CIRCULATION AND CONTROL

Artistic Culture and Intellectual Property in the Nineteenth Century

Edited by Marie-Stéphanie Delamaire and Will Slauter
11. Nineteenth-Century American Sculpture and United States Design Patents

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On 7 July 1849, Hiram Powers submitted a design patent application through the American consulate in Livorno, Italy for his sculpture The Greek Slave. As an expatriated American artist living in Florence, Powers desperately wished to protect his work in Europe and the United States. For unknown reasons, however, Powers’s petition appears to have failed, leaving his most important work vulnerable to piracy. His fears were justified, and unauthorized reductions of The Greek Slave (see Figure 1) soon abounded in plaster and Parian ware, a mass-produced porcelain.

The search for anything relating to Powers’s application in the archives of the United States Patent and Trademark Office (USPTO), in preparation for a 2016 exhibition on The Greek Slave at the Smithsonian American Art Museum (SAAM), sowed the seeds for this essay. It is especially ironic that this hunt for evidence was initiated by SAAM.

1 This essay is dedicated to Dr. William H. Gerdts. The author is grateful to the United States Patent and Trademark Office, especially D. Lawrence Tarazano and Elizabeth Dougherty for their invaluable assistance and guidance in accessing and interpreting the archival records of nineteenth-century design patents. The author is also grateful to Thayer Tolles, Debra Pincus, Kimberly Orcutt, and Ann Boulton for their insights on the material presented here, and to Grace Yasumura for her assistance locating critical nineteenth-century sources. Gratitude is also due to the anonymous peer reviewer who offered such helpful insights. Powers stated he paid a $15 application fee to the US Treasury. ‘Greek Slave Patent Application, 7 July 1849. Hiram Powers Papers, 1819-1953, Bulk 1835-1883. Archives of American Art, Smithsonian Institution.’ https://www.aaa.si.edu/collections/items/detail/greek-slave-patent-17307.
After all, the museum is housed in the Old Patent Office Building in Washington, D.C. — the very place where Powers had directed his ill-fated application in 1849. The building also contains the largest collection of Powers’s sculptures, including several working models of *The Greek Slave* that the artist used to replicate his sculpture.² No patent for *The Greek Slave* came to light, but the search generated a broader exploration of nineteenth-century design patents for sculptures registered through the United States Patent Classification system within Class D11 (‘Jewelry, Symbolic Insignia, and Ornaments’). This classification included ‘sculptures, table or wall ornaments’, some of which are described by the subcategories ‘Simulative, Animate, Equestrian, Humanoid, Winged, Plural’: terms likely devised by Patent Examiners functioning in their capacity as government officials, rather than artists.³

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² The historic structure occupies a city block in Washington, D.C. bounded by F, G, 8, 7, and 9th Streets Northwest.

³ All design patents references in this essay may be found online by conducting a search using the design number (prefaced by ‘D’) in this search engine, ‘United States Patent and Trademark Office Search Engine’ [http://patft.uspto.gov](http://patft.uspto.gov/)
This essay offers the first overview of the USPTO's records for Design Patents classified in D11 issued for sculptures between 1842 and 1902, the years in which patent law offered the most significant protection for this art form. Prior to 1842, sculptures lacked any significant form of intellectual property protection in the United States and copying was rampant. In response, the Patent Act of 1842 created ‘Design Patents’ which provided protection for sculpture and ornamental design. This ended in 1902, when sculptures were no longer protected by design patents and sculptors instead availed themselves of copyright protection, made available in 1870. Between 1842 and 1902, the USPTO issued more than 400 design patents for sculptures that ranged from bust and figures commemorating venerated statesmen to ornaments that were sculptural in nature, such as coffin handles, clock cases, cake decorations, hat stands, and umbrella stands. The records underscore sculpture’s fluidity across the fine and decorative arts in the nineteenth century, especially as a significant number of patents were issued to designers affiliated with major decorative arts manufacturers. These include Karl L. Muller and his bother Nicholas, both of whom worked with Union Porcelain Company in Brooklyn, New York. Similarly, many patents were assigned to firms in Meriden, Connecticut, which earned the appellation Silver City owing to the numerous decorative arts manufactures based there. This remarkable body of patent documents does not offer an accurate or comprehensive history of nineteenth-century American sculpture; indeed, the majority of sculptors did not patent their designs.

4 This essay offers my perspective as an art historian; a legal scholar would surely have different and valuable observations around the selection of design patents. For an overview of the history of the US design patent, see Mark D. Janis and Jason J. Du Mont, ‘The Origins of American Design Patent Protection’, Indiana Law Journal, 88:3 (2013), 837-880, https://www.repository.law.indiana.edu/ilj/vol88/iss3/1/.

5 The Copyright Act of July 8, 1870, defined copyrightable subject matter to include ‘statuary, and . . . models or designs intended to be perfected as works of the fine arts’. Copyright Act of 1870, ch. 230, § 86, 16 Stat. 198, 212 (1870).

Nineteenth-century sculptors critically depended on selling replicas of their compositions, at times in large editions. The iterative nature of sculpture echoed the practices of photography, etching, engraving, and other serial art forms addressed elsewhere in this volume. Yet the copyright laws that protected such print editions did not historically apply to sculptural ones. The passing of the Patent Act of 1842 offered new protections, but the design patent was not self-enforcing, and its effective extent had yet to be tested in court. Moreover, while the Act of 1842 was expansive enough to include sculpture, it was not written specifically for that particular medium, and thus unevenly served the needs of sculptors according to their individual business models, preferred material, and studio practices. Initially, the design patent was only available to US citizens and foreign nationals who had resided in the US for one year who had pledged to become a citizen; this citizenship requirement was removed in 1870. Essentially, one had to submit a petition describing the design and arguing for its novelty and innovation, along with an illustration and the associated fee.7 Between 1836 and 1861, applicants for utility patents were generally required to submit a model that could be returned once it was reviewed, but it is unclear whether all design patents strictly required a model or the illustration alone sufficed. One could choose to hire a patent lawyer to draft the petition and a patent agent to render and deliver the model, or draw the design on behalf of the applicant; however, there is no specific evidence of sculptors contracting these services. If the petition was approved, the designer would take the required oath declaring the originality of his design in any number of places, including clerks of the court, magistrate

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offices, and US consulate offices abroad. Application fees and the term of the patent changed to some degree, with a benchmark established in 1861 that included options to protect a design for three-and-half ($10), seven ($15), or fourteen years ($30).^8

This essay focuses on case studies to show how select sculptors used the design patent to protect their work and advance their careers. In addition to Powers, key artists addressed in this essay include John King, Thomas Ball, John Rogers, Dayton Morgan, Leonard Volk, and Clark Mills, each of whom benefited from the patent in various ways and degrees. This essay also considers the implications of patenting a likeness of a sitter who does not typically profit from the commodification of his portrait, a point that is all the more urgent in the case of the self-emancipated Frederick Douglass, who took extreme care to control the replication and diffusion of his portrait.

Hiram Powers

With so many patents assigned to sculptors, one wonders why Powers's attempt to patent The Greek Slave failed, especially as this work was fast becoming the best-known American sculpture of the nineteenth century.\(^9\) His application may have been doomed from the start, since the US Patent Act of 1836 prohibited patenting anything that had been ‘on sale with the applicant’s consent’, and Powers had already sold several replicas of The Greek Slave between 1844 and 1849, by the time he applied to patent this design.\(^10\) Powers may have also misunderstood the protections a patent was meant to offer. His primary intention may have been to prevent the replication of The Greek Slave altogether. Had he succeeded in obtaining a patent, it is unlikely that he would have ever agreed to license reproduction of The Greek Slave to anyone else, at any price. Yet the design patent was most useful as a tool for authorizing

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\(^8\) Hudson, 384; Rules of Practice In Patent Cases, 1867, 25.


reproductions. Powers appreciated the concept of licensing when applied to his designs for vices, rasps, and other tools, for which he successfully secured utility patents in order ‘to enable others skilled in the arts to make and use my invention’.\(^\text{11}\) When it came to his sculptures, however, Powers could hardly imagine entrusting the execution of his designs to anyone outside his studio, much less a manufacturer. The translation of his design into marble required considerable labor, which he conscientiously confined to his studio where he directly supervised production, paying a premium to carvers who pledged to work exclusively for him.\(^\text{12}\) In the case of The Greek Slave, he was not trying to issue a large edition, but rather protect a handful of exquisite life-sized marble replicas.\(^\text{13}\)

Significantly, Powers’s failed patent application specified ‘a statue of a ‘Greek Slave’ in marble’, suggesting his primary objective was to protect his finished work, rather than its design. Powers may have unwittingly condemned his application by specifying marble as the medium.\(^\text{14}\) By contrast, most other applicants suggested a range of possible materials for those who intended to reproduce the design, stating that it might for example ‘be made of metal, papier-maché, plaster, or other suitable material, painted, stained, bronzed, or colored, as may be desired’.


\(^{12}\) By contrast, other sculptors in Florence sent their clay or plaster models to carving shops for replication, or hired carvers as needed, sharing the skilled artisan’s time with other sculptors.

\(^{13}\) Powers ultimately produced just six examples, each one a singular masterpiece personalized to the tastes and demands of the individual patron who commissioned its translation into stone. For details on these marble examples see Karen Lemmey, ‘From Skeleton to Skin: The Making of the Greek Slave(s)’, Nineteenth-Century Art Worldwide, 15:2 (2016), http://www.19thc-artworldwide.org/summer16/ lemmey-on-from-skeleton-to-skin-the-making-of-the-greek-slave.

\(^{14}\) It follows that Powers did not pursue patents for works that he sold in large plaster editions, for example his busts of The Greek Slave or Proserpine. See Richard P. Wunder, Hiram Powers: Vermont Sculptor, 1805-1873 (Newark: University of Delaware Press, 1991), ii, pp. 187–204 and 168–177.

Indeed, the great expense and specialized skill required to replicate a life-sized sculpture in marble inherently made it an unlikely material for counterfeiters.\(^\text{16}\) It follows that the majority of unauthorized copies of *The Greek Slave* were plaster or Parian ware, materials that were far cheaper than marble and could be used to quickly churn out large editions. In 1851, soon after Powers’s failed patent petition, the first marble example of *The Greek Slave* became the gateway for illicit copies. Powers’s patron Captain John Grant, who had purchased this sculpture in 1844, allowed plaster artisan Domenico Bruciani to make a mold of the sculpture. Bruciani, in turn, cast a life-sized plaster replica and collaborated with prominent Parian ware producer William T. Copeland of Sheffield, England, to create reductions of the sculpture, much to Powers’s vexation.\(^\text{17}\)

Only a handful of American art patrons could afford to tour Europe and commission works in marble from artists like Powers. At midcentury, Americans were just beginning to cultivate a taste for sculpture, and most aspiring patrons in the United States were satisfied purchasing finished plasters—a medium that prevailed until the mid-1850s due to the absence of bronze foundries and lack of locally sourced statuary marble. The low cost of plaster, and the ease with which it could be faithfully copied, prompted professional sculptors to sell their finished work in larger editions than if they had been working in bronze or marble. Yet these circumstances made it relatively easy for counterfeiters to release illicit plaster casts into the market, and most consumers were not able to distinguish between the authentic plasters and their knock-offs. Thus, the protections offered under the new patent law of 1842 particularly appealed to sculptors who primarily used plaster as the medium for their finished works.

\(^\text{16}\) Significantly, other sculptors who worked in marble did not typically patent their work, even those who issued large editions. For example, Randolph Rogers, who served as a witness on Powers’s patent application for *The Greek Slave*, did not patent his compositions, notwithstanding *Nydia*, of which he issued more than 168 marble replicas.

\(^\text{17}\) For a detailed account of this event see chapter ‘Bruciani’s *Greek Slave* and the International Exhibition of 1862’ (pp. 48-54) in Rebecca Wade, *Domenico Bruciani and the Formatori of Nineteenth-Century Britain* (London: Bloomsbury Visual Arts, 2019).
John King and Thomas Ball

One of the first American sculptors to patent his work was John Crookshanks King, a Scottish immigrant who was largely self-taught. King received a patent for his portrait bust of Daniel Webster (see Figure 2) in September 1850.¹⁸

![Fig. 2 John Crookshanks King, Daniel Webster (patented 1850), plaster, Smithsonian American Art Museum, Washington, D.C.](image)

The Boston-based sculptor inscribed the work ‘MODELLED AT WASHINGTON (MARCH) 1850’, suggesting that his effort to travel to the capital to directly observe the New England statesman added to the portrait’s authenticity. Significantly, during the artist’s visit to Washington D.C., he may have also been introduced to officials who could have helped him with the application. (Up to this point, since the passing of the 1842 law only two other patents had been issued to sculptors, in New Orleans and Philadelphia, suggesting that most sculptors were unfamiliar with the process of filing a petition for a

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After the beloved statesman’s death in October 1852, King sold numerous life-size plaster casts, which were usually cast with the inscription ‘Patented 1850,’ suggesting this novel government-issued protection may have made the portrait seem more official.\(^\text{19}\) In June 1853, King arranged to edition smaller replicas of the bust in porcelain through Copeland’s factory in England, perhaps emboldened to send his work to an industrial manufacturer in a foreign country because he had secured a US patent for his design.\(^\text{20}\)

King’s experience with patents likely influenced his protégé Thomas Ball to protect his own models. Ball was an up-and-coming painter specialized in miniature portraits in Boston in the late 1840s, when King suggested he try sculpting.\(^\text{21}\) Ball completed his first sculpture in 1851, a portrait of the popular singer Jenny Lind. It was an instant success, and Ball quickly established a market for plaster copies of his works. However, his progress was immediately threatened by piracy as he recounted, ‘for a time I could not produce the plaster copies fast enough to supply the demand […] But soon an Italian pirate in New York got possession of one of them…flooding the market at starvation prices’.\(^\text{22}\) Ball patented his bust of Lind in April 1852, lamenting how the application process entailed many supporting documents, ‘almost as many as would be required to patent a steam-engine’.\(^\text{23}\) He subsequently patented several other compositions in the 1850s, but it is unclear if these patents successfully discouraged counterfeiters, a reminder that the patent was not self-enforcing and less effective if the holder was unwilling to take legal action against his imitators.\(^\text{24}\)


\(^{20}\) The porcelain version measures approximately 17 x 12 x 8 inches (see example in the New Hampshire Historical Society, https://www.nhhistory.org/object/137355/bust) and is a reduction of the plaster examples that measure 25 x 19 x 14 inches.

\(^{21}\) Craven, p. 191.


\(^{23}\) Ball, *My Threescore Years and Ten*, p. 130.

Ball’s piercing encounter with plaster pirates likely motivated him to reevaluate his studio practice. In a short time, he stepped out of the plaster business altogether, and the D11 patent gave him the means to do so. In 1853, Ball’s plaster statuette of Daniel Webster (Figure 3) caught the eye of George Ward Nichols, a young artist and burgeoning entrepreneur who purchased the sculpture along with the rights to reproduce it.25

Ball used his patent, dated 9 August 1853, to complete this transaction by listing Nichols as the assignee. Nichols paid Ball $500, a considerable sum that afforded the sculptor the opportunity to move to Florence, Italy, where he would refine his skills, develop an international clientele, and increasingly work in marble. Ball arrived in Italy with his wife in October 1854, setting his career on a new path. He patented one more design on his own in 1857, a bust of Napoleon Bonaparte, but only a single, marble example of this composition is known, suggesting the artist found it more efficient to leave replication and marketing concerns to Nichols.26

Through Nichols’s skillful marketing, sales of the Webster statuette soared along with Ball’s reputation. Between 1858 and 1865, during which time Ball was in Boston, he no longer relied on the marginal profits gained through the sales of plaster casts and turned his attention instead to a commission for a monumental equestrian bronze sculpture for the Boston Public Garden.27 Indeed, in 1858 when Ball patented his


Fig. 3 Thomas Ball, *Daniel Webster* (1853), bronze, The Metropolitan Museum of Art, New York.
statuette of Henry Clay, his last statue to receive a patent, he again listed Nichols as the assignee.

Nichols was empowered to replicate Ball’s designs as he saw fit. Without needing to further consult Ball, Nichols single-handedly made decisions about the scale and medium, as well as the size of the editions. Nichols even took the liberty to change the compositions, eliminating the draped column on some editions of the statuettes of Clay and Webster, which had been itemized as a separate element in their respective patents, in an effort to reduce production costs for these simplified versions and to create a tiered market for the sculptures. It seems that ‘the final expression of [Ball’s] idea was not a necessary aspect of the sculptor’s task’; rather, it was the design concept that mattered most.28 When Ball reflected on the transaction for the Webster statuette years later he conceded, perhaps with some regret, that Nichols was a ‘shrewd art dealer […] who must have made five thousand dollars out of it […] I could not have done it’, fully crediting Nichols with the execution, marketing, and success of the sculpture.29

Nichols’s large editions of Ball’s statuettes in plaster and Parian ware were a popular novelty, but he launched a new chapter in the history of American sculpture by deciding to cast hundreds of the statuettes in bronze at the Ames Manufacturing Company in Chicopee, Massachusetts, making these the first mass-produced American bronze sculptures (see Figure 4). Ames was primarily a firearms foundry that had opened a special division for casting art in the early 1850s, through the sustained encouragement of sculptor Henry Kirke Brown.30 Ames became the first bronze foundry in the United States to reliably cast art bronzes. Earlier generations of American sculptors were forced to send their models to European foundries, or settle with inferior casts that were riddled with casting flaws. Nichols perceptively recognized Ames’s unique capacity to execute large editions of high-quality bronze

29 Ball, My Threescore Years and Ten, p. 142.
casts. The foundry’s business records show it cast at least 200 statuettes of Webster, each inscribed with Nichols’s name alongside that of the artist. Nichols issued casts in several sizes between 36 and 76 inches high, with or without drapery, and with an ‘ordinary’ or ‘fine’ finish, so they could be variously priced to reach a range of consumers.31

Fig. 4 Bronze Casting Record (Henry Clay and Daniel Webster), Ames Manufacturing Company, Bronze Foundry after Thomas Ball (1853–ca. 1877), Archives of American Art, Washington, D.C.

Despite the critical importance of patents early in his career, Ball did not patent any other work after assigning the statuette of Henry Clay to Nichols in 1858. Significantly, the bulk of Ball’s small-scale sculpture after this period was made in marble or limited editions of bronze. For Ball, the design patent proved an important means through which the artist could formally separate design from production, a contractual agreement that allowed him to monetize the creative aspect of his practice by selling production rights to an assignee.

John Rogers

A third sculptor from Boston, John Rogers, made exceptional use of the D11. Between 1862 and 1888, he secured 63 patents for his sculptures — approximately eight percent of the total number of patents issued for sculptures in the nineteenth century, far more than any other sculptor.

His body of patents is useful for charting changes in how artists presented their designs. For example, after about 1862, Rogers began replacing simple line drawings of his designs (see Figure 5) with photographs of his models, and around 1866 he switched from handwritten submittals to typed applications.

For nearly four decades, Rogers flourished as an artist of the people, selling tens of thousands of Rogers Groups (as his works were known) and generally issuing two new groups each year.\(^\text{32}\) He targeted his art to an expanding market of middle-class consumers by making affordable, small-scale, plaster compositions depicting a range of accessible themes, from humorous vignettes of young courtship, to more politicized scenes of military troops in camp or advancing the Union cause. Rogers’s consistent choices about the scale, medium, and marketing of his artworks led to a highly standardized production process that made the design patent especially important to his practice.

Rogers was born to a prominent Boston family that had fallen into financial difficulty, and as a consequence he received a limited formal education. While working as a machinist in 1849, he began filling his leisure time modelling clay figures inspired by the work of Scottish genre painter Sir David Wilkie. In 1859, Rogers traveled to Europe to

pursue more formal training in the arts, studying in Paris with Antoine-Laurent Dantan, and in Rome with the English sculptor Benjamin Edward Spence. Rogers soon realized he was uninterested in both the prevailing neoclassical aesthetic and quintessential medium of Carrara marble, both of which had enchanted Powers, Ball, and other expatriate artists in Italy. He returned to the United States after just seven months abroad, eager to create small-scale genre scenes in plaster, his medium of choice.

As Rogers’s career advanced, he employed numerous specialized laborers to focus on each of the steps required to produce a Rogers Group. The artist began each new composition in clay, which was then molded and cast in plaster as needed to fulfill orders. The cast was finely

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finished to remove mold seams, and dipped in specially formulated coatings that protected the surface and gave it the color of terracotta, a material more closely associated with fine art. At the height of his career in the 1870s, Rogers’s studio in New York was a well-run factory buzzing with sixty assistants. Early on, however, he had neither the skills nor the means to oversee this multi-step production, and necessarily relied on professional plaster casters. These were mainly Italian immigrants, whom he regarded with wariness. Fearing they would steal his designs, he bluntly proclaimed ‘I believe all these Italian casters are thieves and rascals’. In fact, these highly skilled formatori (mold-makers) had carried the centuries-old craft from Italy, where they likely apprenticed at a young age in preparation for their essential role in the marble statuary industry. As immigrants to the United States, they were often characterized as mere street peddlers who sold cheap casts, such as the one Ball described selling illicit copies of his bust of Jenny Lind. Rogers demeaned them, but he needed their valuable knowledge of their métier. This was a point made plain by Rogers’s conniving plan to advertise for a workman. ‘I may find one that I can employ but my main object is to pump them all day when they apply and find out all they know –Mean trick, isn’t it?’

Rogers’s business plan required that he sell many multiples to turn a profit, which meant tapping every available market. To reach more clients, he often sold his work through local shops in Chicago, Philadelphia, Boston, and other northern cities where his vignettes of Union troops, such as *The Pickett Guard*, *Camp Life*, and *Wounded to the Rear* (see Figure 6), held the greatest appeal.

Early in his career, in the late 1850s and early 1860s, Rogers arranged to have his works cast close to the point of sale to minimize breakage of works when shipping them from his New York studio. This meant trusting his models to plaster casters in other cities. For example, he arranged for his Boston retailer Williams and Everett to cast his models

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35 John Rogers to SEDR, New York, 1 December 1861, ‘Rogers Family Papers, 1719-1955’, New-York Historical Society Library, Manuscript Collection. All subsequent letters cited for Rogers may be found in this collection.
36 Bogart, p. 157.
with a local caster named Gariboldi. The need to ‘trust to [the] honor’ of both his retailer and craftsman irritated Rogers to no end. He was especially concerned about Gariboldi’s ‘Italian friends getting hold of the models’. Writing from New York in 1861, he asked his father in Boston to check on the replication process, and the following year, he


38 Rogers also notes that Gariboldi charges $2 per cast. By contrast, it costs the artist $1.25 to cast them. John Rogers to Sarah Ellen Derby Rogers, 10 November 1861, New-York Historical Society.
pleaded with his father to check again ‘whether the “original” that Gariboldi [had] been destroyed’.39

During this time, Rogers constantly weighed the cost benefits of patenting his models. As early as 1856, he expressed interest in patents, asking his father to contact fellow Bostonian Thomas Ball for guidance on the application process as he wondered how ‘a patent is managed at Washington, whether the commissioners decide for themselves or whether lawyers are employed like a case in court’.40 His eagerness to patent his work was tempered by limited means to pay the application fees, and he deliberated over which composition to protect first. In January 1860, Rogers wrote of his intention to patent his group *The Slave Auction*, ‘so as to present it being copied [and] to enable me to sell the right in other places’.41 Rogers hoped to reach new clients in Boston’s vibrant abolitionist community by making ‘some bargain with [Nathan Davies] Cotton’, whose art supply store on Boston’s Tremont Row had been known for selling J. C. King and Ball’s plaster sculptures in the 1840s and 50s.42

Rogers yearned for Cotton to ‘either exhibit *The Slave Auction*] and take orders on commission or to buy the rights and [cast the plasters] in Boston. In the latter case I should have to get a patent right to secure him and there is so much risk and trouble in transporting them that I prefer the latter course’.43 Rogers ultimately decided not to patent *The Slave Auction*, once he realized that its emphatically abolitionist message would attract a limited number of customers. He instead targeted direct sales in New York neighborhoods that were known for their abolitionist sympathies, and decided ‘to send a negro round’ with the casts as a way of bringing to life and exploiting the composition’s tragic narrative.44

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40 It is unclear whether Ball ever responded to Roger’s plea for his counsel. JR to [father], Hannibal, 3 November 1856; JR to [Mother], Chicago, 29 October; JR to [mother] Chicago, 5 November 1859, Rogers Family Papers, 1719-1955.
42 For example, this broadside showing Cotton and King jointly advertising King’s work, John Crookshanks King and Nathan Davies Cotton, *A Bust of Dr. Samuel B. Woodward, Which Has Just Been Finished by John C. King, to Be Placed in the State Asylum at Worcester ... Is Now on Exhibition for a Few Days, at the Store of N.D. Cotton, No. 13 Tremont Row* (Boston: s.n., 1847).
As his business grew, Rogers increasingly took measures to protect his designs. In 1861, he moved to a more spacious studio in the Dodsworth Building, where he was surrounded by accomplished artists. He employed more hands in order to keep the casting process in his New York studio, and ceased sending models to plaster casters in other cities. His improved packing and crating methods allowed him to sell Rogers Groups directly through mail-order catalogues, shipping them to ‘all parts of the World’.\(^{45}\) A year later, he began patenting his designs, obtaining six patents over the span of a few weeks in the spring of 1862.\(^{46}\) He grumbled about how the application fees were ‘quite a drain on my stock of cash’, but admitted that securing these documents was ‘the only way I can feel safe’.\(^{47}\)

Rogers’s commitment to patenting his work marked a professional milestone that signaled a new phase in his career. Fellow sculptors John Quincy Adams Ward, whose studio was also in the Dodsworth building, and Charles Calverley signed as witnesses on these first applications, testifying to the originality of Rogers’s designs. Ward worked primarily in bronze and Calverley in marble, and neither of them patented any works of their own; yet their service as witnesses underscores the professional respect Rogers earned from his fellow artists. From this point on, the design patent became a crucial part of Rogers’s business plan, especially as he widened the roster of retailers around the nation beyond art stores, bookstores, jewelry shops, and other points of sale.\(^{48}\)

For all its benefits, the design patent offered incomplete protection. It did not shield Rogers’s groups against unauthorized photographic

\(^{45}\) Quoted from Kimberly Orcutt, ‘Selling the John Rogers Brand,’ in Orcutt et al., p. 160.


\(^{47}\) John Rogers to Sarah Ellen Derby Rogers, 28 April 1862, New-York Historical Society.

\(^{48}\) Kimberly Orcutt, ‘Selling the Rogers Brand’, in Orcutt et al., pp. 159–160.
or other printed reproductions. As Kimberly Orcutt has noted, Rogers struggled ‘to maintain control over the commercial proliferation of his images’, leading the artist to inscribe a warning on the base of some of his patented sculptures, reading ‘The right to photograph this group is not sold with it’.\(^{49}\) Ironically, Rogers took full advantage of advances in photography and print culture to advertise his works in catalogues and periodicals, and increasingly relied on portrait photography to serve as references for his groups representing statesmen and their advisors. This included *Council of War*, which shows Abraham Lincoln with Secretary of War Edwin M. Stanton and Ulysses S. General Grant.\(^{50}\)

With few exceptions, Rogers Groups depicted stock characters and generic figures who typified specific roles or groups of people, but there were many sculptors who sought patents for their work in portraiture: a category of art that presents distinctive questions, as patenting the likeness of another human is fundamentally different than patenting a character type or idealized, allegorical figure. It prompts us to consider the following questions: what legal claim could an artist expect to have over reproductions of another person’s face; furthermore, did the sitter have any authority over the authenticity or proliferation of his portrait; finally, how much should an artist profit from another person’s likeness?

Elected officials such as Daniel Webster could reasonably assume artists might patent and market their portraits for public consumption. But what of private citizens who achieved celebrity? What control might they effectively assert over their portraits, especially as sculptors increasingly relied on photographs to create portraits from a distance, without the intimate contact with subjects that happened when modelling a person from life?

**Dayton Morgan**

These concepts of consent and control are most poignant when considering Dayton Morgan’s patented bust of Frederick Douglass, a man who risked his life to self-emancipate in 1838. Douglass believed positive visual representations had the power to change majority opinions

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\(^{49}\) See illustration of *Challenging the Union Vote* (patented 1869) in Michael Leja, ‘Sculpture for a Mass Market’, in Orcutt et al., p. 23; Orcutt et al., p. 164.

\(^{50}\) Orcutt, ‘Selling the Rogers Brand’ in Orcutt et al., p. 164.
about the nation’s Black population. He recognized that ‘photographic portraits bore witness to African Americans’ essential humanity, while also countering the racist caricatures that proliferated throughout the North’.\(^{51}\) Throughout his life, Douglass took care to ensure he was represented accurately and with dignity; his ‘likeness embodied his cause of racial equality’.\(^{52}\) There is no documentation to suggest that Morgan ever asked Douglass to sit for a portrait bust, and it seems unlikely the orator would have accepted such an invitation as he was skeptical of depictions that were not photographic, observing, ‘Negroes can never have impartial portraits at the hands of white artists...It seems to us next to impossible for white men to take likenesses of black men, without most grossly exaggerating their distinctive features’.\(^{53}\)

Morgan probably relied on one or several photographs made between 1864, when Douglass shaved his beard in favor of a handlebar mustache, and August 1868, when the sculptor patented the bust.\(^{54}\) The bust evidently met the approval of Douglass’s son Charles R. Douglass, who wrote to his father on 9 June 1868, ‘I am proud to see you honored in the way the Cincinnati people have inaugurated, and I predict that in other localities the same steps will be taken to show the people’s appreciation of you and your service in the cause of the oppressed’.\(^{55}\) Since this letter predates Morgan’s patent, it is unclear whether the Douglass family was aware of the artist’s intentions to commodify reproductions of this bust. In these early dates of Reconstruction, Douglass was a legendary figure who was well on his way to becoming ‘the most photographed American in the nineteenth century’. By the time Douglass died in 1895, he had posed for at least 168 photographs, prompting the Chicago Tribune to write, ‘No man, white or black, has been better known for nearly half a

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\(^{52}\) Ibid., p. xv.

\(^{53}\) Ibid., p. xvii.

\(^{54}\) The catalogue raisonné in Stauffer et al., pp. 171-175, includes Morgan’s bust (entry no. 59) and photographs of Douglass from the period in which Morgan made this bust. Dayton Morgan, ‘Design for a Bust of Frederick Douglas [sic], Design Patent No. 3151’, 1868, http://patft.uspto.gov/netacgi/nph-Parser?patentnumber=D3151.

Morgan, a relatively obscure artist who hailed from Ohio, clearly hoped to capitalize on Douglass’s fame by patenting his bust. By the time he patented his bust of Douglass, his most notable artwork had been a bust of Abraham Lincoln (1861) that was displayed at a bookstore in Washington, D.C. in 1865. Morgan was active in the capital from 1877 to 1891, and likely returned to Ohio afterwards, as records show he was buried there in 1914. Morgan’s bust of Douglass was one of only two sculptures made of the orator during his lifetime, yet only one example has come to light. This suggests that the edition was very small, and in turn prompts us to wonder whether Morgan ever profited from patenting the sculpture.

A good portrait is expected to capture more than the line and form of its subject’s face; it should express the essence of a sitter’s character. Nevertheless, the primary criterion for judging a portrait’s success in the nineteenth century was its faithful likeness. To achieve maximum verisimilitude, many sculptors relied on life and death masks that were made from molds cast directly from a subject’s face, an artefact that promised an indexical record of one’s visage. A sculpted portrait that was based on a mask was, arguably, as much the product of the sitter as the artist, since the sitter necessarily participated in its making. Patents, however, were granted solely to the sculptor, regardless of how much or how little artistry went into producing the portrait in question.

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The other portrait bust was sculpted by Johnson M. Mundy in the 1870s. See Stauffer et al., p. 74.

Leonard Volk

Leonard Volk’s statuette of statesman Stephen A. Douglas introduces an unusual degree of agency on the part of the sitter, since the latter served as a witness to the sculptor’s patent application. The senator from Illinois was related to the sculptor through marriage and supported his work in numerous ways, even sponsoring Volk’s studies in Europe. Volk completed a life-size marble statue of Douglas in 1859, a commission from former Illinois governor Joel Matteson. The large sculpture was used as a campaigning prop and accompanied Douglas as he canvased the South for votes in the 1860 presidential election. Volk noted, ‘I spent most of the winter of 1860 in Washington, publishing a statuette of Senator Douglas’, by which he meant securing a patent for his reduction of the life-size marble. Volk received the patent in February 1860, having secured Douglas’s signature as one of his witnesses. In this unusual case, the patent document provided a means for the sitter to show his approval of the portrait and endorse its authenticity.

Douglas had introduced Volk to his political opponent Abraham Lincoln in 1858. The sculptor convinced Lincoln to sit for his portrait, an arrangement that was delayed until April 1860, when Lincoln visited the sculptor’s studio in Chicago. Volk made a plaster mold of Lincoln’s face, regaling him with disparaging anecdotes of how he ‘occasionally employed a little black-eyed, black-haired, and dark skinned Italian as a formatore in plaster work’, to amuse and put his sitter at ease before requiring him to sit immobile as the plaster mask set. Volk subsequently used the mask to create a bust of Lincoln (Figure 7), which he patented in June 1860, after the young statesman had won the nomination as Republican candidate, and before his election as president.

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65 Ibid.
Volk was the only sculptor to patent a portrait of Lincoln during the president’s lifetime. Almost immediately after Lincoln’s death in April 1865, and as the nation mourned, some eleven sculptors secured patents for their portraits of the first American president to be assassinated. Nine of these were issued within a year of Lincoln’s death, including one to sculptor Sarah Fisher Ames—one of only two women to obtain a D11 patent in the nineteenth century.\footnote{The only other design patents issued to a woman in this period were: Celia M. Smith, ‘Design Patent for Statuette of Baby, Design Patent No. 22967’, 1893, http://patft.uspto.gov/netacgi/nph-Parser?patentnumber=D22867; Celia M. Smith, ‘Design Patent for Statuette of Cat, Design Patent No. 21680’, 1892, http://patft.uspto.gov/netacgi/nph-Parser?patentnumber=D21680.}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{figure7}
\caption{Leonard Wells Volk, \textit{Abraham Lincoln} (1860), plaster, National Portrait Gallery, Washington, D.C.}
\end{figure}
Clark Mills

Perhaps the most significant of these sculptural renderings of Lincoln is a life mask made by Clark Mills on 14 February 1865, just two months before the President’s death (see Figure 8).

In contrast to the youthful, beardless face shown in Volk’s *Lincoln*, Mills captured a grizzled, war-weary commander-in-chief. Fisk Mills, the sculptor’s son, secured a patent for his father’s work in June 1865, noting that it was modeled from a cast taken from the living face [of Lincoln] […] and differs from all other likenesses as being a perfect facsimile […] physiologically and phrenologically speaking. The calipers being applicable to the cast for minute exactness of the features and organs.68

This description suggests that Mills intended his sculpture as a tool for other artists seeking to sculpt monuments to the martyred leader. Indeed,

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it is improbable that Mills, who used slave labor to run his foundry on Bladensburg Road in the District of Columbia, was motivated to depict Lincoln out of admiration, and it is telling that the Mills family opportunistically patented the mask after Lincoln’s death, after realizing there would be a market for memorials.

Clark Mills also patented a design for an equestrian monument: one based on his colossal bronze sculpture of Andrew Jackson (see Figure 9), that was dedicated in Lafayette Park in front of the White House on 8 January 1853.\(^\text{69}\)

A largely self-taught artist, Mills had entered the arts through his work as an ornamental plaster craftsman. Through a combination of circumstances and outsized ambition, he won the enviable commission for the Jackson monument in 1847. Equestrian bronze monuments have proven technically challenging for many civilizations, and Washington society enthusiastically celebrated Mill’s work as the first equestrian bronze monument to be cast in the United States. Yet while it marked a technological milestone, it was roundly dismissed by other artists and critics for its artlessness. Mills rigged his lifeless figure of Jackson to sit rigidly at a ninety-degree angle on an equally lifeless horse, in order to balance the weight of the bronze entirely on the hind legs of the horse. Mills ignored these critiques and patented his design in May 1855. His application reveals that his priority was neither his portrait of Jackson nor the overall aesthetic of the monument. Instead, he asserted his ingenuity, and the originality of the technical achievement of balancing the horse ‘rampant, and so poised as to be supported on its hind legs only, and mounted by a rider […] the hind legs […] of the horse are embedded or otherwise secured so as to avoid all other vertical supports which detract from the general effect of the statue’.\(^\text{70}\)

In an era when there were only a handful of monuments in the United States, most of them imported from Europe, Mills had good reason to believe his patented design for an equestrian statue might serve other monument campaigns. In essence, he had patented a generic model for a monument. He admitted his design was formulaic, ‘The trappings being of a character suited to the design, and the size of the whole


\(^{70}\) Ibid.
depending upon the fancy of the maker or user’, encouraging others to replace Jackson with their chosen hero and modify the accoutrements as needed.\footnote{Although Mills patented a design for a general, equestrian monument, statuette replicas after his Andrew Jackson monument were commercially issued in bronze.}
After the Civil War, as the country fell into the grip of monument mania, several manufacturing firms, such as J. W. Fiske Ironworks in New York, indiscriminately filled orders for public and private memorials throughout the North and South. Fiske notably patented a generic life-size figure of a ‘soldier at rest […] thus furnishing an ornamental figure for military monuments, grounds, buildings and similar places’. In subsequent decades Fiske patented various other ‘stock’ figures for a range of commemorative and decorative purposes — from a fireman holding a child to ornamental lions and Newfoundland dogs, which it sold through its catalogue. With few exceptions, the most important monuments of the last quarter of the nineteenth century were not patented, with the notable exclusion of the Statue of Liberty — a reminder that US design patents were available to foreign applicants in some instances. The record for patents classified in D11 continued to grow, but the applications tended towards small-scale decorative objects of lesser importance, figurines and statuettes, a number of which document the ubiquity and popularity of racist caricatures in everyday objects, and which equally bear the imprimatur of an official federal patent.

Conclusion

As the nineteenth century drew to a close, American sculptors became increasingly organized, especially after the founding of the National Sculpture Society in 1893, their first professional association. The most successful sculptors no longer concerned themselves with direct sales, especially casts in plaster. Their finest small-scale work was sold through the expanding network of international art dealers and galleries, some of which were directly operated by bronze foundries, such as Gorham, that had vested interests in protecting the quality and size of editions. The most prominent sculptors were focused on winning major commissions for the new civic buildings of the City Beautiful movement, Beaux-Arts urban projects, and robber-baron mansions, all of which marked the end of the nineteenth century. Many participated in the ambitious sculptural programs featured at various world fairs and expositions that were regularly staged in cities around the nation. Moreover, as the twentieth century began, most sculptors turned away from the patent altogether, preferring to protect their designs through copyright, which was cheaper and simpler to obtain. Indeed, fin-de-siècle sculptors Augustus Saint-Gaudens, Frederick MacMonnies, and A. Phimister Proctor worked with multiple foundries at home and in Europe to release numerous copyrighted reductions of their monumental bronzes, as a way of expanding private sales of their designs for public sculptures.

In hindsight, the design patent offered critical rights to nineteenth-century American sculptors and helped them establish their burgeoning field as a respected creative profession. The protection granted through the design patent was always temporal, and most works from this period have been in the public domain for a long time. As today’s 3D digital scanning and printing technologies continue to improve, and institutions increasingly digitize their historical collections, nineteenth-century sculpture stands on the precipice of a new world of reproductive possibilities entirely unimagined by the sculptors of the past. (It is hard to know what Clark Mills might make of seeing his mask of Lincoln for

sale on Walmart.com. Limitless modern editions of the nineteenth-century sculptures whose replication was once so strictly controlled can now be readily fabricated with variations in medium and scale to meet any market demand.

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