Freedom To Copy

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Only one of Ralph Brown's many works on intellectual property law begins with a literary reference. He introduced a 1984 article on copyright protection for derivative works with a quotation from William Butler Yeats's The Second Coming:

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the center cannot hold
Mere anarchy is loosed upon the world . . . .

Ralph called it "one of the noblest poems of this century," and his fondness for it is revealing. Ralph devoted much of his career to holding the center. He worried that intellectual property law had begun to lean too far toward private rights at the expense of the public interest in access and competition. "Competition is copying," and laws that restrain copying—copyright, patent, trademark, and corners of unfair competition law—restrain competition. They exist as exceptions to a fundamental proposition, expressed by Justice Brandeis in language that Ralph enthusiastically repeated in at least three articles (and twice more in our casebook on copyright law). "The general rule of law is, that the noblest of human

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productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”5 Exceptions require justification, and Ralph was old-fashioned enough to believe that their scope should run no further than their rationale. He systematically analyzed the rationales supporting private rights in intellectual property and challenged any restraint on use that seemed to spiral beyond legitimate justification. This Essay examines the central theme of Ralph’s scholarship: his passionate and influential defense of the freedom to copy.

In recent years, Ralph had grown increasingly uneasy with the rapid expansion of intellectual property rights. He sometimes speculated on the conditions that fostered this trend and on the nature of an appropriate response. His ideas are discussed in Part IV of this Essay.

I. TRADEMARK LAW

A. The Yale Article

In 1948, with his mind no doubt on tenure as much as trademarks, Assistant Professor Ralph Brown undertook a formidable task in an article published in The Yale Law Journal.6 At a time when economic analysis of law was largely confined to tax, antitrust, and rules governing regulated industries,7 he set out to formulate a normative theory of trademark law based on recent economic studies of modern advertising.8 The connection between trademarks and advertising was undisputed. The ability of a firm to capture the benefits of a favorable reputation generated by investments in advertising depends directly on the degree of protection afforded to the symbols that consumers use to identify the firm and its products. “Trade symbols are a species of advertising,”9 Ralph argued, and the scope of their...
protection should be set with reference to the economic effects of advertising. On the latter, influenced principally by the work of Edward Chamberlain, he took a decidedly cynical view. To the extent that it provides information to consumers, advertising contributes to the efficient operation of the market. To the extent that it does not, Ralph believed that advertising wastes resources in sterile competition and, worse, generates irrational consumer preferences that foster monopoly. The implications for trademark law were clear. When trademarks assist consumers in identifying the goods of particular sellers, they support the informational function of advertising. Any unauthorized use that subverts this function by causing confusion about the source of a product should be stopped. Protection beyond the prevention of confusion, however, is not only unnecessary but counterproductive; it shields the selling power or "commercial magnetism" of a mark, facilitating product differentiation and monopoly. For Ralph, the prevention of confusion was thus the defining rationale for the protection of trademarks; additional restrictions on imitation were unjustified intrusions into the competitive process.

Investigations into the economics of advertising published during the first two decades following Ralph's article in The Yale Law Journal generally supported his views. By the 1970s, however, a view more favorable to advertising had gained ground. George Stigler, for example, emphasized that advertising contributes to efficiency by offering information that reduces a buyer's search costs, although Ralph had no quarrel with such informative advertising. Philip Nelson went further, arguing that much of what Ralph called "persuasive" advertising also provides useful information to consumers. Sellers get a bigger economic return from advertising that generates repeat sales, and thus the volume of advertising for a product can be a useful guide to the level of consumer satisfaction that the product has achieved. By 1987, William Landes and

274 (1987) ("[B]rand advertising presupposes trademarks—they are what enable a producer readily to identify his brand to the consumer.").


11. See Justice Frankfurter's famous comment in Mishawaka Rubber & Woolen Manufacturing Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942), used by Ralph as the introduction to Advertising and the Public Interest, supra note 4, at 1165.


15. Other defenses of modern advertising published during the 1970s include Julian L. Simon, Issues in the Economics of Advertising 205-06 (1970), which discounts the extent to
Richard Posner could write "that the hostile view of brand advertising has been largely and we think correctly rejected by economists." 16

The young Ralph Brown undoubtedly understood that his appraisal of modern advertising would not be the final word. His principal achievement was to win acceptance for a mode of analysis that tied the protection of trademarks to their economic role in the marketplace. He had demonstrated that any extension of trademark protection beyond the limits of the confusion rationale was at least debatable, 17 and after the publication of his article any case for expanded protection required more than unadorned allusions to property rights and unjust enrichment. In the decades that followed, as the debate over the scope of trademark protection played out on several fronts, Ralph fought to retain consumer confusion as the touchstone for excluding copiers.

B. Dilution

One protracted conflict over trademark rights had begun only a year before publication of Ralph’s Yale article. In 1947, Massachusetts became the first state to pass a “dilution” statute. The act and its rationale directly challenged Ralph’s views on the appropriate scope of trademark protection. 18 As Ralph recognized, aggressive promotion can invest a mark with considerable power to stimulate sales. In an effort to induce courts to prohibit the use of a mark even on goods that did not compete with those of the trademark owner, Frank Schechter had argued years earlier that the

which advertising induces consumption; and Yale Brozen, New FTC Policy from Obsolete Economic Doctrine, 41 ANTITRUST L.J. 477 (1972), which argues that advertising does not create barriers to entry.

16. Landes & Posner, supra note 9, at 275. But see Andy Bearne, The Economics of Advertising: A Reappraisal, 1 ECON. ISSUES 23, 36 (1996) (concluding, after a review of the literature, “that advertising has both pro- and anti-competitive influences and there is much left to understand about its role within the competitive process”).


18. See Brown, Advertising and the Public Interest, supra note 4, at 1191-94. The Massachusetts statute is quoted id. at 1194 n.121. See also Food Fair Stores v. Food Fair, Inc., 83 F. Supp. 445, 450 (D. Mass. 1948) (noting that the Massachusetts dilution statute rejects the views expressed by Professor Brown).
primary value of a trademark is its capacity to generate sales and that it should be protected against the “gradual whittling away or dispersion of the identity and hold upon the public mind of the mark...” Ralph, of course, emphatically disagreed—far from deserving protection, this “persuasive” power might be better diluted through nonconfusing uses of the mark by others. The common law never adopted Schechter’s dilution rationale, instead extending protection against noncompeting uses only when they threatened to confuse consumers. The dilution statutes, however, gave direct recognition to the selling power of a mark by prohibiting any use that imperiled its “distinctive quality”—that is, its unique connection with the trademark owner and its products.

Dilution protection received a boost when the U.S. (now International) Trademark Association, a private organization of trademark owners, added a dilution provision to the 1964 revision of its Model State Trademark Act, which serves as the basis for most state trademark registration statutes. More than half of the states now have dilution laws. Influenced perhaps by Ralph and other skeptics, courts initially gave the statutes a cool reception. In the 1980s, however, judges began to take the dilution statutes at face value, extending protection against even nonconfusing uses that threatened to dilute the association between the mark and the trademark owner. To economists who saw more good than bad in brand promotion and product differentiation, protection against dilution was sound policy. A nonconfusing use of a well-known mark to denote the products of a different seller can reduce the mark’s capacity to communicate information to consumers by blurring the connotations developed through the prior user’s promotional investments.

The futile effort to hold trademark rights within the confines of the confusion rationale reached its conclusion in 1996, when an amendment to the Lanham Act created a federal cause of action for the owners of

20. Cf. Brown, Advertising and the Public Interest, supra note 4, at 1191 (using “Gold Medal” as an example).
23. See id. § 22:5.
25. See Landes & Posner, supra note 9, at 307 (justifying rules against dilution by arguing that they prevent the creation of distracting and inappropriate associations that reduce the communicative value of the symbol, adding that others “who believe that ‘product differentiation’ is a bad thing because it creates artificial barriers to entry will not applaud such a result, but this view is no longer widespread among economists”).
“famous” marks against unauthorized use that “causes dilution of the distinctive quality of the mark . . .” 26 Even before the enactment of the federal dilution law, however, Ralph and others had begun to stake out a new line of defense against the expansion of trademark protection under the dilution rationale. It was one thing to offer protection against the use of a well-known mark as a trademark on someone else’s goods, but another to prohibit uses intended to identify the trademark owner or its products as the subject of the user’s speech. Examples of the latter include use of another’s mark in comparative advertising or in parodies directed at the trademark owner or its products. Although state dilution statutes have sometimes been invoked to protect a mark from use as a trademark on goods that might tarnish the positive associations that the mark evokes, 27 in a few instances this protection has extended to cases in which the tarnishing results, not from the use of the mark as a trademark for another’s goods, but from its use in speech directed at the trademark owner. 28 The extension of rights against such “nontrademark” use has become the new battleground.

The economic arguments that favor protecting a mark against even nonconfusing use as a trademark for someone else’s goods do not easily extend to other kinds of nonconfusing use. If the symbol is not used as a trademark to denote the goods of a different seller, the exclusive association between the mark and the first user is not diluted. Although the communicative value of the symbol may still be reduced if the use tarnishes the positive associations evoked by the mark, there is no reason to presume that any such harm will outweigh the harm caused by impeding the communication of potentially valuable information about the trademark owner or its products. 29 If the speaker’s message is not commercial, the full weight of the First Amendment is also in the balance.

The proper interpretation of state dilution statutes was a contentious issue in the drafting of the Restatement (Third) of Unfair Competition,

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27. See Restatement (Third) of Unfair Competition § 25 cmt. g (1995).

28. See, e.g., Deere & Co. v. MTD Prods., 41 F.3d 39 (2d Cir. 1994) (enjoining a parody of the plaintiff’s mark in a competitor’s comparative advertisement); Anheuser-Busch v. Balducci Publications, 28 F.3d 769 (8th Cir. 1994) (enjoining the use of the plaintiff’s trademarks in a parody advertisement alluding to environmental problems). Other decisions show greater reluctance to apply the dilution statutes against defendants who have not adopted the plaintiff’s mark as a trademark for their own goods. See, e.g., L.L. Bean v. Drake Publishers, 811 F.2d 26 (1st Cir. 1987) (denying relief against the use of the plaintiff’s trademarks in a parody of its sales catalogue).

29. See Landes & Posner, supra note 9, at 307 (distinguishing the use of a mark as a trademark to denote the defendant’s own products from a use that instead refers back to the products of the trademark owner).
published by the American Law Institute (ALI) in 1995. As a member of the Advisers Committee, Ralph took the lead in arguing for a narrow construction.\textsuperscript{30} As promulgated by the ALI, Section 25 of the Restatement interprets state dilution statutes as extending only to uses that dilute the connection between the mark and its owner by associating the symbol with the products of a different seller.\textsuperscript{31} Under the rule in Section 25(2), the use of a mark "to comment on, criticize, ridicule, parody, or disparage" the owner or its products or business is beyond the reach of the dilution rationale; relief for injuries caused by these "nontrademark" uses is left to the rules governing liability for injurious speech, principally the actions for defamation and disparagement.\textsuperscript{32} The federal dilution statute, enacted soon after publication of the Restatement, offers protection against a use that "causes dilution of the distinctive quality of the mark," with "dilution" defined as "the lessening of the capacity of a famous mark to identify and distinguish goods or services."\textsuperscript{33} With protection linked to the identification function of a mark, the federal statute seems confined to unauthorized use as a trademark for goods originating from a different seller; a use that instead refers back to the trademark owner will not threaten the mark's capacity to identify the owner or its goods.\textsuperscript{34} It is too early to tell whether this new defensive line will hold.

C. Ornamental Use

Ralph's Yale article also recognized a threat more insidious than the dilution statutes. A standard of liability resting on the probability of confusion among a universe of hypothetical purchasers is subject to effortless manipulation. Factual assumptions and legal presumptions, carefully orchestrated, can expand the scope of trademark protection beyond anything envisioned by the conservative model that Ralph endorsed. One such expansion grew out of the increasing popularity in the 1970s of clothing, jewelry, mugs, and other assorted merchandise that display the names, logos, or mascots of athletic teams, musical groups, fraternal organizations, and commercial purveyors, especially of beers and soft drinks. As famous names and marks became valuable as ornamentation on everything from sweatshirts to toilet seats, the question naturally arose

\begin{footnotes}
\item[30] Ralph's Yale article, Advertising and the Public Interest, supra note 4, is cited in Restatement (Third) of Unfair Competition § 25 reporters' note b (1995).
\item[31] See Restatement (Third) of Unfair Competition § 25(1) (1995).
\item[32] See id. § 25(2).
\end{footnotes}
whether a seller needed anyone's permission to emblazon a tee-shirt with the words "New York Yankees," "Yale University," or a picture of a Budweiser beer can. When the owners of famous trademarks pressed their claims, a few courts, especially the Fifth Circuit in *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing*,35 gave them exclusive rights in the new markets through the simple expedient of equating consumer recognition of the mark with confusion of sponsorship. Other courts, however, took the requirement of confusion more seriously, denying relief when consumers were unlikely to infer sponsorship from a decorative use of a famous mark.36

There is more than a little circularity in basing a legal right to control unauthorized ornamental use on the assumptions that consumers make about the official sponsorship of the ornamented items—assumptions that rest in turn on consumers' views about whether trademark owners have the legal right to control such use. If trademark owners win enough high-profile cases or brag loudly enough about licensing revenues from ornamental use, consumers will naturally think that the products they see must be licensed, which in turn will help insure that a license is indeed required. In some product markets such as professional sports paraphernalia, trademark owners' rights now seem well-secured.37

Ralph was unhappy with this self-actuated expansion of trademark rights, although I think his displeasure was eased by the knowledge that colleges and universities were among the principal beneficiaries of the new licensing revenues.38 When we included the *Boston Hockey* decision in our casebook, Ralph, contrary to usual practice, insisted on a disclaimer warning students that "*Boston Hockey* has been distinguished and limited in later decisions for its loose interpretation of the confusion

35. 510 F.2d 1004 (5th Cir. 1975); see also *Boston Athletic Ass'n v. Sullivan*, 867 F.2d 22, 34 (1st Cir. 1989) (presuming confusion of sponsorship among tee-shirt buyers).

36. See, e.g., *Supreme Assembly, Order of Rainbow for Girls v. J.H. Ray Jewelry Co.*, 676 F.2d 1079, 1084-85 (5th Cir. 1982) (holding that the defendant's use of the plaintiff's insignia as an element of jewelry did not infringe the plaintiff's trademark rights in the insignia, and distinguishing its earlier decision in *Boston Hockey*); *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912 (9th Cir. 1980) (holding similarly that the use of the plaintiff's insignia as an element of jewelry was not an infringement); *University of Pittsburgh v. Champion Prods.*, 566 F. Supp. 711, 722 (W.D. Pa. 1983) (holding that the use of a university's trademarks on clothing did not constitute infringement); *Bi-Rite Enters. v. Button Master*, 555 F. Supp. 1188, 1196 (S.D.N.Y. 1983) (holding that the use of performers' likeness on novelty items was not infringement); see also *BROWN & DENICOLA*, supra note 4, at 689 (discussing merchandising rights).

37. Consumer surveys presented by the National Football League in cases such as *National Football League Properties v. Wichita Falls Sportswear*, 532 F. Supp. 651 (W.D. Wash. 1982), and *National Football League Properties, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 327 N.E.2d 247, 250 (III. App. 1975), indicate that most consumers believe professional football merchandise is sponsored by the NFL or its teams.

38. See *BROWN & DENICOLA*, supra note 4, at 691.
requirement.” The Restatement merely reiterates the likelihood of confusion standards as the basis of liability for ornamental use. Ralph, I suspect, wished that it did more.

D. Secondary Meaning in the Making

There have been other battles over trademark rights in the half-century since the publication of Advertising and the Public Interest, and Ralph was an active combatant in most of them. One minor skirmish started in 1974 when courts in the Southern District of New York began to hint that protection might be available even for a symbol that did not yet identify a particular source, as long as it seemed to be in the process of acquiring source association—so-called “secondary meaning in the making.” This sort of protection could not be justified under the confusion rationale for the simple and sufficient reason that if a symbol is not associated with a particular producer, its use by others cannot confuse consumers about the source of a product. For the same reason, there is no obvious economic argument for protection since there is little or no informational value in a nondistinctive symbol. In the 1985 edition of our casebook on copyright law, Ralph said the whole idea was “heresy”; in the 1986 Brace Memorial Lecture to the Copyright Society of the U.S.A., he called it “a crashing solecism.” By 1987, the gloves were off: “[T]here is a notion at large called ‘secondary meaning in the making.’ It should be stamped out.”

As an adviser on the Restatement, Ralph made certain that it did not equivocate: “The doctrine, if taken literally, is inimical to the purpose of the secondary meaning requirement.” The issue was put to rest in 1992 when Judge Oakes, writing for the Second Circuit, flatly rejected secondary meaning in the making in Laureysens v. Idea Group, Inc. After quoting from a tentative draft of the Restatement, he added that the doctrine

39. Id. at 578.
46. 964 F.2d 131 (2d Cir. 1992).
"constrains unnecessarily the freedom to copy and compete." 47 The latter remark sounds like pure Ralph Brown, which perhaps it was—as a Restatement adviser himself, Judge Oakes by 1992 had been listening to Ralph’s views on trademarks for more than five years.

E. Design Protection

A more substantial controversy developed from the increasingly frequent attempts by manufacturers to claim trademark protection for the design features of their products. Labels, packaging, and other aspects of a product’s "trade dress" can be protected as a trademark if they become distinctive of a particular source, and the principle has sometimes been extended to the appearance of the product itself. By the 1960s, it was apparent that trademark protection for product designs could short-circuit the stringent limitations embedded in federal patent and copyright law. For a time it appeared that the Supreme Court had arrested this development, at least under state law, with its companion decisions in Sears, Roebuck & Co. v. Stiffel Co. 48 and Compco Corp. v. Day-Brite Lighting, Inc., 49 which invoked the Supremacy Clause 50 to bar state protection for product features. In a Columbia Law Review symposium on the decisions, Ralph gave them enthusiastic support as a proper rebuff to cases that reflected "a persistent urge to create some general protection against copiers." 51 The preemption argument in Sears and Compco, however, could not deter trademark protection for product features under federal law, and eventually, even state trademark protection seemed to win a quiet reprieve. 52

If trademark protection could reach to product designs, Ralph wanted it kept on a tight leash. In his 1986 Brace Memorial Lecture, he set the issue: "The problem is this: protection of industrial design, unless kept firmly tied to source recognition as a trademark, easily slides into an unpredictable system of monopoly awards for successful designs, uninhibited by the statutory standards of copyright law or design patent law." 53 A year later he staked out his position in a major article published in the UCLA Law Review. 54 Ralph argued that two hornbook rules, vigilantly applied, could

47. Id. at 138.
50. U.S. CONST. art. VI, cl. 2.
51. Ralph S. Brown, Jr., Product Simulation: A Right or a Wrong, 64 COLUM. L. REV. 1216, 1227 (1964) [hereinafter Brown, Product Simulation]. Ralph’s analysis was invoked by Judge Friendly in Ives Laboratories v. Darby Drug Co., 601 F.2d 631, 640 (2d Cir. 1979).
54. See Brown, Design Protection, supra note 44. The Supreme Court cited this article in
hold trademark protection for product designs within tolerable bounds. Design features should be protected only when genuinely distinctive of a particular source, and in no event should protection extend to "functional" features. Ralph believed that timid application of these limiting principles had already disadvantaged both competitors and consumers.55

The rule prohibiting trademark protection for functional features is longstanding.56 Functional features are elements that are costly for competitors to forego. No toothpaste manufacturer can claim trademark rights in a squeezable tube, even if it originated the idea. On the other hand, if there are a variety of perfectly good substitutes for a design feature, trademark protection will not unduly hinder competition. Ralph’s particular concern related to the recognition of trademark rights in features valued for their aesthetic rather than their utilitarian advantages. If functionality is about insuring effective competition, then trademark law should deny protection to a heart-shaped candy box used for Valentine’s Day chocolates, despite the absence of any utilitarian advantage. This concept of "aesthetic functionality" had already made several cautious appearances. Although Ralph did not offer his own formulation, he was critical of the parsimonious interpretations he found in the case law, and he pushed for more robust recognition.57

Ralph also believed that the element of distinctiveness—the requirement that the subject matter convey source information to

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55. Ralph grudgingly acknowledged his willingness to support a "little statutory monopoly" in the form of sui generis design protection if necessary to spur investment in innovative design, but only if the statutory rights were short and well-defined, exclusive of other forms of protection, and plainly excluded utilitarian attributes. Brown, Copyright and Its Upstart Cousins, supra note 43, at 320; see also Brown, Design Protection, supra note 44, at 1395-1403 (offering suggestions on proposed design legislation). Overcoming their earlier defeat under state law, see Bonito Boats, 489 U.S. at 141, boat designers became the first beneficiaries of sui generis design protection in 1998 when the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), added chapter 13 to Title 17. See 17 U.S.C. §§ 1301-1332. The statute’s generalized form invites future expansion.

56. See RESTATEMENT OF TORTS § 742 (1938).

57. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 (1995). Landes & Posner, supra note 9, at 297, define a nonfunctional feature as "one with perfect (or nearly perfect) substitutes."

58. See Brown, Design Protection, supra note 44, at 1359-74 (discussing the existing precedents on aesthetic functionality); see also Brown, Copyright and Its Upstart Cousins, supra note 43, at 311-13 (cautioning against trademark rights that protect the selling power of a product’s pleasant appearance). The economic arguments favoring the recognition of aesthetic functionality parallel those supporting utilitarian functionality. See Landes & Posner, supra note 9, at 297.
consumers—had been applied to product features with too little rigor. For word marks, trademark law has long recognized that the distinctiveness requirement can be satisfied in two different ways. Fanciful or arbitrary terms like “Kodak” on cameras or “Arrow” on shirts are considered “inherently distinctive.” The absence of any other apparent relevance makes it likely that these terms will be understood by consumers as attempts to indicate source. In addition, the recognition of trademark rights will likely not inhibit fair competition by others. Descriptive terms like “Vision Center” for an optical clinic are more problematic since they might be understood by consumers only in a descriptive sense, and the recognition of trademark rights has greater anticompetitive consequences. For these terms, protection is appropriate only when their informational value as a source identifier exceeds the anticompetitive consequences of precluding their use by others. The law thus demands proof that the descriptive term has in fact become a trademark—that is, that the term has acquired a “secondary meaning” as an indicator of source.

In the 1980s, judges began to apply the idea of inherent distinctiveness to the appearance of labels, packaging, and related subject matter. The wide range of alternative designs for labels and packaging generally insures that trademark rights will not unduly hinder competition, and Ralph was not alarmed by this development, “if the standards for instant protection are kept high.” But invoking inherent distinctiveness to justify trademark rights in the design of the product itself was another matter. Here the competitive interest in copying is greater (and the likelihood of actual source association seems smaller) than for labels and packaging, and Ralph believed that the freedom to copy should give way only in the face of proven source significance. “To say that the overall design of a useful article is ‘inherently distinctive’ of a particular source just by examining it . . . substitutes an impression that the design is outstanding, or eccentric, or clever, or something, for the proofs of association with a source” that show real secondary meaning.

Ralph’s position suffered a setback in 1992 when the Supreme Court in Two Pesos, Inc. v. Taco Cabana, Inc. upheld a judgment against a restaurant that had copied the Mexican motif of a competitor. The Court held that proof of secondary meaning is not required to prevail on a claim for trade dress infringement under Section 43(a) of the Lanham Act if the

60. Id. § 14 cmt. a.
63. Id. at 1380.
64. 505 U.S. 763 (1992).
trade dress is inherently distinctive.\textsuperscript{65} Justice White drew no distinction between packaging and product features, and he specifically rejected several Second Circuit decisions that had made proof of secondary meaning a prerequisite to protecting product designs as trademarks.\textsuperscript{66} Ralph complained that the concept of an inherently distinctive product design was even more harmful than the idea of secondary meaning in the making since it eliminated \textit{all} concern over secondary meaning whenever the design was somehow distant from the common prototype.\textsuperscript{67}

Subsequent developments seem to justify Ralph's concern. For word marks, the use of broad categories determinative of inherent distinctiveness avoids the administrative costs of a case-by-case balancing of the informational advantages and competitive disadvantages of protection.\textsuperscript{68} It also affords a degree of predictability, valued both in decisions to adopt and decisions to imitate a putative trademark. The category of inherently distinctive product designs, however, has so far done little to further either interest. Disputes over the appropriate standard for inherent distinctiveness continue to consume public and private resources.\textsuperscript{69} Factors relevant under some formulations, including the user's intent and comparisons with the universe of existing designs, add to the cost and complexity of the determination, and outcomes remain difficult to predict under any version of the standard.

Ralph made another valuable suggestion about trademark protection for product designs. Trademark law does not forbid copying; it forbids conduct likely to confuse consumers about source or sponsorship. Proper respect for the requirements of those laws that \textit{do} forbid copying (patent and copyright) suggests that when subject matters overlap, the protection of trademark rights should be pursued primarily through mandatory labeling and similar precautionary measures rather than injunctions against copying.\textsuperscript{70}

\textsuperscript{65} See \textit{id.} at 767.

\textsuperscript{66} See \textit{id.} at 773-74.

\textsuperscript{67} See \textbf{RALPH S. BROWN \& ROBERT C. DENICOLA, CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS} 677 (6th ed. 1995).

\textsuperscript{68} See \textit{Landes \& Posner, supra} note 9, at 289.

\textsuperscript{69} See, \textit{e.g.}, Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373, 378 (2d Cir. 1997) (considering "whether the design was likely to be understood as an indicator of the product's source"); Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1009 (2d Cir. 1995) (considering whether the design "was primarily aesthetic" or "primarily intended as source identification"); Stuart Hall Co. v. Ampad Corp., 51 F.3d 780 (8th Cir. 1995) (applying the traditional categories of distinctiveness applicable to word marks); Duraco Prods. v. Joy Plastic Enters., 40 F.3d 1431, 1434 (3d Cir. 1994) (discussing whether the product feature is: (i) unusual and memorable; (ii) conceptually separable from the product; and (iii) likely to serve primarily as a designator of origin of the product"); Krueger Int'l v. Nightingale Inc., 915 F. Supp. 595, 603 (S.D.N.Y. 1996) (adopting the test in Seabrook Foods v. Bar-Well Foods, 568 F.2d 1342, 1344 (C.C.P.A. 1977), inquiring whether the design is "unique, unusual or unexpected in the market").

\textsuperscript{70} See Brown, \textit{Design Protection, supra} note 44, at 1385.
The Restatement reflects the concerns of Ralph and others on all these matters. In its section 16 on trademark protection for packaging and product features, the commentary cautions that “[r]igorous application of the requirements of distinctiveness and nonfunctionality is necessary in order to avoid undermining the carefully circumscribed statutory regimes for the protection of useful and ornamental designs under federal patent and copyright law.” Section 17 includes an endorsement of aesthetic functionality as a limitation on trademark rights in product designs, and the adoption of that analysis by the Second Circuit seems to have firmly secured its place in the case law. Ralph also pressed his argument that product features should not be assimilated with packaging and word marks. In the wake of the Supreme Court’s decision in Two Pesos, the Restatement could not advance a strict requirement of secondary meaning for product features. It does caution, however, that as distinguished from packaging, “it is less common for consumers to recognize the design of a product or product feature as an indication of source. Product designs are more likely to be seen merely as utilitarian or ornamental aspects of the goods.” In light of the competitive interest in copying, “[p]roduct designs are therefore not ordinarily considered inherently distinctive and are thus normally protected only upon proof of secondary meaning.” The Restatement also endorses Ralph’s observation on remedies in product-design cases, concluding that “the public interest in access may in some cases influence the choice of appropriate relief by encouraging consideration of alternatives to an injunction against imitation, such as mandatory labeling or other precautionary measures.”

72. See Wallace Int’l Silversmiths v. Godinger Silver Art Co., 916 F.2d 76 (2d Cir. 1990) (adopting the analysis of aesthetic functionality in RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 (Preliminary Draft No. 3, 1989)).
Ralph would have preferred a different name for the concept, fearing that “aesthetic functionality” as a term “implies appraisals of aesthetic worth that courts should and usually do shy away from.” Memorandum from Ralph Brown to the Advisers, Restatement (Third) of Unfair Competition (Nov. 27, 1988) (on file at the American Law Institute). He also thought that the Restatement’s formulation of functionality put too much emphasis on the availability of alternatives. “You intone the privilege to copy. But if you have to find an alternative, you’re not being allowed to copy.” Memorandum from Ralph Brown to the Reporters, Restatement (Third) of Unfair Competition (Oct. 23, 1989) (on file at the American Law Institute).
73. See Memorandum from Ralph Brown to the Advisers, supra note 72; Memorandum from Ralph Brown to the Reporters, supra note 72. Arguing that RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 (Preliminary Draft No. 2, 1988) failed to distinguish adequately between packaging and product features, Ralph commented: “I am tempted to record an impression that our conscientious Reporter, both in his text and notes, is a little perfunctory in supporting the privilege to imitate”—his gentle way of asserting that I had seen too many trees and too little forest. Memorandum from Ralph Brown to the Advisers, supra note 72.
75. Id.
76. Id. cmt. a.
II. COPYRIGHT LAW.

Trademark law was Ralph’s first interest, but in a luncheon speech marking his “retirement” in 1983, he described how he came upon his “favorite subject” and “longest love”—copyright law. It began in 1947 with a seminar on the antitrust problems of creative people in the entertainment business prompted by litigation involving the Dramatists Guild, but it soon expanded to the copyright law that lay behind so many issues in the entertainment industry. The rest is history—a history that includes a 1958 study on monetary remedies under copyright law prepared at the request of the Register of Copyrights in connection with the revision of the 1909 Copyright Act, the first casebook on copyright law (published in 1960 with Professor Benjamin Kaplan and now in its seventh edition), and a series of major articles touching almost every aspect of the subject.

In copyright law too, Ralph worried about “a certain escape from control.” He took as his text the Constitution, which authorizes Congress “to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” He told the Copyright Society that “the central stabilizing elements of copyright law . . . in the Constitution, are to encourage authorship and creativity, for the sake of increasing the stock of knowledge and of art.” Ralph’s most complete disquisition on the

78. See id. For background on the Dramatists Guild litigation, see Ring v. Spina, 148 F.2d 647 (2d Cir. 1945); and Ring v. Authors’ League of America, 186 F.2d 637 (2d Cir. 1951).
79. See Ralph S. Brown, Jr., The Operation of the Damage Provisions of the Copyright Act: An Exploratory Study, COPYRIGHT REVISION STUDY No. 23 (1958), reprinted in 2 STUDIES ON COPYRIGHT 1067 (Arthur Fisher Memorial ed. 1963). The study was discussed by the Supreme Court in Fogerty v. Fantasy, Inc., 510 U.S. 517, 528 (1994). The legal realist in Ralph must have been tested by his experience with 500 questionnaires on damage recoveries that he distributed in connection with the study. Only 88 were returned, 30 of which indicated no relevant experiences. See 2 STUDIES ON COPYRIGHT, supra, at 1072. (Ralph might have objected to the “legal realist” label, but he certainly fit his own definition of the term, offered in Ralph S. Brown, Book Review, 6 LAW & HIST. REV. 191, 193 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986)): “What did it mean, to be a [legal] realist? Did it require anything more than a mistrust of conceptual thinking, a skepticism about orthodox descriptions of the judicial, legislative, and administrative processes, and a willingness to experiment with teaching methods that went beyond the austere Langdellian casebook? Adherence to these three attitudes, I think, qualified one at least to pose as a legal realist, junior grade.”).
80. See BENJAMIN KAPLAN & RALPH S. BROWN, JR., COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS (1960).
83. Brown, Copyright and Its Upstart Cousins, supra note 43, at 301-02. The constitutional clause is the founding grant not only for copyright, but also for patent. Ralph had little to say about patent law, except for design patents, which overlap with both copyright and trademark, and the preemptive effect of patent law on state attempts to suppress copying. I suspect this followed from his apparent disinterest in technology, including computers. He persisted in composing
rationale for copyright came in a 1985 article published in the *Minnesota Law Review*. Copyright was "a way of promoting the general public good"—not necessarily the good of authors and publishers. "The clause does not say ‘to maximize the returns to authors and inventors.’" Along the way, and with a note of regret, he rejected arguments resting on a natural right of authors to ownership of their creations. "Exaltation of authorship, whatever its emotional appeal, is not, in itself, enough to justify extending existing rights, even if it is likely that creating a new property right will in fact shift resources in the authors’ direction."

The public interest pursued by copyright law lies in the creation and enjoyment of works of authorship—contributions that are often easy for copiers to appropriate. Some degree of protection seems necessary to avoid underproduction caused by prices bid down to the cost of copying. Encouraging creativity through the recognition of exclusive rights, however, imposes costs. Trading access for incentive restricts the consumption of public goods and hence reduces consumer welfare.

letters on an old typewriter, but even those smudged and poorly-typed notes were infinitely preferable to his handwritten communications. (My wife, Christine, drew spontaneous applause at a dinner in Ralph’s honor when the participants learned of her ability to decipher his handwriting.) Ralph also had little use for electronic media. Once in the 1980s, I had used Westlaw to find citations for recent cases not yet published in the advance sheets and included the volume and page numbers in the manuscript for our casebook. When the advance sheets eventually arrived at Yale, Ralph telephoned in genuine amazement to ask how I had been able to “predict” where the opinions would appear.

84. See Brown, *Eligibility for Copyright*, supra note 4. The article appeared as part of a symposium, *The Semiconductor Chip Protection Act of 1984 and Its Lessons*, 70 MINN. L. REV. 263 (1985). It was an odd forum for Ralph, who not surprisingly headed for higher ground with a contribution that did not discuss a single provision of the Semiconductor Act.

85. Id. at 592.

86. Id. In a later article, Ralph quoted from a contribution in the same symposium coauthored by Congressman Robert Kastenmeier, then Chair of the House Committee on the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice: “The argument that a particular interest group will make more money and therefore be more creative does not satisfy the constitutional requirements of the intellectual property clause.” Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 441 (1985), quoted in Ralph S. Brown, *Copyright-Like Protection for Designs*, 19 U. BALI. L. REV. 308, 323 (1989) [hereinafter Brown, *Copyright-Like Protection*].

Ralph feigned outrage when a student note in the *Harvard Law Review* asserted that copyright was “simply an anti-misappropriation scheme that protects the fruits of intellectual labor.” Note, *Copyright Protection of Computer Program Object Code*, 96 HARV. L. REV. 1723, 1741 (1983). “No such thing. Let me cite an authority that arguably outweighs the Harvard Law Review, namely the Supreme Court of the United States,” referring to *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), which emphasized that although “[t]he immediate effect of our copyright law is to secure a fair return for an author’s creative labor... the ultimate aim is... to stimulate artistic creativity for the general public good.” Brown, *The Widening Gyre*, supra note 1, at 23.


88. See Brown, *Eligibility for Copyright*, supra note 4, at 596; William M. Landes & Richard
increases the cost of future works by decreasing the material otherwise available to subsequent authors for free. Ralph was particularly sensitive to this latter cost and remained steadfast in his defense of a rich public domain. "Relegation to the public domain will sometimes appear to be an inferior kind of thing that happens to deserving authors and inventors when for some reason they lose control of their creations. Viewed in another way, the public domain is the accumulated wisdom of the ages." Extravagant protection can also produce too much incentive, diverting resources from activities offering greater social utility. It is possible to have too much Hamlet (or Mickey Mouse) and too little butter.

Despite the insights of economics, we lack a practical rule of thumb to tell us what level of incentives will yield an optimum output of authorship. Ralph was characteristically direct: "Thus, the lessons from economics; they are not very helpful in hard cases." But the lessons do inform our judgment, and Ralph was quick to object to propositions that seemed under any plausible calculus to exalt private over public benefits.

One area of concern is the test for "substantial similarity"—the standard that determines whether a defendant has taken enough from a copyrighted work to be branded an infringer. The determination is particularly troublesome when the copying is not literal—that is, when there is little word-for-word or brushstroke-for-brushstroke similarity. One test, popularized by the Ninth Circuit and now making intermittent appearances in others, asks whether the defendant has captured "the total concept and feel" of the copyrighted work. Ralph disliked the test, fearing that it subordinated the distinction between protectable expression and unprotectable ideas, inviting juries (and judges) to exercise their innate prejudice against copying. In our casebook, he wondered how the "total

89. See Landes & Posner, supra note 88, at 332.
90. BROWN & DENICOLA, supra note 4, at 9.
91. This perspective forms the basis for the analysis of copyright law in Glynn S. Lunney, Jr., Reexamining Copyright's Incentives-Access Paradigm, 49 VAND. L. REV. 483 (1996).
92. Brown, Eligibility for Copyright, supra note 4, at 597. Ralph did not play favorites in his judgments. He believed, for example, that copyright law did not permit the repeated dissemination of course anthologies containing copyrighted works. "Is there anything about copyright, unlike computers or photocopier supplies, that marks it for compulsory contributions, at one extreme to school districts in economically depressed communities, at the other to the education of professionals whose earnings prospects may be superior to those of many authors?" BROWN & DENICOLA, supra note 4, at 439; see also Brown, The Joys of Copyright, supra note 3, at 480 (arguing that the Copyright Act "does not in most circumstances authorize the repeated dissemination of anthologies that include complete copyright works").
93. The test originated in Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970); it has appeared with increased frequency following its adoption in Sid & Marty Krofft Television Productions v. McDonald's, 562 F.2d 1157 (9th Cir. 1977).
94. Similar concerns may have contributed to Ralph's enduring admiration for Judge Learned Hand, whose opinions shaped so much of the law of copyright and unfair competition. In a pair of famous decisions that have become standard fare in copyright casebooks, Judge Hand brought increased rigor to the analysis of infringement. See Sheldon v. Metro-Goldwyn Pictures Corp., 81
concept and feel” test could survive in light of the explicit reference to “concept” in the Copyright Act’s list of excluded subject matter. The statutory denial of protection for “idea, procedure, process, system, method of operation, concept, principle, or discovery” was to Ralph “the most powerful category of ineligibility for copyright.” The welfare losses that would otherwise result from permitting the monopolization of ideas through the indulgent standards of copyright and the increased burden on the production of future works would be intolerable.

The intersection of copyright and freedom of speech is also troublesome. Ralph regarded as not fully adequate the conventional response “that the fair use privilege eases any tension,” even when “further lubricated by the freedom to appropriate facts and ideas.” The fair use doctrine, essentially an invitation to recalibrate the balance between incentive and access case by case, is constrained by economic considerations foreign to the First Amendment. As with trademark rights in product features, Ralph saw a solution in the neglected area of remedies. Drawing on an earlier comment by his coauthor Benjamin Kaplan, he argued that when free speech or other concerns weigh in favor of public access to an infringing work, the plaintiff may properly be left to monetary relief—a kind of judicial compulsory license. “In copyright, the main impetus toward a degree of caution in hurling injunctions is a welcome if belated one: an understanding that the First Amendment has a lot to say to copyright.” This approach was subsequently endorsed by the Supreme Court in *Campbell v. Acuff-Rose Music*, but so far with too little effect.

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F.2d 49 (2d Cir. 1936); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930). In every edition of his casebook, Ralph accompanied these opinions with a photograph of Judge Hand. He also paid tribute in the closing footnote of his first article, see Brown, Advertising and the Public Interest, supra note 4, at 1206 n.170, and at his “retirement” luncheon in 1983. He observed: “Unfair competition, when a Learned Hand holds the reins, is mindful of the competitive ideal.” Brown, *The Joys of Copyright*, supra note 3, at 480.

95. Brown & Denicola, supra note 4, at 238 (citing 17 U.S.C. § 102(b) (1994)).


97. Brown, Eligibility for Copyright, supra note 4, at 602.


99. Ralph S. Brown, Civil Remedies for Intellectual Property Invasions: Themes and Variations, LAW & CONTEMP. PROBS., Spring 1992, at 45, 53-54 [hereinafter Brown, Civil Remedies]. The article begins with an expression of Ralph’s “belief that, in general, we do not pay enough attention to remedies,” id. at 45, and ends on “[a] final personal note: It has been a bizarre experience, in looking up scores of cases, mostly to be interested only in the last page or two of an opinion,” id. at 78 n.237.

100. See id. at 51-56. “Justice Benjamin Kaplan, in his inexhaustible source of good sense, the Unhurried View of Copyright, did write that ‘courts have sometimes forgotten that an injunction does not go of course; the interest in dissemination of a work may justify a confinement of the remedy to a money recovery (just as it may suggest the legislative use, in proper doses, of the device of a compulsory license).’” Id. at 52 (quoting BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 73 (1967)).


102. 510 U.S. 569, 578 n.10 (1994). The Court relied heavily on Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105 (1990), which had also influenced Ralph’s thinking.
Another battle, recently lost, concerned the extension of the copyright term from the life of the author plus fifty years (seventy-five years from publication for works made for hire) to life plus seventy years (and ninety-five years for works made for hire). Ralph considered the constitutional requirement of a limited duration as a fundamental legitimizing constraint on copyright. At some point, attempts to defend increased duration on incentive grounds become implausible because of the decreasing time value of money. "How likely is it that additional creative resources will be called forth by the prospect of an extra twenty years of protection commencing fifty years after the author’s death?" The costs of extended duration in terms of a diminished public domain, however, are very real, especially since the extension applies retroactively to existing works. There is no quid pro quo for the public in extending the length of protection for works that have already been created, only windfalls to the owners of a few long-lived works.

Ralph also weighed in on other copyright issues too numerous to recount, but almost always in defense of the copier. His writings on copyright, especially his casebook, have influenced three generations of lawyers, judges, and scholars.

III. MISAPPROPRIATION

Ralph never made a complete peace with the right of publicity, a kind of property right in the commercial value of a person’s identity that sprung from a facet of the right of privacy originally intended to help private

See e.g., Brown, Civil Remedies, supra note 99, at 53-56.


104. See Brown, Copyright and Its Upstart Cousins, supra note 43, at 302.

105. BROWN & DENICOLA, supra note 4, at 486; see also Landes & Posner, supra note 88, at 361-62 (arguing that at some point the incentive effects of extending the duration of copyright become negligible). Even Samuel Clemens, who apparently favored perpetual copyright for authors, thought that life plus 50 years would be enough: “I think that will satisfy any reasonable author, because it will take care of his children .... Let the grandchildren take care of themselves.” Margalit Fox, The Rights of Writers As a Twain Obsession, N.Y. TIMES, Feb. 16, 1998, at E1. Ralph also raised the possibility of varying the length of the copyright term with the nature of the work, a suggestion that has particular resonance as copyright expands into more utilitarian subject matter such as computer programs and product designs. See BROWN & DENICOLA, supra note 4, at 487.

106. Among these was his opposition to a public lending right, recognized in some European countries, that would require compensation to authors for library lending. He dismissed the idea in typical fashion: “If you want people to read more, you don’t make it more expensive.” Establishment of Public Lending Right Explored at Recent Conference, 34 Pat. Trademark & Copyright J. (BNA) 41, 42 (May 14, 1987) (summarizing panel discussion). Ralph had also become increasingly interested in the issues raised by digital dissemination. He applauded the setback suffered by former Patents and Trademarks Commissioner Bruce Lehman’s protectionist agenda at the 1996 meeting of the World Intellectual Property Organization. See Ralph S. Brown, Academic Responses to the TRIPS/WTO Situation, 37 VA. J. INT’L L. 499, 499 (1997).
people avoid the limelight. He was uneasy because a right of publicity had
no obvious center; its underlying rationales seemed dubious, and its scope
was not constrained by the types of boundaries that legitimize copyright. 107
He thought the notion of a descendible right of publicity particularly odd.
"Judicial declarations that a celebrity could keep on exclusively endorsing
Wheaties from across the Styx left troublesome questions," 108 and Ralph
wondered if the right would persist through all eternity. Here as elsewhere
his influence can be seen in the Restatement—in its caution that the right of
publicity should be narrowly construed in light of its uncertain rationale, 109
its argument that post mortem rights (if any) should be narrower still, 110 and
its emphasis on First Amendment constraints. 111
Ralph reserved his harshest criticism, however, for the common-law
tort of misappropriation. That doctrine is traditionally traced to the Supreme
Court's decision in International News Service v. Associated Press, 112
holding that a competitor's appropriation of news from early editions of
Associated Press newspapers constituted unfair competition under federal
common law. The Court admonished the defendant for "endeavoring to
reap where it has not sown." 113 Ralph was not much impressed with this
unjust enrichment rationale "flavored with scripture," 114 and he attacked
the doctrine for the first time in his Yale article. "Its gross fallacy is the
assumption of a general policy in favor of monopolies in ideas, systems, or
any ingenious contrivance." 115 When the Restatement took a similar
position against the misappropriation tort more than four decades later, it
cited Ralph's Yale article along with like criticisms by Zechariah Chafee
and Milton Handler. 116
The misappropriation tort has no center; no limiting principle restrains
it from engulfing all imitation. "There is an ethical belief that the imitator is
guilty of unjust enrichment—what an empty phrase that is!" 117 "Some
people," Ralph wrote, thought that misappropriation "suggests not a

107. See Brown, Copyright and Its Upstart Cousins, supra note 43, at 302-03. Ralph
generally concurred with Judge Kozinski's dissent in White v. Samsung Electronics America, 989
F.2d 1512, 1512 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of rehearing en banc)
(arguing that the right of publicity was too broad, interfered with federal copyright law, and
intruded upon First Amendment rights).
108. See Brown, Copyright and Its Upstart Cousins, supra note 43, at 304.
110. See id. cmt. b.
111. See id. § 47 cmts. b-d.
112. 248 U.S. 215 (1918).
113. Id. at 239.
114. Brown, Advertising and the Public Interest, supra note 4, at 1200.
115. Id.
117. Brown, Copyright and Its Upstart Cousins, supra note 43, at 305. On the natural
inclination to grant relief against a copier, see Wendy J. Gordon, On Owning Information:
euphemism for theft, but a shapeless tort that releases powerful anticompetitive impulses," citing himself.\textsuperscript{118} As an antidote to the "siren song of misappropriation,"\textsuperscript{119} Ralph again invoked his coauthor Ben 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."\textsuperscript{120}

Ralph also attacked along another front. The misappropriation tort is not merely bad policy; it also undermines the balance struck by federal patent and copyright law. Patent and copyright law protect intellectual property, but they protect the public domain too, marking off matter to be left outside the reach of private rights.\textsuperscript{121} That was the essential principle of the \textit{Sears} and Compco cases, whatever their excesses in application. Ralph embraced their sweeping pronouncements on preemption\textsuperscript{122} and was sorry to see them narrowed in subsequent decisions.\textsuperscript{123} He also questioned the capacity of state courts and legislatures to safeguard the public domain and expressed his preference for national standards.\textsuperscript{124} When it became clear that the general revision of the copyright law would include an express congressional declaration of federal preemption, Ralph offered enthusiastic support.\textsuperscript{125} When the revision bill was finally adopted in 1976, Ralph marked the occasion with a major article arguing that any ambiguities in § 301's assertion of federal preemption\textsuperscript{126} "ought to be resolved in the direction of more thorough unification."\textsuperscript{127}

The preemptive reach of § 301 extends to works "within the subject matter of copyright."\textsuperscript{128} Some have argued that this means, basically, things protected by copyright, which in light of the Copyright Act's exclusion of ideas and facts,\textsuperscript{129} inseparable design features of useful articles,\textsuperscript{130} and other

\begin{footnotesize}
\begin{enumerate}
\item 120. Brown, \textit{Design Protection}, supra note 44, at 1386 n.208 (quoting \textit{KAPLAN, supra note 100}, at 2).
\item 121. "It should be, and I believe is, a significant part of the federal scheme to leave some interests unprotected . . . ." Brown, \textit{Unification}, supra note 4, at 1105.
\item 122. \textit{See Brown, \textit{Product Simulation}, supra note 51, at 1216-27.}
\item 124. \textit{See Brown, \textit{Unification}, supra note 4, at 1093-94; Brown, \textit{Publication and Preemption, supra note 123, at 1050-51.}
\item 125. \textit{See Brown, \textit{Publication and Preemption, supra note 123, at 1048-51.}
\item 127. Brown, \textit{Unification}, supra note 4, at 1070.
\item 129. \textit{See id. § 102(b).}
\item 130. \textit{See id. § 101 (defining “pictorial, graphic, and sculptural works”).}
\end{enumerate}
\end{footnotesize}
sundry matters, would still leave a good deal to the states. Ralph would
have none of it. The subject matter of copyright is as much what Congress
has assigned to the public domain as what it has protected, including "the
high-level paradise of ideas, concepts, and principles" and "the low-level
inferno of things too small or routine for copyright." The courts are
wisely following Ralph.

The other question relevant to § 301 preemption is whether the state
right is "equivalent to any of the exclusive rights within the general scope
of copyright," principally the exclusive right to reproduce the work. How
should the misappropriation tort fare? A 1966 House Report stated without
equivocation that "where the cause of action involves the form of unfair
competition commonly referred to as 'misappropriation,' which is nothing
more than copyright protection under another name, section 301 is intended
to have preemptive effect." By 1975, however, misappropriation had
gotten a partial reprieve through the inclusion of a circular reference to
"rights against misappropriation not equivalent" to copyright on an
illustrative statutory list of non-preempted state doctrines. A passage in
the 1976 House Report commented that states were free to afford relief on
facts analogous to the International News Service case. This revival of
misappropriation aroused the opposition of the Justice Department's
Antitrust Division, and at the last minute during floor debate the reference
to misappropriation was dropped from the preemption provision along with
the remainder of the illustrative list. Ralph was pleased to see the
reference to misappropriation disappear. The upshot is that most cases
now sensibly hold that state misappropriation claims aimed at the subject
matter of copyright are preempted. An exception for the appropriation of
"hot news," however, apparently survives as a consequence of the 1976

protection is not preempted); H.O Swimwear, Ltd. v. Lomas, 560 N.Y.S.2d 19 (App. Div. 1990)
(holding that protection of inseparable features of clothing design is not preempted); Paul
Goldstein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing
133. See, e.g., National Basketball Ass'n v. Motorola, 105 F.3d 841 (2d Cir. 1997) (holding
that § 301 covers uncopyrightable as well as copyrightable elements); United States ex rel. Berge
v. Board of Trustees, 104 F.3d 1453 (4th Cir.) (holding that ideas are covered), cert. denied, 118
S. Ct. 301 (1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (holding that facts are
covered).
135. S. 22, 94th Cong., § 301 (1975).
136. "[S]tate law should have the flexibility to afford a remedy (under traditional principles
of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts
(i.e., not the literary expression) constituting 'hot news'...." H.R. REP. No. 94-1476, at 132
(1976).
137. See Brown, Unification, supra note 4, at 1101-02.
138. See id.
139. See, e.g., Financial Info., Inc. v. Moody's Investors Serv., 808 F.2d 204 (2d Cir. 1986);
Warner Bros. v. ABC, 720 F.2d 231 (2d Cir. 1983).
House Report’s reference to *International News Service.* This exception pays unjustified deference to legislative history that does not reflect the final statutory language.

IV. PROCESS AND PROSPECTS

Ralph had two principal concerns about intellectual property law, especially about copyright. One was personal: The increasing length and complexity of the statute made teaching copyright law a little less fun (although he would quickly add, still vastly more enjoyable than everything else in the curriculum). The Copyright Act, enacted in 1976 and enlarged in almost every subsequent year, has swelled to well over six times the length of its succinct 1909 predecessor. Although not yet the Internal Revenue Code or the Uniform Commercial Code, it now at least rivals the Bankruptcy Code. Ralph’s second concern was more substantive: The expansion of intellectual property rights of all kinds seems relentless. The concerns are related. Both are consequences, at least in part, of the unusual process of private negotiation that has come to dominate the making of federal intellectual property law.

It is tempting to attribute the recent expansion of private rights to the size and political power of trademark and copyright owners. It was no coincidence, for example, that the twenty-year extension of the copyright term came in time to save Mickey Mouse from falling into the public domain in 2004, but this political explanation may be more generally true for trademark than for copyright. Copyright users are often as big and well-organized as copyright owners, and even when users are small, like businesses using radio broadcasts to pacify customers, their geographic dispersion provides a political base that many copyright industries, concentrated like the music business in just a few states, are hard pressed to match. The users of others' trademarks, however, are less likely to be

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140. *See* National Basketball Ass’n v. Motorola, 105 F.3d 841 (2d Cir. 1997) (finding, however, that the “hot news” exception was so small as to exclude the distribution on defendant’s pager system of game facts extracted from radio and television broadcasts of NBA games).

141. I include the entirety of Title 17 of the United States Code, although Chapters 9 through 13 are not technically “copyright.”

142. Ralph was concerned too with the expansion of intellectual property rights under state law. To rein in those developments, he counted heavily on federal preemption. *See supra* text accompanying notes 121-140.

143. Donald Duck, Goofy, and Pluto would have followed soon after. Disney and the Gershwin Family Trust, along with the American Society of Composers, Authors and Publishers and the Motion Picture Association of America, were among those lobbying for the extension. Sabra Chattrand, *Congress Has Extended Its Protection for Goofy and Gershwin,* N.Y. TIMES, Oct. 19, 1998, at C2.

either influential or sympathetic. But whatever the imbalance in political power between owners and users of intellectual property, it is too longstanding to account for the recent rush toward protection.

A more promising explanation may be the increasing globalization of intellectual property law. The United States is the largest exporter of intellectual property, not only of works and inventions protected by copyright and patent, but also of the selling power of famous trademarks. When the level of intellectual property protection abroad exceeds the protection available here, American works sold in those markets are sometimes limited on a reciprocity basis to the protection available in the United States. This was the principal argument favoring the extension of our copyright term to match the life-plus-seventy year term in the European Union (which itself had matched the German term, once the longest in Europe), thereby gaining twenty additional years of foreign royalties for American exporters of music and movies. Even when our domestic protection exceeds foreign norms, increases are praised as displays of good faith that strengthen our bargaining position in negotiations aimed at elevating protection for American works abroad. Increased protection may seem deceptively cheap when foreigners are paying part of the bill. The shape of modern intellectual property law, however, may ultimately owe as much to process as to policy.

In a 1987 article that influenced Ralph's thinking on the future of copyright, Jessica Litman described the legislative process that produced the 1976 Copyright Act: "Members of Congress revised the copyright law by encouraging negotiations between interests affected by copyright, by trusting those negotiations to produce substantive compromises, and by ultimately enacting those compromises into law." To replace the outmoded 1909 Act, Congress needed a bill that would not be opposed by too many of the interest groups concerned with copyright. It got what it wanted by pressing the major parties to draft provisions that they could all support. The resulting agreements became law. Similar delegations are now

145. Cf. Brown, Advertising and the Public Interest, supra note 4, at 1202-05 (making the same point with respect to the judicial process).


147. This from a nation that for much of its history practically celebrated its reputation as a pirate. See Brown & Denicola, supra note 4, at 799-817.

Their defining characteristic is the absence of an independent congressional evaluation of the substance of the negotiated agreements. Superficially at least, this process resembles a series of contract negotiations. As Professor Litman demonstrates, since the negotiators are dividing the pie only among themselves, we can expect a pattern of broad rights limited by narrow exceptions tailored to the particular users at the table—an outcome generally favorable to owners. But we can also predict that these agreements destined to become law will have other distinctive characteristics. The parties know that they will be unable to adjust their agreement to reflect future developments; unlike a contract, a statute cannot be modified or rescinded by mutual consent. They also cannot rely on the usual default rules of contract law, such as the obligation of good faith, to fill in interstices and temper abusive behavior. Further, they must anticipate a different mode of interpretation. Interpretation of contracts centers on the intent of the parties, but statutory construction imports a broader perspective.

Each of these considerations weighs in favor of agreements that press the limits of foresight and draftsmanship, leaving unspecified as little as possible. To minimize the risk that their division of the spoils will be disturbed by judges with broader perspectives, the parties are also likely to favor rules over standards. These dynamics have unfortunate consequences. The agreements, and so the statutes, are likely to be long and detailed (and less fun to teach). Their elaborate rules, often unresponsive to the practical needs and intuitions of ordinary users, may reduce public respect for intellectual property law, creating an attitude of cynicism, even defiance. The proliferation of technical rules also diminishes the ability of judges to affect the shape of intellectual property law. Courts, where one party or the other usually finds it expedient to focus on the public interest, can have advantages over legislatures lobbied hard by well-off owners and a few


150. “Congress in effect agreed that if the industry representatives would invest the time and energy to develop a bill that all of them endorsed, Congress would refrain from exercising independent judgment on the substance of the legislation.” Litman, Copyright Legislation and Technological Change, supra note 148, at 314-15; see also Litman, Copyright, Compromise, and Legislative History, supra note 148, at 870-79 (describing congressional deference to industry compromises).

151. See Litman, Copyright Legislation and Technological Change, supra note 148, at 320-23.
well-organized users. The preference for rigid rules over general principles effectively deprives intellectual property law of the moderating influence of a detached judicial perspective, even as Congress increasingly declines its own opportunity to exercise independent oversight.

Can the balance be restored? Under the current regime, the negotiating table must at least seat as many as possible. Ralph was pleased, for example, that education and library representatives had become active participants in the process. But bargaining among interest groups, even when there are many of them, yields only a poor approximation of the broader public interest. Increasing the number of participants is likely to produce only additional narrow exceptions; it cannot itself hold the center.

Ralph's solution was to facilitate a return to past practice, when legislators rather than private negotiators were the primary arbiters of public policy. He knew no one could compel legislators to exercise independent judgment over the handiwork of interest groups, but he hoped at least to insure that they had the capacity to do it, and thus, perhaps, an increased interest in doing it. That educational responsibility fell chiefly on academics, through their scholarship certainly, but more immediately through public speaking, and better still through testimony on pending legislation. Ralph was always willing to do his part. He accepted as many speaking engagements as he could and testified before Congress whenever he had (or created) an opportunity. For those who had the good fortune to know Ralph Brown, it is not surprising that he placed his hopes on education. Teaching was his profession, pursued for more than half a century in the classroom, in his casebook, and in his articles and speeches. Few have done it with more skill and grace.

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152. “Congress, more overtly than the courts, sometimes does no more than respond to pressure groups.” Brown, Eligibility for Copyright, supra note 4, at 593.


155. As a model of his aspirations for legislators, Ralph would no doubt suggest former Representative Robert Kastenmeier, longtime Chair of the House Judiciary Committee’s Subcommittee on Courts, Civil Liberties and the Administration of Justice (with jurisdiction over intellectual property legislation). To Ralph, he was “a true statesman in this field.” Brown, Copyright-Like Protection, supra note 86, at 323. In Ralph’s contribution to a symposium in Kastenmeier’s honor, he noted the Chairman’s “imprint on major legislation” but concluded with what for Ralph was more telling praise. “Just as important, he used his position to discourage unwise proposals.” Brown, Civil Remedies, supra note 99, at 45.

156. Ralph was one of the few witnesses to testify in opposition to the 1988 trademark revision bill, which at the time included a federal dilution provision. In addition to substance, he characteristically complained about the bill’s “very skimpy consideration” by Congress. House Panel Hears Views on Trademark Act Revision, supra note 26, at 490; see also House Panel Hears Testimony on Design Protection Legislation, 36 Pat. Trademark & Copyright J. (BNA) 242, 243 (June 30, 1988) (summarizing Ralph’s testimony opposing broad design protection legislation).