

A Tribute to Ralph S. Brown: Pioneer Scholar and Professorial Statesman

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I was fortunate to know Ralph in two different sectors of his long and remarkably active life: the American Association of University Professors and the law of copyright.

I first saw Ralph's name in 1962 when I took Professor Benjamin Kaplan's Harvard Law School course on Copyright. The coursebook was authored by Ralph and Ben, and had been published only two years before.¹ What a wonderful book it was—intellectually challenging, with carefully selected cases that were fun to read (Superman vanquishing Wonderman in the courtroom, a Lone Ranger impersonator enjoined against beating his horse in public), and authors' notes laced with history, literature, and the arts! I never fully realized the greatness of their accomplishment, for I learned only recently that theirs was the first coursebook in the subject. It brought copyright, and related fields of intellectual property law, into university legal education for the very first time. It must have been a mammoth undertaking for the two of them to confront, organize, and comment on a sea of disconnected statutes and cases, reaching as far back as early eighteenth-century England. Intellectual property scholars and teachers of my generation, and those who have come after, have simply taken for granted that this is what the field should look like.

Today, some forty years after the publication of Kaplan & Brown, many who learned from that book are teaching the course, and those whom we have taught in turn are teaching others who will teach and practice in the field. There are some twenty intellectual property casebooks, at least a dozen of which focus mostly or exclusively on copyright; there are several scholarly treatises in the field; and there are surely well over a hundred American law schools offering courses in the field. Most of these books and courses can trace their inspiration—and also their coverage, organization,

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1. BENJAMIN KAPLAN & RALPH S. BROWN, JR., *CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS* (1960).

and approach—back to the Brown and Kaplan book. Its seventh edition, on which Ralph actively worked with his coauthor Professor Robert Denicola, was just published this summer,² only two or three weeks after Ralph's passing. Ralph was also something of a pioneer in offering, some forty years ago, a course titled "Law and the Arts," a subject increasingly being taught in U.S. law schools.

Ralph's scholarly accomplishments and influence go well beyond the casebook. His first article on intellectual property was published in *The Yale Law Journal* in 1948³ and dealt with trademarks and advertising. More than a generation before most everyone else, Ralph used an illuminating economic analysis of the law, and he produced a work that has been widely praised and still makes stimulating reading today. In his dozen or so significant articles on intellectual property since then, Ralph tackled complex issues of breadth and importance, and he wrote with erudition, wit, analytic rigor, a sense of the real world, and an elegant and highly readable writing style. He was also an innovator in developing the links between copyright and fields such as trademark, unfair competition, defamation, privacy, and publicity.⁴ Laced through almost all of his writings, from the 1940s to the present, was his principled concern that the law not impose undue restraints upon fair copying, elaboration, and communication, lest society's pool of knowledge and culture be diminished. Ralph himself stated his philosophy in a short piece, aptly titled *The Joys of Copyright*:

The perennial tensions between monopoly and competition, between restrictions and openness, also keep this field interesting. Copyright pulls toward a monopoly, albeit a perforated and narrow one. Unfair competition, when a Learned Hand holds the reins, is mindful of the competitive ideal. But other judges, and some legislatures, ride off on what *I* think to be woolly notions of unfairness, and on property rights that Congress has not created. They thus override the position that competition *is* copying—not only making something different, but making it, whatever it is, cheaper or better.⁵

Ralph's inclination toward "low protectionism" has been reflected in the writing of younger scholars who today are concerned about too-

2. RALPH S. BROWN & ROBERT C. DENICOLA, *CASES ON COPYRIGHT, UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS* (7th ed. 1998).

3. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165 (1948), *reprinted in* 108 *YALE L.J.* 1619 (1999).

4. *See, e.g.*, Ralph S. Brown, *Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition*, 33 *J. COPYRIGHT SOC'Y* 301 (1986).

5. Ralph S. Brown, *The Joys of Copyright*, 30 *J. COPYRIGHT SOC'Y* 477, 480-81 (1983).

overreaching a copyright realm in an age of new technologies of vast communicative and instructional potential.

As if the books and articles were not achievement enough, there are uncountable intellectual property scholars, from thirty years old to seventy years old, who have known Ralph's influence as a mentor. He seemed to read everyone's work and actually took the time to write thoughtful notes—friendly but forthright, and always positive and supportive. Of course, it was often something of a task to decipher Ralph's letters; there has never been agreement on whether it was more difficult to decode the notes written in Ralph's compact and spiky handwriting or those that were typed on what has been described to me as "the first typewriter ever built." In urging his coauthor Professor Denicola to refer in his writings to the works of junior scholars, Ralph added the injunction to "give them an adjective—precede the citation with something like 'insightful,' 'innovative,' 'penetrating,' etc." As to Ralph's influence, Professor Jessica Litman recalls that, when she was a young, untenured teacher who had not yet published any article on copyright, Ralph somehow tracked her down and sent her an article he had just published in which he cited and respectfully treated a law review note she had written as a student. She reflects on that experience, and on Ralph's notes to her about her several articles over more than a decade:

For a teacher at the beginning of her career, that was an extraordinarily meaningful gesture. (And I took it to heart. When I have seen a student Note I admire, I've sent a note off to the author.) . . . Ralph always made it clear that he genuinely cared that I wrote and that I wrote what I did. Much of what I've written is better for that feedback. Ralph went out of his way to seek out and build relationships with young scholars. The stories I've heard from others lucky enough to have known him and been influenced by him are much the same. Ralph was an extraordinary mentor for young people in the field. . . . [He] cared about young scholars, and invested a great deal of himself in helping them to find their voices. He taught me that on the very rare occasions that someone does it well, mentoring can be extraordinarily effective. I've tried to pass it on.

So as to pass on Ralph's legacy as scholar and mentor, three forthcoming major intellectual property conferences will be dedicated to him, as will the resulting publications. These conferences, sponsored by the Association of American Law Schools, span the years 1999 and 2000, and will be led by a younger generation—and now the established generation—of scholars, all of whom were touched by Ralph.

So far, I have described only one aspect of Ralph's multiple achievements. The other sphere in which I know of his extraordinary

service is the AAUP. The Association, as most of you know, is dedicated to the promotion and protection of the rights of university faculty members, particularly through academic freedom and tenure—the ultimate goal being to strengthen higher education institutions for the public good.

The length and distinction of Ralph's more than forty years of service to the AAUP are surely unparalleled in the history of the Association. Ralph was President of the AAUP from 1968 to 1970, when race relations and the Vietnam War were causing great divisions both in the larger society and within the Academy. (At the very same time, Ralph was addressing similar problems while sitting as Associate Dean of the Yale Law School.). Ralph's 1970 Presidential Address, characteristically, was notable for its call for open-mindedness, civility and professional responsibility among the professoriate in addressing the contentious issues of the day.

The period of Ralph's presidency was also a time of developing concerns within the AAUP itself. Among other things, the Association was beginning to consider the advent of collective bargaining for faculty in higher education institutions and the vexing question of the AAUP's proper attitude toward this development, with then unknown implications for the governance of universities, professional norms of collegiality, and the very structure and possible existence of the Association itself.

Both before and after his AAUP Presidency, Ralph chaired, and was a long-term member of, the Association's most important policymaking committees. As chair of one such committee, on College and University Government, Ralph played the key role in drafting an AAUP document of great importance and influence, among not only faculty but also university administrators and boards of governors; it is known as the 1966 Statement on Government of Colleges and Universities. And, soon after the AAUP decided in the early 1970s, with great caution and ambivalence, to embrace collective bargaining for university faculty, Ralph became the Chairman of the Committee that formulated AAUP policy about unionization, as to which there were many hotly disputed issues. Ralph's intellect, character, skills, and eminence inspired the confidence and facilitated the deliberations of a diverse collection of faculty types. To this day, I do not know whether Ralph was particularly entranced by issues relating to collective bargaining.⁶ But I do know that when Ralph was asked to chair this important and politically charged committee, he was more than willing to do so; there was a pressing need for his services, and he unhesitatingly stepped forward when called. I sat as a junior member of that committee, and I observed with wonder Ralph's capability, akin to alchemy, to distill

6. *But see* Ralph S. Brown, Jr., *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067 (1969).

wise and congenial solutions from discursive chaos; no one will ever be better than Ralph in efficiently and productively chairing a committee.

With this crescendo of activities in the early 1970s, and after some twenty years in leadership positions in the AAUP, including as President, did Ralph cut back? No. At the age of sixty, in 1973, he embarked upon yet twenty-five more years of tireless and central contributions to the Association. Ralph, for example, served two terms (most recently at the age of seventy-seven) as the Association's General Counsel—its principal legal advisor on all matters from computer purchases, income tax returns, and office-building leases to the drafting of briefs on major constitutional issues.

Surely, Ralph's most significant AAUP service was on Committee A on Academic Freedom and Tenure. In one capacity or other—as chair, member, or consultant—Ralph served with that Committee initially in 1958 and then after his Presidency over an almost uninterrupted thirty-year period from 1970 until just this past June. He has been that indispensable Committee's indispensable pillar of work and wisdom. The qualities that have made him so were well described more than twenty years ago by another AAUP President and long-time colleague, Clark Byse of Harvard, who said: "Ralph Brown has a first-rate, superior intelligence, an overwhelming capacity for work, a willingness to take on difficult assignments, a quickness of perception, a clear and lively literary mode of oral and written expression, and an ability to reconcile apparently irreconcilable views."⁷

As part of his work for Committee A, Ralph's investigating committee reports on academic freedom and tenure issues are of almost mythic stature. He chaired or served on several small ad hoc committees assigned to visit one or another campus at which the administration was accused as an egregious violator of AAUP policies; on the basis of the resulting reports, the Association decides whether to place the institution on the infamous censure list. I can affirm that these can be very demanding assignments, physically and emotionally. Ralph's investigative reports—three of them undertaken in the past ten years—at large universities and small colleges, compellingly and scrupulously provide the reader with memorable lessons at both the institutional and human levels.

On all of the various task forces and committees that Ralph has led over the years, and in his many published articles and speeches, Ralph's writings have illuminated some of the more enduring and difficult issues of the academy in the past quarter-century:⁸ financial exigency that leads to the

7. Clark Byse, *Report of Committee A, 1975-1976*, 62 AAUP BULLETIN 169, 183 (1976).

8. See, e.g., *Academic Freedom and Sexual Harassment*, ACADEME, Sept.-Oct. 1994, at 64; Ralph S. Brown, Jr., *Financial Exigency*, 62 AAUP BULLETIN 5 (1976); Ralph S. Brown &

retrenchment of tenured faculty, academic freedom and tenure for senior faculty when mandatory retirement for age has been legally abolished, the balance between the freedom to teach and the protection of students and colleagues from sexual harassment, and the values and the very real hazards of so-called post-tenure review. Although so many of us think of Ralph as preeminently a scholar in the field of intellectual property, he has also been crucially influential in developing the scholarly field of legal and professional issues in higher education.

How fitting it is that the AAUP has recently decided to create an award named for Ralph Brown, to honor academic leaders with exceptional accomplishments in implementing sound principles of academic governance. It will become one of the most significant and prestigious awards that the Association bestows.

This long litany of achievements cannot begin to convey the depth of admiration and affection felt by each and every AAUPer who has had the memorable pleasure to work with Ralph, and to deliberate, exchange ideas, stroll (usually very briskly), museum-hop, eat, drink, and swap tales with him. We all remember walking into a committee room and immediately finding our eyes drawn to the lean figure with the ruddy complexion, bowtie, and debonair attire, and that enviably full head of startling white hair, the animated engagement of hands and body, and what Ben Kaplan has called "the impetuosity of speech."⁹ He was a person of incomparable integrity, wit, charm, decency, energy, and warmth. The present issue of *Academe*, the AAUP journal, has a number of brief tributes to Ralph from several of us who served with him through the years;¹⁰ the deeply felt reminiscences capture Ralph so well, and I urge you to read them.

To come full circle, I would like to recall the words of Ben Kaplan, Ralph's copyright partner and my own mentor, who wrote on the occasion of Ralph's alleged "retirement" from the Yale faculty some fifteen years ago:

He can be prodigiously efficient: A general manager of, say, the Polaroid Company, was lost when Ralph turned to law. The law school has known and drawn upon his administrative talents. He actually likes to be loaded down with work, and volunteers for sweaty assignments while colleagues prudently look the other way. He strives to keep things moving; hence, he tries constantly to promote consensus in order to overcome impasse or inertia Amidst warring factions, he is a fecund inventor of formulae for peace.

Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325 (1990).

9. Benjamin Kaplan, *The Copyright Connection*, 93 YALE L.J. 1189, 1191 (1984).

10. See *Remembrances of Ralph S. Brown, 1913-98*, ACADEME, Sept.-Oct. 1998, at 10.

This enthusiastic, generous, friendly, witty man of superior intelligence and high cultivation is not an inhabitant of the Egosphere, in which so many law teachers take up residence. If (as I firmly believe) a certain abnegation of self, a certain rejection of enviousness, is the condition of entry into the kingdom of heaven, then Ralph has an excellent chance of final ascension. This, however, should be long delayed. . . . He remains a youth.¹¹

Ralph's ascension into the kingdom of heaven was indeed delayed, but not at all long enough. Until the end, he did remain a youth—and he will continue to inspire so many of us to emulate his rare qualities of mind, temperament, character, and devotion to the public good.

11. Kaplan, *supra* note 9, at 1190-91.

