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### Albrecht Durer's Enforcement Actions: A Trademark Origin Story

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# Albrecht Dürer's Enforcement Actions: A Trademark Origin Story

Peter J. Karol\*

## ABSTRACT

*This Article offers a trademark-framed reappraisal of a pair of extraordinary enforcement actions brought by the Northern Renaissance artist Albrecht Dürer (1471–1528) against copyists of his work. These cases have long been debated by art, cultural, and copyright historians insofar as they appear to reject Dürer's demand for protocopyright protection. Commentators have also contested the historicity of one of the two narratives. But surprisingly little attention has been paid by trademark scholars to the companion holdings—in the same texts—that affirm Dürer's right to prevent the use of his monogram on unauthorized reproductions.*

*This Article seeks to fill that gap by analyzing Dürer's cases through the lens of twenty-first-century trademark theory. It argues that, properly contextualized and understood, the cases provide remarkable and early accounts of two tribunals giving prototrademark relief to a famous artist and his brand. They mark a critical moment in trademark history even if portions of the underlying narratives are unreliable. More broadly, they invite us to reconceptualize the role of artists and aesthetics as a concealed but core aspect of trademark law's otherwise commercial and industrial legal history.*

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## I. INTRODUCTION

A designer label, known for the exquisite technical skill of its founder and the consistently high quality of its craftsmanship, achieves fame throughout Europe. Its products are all branded with the label's distinct monogram and carefully reproduced in a factory system by trained artisans under the close supervision of the founder himself (who is also the creative head). Finished merchandise is distributed widely throughout the continent by a series of authorized sales agents under contract with the label owner.

Due to the business's rapid success, unlicensed copies of its products begin to appear, some of which are quite well made. Almost all the reproductions contain the label's house mark. The founder—angered both by the loss in revenue from substitute goods and by the appropriation of a mark he considers central to his creative identity—brings suit in multiple commercial hubs.

The subsequent rulings are remarkably consistent. Although the founder's designs are not protectable as such, the existence of misbranded goods is likely to create confusion in an otherwise heavily regulated marketplace. The courts thus issue a series of injunctions, ordering that any goods sold with the spurious marks be immediately impounded. While these orders do not end the copying, the copyists thereafter remove the founder's brand identifiers and label subsequent reproductions with their own distinguishing signs.

This narrative encapsulates countless trademark cases today. But it is instead the remarkably contemporary story of the German Renaissance artist Albrecht Dürer (1471–1528).<sup>1</sup> By the first decade of the sixteenth century, Dürer had become one of the most famous artists in Europe, primarily by virtue of his widely distributed and popular woodcut and engraved prints of religious and other scenes, each consistently marked with his distinctive “AD” monogram.<sup>2</sup> He was also one of the most copied and litigious artists of his day.<sup>3</sup>

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1. See John Oliver Hand, *Albrecht Dürer: Biography*, NAT'L GALLERY ART, <https://www.nga.gov/collection/artist-info.1256.html> [<https://perma.cc/TTY5-M2ZZ>] (last visited Mar. 3, 2023).

2. See *infra* Part III.C.

3. *Id.*

Despite the modern character of his litigations, however, US trademark scholarship has paid scant attention to Dürer's cases. They go unmentioned in Frank Schechter's canonical history of trademark law's "historical foundations."<sup>4</sup> They remain uncited in Thomas McCarthy's leading contemporary treatise.<sup>5</sup> The few law review articles on trademarks that mention Dürer tend to restate one account of one of the suits without delving into its contradictions or theoretical implications.<sup>6</sup>

That is not to say that Dürer's cases have gone unstudied by legal or legal-adjacent scholars. To the contrary, there is a substantial body of scholarship that reads Dürer's cases through the lens of the pre-copyright laws of privileges and print monopolies.<sup>7</sup> Scholars hold up these cases as instances of skepticism toward a creator's exclusive right to content, an early victory for the public domain and generative copying.<sup>8</sup> In short, they are framed as early rejections of copyright at the dawn of mechanical reproduction.<sup>9</sup>

This Article seeks to refute this understanding and reposition Dürer's cases as seminal moments in the history and development of trademark law. These decisions should be studied and treated, in depth, as perhaps the first written record of authorities' enjoining the unauthorized use of a famous mark in commerce to protect consumers from mislabeled goods and to affirm the source-associative power of that mark. This offers a possible new perspective on the history of trademark law that starts not in the commerce of guilds but in the monograms of free artists—one rooted in authorship rather than ownership.

This Article proceeds in five parts as follows: Part I gives an overview of Dürer's two conflicts, the Venice and Nuremberg Disputes, providing a descriptive account of his cases against copyists based on the patchy but revealing historical record. Part II steps back to reveal Dürer as artist and businessman. It shows how he grew to operate a surprisingly sophisticated workshop and to use a network of sales agents to distribute marked, mechanically reproduced prints across all of Europe. It concludes by highlighting Dürer's intentional and self-aware focus on his brand *qua* brand, embodied in his still-famous AD monogram.

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4. Cf. FRANK L. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* (1925).

5. Cf. J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* (5th ed. 2023).

6. See *infra* note 335 and accompanying text.

7. See *infra* Part II.A.

8. See *infra* Part II.A.

9. See *infra* Part II.A.

Part III then connects Dürer's practice with his cases by building out the legal framework for the rulings. Focusing first on the legal and regulatory environment of early Renaissance Nuremberg (ca. 1500), it shows how Nuremberg was a free imperial city without guilds, led by a strong and commerce-minded central government known for its protectionist regulatory hand. This environment provided an ideal cauldron for the generation of a surprisingly modern trademark decision, rooted in Roman law, that prohibited the falsification of commercial goods.

Part IV looks back at Dürer's cases in legal scholarship, particularly in the United States. It shows that trademark scholars have given only superficial attention to these cases, with the field having been ceded to copyright and innovation law historians who tend to position them in the context of early print and privilege history. Much of the responsibility for this development rests with the early twentieth-century historian Frank Schechter, who omitted Dürer's cases entirely from his influential account of trademark history. This Part suggests that this significant omission was, in part, due to Schechter's pointed and erroneous decision to leave "decorative" objects out of his core trademark story. Dürer should instead have been positioned at the very beginning of that history.

Part V then shows how Dürer, in effect, received the first recorded instances of injunctions as remedies against prototrademark infringement. After acknowledging the potential hazards of imposing a contemporary understanding on a vastly different historic moment, this Part shows how all the material elements of a contemporary trademark analysis were present in Dürer's disputes, over one hundred years prior to the English case of *Southern v. Howe*—the usual starting place for scholarly accounts of trademark lawsuits. Finally, this Article concludes by speculating on how trademark narratives might have evolved differently, with a more aesthetic grounding, had scholars positioned Dürer's cases from the outset as a leading moment in the development of trademark law.

## II. DÜRER'S DISPUTES

Dürer's disputes—which this Article refers to as the "Venetian Dispute" (ca. 1505–1510) and the "Nuremberg Dispute" (January 1512)—are mythic in both senses of the word.<sup>10</sup> Their art-historical fame locates them at the very core of the narrative of Renaissance

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10. See LISA PON, RAPHAEL, DÜRER & MARCANTONIO RAIMONDI: COPYING AND THE ITALIAN RENAISSANCE 140 (2004).

printmaking.<sup>11</sup> At the same time, the underlying facts are contested to the extent that some present-day historians cast doubt on whether the higher profile of the two cases—the Venetian Dispute—ever occurred as reported.<sup>12</sup>

This Section sifts through the record—relying primarily on the work of art historians—to present as clear a picture as possible of these twinned lawsuits.

### A. *The Venetian Dispute (ca. 1505–1510)*

Of Dürer's two cases, the Venetian Dispute is at once the more prominent and the less reliable. Historians that have looked for official records of the suit or the judgement have consistently found none.<sup>13</sup> Nevertheless, substantial evidence exists to make it more likely than not that what the Italian Renaissance painter and writer Giorgio Vasari (1511–1574) described in his seminal account of the dispute happened in some form.<sup>14</sup> Even if, however, one were inclined to dismiss Vasari's report, the story told about the case has itself attained such prominence in art and Renaissance history that it defines a critical moment in trademark history independent of whether it happened in fact.<sup>15</sup> This relevance is only heightened by the narrative's confounding parallels to the more authoritative and certain Nuremberg Dispute.

What the world knows of the Venetian Dispute comes primarily from Vasari.<sup>16</sup> He recounts the dispute in his essay on the life of the printmaker Marcantonio Raimondi (referred to by Vasari as Marc' Antonio Bolognese), included in the second edition of his canonical *Lives of the Most Excellent Painters, Sculptors, and Architects*.<sup>17</sup> Vasari first

11. See Hand, *supra* note 1.

12. See PON, *supra* note 10, at 138–40.

13. According to the art historian Lisa Pon, there is no archival evidence to support Vasari's claim that Dürer sought resolution of a dispute before the Venetian Senate. *Id.* Moritz Thausing, a leading nineteenth-century German Dürer scholar, reached a similar conclusion. MORITZ THAUSING, ALBERT DÜRER (HIS LIFE AND WORKS) 334 (Fred. A. Eaton trans., 1882) ("It is true that I have searched the Venetian archives in vain for any trace of the lawsuit mentioned by him but this is not to be wondered at considering the great gaps there are in the documents relating to this question.").

14. See PON, *supra* note 10.

15. See *id.*

16. See generally Giorgio Vasari, *Lives of Marc'Antonio Bolognese and of Other Engravers of Prints*, in LIVES OF THE MOST EMINENT PAINTERS SCULPTORS AND ARCHITECTS (Gaston du C. De Vere trans., 6th ed. 1913) (except where otherwise indicated, this Article adopts the De Vere translation).

17. See *id.*



published that edition in 1568—about sixty years after the dispute and forty years after Dürer's death.<sup>18</sup>

According to Vasari, writing in his customarily ornate narrative style, Raimondi was a master of the "burin" (i.e., a master engraver) who came across Dürer's woodcuts for sale on the Piazza San Marco in Venice.<sup>19</sup> Raimondi was "so amazed by the manner and method of the work of Albrecht [Dürer]" that he spent nearly all his money to buy the complete set.<sup>20</sup> He then set out to copy Dürer's works as a form of pedagogic emulation, "studying the manner of each stroke and every other detail of the prints that he had bought, which were held in such estimation on account of their novelty and their beauty, that everyone sought to have some."<sup>21</sup>

As the story continues, Raimondi then made near-identical copies of Dürer's woodcut prints by engraving them in copper—"with engraving as strong as that of the woodcuts that Albrecht had executed"—going so far as to include the "AD" monogram.<sup>22</sup> The copies were so well done that they were erroneously "bought and sold as works by" Dürer himself.<sup>23</sup>

Dürer, according to Vasari, received written word of this "counterfeit" while in Flanders, "at which he flew into such a rage that he left Flanders and went to Venice," where he complained against Raimondi before the Venetian Senate.<sup>24</sup> Vasari concludes the passage by noting that Dürer "could obtain no other satisfaction but this, that Marc' Antonio [Raimondi] should no longer use the name or the above-mentioned signature of Albrecht [Dürer] on his works."<sup>25</sup>

Contemporary commentators have erroneously suggested that Vasari dated the dispute to 1506, when Dürer was in Venice for the second and last time in his life.<sup>26</sup> Vasari, however, never mentions such a date.<sup>27</sup> Instead, this misconception stems from later historiography, especially that of the Viennese art historian Mauriz Thausing, who derived that date based on what he knew of Dürer's travels.<sup>28</sup>

18. See PON, *supra* note 10, at 137.

19. See Vasari, *supra* note 16, at 96.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* (observing "they proved to be so similar in manner").

24. *Id.*

25. *Id.*

26. See MARZIA FAIETTI & KONRAD OBERHUBER, *BOLOGNA E L'UMANESIMO 1490-1510* at 152 (1988).

27. See generally Vasari, *supra* note 16.

28. See THAUSING, *supra* note 13.

Unfortunately, as described by Lisa Pon, a scholar of Renaissance printmaking, Vasari's chapter on the *Life of Marcantonio* is "riddled with inaccuracies and self-contradictions, and as a result, it has often been dismissed in the scholarly literature."<sup>29</sup> Thus, one must be cautious about taking away any hard facts from this foundational account of the Venetian Dispute.

Vasari, for instance, describes Raimondi as having incensed Dürer by copying Dürer's *Small Passion* series.<sup>30</sup> But Raimondi's version of that series (from 1511) postdated Dürer's last trip to Italy by over four years.<sup>31</sup> Moreover, Raimondi's copies of Dürer's *Small Passion* no longer contained Dürer's initials, a detail which has led scholars to believe that the dispute occurred before that time (i.e., that by 1511 Raimondi had desisted from replicating Dürer's monogram in response to Dürer's complaints, a ruling from an adjudicative body, or both).<sup>32</sup> Vasari, instead, likely meant to refer to the first seventeen sheets from Dürer's *Life of the Virgin* series from 1503–04, which were also copied by Raimondi and which (as discussed below) contained Dürer's initials.<sup>33</sup>

Pon also sees an inconsistency in Vasari's claim, earlier in the same essay, that the relationship between Raimondi and Dürer was originally collaborative.<sup>34</sup> Raimondi, according to Vasari, was working with and for Dürer.<sup>35</sup> Vasari then, however, states that Dürer rushed to Venice (from Flanders) to bring Raimondi before the Venetian Senate after learning that Raimondi was copying his works.<sup>36</sup>

29. See PON, *supra* note 10, at 138.

30. See *id.* at 176–77 n.6.

31. See *id.*

32. See *id.*; CHRISTOPHER L.C.E. WITCOMBE, COPYRIGHT IN THE RENAISSANCE: PRINTS AND THE PRIVILEGIO IN SIXTEENTH CENTURY VENICE AND ROME 82 (2004).

33. See PON, *supra* note 10, at 176–77 n.6 (calling scholarly consensus "unanimous" that the dispute was over the *Life of the Virgin* series).

34. See *id.* at 139–40.

35. See Vasari, *supra* note 16, at 95 (stating, "he made an agreement with Marc' Antonio Bolognese that they should publish the sheets in company"). No documents have survived to substantiate the existence of such a collaboration. See PON, *supra* note 10, at 139–40; see also FAIETTI & OBERHUBER, *supra* note 26, at 153 (citing the same reference to an agreement as an apparent contradiction).

36. See Vasari, *supra* note 16, at 95. Vasari also strangely appears to misidentify Dürer as a Flemish, as opposed to a German, artist throughout the essay. See, e.g., *id.* at 93 ("Albrecht Dürer began to give attention to prints of the same kind at Antwerp."). This apparent confusion is observed by Witcombe. WITCOMBE, *supra* note 32, at 81, n.18; see also Zoltán Csehi, *Albrecht Dürer and the Copyright*, 47 ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EOTVOS NOMINATAE 233, 239 (noting how odd it is that Vasari, writing just forty years after Dürer, misattributed his nationality). Dürer did journey to and spend substantial time in Flanders, including Antwerp; however, that was later in his career, around 1520. ERWIN PANOFKY, THE LIFE AND ART OF

One explanation for this apparent contradiction, unmentioned by Pon, could be that Raimondi was working for Dürer while simultaneously selling unauthorized versions of his prints. This is not at all uncommon in the present day—for example, when otherwise authorized factories sell branded merchandise on the black market made from “overruns” of otherwise genuine molds.<sup>37</sup> It is plausible that Dürer both retained Raimondi to assist him with printing his works in Italy and later sued Raimondi when he discovered that Raimondi was also selling unauthorized versions of his prints.

Perhaps more problematic than these real or apparent narrative errors is the lack of corroboration beyond Vasari himself. As detailed below, it is well established that Dürer did travel to Venice around the time that Raimondi could have been there.<sup>38</sup> Dürer scholar Jane Hutchinson points out, however, that if Dürer indeed went there to prosecute his claim against Raimondi, some mention of this extraordinary petition should exist in Dürer’s many extant letters and writings.<sup>39</sup> Yet, Dürer never once identifies this as a motivation for traveling there.<sup>40</sup>

Other scholars, such as Christopher Witcombe,<sup>41</sup> also question how Dürer could have possibly asserted a claim in Venice when there is no evidence of his having possessed a Venetian *privilegio*, or privilege:<sup>42</sup> a pre-copyright legal right of exclusivity in printing projects issued directly by the Venetian or another government to protect the privilege-holder’s financial investment in the project.<sup>43</sup> As these records were relatively well maintained by the Venetian authorities, their absence in this case weighs against Vasari’s story.<sup>44</sup>

Even conceding all of the above, there is still good reason to believe that Dürer brought some form of anti-copying suit against

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ALBRECHT DÜRER 205 (2005); JANE CAMPBELL HUTCHINSON, ALBRECHT DÜRER: A BIOGRAPHY 128 (1990).

37. These so-called “overrun” goods are exempted from the criminal definition of counterfeit goods. See 18 U.S.C. § 2320(f)(1)(B). But these goods are considered a major infringement problem by brand owners. See, e.g., Robert W. Payne, *Dealing with Unauthorized Online Dealers: Sales of ‘Genuine’ Products*, BUS. L. TODAY (July 22, 2014), [https://www.americanbar.org/groups/business\\_law/publications/blt/2014/07/01\\_payne/](https://www.americanbar.org/groups/business_law/publications/blt/2014/07/01_payne/) [<https://perma.cc/LL94-K5TP>]; see also *United States v. Bohai Trading Co.*, 45 F.3d 577, 578 (1st Cir. 1995) (once-authorized factory continued to fill purchase orders after termination of relationship).

38. See Vasari, *supra* note 16, at 96.

39. See HUTCHINSON, *supra* note 36, at 79.

40. *Id.*; WITCOMBE, *supra* note 32, at 83.

41. See *infra* pp. 142-143.

42. WITCOMBE, *supra* note 32, at xxv.

43. See *id.*

44. See *id.*

Raimondi in Venice in the first years of the sixteenth century. To begin with, Vasari was undisputedly the most prominent historian of record for Renaissance artists of the time and was writing just forty years after Dürer's death.<sup>45</sup> Surely if anyone had access to such knowledge it would be Vasari.

From Dürer's letters, moreover, we know that he traveled to Venice for the second and last time in his life in the winter of 1505–06.<sup>46</sup> While there, he expressed general exasperation with Italian guild artists who copied his work: "I have many good friends among the Italians who warn me not to eat and drink with their painters. Many of them are my enemies, and they copy my work in the churches and wherever they find it."<sup>47</sup> Raimondi, for his part, was likely working in Venice at that time.<sup>48</sup>

It is also beyond dispute that Raimondi copied Dürer's works repeatedly and with immense precision, albeit in a different medium.<sup>49</sup> Some published versions of Raimondi's copies even clearly show Dürer's AD monogram in the plate itself.<sup>50</sup> For example, the art historian Joseph Koerner juxtaposes Raimondi's copy of *Joachim and the Angel*, an early work in Dürer's *Life of the Virgin* series, with Dürer's original.<sup>51</sup> Dürer created the work (below, left) around 1503–04.<sup>52</sup> According to Koerner, Raimondi's work (below, right) dates to about 1506, the same year that Dürer was in Venice, complaining of copyists

45. See, e.g., PATRICIA LEE RUBIN, *GIORGIO VASARI: ART AND HISTORY* vii (1995).

46. See Letter from Albrecht Dürer to Willibald Pikkheimer (Feb. 7, 1506) (translated in HUTCHINSON, *supra* note 36, at 80).

47. *Id.*

48. PON, *supra* note 10, at 41, 53. Oberhuber opines that Dürer likely met Raimondi in Bologna in October 1506 during the former's travels, and Raimondi would have become acquainted with all seventeen of the original *Life of the Virgin* prints at that time. FAIETTI & OBERHUBER, *supra* note 26, at 153.

49. PON, *supra* note 10, at 41, 62; WILLIAMS COLLEGE CLARK ART INSTITUTE GRADUATE PROGRAM IN ART HISTORY, *DÜRER THROUGH OTHER EYES* 30 (1975).

50. Pon clarifies, based on her study of Raimondi's print proofs, that these marks might have been added not by Raimondi but by the publishers of his work. PON, *supra* note 10, at 53, 62. This practice was common and accepted in Venice at the time. *Id.* at 62 ("[C]opying Durer's monogram was not a plagiarist's blunder, but . . . a publisher's acknowledgement of a model."). She speculates that whatever Dürer may have assumed, the publishers of Raimondi's copies were likely more interested in the subject than Dürer's authorship of it. *Id.* at 62–63 ("Any commercial advantage to be derived by selling to audiences aware of Dürer's growing fame would surely have been welcome, but also may have been secondary.").

51. JOSEPH KOERNER, *THE MOMENT OF SELF-PORTRAITURE IN GERMAN RENAISSANCE ART* 210–11 (1993).

52. *Id.* at 210.

in one of his letters home.<sup>53</sup> The AD monogram appears on a *cartellino* (i.e., a faux-stone tablet) in the lower right corner of both works.<sup>54</sup>



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It is also highly relevant that some later Raimondi copies of Dürer's works (for instance, the below copy of a Dürer work from 1511)

53. *Id.* at 211. Witcombe notes that the 1506 date on some of Raimondi's prints is unreliable, having recently been found to have been added in the eighteenth century, and thus questions whether Raimondi had done any copying of Dürer by that year. WITCOMBE, *supra* note 32, at 82. However, as detailed more below, Witcombe's skepticism is mostly rooted in the fact that Dürer did not attain a privilege to protect his works until 1511. See *infra* pp. 142-43. If Dürer's Venetian Dispute was not based on assertion of a privilege, but on a species of prototrademark infringement, then the later date of Dürer's privilege does not itself discredit Vasari's account. See *infra* Part IV.

54. ALBRECHT DÜRER, *Joachim and the Angel*, in THE LIFE OF THE VIRGIN (ca. 1504), <https://www.metmuseum.org/art/collection/search/388132> [<https://perma.cc/HWQ8-GAA5>]; MARCANTONIO RAIMONDI, *Angel Appearing to Joachim*, in LIFE OF THE VIRGIN (18th century reprint), <https://artmuseum.princeton.edu/collections/objects/10773> [<https://perma.cc/459M-WBYU>].

55. DÜRER, *supra* note 54.

56. RAIMONDI, *supra* note 54.

lack the AD monogram.<sup>57</sup> This is consistent with Raimondi's desisting from the use of Dürer's mark in his copies sometime after Dürer's 1506 departure from Venice.<sup>58</sup> The below left image is Dürer's *Christ Taking Leave of His Mother*, dated by the National Gallery of Art to about 1509–10.<sup>59</sup> The right image is Raimondi's engraved copy.<sup>60</sup>



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The AD monogram that appears on the stone tablet in the lower right corner is now conspicuously absent from Raimondi's print. This supports Vasari's assertion that the Venetian Senate allowed Raimondi

57. See Joanna Kostylo, *From Gunpowder to Print: The Common Origins of Copyright and Patent*, in *PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT* 21, 43 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010).

58. See *id.* (calling Vasari's account "plausible" since Dürer's monogram was omitted from later prints).

59. ALBRECHT DÜRER, *Christ Taking Leave from His Mother*, in *THE SMALL WOODCUT PASSION* (ca. 1509–10), <https://www.nga.gov/collection/art-object-page.6755.html> [<https://perma.cc/S2XD-R4JJ>].

60. MARCANTONIO RAIMONDI, *Christ Taking Leave of His Mother* (circa 1500–1534), <https://www.metmuseum.org/art/collection/search/342713> [<https://perma.cc/55RB-25FA>].

61. DÜRER, *supra* note 59.

62. RAIMONDI, *supra* note 60.

to continue copying the content of Dürer's woodcuts so long as he refrained from including Dürer's monogram.<sup>63</sup>

As to objections relating to the absence of a Venetian *privilegio*, it is true that no documents have been discovered to suggest that Dürer possessed one.<sup>64</sup> Dürer did, however, obtain imperial privileges for some of the works Raimondi copied (i.e., the *Small Passion* and *Large Passion*).<sup>65</sup> These privileges would have been issued by the Holy Roman Emperor Maximilian I, who had jurisdiction over the massive empire neighboring Venice.<sup>66</sup> Although Venice remained independent, scholars have suggested that the Venetian authorities might still have been willing to enforce the Emperor's privilege.<sup>67</sup> Thus, the Venetian authorities could have been enforcing an extraterritorial privilege, issued to Dürer and archived elsewhere, rather than a specifically Venetian *privilegio*.

More importantly, however, arguments that seek to refute Vasari's narrative based on the absence of a privilege wrongly assume that Dürer was necessarily enforcing a privilege as the legal basis for his suit. Instead (as this Article later discusses), Dürer could equally have been asserting a more generalized claim under then-applicable principles of Roman law that Raimondi was selling falsely marked wares.<sup>68</sup>

Finally, although admittedly more conjectural, a simple reading of the text of Dürer's colophon from his edition of the *Life of the Virgin*

63. Pon makes the same point with respect to Raimondi's later copy (from around 1515) of Dürer's the *Betrayal of Christ* from the *Small Woodcut Passion* series. PON, *supra* note 10, at 70–71. There, Raimondi engraved a blank stone table, in perspective, over what would have been Dürer's AD monogram. *Id.*; see also WILLIAMS COLLEGE CLARK ART INSTITUTE GRADUATE PROGRAM IN ART HISTORY, *supra* note 49 (comparing Dürer's *Christ Washing the Feet of the Disciples* from the *Small Woodcut Passion* series with a copy by Raimondi). Raimondi's version lacks the AD monogram in the cartellino, which is consistent with it postdating Dürer's suit. The Clark possesses a leading collection of prints by Dürer and his copyists.

64. WITCOMBE, *supra* note 32, at 83.

65. *Id.*

66. *Id.* at 84.

67. *Id.* at 83. The original document whereby the Emperor Maximilian I granted Dürer his imperial privilege is lost, thus the precise date it was granted is unknown. That said, it must have been some time in or prior to 1511, when Dürer first mentioned it in the colophon to one of his print works. *Id.* at 84. Dürer scholar Jeffrey Ashcroft specifically dates the imperial privilege to 1511. JEFFREY ASHCROFT, ALBRECHT DÜRER: DOCUMENTARY BIOGRAPHY 346 (2017). Witcombe speculates that the Dürer-Raimondi copying dispute probably occurred "no earlier than 1510;" however, that postdates Dürer's last known trip to Venice by some years. WITCOMBE, *supra* note 32, at 84–85. Under that reading (contra Vasari) it would have to have been prosecuted in Dürer's absence.

68. See *infra* Part IV.

series suggests that, by 1511, the author was both litigious and aggrieved by past copying.<sup>69</sup> Dürer warned:

Beware, you envious thieves of the work and invention [laboris et ingenii] of others, keep your thoughtless hands from these works of ours. We have received a privilege from the famous Emperor of Rome, Maximillian, that no one shall dare to print these works in spurious forms, nor sell such prints within the boundaries of the empire.<sup>70</sup>

To twenty-first-century readers, this strident passage reads like the anti-piracy warnings of the Recording Industry Association of America and Motion Picture Association of America during the peer-to-peer downloading battles of the 2000s. It is language that seeks, with its forceful tone, to forestall infringement before it starts—a telltale sign of a content owner frustrated by past experiences battling against copyists.<sup>71</sup>

In all, it is possible—perhaps even probable—that Vasari, however confused as to certain particulars, was accurately relaying the core truth that Dürer took action against his copyist Raimondi in Venice. Vasari was quite clear as to the outcome of that endeavor: Dürer “could obtain no other satisfaction but this, that [Raimondi] should no longer use the name or above-mentioned signature of [Dürer] on his works.”<sup>72</sup>

### B. The Nuremberg Dispute (1512)

Vasari’s account of the Venetian Dispute is rich in narrative details—however unreliable—but sketchy, at best, as to the legal process and resulting decree. The contrary is true of the record of the Nuremberg Dispute. With the latter, little is revealed about the defendant or the works at issue other than that the dispute involved a “foreigner” selling “prints.”<sup>73</sup> The archives of the Council of Nuremberg, however, offer a clear, if terse, official record of the proceedings and holding, dating from January 3, 1512.<sup>74</sup>

In full, the following is the surviving text of the case in Nuremberg city archives, as translated by Koerner:

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69. See PON, *supra* note 10, at 39.

70. *Id.*; KOERNER, *supra* note 51, at 213.

71. Pon suggests that with this threat and privilege Dürer was “trying to protect the commercial interests that were never fully divorced from his artistic ones” and may have specifically been targeting Raimondi’s publisher and Raimondi himself with this warning. PON, *supra* note 10, at 65–66, 140.

72. Vasari, *supra* note 16, at 96.

73. KOERNER, *supra* note 51, at 209.

74. ASHCROFT, *supra* note 67.



The foreigner, who sold prints before the town hall, some with Albrecht Dürer's monogram [*handzaichen*] that were fraudulently copied from him, shall be bound by oath to remove all the said monograms and sell none of them here; and if he refuses, all his said prints shall be confiscated as counterfeit [*ain falsch*] and taken into the hands of the council.<sup>75</sup>

Koerner further notes that the account is filed under the heading "Albrecht Dürer's art stolen" in the city records.<sup>76</sup>

Taking the above record at face value, the following material points about the Nuremberg Dispute emerge:

- (i) the defendant, who was not from Nuremberg, had been selling copies of Dürer's works openly in public in Nuremberg towards the end of 1511;
- (ii) the accused works were prints;<sup>77</sup>
- (iii) the accused works contained Dürer's AD monogram;
- (iv) Dürer's works were not just copied, but copied in a manner deemed to be "fraudulent;"
- (v) the defendant was forced by the Council to elect either to (a) remove the AD monogram or (b) have the works confiscated by the Council; and
- (vi) the works would be considered "counterfeit [*ain falsch*]" if and only if the defendant refused to remove the AD monogram.<sup>78</sup>

While the factual particulars remain obscure, it would be difficult to create a ruling more precisely focused on the AD mark itself as an infringed asset. As elaborated below,<sup>79</sup> the modern definition of a trademark, in the sense familiar to US practitioners, is a "word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the

75. KOERNER, *supra* note 51, at 209 (brackets in original translation). Ashcroft's translation departs in a few material ways from that of Koerner. For instance, instead of describing the defendant as the "foreigner," Ashcroft prefers the "stranger." He also translates *ain falsch* as "forgeries" as opposed to "counterfeit." ASHCROFT, *supra* note 67.

76. KOERNER, *supra* note 51, at 209. Here, too, Ashcroft's translation differs materially. Ashcroft understands the heading in the Register of Resolutions to be, "Albrecht Dürer's prints counterfeited." ASHCROFT, *supra* note 67.

77. Prints could refer here either to woodcut prints or (as with Raimondi) engraved prints. See *infra* Part III.B for details on the respective processes.

78. KOERNER, *supra* note 51, at 209.

79. See *infra* Part VI.

goods.”<sup>80</sup> Monograms applied to goods have long been seen as core examples of trademarks.<sup>81</sup>

Here, the Council was at pains to point out that the fraud emerged not from the open sale of the copies as such, but from the sale of copies that contained Dürer’s mark.<sup>82</sup> This false marking of the goods made them counterfeits (or forgeries, to use Ashcroft’s term).<sup>83</sup>

Because of the similarities between the Venetian and Nuremberg Disputes, the unprecedented nature of the remedy obtained, and the untrustworthiness of Vasari’s account, some scholars have hypothesized that the two cases might be one and the same.<sup>84</sup> Pon, for instance, contemplates whether there might have only ever have been one dispute in Nuremberg, with Vasari having “adapted” and “transplanted” it to Venice.<sup>85</sup> As a passionate champion for Italy, perhaps Vasari could not countenance the Nuremberg Council as the arbiter of such a key early art law decision and intentionally relocated the story to Venice to better fit with his overall account of the rise of printmaking.

Whatever the relation of the two cases, the text and existence of the Nuremberg ruling is incontrovertible. How, then, had early sixteenth-century Nuremberg come to be the location of such a pivotal moment for “the law’s recognition of the psychological function of symbols”?<sup>86</sup> This Article shows in Part IV how Nuremberg, with its strong and protective commercial regulatory environment, was the ideal cauldron for such a ruling.<sup>87</sup> Before turning to that, however, it first demonstrates how Dürer, as both an artist and businessperson, was the quintessential original trademark plaintiff.<sup>88</sup>

80. 15 U.S.C. § 1127 (definition of “trademark”); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995) (citing same).

81. See, e.g., *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 88 (2d Cir. 2012) (citing multiple court discussions of the “well-known monogram logo” of Louis Vuitton as a trademark). The near-universal acceptance of monograms as trademarks extends to artist and artisan monograms. See, e.g., *U.S. Glass Co. v. Tiffany & Co.*, 55 F.2d 440, 442 (C.C.P.A. 1932) (affirming rights of Tiffany in its “T” monogram logo for blown glass against junior user).

82. See KOERNER, *supra* note 51, at 209.

83. See *infra* Part V for a full analysis of the trademark aspects of this ruling.

84. PON, *supra* note 10.

85. *Id.*

86. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

87. See *infra* Part IV.

88. See *infra* Part III.

### III. DÜRER'S BUSINESS AND HIS BRAND

It is beyond the scope of this Article to provide anything like a complete biography of Albrecht Dürer.<sup>89</sup> Instead, this Article focuses on his development as a graphic artist—especially the manner in which he was trained and by which he organized and conducted his workshop. These details show in particular how this German Renaissance painter, printmaker, and aesthetic theorist developed business and branding practices that bear remarkable similarity to those used in the twenty-first century.

#### *A. Dürer's Early Training and Development*

Dürer was born in Nuremberg, then one of the preeminent independent cities of the Holy Roman Empire, on May 17, 1471.<sup>90</sup> His father, also named Albrecht, was a master goldsmith.<sup>91</sup> His godfather, Anton Koberger, started out in the same trade but transitioned into book publishing the same year Dürer was born and quickly became the leading publisher in Germany.<sup>92</sup>

Dürer's father initially trained him as a goldsmith.<sup>93</sup> During this critical developmental period, Dürer learned to master tools, such as the burin, that were critical to both printmaking and crafting in gold.<sup>94</sup> When the younger Dürer turned fifteen, his father (reluctantly) permitted Dürer to transition to painting and apprenticed him to Michael Wolgemut, the foremost painter in Nuremberg.<sup>95</sup>

In Wolgemut's workshop, Dürer learned not only the art of making mechanically reproducible woodcuts (the medium at the heart of Dürer's later suits), but also how to manage a woodcut workshop operating at scale—one in which many different craftsmen, under the

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89. Countless such biographies in English are available. Leading examples, on which the Author primarily relies upon here, include PANOFSKY, *supra* note 36; HUTCHINSON, *supra* note 36; and KOERNER, *supra* note 51. For a comprehensive set of primary documents written by or relating to Dürer, all translated into English, see ASHCROFT, *supra* note 67.

90. PANOFSKY, *supra* note 36, at 4; HUTCHINSON, *supra* note 36, at 4.

91. PANOFSKY, *supra* note 36, at 4.

92. HUTCHINSON, *supra* note 36, at 14. In his prime, Koberger had branch offices in multiple leading cities ranging from Paris to Budapest and employed over 150 journeymen. *Id.*

93. PANOFSKY, *supra* note 36, at 4.

94. *Id.*

95. *Id.*; HUTCHINSON, *supra* note 36, at 24.

supervision of a master artisan, had a hand in creating a finished product.<sup>96</sup>

As with most artists of the time, after completing his apprenticeship, Dürer began a four-year “bachelor’s journey” throughout Europe just before he turned nineteen.<sup>97</sup> On those travels, he not only perfected his techniques by learning from other masters,<sup>98</sup> but also gained commercial insights into the nascent world of illustrated book publishing.<sup>99</sup> Art historian Jane Hutchinson concludes, for example, that Dürer developed over this time the idea of binding together multiple woodcut prints in book form. This was a more lucrative commercial practice because it allowed Dürer to attain a bookmaker’s “handsome” profits over the lesser ones he would have received as a mere contract artisan. He learned this, in part, by observing the Mainz painter and woodcut designer Erhard Reuwich, who was the first artist to also double as a publisher.<sup>100</sup>

Dürer was heavily involved in the design and creation of woodcuts throughout this trip, often working with and for other masters. The exact degree of his participation, however, cannot be determined due to the factory-like processes employed by the woodblock printers at this time.<sup>101</sup> Indeed, Panofsky compares the woodblock print operations of Basel—where Dürer visited and worked temporarily—to the studio of Walt Disney, complete with layers of subordinate draftsmen and cutters.<sup>102</sup> There, Dürer was a “mere cogwheel in a machine [that] functioned according to the principle of division of labor, and his natural talent as well as his previous training qualified him for the job of ‘cartoonist’ [i.e., one who made full-scale preparatory drawings] rather than that of cutter.”<sup>103</sup>

Dürer returned to Nuremberg in 1494, married Agnes Frey, the daughter of a well-to-do master craftsman, and then journeyed to Italy

96. HUTCHINSON, *supra* note 36, at 25–26. Not unlike Koberger, who in fact hired Wolgemut to make woodcuts for Koberger’s illustrated books, Wolgemut was known for the scale of his workshop. It encompassed multiple buildings and was described by art historian Erwin Panofsky as “a large commercial enterprise.” *Id.*

97. *Id.* at 27, 42.

98. *Id.* at 34. His studies of the so-called Housebook Master, for instance, informed his early engraving of the *Madonna with a Butterfly*. *Id.*

99. *Id.* at 33.

100. *Id.* Perhaps not surprisingly, Mainz was also the city in which Gutenberg invented the idea of printing from movable type, about thirty-five years prior to Dürer’s arrival. *Id.*

101. PANOFSKY, *supra* note 36, at 20, 27.

102. *Id.* at 27.

103. *Id.* at 46. For the art-historical definition of a cartoon, see Annette Wickham, *Art History 101: What is a Cartoon?*, ROYAL ACAD. ARTS (Sept. 2, 2015), <https://www.royalacademy.org.uk/article/daniel-maclise-what-is-a-cartoon>. [<https://perma.cc/YU7Z-Y48D>].

just a few months later.<sup>104</sup> Unlike his bachelor's journey, this follow-up trip was "unprecedented" among his peer group and likely served the dual purpose of allowing Dürer to escape from a plague in Nuremberg and to study the renowned painting and printmaking of Italy.<sup>105</sup> As with the first, this second trip included a copious amount of learning-by-copying.<sup>106</sup> Although it lasted for just a few months, the trip inspired Dürer to adopt major refinements to his woodcut style,<sup>107</sup> finally settling on a mature technique that Panofsky termed "dynamic calligraphy."<sup>108</sup> Dürer would go on to utilize this technique to create the key woodcuts at the center of the legal controversies here at issue.

The period between Dürer's two trips to Italy (ca. 1495–1506) is critical. Over that time he was "established as an independent master";<sup>109</sup> began bringing his own prints to market;<sup>110</sup> opened his own workshop;<sup>111</sup> acquired a printing press;<sup>112</sup> became a publisher;<sup>113</sup> and, perhaps most importantly, created and sold "woodcuts [that] were the most complex and impressive ever to appear in European art, and were an immediate success on both sides of the Rhine and the Alps."<sup>114</sup> During that period, Dürer and his brand truly became famous.<sup>115</sup> Before turning to his renowned AD monogram and fame, the next Section details the technical side of Dürer's printing process and his sales enterprise.

## B. Dürer's Woodcut Printing Enterprise

### 1. The Production of Dürer's Woodcut Prints

Right around the time of Dürer's birth, the printing press was transforming woodcuts just as it was revolutionizing bookmaking.<sup>116</sup>

104. HUTCHINSON, *supra* note 36, at 40–41.

105. *Id.* at 42.

106. Perhaps most notably, Dürer copied multiple engravings of the Venetian master Andrea Mantegna (1431–1506). PANOFSKY, *supra* note 36, at 31. Dürer also directly copied or adapted the work of countless other Italian masters as well, including that of Lorenzo di Credi and Gentile Bellini. HUTCHINSON, *supra* note 36, at 45.

107. PANOFSKY, *supra* note 36, at 46–47.

108. *Id.* at 39.

109. *Id.*

110. HUTCHINSON, *supra* note 36, at 56.

111. *Id.*

112. KOERNER, *supra* note 51, at 205.

113. HUTCHINSON, *supra* note 36, at 62. Dürer explicitly signed his *Apocalypse* series of woodcuts as both artist and publisher. PANOFSKY, *supra* note 36, at 51.

114. HUTCHINSON, *supra* note 36, at 60.

115. *Id.* at 57.

116. *Id.*

Prior to 1455, most woodcuts were cheap, hand-printed, and meant to be “tacked to walls, or pasted on furniture, boxes and book covers, or mounted on panels to serve as small, inexpensive icons or altarpieces.”<sup>117</sup> The advent of the press, however, allowed woodcuts to be incorporated into books. Between 1470 and 1475, woodcutting techniques were also refined to allow mechanical reproduction of single prints capable of capturing far more intricate detail.<sup>118</sup>

Woodcuts (unlike engravings) are made in relief, meaning that ink is applied to the negative space left behind when a cut into the wood is made.<sup>119</sup> Usually, throughout his career, Dürer did not personally cut his woodblocks.<sup>120</sup> Instead, that job generally went to skilled craftsmen in his own workshop or, later in life, to independent master woodcutters.<sup>121</sup> However, primarily during the period between his two Italian journeys, Dürer likely cut his own blocks, a fact that suggests that, for some of the works in suit, Dürer may personally have performed the roles of both designer and carver.<sup>122</sup>

Regardless of who was doing the literal handwork, Dürer closely oversaw his entire woodcut operation.<sup>123</sup> As art historian Joseph Koerner describes it, Dürer “monopolized all stages of an image’s making, from invention and execution to publication and sale.”<sup>124</sup> This “freed” Dürer from dependency on others, especially the large book publishers who dominated mechanical printing around the end of 1500.<sup>125</sup>

The woodblock form also helped free Dürer from the constraints felt by other artists of his day that worked by direct commission under the patronage system.<sup>126</sup> Dürer was free to choose whatever subject and

117. *Id.*

118. *Id.*

119. PANOFSKY, *supra* note 36, at 18 (“A block of wood, sawed along the grain, is covered with a white ground on which the composition can be drawn in ink. Then the block is ‘cut’ in such a way that wood is removed on either side of what is intended to appear as a dark line in the impression. It is to the remaining crests or ridges that the ink is applied in order to be transferred to the paper.”).

120. *Id.* at 46–47, 95.

121. *Id.* at 46.

122. *Id.* at 46, 95. According to Panofsky, there are two contrasting explanations for why Dürer did not cut his own blocks before and after the Italian journeys. *Id.* Prior to that, he was too junior and expected to stick to his role of being a cartoonist or draftsman, and not a cutter. *Id.* After the second Italy trip, by contrast, he would have been too important and senior to spend his time cutting wood blocks, a task that could now be relegated to younger skilled craftsmen to do it for him. *Id.*

123. *Id.* at 95.

124. KOERNER, *supra* note 51, at 205.

125. *Id.* at 205.

126. *Id.*

execute the work in whatever style he wished.<sup>127</sup> As Panofsky elegantly captured it:

The magic of the multiplying arts, however, permitted the artist to take the initiative: instead of waiting for a commission he could turn out, in a great many impressions, works of his own original invention. As almost everyone could afford to buy a print, these impressions found a market like the copies of a printed book. . . . Thus the graphic media became a vehicle for self-expression long before self-expression had been accepted as a principle of what is called the major arts.<sup>128</sup>

In short, by using woodcuts to make relatively inexpensive multiples, Dürer could make artworks from his own imagination that paid for themselves, rather than needing to rely on the wishes of wealthy patrons.

Additionally, woodcuts were more profitable for Dürer than commissioned paintings.<sup>129</sup> Consistent with his business-minded approach, Dürer also standardized the dimensions of his woodblocks, even across different series—an innovation that allowed him to interchange sheets across series and thereby operate more efficiently.<sup>130</sup> This combination of freedom and profitability made woodcuts and engravings his favored commercial ventures.

Dürer's *Life of the Virgin* (or *Life of Mary*) series, created around 1501–04, exemplifies Dürer's woodcutting prowess from around this time and figured prominently in the Disputes that this Article identifies.<sup>131</sup> Panofsky argues that Dürer was especially attentive in his supervision of these woodcuts, likely including his personal participation.<sup>132</sup> That group of woodcuts ultimately consisted of twenty sheets, each depicting a scene in the life of the Virgin Mary.<sup>133</sup> Dürer had completed work on only seventeen of these prior to his second trip to Italy in 1505, and some might have been at issue in the Venetian Dispute.<sup>134</sup> He and his aides sold the sheets individually to buyers.<sup>135</sup>

127. HUTCHINSON, *supra* note 36, at 62.

128. PANOFSKY, *supra* note 36, at 45.

129. ASHCROFT, *supra* note 67, at 224–25; KOERNER, *supra* note 51, at 207. While Dürer continued to paint works commissioned by wealthy patrons throughout his life, in a lament to one particularly exacting and parsimonious patron he expressed a preference for print works because they made him more money and required far less work than paint commissions. KOERNER, *supra* note 51, at 207.

130. PANOFSKY, *supra* note 36, at 99.

131. *Id.*

132. *Id.* at 95.

133. *Id.* at 96.

134. *Id.*; PON, *supra* note 10, at 176–77 n.6 (calling scholarly consensus “unanimous” that the dispute was over the *Life of the Virgin* series).

135. See FAIETTI & OBERHUBER, *supra* note 26, at 150–52; PANOFSKY, *supra* note 36, at 96. For size information, see PANOFSKY, *supra* note 36, at xvii.

He completed the series a few years later, after he had returned to Nuremberg.<sup>136</sup> Dürer added a frontispiece to the set and, in 1511, sold it in book form, complete with the warning to copyists cited above.<sup>137</sup>

## 2. The Distribution and Sale of Dürer's Woodcuts

In the sale of his woodcuts, Dürer "seems to have given a great deal of thought to the means by which his art might reach the widest possible public."<sup>138</sup> Dürer sold woodcuts both as single sheets and in book form.<sup>139</sup> As exemplified, however, by the *Life of the Virgin* and *Large Passion* series, Dürer's woodcut compilations were often originally sold as single sheets for years before being compiled as a book.<sup>140</sup>

These single sheets were particularly affordable to the average consumer of the day.<sup>141</sup> Additionally, Dürer was heavily benefited by his location in Nuremberg, a commercial capital of the Holy Roman Empire.<sup>142</sup> Its renowned "fairs, markets, shooting contests and religious festivals" brought in "droves of out-of-town visitors" to make up a ready, willing, and able clientele for his relatively inexpensive woodcut prints.<sup>143</sup> In preparing his prints for sale, Dürer exploited his position within the city and catered to the stream of visitors that would be passing through.<sup>144</sup>

Dürer was very intentional in amassing a large inventory of readily salable print sheets.<sup>145</sup> As he wrote in a letter in 1509: "For the next year, I'll produce such a pile of ordinary pictures, that nobody will believe it possible for one man to do it. That's the way to make some money."<sup>146</sup> Each of his carved wood blocks was capable of producing hundreds of quality prints (or "impressions," in print parlance) over its

136. Precise dating of the initial seventeen remains elusive. Panofsky suggests about 1501–1504. PANOFSKY, *supra* note 36, at 99.

137. HUTCHINSON, *supra* note 36, at 106–07; *see also* ASHCROFT, *supra* note 67, at 338.

138. *See* PANOFSKY, *supra* note 36, at xvii; HUTCHINSON, *supra* note 36, at 57.

139. PANOFSKY, *supra* note 36, at xvii.

140. *Id.* at 59.

141. *Id.* at 18.

142. HUTCHINSON, *supra* note 36, at 57–58. For more on Nuremberg as a city and its relation to Dürer, *see infra* Section IV.A.

143. HUTCHINSON, *supra* note 36, at 57–58.

144. *Id.* Nuremberg was also benefitted by its "ready supply" of key inputs for the graphic arts, such as fine paper, mechanics to build and maintain presses, and, for engravings, the copper for plates. *Id.*

145. *Id.* at 59.

146. ASHCROFT, *supra* note 67, at 224–25.



life.<sup>147</sup> By retaining ownership of these blocks, moreover, Dürer was essentially able to adopt a print-on-demand model that allowed him to commence additional print runs for any popular work or series that had been depleted.<sup>148</sup>

Dürer's market was hardly limited to Nuremberg; his woodcut sheets were sold throughout Europe, including Italy in particular.<sup>149</sup> He was aided in this regard by his close personal and professional connections to leading area merchants of the day, whose supply chains—onto which Dürer piggybacked—connected Europe's commercial capitals.<sup>150</sup> As he traveled the continent, Dürer took troves of his prints, which he would sell or gift away to artists and important people.<sup>151</sup> Additionally, he recruited his mother and his wife, Agnes, to sell his prints at markets both locally and abroad,<sup>152</sup> though his sales force stretched beyond his immediate family. Indeed, one of his great (if not necessarily successful) art business innovations was to retain the services of independent contract agents that could sell his prints abroad.<sup>153</sup>

A handful of these remarkable contracts survive, such as two from 1497 that show Dürer paying respective itinerant agents a set weekly wage, equivalent to that received by a skilled craftsman, to journey from city to city and town to town selling his woodcuts and prints.<sup>154</sup> They are essentially "best efforts" contracts, requiring the agents to "eagerly and energetically" sell the works while at the same time avoiding "frivolity."<sup>155</sup> In one contract, Dürer established a minimum price per print but gave the agent the authority to increase it in the event that the agent "may sell the prints more profitably."<sup>156</sup> In the other, the agent was simply required to get "the highest price he [could] obtain" for the prints.<sup>157</sup>

Dürer, to be clear, often lost money from these novel arrangements. In one instance, one of his agents died in Rome, resulting

147. HUTCHINSON, *supra* note 36, at 62.

148. *Id.* He even left these to his brother Endres in his will, which allowed for posthumous printing. *Id.* at 185.

149. *Id.* at 60, 79; KOERNER, *supra* note 51, at 207; ASHCROFT, *supra* note 67, at 67.

150. KOERNER, *supra* note 51, at 208.

151. HUTCHINSON, *supra* note 36, at 144.

152. KOERNER, *supra* note 51, at 208.

153. *Id.*; HUTCHINSON, *supra* note 36, at 57; ASHCROFT, *supra* note 67, at 67.

154. ASHCROFT, *supra* note 67, at 65–66.

155. *Id.*

156. *Id.* at 65.

157. *Id.* at 66.

in Dürer's losing all of the prints in that agent's possession.<sup>158</sup> Over time, to prevent further losses, Dürer began demanding more contractual guarantees from his agents.<sup>159</sup> Profitable or not, the contracts show that Dürer was intent on commercializing his art and not simply creating it.

Dürer scholar Jeffrey Ashcroft concludes that all of the above activities show that, upon his first return from Italy, Dürer "evolved a successful business plan to concentrate a good part of his time on producing high-quality woodcuts and copperplate engravings, and to cultivate a market for this mass-reproducible, easily transportable, relatively cheap graphic medium . . . in characteristic Nuremberg fashion—to build up a national and international commerce."<sup>160</sup>

Remarkably, each and every one of Dürer's innovations—the use of mass-production, retention of ownership of molds and masters, supervised factory-style manufacturing, stockpiling of inventory, distribution through sales agents, shipping of branded goods far beyond local markets, and word-of-mouth advertising—would come to be associated with sophisticated, twenty-first-century trademark practices.<sup>161</sup>

### C. Dürer's Monogram and Early Fame

In a pioneering study from the mid-1990s, the art historian Joseph Koerner emphasized the overarching self-centeredness of Dürer's artistic project.<sup>162</sup> Time and again, as Koerner put it, "Dürer propose[d] himself as origin."<sup>163</sup> This aesthetic egoism is central to the story of Dürer's brand-consciousness.

Dürer's focus on the artist-as-origin is perhaps nowhere more evident than in his frontal self-portrait of 1500, one of the most famous portraits ever painted.<sup>164</sup> In the guise of Christ, the artist stares directly into the viewer's eyes.<sup>165</sup> At that same eye level, just off to the side of Dürer's luxurious hair, the viewer is unavoidably confronted with

158. *Id.*

159. ASHCROFT, *supra* note 67, at 67; KOERNER, *supra* note 51, at 207–08.

160. ASHCROFT, *supra* note 67, at 67.

161. PANOFSKY, *supra* note 36, at 3–4; *see also infra* Part IV.

162. *See* KOERNER, *supra* note 51, at xv–xx.

163. *Id.* at xix.

164. *Id.* at xv.

165. The decision to portray himself as the Christian savior was not as presumptuous as it might now appear. According to Panofsky, it was not uncommon during Dürer's time to portray an individual in the position of Christ, such as by depicting a person with a cross on his shoulders. PANOFSKY, *supra* note 36, at 43.

Dürer's AD monogram in gold on a black background, acting almost like a third eye equally demanding of the viewer's attention.<sup>166</sup>



Like the ubiquitous production logo in present-day news and YouTube clips, or a watermark in an online image bank, Dürer literally and intentionally branded his content.

By 1500, though, this was nothing new for Dürer. Following the lead of generations of German artists just prior to him, Dürer began signing works with his own initials by the age of fourteen<sup>167</sup> and using the AD monogram in woodcut blocks and engraving plates by his early twenties.<sup>168</sup> As Koerner makes clear, this tradition among German artists likely grew out of the longstanding practices of stonemasons, goldsmiths, and the like, who were regularly applying their marks to their works to make sure they were paid and, for those working in metal, to guarantee the quality of the raw material.<sup>169</sup>

With the rise of mechanically reproduced, self-financed print works in the first half of the fifteenth century, engravers with links to the goldsmith trade, such as Martin Schongauer, adopted a similar practice.<sup>170</sup> Koerner points out that Schongauer did so only for prints and not his paintings, “as part of a strategy for making mechanical reproductions pay” in a market where the “artist is potentially absent from . . . the community of viewers who initially purchase and use the image.”<sup>171</sup>

166. KOERNER, *supra* note 51, at xv.

167. PANOFSKY, *supra* note 36, at 15.

168. KOERNER, *supra* note 51, at 204–05.

169. *Id.*

170. *Id.* at 203–04.

171. *Id.*

Dürer, who as a young journeyman traveled far, though unsuccessfully, to meet with Schongauer,<sup>172</sup> pushed this nascent concept to new levels. As a practical contribution, Dürer imported the use of a monogram from engravings to the then-burgeoning medium of single-leaf woodcuts—works at the heart of his copying cases and which required a significant division of labor within his workshop.<sup>173</sup> From 1496 on, Dürer consistently applied his mark to “all his major woodcuts.”<sup>174</sup>

Anticipating how the modern brand would later be a mark of status and supervisory approval within a corporate structure, Dürer was also revolutionary in using his monogram as the logo of his business organization, not just a personal signature of a content creator. His was a true house mark. Hutchinson further shows how Dürer, when acting as publisher, initialed woodblocks cut in his workshop even for those designs he did not create himself.<sup>175</sup> In Koerner’s words, Dürer’s monogram “functioned to indicate the image’s designer *and* publisher.”<sup>176</sup>

These self-published, branded woodcuts were an immediate hit in Germany and abroad.<sup>177</sup> In Erwin Panofsky’s colorful description: “Like the ships of a great merchant these giant woodcuts carried their cargo and their flag—Dürer’s famous AD—all over the world.”<sup>178</sup> This metaphor proved to be remarkably apt; since at least the mid-nineteenth century, US jurists have likewise been analogizing trademark infringement to sailing under the flag of another.<sup>179</sup>

172. HUTCHINSON, *supra* note 36, at 30. Schongauer died, likely from the plague, just before Dürer arrived to meet him. *Id.*

173. KOERNER, *supra* note 51, at 204–05; *see* PANOFSKY, *supra* note 36, at 62–67.

174. KOERNER, *supra* note 51, at 205.

175. HUTCHINSON, *supra* note 36, at 109–10.

176. KOERNER, *supra* note 51, at 205 (emphasis in original); *see also* PANOFSKY, *supra* note 36, at 135 (Dürer was “signing himself as publisher” in woodcuts).

177. HUTCHINSON, *supra* note 36, at 60; Evelyn Lincoln, *Invention and Authorship in Early Modern Italian Visual Culture*, 52 DEPAUL L. REV. 1093, 1104 (2003) (noting that the *Life of the Virgin* prints were “almost immediately famous”).

178. PANOFSKY, *supra* note 36, at 46.

179. *See, e.g.*, *Partridge v. Menck*, 2 Barb. Ch. 101, 101 (N.Y. Ch. 1847) (observing, “having appropriated to himself a particular label, or sign or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, . . . he is entitled to protection against any other person who attempts to pirate upon the good will . . . by sailing under his flag without his authority or consent”); *Amoskeag Mfg. Co. v. D. Trainer & Sons*, 101 U.S. 51, 62 (1879) (Clifford, J., dissenting) (citing *Partridge*, 2 Barb. Ch. at 101); *Leidersdorf v. Flint*, 15 F. Cas. 260, 261 (E.D. Wis. 1878) (No. 8,219); *Royal Baking Powder Co. v. Raymond*, 70 F. 376, 380 (C.C.N.D. Ill. 1895), *aff’d*, 85 F. 231 (7th Cir. 1898) (citing *Partridge*, 2 Barb. Ch. at 101).

Panofsky emphasizes that woodcuts bore Dürer's initials not merely because he had created, designed, or even cut them.<sup>180</sup> Rather, central to this branding was Dürer's self-understanding that "[t]hey were issued on his own responsibility" in the sense that he staked his personal reputation on them, even when they were not literally works of his hand.<sup>181</sup> Dürer conceived of his monogram as a statement that any branded print for sale in the market originated with, and was sponsored and approved by, Dürer himself, an understanding that prefigured the language of the modern Lanham Act by almost 450 years.<sup>182</sup>

Consistent with his commitment to branding, Dürer "loved recognition,"<sup>183</sup> and his "lasting fame," as Hutchinson recounts, "was no accident."<sup>184</sup> His remarkably consistent use of his monogram throughout his life functioned—to continue Panofsky's ship metaphor—as a vessel in which to capture that renown.

Given that it was through these mechanically reproduced prints that Dürer's monogram traveled throughout Europe, it should not be surprising that, while Dürer was "famous as a painter," it was as a woodcut designer that he truly "became an international figure."<sup>185</sup> With this fame, of course, came attention, and with attention came imitation. The same early woodcuts that made him famous by 1505 were by then rampantly being copied abroad.<sup>186</sup>

#### IV. COMMERCIAL AND LEGAL REGULATION IN DÜRER'S NUREMBERG

Before turning to the law underlying Dürer's disputes, it is critical to understand the context in which they were brought. This is particularly true here because the unique customs and rules of Dürer's home city of Nuremberg significantly channeled and encouraged

180. PANOFSKY, *supra* note 36, at 46.

181. *Id.*

182. *Cf.* 15 U.S.C. § 1125 (prohibiting uses of a trademark that are "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person").

183. *Id.*; PANOFSKY, *supra* note 36, at 283 (Dürer became so committed to his brand, that he is considered the first artist ever "to sign and date a large percentage of studies and sketches even if he had no intention of selling them or giving them away.").

184. HUTCHINSON, *supra* note 36, at 187 (calling Dürer "the most thoroughly celebrated artist who ever lived," Hutchinson shows that Dürer's fame was actively promoted by his humanist circle of friends as well, "for the sake of German art as well as for his own").

185. PANOFSKY, *supra* note 36, at 3–4; GERALD STRAUSS, NUREMBERG IN THE SIXTEENTH CENTURY 277 (2d ed. 1976) ("Dürer's work was popular in every sense of the word.").

186. HUTCHINSON, *supra* note 36, at 79 (his etchings were often copied as well, starting even prior to 1500); PANOFSKY, *supra* note 36, at 13.

Dürer's enforcement activities. Indeed, Nuremberg of the 1500s—a heavily regulated city, teeming with craftsmen, fairs, and commerce and jealously protective of its regional brands—could not have been more conducive to the generation of a modern trademark decision.

Relying on the work of historian Gerard Strauss, this Part begins by demonstrating why Nuremberg was an ideal locale for a case so protective of a brand as a brand. From there it moves to a discussion of the likely legal bases for the Nuremberg decision and shows how the Council of Nuremberg, in rendering its decision in January 1512, almost certainly intended to protect the source-associative power and value of the insignias of one of its leading citizens and his business. Finally, it turns to the Venetian Dispute and shows that, while the record is too sparse to draw any firm conclusions, Roman law would have provided a plausible basis for such a ruling in Venice at that time.

### *A. Nuremberg as a Cauldron of Brand Protection*

As Albrecht Dürer confronted it, Nuremberg in the sixteenth century was an environment highly conducive to brand protection in the twenty-first-century sense.<sup>187</sup> It was pro-commerce in mindset yet comfortable regulating ostensibly private market transactions. It had a strong commitment to maintaining a marketplace free from misleading product information, traded in goods reproduced at scale, attained a global reach in trade while being fundamentally protective of domestic goods and makers, and maintained the power and independence to articulate rules designed to promote brand value.<sup>188</sup> This might seem like a wish list for a trade group of brand owners like the International Trademark Association, but it also mirrors the situation of Dürer's Nuremberg.<sup>189</sup>

#### 1. Free City of the Holy Roman Empire without Guilds

Dürer's Nuremberg, as an independent city of the Holy Roman Empire, was "free and sovereign; lord of its domain and destiny."<sup>190</sup> Within the city, the Council of Nuremberg controlled nearly all aspects of political and legal life. As Gerald Strauss put it: "There was nothing, literally nothing, in the life of the city that was not the Council's business."<sup>191</sup>

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187. See STRAUSS, *supra* note 185, at 137.

188. See *id.*

189. See *id.*

190. *Id.* at v.

191. *Id.* at 69.

For this reason, guilds had long been outlawed in Nuremberg, dating back to the fourteenth century as part of an effort to keep power in the hands of its patrician council members.<sup>192</sup> The complete absence of guilds set Nuremberg apart from sister cities across the empire.<sup>193</sup> Thus, Nuremberg's artists, in strong contrast to those of the other mercantile hubs of Europe, were only ever controlled directly by the Council itself.<sup>194</sup>

## 2. Pro-Commerce yet Heavily Trade-Regulated

One of the preeminent cities of the empire,<sup>195</sup> Nuremberg was a mercantile city that consistently supported the commercial endeavors of its citizens.<sup>196</sup> Yet, it approached such commerce and its governance with a "cautious, responsible sense of moderation" that contrasted with rival cities, such as Augsburg, that Nuremberg tended to view with "suspicion and not a little disdain" for their support of "rampant capitalism."<sup>197</sup> Nuremberg's staid yet money-making culture informed its artists, who "lived in a pervasive atmosphere of successful business."<sup>198</sup>

Nuremberg, however, was hardly a free-market paradise. To the contrary, it obsessively regulated its sellers, artisans, craftsmen, and the goods they produced in a manner that seems almost farcical today.<sup>199</sup> All of the rules were made by the Nuremberg Council, which maintained, among other things, a specific code of craft regulations known as the *Book of Handicrafts* that governed down to "even social activities in minutest detail."<sup>200</sup> As one example, Strauss cites an archaic rule that circumscribed the conduct of banquet invitees, who were forbidden from pounding the table, conducting toasts, calling one another liars, or leaving early.<sup>201</sup>

The Council used a battery of agents and inspectors to supervise activities at markets, inspect goods for quality, standardize prices, and review products ranging from bricks to textiles for weight and

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192. *Id.* at 50 (in 1349, "guilds and other crafts organizations were dissolved, banned, and forbidden in perpetuity").

193. *See id.*

194. *Id.*

195. *Id.* at 6.

196. *Id.* at 127.

197. *Id.*

198. *Id.* at 232.

199. *See id.* at 97–100.

200. *Id.* at 99.

201. *Id.* at 100.

measure.<sup>202</sup> The Council elected an official known as the *Pfänder* who (along with an army of sub-officials) would “interrogate artisans accused of violating commercial or other regulations, defrauding a customer, or turning out a bad piece of work.”<sup>203</sup> Local artisans, far from viewing this heavy regulation with “resentment,” understood it as “a legitimate extension of [the] government’s concern with the general welfare and with the commercial regulation of the city.”<sup>204</sup>

One notable exception to Nuremberg’s manic attention to minute regulations were the free arts (*Frei Künste*), which would have included Dürer’s woodblock print and engraving enterprise.<sup>205</sup> Unlike almost every other craftsman in Nuremberg, including goldsmiths like his father, Dürer would have been free to set his own price for his prints and determine his own standards for quality.<sup>206</sup>

### 3. Consistent Labeling and Marking of Goods in Commerce

Among the targets of Nuremberg’s obsessive regulations were labels and product markings.<sup>207</sup> The Council hired “tag masters” in charge of affixing certifying labels to an extensive range of goods.<sup>208</sup>

This sensitivity to marking was particularly acute in the arena of metalcraft, for which Nuremberg was especially renowned (and in which Dürer was originally trained).<sup>209</sup> Nuremberg’s master goldsmiths, for instance, were required to stamp their maker’s mark on all goods, whereas unqualified workmen were prohibited from applying such a marking.<sup>210</sup> Instead, the goods of the latter had to bear a simple punch mark.<sup>211</sup>

On top of the maker’s mark, goods for which Nuremberg was particularly known (such as scientific instruments) were required to be stamped with an “N” representing Nuremberg—what twenty-first-century scholars would call a geographic indicator of

202. *Id.* at 98.

203. CHRISTOPH SCHEURL, *Concerning the Polity and Government of the Praiseworthy City of Nuremberg* (Dec. 1516) (reproduced and translated in STRAUSS, *supra* note 185, at 65); *see also* STRAUSS, *supra* note 185, at 98 (detailing same).

204. *Id.* at 144.

205. *Id.* at 98.

206. *See id.* (in 1513, the Council passed censorial regulations of the printing trade that reached even wood block cutters, and required registration and prior notice of books, engravings, and other cuttings).

207. *Id.* at 99.

208. *Id.*

209. *See id.* at 137.

210. *Id.*

211. *Id.*



source (a cousin to the modern trademark).<sup>212</sup> The “N” mark was regularly infringed as a geographic indicator by other towns.<sup>213</sup>

Fraud was considered particularly abhorrent to the Council, with its strong desire to maintain a reliable and trustworthy marketplace. As civil law scholar Zoltan Csehi summarizes it, the sale of “false goods, or any falsification of the goods (presenting old as new, or new as old) was strictly punished.”<sup>214</sup> In one graphic example, immortalized in rhyme, a baker caught falsifying the weight of his loaves was placed in a basket suspended by rope over a pit filled with “stinking filth.” The only way down was for the trapped baker to cut the rope and plunge, basket and all, into the “horrid mess of slops” and crawl his way out in front of a jeering public.<sup>215</sup>

#### 4. International in Outlook yet Protective of Domestic Industry

Located at the center of twelve major, established trading routes, Nuremberg's commerce was remarkably international.<sup>216</sup> By 1500, its commercial reach included almost all of Europe.<sup>217</sup> As a result, Nuremberg's products attained fame throughout the continent for their international influence and high quality, while the city itself drew commerce and visitors for its triannual three-week-long fairs.<sup>218</sup> Not surprisingly, given this, Nuremberg was particularly protective of its reputation for producing high-quality goods.

#### 5. Pride in Its Native Son Albrecht Dürer

Nuremberg was deeply proud of its craftsmen and artists,<sup>219</sup> but especially Albrecht Dürer. He “towered over his fellow artists in his native city, and no other intellectual nor literary man there reached his stature.”<sup>220</sup> He was particularly close with the Council and advised

212. *Id.*; cf. Agreement on Trade-Related Aspects on Intellectual Property Rights, art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 401 (defining Geographical Indications as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin”).

213. STRAUSS, *supra* note 185, at 138.

214. Csehi, *supra* note 36, at 251; *see also* STRAUSS, *supra* note 185, at 105 (“no punishment was harsh enough to deal with men who sought to defraud their fellow citizens”).

215. STRAUSS, *supra* note 185, at 105–06.

216. *Id.* at 127.

217. *Id.* at 128.

218. *Id.* at 141.

219. *Id.* at 27, 276.

220. *Id.* at 231.

them throughout his life on matters ranging from coinage to building construction—for example, he directed the creation of the frescoes on the walls of the Nuremberg *Rathaus*, a project complete by 1530.<sup>221</sup> His close and prominent friend Willibald Pirckheimer was elected to the Council in 1498, a fact which underscores how friendly a forum the Council would have been to Dürer in the early 1500s.<sup>222</sup> Late in life, and certainly by the time of his death, Dürer was both a famous artist abroad and one of the wealthiest and most respected citizens of Nuremberg, making him an ideal proponent of prototrademark rights.<sup>223</sup>

### *B. Surmising the Legal Framework Behind the Nuremberg Dispute Ruling*

Given the absence of Nurembergian guilds for free artists, it was natural for Dürer to have turned to the Council, and not any trade organization, to enforce his claim there. This Section shows how Dürer would have brought his claim and explains the background law governing his and similar cases.

#### 1. Process

Dürer's Nuremberg Dispute likely did not begin with an official municipal inspection action, which the Council's *Pfander* would have carried out. Under Nuremberg law, "free artists" were not subject to the city's strict trade regulations and could set their own prices and quality standards.<sup>224</sup> The record, however, shows that the defendant in the Nuremberg Dispute was a "foreigner" (i.e., not a "free artist") and thus would have been subject to additional scrutiny and requirements.<sup>225</sup> Possibly, therefore, Dürer's case began with a public seizure by municipal inspectors.<sup>226</sup> Alternatively, Dürer himself may have initiated the action. Private parties could initiate complaints on certain

221. *Id.* at 281.

222. Emil Krén & Daniel Marx, *Willibald Pirckheimer*, WEB GALLERY OF ART, [https://www.wga.hu/html\\_m/d/durer/2/13/5/102.html](https://www.wga.hu/html_m/d/durer/2/13/5/102.html) [perma.cc/BR63-5ZG8] (last visited Mar. 7, 2023).

223. HUTCHINSON, *supra* note 36, at 185, 187–88. Csehi notes that Dürer died one of the one hundred richest burghers in Nuremberg primarily due to his revenue from print sales. Csehi, *supra* note 36, at 248.

224. *See supra* pp. 132.

225. STRAUSS, *supra* note 185, at 144 ("[P]rocedures kept inferior imports from reaching the home market; inspection of foreign articles was fully as rigorous as of domestic ones. Moreover, no imported manufactures could except under conditions determined by the Council.").

226. *Id.*

days of the week;<sup>227</sup> through an attorney, Dürer could have identified the defendant and brought this action without the *Pfander's* initiation.<sup>228</sup>

Regardless of how Dürer's case came before the Council, the hearing itself would have been before a panel of nonlawyers. Although the Council was all-powerful, at once "legislative, executive and judicial,"<sup>229</sup> and a deliberative body that would thoroughly review expert memoranda and legal briefs,<sup>230</sup> it consisted of no lawyers.<sup>231</sup> Rather, lawyers were brought in as "jurisconsults" to advise, prepare written legal opinions for the Council to consider, and draft key legal documents.<sup>232</sup>

## 2. The Influence of Roman Law

Lawyers in Nuremberg around 1510, and the Council they advised, would have turned to the Justinian Roman law, interwoven with Nuremberg's own patchwork of longstanding municipal statutes and precedents, to shape their arguments.<sup>233</sup> Beginning around the time of Dürer's birth, German cities had begun the extensive process of codifying "local laws, on the basis of their reformation and of the reception of Roman doctrine."<sup>234</sup> Nuremberg was at the forefront of this process of legal "Romanization" and wholly revised its legal code in 1479.<sup>235</sup> The end result was the first publication of a printed municipal law code in Germany—a project completed by Dürer's own godfather, Anton Koberger, in 1484.<sup>236</sup>

Of particular importance here, these major law reforms focused on preventing imitation and forgery of Nurembergian goods.<sup>237</sup>

227. *Id.* at 66 (reprinting Scheurl).

228. *Id.* at 67.

229. *Id.* at 85 ("the Council was not merely the supreme authority, it was the only authority").

230. *Id.* at 84.

231. *Id.* at 222.

232. *Id.*

233. *Id.* at 223. Records of Council decisions, including that of Dürer, were closely kept in a series of folio volumes known as the Ratsbücher. *Id.* at 88.

234. PAUL VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 141 (Wm. W. Gaunt & Sons, Inc. 1994) (1968). A leading Roman law text at the time, known as the *Vocabulary*, gave "short definitions and explanations of all sorts of terms" in the Roman law. It was written in Erfurt, Germany in 1452, and "extensively circulated in Germany" over the next hundred years. The Roman law historian Paul Vinogradoff notes fifty-two different editions of it that were issued between 1473–1523 (dates closely approximating the life of Dürer). *Id.* at 128.

235. STRAUSS, *supra* note 185, at 220.

236. *Id.* at 221.

237. Csehi, *supra* note 36, at 252.

Dürer—and his counsel, if he used one—thus had a roadmap for how to prosecute such a private claim by 1500.

### 3. The Justinian Roman Law of Falsity

As shown above, Justinian Roman law dominated in early sixteenth-century Nuremberg courts. The question then is what specific Roman law rules would have governed Dürer's suit? The most closely applicable aspect of Roman law would likely have been the statute on *falsum*, a term generally understood to refer to “that which in reality does not exist, but is asserted as true.”<sup>238</sup> In particular, the *Lex Cornelia de falsis* by Sulla, still in force in Justinian's Digest, was an ancient penal law that covered “any kind of forgery, falsification or counterfeiting,”<sup>239</sup> the objects of which ranged from making false wills to fraudulently manipulating seals and counterfeiting measures, weights, and coins.<sup>240</sup> To take one example directly from a section of the *Lex Cornelia* dealing with punishments for *falsum*, as collected in Justinian's Digest: “If a seller or a buyer tampers with the publicly approved measures of wine, corn, or any other thing, or commits a deception with malicious intent, he is sentenced to a fine of double the value of the thing concerned.”<sup>241</sup>

The antitampering aspect of market regulation in the Roman law would have dovetailed closely with the generally accepted Nurembergian view that selling falsely labeled merchandise was an illegal act of counterfeiting.<sup>242</sup> To be clear, neither set of regulations was aimed at preventing the mere copying of others' goods or works. Indeed, Dürer himself copied the works of other artists in his youth<sup>243</sup> and encouraged students to copy the works of master engravers as a pedagogic tool.<sup>244</sup> Instead, consistent with twenty-first-century notions of trademark law, the offense was appropriating the mark of another in connection with those goods.<sup>245</sup> Thus, the Council would have taken a

238. ADOLF BERER, ENCYCLOPEDIA OF ROMAN LAW 467 (The Am. Phil. Soc'y 1953) (1968) (definition of *falsum*).

239. *Id.*

240. *Id.* Although the earlier Roman law of *falsum* dealt specifically with forgery of money and wills, it was broadened over time to the point where “any intentional alteration of a formal document was considered forgery.” RUSS VERSTEEG, THE ESSENTIALS OF GREEK AND ROMAN LAW 197 (2010).

241. JUSTINIAN I, THE CIVIL LAW: VOL. 2 (Theodor Mommsen, ed., 2015) (1495).

242. KOERNER, *supra* note 51, at 209; Csehi, *supra* note 36, at 252; STRAUSS, *supra* note 185, at 68, 144 (describing extensive quality control regulations for market goods).

243. KOERNER, *supra* note 51, at 209.

244. Csehi, *supra* note 36, at 243.

245. KOERNER, *supra* note 51, at 209.

direct interest in the sale of counterfeit, intentionally mislabeled art ostensibly created by one of its most famous citizens, just as it would have with any misrepresented goods sold at other markets, such as counterfeit coins or adulterated wine.<sup>246</sup>

As the art historian Koerner summarizes:

The forger's crime did not lie in producing a copy, for indeed woodcuts and engravings were often purchased precisely to be copied by painters, illuminators, sculptors and the like. . . . What the city did decide was that to copy Dürer's prints with his *handzaichen*, which means literally "the sign of his hand," constituted a criminal act of deception or fraud.<sup>247</sup>

Koerner, in fact, directly connects the Nuremberg ruling to the just-discussed Roman concept of *crimen falsi* by noting that the defendant in the Dürer case had engaged in "deliberate misrepresentation of material objects."<sup>248</sup> Like the modern-day confusion-prevention rationale for trademark law, Koerner concludes that the act at the heart of the Nuremberg Dispute consisted of "a crime against the public trust."<sup>249</sup>

#### 4. The Role of Privileges in the Nuremberg Dispute Ruling

As detailed above in Section II.A, Dürer had, by January 1512 (the time of the Nuremberg Dispute), received an imperial privilege that he included in the colophon of all four of his books of bound woodcuts.<sup>250</sup> According to the surviving Latin text, the privilege prevented the print and sale of "works in spurious forms,"<sup>251</sup> or "images from forged blocks,"<sup>252</sup> depending on the translation.<sup>253</sup> Thus, some scholars have suggested that the privilege—a direct and powerful command from the Emperor himself—may also have informed the Council of Nuremberg's decision in Dürer's case.<sup>254</sup>

Ashcroft, who dates the privilege to 1511, suggests that the privilege "may have impelled the authorities to regard and enforce [Dürer's] monogram more generally."<sup>255</sup> Following Ashcroft's logic, the Nuremberg Dispute decision might be explained as an attempt to

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246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *See supra* Part II.A.

251. KOERNER, *supra* note 51, at 213.

252. ASHCROFT, *supra* note 67, at 338.

253. For the Latin text, see WITCOMBE, *supra* note 32, at 84, n.27. The original privilege is lost. *Id.*

254. KOERNER, *supra* note 51, at 213.

255. ASHCROFT, *supra* note 67, at 346.

enforce the spirit but not the letter of the privilege because, for some unknown reason, the Council of Nuremberg did not believe the privilege directly governed the case before it.<sup>256</sup> Perhaps, for instance, the Council of Nuremberg had concerns over enforcing an imperial document issued by a different (if overlapping) sovereign.<sup>257</sup>

Whatever the underlying reason, following Ashcroft's reading to its conclusion, the Council may have understood from the existence of the privilege that Emperor Maximilian wanted to protect Dürer and his works. As such, it may have compromised and ruled that Dürer's monogram was entitled to protection, even though they could not or would not recognize an exclusive right in the subject image itself. Such a compromise would also have been consistent with background principles of Roman and Nurembergian law against the false representation of goods in the marketplace.

It is also possible, however, that Dürer's privilege played little to no role in the Nuremberg Council's decision. Consideration of the privilege is, to be clear, not mentioned in the surviving text. Because of its commitment to heavy-handed market regulation, the Council was likely focused primarily on enforcing its general rules against the use of deceptive markings on goods in Nuremberg commerce rather than on Dürer's private rights in a personal privilege.

### *C. The Law of the Venetian Dispute*

This Part has thus far addressed the legal aspects of the Nuremberg Dispute because the textual record of the opinion, although sparse, is authoritative. The same cannot be said of the Venetian Dispute, which is contested on all levels. Despite its inherent unreliability, however, some scholars have attempted to parse the legal basis for the Venetian Dispute, even while generally questioning the

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256. One could certainly imagine rationales for the Council consistent with this approach and what we know of the facts. Perhaps the privilege did not cover the specific infringed prints at issue in the Nuremberg Dispute (it will be recalled that the opinion did not specify the infringed works). Or perhaps the Council was uncomfortable with the fact that the accused works were standalone prints whereas the privilege covered bound books of images (i.e., the extension of a book privilege to the sale of individual sheets of prints was considered a bridge too far for the Council). See WITCOMBE, *supra* note 32, at 85 (observing a possible distinction between prints and books of bound prints in this regard).

257. It is important to emphasize that the jurisdictional overlays in the late fifteenth and early sixteenth centuries were anything but precise. STRAUSS, *supra* note 185, at 219 ("Courts had no properly delimited competence with reference towards each other, and it was not even clear what authority, if any, outside tribunals . . . enjoyed over citizens."). It was clear, however, that the while the Council governed everyday life, the Holy Roman Emperor (Maximilian I at the time of the Nuremberg Dispute) was generally recognized as the ultimate authority of all legal rights and privileges.

plausibility of Vasari's account.<sup>258</sup> This Section provides an in-depth summary of those arguments, previewed in Section II.A above, particularly those of the influential Renaissance privilege scholar and art historian Christopher Witcombe. It then offers a counterargument to those criticisms rooted in a trademark framing of the case.

The Venetian Dispute, while long on narrative, is indeed short on law. According to Witcombe, apart from Vasari's narrative, no document from that time in Venice (whether relating to Dürer or otherwise) has ever been discovered to "record a suit brought against a print counterfeiter" in asserting a print privilege.<sup>259</sup>

This general lack of documentation has led some European legal scholars, such as Zoltan Csehi, to conclude that the Venetian Dispute, to the extent there was one, would have been brought not before the Senate, but before the powerful Venetian painters' guild.<sup>260</sup> Csehi extrapolates that the dispute must have been a private international law case "conducted by a forum according to the *lex loci*, probably on the basis of the Venetian rules, or perhaps the guild regulations—or in accordance with common law."<sup>261</sup> He also notes that guild members often used the longstanding and powerful painters' guild in Venice to settle internal disputes and prosecute regulatory violations, making it plausible that the guild itself was the forum for Dürer's suit.<sup>262</sup>

Unfortunately, Csehi's documentary evidence in favor of the guild as the forum is not strong. It is based primarily on Dürer's letter to a friend from April 25, 1506—two months after he complained to the same friend about Italian copyists.<sup>263</sup> In that letter, Dürer notes that "they hauled me before the *Signoria* [Senate] and I have to pay four fl[orins] to their *schull* [guild]."<sup>264</sup> As Ashcroft makes clear, however, Dürer was likely not referring to any sort of "procedural fee" for his lawsuit against Raimondi.<sup>265</sup> Instead, this most likely refers to dues that Dürer was forced to pay as a foreign, non-guild painter for accepting commissions in Venice.<sup>266</sup>

258. See e.g., WITCOMBE, *supra* note 32, at 81; Csehi, *supra* note 36, at 240.

259. WITCOMBE, *supra* note 32, at 81. Witcombe does, however, describe two cases of privileges successfully being asserted by book publishers against book copyists before a Venetian magistrate known as the Civil Lord of the Night (*Signori di Notte al Civile*). *Id.* at 85.

260. Csehi, *supra* note 36, at 240.

261. *Id.*

262. *Id.*

263. *Id.* at 238–40.

264. ASHCROFT, *supra* note 67, at 147, 148 n.7.

265. *Id.*; see also Csehi, *supra* note 36, at 240.

266. ASHCROFT, *supra* note 67, at 148; see also Elizabeth A. Garner, *The Secret of Refuting Yale's Christopher Wood-Book Review "The Early Dürer"* *London Review of Books*, THE HIDDEN

Witcombe is more generally skeptical of Vasari's entire narrative as it applies to Dürer, beyond just the question of forum. In addition to emphasizing the lack of official records, Witcombe grounds his attack in chronology.<sup>267</sup> First, Witcombe questions the pre-1506 dates attributed by art historians to Dürer's circulation of individual sheets of the *Life of the Virgin* series, asserting that those dates are "largely" based on now-discredited 1506 dates visible on some of Raimondi's copies.<sup>268</sup>

Scholars, however, have given extensive evidence to justify dates for Dürer's *Life of the Virgin* sheets prior to their publication in book form in 1511, unrelated to the dating of Raimondi's copies. These scholars include leading Dürer experts, many mentioned in this article, such as Panofsky,<sup>269</sup> Hutchinson,<sup>270</sup> Koerner,<sup>271</sup> Willi Kurth,<sup>272</sup> and many others.<sup>273</sup> They all generally date the first seventeen prints of the *Life of the Virgin* to approximately 1498–1505.<sup>274</sup> This time frame

SECRETS IN ALBRECHT DURER'S ART & LIFE (Aug. 25, 2013), <https://www.albrechtdurerblog.com/refuting-yales-christopher-woods-book-review-the-early-durer-london-review-of-books/> [<https://perma.cc/WD6J-7UHL>] (arguing same in blog post).

267. WITCOMBE, *supra* note 32, at 82–83.

268. *Id.*

269. PANOFSKY, *supra* note 36, at 96–104. Panofsky clarifies that eleven of the woodcuts were released as "single prints," with seventeen having been completed prior to his second and final trip to Venice in 1505. *Id.* Panofsky uses a range of techniques for dating the pre-Venice woodcuts. Although he does rely on the now-disputed 1506 date of Raimondi's series as confirmation that Dürer created a few of the works prior to 1506, most of Panofsky's dates are evidenced independently of Raimondi's copies. To take one example, Panofsky argues based on various formal and iconographic reasons that Dürer's *Glorification of the Virgin* is one of the oldest works in the series and was originally intended as a standalone print to be given to couples on their wedding day. *Id.* at 97–98.

270. Hutchinson dates the *Life of the Virgin* series (which she refers to as the *Life of Mary* series) to 1502–1505. HUTCHINSON, *supra* note 36, at 31. Like Panofsky, Hutchinson sees aesthetic developments in the handful of later-produced woodcuts added to the same series, which is consistent with Dürer having created them (but not the first seventeen) after his return from Italy in 1506. *Id.* at 106.

271. KOERNER, *supra* note 51, at 209–11 & n.33. Koerner, for instance, dates Dürer's *Joachim and the Angel* sheet from the *Life of the Virgin* series to 1503–04, and Raimondi's copy to "c. 1506." *Id.*

272. WILLI KURTH, *THE COMPLETE WOODCUTS OF ALBRECHT DURER* 26–27 (Silvia M. Welsh trans., Dover 2d ed. 1963) (1927) (analyzing a range of dates offered by various Dürer scholars for the first seventeen woodcuts from *Life of the Virgin*; finding them, with minor exceptions, to date from ca. 1498–1505).

273. Another such scholar is Konrad Oberhuber, who is also the source of Witcombe's doubts about Raimondi's print dates. Oberhuber notes that it "known" that Dürer's *Life of the Virgin* series was made between 1502–10 and circulated in Italy in sheets before publication as a single volume in 1511. FAIETTI & OBERHUBER, *supra* note 26.

274. See e.g., PANOFSKY, *supra* note 36, at 96–104; HUTCHINSON, *supra* note 36, at 31; KOERNER, *supra* note 51, at 209–21; KURTH, *supra* note 272; FAIETTI & OBERHUBER, *supra* note 26.



matches up well with Dürer suing Raimondi in 1506 when Dürer was in Venice for the final time.<sup>275</sup>

The art historian Lisa Pon, for instance, has written an authoritative account detailing Raimondi's copying of Dürer's works, an account that includes an in-depth study of some of Raimondi's prints in their proof states.<sup>276</sup> Pon openly acknowledges uncertainties in dating most key events in Raimondi's life,<sup>277</sup> including his arrival in Venice and the start of his fascination with Dürer's works.<sup>278</sup> Pon does not see any doubt, however, that seventeen of Dürer's twenty woodcuts from *Life of the Virgin* were already circulating prior to their publication as a series in 1511, when Raimondi would have encountered them in sheet form.<sup>279</sup>

Witcombe also advances a second chronological challenge to Vasari—one rooted in the dates of Dürer's imperial privilege.<sup>280</sup> Specifically, Witcombe observes that Dürer's privilege first appeared on the book edition of Dürer's *Life of the Virgin* series in 1511, inferring that the privilege would likely have been issued recently prior. This conclusion leads Witcombe to question any date before 1510 for a possible Venetian dispute.<sup>281</sup> As this later estimate would be more than three years after Dürer left Italy for the last time,<sup>282</sup> it would, if true, seriously impugn Vasari's account, which showed Dürer prosecuting the case in Venice personally.

This overreliance on the importance of the privilege, however, seriously limits Witcombe's analysis. Namely, like so many other scholars that have looked at the issue, he approaches it primarily, if not

275. WITCOMBE, *supra* note 32.

276. PON, *supra* note 10, at 62–66.

277. *Id.* at 15.

278. *Id.* at 42.

279. *Id.* at 39. Pon notes that Raimondi “may have already met Dürer during the latter's visit to Bologna in October 1506, and begun his copies of Dürer's *Life of the Virgin* woodcuts there.” *Id.* at 41 & n.8 (citing FAIETTI & OBERHUBER, *supra* note 26, at 153). Elsewhere, Oberhuber asserts based on a stylistic analysis that Raimondi's copying of that series probably occurred prior to the time Raimondi left Venice in 1508. Konrad Oberhuber, *Rafaello e l'incisione*, in RAFAELLO IN VATICANO 342 n.21 (1984).

280. WITCOMBE, *supra* note 32, at 84–85.

281. *Id.* It should be emphasized that Dürer had an imperial privilege from the Holy Roman Emperor Maximilian I. *Id.* This is to be distinguished from a Venetian privilege, which at the time (i.e., prior to 1517) would have been granted on an ad hoc basis by the Venetian Collegio but not the Senate. *Id.* at xxviii. Dürer would most likely not have been eligible for such a privilege because he did not print his works in Venice. Sarah Alexis Rabinowe, *Authorising the Printed Image in Early Modern Venice*, XXI ART ANTIQUITY & L. 157, 160 (2016). It should also be distinguished from Papal privileges, which began to be granted at that time as well. WITCOMBE, *supra* note 32, at xxix–xxx.

282. WITCOMBE, *supra* note 32.

exclusively, as a photocopyright question dealing with the enforcement of privileges.<sup>283</sup> His doubt, that is, stems from his late estimate of the issuance of Dürer's imperial privilege.

What Witcombe overlooks, however, is that the Venetian Senate—or whichever enforcement body heard Dürer's complaint—may have sought to enforce not Dürer's privilege but something more akin to the Roman law of *falsum*, which this Article has argued formed the likely basis for the Nuremberg ruling.<sup>284</sup> In such a case, the absence of a record of an enforceable privilege in 1506 would not alone be a reason to doubt Vasari's story. To the contrary, it would explain why an adjudicating body might have allowed the continued sale of the copyist's prints but demanded removal of Dürer's monogram therefrom. While Witcombe's photocopyright framing threatens the historicity of the Venetian Dispute entirely, a trademark framing synthesizes the known facts in a way that materially preserves Vasari's account intact.

By the end of the fifteenth century, Italian legal scholars had made substantial progress toward their goal of formally synthesizing dominant doctrines of Roman law with the governing German law of the day.<sup>285</sup> In the words of a twentieth-century treatise:

Italian jurists of the day embarked on a project to merge "Roman law, theoretically of universal authority . . . with the German law actually in force and with the ecclesiastical law of the church: the result was that the Commentators Italianized Roman law making it in its combined and composite shape a living common law of Italy."<sup>286</sup>

There was, moreover, tremendous legal cross-pollination between Nuremberg and Venice specifically around 1500.<sup>287</sup> Nurembergian lawyers, including the internationally famous jurist Gregor Heimburg and the scions of leading families such as Willibald Pirkheimer, were regularly trained in law at leading Italian schools like the University of Padua.<sup>288</sup> That same renowned university at Padua

283. See e.g., KOERNER, *supra* note 51, at 213; ASHCROFT, *supra* note 67.

284. STRAUSS, *supra* note 185, at 219.

285. This was toward the tail end of the so-called "Commenators" period in Italy, also known as the time of the "Post-Glossators" or "Bartolists," when Italian jurists were committed to constructing a "Roman law to fit the *actual life* of their age." 3 CHARLES PHINEAS SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 209 (1924) (emphasis in original).

286. *Id.* at 209–10.

287. *Id.* at 307–10. The Justinian Roman law adopted in German was in fact "not from the original source of Roman law, but from the texts of Roman law as glossed by Italian scholars." *Id.*

288. STRAUSS, *supra* note 185, at 213, 240–44; HUTCHINSON, *supra* note 36, at 52. The law faculty at Padua in the late fifteenth century, one of the leading of the day, would have shown "an intensified interest in the practical application of Roman law" to the modernizing world of the early Renaissance. OLIVIA F. ROBINSON, T. DAVID FERGUS & WILLIAM M. GORDON, *EUROPEAN*

was also serving the Republic of Venice around 1500.<sup>289</sup> Given these connections, a Venetian tribunal could just as easily have adopted the Roman law of *falsum* to judge Dürer's complaint in 1505–06, as did the Nuremberg Council a few years later.<sup>290</sup>

If one avoids the temptation, then, of assuming Dürer's case to be a pre-copyright privilege dispute and instead approaches it as a case about intentionally mislabeled goods in commerce, many of the objections of privilege scholars such as Witcombe lose their force. While this, of course, does not prove the historicity of the Venetian Dispute beyond Vasari's own recounting, it does at least remove a major source of doubt.

In all, despite the objections of Witcombe and others, a trademark framing of the Venetian Dispute synthesizes the historical record and seems to accord significantly with Vasari's account. Namely, this understanding ties together the following facts: seventeen of Dürer's *Life of the Virgin* sheets were circulating by 1505, and Raimondi had access to the prints by October 1506. Before 1510, Raimondi's copies of Dürer's prints included the AD monogram. After that date, the monogram conspicuously disappears from most of them. Around that time, Dürer wrote from Venice, complaining that Italians copied his work "wherever they find it."<sup>291</sup> Lastly, the Venetian Dispute, in all probability, would not have focused on Dürer's imperial privilege, but on the enforcement of Roman law trade regulations. Seen not as a protocopyright case but rather as a precursor to modern trademark litigation, the Venetian Dispute, as Vasari recounted, deserves serious consideration as a historical event.<sup>292</sup>

Consistent with this non-privilege-based approach, Renaissance legal scholars who are more sympathetic to Vasari's account, such as Joanna Kostylo, have suggested explanations for the Venice ruling rooted in semiotics rather than content protection.<sup>293</sup> As Kostylo puts it:

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LEGAL HISTORY 60 (2d ed. 1994). Pirkheimer apparently never completed his law degree. HUTCHINSON, *supra* note 36, at 52.

289. HUTCHINSON, *supra* note 36, at 52.

290. See also KOERNER, *supra* note 51, at 490 n.59 (citing additional sources on legal cross-pollination between Nuremberg and Venice).

291. See *supra* Section II.A.

292. See, e.g., Lincoln, *supra* note 177 ("The dates Vasari gives do not make this precise version of events probable, but some version of the story must have occurred because in about 1506 and in the middle of the series, Marcantonio stopped using Dürer's distinctive monogram at the bottom of the engravings and substituted the empty plaquette that became one of his signatures for a long time thereafter.")

293. Kostylo, *supra* note 57, at 44.

In the context of contemporary art theory and the Renaissance culture of learning by imitation, the reproduction of “masters” was widespread and unproblematic. But not the reproduction of the artist’s personal sign which suggested the artist’s personal presence in the making of a particular work of art. . . . [W]hile the Venetian legal system did not consider the copying of Dürer’s prints to be illegal, at the same time, it offered protection for something much more subtle and immaterial.<sup>294</sup>

This approach is also consistent with the view of Renaissance print scholar Evie Lincoln.<sup>295</sup> Lincoln imagines a dispute triggered by Dürer’s objection not to the copying of his work as such, but to Raimondi’s use of Dürer’s monogram.<sup>296</sup> That monogram, to Dürer,

was a guarantee that the particular visualization of a moment from the life of the Virgin was his own, but it also meant that the masterful cutting and articulation, or crafting, of the figures and the detailed background and genre scenes were also his own. This last aspect of visual information was changed in Marcantonio’s (for the most part) faithful engraved copies of Dürer’s woodcut, and this is one of the several reasons why an artist would be upset about the pirating of his images.<sup>297</sup>

This notion of the mark as a guarantor of difficult-to-define qualities in an otherwise similar-seeming copy comports with twenty-first-century notions of trademarks as repositories of the owner’s goodwill.<sup>298</sup>

Pon offers a final, compelling footnote on Renaissance norms surrounding Raimondi’s copying, through which she interrogates Raimondi’s state of mind.<sup>299</sup> Unlike Witcombe, she is ultimately less doubting of Vasari’s account (though she does question many details).<sup>300</sup> Instead, Pon focuses more on the copyist’s motive and argues against viewing the appearance of Dürer’s mark in Raimondi’s published copies as evidence of an intent to exploit the commercial advantage of Dürer’s

294. *Id.* After recognizing this point, however, Kostylo goes on not to connect the case to trademark protection and market regulation, but rather to protecting “the artist’s individual style (*maniera*)—an acknowledgement of Dürer’s generative powers.” *Id.* That conclusion seems to bring the case back to the arena of creativity and protocopyright norms, as opposed to the more natural reading that it (like its Nuremberg companion) was about preventing mislabeled goods from appearing in the marketplace. *Id.* Koerner reaches a similar conclusion to Kostylo: “Dürer’s compositions themselves, in other words, were not protected, only his personal monogram, the main function of which would have been precisely to claim authorship of the composition.” KOERNER, *supra* note 51, at 209. Interestingly, this reading also suffers from a similar limitation, in that it implicitly subordinates the market-regulating and consumer protection aspects of protecting Dürer’s monogram to a more propertized conception of authorship.

295. Lincoln, *supra* note 177, at 1112–13.

296. *Id.*

297. *Id.*

298. See *infra* Section V.B; Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006).

299. PON, *supra* note 10, at 62.

300. *Id.* at 61.

mark.<sup>301</sup> Pon notes that Dürer's monogram was missing in a proof state of *Glorification of the Virgin* made by Raimondi himself, but was added (along with Raimondi's MAF monogram and the publisher's NDFS mark) in a final print version.<sup>302</sup> Pon argues that the AD mark, then, may have been added by the publisher (and not Raimondi) in an attempt to credit Dürer as the original artist, not to appropriate his goodwill.<sup>303</sup>

Of course, the addition of the Dürer mark by a publisher might also be evidence of the very opposite—namely, that the entity with the largest financial stake in the venture saw a lucrative commercial opportunity in adding Dürer's sign to the final published print. Other art historians have been more skeptical of copyists' motives for including the AD monogram, suggesting that it might have been (akin to modern cases) "to sell them at the price of an 'original' Dürer."<sup>304</sup>

The point for these purposes, however, is that Pon's caution about motive<sup>305</sup> is entirely consistent with this Article's contention that Dürer's disputes were most likely grounded in prototrademark commercial regulation (and not protocopyright privileges). Both of these cases reveal Renaissance tribunals grappling with the establishment of norms around when it may or may not be acceptable for a copyist to apply another artist's mark to mass-reproduced prints in commerce.<sup>306</sup> Whether one views the cases with a more positive, public-domain-enriching view of Raimondi's reproductions or more cynically, following Dürer himself, it seems beyond dispute that Dürer was able to use the law of the day to prevent his monogram from appearing in Raimondi's copies, even though he could not prevent the continued publication of the copies themselves. One is left, that is, with clear evidence of rulings in Venice and Nuremberg remarkably consistent with the principles, policies, and purposes behind the modern law of trademark infringement.

301. *Id.* at 62.

302. *Id.*

303. *Id.* at 62–63. Pon objects in particular to any suggestion that Raimondi was a plagiarist stealing artistic property when it is perhaps more profitably cast in terms of conceptions emerging through, or even because of these events: conceptions of what an artist is, of what an artist's relationship to his work is, and of how legal regulation can be used to fashion or enforce these ideas.

*Id.* at 58.

304. KOERNER, *supra* note 51, at 219.

305. PON, *supra* note 10, at 62.

306. *Id.*

## V. AFTER DÜRER

Exactly what happened in Dürer's cases is a matter of distant and disputed legal history, likely never to be resolved. Nevertheless, modern-day academics might still profit by looking to the narratives that have developed around the cases over the past several decades. Accordingly, this Part looks to how Dürer's cases have or have not been received in legal scholarship. The next and final Part then shows how Dürer's complaints met every element of what we now consider to be a claim for trademark infringement, including the remedy provided, and reflects on what it might mean for modern trademark law theory to have emerged not out of English trade battles, but from an artist's woodblock printing shop in Nuremberg.

*A. The Dürer Disputes in Legal Scholarship*

When contemporary legal scholars approach Dürer as litigant,<sup>307</sup> it tends to be as a footnote to copyright history, positioning Dürer's disputes as an early reckoning for protocopyright privileges and the law of authorship. They focus squarely on the Vasari narrative and its relation to print history.<sup>308</sup> Modern trademark law scholars, conversely, have generally paid only passing attention to Dürer's suits. Those that have done so have turned not to Venice, but to the Nuremberg Dispute, which they have treated in a cursory fashion, if at all.<sup>309</sup>

## 1. The Protocopyright Approach to Dürer's Disputes

To be sure, Dürer and his cases have received significant attention from legal commentators. That body of scholarship, however, tends to focus on Vasari's Venetian account and to consider it for what it can tell us about the law of privileges and authorship.<sup>310</sup>

It is outside the scope of this Article to account for the precise reasons for this scholarly bias; nevertheless, a few possible explanations are worth considering. First, Vasari is a monumental figure in art history, and his accounts draw immeasurably more attention than does an anonymous entry in the Nuremberg archives. Second, Vasari's narrative, as this Article has shown, is far richer in facts and

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307. This Article's references to legal scholarship here are meant to exclude the countless excellent treatments of Dürer's cases in art historical scholarship that have been discussed throughout. These accounts are generally not directed toward lawyers, judges, and law scholars.

308. See, e.g., KOSTYLO, *supra* note 57, at 44.

309. See, e.g., KOERNER, *supra* note 51, at 213; ASHCROFT, *supra* note 67.

310. See, e.g., KOERNER, *supra* note 51, at 213; ASHCROFT, *supra* note 67.

characters, making it serve double duty as a biographical record of leading figures and events of the day, whereas the Nuremberg Dispute is little more than an abstract ledger of one remedial order. Third, legal scholars of this period tend to focus on the laws of books, printing, and innovation, making copyright and its antecedents a more natural and obvious legal referent than trademark regulation (a body of law thought to have developed, in its modern form, a century later).<sup>311</sup> Finally, as this Article argues more generally, there is an ineffable lacuna in art law scholarship that tends to marginalize trademark regulation and approach it cautiously as something foreign, commercial, and mercantile.

For example, in his copyright treatise, William Patry discusses Dürer's Venetian Dispute in the context of copyright law's early history in a section dedicated to "Early Venetian privileges and statutes."<sup>312</sup> Relying primarily on Witcombe and Pon, Patry limits his treatment solely to the Venetian Dispute—highlighting inconsistencies in Vasari's story brought out by these scholars—and focuses only on whether and how Dürer may have been enforcing his imperial privilege in Venice.<sup>313</sup> Like Witcombe, Patry doubts that Dürer would have been able to enforce his imperial privilege before a Venetian forum.<sup>314</sup> This leads him to conclude that the case should be seen as little more than a "colorful, cautionary tale for historical reconstructions of intellectual property norms."<sup>315</sup>

Joanna Kostylo similarly considers the Venetian Dispute through the lens of early privilege and authorial property claims.<sup>316</sup> Kostylo is more willing than most Renaissance legal scholars to see in Vasari's narrative a story about Dürer's "sign" as opposed to just the content of his designs.<sup>317</sup> Nevertheless, she still addresses the case more for what it says about the Venetian legal system's willingness to protect Dürer's "generative powers" and "style" (i.e., his authorial output) than what it says about trademarks or the regulation of source information

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311. See *infra* Section V.B (discussing Schechter's history of trademarks).

312. WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:2 (1st ed. 2021) ("Early Venetian privileges and statutes.").

313. *Id.* Patry does note that Dürer seems to have been angered by Raimondi's "passing off" of his "A.D." insignia but does not follow the trail further. See *id.*

314. *Id.*

315. *Id.*

316. KOSTYLO, *supra* note 57, at 43–44.

317. *Id.*

in the consumer marketplace.<sup>318</sup> Kostylo, like Patry, also does not mention the more concrete ruling in the Nuremberg Dispute.<sup>319</sup>

Elsewhere, a leading online repository of early copyright materials, *Primary Sources on Copyright*, contains an extended section on Vasari's account of the Venetian Dispute in multiple translations, with images, as well as a translated copy of Dürer's 1511 imperial privilege.<sup>320</sup> Nowhere in the collection, however, is there mention of the Nuremberg Dispute ruling, despite the parallels between the two cases.<sup>321</sup>

Finally, any fair and accurate picture of the Venetian Dispute in legal scholarship requires mention of the copyright-adjacent realm of art forgery.<sup>322</sup> These more sensationalized accounts, often directed toward a general audience, tend to track Vasari's narrative but include the occasional unsupported fact to embellish the retelling.<sup>323</sup>

As these examples reveal, when copyright and privilege scholars address Dürer, they tend to look solely to the Venetian Dispute at the expense of the Nuremberg Dispute and ignore the consumer-trade-regulatory aspects of the narratives in favor of Dürer's authorial claims.<sup>324</sup> Together, those biases have led to skepticism about the value of Dürer's disputes as legal precedent and a gap in the literature connecting the disputes to early trademark law.

318. *Id.*

319. *See generally id.*

320. *See* Vasari, *supra* note 16; *see also* *Imperial Privilege for Albrecht Dürer, Nuremberg (1511)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_d\\_1511b](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_d_1511b) [<https://perma.cc/NPA9-S97R>] (last visited Mar. 9, 2023).

321. *See* All Documents: Country Germany, PRIMARY SOURCES ON COPYRIGHT (1450–1900), [http://www.copyrighthistory.org/cam/tools/request/browser.php?view=country\\_record&parameter=Germany&country=&core=all](http://www.copyrighthistory.org/cam/tools/request/browser.php?view=country_record&parameter=Germany&country=&core=all) [<https://perma.cc/Y37C-Z43K>] (last visited Mar. 9, 2023) (showing German listings without any mention of the Nuremberg Dispute); Edward L. Carter, *Copyright Ownership of Online News: Cultivating A Transformation Ethos in America's Emerging Statutory Attribution Right*, 16 COMM. L. & POL'Y 161, 178 (2011) (limiting analysis to only the Venetian Dispute).

322. *See, e.g.*, PATRY, *supra* note 312.

323. The best-selling author and art history professor Noah Charney takes a number of liberties in his retelling of the Venetian Dispute including by representing as fact that (i) Dürer sued not just Raimondi but also the Dal Jesus publishing house; (ii) the “Venetian authorities declared that the prints were not exact copies but merely excellent imitations;” and (iii) they “ruled that Raimondi should not be blamed for being as skilled as an artist as Dürer and that Dürer should be flattered that his work was considered important enough to copy.” NOAH CHARNEY, *THE ART OF FORGERY* 12 (2015). Charney provides no evidence for these claims, and this Author is aware of none. *See also* Justine Mitsuko Bonner, Note, *Let Them Authenticate: Detering Art Fraud*, 24 UCLA ENT. L. REV. 19, 27 (2017) (presuming from Vasari's telling that Dürer and Raimondi entered into “an agreement that Raimoni [sic.] would not reproduce Dürer's name or monogram on the works he copied”).

324. *See, e.g.*, KOSTYLO, *supra* note 57, at 43–44; PATRY, *supra* note 312.



## 2. References to Dürer's Disputes in Trademark Law Scholarship

Trademark law scholarship offers a mirror image to that seen in the copyright space. There is little of it relative to the copyright literature; it tends to cite only the Nuremberg Dispute, and it does so in cursory fashion.<sup>325</sup>

To begin with, Dürer's cases are entirely absent from the three most influential US treatises on trademark law.<sup>326</sup> There does not appear to be any published US case that mentions Dürer's trademark dispute. Leading modern accounts of trademark history in US law reviews do not mention Dürer or his cases.<sup>327</sup> Moreover, Dürer is not cited in any of the leading US casebooks on trademark law.<sup>328</sup>

325. Apart from the art historian Evie Lincoln's interdisciplinary essay, discussed just below, this Author was able to locate only two passing references to the Venetian Dispute in US law reviews, both of which unreliably date it to times when Dürer was not in Venice. See Henry Lydiate, *What Is Art? A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgment in the Star Wars Case: Lucasfilm Limited v. Ainsworth*, 4 J. INT'L MEDIA & ENT. L. 111, 119 (2013) (providing a date of 1511 for the suit; characterizing it as involving Dürer's "logo"—his brand identity" and "herald[ing] the development of what became trademark and other intellectual property laws"); Zachary Shufro, *Haute Couture's Paper Shield: The Madrid Protocol and the Absence of International Trademark Enforcement Mechanisms*, 45 N.C.J. INT'L L. 645, 651 n.28 (2020) (dating Vasari's account of Dürer's claim against Raimondi to 1512, perhaps by conflating it with the Council of Nuremberg's ruling of that year). It should also be noted that Charney, the art fraud writer, cites to an unpublished, private interview with the art law scholar Jane Ginsburg in which he quotes Professor Ginsburg as suggesting about the Venetian Dispute that the "inclusion of the AD monogram would be considered 'passing off' copies as originals, thereby violating trademark law." CHARNEY, *supra* note 323, at 13.

326. Dürer is not mentioned anywhere in MCCARTHY, *supra* note 5; ANNE GILSON LALONDE & JEROME GILSON, *GILSON ON TRADEMARKS* (2023); or LOUIS ALTMAN & MALLA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES* (4th ed. 2022).

327. To give a few of the most highly cited articles of the last few decades that discuss trademark history or theory, in no particular order, and where Dürer's name goes unmentioned, see Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007); Bone, *supra* note 298; Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461 (2005); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004); Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761 (2013); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999); Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law & Cognitive Science*, 86 TEX. L. REV. 507 (2008); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

328. Dürer is not mentioned anywhere in JANE C. GINSBURG, JESSICA LITMAN & MARY KEVLIN, *TRADEMARK AND UNFAIR COMPETITION LAW* (7th ed. 2021); BARTON BEEBE, *TRADEMARK LAW AN OPEN-SOURCE CASEBOOK* (8th ed. 2021); DAVID C. HILLIARD, JOSEPH NYE WELCH, II & ULI WIDMAIER, *TRADEMARKS AND UNFAIR COMPETITION* (12th ed. 2019); GRAEME B. DINWOODIE & MARK D. JANIS, *TRADEMARKS AND UNFAIR COMPETITION: LAW AND POLICY* (5th ed. 2018); or GLYNN LUNNEY, *CASES AND MATERIALS ON TRADEMARK LAW* (2d. ed. 2016).

There is one notable line of trademark law historic scholarship in the United States, originating with Edward S. Rogers, that looks back to the Nuremberg Dispute ruling.<sup>329</sup> In an early work on the history of trademarks from 1911, Rogers, a key backer and drafter of the US Lanham Act, cites the Nuremberg Dispute ruling to support the proposition that artist monograms “were protected against infringement” even prior to the leading British case of *Southern v. Howe* from 1618.<sup>330</sup> Six decades later, Sidney A. Diamond, citing the same underlying source as Rogers, read the precedent to show that trademark disputes preexisted the law of copyright.<sup>331</sup>

Since Diamond’s 1975 piece, a handful of law review articles have mentioned the Nuremberg Dispute,<sup>332</sup> usually restating Diamond’s one-paragraph treatment. Megan Carpenter, for instance, reaffirms Diamond’s identification of trademark law as chronologically prior to copyright in legal history and offers Dürer’s Nuremberg Dispute as an example of “what we would think of today as trademark infringement.”<sup>333</sup> Carpenter returned to this theme in a later work as well, again citing Diamond’s account of Dürer’s case for the proposition that trademarks are central to the histories of publishing and art.<sup>334</sup>

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329. Edward S. Rogers, *Some Historical Matter Concerning Trademarks*, 9 MICH. L. REV. 29, 32–33 (1910–1911).

330. *Id.* A similarly terse assertion is made in Benjamin G. Paster, *Trademarks—Their Early History*, 59 TRADEMARK REP. 551, 556–57 (1969).

331. Sidney A. Diamond, *The Historical Development of Trademarks*, 73 TRADEMARK REP. 222, 236 (1983) (observing, “it may be noted that the ‘certain foreigner’ evidently was allowed to continue copying Dürer’s works so long as he did not use the ‘AD’ monogram—the idea of an artist’s copyright in his creations had not yet become part of the law”). For his accounts of the Nuremberg Dispute, Paster looked primarily to GEORGE HAVEN PUTMAN, *BOOKS AND THEIR MAKERS DURING THE MIDDLE AGES* (1897), who in turn cites to the Austrian art historian Moritz Thausing. Thausing, for his part, has been credited as the source of the common misperception that Vasari dated the Venetian Dispute to 1506. Vasari does not date the dispute. Instead, that came from Thausing. See FAIETTI & OBERHUBER, *supra* note 26.

332. Peter J. Karol, *Affixing the Service Mark: Reconsidering the Rise of an Oxymoron*, 31 CARDOZO ARTS & ENT. L.J. 357, 404 n.30 (2013).

333. Megan M. Carpenter, *Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?*, 99 TRADEMARK REP. 892, 905–06 (2009).

334. Megan M. Carpenter, *Contextual Healing: What to Do About Scandalous Trademarks and Lanham Act 2(a)*, 68 HASTINGS L.J. 1, 8 (2016). Carpenter goes on to assert, “Rather than complaining about the copying of the work *per se*, however, Dürer asked that the individual be prevented from using ‘AD’ as a source-identifying mark.” *Id.* There is no evidence, however, that Dürer approached the claim in this manner, and Diamond does not suggest this. See Diamond, *supra* note 331, at 279. To the contrary, Dürer by 1511 was excoriating “envious thieves” of his works and asserting exclusive rights to his own content in privileges and would almost certainly have complained about the copying of his work in addition to use of his monogram as a source identifier. See Lydia Pyne, *The Proliferation and Politics of Copies During the Renaissance*, *Hyperallergic* (Apr. 29, 2019), <https://hyperallergic.com/497448/copies-fakes-and-reproductions->

There are, of course, many instances where art historians have reached for trademark law concepts to color their more aestheticized treatments of Dürer's litigations.<sup>335</sup> To date, however, there is apparently only one instance of such an analysis specifically targeted to US legal scholars and commentators—namely, the Renaissance print historian Evie Lincoln's interdisciplinary essay on Dürer's monogram in the *DePaul Law Review*.<sup>336</sup> In that piece, Lincoln compellingly suggests that Dürer's AD symbol provided a "guarantee" of quality in a manner analogous to that used by trademark scholars.<sup>337</sup> Lincoln keeps her feet firmly planted on art historical ground, however, and does not purport to connect that conception with specific legal claims.<sup>338</sup>

In sum, if copyright law scholarship tends to focus only on the Venetian Dispute as a central myth of print and privilege history, the converse occurs in trademark law scholarship. The small handful of trademark law scholars who have seriously reckoned with Dürer have tended to provide only narrow and overlapping citations to the Nuremberg Dispute without delving into its contradictions and theoretical underpinnings. Both approaches miss the deeper significance of the cases as defining a foundational moment in trademark legal history.<sup>339</sup>

### *B. Frank Schechter's Avoidance of Dürer*

Perhaps nowhere is the neglect of Dürer's cases in trademark scholarship more keenly felt than in Frank Schechter's *The Historical Foundations of the Law Relating to Trademarks*.<sup>340</sup> In this long monograph, described by modern scholars as a "seminal work" of

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printmaking-in-the-renaissance-blanton-museum-of-art/ [https://perma.cc/2ZJ4-YE4J].; see also Shufro, *supra* note 325, at 652 & n.28 (citing Diamond's account of Dürer's Nuremberg Dispute); Csehi, *supra* note 36, at 253 (observing in passing that the Nuremberg Council's order can be read as "one extending the trademark right" to Nuremberg's renowned local artist as a sort of "copyright-like protection against the forgery of his works."). Interestingly, it is only in the passing context of the Nuremberg Dispute that Csehi mentions trademarks at all, omitting that from his large discussion of Vasari's narrative. Csehi, *supra* note 36, at 253.

335. See, e.g., KOERNER, *supra* note 51, at 209–12 (explicitly noting the role of Dürer's *handzzeichen* and connecting the Nuremberg Dispute ruling to the Roman law of falsity; observing of the Nuremberg Dispute decision that "the only thing that is truly Dürer's is his name; or better what is criminal about replicating the monogram is the false appearance the copy conveys that it is the immediate product of Dürer's hand, hence its term 'hand'-zaichen").

336. See generally Lincoln, *supra* note 177.

337. *Id.* at 1112.

338. See generally *id.*; cf. KOERNER, *supra* note 51, at 209 (discussing fraud claims).

339. See, e.g., Diamond, *supra* note 331, at 236.

340. Cf. SCHECHTER, *supra* note 4.

trademark history,<sup>341</sup> Schechter sought to “illumine the hitherto ‘dim historic trails’ to the sources of [trademark] law and to analyze critically the present state and tendencies of [trademark] law in light of its history.”<sup>342</sup> The work, which originated as Schechter’s doctoral thesis at Columbia University, was lauded from the outset and described early on by Congress as “perhaps the most outstanding work on the subject” of trademark law.<sup>343</sup> Schechter’s work remains a highly influential work of trademark history, cited in the historical accounts of all three leading US treatises on trademark law by Thomas McCarthy, Rudolph Callmann, and Jerome Gilson, respectively.<sup>344</sup>

Schechter establishes his theme from the very first pages of his introduction, opening with a digression into commercial law so that he can then squarely ground the subject of “[trademarks] and good will” in “commercial life today . . . circumscribing at a hundred different points the predatory and overreaching instincts of the mercantile mind.”<sup>345</sup> Trademarks, as Schechter explains, are the stuff of business and commerce.<sup>346</sup>

As one would expect from this framing, his account traverses every imaginable sort of pre-modern commerce and trade—starting with the famed (if hazily depicted) clothier in the 1618 case of *Southern v. Howe*, thought to be the first reference to trademarks in recorded English law.<sup>347</sup> From there, Schechter journeys through extended chapters on guild marks generally, and the cloth and cutlery trades in particular.<sup>348</sup>

Despite covering plenty of German and other continental examples,<sup>349</sup> Schechter never mentions Dürer or Dürer’s disputes in his nearly 200-page account.<sup>350</sup> The closest he comes is in reference to the

341. See, e.g., McKenna, *supra* note 327, at 1851.

342. SCHECHTER, *supra* note 4, at xiii.

343. Robert G. Bone, *Schechter’s Ideas in Historical Context and Dilution’s Rocky Road*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 469, 474–75 & n.30 (2008).

344. 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:1 n.1 (5th ed.); 7 CALLMANN ON UNFAIR COMPETITION, TRADEMARK & MONOPOLIES § 26:2 n.4 (4th ed.); 1 GILSON ON TRADEMARKS § 1.06 n.10 (2022).

345. SCHECHTER, *supra* note 4, at 4.

346. 15 U.S.C. § 1127 (2006).

347. SCHECHTER, *supra* note 4, at 6–7. For a discussion of the varying accounts of the *Southern* case, see McKenna, *supra* note 327, at 1850–51.

348. SCHECHTER, *supra* note 4, at 19–21. This comes after Schechter spends some time distinguishing marks of ownership or “proprietary marks” (which were not trademarks in his view) from marks of production (which were). *Id.* at 20–21.

349. See, e.g., *id.* at 196–98 (indexing covered trades by geography).

350. He also fails to mention Dürer in his most cited trademark article. See Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

early print and publishing trades in general, and to book publisher's warnings about infringement of their marks in particular.<sup>351</sup> For instance, he relates the well-known case of the publisher Aldus Manutius, who warned readers in a 1518 book not to confuse his "well-known sign of the dolphin wound around the anchor" with unauthorized copies that had been affixed (facing the reverse direction) in the books of his competitors.<sup>352</sup>

Schechter's rejection of these devices as trademarks, or even precursors to trademarks, goes far in explaining why he avoided Dürer entirely. Schechter argued strenuously that such symbols were distinguishable from modern trademarks in that they were "simple marks of personality which gradually acquired decorative function rather than any particular legal significance."<sup>353</sup> They were not consistently used "industrial marks" of production, but merely variable devices that were ultimately "decorative rather than regulatory."<sup>354</sup> To Schechter, these characteristics meant that such marks were not valuable assets to their owners—a critical precondition, to him, of a precursor to the modern trademark.<sup>355</sup> Critically, this same distinction between decorative symbols of personality and industrial marks eliminated from trademark status not just publisher signs but any craftsman's mark of the Middle Ages.<sup>356</sup>

Why was Schechter at pains to distinguish printers' and publishers' devices from what he saw as the true trademarks of industry? For much of his lifetime, Schechter argued that trademarks constituted valuable assets to their owners, symbols of goodwill "impressing on the mind of the purchaser the excellence of the product in question and thereby the creation of the psychological need for that product."<sup>357</sup> He thus dismissed any other marks that he considered to be lacking in assignable or even inheritable value.<sup>358</sup>

Ironically, even under this relatively narrow and propertized view of trademarks, Dürer's AD monogram, for its inherent value

351. SCHECHTER, *supra* note 4, at 63.

352. *Id.* at 63–64. He gives two other similar examples as well. *Id.* at 64.

353. *Id.* at 77.

354. *Id.* at 64 ("[T]he exclamations of outraged victims of unfair competition rather than as a threat to invoke the protection of the law for a definite legal right in a device.").

355. *Id.* at 77–78. Schechter also conversely rejected these as compulsory police or regulatory marks (medieval predecessors, to him, of trademarks) because they were neither mandated nor understood as a "liability." *Id.* at 78.

356. *Id.* at 78.

357. *Id.*

358. *Id.* at 77.

among Dürer's contemporaries, would likely still have qualified.<sup>359</sup> But, by categorically rejecting all "mark[s] of personality"<sup>360</sup> from trademark status, Schechter created a major omission in his facially comprehensive account.

Whatever the reason, Schechter drew a distinction between valueless marks of personality on the one hand and valuable marks of industry on the other. The former he associated with creative and craft works; the latter were those of industry and commerce.<sup>361</sup> As a result, Schechter categorically excluded Dürer from his account of early trademark history, which in turn discouraged future trademark scholars from fully investigating Dürer and his famous monogram.

## VI. DÜRER'S CASES AS TRADEMARK INFRINGEMENT

Had Schechter not created an artificial distinction between marks of decoration and industry, he might have observed that Dürer's use of his monogram meets all the elements of modern trademark usage and that Dürer's suits parallel trademark infringement claims. This final Part defines the terms trademarks and trademark infringement under current practice and then makes that case.

Before doing so, however, one should recognize the dangers inherent in blindly conflating modern and Renaissance notions of trademark law and clarify the limits of any such project. A number of the scholars cited above express a similar caution. Zoltan Csehi makes the point explicitly in reference to the Nuremberg Council: "We have to treat very carefully the institutions that evolved under the circumstances of our era, such as . . . trademark rights."<sup>362</sup> Professor Ginsburg echoes a similar hesitancy about the Venetian Dispute: "Dürer's cases probably come too early to be called [trademark] cases[;] . . . concepts we consider distinct had not then received full articulation."<sup>363</sup> Pon, further justifying this caution, demonstrates convincingly that the verb "counterfeit" in Italian, as used by Vasari in the *Lives* (the verb *contrafare*), "does not indicate any negative judgement."<sup>364</sup> Vasari's Raimondi would have "copied as part of his

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359. Dürer, in fact, left his woodblock prints to his widow Agnes, who herself successfully brought suit to enjoin copyists after his death. See KOERNER, *supra* note 51, at 214.

360. SCHECHTER, *supra* note 4, at 77.

361. *Id.* at 78.

362. Csehi, *supra* note 36, at 251–52.

363. Email from Jane Ginsburg to Lisa Pon & Peter Karol (July 8, 2021, 12:29 PM) (on file with the author).

364. PON, *supra* note 10, at 1432.

education,” and bringing to that term a twenty-first-century association of piracy would be anachronistic and wrongheaded.<sup>365</sup>

The point is not, however, to avoid drawing comparisons between modern and late medieval legal practices. It is to do so thoughtfully, with clear eyes about historical contexts and contemporary assumptions, and to use careful definitions. This Article does not purport to suggest that the jurists of Dürer's day understood themselves to be enforcing a coherent body of trademark law akin to the Lanham Act. Instead, it seeks to show that all of the aspects of modern trademark use and infringement were present in what we know of Dürer's cases, even before these concepts had received a rigorous articulation in law.

### *A. Dürer Used His AD Monogram as a Commercial Trademark*

Under the federal Lanham Act, the primary source of trademark law in the United States,<sup>366</sup> a trademark is a “word, name, symbol, or device, or any combination thereof . . . used by a person, . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods.”<sup>367</sup> Courts and lawmakers have long recognized that monograms, as applied to goods, are core examples of trademarks.<sup>368</sup> In addition, under the Lanham Act, the

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365. *Id.* at 141–42. Pon, in fact, contrasts Vasari's use of *contrafare* with the Nurembergian Council's use of *ain falsch*, the latter of which does have the negative connotation of deliberate misrepresentation. *Id.* at 141.

366. Although Dürer's claims originated in Germany and Italy, this Part focuses only on US trademark law in comparison to Dürer's enforcement actions, as opposed to the contemporary law of those or other jurisdictions. It does so for three reasons. First, this aligns with most historic US trademark law scholarship, such as that seen in almost all of the sources cited in Section V.A.2 and V.B., by tracing present US trademark practice to its European precedents. Second, it is outside the scope of this Article to provide a survey across multiple international jurisdictions, and the United States provides a strong and representative example of contemporary practice. Third, this project is not intending to make a direct causal claim that Dürer's cases spawned a specific, cohesive body of trademark law. To the contrary, the point is to emphasize at a high level the remarkable conceptual similarities between how Dürer enforced his marks 500 years ago and how trademark practitioners and scholars understand trademarks now.

367. 15 U.S.C. § 1127 (definition of “trademark”); *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 162 (1995) (citing same).

368. *See, e.g., Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 88 (2d Cir. 2012) (citing multiple court discussions of the “well-known monogram logo” of Louis Vuitton as a trademark). The near-universal acceptance of monograms as trademarks extends to artist and artisan monograms. *See, e.g., U.S. Glass Co. v. Tiffany & Co.*, 55 F.2d 440, 442 (C.C.P.A. 1932) (affirming rights of Tiffany in its “T” monogram logo for blown glass against junior user).

modern trademark must be “use[d] in the ordinary course of trade.”<sup>369</sup> This requirement, among other things, distinguishes trademarks from any random sign or symbol drawn on a piece of paper.<sup>370</sup>

Few marks, historical or contemporary, could sit more at the heart of this definition than the AD monogram of Albrecht Dürer. Dürer’s monogram is literally a symbol or device that he used to distinguish his woodcut prints from those made and sold by others and to indicate that his workshop was the source of the prints.<sup>371</sup> Dürer, of course, did apply his AD monogram to sketches and other purely private works (his famed *Self-Portrait of 1500*, shown above, remained in his home for his entire life).<sup>372</sup> Yet, the vast majority of works on which Dürer applied his monogram were mechanically reproduced prints publicly sold at scale in the commercial markets of Nuremberg and throughout Europe.<sup>373</sup> Dürer’s commercial use of his monogram closely parallels the modern conception of a trademark under the Lanham Act.

Dürer used his monogram with the specific intent that purchasers would know that these prints came from his workshop and had been made under his supervision.<sup>374</sup> To him, the AD monogram had

369. See 15 U.S.C. § 1127 (definitions of “trademark,” “abandoned,” and “use in commerce”); Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977 (2019) (summarizing trademark use rules). The Author is ignoring for these purposes the US intent to use regime, as it is immaterial to Dürer’s cases. Cf. 15 U.S.C. § 1051(b).

370. 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 16:1 (5th ed. 2023) (“At common law, ownership of trademark or trade dress rights in the United States is obtained by actual use of a symbol to identify the goods or services of one seller and distinguish them from those offered by others. The way to obtain rights in a business symbol is to actually use it as a mark. . . . With each sale of goods or services under such a business symbol, the seller builds up greater and greater legal rights in that symbol. In the absence of customer recognition of the symbol, the ‘owner’ of the business has no good will, and thus there is nothing for the ‘trademark’ or ‘trade dress’ to symbolize or represent.”) (internal citations omitted).

371. This Author does not consider the AD or other purely initial-based monograms to be examples of “selfmarks” of the type explored by William McGeeveran in his article of the same name. See William McGeeveran, *Selfmarks*, 56 HOUS. L. REV. 333 (2018). The limitations on personal name or surname marks that McGeeveran discusses generally do not apply in the case of monograms. *Id.* at 365–68; cf. 15 U.S.C. §1052(e)(4) (denying registration to “a mark that is primarily merely a surname”). Initials are not surnames. See *Michael S. Sachs Inc. v. Cordon Art B.V.*, 56 USPQ2d 1132, 2000 WL 1052061, \*4 (T.T.A.B. 2000). Indeed, the USPTO often will not even consider initials combined with a surname to be a primarily a surname. *Id.* (affirming registrability of M.C. ESCHER mark) (“The mark M.C. ESCHER would no more be perceived as primarily merely a surname than the personal names P.T. Barnum, T.S. Eliot, O.J. Simpson, I.M. Pei and Y.A. Tittle.”).

372. HUTCHINSON, *supra* note 36, at 67–68.

373. See *supra* Part IV.

374. KOERNER, *supra* note 51, at 204–05, 218–19. Koerner goes further and suggests that Dürer’s disputes establish the monogram as a form of “private property” and sees the cases as protecting “authorship per se.” *Id.* at 219. This makes the analytic mistake of proprietizing



clear and real value, and he used it as a modern commercial brand.<sup>375</sup> It was a trademark in every sense, even if the law of the day had not yet defined the term.<sup>376</sup>

*B. The Unauthorized Use of Dürer's AD Monogram in Copies was Trademark Infringement in the Modern Sense*

At its most basic level, the purpose of contemporary US trademark law is “to prevent the use of the same or similar marks in a way that confuses the public about the actual source of the goods or service.”<sup>377</sup> Trademark infringement comes in varying flavors in US practice, including infringement of registered and unregistered trademarks<sup>378</sup> as well as adjacent false endorsement, affiliation, sponsorship, and approval claims.<sup>379</sup> If brought today, Dürer's cases would not require much creative lawyering, as they are about as traditional as trademark infringement gets.

For a modern plaintiff to succeed on a claim for trademark infringement, she must establish not just that her mark is entitled to trademark protection but also that the allegedly infringing use is likely to cause consumer confusion.<sup>380</sup> Differently worded but substantively similar tests can be found across federal courts for determining such a likelihood of confusion. To take one representative list of factors, courts look to “the similarity of the marks; the similarity of the goods; the relationship between the parties' channels of trade; the relationship between the parties' advertising; the classes of prospective purchasers; evidence of actual confusion; the defendants' intent in adopting its mark; and the strength of the plaintiff's mark.”<sup>381</sup> Because the focus of the trademark infringement analysis is on preventing the public from

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trademarks “as things valuable in and of themselves, rather than for the product goodwill they embody.” Lemley, *supra* note 327, at 1688. Dürer monogram is a quintessential trademark *not* because it is authorial property in the abstract, but because it is used in connection with goods and services to protect consumer information in a marketplace. See 15 U.S.C. § 1127.

375. See *supra* Part IV.

376. Dürer's AD monogram would almost certainly also have qualified as a technical trademark, in the pre-Lanham Act sense of an arbitrary or fanciful trademark understood as a form of property right. See *Avery v. Meikle*, 81 Ky. 73, 85 (1883) (listing printed monograms as a type of technical trademark). For a discussion of the distinction between technical and non-technical trademarks, see Bone, *supra* note 298, at 564–65.

377. *Star Fin. Servs., Inc. v. AASTAR Mortg. Corp.*, 89 F.3d 5, 9 (1st Cir. 1996).

378. See 15 U.S.C. § 1114(1)(a) (Lanham Act § 32) (registered marks); see also 15 U.S.C. § 1125(a) (Lanham Act § 43(a)) (unregistered marks).

379. See 15 U.S.C. § 1125(d).

380. See *Bos. Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 12 (1st Cir. 2008).

381. *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 487 (1st Cir. 1981).

confusion in the marketplace, the defendant's intent in adopting or using the mark is not a required element for a claim.<sup>382</sup>

From the historic record, Dürer's and the defendants' respective usages were more or less identical. In both cases, the two parties used the same marks (the AD monogram), sold the same goods (single sheet prints of an identical image),<sup>383</sup> put those goods into the same channels of trade (direct consumer sales at medieval markets), and targeted the same prospective purchasers (the burgeoning mid-market, graphic-art-buying public of 1500s Europe). It is difficult to conceive of a modern tribunal that would not find a likelihood of consumer confusion under such facts.

The only meaningful factor weighing against likely confusion would be the copyists' intent in adopting the mark. Pon and others, for example, have argued that Raimondi and other copyists at the time were not intending to use Dürer's fame to their commercial advantage.<sup>384</sup> Regardless, however, the totality of the factors would almost certainly result in the plaintiff's victory under a trademark infringement approach, where the goal is to avoid consumer confusion rather than protect against copying as such.<sup>385</sup>

Finally, US trademark law, in its current state, entitles a prevailing plaintiff to a rebuttable presumption that the infringement

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382. *Bos. Duck Tours LP*, 531 F.3d at 9 (“Evidence of bad intent, . . . while potentially probative of likelihood of confusion, is simply not required in a trademark infringement case.”). Trademark infringement can be distinguished from “passing off” more generally. The latter term is ambiguous in modern US parlance, and can refer to at least three distinct concepts, but in its most common sense, passing off is a species of trademark infringement that requires an element of intent to confuse or mislead buyers. 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:1 (5th ed. 2023) (citing *Larsen v. Terk Techs. Corp.*, 151 F.3d 140, 142 (4th Cir. 1998); *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 630 (6th Cir. 2002); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 27 n.1 (2003)). In its early instantiations, prior to the Lanham Act, passing off also required direct competition between the parties, and relief would be “granted solely to shield the mark owner from having its customers diverted away by a confusingly similar mark used by a direct rival.” 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:1 (5th ed. 2023). Passing off was particularly applicable in the pre-Lanham Act (pre-1946) era when there remained a distinction—no longer present today—between technical and nontechnical trademarks. Trademark infringement was available for the former, but only passing off for the latter. See *Bone*, *supra* note 298, at 565.

383. As discussed above, Raimondi's copies were engravings, whereas Dürer's *Life of the Virgin* and other series in suit made through the woodcut printing technique. See *supra* Part II. In both cases, however, the end product on the market (the “goods” in suit in the trademark litigation sense) would have been nearly identical to an ordinary consumer: a sheet of paper showing an exact rendering of the same graphic design. *Id.*

384. PON, *supra* note 10, at 62–63 (“Any commercial advantage to be derived by selling to audiences aware of Dürer's growing fame would surely have been welcome, but also may have been secondary.”).

385. See *infra* note 400.

is causing harm.<sup>386</sup> In most cases, this will lead the court to issue an injunction that prevents the defendant from continuing to use the infringing mark.<sup>387</sup> Courts may further require the delivery and destruction of infringing materials.<sup>388</sup>

*C. The Accounts of Dürer's Disputes Contain the Vital Elements of Trademark Infringement*

The reports of the Nuremberg and Venetian Disputes closely parallel a twenty-first-century analysis of trademark infringement. Both accounts start by acknowledging Dürer's ownership of a valid mark.<sup>389</sup> The Nuremberg Council, for example, explicitly referred to "Albrecht Dürer's monogram," or in German "Albrecht Dürers *handzaichen*."<sup>390</sup> The possessive phrasing shows that the tribunal was cognizant of Albrecht Dürer having an assertable legal interest in his monogram.<sup>391</sup> Vasari's account has its own parallels, with Vasari first establishing that Dürer "used" his AD monogram with "all his works," and then later in that paragraph reporting the Venetian Senate's ruling that Raimondi needed to stop using "the above-mentioned signature of Albrecht".<sup>392</sup>

Both reports also go on to allude, in varying degrees, to consumer confusion. In the Nuremberg Dispute decision, the Council specifically used the term *ain falsch*, translated as "counterfeit" by Koerner, who defines that term in medieval usage as "making something appear as other than it is."<sup>393</sup> This definition inherently operates from the perspective of the marketplace consumer—the person to whom the spurious mark is "appear[ing]" on a good that is "other

386. 15 U.S.C. § 1116 ("A plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation.")

387. 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:1 (5th ed. 2023) ("A permanent injunction is the usual and normal remedy once trademark infringement has been found in a final judgment.")

388. See 15 U.S.C. § 1118 ("[T]he court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark . . . or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed.")

389. KOERNER, *supra* note 51, at 209.

390. *Id.*

391. *Id.*

392. VASARI, *supra* note 16, at 96. Pon translates the Italian "*il segno*" even more to the point as "monogram" as opposed to "signature." PON, *supra* note 10, at 41.

393. KOERNER, *supra* note 51, at 212 (internal quotations omitted).

than” what it purports to be.<sup>394</sup> This emphasis on consumer perception parallels the essence of the modern-day likely confusion analysis.

The same focus on consumer deception permeates Vasari’s narrative.<sup>395</sup> Vasari writes that Dürer decided to bring suit in Venice when he learned that Raimondi’s “prints were believed to be by Albrecht, and were bought and sold as such, since no one knew that the prints had been made by Marcantonio.”<sup>396</sup> The offense, as Vasari tells it, was duping a confused, consuming public, not the copying as such<sup>397</sup>—a characteristic distinction of a trademark infringement story.

Finally, the remedy in both cases is on all fours with what litigants encounter in modern trademark infringement disputes. The Nuremberg opinion specifically requires the infringer to “remove all the said monograms”<sup>398</sup>—language that could be directly taken from hundreds of contemporary trademark injunction orders.<sup>399</sup> If that action was not taken, then “said prints shall be confiscated as counterfeit,” which closely tracks the modern delivery-and-destruction regime.<sup>400</sup>

The remedy described in the Venice account, although more lenient and addressing only future conduct, provides a result equally familiar to the modern practitioner: the purely forward-looking injunction. Raimondi either “should no longer use”<sup>401</sup> or “could no longer add”<sup>402</sup> Dürer’s monogram to his copies, depending on the preferred translation. This is precisely the sort of remedy that present-day trademark courts order in attempting to ameliorate prospective consumer confusion in the marketplace when the defendant lacks malicious intent.<sup>403</sup>

394. *Id.* at 209.

395. VASARI, *supra* note 16, at 96.

396. PON, *supra* note 10, at 40. DeVere translates this same phrase as, “no one knowing that they had been executed by Marc’ Antonio, they were ascribed to Albrecht, and were bought and sold as works by his hand.” VASARI, *supra* note 16, at 96.

397. The same perspective can be gleaned from what little we are told by Vasari about the ruling itself. *See id.*

398. KOERNER, *supra* note 51, at 209.

399. *See e.g.* CPC Int’l, Inc. v. Skippy Inc., 214 F.3d 456 (4th Cir. 2000) (“Injunction requiring defendant holder of trademark rights in ‘SKIPPY’ cartoon character to remove certain materials from its web site.”); Goldic Elec. Inc. v. Loto Corp. U.S.A., 27 F. App’x 71 (2d Cir. 2001) (“[I]njunction ordering alleged trademark infringer to remove infringing mark from its premises.”).

400. KOERNER, *supra* note 51, at 209.

401. VASARI, *supra* note 16, at 96.

402. PON, *supra* note 10, at 41.

403. In this regard, it tracks the doctrine of “inevitable confusion,” which allows a court to issue an injunction against ongoing trademark infringement in order to protect the public from confusion even in cases where the plaintiff acted inequitably and delayed for far too long in bringing suit. *See* 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:10 (5th ed. 2023)

*D. The Significance of Dürer's Disputes for Trademark Studies*

Key details of Dürer's Disputes—from the works at issue and the defendant(s) in Nuremberg to exactly if and how the Venetian Dispute transpired—will likely remain forever unknown. But, despite these mysteries, these cases nevertheless reveal a remarkable anticipation by one or more early Renaissance tribunals of modern trademark infringement law.<sup>404</sup> This prefiguration of contemporary infringement practice emerged not out of the trade guilds of Europe or an English dispute over cloth, as in Schechter's telling,<sup>405</sup> but rather as a self-conscious, free artist's desire to control his source-associative symbol in the marketplace.

This is not to suggest that Dürer only sought and wished to receive the sixteenth-century equivalent of an injunction against trademark infringement. It seems clear from the context—including Dürer's brandishing of his imperial privilege—that he wished to have copies of his print works banned from the market in their entirety.<sup>406</sup> This conclusion directly challenges the perception that Dürer's cases were merely failed efforts at pre-statutory copyright or privilege enforcement.<sup>407</sup>

Dürer's Disputes constitute a watershed moment for trademark law. There does not appear to be any case, anywhere, prior to Dürer's that so completely encapsulates a modern trademark infringement ruling. One or more tribunals used a form of injunctive relief to prevent a famous and valuable symbol from being affixed to a competitive good in commerce, without the mark-holder's authorization, in order to prevent source confusion in a retail consumer market.<sup>408</sup> The very fact that Dürer did not receive any associated protocopyright relief only underscores the sensitivity these tribunals showed to the power of branding. The Nuremberg opinion,<sup>409</sup> in particular, was a tailored,

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(quoting *Kason Industries, Inc. v. Component Hardware Group, Inc.*, 120 F.3d 1199, 1207 (11th Cir. 1997) (“[I]f the likelihood of confusion is inevitable, or so strong as to outweigh the effect of the plaintiff's delay in bringing a suit, a court may in its discretion grant injunctive relief, even in cases where a suit for damages is appropriately barred.”)).

404. KOERNER, *supra* note 51, at 212.

405. SCHECHTER, *supra* note 4, at 123.

406. See KOERNER, *supra* note 51, at 213.

407. See, e.g., CSEHI, *supra* note 36, at 241 (calling the Venetian decision a ruling “against Dürer”). Perhaps Vasari is the most to blame for this perception, insofar as he used the deflating phrase “he could obtain no other satisfaction but this” to introduce the result of the suit. VASARI, *supra* note 16, at 96. This certainly tells us a lot about Vasari's view of the relief granted (trivial) but not necessarily that of Dürer himself. *Id.*

408. KOERNER, *supra* note 51, at 209.

409. *Id.* at 213.

nuanced order sensitive to how consumers would encounter the mark in suit on the goods in commerce.

With its known commitment to protecting consumers against marketplace fraud, source deception, and commercial misinformation, sixteenth-century Nuremberg was an ideal locale for a prototrademark dispute. It should also not be surprising that such narratives emerged at the very moment when mechanical reproduction was beginning its ascent in the decades after Gutenberg. Just as art historians connect Dürer's consistent use of his monogram to the rapid growth in scale at which he could distribute and sell his prints,<sup>410</sup> trademark historians ought to connect Dürer's cases to that same nascent reality.

Dürer's cases also offer an insight into the relation of aesthetics and art to trademark law. Legal historians after Schechter have been at pains to assure their readers that trademarks belong in an industrial and commercial context and have deliberately omitted artists like Dürer from their trademark origin stories.<sup>411</sup> Art is relegated to trademark's periphery, if allowed in at all. This Article argues that this understanding has it exactly backwards. Dürer's Disputes suggest that trademark law may have been born out of artistry and grown into industry. It began, that is, precisely at the moment when creators like Albrecht Dürer began to conceive and value themselves self-consciously as artists,<sup>412</sup> with all the weight and ambiguity that term entails, and not when guilds or later industrialists started to affix their marks to fungible goods. This understanding, for the first time, was crystallized in Dürer's attempt to prevent another from passing off his creative work as his own.

What might it mean for trademark theory and history if the essence of trademark law is an artist's personal connection to a work of authorship? On a narrow, doctrinal level, this might call into question major strains of modern US case law that attempt to keep authorship disputes out of the Lanham Act, including the US Supreme Court's leading *Dastar* case.<sup>413</sup> On a broader note, though, a counterfactual of this sort seems poised to provide insights to trademark scholars into a range of modern phenomena that connect "origin" with blurry notions of authenticity and value in the aesthetic realm. What are NFTs, after all, other than the guarantee of source for source's sake? What could explain a consumer's willingness to buy an entirely abstract ownership interest in a digital token representing 1/10,000 of a Banksy painting,

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410. See *supra* Part II.

411. See SCHECHTER, *supra* note 4, at 123.

412. See Csehi, *supra* note 36, at 250.

413. *Dastar Corp. v. Twentieth Cent. Fox Film Corp.*, 539 U.S. 23 (2003).

devoid of any rights in the object itself, other than an almost religious or fetishistic faith in trademark law's notion of designation of origin?<sup>414</sup>

An alternative history of trademark law that focuses on aesthetic developments presents a rich topic deserving of deep analysis. Within that framing, helpful investigations might include surveys that can provide a full picture of the use and enforcement of trademarks by visual artists today, a normative account of how trademark law's diminution of aesthetic concerns might disincentivize creativity, consideration of whether and how moral and personality rights emerged to fill the vacuum that trademark law left open, or even a full aesthetic-framed account of trademark history to rival Schechter's. Any such history should naturally start with Dürer.

## VII. CONCLUSION

Erwin Panofsky ends his heralded treatise on Dürer by emphasizing how Dürer was, in essence, the first artist to explicitly value source as source.<sup>415</sup> Panofsky depicts Dürer with a deep reverence for the conception of the artist as creative genius, so much so that he prized a gift drawing he received from Raphael because he thought it evidenced that the master's own "hand" had touched the work.<sup>416</sup> A "reverence for genius could merge in Dürer's mind with what may be called the spirit of relic-worship."<sup>417</sup> This aligns with Joseph Koerner's more recent observation that "Dürer mythicize[d] the identity between image and maker, product and producer, art and artist."<sup>418</sup> A fundamental part of Dürer's artistic project, therefore, was the burgeoning Renaissance conception that *who* created (or supervised the creation of) a work of art matters. For Dürer, this focus on artistic authorship applied not just to oil paintings, literally touched by his own hand, but to mechanical reproductions like the woodcut prints<sup>419</sup> central to this trademark story. He intentionally and consciously used his monogram to create the link between artist and artwork, even where the hand was absent.<sup>420</sup>

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414. See Robin Pogrebin, *Cutting a Banksy Into 10,000 (Digital) Pieces*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/arts/design/banksy-nft-loic-gouzer-particle.html> [<https://perma.cc/47JW-8YHS>].

415. PANOFSKY, *supra* note 36, at 283.

416. *Id.* at 284.

417. *Id.*

418. KOERNER, *supra* note 51, at xvi.

419. *Id.* at 204, 205.

420. *Id.* at 204.

Dürer was unquestionably a commercial artist, and he used his trademark in every commercial sense familiar to twenty-first-century consumers.<sup>421</sup> But he also saw his monogram as deeply personal; the “AD” on each of his prints meant something about Dürer’s connection to, or origination or sponsorship of, the work. As Koerner put it, with respect to an engraving from 1498, “Dürer’s idealized nude . . . is linked through inscription, date and monogram to another monologic presence: the artist himself as economic man, defining his intellectual property and protecting it from usurpation or disfiguration by lesser talents.”<sup>422</sup>

Panofsky, for his part, adopted a ship metaphor to describe the relationship among the artist, the monogram, and the artwork.<sup>423</sup> As the work traveled throughout Europe after leaving the workshop, the artist’s monogram served as the “flag” of the “vessel”—the work itself.<sup>424</sup> It is a striking example to end with because of its salience to trademark law. The metaphor of trademark as a ship’s flag has long been a favorite of trademark judges because it captures the idea of the maker-owner having publicly sponsored or approved a work moving through commerce in the industrial economy, far from its origin.<sup>425</sup> Panofsky, of course, may not have known that this metaphor had been widely adopted by trademark jurists.<sup>426</sup> If he did not, Panofsky’s use of the term would parallel Dürer’s own archetypal actions in their almost accidental crystallization of the essence of modern trademark disputes.

To borrow from Koerner, “Dürer propose[d] himself as origin.”<sup>427</sup> He did so, in large part, by using and enforcing his AD monogram, and he obtained what should be recognized as the world’s first modern trademark injunctions.

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421. *Id.* at 205.

422. *Id.* at 218.

423. PANOFSKY, *supra* note 36, at 46.

424. *Id.*

425. *See supra* note 179.

426. *Id.*

427. KOERNER, *supra* note 51, at xix.