

1999

draft

Introduction

Wendy J. Gordon^{*}

Ralph Sharp Brown crossed out the "Junior" that followed his name after his father died. In explanation of the hand-altered stationery, he said (if my recollection holds) that "I'm the only one left now." Today, with Ralph's death a fact, there remain no Ralph Sharp Browns by that literal name. But there remain many intellectual-property teachers who continue to do battle on behalf of the campaign that Ralph set as his life work: to save an interdependent society from an ungenerous notion of "what's fair". Ralph sought to teach us that it can be *rightful* to "reap without sowing", and that we should fear the societal stagnation that can result from an immaturely overblown sense of honor.

Ralph himself was far too modest to claim that his goal was "saving society", and much too kind to deride his opponents' sense of honor as juvenile or parsimonious. But consider the article reprinted herein, *Advertising and the Public Interest*.² In it, Ralph identifies two competing premises for the law of

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²*Advertising and the Public Interest*, 57 Yale L.J. 1165 (1948), (hereinafter *Advertising*) reprinted in this issue of the journal, Yale L.J. at ____.

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unfair competition.³ One premise was that the law should prohibit all "poaching",⁴ all "reaping where one has not sown".⁵ The other premise was that the law should follow "the basic common law policy of encouraging competition"⁶ and imitation. Admittedly, Ralph initially pretends to be agnostic between these premises.⁷ But he soon shows his true preference: fostering a liberty to copy.⁸

³The law of unfair competition is more familiarly known today as "intellectual property." Trademark law was the branch of intellectual-property law which Ralph addressed in *Advertising and the Public Interest*, reprinted herein. As the essay by Robert Denicola attests, however, Ralph's writings and interests ranged over the entire field, from copyright, through trademark and patent, to the interests of free speech and free competition.

Unfortunately, if a symposium is to have a unity, it can only address a portion of Ralph's life work. For his additional contributions-- to labor law, to first amendment law, to the cause of liberty generally -- the reader is advised to read the excerpts from the Memorial Service, *infra* at XX.

⁴*Advertising*, 57 Yale L.J. at text accompanying note 1; also see *id.* at 1166

⁵*Advertising*, 57 Yale L.J. 1200 at n.147 and accompanying text.

⁶*Advertising*, 57 Yale L.J. at 1166 & n. 6, quoting from Judge Frank in *Eastern Wine Corp. v. Winslow-Warren Ltd.*, 137 F.2d 955, 959 (2nd Cir 1943), *cert. denied*, 320 U.S. 758 (1943).

⁷*Advertising*, *id.* at 1166.

⁸Ralph himself claimed only to be indulging in a temporary "disproportion", in "an attempt to redress the balance" that had, he said, sometimes resulted from unfair competition law's "emphasis on unfairness." *Id.* at 1203. But what undue "emphasis" was there to be redressed? Ralph claimed that at the time he wrote, solicitude for the hard-working plaintiff only a minority strain. *Id.* He was working not to 'redress a balance', but to educate that erring minority out of its distaste for copying.

This is clear both from the totality of the *Advertising* piece and from his

He puts a heavy burden of persuasion on those who would seek exceptions.

By no means did Ralph oppose all such exceptions; he actively supported many intellectual-property restraints. For example, his classic *Advertising* article makes clear that virtually everyone will be better off in the long run if trademark law is capable of enjoining a stranger's deceptive and confusing use of an established mark. The *Advertising* piece even takes several steps which were pro-plaintiff at its time (though the steps are uncontroversial today).⁹

Ralph was the opposite of a fanatic.

This can also be seen in the interstitial nature of the suggestions he made to limit plaintiff's rights. The *Advertising* article urged that courts require plaintiffs to make some meaningful showing that the 'confusion' allegedly resulting from a defendant's use of a trade symbol would actually be material to

later work. See [cite to Denicola essay, this volume.] Today, both legislature and courts indeed do show an undue solicitude for intellectual-property plaintiffs. This is clear from the essays by Denicola, Lemley and Litman [cite to this volume]. Today, accordingly, we need Ralph's voice more than ever.

⁹ First, the article accepts the desirability allowing plaintiffs to enjoin confusing usages of marks even when the defendant's goods do not compete with plaintiffs' own goods, so long as the two parties' products are sufficiently related in type that the use of a common symbol will deceive consumers into thinking that defendant's non-competing goods are authorized or made by plaintiff. *Id* at 1192-1196, especially at note 113.

Second, the article recommends that courts allow trademark suits to proceed even if the consumers do not know the source's specific identity, so long as the consumers associate the mark with a constant, if anonymous, source. *Id.* at 1188-91.

a consumer's purchasing decision.¹⁰ The *Advertising* piece also suggested that the courts reject "the unwary purchaser" as a standard by which to measure likelihood of confusion.¹¹ Instead the article suggested that the courts restore "the reasonably careful purchaser," an imaginary creature more realistic and more hardy.¹² The article warns, in sum, that the courts should be a little less gullible about 'confusion' -- and developments highlighted in both the Lemley and Litman pieces herein show us that the legal system would have been much better off had Ralph's 1948 warning been heeded.

Ralph's final set of suggestions in the *Advertising* piece involved preserving "the avoidance of confusion" as the touchstone of trademark law. For him, advertising that carried information was valuable, while advertising that carried merely persuasive power was either pernicious or useless.¹³ For

¹⁰ *Id.* at 1196-98. For fuller development of this central issue of "materiality", see Glynn Lunney, "Trademark Monopolies" (copy on file with the Yale Law Journal.) [note to editors: Lemley cites to the Lunney piece, and has sent you a copy]

¹¹ *Id.* at 1198.

¹² In explaining the standard of the "reasonably careful purchaser", *id.* at 1198, Ralph viewed the standard of "the unwary purchaser" as "a convenient front for advertisers." *Id.*

¹³ As Denicola's essay comments (*infra* at --, this symposium), a newer economic learning suggests that increases in economic welfare can result even from advertising that carries no specific information about its product, if the intensity and frequency of the advertising indicates (accurately) to the consumer that the producer has confidence in the product and that the product is popular with an audience of consumers who have already experienced its merits. Denicola at xx. But although this introduces a third category into Ralph's lexicon-- that is, it adds "intensity advertising" to "persuasive" and "informative" advertising-- it would not change Ralph's basic analysis. There is

Ralph, therefore, our society has nothing to fear when a defendant's nondeceptive, nonconfusing use of a trade mark diluted its emotional "punch", and the trademark owner has no normatively justifiable ground for complaint.

Here Ralph's rhetoric was broad. One can see why. If consumer confusion is avoided by trademark enforcement, then such enforcement will lead to an increased social product.¹⁴ But as Felix Cohen had noted (and as Ralph praised him for so seeing)¹⁵, absent such confusion the economic benefit from giving rights in trade symbols is intensely debatable, even doubtful.¹⁶ Anti-

nothing about the potential value of "intensity advertising" that should lead us to abandon "avoiding consumer confusion" as the central goal of trademark law. Denicola, *id.*, at __; also see Lemley at __ [both, this symposium].

¹⁴If enforcement of a mark does avoid confusion, then both consumer, producer, and society as a whole is better off. Brown, *Advertising*.

¹⁵ *Id* at 1199, near n 142 (wherein he cites to Felix Cohen's analysis as "trenchant")

¹⁶Cohen observed the following logic operating in many decisions: X has "created a thing of value; a thing of value is property; X, the creator of property, is entitled to protection against third parties who seek to deprive him of his property." Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 815 (1935). Cohen noted the circularity of the value/property approach. He argued that the "property from value" reasoning "purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected." Cohen, *supra*, at 815.

Following Cohen, the argument might run as follows: placing a famous sports team's logo or trademark on T-shirts makes the shirts more desirable than T-shirts bearing less famous logos. If everyone can copy the team's mark without paying license fees for doing so, the marginal cost of copying will consist solely of the cost of the physical paint or dye process needed to affix the image; no costs will be attributable to the image itself. Price in a perfectly competitive

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dilution law may cause no large problems, as Lemley hopes,¹⁷ but it also has the potential for undermining the liberty our legal system now gives to those

market will equal marginal cost and long-run average cost. Because the copyist's average and marginal cost attributable to the famous mark are both zero, none of the price she charges for a shirt will include payment for the team's mark. The mark's value to any given seller is then zero. (Admittedly, it may be asked whether the sports team will likely have adequate incentive to perform well, because of the rewards that come to its primary activity, if it loses an ability to monopolize logo merchandise. On this, see both *Advertising* and Lunney, *Trademark Monopoly* [on file with Yale L J].)

Rochelle Dreyfuss makes an observation parallel to Cohen's, but draws from it a somewhat different and interesting point: when the competition value of the intangible is competed away, the public, rather than the competitor, benefits. Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 Notre Dame L. Rev. 397 (1990) at 407.

¹⁷Lemley, *infra* at __ [this symposium].

One possibly hopeful development for the social interest is that some courts are reading something that looks very much like a "confusion" requirement back into anti-dilution provisions. See, e.g., *Mead Data Central, Inc., v Toyota Motor Sales, U.S.A. Inc.*, 875 F 2d 1026 (2nd Cir 1989). This is one possible legitimate result of the internal incoherence of the "anti-dilution" notion. (Although of course the development merits debate as regards the range of a court's response to the ambiguity of the anti-dilution mandates.)

As Maureen O'Rourke has urged me to emphasize, there is irony when some courts read "confusion" *into* anti-dilution provisions that don't require it, while other courts have basically read "confusion" out of the law in the more expansive decisions under what is supposedly the traditional trademark cause of action.

who market generic goods, do comparative advertising,¹⁸ or parody the establishment's icons.¹⁹ One can only hope that Congress's recent decision to allow famous marks to sue in the absence of "consumer confusion" will not prove too socially costly.²⁰

Ralph not only reminds us that transfers of funds from one set of hands to another may yield no increase to the total social product; he also stresses that when the issue is the disposition of such a "mere" transfer payment, legal efforts to secure one distribution rather than another has no social desirability unless the receiving hands *deserve* what they receive. To this end, despite Ralph's claim to be neither philosopher nor psychologist, the article is full of a

¹⁸Judging from Ralph's admiration for price competition, *Advertising* at 1204, one of the key reasons he would have resisted "trademark as property" treatment is that it might prevent a truthful comparative advertiser from explaining what famous product he is emulating. In at least one case, an anti-dilution cause of action has indeed been used in a way that threatened comparative advertising. *Sykes Laboratory, Inc. v. Calvin*, 610 F Supp. 849, 858-59 (C.D. California 1985)(generic nail hardener making reference to a more famous brand).

¹⁹Consider the PILLSBURY DOUGH BOY case. *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 135, 1981 WL 1402 (N.D.Ga.1981) (Pillsbury dough boy depicted engaging in sexual intercourse; despite court's clear finding that the parody was "fair use" under copyright law and court's recognition that parody serves public interest, the parody's potential effect under dilution was held sufficient to enjoin it.)

²⁰For a discussion of this development and its relation to Ralph's work, see the essay by Robert Denicola, *infra*. Also, Lemley's essay in this symposium notes that the Federal Anti-Dilution Law is still fairly new. Conceivably it can be interpreted in ways that adhere fairly closely to Ralph's vision of desirable unfair competition law, Lemley, *infra* at ___, or it can be blown into "trademark as property" with consequent deleterious results.

normative social psychology²¹ that questions whether advertisers do more harm than good, and whether competing newcomers are really as "shady"²² as the courts often paint them. Their real sin, Ralph hints, may be their newness.²³ Though Ralph claims to be taking a "conservative"²⁴ position in the *Advertising* piece, he well knew that enshrining the status quo was not his goal but his target-- not what he was shooting *for*, but what he was shooting *at*.

The notion that Ralph targeted for critique-- that the status quo *ipso facto* deserves protection-- goes by many names. It can be characterized as

²¹See, e.g., *Advertising* at 1180-82, where Ralph who says of the "dogma of consumer autonomy" that:

Anyone who questions the untrammelled use of influence by the seller and its uncoerced acceptance by the buyer is at best a Puritan, at worst a Fascist. The debate seems to end in a defense of freedom...

But does the sovereign consumer have real freedom of choice?

Id at 1181-2 (footnotes deleted).

²²*Advertising* at 1192 (questioning the courts' assumption "that a defendant who would jeopardize the plaintiff's advertising budget was in all probability a shady character").

²³ Thus Ralph writes, presumably tongue well in cheek:

We have previously referred to defendant impartially as a copier or an imitator. Is he not also likely to be a cheat, a chiseler, and, *worst of all*, a newcomer?

Advertising, at 1209 (emphasis added.)

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Id at

"possession providing a basis for title".²⁵ It might be folded into a "but-for" approach to causal maximalism:²⁶ (that is, if you are a but-for cause of some value existing, then you deserve to own it). The notion is equally associated with a kind of primitive corrective justice,²⁷ is a close cousin to "economic might makes right",²⁸ and is closely allied with the force that tries to equate "ought" and "is." The notion also captures how a first-year law student initially

²⁵Richard Epstein, "Possession as the Root of Title," *Georgia Law Review*. Note that for John Locke, possession did *not* give justifiable title, unless "enough and as good" were left for others. John Locke *SECOND TREATISE ON GOVERNMENT*, chapter V. For discussion of the relevance of the Lockean proviso to intellectual property, see, e.g., Edwin C. Hettinger, *Justifying Intellectual Property*, 18 *Phil & Pub Aff* 31 (1989); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Georgetown L J* 287 (1988); Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *Yale Law Journal* 1533, 1555-72 (1993).

²⁶The phrase belongs to Hart and Honore. They analyze and criticize Richard Epstein's view of tort law, characterizing Epstein as an "advocate [of] what we have termed 'causal maximalism', viz. the doctrine that causing harm is a necessary and sufficient condition of tort liability." H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* (Second Edition) *Introduction* at lxxiv (footnotes omitted)(Oxford 1985, reprinted in paperback 1987). If "causal maximalism" in tort law yields a doctrine that causing a loss is a sufficient basis for responsibility, then "causal maximalism" in intellectual-property law yields the corollary doctrine: that causing a benefit is a sufficient basis for legally enforced desert.

²⁷Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 *Virginia Law Review* 149 at 150-180 (1992).

²⁸See Wendy J. Gordon and Sam Postbrief, *On Commodifying Intangibles*, 10 *Yale Journal of Law and the Humanities* 135-61 (review essay, 1998) at 135-38, especially text at note 16. [NOTE TO EDITOR: self-citing is obnoxious but sometimes necessary; do you think the cite adds enough informative value to outweigh its irritatingness? --WJG]

visualizes 'internalizing externalities'²⁹ or what is meant by "unjust enrichment."³⁰ Rochelle Dreyfuss is perhaps the most economical of us all in the name she gives the vampiric notion. She calls it: "if value, then right."³¹

Misappropriation is the name of the tort where this notion plays the

²⁹ Students sometimes imagine that there is only *one* entity whose actions or characteristics impose a loss, and that if the law simply imposed the loss on *that* one entity, the resulting liability will "internalize the externality" and automatically encourage economically desirable behavior. However, it always "takes two to tort" (using the apt phrase of Saul Levmore), and the Coase theorem reminds us that there are always multiple candidates "internalization". Thus, Guido Calabresi explains that it is a difficult policy decision, and not a matter of simple fact, to determine "what is the cost of what". GUIDO CALABRESI, *THE COSTS OF ACCIDENTS*. {NOTE TO EDITORS: "what is the cost of what" is, I think, the title of a whole chapter in the Calabresi book, but I don't have the volume on hand to do a page cite. At a minimum, there'll be a reference in the book's Index that will help you find the material.]

³⁰ Students are not the only ones to imagine that all unearned gains are unjust. Thus, in *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983) (commodities futures contract pegged to the Dow Jones Average held to violate the common-law rights of Dow Jones, Inc.), Justice ___ in dissent chastised his brethren for being carried away by notions of unjust enrichment. Also see Gordon, *On Owning Information*, 78 Va L Rev at 196-258 (examining the way that unjust enrichment law does not lead to a wholesale adoption of the reap/sow notion, but at most to a narrow, non-property, tort-like cause of action.)

alph, like Ben Kaplan, continually reminds us we are *all* and *always* the recipients of unearned gains. Something more needs than "reaping without sowing" needs to be present before we are to be condemned as unjustly enriched.

³¹ Dreyfuss, *Expressive Genericity*, *supra* note xx, at 405.

strongest role. As Robert Denicola's essay herein describes,³² misappropriation was the area of intellectual-property law which most incensed Ralph. In the most famous of all misappropriation cases, *INS v AP*, Oliver Wendell Holmes, Jr., protested against the doctrine much as Ralph did:

Property, a creation of law, does not arise from value, although exchangeable-- a matter of fact.³³

This classic distinction between "is" and "ought" lies at the basis of Ralph's work. Had Justice Holmes in the *INS* case written as well and as wittily as Ralph Brown, perhaps the *INS* majority would have been persuaded to go the other way, and perhaps Ralph's campaign (and ours) would already be victorious.³⁴ Instead, trademark law and its various cousins seem to be expanding against all common sense under the vague umbrella that is misappropriation law's shaded (and shady) domain.³⁵

If one imagined Ralph having a dialogue with himself, these sentences would stand out:

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Denicola, *infra* at xx

³³*INS v AP*, 248 US 215 (1918)(Holmes, J., in a separate opinion.) The majority upheld an injunction that prevented the International News Service from copying and rewriting news from Associated Press papers "until its commercial value as news... has passed away."

³⁴Ironies abound. In *Advertising*, the main didactic point is that the law should aid *informational* advertising, but treat the *persuasive* advertiser as little better than a gambler's creditor. *Id. at* . But the piece's power lies in its persuasive language, in its charmingly sly use of rhetoric, and in its imagery.

³⁵See Litman, Lemley, Denicola; also Lemley.

"A persistent urge to create some general protection against copiers... runs along like the Manichean heresy, forever pitting the forces of light against the alleged forces of darkness."³⁶ But "[W]e are all imitators,"³⁷ and "[O]ur society is committed to the proposition that progress is advanced by the free use and adaptation of novel things and ideas".³⁸

³⁶Ralph S. Brown, Jr, *Product Simulation: A Right or A Wrong [Symposium Contribution]*, 64 Columbia L. Rev. 1216 at 1227 (1964)(hereinafter *Product Simulation*).

³⁷Ralph S. Brown, Jr., *Advertising*, 57 Yale L.J. 1165 at 1205. To similar effect, Ralph cited his friend and co-author Justice Benjamin Kaplan:

"[I]f man has any 'natural' rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown."

Ralph S. Brown, *Design Protection: An Overview*, 34 UCLA L.R. 1341 at n. 208 (1987), quoting from B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1967).

³⁸*Id.*

As our generation cites Ralph, Ralph too felt the need to cite his elders. What is omitted from my imagined "dialogue of Ralph with himself" (in text immediately above) was Ralph's quotation of a few key sentences from Justice Brandeis -- the same sentences that Ralph quoted again in the "Product Simulation" piece.

Here is the quote to which Ralph twice paid deference:

Kellogg Company [the Defendant] is undoubtedly sharing in the goodwill of the article known as 'Shredded Wheat'; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all--and in the free exercise of which the consuming public is deeply interested.

Kellogg v. national Biscuit Co., 305 U.S. 111, 122 (1938), quoted by Brown in *Advertising* at 57 Yale L.J. 1204 and in *Product Simulation* at 64 Colum.

And, most appropriately for Ralph's role as generous mentor to many, he would insist:

"Like other teachings, this lesson has now to be brought home to another generation."³⁹

It is fitting that in this issue of the *Yale Law Journal* Ralph speaks his lesson again.

L.Rev. 1227.

³⁹Brown, *Product Simulation*, 64 Colum. L. Rev. at 1227.

Symposium

Introduction

Wendy J. Gordon[†]

Ralph Sharp Brown crossed out the "Junior" that followed his name after his father died. In explanation of the hand-altered stationery, he said (if my recollection holds), "I'm the only one left now." Now, after Ralph's death, there may remain no Ralph Sharp Browns. But there remain many teachers of intellectual property who continue to wage the campaign that Ralph made his life work: to save an interdependent society from unnecessary restraints on liberty.

In the intellectual property area, Ralph sought to teach us that it can be both right and necessary to give individuals the liberty to "reap without sowing," and that we should fear the excessive protectionism resulting from an overblown and ungenerous sense of what's "due" to property claimants.

Ralph himself was far too modest to claim that his goal was "saving society" and much too kind to deride his opponents' sense of progenitarian honor as immature or parsimonious. But consider the article reprinted herein, *Advertising and the Public Interest*.¹ In it, Ralph identified two competing premises for the law of unfair competition.² One

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[†] Professor of Law and Paul J. Liacos Scholar in Law, Boston University. Thanks are owed to Jessica Litman for suggesting the format of the Symposium, and to her and to Maureen O'Rourke for helpful critique.

1. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948), reprinted in 108 YALE L.J. __ (1999). [DBL: Symposium ref needs final check.] Page citations in this and subsequent Symposium pieces will reference the original 1948 pagination. The original page numbers are bracketed in the 1999 reprint.

2. The law of unfair competition is subsumed today under the law of "intellectual property." Trademark law was the branch of intellectual property

premise was that the law should prohibit all "poaching,"³ all "reap[ing] where one has not sown."⁴ The other premise was that the law should follow "the basic common law policy of encouraging competition"⁵ and imitation. Ralph initially pretended to be agnostic between these premises,⁶ but he soon revealed his true preference: fostering a liberty to copy.⁷ He placed a heavy burden of persuasion on those who sought exceptions.

By no means did Ralph oppose all such exceptions; he actively supported many restraints on intellectual property. For example, his article made clear that society will be better off in the long run if trademark law can enjoin a stranger's deceptive and confusing use of an established mark.⁸ The *Advertising* piece even takes several steps that, though uncontroversial today, were pro-plaintiff for the time.⁹

law that Ralph addressed in *Advertising and the Public Interest*. As Robert Denicola's essay in this Symposium demonstrates, Ralph's writings and interests ranged over the entire field, from copyright through trademark and patent, to the interests of free speech and free competition. See Robert C. Denicola, *The Freedom To Copy*, 108 YALE L.J. 101, 101 (1999) [DBL: Symposium ref needs final check.]. Unfortunately, if this symposium is to have a unity, it can only address a portion of Ralph's life work. For his additional contributions—to labor law, to First Amendment law, to the cause of liberty generally—the reader need only turn to the Tributes printed in this issue.

3. Brown, *supra* note 1, at 1166.

4. *Id.* at 1200 & n.147.

5. *Id.* at 1166 & n.6 (quoting *Eastern Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 959 (2d Cir. 1943)).

6. See *id.* at 1166.

7. Ralph himself claimed only to be indulging in a temporary "disproportion," in "an attempt to redress the balance" that had, he said, sometimes resulted from unfair competition law's "emphasis on unfairness." *Id.* at 1203. But what undue "emphasis" was there to be redressed? Ralph had claimed ~~that~~ solicitude for the hard-working plaintiff was only a minority strain. See *id.* He was in my view working not to redress a balance, but to disabuse that erring minority of its distaste for copying. This is clear both from the totality of the *Advertising* piece and from his later work. See *id.*; Denicola, *supra* note 2, at 102-08 [DBL: Symposium ref needs final check.]. ~~Both~~ both legislatures and courts indeed show an undue solicitude for intellectual-property plaintiffs, as the contributions to this Symposium show. See *id.* at 113-15; Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 101, 111-28 (1999); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 101, 105-09 (1999) [DBL: Symposium refs (3) need final check.]. We need Ralph's voice more than ever ~~today~~.

8. See Brown, *supra* note 1, at 1203-04 (discussing the deterioration of the "Coca-Cola" mark).

9. First, the article accepts the desirability of allowing a plaintiff to enjoin confusing usages of marks even when the defendant's goods do not compete with the plaintiff's own goods, as long as the two parties' products are sufficiently related in type that the use of a common symbol would deceive consumers. See *id.* at 1192-96, 1196 n.131. Second, the article recommends

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Symposium

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Ralph was the opposite of a fanatic. This can also be seen in the interstitial nature of the suggestions he made to limit plaintiffs' rights. In the *Advertising* article, Ralph urged courts to require a plaintiff to make some meaningful showing that the "confusion" allegedly resulting from a defendant's use of a trade symbol would actually be material to consumer purchasing decisions.¹⁰ Ralph also suggested that courts reject "the unwary purchaser" as a standard by which to measure likelihood of confusion.¹¹ Courts should instead restore the standard of "the reasonably careful purchaser," a creature more realistic and more discerning.¹² In sum, the courts should be a little less gullible about "confusion," and the pieces by Mark Lemley and Jessica Litman in this Symposium highlight developments showing that the legal system would have been much better off if Ralph's 1948 warning had been heeded.¹³

Ralph's final set of suggestions in the *Advertising* piece involved preserving, as the touchstone of trademark law, avoiding consumer confusion.¹⁴ For him, advertising that carried information was valuable, while advertising that carried mere persuasive force was either pernicious or useless.¹⁵ For Ralph, therefore, society had nothing to fear when a defendant's nondeceptive, nonconfusing use of a

that courts allow trademark suits to proceed even if consumers do not know the source's specific identity, as long as they associate the mark with a constant, if anonymous, source. See *id.* at 1188-91.

10. See *id.* at 1196-98. For fuller development of this central issue of "materiality," see Glynn Lunney, *Trademark Monopolies* 8-58 (1999) (unpublished manuscript, on file with *The Yale Law Journal*).

11. Brown, *supra* note 1, at 1198.

12. In explaining the standard of the "reasonably careful purchaser," *id.* Ralph viewed the standard of "the unwary purchaser" as "a convenient front for advertisers." *Id.*

13. See Lemley, *supra* note 7, at 118-25; Litman, *supra* note 7, at 116-21. [DBL: Symposium refs need final check.]

14. See Brown, *supra* note 1, at 1195-98.

15. As Denicola's essay indicates, newer economic thinking suggests that economic benefits can result—even from advertising that carries no specific information about its product—if the intensity and frequency of the advertising accurately communicate the producer's confidence in its product and the product's popularity with consumers. See Denicola, *supra* note 2, at 105-06. [DBL: Symposium ref.] Although this insight might introduce a third category into Ralph's lexicon—adding "intensity advertising" alongside "persuasive" and "informative" advertising—it does not change Ralph's basic analysis. To the extent that the intensity advertising provides information that is useful to consumers' decisionmaking, it is desirable; to the extent that it functions as an emotionally compelling drum-beat, it is undesirable. See Denicola, *supra* note 2, at 112-15; see also Lemley, *supra* note 7, at 109-11 (arguing against propagating trademarks). [DBL: Symposium refs.] delete

trademark diluted the mark's emotional punch, and the trademark owner had no normatively justifiable grounds for complaint.

Here Ralph's rhetoric was broad. One can see why: If consumer confusion is avoided by trademark enforcement, then such enforcement will increase social welfare. But as Felix Cohen had noted (and as Ralph praised him for so seeing),¹⁶ absent such confusion the economic benefit from enforcing rights in trade symbols is debatable, even doubtful.¹⁷ Antidilution law purports to prohibit strangers from using famous marks even when the use threatens no confusion. This extension of trademark law may cause no large problems, as Lemley hopes,¹⁸ but ~~it~~ also ~~has~~ the potential to undermine the liberty our legal system now gives to those who market generic goods, employ comparative

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16. See *id.* at 1199 n.142 (referring to Cohen's analysis as "trenchant").

17. Cohen observed the following logic operating in many decisions: X has "created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property." Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935). Cohen noted the circularity of the value/property approach. He argued that "property from value" reasoning "purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected." *Id.*

Following Cohen, the argument might run as follows: Placing a famous sports team's logo or trademark on t-shirts makes the shirts more desirable than t-shirts bearing less famous logos. If everyone can copy the team's mark without paying license fees for doing so, the marginal cost of copying will consist solely of the cost of the physical paint or dye process needed to affix the image; no costs will be attributable to the image itself. Price in a perfectly competitive market will equal marginal cost and long-run average cost. Because the copyist's average and marginal cost attributable to the famous mark are both zero, none of the price she charges for a shirt will include payment for the team's mark. The mark's value to any given seller is then zero.

Admittedly, it may be asked whether the sports team will have adequate incentives to perform well if some of the rewards from its primary activity will flow to others due to its inability to monopolize logo merchandise. On this issue of adequate incentives, see Lunney, *supra* note 10 (manuscript at 81-127).

Rochelle Dreyfuss makes an observation parallel to Cohen's, but she draws from it a somewhat different point: When the competitive value of the intangible is competed away, the public, rather than the competitor, benefits. See Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 407 (1990).

18. See Lemley, *supra* note 7, at 118. [DBL: Symposium ref; look for "I do not believe."] One hopeful development is that some courts are reading something like a "confusion" requirement back into antidilution provisions. See, e.g., *Mead Data Cent., v. Toyota Motor Sales, U.S.A.*, 875 F.2d 1026, 1028-29 (2d Cir. 1989). This is one possible legitimate result of the incoherence of the "antidilution" notion. But note that *Mead Data* predates the federal adoption of an antidilution statute, now codified at 15 U.S.C.A. §§ 1125(c) (West 1998).

the word note:
is possibly

advertising,¹⁹ or parody established icons.²⁰ One can only hope that Congress's recent decision to allow the owners of famous marks to sue in the absence of "consumer confusion" will not prove too shortsighted.²¹

Ralph not only reminded us that transfers of funds from one set of hands to another may yield no increase to the total social product; he also stressed that legal efforts to secure one distribution rather than another have no social desirability unless the receiving hands *deserve* what they receive. To this end, despite Ralph's claim to be neither philosopher nor psychologist, his article contains a normative social psychology²² that questions whether advertisers do more harm than good and whether competing newcomers are really as "shady"²³ as the courts often paint them. Their real sin, Ralph hinted, may be their newness.²⁴ Though Ralph claimed

19. Judging from Ralph's admiration for price competition, see Brown, *supra* note 1, at 1204, he would have resisted "trademark as property" treatment because it might prevent a truthful comparative advertiser from explaining what famous product he is emulating. In at least one case, an antidilution cause of action has indeed been used in a way that threatened comparative advertising. See *Sykes Lab., Inc. v. Kalvin*, 610 F. Supp. 849, 858-59 (C.D. Cal. 1985) (holding that the plaintiff could attempt to prevent the defendant, the maker of a generic nail hardener, from referring to the plaintiff's more famous brand). This threat remains present under state anti-dilution laws, though the federal statute is more sensible. See 15 U.S.C.A. §§ 1125(c)(4)(A) (West 1998) (providing that fair use of a famous mark in comparative advertising is not actionable under federal anti-dilution law).

20. Consider the Pillsbury Dough Boy case. See *Pillsbury Co. v. Milky Way Prods.*, 215 U.S.P.Q. 124, 135 (N.D. Ga. 1981) (enjoining, because of its potential effect under dilution, a parody depicting the Pillsbury dough boy engaging in sexual intercourse, despite finding the parody a "fair use" under copyright law).

21. For a discussion of this development and its relation to Ralph's work, see Denicola, *supra* note 2, at 106-07. Also, as Lemley's essay in this Symposium notes, the federal antidilution law is still fairly new. See Lemley, *supra* note 7, at 112. Conceivably it can be interpreted in ways that adhere fairly closely to Ralph's vision of desirable unfair competition law, see *id.* at 118, or it can be blown into "trademark as property" with deleterious results. [DBL: Check all three Symposium refs in this footnote.]

22. See, for example, Brown, *supra* note 1, at 1180-82, where Ralph, who referred to the "dogma of consumer autonomy," *id.* at 1181, stated that: "[A]nyone who questions the untrammelled use of influence by the seller and its uncoerced acceptance by the buyer is at best a Puritan, at worst a Fascist. The debate seems to end in a defense of freedom But does the sovereign consumer have real freedom of choice?" *Id.* at 1181-82 (footnotes omitted).

23. *Id.* at 1192 (questioning the courts' assumption "that a defendant who would jeopardize the plaintiff's advertising budget was in all probability a shady character").

24. Ralph wrote, presumably tongue well in cheek: "We have previously referred to defendant impartially as a copier or an imitator. Is he not also likely to be a cheat, a chiseler, and, *worst of all*, a newcomer?" *Id.* at 1203 (emphasis added).

to take a "conservative"²⁵ position in the *Advertising* piece, ~~he understood that~~ the status quo ~~was~~ as his target, not his goal.

The notion that Ralph targeted for critique—that the status quo ipso facto deserves protection—is known by many names. It can be characterized as "possession providing a basis for title."²⁶ It might be folded into a "but-for" approach to causal maximalism.²⁷ If you are a but-for cause of some value's existing, then you deserve to own it. The notion is equally associated with a kind of primitive corrective justice,²⁸ is a close cousin to "economic might makes right,"²⁹ and is closely allied with the force that tries to equate "ought" and "is." The notion also captures how a first-year law student initially visualizes "internalizing externalities"³⁰ or what is meant by "unjust enrichment."³¹ Rochelle Dreyfuss is perhaps

25. *Id.* at 1206.

26. See Richard Epstein, *Possession as the Root of Title*, 13 *GA. L. REV.* 1221 (1979). Note that for John Locke, possession did not give rise to justifiable title, unless resources that were "enough, and as good" were left for others. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 228 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). For discussions of the relevance of the Lockean proviso to intellectual property, see, for example, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1555-72 (1993); Edwin C. Hettinger, *Justifying Intellectual Property*, 18 *PHIL. & PUB. AFF.* 31 (1989); and Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287 (1988).

27. The phrase belongs to H.L.A. Hart and Tony Honore. They analyze and criticize Richard Epstein's view of tort law, characterizing Epstein as an "advocate [of] what we have termed 'causal maximalism,' viz. the doctrine that causing harm is a necessary and sufficient condition of tort liability." H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* at lxiv (2d ed. 1985) (footnote omitted). If "causal maximalism" in tort law yields a doctrine that causing a loss is a sufficient basis for responsibility, then "causal maximalism" in intellectual property law yields the corollary doctrine: that causing a benefit is a sufficient basis for legally enforced desert.

28. See, e.g., Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 *VA. L. REV.* 149, 150-80 (1992).

29. See, e.g., Wendy J. Gordon & Sam Postbrief, *On Commodifying Intangibles*, 10 *YALE J.L. & HUMAN.* 135, 135-38 (1998) (book review).

30. Students sometimes imagine that there is only one entity whose actions or characteristics impose a loss, and that if the law simply imposed the loss on that one entity, the resulting liability will "internalize the externality" and automatically encourage economically desirable behavior. However, it always "takes two to tort" (using the apt phrase of Saul Levmore), and the Coase theorem reminds us that there are always multiple candidates for internalization. Thus, as Guido Calabresi explains, it is a difficult policy decision, and not a matter of simple fact, to determine "what is the cost of what." GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 133 (1970).

31. Students are not the only ones who imagine that all unearned gains are unjust. Thus, in *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84 (Ill. 1983), which held that a commodities futures contract pegged to the Dow Jones Average violates the common-law rights of Dow Jones, Justice Simon, in dissent, chastised his brethren for being carried away by notions of unjust enrichment. See *id.* at 93 (Simon, J., dissenting); see also Gordon, *supra* note

the position was simply conservative in the sense that it sought to preserve traditional legal approaches to trademark law. It was not conservative in the sense of seeking to preserve and consolidate existing advantages. To the contrary, I understand Ralph as taking

the most economical in the name she gives the vampiric notion: "if value, then right."³²

This notion plays the strongest role in misappropriation actions. As Robert Denicola's symposium essay describes, misappropriation was the area of intellectual property law that most incensed Ralph.³³ In the most famous misappropriation case, *International News Service v. Associated Press*,³⁴ Justice Holmes protested against the doctrine as much as Ralph did: "Property, a creation of law, does not arise from value, although exchangeable—a matter of fact."³⁵

This classic distinction between "is" and "ought" lies at the foundation of Ralph's work. Had Justice Holmes's *INS* opinion been as witty and well-written as Ralph's work, perhaps the *INS* majority would have been persuaded to go the other way, and perhaps Ralph's campaign would already be victorious.³⁶ Instead, trademark law and its various cousins seem to be expanding against all common sense under the vague umbrella that is misappropriation law's shaded (and shady) domain.³⁷

If one imagined Ralph having a dialogue with himself, these sentences would stand out: "[A] persistent urge to create some general protection against copiers. . . . runs along like the Manichean heresy, forever pitting the forces of light against the alleged forces of darkness."³⁸ But "we are all

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28, at 196-258 (examining the way that unjust-enrichment law does not lead to a wholesale adoption of the reap/sow notion, but at most to a narrow, tort-like cause of action, most unlike the strict liability causes of action that historically resulted from trespass on property).

Ralph continually reminded us that we are *all* and *always* the recipients of unearned gains. Something more than "reaping without sowing" needs to be present before we are to be condemned as unjustly enriched.

32. Dreyfuss, *supra* note 17, at 405.

33. See Denicola, *supra* note 2, at 120. [DBL: Symposium ref.]

34. 248 U.S. 215 (1918).

35. *Id.* at 246 (Holmes, J., concurring). The majority upheld an injunction that prevented the International News Service from copying and rewriting news from Associated Press papers "until its commercial value as news . . . had passed away." *Id.* at 232.

36. Ironies abound. In *Advertising*, the main didactic point is that the law should aid *informational* advertising but treat the *persuasive* advertiser as little better than a gambler's creditor. See Brown, *supra* note 1, at 1205-06. But the piece's power lies in its persuasive language, its charmingly sly use of rhetoric, and its imagery.

37. See Denicola, *supra* note 2, at 121-22. [DBL: Symposium ref.]

38. Ralph S. Brown, Jr., *Product Simulation: A Right or Wrong?*, 64 COLUM. L. REV. 1216, 1227 (1964).

imitators,"³⁹ and "our society is committed to the proposition that progress is advanced by the free use and adaptation of novel things and ideas."⁴⁰ And, most appropriately for Ralph's role as a generous mentor to many, he would insist: "Like other teachings, this lesson has now to be brought home to another generation."⁴¹ It is fitting that in this issue of *The Yale Law Journal* Ralph teaches his lesson again.

39. Brown, *supra* note 1, at 1205. To similar effect, Ralph cited his friend and co-author Justice Benjamin Kaplan: "[I]f man has any 'natural' rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown." Ralph S. Brown, *Design Protection: An Overview*, 34 UCLA L. REV. 1341, 1386 n.208 (1987) (quoting BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1967)).

40. Brown, *supra* note 1, at 1205. As our generation cites Ralph, he too felt the need to cite his elders. What is omitted from my imagined dialogue of Ralph with himself was Ralph's quotation of a few key sentences from Justice Brandeis—the same sentences that Ralph quoted again in the *Product Simulation* piece. Here is the quote to which Ralph twice paid deference:

[Defendant] Kellogg Company is undoubtedly sharing in the goodwill of the article known as "Shredded Wheat"; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.

Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 122 (1938), quoted in Brown, *supra* note 1, at 1205; and Brown, *supra* note 38, at 1227.

41. Brown, *supra* note 38, at 1227.