴⁷ She initially acknowledged that the museums could try to seek permission from copyright owners.⁵⁴⁸ But even in the absence of express permission, she observed that implied licenses and fair use could also serve as tools to allow museums to legally display art created abroad.⁵⁴⁹

Finally, the majority raised concerns about consumer goods⁵⁵⁰ because many consumer goods that are manufactured abroad contain copyrighted software, packaging, logos, instructions, et cetera.⁵⁵¹ The majority worried that a

⁵³⁹ *Id.* at 553.

⁵⁴⁰ *Id.* at 580 (Ginsburg, J., dissenting).

⁵⁴¹ *Id.* at 541 (majority opinion).

⁵⁴² *Id.*

⁵⁴³ *Id.* at 583 (Ginsburg, J., dissenting).

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.* at 543 (majority opinion).

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 584 (Ginsburg, J., dissenting).

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* at 542 (majority opinion).

⁵⁵¹ *Id.*

geographical interpretation would prevent the resale of tangible goods, including products like automobiles, because they contained copyrighted software.⁵⁵² As neither foreign manufacturers nor American purchasers regularly obtain permission from copyright holders to import objects of manufacture that utilize copyrighted software, subsequent sales in the United States would be subject to the threat of litigation.⁵⁵³ Similarly, a tourist who purchased a copyrighted work abroad would not be able to display or resell the copy in the United States without authorization.⁵⁵⁴ This, the majority feared, could be chaotic.

Justice Ginsburg again listed alternative mechanisms to minimize the risk of social disruptions. As for museums, she asserted that the principles of express licenses, implied licenses, and fair use were tools to enable the legal resale of products without the necessity of obtaining a copyright owner's permission.⁵⁵⁵ These same principles would also allow tourists to display or resell their copies.⁵⁵⁶ She also invoked § 602(a)(3)(B) of the Copyright Act, which states that the ban on imports does not apply to "any person arriving from outside the United States . . . with respect to copies . . . forming part of such person's personal baggage" as long as it is for private use and not for distribution.⁵⁵⁷ Finally, Justice Ginsburg explained that the majority's concerns were overblown because of the realities of the marketplace.⁵⁵⁸ She observed that "[r]outinely suing one's customers is hardly a best business practice" and that manufacturers "may be hesitant to do business with software programmers taken to suing consumers."⁵⁵⁹ Moreover, "[m]anufacturers may also insist that software programmers agree to contract terms barring such lawsuits."⁵⁶⁰ Although Justice Ginsburg was unable to fully allay all of the majority's concerns enough to persuade them to vote with her in *Kirtsaeng I*, her presentation of alternative avenues for relief assisted the majority in accurately identifying the policy effects of the case's outcome.

*Petrella v. Metro-Goldwyn-Mayer, Inc.*⁵⁶¹ provides yet another illustration of Justice Ginsburg's predilection for seeking alternatives. Writing for the majority, she found that laches could not preclude a claim for damages brought within the three-year statute of limitations period.⁵⁶² The defendants and dissenting Justices expressed concern that because of a long period of delay, a defendant might be harmed by its reliance on the plaintiff's silence, or by the loss

⁵⁵² *Id.*

⁵⁵³ *Id.* at 542–43.

⁵⁵⁴ *Id.* at 537.

⁵⁵⁵ *Id.* at 584 (Ginsburg, J., dissenting).

⁵⁵⁶ *Id.* at 584 n.25.

⁵⁵⁷ *Id.* (quoting 17 U.S.C. § 602(a)(3)(B)).

⁵⁵⁸ *Id.* at 585.

⁵⁵⁹ *Id.* at 585–86.

⁵⁶⁰ *Id.* at 586.

⁵⁶¹ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014).

⁵⁶² *Id.* at 666–67, 679.

of potential evidence.⁵⁶³ Justice Ginsburg recognized this potential for injustice and wrote that an alternative mechanism, the doctrine of estoppel, could play a role in alleviating some of these concerns.⁵⁶⁴ She acknowledged that estoppel was not a complete replacement for laches and that estoppel requires a more exacting test,⁵⁶⁵ but she felt it was still a useful alternative tool to help address some of the contrary concerns.⁵⁶⁶

*Golan v. Holder*⁵⁶⁷ was yet another case in which Justice Ginsburg articulated an alternative avenue of relief to mollify the dissent's policy trepidations. One concern about restoring copyright protection in foreign works was that entities currently using the works based on an understanding that they were in the public domain would be deprived of their investments in these works.⁵⁶⁸ In counterpoint, Justice Ginsburg noted that under the Uruguay Round Agreements Act, Congress had created additional protections for reliance parties.⁵⁶⁹ If users of the previously unprotected materials had exploited the work prior to restoration, then the user could continue using the work until the copyright owner actually or constructively notifies the user.⁵⁷⁰ And even after notification, the reliance party could continue exploiting the work for an additional year.⁵⁷¹ Finally, reliance parties who created derivative works based on previously unprotected works could continue to exploit their derivative works upon payment of "reasonable compensation."⁵⁷²

The final case in which Justice Ginsburg listed alternatives to eliminate or minimize counter-arguments is *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*.⁵⁷³ In this case, she held that "registration has been made" when the Copyright Office registers (or refuses to register) a copyright, and not simply by filing the application.⁵⁷⁴ The plaintiff argued that waiting until registration occurred would harm plaintiffs because it delays their ability to file suit and seek relief.⁵⁷⁵ Justice Ginsburg acknowledged the possibility, but listed two alternative mechanisms that tempered its effects. First, Congress created a system of preregistration that applies to categories of works that are especially susceptible to infringement before the works have been published.⁵⁷⁶ Second,

⁵⁶³ *Id.* at 689–90 (Breyer, J., dissenting).

⁵⁶⁴ *Id.* at 684 (majority opinion).

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.* at 684–85.

⁵⁶⁷ *Golan v. Holder*, 565 U.S. 302 (2012).

⁵⁶⁸ *Id.* at 315–16.

⁵⁶⁹ *Id.* at 316.

⁵⁷⁰ *Id.* (citing 17 U.S.C. § 104A(c), (d)(2)(A)(i), (B)(i)).

⁵⁷¹ *Id.* (citing 17 U.S.C. § 104A(d)(2)(A)(ii), (B)(ii)).

⁵⁷² *Id.* (citing 17 U.S.C. § 104A(d)(3)).

⁵⁷³ *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC (Fourth Estate)*, 139 S. Ct. 881 (2019).

⁵⁷⁴ *Id.* at 892.

⁵⁷⁵ *Id.* at 891.

⁵⁷⁶ *Id.* at 892 (citing 17 U.S.C. § 408(f)).

the Copyright Office permits copyright claimants to seek expedited review of their application, which is normally accomplished within five days.⁵⁷⁷ These alternative avenues, according to Justice Ginsburg, provided some relief for copyright owners in light of the Court's interpretation of the language to require more than simply filing the application before bringing suit.

B. *Suspicion of Alternatives in Gender Equality*

Justice Ginsburg treated alternatives in equal protection cases differently than she did in copyright cases. Unlike her Goliath-favoring copyright opinions, in social justice cases Justice Ginsburg's focus was almost always on the underdog.⁵⁷⁸ In 1973, when she was still a law professor, Ruth Bader Ginsburg penned a short article on the need for the proposed Equal Rights Amendment.⁵⁷⁹ In this article, she noted that “[o]pponents of the amendment suggest the pursuit of alternate routes: particularized statutes through the regular legislative process in Congress and in the states, and test case litigation under the Fourteenth Amendment.”⁵⁸⁰ This, she opined, was ill-advised because “[o]nly those who have failed to learn the lessons of the past can accept that counsel.”⁵⁸¹

Her skepticism toward alternatives in social justice contexts carried over into her role as a jurist. In perhaps her most famous opinion, *United States v. Virginia*,⁵⁸² also known as the VMI case, Justice Ginsburg was highly critical of alternatives proffered by those who would retain gender segregation.⁵⁸³ This case involved an equal protection challenge to Virginia's exclusion of women from its public military college, Virginia Military Institute (VMI).⁵⁸⁴ After VMI prevailed in the district court, the Fourth Circuit vacated the decision and remanded the case so Virginia could select and implement a remedial course.⁵⁸⁵ Rather than admit women to VMI, Virginia chose to create a parallel program for women—the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College.⁵⁸⁶ The allure of “separate but equal” as a justification to retain segregation clearly had not disappeared after *Brown v. Board of Education*.⁵⁸⁷

⁵⁷⁷ *Id.* at 892 n.6.

⁵⁷⁸ See *supra* note 8 and accompanying text.

⁵⁷⁹ Ginsburg, *supra* note 294, at 1013.

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

⁵⁸² *United States v. Virginia*, 518 U.S. 515 (1996).

⁵⁸³ *Id.* at 553 (“[T]he Commonwealth has created a VWIL program fairly appraised as a ‘pale shadow’ of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.”).

⁵⁸⁴ *Id.* at 519.

⁵⁸⁵ *Id.* at 525.

⁵⁸⁶ *Id.* at 526.

⁵⁸⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

Although VWIL shared VMI's mission of producing "citizen-soldiers," there were differences between the institutes.⁵⁸⁸ Nonetheless, the district court determined that "the two schools would achieve substantially similar outcomes."⁵⁸⁹ The district judge wrote, "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."⁵⁹⁰ On appeal, the Fourth Circuit recognized some of the differences between the programs but concluded that the educational opportunities were "sufficiently comparable."⁵⁹¹

At the Supreme Court, Justice Ginsburg soundly rejected Virginia's VWIL alternative. She walked through the myriad differences between the programs: military education versus "a 'cooperative method' of education 'which reinforces self-esteem'";⁵⁹² the lack of a military-style residence and "barracks" life designed to foster an "egalitarian ethic";⁵⁹³ leadership training without the physical rigor, mental stress, and minute regulation of behavior and a lack of adversative training;⁵⁹⁴ a faculty with significantly fewer faculty members with doctoral degrees;⁵⁹⁵ different educational courses;⁵⁹⁶ different physical training facilities;⁵⁹⁷ and a different alumni network.⁵⁹⁸ In short, Ginsburg concluded, Virginia "has created a VWIL program fairly appraised as a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."⁵⁹⁹ Although VWIL may have had some value for female students seeking such a program, Justice Ginsburg concluded that this alternative afforded "no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade."⁶⁰⁰

Justice Ginsburg was more willing and likely to give copyright plaintiffs only partial relief than she was to endorse compromises in gender equality cases. Had she still been a law professor when legal scholarship began making

⁵⁸⁸ *Virginia*, 518 U.S. at 526.

⁵⁸⁹ *Id.* at 528.

⁵⁹⁰ *United States v. Virginia*, 852 F. Supp. 471, 484 (W.D. Va. 1994).

⁵⁹¹ *United States v. Virginia*, 44 F.3d 1229, 1241 (4th Cir. 1995).

⁵⁹² *Virginia*, 518 U.S. at 548.

⁵⁹³ *Id.*

⁵⁹⁴ *Id.* at 549.

⁵⁹⁵ *Id.* at 551.

⁵⁹⁶ *Id.* at 551–52 (describing the lack of engineering and advanced math and physics courses at Mary Baldwin College).

⁵⁹⁷ *Id.* at 552 ("Mary Baldwin has 'two multi-purpose fields' and '[o]ne gymnasium.' VMI has 'an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11-laps-to-the-mile indoor running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track.'").

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.* at 553.

⁶⁰⁰ *Id.* at 555.

connections between human rights and copyright laws, one wonders what she would have made of it as a fellow academic. It is regrettable that she will never be able to adjudicate a case directly pitting civil rights against copyright protections, as no one could ever be as qualified as she was to do so.

V. STOICISM, THEN ANGER

A final theme running through Justice Ginsburg's copyright jurisprudence, her other writings, and her public life generally initially presented itself as "excessive politeness." Yet after reflecting upon her frequently expressed institutional capacity doubts about the courts, it seems to be something rather more complicated. What seemed like deferential politeness by Justice Ginsburg may instead have reflected an innate stoicism. But eventually, this stoicism fractured a little, permitting brief flashes of anger and frustration to emerge in a couple of copyright cases, and other contexts as well.

A. Stoicism

Ruth Bader Ginsburg was obviously animated by making changes, especially social changes, though sometimes gradually and by degrees. Yet contemporaneously, she also was astonishingly stoic in the face of the devastating loss of her husband Marty Ginsburg, and during the many health challenges she pushed through while remaining on the job and fully engaged as a Supreme Court Justice.⁶⁰¹ Anyone who has seen video of Justice Ginsburg working out with a trainer, wearing a grim but determined countenance, has witnessed her stoicism manifest itself physically.⁶⁰² Though in contemporary parlance the word "stoic" is assumed to mean "emotionless,"⁶⁰³ Stoicism is a vibrant, action-oriented, and paradigm-shifting life philosophy.⁶⁰⁴

Epictetus, one of the most important ancient Stoic philosophers, explained in *The Discourses* that the Stoic "must make the best use that we can of the things which are in our power, and use the rest according to their nature."⁶⁰⁵ But this should not be interpreted as complacency. Stoics believe in their ability

⁶⁰¹ DE HART, *supra* note 262, at 410–11 (describing both Justice Ginsburg's and Marty Ginsburg's cancer diagnoses, the subsequent surgery, and how she returned to Washington to avoid missing oral arguments).

⁶⁰² Veronica Stracqualursi, *Ruth Bader Ginsburg Continues to Work Out at Supreme Court Private Gym, Her Trainer Says*, CNN, (Apr. 1, 2020, 5:09 PM), <https://www.cnn.com/2020/04/01/politics/ruth-bader-ginsburg-workout-coronavirus/index.html> [<https://perma.cc/R9D5-4KMX>].

⁶⁰³ JOHN SELLARS, *STOICISM 1* (Routledge 2014) (2006).

⁶⁰⁴ *Id.* at 2–3.

⁶⁰⁵ EPICETUS, *THE DISCOURSES OF EPICETUS* 10 (Greenbook Publ'ns 2011) (c. 108 A.D.); see also Jason Reddoch, *The Stoics on Hope and Fear: How to Be a Politically Engaged Stoic*, 101 *SOUNDINGS* 52, 53 (2018).

to change the world.⁶⁰⁶ Marcus Aurelius, Roman emperor from 161 to 180 A.D. and one of the most famous Stoics, wrote, “The impediment to action advances action. What stands in the way becomes the way.”⁶⁰⁷ What he meant was that failure is an opportunity to be better, to do better, to reevaluate and start over. Stoics believe that successful activism requires wisdom, strategy, and an abandonment of irrational emotions.⁶⁰⁸

Stoics highly value justice as a core principle. As Aurelius explained, “[f]rom justice, all other virtues have their existence.”⁶⁰⁹ History is replete with Stoics courageously advocating for justice to defend the principles they believed in.⁶¹⁰ But there is also firm recognition that some things are out of our control and must be left to nature. The late American novelist, playwright, essayist, poet, and activist James Baldwin captured this tension:

It began to seem that one would have to hold in mind forever two ideas which seemed to be in opposition. The first idea was acceptance, the acceptance, totally without rancor, of life as it is, and men as they are: in the light of this idea, it goes without saying that injustices is a commonplace. But this did not mean that one could be complacent, for the second idea was of equal power: that one must never, in one’s own life, accept these injustices as commonplace but must fight them with all one’s strength.⁶¹¹

To practicing Stoics, virtue must be its own reward; one does something because it is the right thing to do.⁶¹² It does not matter whether one gets anything out of it personally; in fact, sometimes Stoicism requires taking action that would lead to unpleasant personal outcomes.⁶¹³ Stoics must do the right thing; it is their nature.⁶¹⁴ One can imagine Justice Ginsburg having had such a phrase charmingly embroidered on a decorative pillow. More pointedly, whether or not she credited Marcus Aurelius for the proposition, she lived by these thoroughly Ginsburgian words of his: “If it’s endurable, then endure it. Stop

⁶⁰⁶ Christopher Gill, *Stoic Writers of the Imperial Era*, in *THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT* 597, 600 (Christopher Rowe & Malcolm Schofield eds., 2000) (“The Stoic view is that political structures (like other social and interpersonal structures) can, in principle, function as vehicles for the attempt to make progress towards the life of virtue and sagehood.”); Malcolm Schofield, *Epicurean and Stoic Political Thought*, in *THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT*, *supra*, at 435, 435–36, 443–46, 451–53.

⁶⁰⁷ RYAN HOLIDAY, *THE OBSTACLE IS THE WAY*, at xiv (2014).

⁶⁰⁸ Reddoch, *supra* note 605, at 64.

⁶⁰⁹ MARCUS AURELIUS, *MEDITATIONS* 109 (Méric Casaubon trans., Enhanced Media 2017) (c. 171–175 A.D.).

⁶¹⁰ *See, e.g.*, Gill, *supra* note 606, at 601 (describing the activism of Musonius Rufus and his subsequent exile).

⁶¹¹ JAMES BALDWIN, *NOTES OF A NATIVE SON* 114–15 (rev. ed. 2012).

⁶¹² SELLARS, *supra* note 603, at 3 (“[V]irtue alone is sufficient for happiness.”).

⁶¹³ *Id.* at 108–09.

⁶¹⁴ *Id.* at 109.

complaining.”⁶¹⁵ Activists like Justice Ginsburg have used these Stoic precepts as a framework for fighting for important ideals.

Justice Ginsburg's stoicism is evident within her copyright jurisprudence as a willingness to go against the traditional liberal values she was otherwise associated with. Copyright protection can fairly be described as a socially permissible form of censorship.⁶¹⁶ When someone copyrights a text, no one is supposed to say or repeat those words⁶¹⁷ without the authority of the copyright holder. If one asks the copyright holder for permission to speak their copyright-protected words, the copyright holder can attempt to charge a licensing fee for the privilege of using their text or can deny permission altogether. For these reasons, copyright laws can function as tools of censorship,⁶¹⁸ something a good liberal consistently abhors. But Justice Ginsburg favored strong copyright protections.⁶¹⁹ This brought criticism her way, which she stoically ignored.

When Justice Ginsburg persuaded a Supreme Court majority that the freelance writers were entitled to copyright royalties in *Tasini*, she shook off dire predictions that the world would lose access to all of the articles, history, and “knowledge” that the freelancers had written.⁶²⁰ When she declined to give an injunction to the freelance writers to leverage against the publishers, she was arguably betraying labor in favor of capital. In a 2003 law review article, Maureen O'Rourke asked an important policy question: “If the Copyright Act provides authors with a right that the market often renders valueless, has its goal[] [of incentivizing new works] necessarily been thwarted?”⁶²¹ She explained why the holding in *Tasini* was not actually going to benefit the prevailing freelancers very much, observing that “[a]lthough the holding in the case ostensibly gave freelancers a bargaining chip, a lack of bargaining power precludes their obtaining additional consideration for licensing their judicially vin-

⁶¹⁵ MARCUS AURELIUS, MEDITATIONS 132 (Gregory Hays trans., Mod. Libr. 2003) (c. 171–175 A.D.). In fact, Justice Ginsburg was offered similar advice from Justice Sandra Day O'Connor early in her tenure on the Court. After receiving her first opinion assignment, which involved an intricate and difficult case, Justice Ginsburg sought Justice O'Connor's advice. Justice O'Connor told her, “Just do it and, if you can, circulate a draft before [Chief Justice Rehnquist] makes the next set of assignments. Otherwise, you will risk receiving another tedious case.” DE HART, *supra* note 262, at 327. Justice Ginsburg was very appreciative of this advice, and it helped cement a close friendship between the two. *Id.*

⁶¹⁶ John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245, 247–50 (2015); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 182 (1998).

⁶¹⁷ This is an oversimplification for literary purposes. Fair use and other copyright law doctrines always allow limited unauthorized uses of copyright protected works.

⁶¹⁸ Tehranian, *supra* note 616, at 250 (“As this Article argues, copyright law has become the weapon *par excellence* of the 21st-century censor.”).

⁶¹⁹ See *supra* Sections I.A and I.B.

⁶²⁰ *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 504–05 (2001).

⁶²¹ Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 CASE W. RES. L. REV. 605, 616 (2003).

icated rights.”⁶²² By declining to grant an injunction to the freelancers, Justice Ginsburg deprived labor of the full fruits of its labor and saved the publishers plenty of capital.

In *Eldred v. Ashcroft*, she was widely accused of betraying the First Amendment when she wrote for a majority holding the Copyright Term Extension Act (CTEA), a law extending almost all U.S. copyrights by two decades, was constitutional.⁶²³ The CTEA also extended existing copyrights, thereby preventing twenty years’ worth of existing works from falling out of copyright protection.⁶²⁴ This meant that almost nothing new was contributed to the public domain, where it could be freely used, during that extended interval. Critics of the holding sarcastically pointed out that the CTEA’s retroactive copyright extensions would not be effective at incentivizing dead authors to create new works.⁶²⁵ Justice Ginsburg did not flinch.

Finally, when she dissented in *Georgia v. Public.Resource.Org*, she ignored impassioned claims that the copyright protections in dispute would restrict access to the law, especially to people with low incomes. Instead, she prioritized the commodification of Georgia’s laws over making sure that Georgia citizens had the best opportunity to access and understand the statutes that bind them.⁶²⁶ She even got Justice Breyer, who was typically her loyal opposition in copyright law cases, to join her in dissent.⁶²⁷ One commentator astutely noted after her passing that her stoicism was one of “5 Great Things We Should Never Forget About Ruth Bader Ginsburg.”⁶²⁸

B. From Stoicism to Exasperation

In *On Anger*, Stoic philosopher Seneca asked: “What bad habit have you put right today? Which fault did you take a stand against? In what respect are

⁶²² *Id.* at 606.

⁶²³ *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003).

⁶²⁴ *Id.* at 195.

⁶²⁵ See William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 Hous. L. Rev. 749, 761 (2003); Matthew Sag et al., *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 815 (2009).

⁶²⁶ *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1522–24 (2020).

⁶²⁷ *Id.*

⁶²⁸ Alisa Ross, *5 Great Things We Should Never Forget About Ruth Bader Ginsburg (1933-2020)*, GOOD NEWS NETWORK (Sept. 21, 2020), <https://www.goodnewsnetwork.org/5-great-reasons-to-remember-ruth-bader-ginsburg/> [<https://perma.cc/52ND-2HL2>] (“She showed there’s value in stoicism. In an interview with legal academic Jeffrey Rosen, published in the Atlantic, she spoke of ignoring ‘useless emotions.’ ‘My mother’s advice was, don’t lose time on useless emotions like anger, resentment, remorse, envy. Those, she said, will just sap time; they don’t get you where you want to be.’ ‘One way I coped with times I was angry: I would sit down and practice the piano. I wasn’t very good at it, but it did distract me from whatever useless emotion I was feeling at the moment. Later, I did the same with the cello. I would be absorbed in the music, and the useless emotion faded away.’ Perhaps that’s why RBC [sic] loved listening to classical music all her life—even during her famous workouts.”).

you better?”⁶²⁹ Throughout her career and life, Justice Ginsburg exhibited a high degree of professional restraint, but her stoicism seemed to lessen, almost as if it got worn down. At her Supreme Court confirmation hearings in 1993, Justice Ginsburg said, “[W]hat a judge should take account of is not the weather of the day, but the climate of an era.”⁶³⁰ During her years on the Court, Justice Ginsburg experienced significant climate change.⁶³¹ When she joined the Court, Bill Clinton was President of the United States, and the majority of her colleagues were moderates or liberals. This changed. She was always part of an outnumbered liberal wing on the Court throughout her twenty-seven-year tenure, she but experienced the entire Court grow more conservative over time.⁶³² As her years on the Supreme Court passed, Justice Ginsburg gradually began expressing frustration and discontent publicly.

In *Bush v. Gore* in 2000, Justice Ginsburg did not “respectfully” dissent from the majority’s decision to shut down the Florida recount in contravention of a ruling by Florida’s Supreme Court; she simply (and emphatically) dissented.⁶³³ She later said the case exemplified “how important—and difficult—it is for judges to do what is legally right, no matter what ‘the home crowd’ wants.”⁶³⁴ She seemed furious at her colleagues who voted in the majority, and in this, she represented a majority of voters who had given the popular vote to Al Gore. But even in anger, she remained polite.

It must have been deeply frustrating for Justice Ginsburg that usually she could only make an impact on social justice issues through her feisty dissents. In 2007, a Supreme Court majority denied relief to Lilly Ledbetter in *Ledbetter v. Goodyear Tire and Rubber Co.*, holding that Title VII of the Civil Rights Act of 1964 imposed strict time limits for bringing workplace discrimination suits.⁶³⁵ Justice Ginsburg called on Congress to overturn the decision legislatively,⁶³⁶ and it did.⁶³⁷ Justice Ginsburg reportedly kept a framed copy of the Lilly Ledbetter Fair Pay Act of 2009 on the wall of her chambers, counting the

⁶²⁹ SENECA, ON ANGER bk. III (c. 45 A.D.), reprinted in SENECA: DIALOGUES AND ESSAYS 18, 47 (John Davie & Tobias Reinhardt eds., John Davie trans., Oxford Univ. Press 2007) (recounting the custom of Sextius).

⁶³⁰ *Confirmation Hearing*, supra note 260, at 303.

⁶³¹ DE HART, supra note 262, at 408–10 (describing Justice Ginsburg’s growing frustration with the direction of the Court).

⁶³² Adam Liptak, *Justice Ginsburg’s Judicial Legacy of Striking Dissents*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/rbg-accomplishments.html> [perma.cc/EXV6-QT77].

⁶³³ *Bush v. Gore*, 531 U.S. 98, 135–44 (2000) (Ginsburg, J., dissenting).

⁶³⁴ Charles Lane, *Ginsburg Critical on Bush v. Gore*, WASH. POST (Feb. 3, 2001), <https://www.washingtonpost.com/archive/politics/2001/02/03/ginsburg-critical-on-bush-v-gore/a4fb7268-3c49-4e8a-b92b-dd2f6cb53325/> [https://perma.cc/78NP-VP68].

⁶³⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007).

⁶³⁶ *Id.* at 643–61 (Ginsburg, J., dissenting) (calling for Congress to change the law).

⁶³⁷ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (overruling the Supreme Court’s decision in *Ledbetter*).

law “among her proudest achievements, even as it illustrated her limited power.”⁶³⁸

In remarks delivered at the National Museum of Women and the Arts in Washington, D.C., on April 15, 2015, Justice Ginsburg, reflecting on advice given to her by Justice O’Connor, said, “Waste no time in anger, regret, or resentment, just get the job done.”⁶³⁹ A year later, however, she was described as “the court’s most outspoken justice off the bench” when she made deeply critical remarks to the press about then-Presidential candidate Donald Trump.⁶⁴⁰ Justice Ginsburg observed again in a 2017 lecture that “[a]nger is a useless emotion. It doesn’t advance your cause.”⁶⁴¹ Yet recently, from her granddaughter Clara Spera, we have learned that she carried a lot of anger inside, and that it built up over time.⁶⁴² This is an excerpt from an October 2020 interview with Spera:

[INTERVIEWER:] There was a paradox with your grandmother’s body of work, in which she would talk a lot about civility and institutions. She would often cite advice from her mother that anger is a distraction or a waste of time. [“My mother’s advice was don’t lose time on useless emotions like anger, resentment, remorse, envy,” Ginsburg said. “Those, she said, will just sap time; they don’t get you where you want to be.”]

[CLARA SPERA:] Right.

[INTERVIEWER:] But in reality, she often was angry. Especially near the end of her life, she was dissenting. Of course, she was using the tools of the Court, but it was not very civil the way she called out Trump, even though she apologized. I’ve talked about this a lot with Rebecca Traister, my colleague and friend, because she wrote a whole book about women and anger and change. She told me that at practically every talk she gives, somebody asks about Justice Ginsburg repeating the advice from her mother.

[CLARA SPERA:] In the ’70s, being a woman and angry wouldn’t get you very far. It’s also important to remember the context in which she was working. She was in the courts. There were other venues, perhaps, where to be more emotive would be a successful strategy, but I don’t think that doing that in front of an all-male three-judge panel, or nine male justices of the Supreme Court, would have helped her and her argument and her cause.

⁶³⁸ Liptak, *supra* note 632.

⁶³⁹ GINSBURG ET AL., *supra* note 258, at 90.

⁶⁴⁰ See Pete Williams et al., *Ruth Bader Ginsburg Doubles Down on Donald Trump Criticism*, NBC NEWS (July 13, 2016, 07:32 AM), <https://www.nbcnews.com/politics/2016-election/ruth-bader-ginsburg-doubles-down-trump-criticism-n608006> [<https://perma.cc/NLW8-E8M9>].

⁶⁴¹ Ruth Bader Ginsburg, Stanford Rathbun Lecture (Feb. 6, 2017) (transcript available at IOWA STATE UNIV.: ARCHIVE OF WOMEN’S POL. COMM’N, <https://awpc.cattcenter.iastate.edu/2017/10/05/stanford-rathbun-lecture-february-6-2017> [<https://perma.cc/S9UD-UT97>]).

⁶⁴² Irin Carmon, *Honoring Her Wish: In Conversation with Ruth Bader Ginsburg’s Granddaughter, ACLU Fellow Clara Spera*, N.Y. MAG. (Oct. 23, 2020), <https://nymag.com/intelligencer/2020/10/clara-spera-ruth-bader-ginsburg-aclu.html> [<https://perma.cc/5YYN-SFC3>].

Again, this returns to the benefits that my generation has reaped from the work that she did, in that now I don't think it is as unsettling or as strange for a woman to express anger. And I want to be clear that I mean a white woman. Because I think you still see this dichotomy, the stereotype of the quote "Angry Black woman." So I think women of color do not get to be angry in the same way that white women or white-passing women get to get angry. And I think, if we go back to the '70s, no women could be angry in the way that men could be angry. So we've moved forward with our ability to express anger, but this does not apply equally to all women and to all people.⁶⁴³

Had she started her career in the 2000s, maybe Ruth Bader Ginsburg would have repressed her anger less. In 2013, she read five dissents from the bench, breaking a fifty-year record among the Justices, perhaps reflecting impatience with her colleagues as well as disagreement.⁶⁴⁴ Yet she kept her much-vaunted composure, at least in public.⁶⁴⁵ Colorado Attorney General Philip Weiser, one of her former Supreme Court clerks, recently observed, "There's a quote of hers that I think about a lot. It's something like, 'Never react in anger.' She kept her cool and she kept her relationships. She always maintained her equanimity, her calm, even in the midst of a storm."⁶⁴⁶ Weiser clerked for Ruth Bader Ginsburg in 1995–96, when perhaps she was more successfully bottling up any feelings of anger. By 2020, she was more willing to publicly express negative emotions. The Trump years were very hard on her. Just a few months before her death, she was being called "the face of the Trump resistance."⁶⁴⁷

How might her anger have affected her copyright jurisprudence? So many alarming things happened during the Trump presidency that adjudicating copyright cases might have actually felt like a respite to her. While her stoicism may have been visible in her copyright jurisprudence, the relatively scant evidence of anger in her copyright jurisprudence is primarily in tone rather than substance. And it reads more like exasperation than anger.

In Part III, we explained how Justice Ginsburg often expressed doubts about the institutional capacity of the courts with respect to copyright law and policy.⁶⁴⁸ All those years of frustration and helplessness when she was unable to attract a majority that would help her advance social justice on issues that were deeply important to her may have taken a toll. Though none of her writ-

⁶⁴³ *Id.*

⁶⁴⁴ IRIN CARMON & SHANA KNIZHNIK, *NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG* 5 (2015).

⁶⁴⁵ Diane Carman, *Ruth Bader Ginsburg's Legacy Lives in the Beating Hearts of Colorado's Justice System*, COLO. SUN (Sept. 21, 2020, 3:10 AM), <https://coloradosun.com/2020/09/21/ruth-bader-ginsburg-phil-weiser-supreme-court-opinion/> [https://perma.cc/SN8F-ZTD6].

⁶⁴⁶ *Id.*

⁶⁴⁷ See Chris Cillizza, *How RBG Became the Face of the Trump Resistance*, CNN: THE POINT (April 2, 2020), <https://www.cnn.com/videos/politics/2020/04/02/ruth-bader-ginsburg-trump-resistance-cillizza-the-point.cnn/video/playlists/ruth-bader-ginsburg-rbg/> [https://perma.cc/NP6D-G36Q].

⁶⁴⁸ See *supra* Section III.B.

ings in copyright cases descend in tone to a point of churlishness, a decided impatience with her colleagues is evident in her 2013 dissent in *Kirtsaeng I*, as demonstrated by this excerpt:

Instead of adhering to the Legislature’s design, the Court today adopts an interpretation of the Copyright Act at odds with Congress’ aim to protect copyright owners against the unauthorized importation of low-priced, foreign-made copies of their copyrighted works. The Court’s bold departure from Congress’ design is all the more stunning, for it places the United States at the vanguard of the movement for “international exhaustion” of copyrights—a movement the United States has steadfastly resisted on the world stage.

To justify a holding that shrinks to insignificance copyright protection against the unauthorized importation of foreign-made copies, the Court identifies several “practical problems.” The Court’s parade of horrors, however, is largely imaginary. Congress’ objective in enacting 17 U.S.C. § 602(a)(1)’s importation prohibition can be honored without generating the absurd consequences hypothesized in the Court’s opinion. I dissent from the Court’s embrace of “international exhaustion,” and would affirm the sound judgment of the Court of Appeals.⁶⁴⁹

Throughout her years as a Supreme Court Justice, she always stood a much better chance of writing or joining a majority opinion in a copyright law case than she did in cases involving issues like voting rights, civil rights, or reproductive freedom. Perhaps that made lost opportunities to build a majority and craft a majority opinion in a copyright law case such as *Kirtsaeng* deeply disappointing.

CONCLUSION

Ruth Bader Ginsburg’s copyright decisions favored copyright owners and authors.⁶⁵⁰ But careful review of her writings reveals a rich and complex copyright jurisprudence. Her opinions reflect her consistent position that optimal legal changes occur in incremental steps⁶⁵¹ and in collaboration with the other branches of government.⁶⁵² Ginsburg’s groundbreaking litigation on gender equality⁶⁵³ and her dogged pursuit of civil rights as a jurist understandably outshine her copyright jurisprudence, but her copyright jurisprudence is also quite fascinating, at least to copyright law geeks and aficionados like us.

⁶⁴⁹ *Kirtsaeng I*, 568 U.S. 519, 557 (2013) (Ginsburg, J., dissenting) (citations omitted).

⁶⁵⁰ See *supra* Sections I.A. and I.B.

⁶⁵¹ See *supra* Part II.

⁶⁵² See *supra* Section III.A.

⁶⁵³ See *supra* notes 1 and 5 and accompanying text.