INTRODUCTION
A DUTY TO REMEMBER

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Social media gets no respect. Some scholars may turn to it for insights into contemporary, post-millennial, hybridized remix culture.[1] But for most, social media makes all that is solid in rigorous thinking melt into tweets.

Therefore, it is with some hesitation that I mention that the idea for this symposium came up in a Facebook exchange. A Facebook friend named Zvi Rosen, then with the Copyright Office, posted one day, asking why *Perris v. Hexamer*[2] was not cited more often. From that innocent question, the idea for this symposium blossomed. If I were truly guilt ridden about this origin story, I would say: "Blame Zvi Rosen!" Instead, I own up to the story and take pride in it. I would go further and embrace explicitly the goal to take back social media from the errant tweeters and propagandists. Facebook is a locus to exchange ideas that feed back into our muddled engagement with how the law, the world works. It can be the seed for solid ideas, as opposed to a venue for trading jestful animal videos, superficial forms of validation, and self-satisfying jabs at the political cause of the day, on whatever side of the spectrum.

Ultimate proof for this seemingly quixotic goal will lie in the success of this symposium. In identifying seven cases that have for various reasons been forgotten, our bold authors confront the obvious reaction—maybe these cases were forgotten for a reason. But what the seven contributors show is that each case has a redeeming feature demanding attention despite the relegation to the shadows. Understanding why these cases have been forgotten helps to understand how the legal canon gets constructed, how precedent gets recognized, and how contingent the legal universe we inhabit actually can be.

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1. *See generally* JOSÉ VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA (2013) (discussing the history and emergence of major platforms of social media and the changing systems and technological, cultural, and ideological transformations between these platforms).

2. 99 U.S. 674 (1878).

Robert Brauneis's article on *Columbia Broadcasting System, Inc. v. Loew's, Inc.*[3] and *Williams & Wilkins Co. v. United States*,[4] two Supreme Court fair use decisions that failed to materialize, illustrates this last set of points. Without giving away any spoilers, let me pass along the highlights. The Supreme Court split 4-4 in both cases,[5] leaving open several questions about copyright fair use answers to which could have taken the law in a different direction. In *Loew's*, Justice Douglas had to recuse himself because of an unexpected conflict, one that might have been orchestrated, blocking him from his casting the deciding vote against Loew's.[6] What was lost is what would have been the only Douglas opinion on copyright, a harbinger of how fair use relates to the elements of the substantive claim of copyright infringement, and a copyright decision expressly questioning the analogy to property. Similarly, Justice Blackmun recused himself in the second case, because of alleged conflicts of interest arising from his work with the Mayo Clinic, an amicus in the appeal.[7] As with Justice Douglas's recusal, Justice Blackmun's altered the course of fair use analysis, especially the use of copying technologies. Professor Brauneis scrutinizes previously unexplored Supreme Court records in each case and paints a plausible and disappointing picture of what could have been.

A decision never issued is clearly a forgotten case. Other scholars in this symposium unearth decisions that were issued, but whose holdings became distorted. Samuel Ernst revives *Westinghouse v. Boyden Power Brake Co.*, a Supreme Court precedent reconstituted and minimized by the Federal Circuit.[8] Amelia Rinehart offers *Bement v. National Harrow Co.*, one of the first antitrust cases about patent pools, as a decision which could have instructed the current Supreme Court on the relationship between patent and antitrust.[9] Professors Ernst and Rinehart teach us how precedent can readily be eroded through

3. 356 U.S. 43 (1958).

4. 420 U.S. 376 (1975).

5. *Id.*; *Loew's, Inc.*, 356 U.S. at 43.

6. 420 U.S. at 376; Robert Brauneis, *Parodies, Photocopies, Recusals, and Alternate Copyright Histories: The Two Deadlocked Supreme Court Fair Use Cases*, 68 SYRACUSE L. REV. 7 (2018).

7. *Loew's, Inc.*, 356 U.S. at 43; Brauneis, *supra* note 6.

8. 170 U.S. 537 (1898); Samuel F. Ernst, *The Supreme Court Case that the Federal Circuit Overruled:* Westinghouse v. Boyden Power Break Co., 68 SYRACUSE L. REV. 53_ (2018).

9. 186 U.S. 70 (1902); Amelia Smith Rinehart, E. Bement & Sons v. National Harrow Company*: The First Skirmish Between Patent Law and the Sherman Act*, 68 SYRACUSE L. REV. 81 (2018).

mischaracterization or desuetude. In another instance, Professor Jessica Kiser shows how a case can be reduced to a four sentence nostrum about abandonment, while concealing a metamorphosis of trademark's role in policing consumer confusion.[10] Her exploration of the trademark dispute over the word "Crown" for wallpaper peels away at a legal dispute that seemed unnecessary as Canadian and UK companies battling over the markets in the former colony of New York (now known as the Empire State) retreated to their respective nations.[11] Left in their wake, according to Professor Kiser, is a puzzling litigation and a troubling shift in trademark policy.[12]

Sometimes, forgotten cases just seem to have been cast aside. Professor Bruce Boyden traces the "audience test" for copyright infringement to *Daly v. Palmer*, a case cited disproportionately to its influence (and legacy for popular culture).[13] Professor Brian Frye unearths not a judicial opinion but an opinion letter from an ante-bellum Attorney General denying a patent to a slave on grounds made unconstitutional by the Fourteenth Amendment.[14] This forgotten episode reveals the moral and instrumental complications of citizenship, federal economic rights, and the political war between the States. Finally, Zvi Rosen replies to his original Facebook post with a resurrection of *Perris v. Hexamer*, a late nineteenth century case about maps, copyrights, color schemes, and an elegant way to limit the scope of copyright in functional works.[15] Overshadowed by the other decisions, the two-page opinion is perhaps the more daunting David pitted against the Goliaths of copyright doctrine.

Individually, each author takes us deep into the wardrobe, down a rabbit hole, through a train station wall to discover reasoning and doctrines that have, without our knowledge, shaped our thinking as lawyers and scholars. Their work parallels those of the scholars published by Foundation Press in the 2006 volume *Intellectual Property Stories*.[16] But while those scholars helped us understand the canon,[17] the

10. Jessica M. Kiser, *Wallpaper by Any Other Name*, 68 SYRACUSE L. REV. 117 (2018).

11. *Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp.*, 680 F.2d 755, 757 (C.C.P.A. 1982).

12. Kiser, *supra* note 10.

13. *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552); Bruce E. Boyden, Daly v. Palmer, *or the Melodramatic Origins of the Ordinary Observer*, 68 SYRACUSE L. REV. 147 (2018).

14. Invention of a Slave, 9 Op. Att'y Gen. 171, 171–72 (1858).

15. 99 U.S. 674 (1878); Zvi S. Rosen, *How* Perris v. Hexamer *was Lost in the Shadow of* Baker v. Selden, 68 SYRACUSE L. REV. 231 (2018).

16. *See generally* INTELLECTUAL PROPERTY STORIES (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

cases we all read as students and teach and write about now, the seven scholars in this Symposium jog our memory, guide us among the preterite, reveal how readily cases can be either followed or cast aside.

In a world of information overload, the contributors, and the premise of this Symposium, might be irritating. "You mean, we not only have to know cases that everybody cites, but also ones that no one remembers?" Who has the time? We think it is worth the effort of scholars and practitioners to identify and examine forgotten cases. The return may lie in identifying a citation that saves a client or an article. More satisfying is what identifying forgotten cases says about precedent. Technically, even forgotten cases are binding on some courts in some jurisdictions. However, forgotten cases are different from overruled cases because they still are a source of authority. Should we view them as a dethroned monarch waiting to retake the reins? Or, are they a faded film star basking in memories of questionable glory? What does all this say for the Supreme Court cases that are forgotten, and there are a few represented in this Symposium? They seem to pass from the Justices' lips to the uncited pages of an unnoted volume of the United States Reporter.

How can even a Supreme Court precedent be forgotten? This symposium teaches that cases are forgotten for several reasons. First, they may be eclipsed by stronger precedents, ones that are broader in effect and more rigorous in analysis. Such might be the case with *Perris v. Hexamer*, according to Rosen. The same may be true for *Daly v. Palmer*, according to Boyden, and *Bement v. National Harrow Co.*, according to Rinehart. Eclipsing reflects an evolution of case law as subsequent decisions shore up the forgotten one. Alternatively, a case may be forgotten because it is too successful and becomes memorialized in a simple statement of law. Such is the case with *Wallpaper Manufacturers*, which Kiser points out has been reduced to a four-sentence holding on the doctrine of abandonment. Such a simplification causes practitioners to forget other substantive implications of the decision. In addition, some cases, even Supreme Court decisions, become diluted and muted in interpretation, as Ernst demonstrates, by a lower appellate court that has a particular agenda. A final reason for the forgetting is a change in circumstances that arises either from pure luck or from a dramatic shift in history. Brauneis's case exemplifies how a forced recusal stifled the development of fair use. By

17. For a recent example of how to reinterpret a classic intellectual property case, *see* Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017).

contrast, Frye's case is forgotten because of a Constitutional change in our understanding of citizenship.

A somber saying is that people go through two deaths. The first is the physical passage; the second is the last time one's name is ever mentioned. Cases die only once, upon the last citation. For legal decisions, physical existence subsists only in the word, whether written or spoken. Celebrity and notoriety fade when people stop talking about you. This symposium invokes memory by reviving the words of forgotten cases, even in mentioning their name, but more so in resurrecting the language, facts, and reasoning folded into the pages. We hope the experience is similar to the panic evoked by Vladimir Nabokov who discovered a film of his parents taken sometime before his birth: "He saw a world that was practically unchanged . . . and then realized that he did not exist there at all and that nobody mourned his absence."[18] How ephemeral are the debates we engage in now and the legal battles enshrined in case law. The authors in this symposium do not engage in a mourning but in a celebratory renewal.

It is good to be shaken awake from one's doctrinal slumbers to rethink what we know about intellectual property law and the world of doctrine we take for granted. Remembering the forgotten, more so than retweeting the familiar, is perhaps the best way to steel ourselves as we turn off our devices and take off into the future.

18. VLADIMIR NABOKOV, SPEAK, MEMORY: AN AUTOBIOGRAPHY REVISITED 19 (rev. ed. 1966).