

# The Trademark Reporter®



## The Law Journal of the International Trademark Association

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## BOOK REVIEW\*

*By Zvi Rosen\*\**

**Branding Trust: Advertising and Trademarks in Nineteenth-Century America.** Jennifer M. Black, 2023. Pp. 320. \$49.95 (hardcover, eBook). University of Pennsylvania Press, 3810 Chestnut Street, Suite 300, Philadelphia, PA 19104-3171.

American trademark law came of age in the nineteenth century. Although trademark law would not yet reach maturity until the Lanham Act decades later, the first state trademark statute was enacted in 1847, followed by many others, and a federal trademark statute was enacted in 1870. The lack of a firm constitutional tie to commerce led to the fall of the federal laws with the *Trade-Mark Cases* in 1879.<sup>1</sup> A new federal law limited to international commerce came in 1881, but after the Supreme Court made clear in 1903 that this new law did not protect against domestic infringements of such marks,<sup>2</sup> the 1905 Trademark Act was passed, which was based on use of a mark in interstate commerce. All this time, the common law of trademarks was developing simultaneously and in tandem with the federal law.

Stated above is the history of trademarks, through a purely legal lens. There are relatively few legal histories of trademarks to begin with—Frank Schechter’s 1925 work *The Historical Foundations of the Law Relating to Trade-Marks*<sup>3</sup> is frequently pointed to, although the bulk of the work focuses on trademarks before (often well before) 1776. Scholars including myself have written longer articles on the history of American trademark law, but there hasn’t been a major monograph on the subject<sup>4</sup>—and there are even fewer, if any, histories of trademarks that ground the legal development of trademarks within a broader cultural context.

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\* This book review should be cited as Zvi Rosen, Book Review, 116 Trademark Rep. 604 (2026) (reviewing Jennifer M. Black, *Branding Trust: Advertising and Trademarks in Nineteenth-Century America* (2023)).

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<sup>1</sup> 100 U.S. 82 (1879).

<sup>2</sup> *Warner v. Searle & Hereth Co.*, 191 U.S. 195 (1903).

<sup>3</sup> Frank I. Schechter, *The Historical Foundations of the Law Relating to Trade-Marks* (1925).

<sup>4</sup> See Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 St. John’s L. Rev. 827 (2009); Zvi S. Rosen, *In the shadow of the Trade-Mark Cases: the 1881 Trademark Act and the Supreme Court*, in *Forgotten Intellectual Property Lore* 256 (Shuba Ghosh ed., 2020).

Now we have one, from an unexpected place: Jennifer M. Black, an Associate Professor of History and Government at Misericordia College. Professor Black is not a lawyer, instead coming from an academic history background, focusing on visual studies, advertising, and material culture. The result is the book *Branding Trust: Advertising and Trademarks in Nineteenth-Century America*, offering a fresh perspective on an intersection of law, business, and culture that we perhaps acknowledge but rarely interrogate. The author “integrates the study of legal history, cultural history, economic history, and visual culture”<sup>5</sup> to analyze “the visual rhetoric of trust and legitimacy”<sup>6</sup> that trademarks and advertising represent. The book is arranged in six chapters that culminate in the review of the early twentieth century and the passage of the 1905 Trademark Act.

This synthesis of disciplines has a great deal to tell us and can enrich our understanding of the history of trademark law. It’s easy enough to talk about the early common-law cases and state statutes regarding trademark law, but the connection between these legal developments, the development of standards of commercial morality, and the aftermath of the Panic of 1837 is not nearly as obvious without this interdisciplinary focus. The first chapter’s exploration of the importance of testimonials in promotion of goods connects the “material culture of gentility” of the era directly to the development of trademark law happening at that time.<sup>7</sup>

The book’s second chapter dips deeper into legal history, exploring the litigation involving passing off and counterfeiting in the mid-nineteenth century, and the evolution of moral norms regarding authenticity that accompanied this litigation. The chapter culminates with the passage of the 1870 Act, and speaking as someone who has written a history of the 1870 Act, I find it fascinating to see how a historian approaches it, looking less to diplomatic maneuvers, and more to evolving conceptions of appropriate commercial behavior. Of course, diplomacy and commercial mores often intersect, but Professor Black’s expertise allows her to illuminate this intersection in a way that combines nonlegal and legal considerations in a uniquely skillful way.

Moving forward, the next chapters gravitate further away from legal history, with the third and fourth chapters, respectively, focused on uses of type (setting and faces) in newspaper advertising and in trade cards. Although they don’t dive into legal history, these

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<sup>5</sup> Jennifer M. Black, *Branding Trust: Advertising and Trademarks in Nineteenth-Century America* (interview by H-Net), H-Net: Humanities & Social Sciences Online (May 6, 2026), <https://networks.h-net.org/group/discussions/20150838/jennifer-blacks-branding-trust-advertising-and-trademarks-nineteenth>.

<sup>6</sup> Jennifer M. Black, *Branding Trust: Advertising and Trademarks in Nineteenth-Century America* 17 (2023).

<sup>7</sup> *Id.* at 28.

chapters add understanding to the milieu of trademark law at the time and inform legal precedents from that period. For instance, the Supreme Court case of *Higgins v. Keuffel*, finding that an unadorned product label for ink simply describing the contents was not protectible under the copyright-adjacent 1874 Print and Label Law, is given additional context when we learn that advertising was becoming creative through the use of various typefaces.<sup>8</sup> The book's fifth chapter looks at the shift from testimonials in advertising to the rise of fictional characters associated with a corporation who would embody the brand's goodwill in advertising. Obviously, such characters are still used extensively, and understanding their rise is to understand the commercial considerations underpinning trademark law.

The final chapter returns to legal history, looking at the increased importance of goodwill and trademarks in advertising, as these legal considerations became less incidental and more central to branding and marketing-positioning strategy. A substantial portion of this chapter is focused on Nabisco, offering a valuable study of trademark strategy in the era. Nabisco built a trademark portfolio that not only generated strong marks but created associations of those marks and their owner with quality. This was complemented by an aggressive litigation strategy to ensure that Nabisco's marks retained their association. Black estimates that within sixteen years of its founding, Nabisco had been successful in about 830 trademark disputes in and out of court as part of building its brands.<sup>9</sup> The passage of the 1905 Act marks the culmination of the book, although the 1905 Act was famously insufficient—as an epilogue notes. It would not be until 1946 and the enactment of the Lanham Act that the United States had a truly effective federal trademark law.

The book is printed in black and white and is extensively illustrated in a way that enriches the narrative, showing us examples of the advertising being discussed. Color would have been nice when chromolithographs were discussed, but it would have doubtless added to the cost, and most of the advertisements discussed had originally appeared in black and white newspapers anyway.

I enjoyed reading *Branding Trust: Advertising and Trademarks in Nineteenth-Century America*, and I'm certain others would find it enjoyable as well. It makes an important contribution to our understanding of how trademark law became what it is today.

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<sup>8</sup> 140 U.S. 428 (1891).

<sup>9</sup> Black, *supra* note 6 at 232.