Introduction

This book continues the project started in the 2018 Special Issue of the Syracuse Law Review, “Forgotten Intellectual Property Cases.”¹ The issue focused on forgotten cases. This book focuses on forgotten lore. Webster’s New World Dictionary defines lore as “all the knowledge of a particular group or having to do with a particular subject, especially that of a traditional nature.”² A second proffered definition is “the space between the eye and the upper edge of the bill of a bird or between the eye and nostril of a snake or fish.”³ The first definition is intended here, but by the end of this introduction, the second definition will have surprising relevance.

Our shift in focus from case to lore reflects a broadening of our concern from traditional legal analysis to contextual understandings, rooted in history, sociology, political science, and literary studies. Contributors to the original Syracuse Law Review volume unearthed forgotten dimensions of familiar and lesser known judicial opinions. Their work set the foundation for a deeper reassessment of what may appear to be well-worn areas of intellectual property traditions and knowledge. Scholars represented in this volume go beyond cases to explore both the context of particular cases and the ramifications of specific doctrines for the evolution of intellectual property practices. From Locke’s publication agreements to wartime patents and trademarks, the following chapters span a range of intellectual property concepts and history that I hope will inspire discussion and future research.

Seven types of lore are represented in these 15 chapters:

1. The Lore of Property and Contract
2. The Lore of Intangibility
3. The Lore of Authorship
4. The Lore of Common Law
5. The Lore of Courts
6. The Lore of Intellectual Property, Human Rights and Development
7. The Lore of Intellectual Property During Wartime

² Webster’s New World College Dictionary (4th edn) 848 (2010).
³ Id.
Forgotten intellectual property lore

Engaged readers may find other intellectual property lore pops out of these pages. I invite further analysis and critique. But speaking as editor, these are the categories that appeared most salient. Missing perhaps are “The Lore of Entrepreneurship” or “The Lore of Innovation.” Parts of some chapters address these pieces of lore. As always, inquiry invites only more inquiry, and the stimulating topics developed here prove that proposition.

Lore is in part background understandings that permeate the law. The United States Copyright Office acknowledges this point through its own webpage titled simply “Copyright Lore.” A more technical term might be the tacit knowledge undergirding intellectual property law. But lore also has elements of myth, stories that are aspirational and rest on unquestioned belief. One example of lore as myth is the invocation of maxims. In his dissent in *Golan v. Holder*, Justice Breyer quotes: “To every cow its calf, to every book its copy.”

Professor Brian Frye’s contribution to this volume unravels the background to this stodgy statement, neither holding nor legislative pronouncement, but proverbial wisdom. The power of courts and of common law reasoning also rest on a mythology of judicial decision making and rationality. Samuel Ernst’s examination of common law decision making in US Supreme Court patent cases dissects this mythology. Zvi Rosen’s innovative article teaches us about federal courts and trademark law. More abstractly, myth and storytelling also inform the substance of the public domain, as Mayuree Sengupta reminds us in her work on Bengali folklore.

Lest we forget, there is also the lore of reform, which ostensibly guides the work of most legal scholars, of whatever political vintage. Armed with tight legal arguments, a command of facts, and normative seriousness, reformers bring change, contributing to the progress of law. Add big data to the armament, larger quantities of numbers measuring whatever we think we are measuring to persuade judges, legislatures, leaders. Reform mindedness pervades these chapters. Sometimes the author is explicit, as with Alvin Kosgei’s analysis of traditional knowledge protection or Jeffrey Lefstin on the Supreme Court’s struggle to teach us about patentable subject matter, Kshitij Kumar Singh on the biotechnology sector in India, and Emmanuel Oke on human rights and economic development. Sometimes the plea for reform is more subtle, as in Mark Perry’s unearthing confusions over the original meaning of copyright or Graham Dutfeld and Uma Suthersanan’s reconsideration of how copyright became intangible and the implications for the author in the marketplace. Rebecca Curtin on Locke’s publication agreements, unintentionally

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4 https://www.copyright.gov/history/lore/ (visited March 8, 2020). Thanks, as always, to Zvi Rosen for pointing this site out to me.

but perfectly, plays off the theme of author and marketplace in showing how contract law, perhaps more than clearly delineated property rights, protects authors. And Robert Spoo’s literary history of self-regulated piracy in the publication of James Joyce’s poetry in the United States reveals how industry governance shapes markets for creative works. Readers will find many more examples to follow.

Skeptical readers, however, may scoff at the lack of big data; numbers are few in this volume. But equally important as measurement is observation. The authors observe moments in time, and sometimes across time, and raise questions about the resilience of legal rules. One example is the lore of intellectual property during wartime, represented by two co-authored chapters. Arpan Banerjee and Dana Beldiman teach us about trademark disputes in India arising from World War I; Catherine Bond and Jessica Lai, about wartime patents in Australasia. Wartime disruptions to markets, society, and law reshape them, and to observe how demonstrates the unpredictability of change. Observation is not just casual anecdotes. Observation supports analytic narratives that can be as important and clearer than undifferentiated numbers and their mechanical manipulations.6

Looking at the world, whether through direct experience or archival materials, opens the mind. Remember Charles Darwin and his finches.7 Collective observations about the natural world hinted at patterns that coalesced into theories that could be assessed for plausibility and usefulness. On this point, the second definition of lore comes into play: “the space between the eye and the upper edge of the bill of a bird or between the eye and nostril of a snake or fish.” Leaping off the page of the Oxford Online Dictionary, this surprised me. “What’s the connection, if any, between the first and second definitions?” I asked myself. Darwin’s finches came to mind. The first definition of lore points to culture; the second, to nature. But that dichotomy is strained. Identifying forgotten intellectual property lore involves observing many artifacts—agreements, practices, judicial opinions, inventions, writings—to reconstruct memory and point the way to where we could and should be.

As editor and contributor, I hope this volume inspires further research identifying what should not be forgotten in intellectual property lore. For those who worry about the law’s future, rethinking the narratives we have can offer hope. “All sorrows can be borne if you put them into a story or tell a story about them.”8 The colleagues who contributed to this book and to the law review

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7 David Lack, Darwin’s Finches (1947).
issue offer a range of methods and a host of ideas. Their work individually and collectively offers a hopeful story, rigorous, analytical, and critical.