TRIBUTE TO ARTHUR MILLER

HENRY B. GUTMAN

I confess that being up here today, in such distinguished company, I have the same feeling I did as a first year law student at Harvard where I met Arthur in the early 1970s, namely that my presence here must be some kind of a mistake. Now as then, I happily accept my undeserved good fortune. And I'd like to think that I'm here to represent Brooklyn and—Thank you. Brooklyn is in the house. I see the Eastern District right here—as well as the intellectual property side of Arthur's expertise. It's been my privilege to know Arthur for over thirty-five years as a teacher, a colleague, and now as a friend.

At Harvard in the seventies, as you've heard, Arthur was already a legend—not simply for his treatises, casebooks, and other scholarly works, but in particular for his teaching. The prescribed mode of instruction back then was the Socratic method. No one was better at it than Arthur. He may not have been the model for Professor Kingsfield, as some have speculated, in *The Paper Chase*,[1] because the dates just do not match up. Arthur is way too young to have been the model for that book. But as John Sexton said, he clearly was Professor Perini in Scott Turow's *One L*,[2] which was published when I was a law student.

Unfortunately, I was not in the lucky section that had Arthur for civil procedure, so I can't provide a first hand account of the *Erie* Day performance or describe his costume. There were rumors about cross-dressing, but I can't say. All I know is that the rest of us, the three-fourths of the class in other sections, knew we were missing something very special. But you didn't have to be in Arthur's class in order to know how he taught, because he took his teaching technique beyond the classroom walls, and he brought it to the world. Countless bar and professional groups and gatherings of judges have been treated to panel discussions run by Arthur and his patented teaching style. For decades every Harvard Law School reunion featured a program for which the formula was simple: one, pick a timely topic of interest; two, assemble a panel of experts from the reunion classes; and three, as the dean used to say, "Have Ar-

1. JOHN JAY OSBORNE, JR., THE PAPER CHASE (1970).

2. SCOTT TUROW, ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL (1977).

thur do his thing." These performances became Arthur's trademark as surely as the ubiquitous red tie and handkerchief and his three-piece suit.

My favorite example of Arthur doing his thing has been referenced by other speakers today. And I suspect it may be Arthur's too. And that was the series of TV programs with Fred Friendly in the eighties. For those too young to have seen them or too old to remember, imagine—I'm in the latter class but I did look at them online the other day for a refresher—imagine a semi-circle of desks as in a law school classroom, but in the front row, instead of nervous students, you have senators and congressmen, justices and judges, cabinet secretaries, governors, scholars, distinguished lawyers, pundits, and even a former president of the United States. Arthur poses a hypothetical raising a great constitutional question of the day and then proceeds from panelist to panelist, asking questions, eliciting reactions, tweaking the hypothetical, and orchestrating a high-end debate in a format that any law student would instantly recognize. Much as I appreciate the efforts of CNN, ABC News and others, nothing on TV, in my view, in the last thirty years has come as close to realizing the potential of the medium to inform and enlighten as those programs with Fred Friendly did. That's Arthur as the teacher.

A decade after I graduated, I got to know Arthur in a different capacity as a colleague. I was representing Lotus Development Corporation, a software company that was concerned about all the self-proclaimed clones of its best-selling spreadsheet program, Lotus 1-2-3. I was destined to spend the next ten years of my life litigating software copyright cases, culminating in the *Lotus v. Borland* case,[3] which we argued before the Supreme Court in the midst of a record blizzard. The only problem was that I had never handled a copyright case before and lacked even the foresight to have taken the only copyright course offered at Harvard when I was a student—one semester every other year. But I did remember who taught that course, and I called Professor Miller in search of some post-graduate instruction.

Now Arthur's accomplishments in the civil procedure field are so vast that many people are unaware of his equally distinguished record in copyright law, the expertise that gave Columbia and the copyright world Jane Ginsburg. But Arthur's love of intellectual property and copyright in particular dates back to his days as a law student. His first assignment on the law review was to study the mag-

3. Lotus Dev. Corp. v. Borland Int'l, Inc., 516 U.S. 233 (1996).

azine's copyright procedures to make sure they complied with the notice requirements of the 1909 statute. They didn't. His student note was on potential common law protection for unpatentable and uncopyrightable ideas. It took 50 years before that draft note finally became an article in the *Harvard Law Review*;[4] because at the time it was first written, then Dean Griswold and the university had been sued by someone who claimed the dean had stolen his idea for a series of tax books. Not a good time to publish an article about protecting ideas.

It was then that Arthur began his relationship with his friend and mentor Ben Kaplan, who taught both procedure and copyright as Arthur someday would. Arthur spent his second law school summer as Kaplan's Research Assistant, later writing of that decision, quote, "I have sixty years to practice law and only one summer to work for Ben Kaplan." Well that turned out not to be true. Actually it turned out to be more than just one summer. What began that summer became a long-term collaboration. Professor, later Judge, Kaplan was a giant in copyright law. His book *An Unhurried View of Copyright* remains to this day one of the most thoughtful treatments of the subject. Together he and Arthur participated in the decades-long legislative process that culminated in enactment of the Copyright Act of 1976. On behalf of a consortium of universities, they argued to protect the academic community's use of technology, especially computers and databases, for research and teaching. To put all this in perspective, before the founders of Google had even been born, Arthur wrote in defense of a future in which a computerized, globally accessible library would make the world's collective knowledge available to all. Arthur turned down an opportunity to be register of copyrights. But when President Ford asked him to serve on the presidential commission known by the acronym CONTU,[5] he agreed and he spent the next three years hearing testimony, reviewing submissions, and preparing the report that was to address the question of how the new copyright act should deal with computer software and databases.

So in short, when I needed a mentor to help me understand how to apply traditional copyright doctrine to the new digital works of authorship known as software, or as Arthur put it, to pour new wine into old bottles, wine being something Arthur also knows about, Arthur was the natural choice. What began with my stopping

4. Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 HARV. L. REV. 705 (2006).

5. The National Commission on New Technological Uses of Copyrighted Works.

by Arthur's office to pick his brains and drink his coffee, ripened into a professional partnership. When the First Circuit unexpectedly reversed our trial victory in *Lotus v. Borland*, we retained Arthur as co-counsel for the Supreme Court battle ahead. Now writing a brief with Arthur is a real treat. As in the classroom, he didn't preach. He prodded. A witty tongue in cheek note or a raised eyebrow usually did the trick. The word "really"—you can almost hear him saying it as you read it—written in the margin of a draft often followed by appropriate, but unnecessary, punctuations spoke volumes. And for you young law review editors wondering if the hours that you spend honing your technical cite-checking skills will ever be used after graduation, let me tell you, that after all of us were done proof-reading a brief the person who caught the last nit, the improperly italicized comma—I'm not kidding—was invariably Arthur.

Since then, Arthur and I have written an amicus brief together urging the Supreme Court to reverse the Second Circuit in the *Tasini* case.[6] We only got two votes, but I'm still very proud of that brief. We've done copyright panel discussions together, and Arthur has been kind enough to invite me to participate in classes he taught on copyright and new technologies both at NYU and at Harvard. And most recently, Arthur helped our team prepare for the Supreme Court argument in *Reed Elsevier v. Muchnick*,[7] a case decided in our favor earlier this term. The issue in the case was one of federal subject matter jurisdiction in a class action settlement of a copyright case—three of Arthur's legal specialties. All that was missing was privacy, and you would have had the whole shebang. Who better to turn to for advice than Arthur Miller?

Over these years as teacher, colleague, and mentor, Arthur has become a good friend. He is the person to whom the wine list should be passed at dinner, especially if budgetary constraints have been suspended for the evening. He is an enthusiastic companion at any sporting event featuring a New York team—Arthur, I actually had Yankees tickets this afternoon, but I thought we had to be here—particularly if it involves his beloved Yankees. And yes, Arthur has been known to dispense with the tie and vest at a ballgame. As you've heard, he is an avid collector of Japanese prints. His museum quality collection is now on display at the Japan Society—you should really get there and see it—after a successful museum exhibition in London last year. And in an age when most of our words

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

7. Reed Elsevier, Inc. v. Muchnick, 130 S.Ct. 1237 (2010).

are composed at a computer keyboard or with our thumbs on a Blackberry, Arthur has a world-class collection of fine, limited edition, numbered fountain pens, most of which bear one or another of his favorite numbers.

Now I can't reveal those numbers here today lest I inadvertently disclose someone's computer password or pin number, but his fondness for fountain pens is a vice that Arthur and I share. In fact, Arthur's favorite pen shop holds a pen fair twice a year when the makers of the world's finest and rarest fountain pens descend on West 45th Street to show off their wares. The proprietors of the shop have taken to calling Arthur's assistant and mine to find a mutually convenient time when we could meet at the pen fair to check out the newest temptations and then grab some lunch. They understood perhaps better than we, that we each bought more pens when egged on by the other than either of us would if left to our own devices. When we discovered, to our horror, that some of the vendors themselves were timing their arrival at the fair to coincide with our visits, it became clear that we ought to focus more on the lunches and less on the pens.

But on a more serious note, whenever I've needed career advice, a mentor, or just a friend, Arthur has been there. I love spending time with Arthur, because he reminds me of why I wanted to do this in the first place, and he makes me feel good about being a lawyer. Now Arthur would tell you, and I'm sure when he stands up will tell you, that his life has been enriched by some great mentors and friends: Ben Kaplan, Fred Friendly, Charles Alan Wright, and others, including many in this room today. But what he may not appreciate is that he has been precisely that to so many of us. I'm grateful to the law school for having given me this opportunity to say so. Congratulations, friend, on a richly deserved honor.

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