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A Timeless Principle: Copyright Before the Statute of Anne

Victoria Lieberman

A TIMELESS PRINCIPLE: COPYRIGHT BEFORE THE STATUTE OF ANNE

Victoria Lieberman[*]

I. INTRODUCTION

An artist carves marble bust of a particular person, a person with great significance. A second artist takes the first portrait and modifies it slightly by carving a symbol onto it. This second artist then presents the "new" work as something with more significance because of the addition. The second artist claims it has been transformed into an entirely different person. The original artist could argue that their work has been infringed under United States (U.S.) Copyright Law, which gives plaintiff's ownership of a valid copyright and a bundle of rights including the exclusive rights to create copies and derivative works.[1] In this hypothetical, the original artist would have a valid infringement claim against the second artist.[2] But, what if the case arose before the U.S. existed?

Head of Aphrodite[3]

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[1] 17 U.S.C. § 106.

[2] 17 U.S.C. § 501(b).

[3] *Head of Aphrodite* (photograph), *Layers of Culture: Byzantine Artifacts in Heaven and Earth*, HISTORIANS.ORG (May 1, 2014),

The Head of Aphrodite is evidence that copyright, and the principles at its core, existed long before it was ever codified into law. The bust, itself a copy of an earlier original, was defaced by an unknown Christian to later serve as an early representation of the Virgin Mary.[4] Today, we might consider this illegal copyright misappropriation of an original artist's work. Copy culture, and repurposing art that came before, has persisted throughout the ages. While U.S. law seeks to protect the artist from unauthorized copying, history demonstrates a long and storied tradition of appropriation. The common understanding of copyright law is that it originates from the U.S. Copyright Act, which protects all tangible works of expression.[5] Most modern legal scholarship would point to the Statute of Anne from English Law, which codified a right to copy and established an early form of "copyright."[6] However, the creation and appropriation of creative works existed long before these statutory creations.

A historical perspective aids in the comprehensive understanding of the U.S. Copyright protection system. The underpinnings of U.S. Copyright Law originated in Europe from the early Middle Ages.[7] It was ultimately a combination of common law, civil law, and statutes that provided a unified code of legal conduct.[8] This paper will look back at a history of art and art law from early Rome through the Renaissance, culminating in the codification of the Statute of Anne. In doing so, it will provide an understanding of the landscape of creative works, the extent of legal protection of those works and how that early protection set the stage for the U.S. Copyright Law as we know it today.

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https://www.historians.org/research-and-publications/perspectives-on-history/may-2014/layers-of-culture.

[4] *Id.*

[5] *See* §§ 106, 501(b).

[6] *See* Statute of Anne, 1710, 8 Ann. C. 19-21.

[7] *The Common Law and Civil Law Traditions,* UNIVERSITY OF CALIFORNIA, BERKELEY, 1,4, https:/www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf (last visited last Mar. 13, 2024).

[8] *Id.*

II. ANCIENT AND CHRISTIAN ROMAN LAW: FORGERY AND SPOLIATION

The roadmap to modern copyright law begins in 80 B.C.E. when Roman legal system passed a law against the duplication of documents.[9] This law inspired later forgery laws but was most likely not used in the context of creative works.[10] The law applied to documents for inheritance and land conveyance.[11] While this law was restricted to documents of a particularly legal nature, its importance to the creative work cannot be understated. Kenneth A. Adams, in his article on "Copyright and the Contract Drafter," notes that it takes little to impart originality and creativity in a contract, an unequivocally legal document.[12] A little extra flair and tweaking could turn a standard recitation of contract doctrine into a work entitled to modern copyright protection.[13]

The Roman version of the law may not have been intended as a protection for the creative element but as a preventative measure against fraud. Other forms of forgery proliferated in the Roman market with little recourse.[14] Romans were prolific artists, drawing inspiration from the world around them to paint and sculpt portraiture, landscapes, and depictions of both the fictional and factual.[15] Pliny the Elder, a famous natural historian, claimed that the Romans were the true inventors of landscape painting,[16] although the claim may be as erroneous as his medical prescriptions.[17] The public, eager to consume great art, bolstered

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[9] William Casement, *Were the ancient Romans art forgers?*, Journal of Art Historiography, 23, 27 (2016).

[10] *Forgery History*, Law Library – American Law and Legal Information, https://law.jrank.org/pages/1234/Forgery-History.html (last visited last Mar. 13, 2024).

[11] *Id.*

[12] Kenneth A. Adams, *Copyright and the Contract Drafter*, N.Y.L.J., 1, 5 (2006).

[13] *Id.*

[14] Casement, *supra* note 9, at 13.

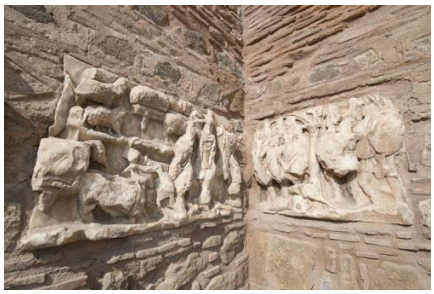
[15] *Id.*

[16] *Id.*

[17] Pliny the Elder's most famous text *Naturalis Historia* detailed many recommendations for medical treatment like using dog ashes for a toothache or a drowned lizard as an anti-aphrodisiac. Jon Miltmore, *Pliny's 'Natural History' Offers Odd Home Remedies* (July 21, 2016),

the art market of both old and new works.[18] This heightened interest inadvertently fostered a fortuitous market for art forgery.[19] However, the Romans were indifferent to such behavior; where no surviving law on record punished acts of art forgery.[20] Moreover, Roman records lack any documented cases of art forgery being prosecuted under 80 B.C.E law.[21] The absence of records suggests that the forgery law was strictly an anti-fraud measure that happened to protect documents, as opposed to creative works.

New law would come with the act of spolia. Spolia was the widespread appropriation and reuse of art and architectural materials in both ancient and Christian Rome.[22] As Rome spread its reach, a demand for materials for new construction grew. This demand created a new problem known as "spoliation" or the appropriation of art and architectural materials for the purpose of reuse.[23]



Relief Incorporated into a Wall[24]

Spoliation was everywhere. Much of the market was fueled by the fact that it was simply cheaper to disassemble the old than

https://intellectualtakeout.org/2016/07/plinys-natural-history-offers-odd-home-remedies/.

[18] Casement, *supra* note 9 at 13.

[19] *Id.*

[20] *See History of Forgery, in Forensic Document Examination*, Human Press 1 (2007), https://doi.org/10.1007/978-1-59745-301-1_5.

[21] *Id.*

[22] Joseph Alchermes, *Spolia in Roman Cities of the Late Empire: Legislative Rationales and Architectural Reuse*, Dumbarton Oaks Papers, 167, 178 (1994).

[23] *Id*.

[24] Dick Dosseman, *Spolia in the city wall of íznik, Turkey, at Lefke Gate*, https://en.wikipedia.org/wiki/Spolia#/media/File:Iznik_Wall_at_Lefke_Gate_8254.jpg (last visited Mar. 19, 2024).

produce new.[25] Some scholars argue that the plunder of old construction was a random happenstance of convenience.[26] Others contend that the deconstruction was more systematic, targeting old cities that had higher quality materials that would be difficult to quarry.[27] Spoliation was not unique to architectural construction and was also found in the reuse of gemstones, carved ivory, and stone-works that the rich and noble used to adorn their homes and places of worship.[28] By the Third century A.D., the widespread use of spolia prompted legal intervention.[29]

The Imperial Code of Theodosius II decreed in the Fourth Century C.E. that spoliation was subject to government regulation.[30] Theodosius II ruled the Eastern Roman Empire and was remembered mainly for two things: heralding the empire's shift towards Christianity, and the publication of these codes.[31] The law itself was extensive. No buildings considered public monuments could be disassembled, and no civic ornaments could be removed for later reuse.[32] Additionally, public monuments could not be "ruined" by attaching construction intended for private use. A later ban was added for demolitions with the express purpose of acquiring new materials for installation in a new building.[33] The conditions under which the government allowed spoliation are informative: Theodosius II's code permitted (or even obligated) builders to remove old ornaments to reuse them on

[25] Ishaan H. Jajodia, *The Industry of Spolia*, Medium (Oct. 13, 2018), https://medium.com/@ishaanj/the-industry-of-spolia-6919cdfb58d5.
[26] *Id.*
[27] *Id.*
[28] Pamela Sachant et. Al., *Precious Materials, Spolia, and Borrowed Glory*, University System of Georgia via GALILEO Open Learning Materials, https://human.libretexts.org/Bookshelves/Art/Book%3A_Introduction_to_Art_-_Design_Context_and_Meaning_(Sachant_et_al.)/03%3A_Significance_of_Materials_Used_in_Art/3.03%3A_Precious_Materials_Spolia_and_Borrowed_Glory (last visited Mar. 19, 2024).
[29] *Id.*
[30] Alchermes, *supra* note 22, at 168-9.
[31] Geoffrey S. Nathan, *Theodosius (408-450 A.D.)*, University of California – Los Angeles 1 (Jul. 4, 1999), https://roman-emperors.sites.luc.edu/theo2.htm.
[32] Alchermes, *supra* note 22, at 168-9.
[33] *Id.* at 172.

public monuments and display their splendor.[34] Even long after Theodosius II's reign, a Senate decree from 1162 C.E based on the code permitted the Column of Trajan to remain in its new home of the Church of St. Nicholas in Rome because it increased the "public honor of the city."[35] Specific orders were given to protect this spoliated monument – and others like it – from harm.[36] It was the clear directive of the Roman government to preserve public works. In enacting laws against spoliation, the Roman government effectively enacted an early form of anti-appropriation law.

Architectural, sculptural, figural, and other physical works enjoy some protection under modern copyright law. While architectural works are functional, U.S. Copyright Law protects the architectural designs of buildings.[37] Sculptural and other physical works of expression can be entitled to the full benefit of modern copyright protection.[38] However, just as legal document protection can serve different purposes, laws for physical and architectural works were established with a broader perspective. Instead of legislating to deter personal appropriation between individuals, the Roman senate specifically passed anti-spoliation laws to address cultural objectives.

The first reason, as Joseph Alchermes notes, is that Rome was facing an era of struggle.[39] Centuries of foreign attacks on an empire stretched thin made the collective ransacking of old buildings an appealing prospect.[40] The laws were part of a movement to reinvigorate the empire and preserve public history.[41] Russ Ver Steeg in "The Roman Law Roots of Copyright" likened

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[34] *See id.* at 173 ("Another constitution of 365 gave "full and gracious permission to those (scil. officials) . . . to restore to their pristine appearance and to an appropriate and useful function public monuments ("ornamenta urbium," literally "the ornaments of the cities") and their marble adornments, if they are suffering the decaying effects of time in any way").

[35] Dale Kinney, *Spolia from the Baths of Caracalla in Sta. Maria in Trastavere*, 68.3 The Art Bulletin, 387, 397 (1986).

[36] *Id.* at 389.

[37] *Id.*; *See* 17 U.S.C.A. § 102(a)(8); *See also* Hunt v. Pasternack, 192 F.3d 877, 878 (9th Cir. 1999).

[38] 17 U.S.C. § 102 (a)(5); Gene Markin, *Architectural Copyrights: No Need to Pay the Troll Toll*, 11 Nat'l L. Rev. 229 (Aug. 17, 2021).

[39] Alchermes, *supra* note 22, at 169.

[40] *Id.*

[41] *Id.*

the systematic preservation of public works to an early form of "public domain," or works explicitly preserved from the private and for the public.[42] Under this theory, old unclaimed works are specifically kept from private hands (like spolia kept from private builders) and preserved for the good of the public to reuse, re-appropriate, and reinvent.

And these appropriators did reinvent. During the transition into Christianity, pagan works were particularly targeted for appropriation, while their origins and roots were purged so that they would enrich Roman culture without pagan associations.[43] Constantine's Arch is a notable example, incorporating elements from multiple spoliated arches.[44] His Arch is also notable for its inclusion of a sculptural portrait, which was recut from one of Trajan.[45]

Head of Constantine, Re-Cut from Trajan[46]

[42] *Id.* at 173.
[43] Russ Ver Steeg, *The Roman Law Roots of Copyright*, 59 Md. L. Rev. 524, 552 (2000).
[44] Alchermes, *supra* note 22, at 171.
[45] Jacqueline D. Schwartz, Reduce, Reuse, Recycle: The Spolia of Late Antique and Early Christian Rome, Swarthmore-Undergraduate History Journal 61, 70 (2021).
[46] Jaś Elsner, *The Arch of Constantine: Detail of the head of Constantine* (photograph), Research Gate (Nov. 2000),

The earliest forms of anti-appropriation law regulate the ways in which one could remove, and reuse art. Earlier pagan works were worth preserving and not just works with historic significance. In this vein, anti-spoliation law was intended to protect art and not just history.

Modern U.S. law echoes the intent of anti-spoliation law. The best way to analyze it isn't by what it protects, but what it doesn't protect. Laws against spoliation were enacted to maintain public culture and beauty, ensuring that works were protected for the good of the people.[47] Similarly, modern U.S. law requires that all copyrighted works eventually enter the public domain,[48] signifying that these works are dedicated to the public for its collective benefit.[49] Some works are automatically entered into the public domain such as government works as they are always intended for the use and benefit of the public.[50] Russ Ver Steeg likened the public domain to the Roman concept of "res communes," or communal property: that which belongs to all and benefits all.[51] The transition of works into the public domain, moving from private to public ownership, embodies anti-spoliation laws aim of enriching public good.

III. THE MONASTIC COPY: MANUSCRIPT CULTURE AND MONASTERY REPRODUCTIONS

The trail of early law is not limited to physical and sculptural works. It can also be found in tomes and in dark, candle-lit monasteries. Before the popularity of printing across Europe,

https://www.researchgate.net/figure/The-Arch-of-Constantine-Detail-of-the-head-of-Constantine-recut-from-a-head-of-Trajan_fig1_259417044.

[47] Ver Steeg, *supra note* 43, at 524.

[48] Rich Stim, *Welcome to the Public Domain*, Stanford Libraries (2021); 17 U.S.C. § 302(a).

[49] Rich, *supra* 40.

[50] *Id*.

[51] Ver Steeg, *supra* note 43, at 524; *See* Georgia v. Public.Resource.Org, Inc., 140 S.Ct. 1498, 1513 (U.S., 2020) (holding that works prepared by judges or legislators in the course of their official duties are in the public domain and not copyrightable).

medieval scribes labored to manually copy texts by hand.[52] A "pristine" version would be imparted to a monastery or university, where monks and student scribes would begin the copying process.[53] These manual copies were sometimes rife with errors, omissions, and personal bias.[54] Personal copies were also made and were often passed on to others to copy further.[55] Likely the most popular and copied text was the Bible, and even that was not immune to mistakes.[56] A noted example from 1631 commanded its readers, "Thou shalt commit adultery."[57] Medieval scribes enjoyed a unique privilege as some of the few who had access to an abundance of written works, the medium to copy the works, and the ability to read and write Latin (the primary written language used at the time.)[58]

Officially administrated works produced through monasteries were not the only copies made for distribution by scribes. Dr. Levi Roach of the University of Exeter suggests that monks began forging legal documents in the Tenth Century.[59] Many of these documents were modeled on extant originals, with minor alterations to effect inter-church relations and land inheritance.[60] Monks were uniquely poised to produce forgeries due to their high literacy rates and access to rare supplies for creating manuscripts and documents.[61] In an era where the best way to authenticate a

[52] Edward Grant, *The Foundations of Modern Science in the Middle Ages*, New York: Cambridge University Press, 11, 69 (1996).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Mathew Fisher, *Copying Was Once an Art Form, Zocalo Public Square* (Dec. 1, 2015), https://www.zocalopublicsquare.org/2015/12/01/copying-was-once-an-art-form/ideas/nexus/.
[57] *Id.*
[58] Grant, *supra* note 53, at 11.
[59] Levi Roach, *Forgery and Memory at the End of the First Millennium*, Princeton University Press 1-3 (2021).
[60] *Id.*
[61] Jean Sorabella, *Monasticism in Western Medieval Europe*, The Metropolitan Museum of Art (Mar. 2013), https://www.metmuseum.org/toah/hd/mona/hd_mona.htm.

legal document was to meticulously examine the vellum,[62] on which it was written, this practice became widespread.[63]

These monastic copiers were clearly not deterred by the standing anti-forgery laws. Although laws were established to deter and punish forgery, as discussed in the previous section, the prevalence of monastic forgery indicates two things. First, the Church was so intertwined with the legal system that it was practically exempt from prosecution. The Church was deeply intertwined with the legal system and could effectively insulate itself from consequences due to its own influence on the court and the crown.[64] It was customary for the government to defer to the Church, and the Church used that influence with abandon.[65] Second, the advantages gained from forgery were too great to be discouraged by the risks. Forgery could grant land and money through inheritance and influence through false reliquaries and relics. Medieval Europe was rife with challenges to the legitimacy of rulers and inter-disciplinary conflicts between sects of the Church and using forged documents to reinforce a claim was an effective way to retain power.[66]

Monastic scribes were not limited to forging legal documents; they also copied each other's works. The Fontes Anglo-Saxonici Project aimed to document and map out the extensive borrowing, referencing, and quoting among medieval scribes in Anglo-Saxon

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[62] Vellum, a type of animal-skin paper, was prone to delamination or deterioration if someone attempted to alter what was written on it. This made any attempts to forge the terms in existing documents obvious. If a forger wanted to create a wholesale copy, they would have to source the exact shade and weight of vellum which would be extremely difficult and expensive. Its natural source also meant that it could be prone to blemishes that would be impossible to replicate. Sean Doherty, Johnathan Finch, *Sheepskin was used as an anti-fraud device in British documents for hundreds of years*, The Conversation (Apr. 9, 2012) https://theconversation.com/sheepskin-was-used-as-an-anti-fraud-device-in-british-legal-documents-for-hundreds-of-years-158547.

[63] Nathan Falde, *Medieval Lawyers Used Sheepskin Parchment to Prevent Fraud and Forgery*, Ancient Origins (Mar. 25, 2021), https://www.ancient-origins.net/news-history-archaeology/parchment-001509.

[64] David S. Clark, *The Medieval Origins of Modern legal Education: Between Church and State*, 35 AM. J. of Comp. L. 653 (1987).

[65] *Id.*

[66] *Id.*

England.[67] The database is immense, citing over 1000 sources.[68] It unveils extensive cross-referencing and borrowing, indicating a large amount of plagiarism. This plagiarism demonstrates how monks used large sections of writing from each other and other writers.[69] While there were no laws against borrowing small excerpts, the appropriation of entire creative works was another matter.

This monastic story turns to an Abbey in Sixth Century Ireland and St. Finnian and his student St. Columba.[70] St. Finnian began to translate and transcribe a copy of the Bible from a copy in Vulgate Latin to Gaelic, hoping to bring great honor and prestige to his abbey and spread the unique version throughout Ireland.[71] His student, however, had similar ideas.[72] St. Columba allegedly stole the manuscript and copied it for himself, refusing to hand his copy back when St. Finnian demanded.[73] The matter ended up before the High King Diarmat mac Cerbhial.[74]

St. Finnian argued that he owned the original copy and had made the translation of it.[75] Thus, he owned the intellectual work, and any subsequent copy should belong to him.[76] St. Columba, on the other hand, argued that the book was simply physical property.[77] Columba also argued that monks had a duty to copy

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[67] A Register of Written Sources Used by Anglo-Saxon Authors, *Fontes Anglo-Saxonici*, University of St Andrews, https://www.st-andrews.ac.uk/~cr30/Mercian/Fontes (last visited Mar. 13, 2024).
[68] *Id.*
[69] Jonny Diamond, *Early Medieval English Literature Was a Sordid Swamp of Wanton Plagiarism!*, Literary Hub (May. 11, 2021), https://lithub.com/early-medieval-english-literature-was-a-sordid-swamp-of-wanton-plagiarism/.
[70] Alexander Meddings, *Two Monks Started First Recorded Copyright Battle, Resulting in Thousands of Deaths,* History Collection (Oct. 25, 2017), https://historycollection.com/copyright-dispute-dark-ages-ended-costing-3000-lives/.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Meddings, *supra* note 71.
[75] Mike Masnick, *The Very First Copyright Trial, in 6th Century Ireland, Sounds Really Familiar*, Techdirt (Aug. 20, 2009), https://www.techdirt.com/2009/08/20/the-very-first-copyright-trial-in-6th-century-ireland-sounds-really-familiar.
[76] *Id*.
[77] *Id.*

and spread the teachings of the church, and that by copying the Bible he was simply fulfilling his duty.[78]

The Irish King was unconvinced by St. Columba's argument.[79] He stated, "Wise men have always described the copy of a book as a child-book. This implies that someone who owns the parent-book also owns the child-book. To every cow its calf, to every book its child-book."[80] He determined that, because Finnian owned the original, he owned the copy.[81] Unclear in modern interpretations is whether this ruling applies to the original, untranslated version or to St. Finnian's translated version. Part of St. Columba's argument was that St. Finnian had the original, untranslated version and that the knowledge should be available to anyone with the skill to read it.[82] The King's ruling is silent on this part of St. Columba's argument. Had he commented, it would have clarified an important distinction between physical and intellectual property in the Sixth Century law.[83]

The original, untranslated copy was St. Finnian's physical copy, and his translated copy were his intellectual property. If the ruling had determined that the "parent-book" was the untranslated copy, then it would have been a physical property dispute. St. Finnian's ownership of the untranslated book imputed to him rights to his translation and thus to any copy of his translation. Alternatively, if the ruling had determined that the "parent-book" was St. Finnian's translation, it would have been an intellectual property dispute. St. Finnian's ownership of his translation (and not the untranslated manuscript that he did not create) imputed to him rights to the copies.

The ruling in this Sixth Century Medieval Ireland lawsuit found that St. Finnian owned the rights in his translated work and any of its copies. This lawsuit is often considered the first copyright lawsuit.[84] By granting St. Finnian the rights to the copies

[78] *Id.*
[79] Masnick, *supra* note 76
[80] *Id*.
[81] *Id.*
[82] *Id.*
[83] Masnick, *supra* note 76.
[84] *Id*.

of his translated Bible, the Irish King cemented in common law a form of copyright for future exact duplicates of written works.[85] In modern U.S. Copyright Law, translations are considered a derivative work.[86] Ownership of a copyright means owning the right to prepare a derivative work.[87] This means that if a work is translated, the original work still belongs to the original owner, the creator of the translation only owns the rights in the translated work and not any rights on the original.[88] These rights can be granted.[89] Modern creative works are inarguably an intellectual right, and do not require physical ownership in their assessment.[90] While it may be impossible to answer the physical versus intellectual rights quandary without asking the long-dead parties involved, it shows the contrast between early and modern creative works and their respective protections.

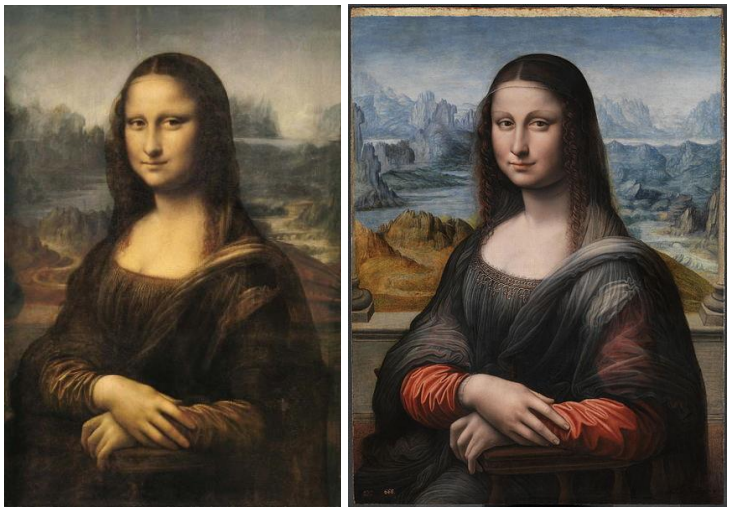
As the influence of the Church shifted towards the oligarchy, the necessity for the forgery of documents waned.[91] New venues for creative works flourished, and with them came new legal concerns.

IV. THE RENAISSANCE AND THE COPY: PAINTINGS

While written works would enjoy some protection under the Irish court's theory, visual art experienced a copy culture boom during the Renaissance.[92] To meet the demand of an art-hungry public, family-run workshops completed artwork in a

[85] St. Columba refused to surrender his copy of the book and may have resulted in a military conflict that took over 3,000 lives. *See* Saint Adamnan, *Life of Saint Columba, Founder of Hy.*, Edinburgh Edmonston and Douglas (1874), [https://archive.org/details/lifeofsaintcolum00adamuoft/page/n11/mode/2up].
[86] Nicole Lamberson, *Copyright in Translation: Gregory Rabassa*, Library of Congress (Oct. 14, 2022), https://blogs.loc.gov/copyright/2022/10/copyright-in-translation-gregory-rabassa/.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] 17 U.S.C. §§ 106, 501(b).
[91] Clark, *supra* note 65.
[92] *See* Fred S. Kleiner, *Gardner's Art Through the Ages: Western Perspective* 1 (2016).

homogenous, collaborative method.[93] Assistants and masters commonly intermingled pieces or work.[94] The nearly identical works imitated styles that were popular amongst their customers.[95]



Mona Lisa, Leonardo da Vinci; Prado Mona Lisa, possibly Salaì or Franceso Melzi[96]

A notable example of integrating style in an identical work is the Prado Mona Lisa.[97] Housed in its namesake museum, the work notably depicts the same woman as Leonardo da Vinci's original famous Mona Lisa, in the same composition and with the same mysterious expression on her face.[98] It was likely painted by one of da Vinci's apprentices at the same or a similar time as the

[93] Hans Tietze, *Master and Workshop in the Venetian Renaissance*, Parnassus , Vol. 11, No. 8, 34-35+45 (Dec., 1939).
[94] *Id.* at 34.
[95] *Id*. at 45.
[96] Everett Art, *Copia del Museo del Prado restaurada* (photograph), Museo del Prado, https://commons.wikimedia.org/wiki/File:Gioconda_(copia_del_Museo_del_Prado_restaurada).jpg (last visited Mar. 13, 2024).
[97] Eli Anapur, *The Exhibition Around Prado's Mona Lisa Sheds New Light on the Original*, Widewalls (Oct. 4, 2021) https://www.widewalls.ch/magazine/prado-mona-lisa.
[98] *Id.*

original.[99] The Pardo Mona Lisa's current condition reveals rich colors and delicate details not currently seen in the original.[100] The condition of the Prado Mona Lisa is attributed to modern restoration efforts that art conservationists would be too apprehensive to make to the da Vinci original.[101] The copy also reveals an art market unafraid of and, even encouraging of, copying.

Other notable copies can be found in the portfolio of Peter Paul Rubens. As a Flemish painter whose career rose on the eve of the Italian Renaissance, Rubens appropriated heavily from some of his esteemed predecessors. His early years were spent making copies for the Duke of Mantua before he endeavored to create his own originals.[102] Rubens eventually established his own studio where he would create the original sketch and then entrust students to finish the majority of the work for him.[103] He maintained quality control by painting key details himself.[104]

Adam and Eve:Titian; Rubens[105]

[99] *Id.*
[100] *Id.*
[101] *Anapur*, *supra* note 98.
[102] Charles Scribner, *Peter Paul Reubens* (photograph), Britannica (Mar. 8, 2024), https://www.britannica.com/biography/Peter-Paul-Rubens.
[103] *Id.*
[104] *Id.*
[105] Darren Rousar, *Old Masters Copying Older Masters – Part 1* (photograph), Sight-Size, https://www.sightsize.com/old-masters-copying-older-masters-part-1/ (last visited Mar. 13, 2024).

The Rape of Europa:Titian; Rubens[106]

The Entombment of Christ

Caravaggio; Rubens[107]

While the Sixth Century monastery case afforded books some protection, paintings were regarded differently. Unlike literacy, which could be mastered with a few years of training and was essential for copying books, mastering painting required a lifelong commitment. Even Rubens' near-exact copies of incredible skill are nowhere near photocopy perfect.

The skill prerequisite that made master copies so difficult to produce also made them incredibly valuable. Treasured collections include that of King Charles I, who bragged of his

[106] *Id.*
[107] *Id.*

nearly sixty master copies.[108] Their exclusive and treasured nature meant there was likely no need to legislate and regulate them; the market wanted artists to copy paintings. No regulation meant more copies to buy and sell, and more apprentices able to copy to study and increase their skills.

Rubens' copies are incredible imitations. They use key elements: composition, color, and message. Titian[109] died one year before Rubens was born .[110] So, these copies were not made under an apprenticeship and not with the permission of the original creator.[111] Under modern U.S. Copyright Law, an act of copyright infringement occurs when a party copies the elements of a copyrighted work that are original.[112] It is possible to incorporate some elements from previous works, or elements from the public domain.[113] Still, there are very few instances that permit wholesale copying under modern law.[114] Ruben's copies are undeniably wholesale copying, but were made in a time before laws protected against this kind of creation of artistic copies and derivative works.

V. THE RENAISSANCE AND THE COPY: PRINTS

Art copies were in demand by those with money and access to painted reproductions. At this point, Johannes Gutenberg revolutionized the book and art reproduction industry in 1440. [115]

[108] Sotheby's, *A Brief History of Old Master Copies*, Sotheby's (Aug. 3, 2018), https://www.sothebys.com/en/articles/a-brief-history-of-old-master-copies.
[109] *Titian,* The National Gallery, https://www.nationalgallery.org.uk/artists/titian (last visited Mar. 13, 2024).
[110] *Peter Paul Rubens*, The National Gallery, https://www.nationalgallery.org.uk/artists/peter-paul-rubens (last visited Mar. 13, 2024).
[111] Sotheby's, *supra* note 109.
[112] Carlin v. Bezos, 649 F. App'x 181, 182 (3d Cir. 2016).
[113] Skidmore v. Led Zeppelin, 952 F.3d 1051, 1071 (9th Cir. 2020).
[114] Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1118 (9th Cir. 2000).
[115] Heming Nelson, *A History of Newspaper: Gutenberg's Press Started a Revolution*, The Washington Post (Feb. 10, 1998), https://www.washingtonpost.com/archive/1998/02/11/a-history-of-newspaper-gutenbergs-press-started-a-revolution/2e95875c-313e-4b5c-9807-8bcb031257ad/.

Gutenberg personally would not profit from his invention of movable type.[116] However, movable type eventually became the engine that powered the Renaissance.[117] It took the following decades for the European use of movable type to take off by spreading new kinds of copies across the continent.[118]

The copy at the forefront of the movable type revolution was yet another Bible with a combination of text and illustrations, mirroring the dispute nearly a millennium earlier.[119] Unlike in the Sixth Century lawsuit, however, Gutenberg neither sought nor enforced rights in his work. He died without seeing any personal profit.[120]

The genius of Gutenberg's press lay not only in its ability to copy text but also in its ability to copy images.[121] The press was also used for copying images.[122] Woodcuts, engravings, and etchings would be plied with ink and pressed on paper to reproduce images for mass production.[123] Popular subjects were religion, classical mythology, public portraiture, and education.[124] Engravings were also used to spread a less colorful snapshot of master works to the public. Notable examples include excerpts from the Sistine Chapel by Michelangelo, which was adapted for print by Giorgio Ghisi in a series of six engravings.[125] Michelangelo's "The Punishment of Tityus" was also reproduced for print by Francesco Bartolozzi.[126]

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] Hafeezat Ghaffar, *Johannes Gutenberg's Printing Press: A Revolution in the Making*, U.C. Denver 1, 14, https://clas.ucdenver.edu/nhdc/sites/default/files/attached-files/entry_172.pdf.
[120] *Id.* at 4.
[121] *Id.*
[122] *Id.*
[123] Jennifer Jensen, A Brief History of Printmaking, Utah Museum of Fine Arts 1, 63 (Mar. 7, 2012), https://umfa.utah.edu/sites/default/files/2017-10/Printmaking-through-the-Ages.pdf.
[124] *Id.* at 7.
[125] *Girgio Ghisi*, Royal Academy, https://www.royalacademy.org.uk/art-artists/name/giorgio-ghisi (last visited Mar. 13, 2024).
[126] *The Punishment of Tityus*, The Royal Trust Collection, https://www.rct.uk/collection/912771/the-punishment-of-tityus (last visited Mar. 13, 2024).

Sistine Chapel, Michelangelo; The Delphic Sybil, Giorgio Ghisi[127]

The Punishment of Tityus, Michelangelo[128]; Tityus, Franceso Bartolozzi[129]

While not as bright, vibrant, and exact as an old master copy, the engravings were copies that made works accessible and most importantly duplicative. They are also nearly exact in key content. The composition and subjects are nearly unchanged. Sometimes a print was horizontally flipped, which was an artifact of the printmaking process. Ghisi's works were cropped versions of the larger Sistine ceiling, but the art was still lifted nearly exactly from the original.

[127] Giorgio Ghisi, *The Delphic Sibyl* (photograph), The Art Institute of Chicago, https://www.artic.edu/artworks/80019/the-delphic-sibyl (last visited Mar. 13, 2024).
[128] Michelangelo Buonarroti, *The Punishment of Tityus (1532)* (photograph), The Royal Trust Collection, https://www.rct.uk/collection/912771/the-punishment-of-tityus (last visited Mar. 13, 2024).
[129] Francesco Bartolozzi, *Tityus*, The Royal Academy of the Arts, https://www.royalacademy.org.uk/art-artists/work-of-art/tityus (last visited Mar. 13, 2024).

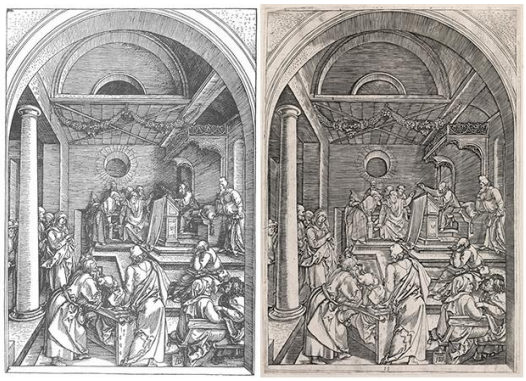
So, what happens when a print is not nearly so exact? Not every printmaker was copying from paintings and sketches. Some were copying from other printmakers. Albrecht Durer, an artist and engraver, used his skills as a trained goldsmith to hone the potential of the medium of print.[130] His prints often involved striking biblical scenes and were circulated far and wide due to the advantages of the print medium.[131] But, Durer eventually became frustrated with other printmakers, exclaiming in one of his publications:

> Hold! You crafty ones, strangers to work, and pilferers of other men's brains. Think not rashly to lay your thievish hands upon my works. Beware! Know you not that I have a grant from the most glorious Emperor Maximillian, that not one throughout the imperial dominion shall be allowed to print or sell fictitious imitations of these engravings? Listen! And bear in mind that if you do so, through spite or through covetousness, not only will your goods be confiscated, but your bodies also placed in mortal danger.[132]

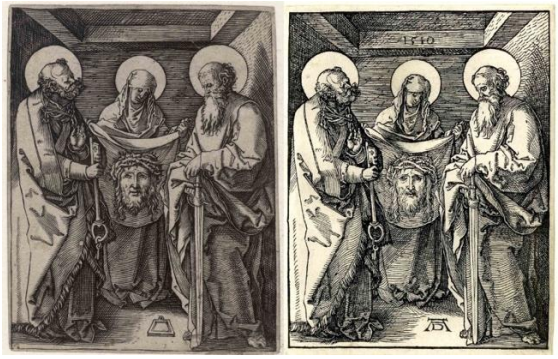
One particular subject of his ire was Marcantonio Raimondi.[133] Raimondi, a printmaker who copied prints from other artists, spread them in markets that were previously untapped.[134] When Durer discovered the copies in circulation, he brought suit against both Raimondi and his printing house alleging that they were not

[130] John H. Leinhard, *Albrecht Durer*, Engines in Our Ingenuity 138 (2018), https://engines.egr.uh.edu/episode/138.
[131] Despoina Tsoli, *How Albrecht Durer's Self Portrait Shook the World*, The Collector (Apr. 20, 2021), https://www.thecollector.com/how-albrecht-durers-self-portrait-shook-the-art-world/.
[132] William Patry, *Albrecht Durer and Copyright*, The Patry Copyright Blog (Sep. 26, 2005, 11:36pm), http://williampatry.blogspot.com/2005/09/albrecht-drer-and-copyright.html.
[133] *Id.*
[134] Lydia Pyne, *The Proliferation and Politics of Copies During the Renaissance*, Hyperallergic (Apr. 29, 2019), https://hyperallergic.com/497448/copies-fakes-and-reproductions-printmaking-in-the-renaissance-blanton-museum-of-art/.

just copying but forging his works.[135] They were complete duplicates that could sometimes only be differentiated by their horizontal mirroring.[136] However, the court declined to find the work a forgery.[137]



Christ Among the Doctors in the Temple, Albrecht Durer; Christ Among the Doctors in the Temple, Marcantonio Raimondi[138]



The Sudarium, Marcantonio Raimondi; St. Veronica with the Sudarium, Albrecht Durer[139]

[135] *Id*.
[136] *Id.*
[137] *Id.*
[138] Noah Charney, *The Art of Forgery: The Minds, Motives, and Methods of Master Forgers* (photograph) (2015).
[139] *Compare* Marcantonio Raimondi, *The Sudarium*, Princeton University Art Museum, https://artmuseum.princeton.edu/collections/objects/9962 (last visited

The court found there was no actual fraudulent intent in the copying.[140] Raimondi was merely an extremely talented artist, and art purchasers could not help but mistake his copies for the original because of his skill.[141] Instead, the court focused on how to protect Durer's name.[142] Durer signed all of his prints with a distinctive, stylized "AD" mark, and Raimondi's copies included the mark by virtue of being an exact copy.[143] The court effectively issued an injunction against any future copies using the mark to protect Durer.[144] As for the prints themselves, the court determined that they were not truly exact copies and that the exclusion of the signature would be sufficient.[145] Tiny differences in details could allow a discerning eye to tell a true Durer from a copy.[146] The court even went so far as to tell Durer he should be flattered that copyists were targeting his work.[147]

The implications of the verdict draw a broad line in the sand for early copyright law. A work is considered transformative in U.S. copyright law when the secondary work alters the original work by adding new elements of expression, meaning, or message.[148] The more elements original elements added, the more likely that the work is transformative, and the use is fair.[149] U.S. law also allows copyright owners to control how derivative works are produced with their creations.[150] Owners of a work must grant permission for a derivative work to be made, and the creator of a

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Mar. 15, 2023) *with* Albrecht Durer, *St. Veronica with the Sudarium*, Rijks Museum, https://www.rijksmuseum.nl/en/search/objects?q=the+sudarium&p=2&ps=12&st=Objects&ii=11#/RP-P-OB-12.057,23 (last visited Mar. 15, 2023).

[140] Pyne, *supra* note 135.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Pyne, *supra* note 135.

[146] *Id.*

[147] *Id.*

[148] Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 1258, 1261 (2023); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).

[149] *Id.*

[150] 17 U.S.C. § 101.

derivative work only owns the original additions in such a work.[151] For the Venetian Court the threshold was not nearly so high. The court effectively determined that any variation in a copy, no matter how small, would be transformative. Any deviation of a line, darker shading, or the omission of a detail could make a copy of a work an entirely new and original work. So long as the two, side by side, were somehow distinguishable to the trained eye, there was no infringement of the original work by the derivative work.

The Durer decision reinforced the general attitude that the more art available to the masses, the better. Durer largely operated out of Germany and Northern Europe, and many of his potential infringers started producing copies in Italy and Southern Europe. The holding of the court supported the idea that more copies of art in circulation benefited members of the public who would not otherwise be able to access Durer's work could now get ahold of it. Even in the age of the printing press, which greatly expanded the artist's reach, art was not available on a global scale.

Where the court found in defense of Durer introduced some novel ideas reflected in modern law. The court held that Durer had the right to attribution on his work, and that he had the right to not have his name misattributed[152]. By holding that Raimondi could not use Durer's monogram, the court introduced a form of early moral rights. Under the Visual Artists Rights Act of 1990 ("VARA"), an artist has the exclusive right to claim authorship, as well as exclude one's name from works they did not create.[153] This act applies to visual works like paintings, drawings, and prints and is typically limited to works of single or limited runs.[154] The rights under VARA recognize that copyright exists to protect more than economic rights, but also rights to how the artist is associated with their work and how the work is used.[155]

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[151] *Id.*

[152] Peter J. Karol, *Albrecht Durer's Enforcement Actions: A Trademark Origin Story*, 25 Vand. J. Ent. & Tech. L. 421 (2023).

[153] 17 U.S.C. § 106A.

[154] *Id.*

[155] VARA grants visual works of limited runs the exclusive right of authorship, the right to prevent one's name on a work they did not create, the right to prevent one's name on a work that has been changed or distorted in a way that would harm the author's reputation, and the right to prevent distortion,

Albrecht Durer's Monogram[156]

The court's decision also looks at some concepts found in trademark law. Trademarks are symbols, phrases, and product indicators in commerce that communicate the source of a good or service to a consumer and in modern U.S law are regulated by the Lanham Act.[157] The concept of trademarks can even be found all the way back to ancient Rome. For instance, excavations in Pompeii have unearthed bread loaves with distinctive loaves bearing stamps that would signal the bakery of origin[158]. By saying only Durer could use his monogram, the court held that it was a sort of trademark for his art. It was a signal that his prints were authentic from his studio to consumers. The court effectively used alternative legal theories to protect Durer's rights.

Modern artists also employ alternative legal theories when copyright law falls short. Specifically, copyright law leaves large

mutilation, or modification that would harm the authors reputation. 17. U.S.C.A. § 106A.

[156] Steven Brower, *Albrecht Durer: The First Post-Modernist Designer* (photograph), PRINT (Jul. 9, 2017), https://www.printmag.com/culturally-related-design/albrecht-durer-first-post-modernist/.

[157] 15 U.S.C. § 1051.

[158] Researchers believe these stamps acted as a sort of consumer goods regulation that allowed Pompeiians to know where good loaves came from and prevented bakers from diluting grain because the loaves could be traced back to their shop. If bread was altered, bakers could be punished. Kristy Mucci, *Ancient Romans Branded Their Bread to Punish Fraudulent Bakers*, Saveur (Jul. 21, 2017), https://www.saveur.com/roman-bread-brander/.

gaps in protection in the realm of fashion and product design. Typically, utilitarian articles such as clothing are not protectable under U.S. copyright law.[159] This protection was expanded slightly under *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, in which the court held that pictorial and graphic elements that could be considered separate and distinct from the utilitarian elements were protectable.[160] However, many fashion brands have opted to turn to trademark law instead.[161] Where copyright requires the design to stand separate from the wearable item, trademark law has doctrines that allow design elements to be fully integrated.[162] Trade dress specifically protects the "commercial image" of anything that has a source-identifying function, whether or not its utilitarian in nature[163]. Many fashion brands make their logo an important part of their style and image.[164] The logo can become more than just a brand identifier, but also an important part of the design language.[165] By trademarking a brand's logo, name, and distinctive design elements, a brand can afford protection where copyright may leave them vulnerable.[166] Then, the same way Durer did, they can ensure that no competitor or counterfeiter can use their distinctive mark to confuse consumers on the authenticity and origins of their goods.

[159] Norman J. Leonard, *Applying Copyright Law to Useful Articles – A Dispute Over Cheerleading Uniforms May Result in a New, Unified Test*, Ward and Smith (Oct. 4, 2016), https://www.wardandsmith.com/articles/applying-copyright-law-to-useful-articles.
[160] Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S.Ct. 1002 (U.S. 2017).
[161] John Zarocostas, *The Role of IP Rights in the Fashion Business: A US Perspective*, WIPO Maganize (Aug. 2018), https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html.
[162] *Id.*
[163] 15 U.S.C. § 1125(a).
[164] Zarocastas, *supra* note 161.
[165] *Id*.
[166] Michael Kondoudis, *Can You Trademark Fashion Designs?*, The Law Office of Michael E. Kondoudis, https://www.mekiplaw.com/trademark-fashion-design/ (last visited Mar. 13, 2024).

VI. THE RENAISSANCE AND THE COPY: PATRONAGE

Not all artists were independent creators. Some Renaissance artists entered into patronage agreements with wealthy families to produce art on demand in exchange for reliable income.[167] These arrangements typically took one of two forms. The first was a permanent residence where an artist joined a family and made a continual stream of art while being on a regular payroll[168]. The second was the singular commission directly for a wealthy customer.[169] A singular artist could make a decent living this way. Even some women artists found careers working for patrons during the Renaissance.[170]

However, a key question that is often asked in modern commission situations permeates the same circumstances of 400 years ago. When a patron commissions an artist, who owns the final work? A lawsuit surrounding famous and prolific patrons the Medicis may shed some light.

The conflict surrounds a tryptic of battle scenes known as "The Battle of San Romano."[171] The works were painted by Paolo Uccello to commemorate a Florentine victory over the Sienese in 1432 B.C.E.[172] The battle was significant to Cosimo de Medici, and for a long time it was thought that he commissioned the works.[173] However, new examinations of the paintings and how they do not quite fit their corresponding panels reveal this may not be the case.

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[167] *See* Mark Cartwright, *Patrons & Artists in Renaissance Italy*, World History Encyclopedia (Sep. 30, 2020), https://www.worldhistory.org/article/1624/patrons--artists-in-renaissance-italy/.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] Roderick Conway Morris, *Gothic Heralds od the Renaissance Dawn*, The New York Times (Aug. 10, 2012), https://www.nytimes.com/2012/08/11/arts/11iht-conway11.html.
[172] *Id.*
[173] *Id.*

Niccolò da Tolentino Leads the Florentine Troops, Paolo Uccello[174]

The paintings were actually commissioned by a man named Lionardo Bartolini Salimbeni.[175] Lorenzo de Medici attempted to purchase the trio of works from his estate but only managed to acquire one of them.[176] Not willing to take no for an answer, the Medicis simply took the other two anyway.[177] The Salimbeni family filed suit, but the Medicis were able to leverage their political power to win the lawsuit and keep all three works.[178]

For purposes of copyright ownership and protection, the primary problem with the dispute was that Uccello, the painter, is not mentioned anywhere in it. The dispute was entirely between the two families who contended that they had commissioned or bought the works. Ownership by the artist was never even considered. In modern U.S. Copyright Law, unless the artist is an employee of the party who commissioned the work, ownership is

[174] Paolo Uccello, *Niccolò da Tolentino Leads the Florentine Troops* (photograph), National Gallery, London, https://www.nationalgallery.org.uk/paintings/paolo-uccello-the-battle-of-san-romano (last visited Mar. 15, 2024).
[175] Deanna MacDonald, *Paolo Uccello: The Battle of San Romano c1440*, Great Works of Western Art. http://www.worldsbestpaintings.net/artistsandpaintings/painting/180/.
[176] *Id.*
[177] *Id.*
[178] *Id.*

not automatically assumed to transfer to a party.[179] Parties need to contract for a transfer of rights, a license, or make sure that the work is being made under a valid work-for-hire agreement.[180]

In comparison, it appears that a work made for a patron like "The Battle of San Romano" was automatically assumed to belong to whichever patron commissioned it (be that Salimbeni or Medici). Had the court awarded the work to Uccello, he would have been recognized as the rightful owner of his creation, despite it being commissioned by the patron; however, the court did not hold this.

Allowing patrons to exclusively own the works they paid for was a good incentive to encourage the patronage system. Whether utilizing one artist or many, a wealthy patron could fill their home and life with art and use it as they see fit. The patron obtained full return on investment without worrying about being permanently contractually bound. And, considering the hefty living an artist could make off of patronage, they were not exactly suffering either.

Modern patronage agreements can be seen in works made for hire. Works made for hire are works that are either made by employees within the specific scope of their employment or works that are specifically prepared for a contribution as part of a collective work.[181] In the case of a work for hire, the rights would transfer to the person who commissioned the work or the employer, and not to the person who prepared the work.[182] Not all works prepared under a commission scenario are considered a

[179] *See* Meltzer v. Zoller, in which specially commissioned architectural work was held not to be work for hire because it was work prepared by independent contractor that did not fall into specific collaborative work category necessary for transfer of rights. 520 F. Supp. 847 (D.N.J. 1981).
[180] *See* Schiller & Schmidt, Inc. v. Nordisco Corp., which held that a clear written agreement was essential for the purpose of making the transfer ownership of rights in a creative work clear. 969 F.2d 410 (7th Cir. 1992).
[181] 17 U.S.C § 101. Works for hire are divided between works by employees and works by independent contractors; Works by employees must be prepared within the scope of employment and works by independent contractors must be prepared for collective works. Examples of collective works include works for periodicals, anthologies, encyclopedias, part of a motion picture or audiovisual work, instructional text, tests or answer materials for tests, or atlases.
[182] *Id*.

work for hire. For example, a sculptor preparing a single commissioned work with his own tools in his own studio is not considered an employee, only an independent contractor.[183] His work, being a single work and not part of a collective work, would not be covered by the statute.[184] Thus, not every commissioned work belongs to the commissioner. When artists enter into an agreement to prepare works, it is critical that they get their agreement in writing and know exactly what their rights are in order to avoid any confusion because of the potential ambiguities of work for hire situations.

Renaissance patronage was largely a display and demonstration of wealth by the great elite.[185] The city's wealthy would secure the finest paintings and sculpture the same way they would buy the fanciest clothing and eat the best food.[186] Artwork was the status symbol of the Renaissance, and as a result the people who commissioned the artwork were also same the people adjudicating the law.[187] In a dispute about the creation the Opera del Sacro Cingolo's bronze chapel screen, Cosimo de Medici served as a judge to evaluate the final work. He was chosen specifically because of his extensive experience with commissioning artists and his influence in the city of Florence.[188] He took the role to widen his influence due to the importance of the final work to the region.[189]

Political figures have supported the arts in recent history as well. John F. Kennedy made it a point of his political career to promote the arts.[190] Similarly, the tradition of the presidential

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[183] Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (U.S. 1989).
[184] *Id.* at 2178.
[185] Alina Cohen, *In the Italian Renaissance, Wealthy Patrons Used Art for Power*, Artsy (Aug. 20, 2018).
[186] *Id.*
[187] M. Fujikawa, T*he Medici Judge, A Bitter Lawsuit, and an Embezzlement: The Opera del Sacro Cingolo's Bronze Chapel Screen at Santo Stefano*, Prato. Renaissance Stud. 612, 612-32 (2013), https://doi.org/10.1111/j.1477-4658.2012.00829.x.
[188] *Id*.
[189] *Id.*
[190] Rick Perdian, *Arts and Ideals: President John Kennedy summons a brief shining moment when the arts captured America's imagination*, Seen and Heard International (Sep. 25, 2022), https://seenandheard-

portrait has been carried from Washington commissioning Gilbert Stuart to the modern day.[191] Aside from the political sphere, wealthy college alumni will often gift generous donations to their former institutions in order to have buildings like libraries named in their honor. Wealthy individuals will use large donations to advance community causes. Buildings dedicated to the development of the arts in New York were recently unveiled thanks to large amounts of funding from Michael Bloomberg and Jonathan Tisch.[192] Both are Board of Directors members and may use the opportunity to promote cultural and reputational growth.

The single-client patronage relationship of the Renaissance eventually shifted as the booming art demand of the Renaissance faded, but the idea of work-for-commission remained.[193] Art was no longer restricted to just the affluent but was available to anyone who could afford a print or pamphlet.[194] Artists could make their own careers independently.[195] However, not everyone was a fan of the idea of a free art market and the free proliferation of ideas.

VII. ENGLISH REGULATION: THE INCEPTION OF STATUTORY COPYRIGHT LAW

By the early 1600s, England found itself a particularly bustling home for the print trade. London went from just over 60 printers in the mid-1500s to almost 150 by 1650 B.C.E.[196] But the flourishing industry turned vexatious for Charles II. Many print works

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international.com/2022/09/arts-and-ideals-president-john-f-kennedy-summons-a-brief-shining-moment-when-the-arts-captured-americas-imagination/.

[191] Ellen G. Miles, *Presidential Portraits*, Colonial Williamsburg Journal (2007), https://research.colonialwilliamsburg.org/Foundation/journal/Spring07/portraits.cfm.

[192] *The Shed NY Unveils Buildings Named After Patrons Bloomberg and Tisch*, Artlyst (Jan. 9, 2019), https://artlyst.com/news/the-shed-unveils-buildings-named-after-patrons-bloomberg-and-tisch/.

[193] Thomas Adams, *Patronage: The Renaissance and Today*, Theses and Dissertations 147, 1, 23 (2014).

[194] *Id*. at 12

[195] *Id.*

[196] *'Industries: Printing', in A History of the County of Middlesex: Volume 2*, British History Online 197-200, https://www.british-history.ac.uk/vch/middx/vol2/pp197-200 (last visited March 22, 2024).

contained non-religious and scandalous content.[197] He considered the content of the works produced by print houses to be problematic calling many works "seditious" and "treasonable."[198] He passed a sweeping act to regulate all print works known as the Licensing Press Act of 1662.[199] It banned private printing of any kind. The act required print shops to register with the crown and limited the number of official London printing offices to 20.[200] The act was passed under a "royal prerogative" to screen and approve all works for offending material and censor works so that only those the Crown deemed proper would be issued into print.[201]

Under this act, the rights of the author were virtually non-existent. The work would be given to the printing house, which then registered it with the Crown.[202] Through this registration, the printing house owned the work, and not the actual author.[203] The Crown had exclusive control over what could be printed, and the printing houses had control over how those works could then be printed and distributed and could profit from them. The law was essentially state-controlled censorship in the guise of regulating creative works. The author was merely an auxiliary element in the equation.

Modern copyright is not free from the potential to be used as censorship. Maria Shied of Ohio State University asserts that the Digital Millennium Copyright Act has become a tool of modern censorship.[204] The act was originally passed to help copyright owners curb infringement in online spaces.[205] However, the takedown process favors large corporations who can issue large

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[197] Karen Nipps, *Cum privilegio: Licensing of the Press Act of 1662*, The Library Quarterly: Information, Community, Policy, Vol. 84, No. 4, Special Issue in Honor of John Carlo Bertot, 494, 500 (October 2014).
[198] *Id*. at 494.
[199] *Id.*
[200] *Id.* at 496.
[201] Nipps, *supra* note 198.
[202] John W. Draper, *Queen Anne's Act: A Note on English Copyright*, 36 Mod. Language Notes 146-154 (1921), https://doi.org/10.2307/2915167.
[203] *Id.* at 146.
[204] Maria Sheid, *Copyright as an Instrument for Censorship*, Ohio State University Libraries (Jul. 29, 2015), https://library.osu.edu/site/copyright/2015/07/29/copyright-as-an-instrument-for-censorship/.
[205] *Id.*

numbers of removal requests without regard to whether the use is fair or even infringing in the first place.[206] Web services like Google, YouTube, and Facebook typically defer to takedown requests in order to avoid liability.[207] While the act does not explicitly aim to censor works, scholars like Sheid contend that prioritizing the removal of creative works as the first step contradicts the very purpose of U.S. copyright law.[208]

The Licensing Press Act was renewed in a secession of two-year periods until 1692.[209] By then, the public outcry against government censorship had reached a fever pitch. The unpopular act was abandoned.[210] To fill the void, Parliament petitioned and drafted an act that would behave similarly to the original but without the rampant censorship. This act vested the ownership of the work in the actual author and not the printing house. But the revised act required that copies would be distributed to the Crown, the Stationers' Company, and to various universities.[211] After distribution of the copies, an author would be given an exclusive grant of rights for fourteen years with the option to extend it for another fourteen years.[212] This act was passed in 1710 and titled the Statute of Anne.[213]

By being the first statute to explicitly vest rights in a creative work in the author, the Statute of Anne is considered the foundation of U.S. Copyright Law. However, the statute did not become particularly popular in the market. Printing houses were slow to accept works that had been copyrighted under the Act. Some printing houses boycotted protected works to maintain their monopoly.[214] Printers argued to Parliament that the act was a "failure" and a betrayal of the traditional operation of the industry.[215] Doomsayers warned of the collapse of the industry.[216]

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[206] *Id.*
[207] *Id.*
[208] Sheid, *supra* note 205.
[209] Draper, *supra* note 203, at 146.
[210] *Id.*
[211] *Id.* at 147.
[212] *Id.*
[213] *Id.*
[214] *Id.* at 148.
[215] Draper, *supra* note 203 at 169.
[216] *Id.*

Fortunately, printing did not collapse, and many authors were finally able to make a return on their craft.[217]

The early American copyright law mirrored the prerogatives of the Statute of Anne in both the Constitution and in the Copyright Act of 1970. The Constitution imparts the power to the government to secure rights "for limited times to authors" for their creative works.[218] Both the Statute of Anne and the Constitution set out to protect the rights of authors explicitly and laid out that there will be a limited time through which those rights will be protected.

The Copyright Act of 1790 was purposefully modeled on the Statute of Anne.[219] Instead of having authors send copies to the Crown, the Stationers' Company, and the designated universities as a form of registry, the Act formed an official government registry.[220] The 1790 Act also expanded the types of works that were covered with the Constitution as a framework for coverage.[221] From here, modern U.S. copyright law grew into what it is today.

VIII. CONCLUSION

Under this retrospective analysis, the evolution of U.S. copyright is clear. It did not emerge solely from the Statute of Anne. Instead, it was built from a long foundation of history and theory. Those ancient theories are still echoed in modern copyright law and how it functions today. In order to fully understand copyright law, and how it will continue to evolve, it is thus necessary to look back on history and see how it evolved.

Copyright has always developed in step with the ever-changing landscape of the creative world. In ancient and medieval Rome, anti-appropriation law served the state[222]. The priority of the law was to regulate the flow of architectural and artistic spoliation and

[217] *Id.* at 149.
[218] U.S. Const. art. I, § 8, cl. 8.
[219] *Highlight: Congress Passes First Copyright Act*, Copyright.gov, https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Mar. 22, 2024).
[220] *Id.*
[221] *Id.*
[222] Ver Steeg, *supra note* 43.

protect the art that was deemed culturally important and valuable.[223] The emphasis was on the public and not on the individual artist.[224] However, individual rights emerged and grew in prominence. Courts wrestled with the conflict between the single artist's right to exploit their work as a viable career and the cultural and technological revolution pushing art duplication across Europe and the West.

Courts continue to wrestle with copyright and its future implications. A.I. generated works create new art using large swathes of already created potentially copyrighted works.[225] Some courts have already denied protection for A.I. generated works.[226] Will the court of the future find that the rights of the individual prevail, or that the public interest favors protecting A.I.?

More and more technological advances mean that more works are lost to outdated data storage methods or unmaintained archives.[227]Additionally, there are works whose authors are lost (literally or figuratively) and who leave behind so-called "orphan works."[228] Will the court of the future find that these works should be preserved in the public domain? Or is maintaining individual rights more important?

Precedent does not just exist in the literal sense of cases influencing cases, but in legal theory influencing legal theory. In the case of copyright law, history has been repeating itself for centuries, and it may continue to do so for centuries more. These questions have arisen before and will arise again. The best way for a copyright practitioner and legislator to answer them effectively is to look back at how they have been answered in the past.

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[223] *Id.*
[224] *Id.*
[225] Gary Myers, *The Future is Now: Copyright Protection or Works Created by Artificial Intelligence*, 102 T.L.R. 8, 8-29 (2023).
[226] *Id*. at 20.
[227] Alexander Stille, *Are we Losing Our Memory? or The Museum of Obsolete Technology*, Lost Magazine 3 (Feb. 2006), https://group47.com/LOSTMagazine-AreWeLosingOurMemory.pdf.
[228] *Orphan Works*, U.S. Copyright Office, https://www.copyright.gov/orphan/ (last visited Mar. 15, 2024).