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Introduction: Property Rules as Remedies

Wendy J. Gordon

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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 are many law teachers who continue to wage the campaign that Ralph made his life work: to save an interdependent society from unnecessary and stagnating 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 that can result 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’ broad sense of property rights as immature or grasping. But consider the article reprinted herein, Advertising and the Public Interest. In it, Ralph identified two competing premises for the law of unfair competition. One premise was

† 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 other colleagues, such as Mark Lemley, Maureen O’Rourke, and Marc Poirier, for helpful critiques. This Introduction was largely inspired by Leo J. Raskind and Diane Leenheer Zimmerman, longtime friends of Ralph who spoke in his honor at the 1999 meeting of the Association of American Law Schools.


3. The law of unfair competition is subsumed today under the law of “intellectual property.” Trademark law was the branch of intellectual property law that Ralph addressed in Advertising
that the law should prohibit all "poaching," all "reap[ing] where one has not sown." The other premise was that the law should follow "the basic common law policy of encouraging competition" and imitation. Ralph initially pretended to be agnostic between these premises, but he soon revealed his true preference: fostering a liberty to copy. 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 of the restraints that intellectual property law imposes. 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. The Advertising piece even takes several steps that, though uncontroversial today, were pro-plaintiff when the piece was written.

That Ralph was the opposite of a fanatic 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

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. 1661, 1661 (1999). 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.

4. Brown, supra note 2, at 1166.
5. Id. at 1200 & n.147.
6. Id. at 1166 & n.6 (quoting Eastern Wine Corp. v. Winslow-Warren, Ltd., 137 F.2d 955, 959 (2d Cir. 1943)).
7. See id. at 1166.
8. Ralph himself claimed only to be indulging 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 blindered 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. That the latter was his goal is clear both from the totality of the Advertising piece and from his later work. See id.; Denicola, supra note 3, at 1662-69. Whether or not pro-plaintiff sentiment was a minority influence in 1948, today both legislatures and courts indeed show an excessive solicitude for intellectual property plaintiffs, as the contributions to this Symposium show. See id. at 1672-74; Mark A. Lemley, The Modern Lanham Act and the Death of Common Sense, 108 YALE L.J. 1687, 1697-1714 (1999); Jessica Litman, Breakfast with Batman: The Public Interest in the Advertising Age, 108 YALE L.J. 1717, 1721-25 (1999). We need Ralph's voice now more than ever.
9. See Brown, supra note 2, at 1203-04.
10. First, the article accepts the desirability of allowing a plaintiff to enjoin confusing uses 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, 1193 n.113. Second, the article recommends 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.
purchasing decisions.\(^1\) Ralph also suggested that courts reject “the unwary purchaser” as a standard by which to measure likelihood of confusion.\(^2\) Courts should instead restore the standard of “the reasonably careful purchaser,” a creature more realistic and more discerning.\(^3\) In sum, the courts should be a little less gullible about “confusion.” The pieces by Mark Lemley and Jessica Litman in this Symposium highlight developments that in my opinion show that the legal system would have been much better off if Ralph’s 1948 warning had been heeded.\(^4\)

Ralph’s final set of suggestions in the Advertising piece involved preserving, as the touchstone of trademark law, avoiding consumer confusion.\(^5\) For him, advertising that carried information was valuable, while advertising that carried mere persuasive force was either pernicious or useless.\(^6\) For Ralph, therefore, society had nothing to fear when a defendant’s nondeceptive, nonconfusing use of a 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 seen (and as Ralph praised him for so seeing),\(^7\) absent such confusion the economic benefit from enforcing rights in trade symbols is debatable, even doubtful.\(^8\)

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2. See Lemon, supra note 2, at 1198.

3. In explaining the standard of the “reasonably careful purchaser,” Ralph viewed the standard of “the unwary purchaser” as “a convenient front for advertisers.” Id. For the stretches to which trademark law has been recently subjected in the supposed interest of the “credulous consumer,” see Litman, supra note 8, at 1722.

4. See Lemley, supra note 8, at 1704-13; Litman, supra note 8, at 1721-25.

5. See Brown, supra note 2, at 1195-98; Litman, supra note 8, at 1719-21.

6. 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 3, at 1663-64. 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 repetition functions as an emotionally compelling drumbeat, it is undesirable.

Would the new category, “intensity advertising,” have implications for trademark law? I doubt it would affect Ralph’s distaste for legal attempts to safeguard a mark’s emotional power. Even if advertising intensity does convey some rudimentary information that “this product is okay,” it would be a giant step to presume that the accuracy of this message is threatened any time a famous mark is used commercially without the owner’s consent.

7. See Brown, supra note 2, at 1199 n.142 (referring to Cohen’s analysis as “trenchant”).

8. 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
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, but antidilution doctrines also have the potential to undermine the liberty our legal system now gives to those who market generic goods through comparative advertising or who parody established icons. One can only protect 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.”

Following Cohen, the argument might run as follows: Placing a famous sports team's logo or trademark on tee-shirts makes the shirts more desirable than tee-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.

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). Admittedly, fans of strong trademark protection might argue that the immediate benefit to the public (in the form of free access to logos for their tee-shirts) would be outweighed by a loss in team or game quality as team owners lost some of their ability to monopolize logo merchandise. But that is an argument that would have to be empirically proved. Intellectual property tends to be most economically justifiable when protecting against free riding on a claimant's primary activity, such as a sports team's making championship game tapes, and more controversial when extended to marketing areas outside the primary activity. See Wendy J. Gordon, Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property, 17 U. Dayton L. Rev. 853, 864-88 (1992).

The role of trade symbols today is complex. For valuable discussion, see Litman, supra note 8.

19. See Lemley, supra note 8, at 1704. One hopeful development is that some courts are reading something like a “confusion” requirement back into antidilution provisions. See, e.g., Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., 875 F.2d 1026, 1028-29 (2d Cir. 1989). This is one possibly legitimate result of the incoherence of the “antidilution” notion. But note that Mead Data predates the federal adoption of an antidilution statute. See 15 U.S.C.A. § 1125(c) (West 1998).

20. Judging from Ralph’s admiration for price competition, see Brown, supra note 2, at 1204, he would have resisted “trademark as property” treatment particularly strongly where 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 sue to prevent the defendant, the maker of a nail hardener, from referring to the plaintiff’s more famous brand). This threat remains present under state antidilution laws, though the federal statute is more sensible. See 15 U.S.C.A. § 1125(c)(4)(A) (providing that fair use of a famous mark in comparative advertising is not actionable under federal antidilution law).

hope that Congress's recent decision to allow the owners of famous marks to sue in the absence of "consumer confusion" will not prove a disaster in terms of increased litigation costs and, most importantly, market constraints.  

In addition to reminding us that transfers of funds from one set of hands to another may yield no increase to the total social product, Ralph also stressed that legal efforts to secure one distribution over another have no social desirability unless the total social product does increase, or the receiving hands deserve what they receive. Thus Ralph also turned his attention to the question of desert. Despite Ralph's claim to be neither philosopher nor psychologist, his article contains a normative social psychology that questions whether advertisers do more harm than good and whether competing newcomers are really as "shady" as the courts often paint them. Their real sin, Ralph hinted, may be their newness.

Though Ralph claimed to take a "conservative" position in the piece, 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 status quo as his target, not his goal.

The notion that the status quo ipso facto deserves protection is known by many names. It can be characterized as "possession providing a basis for

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Enters. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1574 (S.D. Cal. 1996) (holding that a book using a parodic version of Dr. Seuss marks to reexamine the O.J. Simpson murder trial was not a commercial use, but nevertheless enjoining the parody on other grounds), aff'd, 109 F.3d 1394 (9th Cir. 1997). But see American Dairy Queen Corp. v. New Line Prods., No. 98-CV-1923, 1998 WL 915449, at *5 (D. Minn. Dec. 22, 1998) (holding that the defendant's use of "Dairy Queens" as the title of a film about dairy-country beauty contests was a commercial use subject to the federal antidilution provision).

22. For a discussion of this development and its relation to Ralph's work, see Denicola, supra note 3, at 1665-66. Also, as Lemley's essay in this Symposium notes, the federal antidilution law is still fairly new. See Lemley, supra note 8, at 1698. Conceivably it can be interpreted in ways that adhere fairly closely to Ralph's vision of desirable unfair competition law, see id. at 1704, or it can be blown into "trademark as property" with deleterious results. The latter is more likely. As Litman points out, even without the prompting of specific antidilution law, in recent decades many courts have blunted the teeth of the traditional requirement that plaintiffs prove likelihood of confusion. See Litman, supra note 8, at 1722-23.

23. See, for example, Brown, supra note 2, 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).

24. 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").

25. 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).

26. Id. at 1206.
title.” It might be folded into a “but-for” approach to causal maximalism: If you are a but-for cause of some value coming into existence, then you deserve to own it. The notion is equally associated with a kind of primitive corrective justice 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” or what is meant by “unjust enrichment.” Rochelle Dreyfuss is perhaps the most economical in the name she gives the notion: “if value, then right.”

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. In the most famous misappropriation case, International News Service v. Associated

27. 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).

28. The phrase belongs to H.L.A. Hart and Tony Honoré. 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 HONORÉ, CAUSATION IN THE LAW at lxxiv (2d ed. 1985) (footnote omitted). If “causal maximalism” in tort law yields a doctrine that causing a loss is a sufficient basis for legally enforced responsibility, then “causal maximalism” in intellectual property law yields the corollary doctrine: that causing a benefit is a sufficient basis for legally enforced desert.


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 29, at 196-258 (arguing 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. “A culture could not exist if all free riding were prohibited within it.” Gordon, supra note 29, at 167.

32. Dreyfuss, supra note 18, at 405.

33. See Denicola, supra note 3, at 1680.
Introduction

Press, 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." To be less cryptic: Whether monetary value exists is a fact; whether it should be protected as property is a normative issue.

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. 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.

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.” But “we are all imitators,” and “our society is committed to the proposition that progress is advanced by the free use and adaptation of novel things and ideas.” 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.” It is fitting that, in this Issue of The Yale Law Journal, Ralph teaches his lesson again.

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

35. Id. at 246 (Holmes, J., concurring in part and dissenting in part).

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 2, at 1205-06. But the power of the Advertising piece itself largely lies in its persuasive language, its charmingly sly use of rhetoric, and its imagery.

37. Ralph S. Brown, Jr., Product Simulation: A Right or Wrong?, 64 Colum. L. Rev. 1216, 1227 (1964).

38. Brown, supra note 2, at 1205. To similar effect, Ralph cited his friend and coauthor Justice Benjamin Kaplan: “[If 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)).

39. Brown, supra note 2, 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 2, at 1205; and Brown, supra note 37, at 1227.

40. Brown, supra note 37, at 1227.