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Copyright dupes: piracy and new media in Edison v. Lubin (1903)

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Writing in 1926, film historian Terry Ramsaye described the first decades of the film industry in the US as a 'lawless frontier'. For the most part, he ignored the many piracy battles that consumed the first filmmakers, claiming that 'Ethics seldom transplant. They must be raised from seed, in each new field.'[1] Ramsaye's conclusion may have been right – new media require new ethics – but he overlooked the process through which media ethics are updated and rethought when he brushed piracy battles under the carpet. It is often in the debates over piracy that we see new media breaking away from the old. Piracy wars frequently veil contests to control innovation and new avenues for creativity. Where we encounter piracy claims in new media, we often find incumbent businesses trying to protect their investment in older media by resisting the new. On the other side, today's pirates are often tomorrow's moguls, who are simply pushing the limits of new technology in directions that have yet to be assimilated (or condemned) by the law or society. To be sure, many pirates simply take advantage of the temporary lawless frontiers that accompany the diffusion of new media. Whatever their motivation, most early filmmakers were pirates of one stripe or another.

Copyright law is the battlefield on which media piracy battles are fought; it is the official engine for distinguishing piracy (or more innocuously 'infringement') from the many legal forms of copying, distributing, performing, and building on art and information. Justice Joseph Story famously referred to copyright as the 'metaphysics of the law'; we could add that copyright law is also the metaphysics of new media.[2] One thing that becomes clear from the early history of film copyright is that lawsuits and piracy claims arose out of struggles to define the nature of the medium. Truths about motion pictures that seem obvious and inevitable in hindsight took decades to identify and fix. Just for example, is the celluloid that runs through the camera and projector part of the machine (and thus covered by patent law) or is it the content or software played by the technology (and therefore covered by copyright law)? The answer is a little bit of both. Other questions to be answered in copyright court cases included: Could silent moving images really copy words on a page? Who publicly 'performed' the film: the creators back in the studio or the projectionist who ran the film for audiences? And the question I will trace through the court system in this essay: Was film really a new medium or was it just the latest extension of photography?

The answers to these questions grew out of philosophical positions about how to shape the future of art, business, and society through new media. It generally falls to courts, however, to make sweeping decision about new technology before society, philosophers, or Congress have a chance to explain them. In piracy cases, courts are periodically faced with a difficult decision: do existing laws account for the technology before them or does Congress need to devise a new set of regulations for a new medium? Court rulings on this question always change the development of the medium at hand. Where legal histories tend to end with the handing down of deci-

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Fig. 1. The photograph made from the film *Edison Kinetoscopic Record of a Sneeze*, submitted for copyright registration in 1894.

sions or statutes, I will look at the impact of the law as well as its creation. The pronouncements of judges and Congress frequently have unintended results, and they are always only one piece of a complex formula that steers the development of new media in one direction or another. It is in the interaction of law, public discourse, and business practices that we can see how piracy debates define and shape new media.[3]

Photography: an unstable base

Movies are just a lot of photographs strung together, right? That is what Thomas Edison's lawyers argued at first. And the story of copyright law's impact on the development of the US film industry begins with Edison's successful, though short-lived attempt to monopolize the film industry. The Edison Manufacturing Company and later Edison's trust, the Motion Picture Patents Company, were involved in every landmark copyright case leading up to the 1912 Townsend Amendment, which officially added motion pictures to the Copyright Act. Edison and his confederates were slow to realize the centrality of copyright law to their endeavors, and, as we will see, they generally clung to old laws when new ones might have been more beneficial to their business. Until 1903, for example, the Edison Company campaigned to have films defined and protected as photographs. As a result of Edison's successful campaign, the law defined films as photographs from 1903 to 1911 – some of the most important years for the development of film style and the film industry.

With the film of Edison laboratory assistant, Fred Ott, sneezing in January 1894, the Edison Manufacturing Company began copyrighting its films as photographs. Looking for an illustration of its new motion picture technology for a promotional article in *Harper's Weekly*, the Edison Company printed the entire film of Fred Ott's sneeze on a single sheet of paper. It then must have occurred to someone in the company that they had transformed their film into a copyrightable object. In accordance with the current copyright regulations, the Edison Company proceeded to register the photograph, pay the registration fee, and deposit two copies with the Library of Congress.

Over the next eighteen years (until 1912), Edison and his competitors experimented with methods of copyright deposit. It is often thought that early film companies only deposited films printed on long strips of photographic paper known as 'paper prints', but occasionally they also deposited complete celluloid film negatives and positives; in some cases, they even tried depositing representative frames from every scene of a film. The changing methods of applying for copyright reflected the battles to define what film is, to define standards of originality in filmmaking, and to stem the tides of piracy.

From the perspective of copyright history, one of the most fascinating things about the filing of paper prints is that this widespread practice went unchallenged and unverified as a method of copyrighting films for almost a decade. The practice of registering films as photographs is particularly trou-

bling because the status of photographic copyright was itself far from settled in the 1890s.

Congress added photographs to the copyright statute as early as 1865 to accommodate the growing market for artistic photographs established by Matthew Brady's Civil War photographs and the work of many other photographers. Brady's photographs, which were exhibited in New York galleries, helped to legitimize the medium, conveying aesthetic value and historical significance.[4] The United Kingdom had added photography to its copyright laws just three years earlier, and US copyright laws frequently follow on the heels of British law, even today.[5] The amendment to the Copyright Act, however, didn't satisfactorily draw a line between photographs eligible for copyright registration and those that fell outside of the copyright system. Which photographs, for instance, were truly original and therefore deserving of copyright protection and which did not have enough of a spark of originality to be copyrighted?[6] Copyright, after all, protects originality, not art or historical significance. In determining whether photographers could be considered authors for merely pushing a button, copyright law came up against a strong and very long tradition of photographic theory, articulated perhaps most famously by Oliver Wendell Holmes Sr. in the 1850s. This line of accepted wisdom held that the genius of photography – Holmes called it 'sun-painting' – is precisely its ability to capture unbiased reality free of human mediation.[7]

A second line that remained to be drawn would separate photographs that could be copyrighted as original expressions from those photographs that belonged so firmly to the field of commerce that they forfeited copyright protection. In the 1879 *Trade-Mark Cases*, the Supreme Court made clear that the commercial purpose of many symbols and signs used for advertising disqualified them from the scope of copyright. And the ability of courts to see art in commerce has been a very gradual process. As recently as 1994, the Supreme Court lowered the bar even further, declaring that the highly commercial nature of a rap song did not disqualify it from a fair use claim – a factor that had stumped lower courts. In the late nineteenth century, it was not at all clear where the line should be drawn for mass reproduced postcards or other commercial photographs?[8]

As a result of these unanswered questions, photographic piracy remained rampant in the decades after the 1865 addition of photography to the Copyright Act. In the early 1880s, two cases directly questioned the constitutionality of adding photographs to the copyright statute. In both cases the defendants claimed that they could not be considered pirates, because photographs were neither writings nor works of authorship, two constitutional criteria for copyright protection.[9] The Supreme Court eventually heard both cases.

Fig. 2. Napoleon Sarony, 'Oscar Wilde n.18'; the central exhibit in Burrow-Giles Lithographic Co v. Sarony (1884).

In the first and now very famous case a well-known portrait photographer, Napoleon Sarony, sued the Burrow-Giles Lithographic Company for duplicating and selling 85,000 copies of his portrait of Oscar Wilde. Sarony had built a successful business making cartes-de-visite, portraits that celebrities frequently distributed to enhance their celebrity. Oscar Wilde had yet to publish any of the works that made him an internationally-known literary star, and he used the cards from Sarony to boost his profile on his first trip to America. A retail store in New York City, Ehrich Brothers, decided to take advantage of the sartorial trends Wilde was bringing to America, and

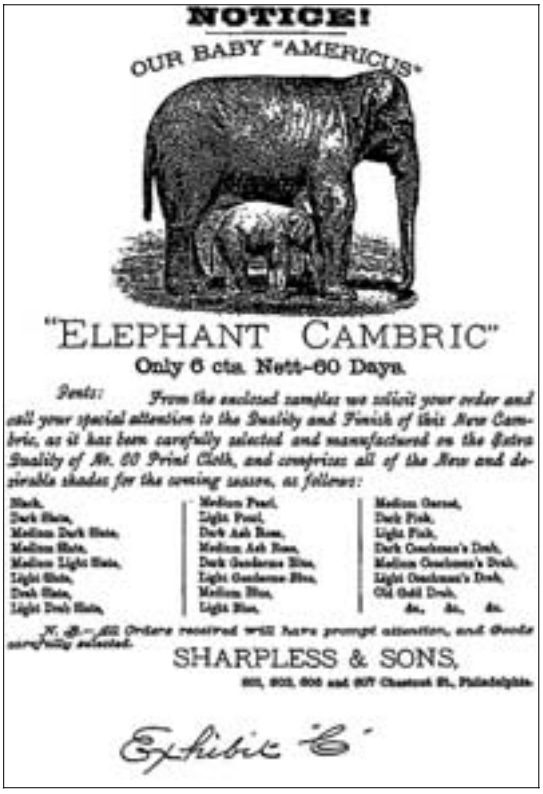


Fig. 3 (left) and 4 (right). Charles Sharpless and Sons labels featuring the Schreiber and Son's photograph. Exhibits from Thornton v. Schreiber (1888).

the store commissioned Burrow-Giles Lithographic Co. to print an advertisement for hats using the Wilde photo. Over 85,000 copies of the ad were made by the time Sarony brought the printers to court. The number of copies helps to indicate the scope of piracy at the time, almost 20 years after Congress had added photographs to the list of media covered by copyright law. But when the Supreme Court decided the case, they did not exactly settle either of the burning questions. Did pushing a button constitute authorship? Did the commerce in photographic portraits negate their inclusion in the scope of copyright law?[10]

The court did not doubt that images could be copyrighted as writings, since the original US Copyright Act of 1790 included maps and charts. But was a photograph different? Was it 'simply the manual operation ... of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit?' The court found that 'this may be true in regard to the ordinary photograph, and, further that in such case a copyright is no protection. On the question as thus stated we decide nothing.' In other words, they sidestepped the pushing-a-button-as-authorship question entirely. The justices refused to rule on whether pushing a button constituted authorship, because they found another method for defining Sarony as an author. Sarony had posed Wilde, arranged his costume and the decor, and generally composed the image before the camera passively recorded it. As such, the photograph could be copyrighted as the record of the arrangement of a creative scene.[11]

Four years after the Sarony case, the Supreme Court decided a similar case, Thornton v. Schreiber, which had originally been launched two years before Sarony's. The inconvenient death of one of the defendants and some confusion about who to prosecute delayed the case's route to the Supreme Court. In this case, Schreiber and Sons, a publisher of postcards and stereopticon views, sued Edward B. Thornton, an employee of the Charles Sharpless and Sons dry goods company in Philadelphia. Thornton had duplicated and published without permission 15,000 copies of Schreiber and Son's photograph 'The Mother Elephant "Hebe" and her Baby

"Americus"', using the elephant photograph on packing labels for Sharpless's merchandise.[12]

The Thornton case was very similar to the Sarony case. But this time the court's decision focused largely on how to award damages properly. At the opening of the case, Justice Miller, who had written both the *Trade-Mark* and the Sarony decisions, seemed simply to assume that the photograph of the two elephants was eligible for copyright protection with no further scrutiny. But had the photographer posed the elephants? Was the photograph, which was made by a company that specialized in commercial postcards and stereopticon views and used by the infringers in the production of labels worthy of copyright despite its commercial nature? The Supreme Court did not signal a clear method of interpreting the copyright status of photographs, and confusion continued to reign.

An article in the *New York Sun* that was reprinted in *Scientific American* in February 1900 catalogued the variety of interpretations that confused lower courts, publishers, and photographers alike. Many editors thought the Sarony precedent existed so that celebrities could protect the circulation of their image; the author of the *Sun* article favored this interpretation. Moreover, the awarding of damages in copyright cases was so severe ($1 for each infringing copy with a cap of $10,000) that it caused most cases to be settled out of court; one innocent mistake could topple a small newspaper. When cases did make it to the courts, judges inconsistently applied the Sarony standard of authorship. In one case, a landscape photograph had been deemed to have no human author, because nature alone could be thought responsible for its own arrangement. In another case, a printer of advertisements claimed that he could use non-artistic photographs without permission.[13] Even the Library of Congress was not immune from the confusion over photographic copyright. In 1900, one of the artists whose work decorated the building sued the library, claiming that it did not have his permission to allow visitors to take photographs of his work. The institution had merely purchased the work and the right to publicly exhibit it, not the right to make or sell reproductions or allow others to take photographs.[14]

The following year, in 1901, legislators attempted to put an end to the public and judicial confusion over which photographs met the conditions for copyright protection. Congress clarified the copyright statute by extending the scope of copyright from 'photographs' to 'any photograph'. This clarification might have settled the debates about photographic art and authorship, but the law could not keep up with technology. One of the first major cases to be tried under the new 'any photograph' statute, Edison v. Lubin, asked a particularly difficult question: were motion pictures photographs or not?

An industry built on copying

Unauthorized copying was a staple of the early film industry, as it was for early book printing, photography, and recorded music, and as it would be for digital intellectual property on the Internet. But as with those other media, separating the good piracy from the bad was an unenviable task. Film pioneers, including the Edison Company, had built their businesses on the practice of copying each others' films – a practice known as 'duping'. After obtaining a print of, say, Georges Méliès's *A Trip to the Moon* (1902), a rival company would create their own negative from the positive print and then begin printing and selling the film as if it were their own.

Dupes circulated rapidly and globally, and they fed an international system of filmmaking based on copying and imitation. As both Jay Leyda and Jane Gaines have shown, filmmakers around the world were engaged in a project of rapid, fluid exchange of ideas that contributed to the fast paced growth of film art. Duping was only one part of a much larger culture of copying.[15]

Some companies indiscriminately duped their competitors' films. The industry leaders like Edison and American Mutoscope and Biograph (Biograph), however, set some ground rules. They freely duped films that had not been registered as photographs, but they respected the copyright notices on films that had been registered. The Edison company took an extra step to insulate itself from duping by contracting out duping of films form the Lubin and Amet companies to the Vitagraph Company.[16] It had yet to be determined whether films could be copyrighted as photographs, and these companies were clearly gambling by forging their own legal practices. But by adhering to this model, Edison and others helped entrench the position that business could proceed unhampered under the existing copyright law.

Even for these industry leaders, it is important to note, duping was a large and integral part of their business. Duping European films that were less likely to have US copyrights, in particular, was a major part of every early American film company's strategy, and

Fig. 5. Thomas Edison in his studio.

the fastest dupers were also the market leaders. As Charles Musser observes, 'To a remarkable degree, Edison's competition with its rivals revolved around the rapidity with which newly released European story films could be brought to the United States, duped, and sold'. Moreover, this wasn't a case of honor among thieves. Musser also recounts the elaborate deceptions Edison had to create just to purchase Méliès's films. Once the French filmmaker became aware of Edison's prodigious duping, he refused to sell to Edison or his subsidiaries. Edison was forced to use multiple layers of intermediaries to acquire Méliès prints undetected.[17]

The decision to protect film content at all was gradual and born out of experience with the medium and the cultures of copying. Many of the first film production companies were principally equipment manufacturers, who were not immediately concerned about who copied their films. For years, films were made primarily to sell equipment, where the real money was to be made. Moreover, each machine had a proprietary format. No Edison film, for example, could be shown on a Lumière projector without modification, because the sprocket holes were in different places.

Much early film duping was the byproduct of the technological format wars. Distributors used duping as a method of bypassing technical limitations; a Lumière film, for example, could be transformed into one playable on Edison projectors through duping, or vice versa. This pattern is repeated today, where film, music, and software piracy results from attempts to bypass technical protections, copying iTunes music for playback on a non-Apple media player or copying a DVD encoded for one geographic region to a format playable in another. As it does today, tying content to technology encouraged rather than deterred piracy.

It was only during a brief window when patent disputes began to be settled and the technology platforms stabilized that concepts like originality and authenticity in moviemaking registered with producers, who then needed to protect their content as well as their technology. In 1903, as we will see, the patent environment became clearer for a moment, and content and copyright became more important. In that year, a Pennsylvania court decided the first major copyright case involving the new medium of the movies; first the circuit court and then an appeals court weighed the arguments for and against copyrighting films as photographs. The story of the case reads like a soap opera, with switched loyalties, filmmakers on the lam, and dramatic court reversals. In the end, the decisions came down to a systematic interpretation of how to answer the question: was film a new medium or an extension of an old one?

Edison v. Lubin

Edison's campaign to control the entire film industry by controlling the technology rose and fell quickly. In 1901, he won a patent suit against his major competitor, Biograph. The decision stunned the industry, because Biograph seemed to be in the best position to oppose Edison. The technical wizard behind Biograph's camera, W.K.L. Dickson, had originally developed Edison's own motion picture technology, the Kinetograph and Kinetoscope. If anyone understood how to avoid infringing Edison's patents, it was Dickson.

The same month that the court handed down the Biograph decision, Edison also gained the upper hand against his most brazen competitor, Siegmund Lubin. Edison successfully wooed Lubin's cameraman, J. Blair Smith, at a very high price. Smith now sat in a position to testify that Lubin had been using equipment protected by Edison's patents. Along with Biograph's management, Lubin had been one of the strongest opponents of Edison's belligerent attempts to corner the motion picture market. Lubin's biographer Joseph Eckhardt describes Lubin's reaction to Edison's first suit against him:

> Annoyed that Edison, who he felt had no more invented the motion picture than he had, would, nevertheless, have the chutzpah to sue him for infringement, Lubin angrily told his lawyers, 'I want nothing to do with that man!' 'Well, Mr. Lubin', his lawyers advised him, 'He wants something to do with you'.

With the combination of the Biograph decision and Smith defection, Lubin weighed his options and quickly decided to flee to Berlin, where he had been registering patents on motion picture technology.[18]

The following March the appeals court overturned the earlier Biograph decision and offered a crushing blow to Edison, finding that his patent claims far exceeded his accomplishments. The judge added: 'It is obvious that Mr. Edison was not a pioneer, in the large sense of the term, or in the more limited sense in which he would have been if he had also invented the film'.[19] The Edison Company consequently changed its strategy. Edison's lawyer, Howard Hayes, resubmitted Edison's patent applications with considerably restricted claims (which were eventually granted), and he began to devise the licensing agreements and alliances that eventually led to the creation of the Edison Trust. Hayes also added copyright to the company's legal arsenal, controlling the content in addition to the motion picture hardware. During the next year, the Edison Company launched copyright suits against Biograph in New York, against the Selig Company in Chicago, and against Lubin in Philadelphia.

The cases began to set legal parameters for film duping, but, equally important, the onslaught of suits announced a new front of attack on Edison's competitors. After launching its case against Lubin, for example, the Edison Company took out an ad in the *New York Clipper* warning filmmakers and the public that anyone making or exhibiting a dupe of an Edison film would be prosecuted. At the last minute, the Edison Company decided to remove the line, 'Who will be the next man to be sued?' fearing that it might be bad business to threaten all of their customers directly.[20] Edison and Lubin would continue to fight their battle through advertisements as well as in the courts. The advertisements may have been more important than the suits, since the ads helped to control the interpretation and impact of the technical court decisions.

After the courts overturned Edison's patent claims and subsequently dismissed the patent case against Lubin, the Philadelphia optician returned to the US with a new vigor for duping films. Among other subjects, the Lubin Company copied a popular film, *Christening and Launching Kaiser Wilhelm's Yacht 'Meteor'* (1902), which showed the Prussian Prince Henry and US President Theodore Roosevelt engaged in the titular ceremony on an island off the coast of New York. The Edison Company had paid a high price for the exclusive right to record the widely publicized, invitation-only event. Edison prosecuted Lubin for his audacious copying and advertising of the films In the lawsuit, the Edison Company defended its method of copyrighting films, nearly a decade after Edison had submitted the film of Fred Ott's sneeze. Did the thousands of copyright confirmation notices given to filmmakers by the Library of Congress's Copyright Office have any value? Could filmmakers afford to continue making films without the limited monopoly offered by a copyright? The answers to these legal and business questions hung on the interpretation of a number of philosophical questions about the nature of film and the role of courts in shaping copyright law.

Neither Edison nor Lubin disputed the details

Fig. 6. Siegmund Lubin (1881). [Courtesy of Theater Collection, Free Library of Philadelphia.]

of the case. Rather than filing separate briefs, the two sides filed an agreed statement of facts. Edison's and Lubin's lawyers explained that Lubin's old cameraman, Smith, had shot the film for Edison, choosing the angle and then cranking the camera. The rest of the filmmaking process, the court document stated, was 'automatic'. Once the film had been processed, Edison's lab made prints of the film to be sold, and his secretary submitted two positive prints to the Library of Congress. Thorvald Solberg, the recently appointed Register of Copyrights, recorded the deposit, and responded with a note officially confirming the granting of the copyright. The Edison Company, as it had for years, then affixed a copyright notice to the beginning of the film.

Lubin, for his part, freely admitted purchasing a copy of the film, making dupes, and reselling it. According to Lubin, the copyright notice had been removed from the copy he purchased, and he didn't know that Edison had copyrighted the film. Lubin's plea of ignorance is hard to believe since one of his former employees, Fred Balshofer, has written in a memoir that Lubin first employed him to snip off copyright notices and block out trademarks from films to be duped. But in the end this claim didn't matter. The burden of determining if a film had been copyrighted lay with the copier, who was obligated to check registrations at the Copyright Office before making a copy. If Lubin had checked, he would have found Edison's registration.[21]

From both Edison's and Lubin's perspectives, this was a cut and dry case. Edison's lawyers argued that Lubin illegally copied the film without permission. Lubin's lawyers responded with a very simple argument: films are not photographs, and they didn't fall within the scope of the current copyright law, which read 'any photograph' but didn't bother to mention motion pictures of any kind. On 27 June 1902, Judge George Mifflin Dallas denied Edison's request for an injunction against Lubin, thus allowing Lubin to continue selling the Edison film. Both sides regrouped to prepare for the trial, suspecting that the scales tipped towards a Lubin victory.

After a decade of registering films as photographs, the Edison team briefly considered suspending its practice altogether. But they decided that the costs of copyrighting and depositing films were so minimal that it wasn't worth curtailing the practice just yet. Instead, they left it up to their lawyer, Howard Hayes, to strengthen their legal case.

In the new brief Hayes prepared for the case, he made several arguments about the nature of the new art of film. First, he reconsidered the earlier arguments about authorship he had constructed on Edison's behalf. Hayes worried that the film didn't meet the Sarony standard of original authorship, so he expanded on Smith's role as a photographer. 'Does the photograph in question show such artistic skill as to make it the subject of copyright?' Hayes asked rhetorically. He responded by enumerating the many artistic decisions Smith had made in choosing the placement of the camera, although he could only come up with two: lighting and angle. The brief went on to describe the growing market in artistic photographs as evidence of the artistry – and by extension originality – that went into their production. Finally, just to cover all bases, Hayes cited the case of Bolles v. Outing in which the copyright of a photograph of another yacht had been upheld, just in case photographs of boats were somehow outside the sphere of copyright. The Sarony precedent, after all, still suggested that photography was the art of recording an arranged scene.[22]

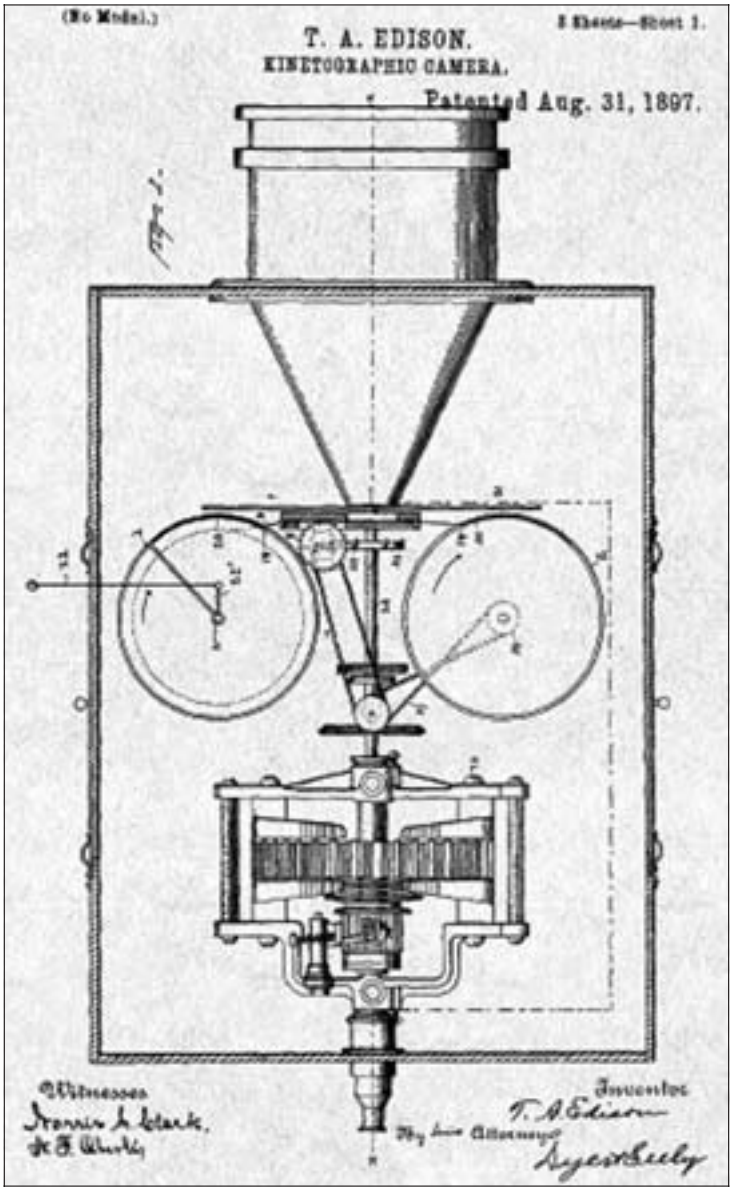
Hayes concluded his discussion of photographs and aesthetics by citing several cases in which the scope of copyright had been liberally construed, including one in which a judge declared a single sheet of paper containing a dress design to be a book in order to bring it within the scope of the current copyright statute. According to Hayes – and this was really the larger issue at hand – the philosophy of US courts advocated expanding the law to include a new medium if it could be stretched that far. But Hayes himself couldn't quite decide if he was looking at a photograph or something new. In the brief, he alternated between calling the film in question a 'photograph' and a 'photographic view', sometimes crossing out one and writing the other (with no apparent logic) on his draft of the brief.

Another argument proposed that projection was an integral element of the film, actually weakening his attempts to draw correspondences between film and photography. Now that Edison's diminished patent claims had been granted, Hayes returned to the argument that films were part of the machine (the hardware) rather than works of art and the product of human authors (the software). Hayes still held out hope that Edison could monopolize the entire market through the control of technology, and he claimed boldly that 'this art of reproducing motion is the product of the genius of Thomas A. Edison'. Further, each frame of film 'is worthless ... It is only when the

photograph is used in connection with an apparatus like the magic lantern that it is useful'.[23] Edison's genius, in other words, lay behind every film, regardless of who shot it. As a result, Edison alone owned the exclusive right to create moving images. It didn't seem to bother Hayes that the diminished patents simply granted Edison the very limited claim on his sprocket mechanism – hardly a claim on the entire apparatus.

At first, this argument about patents seems to reveal little more than the frustrations of the Edison Company. It had no direct bearing on the case at hand. Yet, as we will see below, this argument went to the heart of the issue, one that complicates the copyright policies of many new technologies: where to draw the line between hardware/software. In another landmark case, five years after Edison v. Lubin, the Supreme Court faced a similar decision when confronted with player piano rolls. They decided that player piano rolls – really just perforated pieces of paper – belonged to the machine that read them; they weren't a form of software like sheet music.[24] And since the 1980s courts have continually had to move the line between computer hardware and software, first granting copyright protection to computer applications and eventually to the short bits of code embedded in microprocessors.[25] When new technology necessitates the development of a new recording medium, it generally takes time for the recording medium to appear independent from the technology. Needless to say, this further complicates judges' decisions about whether a new media technology is truly new or not.

In a final argument, Hayes got greedy. Copyright law, after all, is about money as well as protecting original expression. He argued that the phrase 'any photograph' in the copyright statute should be interpreted liberally when considering the scope of copyright, not only extending the copyright in photographs to films but allowing an entire film to be registered as a single photograph. This argument was key to defending Edison's method of registering film as photographs, because it required only a single copyright fee on the part of the production company. But, Hayes argued further, the phrase 'any photograph' should be interpreted strictly when awarding damages. In this scenario, when infringers paid damages, they would have to suffer as if each frame were an individual photograph even though the work had only been registered once as a single photograph.



While Judge Dallas considered the arguments, Lubin kept on duping Edison films to the great consternation of Edison's staff.[26] Still awaiting legal restitution, the Edison Company adjusted their business practices to counter Lubin. Edison realized that the high price of his films drove many exhibitors to use cheap, poor quality dupes. His refusal to adjust film prices to the demands of the market had actually stimulated the traffic in pirated films. Lubin capitalized on this by advertising the 'reasonable price' of his films, whether they were dupes or original Lubin films. Now a bit desperate, Edison finally capitulated

Fig. 7. Thomas Edison's Kinetograph Patent (1897), which was overturned in Edison v. American Mutoscope Co. (1902).

and adopted a new pricing scheme. The Edison Company divided its films into two classes (A and B), lowering the price of its older and less ambitious films to compete with the cheap Lubin dupes.[27]

At the same time, the Edison Company began to register its films as dramas in addition to registering them as photographs. The new registration method also indicated the growing importance of longer, narrative multi-shot films. The first case to consider films as dramas was decided in 1905, but it would take until 1911 for courts to put together all of the pieces necessary to adapt copyright law to encompass the dramatic and performance elements of film. *Meteor*, the film in question in Edison v. Lubin, may have been composed of one long shot, perhaps much closer to a single photograph than other films made at the time. But the decision in the case would govern the copyright status of all films, whether they were short 'actualities' or multi-shot narrative films.[28]

On 13 January 1903 Judge Dallas handed down his decision, siding with Lubin as he had done in the initial injunction hearing. Brushing aside all of the arguments Hayes made on Edison's behalf and the nine years of film copyright registrations, Judge Dallas decided the case in two succinct paragraphs. The entire case, he argued, hinged on one very simple question: how to interpret the phrase 'any photograph'. 'The question is', he explained, 'is a series of photographs arranged for use in a machine for producing them in a panoramic effect entitled to registry and protection as a photograph?' His answer: '[the revised copyright statute] extended the copyright law to "any ... photograph", but not to an aggregation of photographs'.[29] Judge Dallas bought Lubin's argument completely: films and photographs are different, and it is just too complicated for the law to consider them to be equal. As even Hayes had argued on Edison's behalf, photographs and films function differently. A single photograph has value and can be experienced as a whole where a film requires the rapid display of a series of frames to create both the experience of film and its value in the marketplace.

Judge Dallas wasn't endorsing piracy. As many judges have done when considering new technologies, Dallas took the position that court decisions are blunt instruments, declaring one winner and one loser. Judges can't always accommodate the new worlds opened up by technology. The task of extending copyright to new media, he suggested, should fall to Congress, which can sculpt subtle laws. Nevertheless, for a brief period, film duping was legal.

Edison immediately appealed the case, which the court heard three months later, overturning Dallas's decision and finding for Edison. How did Dallas's decision affect the film industry in the interim? The Edison Company continued to make short-term decisions while the case worked its way through the court system. Edison's studio suspended its production of original films and took advantage of the window of legal duping. Many other companies continued their duping practices as well.

French magician-filmmaker Georges Méliès continued to be hurt by the mass duping of his films in the US. In March, Méliès sent his brother Gaston to New York to set up shop and control the expanding market for unauthorized duplication and reselling of his films. In the new US catalogue of Méliès films, Gaston threatened American dupers, 'we are prepared and determined energetically to pursue all counterfeiters and pirates. We will not speak twice; we will act.'[30]

According to some accounts, Gaston visited Lubin's studio posing as a potential buyer. When Lubin tried to pass off Méliès's famous film *A Trip to the Moon* as a Lubin creation – renamed *A Trip to Mars* – Méliès harangued the rival filmmaker. But with Judge Dallas's decision, Méliès had little legal recourse.[31]

Edison's lawyers worried that Gaston Méliès had actually come to the US to take advantage of the new court precedent and dupe Edison films rather than protect those of his brother. To deter this suspected pirate, they sent Gaston a note informing him of the cases against Biograph, Selig, and Lubin. They didn't mention, of course, that they had lost the first round of the Lubin case.[32]

Not only did duping proceed unabated, but producers also withheld new films from the market or cut back production in the unstable environment. As Charles Musser has documented, the Edison Company shelved one of its most ambitious and expensive productions to date, Edwin S. Porter's *Jack and the Beanstalk*, while they waited for the court to ensure copyright protection. When Dallas refused to grant the initial injunction stopping Lubin's duping, the Edison company took a chance and released the film anyway. With the court on his side, Lubin duped *Jack and the Beanstalk* and advertised it as his own. Still infuriated by Edison's bullying, Lubin impishly suggested in the same ad that Edison

had in fact duped his creation. 'We are aware of the fact', the ad read, 'that our Films are copied by unscrupulous persons, but the Copyright Law contains many loopholes through which they make their undignified escape'. After Porter completed *Jack and the Beanstalk*, the Edison Company gave their top director a hiatus from directing, and they set him to work remaking Biograph's films rather than investing the time and effort in creating original films.[33]

In his compelling cultural history of US copyright law, Siva Vaidhyanathan speculates that if Judge Dallas's decision were allowed to stand, it would have exacerbated the chaos of the early film industry. And the decision certainly created a brief window of chaos. But it is also possible that Congress would have heeded Dallas's warning and stepped in to calm the storm by revising the copyright statute to encompass films rather than waiting another nine years. It is often when judges throw up their hands and put the burden on Congress that new solutions are found for new media. That was the case with the 1908 Supreme Court White-Smith v. Apollo (piano roll) case mentioned above. The court left it to Congress to find a method for compensating composers and musicians for recorded music. It was a complex problem that a court decision probably could not have addressed adequately. Congress's solution was to introduce statutory licensing in the 1909 act the following year. The licenses not only compensated the music creators, they leveled the market and helped to prevent one company from gaining a monopoly on music copyrights. Film, in contrast, was left out of the 1909 Copyright Act because the appellate court stepped in to reverse Dallas's decision and find a common law (or court) solution.[34]

On 20 April 1903 the Third Circuit Court of Appeals overturned Dallas's decision, this time siding with Edison over Lubin. Only a few months separated the two cases, but between the two decisions the Supreme Court had released a landmark copyright decision that signaled a change in common law approaches to copyright. On 2 February, Supreme Court Justice Oliver Wendell Holmes Jr., a newcomer to the bench, had written the first of several copyright decisions that dramatically changed the field. In Bleistein v. Donaldson Lithographic Company, Justice Holmes overturned lower court decisions that found circus posters to be unworthy of copyright protection because they were used as advertisements. In his decision, Holmes made clear that neither mass reproduction, nor commercial use, nor lowbrow or risqué subject matter, could disqualify a work from copyright protection. 'It would be a dangerous undertaking', Holmes wrote sagely, 'for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations'.[35]


LUBIN
IS
AGAIN VICTORIOUS
WARNING
OUR SPECIAL OUTFIT READY FOR THE ROAD.
Price for the Complete Outfit, as shown above, only $75.00
BLUE BEARD, THE $5,000 PRODUCTION
JACK THE GIANT KILLER,
The Martinique Disaster,
SIX DOLLARS by FIFTY for
S. LUBIN,

Fig. 8. Advertisement in *New York Clipper* (1901)

In the appellate decision in Edison v. Lubin, Judge Joseph Buffington took his cue from Holmes. Citing the Bleistein decision, Buffington easily found the *Meteor* film to be a work of original authorship. But more than that, the Bleistein decision empowered Judge Buffington to use case law to expand the scope of copyright rather than throw the ball into Congress's court. When Congress expanded the Copyright Act to include 'all photographs', he reasoned, it certainly didn't expect the technology and art to stand still. As a result, it fell to the court to

expand on the intention of the legislators rather than ask Congress to revisit the issue. Looking at the film in question, Buffington argued that motion pictures advanced the art of photography rather than creating a new medium.[36]

How is film like a photograph? Buffington found a solution in one of the arguments Hayes had offered in the brief he wrote for Edison. It was Hayes's rant about the centrality of the technology that spoke to Buffington. The argument seemed to have little to do with the case at hand, but it tapped into the greater philosophical question: what is cinema? Hayes argued that motion picture photography only gained value when presented through a projecting or viewing machine. Buffington agreed that film created a complete experience when projected or displayed and that experience of the whole should be protected, not the individual frames, which were effectively worthless. In his pithy formulation, Buffington overturned Judge Dallas's decision and logic. 'To require each of numerous undistinguishable pictures to be individually copyrighted, as suggested by the court, would, in effect, be to require the copyright of many pictures to protect a single one.' Edison's method of depositing films, which began with the film of Fred Ott's sneeze in 1894, was finally sanctioned. Filmmakers could register an entire film as a single photograph – one that just happened to move. Buffington had been empowered by Holmes's decision in Bleistein v. Donaldson, and he probably wasn't surprised that the Supreme Court decided not to hear the case, finally resolving the issue in November 1904.[37]

Films as photographs

With Edison's method of copyrighting films as photographs upheld, Edison's staff immediately resumed film production. But did defining film as a new form of photography rather than as a new medium either stop piracy or stabilize the market? Legal histories often enumerate precedents and stop there. But like any landmark decision or new law, this one needed time to be digested and diffused. The decision was the beginning and not the end of the process of defining and controlling film piracy.

Edison won, but Lubin still had a card up his sleeve. Lubin's lawyers had convinced the Edison Company to sign an agreement preventing them from advertising the decision.[38] Both sides knew that the public perception of piracy was as important as its legal definition. Even Edison couldn't afford to sue every duper if the practice continued on the same massive scale. In order to enforce the decision, Edison needed to instill fear of retribution into potential pirates and the exhibitors who bought their wares. Advertising had been the main forum both Edison and Lubin used to inform others about the law and to create norms in the marketplace. With that important means of communication closed off, Edison had little chance of implementing his new legal protection. Of course the agreement not to advertise the decision would have hurt Lubin too if he had won. It doesn't seem to be a stretch to speculate based on Lubin's history that he might not have intended to keep his end of the bargain.

Without mentioning the case directly, Edison continued to use ads to intimidate his competitors. But even the Edison Company didn't interpret the Buffington decision as having created a black and white ethical or legal standard. Rather than condemning all duping, which might have helped clarify the impact of Buffington's decision, the Edison Company approached the Buffington decision as having created a technical distinction, separating legal from illegal duping. It still wasn't clear to anyone, even Edison, if duping was in itself a form of piracy that should be outlawed.

The Edison Company tried to take advantage of the precedent by creating a market for *legal* duping, continuing to copy European films as they had in the past. Some members of Edison's staff, including the company's manager, William Gilmore, thought the process was unethical. But, in the end, the Edison legal team made the final decision to go on duping. 'I understand that personally you are averse to the copying of our competitors' films', Edison lawyer Frank Dyer wrote to Gilmore, 'but at the same time there must be a good profit in that business as it does away with making an original negative'.[39] Edison's staff then set out to develop a system for duping unregistered films. They first identified four European films that had commercial potential in the American market. Then they contracted a law firm to track down copyright registrations for the films. When every effort to find US registrations for the films failed, the Edison Co. duped the films and released them to exhibitors only to learn that Biograph had already duped and registered the films under different titles. Tracking down copyright registrations proved to be expensive and difficult. Creating a technical distinction between legal and illegal duping created even more confusion.

Fig. 9. Lithograph of The Great Wallace Shows poster, which were at issue in Bleistein v. Donaldson (1903).

Lubin didn't waste his time trying to find loopholes. He had been sued many times before, and he knew that the tides of motion picture law would continue to change. If the past had taught him anything, it was to ignore the capricious mandates of judges – apparently even those on the Supreme Court. Lubin just went on duping. According to Terry Ramsaye, an Edison partisan to be sure, Lubin skirted the law by developing political connections. 'Philadelphia's master film duper', explained Ramsaye, 'is wealthy and so well bulwarked politically that prosecutions have proven impractical and he has seldom been annoyed by indictments'.[40] Perhaps this is the image of Lubin that Edison liked to circulate: a slick, savvy businessman who skirted the law. But in reality, both patent and copyright suits against Lubin continued. Indeed, Lubin was back in court for copyright infringement even before the Supreme Court ruled on Edison v. Lubin – this time for duping Biograph films. Only a few months later, the Edison Company was sending cease and desist letters to Lubin, adding trademark infringement to their ongoing patent and copyright battles.

Nevertheless, Lubin remained a prodigious duper. Lubin's old employee Fred Balshofer states that Lubin continued to dupe Lumière films into 1906, and Richard Abel has shown that Lubin's duping continued to frustrate the French production company Pathé Freres for years. In turn, Lubin's competitors in the US and Europe duped his original films. The market for new films turned over quickly, and prosecuting every case of duping wasn't a practical solution. Moreover, the film industry had been built on duping, and it was very difficult for companies to give up a practice so central to their livelihood. A 1907 issue of *Show World*, four years after the Edison v. Lubin decision, sounded the familiar alarm, '"Duping" of Fine Pictures Condemned'.[41] Despite the expensive court battles, little had changed. Declaring duping to be piracy was easy; enforcing the decision was difficult.

Another reason that declaring films to be a new form of photography didn't put an end to piracy is that in 1903 film style was changing. Films began to look less like moving photographs than they had just a year before. Buffington's decision came on the cusp of a transition in filmmaking, and his landmark decision appeared relevant to only a fading genre of film. Buffington's decision clearly protected single shot, panoramic films, like the film of the Kaiser's yacht *Meteor*. But 1902–1904 saw the rapid displacement of this type of film with multi-shot, narrative,

fiction films such as *Life of an American Fireman*, *Jack and the Beanstalk*, and *The Great Train Robbery*, to name only a few Edison titles.[42] Films began to look more like a new form of drama and less like animated photographs. It wasn't clear how Buffington's decision applied to these films, which were already prevalent by the time he decided the case.

Edison's company led the transition to story films, and even his lawyers were confused about how to implement Bufington's decision. Did it apply to the new films they were making? The lawyer who had won the Edison v. Lubin copyright suit, Howard Hayes, died shortly after the case was decided. The Edison Company, which was now in the business of fighting lawsuits as much as manufacturing technology and entertainment, started its own in-house legal division. Edison appointed the young and brilliant Frank Dyer as its head. Dyer had a particular interest in film, and he would eventually oversee much of the Edison film business. New on the job, Dyer was justifiably frustrated by film copyright law and by the Lubin decision in particular. In October 1905, Dyer wrote to the Register of Copyrights, Thorvald Solberg, asking how the Lubin decision applied to multi-shot films. Should each shot be registered separately? Or could the entire film be registered as a single photograph, a process that would cut down on paperwork and expense? Dyer also suggested that registering just one representative frame from each scene might satisfy the requirement. Once the films were registered, Dyer continued to wonder, how would the multi-shot films be protected: as a series of distinct moving photographs or as a single photograph?

Solberg offered a bureaucratic and unhelpful response, 'This opens up legal questions of some difficulty, which should receive very careful consideration before action is taken'.[43] There is no further correspondence on the subject in the Edison archive, but this question was decided later that year in a case involving Biograph and Edison. In the decision, Judge Lanning reasoned: 'I am unable to see why, if a series of pictures of a moving object taken by a pivoted camera [as was the case in the *Meteor* film] may be copyrighted as a photograph, a series of pictures telling a single story like that of the complainant in this case, even though the camera be placed at different points, may not also be copyrighted as a photograph'.[44] As a result, the legal doctrine that defined films as photographs became broader and more entrenched.

Conclusion

Although Edison v. Lubin clearly set a legal precedent, I think it is fair to say that the quick fix of declaring film to be a new form of photography rather than a new medium didn't solve any of the existing problems. On the contrary, the decision exacerbated the problems. Duping continued and the confusion over how to implement the new standard contributed to the monopolization of the film industry.

With no end to duping in sight, Edison and other companies changed the way they did business. The high price of films had always driven exhibitors to buy cheap dupes. In response, producers began to rent rather than sell films to exhibitors – a model that allowed for greater price differentiation. The move to rentals also allowed the producers to institute restrictive licensing agreements, exerting greater control over their prints. Finally, the expense of legal cases and the inability of the courts to stabilize the market led Lubin and other companies to sign exclusive licensing agreements with Edison and join his cartel, the Motion Picture Patents Company. This wasn't a case of the industry fixing a problem that the courts failed to solve. Edison's cornering of the film industry was, in some ways, the disastrous outcome of the courts' failings, although the Lubin decision was only one in a string of events that led to the formation of the Motion Picture Patents Company.

What if circuit court Judge Dallas's original opinion – that films were not covered by the phrase 'any photograph' – had been allowed to stand? In other words, what would have happened if film had been declared a new medium demanding new laws? Could Congress have found a solution as they did with recorded music? We will never know, but I think it is unlikely that Congress could have solved the piracy problem either. The judges who heard the Edison v. Lubin case were trying to fix a moving target. As is often the case, the law couldn't keep pace with the development of film style and technology. This was the wrong moment in film history to recognize the new challenges to the law. The ability to record and present movement though rapid photography was only one part of cinema's revolution. There were still many aspects of the art and technology that needed to be explored, exploited, and understood. A series of cases over the next decade took up questions of genre, adaptation, film language, and film distribution. In short, there was more work to be done by pirates.

Edison v. Lubin is a fascinating example of what happens when courts try to explain a new medium using the terms of an old one: their decisions are ineffectual and generally delay true grappling with the newness of the new medium. Piracy is an integral element in the development of new media;[45] it reveals the new functions and dimension of the new medium. Courts are left with the difficult job of separating the innovations revealed by piracy from the theft facilitated by piracy. But forcing new media to labor exclusively under the rules of old media inevitably fails. In 1903, film piracy clearly challenged both social norms and established business practices. This was a sign not that norms and businesses needed greater protection but rather that they needed to be updated. Of course it is much easier to make this assessment in hindsight. But it also provides an important lesson for thinking about new media. Which forms of piracy today will be tomorrow's norms? Which of today's pirates will be tomorrow's media moguls?

Notes

1. Terry Ramsaye, *A Million and One Nights: A History of the Motion Picture Through 1925* (New York: Simon and Schuster, 1926), 309.
2. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass., 1841). Several film theorists have noted the early theorization of film present in the Edison v. Lubin case. André Gaudreault has observed that the Edison cases prefigure by 80 years theorists' debates about cinematic storytelling. 'The Infringement of Copyright Law and Its Effects (1900–1906)' in *Early Cinema: Space, Frame, Narrative*, ed. Thomas Elsaesser with Adam Barker (London: British Film Institute, 1990), 114–122. And Mary Ann Doane notes that early film copyright cases revolve around changing conceptions of the spectator; *The Emergence of Cinematic Time: Modernity, Contingency, Irony* (Cambridge, MA: Harvard University Press, 2002), 156–158.
3. Two books that consider the impact of copyright law as well as its legislative and judicial history are Vaidyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2001); and Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004).
4. Interestingly, Brady was commonly considered the artist or author of all works exhibited under his name, even those shot by his assistants or commissioned by him. See Alan Trachtenberg, *Reading American Photographs: Images as History, Mathew Brady to Walker Evan* (New York: Hill and Wang, 1989), 37.
5. Pascal Kamina, *Film Copyright in the European Union* (Cambridge: Cambridge University Press, 2002), 12.
6. The phrase 'spark of originality' is borrowed, anachronistically, from Bridgeman Art Library v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
7. Discussions of photography as a medium that diminished the role of the author were alive and well in the 1950s and 1960s. See essays by Holmes, Andre Bazin, and Siegfried Kracauer collected in Alan Trachtenberg (ed.) *Classic Essays on Photography* (New Haven: Leete's Island Books, 1980).
8. *Trade-Mark Cases* 100 US 82 (1879)
9. 'The Congress shall have the power ... To promote the progress of science and useful arts, by securing, for limited times to *authors* and inventors the exclusive right to their respective *writings* and discoveries.' US Constitution, Article 1, Section 8, cl. 8.
10. On Sarony see Paul Goldstein, *Copyright's Highway: From Guttenberg to the Celestial Jukebox*, rev. ed. (Stanford: Stanford University Press, 2003), 46–47. Jane Gaines, *Contested Culture: the Image, the Voice and the Law* (Chapel Hill: University of North Carolina Press, 1991), chapter 2.
11. Burrow-Giles Lithographic Co. v. Sarony, 111 US 53 (1884).
12. Thornton v. Schreiber 124 US 612 (1888).
13. 'New Practice in the Copyright of Photographs' *Scientific American* (17 February 1900) 82.7, pg. 102.
14. Dielman v. White, et al. No. 1133. 102 F. 892 (C.C.D. Mass. 1900). 'Copyright in Pictures' *New York Times* (24 May 1900): 6.
15. Jay Leyda, 'A Note on Progress', *Film Quarterly* 21.4 (Summer 1968): 28–33; Jane M. Gaines, 'Early Cinema's Heyday of Copying: Too Many Copies of *L'Arroseur arrosé* (*The Waterer Watered*)', *Cultural Studies* 20.2-3 (March/May 2006): 227–244.
16. Musser, *The Emergence of Cinema*, 278.
17. Charles Musser, *Before the Nickelodeon: Edwin S. Porter and the Edison Manufacturing Company* (Berkeley: University of California Press, 1991), 239, 209.
18. Joseph P. Eckhardt, *The King of the Movies: Film Pioneer Siegmund Lubin* (Madison: Farleigh Dickinson University Press, 1997), 37; Charles Musser, *The Emergence of Cinema: The American Screen to 1907* (Berkeley: University of California Press, 1990), 330.

19. Edison v. American Mutoscope Co. 113 F. 934 (C.C.A. 2, 1902).
20. Letter James White to Howard Hayes (10 June 1903) in *Thomas A. Edison Papers: A Microfilm Edition* (Frederick, MD: University Publications of America, 1987–) reel 223, frame 854–856 (hereafter Edison Papers).
21. Agreed Statement of Facts, Edison v. Lubin, *Edison Papers*, reel 223, frames 857–861.
22. Edison's Brief, Edison v. Lubin, *Edison Papers*, reel 223, frames 872–881.
23. Edison's Brief, frame 876.
24. White-Smith Music Publishing Co. v. Apollo Co. 209 US 1 (1908).
25. The best method for protecting computer software is still disputed, and many programs are protected by patents and licenses in addition to or instead of by copyrights.
26. Letter, William Edgar Gilmore to William Peltzer (29 July 1902), *Edison Papers*, reel 223, frame 882.
27. Musser, *Before the Nickelodeon*, 207–208; Musser, *The Emergence of Cinema*, 207.
28. American Mutoscope & Biograph v. Edison Manufacturing Co. 137 F. 262 (C.C.D. New Jersey, 1905); Kalem Co. v. Harper Bros. 222 US 55 (1911).
29. Edison v. Lubin 199 F. 993 (E.D. Pa. 1903).
30. Robert Sklar, *Movie-Made America: A Cultural History of American Movies*, rev. and exp. (New York: Vintage Books, 1994), 23; Terry Ramsaye, *A Million and One Nights*, 396.
31. Fred J. Balshofer and Arthur C. Miller, with the assistance of Bebe Bergsten, *One Reel a Week* (Berkeley, University of California Press, 1967), 8–9. Balshofer misidentifies Gaston as Georges.
32. *Edison Papers*, reel 188, frame 559. Kerry Segrave, *Piracy in the Motion Picture Industry* (Jefferson, NC: McFarland, 2003), 27.
33. Musser, *Before the Nickelodeon*, 208. The ad is quoted in Eckhardt, *King of the Movies*, 46.
34. Vaidyanathan, *Copyrights and Copywrongs*, 89. The economist Harold Scott Wallace also suggests that Edison v. Lubin along with other patent and copyright cases helped to stabilize the film industry. See 'Competition and the Legal Environment: Intellectual Property Rights in the Early American Film Industry', Department of Economics Working Paper Series, University of Connecticut (October 1998). Film was not simply ignored by the legislators in 1909. Edison lawyer Frank Dyer lobbied to have film kept out of the 1909 Act, because the existing case law was beneficial to the film industry.
35. Bleistein v. Donaldson Lithographic Co. 188 US 239 (1903).
36. Edison v. Lubin 122 F. 240 (3rd Cir. 1903).
37. Edison v. Lubin 122 F. 240 (3rd Cir. 1903). Letter, Howard Hayes to Edison, *Edison Papers*, reel 223, frame 892.
38. Letter, William Gilmore to Howard Hayes , *Edison Papers*, reel 223, frame 884.
39. All of the correspondence and documentation about this incident can be found in a folder labeled 'Correspondence: Foreign Films (1904)', *Edison Papers*, reel 223, frames 463–477. Dyer is quoted in Musser, *Before the Nickelodeon*, 277.
40. Ramsaye, *A Million and One Nights*, 321; On the Biograph cases see Eckhardt, *King of the Movies*, 46, 54. For the correspondence between Edison and Lubin regarding the 1904 trademark dispute see Edison Papers, reel 223, frames 478–485.
41. Richard Abel, *The Red Rooster Scare: Making Cinema American, 1900–1910* (Berkley: University of California Press, 1999), 89, 232; Eckhardt, *King of the Movies* and Balshofer, *One Reel a Week*, 5–9.
42. For a detailed account of the transition to story films that discussed the impact of copyright see Musser, *Before the Nickelodeon*, chapter 8.
43. Letter, Frank Dyer to Thorvald Solberg (6 October 1905); letter, Solberg to Dyer (11 October 1905), *Edison Papers*, reel 323, frame 453–456.
44. American Mutoscope & Biograph v. Edison Manufacturing Co. 137 F. 262 (C.C.D. New Jersey, 1905).
45. Stanford law professor Lawrence Lessig has shown that piracy has been central to the development of new media from radio to video recorders to cable television. New forms of copying and distribution only appear as piracy until they are assimilated (and often modified) by the law. Lessig, *Free Culture*.

Abstract: Copyright dupes: piracy and new media in Edison v. Lubin (1903), *by Peter Decherney*

The author examines the attempts of studios such as Edison to copyright films as photographs in the period prior to the inclusion of motion pictures in copyright law in 1912. The essay reviews the history of copyright law as it applies to photography, instances of piracy in this period, and Edison's lawsuit against rival producer (and fellow pirate) Siegmund Lubin.