Rights and Reproductions?: Commercial Photography and Copyright Law in the United States, 1884-1909

By

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Abstract

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This dissertation examines photographic copyright cases tried in the United States between 1884 and 1909 to elucidate shifts in the production and reception of photographic works at the turn of the twentieth century. Copyright cases prove compelling sources for studying the history of photography because they hinge on period definitions of authorship, originality, and value as applied to photographic works. As commercial photographs from this period were increasingly produced in industrialized studios, reproduced using novel photomechanical processes, and intended for mass audiences, the judges and juries who heard these cases struggled to situate commercial photographs within established legal and popular conceptions of individual authorship, artistic originality, and criteria identifying a "copy." Thus, the deliberations and opinions in these cases thus offer important insight into the popular reception of commercial photographs of this period.

In its focus on legal debates over the aesthetic values of commercial photographs, this dissertation departs from previous studies of turn-of-the-century American photography, which primarily attend to the promotion of fine art photography by Alfred Stieglitz and his circle. Where the work and writing of Stieglitz and his cohort clarify the aims of the photographic avant-garde, the copyright cases examined in this dissertation illuminate the aesthetic and business practices of enterprising photographers who are less well known today but who met with great success in their time through the creation of work for the mass market. The examination of photographic copyright cases in this dissertation thus not only offers an opportunity to study the often neglected endeavors of commercial photographers but also to observe how judges and juries, audiences with no specialized knowledge of photography, viewed and valued popular photographic works.

This dissertation is composed of three chapters that each focuses on a distinct set of photographs and legal questions. Chapter one charts the difficulty of applying the originality requirement of American copyright law to commercial photographs in an analysis of *Detroit Photograph Company v. Merchants' Publishing Company* (1899). This case centers on a landscape view taken by William Henry Jackson, the acclaimed photographer of the American West, and owned by the Detroit Photograph Company. Chapter two examines legal debates over the distinctions

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between originals and copies in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896). This case focuses on a photographic reproduction of a German painting produced by the international firm Berlin Photographic Company, and more broadly attends to the shifting aesthetic and educational import assigned to art reproductions in the United States at the turn of the twentieth century. Chapter three considers the relationship between the monetary damages granted to photographers in copyright cases and the cultural value ascribed to commercial photographs. This chapter centers on *Falk v. Curtis Publishing Co.* (1901), one of a number of cases that Benjamin J. Falk, a successful studio photographer based in New York City, fought against the rising photographically illustrated press at the turn of the twentieth century. The Conclusion examines both debates over the drafting of the Copyright Act of 1909, which reveal the emergence new attitudes towards commercial photography since 1884, and the lessons that photographic copyright cases from the turn of the twentieth century hold for photographers and lawmakers of today.

Joining legal and art historical analysis, this dissertation demonstrates the central role of the law in shaping the production of American art and the simultaneous influence of popular visual culture on legal opinions. The fraught relationship between American art and the law continues today in courtroom debates over the promiscuous circulation of images online. Looking back to earlier cases that consider new technologies for reproducing and circulating photographic images, this dissertation argues that we can better evaluate the challenges and opportunities facing artists and the legal system in the Digital Age.

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This dissertation is dedicated to
Jim and Lauren Mintie
And to the memory of
Grandpa Bob Mintie (1927-2001)

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Introduction

This dissertation analyzes a series of contentious copyright cases tried between 1884 and 1909 to consider how commercial photographs were produced, circulated, and viewed in the United States during a period of major technological and cultural transformation. The primary aims of this project are three-fold. First, this dissertation will highlight the role of copyright cases in initiating public debates over the aesthetics and value of popular photographs at the turn of the twentieth century.[1] Simply defined, copyright law offers an individual author the exclusive right to make and sell copies of an original work.[2] While seemingly straightforward, many of the terms central to American copyright law were difficult to apply to commercial photographs of this period, which were increasingly produced in industrialized studios, reproduced using novel photomechanical processes, and intended for mass audiences. As a result of these and other shifts in photographic practice, the judges and juries who heard the cases addressed in this dissertation struggled to situate commercial photographs within established legal and popular conceptions of individual authorship, artistic originality, and criteria identifying a "copy."

Though legal judgments are presented as neutral and impartial, cultural and legal historians remind us that courtroom opinions in the United States are deeply informed by the beliefs, expectations, and preferences (including aesthetic preferences) held among the majority of Americans at a given historic moment.[3] The American legal system, adapted from British common law, centers on the interpretation rather than strict enforcement of statutory law by appointed judges. While judges must rely on statutes and past precedent in arriving at their decisions, they have the power to construe the law to meet changing social, economic, and

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[1] Scholars who have approached the history of photography in the United States through analyses of copyright law include Darcy Grimaldo Grigsby, "Negative-Positive Truths," *Representations* (Winter 2011), 16-38 and *Enduring Truths: Sojourner's Shadows and Substance* (Chicago: University of Chicago Press, 2015), 123-141; Mazie Harris, "Inventors and Manipulators: Photography as Intellectual Property in Nineteenth-Century New York" [1839-1884] (Ph.D. dissertation, Brown University, 2014); Erin Pauwles, "Sarony's Living Pictures: Performance, Photography and Gilded Age American Art" (Ph.D. dissertation, Indiana University at Bloomington, 2014). Studies of European photography through the lens of copyright law include Elizabeth Anne McCauley, "'Merely Mechanical': On the Origins of Photographic Copyright in France and Great Britain" in *History of Art* 31:1 (Feb. 2008), 57-78 and Molly Nesbit, "What Was an Author?" in *Yale French Studies* 73 (1987), 229-257. This study also relies on the work of scholars of American art who have turned to case law to study the reception of contested visual forms. See, for example, Amy Werbel, "The Crime of the Nude: Anthony Comstock, the Art Students League, and the Origins of Modern American Obscenity" in *The Winterthur Portfolio* (2014), 249-282; Michael Leja, "Mumler's Fraudulent Photographs," 21-58 in *Looking Askance: Skepticism and American Art from Eakins to Duchamp* (Berkeley: University of California Press, 2004); and Richard Meyer, *Outlaw Representation: Censorship and Homosexuality in Twentieth-Century American Art* (New York: Oxford University Press, 2002).

[2] On the history of Anglo-American copyright law, see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993); Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property,1790-1909* (New York: Cambridge University Press, 2016); B. Zorina Khan, *The Democratization of Invention: Patents and Copyright in American Economic Development, 1790-1920* (New York: Cambridge University Press, 2005), 222-257; and Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001).

[3] Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), 11-14. Gaines relies on Mark Tushnet's analysis of the links between juridical opinions and popular consciousness laid forth in "A Marxist Analysis of American Law" in *Marxist Perspectives* (Spring 1978), 96-116. See also Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law,* trans. Elizabeth Kingdom. (London: Routledge & Kegan Paul, 1979).

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technological conditions.[4] Through this process of interpretation, judges, consciously or not, continually lace their opinions with their cultural biases that express assumptions and tastes broadly shared among their contemporaries. Thus, the deliberations and opinions in the following photographic copyright cases offer insight into the prevailing aesthetic expectations and norms that informed the reception of commercial photographs both in and outside of the courtroom at the turn of the twentieth century.

As we will see in the following cases, the American copyright system often fails to keep pace with aesthetic and technological advances.[5] This lag in the legal recognition of the new has a parallel in the cultural sphere where novel artistic forms and innovations are not met with immediate acceptance and are only gradually (if at all) embraced by a large number of Americans. Photographic copyright cases from the nineteenth century exemplify this gradual and often uneven process whereby new forms of expression are adopted by the American public and recognized by the American legal system.

While turning to case law to illuminate responses to commercial photography at the end of the nineteenth century, this dissertation also proposes that the study of popular visual culture opens up new ways of interpreting copyright cases and accounting for developments in legal history.[6] Typically, the relationship between law and art is presented as one in which the law is active and art is passive. In this formulation, the law functions as a force that regulates the production and circulation of art to which artists must accommodate themselves and their work.[7] This understanding of the interactions between the law and art obscures the agency of artists and their work in the unfolding of legal history. Although copyright law certainly shaped the artistic and business practices of American photographers at the turn of the twentieth century (and still does so today), this dissertation emphasizes the various strategies that photographers adopted, from pursuing litigation in defense of their work to lobbying for copyright reform, in an attempt to shift the law to their advantage.

In addition to underscoring the agency of photographers who engaged in copyright cases and activism, this dissertation attends closely to popular American visual culture of the turn of the twentieth century, from souvenir views of the American West to fine art reproductions and newspaper illustrations. As mentioned above, judges in the United States interpret rather than strictly enforce the law, and their opinions are informed by the dominant cultural values of a given period. As popular visual culture both reflects and shapes widely accepted aesthetic preferences, it is essential to consider for establishing the artistic norms against which judges and juries viewed the commercial photographs at the center of the following cases.

Finally, this dissertation seeks to expand current scholarship on the history of American photography through an analysis of the production and reception of commercial photographs from the turn of the twentieth century, works largely excluded from art historical study.[8]

[4] See Gaines, 11-14.
[5] Ibid., 49-51.
[6] Here I follow Gaines and Edelman.
[7] See, for example, Costas Douzinas and Lynda Nead, "Introduction," 1-17 in *Law and the Image: The Authority of Art and the Aesthetics of Law* (1999).
[8] In this aim, my work joins recent scholarship focused on commercial photography produced in the United States during the late nineteenth century. See, for example, Tanya Sheehan, *Doctored: The Medicine of Photography in*

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Commercial photography is defined here as photographic work that is produced by professional photographers, printed in mass quantities, and sold to a wide audience. While commercial photography encompasses a range of genres (*e.g.*, portraiture, landscape, and still life), these works share the primary aim of being profitable rather than advancing scientific knowledge or promoting artistic innovation.[9]

Despite the wide circulation and viewership of commercial photographs at the turn of the twentieth century, most studies of American photography of this period focus on debates over the rise of art photography among members of the small circle of photographers aligned with Alfred Stieglitz and the Photo-Secession.[10] By turning to copyright cases that center on commercial photographs, this dissertation seeks to illuminate a parallel set of debates over the production and aesthetics of American photography. Where deliberations among members of the Photo-Secession, which took place in galleries and specialized publications like *Camera Work,* reveal the artistic concerns and priorities of cultural elites who were producing small numbers of labor intensive photographs at the turn of the twentieth century, the courtroom contentions over the authorship, originality, and value of commercial photographs examined in this dissertation offer insight into how a set of enterprising photographers defended the aesthetic merits of their mass produced, industrialized work. Further, the examination of photographic copyright cases offers an opportunity to observe how judges and juries, audiences with no specialized knowledge of photography or aesthetics, viewed and valued popular photography.

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Legal debates over the interpretation of photographs began almost as soon as the new medium debuted in 1839.[11] The first legal debates concerning photographs in the United States revolved

Nineteenth-Century America (University Park, PA: Pennsylvania State University Press, 2011); Elspeth H. Brown, *The Corporate Eye: Photography and the Rationalization of American Commercial Culture* (Baltimore: John Hopkins University Press, 2005); Martha Sandweiss, *Print the Legend: Photography and the American West* (Yale: Yale University Press, 2002); Laura Wexler, *Tender Violence: Domestic Visions in an Age of U.S. Imperialism* (Chapel Hill: University of North Carolina press, 2000); and Shawn Michelle Smith, *American Archives: Gender, Race, and Class in Visual Culture* (Princeton: Princeton University Press, 1999). Scholarship on commercial photography produced in Europe during the nineteenth century has also been influential to this study. See Elizabeth Anne McCauley, *Industrial Madness: Commercial Photography in Paris, 1848-1871* (New Haven: Yale University Press, 1994) and Steve Edwards, *The Making of English Photography: Allegories* (University Park: The Pennsylvania State University Press, 2006).

[9] My definition of commercial photography draws on the McCauley's conceptualization outlined in *Industrial Madness*, 3-7.

[10] There is a substantial body of scholarship on Pictorialist photography, Alfred Steiglitz, and the Photo-Secession. Among other work, see Sarah Greenough, *Alfred Stieglitz: The Key Set: The Alfred Stieglitz Collection of Photographs* (Washington, D.C.: National Gallery of Art; New York: in association with Harry N. Abrams, 2002); Greenough, *Modern Art and America: Alfred Stieglitz and his New York Galleries* (Washington, D.C.: National Gallery of Art; Boston: Bullfinch Press, 2000); Lauren Kroiz, *Creative Composites: Modernism, Race and the Stieglitz Circle* (Berkeley: University of California Press, 2012); Jay Bochner, *An American Lens: Scenes from Alfred Stieglitz's New York Secession* (Cambridge: MIT Press, 2005); Paul Sternberger, *Between Amateur and Aesthete: The Legitimization of Photography as Art in America, 1880-1900* (Albuquerque: University of New Mexico Press, 2001); *Pictorialism into Modernism: The Clarence H. White School of Photography* ed. Marianne Fulton (New York: Rizzoli, 1996).

[11] In *The Pencil of Nature,* published in England between 1844 and 1846, William Henry Fox Talbot first envisioned the use of photographs as evidence in legal cases. In the caption appended to a calotype showing a display of fine china, Talbot writes "should a thief afterwards purloin the treasures—if the mute testimony of the picture were to be

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around their use as evidence in court cases.[12] Early commentators on photography referred to the new medium as a "mirror with a memory" to suggest its seemingly direct, unbiased mode of representation.[13] Given this popular understanding of photographic images as truthful reflections of the external world, it was not long before they appeared in court to give their "mute testimony" on a range of cases.[14] Where these early cases involving photographic evidence asked judges to consider whether the new medium could be relied upon as objective testimony, the first photographic copyright cases, which came before American courts in the in the late 1860s, called upon judges to validate photographs as a subjective form of expression.[15]

Though the origins of photographic copyright in the United States are murky, the U.S. Congress amended the Copyright Act in 1865 to admit photographs as a protected subject matter under the law.[16] However, as will be discussed in Chapter 1, judges who heard early photographic copyright cases were often dissuaded from enforcing their protection.[17] Legal decisions of the 1860s and 1870s that denied copyright protection to photographs suggested the incompatibility between photography and one of the central terms of American copyright law: originality. The Copyright Act stipulated that it protected only "original works," works defined in this period as novel "intellectual conceptions of an author."[18] Precisely because photography was celebrated during the mid-nineteenth century as a mechanical and objective form of image making, prevalent attitudes towards photographic images discouraged some judges from conceiving of

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produced against him in court—it would certainly be evidence of a novel kind; but what the judge and jury might say to it, is a matter which I leave to the speculation of those who possess legal acumen." William Henry Fox Talbot, *The Pencil of Nature* (Chicago: KWS Publishers, in association with the National Media Museum, 2011), Plate 6. Cited in Allan Sekula, "The Body and the Archive" in *October* 39 (Winter, 1986), 5-6.

[12] On early debates over the use of photography as legal evidence in the United States and Europe, see Sekula, 3-64; Jennifer Mnookin, "The Image of Truth: Photographic Evidence and the Power of Analogy" in *Yale Journal of Law & Humanities* 10:1 (1998), 1-74; John Tagg, *The Burden of Representation: Essays on Photographies and Histories* (Minneapolis: University of Minnesota Press, 1988); and Christine Hult-Lewis, "The Mining Photographs of Carleton Watkins, 1858-1891, and The Origins of Corporate Photography" (Ph.D. dissertation, Boston University, 2011).

[13] Oliver Wendell Holmes, "The Stereoscope and Stereograph," in *The Atlantic Monthly* (June 1859), 748.

[14] Talbot, Plate 6. As Mnookin shows, photographs were employed to identify the suspects and victims of crimes, to compare handwriting, to settle land disputes, among other uses in court cases during the mid-nineteenth century. See Mnookin.

[15] On the difficulties American courts faced in recognizing photographs as both a neutral form of evidence and a subjective mode of express, see Christine Haight Farley, "The Lingering Effects of Copyright's Response to the Invention of Photography" in *University of Pittsburgh Law Review* 65 (2004), 385-456. On early copyright cases in Europe, see McCauley, "'Merely Mechanical,'" 57-78.

[16] It is speculated that the Copyright Act was expanded to include photographs because of petitions from Civil War photographers, such as Mathew Brady and Alexander Gardner. See Alan Trachtenberg, *Reading American Photographs: Images as History, Mathew Brady to Walker Evans* (New York: Hill and Wang, 1989), 82 and Gaines, *Contested Culture,* 49. Even before 1865 a number of photographers and even one sitter, Sojourner Truth, attempted to copyright their work to protect it against copyists. See Grigsby, "Negative-Positive Truths," 29; Grigsby, *Enduring Truths,* 135-139; Jeff L. Rosenheim, *Photography and the American Civil War* (New York: Metropolitan Museum of Art, 2013), 8; and Kathleen Collins, "Photographic Fundraising: Civil War Photography" in *History of Photography* 11:3 (Jul-Sept. 1987), 183.

[17] Early copyright disputes include *Wood v. Abbott,* 30 F. Cas 424, 425 (C.C.S.D.N.Y. 1866) and *Udderzook v. Pennsylvania,* 76 Pa. 340 (1874). On these cases, see Farley, "The Lingering Effects," 403-405.

[18] This definition of originality comes from Justice Miller's opinion in *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884). For a detailed history of the originality requirement in American copyright law, see Bracha, 54-123. See also, Gaines, 58-65.

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photographs as original forms of expression, and they were therefore deemed ineligible for copyright protection.

Tensions over the compatibility of photographic images and the originality requirement of American copyright law came to a head in the U.S. Supreme Court case *Burrow-Giles Lithographic Co. v. Sarony* (1884), which will be addressed in greater detail in Chapter 1. This landmark case affirmed the constitutionality of photographic copyright law and asserted that photographs could exhibit originality.[19] While this decision was hailed as a victory among commercial photographers, it hardly put an end to the legal challenges photographers faced in securing copyright protection for their work. Rather than position the decision in *Burrow-Giles Lithographic Co. v. Sarony* as an end to contentions over photographic copyright law as previous studies have done, this dissertation takes this monumental but complex and problematic case as its starting point for examining later cases. [20] Further, this dissertation will consider photographic copyright cases that not only turn on questions of photographic authorship and originality but also criteria defining a copy and the monetary value of photographic works.

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This dissertation examines three divisive copyright cases that were heard in the twenty-five years between the decision in *Burrow-Giles Lithographic Co. v. Sarony* (1884) and the Copyright Act of 1909, which overhauled existing copyright legislation and initiated new policies regarding the status and treatment of photographs. [21] Overshadowed by the well-publicized *Sarony* decision and the major reforms brought by the Copyright Act of 1909, the photographic copyright cases that were heard in the intervening years have been largely ignored by legal scholars and art historians.[22] While little studied, these photographic copyright cases are of substantial interest to historians of both art and the law because these years were marked by innovations in photographic practice and attempts to expand American copyright law in terms of the subject matter it covered and its geographical reach to keep pace with changing social conditions.

In the history of American photography, the period between 1884 and 1909 saw the adoption of a number of new technologies that transformed the production and circulation of photographic images. The introduction of dry-plate and roll films, affordable point-and-shoot cameras, film processing services, and other photographic conveniences on the mass market made it possible for an growing number of Americans to create their own photographs.[23] Before the arrival these

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[19] *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884). For close analyses of this case, see Gaines, 42-83 and Farley, “The Lingering Effects.”
[20] See David S. Shields, *Still: American Silent Motion Picture Photography* (Chicago: University of Chicago Press, 2013), 40 and Barbara McCandless, “The Portrait Studio and the Celebrity,” 69-70 in *Photography in Nineteenth Century America*, ed. Martha Sandweiss (New York: Abrams, 1991).
[21] For a comprehensive history of the 1909 Copyright Act, see *Legislative History of the 1909 Copyright Act* eds. E. Fulton Brylawski and Abe A. Goldman (South Hackensack, NJ: Fred B. Rothman & Co., 1976).
[22] An exception is the work of Christine Haight Farley who offers a short section on photographic copyright cases following *Burrow-Giles Lithographic Co. v. Sarony* (1884). See Farley, “The Lingering Effects,” 438-444.
[23] For a discussion of these innovations and their impact, see Sarah Greenough, “Of Charming Glens, Graceful Glades, and Frowning Cliffs: The Economic Incentives, Social Inducements, and Aesthetic Issues of American Pictorial Photography 1880-1902," 259 in *Photography in Nineteenth-Century America,* ed. Martha Sandweiss (New York: Abrams, 1991). See also Reese V. Jenkins, *Images and Enterprise: Technology and the American Photographic Industry* (John Hopkins University Press, 1975), 96-159.

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inventions, the practice of photography was limited to professionals and committed amateurs with specialized knowledge of chemistry and optics, training in the complex and often messy processes required to produce negatives and prints, and access to a darkroom. With these new technologies, however, the practice of photography became increasingly ubiquitous in the United States at the end of the nineteenth century, so much so that the *New York Times* would describe the trend as an "epidemic" that took hold of the nation in the same fast-spreading manner as cholera.[24]

As we will see in the following chapters, these new technologies that allowed even children to snap photographs put pressure on the authority and artistry of commercial photographers. In both the popular press and the courtroom, commercial photographers of this period had to develop new strategies for defending the originality and value of their work not simply against charges of imitating nature, but now against charges of possessing no distinctive power to do so. Further, the new ease with which photographic images could be created made the reproduction of photographic images simpler than ever before. Faced with a mounting number of cheap reproductions after their work, commercial photographers increasingly turned to the law to protect their livelihood.

Another important innovation of this period was the broad adoption of halftone printing by book and periodical publishers. Since the 1840s photographers and publishers had been searching for a process that would allow them to reproduce photographs in a manner compatible with the printing of type. [25] Although halftone printing was not the first nor the most visually satisfying solution to this conundrum, it proved the swiftest and most cost-effective. First used in 1880s, halftone reproductions after photographs became commonplace in the 1890s, when they appeared regularly in newspapers, magazines, and books and ignited what Neil Harris has referred to as the "halftone revolution."[26]

The explosion of halftone printing considerably expanded the visibility and consumption of photographic images at the turn of the twentieth century. While this new printing technology made it possible for commercial photographers to showcase their work to broader audiences, the poor quality and low cost of halftone reproductions in popular publications also posed a threat to the perceived aesthetic merit and monetary value of photographic prints. As American audiences could now purchase a two-penny newspaper with a dozen halftones after photographs,

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[24] By 1900, Kodak alone was selling 150,000 cameras per year. See Diane Waggoner, "Photographic Amusements, 1888-1919," 14 in *The Art of the American Snapshot, 1888-1978, From the Collection of Robert E. Jackson* ed. Sarah Greenough and Dianne Waggoner (Washington, DC: National Gallery of Art; Princeton: Princeton University Press, 2007) 14. "The Camera Endemic" in *New York Times* (Aug. 20, 1884), 4. Cited in Michael L. Carlebach, *American Photojournalism Come of Age* (Washington: Smithsonian Institution Press, 1997), 18.

[25] On the history and development of photomechanical printing processes, see Helena E. Wright, "Photography in the Printing Press: The Photomechanical Revolution," 21-22 and 33-34 in *Presenting Pictures* ed. Bernard Finn (London: Science Museum, 2004).

[26] On the broad adoption of halftone printing and its effects on American culture, see Neil Harris, "Iconography and Intellectual History: The Halftone Effect," 304-317 in *Cultural Excursions: Marketing Appetites and Cultural Tastes in Modern America* (Chicago: University of Chicago Press, 1990) and Estelle Jussim, *Visual Communication and the Graphic Arts: Photographic Technologies in the Nineteenth Century* (New York: R.R. Bowker Co., 1974).

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commercial photographers struggled to justify the value of their prints to customers and judges alike.[27]

In terms of legal history, the period between 1884 and 1909 was marked by expansions and reforms to American copyright law to keep pace with modern life. In 1891 the United States passed the first International Copyright Act, granting copyright protection to foreign authors and securing reciprocal protections for domestic authors abroad.[28] In addition to enlarging its geographic reach, American copyright law began to extend protections to new technologies, such as motion pictures and sound recordings.[29] Finally, the opinion in the landmark U.S. Supreme Court case *Bleistein v. Donaldson Lithographing Co*. (1903), to be examined in Chapter 1, brought about a radical reformulation of the originality requirement of the Copyright Act that permitted material previously denied copyright, including certain forms of commercial photography, to enjoy its protections.[30]

The turn of the twentieth century also saw many calls for reform to the Copyright Act by lawmakers, judges, and cultural producers.[31] The need for reform to the existing statutes was instigated by both the introduction of new technologies (especially sound recordings) and conflicting decisions in contemporary copyright cases, including the photographic copyright cases that we will encounter in the following chapters. While a number of patchy amendments were made to the Copyright Act at the beginning of the twentieth century to quell confusion in the courtroom, the U.S. Congress along with President Theodore Roosevelt determined in 1904 that a major revision to existing legislation was necessary.[32] This call for a broad review of American copyright law would result in the Copyright Act of 1909, a set of laws that would remain in place until the next major reform was passed in 1976. Commercial photographers played an active role in the revision process and lobbied for amendments to the Copyright Act that would reformulate definitions of authorship, originality, and copies and streamline procedures for determining monetary damages in successful copyright cases. While the 1909 Copyright Act hardly settled debates over photographic copyright, this important set of reforms resolved some of the central ambiguities that had plagued copyright decisions over the previous twenty-five years.

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[27] On the anxiety photographers felt over the pricing of their work during this period, see Greenough, "Of Charming Glens," 260-264.
[28] On the 1891 Copyright Act, see Vaidhyanathan, 50-55. As Vaidhyanathan suggests, the lobbying efforts of American publishers and authors, such as Mark Twain, Louisa May Alcott, Walt Whitman, and Oliver Wendell Holmes, Sr., were central to the passage of this act.
[29] On early copyrights granted to motion pictures in the United States, see Peter Decherney, "Copyright Dupes: Piracy and New Media in *Edison v. Lubin* (1903)" in *Film History: An International Journal* (2007), 109-124. For a glimpse of the debates over the protection of sound recordings, see "Arguments before the Committee on Patents from May 2, 1906," 2-26 in *Legislative History of the 1909 Copyright Act* (Vol. 4).
[30] *Bleistein v. Donaldson Lithographic Co.* 188 US 239 (1903).
[31] Throughout this dissertation, we will encounter instances in which judges, lawyers, and photographers bemoan the convoluted and even contradictory nature of the Copyright Act.
[32] For example, the Copyright Act was amended in 1901 to extend protections to "any photographs" where it had previously read "photographs." This revision was partly intended to ameliorate confusion regarding which photographs met the originality requirement in the wake of *Burrow-Giles Lithographic Co. v. Sarony* (1884). See Decherney, 113. This amendment will be considered at greater length in the conclusion to Chapter 1.

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The three case studies that comprise this dissertation each feature a body of commercial photographs that challenged traditional interpretations of American copyright law and popular aesthetic conventions at the turn of the twentieth century. The individual case studies each focus on a primary term in copyright legislation and elucidate the complexities of applying these terms to commercial photographs of the period. The following case studies turn on the questions: What does it mean for a photograph to be original? What are the criteria defining a copy? What is the value of a photograph? In addition to attending to distinctive areas of American copyright law, each case study considers a different genre of commercial photography popular at the turn of the twentieth century: landscape studies, art reproductions, and studio portraiture. The examination of a variety of photographic forms serves to suggest the range of aesthetic and business practices adopted by commercial photographers at the turn of the twentieth century.

Though the case studies consider divergent legal questions and genres of commercial photography, I follow a similar interpretive strategy to elucidate the arguments and verdicts delivered in each case. In the chapters that follow, I examine both legal precedents and developments in American visual culture to view the contested photographs from the perspective of period judges and juries at the time. Thus, this dissertation takes an explicitly interdisciplinary approach to the analysis of these cases and draws on scholarship from a range of fields, including art history, legal history, and cultural history.

The first chapter focuses on the 1899 case *Detroit Photograph Company v. Merchants' Publishing Company* in which *The Palisades, Alpine Pass* (figs. 1a and 1b), a view taken by acclaimed landscape photographer William Henry Jackson and owned by the Detroit Photograph Company, was denounced by Judge Moses Hallett as unoriginal and unqualified for copyright protection. In analyzing this surprising courtroom critique of Jackson's work, this chapter considers the ambiguous originality requirement imposed by American copyright law, and its effect of casting legal judges in the unfamiliar role of aesthetic critic. The dismissal of *The Palisades, Alpine Pass* has never been addressed in studies of Jackson's oeuvre, and an analysis of the case offers an opportunity to assess the contemporary reception of his mid-career landscape photographs. To better understand Judge Hallett's unexpected verdict, this chapter will take into account the legal precedents that informed his decision, primarily the landmark U.S. Supreme Court decision in *Burrow-Giles Lithographic Co. v Sarony* (1884), as well as technological and business innovations that were transforming the market for views of the American West at the end of the nineteenth century. By situating *The Palisades, Alpine Pass* in the mass image economy and thriving tourist market of the 1890s, this chapter will explain how Jackson's commercial landscape photographs came to be seen as conventional only a few decades after the triumphant reception of his work for the United States Geological and Geographical Survey of the Territories made during the 1870s.

The second chapter examines legal debates over the distinctions between originals and copies in the case *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896). The suit was initiated by Emil Werckmesiter, a German citizen and head of the Berlin Photographic Company (also known as the Photographishe Gesellschaft), an international firm based in Berlin that manufactured high quality art reproductions. In 1893, Werckmeister discovered that the American firm Pierce & Bushnell Manufacturing Co. was reproducing and selling photographic

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copies after the Berlin Photographic Company's own photographic reproductions of the painting *Saint Cecilia* by German artist Gustav Naujok (fig. 2). The arguments and opinions delivered in the ensuing case offer perhaps the most thorough consideration of the legal distinctions between original artworks and reproductions in the United States at the end of nineteenth century. Thus, this case provides an opportunity to examine the extent to which new technologies of reproduction began, as Walter Benjamin famously contends in "The Work of Art in the Age of Mechanical Reproduction," to reconfigure established hierarchies between originals and copies.[33] Along with reviewing legal constructions of "the copy," this chapter will examine the consumption and reception of art reproductions in the United States during the late nineteenth century, the exhibition and collecting practices of early fine art museums, and the elevation of original artworks in American culture during the early years of the twentieth century.

The final chapter examines the work of acclaimed New York studio photographer Benjamin J. Falk and the shifting value of studio photography at the dawn of the halftone era. Though little remembered today, Falk was one of the premier portrait photographers of his day and a tireless promoter of photographic copyright protection. This chapter will focus on *Falk v. Curtis Publishing Co.* (1901), one of a number of cases that Falk fought against photographically illustrated periodicals at the turn of the twentieth century.[34] At the center of this case was one of Falk's portraits of theater actress Minnie Ashley (fig. 3) that was reproduced as a halftone print without permission in *The Ladies' Home Journal,* a widely read women's magazine owned by Curtis Publishing Co. While the courts agreed that Falk's photograph was original and that his copyright had been violated, judges were less certain of how to assess the monetary damages (if any) that Curtis Publishing Co. owed to Falk for its illicit use of his work. The perceived value of studio photography was a matter of considerable concern for commercial photographers of this period as new photographic technologies and aesthetic preferences began to erode the market for their work. While scholars have argued that the heyday of American studio portraiture declined with the emergence of the twin forces of amateur photography and the Pictorialist movement, this study of Falk's legal woes suggests that the methods of producing, distributing, and consuming photographic images introduced by the illustrated press also contributed to the waning value of professional studio photography at the turn of the twentieth century.[35]

The Conclusion will examine the participation of commercial photographers, principally Falk and fellow studio photographer Pirie MacDonald, in the drafting of the Copyright Act of 1909. This analysis of debates regarding the legal status of photography that took place during the revision process and the contents of the new legislation itself offers an opportunity to consider how the reception of commercial photographs had changed over the preceding twenty-five years. While Falk and MacDonald were not successful in achieving all of their proposed reforms, the terms of debate over the legal status and treatment of photographs had shifted in significant ways that reveal new attitudes toward photography within American culture during the early twentieth century.

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[33] Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," 218-221 in *Illuminations* ed. Hannah Arendt and trans. Harry Zohn (New York: Schocken Books, 2007).
[34] Previously, Falk had pursued at least two other copyright cases against the periodical press: *Press Pub v. Falk* (1894) and *Falk v. City Item Printing Co* (1897).
[35] On the decline of studio portraiture in this period, see Greenough, "Of Charming Glens," 259-81.

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Finally, the Conclusion considers contentions in photographic copyright cases of the twenty-first century and the lessons that photographers, lawyers, and judges working now can take from their predecessors in the late nineteenth and early twentieth centuries. Creative producers and lawmakers face similar challenges today as they adapt to the advent of Internet culture and developments in digital technologies that both open up new possibilities for artistic practice and unsettle established intellectual property frameworks. By learning from these earlier debates over photographic copyright, I argue that we can better strategize how to reform the legal system to encourage rather than dampen the exciting and rapidly evolving work of contemporary artists.

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Chapter One

An Unoriginal View?: *Detroit Photograph Company v. Merchants' Publishing Company* (1899)

On December 14, 1899, *The Denver Evening Post* ran the bold headline "SMASH GOES PHOTOGRAPHIC COPYRIGHTS."[1] The accompanying article reported the decision made in the case *Detroit Photograph Company v. Merchants' Publishing Company,* which was to determine whether Frank S. Thayer of Merchants' Publishing Company had made unauthorized reproductions of a photograph by William Henry Jackson entitled *The Palisades, Alpine Pass* (figs. 1a and 1b). In the contested photograph, Jackson positions the viewer on the tracks of the Denver, South Park, and Pacific Railroad that curve along the side of a steep mountain pass and climb upward to the Alpine Tunnel, then the highest railway station in the United States. From this precarious perch, the viewer is rewarded with a postcard view of snow-capped Uncompahgre Peak framed between an open sky and timbered valley. To enhance the viewer's immersion in the Colorado scenery, the photographic print has been colored with rusty brown, deep green, and icy blue hues.

The addition of color to Jackson's view was the innovation of the Detroit Photograph Company, a newly-formed publishing firm headed by William A. Livingstone that specialized in vivid Photochrom reproductions after photographs of American scenery.[2] Jackson had entered a partnership with Livingstone in 1897 and had transferred his extensive collection of photographic negatives and control over their copyrights to the publisher in exchange for $5,000 cash and $25,000 in company stock.[3] The potential value of the acquisition for both parties was soon undermined, however, when the Detroit Photograph Company discovered that Thayer had illegally reproduced *The Palisades, Alpine Pass* as a tinted halftone in the souvenir book *Colorado in Color and Song* (1899, fig. 4). Eager to protect its investment in Jackson's negatives, the Detroit Photograph Company sued Thayer for copyright infringement.

Beneath its exclamatory headline, *The Denver Evening Post* went on to report the verdict in *Detroit Photograph Company v. Merchants' Publishing Company* reached by Judge Moses Hallett of the Colorado Circuit Court. Moved by neither the thrilling point of view of Jackson's photograph nor its brilliant Photochrom coloring, Judge Hallett decided: "A photograph of natural scenery is not the subject of copyright, because it is not the original conception of the

[1] "Smash Goes Photographic Copyrights" in *The Denver Evening Post,* 14 Dec. 1899, 2. I have not been able to locate the official court documents for this case and have relied on extant press coverage of the trial in its absence. In addition to being covered in local papers in Denver, the case was also commented upon in the photographic and national press. See "More About Photographic Copyright" in *Wilson's Photographic Magazine* (Feb. 1899), 52-53 and "New Practice in Photographic Copyright," in *Scientific American,* 17 Feb. 1900, 102.

[2] For a discussion of the Photochrom process, see Thomas Southall, "'In the Colors of Nature': Detroit Publishing Company Photochroms," 67-75 in *Intersections: Lithography, Photography, and the Traditions of Printmaking* (Albuquerque: University of New Mexico Press, 1998).

[3] Jackson relates further details on his partnership with the Detroit Photograph Company (later the Detroit Publishing Company) in his autobiography. See William Henry Jackson, *Time Exposure: The Autobiography of William Henry Jackson, 1843-1942* (New York: G.P. Putnam's Sons, 1940), 321-23. Peter B. Hales reports the terms of the contract between Jackson and the Detroit Photograph Company in *William Henry Jackson and the Transformation of the American Landscape* (Philadelphia: Temple University Press, 1988), 261 and 326 fn 10.

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artist. It is merely a skillful manipulation of the camera."[4] With these words the Detroit Photograph Company not only lost the case but Jackson, perhaps the most prominent landscape photographer of the period, was denounced as a skillful mechanic. The headline was not mistaken; this decision was a definite "smash" to the authority photographic copyright law and the aesthetics of landscape photographs.

Judge Hallett's verdict may surprise contemporary readers even casually familiar with the life and work of William Henry Jackson, who has been heralded as a pioneer in American landscape photography and whose views have been credited with shaping Americans' outlook on the West during the late nineteenth century.[5] His landscape photographs of the American West have been variously described as mythic, picturesque, sublime, and nostalgic.[6] But unoriginal? Never. Suspending present-day veneration of Jackson and his work, this chapter will attempt to view *The Palisades, Alpine Pass* through the eyes of Judge Hallett using two central methods: by tracing the legal precedents that informed his verdict and reconstituting the visual culture of the American West against which he evaluated the aesthetic merits of Jackson's photograph. By considering together the legal and popular reception of *The Palisades, Alpine Pass,* we can begin to come to terms with Judge Hallett's puzzling dismissal of the originality of Jackson's work.

Though Jackson is best known today for the landscape views he produced while working as a photographer for the United States Geological and Geographical Survey of the Territories in the 1870s, he took *The Palisades, Alpine Pass* while pursuing a successful career as a commercial photographer in Denver during the 1880s and early 1890s.[7] In Denver Jackson found ready work in this realm from an enthusiastic community of western boosters seeking to advertise the opportunities for leisure, adventure, and economic gain to be had in the frontier metropolis. Western railroad companies looking to promote the scenic pleasures and thrills of their routes were some of Jackson's best clients, and he likely made *The Palisades, Alpine Pass* on commission from the Denver, South Park, and Pacific Railroad.[8] In addition to commissioned work, Jackson produced picturesque views of the western landscape to sell in a wide range of photographic formats to the swell of tourists who flocked to the region on the rail lines he regularly photographed.

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[4] "Smash Goes Photographic Copyrights," 2.

[5] Jackson himself was a relentless self-promoter and completed two autobiographies celebrating his adventures in the West. See William Henry Jackson, *The Pioneer Photographer* (Yonkers-on-Hudson: World Books, 1929) and *Time Exposure*. The secondary literature on Jackson is broad, but writers often take a biographical rather than a critical approach to his photographs. Peter B. Hales' study of Jackson's career remains the most thorough analysis of his work.

[6] Hales refers to Jackson's early landscape views of the American West as "mythic" and "picturesque." See Hales, 5 and 71-75. Weston Naef uses the terms "picturesque" and "romantic" to describe Jackson's landscape work for the Hayden Survey. See Naef, in collaboration with James N. Wood, *Era of Exploration: The Rise of Landscape Photography in the American West, 1860-1885* (Buffalo: Albright Know Gallery; Boston: New York Graphic Society, 1974), 224. Ellen Handy has described Jackson's commercial work as at once "sublime" and "nostalgic," see Handy, "Postcard Sublime: William Henry Jackson's Western Landscapes" in *Visual Resources* 17: 4 (2001), 421.

[7] On Jackson's work for the Hayden Survey and its reception, see Hales, 67-136; Martha Sandweiss, *Print the Legend: Photography and the American West* (New Haven: Yale University Press, 2002), 196-204; Howard Bossen, "A Tale Retold: The Influence of the Photographs of William Henry Jackson on the Passage of the Yellowstone Park Act of 1872" in *Studies in Visual Communication* (Winter 1982), 98-109; and Naef, 219-226.

[8] On Jackson's strong relationship with Western railroad companies, see Hales, 144.

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Despite the popularity and wide circulation of Jackson's commercial photographs from the 1880s and 1890s, scholars have largely ignored this substantial body of later landscape photographs and focused instead on his early work for the United States Geological and Geographical Survey of the Territories.[9] While the greater emphasis placed on Jackson's photographs for the Survey is undoubtedly a result of the historical importance of these explorations of the American West, the explicitly commercial nature of Jackson's later views likely contributes to their neglect as well.[10] By focusing on Jackson's commercial work of the 1880s and 1890s and Judge Hallett's critique of *The Palisades, Alpine Pass,* this chapter aims to offer a broader perspective on the consumption and reception of Jackson's landscape photographs by providing a counterpoint to the heroism and triumphalism ascribed to his Survey work.[11]

Before turning to Jackson's commercial work in Denver, this chapter will take brief detours to New York City and Washington, DC to consider *Burrow-Giles Lithographic Co. v. Sarony* (1884), a United States Supreme Court decision that Judge Hallett relied upon in formulating his judgment of *The Palisades, Alpine Pass.* This momentous copyright case set forth a new standard for determining the originality of photographic works that would remain in place until the early years of the twentieth century when, as we will discuss in the conclusion to this chapter, the U.S. Supreme Court and the U.S. Congress proposed new formulations of originality as it applied to the Copyright Act. While a comparison between the language used in the opinion in *Burrow-Giles Lithographic Co. v. Sarony* and the verdict in *Detroit Photograph Company v. Merchants' Publishing Company* moves us closer to understanding Judge Hallett's reasons for dismissing *The Palisades, Alpine Pass*, legal precedent alone does not satisfactorily explain his confounding opinion.

Judge Hallett's unfavorable verdict must also be evaluated in terms of the cultural context in which *The Palisade, Alpine Pass* and other of Jackson's commercial photographs were circulated and consumed. To situate *The Palisades, Alpine Pass* within the visual culture of the American West at the end of the nineteenth century, this chapter will consider the growth of tourism in the west, the expansion of corporate business models, and the adoption of new photographic and printing technologies. By examining Jackson's landscape photographs within the legal and visual conventions of the 1890s, we can begin to comprehend how an image like *The Palisades, Alpine Pass* was dismissed in court as merely good camera work only a few decades after the triumphant reception of his work for the United States Geological and Geographical Survey of the Territories in the 1870s.

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[9] On Jackson's commercial work, see Hales, 141-281; Handy, 417-433; and Jim Hughes, *The Birth of a Century: Early Color Photographs of America* (New York: Tauris Parke Books, 1994).

[10] Commercial or popular forms of visual culture previously received little attention in art historical studies because these works were created in the pursuit of profit rather than higher aesthetic ideals. However, as John Davis notes in his recent review of the state of American art history, studies of popular visual and material culture are on the rise. As an example of this new focus on popular rather than "high" art, Davis cites Michele Bogart, *Advertising, Artists, and the Borders of Art* (Chicago: University of Chicago Press, 1995). See John Davis, "End of the American Century: Current Scholarship in the Art of the United States" in *Art Bulletin* (Sept. 2003), 560-562.

[11] On the acclaim of Jackson's photographs for the Hayden Survey, particularly the views he made of Yellowstone, and their portrayal of the triumphalism of western expansion, see Hales, 80-85; Sandweiss, 198-201; and Naef, 223-224.

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In March of 1884, the U.S. Supreme Court heard the landmark photographic copyright case *Burrow-Giles Lithographic Co. v. Sarony.*[12] The case centered on a portrait of Oscar Wilde (fig. 5), the acclaimed Irish author and wit, which the popular photographer Napoleon Sarony produced at his New York studio in 1882 when Wilde visited the United States as part of a lecture tour. In the portrait, Wilde sits on a deep, luxuriously upholstered sofa, half of which has been draped with a lustrous fur throw. Wilde is dressed in a dark velvet jacket, knee breeches, and smooth stockings that culminate in pointed, gleaming black shoes tied in bows of wide ribbon. The inviting tactility of the portrait is heightened by the addition of an undulating Turkish carpet that unfurls at Wilde's feet and extends out toward the viewer. Wilde holds a seeming informal, conversational pose: he leans forward, cups his chin in his right hand, and gazes at the viewer with thoughtful eyes framed by his sweeping locks. Lips slightly open, Wilde appears poised to respond to a comment the viewer has made. In his left hand, Wilde holds a closed book upon his thigh that alludes to his literary talents. Drawing together sumptuous textures and patterns, the portrait invites the viewer into the refined intellectual and aesthetic sphere with which Wilde was associated with in the public imagination.

Called *Oscar Wilde, No. 18,* the elegant portrait proved popular as Wilde made news across the United States for his unabashed aestheticism and clever quips. Though Sarony had copyrighted the portrait, the printers at Burrow-Giles Lithographic Co. chose to ignore his copyright notice and made unauthorized reproductions of *Oscar Wilde, No. 18* in the form of lithographs to advertise a new line of hats available at the New York department store, Ehrich Brothers. [13] Sarony soon discovered the illicit advertisement and sued Burrow-Giles Lithographic Co. for copyright infringement in 1883.

In their defense, the lithographers argued that photographs as a general category, including Sarony's portrait of Wilde, did not qualify as copyrightable subject matter because they were mechanical reproductions and thus did not meet the originality requirement imposed by American copyright law.[14] During the period of this trial, an original work was understood as one in which "the ideas in the mind of the author are given visible expression."[15] This definition of originality emphasizes intellectual labor, the production of "ideas in the mind," over the manual or technical skill required by an author to create a work. As we will see, this legal construction of originality and the recognition of its direct, "visible expression" in the resulting work would prove difficult to apply to photography of this period, for the camera and action of light were often given credit for the resulting image rather than the photographer. It was

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[12] *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884). This landmark case has been the subject of a substantial body of scholarship by researchers in a wide range of disciplines. The following analyses have been particularly useful in formulating my own understanding of the case: Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), 42-83; Christine Haight Farley, "The Lingering Effects of Copyright's Response to the Invention of Photography" in *University of Pittsburgh Law Review* 65 (2004), 385-456; and Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property,1790-1909* (New York: Cambridge University Press, 2016), 88-91.
[13] As Gaines notes, the Burrow-Giles Lithographic Co. was charged with producing an astounding 85,000 copies of *Oscar Wilde, No. 18.* See Gaines, 52.
[14] For a detailed history of the originality requirement of American copyright law, see Bracha, 54-123. See also, Gaines, 58-65.
[15] *Burrow-Giles Lithographic Co. v. Sarony*.

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precisely this straining of the legal definition of originality of this period that led the U.S. Supreme Court to hear *Burrow-Giles Lithographic Co. v. Sarony* in 1884.[16]

Thus, the U.S. Supreme Court was asked in *Burrow-Giles Lithographic Co. v. Sarony* not only to settle the question of whether the Burrow-Giles Lithographic Co. had violated Sarony's copyright but also to determine whether or not photographic prints and negatives qualified for protection by American copyright law. Though the Copyright Act had been amended in 1865 to grant protection to photographic prints and negatives, courts had unevenly enforced the copyright of photographs in the intervening twenty years.[17] As Christine Haight Farley notes in her study of early photographic copyright cases, these legal judgments were often based on popular conceptions of photographic practice and aesthetics.[18] Since its invention, photography was widely promoted and praised for its exacting "mechanical objectivity."[19] Where previous representational forms relied on the interfering hand of an artist, photographic images were understood to be the joint product of unbiased nature, in the form of sunlight, and the unflinching camera. Such perceptions of photography were encoded in its very naming, literally "light writing," and were bolstered by other period monikers for the medium, such as "the pencil of nature" and a "mirror with a memory."[20] As a result of these prevalent ideas about the production of photographs, some judges were disinclined to see photographic images as original forms of expression by an individual author. The justices hearing *Burrow-Giles Lithographic Co. v. Sarony* were thus presented with a difficult case that required them to consider not only the word of the law and established precedents but also the aesthetic potential of photography.

While the U.S. Supreme Court ultimately decided in favor of Sarony and defended the legality of photographic copyright, the opinion did not constitute a conclusive victory for photographers seeking to protect their work from unauthorized copying.[21] The cautiously worded decision, penned by Justice Samuel Freeman Miller, did not assert that *all* photographs qualified for copyright protection but only those that could be shown to be the "original mental conception" of an individual photographer.[22] As to the copyright of so-called "ordinary" photographs that required "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 U.S.

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[16] Before heading to the U.S. Supreme Court, the case was heard in the circuit court of New York where Sarony won. See *Sarony v. Burrow-Giles Lithographic Co.,* 17 F. 591 (C.C.S.D.N.Y. 1883). Despite this victory, the legal inconsistency regarding photographs enabled the Burrow-Giles Lithographic Co. to present their case to the U.S. Supreme Court.

[17] Copyright Act of 1865, ch. 126, 13 Stat. 540.

[18] On *Wood v. Abbott,* 30 F. Cas 424, 425 (C.C.S.D.N.Y. 1866) and *Udderzook v. Pennsylvania,* 76 Pa. 340 (1874). See Farley, "The Lingering Effects," 403-405.

[19] On the emergence of the concept of mechanical objectivity and its relationship to photography, see Lorraine Daston and Peter Galison, *Objectivity* (New York: Zone Books, 2006), 120-190.

[20] The name "the pencil of nature" comes from William Henry Fox Talbot, one of the early inventors of photography, who used the phrase to title his 1844-1846 book showcasing the calotype process. See Talbot, *The Pencil of Nature* (Chicago: KWS Publishers, in association with the National Media Museum, 2011). The phrase "mirror with a memory" comes from Oliver Wendell Holmes, popular writer and champion of photography as art. See "The Stereoscope and Stereograph," in *The Atlantic Monthly* (June 1859), 748.

[21] This case is often misinterpreted as a decisive victory for the protection of photographic works. See, for example, David S. Shields, *Still: American Silent Motion Picture Photography* (Chicago: University of Chicago Press, 2013), 40 and Barbara McCandless, "The Portrait Studio and the Celebrity," 69-70 in *Photography in Nineteenth Century America*, ed. Martha Sandweiss (New York: Abrams, 1991).

[22] *Burrow-Giles Lithographic Co. v. Sarony.*

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Supreme Court chose to "decide nothing" and left the copyright status of this capacious category of "ordinary" photographs open to interpretation.[23] Justice Miller's description of *Oscar Wilde, No. 18* and what made it Sarony's "original mental conception" rather than an "ordinary" work proved an influential yet ambiguous standard for adjudicating which photographs qualified for copyright protection for the next twenty years. A close examination of Justice Miller's opinion in *Burrow-Giles Lithographic Co. v. Sarony* clarifies which qualities were seen to constitute an original photograph and the problems this wording posed for Judge Hallett as he approached Jackson's *The Palisades, Alpine Pass* in *Detroit Photograph Company v. Merchants' Publishing Company* fifteen years later.

In his opinion, Justice Miller gives a thorough description of Sarony's portrait of Wilde and its creation as a means to establish the originality of the photograph. He writes that Sarony produced the portrait

> entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph. . .arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit.[24]

For Justice Miller, the originality of a photograph takes "visible form" in the various actions—posing, selecting, arranging, etc.—that the photographer performs on the subjects and objects in the scene *before* they are photographed. As other scholars have suggested, Justice Miller emphasizes Sarony's creative role as a kind of director in front of the camera rather than his skill in operating the camera itself.[25] By tracing the originality of the photograph to the various actions Sarony performed before the exposure of the negative plate, Justice Miller overcame arguments made by Burrow-Giles Lithographic Co. and others that photographs were primarily the product of the mechanical operations of the camera. While Justice Miller's strategic silence on the role of camera and its manipulation by the photographer in his construction of photographic originality may have enabled Sarony to win his case, this legal framework would work against Jackson in *Detroit Photograph Company v. Merchants' Publishing Company.*

Rereading Judge Hallett's verdict on *The Palisades, Alpine Pass* in light of the Sarony opinion helps clarify his assessment of Jackson's photograph as "ordinary" rather than original. Recall that Judge Hallett had decided, "[a] photograph of natural scenery is not the subject of copyright, because it is not the original conception of the artist. It is merely a skillful manipulation of the camera."[26] As defined in the Sarony case, photographic originality stems from the photographer's ability to *imagine* and compose a desired scene in front of the camera before the exposure of the negative plate. Relying on this precedent, Judge Hallett needed to determine if Jackson performed any actions *on* the Colorado landscape to produce *The Palisades, Alpine Pass* as his own "original mental conception."

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[23] Ibid.
[24] Ibid.
[25] See Gaines, 71-75 and Farley, "The Lingering Effects," 427.
[26] "Smash Goes Photographic Copyrights," 2.

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Did Jackson pose Uncompahgre Peak in this scene? Did he arrange the railroad tracks just so? Did he evoke the desired expression from the trees below? These propositions are not only absurd but also would have been denounced as blasphemous by many Americans of the late nineteenth century. God, not a mortal photographer, was commonly proclaimed as the author of the natural world, and many Americans understood their communion with the landscape as a spiritual experience.[27] Following this period logic, Jackson did not produce but merely *reproduced* God's works in nature; he had taken what Justice Miller referred to as an "ordinary" photograph that "simply…transfer[s] to the plate the visible representation of some existing object." For Judge Hallett, Jackson was a mere recorder of pre-existing works and not the creator of pre-meditated, imaginative works that reflected "his own original mental conception."[28]

Even if Jackson did not move mountains to produce *The Palisade, Alpine Pass,* he did make a number of crucial decisions in the creation of the photograph. Among other choices, he selected a point of view, decided upon an appropriate aperture and exposure time, and developed the negative and print in a particular manner to adjust the values of the resulting photograph. However, these complex activities that took place behind the camera and in the darkroom did not amount to authoring an original photograph in the legal terms of the day. As laid forth in Justice Miller's opinion in *Burrow-Giles Lithographic Co. v. Sarony,* neither the photographer's operation of the camera nor his development technique was considered relevant in evaluating the originality of a photograph. Indeed, Sarony, like many other leading studio photographers of the day, was rarely behind the camera or in the darkroom at his studio; he hired skilled studio assistants to take and develop the images he staged.[29] Technical proficiency was not prized by the courts as evidence of originality but constituted what Judge Hallett disparagingly referred to as "merely a skillful manipulation of the camera." Following a strict interpretation of the *Sarony* opinion, technical facility alone would not suffice to ensure copyright protection for *The Palisade, Alpine Pass.*

Until the early twentieth century when the legal definition of originality would be reformulated by another landmark copyright case, *Bleistein v. Donaldson Lithographic Co.* (1903), and reforms to the Copyright Act by the U.S. Congress, the opinion in *Burrow-Giles Lithographic Co. v. Sarony* exerted a determining influence on the outcomes of photographic copyright cases. Despite the authority of this decision, legal precedent alone does not fully account for Judge Hallett's verdict in *Detroit Photograph Company v. Merchants' Publishing Company.* As in many societies and polities, the American legal system centers on the interpretation rather than strict enforcement of the law by appointed judges. While judges refer to the legal code and relevant precedents when crafting their opinions, they have the power to construe the law to accord with changing social conditions.[30] By way of this process of individual interpretation, even the most careful legal opinions are inevitably informed by the cultural biases of the judges who pen them and they reflect the expectations and conventions of the time in which they were written.[31] Indeed, we have already seen this process at work in *Burrow-Giles Lithographic Co. v.*

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[27] On the relationship between nature and divinity in late-nineteenth-century America, see Marguerite S. Shaffer, *See America First: Tourism and National Identity, 1880-1940* (Washington: Smithsonian Institution Press, 2001), 277-280.
[28] *Burrow-Giles Lithographic Co. v. Sarony.*
[29] Sarony's trusted cameraman was Benjamin Richardson. See Gaines, 72.
[30] See Gaines, 11-14.
[31] Ibid., 11-14.

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Sarony and earlier photographic copyright cases in which popular perceptions of photographic practice and aesthetics played a key role in determining the outcome of these cases.

Though photography was gaining greater recognition as an expressive practice in the United States at the end of the nineteenth century through the efforts of Pictorialist photographers and others, Judge Hallett's decision in *Detroit Photograph Company v. Merchants' Publishing Company* suggests that the courts were not yet convinced of the artistic potential of photography.[32] In the case of *The Palisades, Alpine Pass,* the challenge to the originality of Jackson's work not only stemmed from prevailing conceptions of photographic aesthetics but also the specific reception of Jackson's work within the competitive market for western views at the end of the nineteenth century. To situate *The Palisades, Alpine Pass* within the visual culture of the American West of the 1890s, this chapter will now turn to consider four central phenomena that transformed the production and circulation of western views during this period: the rise of tourism in Colorado, advances in photomechanical printing, the expansion of corporate business models, and the introduction of new photographic technologies that allowed an increasing number of Americans to practice photography. Attending to these extra-legal factors and their effects on Jackson's commercial photography business offers a broader context for understanding Judge Hallett's emphatic dismissal of *The Palisade, Alpine Pass* as an "unoriginal" and "ordinary" photograph.

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In 1879 Jackson concluded an exhilarating nine-year career as a photographer for the United States Geological and Geographical Survey of the Territories under the supervision of Dr. Ferdinand Vandeveer Hayden. His experiences with the Hayden Survey brought him public renown as a landscape photographer, financial stability, and fulfilled his sense of adventure.[33] Seeking to capitalize on his growing fame as a photographer of the American West and learning of the expansion of the railroads in Colorado, Jackson turned his course to the rapidly growing city of Denver to set up his own commercial practice.[34]

Jackson had traveled to Denver frequently during the years he spent with the Hayden Survey and had watched the city swell with newcomers and urban investment over the previous decade. Well-connected to various railroads, rich in mineral deposits, abundant in timber, encircled in scenic nature, and flush with healthful air and sunshine, Denver was fast on its way to becoming

[32] On the role of certain amateur photographers and Pictorial photographers in arguing for photography as an artistic medium, see Paul Sternberger, *Between Amateur and Aesthete: The Legitimization of Photography as Art in America, 1880-1900* (Albuquerque: University of New Mexico Press, 2001) and Sarah Greenough, Sarah Greenough, "Of Charming Glens, Graceful Glades, and Frowning Cliffs: The Economic Incentives, Social Inducements, and Aesthetic Issues of American Pictorial Photography 1880-1902," 259 in *Photography in Nineteenth-Century America,* ed. Martha Sandweiss (New York: Abrams, 1991). See also Reese V. Jenkins, *Images and Enterprise: Technology and the American Photographic Industry* (John Hopkins University Press, 1975), 96-159.

[33] For a detailed account of Jackson's experiences and work for the Hayden Survey, see Hales, 67-136.

[34] Jackson discusses his decision to relocate to Denver in his autobiography. He writes: "Denver was the place. I liked it there, the climate, the splendid mountains. I liked the people, and many of them were my friends. I liked the way the place had grown…I was sure it would keep on growing and I should be prosperous there." See Jackson, *Time Exposure,* 252. Initially, Jackson co-operated a studio with Albert E. Rinehart, an established Denver studio photographer. Jackson would go on to open his own studio only a few years later in 1884. See Hales, 143 and 157.

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a major metropolis of the American West.[35] Despite the enthusiastic activity of Denver boosters to establish the "Queen City of the Plains" as *the* major outpost of business and leisure in the west, Colorado had only been admitted as a state in 1876 and the city was still transitioning from a mountain town to an urban (and urbane) center when Jackson arrived in 1879.

As Colorado boosters keenly understood, images were powerful tools in luring newcomers and their capital to the state's burgeoning towns and cities. Large-scale artworks depicting the wonders and opportunities of the western landscape by romantic landscape painters, such as Albert Bierstadt's *The Rocky Mountains, Lander's Peak* (fig. 6) of 1863, had been shown at popular public exhibitions and circulated in reproduction as engravings and chromolithographs.[36] In this well-known canvas, Bierstadt appeals to the period taste for sublime nature through his emphasis on the soaring, craggy Rockies that dominate the upper half of the painting and dwarf the Shoshone encampment in the foreground of composition. In addition to conveying the grand scale of the looming mountain range, Bierstadt's representation of the Shoshone in the placid meadow in the bottom portion of the painting would have signaled to white audiences in the eastern United States that this fertile region was yet "uncivilized" and a possible site for future settlement. In the horizontally divided composition of *The Rocky Mountains, Lander's Peak,* Bierstadt successfully tapped into both aesthetic and economic fantasies of the American West that would draw settlers, investors, and tourists to Colorado in the following decades.[37]

Materials produced by Jackson and his colleagues at the United States Geological and Geographical Survey of the Territories were also intended to showcase the natural resources and beauty of the Territory of Colorado to potential investors and settlers. As Robin Kelsey has shown in his study of the visual records produced by government-sponsored surveys of the American West between 1850 and 1890, photographs and prints produced by survey artists played a central role in guiding the exploitation of these lands by the government and business interests.[38] One of Jackson's photographs of the Rockies for the Hayden Survey, *Longs Peak, From Estes' Park, Colorado* (fig. 7), visually conveys the abundant resources of the region. Taken from an elevated perch, Jackson's photograph looks down on a verdant, uninhabited

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[35] Various tourist and investor guides to Denver from the 1870s and 1880s praise all of these and other elements, such as the quality of schools and affordability of homes, as winning features of the city. See, for example, *Handbook of Colorado with Maps and Illustrations for Tourist and Capitalist* (Denver: Blake, 1876); *History of the City of Denver, Arapahoe County, and Colorado* (Chicago: O.L. Baskin & Co., 1880); and *Denver Illustrated* (Denver: Pictorial Bureau of the Press, 1887). For an extended account of the rapid development of Denver during the late nineteenth century, see Gunther Barth, *Instant Cities: Urbanization and the Rise of San Francisco and Denver* (New York: Oxford University Press, 1975).

[36] *The Rocky Mountains, Lander's Peak* was one of Albert Bierstadt's first popular works, and it was shown to great acclaim at the 1864 New York Sanitary Fair. Numerous engravings and chromolithographs extended the fame of Bierstadt's painting and the allure of the Rocky Mountains. See Anne Farrar Hyde, *An American Vision: Far Western Landscape and National Culture, 1820-1920* (New York: New York University Press, 1990), 78-79 and Nancy K. Anderson and Linda S. Ferber, *Albert Bierstadt: Art& Enterprise* (New York: Hudson Hills Press in association with the Brooklyn Museum, 1990), 74-78.

[37] As Nancy K. Anderson has persuasively argued, artists like Bierstadt saw the western landscape as a "natural resource, a raw material, that could be used to construct seductively beautiful works of art that reflected in both direct and subtle ways, the material and spiritual needs of the culture that gave them birth." See Anderson, "The Kiss of Enterprise: The Western Landscape as Symbol and Resource," 237 in *The West as America: Reinterpreting the Frontier, 1820-1920* ed. William Truettner (Washington, DC: Smithsonian Institution Press, 1991).

[38] Robin Kelsey, *Archive Style: Photographs and Illustrations for U.S. Surveys, 1850-1890* (Berkeley: University of California Press, 2007), 76-82.

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valley dotted with tall trees and a glassy water source snaking through its middle. A snow-covered Longs Peak, one of the most prominent features of the Rocky Mountain range, emerges through the clouds of the background and crowns the center of the composition. Beyond its aesthetic impact, the photograph suggests opportunities for business: the trees can be read as lumber, the mountains as sites of rich mineral deposits, the watered valley as a future homestead.[39] Photographs like *Longs Peak, From Estes' Park, Colorado* that Jackson produced for the Hayden Survey were not only included in lavishly illustrated governmental reports but also circulated among the American public as stereographs and engravings in the popular press.[40] The compelling compositions of Jackson's early landscape photographs earned particular praise for exciting interest and investment in Colorado. As an early history of Denver published in 1880 proclaimed: "Perhaps Colorado and her Sisters of the rocky range [sic] are indebted to few of the number [of artists] who have, during the past decade, represented their glories of nature to the world at large, more than to the artist whose name is written above [Jackson's]."[41]

When Jackson arrived in Denver in the late 1870s, city boosters sought to transform the image of the city from a burgeoning frontier town to a more polished metropole in order to attract a new population: tourists. With the completion of the transcontinental railroad in 1869, tourism in the American West began to grow, and a decade later one hundred thousand people per year were riding the Union and Central Pacific railroads westward.[42] For the first time, Americans and foreigners could travel west with relative safety and ease to experience first-hand the rugged landscapes they had read about and seen in illustrations reproduced in popular books, newspapers, and magazines over the previous decades.[43] As Anne Farrar Hyde suggests in *An American Vision: Far Western Landscape and National Culture, 1820-1920*, Americans of this period began to travel in greater numbers as a result of the postbellum economic prosperity and the development of positive new attitudes towards leisure. Hyde points out, however, that many Americans who could afford to travel for pleasure had reservations about embarking westward. Compared to Europe, then the most popular destination among leisured tourists, the American West seemed to lack the comforts, culture, and interesting sites that attracted holidaymakers. To present the American West as a favorable alternative to Europe, investors in the railroads and other western boosters—who were keen to profit from the development of a tourist market—launched numerous promotional campaigns rich with images to highlight the unique combination of adventure and luxury that awaited travelers who journeyed west.[44]

When Jackson established his commercial practice in Denver in 1879, he found himself in a changing city that presented both business and representational challenges. During the previous

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[39] On the western landscape as aesthetic and economic "raw material," see Anderson, "The Kiss of Enterprise," 237.
[40] See Hales, 88-89. See also Sandweiss, 200-201.
[41] *History of Denver,* 482.
[42] See Hyde, 108.
[43] One of the first popular accounts of the landscape of the American West was John C. Frémont's *Report of the Exploring Expedition to the Rocky Mountains in the Year 1842, and to Oregon and Northern California in the Years 1843-1844* (1845). The government expeditions that surveyed the west in the 1850s to determine the best route for a transcontinental railroad also resulted in a much discussed publication, *Reports of Explorations and Surveys to Ascertain the Most Practicable and Economic Route for a Railroad from the Mississippi River to the Pacific Ocean* (1860). For further discussion of these reports, see Hyde, 2-6 and 54-62.
[44] See Hyde, 107-109. Marguerite Shaffer offers a detailed account of one such campaign, "See America First," to lure American tourists westward. See Shaffer.

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decade, Jackson had enjoyed the institutional support and financial stability granted by a government position. His supplies and labor had been paid for by the government, which allowed him a degree of freedom to pursue experiments in picturing the landscape. In starting his own studio, Jackson found himself in a much more precarious position, for he now had to invest his own capital to cover production costs and to depend on sales or commissions to support himself and his growing family.[45] In addition to these financial obstacles, Jackson also faced the pictorial challenge of encouraging tourists to journey to the unfamiliar American West on the recently built railroads. Where his work for the Hayden Survey had focused on conveying the available natural resources and topography of the West for the purpose of encouraging business development, he now needed to formulate images that would speak to the opportunities for sight-seeing and leisure in these regions. Jackson faced these hurdles with characteristic hard work and attention to innovations in technology and business practice. However, his very success in the increasingly competitive market for western views would ultimately contribute to Judge Hallett's sharp dismissal of his work in *Detroit Photograph Company v. Merchants' Publishing Company.*

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Through connections Jackson made while working for the Hayden Survey, he gained an important commission from the Denver & Rio Grande Railroad to produce a body of promotional photographs of its scenic route soon after he arrived in Denver in 1879.[46] In the course of completing this commission, Jackson would draw on the experiences he gained while working for the Hayden Survey and earlier attempts to photograph the transcontinental railroad to create a body of work for the tourist market that would be widely praised, circulated, and imitated thereafter. The success of this commission would launch Jackson's career as a leading photographer of the western railroads and purveyor of souvenir views taken along these routes.

The railroad was not an unfamiliar subject to Jackson, who had produced several unsolicited promotional photographs of the Union Pacific railroad in 1869, including *Dale Creek Bridge* (fig. 8), before he joined the United States Geological and Geographical Survey of the Territories.[47] These early photographs of the transcontinental railroad contain the seeds of the popular mode of picturing the American West that Jackson would master a decade later in Denver, a formula that successfully merged the natural wonders of the landscape with the civilizing presence of the railroad.[48]

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[45] Jackson was married and had two children to support by 1879. See Hales, 143.

[46] As Jackson suggests in his autobiography, he may have earned this commission as a result as a meeting with railroad magnate Jay Gould, which Jim Stevenson of the Hayden Survey had arranged for him. See Jackson, *Time Exposure,* 253-54 and 258. Hales discusses Jackson's first commission from the Denver and Rio Grande Railroad in greater detail. As Hales notes, painter Thomas Moran and writer Ernest Ingersoll, colleagues form Jackson's time with the Hayden Survey, joined him on this extended railroad trip on commission themselves from *Harper's Weekly*. Both Moran and Ingersoll would rely on Jackson's photographs when completing the article. See Hales, 144-150.

[47] For a more extensive account of Jackson's early photographs of the transcontinental railroad, see Hales, 40-65. As Hales notes, these photographs did not attract the attention of the railroads so much as the eye of Ferdinand V. Hayden, leader of several United States Geological and Geographical Survey of the Territories expeditions, who offered Jackson an informal position on his Survey team on the strength of his early railroad photographs.

[48] For a broader study of the aestheticization of new technologies in the United States during the nineteenth century, see John F. Kasson, *Civilizing the Machine: Technology and Republican Values in America, 1776-1900* (New York: Penguin Books, 1977), 139-180. Kasson addresses visual representations of the railroads on 172-180.

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In *Dale Creek Bridge,* Jackson focuses on a trestle bridge that connects two craggy ridges in a desolate portion of the Wyoming landscape. The bridge cuts through the middle of the composition in an energetic diagonal, leading the eye of the viewer to the rigid and regular geometries of the trestle frame that occupy the center of the view. The strong diagonal line of the bridge then vanishes into the horizon line, suggesting the extension of the resolute tracks into the terrain beyond our view. In this composition, Jackson simultaneously suggests the modernity and naturalness of the railroad within the western landscape.[49] The contrast between the regular linear supports of the trestle bridge and the haphazard organic forms of the boulders that Jackson places at the center of the composition highlights the technological ingenuity of the railroad and the engineering feats required to smooth the unruly terrain. However, Jackson also depicts the trestle bridge as if embedded in its natural surroundings. The horizontal lines of the upper portion of the bridge in the photograph parallel the ridge that dominates the background of the composition and, because we cannot see the base of the trestle frame, the vertical supports appear to sprout out of the rocky valley. Despite its clearly articulated difference from the landscape in terms of line and form, the trestle bridge does not overwhelm the landscape. The strong lines of the bridge instead draw our attention to the surrounding landscape and its features. Indeed, the most awesome feature of this scene is not the trestle bridge itself but the incalculable vastness of the landscape that lays beyond the horizon.

In executing his first commission for the Denver & Rio Grande Railroad in 1880, Jackson elaborated upon the compositional strategies he learned while crafting early views like *Dale Creek Bridge*. *The Royal Gorge, the Grand Cañon of the Arkansas* (fig. 9) of 1880-1881, one of the most popular and widely reproduced photographs that Jackson made during this commission, exemplifies this new aesthetic. In the photograph, Jackson positions the viewer on the railroad tracks as they follow the Arkansas River through the narrow and vertically soaring canyon called the Royal Gorge, one of the most compelling natural sites along the route of the Denver & Rio Grande Railroad. As in *Dale Creek Bridge,* Jackson pictures the railroad as a wonder of human ingenuity yet does not allow technology to detract from the natural scenery, specifically the looming incline of the canyon walls. Jackson's experience with the Hayden Survey is apparent in his confident use of compositional techniques to emphasize the dramatic features of the landscape. In *The Royal Gorge, the Grand Cañon of the Arkansas,* Jackson accentuates the sharp verticality of the canyon by opting for a vertical composition and crops the image so that the towering walls of the canyon encircle and dwarf the viewer. Jackson also takes care to offer the viewer relief from the precarious heights of the canyon, for the steady tracks lead the eye to a triangular expanse of open sky in the distance.

As Peter B. Hales and others have argued, Jackson's ability to evoke simultaneously the power of human technology and the physical greatness of nature in his photographs of the western railroads appealed to tourists seeking a contradictory set of experiences as they traveled to the American West. Tourists sought thrills in their encounter with the unfamiliar landscape and people of the west but none of the hardships or real danger that early settler and others had met

[49] Hales suggests that Jackson may have studied A.J. Russell's well-known promotional photographs for the Union Pacific Railroad and Charles Roscoe Savage's landscapes around Salt Lake City in coming to this early method for picturing the railroads. See Hales, 51-53.

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with in previous decades.[50] In *The Royal Gorge, the Grand Cañon of the Arkansas* and later *The Palisades, Alpine Pass,* which similarly features railroad tracks that lead the viewer through a seemingly dangerous but wondrous landscape, Jackson met the desires of the typical tourist for both excitement and security, for the exhilarating peril posed by the rough landscape and the reassurance of the carefully plotted railway tracks.

The photographs that Jackson produced during this first commission for the Denver & Rio Grande Railroad proved highly successful and circulated widely in a range of formats. The railroads reproduced his photographs as wood engravings in cheap brochures to their lines (fig. 10), and Jackson himself sold high-end mammoth plate prints (fig. 9) of these views to discerning tourists in his elegant studio in downtown Denver. An astute businessman, Jackson seems to have arranged his contract with the Denver & Rio Grande Railroad such that he held the rights to the photographs he made on commission. Thus, he not only profited from the original commission but also added to the impressive stock of scenic views that he could print and sell to the patrons who visited his bustling studio. Jackson continued to earn prestigious commissions from railroad companies throughout the 1880s and 1890s and found additional work from Colorado boosters who published countless illustrated souvenir books with titles like *Gems of Colorado Scenery* and *Among the Rockies: Pictures of Magnificent Scenes in the Rocky Mountains* that extolled the natural beauty and urbane comforts to be found in the Queen City of the West.

Jackson's participation in the production of visual representations of Colorado as a sightseer's paradise both fueled and responded to the expansion of the western tourist market during the 1880s. Traveling to the American West became increasingly affordable in the mid-1870s, and a holiday in the Rockies came within the reach of a growing number of middle-class Americans.[51] The promotional efforts of the railroad companies to present the west as a destination with the sights and accommodations to rival Europe began to pay off as rising numbers of passengers booked tickets to Colorado, California, and other popular destinations.[52] As more tourists poured into the west, the railroads expanded their lines and commissioned new sets of photographs and other illustrations to advertise the scenic pleasures of their routes. The growing demand for promotional imagery of the American West and visual souvenirs in turn enticed photographers and other artists to follow Jackson and set up shop in Denver and other western boomtowns.[53]

The expansion of the tourist market in the American West proved both a boon and a blow to Jackson and his photographic practice. While Jackson initially met with great success for representing the diverse pleasures of traveling in Colorado and beyond, the very popularity of his

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[50] On the expectations of tourists who travelled to the American West in the late nineteenth century, see Hyde, 109-115 and Hales, 144-45.
[51] See Hyde, 108-109.
[52] As Hyde argues, the railroad companies pursued two main strategies to encourage Americans to travel west: they presented the western landscape as comparable and even superior to that of Europe (e.g., referring to Colorado as the Switzerland of the United States) and they appealed to the national pride of Americans and compelled them to discover the natural wonders of their own land rather than that of Europe. See Hyde, 107.
[53] Other photographers who were active and settled in the Denver area include Louis Charles McClure (who trained with Jackson), George L. Beam, W.E. Hook, and many others. The Denver Public Library has excellent photographic collections of work from this period and biographic records for these and many other photographers working in and around Denver during the end of the nineteenth century.

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landscape views would contribute to the denunciation of his work a few years later in *Detroit Photograph Company v. Merchants' Publishing Company.* To trace the process through which aesthetically innovative and stimulating photographs like *The Royal Gorge, The Grand Cañon of the Arkansas* and *The Palisades, Alpine Pass* came to be seen as commonplace, I now want to consider the various avenues through which Jackson circulated his photographs. This examination of Jackson's embrace of photomechanical printing and early adoption of corporate business models aims not only to demonstrate the heightened visibility of his work during the 1880s and 1890s but also to highlight larger transformations in the methods used by commercial photographers to produce and circulate their work during the late nineteenth century.

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After establishing himself as one of the leading photographers in Denver during the 1880s, Jackson confidently embarked on a new venture in 1891: the W.H. Jackson Photography and Publishing Company. In the very naming of this new enterprise, Jackson signaled the expansion of his photographic practice in two key ways. First, his designation of the business as a company indicated his decision to incorporate and to reorganize operations to follow prevailing business practices of the day.[54] Through the process of incorporation and the influx of capital from silent partners, Jackson aimed to "expand [his] view business quite materially" so that his "excellent work would be on sale in all the principle cities of the country."[55] Second, the naming of his new business indicated his entrance into the field of publishing. Though Jackson's photography studio in Denver had prospered from ongoing commissions from western railroad companies, the sale of individual prints of his landscape views to local customers and tourists had declined since the early 1880s.[56] Searching for new opportunities to profit from his extensive stock of western views, Jackson began to collaborate with publishers in Denver who specialized in the production of cheap, heavily illustrated souvenir books for the tourist market. In his partnerships with various publishers of these souvenir books, Jackson adopted his popular photographs for reproduction as halftones, a newly developed photomechanical printing process. Though these expansions of Jackson's business practice initially brought him success in the competitive western view market, the substantial increase in the circulation of his photographs would ultimately transform the reception of his work. As Jackson's photographs reached larger audiences and his techniques were adopted as by other photographers, his once innovative compositions would come to be viewed as the aesthetic norm for depicting the American west.

Even before adding "Publishing" to his company name in 1891, Jackson had built relationships with local publishers, from the editors at Denver newspapers to the manufacturers of souvenir guidebooks.[57] His collaborations with western publishers would steadily expand in the late 1880s

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[54] On the pervasive culture of incorporation in the United States at the end of the nineteenth century, see Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982).

[55] "Editor's Table" in *The Philadelphia Photographer* (May 1891), 391. In his autobiography, Jackson notes that the "wealthy amateur photographer" Walter F. Crosby was the primary "silent" partner of his new business and invested $100,000 in the venture. See Jackson, *Time Exposure,* 258.

[56] In his 1940 autobiography, Jackson lamented the declining sale of photographic prints in favor of photomechanical reproductions. See Jackson, *Time Exposure,* 320.

[57] In the mid-1880s, Jackson produced a number of souvenir guidebooks in partnership with Denver publishers Chain & Hardy. For example, *Scenic Colorado* (Denver: Chain and Hardy, c. 1885) and *Denver Illustrated* (Denver:

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along with the broad adoption halftone printing. Inexpensive to produce and easy to print in mass quantities, the halftone process significantly transformed not only the production and circulation of Jackson's work but also the way that Americans consumed photographic images. [58]

Photographers and scientists in the United States and Europe had long been searching for a reliable and affordable method for reproducing photographs in a format that would be compatible with the printing of type. Such a process would allow photographs to be reproduced in books, newspapers, and other printed matter without the added labor involved in the photochemical reproduction and separate mounting of photographs alongside the printed text. From the 1840s onward, a number of processes were introduced to accomplish this feat of merging photography and the printing press, among them photo-lithography and the collotype, but most proved either too expensive or labor intensive to be used in mass-produced print media, like newspapers and magazines.[59]

Before the invention and advancement of the halftone process, the most common method for reproducing a photographic image in a popular publication was by wood engraving, a manual rather than a photomechanical process that will be discussed in greater detail in Chapter 3. Indeed, a number of Jackson's photographs for the Hayden Survey from the 1870s had been reproduced using this method when they were published in government reports and reproduced in the popular press.[60] To translate a photograph into a wood engraving, specialized technicians would print the photographic image onto a prepared wood block and then work the hard surface with miniscule carved lines and hatch marks to imitate the tonal qualities of the original photograph.[61] Though skilled technicians could render fine results, the process was labor intensive, time consuming, and expensive.[62]

The idea of using a screen as a medium to transfer the tonalities of a photographic image to the printed page, the basis of the halftone process, was first introduced by William Henry Fox Talbot in 1852 and was improved by inventors and practitioners in the United States and Germany over

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Chain & Hardy, c. 1885). For a more complete listing of publications that feature Jackson's photographs from this period, see Thomas H. Harrell, *William Henry Jackson: An Annotated Bibliography, 1862-1995* (Nevada City: Carl Mautz Publishing, 1995), 34-37.

[58] On the impact that the halftone process has had upon American print culture, see Estelle Jussim, *Visual Communication and the Graphic Arts: Photographic Technologies in the Nineteenth Century* (New York: R.R. Bowker Co., 1974) and Neil Harris, "Iconography and Intellectual History: The Halftone Effect," 304-317 in *Cultural Excursions: Marketing Appetites and Cultural Tastes in Modern America* (Chicago: University of Chicago Press, 1990).

[59] On the history and development of photomechanical printing processes, see Helena E. Wright, "Photography in the Printing Press: The Photomechanical Revolution," 21-22 and 33-34 in *Presenting Pictures* ed. Bernard Finn (London: Science Museum, 2004).

[60] See Hales, 120-121.

[61] On the process of translating a photograph to a wood engraving, see Bamber Gascoigne, *How to Identify Prints: A Complete Guide to Manual and Mechanical Processes from Woodcuts to Inkjet* 2nd Ed. (New York: Thames and Hudson, 2004), 6d. Joshua Brown also provides a detailed description of the process. See Joshua Brown, *Beyond the Lines: Pictorial Reporting, Everyday Life, and the Crisis of Gilded- Age America* (Berkeley: University of California Press, 2002), 35-38.

[62] According to an article published in *Wilson's Photographic Magazine* in 1894, "Untouched half-tone work is made by the photo-engravers at from twenty to forty cents per inch. First-class wood-engraving cost from three dollars and a half to seven dollars per inch." See "Photographic Advance" in *Wilson's Photographic Magazine* (Oct. 1894), 440-442.

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the second half of the nineteenth century.[63] In 1880 the first halftone reproduction after a photograph appeared in an American newspaper, the New York *Daily Graphic,* and soon they began to feature regularly in the press and other print publications.[64] This method of translating the tonalities of photographs into a pattern of black and white dots invariably diminished the overall print quality of its source image; it literally reproduced only half the full tonal range possible in photographic prints.[65] However, the halftone process made it possible to reproduce a photographic image in mass quantities swiftly and at low cost. Publishers quickly caught on to this new mode of illustration and by the 1890s halftones were everywhere, including Denver.

In the late 1880s and into the 1890s, Jackson's photographs were circulating across the United States as halftone reproductions that varied in their visual quality. Photomechanical printing allowed Jackson to distribute his photographs in new venues, such as printed books and souvenir albums. He also used the halftone process to produce inexpensive versions of photographic products he already sold, including stereographs (fig. 11) and cabinet cards of his famous western landscapes views. Unlike other photographers of his day who found the halftone process vulgar or threatening to the photographic industry, Jackson wholeheartedly embraced the new printing process and its many possibilities for circulating his work.[66]

Especially relevant to the case *Detroit Photograph Company v. Merchants' Publishing Company* are Jackson's collaborations with Frank S. Thayer, the publisher with Merchants' Publishing Company whose unauthorized reproduction of *The Palisade, Alpine Pass* in the souvenir book *Colorado in Color and Song* trigged the landmark case. In the mid-1880s Jackson developed a fruitful relationship with Thayer, and they collaborated on a number of Colorado booster books that were heavily illustrated with halftones after Jackson's photographs of popular sights in Denver and along the western railroads.[67] In his work with Thayer, Jackson not only found a new outlet for selling his photographs but also secured credit for his work in a period in which the piracy of photographic images was rampant.[68] While the popular souvenir books that Jackson contributed to were packaged in a wide range of physical formats, the same or similar images appear again and again in these popular books. Examining several of these souvenir books, the reader can begin to feel the familiarity with Jackson's work that Judge Hallett may have experienced as he studied *The Palisades, Alpine Pass* over the course of *Detroit Photograph Company v. Merchants' Publishing Company*.

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[63] In the United States, John Moss and Frederic Ives contributed to the development of the halftone process. In Germany, George Meisenbach made significant improvements to halftone printing. See Wright, 33-34.
[64] Ibid., 35. See also Michael L. Carlebach, *The Origins of Photojournalism* (Washington, DC: Smithsonian Institution Press, 1992), 161-162.
[65] American readers and publishers were keenly aware of the lower quality of halftone prints. See, for example, W. Lewis Fraser, "A Word about *The Century*'s Pictures" in *The Century Illustrated Magazine* (Jan 1895), 479.
[66] For one critical response by an American photographer to the rise halftone printing, see Robert E.M. Bain, "Magazine Illustration Work" in *The American Annual of Photography and Photographic Times Almanac* (1900), 152. This article will be discussed in detail in Chapter 3.
[67] For a list of the publications that Jackson and Thayer collaborated on, see Harrell.
[68] Hales gives the example of travel guide publisher Rand McNally, which reprinted Jackson's photographs of the Colorado landscape as steel engravings without credit or permission in the mid-1890s. This is only one of what were certainly numerous other examples of uncredited reproductions after Jackson's work during this period. See Hales, 259.

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The Cañons of Colorado is among the more popular of the souvenir books that Jackson collaborated on with Thayer. First published in the early 1890s, *The Cañons of Colorado* would be printed in numerous other editions that vary in their material presentation. One of the finer editions is clothed in a brilliant cover of red leather decorated with sinuous gold lettering and a floral lunette (fig. 12). A brass clasp to keep the volume closed has been added to suggest the precious nature of its contents. The paper used to support Jackson's halftones also imparts an air of luxury; hand and eye each appreciate the thick cardstock colored a soft gray-blue and trimmed with a border of dainty entwined flowers.[69] However, the illustrations themselves appear grainy and their tonal contrasts harsh, both characteristic effects of early translations of photographic prints to halftones. Indeed, the halftone of *The Royal Gorge* that appears in *The Cañons of Colorado* (fig. 13) lacks the vivid detail and robust tonal range of the warm albumen silver prints discussed earlier (fig. 9) or the inkier gelatin silver prints that tourists could have purchased from Jackson's studio in Denver. The difference in print quality becomes apparent when the halftone of *The Royal Gorge* from *The Cañons of Colorado* is set in comparison with a series of gelatin silver prints of the same landscape (fig. 14) that Elizabeth H. Wilder Rice, a tourist from Boston, purchased and arranged in a handmade album to commemorate her travels in the American West in 1889. Though the gelatin silver prints are sharper and exhibit smoother tonal transitions than the halftones in *The Cañons of Colorado*, the souvenir book was more affordable and convenient in presenting the buyer with an attractive, readymade album that required no further collecting or collation of images after purchase.[70]

Halftone reproductions of Jackson's photographs of *The Royal Gorge* appear in several other souvenir books published by Thayer, including *Gems of Colorado Scenery* (fig. 15). This publication lacks the finer material and decorative details of *The Cañons of Colorado*, but the halftones depict the same scenery and share a similar print quality. The simpler packaging of *Gems of Colorado Scenery* did not deter buyers, for it went through twelve editions by 1900. The frequent reprinting of this volume suggests its popularity and that of other affordable souvenir books among tourists visiting the West.

Though the liberal use of bright tints set *Colorado in Color and Song* (1899) apart from the black-and-white halftones that appeared in *The Cañons of Colorado* and *Gems of Colorado Scenery*, the images are familiar from these earlier guidebooks. Compare, for example, the colorized print of *The Royal Gorge* (fig. 16) as it appears in *Colorado in Color and Song* to the grayscale versions of the print in *The Cañons of Colorado* (fig. 13) and *Gems of Colorado Scenery* (fig. 15). Though the addition of lively colors enhances the presence and rugged beauty of the Colorado for the viewer, the tinting of the halftone is blotchy in areas, especially the right face of the canyon, and does not mask the insistent grain of the halftone screen.

In *Detroit Photograph Company v. Merchants' Publishing Company*, the leaders of the Detroit Photograph Company were particularly concerned that Thayer had made unauthorized color

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[69] *The Cañons of Colorado* was printed in sold in numerous other material iterations. Other editions feature simpler cloth covers, present the views in an accordion format, and are printed on cheaper paper supports than the version described in the text above. Despite these material differences, all editions of the book that I have encountered feature halftone prints.

[70] For about $2.50 or $3 dollars a tourist of this period could purchase a souvenir book flush with halftones or a single mammoth plate print.

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reproductions of *The Palisades, Alpine Pass* (fig. 4). The Detroit Photograph Company had purchased Jackson's negatives with the specific intention of selling Photochrom versions of his views. Thayer's tinted halftone of *The Palisades, Alpine Pass* thus created unwanted competition for the Detroit Photograph Company's own reproductions of Jackson's work. In attempt to squash Thayer's alternative color reproductions, the Detroit Photograph Company made a point of addressing the specific aesthetic values of Photochrom printing before the court. The Detroit Photograph Company argued that Jackson's choice of colors for the Photochrom print—one of Jackson's early roles at the company was to select appropriate color schemes for prints after his negatives— constituted a set of artistic, imaginative choices that contributed to the originality of the Photochrom version of *The Palisades, Alpine Pass*.[71] This argument sought to align Photochrom printing with painting, a medium that was securely defined as conveying the original conceptions of the maker because it involved hand rather than machine labor.[72] The proposed link between the Photochrom process and painting quickly falls apart, however, because of the very lack of Jackson's hand in the coloring of the images. Rather, the application of color in the Photochrom process was likely done by a large team of printers in a variation on the process used to make color lithographs.[73] Though not entirely mechanical, the process was industrialized and lacked evidence of an individual imagination that was central to legal notions of originality during this period.

Judge Hallett was unimpressed by these arguments regarding the coloring of *The Palisades, Alpine Pass*, which he underscored in his verdict by declaring: "it is not shown [that] there was any originality about the coloring of the photograph in question and that…the result achieved was old and in common practice."[74] Indeed, the practice of tinting photographic prints was as old as photography itself. From the 1840s onward, photographers had applied color to photographs to enliven their black-and-white surfaces (fig. 18).[75] Despite the novelty of the Photochrom process and its superior quality over the tinted halftone, Judge Hallett could not find "any originality" in its effects or Jackson's involvement in the choice of colors.

Taking into account the reproductive power and market appeal of the halftone process in conjunction with Jackson's determination to "expand [his] view business quite materially" in the wake of incorporating, it is possible to imagine the vast quantities of Jackson's work that began to appear on the market not only in Colorado but across the United States.[76] A forward-thinking entrepreneur, Jackson made these decisions to keep up with trends within the market for souvenir views and the broader American business world. Jackson's very success in adopting these strategies to increase the production and sale of his popular landscape photographs ultimately led to the perception that his work was, in the words of Judge Hallett, "common." In achieving the heighten visibility and popularity of his work, Jackson inadvertently created the conditions in

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[71] "Smash Goes Photographic Copyrights," 2.
[72] On Jackson's role in selecting colors for Photochrom prints after his negatives, see Hales, 263.
[73] See Southall, 67-75.
[74] "Smash Goes Photographic Copyrights," 2.
[75] A number of manuals on the tinting and painting of photographs were published in the United States not long after the invention of photography. For example, see Montgomery P. Simons, *Plain Instructions for Coloring Photographs in Watercolors and India Ink* (Philadelphia: T.K. & P.G. Collins, 1857) and P.F. Cooper, *The Art of Making and Colouring Ivrotypes, Photographs, Tintypes, and Miniature Paintings on Ivory &c.* (Philadelphia: S.P. Town, 1863).
[76] "Editor's Table," 391.

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which his photographs would be seen as the aesthetic norm rather than the product of his individual imagination.

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While Jackson's embrace of new technologies and business practices contributed in large part to the reception of his landscape views as aesthetically conventional by the late 1890s, other economic and technological forces beyond his control also led to the decline in the perceived originality of his once daring compositions. The growing tourist industry in the American West not only attracted Jackson but numerous other professional and aspiring photographers who sought to profit from the steady market for souvenir photographs of the landscape and popular railroad sights. The introduction of dry-plate negative technologies in the 1880s, much easier to use than the wet-plate process that Jackson and others of his generation had cut their teeth on, led an increasing number of job seekers to enter the photography industry in the West and elsewhere. When these newcomers arrived in Colorado and other popular western destination, they often looked to Jackson's successful photographs as models for their own work and unleashed a large body of Jackson look-alikes onto the view market.

Jackson's photographic empire also began to be threatened by the very population that sustained it: tourists. With the release of the point-and-shoot Kodak camera by the Eastman Dry Plate and Film Company in 1888, many American tourists began to produce their own souvenir photographs of the west and, in many instances, to follow the visual conventions that they had absorbed from exposure to Jackson's popular views. As Jackson struggled to stay ahead of these new competitors, his efforts to increase the production and sale of his photographs only fueled the replication of his work by the growing number of professional and amateur photographers in the American West.

Though Jackson was and remains one of the most acclaimed photographers of the Colorado landscape, a number of other enterprising photographers competed with and prospered alongside him at the end of the nineteenth century. While a number of these photographers developed their own aesthetic approach to capturing the western landscape, such as Timothy O'Sullivan who also worked for the United States Geographical and Geologies Survey of the Territories in the 1870s, many followed the successful conventions set by Jackson in well-known photographs like *The Royal Gorge, Grand Cañon of the Arkansas* (fig. 9) and *The Palisades, Alpine Pass* (fig. 1). The work of photographers W.E. Hook and Louis Charles McClure, to give just two examples, shows the strong influence of Jackson's scenic views of the Colorado landscape.

W.E. Hook, an Englishman, established a photography studio near the popular tourist destination of Manitou Springs, CO in 1885 and specialized in views of local sites.[77] One of these views, *The Cañon of the Grand* (fig. 19) from around 1900, is taken along the same tracks of the Denver & Rio Railroad as Jackson's *The Royal Gorge, Grand Cañon of the Arkansas.* In *The Cañon of the Grand*, Hook not only turns to a site that Jackson was known for photographing but also

[77] "Guide to the W.E. Hook Photographs of Colorado, New Mexico, and Texas," Beinecke Rare Book and Manuscript Library. Yale University. New Haven, CT. http://drs.library.yale.edu/HLTransformer/HLTransServlet?stylename=yul.ead2002.xhtml.xsl&pid=beinecke:hook&clear-stylesheet-cache=yes Accessed 12 September 2015.

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captures the scene in a parallel composition. Like Jackson, Hook offers the viewer a simulation of moving along the railroad tracks and taking in the awesome heights of the canyon walls that surround them. Further, Hook captures the constricted path of the railroad tracks through natural landscape and accentuates the impressive capabilities of human engineering. Though the parallels between the two works are many, Hook's photograph lacks the sense of soaring verticality of Jackson's celebrated *The Royal Gorge, Grand Cañon of the Arkansas.*

Louis Charles McClure was another commercial photographer active in Denver at the turn of the twentieth century whose work bears the influence of Jackson's Colorado views. Before starting his own photography business in the late 1890s, McClure worked as an assistant in Jackson's Denver studio. Though McClure would make a name for himself by photographing the Denver cityscape, he also produced numerous landscape views that suggest his tutelage under Jackson.[78] For example, *Narrows, Phantom Canyon* (fig. 20) taken around 1900, strongly resembles Jackson's *The Palisades, Alpine Pass.* Both works show railroad tracks curving along the edge of a steep and jagged mountain pass. On the right side of each composition, the viewer registers a considerable drop from the tracks to the landscape below that heightens the sense of anticipation and exhilaration that pervades the scene. Relying on conventions set by Jackson, McClure effectively conveys the thrills of railroad travel in the American West.

Fellow professional photographers were not the only competition that Jackson faced in the western view market of the late nineteenth century. In the 1890s, a new group of photographers would take aim at the Rocky Mountain scenery: amateur photographers. With the introduction of a range of user-friendly film and camera technologies in the late 1880s and 1890s, many more Americans began to photograph their everyday lives and travels.[79] The rise of photography by tourists during this period would not only threaten Jackson's sales but also shift popular perceptions of the skills and mental labor necessary to produce professional landscape views.

In 1889 a simple yet clever ad (fig. 21) began to appear in the popular and photographic press.[80] It showed a pair of hands holding a small rectangular box, which we learn is a camera. The text bedside the illustration reads: "The Kodak Camera/ You press the button/ We do the rest." This ad proclaimed the arrival of the first popular hand-held, point-and-shoot camera, an invention that would transform the photography industry and Americans' interactions with photography

[78] There is little scholarship on Louis Charles McClure's work despite his extensive documentation of Denver at the turn of the twentieth century. For an overview of his life and work, see William C. Jones and Elizabeth B. Jones, *Photo by McClure: The Railroad, Cityscape, and Landscape Photographs of L.C. McClure* (Boulder: Pruett Publishing Co., 1983).

[79] On the new technologies that enabled the expansion of photographic practice, see Reese V. Jenkins, *Images and Enterprise: Technology and the American Photographic Industry* (John Hopkins University Press, 1975), 96-159. On early amateur photography in the United States, see Diana Waggoner, "Photographic Amusements, 1888-1919," 9-45 in *The Art of the American Snapshot, 1888-1978, From the Collection of Robert E. Jackson* ed. Sarah Greenough and Dianne Waggoner (Washington, DC: National Gallery of Art; Princeton: Princeton University Press, 2007); Sarah Greenough, "Of Charming Glens, Graceful Glades, and Frowning Cliffs: The Economic Incentives, Social Inducements, and Aesthetic Issues of American Pictorial Photography 1880-1902," 259-278 in *Photography in Nineteenth-Century America,* ed. Martha Sandweiss (New York: Abrams, 1991); and Paul Sternberger, *Between Amateur and Aesthete: The Legitimization of Photography as Art in America, 1880-1900* (Albuquerque: University of New Mexico Press, 2001).

[80] On the brilliant advertising campaigns produced by the Eastman Kodak Company, see Nancy Martha West, *Kodak and the Lens of Nostalgia* (Charlottesville: University of Virginia Press, 2000).

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ever after. As the ad explains, this was "[t]he only camera that anybody can use without instructions." To take a photograph, all the owner of the Kodak camera had was to point the shutter in the direction of what he or she wanted to photograph, press the button, and Kodak would "do the rest," which included the development of the negatives and processing of the prints. The owner of a Kodak camera did not need a thorough knowledge of chemistry or to spend time among the unpleasant fumes of a darkroom in order to make photographic prints. The Kodak camera, which used new flexible roll film technology invented by the Eastman Dry Plate and Film Company in 1884, was also remarkably light-weight and voided the need for owners to carry fragile glass plates and other bulky equipment when photographing outdoors.[81] Though the first Kodak cameras were prohibitively expensive—they sold for a steep $25—hand cameras became more affordable in the mid-1890s, which enabled more Americans to buy them and to participate in the pleasures of snapping any and all things that passed before their shutters.[82]

Kodakery, a period term used to designate the craze for taking pictures with Kodak and similar hand cameras, was especially strong among American tourists. The Eastman Kodak Company actively advertised their cameras as travel essentials and consumers readily responded.[83] As American tourists set out for distant locales, including Europe and the American West, they brought their Kodak cameras along to document the sights they encountered and the activities they enjoyed with friends along the way.

While tourists happily snapped their way through vacations, Jackson and other commercial photographers who specialized in the sale of souvenir photographs began to worry about business. The anxiety among commercial photographers regarding the popularization of Kodak and similar cameras is manifest in attempts to regulate amateur photography at the World's Columbian Exposition in Chicago in 1893. To promote the sale of official souvenir photographs of the Exposition, which were produced by Chicago-based commercial photographers, the administrators of the event required that amateur photographers pay a fee of $2 to make pictures on the fairground. As Nancy Martha West has pointed out, this fee amounted to four times the daily ticket fare and would have deterred less affluent amateurs from bringing their cameras to the Exposition.[84] The Eastman Kodak Company responded to these regulations with aggressive petitions to Exposition administrators to gain a concession stand at the fairground that would allow them to sell rolls of film and permit customers to try out their latest camera models. Ultimately, Exposition leaders caved to pressure from the Eastman Kodak Company as well as protests from the general public and allowed the Eastman Kodak Company to open shop at the fairgrounds.[85] The triumph of amateur photography at the World's Columbian Exposition proved a bleak prophesy for commercial photographers who sought to maintain control over the

[81] The first Kodak cameras weighed only 1.3 pounds. On the design of early hand-held cameras and their appeal to amateur photographers, see Waggoner, 12-14.
[82] I am grateful to John Rohrbach for this observation on the prohibitive price of the first Kodak cameras. One of the early affordable hand cameras was the Kodak Pocket Camera, released in 1895, which cost a more reasonable $5. The Kodak Brownie, which only cost $1, would be released in 1900 and bring hand-held cameras within the reach of most middle-class Americans. On the range of models and costs of early Kodak cameras, see Waggoner, 14-15.
[83] See West, 25.
[84] For a lively account of the battle over the use of Kodaks at the World's Columbian Exposition, see West, 62-65.
[85] Ibid., 64.

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production of souvenir images. Indeed, only three years later Jackson would find his own successful photography business in financial shambles.[86]

While not solely responsible for the downturn in Jackson's business, the expansion of amateur photography was certainly a central factor. As amateur photographers headed to Colorado, they not only snapped pictures at the same sites as Jackson but also composed them in a similar way. These striking correspondences become evident in an examination of illustrations in amateur photography manuals and extant tourist albums composed by amateur photographers who visited the American West at the turn of the twentieth century.

In the 1880s and 1890s, a number of instructional photography manuals and journals began to target the growing body of amateur photographers in the United States.[87] These publications advertised user-friendly camera and film technologies and offered advice to beginners on how to compose successful photographs. One early manual, *How to Make Pictures: Easy Lessons for the Amateur Photographer,* was published by Scovill Manufacturing Co. in 1887 to showcase their new "Ten Dollar Outfit," an inexpensive set of photography equipment aimed at the amateur market.[88] A photograph taken outdoors in a tight, jagged canyon serves as the frontispiece to the manual (fig. 22). While the location of the scene is not given, it appears to be The Narrows, a well-known and frequently photographed site in Williams Canyon located outside Manitou Springs, Colorado (compare to fig. 24). In addition to highlighting the technical capabilities of the Ten Dollar Outfit, the frontispiece offers an aesthetic model for beginning photographers to emulate when making landscape views.

The subject matter and composition of the frontispiece to *How to Make Pictures* should immediately recall Jackson's *The Royal Gorge, Grand Cañon of the Arkansas* (fig. 9) and other of his popular Colorado scenes examined earlier in this chapter. Like Jackson's *The Royal Gorge, Grand Cañon of the Arkansas*, the frontispiece to *How to Make Pictures* positions the viewer at the bottom of a contracted canyon with steep rock walls rising from both sides. In each work, the vertical composition serves to emphasize the towering height of the canyon walls. While imparting a sense of awe and danger by allowing the canyon walls to nearly engulf the viewer, the frontispiece, like Jackson's photograph, offers visual relief in a glimpse of sky in the distance. The frontispiece to *How to Make Pictures* signals the extent to which Jackson's daring compositional method for picturing the western landscape had become, by the end of the nineteenth century, *the* aesthetic ideal for photographers, both professional and amateur. The very prescription of Jackson's aesthetic approach to the Colorado landscape, however, dulls its thrilling effects. No longer original, his views had become standards that all could and should follow.

Whether through direct observation of Jackson's work or by way of instruction manuals like *How to Make Pictures,* amateur photographers absorbed his compositional techniques and

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[86] On Jackson's financial troubles during the 1890s, see Hales, 260.

[87] For a study of amateur photography journals with an emphasis on the aesthetic debates that played out in their pages, see Sternberger.

[88] Henry Clay Price, *How to Make Pictures: Easy Lessons for the Amateur Photographer* 2nd Ed. (New York: Scovill Manufacturing Co., 1887). The Ten Dollar Outfit advertised in this booklet set was a precursor to the point-and-shoot Kodak Camera. The most innovative component of this set was the use of dry-plate film technology, which appealed to amateurs because it was far less messy and portable than wet-plate film.

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replicated them in their own images of the western landscape. Photography albums produced by amateurs from the turn of the twentieth century suggest the pervasive influence of Jackson's work on Kodak-toting tourists. For example, an album produced by an unknown traveler circa 1900 in the collection of the Bancroft Library includes a series of photographs taken in William Canyon that strongly echo Jackson's Colorado views. The creator of the album marks the start of this series with a kind of title page that features a photograph showing the entrance to Williams Canyon and a caption, penned in curvy script, that announces "Ten Views from 'Williams Canyon,' Manitou, Col" (fig. 23). In the following pages, the album maker has arranged and captioned various photographs of the winding passage through the canyon, including a shot of The Narrows (fig. 24). In its emphasis on the verticality and sharp constriction of the canyon walls, this amateur snapshot of The Narrows strongly echoes the pictorial approach to the western landscape pioneered by Jackson in works like *The Royal Gorge, Grand Cañon of the Arkansas* and further popularized by manuals like *How to Make Pictures.*

The comparison between the amateur tourist album and Jackson's work, however, extends beyond similarities in subject matter and composition. In addition, the decision of the amateur photographer to capture the tight passages of Williams Canyon as a series and to bring them together in an album is reminiscent of *The Cañons of Colorado,* the souvenir book that Jackson published in collaboration with Frank S. Thayer in the early 1890s and examined earlier in this chapter (see figs. 12 and 13). The correspondences in format suggest that tourists modelled their home-made travel mementoes on commercial souvenir albums that Jackson, among other professional photographers, contributed to and profited from in the 1880s and 1890s. Though imitation may be the sincerest form of flattery, as Oscar Wilde suggested, the replication of Jackson's landscape views and their presentation by amateur photographers strained the perceived originality of Jackson's work.

The rise in snapshot photography among tourists and other amateurs not only added to the glut of western landscape views in circulation at the turn of the twentieth century, but also may have altered public understanding of the skill and labor required to produce professional landscape photographs. If producing a photograph of the western landscape required little more than pointing the camera and pressing a button, as the Eastman Kodak Company claimed, what made the work of professional photographers original? Though the quality of professional photographic work was typically superior to that of most tourists, the fact remained that American travelers equipped with a Kodak camera or Ten Dollar Outfit could capture landscape scenes similar to those produced and sold by professionals like Jackson. When Judge Hallett heard the *Detroit Photograph Company v. Merchants' Publishing Company* case, the Eastman Kodak Company's catchy slogans may have been ringing through his ear. As his verdict suggests, landscape photographers could no longer rely on capturing a particularly attractive or interesting sight to secure the originality of their work, for Kodak-toting amateurs would be right behind them to make their own snaps of the view.

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Having examined a set of disparate historical phenomena— *Burrow-Gilles Lithographic Co. v. Sarony* (1884), the rise of tourism in the American West, the broad adoption of corporate business models, advances in halftone printing, and the popularity of Kodak and other hand-held

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cameras—*The Palisades, Alpine Pass* may no longer appear as daring and picturesque as it did at the start of this chapter. Indeed, it is possible to glimpse Jackson's photograph as Judge Hallett did from the bench in 1899: as a photograph that was unoriginal not only by the legal standards of the day but also in terms of the popular visual culture of the American West. Jackson's production of *The Palisades, Alpine Pass* was understood by the courts as a mechanical rather than an imaginative process, and therefore did not meet the legal definition of originality during this period. Further, Jackson's success in circulating his work in the western view market led the courts and consumers alike to see his photographs, including *The Palisades, Alpine Pass,* as conventional rather than innovative in their presentation of the landscape.

While Judge Hallett's depreciation of *The Palisades, Alpine Pass* in *Detroit Photograph Company v. Merchants' Publishing Company* should seem far less unexpected now, the case poses further questions regarding its effects on the future of American landscape photography. Recall that Judge Hallett declared that "[a] photograph of natural scenery is not the subject of copyright, because it is not the original conception of the artist."[89] His words suggest that landscape photography, an enormously popular genre then and still today, would no longer enjoy copyright protection. To conclude, this chapter will consider the legacy of Judge Hallett's decision and debates over the legal construction of originality, particularly as that term applied to commercial artworks, that transpired in its wake.

Judge Hallett's decision, in fact, held little sway as a legal precedent and was overturned only a few years later. The Detroit Photograph Company appealed the unfavorable 1899 decision and was vindicated by a verdict in their favor in 1903.[90] Though the 1899 and 1903 decisions are separated by a scant four years, copyright law had changed in significant ways that moved the courts away from Judge Hallett's exacting dismissal of *The Palisades, Alpine Pass* as mechanical and towards a more open position on what constituted an original photograph. This rather sudden shift in the legal definition of originality was motivated by both an amendment to the Copyright Act in 1901 and the U. S. Supreme Court decision in *Bleistein v. Donaldson Lithographing Co*. two years later.

In 1901 the U.S. Congress amended the Copyright Act in a small but significant way that expanded the scope of photographic copyright law. The Copyright Act would no longer protect undefined "photographs" but explicitly "all photographs."[91] As film scholar Peter Decherney has pointed out, legislators hoped that this new wording would quell confusion over which photographs warranted copyright protection.[92] The widespread misunderstanding over the application of photographic copyright law during this period stemmed from Justice Miller's ambiguous opinion in *Burrow-Giles Lithographic Co. v. Sarony* (1884). Justice Miller attempted in this opinion to draw distinctions between original and ordinary—artistic and technical—photographs.[93] This artificial and ambiguous division proved troublesome for photographs, like *The Palisades, Alpine Pass*, that were taken outside of a studio setting where the photographer

[89] "Smash Goes Photographic Copyrights," 2.
[90] *Cleland v. Thayer* 121 F. 71 (1903). The shift in the naming of the case from *Detroit Photograph Company v. Merchants' Publishing Company* to *Cleland v. Thayer* remains a puzzle to me.
[91] See Peter Decherney, "Copyright Dupes: Piracy and New Media in *Edison v. Lubin* (1903)," in *Film History: An International Journal* (2007), 113.
[92] Ibid., 113.
[93] *Burrow-Giles Lithographic Co. v. Sarony.*

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could exert less direct control over his or her photographic subject. This small addition of the word "all" sought to do away with the need for judges to parse the perceived artistic merits of contested photographs in copyright cases. While skilled in the word and practice of the law, Congress seems to have recognized that few judges were well-equipped to play the role of a discerning aesthetic critic.[94]

The unease that judges felt at making aesthetic determinations in the courtroom is expressed most famously in the opinion delivered in the 1903 U.S. Supreme Court case *Bleistein v. Donaldson Lithographing Co.* This landmark copyright case centered on a series of circus posters (fig. 25) printed as chromolithographs by George Bleistein, proprietor of Courier Lithographing Co., that were then reproduced without permission by his competitor Donaldson Lithographing Co.[95] The lower courts that first heard the case denied copyright protection to Bleistein's circus posters on the grounds that they did not meet the originality requirement imposed by the Copyright Act. Ephemeral and explicitly commercial, the posters were not seen as the products of individual imagination and skill that the Copyright Act was thought to protect. Despite these initial loses, Bleistein persisted in defending his copyright in his posters and ultimately the case came before the U.S. Supreme Court in 1903. Here Bleistein was vindicated, for the Supreme Court overturned the rulings of the lower courts and found in his favor.

Defending the extension of copyright protection to Bleistein's circus posters in the majority opinion in the case, Supreme Court Justice Oliver Wendell Holmes, Jr., son of outspoken photography advocate Oliver Wendell Holmes, proposed a new mode of judging the originality of a contested work that did not depend on the its perceived aesthetic achievement.[96] In arguing for a reformulation of the originality requirement, Justice Holmes penned the now famous warning:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits. At the one end some works of genius would be sure to miss apprehension. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It is more than doubted for instance whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.[97]

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[94] This remains true today and, as Christine Haight Farley has argued, has created havoc within the American legal system. See Farley, "Judging Art" in *Tulane Law Review* (Mar. 2005), 815-817.

[95] *Bleistein et al. v. Donaldson Lithographic Co.* 188 U.S. 239 (1903). For further discussion of this case, see Bracha, 105-108.

[96] In particular, Oliver Wendell Holmes Sr. advocated for stereographic photography. This form of photography allowed viewers, when looking through a stereoscope, to see a photographic scene with a sense of realistic depth and volume. Holmes argued that stereographic photography, especially views of distant places and people, would be an important educational tool that would "be the card of introduction to make all mankind acquaintances." Oliver Wendell Holmes (Sr.), "The Stereoscope and Stereograph," in *The Atlantic Monthly* (June 1859), 748. Given Holmes's encouragement of this form of popular visual culture, it is perhaps not surprising that his son would defend the originality of commercial artworks.

[97] *Bleistein et. al v. Donaldson Lithographic Co.*

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For Justice Holmes, practitioners of the law not only lack the training in aesthetics to adequately assess the "worth of pictorial illustrations" but also the foresight to predict which "novel[]" works that initially appear "repulsive" may be celebrated once the public grew accustomed to their "new language" of artistic expression. He adduces Goya and Manet as instances in which great artworks were initially denounced by the public and could have been condemned as unworthy of legal protection because of their departure from "the narrowest and most obvious limits" of artistic conventions of the day.

To avoid the "dangerous" practice of relying on the subjective and untrained judgment of legal authorities in determining the originality of artworks, Justice Holmes proposed a new definition of originality in his opinion for *Bleistein v. Donaldson Lithographing Co.* Rather than framing originality in terms of the aesthetic qualities of a work, Justice Holmes moved to locate the originality of a work in the individuality of its author. In support of this reformulation, he argues: "personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone."[98] For Justice Holmes, originality was that "something irreducible which is one man's alone" that could make itself visible even in "very modest" modes of expression, including the quotidian art of handwriting or ephemeral circus posters and popular landscape photographs.

The effects of Justice Holmes' landmark opinion in *Bleistein v. Donaldson Lithographing Co.* were immediately felt in the appeal of Judge Hallett's decision in *Detroit Photograph Company v. Merchants' Publishing Company*, which was heard only a few months later, and it remains a widely cited decision in copyright cases today. [99] While *Bleistein et al. v. Donaldson Lithographing Co.* is the case best known for transforming the legal definition of originality, earlier cases like *Detroit Photograph Company v. Merchants' Publishing Company* are equally important in understanding this shift in legal practice. *Detroit Photograph Company v. Merchants' Publishing Company* and other cases of this period that centered on popular forms of American visual culture challenged judges to rethink legal and popular conceptions of originality even when complainants lost their case. Though the law and its representatives can be stubborn, as Justice Holmes recognized in 1903, an examination of *Detroit Photograph Company v. Merchants' Publishing Company* and its appeal offers a rare glimpse of the law as a process with the ability to accommodate new technologies and cultural practices. Further, these copyright cases from the turn of the twentieth century suggest that even very humble forms of popular visual culture, like picture postcard views and circus posters, can shape the history and practice of the law.

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[98] *Bleistein et al. v. Donaldson Lithographic Co.*
[99] *Cleland v. Thayer* 121 F. 71 (1903). On the numerous court cases that have relied on Justice Holmes's opinion in *Bleistein et al. v. Donaldson Lithographic Co.*, see Farley, "Judging Art," 815-817.

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Chapter Two

"A Plurality of Copies": *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896)

In "The Work of Art in the Age of Mechanical Reproduction" (1936), Walter Benjamin famously argues that mechanical forms of reproduction, namely photography and photomechanical processes, had transformed the ways that audiences encountered and experienced artworks during the late nineteenth and early twentieth centuries.[100] Though Benjamin acknowledges that artworks had long been reproduced through various manual processes, like woodcut and engraving, he asserts that technologies of mechanical reproduction introduced during the second half of the nineteenth century offered something new in their speed and independence from the hand of an artist.[101] Produced in mass and exacting in detail, mechanical copies take original artworks out of their "presence in time and space" and allow consumers to enjoy them in entirely new contexts and novel scales. In the age of mechanical reproduction, Benjamin contends, a massive and weathered cathedral can be transported to the drawing room walls of countless art lovers.[102] As Benjamin summarizes, "the technique of reproduction detaches the reproduced object from the domain of tradition. By making many reproductions it substitutes a plurality of copies for a unique existence."[103]

Forty years before Benjamin observed this collapse between originals and copies in the age of mechanical reproduction, appellate judges of the First Circuit Court in Massachusetts wrestled to define the legal distinctions between original artworks and mechanical reproductions in the case *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896). The suit was initiated in 1893 by Emil Werckmesiter, a German citizen and head of the Berlin Photographic Company (also known as the Photographishe Gesellschaft), an international firm based in Berlin that specialized in high-quality reproductions of European paintings. In 1892 Werckmeister had purchased the exclusive right to reproduce the painting *Saint Cecilia* by German artist Gustav Naujok and, after registering his copyright to the painting with the Library of Congress, began to sell various photographic copies of the painting (fig. 2) in the United States.[104] Less than a year later, Werckmeister filed a complaint after discovering that the Pierce & Bushnell Manufacturing Co., a New Bedford-based firm specializing in art reproductions and decorative frames, was

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[100] Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," 218-221 in *Illuminations* ed. Hannah Arendt and trans. Harry Zohn (New York: Schocken Books, 2007).
[101] Stephan Bann offers an illuminating critique of Benjamin's failure to recognize the continuing significance of wood engraving and steel engraving as modes of reproduction through the second half of the nineteenth century. See Stephan Bann, *Parallel Lines: Printmakers, Painters, and Photographers in Nineteenth-Century France* (New Haven: Yale University Press, 2001), 7-11.
[102] An artwork's unique "presence in time and space" is what Benjamin refers to as its "aura." Benjamin, 220-221.
[103] Benjamin, 221. A number of scholars have argued persuasively in opposition to Benjamin that mechanical reproduction in fact heightens the perceived aura of an original artwork. See, for example, Ian Knizek, "Walter Benjamin and the Mechanical Reproducibility of Art Works Revisited" in *British Journal of Aesthetics* (1993), 357-366.
[104] According to Franz Schröder, a manager at the Berlin Photograph Company, *Saint Cecilia* was published in the following formats: photographic folio size (15 x 20 in, sold for $1), photographic imperial size (26 x 33 ½ in, sold for $4), and photographic normal size (31 ½ x 43 in, sold for $10). It was also published as a photogravure in imperial size (15 x 20 in, sold for $5). See *Pleadings and Evidence for* Werckmeister v. Pierce & Bushnell Manufacturing Company (New York: The Evening Post Job Printing House, 1894), 25. See also *Catalogue of the Berlin Photographic Company* (New Rochelle, NY: The Knickerbocker Press, 1896), 20 and 46.

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reproducing and selling photographic copies after the Berlin Photographic Company's photographic reproduction of *Saint Cecilia.*[105] Thus the court was presented three variations of *Saint Cecilia*: the original painting, photographic copies of the original painting made by the Berlin Photographic Company, and photographic copies after those copies made by Pierce & Bushnell Manufacturing Co. Confronted with this complex set of similar works, each one exhibiting layers of artistic and technical mediation, the judges puzzled over a set of fundamental questions: What is an original artwork? What is a copy? And to what extent do distinctions between these categories matter in American copyright law?[106]

The wide-ranging debates in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* offer perhaps the most thorough consideration of the legal distinctions between original artworks and reproductions in the United States at the end of nineteenth century.[107] As such, they provide an opportunity to examine whether and how new technologies of reproduction began, as Benjamin contends, to reconfigure established hierarchies between originals and copies at the turn of the twentieth century.[108] While American copyright law may seem to offer little insight into the perceptual shift that Benjamin identifies, copyright cases address the issues central to Benjamin's argument: the boundaries between and evaluation of originals and copies. As argued in the

[105] The Pierce Bushnell Manufacturing Company was founded in 1870 and operated on a much smaller scale than the Berlin Photograph Company. It had only one office in New Bedford, MA and had a capital stock of $45,000. See Leonard Bolles Ellis, *History of New Bedford and Its Vicinity, 1620-1892* (Syracuse: D. Mason & Co., 1892), 447.
[106] The case also involved a number of other legal issues related to the International Copyright Act of 1891 and the relationship between ownership and the right to make copies. Regarding the International Copyright Act of 1891, the case dealt with questions related to the problematic "manufacturing clause," which required photographic negatives to be produced within the United States in order to qualify for copyright protection. The clause was intended to protect American workers, especially printers, but it posed problems to companies involved in creation and sale of art reproductions because many of the artworks they reproduced were located in Europe. This issue remained largely undecided in the case. Regarding the question of ownership, the case involves a thorough discussion of whether the right to copy an artwork could be separated from the authorship and the ownership of the physical artwork. Emil Werckmeister only secured the right to copy the painting *Saint Cecilia* from the artist Naujok and did not own the actual artwork, which was sold to an unknown buyer in Germany. The judges who heard this case agreed that the right to copy a work could be secured by someone other than the author or owner of the physical work.
[107] Surprisingly, this case has been ignored by art historians and legal scholars alike perhaps because the case was repealed about a decade later by the case *Werckmeister v. American Lithographic Co. et al.* (1905), which will be considered in the conclusion of this chapter. There were only a handful of copyright cases from this period that dealt with paintings. As B. Zorina Khan has documented, only about six cases involving paintings were heard in U.S. courts between 1880-1899. See B. Zorina Khan, *The Democratization of Invention: Patents and Copyright in American Economic Development, 1790-1920* (New York: Cambridge University Press, 2005), 240-241. Even fewer cases addressed the distinctions between originals artworks and copies. For earlier cases on this subject, see *Parton v. Prang* (1872), which involved a chromolithographic reproduction after an original painting; *Yuengling v. Schile* (1882), which involved the reproduction of a chromolithograph; and *Schumacher v. Schwencke* (1885), which involved the creation of prints by the defendant after an original painting designed by the complainant. All of these precedents were cited and discussed in *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) and its appeal.
[108] It is of course important to account for the specific historical and political context in which Benjamin wrote "The Work of Art in the Age of Mechanical Reproduction." He composed and published this essay in exile in Paris after fleeing Nazi Germany. As such, there are inherent difficulties in thinking about the applicability of his arguments, which are steeped in his fierce resistance to the rise of fascism in Europe during the 1930s, to the turn-of-the-century United States. While acknowledging the historical specificity of Benjamin's arguments, I, like many other scholars, take them as a productive starting point from which to consider the relationship between art, technology, and the law at the dawn of the age of mechanical reproduction. See, for example, Miles Orvell, *The Real Thing: Imitation and Authenticity in American Culture, 1880-1940* (Chapel Hill: The University of North Carolina Press, 1989), xxix.

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preceding examination of *Detroit Photograph Company v. Merchants' Publishing Company* (1899), American case law also serves as a well-tuned barometer of the dominant cultural values of a given period.[109] An analysis of the arguments and outcomes in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* thus offers insight into the fluctuating reception of original artworks and reproductions in the United States at the end of the nineteenth century.

In *Pierce & Bushnell Manufacturing Co. v. Werckmeister,* judges in the Circuit Court and Appeals Court came to conflicting decisions regarding the legal status of originals and copies. While framed in terms of differing interpretations of the law, the divergent opinions evidence a broader shift in the cultural values assigned to original artworks and reproductions both in and outside of American courtrooms during the 1890s. Where the Circuit Court judge that initially heard the case found in favor of Werckmeister and implicitly defended the primacy of original artworks, the judges of the Appeals Court would reverse the decision and allege that the distinctions between original artworks and reproductions were inconsequential in the eyes of the law. While the decision handed down from the Appeals Court would seem to announce the triumph of a "plurality of copies" over original artworks at the turn of the twentieth century, a consideration of the reception of art reproductions in the United States during the second half of the nineteenth century, alongside period debates over the collection and display of art reproductions, in fact suggests the increasing value assigned to original artworks, a notion that gained recognition in the courts only a decade later.

These complex questions regarding the legal differentiation between original artworks and reproductions were hardly settled at the turn of the twentieth century and remain a lively source of debate today. While seemingly far removed from contemporary practices, the points of contention in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* offer insight into current confusion regarding the copyright status of art reproductions. The conclusion to this chapter will address the legacy of the arguments made in *Pierce & Bushnell Manufacturing Co. v. Werckmeister*, which are frequently replayed in contemporary copyright cases involving digital reproductions of artworks.

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In October of 1891, Gustav Naujok was in Königsberg putting the finishing touches on a new painting titled *Die Heilige Cäcilie* or *Saint Cecilia*. The painting shows a youthful and haloed St. Cecilia, patron saint of music and musicians, sitting in front of an organ. Her playing has been interrupted by the arrival of three smiling cherubs who appear at the top right of the canvas in a cloud of light and scatter roses upon the serene saint and her instrument. Not long after completing the painting of "this most delicate and aesthetic of saintly characters," Naujok exhibited it at the Kunsthandlung von Schulte, a public art gallery in Berlin, from January to March of 1892.[110] There the painting caught the eye of Emil Werckmeister, who was taken by its "artistic coloring" and the sweet "expression in the face of St. Cecilia."[111] Werckmesiter, astute

[109] See Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), 11-14.
[110] See the description of *St. Cecilia* provided by the Berlin Photographic Co. at the bottom of Fig. 1
[111] See *Pleadings and Evidence*, 4. Werckmeister and his agents frequently traveled to major art exhibitions for the purpose of scouting new artworks to reproduce and sell through the Berlin Photographic Co.

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to the commercial potential of this charming portrayal of St. Cecilia, contacted Naujok about reproducing it in photographic and photomechanical formats through the Berlin Photographic Company. Naujok agreed to Werckmeister's terms and signed the following contract on March 5, 1892:

> I transfer hereby to the Photographische Gesellschaft [Berlin Photographic Co.], in Berlin, for my work 'Die Heilige Cäcilie' [St. Cecilia] the right of publication—by which I wish to have understood the exclusive right of reproduction—against a payment of 500 marks, and nine gratuitous copies thereof.[112]

After signing the agreement and allowing the painting to be photographed by Werckmesiter's employees at a Berlin workshop, Naujok sent *St. Cecilia* to Munich to be exhibited at the Grosse Internationale Kunstausstellung for the summer of 1892. There the painting was sold to an unknown collector (the original painting could not be located for consideration in the trial) at a reportedly high price.[113] Between the sale of the rights to reproduction and the sale of the physical painting, Naujok had profited well from *St. Cecilia*.

Meanwhile, Werckmeister and his agents prepared *St. Cecilia* for her American debut. In March of 1892, Werckmeister sent an application to the Library of Congress to claim title to *St. Cecilia* in the United States and attached one of the photographs of the painting as required by law. Werckmeister's title was deposited on May 16th, 1892 and by September of that year reproductions of the painting marked with the copyright of the Berlin Photographic Co. were offered for sale at the company's newly opened office in New York City.[114] The reproductions of *St. Cecilia* were well received by American audiences and proved profitable to the Berlin Photographic Co.[115] However, trouble began in early 1893 when the Pierce & Bushnell Manufacturing Co., eager to partake in the success of *St. Cecilia*, started to produce photographic copies of the painting by re-photographing the Berlin Photographic Co.'s initial photographic reproductions. Lawyers for the Berlin Photographic Co. swiftly filed a complaint against Pierce & Bushnell Manufacturing Co. for copyright infringement and both sides readied for trial.

These were the basic facts presented to the court in the case of *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) and its appeal, *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896). While the case seemed a straightforward instance of copyright

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[112] "Ich übertrage der Photographischen Gesellschaft in Berlin für mein Work 'Die Heilige Cäcilie,' das Verlagerecht—worunter ich das unbeschrankte Nachbildungsrecht verstanden wissen will—gegen Zahlung von Rm. Fünfhundert und neun Freiexemplars." This direct transcript of the contract as well as the English translation are provided in *Pleadings and Evidence*, 20 and 26. It is unclear who produced the translations, but lawyers on both sides of the case agreed to their accuracy. See *Pleadings and Evidence*, 26. Naujok would state in a deposition that he understood that he had granted Werckmeister the exclusive right to reproduce *Die Heilige Cäcilie* not only in United States but "in the whole world." See *Pleadings and Evidence*, 27.

[113] *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) 63 Fed. 445. In his deposition, Franz Schröder describes the process of photographing *Saint Cecilia*. See *Pleadings and Evidence*, 25.

[114] This sequence of events is laid out in *Pleadings and Evidence,* 2-3. The Berlin Photographic Co. opened its New York office in 1892.

[115] The painting was reproduced as a wood engraving in *Harper's Bazaar* in December of 1893 with permission from the Berlin Photographic Co. An unnamed writer called the painting "charming" and credited the work with launching Gustav Naujok to "general fame." See *Harper's Bazaar,* "Personal" (Jun. 1894), 7. Werckmeister notes the high demand for the painting in *Pleadings and Evidence,* 3.

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infringement, it would lead the lawyers and judges involved to engage in debates over the construction of two central terms of American copyright law: "copy" and "publication." The contest over the legal definitions of these terms played out most vividly in legal briefs volleyed back and forth between the lawyers who tried the case: Louis C. Raegener of Goepel & Raegener for Emil Werckmeister and Alexander P. Browne for Pierce & Bushnell Manufacturing Co. Setting practical readings of the law against literal readings of the law, the debates over these terms would have consequences not only the reproduction of artworks but also the creation and presentation of original artworks themselves.

Werckmeister v. Pierce & Bushnell Manufacturing Co. (1894) was first heard in the Circuit Court of Massachusetts on June 12, 1894. Leading up to the court date, both Browne and Raegener filed briefs with the court on behalf of their clients. In calling for a dismissal of the case, Browne put forward three central arguments in defense of Pierce & Bushnell Manufacturing Co. First, Browne argued that *St. Cecilia* was in the public domain when the Pierce & Bushnell Manufacturing Co. reproduced it because the painting already had been "published" in Germany. Here, Browne defined publication broadly as "bringing to the public notice" and proposed that the pubic exhibition of the work at the Kunsthandlung von Schulte in Berlin and the Grosse Internationale Kunstausstellung in Munich constituted publications of the painting.[116] Further, Browne noted that the painting did not feature a copyright notice on either the canvas or frame when it was on view in these public exhibitions. The lack of a copyright notice on the painting at these exhibitions was problematic, he pointed out, for the Copyright Act stipulated that: "no person shall be entitled to a copyright unless he shall, *on or before the date of publication in this or any foreign country,* deliver at the office of the Librarian of Congress…a description of the painting…for which he desires a copyright."[117] In other words, Browne claimed that Naujok had forfeited his copyright to *St. Cecilia* when he exhibited the work in Germany without applying for or giving notice of copyright. After the public displays of the painting, *St. Cecilia* went into the public domain and the Pierce & Bushnell Manufacturing Co. could reproduce the work freely.

Browne's second point of contention was related to his first, for he claimed that Werckmeister had invalidated his copyright to *St. Cecilia* after failing to inscribe a copyright notice on the painting before making reproductions. Similar to his discussion of the public exhibition of *St. Cecilia*, Browne argued that the lack of proper notification revoked Werckmeister's claim to copyright in the painting. While current readers (art historians, in particular) may balk at the notion of a painter being required to mark his or her work with an intrusive copyright notice, the Copyright Act was decidedly murky as to whether it was necessary to apply a notice directly upon a work of fine art or only upon copies made after the original work. The exact wording of the law read as follows:

> No person shall maintain an action for the infringement of any copyright unless he shall give notice by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book, or if a…painting…by inscribing upon some visible portion thereof or of the substance on which the same

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[116] Browne cites *The Century Dictionary* as including this definition of "publication." See Alexander P. Browne, *Brief for Defendant* (Boston: Addison C. Getchell. 1894), 6.
[117] Ibid., 5. Browne's emphasis.

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shall be mounted, the following words…'Copyright 18[blank for year], by AB [name of copyright holder].'[118]

The phrasing is anything but exact and can be constructed in a number of different ways depending on if one reads "inserting in the several copies of every edition published" as applying only to books or to all copyrightable subject matter, including paintings. Browne argued for the former interpretation and summarized his reading of the law as follows: "If the thing copyrighted is unique in nature, as a painting or statue, the copyright notice must be placed upon the original. If it is not unique, but manifold, as in the case of a book or photograph, then the copyright notice must be placed upon every manifold or 'copy.'"[119] The question of whether Browne's more literal construction of the law or Raegener's more practical reading of it (to be considered in the coming pages) was more in line with the intentions of lawmakers would become a major point of contention in the case.

The third argument that Browne made against Werckmeister regarded the interpretation of the term "copy" within the Copyright Act. Where Werckmeister had registered a copyright for the painting of *St. Cecilia*, Browne proposed that he should have applied for copyright in the photographic reproductions of *St. Cecilia* because the photographs were original, copyrightable works in their own right and not mere copies after the painting. In a surprising move, Browne cited the U.S. Supreme Court case *Burrow-Giles Lithographic Co. v. Sarony* (1884) as support for his argument. As discussed in the case of *Detroit Photograph Company v. Merchants' Publishing Company*, the opinion in *Burrow-Giles Lithographic Co. v. Sarony* affirmed that photographs were a valid subject of copyright. However, the courts only acknowledged that "original" photographs, photographs that display the intellect of the photographer, qualified for copyright protection.[120] Regarding photographs that were deemed "mere mechanical reproduction[s]," the Supreme Court chose to "decide nothing" about their copyright status.[121]

In a creative reading of the *Sarony* decision, Browne contended that photographic reproductions of artworks qualified as original copyrightable materials and were not "mere mechanical reproduction[s]." Though Browne conceded that "the mechanical process of photographing a painting is precisely the same by whomever performed," he asserted that "the artistic value of the result will depend upon the judgment, taste, and intellectual skill of the operator."[122] Echoing the *Sarony* opinion, Browne pointed to the "artistic judgment" required of the photographer in controlling the "light and shade" when photographing the original painting as evidence of the "aesthetic value" of the resulting reproduction.[123] Situating the photographic reproductions of *St.*

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[118] Section 4962 of the Copyright Act as quoted in Louis Raegener, *Supplemental Brief on Behalf on the Complainant* (Boston: Addison C. Getchell. 1894), 10. The elided material surrounding the term "painting" in the above quote is a list of other copyrightable subject matter, such as prints, maps, dramatic compositions, etc.
[119] Browne, *Brief for Defendant,* 4.
[120] *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884).
[121] Ibid.
[122] Browne, *Brief for Defendant,* 11.
[123] Ibid., 5. Justice Miller specifically described the originality of Sarony's portrait of Oscar Wilde in these terms: "said plaintiff [Sarony] made the same [portrait of Wilde]…entirely from his own mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories…arranging and disposing the light and shade, suggesting and evoking the desired expression." See *Burrow-Giles Lithographic Co. v. Sarony.*

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Cecilia as original works—or, more precisely, original copies—Browne argued that Werckmeister erred in applying for copyright in the painting rather than the photographic reproductions. Following this reasoning, Pierce & Bushnell Manufacturing Co. could not have infringed upon Werckmeister's copyright because the photographic reproductions of *St. Cecilia* that the company had copied were not protected by copyright.

While Browne's argument regarding the status of photographic art reproductions as original works is plausible within copyright frameworks and cultural practices of the twenty-first century, his argumentation ran counter to prevailing legal norms at the time.[124] As evidenced by the outcome in the case *Detroit Photographic Co. v. Merchant's Publishing Co.* (1899), the originality of a photograph was difficult to establish during this period despite (or because of) the *Sarony* ruling. More importantly, Browne's assertion was radical in proposing that the photographic reproduction and original artwork were equally original in the terms of American copyright law. For Browne, the photographic copy of *St. Cecilia* possessed as much "aesthetic value" as the original painting. Further, Browne's argument suggested that the "operator" who created the reproductions after *St. Cecilia* and the painter Naujok each employed "artistic judgment" in the creation of their respective works. In claiming for a photographic art reproduction the status of an original work, Browne likewise leveled traditional hierarchies between originals and copies.

Responding to the acrobatic arguments laid out in Browne's brief, Louis Raegener, the counsel for Werckmeister, appealed to common sense in the application of copyright law to paintings and their reproductions. In a concise retort to Browne's suggestion that the public exhibition of the painting in Germany counted as publication, Raegener cited the case *Parton v. Prang* (1872). In this case Arthur Parton, an American artist, sued Louis Prang, the well-known purveyor of fine art chromolithographs, for illicitly reproducing his painting *Close of Day*.[125] One of the matters that the judge considered in this case was whether the public exhibition of the painting in Parton's studio constituted a publication of the work. As clarified in the opinion, the judge ruled that the public exhibition of a work did not qualify as a form of publication.

Raegener also provided a straightforward reply to Browne's argument that the photographic reproductions of *St. Cecilia* were themselves original works that should be copyrighted separately. He too turned to *Burrow-Giles Lithographic Co. v. Sarony* on this point. Raegener reminded the court that the majority opinion in the *Sarony* case included a very specific statement about the copyright status of art reproductions. The opinion, penned by Justice Samuel Freeman Miller, asserted: "It is exceedingly doubtful whether a copyright in a photograph of a painting could be upheld."[126] Raegener elaborated: "In the case last referred to [*Burrow-Giles Lithographic Co. v. Sarony*] the Court held that the artistic posing of Oscar Wilde involved brain labor, but we are of the opinion from a careful study of this decision, that no valid copyright can

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[124] Similar arguments about the originality of photographic art reproductions and the skill involved in making "slavish" copes have resurfaced in twentieth-century copyright cases involving art reproductions. See, for example, *Bridgeman Art Library v. Corel Corporation* (1999), which will be discussed in the Epilogue to this chapter. On clashes between contemporary art practices, such as appropriation art, and the American legal system, see Martha Buskirk, *The Contingent Object of Contemporary Art* (Cambridge: MIT Press, 2003), 65-105.
[125] Parton v. Prang (1872) 3 Cliff. 537.
[126] *Burrow-Giles Lithographic Co. v. Sarony.* Quoted in Raegener, *Brief on Behalf on the Complainant,* 5.

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be taken on a mechanical reproduction of an inanimate object."[127] For Justice Miller and Raegener, the photographic reproductions after *St. Cecilia* were mechanical rather than original because they did not require the "brain labor" of the photographer. Indeed, Raegener argued, the point of an art reproduction is to produce a faithful copy of the original, not an "artistic" rendering of it.

While Raegener posed effective rebuttals to the above two aspects of Browne's argument, he took a more creative approach to puncture Browne's assertion that the painting of *St. Cecilia* needed to exhibit a copyright notice for Werckmeister's claim to be valid. In contrast to Browne's literal reading of the section of the Copyright Act related to the notification requirements (see 7-8), Raegener proposed a more practical reading of the law. In his brief, Raegener gave the following interpretation: "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, if a map, chart…painting, &c., by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted the following words [the notification]."[128] In Raegener's (re)construction of the clause, he proposed that the copyright notification need only be applied to copies made after a work and not the original.

To further his point, Raegener made an implicit analogy between paintings and manuscripts: "It surely was not the intention [of Congress] to require a copyright notice to be upon the unpublished original manuscript in the case of a book."[129] In American copyright law, authors have common law protection in their unpublished manuscripts. Common law copyright grants creators an automatic "natural right" of ownership in original, unpublished works. However, if an author chooses to publish and distribute copies of a manuscript, he or she would need to apply for a statutory copyright to secure his or her right to reproduction. Statutory copyright law is granted by adherence to written law, specifically the Copyright Act, and is concerned with published works.[130] By drawing a comparison between paintings and manuscripts, both unique presentations of an author's original handwork, Raegener suggested that *St. Cecilia* was protected by common law copyright and need not bear the mark of a copyright notification on its canvas.

While the comparison Raegener made between original paintings and manuscripts is compelling, it does not adequately convey the confusion surrounding the status of paintings within American copyright law at the end of the nineteenth century. The question of how painting fit within established copyright frameworks had been debated within courtrooms since 1870, when the Copyright Act was amended to include "painting, drawing, chromo[s], statue[s], statuary, and of models or designs intended to be perfected as works of the fine arts" as subjects of copyright.[131] Before this revision, the Copyright Act had granted statutory copyright protection exclusively to inherently reproducible works, such as books and photographs. Unique works, like manuscripts, were largely covered by common law copyright. The 1870 revision to the Copyright Act

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[127] Raegener, *Brief on Behalf on the Complainant,* 5.
[128] Raegener, *Supplemental Brief on Behalf on the Complainant,* 11.
[129] Ibid., 12.
[130] On the distinctions between common law copyright and statutory copyright, see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993), 4-5.
[131] Act of July 8, 1870, 41st Congress, 2nd Session, 16 Statute 212.

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complicated this system by adding works expected to be enjoyed primarily as singular originals, namely painting, drawings, and statues. While intended to expand protections to fine artists and their work, this amendment to the Copyright Act left unclear whether such "works of the fine arts" were subject to all the requirements of statutory copyright law, including the notification requirement for published works.[132] The situation was not helped by a number of conflicting court decisions in the United States and Great Britain regarding the application of copyright law to paintings.[133]

In the face of the uncertainty of the law, many painters reluctantly inscribed copyright notices on the faces or frames of their paintings that were exhibited publicly (figs. 26a and 26b) to ensure their protection in the wake of the 1870 amendment to the Copyright Act. Many artists voiced their contempt for the notification requirement to Congress and complained that it marred and distracted from their compositions. As painter John White Alexander told Herbert Putnam, the Librarian of Congress, in 1905, "a good picture is like a good piece of music or a poem—it ought to be complete in itself. The minute we, by law, are forced, to protect ourselves, to paint on it "Copyright" and the date and name, the composition is destroyed. Those things are really much more conspicuous than the picture itself."[134] Instead of the written notification, White and other artists proposed that their signatures stand in as a signal of their copyright in a work, an argument we will return to in the Conclusion.[135]

On August 7, 1894 Judge Putnam of the Circuit Court for the District of Massachusetts, having read and considered Browne and Raegener's arguments, delivered an opinion in favor of Werckmeister. In large part, Judge Putnam agreed with the arguments as laid out by Raegener. Regarding the question of whether the public exhibition of *St. Cecilia* constituted a publication,

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[132] Oren Bracha provides a brief but helpful discussion of the history of copyright in paintings and other unique artworks in the United States. Among the first artists to petition the U.S. Congress for copyright protection were Peter Cardelli, an Italian sculptor working in the United States, in 1820 and Rembrandt Peale, the American painter, in 1824. In particular, Peale was concerned to protect his famous equestrian portrait of George Washington from infringement. Members of Congress were not compelled by his arguments, claiming that "such an act of Congress would have a great tendency to retard the progress of the art of painting, as it would do away with the right of imitating, and attempting to excel paintings already in existence." See 41 *Annals of Congress* 511 (Apr. 12, 1824). Cited in Bracha. There was another failed attempt to extend copyright protection to fine artworks in 1838, an effort spearheaded by John A. Brevoort and O.S. Fowler. Bracha argues that the success of the 1870 amendment to grant copyright to painting and other works of fine art was the result of both an expanded American art market and the savvy lobbying efforts by William Morris Hunt and a group of other prominent Boston artists. See Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property,1790-1909* (New York: Cambridge University Press, 2016), 120-123.

[133] American lawyers and judges frequently turned to British court decisions when there was no clear legal precedent in the United States regarding a given issue. In the American context, the decision *Parton v. Prang* (1872) 3 Cliff. 537 (discussed on 10) suggested that paintings were protected by common law copyright. In the British context, however, there were instances in which judges affirmed the application of statutory copyright to original paintings and not only reproductions. See *Turner v. Robinson* 10 Irish Chancery 121 (1860).

[134] See *Stenographic Report of the Proceedings of the Librarian's Conference on Copyright* published in the *Legislative History of the 1909 Copyright Act* (Vol. 1) ed. E. Fulton Brylawski and Abe Goldman (South Hackensack, NJ: Fred B. Rothman & Co, 1976), 118. We will return to these arguments in the Conclusion.

[135] It was not until the U.S. Supreme Court weighed in on the substitution of the artist's signature for a copyright notice in 1907 in *American Tobacco Co. v. Werckmeister* (1908) and *American Lithographic Co. v. Werckmeister* (1911) that this new form of notification seemed secure. See, for example, the discussion of this topic in "Artists' Control Over Reprints of Their Works" in *The Inland Printer* (1908), 863. These cases will be discussed in the conclusion to this chapter.

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Judge Putnam also referred to the decision in *Parton v. Prang* (1872) and flatly stated: "a mere exhibition of a picture in a public gallery, like that at Berlin, does not at common law forfeit the control of it by the artist, or the owner."[136] Moving on to the matter of whether Werckmeister should have applied for copyright in the photographic reproductions of *St. Cecilia* rather than the original painting, Judge Putnam found little compelling in Browne's argument and sides with Raegener: "We have no doubt that…the author or proprietor of a painting who properly copyrights it, is protected against all reproductions of it in any form. This proposition is so fundamentally essential to the policy of the copyright statutes, that it needs no elaboration."[137]

While assured in the above remarks, Judge Putnam took a more cautious approach to the question of whether Werckmeister needed to apply a copyright notice to the painting *St. Cecilia* to make his copyright valid. Considering Browne and Werckmeister's divergent readings of this segment of the Copyright Act, Judge Putnam lamented that "on the whole…we must admit that the phraseology of the statute is unfortunate, and might have been more clearly and positively expressed."[138] However, he ultimately decided in favor of Raegener's more practical reading of the law. On this point, Judge Putnam referred to the now familiar U.S. Supreme Court opinion in *Burrow-Giles Lithographic Co. v. Sarony*. While the main argument considered in this case was whether or not photographs were a proper subject matter for copyright protection, the court also dealt with a number of smaller issues, including the required wording of the copyright notification to be affixed to published works. Judge Putnam summarized the findings of the Supreme Court as follows: "The Supreme Court has said, what must be patent to everyone, that the object of the statute in this particular is to give notice of the copyright to the public."[139] Following this logic, Judge Putman argued: "The purpose of the statute, therefore, would wholly fail of accomplishment by inscribing [the] notice on the painting only, which presumably passes into some private collection, entirely out of the view of the general public."[140] Rather than placing the notification on the painting, which likely would be inaccessible to the general public and ineffective as a tool of communicating the copyright status of the original work, Judge Putnam supported "the decision of the Supreme Court last cited [*Burrow-Giles Lithographic Co. v Sarony*], in which the court said that the notice is to be given by placing it 'upon each copy.'"[141]

As Judge Putnam found in favor of Werckmeister, Pierce & Bushnell Manufacturing Co. chose to appeal the decision. The appeals case, *Pierce & Bushnell Manufacturing Co. v Werckmeister* (1896), would be heard between January 11-24, 1896. Leading up to the trial date, Raegener and Browne would engage in another skirmish played out in an exchange of briefs written on behalf of their respective clients. Browne would be joined in this effort by William A. Jenner, another attorney assigned to work on the case on behalf of Pierce & Bushnell Manufacturing Co. Though centering on the same three main questions from *Werckmeister v. Pierce & Bushnell Manufacturing Co.,* the lawyers would approach their arguments regarding the definitions of

[136] *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) 63 Fed. 445.
[137] Ibid.
[138] Ibid.
[139] *Burrow-Giles Lithographic Co. v. Sarony*. Cited in *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) 63 Fed. 445.
[140] *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) 63 Fed. 445.
[141] *Burrow-Giles Lithographic Co. v. Sarony.* Cited in *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) 63 Fed. 445.

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"publication" and "copy" with heightened rhetoric that reveals the flexibility of these terms within legal discourse at the end of the nineteenth century.

In his brief to the Court of Appeals, Browne continued to press the notion that the public exhibition of the painting *St. Cecilia* in Berlin and Munich was a form of publishing the painting. As he wrote, "[t]hat by public exhibition the painting is publicly exposed or brought to public notice cannot be denied. If publicly exposed, there is no question that opportunity for copying it is thus afforded to the public."[142] For Browne, the public exhibition of *St. Cecilia* was a kind of invitation to the public to copy the painting; the painting was "exposed" and could not be recovered from the public domain.

In response to Browne's insistence on expanding the definition of publication to include public exhibition, Raegener offered the following narrative in his brief: "Suppose Mr. Vanderbilt, in his mansion on Fifth Avenue, at stated periods, allowed the public to view certain masterpieces in his gallery, would not the common law protect these pictures from being copied? Undoubtedly it would." Thus, Raegener queried, "why should the exhibition in Berlin prior to statutory copyright destroy the copyright?"[143] As before, Raegener argues for the protection of original paintings based on common law copyright. In addition, Raegener's hypothetical visit to Mr. Vanderbilt's personal art gallery makes a case for a practical understanding of the term "publication" based on the public good of art exhibitions. In his anecdote, Raegener presented Mr. Vanderbilt as generous in making his art collection accessible and suggested the potential benefit that the exhibition of these works would afford the viewing public.[144] As Raegener implied, the law should ensure the protection of Mr. Vanderbilt's private property, his "masterpieces," and his goodwill to the public. Following this logic, Raegener pressed for similar protections to be granted to *St. Cecilia* after the showing of the painting in public exhibitions in Germany.

On the question of whether Werckmeister should have applied for the copyright in the photographs rather than the painting, William A. Jenner pursued a new line of argument on behalf on Pierce & Bushnell Manufacturing Co in his only brief for the case. For Jenner,

> [t]he fundamental error from which other errors arise [in the case] is in holding that a photograph is a copy of a painting. It is not, either in fact or within the view of the

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[142] Alexander P. Browne, *Brief for Appellant*, 4. In court files for *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) 72 Fed. 54, 18 C.C.A. 431.

[143] Louis C. Raegener, *Brief on Behalf of the Appellee,* 6. In court files for *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) 72 Fed. 54, 18 C.C.A. 431. It is unclear whether Raegener is referring to William Henry Vanderbilt (1821-1885) who lived in a mansion on Fifth Avenue with a substantial art collection to which he granted access to the public between 1882-1884 or Cornelius Vanderbilt II (1843-1899) who also had a magnificent mansion on Fifth Avenue with an art gallery, though I was not able to ascertain whether he opened this gallery to the public.

[144] In the 1890s, art museums and public galleries in the United States were largely understood as spaces of education that performed the public good of improving American culture and taste. See Alan Wallach, *Exhibiting Contradiction: Essays on the Art Museum in the United States* (Amherst: University of Massachusetts Press, 1998), 47-49.

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statute, because it is not in the same or an analogous medium, and does not give the color, nor, in many respects, the light and shade.[145]

Rather, Jenner proposed that a photographic copy of a painting was better defined as a separate entity, a "translation."[146] In support of this claim, Jenner cited the well-known case *Stowe v. Thomas* (1853) in which Harriet Beecher Stowe sued F.W. Thomas, a Philadelphia-based printer, for producing and circulating an unauthorized German translation of her popular novel *Uncle Tom's Cabin.* In a narrow construction of Stowe's proprietary rights in her novel, the judge found in favor of Thomas on the basis that a translation could "in no correct sense…be called a copy of her book."[147]

Jenner's arguments in this brief are unconventional on a number of levels. First, he proposed a very strict definition of a copy, one in which a copy must be in an "analogous medium" to the original and closely replicate its color and shading. As Raegener pointed out in his response brief, the Copyright Act makes no such stipulation regarding the material exactitude of copies. To further his point, Raegener noted that published books rarely resemble original manuscripts physically, nor are they generally printed on the same material.[148] Second, Jenner's allusion to *Stowe v. Thomas* (1853) had little bite because American authors gained protection to translations and abridgements of their works when the Copyright Act was amended in 1870.[149] Even if the courts were to define the photographic reproduction of *St. Cecilia* as a translation, it would not have invalidated Werckmeister's claim to copyright in the work. While Jenner's arguments were largely ineffective, they point to the extent to which the definition of a copy remained open to interpretation in American courts at the end of the nineteenth century.

Finally, the briefs once again turned over the question of whether Werckmeister had invalidated his copyright in *St. Cecilia* by not including a copyright notice on the face of the painting or the frame. In this brief, Browne took a slightly different approach than the one he pursued previously and focused on the confusion among the public that Werckmeister's notification could cause. He wrote, "the complaint, having failed to mark the painting, which was copyrighted, and having falsely marked as copyrighted the photograph which is not copyrighted, has complied with neither the letter nor with the spirit of the law."[150] Browne continued regarding the problem of the "falsely marked" photographic reproductions, "furthermore, the notice on the photograph says nothing either expressly or by implication about the painting, or indeed that there is any

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[145] William A. Jenner, *Supplemental Brief for Defendant-Appellant,* 15-17. In court files for *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) 72 Fed. 54, 18 C.C.A. 431.
[146] Ibid.
[147] Judge Robert Grier, who heard *Stowe v. Thomas* (1853), defined a copy in his opinion in this manner: "A 'copy' of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed…The same conceptions clothed in another language cannot constitute the same composition; nor can it be called a transcript or "copy" of the same "books." See *Stowe v. Thomas* (1853) 2 Wall Jr. 547. For a detailed analysis of this fascinating case, see Melissa J. Homestead, "'When I Can Read My Titled Clear': Harriet Beecher Stowe and the *Stowe v. Thomas* Copyright Infringement Case" in *Prospects: An Annual of American Cultural Studies* (2002), 201-245.
[148] See Louis C. Raegener, Supplemental *Brief on Behalf of the Appellee,* 3-4. In court files for *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) 72 Fed. 54, 18 C.C.A. 431.
[149] Act of July 8, 1870, 41st Congress, 2nd Session, 16 Statute 212.
[150] Browne, *Brief for Appellant*, 5. In court files for *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) 72 Fed. 54, 18 C.C.A. 431.

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painting. None but an expert can tell that the photograph is a photograph of a painting."[151] For Browne, the "spirit" of the Copyright Act was about clear communication to the American public regarding the copyright status of a given published work, and Werckmeister had clouded the identity of the protected work by placing the notification on the photograph rather than the painting. Not only had Werckmeister created confusion about which form of the work was protected but also about what exactly the work was. Pointing to the accuracy and vividness of the photographic reproduction, Brown concluded that "[n]one but an expert can tell" whether the photographic reproduction is an original work itself or a copy after an original work.[152]

In response to Browne's concerns over public misinformation, Raegener responded that copyright was exactly about the right of an author or proprietor to make copies of an original work. As such, he argued, the person who holds the copyright to a given work should be able to reproduce it in any form that he or she sees fit. With little regard for Browne's quibbles over the identity of the work, Raegener countered: "*For copyright purposes all originals are matrices or moulds,* and the sole right to make reproductions, casting, or copies from these original matrices or moulds is given to the owner of the copyright upon the original matrix or mould."[153] Raegener's description of original artworks as "matrices or moulds" from which "reproductions, casting, or copies" can be crafted is startling in its disregard for the original work as such. An original work, in his phrasing, primarily served as a source from which to make copies; it was another kind of original copy, an "original matrix," the origin point of all subsequent copies. This notion of original works as "matrices or moulds" echoes early modern conceptions of original works. As Mark Rose has noted in his study of the origins of Anglo-American copyright in eighteenth-century England, the term "copy" was used by members of the Stationers' Company, a powerful guild of publishers and booksellers, to refer "both to the original manuscript—even printers today speak of manuscript as 'copy'—and to the right to make copies of it."[154] Though Raegener's alignment of original artworks with the tools of commercial printing is jarring in its emphasis on the creation of reproductions over the original work itself, his comparison nonetheless maintained the primacy of the original artwork (the "original matrix") and did not blur distinctions between originals and reproductions as Browne did in his briefs.

Having heard the arguments on behalf of Pierce & Bushnell Manufacturing Co. and Werckmiester, the three judges of the Appeals Court of the District of Massachusetts—Le Baron B. Colt, Thomas L. Nelson, and Nathan Webb—deliberated and came to a decision on January 24, 1896. While Judge Webb concurred with the decision made in favor of Werckmeister in the Circuit Court, Judges Nelson and Colt found in favor of Pierce & Bushnell Manufacturing Co. and overturned the findings of the Circuit Court. Judge Colt, who wrote the majority opinion for the case, found fault with the decision of the Circuit Court on two main points: the assertion that an original painting did not require a copyright notice and the argument that the public exhibitions of the painting in Germany did not count as publications of the painting. In sum, Colt

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[151] Ibid. 5. Emphasis in the original.

[152] The argument Browne presents here is repeated in a note Jenner attached his own brief. There Jenner specifically cites the accuracy of the "Goupil process" (a form of photogravure) for reproducing "water-color paintings" that "cannot be distinguished from the originals except by experts." See Jenner, *Supplemental Brief for Defendant-Appellant,* 21.

[153] See Raegener, Supplemental *Brief on Behalf of the Appellee,* 5. In court files for *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) 72 Fed. 54, 18 C.C.A. 431. Emphasis in the original.

[154] See Rose, *Authors and Owners*, 12.

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concluded: “The evidence shows that the painting was publicly exhibited in Berlin from January to March, 1892, and at Munich in the summer of 1892. Under these circumstances, we hold that the alleged copyrighted painting has been published within the meaning of section 4962 [of the Copyright Act], and should have been inscribed with notice of copyright.”[155]

In the opinion for *Pierce & Bushnell Manufacturing Co. v. Werckmeister,* Judge Colt focused on the question of whether the original painting required a copyright notice for Werckmeister’s copyright to be valid. As discussed earlier in an examination of the briefs exchanged between Raegener and Browne, the section of the Copyright Act that dealt with the notification requirement was poorly written and open to multiple interpretations. Like Browne, Judge Colt proposed a literal reading of this section of the Copyright Act. As he wrote,

> Section 4962 does not deal with copies as distinct from originals, or with originals as distinct from copies…but it deals with published copyrighted things, and it declares that no action for infringement will lie unless each copyrighted thing which is published, or made public, be it a “copy,” so called, or an “original,” so called…has been inscribed upon it notice of copyright.[156]

By “copyrighted things,” Judge Colt refers here to the various subjects of copyright: books, maps, photographs, paintings, and so on. Where Judge Putnam of the Circuit Court argued that original paintings, like an author’s original manuscript, were protected by common law copyright, Judge Colt maintained that paintings are subject to statutory copyright law like all other material covered by the Copyright Act. Thus, when a painting was “made public” it needed to bear a “notice of copyright” to ensure its protection from infringement.

Judge Colt’s argument that distinctions between originals and copies are inconsequential to the interpretation of copyright law echoes Browne’s assertion in his initial brief in *Werckmeister v. Pierce & Bushnell Manufacturing Co.* that reproductions and original artworks are equally original in the eyes of the law. In their literal readings of the law, both Judge Colt and Brown level distinctions between originals and subsequent.[157] Their surprising disregard for the authority of the original artwork in both of their arguments calls to mind Benjamin’s assertion in “The Work of Art in the Age of Mechanical Reproduction” that “[t]o pry an object from its shell, to destroy its aura, is the mark of a perception whose ‘sense of the universal quality of things’ has increased to such a degree that it extracts it even from a unique object.”[158]

As Benjamin reminds us, the issues raised by *Pierce & Bushnell Manufacturing Co. v. Werckmeister* are not confined to interpretations of the law but also embrace questions of perception, in particular the ways in which artworks were seen and experienced during the late

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[155] *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) 72 Fed. 54, 18 C.C.A. 431.
[156] Ibid.
[157] As Jane Gaines asserts, copyright is the “great leveler” of cultural production. In formulating this argument, she cites the work of Paul Q. Hirst. See Hirst, “Introduction” in Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law,* trans. Elizabeth Kingdom (London: Routledge and Kegan Paul, 1979), 1-17. In her lucid discussion of the definition and history of the “author” in French copyright law, Molly Nesbit also argues that cultural hierarchies have been historically irrelevant to the law. See Nesbit, “What Was an Author?” in *Yale French Studies* (1987), 230-234.
[158] Benjamin, “The Work of Art in the Age of Mechanical Reproduction,” 223.

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nineteenth century. In arguing for a literal reading of the law, Judge Colt and Browne likewise proposed a manner of looking at art that flattens distinctions between high and low forms, fine and commercial art, originals and copies. Judge Putnam and Raegener, on the other hand, argued for a practical reading of the law that recognized the primacy of original artworks based on their uniqueness. (Raegener, however, certainly comprehended the commercial potential of reproductions after paintings, as indicated by his "matrices and moulds" argument). As such, the divergent opinions in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* are also implicitly concerned with questions of aesthetics and cultural hierarchies. Though these topics are never openly discussed in this case, they simmer beneath its surface and are central to understanding the contradictory opinions delivered in the case. As discussed with regard to *Bleistein v. Donaldson Lithographing Co.* (1903), many judges of this period were uncomfortable with making aesthetic determinations as part of their legal decisions, and this anxiety may have deterred a direct confrontation with the visual and material features of *St. Cecilia* and the reproductions made after it.[159] To introduce aesthetics into the discussion of this case, this chapter will now consider the consumption and reception of original paintings and art reproductions in the United States during the late nineteenth century.

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As Miles Orvell argues in his classic study *The Real Thing: Imitation and Authenticity in American Culture, 1880-1940,* the turn of the twentieth century was a period in which the fascination with the ingenuity of imitations that characterized nineteenth-century American culture began to give way to an investment in authenticity as a central value of cultural production.[160] For Orvell, changing attitudes towards mechanization and machine-made products are at the fulcrum of this broad shift in American culture. Where nineteenth-century Americans embraced mechanical forms of reproduction as a means of democratizing culture, modernists of the early twentieth century sought to connect with the "real thing."[161] *Pierce & Bushnell Manufacturing Co. v. Werckmeister,* which centers on competing definitions and evaluations of machine-made copies and handmade originals, evokes many of these tensions that Orvell describes as emerging at the turn of the twentieth century. Drawing upon Orvell's claims, this section will examine the reception of art reproductions during the second half of the nineteenth century to offer a broader context through which to understand the divergent legal definitions of copies and originals put forward in *Werckmeister v. Pierce & Bushnell Manufacturing Co.* and its appeal.[162]

During the second half of the nineteenth century, many individuals and institutions in the United States advocated for the educational and aesthetic values art reproductions. It must be

[159] Supreme Court Justice Oliver Wendell Holmes Jr. would express this anxiety most clearly (and memorably) in his 1903 opinion in the case *Bleistein v. Donaldson Lithographing Co*: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations." See *Bleistein v. Donaldson Lithographic Co.* 188 US 239 (1903). For an analysis of this opinion, see Chapter 1.
[160] See Orvell, xv. As Orvell emphatically notes, this broad shift away from a culture of imitation in the nineteenth century did not entail its erasure. Indeed, he argues, American culture of the twentieth century remains enamored of copies and reproductions.
[161] Ibid., xvii-xix.
[162] Orvell only briefly addresses conflicting attitudes towards art reproductions, primarily chromolithographs after paintings, which were popular in the United States at the end of the nineteenth century. See Orvell, 36-38.

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remembered that for much of this period art museums and galleries as we know them today did not yet exist and the American public had few opportunities to view original artworks in person.[163] The dearth of art institutions coupled with period arguments that art had the power to improve the morality and taste of citizens led to the wide consumption of art reproductions—in the form of engravings, chromolithographs, photographs, and plaster casts—during the second half of the nineteenth century.[164]

One of the early yet briefly successful purveyors of art reproductions in United States was the American Art-Union. Incorporated in 1844, the American Art-Union modeled itself on European art unions that sought to elevate public taste and to provide support to artists outside of a small circle of wealthy patrons. For an annual fee of five dollars, subscribers to the American Art-Union would receive one engraving after an original painting by an American artist and their names would be entered in a lottery to win original paintings, sculptures, and medals. The subscription fees were used by the administrators of the American Art-Union to purchase original paintings by American artists—including works by George Caleb Bingham (fig. 27), Thomas Cole, and Lilly Martin Spencer—which were exhibited at the organization's free gallery in New York City and served as the basis for the engravings sent to subscribers (fig. 28).[165] As Rachel Klein has noted, the American Art-Union was fairly popular during its short existence between 1844 and 1852, counting nearly 19,000 subscribers in 1849.[166] While the American Art-Union was disbanded in 1852 after its lottery system came under attack for violating New York's anti-gambling laws, its success paved the way for other entrepreneurs and institutions to promote reproductions as a means to encourage an American interest in and consumption of art.[167]

With the fall of the American Art-Union, numerous other organization and companies stepped in to provide Americans with fine art reproductions. The French firm Goupil, Vibert & Co., a former rival of the American Art-Union, opened a branch of their operations in New York City in 1846 and provided high quality engravings (and later photogravures) after European and some American artworks through the end of the nineteenth century.[168] In the mid-1860s,

[163] See Wallach, 9-10. As Wallach notes, there are important expectations: the Boston Athenaeum (founded in 1807), the National Academy of Design in New York (founded in 1826), and the Pennsylvania Academy of Fine Art (founded in 1805). As Margaretta Lovell reminded me, the Yale University Art Gallery opened in 1832. There were also wealthy collectors who opened up their private art galleries to the public. See, for example, the collections documented in William Young, *Lights and Shadows of New York Picture Galleries* (1864) illustrated with photographs by A.A. Turner.

[164] On arguments for the moral value of art during the mid-nineteenth century, see Rachel Klein, "Art and Authority in Antebellum New York City: The Rise and Fall of the American Art-Union" in *The Journal of American History* (March 1995), 1534 and 1538.

[165] On the history of the American Art-Union, see Klein, "1535-1537. See also *Perfectly American: The Art-Union & Its Artists* (Tulsa: Gilcrease Museum, 2011). On the exhibition space of the American Art-Union, see Randy Ramer, "Free to the World: The Art-Union Galley," 101-127 in *Perfectly American*.

[166] Klein, 1546. Though the American Art-Union had subscribers across the country, fifty percent of them came from New York state.

[167] On the curious end of the American Art-Union, see Klein, 1559. See also, Amanda Lett, "Pictures Are More Powerful Than Speeches," 40-42 in *Perfectly American.*

[168] On the rivalry between the American Art-Union and Goupil, Vibert & Co. see Klein, 1549-1550. On the early history of the firm in the United States (later known as the Knoedler Gallery), see DeCourcy E. McIntosh, "Goupil and the American Triumph of Jean-Léon Gérôme," 31-43 in *Gérôme & Goupil: Art and Enterprise* (Paris: Réunion des Musées Nationaux; Bordeaux: Musée Goupil; Pittsburgh: The Frick Art and Cultural Center; New York: Danesh Museum of Art, 2000).

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chromolithographic reproductions after artworks gained immense popularity among audiences in the United States.[169] L. Prang and Co., founded in 1860, led the market for fine art chromolithographs, or "chromos" as they were called, and sold reproductions after works by American painters such Frederick Church, Eastman Johnson (fig. 29), and Winslow Homer.[170] Between the 1860s and 1890s, Prang and other printers sold millions of chromos after popular artworks and countless middle-class homes across the United States were papered with these bright reproductions.[171]

By late 1860s, the American passion for engravings, chromos, and other art reproductions became fodder for humorist Mark Twain. In *The Innocents Abroad* (1869), his comic chronicle of a journey to Europe and the Holy Land, Twain recounts his visit to Milan to see Leonardo da Vinci's *The Last Supper* in the refectory of the Convent of Santa Maria delle Grazie. Twain spends little time recording his impressions of the original fresco and instead focuses on the copyists working in the refectory and the engravings after *The Last Supper* that they offered for sale. Twain reports, "as usual, I could not help noticing how superior the copies were to the original, that is, to my inexperienced eye. Wherever you find a Raphael, a Rubens, a Michael Angelo, a Carracci, or a Da Vinci…you find artists copying them, and the copies are always the handsomest. May be [sic] the originals were handsome when they were new, but they are not now."[172] In shamelessly declaring his preference for newer copies of European artworks to the aged originals, Twain pokes fun at the perceived backwardness of the tastes of American tourists and their "inexperience[d] eye[s]." Underlying this playful barb, Twain also suggests the degree to which many Americans' experiences and expectations of artworks—including his own—were shaped by encounters with reproductions rather than originals. In the absence of many public art collections in the United States before the 1870s, Americans largely relied upon engravings and other reproductions to educate themselves in the history of art.

Beyond professing a preference for reproductions, Americans occasionally collapsed distinctions between copies and original artworks. In Catharine E. Beecher and Harriet Beecher Stowe's *The American Woman's Home* (1869), their immensely popular guide to creating and maintaining an efficient middle-class home, Beecher and Stowe encourage women to purchase chromolithographs as an affordable means of decorating their homes and educating their children. As Beecher and Stowe remark of chromos: "the educating influence of these works of art can hardly be overestimated. Surrounded by such suggestions of the beautiful, and such reminders of history and art, children are constantly trained to correctness of taste and refinement

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[169] For a description of the chromolithograph process, which was laborious and involved the use of many stones to create their characteristic richness of color, see Bamber Gascoigne, *How to Identify Prints: A Complete Guide to Manual and Mechanical Processes From Woodcut to Inkjet* (New York: Thames & Hudson, 2004), 28 a-c.
[170] On the history of chromolithography in the United States, see Peter Marzio *The Democratic Art: Pictures for a 19th-Century America* (Boston: David R. Godine, Publisher, in association with the Amon Carter Museum of Western Art, Fort Worth, 1979). He discusses the career and work of Louis Prang on 94-106. In terms of Prang's management of copyrights, he typically bought paintings directly from artists for the purpose of reproducing them. This was a strategy Prang used to fend off potential copyists, for owning the physical paintings gave him direct control over their copyrights. See Marzio, 95.
[171] Ibid., 129.
[172] Mark Twain, *The Innocents Abroad, or The New Pilgrims' Progress* (New York: Literary Classics of the U.S.: Distributed to the trade by Viking Press, 1984) 150-151. Cited in Orvell, 306 fn 19.

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of thought."[173] Here the chromolithographs are referred to as "works of art" and identified with the original artworks that they reproduce. Further, Beecher and Stowe imply that the reproductions have the same "educating influence" as originals. This slippage between the original and the copy was precisely the effect that chromolithographers sought to create. As a promotional article on L. Prang & Co. stated in 1869, the company was "turning out pictures so soft, so spirited and so accurately reproduced that the average observer cannot distinguish them from oil-paintings."[174] Indeed, L. Prang & Co. appears to have displayed its "so accurately reproduced" chromolithographs next to original paintings at commercial exhibitions and reported that viewers could not tell the difference between them.[175]

Fine art reproductions were not only collected and displayed by private individuals during the second half of the nineteenth century but also were a central feature of American art museums of this period. As Alan Wallach has argued, cast collections after well-known works of Classical and Renaissance sculpture—not original works of art—were the centerpieces of newly founded institutions like the Metropolitan Museum of Art in New York City (opened in 1872) and the Boston Museum of Fine Arts (opened in 1876).[176] While the exhibition of cast collections runs counter to contemporary notions of art museums as sites to experience first-hand original works of art, the display of casts was aligned with the educational mission (and budgets) of late-nineteenth-century museums. As Edward Robinson, the curator of classical antiquities at the Boston Museum of Fine Arts, explained in an article in 1889, "[m]ore than once we have endeavored to impress upon our readers the importance of collections of casts and other art reproductions as factors in popular education. It is only through these that the body of our people can ever hope to become familiar with the great masterpieces of European galleries."[177] Robinson stresses the importance of casts as educational tools that allow large segments of the American public to study "the great masterpieces of European galleries" without having to cross the Atlantic. According to Robinson and other museum leaders of his day, proxies were to be embraced as technologies of civilization that would instruct Americans in the history of the Western world and the appreciation of the beautiful.[178]

While casts and other forms of art reproduction were exceedingly popular with the American public and promoted by many cultural authorities, they also had their critics who saw copies as a threat to good taste and established social hierarchies. Clarence Cook, the influential art critic, and E.L. Godkin, editor of *The Nation,* each took aim at chromolithographs in the 1870s and referred to them respectively as "ruining the art of this country" and producing "a society of ignoramuses" who thought they were cultured but in fact possessed but a "smattering of all sorts

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[173] Catharine E. Beecher and Harriet Beecher Stowe, *The American Woman's Home* (New York: J.B. Ford & Co, 1870), 94. Beecher and Stowe express a particular fondness for the chromolithograph of L. Prang & Co and single out three of the company's reproductions as suitable for the middle-class American home. For a more detailed discussion of chromos and interior decoration during the second half of the nineteenth century, see Marzio, 116-129.

[174] "Pictures for the People: An Art Workshop," 56 in *Official Catalogue & Journal of the 11th Exhibition of the Massachusetts Charitable Mechanic Association* (1869).

[175] See John C. Kimball, "Machinery as a Gospel Worker" in *Unitarian Christian Examiner* (Nov. 1869), 320. Cited in Orvell, 37.

[176] Wallach, 38-39. As Wallach notes, the Boston Museum of Fine Arts had amassed a collection 777 plaster casts by 1890 that was only rivaled by collections in Europe. The Metropolitan Museum, keen to keep up, raised $80,000 between 1890 and1894 for the specific purpose of purchasing casts. See Wallach, 41 and 45.

[177] Edward Robinson, "The Cost of a Small Museum" in *The Nation* 21 Nov. 1889, 405. Cited in Wallach, 47.

[178] Wallach, 47.

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of knowledge."[179] For Cook and Godkin, the chromolithograph was not an educational tool but quite the opposite: it offered "pseudo-culture," a form of commerce disguised as art that bred "moral and mental chaos" rather than social progress.[180] In their view, chromos were poor substitutes for actual paintings and were not to be trusted with the advancement of American taste.[181]

Cast collections began to lose favor in the late 1890s and were fazed out of American museum displays not long after their celebrated installation. The final decade of the nineteenth century saw art-hungry robber barons collecting original European masterworks in great quantities and joining the boards of museums, like the Metropolitan, where their investment in the historical authenticity of original artworks began to permeate institutional practices of collection and display. [182] In the realm of art history, connoisseurship was on the rise with figures such as Bernard Berenson authenticating Italian masterworks on behalf of wealthy clients in the United States and amplifying the aesthetic (and monetary) values of originals.[183]

Where did photography fit within these debates over the respective values of copies and originals that waged during the last decades of the nineteenth century? Though photography had been used as a medium for manufacturing art reproductions since the 1850s, it was initially plagued by concerns over its accuracy and high cost.[184] In the 1870s, however, new films and the invention of photomechanical printing technologies, notably the photogravure process and its variants, led to a great increase in the production and consumption of photographic art reproductions. With its claim to objectivity and subdued tonalities, photographic reproductions after artworks were often positioned as favorable alternatives to chromolithographs, which were being condemned in the

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[179] Clarence Cook, "A New Chromo" in *New York Daily Tribune* 22 Oct. 1868. Cited in Marzio, 207. E.L. Godkin, "Chromo-Civilization" in *The Nation* 24 Sep. 1874, 201-202. Cited in Marzio, 2.
[180] See Godkin, Chromo-Civilization," 201-202. Cited in Marzio, 2.
[181] Ibid., 201-202.
[182] On the growing interest in wealthy Americans in purchasing European masterworks at the turn of the twentieth century, see the essays in *A Market for Merchant Princes: Collecting Italian Renaissance Paintings in America* ed. Inge Reist (University Park, PA: The Pennsylvania State University Press, 2015). See also, Wallach, 50. Wallach suggests that the rising popularity of Impressionism in the United States, which privileged the painterly surface of the canvas, also contributed to the new importance placed on the display of original artworks in American museums of the 1890s.
[183] On the role of connoisseurship in encouraging the market for original artworks in the United States, see Jaynie Anderson, "'Modern Connoisseurship' and the Role It Played in Shaping American Collectors' Taste in Italian Renaissance Art" in *A Market for Merchant Princes,* 28-37.
[184] Before the invention of orthorochromatic plates in the 1870s, photographs translated colors to black and white in a manner that baffled viewers. See *Encyclopedia of Nineteenth-Century Photography* ed. John Hannavy (New York: Routledge, 2013), 1098. On the early use of photography as a mode of art reproduction, see Trevor Fawcett, "Graphic Versus Photographic in the Nineteenth-Century Reproduction" in *Art History* (Jun. 1986), 185-212; Elizabeth Anne McCauley, *Industrial Madness: Commercial Photography in Paris, 1848-1871* (New Haven: Yale University Press, 1994), 265-300; Anthony Hamber, '*A Higher Branch of the Art': Photographing the Fine Arts in England 1839-1880* (Amsterdam: Gordon and Breach, 1996); Pierre-Lin Renié, "The Battle for a Market: Art Reproductions in Print and Photography from 1850-1880," 41-53 in *Intersections: Lithography, Photography, and Traditions of Printmaking* ed. Kathleen Stewart Howe (Albuquerque: University of New Mexico Press, 1998). The vast majority of scholarship on early art reproductions focuses on the production and reception of these works in Europe, especially France and Great Britain.

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press during the 1870s and beyond for their deceptive nature and garish coloring.[185] The periodical *Art Amateur,* for example, recommended photogravures over chromolithographs in 1881 in response to a supposed bachelor who had written in for advice on how to decorate his rooms. As *Art Amateur* advised, "[it] would be best for him to buy engravings or photo-gravures. These are much more desirable than chromo-lithographs…[which] are much too mechanical to be artistic."[186] In this interesting turn of phrase, the photomechanical process of photogravure is described as "artistic" while chromolithography is subordinated as "mechanical." The aesthetic appeal of photogravure was likely a result of its association with traditional intaglio printing and its lush tonalities that ranged from clear whites to inky blacks (figs. 2 and 30).[187] Both artistic and seemingly truthful to the original, photographic reproductions began to overtake chromolithographs as the preferred method for commercial art reproductions.

In addition to finding favor among consumers looking to decorate their homes, photographic reproductions also appealed to scholars in the growing field of art history. Connoisseur Giovanni Morelli wrote approvingly of photography in his *Italian Painters* (1890) and advised aspiring students of art history: "As the botanist lives among his fresh or dried plants, the geologist among his fossils, the art-connoisseur ought to live among his photographs and, if his finances permit, among his pictures and statues. This is his world, and here he learns to see with the trained and cultivated eye of an artist."[188] For Morelli, connoisseurship was a scientific pursuit and he seamlessly aligns the discipline here with geology and botany. Further, he creates a parallel between scientific specimens, "fresh or dried plants" and "fossils," and photographic reproductions after artworks. The ability of photographs to transmit in a seemingly objective manner the formal qualities of painting, its lines and shapes, made them the ideal specimen for Morelli's method of analysis, which focused on the idiosyncratic ways artists painted certain details, like hands or ears.[189] Thus, Morelli does not prioritize the possession of original "pictures and statues" for the study of art and only suggests their use if "finances permit." Bernard Berenson, who was influenced by Morelli and a well known authority on art in the United States at the turn of the twentieth century, also endorsed the study of photographic reproductions in the study of art history and relied on them when attributing paintings.[190]

There were, of course, detractors against the use of photographic reproductions within the field of art history. Chief among them was German academic art historian Heinrich Wölfflin. Chafing against popular faith in the objectivity of photography, Wölfflin observed that "the good people

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[185] For example, Godkin derided the mechanical coloring of chromolithographs as lacking the "brilliancy or purity or noticeable softness of color." Godkin, "Fine Arts: Color Printing from Wood and from Stone" in *The Nation* 10 Jan. 10 1867, 36-37. Cited in Marzio, 105.

[186] "Correspondence" in *Art Amateur* (Sep.1881), 68. Cited in Marzio, 129.

[187] For a discussion of the photogravure process, see Gascoige, 37. Even Alfred Stieglitz, who was very demanding in terms of print quality, embraced and praised photogravure. He used photogravures (at great personal cost) to illustrate his well-known periodical *Camera Work*, which was devoted to art photography and modern art.

[188] Giovanni Morelli, *Italian Painters* (London: John Murray, 1892), 11.

[189] On Morelli's method of scientific connoisseurship, see Carlo Ginzberg and Anna Davin, "Morelli, Freud and Sherlock Holmes: Clues and Scientific Method" in *History Workshop* (Spring 1980), 5-36.

[190] On Berenson's use and collection of photography, see Giovanni Pagliarulo, "Passions Entwined: Art and Photography at I Tatti," 71- 85 in *The Bernard and Mary Berenson Collection of European Painting at I Tatti* ed. Carl Brandon Strehlke and Machtelt Brüggen Israëls (Florence: Villa I Tatti in collaboration with Officina Libaria, 2015). See also Wolfgang M. Freitag, "Early Uses of Photography in the History of Art" in *Art Journal* (Winter 1979-1980), 119.

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in their innocence buy these images because they trust that in a mechanical medium nothing essential can get lost from the original."[191] Wölfflin possessed no such "trust" in photographic reproductions, especially those made after sculptures, and argued that photographers distorted artworks such that "essential" visual information was "lost" in reproductions.[192] His comments echo the charges of deception that Cook and Godkin had leveled against chromolithographs twenty years earlier. However, photographic reproductions were not to suffer the fate of chromolithographs and continue to be a staple of art historical study today.

In addition to serving as aids in the study of art history, photographic art reproductions were displayed at public institutions where audiences enjoyed them for their aesthetic qualities. While photographic reproductions do not seem to have enjoyed the same visibility within art museums as sculpture casts, they were frequently exhibited in public libraries at the end of the nineteenth century. As Julie Brown has shown, public libraries voraciously collected and frequently displayed photographic reproductions of artwork and architecture in their reading rooms (fig. 31).[193] While primarily shown for their "informational" value, photographic reproductions of artworks were also exhibited for the aesthetic enjoyment of visitors.[194] Indeed, as seen in Figure 31, photographic reproductions of various artworks were often presented alongside original paintings and sculptures. Where today copies and originals are vigilantly distinguished in exhibition contexts, institutions and viewers at the end of the nineteenth century embraced such heterogeneous displays and saw both copies and originals as acceptable means of experiencing artworks.[195]

It should also be noted that photographs were beginning to be exhibited as artworks in their own right during the 1890s. With the flourishing of the Pictorialist movement in the United States and the organizational efforts of proponents of art photography, including Alfred Stieglitz and the members of the Photo-Secession, a number of annual exhibitions began to highlight the aesthetic achievements of American photographers. Among the most prominent of these photography exhibitions were the Philadelphia Photographic Salons held between 1898-1901, which served as battlegrounds over the definition and future of art photography.[196]

As this brief survey of the reception of art reproduction during the second half of the nineteenth century suggests, copies had been long accepted and enjoyed by American audiences in a range of contexts as comparable to and even superior substitutes for original artworks. Photographic reproductions in particular were admired for their dual artistic and objective qualities. Actively collected and exhibited by private individuals and public institutions, photographic reproductions

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[191] Heinrich Wölfflin, "How Sculptures Should be Photographed" in Zeitschrift für Bildende Kunst (1896), 224. Cited in Freitag, 120.
[192] Freitag, 120.
[193] Julie Brown, *Making Culture Visible: The Display of Photography at Fairs, Expositions, and Exhibitions in the United States, 1847-1900* (Australia: Harwood Academic Publishers, 2001), 153 and 158. As Brown notes, Herbert Putnam of the Boston Public Library (and who would later serve as the Librarian of Congress) purchased 6,765 photographic art reproductions for the Boston Public Library in 1897 alone.
[194] Ibid., 158.
[195] Wallach, 60-67.
[196] On the Philadelphia Photographic Salons, see Sarah Greenough, "Of Charming Glens, Graceful Glades and Frowning Cliffs: The Economic Incentives, Social Inducements and Aesthetic Issues of American Pictorial Photography 1880-1902," 276-278 in *Photography in Nineteenth Century America* ed. Martha A. Sandweiss (New York: Harry A. Abrams, Inc.; Fort Worth: Amon Carter Museum, 1991).

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educated Americans in the history of art and were enjoyed as aesthetic objects in their own right. However, as Wallach has argued with regard to casts, the cult of the original began to overtake American perceptions of artworks in the late 1890s and reproductions in all media would begin to lose their central place in the American art world.[197] This emerging shift in the reception of original artworks and fine art reproductions would not only resonate in displays at American museums but also the arguments and decisions in copyright cases like *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) and its appeal.

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The divergent definitions of copies and originals put forward by the lawyers and judges in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896) begin to make more sense within the context of contemporary debates over the status of original artworks and reproductions, particularly photographic reproductions, within American culture. For example, Browne's arguments in favor of the "artistic value" of photographic reproductions in his brief for *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) echo contemporary admiration for photogravures that were lauded for both their perceived objectivity and aesthetic qualities.[198] Further, Browne's later claim that "[n]one but an expert can tell that the photograph[ic reproduction of "St. Cecilia"] is a photograph of a painting" suggests the vividness of photographic reproductions to viewers at the end of the nineteenth century and the extent to which they were confounded with actual works of art.[199]

In his opinion in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896), Judge Colt's lack of interest in distinctions between copies and original— "be it a 'copy,' so called, or an 'original,' so called"—also makes more sense within a visual culture where original artworks and reproductions were often understood to be interchangeable.[200] As discussed above, reproductions were promoted by museum administrators and art historians as tools for studying art and improving public taste. Indeed, original artworks and fine art reproductions were often presented side-by-side in museums and other institutions until the late nineteenth century with little anxiety over the differences between these two categories.[201]

The arguments made by Raegener and supported by Judge Putnam, on the other hand, align with a burgeoning investment in original artworks at the turn of the twentieth century. Raegener's frequent comparisons throughout the case between original paintings and "original manuscript[s]" are telling.[202] Manuscripts, which conveyed the physical mark of the author in his or her handwriting, were perceived to be more directly linked to the intellect and imagination of the author than machine-made copies.[203] By drawing correspondences between the individual

[197] Wallach, 50.
[198] Browne, *Brief for Defendant,* 11. The very term "artistic" was used to describe photogravure reproductions in *Art Amateur* in 1881, quoted on 29.
[199] Browne, *Brief for Appellant*, 5.
[200] *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896).
[201] Wallach, 60-67.
[202] Raegener, *Supplemental Brief on Behalf on the Complainant*, 12.
[203] Raegener, *Brief on Behalf on the Complainant,* 5. As Tamara Plakins Thornton has argued, the rise of Romantic notions of authorship in the late eighteenth century corresponded to a rising interest in handwriting as a site of individual expression and personality. This gave way in the nineteenth century to a fascination with the handwriting

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handwriting of manuscripts and the unique facture of paintings, Raegener makes a case for the greater authenticity of original artworks and subordinates reproductions as lacking the "brain labor" imparted in the original.

Raegener also makes a claim for the specific value of viewing original artworks in his discussion of the definition of publication in the Copyright Act. As he argued in his brief in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896), "[s]uppose Mr. Vanderbilt, in his mansion on Fifth Avenue, at stated periods, allowed the public to view certain masterpieces in his gallery, would not the common law protect these pictures from being copied? Undoubtedly it would."[204] While framing his argument in terms of the protections provided by common law copyright, the force of Raegener's argument rests on an understanding of the exhibition of original artworks, of "certain masterpieces," as a public good. Indeed, this was a moment when old master paintings were beginning to replace cast collections as the centerpieces of American museums. As the acquisition of original paintings began to dominate collecting policies, museums also began to argue for the superior educational and aesthetic value of original artworks.[205]

Reviewing the legal arguments presented by Judge Colt and Browne, we find an implicit embrace of the copy that aligns with American cultural preferences and experiences of art throughout much of the nineteenth century. In contrast, Judge Putnam and Raegener emphasize the primacy of original artworks in their assessments of the case, a position that is more in step with the growing value assigned to originals in the United States at the turn of the twentieth century. It is precisely the tension between and simultaneity of these two attitudes towards copies and originals that makes this case fascinating. While the position of Judge Putnam and Raegener aligns with our twenty-first-century sensibilities, the final opinion of Judge Colt reminds us that the current elevation of original artworks was not an inevitability.

The arguments in this case also complicate the triumphant narrative of technological progress that Benjamin proposed in "The Work of Art in the Age of Mechanical Reproduction." While photographic and photomechanical reproductions were a cornerstone of the American experience of artworks at the turn of the twentieth century (and remain so today), the rise of these new reproductive technologies and the "plurality of copies" they unleashed certainly did not correspond to a "wither[ing]" of the historical authority of original artworks.[206] In fact, the broad embrace of photographic and photomechanical forms of reproduction coincided with a heightened regard and financial investment in original artworks in the United States. Though original artworks were accorded the same standing as reproductions in the majority opinion in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* (1896), the new esteem for original artworks in American culture would soon make its way into legal discourse.

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of authors as a way to understand their literary productions. See Tamara Plakins Thornton, *Handwriting in America: A Cultural History* (New Haven: Yale University Press, 1996), 76-77. The perception that works produced by the hand of an author exhibit a stronger sense of originality than machine-made copies echoes earlier debates about the compatibility of photography and the originality requirement of American copyright law. Jane Gaines addresses this distinction between the hand and the machine in her analysis of *Burrow-Giles Lithographic Co. v. Sarony* (1884). See Gaines, 54 and 65-70.

[204] Raegener, *Brief on Behalf of the Appellee,* 6.

[205] See Wallach, 49-56.

[206] Benjamin, "The Work of Art in the Age of Mechanical Reproduction," 221.

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In December of 1905, Emil Werckmeister was involved in yet another copyright case involving the illicit reproduction of one of the Berlin Photographic Co.'s photographic art reproductions. In this instance, he faced off against the American Lithographic Co., which had reproduced without permission the work *Chorus* by British artist W. Dendy Sadler.[207] In its details *Werckmeister v. American Lithographic Co. et al.* (1905) strongly resembles *Pierce & Bushnell Manufacturing Co. v. Werckmeister* of a decade earlier. However, the outcome of the case could not have been more different.

The case was first tried in Circuit Court of New York before district Judge George Chandler Holt.[208] The defense for the American Lithographic Co., headed by the same William Jenner who had assisted on *Pierce & Bushnell Manufacturing Co. v. Werckmeister,* echoed many of the arguments that had won the case for Pierce & Bushnell Manufacturing Co. in 1896. Judge Holt, however, had little patience for the defense's arguments or the earlier opinion of Judge Colt. In his opinion for the case that found in favor of Werckmeister, Judge Holt openly expresses his bewilderment at the defense's argument that an artist was required to place a copyright notice upon a publicly exhibited painting in order to fend off infringers. Not only did he find such arguments legally suspect but, more importantly, aesthetically unreasonable. His lengthy digression on this point is worth quoting in full:

> Moreover, the [notification] requirement in the case of paintings or statues, is one which would be so distasteful to many artists and purchasers that it seems to me improbable that Congress should have intended to require it. More artists, and many purchasers, I think, would object to having a notice of copyright affixed to a beautiful painting or statue. Many persons would regard it as a serious blemish, particularly foreigners, by whom the object of the requirement would not be understood. It seems almost a deliberate vulgarization of art if the finest specimens of painting and sculpture exhibited in the Paris Salon, the London Royal Academy, or the leading art societies in this or other countries, were all ticketed with copyright notices. I cannot see why the law should require it, or that it does require it.[209]

Only a decade after Judge Colt declared that copyright law "does not deal with copies as distinct from originals, or with originals as distinct from copies," we find in Judge Holt's opinion a fulsome defense of the distinction of original artworks. Such was the sanctity of an original painting within American culture by 1905 that the offensiveness of the notification requirement is called out by Judge Holt at various points as "distasteful," "a serious blemish," and a "deliberate vulgarization of art."

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[207] *Werckmeister v. American Lithographic Co.* (1905) 126 F.R. 244. Werckmeister pursed a simultaneous and related case involving the same artwork against the American Tobacco Co. See *American Tobacco Co. v. Werckmeister* 207 U.S. 284 (1907).

[208] The case would eventually be heard in the U.S. Supreme Court where the opinion of Judge Holt would be affirmed. See *American Lithographic Co. v. Werckmeister* (1911) 221 U.S. 603. A similar opinion would also be affirmed in the parallel case *American Tobacco Co. v. Werckmeister*, which was also heard by the U.S. Supreme Court. See *American Tobacco Co. v. Werckmeister* 207 U.S. 284 (1907).

[209] *Werckmeister v. American Lithographic Co.* (1905).

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While Judge Holt uses the term "vulgarization" to describe the debasement of the artistic merit and overall composition of an artwork, his wording also suggests that the copyright notification challenged the perceived autonomy of art. During this period (and still today to a certain extent), artworks were understood as separate from and a remedy to the strains of the marketplace and commerce.[210] This fantasy of the division between art and commerce was exposed by the required copyright notice, which positioned artworks as commodities that could be bought, sold, and mass produced like any other commercial good. Indeed, Judge Holt uses the retail term "ticketed" to describe a painting marked with a copyright notice and to suggest its transformation into a saleable product. While the popular period dictum of "art for art's sake" stressed the detachment of aesthetic objects from external affairs, the insistent copyright notice introduced uncomfortable questions of money—"filthy lucre," to borrow the phrase of artist James McNeil Whistler—into the creation and consumption of artworks.[211]

In addition to conveying the underlying anxiety over the commercial nature of artworks, Judge Holt's opinion expresses apprehension about the cultural position of the United States vis-à-vis Europe. Arguing against the requirement of a copyright notification, Judge Holt claims that such a practice would be distasteful and confusing "particularly [to] foreigners." While the United States boasted a robust artistic culture at the beginning of the twentieth century, there lingered a feeling that America trailed behind Europe in the realm of the fine arts.[212] For Judge Holt, it is an embarrassment that the United States would require its artists to mar their works with blocky copyright notices when this was not done at European arenas of high culture, such as the "Paris Salon" and "London Royal Academy." The copyright notice thus called attention not only to the commercial status of artworks but also to the alleged deficiencies of Americans culture in comparison to that of Europe.

Another striking aspect of Judge Holt's opinion is his frank discussion of aesthetics alongside the law. In *Pierce & Bushnell Manufacturing Co. v. Werckmeister,* the lawyers and judges alike avoided remarking on the quality of the works under consideration or the compositional effects a required copyright notice would have on artworks. Judge Holt, however, makes explicit his concern over the potential of the notification requirement to alter the appearance of a "beautiful painting or statue." Further, he assumes that his concern for the aesthetic integrity of original artworks is widely shared and argues that it is "improbable" that the U.S. Congress could have intended the law to deface paintings or sculptures.

As Judge Holt's words suggest, the authority assigned to original artworks that was beginning to be articulated in the arguments of Raegener and Judge Putnam had become a norm within

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[210] See Kathleen Pyne, *Art and the Higher Life: Painting and Evolutionary Though in Late Nineteenth-Century America* (Austin: University of Texas Press, 1996), 168- 177. As Pyne notes, American industrialists like Charles Lang Freer collected and studied works of art as a relief from the demands and stresses of the marketplace. For a more theoretical approach to the insistent separation of art and commerce in modern Western culture, see Pierre Bourdieu, "The Market of Symbolic Goods" in *The Field of Cultural Production: Essays on Art and Literature* ed. Randal Johnson (New York: Columbia University Press, 1993), 112-141.
[211] James McNeil Whistler used this vivid phrase in a title for his paintings, *The Gold Scab: Eruption in Filthy Lucre (The Creditor)* of 1879, which depicted his former patron Frederick Leyland, a wealthy British businessman, who had drawn Whistler into debt after a falling out over the design of the Peacock Room that Whistler had created for Leyland's home.
[212] See Wallach, 46-47.

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American culture by 1905. Counterintuitively, it was a case fought by a proprietor of an art reproduction firm that ultimately upheld the authority of the original artwork within the American legal system. Far from destroying the aura of original artworks, photographic and photomechanical reproductions were a primary force in enforcing the elevated status of original artworks within American culture and law at the turn of the twentieth century.

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Despite the clarification regarding the notification requirement brought by the decision in *Werckmeister v. American Lithographic Co.* (1905), confusion over the copyright status of photographic art reproductions has persisted into the twenty-first century. Indeed, court cases on the subject have received new attention in recent years with the proliferation of digital reproductions of fine art works. In high-profile cases such as *Bridgeman Art Library, Ltd. v. Corel Corp.* (1999), American courts have attempted to resolve lingering doubts regarding the copyright status of art reproductions, particularly of works in the public domain. However, there remains considerable debate and uncertainty about these issues among legal scholars, museum professionals, artists, and art historians that hinders the creation and study of artworks in the United States today.

The landmark case *Bridgeman Art Library, Ltd. v. Corel Corp.,* which was heard by the Southern District Court of New York in 1998 and 1999, reprises arguments made in *Pierce & Bushnell Manufacturing Co. v. Werckmeister* and suggests the continuing difficulty of situating art reproductions within American copyright frameworks. The Bridgeman Art Library, founded in 1972, is one of the largest archives of fine art reproductions. During the late 1990s, the Bridgeman Art Library sold both color transparencies and CR-ROM versions of its vast collection of art reproductions. In 1998, the Bridgeman Art Library sued Corel Corporation, a Canadian software company, after it released a CD-ROM set that included seven hundred digital reproductions of well-known artworks in the public domain. The Bridgeman Art Library claimed that Corel Corporation had copied up to one hundred and fifty of its reproductions and used them on its CD-ROM without permission.[213] In response to these allegations, the Corel Corporation asserted that there was no proof that it had copied the reproductions produced and circulated by the Bridgeman Art Library. Further, they argued that the Bridgeman Art Library did not have a valid claim to copyright in the reproductions because they lacked originality.[214] As in *Pierce & Bushnell Manufacturing Co. v. Werckmeister,* the *Bridgeman* case centered on copies possibly made after other copies and rested on the vexing question of whether or not mechanically produced art reproductions qualified as original, copyrightable materials.

Judge Lewis A. Kaplan, who heard *Bridgeman Art Library, Ltd. v. Corel Corp.,* decided against the originality of fine art reproductions and thereby dismissed Bridgeman's claim to copyright in these works – and its case against Corel Corporation. In formulating his opinion, Judge Kaplan drew upon the decision and language used in the Supreme Court case *Burrow-Giles Lithographic Co. v Sarony* (1884) just as Judge Putnam had done in *Werckmeister v. Pierce & Bushnell Manufacturing Co.* a century earlier. As Judge Kaplan wrote in his opinion, "Elements of

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[213] For a review of the basic facts of *Bridgeman Art Library, Ltd. v. Corel Corp.*, see Robert C. Matz, "Bridgeman Art Library, Ltd. v. Corel Corp." in *Berkeley Technology and Law Journal* (Jan. 2000), 9-10.
[214] Ibid., 10.

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originality . . . may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."[215] As discussed earlier, these are the very actions and qualities that Justice Miller named in formulating his definition of originality in *Burrow-Giles Lithographic Co. v Sarony*. In contrast to the production of an original work involving these forms of creative labor, Judge Kaplan asserted that "'slavish copying,' although doubtless requiring technical skill and effort, does not qualify."[216] For Judge Kaplan, like Judge Putnam before him, the very nature of an art reproduction—that is intended to be an as exact a copy as possible—negates any claim to originality in such works.

While the ruling in *Bridgeman Art Library, Ltd. v. Corel Corp.* and the broader case law that supports the decision would suggest that reproductions of artworks in the public domain are not subject to copyright restrictions, there remains considerable confusion and anxiety regarding their copyright status. In 2015 the College Art Association published a "Code of Best Practices in Fair Use in the Visual Arts," which not only offers guidelines for scholars and artists about employing fair use in their work but also insight into the stress caused by image permissions for a range of professionals in the arts.[217] After interviewing numerous scholars and artists, the study leaders found that there was widespread "confusion, doubt, and misinformation" regarding the management of image permissions.[218] This uncertainty often led professionals to "over rely" (and over pay) for image rights from museums, archives, or third-party vendors even when the reproduced work was in the public domain.[219] As others have pointed out, the high cost of securing reproduction rights can limit what kinds of research scholars engage in and who can publish their work.[220]

The confusion among scholars and artists over image permissions not only stems from the often opaque wording of the law but also the conflicting policies held by museums and other image archives that control access to high-quality art reproductions. Despite the outcome of *Bridgeman Art Library, Ltd. v. Corel Corp.,* most museums in the United States continue to claim copyright in reproductions after two-dimensional artworks in the public domain. The Museum of Fine Arts, Boston, for example, gives the following disclaimer regarding the digital reproductions of works

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[215] In his opinion, Judge Kaplan draws this formulation of originality from *Rogers v. Koons* (1992). This definition has its origins the opinion in *Burrow-Giles Lithographic Co. v. Sarony* in which Justice Miller declared the photograph under consideration was a "graceful picture…and that said plaintiff [Sarony] made the same…entirely from his own mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories…arranging and disposing the light and shade, suggesting and evoking the desired expression…" See *Burrow-Giles Lithographic Co. v. Sarony.*

[216] *Bridgeman Art Library, Ltd. v. Corel Corp.,* 36 F. Supp. 2d 191 (S.D.N.Y. 1999). In remarking on "slavish copying," Judge Kaplan cites *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987) and the earlier case *L. Batlin & Son, Inc. v. Snyder* 536 F.2d 486 (2d Cir.) (en banc), cert denied, 429 U.S. 857 (1976).

[217] Patricia Aufderheide and Peter Jaszi, "Code of Best Practices in Fair Use in the Visual Arts." College Art Association. 2015. http://www.collegeart.org/programs/caa-fair-use/best-practices. Accessed 23 March 2017.

[218] The report states that the study leads interviewed 100 professionals and also conducted a survey among 12,000 members of the College Art Association. See Aufderheide and Jaszi.

[219] Ibid. Susan Beilstein also address this widespread anxiety in her excellent book *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property* (Chicago: University of Chicago Press, 2010), 10-11.

[220] On the negative effects of such practices and how museums might influence image rights practices for the better, see Bielstein, 4-5. As Bill Ivey notes, the cost of reproducing images clarifies the fact that our much of our cultural heritage is also a corporate asset. He underscores the high cost of image licenses by including the price he paid to reproduce each image in his book. See Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights* (Berkeley: University of California Press, 2008), 30-38.

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in its collection available on its website: "The images are not simple reproductions of the works depicted and are protected by copyright."[221] This outright rejection of current legal sensibilities has been referred to as "copyright overreaching" or "copyfraud" by various legal scholars who find these policies antithetical to both the aims of copyright and the mission of many museums.[222] Though the Museum of Fine Arts, Boston emphasizes "research," "educational opportunities," and "discovery" in its Mission Statement, it impedes these very goals by limiting access to collections and charging scholars and educators for permission to use reproductions of works in the public domain.[223] While some museums justify these policies by arguing that the revenue from reproduction licenses is central to their operating budget, very few museums in fact make substantial income from these licensing fees, especially those for non-commercial uses.[224]

In contrast to these legally dubious and ethically troubling policies, a small number of art museums have chosen to offer users open access to digital reproductions after public domain works in their collections. Such institutions include the J. Paul Getty Museum, the Metropolitan Museum, the Yale University Art Gallery, among others.[225] Many of these museums made the decision to switch to an open access model because it both aligned with their missions of supporting education and research and put less of a burden on staff to manage and monitor image rights.[226] Further, these policies are legally sound and work to make public what is properly in the public domain.

While a few museums are investing in projects to digitize their collections and produce platforms that grant users greater access to them, there is more work to be done in educating scholars, artists, and museum professionals in image permissions and the limits of copyright protections. Engaging with copyright histories and current practices will help to overcome the broad "confusion, doubt, and misinformation" that characterizes image permissions in the twenty-first century. With a greater understanding of copyright and its long-standing role in the production of knowledge, researchers and institutions can work together to overcome inconsistencies that inhibit and stifle the production and study of world visual cultures.

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[221] This statement echoes Brown's arguments in *Werckmeister v. Pierce & Bushnell Manufacturing Co.* (1894) in which he attempted to stress the mental labor rather than the mechanical labor that went into the productions of photographic art reproductions. See "Terms and Conditions," Museum of Fine Arts, Boston. http://www.mfa.org/collections/mfa-images/terms-and-conditions Accessed 23 March 23, 2017. Cited in Grischka Petri, "The Public Domain v. the Museum: The Limits of Copyright Reproductions of Two-Dimensional Works of Art" in *Journal of Conservation and Museum Studies* (2014). http://www.jcms-journal.com/articles/10.5334/jcms.1021217/ Accessed 23 March 23 2017. Petri provides an excellent review of debates about the copyright status of art reproductions of works in the public domain post-Bridgeman.

[222] See Kenneth D. Crews, "Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching" in *Fordham Intellectual Property Media & Entertainment Law Journal* (Jul. 2012), 795–834; and Jason Mazzone, *Copyfraud and Other Abuses of Intellectual Property* (Stanford: Stanford Law Books, an imprint of Stanford University Press, 2011). Both sources cited in Petri, "The Public Domain v. the Museum."

[223] See "Mission Statement," Museum of Fine Art, Boston. http://www.mfa.org/about/mission-statement Accessed 23 March 23 2017.

[224] On the revenue from image licensing and its relationship to museums' decisions to offer open access to their collections, see Kristin Kelly (for the Andrew W. Mellon Foundation), "Images of Works of Art in Museum Collections: The Experience of Open Access," 24. June 2013. https://www.clir.org/pubs/reports/pub157/pub157.pdf Accessed 23 March 2017. Cited in Petri.

[225] For a study of the open access policies that these and other institutions have pursued, see Kelly.

[226] On the relationship between open access policies and museums' missions, see Kelly, 26. On decreasing the burden on staff to manage image rights, see Kelly, 10.

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Chapter 3

"Photography VS The Press": *Falk v. Curtis Publishing Co.* (1901)

In February of 1900, *Scientific American* published an article entitled "New Practice in Photographic Copyright."[227] The bland title stood in stark contrast to the fiery rhetoric that followed, for the article began: "It has been a notorious fact for a long time that many photographic establishments have made a regular practice of levying a species of blackmail upon publishers, who have, unwittingly perhaps, published a copyrighted photograph without permission." Further, the anonymous author asserted that "[t]he penalty in many cases would amount to many thousands of dollars, while the photograph had, perhaps, no value whatever."[228] For the author, United States copyright law allowed photographers to perform a kind of perverse alchemy.[229] Photographs "with no value whatever," once reproduced by unsuspecting publishers, can be converted into "thousands of dollars" of undeserving profits for the photographer. However, the author noted that the tides were beginning to turn against these supposedly scheming photographers and offered as evidence a series of recent copyright cases in which judges had begun "reducing the exorbitant damages" that photographers could extract from publishers in copyright cases.[230] The author concluded the article by expressing hope that these new precedents would put an end to the "species of blackmail" that publishers had been subjected to ever since that "decision in a suit brought some years ago by the late Napoleon Sarony concerning a photograph of a British aesthete whose name attracts little attention now."[231]

The lawsuit that the author refers to above is of course the 1884 U.S Supreme Court case *Burrow-Giles Lithographic Company v. Sarony*, examined in detail in the preceding cases, that centered on a portrait of author and "aesthete" Oscar Wilde by studio photographer Napoleon Sarony (fig. 5). As discussed in our consideration of *Detroit Photograph Company v. Merchants' Publishing Co.* (1899), this momentous case affirmed the constitutionality of photographic copyright law. Consequently, the case also sustained the monetary penalty for violating a photographer's copyright, which required the infringer to forfeit one dollar for each "sheet" or copy of the reproduced image found in his or her possession.[232] This was hardly an unusual standard for determining penalties, for the same method of accounting—called the "per sheet penalty"— was applied in copyright cases involving books, maps, charts, and musical

[227] Portions of this article were reproduced from a "recent edition" of the New York *Sun,* suggesting the larger interest among the periodical press in the issue of photographic copyright law and the statutory penalties applied in cases of infringement. "New Practice in Photographic Copyright" in *Scientific American*, 17 Feb. 1900, 102.
[228] "New Practice in Photographic Copyright," 102.
[229] As Darcy Grimaldo Grigsby has pointed out, photography itself can be described as a kind of "alchemy in reverse," for the process involves the transformation of precious metals into a paper image. See Grigsby, "Negative-Positive Truths," in *Representations* (Winter 2011), 27. It is important to note, however, that the precious metals remain embedded in the paper print and are not entirely transformed in the process of printing.
[230] "New Practice in Photographic Copyright," 102. One of the cases that the author notes is in fact *Detroit Photograph Company v. Merchants' Publishing Company* (1899) examined in Chapter 1.
[231] Ibid.
[232] See *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright* (Washington, DC: Library of Congress, 1973), 34.

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compositions, and the dollar rate had been in place since 1802.[233] However, as the *Scientific American* article suggests, the assessment of monetary damages in photographic copyright cases had transformed from a minor to a major issue in the years following the Sarony case, and new procedures for evaluating them were taking hold in American courts by 1900.

Though seemingly technical and of little interest to the study of the history of photography, the assessment of penalties in photographic copyright infringement cases offers unexpected insight into the reception of commercial photographs at the turn of the twentieth century. In determining the penalty awarded in these cases, juries and judges were essentially asked to evaluate the reproduced photograph and the labor of the photographer who made it. As noted above, a statute existed to guide the accounting of penalties but it was open to interpretation like any other law and was construed differently over time.[234] An examination of the monetary penalties given or withheld in photographic copyright cases thus offers a means of assessing the perceived value, monetary and cultural, of the reproduced photographs.

A number of scholars, including Allan Sekula, Alan Trachtenberg, and Darcy Grimaldo Grigsby, have written on the relationship between American photography and money during the second half on the nineteenth century, especially the striking parallels between photography and paper currency.[235] In formulating their arguments, each of these authors turns to Oliver Wendell Holmes's enthusiastic writings on photography, primarily "The Stereoscope and the Stereograph" and "Doings of the Sunbeam" that appeared in *The Atlantic Monthly* in 1859 and 1863, respectively.[236] In these essays, Holmes argues that photographs, particularly stereographs and other mass produced photographs on card mounts, had become "banknotes" and a form of "social currency" in American society by the mid-nineteenth century.[237] While Holmes's witty commentary on the correspondences between photography and paper currency has opened up incisive analyses regarding the relationship between the photographic image and its referent, this chapter is less interested in the correspondences between photography and paper money than how monetary values were assigned to commercial photographs, particularly studio portraits, in the competitive visual marketplace at the end of the nineteenth century.

This chapter will trace the decline in penalties awarded in photographic copyright cases between 1895 and 1909 to assess broader shifts in the reception of commercial photographs during this period. In particular, this chapter will focus on lawsuits involving newspaper or magazine publishers that violated the copyright of commercial photographers. As evidenced by the heated

[233] Legal scholars Pamela Samuelson and Tara Wheatland note that the "per sheet penalty" was developed in lieu of more complex forms of accounting for the actual monetary damage done to the injured party, which could be difficult to prove. See Pamela Samuelson and Tara Wheatland, "Statutory Damages in Copyright Law: A Remedy in Need of Reform" in *William and Mary Law Review* vol. 51 (2009) 447, fn. 22. The 1802 amendment to the Copyright Act bumped the statutory penalty from fifty cents per sheet found in possession of the infringer to one dollar per sheet found in possession of the infringer. See *Copyright Enactments*, 22-26.

[234] As we will see in *Falk v. Curtis Publishing Co.*, the injured party recovered over 5,000 copies of the infringed photograph but the jury decided to award him a penalty of only $3,000.

[235] See Allan Sekula, "Traffic in Photographs" in *Art Journal* (Spring 1981), 15-25; Alan Trachtenberg, *Reading American Photographs: Images as History, Matthew Brady to Walker Evans* (New York: Hill and Wang, 1989), 18-20; and Grigsby, 16-38.

[236] Oliver Wendell Holmes, "The Stereoscope and the Stereograph" in *The Atlantic Monthly* (June 1859), 738-739 and Holmes, "Doings of the Sunbeam" in *The Atlantic Monthly* (July 1863), 1.

[237] See Holmes, "The Stereoscope and the Stereograph," 738 and Holmes, "Doings of the Sunbeam," 1.

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Scientific American article above, hostilities between photographers and the press publishers in copyright cases erupted during the 1890s and continued in the 1900s. The rising enmity between these two professions coincided with a significant innovation in photographic technology: the perfection and broad adoption of halftone printing. This photomechanical process allowed photographic images to be quickly and cheaply reproduced by the printing press alongside text in books and popular periodicals. [238] The "halftone revolution" brought about new forms of mass visual communication that persist to this day.[239]

While the arrival of halftone printing seemed to promise mutually beneficial business exchanges between commercial photographers and the press, some photographers found they were getting the raw end of the deal. In an 1895 article aptly titled "Photography VS the Press," the author argues that the photographer did not share equally in the "blending of interests" that came with the broad adoption of halftone printing, for press publishers "only grudgingly accorded the photographer proper credit for his share of the work."[240] Indeed, many periodical publishers were reluctant to compensate or give "proper credit" to photographers when reproducing their work. Despite the increased demand for and consumption of commercial photography with the expansion of halftone printing, studio photographers often did not benefit from this new visual economy. Rather, many established photographers found their prices and profits lagging as cheap, low-quality reproductions of their prints circulated widely in the popular press.[241]

To chart the uneasy convergence of photography and the press at the dawn of the halftone era, this chapter will focus on the work of Benjamin J. Falk, the embattled author of "Photography VS the Press." Though little remembered today, Falk was lauded as one of the premier portrait photographers of turn-of-the-century America and was a tireless promoter of photographic copyright law.[242] Falk began his photographic career in the 1870s; he first served as an assistant

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[238] On the technical aspects of halftone printing, see Bamber Gascoigne, *How to Identify Prints: A Complete Guide to Manual and Mechanical Processes from Woodcut to Inkjet* 2nd Ed. (New York: Thames & Hudson, 2004), 34.
[239] Neil Harris, "Iconography and Intellectual History: The Halftone Effect," in *Cultural Excursions: Marketing Appetites and Cultural Tastes in Modern America* (Chicago: University of Chicago Press, 1990), 307-308 and 316. It is important to note, as Harris does, that the advent of halftone printing did not spell the end of autographic forms of popular illustration, such as wood engraving. On the persistence of wood engraving in the United States through the turn of the twentieth century, see Joshua Brown, *Beyond the Lines: Pictorial Reporting, Everyday Life, and the Crisis of Gilded- Age America* (Berkeley: University of California Press, 2002), 239-242.
[240] Benjamin J. Falk, "Photography VS the Press" in *Wilson's Photographic Magazine* (Sept. 1895), 389.
[241] Benjamin J. Falk would make this point in a later report to the professional photographic community: "we call your attention again to the anomalous condition existing in this country to-day, whereby illustrated magazine, periodicals, and newspapers secure their most valuable illustrations by reproducing our work without remuneration to us—a remuneration which might, in some measure, counteract the loss we sustain by reason of their cheap reproductions having almost killed the sale to the public of our photographic originals." See Falk, "Annual Meeting and Report of the Copyright League," in *Wilson's Photographic Magazine* (March 1899), 136.
[242] Few scholars have examined Falk's work. Jane Gaines briefly considers the case *Falk v. Donaldson Lithographic Co.* in the context of her discussion of *Sarony v. Burrow-Giles Lithographic Co.* See Jane Gaines, *Contested Culture: The Image, The Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), 75-77. Legal scholar Christine Haight Farley mentions Falk's copyright activism in her article, "The Lingering Effects of Copyright's Response to the Invention of Photography" in *University of Pittsburgh Law Review* (2003-2004), 439-443. David S. Shields considers Falk's theatrical photographs as precursors to Hollywood film stills. See Shields, *Still: American Silent Motion Picture Photography* (Chicago: University of Chicago Press, 2013), 46-47. Shields also provides information about Falk on his informative and richly illustrated website related to theatrical photography of the late nineteenth century. See Shields, *Broadway Photographs: Photography and the American Scene.* University of South Carolina. 2006. http://broadway.cas.sc.edu/ Accessed 20 March 2017.

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to established studio photographer George G. Rockwood and then opened his own successful studio in New York City in 1877.[243] Falk specialized in portraits of theater actors and actresses, called theatrical portraits, which enjoyed immense popularity in the United States during the late nineteenth century.[244] Falk's success in the genre of theatrical portraits, however, made his work especially attractive to publishers, advertisers, and outright copyists looking to capitalize on the celebrity of his sitters. In response to the frequent uncredited reproduction of his work, Falk devoted much of his career to campaigning for improved photographic copyright laws. From the late 1880s to the 1910s, he initiated countless lawsuits against publishers that reproduced his work without permission, wrote articles for trade journals encouraging his fellow photographers to apply for and enforce their copyrights, founded the Photographers' Copyright League of America, and often went to Washington, DC to lobby on behalf of professional photographers.

Though Falk pursued a number of copyright cases against the press, this chapter will focus on *Falk v. Curtis Publishing Co.* (1901), which went to court as the damages in photographic copyright cases began to be evaluated in new ways.[245] Falk initiated this suit soon after discovering that one of his portraits of the popular actress Minnie Ashley (fig. 3) had been reproduced as a halftone (fig. 32) without his permission in the October 1899 issue of *The Ladies' Home Journal,* a widely-read women's magazine owned by Curtis Publishing Co.[246] The primary question in the case was not whether Falk's copyright had been violated—the various courts that heard the case agreed that it had—but rather how to assess the damages (if any) that Curtis Publishing Co. was required to forfeit to Falk. This case exemplifies the shift in how judges determined penalties in photographic copyright cases, as noted in the *Scientific American* article above, and the increasing difficulty that commercial photographers faced in asserting the value of their images before both legal courts and the court of public opinion at the turn of the twentieth century.

To account for the dwindling penalties awarded to photographers in copyright cases during this period, this chapter will begin by examining Falk's legal struggles against the press in the 1890s and the opinions issued by judges at various stages in *Falk v. Curtis Publishing Co.* Arguments posed by legal scholars regarding the strict assessment of damages during this period run short of fully explaining the dramatic drop in penalties in photographic copyright cases after 1895. To offer a more satisfactory understanding of this shift in legal practice, this chapter will examine transformations in the production and consumption of commercial photographs taking place in the 1890s and early 1900s. By assessing the mixed reception of halftone illustrations, the rising interest in candid representations of celebrities, and the indifferent attitude towards copyright law among a new generation of aspiring commercial photographers at the turn of the twentieth century, this chapter argues that the decline in penalties awarded to Falk in the late 1890s was part of a broader devaluation of commercial photography in popular American culture during this period.

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[243] A.L. Bowersox, "Photographers at Home and Abroad" in *The Photographic Times* (Aug. 1894), 149.

[244] On the production and popularity of theatrical portraits in the United States at the end of the nineteenth century, see Shields, 31-50 and Barbara McCandless, "The Portrait Studio and the Celebrity: Promoting the Art" in *Photography in Nineteenth-Century America* ed. Martha Sandweiss (New York: Abrams, 1991), 49-72.

[245] Two other instances in which Falk sued the press are *Press Pub v. Falk* (1894), involving a portrait of actress Marie Jansen, and *Falk v. City Item Printing Co* (1897), involving a portrait of dancer Lois Fuller.

[246] On the history and popularity of *The Ladies' Home Journal,* see Jennifer Scanlon, *Inarticulate Desires: The Ladies' Home Journal, Gender and the Promise of Consumer Culture* (New York: Routledge, 1995), 3-4.

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Before turning to the specifics of *Falk v. Curtis Publishing Co.,* it is important to first review the business practices of successful studio photographers of the 1890s and their thorny relationship with press publishers. The daily operations of a prominent studio photographer like Falk can be glimpsed in his detailed account books (figs. 33a and 33b) where Falk or one of his assistants entered the names and addresses of the various customers who came for portrait sittings, the photographic formats they desired, the number of prints requested, the form of payment, and other pertinent details.[247] While Falk is best known for his portraits of theater actors and actress, he also profited from photographing prominent members of New York society and travelers to the city interested in visiting his glamorous studio where the stars of the stage might be glimpsed. However, Falk's main business was in the creation and sale of celebrity portraits.

In dealing with theater actors, Falk followed a standard procedure that was widely employed by studio photographers of the day. Falk would photograph the actor in his studio for free (or at a reduced rate) and agree to provide him or her with gratuitous copies of the photographs. In exchange for his services, Falk secured the exclusive right to sell copies of these portraits to the public.[248] However, Falk did not sell the photographs himself and instead relied on a range of middlemen: specialized dealers, stationers, and street hawkers.[249] Falk kept sample books crammed with miniature versions of his numerous celebrity portraits (fig. 34) for this very purpose.[250] Dealers would leaf through these hefty volumes, note which portraits they wanted copies of and in which sizes, and Falk would provide the requested photographs.[251] Barbara McCandless estimates in her study of theatrical photography of this period that dealers sold several hundred thousand dollars' worth of photographic prints per year and that street hawkers brought in over a million dollars annually.[252] From this assessment, it is clear that the trade in celebrity portraits was a lucrative business in the United States at the end of the nineteenth century.

Given that Falk and other studio photographers engaged in the sale of theatrical portraits made a substantial portion of their profits from the sale of prints, it was damaging to their business when cheap halftone versions of their work circulated in popular periodicals without permission or a credit line. Though halftone reproductions of theatrical photographs lacked the quality of the originals (compare fig. 3 and fig. 32), a newspaper replete with halftones could be purchased for

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[247] Falk's studio records are housed at the New York Public Library and are a wonderful yet underused resource for studying the everyday business practices of a late nineteenth century studio photographer. See Benjamin Falk, "Record Books, Vol. 1-6," 1881-1917. Boxes 1-4. B.J. Falk Papers, 1881-1917. Rare Books and Manuscript Division, New York Public Library, New York, NY. Common photographic formats are imperial (10 x 7 inches), promenade (7 x 4 inches), and cabinet (8 x 6 inches).

[248] Falk and actress Marie Jansen describe the terms of this arrangement, which seems to have been secured by "custom" rather than formal legal contracts, in the case *Press Publishing Co. v. Falk* (1894) C.C.S.D.N.Y 59 F. 324.

[249] On the network of dealers in celebrity portraits that emerged in the 1880s, see McCandless, 68.

[250] See Benjamin J. Falk, "Illustrated Catalogue of Photographer's Negatives, v. 1-4," c. 1881-1900. Performing Arts Research Collections (Theater), New York Public Library, New York, NY.

[251] In some instances, these dealers took more than a look at these sample books. In the case *Falk v. Gast Lithograph and Engraving Co.*, one dealer re-photographed a sample image of well-known actress Julia Marlowe (the sample images did not bear copyright notices) and went on to sell large format versions. See *Falk v. Gast Lithograph and Engraving Co.* (1891) C.C.S.D. N.Y 48 F. 262. Falk prevailed in this case.

[252] McCandless, 68.

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pennies where a single mounted print could cost up to five dollars.[253] This is not to say that Falk entirely shunned the press, for his photographs were reproduced as halftones and credited to him in a number of periodicals, particularly those devoted to theater. [254] Falk likely profited from granting such periodicals the right to use his work, however, the sale of reproduction rights does not seem to have been a major source of income for him. In general, the press was a drain on rather than a boon to his business.

To protect their bottom line and gain proper recognition for their work, a number of prominent studio photographers of the 1880s and 1890s began to sue newspapers and magazines for infringing upon their copyrights. In the beginning at least, a number triumphed and were well compensated for their efforts. In the decade following *Burrow-Giles Lithographic Company v. Sarony* (1884), penalties were rarely contested in photographic copyright cases.[255] The silence on this matter suggests that the standard evaluation of one dollar per copy found in possession of the infringer was generally accepted even as it was almost certainly unpopular among publishers required to pay the forfeiture. It is also likely that few legal disputes over penalties occurred during this period because infringers frequently opted to settle out of court with photographers.[256] This route would have appealed to the proprietors of popular newspapers and magazines that had high circulation numbers and thereby faced steep penalties based on the "per sheet penalty." By making arrangements with the injured photographer outside of court, offending publishers had an opportunity to negotiate down potentially lofty penalties. Such was the case in *Press Publishing Co. v. Falk* (1894) in which the company that owned the New York *World,* the enormously popular newspaper published by Joseph Pulitzer, attempted to prevent Falk from bringing a copyright case against them after the newspaper printed a halftone reproduction of one of his portraits of well-known theater actress Marie Jansen. Falk alleged that the *World* had printed 260,183 copies of his photograph and was thus owed damages in the dizzying amount of $260,183. While the judge rejected Press Publishing Company's attempt to dismiss the case, there is no record of it proceeding to trial presumably because the *World* chose to settle with Falk privately for a smaller sum rather than risk paying the full penalty that Falk had levelled against the paper.[257]

The fact that an individual photographer like Falk could confidently allege such high penalties from the press was no small feat, for the press wielded incredible power in the United States during the late nineteenth century. William Randolph Hearst, millionaire publisher of the New York *Journal* and other popular urban dailies, asserted the influence of his newspaper in its

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[253] Ibid., 67.

[254] Falk appears to have developed a good relationship with the widely read women's periodical *Godey's Magazine* in the 1890s. When his photographs appeared in this periodical, they were accompanied by his name and copyright. For example, see Beaumont Fletcher, "The Art of Julia Marlowe-Taber" in *Godey's Magazine* (Jun. 1896), 589-598. His work also appeared regularly in the *New York Dramatic Mirror*, a theatrical trade journal.

[255] I have located only one photographic copyright case in which penalties are contested before 1899. In the case *Thornton v. Schreiber* (1888) the assignment of penalties was disputed because the copies of the infringed photograph, entitled *The Mother Elephant 'Hebe' and her Baby 'Americus,'* were not found in possession of the defendant but rather in a storehouse owned by the defendant's employer, Sharpless & Sons. This case is cited in *Bolles v. Outing Co.* and *Falk v. Curtis Publishing Co.* For a brief but useful overview of this case, see Peter Decherney, "Copyright Dupes: Piracy and New Media in *Edison v. Lubin* (1903)" in *Film History: An International Journal* (2007), 111-112.

[256] That infringers frequently opted to settle out of court is noted in "New Practice in Photographic Copyright," 2.

[257] *Press Publishing Co. v. Falk* (1894) 59 F. 324.

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motto: “While others talk, the *Journal* Acts.” Indeed, Hearst not only reported the news but sought to create it—most famously agitating for the Spanish-American War—through the paper’s ability to sway the public.[258] Compared to the political and economic might of the newspapers, studio photographers were small fry. During the 1880s and early 1890s, however, the law afforded a unique arena in which photographers could take on the giants of the press. In the words of Falk, these copyright cases were a struggle of “Might against Right.”[259]

In the wake of high profile and high stakes cases like *Press Publishing Co. v. Falk* in the 1890s, press publishers began to organize to limit the penalties that aggrieved photographers could bring against them in court.[260] The Newspaper Union, a group of powerful newspaper publishers primarily based in New York City, joined forces to lobby Congress to alter the penalty clause of the Copyright Act in their favor. The result of this effort was an amendment to the Copyright Act enacted in March of 1895 that set specific restrictions on the penalties to be paid in cases involving photographs. The revised statue read: “That in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, this sum to be recovered in any action…shall be not less than one hundred dollars, nor more than five thousand dollars.”[261] With penalties capped at $5,000, large publishers no longer had to worry about paying staggering sums to photographers, either in or outside of the court, in copyright cases.

For some commercial photographers, this amendment amounted to nothing less than having “the right to steal from photographers legalized by the United States Government.”[262] From their perspective, this limit to penalties gave large publishers less reason to pause before reproducing copyrighted photographic works. Further, because the reduced penalties applied only to photographs, the amendment suggested that the work of photographers was not as esteemed as other cultural forms covered by copyright law, such as prints or books. Indeed, this amendment and the little opposition it encountered outside a small segment of the professional photographic community provided a worrisome indicator that commercial photographs were losing value in the eyes of lawmakers and the broader public at the turn of the century.

In response to the perceived injustice of the 1895 amendment to the Copyright Act, a group of concerned photographers led by Falk established the Photographers’ Copyright League of

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[258] Hearst is thought to have telegrammed newspaper artist Frederic Remington, who was stationed in Cuba awaiting the first signs of action, “You furnish the pictures, and I’ll furnish the war.” Though several scholars have contested this story as legend, it nonetheless suggests the wide-ranging power ascribed to the popular press and Hearst’s influence during this period. See Christopher Daly, *Covering America: A Narrative History of a Nation’s Journalism* (Amherst: University of Massachusetts Press, 2012), 132-134.

[259] Falk, “Photography VS the Press,” 389.

[260] Don Carlos Seitz, who worked at the New York *World* as an advertising and business manager, recalls another copyright case involving a photograph by the Pach Brothers as motivating the formation of the Newspaper Union. See “Stenographic Report of the Proceedings of the Librarian’s Conference on Copyright, 1st Session, in New York City, May 31-June 2, 1905” in *Legislative History of the 1909 Copyright Act* (Vol. 1) ed. E. Fulton Brylawski and Abe A. Goldman (South Hackensack, NJ: Fred B. Rothman & Co., 1976), 22.

[261] *Copyright Enactment,* 56. Reproductions of artworks, photographic and otherwise, were subject to different copyright laws, which is why they are excluded in the amended statue. On copyright issues related to art reproductions, see Chapter 2.

[262] Photographers’ Copyright League of America, “Concerning Copyright” in *Wilson’s Photographic Magazine* (March 1895), 221.

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America (PCLA) in 1895.[263] Founding members included some of the most prominent New York-based photographers of the time: Napoleon Sarony, James L. Breese, Charles E. Bolles, and George G. Rockwood.[264] Membership soon expanded to include photographers from across the United States, however the PCLA would remain a small organization primarily composed of established studio photographers at the peak of their careers whose popular works were the frequent the target of copyists.[265] The stated mission of the PCLA was to present a "united front" against the powerful press and other copyists and to pool resources to prosecute infringers who violated the copyright of members. The PCLA proposed to "defray all expenses" when members pursued a case and "in return, so as to make it [the PCLA] self-supporting, a fair percentage of all recoveries so obtained be turned into the treasury of the organization."[266] Though a clever system for enforcing photographic copyright, the PCLA encountered difficulty in recruiting members and was never able to match the power of the Newspaper Union. Nonetheless, Falk and other stalwart members kept the PCLA alive through the 1910s and continued its struggle against the press and other infringers.

Though the 1895 amendment to the Copyright Act dealt a considerable blow to photographers seeking to prevent the illicit reproduction of their work, the situation worsened in 1899 when Falk initiated his suit against Curtis Publishing Company. This lengthy and expensive case was heard in several courts over nearly two years and can be traced through a complex series of interlinking legal documents: summons, replevins, demurrers, motions, amendments, opinions, and appeals. Ultimately, this paper trail allows us to recover the legal logic that led to unexpectedly exacting and narrow interpretations of the penalty clause of the Copyright Act in the years after 1895. Indeed, this shift in the legal evaluation of penalties in photographic copyright cases was dramatic: where Falk could confidently allege $260,183 in penalties in *Press Publishing Co. v. Falk* in 1894 and negotiate an undisclosed sum in the settlement, he would fight (and ultimately fail) to recoup $3,000 in *Falk v. Curtis Publishing Co.* in 1899.

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Though PCLA frequently presented the press as "unprincipled" pirates, the act of infringement that launched *Falk v. Curtis Publishing Co.* was less likely a deliberate affront to the photographic profession than an accident committed in the rush to meet a deadline.[267] While the details of how the Curtis Publishing Co. came to reproduce Falk's portrait of Minnie Ashley in *The Ladies' Home Journal* are not documented in case records, we can imagine a probable scenario. First, it is important to note that the portrait of Ashley accompanies a one-page essay

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[263] Falk had been trying to organize American photographers around the issue of copyright since the late 1880s. See, for example, Falk, "Improved Copyright for Photographers" in *The Photographic Times and American Photographer* (Nov. 1888), 511-512.
[264] "Concerning Copyright," 223.
[265] Falk frequently lamented the lack of interest in the PCLA among greater numbers of studio photographers of America. See, for example, Falk, "Annual Meeting and Report of the Copyright League" in *Wilson's Photographic Magazine* (Mar. 1899), 135. As will be discussed in the conclusion to this chapter, a new generation of photographers coming of age in the 1890s were less concerned with their intellectual property rights and would, in some cases, actively withhold their copyrights as a strategy to further their careers.
[266] Ibid., 222.
[267] Charles E. Bolles (Secretary of the Photographic Copyright League of America), "A Copyright Crisis" in *Wilson's Photographic Magazine* (March 1898), 98.

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by Rudyard Kipling entitled "The American Girl," and is one of seven small halftone portraits of unnamed young white women that frame the text (fig. 35).[268] These portraits are not intended as likenesses of specific individuals but rather as general illustrations of the type of "American girl" Kipling describes in his short essay. In this context, it is not hard to conceive that this illustration scheme came about as a frantic editor attempted to finalize the layout for the article before it went to press. With too little time to craft wood engravings of pretty "American girl[s]," the editor may have sent an errand boy out to the local picture dealer or corner street hawker to purchase an assortment of photographic portraits of chorus girls or models who were attractive but not recognizable.[269] The selected portraits then would have been handed off to the magazine's art department and re-photographed with the aid of a halftone screen to produce a halftone negative that could be used to reproduce copies of the original photograph.[270] Like typical photographic negatives, the halftone negative could be retouched in a number of ways to achieve specific effects. For example, "American girl" portraits were tooled into heart shapes. All told, the transformation of Falk's original silver gelatin portrait of Ashley into a halftone of a nameless woman would have taken less than a day's work.[271] In terms of attending to the copyright of the photographs, there may not enough time to contact and negotiate with the photographers. In any case, the editors probably assumed it was unlikely that the photographers would notice the infringing copies of their work or spend the money to press charges.

However, Falk did notice the illicit reproduction of his portrait of Minnie Ashley in *The Ladies' Home Journal* and possessed both the conviction and capital to take Curtis Publishing Co. to court. *Falk v. Curtis Publishing Co.* was thus initiated on September 29, 1899 when Falk's lawyer, Samuel Hyneman, issued two writs to Curtis Publishing Co.: one was a summons to appear in court for allegedly violating Falk's copyright and the other was a replevin, a legal order, to retrieve the copies of the reproduced photograph in possession of Curtis Publishing Co. Through the power of the replevin, Curtis Publishing Co. forfeited to Falk over 5,000 copies of *The Ladies Home Journal* still held in their offices or warehouses that featured the offending photograph and thus enabled Falk to sue for $5,000, the maximum penalty permitted after the 1895 amendment to the Copyright Act.

Despite Falk's strong show of evidence, the case was almost dropped before it began. Lawyers for Curtis Publishing Co. immediately filed a demurrer to dismiss the claims laid out in Falk's complaint and to squash the potentially costly suit before it went to trial. Though Curtis Publishing Co. seemed to have little room to maneuver, its lawyers came up with ten points on which to challenge Falk's claims.[272] Judge George M. Dallas of the Circuit Court of

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[268] Rudyard Kipling, "The American Girl" in *The Ladies' Home Journal* (Oct. 1899), 5.

[269] The process of producing a single wood engraving was time-consuming and laborious. Numerous engravers typically worked on a given image, often parsed into separate blocks, and had to individually parse each of the miniscule lines that made of the print surface. As Joshua Brown estimates, a full-page wood engraving would take around eight hours for a team to engrave and this does not include the preparatory work involved. See Browne, 39.

[270] For a description of the halftone process, see Helena E. Wright, "Photography in the Printing Press: The Photomechanical Revolution," 33-34 in *Presenting Pictures* ed. Bernard Finn (London: Science Museum, 2004).

[271] For a description of the images, see Falk's plaintiff statement filed October 11, 1898 and kept with federal records of *Falk v. Curtis Publishing Co.* This was one of several portraits that Falk made of Minnie Ashley in the last year of the nineteenth century. She was active on the stage from about 1892-1902 and retired after her marriage to wealthy politician William Astor Chanler. For more on Minnie Ashley's theater career, see Shields, "Minnie Ashley," *Broadway Photographs.* http://broadway.cas.sc.edu/content/minnie-ashley Accessed 20 March 2017.

[272] Demurrer filed by Curtis Publishing Co. October 26, 1899 in *Falk v. Curtis Publishing Co.,* 98 F. 989 (1900)

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Massachusetts issued an opinion on the demurrer on January 4, 1900 that tore down all of Curtis Publishing Co.'s defenses except for one. This single, seemingly trivial point would form the key contention throughout the case. This statement in the demurrer read: "the amount of the penalty recoverable is limited to the number of copies actually found in the possession of defendant before suit brought, and the Statement does not aver that any were so found."[273] At first glance, this objection to Falk's claims makes little sense given that he reported to have recovered through legal means over 5,000 copies of the infringed photograph from Curtis Publishing Co. However, a recent photographic copyright case decided by the Supreme Court, *Bolles v. Outing Co.* (1899), had established more exacting criteria for which copies counted towards the assessment of damages.

Bolles v. Outing Co. was initiated in 1894 by Brooklyn-based photographer Charles Bolles, one of Falk's colleagues and fellow member of the PCLA. Bolles sued Outing Co., proprietor of a sporting magazine called *The Outing,* after discovering that his copyrighted photograph of a yacht called The Vigilant had been reproduced without his permission, credit, or payment in the pages of the publication. As evidence that his copyright had been violated, Bolles purchased a single copy of the magazine that featured the infringing image. As the case worked its way through the lower courts and ultimately to the Supreme Court, intense scrutiny was applied to the clause regarding the assignment of penalties in the Copyright Act. This clause read: "he [the infringer] shall forfeit to the proprietor all the plates on which the same [the copyrighted image] shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession." In particular, judges focused on the phrase "found in his possession." Did that mean all copies put into circulation by the infringer? Or only those physical copies forfeited by the infringer? And when did the copies need to be found?

Ultimately, the United States Supreme Court justices determined that the penalty was "limited to such [copies] as are found in, and not simply traced to, the possession of the defendant."[274] Further, and more important for our consideration of *Falk v. Curtis Publishing Co.,* the Supreme Court justices affirmed an additional check regarding which copies counted toward the penalty: "We are of the opinion that the section means to affix the penalty only when the sheets are shown to have been discovered or detected in the possession of the defendant *prior to* the bringing of the suit."[275] This reading of the law restricted which copies count towards the penalty to only those found in possession of the infringer "prior to the bringing of the suit." For the justices, it was logical for the injured party to retrieve the infringing copies through the action of a replevin before filing a suit because a case could not proceed without first establishing evidence of infringement. The term "found" is interpreted literally here and fixed in the past tense. Photographers thus could not report the finding of additional copies after filing a complaint, but must have already found them. Following this narrow interpretation of the penalty clause of the Copyright Act, the Supreme Court justices determined that Bolles could seek only $1 in penalties from Outing Co. based on the single copy of the magazine he had purchased

[273]Ibid.
[274] *Bolles v. Outing Co.* 20 S.Ct. 94, 175 U.S. 262, 44 L.E. 156 (1899)
[275] From the opinion of the Court of Appeals of the Second Circuit 77 F. 966 (2d. Cir. 1897), whose opinion the Supreme Court affirmed and cited in *Bolles v. Outing Co.* (1899). Emphasis mine.

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before filing a complaint. Needless to say, photographers following the case, including Falk, were outraged by the decision that seemed yet another attack on the value of their work.[276]

Returning to the demurrer issued by Curtis Publishing Co. with the recent precedent of *Bolles v. Outing Co.* in mind, the argument that "the amount of the penalty recoverable is limited to the number of copies actually found in the possession of defendant before suit brought" takes on a new urgency and the word "before" appears to spell trouble for Falk. Thinking back to the start of the case, we will recall that Falk's lawyer sent two writs *simultaneously* to Curtis Publishing Co. on September 29, 1899: an order to appear in court and an order to recover copies of the infringing photograph from the publisher. Based on the precedents set by *Bolles v. Outing Co.*, Falk's lawyer may have acted too swiftly in bringing an action against Curtis Publishing Co. without first seizing the infringing copies. Keenly aware of the recent decision in *Bolles v. Outing Co.*, Judge Dallas cites the case in his opinion of the demurrer and expresses his concern regarding the timing of Falk's recovery of copies of the infringing photograph. In an attempt to clear up the question, Judge Dallas gave Falk and his lawyer twenty days to amend their complaint to better document the timeframe in which the infringing copies were recovered from Curtis Publishing Co.[277] When Falk's lawyer misleadingly averred that the forfeiture of the infringing copies had preceded his call for legal action against Curtis Publishing Co., Judge Dallas dismissed the demurrer and allowed the case to proceed to trial.[278]

On April 16, 1900 a jury heard *Falk v. Curtis Publishing Co.* in Philadelphia and determined that Falk's copyright had been violated by Curtis Publishing Co. and awarded him $3,000 in penalties.[279] Falk's victory was short-lived, however, for the lawyers for Curtis Publishing Co. immediately issued a motion for a judgment *non obstante veredicto,* a motion for the judge to reverse the jury's decision based on the belief that it does not accord with the law. Judge John Bayard McPherson reviewed the motion and filed his opinion on July 2, 1900. Thorough and thoughtful, Judge McPherson's opinion echoes Judge Dallas's earlier misgivings about the timeframe in which the copies were recovered yet also critiques the vagueness of the Copyright Act regarding the procedure for recovering penalties.

The two central points from the motion for a judgment *non obstante veredicto* that Judge McPherson considers in his opinion are as follows:

> (10) The pecuniary penalty sued for does not attach to alleged infringing copies that may have been printed, sold, offered for sale, or at some time in possession of the defendant, but solely to those infringing copies, if any, which were actually found in possession of defendant, and became the property of plaintiff by actual seizure *before* suit brought.

[276] Members of the PCLA had contributed funds to Bolles to pursue the case and had a serious stake in its outcome. Falk, "Annual Meeting and Report of the Copyright League," 136.

[277] *Falk v. Curtis Publishing Co.* 98 F. 989 (1900)

[278] Falk's lawyer simply amended the claim to say that the seizure of the infringing copies happened before the case was brought, even though they happened simultaneously. See the Amended Plaintiff Statement filed January 4, 1900 in *Falk v. Curtis Publishing Co.* 98 F. 989 (1900).

[279] As discussed earlier, the jury was not required to award the plaintiff the full penalty of one dollar for each copy of the infringing photograph found in possession of the defendant, but could use its discretion to award the penalty it thought best.

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> (11) In the statue imposing the pecuniary penalty sued for, the word "found" means that there must be a time *before* the cause of action accrues at which the infringing copies are actually found in the possession of defendant, for the purposes of forfeiture and seizure. In other words, the pecuniary punishment does not accrue, nor that cause of action arise, until such forfeiture and seizure.[280]

Both of these arguments, with their emphasis on the necessity of finding the infringing copies before taking legal action, stem from the precedent set by *Bolles v. Outing Co.* (1899). While Judge McPherson turned to this case in coming to his own decision in *Falk v. Curtis Publishing Co.,* he admitted that the "precise meaning and scope" of the penalty section of the Copyright Act had not "yet been definitely ascertained."[281] Primarily he takes issue with the fact that the Copyright Act does not provide a "satisfactory method or procedure" that the injured party can follow to enforce the penalties provided by the act.[282] As he admits, "[t]he utterances of the supreme court upon this subject are, I think, not easy to reconcile."[283] Essentially, Judge McPherson finds himself conflicted over following the interpretation of the penal clause of the Copyright Act laid down by the Supreme Court in *Bolles v. Outing Co.* because he finds the procedure it prescribes vague and difficult to implement.[284]

Though Judge McPherson acknowledges the challenges Falk and his lawyers faced in filing for monetary damages, he ultimately reaffirms the interpretation of the law put forward by the U.S. Supreme Court. He concludes that Falk had "su[ed] prematurely" and that "no action for the penalty could be brought until the infringing publications have been 'found.'"[285] Curtis Publishing Co.'s motion for a judgment *non obstante veredicto* prevailed and the penalty of $3,000 that the jury had awarded Falk in April was revoked. Though Falk and his lawyers appealed Judge McPherson's decision, the Appeals Court upheld it on February 2, 1901.[286] After nearly two years of legal volleying and erudite debate over the seemingly unremarkable phrase "found in his possession," Falk relented and *Falk v. Curtis Publishing Co.* came to an unfruitful conclusion for the photographer.

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Having followed the course of *Falk v. Curtis Publishing Co.* as well as *Bolles v. Outing Co.*, it seems clear that American judges were looking at photographs and photographic copyright law in a new way as the nineteenth century faded into the twentieth. Where Sarony, Falk, and other commercial photographers were able to press for substantial penalties in the 1880s and early 1890s, they found themselves stymied by narrow and rigid interpretations of the penal clause of the Copyright Act at the turn of the century. While legal scholars have argued that judges strictly interpreted this aspect of the Copyright Act because of the "quasi-criminal" nature of penalties,

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[280] *Falk v. Curtis Pub. Co.* (102 F. 967) Circuit Court, E.D. Pennsylvania, July 2, 1900. Emphasis mine.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] *Falk v. Curtis Pub. Co.* (107 F. 126) Circuit Court of Appeals Third Circuit, Feb. 20, 1901.

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this explanation fails to address why this construction of the law began to be applied to photographic copyright cases only in the late 1890s and early 1900s. [287]

To better grasp why penalties in *Falk v. Curtis Publishing Co.* and other photographic copyright cases were restricted during this period, the remainder of this chapter will consider cultural factors related to the production and consumption of commercial photographs that may have spurred this shift in legal practice. Judges in the late nineteenth century based their opinions (as they do today) not only on statutory law and legal precedent but also on prevailing trends in popular culture and even personal preferences.[288] By examining the reception of halftone illustrations, stylistic developments in celebrity portraiture, and the indifference among a new generation of commercial photographers towards exerting their copyright at the turn of the twentieth century, we can begin to account for the diminished reception and devaluation of commercial photographs within American courtrooms and beyond.

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On March 4, 1880 the New York *Daily Graphic* became the first popular periodical to publish a halftone within its pages.[289] The image, entitled *A Scene in Shantytown, New York* (fig. 36), was grainy and overexposed but initiated a new method of illustration that continues to be used in newspapers and magazines. While photography and the popular press seem an inseparable pairing today, this combination had an uncertain start in the late nineteenth century. Indeed, as Michael Carlebach has shown, *A Scene in Shantytown, New York* was featured in a spread alongside many other illustration processes used by the newspaper (fig. 37), including wood engraving, steel engraving, and lithography. Further, *A Scene in Shantytown, New York* did not take center stage as a triumphant upstart among this array of illustration processes but occupied a tentative place in the bottom left corner of the spread.[290] While photographic reproductions are commonly thought to have replaced older illustration technologies at the end of the nineteenth century, the constellation of illustrations processes provided by the *Daily Graphic* suggests the co-existence and interaction among these varied modes of illustration.[291] To understand how halftones fit within this complex "image ecology," it is first necessary to review the history and methods of pictorial journalism in the United States.[292]

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[287] See Samuelson and Wheatland, 447-48. The exception being the photographic copyright case *Thornton v. Schreiber* (1889) in which the phrase "found in possession" was interpreted strictly. What is odd is that this case seemed to go uncited until the late 1890s when it resurfaces in *Bolles v. Outing Co., Falk v. Curtis Publishing Co.,* and other cases despite the trial of other photographic copyright cases that involved penalties between 1889 and 1899.

[288] On the links between legal opinion and popular culture, see Gaines, 11-14

[289] On this image, see Michael L. Carlebach, *The Origins of Photojournalism in America* (Washington, DC: Smithsonian Institution Press, 1992), 161-162 and Harris, 306.

[290] See Carlebach, *The Origins of Photojournalism,* 161-162.

[291] William M. Ivins, Jr., among others, proposes that photographic reproductions displaced commercial engraving and other autographic print practices. See Ivins, *Prints and Visual Communication* (Cambridge: MIT Press, 1978). On the co-existence and interactions between prints and photographs during the second half of the nineteenth century, see Stephan Bann, *Parallel Lines: Printmakers, Painters, and Photographers in Nineteenth-Century France* (New Haven: Yale University Press, 2001); Michael Gaudio, *Engraving the Savage: The New World and Techniques of Civilization* (Minneapolis: University of Minnesota Press, 2008), 127-132; and Michael Leja, "Fortified Images for the Mass" in *Art Journal* (Winter 2011), 66.

[292] I borrow the phrase "image ecology" from Michael Leja. See Leja, 60-83.

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Illustrations were not a common feature of newspapers and magazines in the United States until the 1830s. The early publishers of the penny press, including James Gordon Bennett of the New York *Herald,* began to feature occasional woodcuts and wood engravings depicting topical events during this period (fig. 38).[293] However, these illustration methods were labor intensive and expensive to produce, so they remained only an infrequent feature of the popular press until the 1850s. The middle decade of the nineteenth century saw the emergence of two of the most lavishly illustrated popular periodicals: *Harper's Monthly Magazine* and the weekly *Frank Leslie's Illustrated Newspaper*. With new printing technologies, improved transportation networks, and a growing literate public, the time was ripe for the success of the illustrated press in the United States.[294] Under these conditions, both *Harper's Monthly Magazine* and *Frank Leslie's Illustrated Newspaper* flourished and captivated their middle-class readers with an abundance of wood engravings that documented current events and everyday life.[295]

The wood engraving *Our National Exercise—Skating* (fig. 39a), which was published in *Frank Leslie's Illustrated Newspaper* in January of 1866, offers an opportunity to consider the process and visual characteristics of wood engravings. This particular illustration had its origins in the pen of "special artist" Winslow Homer, who worked as an artist-correspondent for the illustrated press during the 1860s and 1870s.[296] Once Homer had completed a pen sketch of this dynamic scene of urbanites braving the ice, the drawing would have passed through a number of different stages before appearing in the pages of *Leslie's.* As Joshua Brown explains, the drawing would first be approved by the art superintendent and then re-drawn by an in-house artist for transfer to a woodblock(s) made from the durable Turkish boxwood tree. From there, various engravers would begin the tedious process of cutting countless fine lines into the end grain of the woodblock to produce the desired image. [297] This dynamic network of hand engraved lines, clearly visible on the surface of the published print, formed complex scenes with a rich tonal range, as seen in the stripped border of the central figure's billowing skirt (fig. 39b).

The same process used to produce the above print of carefree skaters was employed to capture the horrific events of the Civil War, which the illustrated press covered extensively in both image and text. During the course of the conflict, periodicals like *Harper's* and *Leslie's* sent special artists to the front lines to sketch the action as well as camp life. The special artists would

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[293] Joshua Brown provides a useful overview of the history of antebellum illustrated news in the United States in *Beyond the Lines.* On the use of illustration by the penny press, see Brown, 11-12.

[294] Improvements in transportation during the 1850s include expanded railway systems as well as postal regulations that lowered the cost of circulating the news. Among the innovations in printing that led to the success of the pictorial press in the 1850s were the adoption of the steam press that increasing production speeds and new paper-making technologies that lowered the cost of newsprint. See Brown, 22-23.

[295] *Frank Leslie's Illustrated Newspaper* was founded by Henry Carter, better known as Frank Leslie. Leslie had his start in the newspaper business at the *Illustrated London News*, the first successful illustrated newspaper that began publishing in 1842. Leslie worked there as an engraver between 1842-1846 before moving to New York City where he worked as an engraver for the likes of P.T. Barnum before starting his own illustrated newspapers in the 1850s. For a detailed account of Frank Leslie's career, see Brown, 17-24.

[296] On Winslow Homer's work for the periodical press, see David Tatham, *Winslow Homer and The Pictorial Press* (Syracuse: Syracuse University Press, 2003). See also, Elizabeth Johns, *Winslow Homer: The Nature of Observation* (Berkeley: University of California Press, 2002), 12-51.

[297] As Brown points out, engravers often specialized in certain pictorial forms—figures, foliage, drapery—and a given woodblock often passed through several hands before completion. See Brown, 35- 38.

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forward their sketches to the city offices of the papers where their drawings would be translated to wood engravings and then distributed to the homes of thousands of anxious readers.[298] While the photographs of the Civil War by Mathew Brady, Alexander Gardner, Timothy O'Sullivan, George Barnard, and others are better known to readers in the twenty-first century, the wood engravings that appeared in the illustrated press were more familiar and accessible to Americans who lived through the conflict.[299] During the 1860s, photographs could not be mass reproduced and circulated as quickly or cost-effectively as wood engravings. Further, film speeds and the heft of camera equipment limited photographers to shooting the aftermath of battles. Special artists, on the other hand, could get close to the fighting and capture the height of action on their sketchpads as evidenced by the dramatic rendering of the Battle of Gettysburg (fig. 40) by A.R. Waud that appeared in *Harper's Weekly* in August of 1863.

While wood engravings continued to dominate the illustrated press through the 1880s, photographic images in the form of halftones gained popularity among some publishers and audiences in the 1890s. Halftones appealed to publishers because they could be produced more swiftly and cheaply than wood engravings. Where the production of wood engravings required a large team of artists and engravers, a halftone could be produced by simply re-photographing and minimally retouching a source photograph provided by either one of the paper's in-house photographers (a new position in the late 1890s), a freelance news photographer, or a professional photographer.[300] Some members of the press also promoted halftones as more faithful to reality than wood engravings, for they were the product of the camera, a machine, rather than the interpretive hands of special artists and engravers.[301]

While halftones were touted by some as a more efficient and objective form of periodical illustration, other publishers and readers rejected halftones as threatening the intelligence and taste of the American public. This criticism stemmed from both the perceived poor quality of halftone illustrations and their association with an emerging form of journalism that was in ascendance at the end of the nineteenth century. Called "new journalism" or "yellow journalism," as it is better known today, this form of the popular press was pioneered by Joseph Pulitzer at the New York *World* and adopted by many others during the 1880s and 1890s, most famously by Pulitzer's rival William Randolph Hearst of the New York *Journal*.[302] Sensational was and is the primary adjective associated with this style of journalism, for these papers featured vivid, titillating reporting that revealed the injustices and scandals of everyday urban life.[303] As Michael Schudson has observed in his study of American newspapers, the publications associated with "new journalism" were also sensational in terms of the eye-catching visual style

[298] Ibid., 48-52.
[299] Ibid., 48-49.
[300] On the rise of press photographers, see Carlebach, *American Photojournalism Comes of Age* (Washington, DC: Smithsonian Institution Press), 1-9.
[301] On claims of the accuracy of halftone reproductions, see Carlebach, *American Photojournalism Comes of Age,* 28-30. Michael Gaudio also remarks on the "mechanical objectivity" ascribed to halftones in comparison to wood engravings during the end of the nineteenth century. See Gaudio, 137.
[302] On the rise of "yellow journalism," see Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978), 88-106 and Daly,114-138.
[303] On sensationalism, see Schudson, 95 and Daly, 122-126. Schudson notes that reporting on urban scandals had its roots in the penny press of the 1830s and 1840s.

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in which they presented the news.[304] Bigger and bolder headlines, the extensive use of illustrations (both wood engravings and halftones, fig. 41), and the occasional splash of color (fig. 42) were innovations the "new journalism" deployed to attract audiences, especially the large populations of working class and immigrant readers with limited English literacy.[305] The sensational style popularized by Pulitzer and Hearst was soon adopted by a number of new magazines, primarily *Cosmopolitan* (founded 1886), *Munsey's Magazine* (founded 1889), and *McClure's* (founded 1893), that were eager to boost their circulation rates.[306]

Though the advocates of this new style of journalism positioned themselves as champions of the people and reformers of corrupt American metropoles, others disapproved of this transformation of the press.[307] One of the features of sensational periodicals that critics repeatedly attacked was the prevalence of illustrations, especially halftones.[308] A typical critique of the corrupting effects of halftones appeared in the magazine *Current Literature* in 1897. The article warns that the American public had been overtaken by a "picture virus" that "raged among the people and ravaged magazine literature."[309] Further, this "public malady" brought about by the craze for halftones had eroded the magazine industry in terms of "the purity of its ideals and the quality of its contributors."[310] In this article, the rise of halftone printing is imagined satirically as a public health crisis that has sullied the "purity of ideals" of the press and its readers. By prioritizing halftone illustrations over textual content, artificial entertainment over serious "literature," the magazine industry was guilty, in the eyes of *Current Literature,* of degrading the minds and taste of it readers.

Another periodical, *The Independent,* featured a critique of halftones in 1895 that framed the extensive use of illustrations by the press explicitly in classed terms. The article, entitled "Cheap Magazines," argues that "pictures, at least pictures not meant for instruction but merely attractiveness, will give a paper popularity among a very numerous class, especially if they border on sensational."[311] The "numerous class" here likely refers to the large populations of immigrants who came to the United States at the end of the nineteenth century. [312] Many

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[304] Schudson, 95-98.

[305] Ibid., 97-98. This new attention to graphic design and illustration is especially evident in the Sunday editions of these papers. The pages of the Sunday editions are densely populated with illustrations—bright cartoons, wood engravings, halftones—and feature much less textual content than the weekday editions.

[306] On the rise of *Cosmopolitan Munsey's Magazine,* and *McClure's* in the 1880s and 1890s, especially in relation to the more conservative "family house magazines" of the postbellum period (*e.g. The Century Illustrated* and *Harper's Monthly*), see Matthew Schneirov, *The Dream of a New Social Order: Popular Magazine in America, 1893-1914* (New York: Columbia University Press, 1994).

[307] Joseph Pulitzer considered *The New York World* a "daily schoolhouse and daily forum—both a daily teacher and a daily tribune." See New York *World,* 11 Oct. 1891. Cited in Schudson, 98.

[308] Both Neil Harris and Michael Gaudio address critiques of "over-illustration" in the late nineteenth century. See Harris, 311-313 and Gaudio, 157-164.

[309] "The Passing of the Illustration Fad," in *Current Literature* (Nov. 1897), 385.

[310] Ibid., 385.

[311] "Cheap Magazines," in *The Independent* (Jun. 1895), 11. The title of the article refers to low-cost *Cosmopolitan, Munsey's, and McClure's.* Many critics of these new magazines (specifically the editors of other periodicals) called them out as cheap. Richard Watson Gilder, editor of *The Century Illustrated Magazine,* called out his competition in this manner. See Schneirov, 77.

[312] The late nineteenth-century was a period of increased immigration to the United States, which many white, native-born Americans perceived as threatening. These attitudes led to several policies enacted during this period, among them the Chinese Exclusion Act (1882), that restricted immigration to the United States. See Patrick Ettinger,

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newspapers and magazines of this period began to include halftones and other graphic features in their pages specifically to appeal to this audience. In the article, the "numerous class" is aligned with "sensational" pictures that "are not meant for instruction" but merely to appeal to the eye. In opposition to the "numerous class," the author sets the "fit audience" of "thinking people," presumably the native-born, white middle class, that the author positions as favoring more substantial fare over the temptations of sensationalism.[313] "Cheap magazines" and their halftone illustrations are identified as a threat to white middle-class Americans, for they held the potential to degrade the intelligence and tastes of the "fit audience" to the level of the "numerous class."[314]

While the halftone reproduction of Falk's elegant portrait of Minnie Ashley in the respectable *The Ladies' Home Journal* may seem exempt from categorizations as "cheap" or "sensational," even halftones reproduced in magazines aimed at middle-class audiences were viewed as "artistically suspect."[315] In an article on the illustration methods featured in *The Century Illustrated Magazine* (founded 1881), a polished publication aimed at an educated middle-class audience, the author explains the qualitative shortcomings of halftones to readers: "this new process is largely what its name implies—a *halftone;* that is, as the deepest darks cannot be rendered by it, nor the highest lights, only the middle of the scale…can be reproduced. In other words, there is a loss of a great many of the tones of the original."[316] The author gives a fair assessment of the failings of halftone reproductions, which we can see in the reproduction of Falk's portrait of Minnie Ashley in *The Ladies' Home Journal* (fig. 32). The actress's dark locks have been dulled to an indeterminate gray, the shadows that model her face appear blocky and obscure the features of the left side of her face, and the overall grainy texture of the image (a product of the halftone screen) diminishes our perception of details. In contrast, the gelatin silver print of Ashley's portrait (fig. 3) exhibits bright whites and opaque blacks, renders the details of Ashley's face and costume, and possesses a smooth, even texture. Indeed, there is not only "a loss of a great many of the tones of the original" in the translation to halftone but also a loss of detail, gloss, and the fine surface texture apparent in the original photographic print.

Though photographers were widely thought to benefit from the rise of halftone printing at the expense of engravers, some commercial photographers viewed the poor quality of early halftones as detrimental to their profession and its aesthetic standards.[317] In an article entitled "Magazine

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Imaginary Lines: Border Enforcement and the Origins of the Undocumented Immigration, 1882-1930, (Austin: University of Texas Press), 18-36.

[313] "Cheap Magazines," 11.

[314] As Kathleen Pyne has argued, Americans during the late nineteenth century drew direct connections between the consumption of visual culture and social progress. While viewing harmonious and refined works of art could contribute to the elevation of a society and the assimilation of immigrant populations, exposure to agitating and coarse works could have the opposite effect. In this context, it is unsurprising that a reader would condemn the halftones that appeared in the sensational press as a potential force of moral and social degradation. See Kathleen Pyne, *Art and the Higher Life: Painting and Evolutionary Though in Late Nineteenth-Century America* (Austin: University of Texas Press, 1996), 38-47.

[315] See Harris, 309.

[316] W. Lewis Fraser, "A Word about *The Century*'s Pictures" in *The Century Illustrated Magazine* (Jan 1895), 479. Emphasis in the original. On *The Century Illustrated Magazine,* see Mark Noonan, *Reading* The Century Illustrated Monthly Magazine: *American Literature and Culture, 1870-1893* (Kent: OH: The Kent State University Press, 2010).

[317] As one article described the rise of halftone printing: "The voice of the photographer waxed great, and was heard in all the land. He was the man of the hour." See "The Passing of the Illustration Fad," 385.

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Illustration Work" that appeared in *The American Annual of Photography and Photographic Times Almanac* in 1900, Robert E.M. Bain, a commercial photographer known for his travel views, bemoans the low quality of halftones, dismissing them as "smudges in black and white" that depict "nothing so much as an upset inkstand."[318] For the author, these pitiable reproductions gave a bad impression of the skill and aesthetic sensibilities of contemporary photographers. Dismissed as mechanical operators rather than visual artists since the invention of the medium, photographers had long attempted to raise public opinion of their profession and to emphasize the artistry of their work. For the author, the clunky halftones printed in the popular press did little to improve their reputation. Further, the author grumbles that publishers "cater to the taste for the sensational to the extent of publishing the greater part of their illustrations from the very poorest class of photographic work and consider only the title."[319] Though newspapers and magazines were potential sites for professional photographers to showcase their best work to large audiences, the author feels that only the "very poorest" photographs were selected for inclusion and were chosen for reasons of convenience or entertainment rather than aesthetic merit. While the author imagines that publications would eventually improve the quality of their photographic selections, he concludes with the lament: "The kind of work we offer now, for the most part, we should be ashamed of."[320]

Periodical critics often contrasted the "cheap" and "poor" quality of halftones with the superior value of wood engravings. As one writer put it: a "[f]irst-class wood-engraving is ten times dearer than [a] good half-tone."[321] While this statement primarily refers to the comparative aesthetic values of wood engraving and halftones, it also reflects the relative production costs of these competing illustration processes. Halftones could be printed for less than $20, where wood engravings cost publishers up to $300. [322] Though wood engravings were expensive, established periodicals, such as *Century* and *Harper's,* continued to feature them as a means to distinguish themselves from more sensational magazines, such as *Cosmopolitan* and *Munsey's,* which almost exclusively employed halftone illustrations. Wood engravings not only set *Century* and *Harper's* apart from their new competition in terms of appearance but also in terms of price. Where an issue of *Cosmopolitan* could be purchased for 12.5 cents in 1893, *Century* cost nearly three times as much at 35 cents per issue.[323] Wood engravings literally enhanced the value of the *Century,* where halftones cheapened *Cosmopolitan* and *Munsey's.*

The editors of the *Century* not only used wood engravings to set their periodical apart visually from its new competitors but also to appeal to its educated, middle-class subscribers. The preference for wood engravings among the magazine's readers is conveyed in a letter to the

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[318] Robert E.M. Bain, "Magazine Illustration Work" in *The American Annual of Photography and Photographic Times Almanac* (1900), 152.
[319] Ibid., 151.
[320] Ibid., 153.
[321] Fraser, 479.
[322] Schneirov suggests that halftones cost less than $20 to produce, where wood engravings cost up to $300. See Schneirov, 68-69. According to an article published in *Wilson's Photographic Magazine* in 1894, "Untouched half-tone work is made by the photo-engravers at from twenty to forty cents per inch. First-class wood-engraving cost from three dollars and a half to seven dollars per inch." See "Photographic Advance" in *Wilson's Photographic Magazine* (Oct. 1894), 440-442.
[323] In 1893, *Munsey's* could be purchased for 10 cents and *McClure's Magazine* for 15 cents. On the competitive pricing of these newer magazines, see Schneirov, 76. On the pricing of *The Century Illustrated Magazine,* see Noonan, 178.

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editor that appeared in the *Century* in 1899, the same year that *Falk v. Curtis Publishing Co.* began. The reader writes in to commend the magazine for its continued use of "the delightful art" of wood engraving and complains of being "weary of, so nauseated with, 'halftone' and 'process' things" that were appearing in abundance in other publications.[324] Appended to the letter is a response from one of the magazine's editors, who confirms the good taste of the reader and agrees that "even a wood-engraving not of the highest quality often takes hold of the printed page and gratifies the eye in a way that scarcely any process plate can do." The editor goes on to note that the magazine does employ halftones in some cases— "solely" in instances where "fidelity" to the source is essential— but ranks them at the bottom of the illustration hierarchy and laments their categorical "dullness."[325] The editor at the *Century*, like a number of other periodical critics, viewed halftones as a passive form of illustration that lacks the interpretive, enlivening hand of an artist. As this exchange suggests, magazines like *Century* and *The Ladies' Home Journal* employed wood engravings as a visual tactic to appeal to the tastes of their middle- and upper-middle-class audience. Halftones were to be used sparingly to distinguish these more genteel periodicals from the bawdy sensational press.

Cheap, poor, second-class. These are just some of the adjectives used to conjure the visual qualities of halftone illustrations, even those that appeared in respectable magazines, as *Falk v. Curtis Publishing Co.* entered the courts in 1899. Significantly, these popular descriptors of halftones also have economic connotations and suggest a deficiency of capital. Halftones are imagined in this period not only as lacking cultural value but also monetary value. Considering this assessment of halftones, especially among the white middle class, it is perhaps unsurprising that the judges who heard *Falk v. Curtis Publishing Co.* saw little worth in the halftone reproduction of Minnie Ashley's portrait in *The Ladies' Home Journal.* Indeed, Falk's alleged $3,000 in damages perhaps struck them as too steep an evaluation given the poverty of the infringing copies.

While the material and visual deficiency of halftones contributed to the minimal damages accorded Falk in *Falk v. Curtis Publishing Co.,* there were other formal aspects of the Ashley portrait and its reproduction that led to its poor reception before court. Its stylistic qualities also would have contributed to the diminishing reception of the work. The elegance and careful composition that characterize Falk's photograph of Minnie Ashley and many of his other studio portraits were being abandoned during this period by a new generation of commercial photographers for a more informal and candid mode of portraiture.

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Celebrity portraiture had been a popular photographic genre in the United States since the 1840s when enterprising photographers like Mathew Brady and Jerimiah Gurney persuaded public figures, especially politicians and cultural elites, to sit for them in their studios.[326] Photographic

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[324] "Question and Answer" in *The Century Illustrated Magazine* (Jan 1899), 474-475. As Michael Gaudio has pointed out, *The Century Illustrated Magazine* was one of few popular periodicals that resisted the embrace of halftone illustrations and continued to feature wood engravings into the twentieth century. This was a significant point of pride to the magazine and, as the quote above suggests, to the its readers. See Gaudio, 136-137.
[325] Ibid. "Question and Answer," 475.
[326] On photography and celebrity culture in the United States during the mid-nineteenth century see McCandless, 49-63; Leo Baudry, *The Frenzy of Renown: Fame and Its History* (New York: Oxford University Press, 1986), 491-

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portraits of the antebellum period typically presented the famed individual posed in a dignified manner in a refined studio environment. Brady's acclaimed Cooper Union portrait of Abraham Lincoln (fig. 43) from 1860 is exemplary of the early celebrity portrait genre. Lincoln stands stiffly in somber but elegant attire and poses in a studio setting outfitted with symbols that convey his intellect (the books he rests his hand upon) and commitment to democracy (the classical column at left that echoes Lincoln's firm uprightness). Lincoln looks directly out at the viewer but betrays no emotions. In this formal portrait, Lincoln is presented as a public persona and not a private individual. We grasp his character through the sum of his physical and material attributes on display but have little sense of his interiority.[327]

By the end of the nineteenth century the kinds of celebrities that were photographed and the way they were photographed had changed considerably. Where in the antebellum period portraits of political and social leaders had been collected by the public, the 1870s and 1880s saw a rising interest in photographs of actors, actresses, and dancers.[328] The increased sales in these subjects emerged as American theater gained respectability and became a popular form of middle-class entertainment.[329] As today, these celebrities of the stage were admired as much (or even more so) for their good looks as for their acting abilities.

One of the preeminent photographers to capitalize on this new taste for theatrical portraits was Napoleon Sarony, the protagonist of the U.S. Supreme Court case *Burrow-Giles Lithographic Co. v. Sarony* (1884). A flamboyant personality known for his unconventional wardrobe and diminutive stature, Sarony opened his first studio in the United States in the late 1860s and gained a reputation for crafting dramatic portraits of actors in his studio in which they donned costumes and posed as the characters they played on stage (fig. 44).[330] Where earlier celebrity portraits had been dignified yet stiff, Sarony's sitters appeared emotive and active. Despite the perceived "naturalness" of Sarony's portraits, his celebrity photographs were just as deliberately posed as Brady's portrait of Lincoln. Indeed, Sarony employed a specialized iron posing apparatus designed by his brother to still actors in the animated poses he sought to capture them in.[331]

506; and Amy Lippert "Consuming Identities: Visual Culture and Celebrity in Nineteenth-Century San Francisco" (Ph.D. dissertation, University of California, Berkeley, 2009). Photographers often competed to gain access to famous figures. A particularly heated and interesting instance was the competition between Jeremiah Gurney and Mathew Brady to photograph author Charles Dickens when he visited the United States in 1867. On this case, see Malcom Andrews, "Mathew Brady's portrait of Charles Dickens: 'a fraud and imposition to the public'?" in *History of Photography* vol. 28 (2004), 375-379.

[327] McCandless, 55.

[328] Ibid., 64-68. See also, Shields, 33-37.

[329] Benjamin Arthur, *Actors and American Culture, 1880-1920* (Philadelphia: Temple University Press, 1984), ix.

[330] On Sarony's career, see McCandless, 63-70; Shields, 40-44; and Erin Pauwels, "Sarony's Living Pictures: Performance, Photography and Gilded Age American Art" (Ph.D. dissertation, Indiana University at Bloomington, 2014).

[331] On Sarony's posing apparatus, see Erin Pauwels, "Resetting the Camera's Clock: Sarony, Muybridge, and the Aesthetics of Wet-Plate Photography" in *History and Technology* (2015), 485-487.

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Benjamin Falk deeply admired Sarony and adopted many of his techniques as he pursued his own successful career in theatrical portraiture in the final decades of the nineteenth century.[332] When Sarony died in 1896, Falk was hailed as his natural successor in the realm of celebrity portraiture. However, by the time Falk established himself as the premier theatrical photographer in New York City, audiences began to crave new kinds of images of stage celebrities and prominent society figures. Rather than posed photographs on card mounts of their favorites actors performing as if on stage, audiences sought more intimate, "behind-the-scenes" glimpses of the celebrities they admired. As Scott E. Casper has argued with regards to textual biographies of the 1890s, writers and readers began to privilege descriptions of the famous that gave "the whole truth" and would "hold back nothing."[333] Where earlier modes of American biography focused on the public persona of a given figure and presented these traits as models of emulation, the end of the nineteenth century saw a rise in biographies rich in private and personal details of an individual's life that entertained readers and provoked their curiosity.[334]

Casper links this new interest in the private habits and foibles of famous Americans to journalistic practices of the period, which, as discussed earlier, sought to expose hidden truths and reveled in scandal.[335] The sensationalism of the popular press at the end of the nineteenth century manifested itself not only in articles on popular personalities but also in the accompanying images of them. Often snapped out on city streets without the knowledge or permission of the figure photographed, these candid images of celebrities and society figures were produced at a moment when American photojournalism began to establish itself as a profession and an aesthetic.[336] Though photographers had captured images of newsworthy events and people since the 1840s, they did not become fixtures of newspaper and magazine staffs until the late 1890s.[337] This period not only saw the perfection of halftone printing but also the introduction of smaller, lighter, and easier to operate cameras as well as more sensitive films that permitted early news photographers to capture subjects effectively in the field.[338] With these advances in photographic technology, news photographers could speed through cities, often on bicycles, to capture an interesting incident or scene on the spot. Just as readers were enthralled by sensational reports of contemporary urban life, they were captivated by this novel form of periodical illustration that positioned them as witnesses to current events and scandals.

Celebrities and socialites, such as the Vanderbilts (fig. 45), were frequent targets of early photojournalists who often followed them around the city much as modern paparazzi stalk movie

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[332] Falk in fact kept a bust of Sarony in his studio. Like Sarony, Falk also made many innovations in theater photography. He is perhaps best known for his use of electrical lighting to photograph performers on stage. See Shields, 47.

[333] Scott E. Casper, *Constructing American Lives: Biography and Culture in Nineteenth-Century America* (Chapel Hill: The University of North Carolina Press, 1999), 237 and 312-316.

[334] Ibid., 314.

[335] Ibid., 304.

[336] Carlebach, *American Photojournalism,* 1-9. On the use of photographs by news outlets before the rise of photojournalism, see Carlebach, *The Origins of Photojournalism.*

[337] Carlebach, *American Photojournalism,* 30.

[338] On these new photographic technologies and their role in the rise of photojournalism, see Carlebach, *American Photojournalism,* 16-19. It is important to note that photojournalistic images of this period were not always reproduced in a photographic format, such as halftone, but were also printed as wood engravings or tone engravings (a combination of halftone printing and wood engraving). See Carlebach, *American Photojournalism,* 13 and Brown, 239-241.

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stars today. An 1899 article entitled “News Photography” by early press photographer Gilson Willets suggests the lengths that photographers would go to get a desirable image of a popular figure. Willets, addressing potential photojournalists, advises that the news photographer “must always look alive, give no quarter to people who do not wish to be photographed. He is ordered to get a snap-shot of a well-known society woman. He must follow that lady till he gets a chance to snap his camera…at the right moment.”[339] Willets emphasizes the timeliness of the successful news photograph, that it must be taken at just “the right moment” that will spark the interest and curiosity of readers. Even if the subject does “not wished to be photographed” or must be “follow[ed],” the news photographer must persevere and “snap” the subject in a noteworthy situation. Unsurprisingly, this invasive mode of photography sparked intense debates about privacy rights in popular culture and within the legal community.[340] Despite the criticism directed at these photographic practices, early news photographers “preserve[d]” in their pursuit of candid shots of public figures because these images proved profitable.

In addition to commenting on the process of capturing a subject at just the “right moment,” Willets discusses the aesthetics of press photography. He directs aspiring photojournalists to “picture the news, whether the pictures are artistic or not. A poor picture of a public personage at a crucial, newsy moment is worth its weight in gold, while the finest, most artistic photograph of the same person at an unimportant moment, is not worth the paper it is printed on.” He emphasizes this point by adding, “there is no time for posing the subject, or for taking the scene from the best point. Get the subject in the act, get action in the scene; these are the main objects.”[341]

The distinction that the author makes between a “newsy” photograph and an “artistic” one is clarified in a comparison between two photographs of Colonel Theodore Roosevelt taken in 1898 on the eve of his election as governor of New York. One is a candid shot taken by a photographer employed by the New York *Journal* (fig. 46) and the other is a studio portrait taken by Falk (fig. 47). According the captions, the photograph in the *Journal* shows Roosevelt walking up the steps to his sister’s home not long before he was to go to Albany to be inaugurated as governor. The image was surrounded by three articles on Roosevelt’s personal and political agenda in Albany.[342] While not an emphatically dramatic photograph in terms of the action it captures, the *Journal* portrait of Roosevelt shows the subject un-posed at the “crucial, newsy moment” when Roosevelt was about to take on considerable political power in New York. Significantly, the photograph was taken as Roosevelt enters the personal, familial space of his sister’s home. In this regard, the image offers a glimpse of the private side of this popular public

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[339] Gilson Willets, “News Photography” in *The American Annual of Photography and Photographic Times Almanac* (1900), 57.
[340] For a legal consideration of the subject of privacy and publicity in the 1890s, see Louis D. Brandeis and Samuel D. Warren, “The Right to Privacy” in *Harvard Law Review* (Dec. 1890), 193-220. This law review article, which remains widely read today, was written in response to new intrusions of the press, both textual and visual, into the lives of private individuals. For a more popular response to the ways in which the press and news photography imperiled privacy rights, see John Gilmer Speed, “The Right of Privacy” in *The North American Review* (Jul. 1896), 64-75. On celebrity and concerns about privacy pre-dating the nineteenth century, see Julia Fawcett, *Spectacular Disappearances: Celebrity and Privacy, 1696-1801* (Ann Arbor: University of Michigan Press, 2016).
[341] Willets, 59.
[342] These articles include: “Roosevelts Installed in Executive Manor,” “Here is the Pith of Roosevelt’s Message,” and “Eight Roosevelts Off for Albany.” See New York *Journal* 31 Dec. 1898, 8.

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figure. Though hazy and obviously retouched, this "poor picture" capitalizes on readers' fascination with Roosevelt, his family, and his political plans and therein earns "its weight in gold" as a press image.

Falk's studio portrait of Roosevelt is entirely unlike the *Journal* photograph in all but the subject represented. Where the *Journal* snapshot was taken outdoors and captures a fleeting moment in Roosevelt's personal life, Falk's photograph echoes Brady's portrait of Lincoln (fig. 43) in its formality and attempt to convey Roosevelt's public persona. Taken in October in the lead up to the gubernatorial election, we might think of this portrait as a campaign image. In Falk's portrait, Roosevelt is shown in three quarters profile standing firmly upright with one hand on his hip. In the other hand, Roosevelt holds a pair of binoculars and stares vigilantly out into the distance at left. Roosevelt poses in military uniform, which reminds the viewer of his participation and leadership in the Spanish-American War. Together the carefully selected pose, props, and dress present Roosevelt as a disciplined and tough leader with an eye on the future. The studio setting, including the plain backdrop and even lighting, has also been carefully managed to focus attention on Roosevelt and the details of his dress. Finally, the print quality of Falk's portrait, with its clarity and soft tones, stands in stark contrast to the *Journal's* murky halftone. Though direct in its messaging and replete in "artistic" quality, Falk's portrait of Roosevelt lacked the spontaneity and timeliness requisite for an engaging press image.

Falk's portrait of Minnie Ashley shares many of the qualities of his study of Roosevelt. The Ashley portrait, like almost all of Falk's theatrical photographs, was taken in a studio setting, the subject deliberately posed and costumed, carefully lit, and arranged to capture the subject's "best point." Indeed, this heightened attention to the details was the very quality that secured Falk's reputation as a leader in celebrity photography and, more broadly, as an artistic photographer.[343] While similar in many ways, there is one central difference between Falk's portraits of Roosevelt and Ashley: the respective fame of the sitters. Whereas Roosevelt was widely known both in and beyond New York, Ashley was a working actress who would enjoy only a fleeting career on the stage. In other words, Ashley was hardly the "public personage" or "well-known society woman" whose photograph would merit much interest from readers. Indeed, as discussed earlier, Falk's photograph of Ashley was situated in *The Ladies' Home Journal* as a generic representation of a pretty young white woman and not the portrait of a distinct individual.

Despite the popularity of Falk's refined portraits, which were collected by theater buffs and used to publicize particular actors or performances, they fail as interesting press images.[344] It is only those photographs of a "public personage" that "[g]et the subject in the act," that forgo artistry and embrace candid expression in the representation of celebrities, that were "worth [their] weight in gold." The judges and jury who heard *Falk v. Curtis Publishing Co.* must have recognized the distance between his attractive but ultimately decorative portrait of obscure actress Minnie Ashley and the more active and "newsy" pictures of widely known theater personalities and social elites that were appearing in magazines and newspapers of the day. Indeed, by deciding that Falk was not to be awarded a single dollar in damages in *Falk v. Curtis*

[343] Many period biographies of Falk emphasize his status as an artistic photographer and note that he worked in crayon drawings for five years before taking up photography. See, for example, A.L. Bowersox, "Photographers at Home and Abroad" in *The Photographic Times* (Aug. 1894), 149.
[344] Willets, 59.

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Publishing Co., the judges ultimately aligned with the wisdom of early photojournalists in deeming Falk's portrait "not worth the paper it is printed on."[345]

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The growing preference for more informal, spontaneous photographs was not limited to celebrity portraiture during the end of the nineteenth century. The same technologies that aided the emergence of photojournalism—smaller, lighter cameras that were simple to operate and loaded with more sensitive films— along with the introduction of a photo-finishing industry gave rise to a growing population of amateur photographers that, as discussed in Chapter 1, reveled in taking photographs of family and friends in casual poses and informal settings.[346] The ascendance of amateur photography and the embrace of more relaxed portraiture soon proved a threat to studio photographers who had trouble attracting customers and maintaining prices.[347]

In the face of these challenges to their professional reputation and economic security, commercial photographers like Falk began to develop new business strategies to promote and defend their work. In an essay on the crisis of commercial photography in the 1880s and 1890s, Sarah Greenough shows that photographers attempted to form unions and associations, among other tactics, to stimulate business and to uphold decent prices for their work.[348] Falk's organization of the Photographers' Copyright League of America (PCLA) in 1895 can be seen as part of this movement among commercial photographers to secure recognition and generate new sources of income. However, at the same time that Falk championed photographic copyright and demanded monetary compensation from publishers, other commercial and amateur photographers chose to forgo their images rights in exchange for the public recognition offered by the press.

Photographic illustrations, both newsy and artistic, had become essential features of newspaper and magazines by the end of the nineteenth century. Seeking to please and attract audiences, publishers desperately sought fresh photographs to reproduce within their pages. As an article in *Wilson's Photographic Magazine* in 1897 stressed, "[t]he demand for illustrations for periodical publications is now so imperative that almost every possible device is exercised by the publishers for them to secure original prints."[349] One of the devices that publishers employed to procure a steady stream of photographic work was the contest. Newspapers and magazines would offer cash prizes and the promise of seeing one's name in print to the purveyors of the best photographic submissions.[350] With the hope of winning prizes and publicity, aspiring

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[345] Ibid., 59.

[346] See Sarah Greenough, "'Of Charming Glens, Graceful Glades, and Frowning Cliffs': The Economic Incentives, Social Inducements, and Aesthetic Issues of American Pictorial Photography, 1880-1902," 259-261 in *Photography in Nineteenth-Century America* ed. Martha Sandweiss (New York: Abrams, 1991) and Dianne Waggoner, "Photographic Amusements, 1888-1919," 11 and 27-30 in *The Art of the American Snapshot, 1888-1978, From the Collection of Robert E. Jackson* ed. Sarah Greenough and Dianne Waggoner (Washington, DC: National Gallery of Art; Princeton: Princeton University Press, 2007).

[347] Greenough, 260-264.

[348] Ibid., 261-262.

[349] Walter Sprange, "Facts Concerning Copyright and Reproduction" in *Wilson's Photographic Magazine* (Feb 1897), 85.

[350] Periodicals and newspapers had long used the literary contest as a means of securing a free supply of short stories and essays. In some cases, these competitions helped launch the careers of now famous American writers, such as

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photographers sent their negatives and prints to periodicals for consideration.[351] While not all publications followed through on their offers of cash or acknowledgments, some photographers got significant career boosts from their participation in these contests. Edward S. Curtis, later famed for his twenty-volume project on *The North American Indian*, attracted the eye of one of his key supporters, Theodore Roosevelt (by this time President), after winning a child portrait contest held by *The Ladies' Home Journal* in 1904.[352]

Contest submissions guaranteed the popular press a ready source of new photographic works to print at little cost to them. Significantly, many of the prints and negatives sent in were not copyrighted by their makers and thus could be reproduced whether or not the images won the contest. An article in a photographic journal warned readers of "[t]he practice of those publishers, who, having obtained prints for reproduction in their publications free of cost, and having wrongfully claimed the copyright to the plates made from them, and who afterward order electrotypes from these plates on the market for advertising purposes."[353] The un-copyrighted submissions from readers thereby become an additional source of revenue to publishers who could sell them to advertisers as electrotypes, durable metal-based plates used to reproduce images or type. As the article cautions, this practice not only costs the photographer credit but "might prove to be very annoying to the sitters to find that portraits of themselves, taken, perhaps, as art or figure studies have been utilized in this manner."[354]

Despite warnings of the abuses of the press, commercial photographers continued to supply work to publishers with the hope of earning public recognition. Identifying many photographers' acute desire for publicity, some publishers did not even bother running photography contests and instead simply offered a credit line in exchange for their labors. An article published by Toledo newspaper editor A.G. Anderson exemplifies the emphasis placed on the value of name recognition in urging photographers to submit work. Anderson advises aspiring commercial photographers to: "go to the newspaper correspondents in your town and say: 'Here is a picture. Write a story and fire it into your paper, will you?' And just say that the credit for the picture must be given—photo by Jones or Smith."[355] Anderson then poses the obvious question that hangs over this exchange: "Would it pay you? It would repay you if you did not get a cent from the newspapers. Your people will know you furnished those photographs and so helped the town. The public will appreciate that."[356] The photographer may not see a "cent" from the paper, but

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Edgar Allen Poe. In these literary competitions, authors forfeited their copyright to the publication whether or not they won the competition. See Meredith McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia: University of Pennsylvania Press, 2001), 176-177 and 319 fn 69. Sprange notes that even *Youth's Companion* magazine held amateur photography competitions, indicating the degree to which photography was easy to practice and accessible during this period. See Sprange, 85. Brown suggests that these contests were also a method deployed by publishers to allow readers to feel more connected to and involved with the publication. See Brown, 239.

351 These contests seem to have been wildly popular. In the Curtis example discussed below, *The Ladies' Home Journal* reported receiving 18,000 entries. See "The Prettiest Children in American" in *The Ladies' Home Journal* (Jun. 1904), 28.

352 Shannon Egan, "'Yet in a Primitive Condition': Edward Curtis's *North American Indian*," in *American Art* (Fall 2006), 63.

353 Sprange, 85.

354 Ibid., 85.

355 A.G. Anderson, "Photography and the Daily Press" in *Wilson's Photographic Magazine* (Mar. 1905), 217.

356 Ibid. 217.

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the goodwill generated by his or her contribution to the press is positioned here as its own form of payment. The notion that local readers will "appreciate" the work suggests that the photographer can expect to profit from customers' recognition of his or her investment in the community.

Even before Anderson published the above article, a number of up-and-coming commercial photographers had grasped the business potential of generating publicity by cooperating with the press. One such photographer was Fred Hartsook, who established a popular chain of eponymous studios in California at the turn of the twentieth century.[357] In building his photography empire, Hartsook made strategic negotiations with the press regarding the copyright to his work. As David Shields discusses in his fascinating history of American film stills and their precursors, Hartsook would send prints of his celebrity portraits to major newspapers and magazines with a provisional copyright waiver that would allow the publisher to reproduce the image as long as it was credited to Hartsook.[358] As a result of this shrewd strategy that eliminated the application and payment for rights to reproduction, Hartsook's photographs were favored by publishers and his name was widely publicized. Both celebrities and fans began to flock to Harstook's studios to have their portraits taken by an establishment that they associated with fame and beauty.[359]

Where a new generation of commercial photographers like Hartsook were willing to work with the illustrated press to their advantage, Falk and established studio photographers who got their start before the rise of the photographically illustrated press remained resolutely against such concessions and continued to demand both fair pay and credit for his photographic work. To younger commercial photographers that valued publicity, Falk's insistence on the importance of enforcing one's copyright must have seemed futile in the face of the powerful press or simply out of touch with business practices in the cut-throat market for commercial photographs.

The gap between Falk's stance on copyright and that of aspiring commercial photographers of the 1890s is evidenced by the flagging interest in the PCLA among professional photographers. In his annual report for the PCLA published in *Wilson's Photographic Magazine* in 1899, Falk lamented the state of the organization and its meager membership. Using the report as a venue to air his frustrations, Falk implored his fellow photographers

> Why should the publisher profit by selling the photographer's work, and the photographer be content with "glory?" Does the publisher pay the photographer for his use of his productions? Sometimes, where he is compelled to do so; never, if he can avoid it. Why? Because the photographer has not yet learned to appreciate the value of his work to the world.[360]

From Falk's perspective, commercial photographers had been blinded by publishers' offers of the "glory" of seeing their work and names in print and had lost sight of the "value of [their]

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[357] Shields, 86. As Shields notes, Hartsook Studios, which opened a branch in Los Angeles in 1904, produced early film stills and publicity portraits of Hollywood actors and actresses during the Silent Era.
[358] Ibid., 86. Shields notes that other photographers had attempted this strategy as well, primarily the Moffett Studio in Chicago.
[359] Ibid., 86.
[360] Falk, "Annual Meeting and Report of the Copyright League," 135.

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work to the world." Only by applying for and exercising their copyrights, Falk argues, will photographers realize the full value of their work from reluctant publishers who pay only when "compelled to do so." Despite the conviction of Falk's pleas, many commercial and amateur photographers continued to prefer the publicity granted by freely offered works over a possible cash compensation for copyrighted works.

The indifference that many rising studio photographers displayed towards copyright during this period not only affected the membership of the PCLA but also likely influenced the outcome of *Falk v. Curtis Publishing Co.* As magazines and newspapers touted the thousands of photographic submissions they regularly received from readers, the opportunity to have one's work and name printed in the press came to be seen as not only fair compensation but even a privilege. In this fiercely competitive image economy where anyone with a Kodak camera had the potential to be published, waiving one's copyright was as a small sacrifice for a photographer to make in exchange for publicity. Thus, Falk's demands that photographers be paid by the press for the reproduction of their work and his insistence on pursuing the maximum monetary damages in *Falk v. Curtis Publishing Co.* may have struck the courts as overreaching in his assertion of the value of a photographer's work.

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In the battle of "Photography VS the Press," the press had the clear advantage at the turn of the twentieth century as evidenced by the outcomes in cases like *Falk v. Curtis Publishing Co.* (1901) and *Bolles v. Outing Co.* (1899). With the power of the Newspaper Union in Washington, DC, the perceived poverty of halftone reproductions, the rising interest in candid representations of celebrities, and the use of new rights management strategies among commercial photographers, Falk and other established studio photographers of his generation struggled to convince judges and juries of the value, both monetary and cultural, of their work. However, the contest between commercial photographers and press over the assignment of penalties in copyright cases was far from over and would continue to wage over the coming decade. As we will see in the Conclusion, Falk and other successful studio photographers would use the U.S. Congress's call for copyright reform in 1904 to stage a rematch against their press rivals and agitate for penalty reform among other improvements to the Copyright Act.

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Conclusion

The 1909 Copyright Act and Beyond

On May 31st of 1905 many leaders of American arts and culture gathered at the City Club of New York. Publishing giants William W. Appleton, George H. Putnam, and Charles Scribner were present as were painters John La Farge and John White Alexander. Edmund C. Stedman, a popular poet and critic, joined them as did Don C. Seitz, formerly Joseph Pulitzer's right-hand man at the New York *World.* Benjamin J. Falk, a successful studio photographer discussed in Chapter 3, and William A. Livingstone, the proprietor of the Detroit Photograph Co., were also among those who congregated in New York on this warm May morning. Called together by Herbert Putman, the Librarian of Congress, this curious assembly of artists and businessmen were there to discuss an issue that was vital to their disparate professions: copyright law.

A few months earlier, Putnam had sent letters to various professional organizations to ask for their members' help in reforming the "textual contradictions and inconsistencies" in the current Copyright Act that had "give[n] rise to serious perplexities and embarrassments."[361] Putnam's lament over the poor state of American copyright legislation echoes the frustrations voiced by many of the judges who heard the photographic copyright cases discussed in the previous chapters. President Theodore Roosevelt and the U.S. Congress, aware of the "serious perplexities" that plagued copyright law, had decided to overhaul this area of legislation in 1904. Rather than adding to the existing flurry of statutes, Congress planned to replace them with "one general copyright statute" that would clarify this important area of legislation for judges, cultural producers, and the public.[362] To move forward with this reform, members of the Senate Committee on Patents (also responsible for matters related to copyright) asked the Librarian of Congress and Register of Copyrights, Thorvald Solberg, to convene a series of conferences where cultural producers in various fields could make recommendations for improving copyright legislation.[363] During the three resulting meetings held in 1905 and 1906, authors, fine artists,

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[361] The letter was sent on April 10, 1905. See "Stenographic Report of the Proceedings of the Librarian's Conference on Copyright, 1st Session, in New York City, May 31-June 2, 1905" in *Legislative History of the 1909 Copyright Act* (Vol. 1) ed. E. Fulton Brylawski and Abe A. Goldman (South Hackensack, NJ: Fred B. Rothman & Co., 1976), vii. Among the professional organizations that received the invitation to discuss copyright reform were the American (Authors') Copyright League, American Dramatists Club, American Institute of Architects, American Library Association, American Newspaper Publishers' Association, American Bar Association, American Publishers' Copyright League, Architectural League of America, Association of American Directory Publishers, Association of Theatre Managers of Greater New York, International Advertising Association, International Typographical Union, Lithographers' Association, Manuscript Society, Music Publishers' Association of the United States, National Academy of Design, National Association of Photo-Engravers, National Educational Association, National Institute of Arts and Letters, National Sculpture Society, Periodical Publishers' Association of America, Photographers' Copyright League of America, Print Publishers' Association of America, Society of American Artists, and the Sphinx Club (aka the Advertising Club of New York).

[362] Ibid., vii.

[363] Ibid., vii. The first two meetings took place at the City Club of New York in New York City and were held on May 31- June 2, 1905 the November 1- 4, 1905. The third meeting took place at the Library of Congress in Washington, DC from March 13-16, 1906. It is telling that Congress primarily turned to business interests in formulating a new copyright statute. The consuming public was only nominally represented at these conferences by the American Library Association and the National Educational Association. Copyright laws have continued to privilege powerful industry interests rather than consumers across the twentieth century with the increasing length of copyright protection, the stiffening of penalties for infringement, and the weakening of fair use. This direction in

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and commercial manufacturers would come together to debate a wide range of topics, from the length of copyright protection to the wording of the copyright notification. Ultimately, the reforms that conference members agreed to at these conferences formed the basis of the Copyright Act of 1909, legislation that would remain in place until 1976, when another broad revision to copyright laws was passed.

A review of the conversations regarding the legal status of photography that took place at these conferences and the contents of the Copyright Act of 1909 itself offers an opportunity to consider how the reception of commercial photographs had changed over the preceding twenty-five years. As we have seen in the preceding cases, these years were marked by innovations in both photographic technologies and copyright practices. In the realm of photography, the broad adoption of halftone printing and the introduction of point-and-shoot cameras made photography more visible and accessible to American consumers. In the courtroom, a number of landmark U.S Supreme court decisions, including *Burrow-Giles Lithographic Co. v. Sarony* (1884) and *Bleistein v. Donaldson Lithographing Co.* (1903), redefined how judges approached popular visual culture in copyright cases. To chart, in broad strokes, the impact of these visual and legal developments on the reception of commercial photographs in and outside of the courtroom, this conclusion will return to the central questions posed at the beginning of this dissertation: What does it mean for a photograph to be original? What are the distinctions between originals and copies? What is the value of a photographic work? While none of these questions was settled by the conferences of 1905 and 1906 or the Copyright Act of 1909 (and remain unsettled today), the terms of debate over these questions had shifted in significant ways that reveal new attitudes toward photography within American culture during the early twentieth century.

Further, an examination of the discussions that took place at the copyright conferences and the contents of the revised copyright statue illuminates the distinctly reciprocal relationship between American art and the law. While copyright law shaped the artistic and business practices of photographers during the turn of the twentieth century, photographers were not passive subjects of the law and instead worked to shift copyright legislation to their advantage through both their photographic practices and legal actions. As argued throughout this dissertation, an engagement with the artists and work at the center of copyright opens up new perspectives on the unfolding of this area of legal history, just as the tools and sources of legal history provide new methods for examining artistic practices.

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At the 1905 and 1906 copyright conferences, photographic interests were represented by two main organizations: the Photographic Copyright League of America (PCLA, discussed in Chapter 3) and the Print Publishers' Association of America (PPAA), a group that represented not only the interests of photographers but also lithographers and other commercial print makers.

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favor of stronger copyright protections for business interests stands in stark contrast with copyright legislation and practices of the late eighteenth and early nineteenth century, which privileged the consuming public. On this shift in American copyright practices, see Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001). As Bill Ivey notes in his study of contemporary intellectual property laws, cultural heritage is made simultaneously into a corporate asset. See Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights* (Berkeley: University of California Press, 2008), 30-31.

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The PCLA sent as its delegates Benjamin J. Falk and Pirie MacDonald, another prominent New York-based studio photographer who earned renown as the "Photographer of Men."[364] The PPAA was represented by William A. Livingstone, the head of the Detroit Photograph Co. who had persuaded William Henry Jackson to join the firm in 1897. In addition to producing Photochrom postcards of American scenery, the Detroit Photograph Co. created popular fine art reproductions in their signature color process. After the unfavorable opinion delivered in *Pierce-Bushnell Manufacturing Co. v. Werckmeister* (1896, discussed in Chapter 2), Livingstone and his colleagues were particularly concerned to clarify the terms of copyright laws as they applied to fine art works and reproductions. Falk, MacDonald, and Livingstone had all participated in a number of copyright cases (including those discussed in Chapter 1 and Chapter 3) and were well acquainted with the detrimental effects of the "textual imperfections and inconsistencies" of the current copyright legislation. While lobbying on behalf of different areas of the photographic trade, these men often found themselves aligned against the powerful American Newspaper Publishers' Association (ANPA; previously known as the Newspaper Union and discussed in the case *Falk v. Curtis Publishing Co.*) and the vocal members of Lithographers' Association, who were keen to weaken copyright protection in photographs for their own gain.

While the debates in the three copyright conferences were generally civil and ably moderated by Librarian of Congress and Register of Copyrights, sparks flew at various points regarding proposed reforms to areas of photographic copyright law. The question that provoked the least amount of controversy among the participants at the 1905 and 1906 meetings concerned the application of the originality requirement to photographic works. The limited discussion of this point partly stemmed from the recent U.S Supreme Court decision in *Bleistein v. Donaldson Lithographing Co.* (1903) in which Justice Oliver Wendell Holmes, Jr. considerably expanded the legal definition of originality. As discussed in the conclusion to the case *Detroit Photograph Co. v Merchants' Publishing Co* (1899)., Justice Holmes argued that judges should not be responsible for determining the aesthetic merits of a work and instead proposed that any work originated by an individual author that was not an exact copy of another work should meet the originality requirement of copyright law. As he explained in his opinion, even "a very modest grade of art has in it something irreducible which is one man's alone."[365] Justice Holmes's determination that the originality requirement could be meet by "a very modest grade of art" not only quelled debates over the originality of photographs but also likely led conference attendees to argue for expanding of the kinds of work protected by American copyright law. In their proposed bill to the Senate Committee on Patents, conference members used the capacious phrasing "all the writing and other productions by an author" to designate the works protected by the new copyright statute and argued for extending the law to include even explicitly commercial works, such as "labels and prints of all kinds relating to articles of manufacture" that had previously occupied an uncertain place within American copyright law.[366]

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[364] On Pirie MacDonald and his decision to photograph only men at his New York City studio, see "Pirie MacDonald: A Personal Sketch" in *Wilson's Photographic Magazine* (Jan. 1905), 33-34. Previously, MacDonald had run a successful studio in Albany, New York where he photographed both men and women. MacDonald was enormously successful in his new studio and photographed many of the most prominent men in the United States in the early twentieth century. Despite his popularity at the turn of the twentieth century and unconventional business strategies, MacDonald has only received brief mentions in histories of American photography.

[365] *Bleistein v. Donaldson Lithographing Co.* 188 US 239 (1903).

[366] See "Stenographic Report of the Proceedings of the Librarian's Conference on Copyright, 3rd Session, in Washington, DC, March 13-16, 1905" in *Legislative History of the 1909 Copyright Act* (Vol. 3), 160-161.

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The general openness of conference attendees and legislators to this new standard of originality is impressive given the dismissal of William Henry Jackson's landscape photograph, *The Palisades, Alpine Pass,* as unoriginal in court only six year earlier.[367] In addition to the impact of the *Bleistein* decision, the growing consensus among legal authorities and wider public that photographs were original works likely resulted from recent aesthetic and technological shifts in American photography. Pictorialist photography, a style and movement that emphasized the expressive potential of the medium, became known to a larger segment of the American public during the early twentieth century. Popular periodicals, like *Everybody's Magazine,* began to feature reproductions after Gertrude Käsebier's extensively hand-worked photographic prints.[368] Alfred Stieglitz, a leader of the Pictorialist movement, also turned to the popular press to promote his view that photography ranked among the fine arts.[369] During this period, amateur photographers too became important advocates for situating photography as an aesthetic practice. With the increasing affordability of point-and-shoot cameras manufactured by the Eastman Kodak Co. and others, the early twentieth century witnessed a boom in amateur photography.[370] Many of these amateurs situated their hobby as a means of personal and artistic expression, a stance that contributed to the growing acceptance of the originality of photographic works.[371]

While conference attendees hardly questioned the originality of photographs, they spent a considerable amount of time debating legislation regarding the distinctions between and treatment of originals and copies, particularly in terms of fine artworks and art reproductions. With *Werckmeister v. American Lithographic Co.* (1905), discussed in the conclusion to Chapter 2, about to be tried in Circuit Court of New York, these issues were at the forefront of the minds of many conference participants. In the course of the three conferences, artists John Alexander White, John La Farge, Francis D. Miller, and Karl Bitter argued exhaustively for artists to be exempted from inscribing a copyright notification upon their works and for their signatures alone to serve as an indication of copyright. Further, they demanded that art exhibitions be excluded from the definition of publication. While the members of the PCLA and Livingstone joined the artists in calling for the elimination or a shortening of the notification requirement, representatives from the ANPA and the Lithographers' Association, who frequently reproduced

[367] The only questioning of the originality of photographs came (unsurprisingly) from Don C. Seitz of the American Newspaper Publishers' Association. Seitz could not help but remarking that "Why the wisdom of the father changed in 1865 [when the Copyright Act was amended to include photographs] in the matter of photographs I could never comprehend." See "Stenographic Report of the 1st Session," 22.

[368] "Some Indian Portraits" in *Everybody's Magazine* (Jan. 1901), 20. Cited in Elizabeth Hutchinson, *The Indian Craze: Primitivism, Modernism, and Transculturation in American Art* (Durham: Duke University Press, 2009), 131-132.

[369] See, for example, Alfred Stieglitz, "Pictorial Photography" in *Scribner's Magazine* (Nov. 1899), 528-537. The article was illustrated with halftones after pictorial photographs by Stieglitz.

[370] With the introduction of the Kodak Brownie camera that cost only $1 in 1900 amateur photography became a wide and popular practice. On this phenomenon, see Diane Waggoner, "Photographic Amusements, 1888-1919," 12-15 in *The Art of the American Snapshot, 1888-1978, From the Collection of Robert E. Jackson* ed. Sarah Greenough and Dianne Waggoner (Washington, DC: National Gallery of Art; Princeton: Princeton University Press, 2007).

[371] On amateur photographers and the promotion of art photography, see Paul Sternberger, *Between Amateur and Aesthete: The Legitimization of Photography as Art in America, 1880-1900* (Albuquerque: University of New Mexico Press, 2001).

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artworks, were adamant that paintings and other works of fine art exhibit a clear copyright notice to prevent "innocent" infringement.[372]

Frustrated over concerns voiced by certain attendees that an artwork without a notification might be misunderstood as belonging in the public domain, sculptor Karl Bitter exclaimed: "I do not see how it can be argued that a work of art is public property unless there appears on it a sign: 'Please do not steal it.'"[373] For Bitter and the other artists, the notification requirement was as disruptive (and absurd) as placing a "do not steal" sign alongside their work. Bitter's evocation of a such a sign further suggests that the notification would lower works of fine art to the level of ordinary commercial goods that might tempt a petty thief. Indeed, this was the implicit concern among the fine artists gathered at the conference: that the requirements of copyright law would, as discussed in *Pierce & Bushnell Manufacturing Co.* (1896), expose the commercial nature of art. By calling for artists to be exempt from the notification requirement, Bitter and others sought to maintain the illusion of art as distinct and removed from the market.

Where the artists viewed the notification requirement as injurious to their profession, many members of the conference involved in the art reproduction trade perceived the notification as central to their business. Indeed, a "do not steal" sign was exactly what they desired to protect their own works and to avoid becoming infringers themselves. Approaching the question from a distinctly practical point of view, A. Beverly Smith of the Lithographers' Association, argued: "We put our names on our umbrellas; we do not think that affects our dignity. Let us have a mark, by all means, on our paintings: let us demonstrate to the world that there is an intangible something [i.e. copyright] that belongs to somebody."[374] Smith's unlikely comparison between umbrellas and paintings, a mass manufactured good and a unique artwork, seems calculated to degrade the "dignity" and fire the tempers of the artists present. Collapsing distinctions between physical property and "intangible" intellectual property, Smith also disregards the investment of mental labor on the part of the artist in the creation of a painting. For Smith and others, the artistic merit of a painting mattered less than whether or not the reproduction rights, that "intangible something," "belong[ed] to somebody" or were free to exploit.

The directly opposing views of the artists and art reproducers on the notification requirement led the conference members on a long search for a compromise that would appease the conflicting aesthetic and practical needs of each group. Their solution was the now ubiquitous copyright symbol: ©. This mark came about after various longer suggestions were put forward, which included "Copyright" and the author's name, "U.S. Cop." and the author's name, "Ct" and the author's name, a serial number system, and other variations.[375] While the © symbol was

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[372] Though Livingstone was in the business of creating and selling art reproductions, he agreed with the artists that the notice disfigured the work and made it harder to sell. As he argued in the conference, the notice was "an impairment of the value of the subject." See "Stenographic Report of the 1st Session," 116. In contrast to the members of the Lithographers' Association who seemed to primarily reproduce artworks for advertisements and labels, Livingston created fine art reproductions intended for the study and enjoyment of art. This business distinction likely accounts for Livingstone's break with other producers of art reproductions on this issue.

[373] See, "Stenographic Report of the 3rd Session," 254.

[374] See "Stenographic Report of the Proceedings of the Librarian's Conference on Copyright, 2nd Session, in New York City, November 1-4, 1905" in *Legislative History of the 1909 Copyright Act* (Vol. 3), 272.

[375] See "Stenographic Report of the 1st Session," 118-119 and "Stenographic Report of the 2nd Session," 261. Richard R. Bowker, an editor and representative of the American (Author's) Copyright League, first suggested the

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specifically developed by the committee to appease the fine artists, the Supreme Court decision in the 1907 case *American Tobacco Co. v. Werckmeister* (a corollary case to *American Lithographic Co. v. Werckmeister*) eliminated the notification requirement for works of fine art before the passage of the 1909 Copyright Act.[376] However, the symbol was thereafter taken up by photographers (fig. 48) among other artists and continues to be widely used today.

The U.S. Supreme Court decision in *American Tobacco Co. v. Werckmeister* to relieve paintings and other fine artworks from the notification requirement signaled the ultimate triumph of the original artwork in American culture. As discussed in Chapter 2, the turn of the twentieth century was a period in which Americans began to prioritize the cultural authority of original artworks over reproductions. However, as suggested by the outcome of *Pierce & Bushnell Manufacturing Co. v. Werkmeister* (1896) these notions had not yet penetrated legal discourse. With the U.S. Supreme Court opinion in *American Tobacco Co. v. Werckmeister* (1907)*,* the legal system caught up with cultural preferences of the period and officially recognized the cult of the original artwork.

The issue that provoked the most bitter arguments and cutting barbs at the copyright conferences was legislation regarding the assignment of penalties in copyright cases, especially those involving photographs. The battle of "Photographers VS. The Press," examined in Chapter 3, continued to wage well through 1909. While the ANPA had successfully lobbied to lower the maximum penalties in photographic copyright cases to $5,000 in 1895, they sought to limit further the actions that photographers could bring against them in infringement cases. At the copyright conferences and hearings before the Joint Committee on Patents in 1906 and 1907, Falk and MacDonald found themselves on the defensive against detrimental proposals put forward by representatives of the press and struggled to promote their own reforms to the assignment of penalties.

Throughout the copyright conferences and Senate hearings on copyright reform, the ANPA and, to a lesser degree, the Lithographers' Association attacked the photographic profession and their work in order to reduce penalties in photographic copyright cases. As discussed in the case *Falk v Curtis Publishing Company* (1899), the press often called out commercial photographers as "blackmailers" who made their living by squeezing inordinate amounts of money from publishers in copyright cases. This myth was revived at various points in the copyright conferences. One delegate related his supposed dealings with a devious photographer who "had a way of almost concealing his signature on his photographs" and would then sue the unsuspecting press for thousands of dollars in damages for reproducing his "non-artistic" photographs.[377] MacDonald responded to this unfounded accusation on behalf of photographers by pointing out that "there is not in photography, as a class, a tendency [to pursue unfair infringement suits] any more than it is found among writers of music publishers or any other class that is represented here."[378] It is possible to read MacDonald's comment as an implicit critique of the hypocrisy of the press, which had a long history of reproducing the work of competitors without

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use of a small "c" as a designation for copyright at the third copyright conference. See "Stenographic Report of the 3rd Session," 252.

[376] *American Tobacco Co. v. Werckmeister* 207 U.S. 284 (1907).

[377] "Stenographic Report of the 1st Session," 72.

[378] Ibid., 74.

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permission.[379] While the newspaper men apologized to MacDonald and claimed that "a better class of photographers" should be able to pursue the "extreme limit" in penalties, their later arguments before members of the Senate Committee on Patents suggested no such reconciliation.[380]

In 1906 and 1907, the Senate Committee on Patents hosted several hearings about copyright reform and invited members of the copyright conferences to come defend their proposed revisions to the statute. While delegates at the copyright conference collectively agreed that penalties in the new legislation should range between a minimum of $250 and maximum of $5,000 for all subject matter, the ANPA surreptitiously lobbied members of the Senate Committee on Patents to do away with penalties in infringement cases brought by photographers against the press. In their statement to the joint committee, the newspaper men argued that it was an "injustice" that "the mechanical maker of a [K]odak snap shot [enjoys] the same protection given to the author of a literary, artistic, or musical composition." Further, they contended that press reproductions did not infringe upon a photographer's copyright because these copies were "imperfect," by which they meant low quality, and thus did not detract from sales in the original. To the contrary, the ANPA reasoned, reproductions of original photographs in the press benefited the photographer because they served "to advertise and to increase the sale of the original photographs."[381]

The ANPA's statements are as malicious as they are predictable and rife with contradictions. Belittling photography as "mechanical" rather than "artistic," the ANPA rehashed the long-standing challenge to the legitimacy of photographic copyright discussed in the case *Detroit Photographic Co. v. Merchants' Publishing Co.* (1899). The deliberate reference to the "[K]odak snap shot" offered an updated twist on this well-trodden argument that photographs lacked originality, for Kodak proudly advertised the mechanical ease of photography in the popular slogan "You press the button/We do the rest." As we saw in Chapter 1, the argument that *all* photographs were inherently mechanical was rejected by the courts in the *Burrow-Giles Lithographic Co. v. Sarony* (1884) and the appeal of *Detroit Photographic Co. v. Merchants' Publishing Co.* in 1903. However, the ANPA's categorical dismissal of all photographs as "snap shot[s]" serves to call into question the labor and value ascribed to work produced by professional photographers.

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[379] Falk made a similar point in an earlier article, in which he wrote: "Twenty-five years ago it was almost a universal practice for newspapers to "crib" new items or entire editorials *from their own competitors,* without thanks or acknowledgement of any sort. This pernicious habit, although not entirely eradicated, is now considered a brand of infamy among the newspaper fraternity, and no self-respecting journal would countenance such literary piracy. On the other hand, it is an astonishing fact that many of these same journals think nothing of violating the same principle here embodied *when it is applied to the productions of the photographer*. See Falk, "Photography VS. The Press" in *Wilson's Photographic Magazine* (Sept. 1895), 390. Emphasis in the original.

[380] A joke that Don C. Seitz made in one of the later copyright meetings reflected the press's attitude toward photographic copyright law. As Seitz quipped to conference members, "As a matter of fact, the copyright law is a hindrance to the newspaper business and prevents our taking things we have seen and admire, which we would like to have. (Laughter)." See "Stenographic Report of the 2nd Session," 202.

[381] "Hearings Before the (Joint) Committees on Patents, December 7-11, 1906" in *Legislative History of the 1909 Copyright Act* (Vol. 4), 169.

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The second part of the ANPA's argument relies on the public reception of halftone printing, which was the primary photomechanical process used by newspapers and magazines to translate original photographs to the printing press. As discussed in the case *Falk v. Curtis Publishing Company* (1901), some readers perceived halftones to be inferior to other illustration forms (especially wood engravings) and potentially harmful to American taste. For the ANPA, this "imperfect" quality of halftone reproductions made them unthreatening to photographers and their business. As the ANPA argues, these inferior copies "are not such reproductions as can be substituted in sales for the originals."[382] Though halftones were certainly of much lower quality than original photographic prints, that did not change the fact that a newspaper full of halftones cost only a few pennies in the early twentieth century where prints by professional photographers could cost several dollars.

Despite admitting the low quality of halftones after original photographs, the ANPA then make the incongruous assertion that these reproductions serve as good advertising for photographers. This seamless move from self-deprecation to self-promotion regarding the halftone reproductions that appeared in the press further exposes the faulty logic of the ANPA's arguments. As Falk and MacDonald wrote in their response to the ANPA's statement, the idea that the illicit reproduction of copyrighted photographic works by the press was a means to "increase the sale of the original photographs" was "misleading and calculated to divert attention from the vital point [of copyright law]," which granted the author of a protected work the very right to make and sell copies of that work.[383] As we saw in our discussion of *Falk v. Curtis Publishing Co.,* a number of commercial photographers of this period did embrace the press as a site to publicize their work. More often than not, however, the press used the promise of publicity to claim ownership over and profit from submissions sent by aspiring photographers.

In addition to combating the ANPA's "misleading" arguments about the use of photography by the press, Falk and MacDonald appeared before the members of the Senate Committee on Patents to campaign for reform to legislation related to the recovery of penalties in copyright cases. As discussed in Chapter 3, the convoluted phrasing of this area of the Copyright Act had cost Falk and other members of the PCLA thousands of dollars in potential damages (not to mention legal fees). Before the Senate Committee on Patents, Falk and MacDonald asked that the new copyright statute allow injured parties to pursue penalties based on the total number of copies the infringer had circulated, not simply those "found in [the infringer's] possession."[384] Further, they asked the members of the committee to simplify and clarify the procedures for seeking damages against infringers. Rather than being required to first issue an injunction against the infringer and then file legal action for monetary damages, photographers lobbied for these operations to be pursued simultaneously as Falk had done in *Falk v. Curtis Publishing Co.* (1899-1901).[385]

While photographers secured the desired reforms to legislation regarding the recovery of penalties in the 1909 Copyright Act, they were dealt a considerable blow when they discovered that the ANPA had convinced legislators to lower the maximum penalty in photographic

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[382] Ibid., 169.
[383] Ibid., 389.
[384] Ibid., 389.
[385] Ibid., 389.

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copyright cases involving the press to a mere $200.[386] With such low penalties at stake, it was no longer worth it for photographers to sue the press for infringement. As described in *Wilson's Photographic Magazine,* "in plain words this means that the photographer has no protection for his property rights in his own work if the newspapers decide they want to use it."[387]

Ultimately, the Copyright Act of 1909 provoked mixed feelings among American photographers. In spite of the maneuvering of the ANPA, photographers cheered the new copyright statute for expanding the legal definition of originality, for bringing about a simplified notification requirement with the use of the © symbol, and clarifying the actions for pursuing penalties.[388] In addition to these legal gains, the very fact that photographers had been asked to weigh in on copyright reform alongside more powerful cultural interests suggested the rising prominence of their profession. Considering that only twenty-five years earlier photographers had to defend the basic protection of their works by copyright law, the debates leading up to and provisions of the 1909 Copyright Act represent considerable progress for the standing of the photographic profession and the reception of photographs within the United States. However, photographs continued to await the day when they would be "entitled to…the same protection for [their] work that is accorded to the work of a Sargent, an Edison, or a Mark Twain."[389]

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In the hundred years since the 1909 Copyright Act, photography in the United States has changed in countless ways. Photography is now firmly understood as an artist practice with photographic works appearing regularly in museum exhibitions and commanding high prices at auctions. The creation and circulation of photographs has also transformed in considerable ways with the introduction and wide adoption of digital technologies. However, photography has not changed in one key way since the turn of the twentieth century: it continues to challenge the terms and practices of American copyright law. A brief consideration of a copyright case currently causing a stir among art cognoscenti and legal scholars, *Graham v. Prince et al.*, suggests that many of the issues central to copyright cases at the turn of the twentieth century remain unsettled today.

In 2014 the Gagosian Gallery in New York City opened an exhibition of new work by well-known contemporary artist Richard Prince. Entitled "New Portraits," the show featured a series of 4.75 x. 5.5 foot canvases printed with digital photographs that Prince had selected from the popular photo sharing app Instagram (fig. 49). Prince did not take any of the photographs nor did he ask the Instagram users or their subjects for permission to print and exhibit these works. Initially, the exhibition proved a commercial success for Prince and the Gagosian Gallery with the digitally printed canvases selling for up to $100,000. However, complaints soon began to pour into the gallery from a number of Instagram users and their collaborators who claimed that Prince had violated their copyrights. One of the photographers who sent a cease and desist letter to Prince was Donald Graham, a successful professional photographer whose copyrighted photograph "Rastafarian Smoking a Joint" from 1997 (fig. 50a) was among those photographs

[386] "The New Copyright Law," in *Wilson's Photographic Magazine* (Apr. 1909), 145.
[387] Ibid., 145.
[388] Ibid., 145-146.
[389] "The American Photographer and the Copyright Law," in *Wilson's Photographic Magazine* (Jan. 1907), 1.

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that Prince had selected from Instagram for his "New Portraits" series (fig. 50b). With no response from Prince or the gallery, Graham decided to sue Prince for copyright infringement.[390]

The central questions are being debated in this case—Is Prince's work original? Or is it a copy? And how will the damages be assessed if Graham wins the case?— evoke those that have occupied us over the course of this dissertation.[391] That this and other photographic copyright cases tried today recall those from the turn of the twentieth century is not surprising given that these historic periods are both marked by the introduction of technologies that have greatly increased the production and circulation of photographs. Where Americans at the end of the nineteenth century witnessed the broad adoption of halftone printing and the booming popularity of Kodak cameras, today the Internet and cellphone cameras have made the circulation and (re)production of photographs more ubiquitous than ever before.[392]

Despite the strong parallels between recent cases like *Graham v. Prince et al.* and copyright cases from the turn of the twentieth century, there has been little reflection on these earlier cases by lawyers, judges, or photographers today. For lawyers and judges, photographic copyright cases from the distant analog era appear less relevant and compelling than the more recent cases involving digital technologies. For photographers, legal history is not typically a part of their training or practice. I would argue, however, that the study of these now forgotten copyright cases offers valuable lessons to art historian, legal professionals, and photographers working today.

As discussed in the case *Detroit Photograph Company v. Merchants' Publishing Company* (1899), the originality requirement of American copyright law provoked considerable anxiety among judges at the turn of the twentieth century because it put them in the position of delivering subjective judgments on the aesthetic merits of a contested work. Despite Justice Holmes's warning in *Bleistein v. Donaldson Lithographing Co.* (1903) that judges are ill equipped to play the role of the aesthetic critic, judges have continued to shape legal opinions upon their evaluation of the visual qualities and art historical value of contested works.[393] In the case of *Graham v. Prince et al.,* for example, the judge hearing the case has been bombarded with briefs written by art historians and curators that argue for the cultural importance of

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[390] For an overview of this case, see Eileen Kinsella, "Outraged Photographer Sues Gagosian Gallery and Richard Prince for Copyright Infringement" on artnet.com 4 Jan. 2016. https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498 Accessed 15 April 2017.

[391] One of the important considerations in this case which was not taken into account in copyright cases at the turn of the twentieth century is whether or not Price's use of Graham's photograph is protected under fair use. The concept of fair use had its origins in the nineteenth century but was only codified in 1976. On the rise of fair use doctrine, see Vaidhyanathan, 26-28. On the application of fair use defenses in cases involving appropriation art, see Martha Buskirk, *The Contingent Object of Contemporary Art* (Cambridge: MIT Press, 2003), 59-105.

[392] By 2017 the number of photographs taken is projected to reach 1.3 trillion, a giant leap from the estimated 80 billion taken in 2000. The increasing affordability and quality of cellphone photography is largely responsible for this rapid rise in the production of photographs over the last seventeen years. See Stephen Heyman, "Photos, Photos Everywhere" in *The New York Times.* 29 July 2015. https://www.nytimes.com/2015/07/23/arts/international/photos-photos-everywhere.html?_r=0 Accessed 15 April 2017.

[393] As Holmes wrote it in this opinion, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustrations." *Bleistein v. Donaldson Lithographing Co.* 188 US 239 (1903). On contemporary confrontations between art and the law, see Christine Haight Farley, "Judging Art" in *Tulane Law Review* (Mar. 2005), 805-858.

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appropriation art, of which Prince is a leading practitioner.[394] In addition to considering the art historical value of Prince's work, the judge will have to consider whether Prince sufficiently transformed Graham's work to qualify for a fair use defense. This will require the judge to weigh the effect of a number of small changes that Prince made to Graham's original work, including the expanded scale, the use of a canvas support, the inclusion of the trappings of an Instagram post, among other details.

While Justice Holmes sought to sidestep the consideration of aesthetic values in his reformulation of the originality requirement, another solution to confronting the persistence of artistic judgments in copyright cases (and other legal cases) is to make visual analysis a regular feature of legal education.[395] Given that patent attorneys are expected to possess a working knowledge of science and technology, it is not unreasonable to expect lawyers interested in pursuing a career in copyright law to have training in American artistic practices and history (not limited to fine arts but also literature and other cultural forms).[396] With this extra-legal knowledge, it would be a less "dangerous undertaking," as Justice Holmes put it, for legal professionals to "constitute themselves judges of the worth of pictorial illustrations."[397]

For contemporary photographers, the Photographers' Copyright League of America (PCLA) offers a model for collectively pursuing copyright litigation and reform. While the PCLA disbanded due to a lack of interest in the late 1910s, many photographers today have established similar professional organizations to promote their interests. These groups include the National Press Photographers Association, Professional Photographers of America, Picture Archive Council of America, American Society of Media Photographers, and others.[398] These organizations have taken a heightened interest in copyright cases and legislation in recent years as digital technologies have enabled the promiscuous circulation of members' work. Following

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[394] Sergio Munoz Sarmiento, "Art and the Law" lecture given at the Pennsylvania Academy of Fine Arts on April 5, 2017. Sarmiento, a practicing artist and lawyer, noted that one of the institutions that sent a brief in defense of Prince and the tradition of appropriation art was the Warhol Foundation. The position of the Warhol Foundation is ironic given their history of aggressive litigation against those who reproduce Warhol's work.

[395] This proposal that practitioners of the law engage with art historical practice parallels Christine Haight Farley's call for lawyers and judges to educate themselves in aesthetic philosophies. Along with Farley, I support the idea the practitioners of the law should explicitly engaged with questions of the definition of art and aesthetics. By sidestepping these issues, judges only create inconsistencies or confusion within case law as in the case of *Burrow-Giles Lithographic Co. v. Sarony* (1884). See Farley, 808-809. In contrast to Farley, I believe that the practice of formal analysis and the study of actual art objects would be more useful to lawyers and judges than the study of texts on aesthetics. However, given the textual leaning of the law and legal education, I understand the appeal of studying aesthetics over actual artworks to members of the legal profession.

[396] The annual intellectual property educational programs organized by UC Berkeley law professor Peter Menell for the Federal Judicial Center are one of few examples of legal professionals receiving special training in contemporary cultural production. These programs focus on recent issues in patent law, trademark law, and copyright law. The extra-legal training related to contemporary copyright cases has primarily focused on music, and the programs has invited musicologists to instruct judges in reading sheet music and listening for distinctions in arrangement. For more information on this and other educational programs offered by the Federal Judicial Center, see https://www.fjc.gov/education/programs-and-resources-judges#SF Accessed 25 April 2017.

[397] *Bleistein v. Donaldson Lithographing Co.* 188 US 239 (1903).

[398] On the organizational efforts of contemporary photographers, see Patricia Cohen, "Photographers Band Together to Protect Work in 'Fair Use' Cases" in *The New York Times.* 21 Feb 2014. https://www.nytimes.com/2014/02/22/arts/design/photographers-band-together-to-protect-work-in-fair-use-cases.html?_r=0 Accessed 19 April 2017.

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in the footsteps of the PCLA, these groups have banded together to pay the dizzying legal fees of members pursuing copyright infringement cases and have made their voices heard to representatives in Washington, DC. Indeed, these groups have reported interest in hiring a full-time lobbyist to represent their interests on Capitol Hill.[399]

In addition to learning from the PCLA's successes, photographers today have much to gain from studying their failures. As discussed in the case *Falk v. Curtis Publishing Company* (1901), the PCLA never managed to generate broad interest or support from large numbers of professional photographers; rather, the organization was comprised of a small but powerful group of committed members such as Benjamin J. Falk and Pirie MacDonald. And it's not hard to understand why even charismatic Falk and MacDonald could not retain high membership levels in the PCLA: copyright laws are complex and difficult for laypeople to parse. To secure interest among professional photographers today, organizations need to educate their peers in managing their copyrights (including more open Creative Commons licensing) and options for pursuing legal actions. Indeed, many art schools have recognized the importance of imparting practical legal knowledge onto their students and have begun organizing workshops to prepare the next generation of artists to succeed in the Digital Age.[400]

Undoubtedly, new technologies will continue to transform the creation and circulation of photographs in the next hundred years and beyond. It is just as certain that photographic works of the future will spark legal disputes over their authorship, ownership, originality, and value. Whichever direction photography may take, the early photographic copyright cases that have been the subject of this dissertation will continue to offer a touchstone for sorting through these entanglements of artistic and legal practice.

[399] See Cohen.
[400] For example, I recently attended a lecture on the basics of copyright law for art students at the Pennsylvania Academy of the Fine Arts. See Sarmiento.

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Figures

Fig. 1a: William Henry Jackson, *The Palisades Alpine Pass,* c. 1885, scan of glass negative. Denver Public Library.

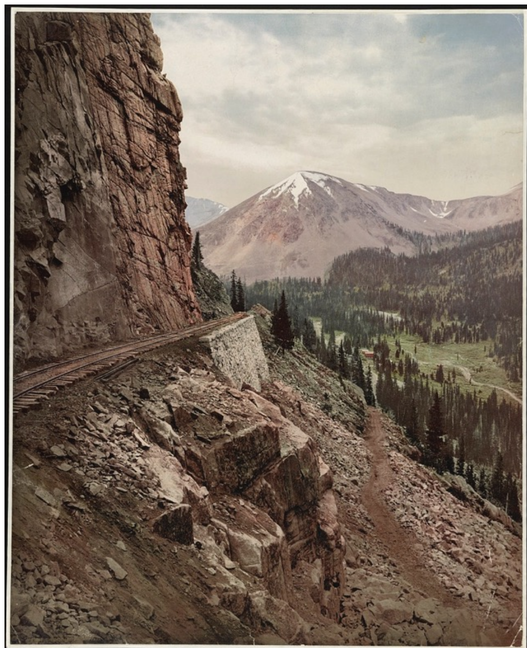

Fig 1b: William Henry Jackson, *The Palisades, Alpine Pass,* c. 1900, Photochrom print by the Detroit Photograph Company. Library of Congress.

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G. NAUJOK.

SAINT CECILIA.

All the world of art has laid its tributes on the shrine of Saint Cecilia, patroness of music and musicians the world over. The popularity of this most delicate and æsthetic of all the saintly characters is universal. Half the musical societies of Europe are named after her. Poets have sung her praises, the great Dryden at their head; sculptors have carved her image to adorn her sanctuaries; and since the days of Domenichino, painters have found in their conceptions of the protectress of harmony and its devotees their highest ideal of virgin sweetness and elevation. The artist who produced the painting which is here engraved, owes to it a vogue that extends not only throughout Europe, but reaches to the remotest bounds of the American continent, and a reputation that formerly was limited to his native Königsberg, has now become world-wide. While in large measure this is due to his happy choice of subject, it is also to be accounted for by the extraordinary merit of his composition. The pleasing contrasts of light and shade; the illumination proceeding from the flower-laden cherubs, who typify the legend of Cecilia's harmonious communion with heaven; her sweet serenity and strength of expression; the graceful pose of the fingers, one hand resting lightly on the keys, and the other raised in surprised recognition of the heavenly host—each contributes to the appreciation of a most happy combination of reality and idealism.

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Fig. 2: Berlin Photographic Co., *St. Cecilia,* 1893, photogravure after an oil painting by Gustav Naujok. Collection of the author.

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Fig. 3: Benjamin J. Falk, *Minnie Ashley,* 1897, gelatin silver print. Museum of the City of New York.

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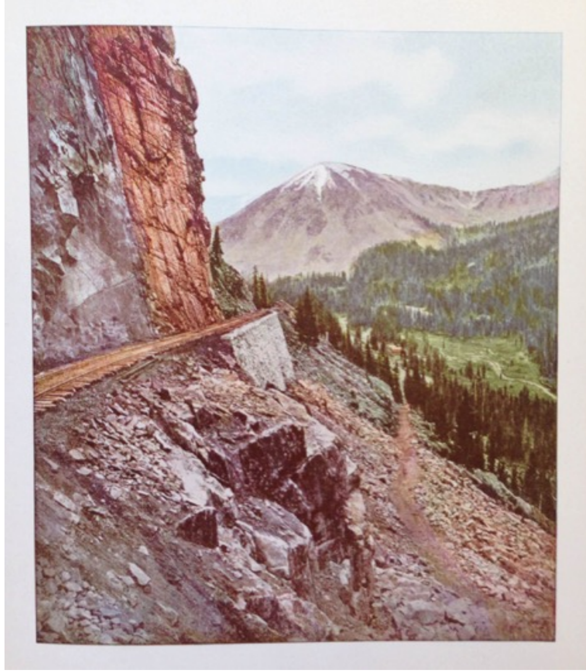

Fig. 4: William Henry Jackson, *The Palisades, Alpine Pass* as reproduced in *Colorado in Color and Song* (Denver: Frank S. Thayer Pub., 1898), tinted halftone. New York Public Library.

Fig. 5: Napoleon Sarony, *Oscar Wilde No. 18,* 1882, albumen silver print. Library of Congress.

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Fig. 6: Albert Bierstadt, *The Rocky Mountains, Lander's Peak,* 1863, oil on canvas. Metropolitan Museum of Art.

Fig. 7: William Henry Jackson, *Long's Peak, From Estes' Park, Colorado,* 1873, albumen silver print. J. Paul Getty Museum.

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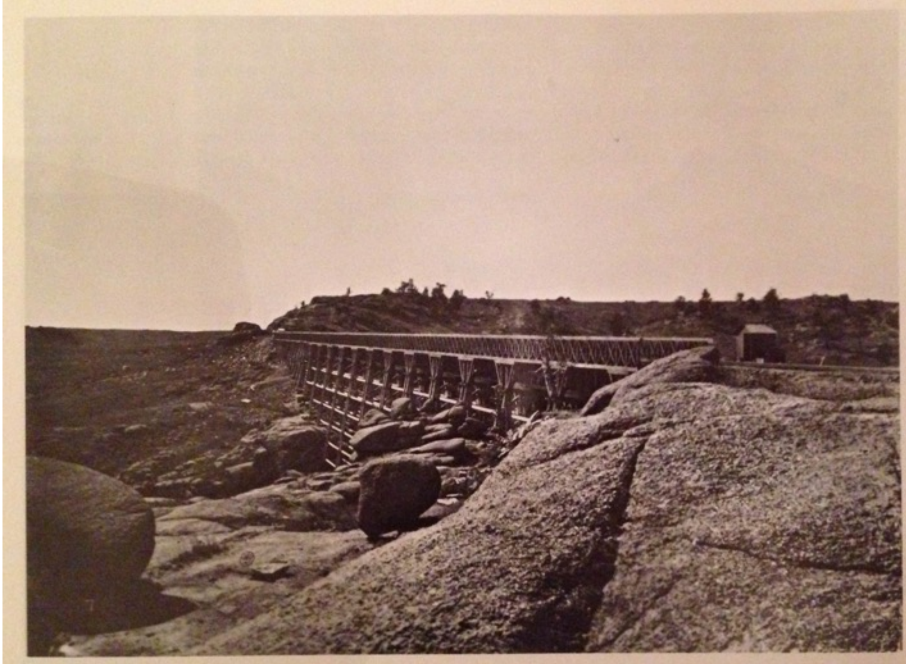

Fig. 8: William Henry Jackson, *Dale Creek Bridge,* 1869, albumen silver print. United States Geological Survey.

Fig. 9: William Henry Jackson, *The Royal Gorge, the Grand Cañon of the Arkansas,* 1880-81, albumen silver print. J. Paul Getty Museum.

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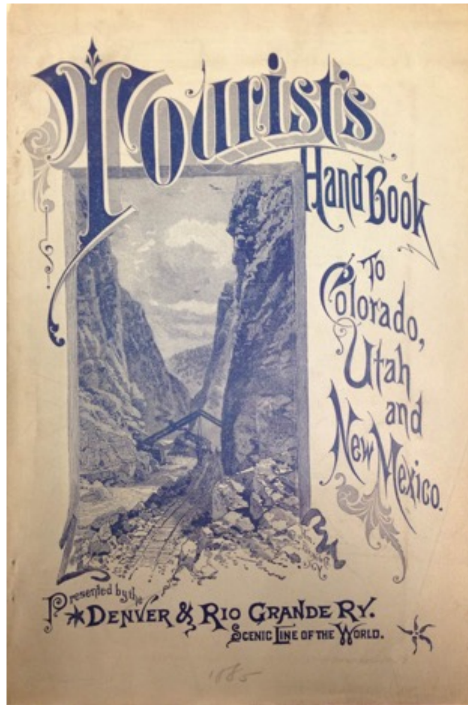

Fig. 10: Cover to *The Royal Gorge, the Grand Cañon of the Arkansas* in *Tourist's Hand-Book to Colorado, Utah, and New Mexico* (Denver: Published under the auspices of the Passenger Department of the Denver & Rio Grande Railroad, 1885), steel engraving after a photograph by William Henry Jackson. American Antiquarian Society.

Fig 11: William Henry Jackson, *The Royal Gorge,* c. 1891, halftone print. Denver Public Library.

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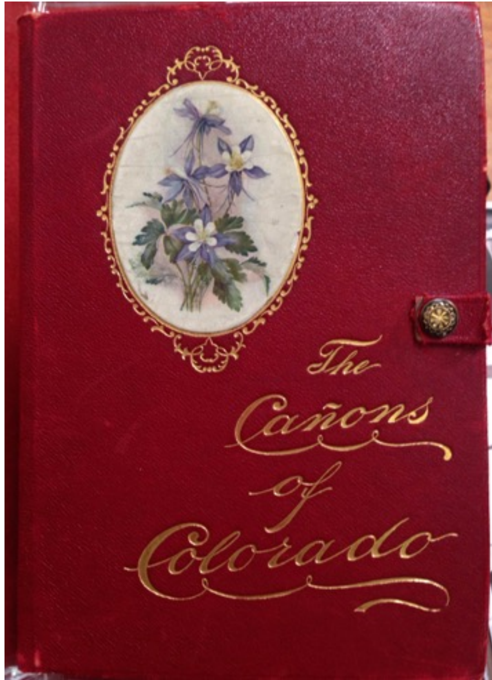

Fig. 12: Cover to *The Cañons of Colorado* (Denver: Frank S. Thayer Pub., c. 1890). American Antiquarian Society.

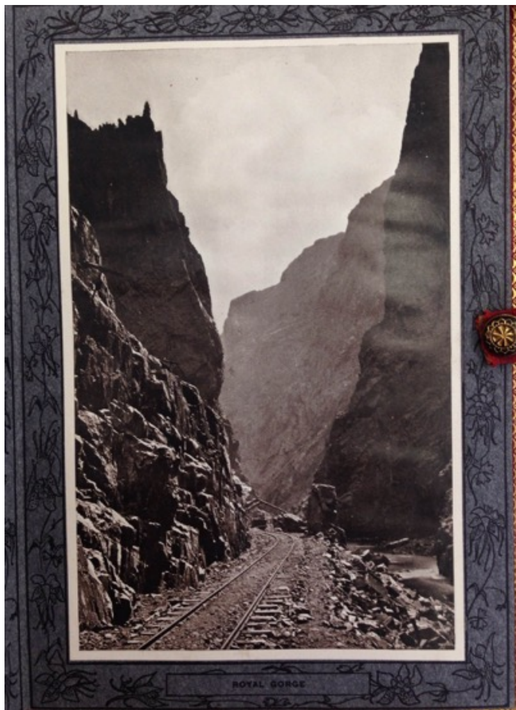

Fig. 13: William Henry Jackson, *Royal Gorge* in *The Cañons of Colorado* (Denver: Frank S. Thayer Pub., c. 1890), halftone print. American Antiquarian Society.

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Fig. 14: William Henry Jackson, *The Royal Gorge,* 1889, gelatin silver prints from a photograph album compiled by Elizabeth H. Wilder Rice. American Antiquarian Society.

Fig. 15: William Henry Jackson, “Bridge in the Royal Gorge, Grand Cañon of the Arkansas” in *Gems of Colorado Scenery* (Denver: Frank S. Thayer, c. 1890), halftone print. American Antiquarian Society.

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Fig. 16: William Henry Jackson, *The Royal Gorge* in *Colorado in Color and Song* (Denver: Frank S. Thayer, 1899), tinted halftone print. New York Public Library.

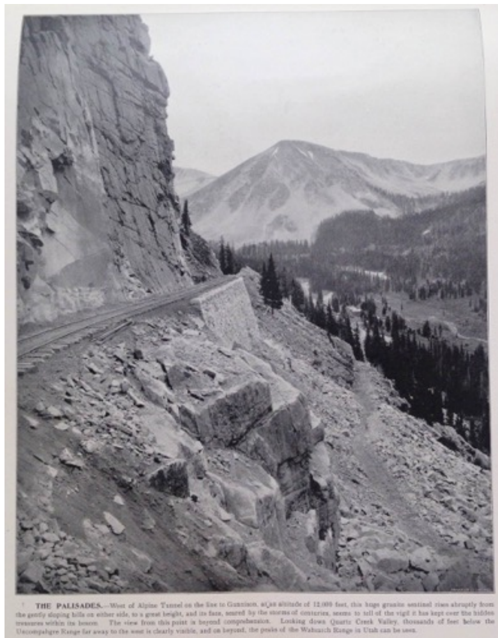

Fig. 17: William Henry Jackson, *The Palisades, Alpine Pass,* in *Among the Rockies: Pictures of Magnificent Scenes in the Rocky Mountains* (Denver: H.H. Tammen, 1895), halftone print. Princeton University Libraries.

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Fig. 18: Jeremiah Gurney, *Ann Eliza [aka Mrs. Charles Eldridge] and Walter Barnes,* c. 1852, daguerreotype with applied color. San Francisco Museum of Modern Art.

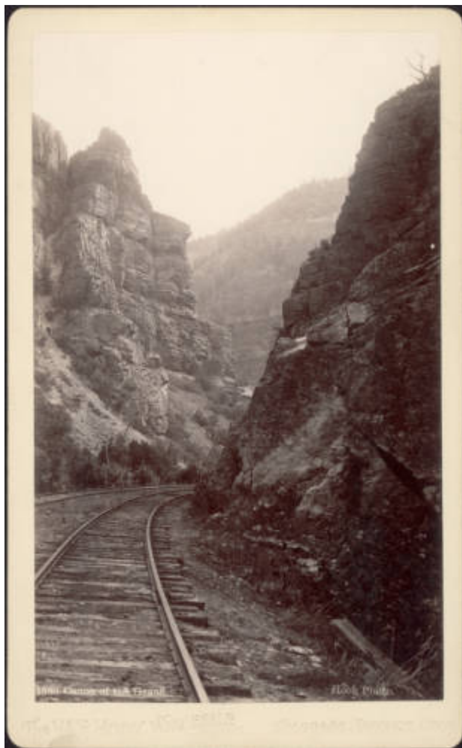

Fig. 19: W.E. Hook, *Canon of the Grand*, c. 1890, gelatin silver print. Denver Public Library.

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Fig. 20: Louis Charles McClure, *Narrows, Phantom Canyon,* c. 1900, scan from a glass plate negative. Denver Public Library.

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Fig. 21: Advertisement for a Kodak Camera, 1889. New York Public Library.

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Fig. 22: Unknown author, *Ten Dollar Outfit Picture* in Henry Clay Price, *How to Make Pictures: Easy Lessons for the Amateur Photographer* (New York: Scovill Manufacturing Co., 1887), gelatin silver print. Library of Congress.

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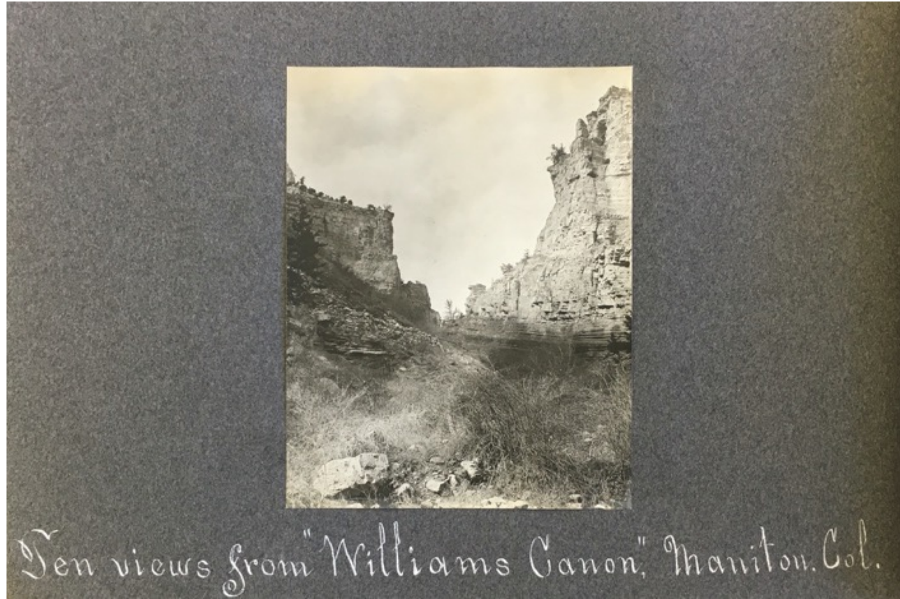

Fig 23: Unknown author, *Ten Views from 'Williams Canon,' Manitou, Col.* from *Travel Album of California Costal Views,* c. 1900, gelatin silver print. Bancroft Library, University of California, Berkeley.

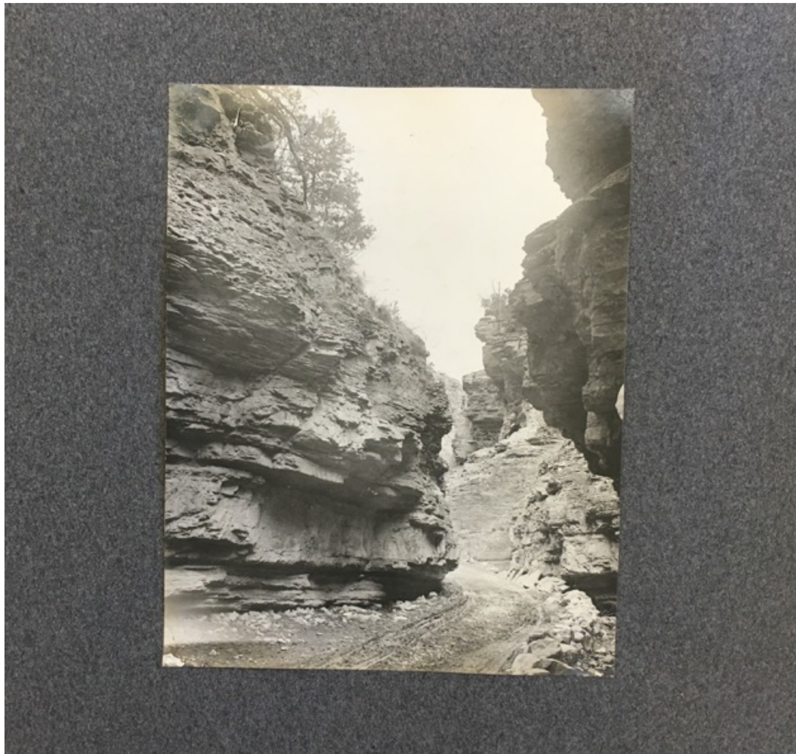

Fig. 24: Unknown author, *The Narrows* from *Travel Album of California Costal Views,* c. 1900, gelatin silver print. Bancroft Library, University of California, Berkeley.

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Fig. 25: Courier Lithographing Co., *The Great Wallace Shows,* c. 1898, chromolithograph. Library of Congress.

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Fig. 26a: W.H. Lippincott, *Infantry in Arms,* 1877, oil on canvas. Pennsylvania Academy of Fine Arts.

Fig. 26b: Detail of W.H. Lippincott, *Infantry in Arms*, 1877, oil on canvas. See the copyright notification at bottom left.

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Fig. 27: George Caleb Bingham, *The Jolly Flatboatmen,*1846, oil on canvas. National Gallery of Art, Washington, DC.

Fig. 28: T. Doney (printed by Powell & Co), *The Jolly Flat Boat Men,* 1847, mezzotint engraving after an oil painting by George Caleb Bingham. Library of Congress.

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Fig. 29: L. Prang & Co., *Barefoot Boy,* 1867-1869, chromolithograph after an oil painting by Eastman Johnson. Boston Public Library.

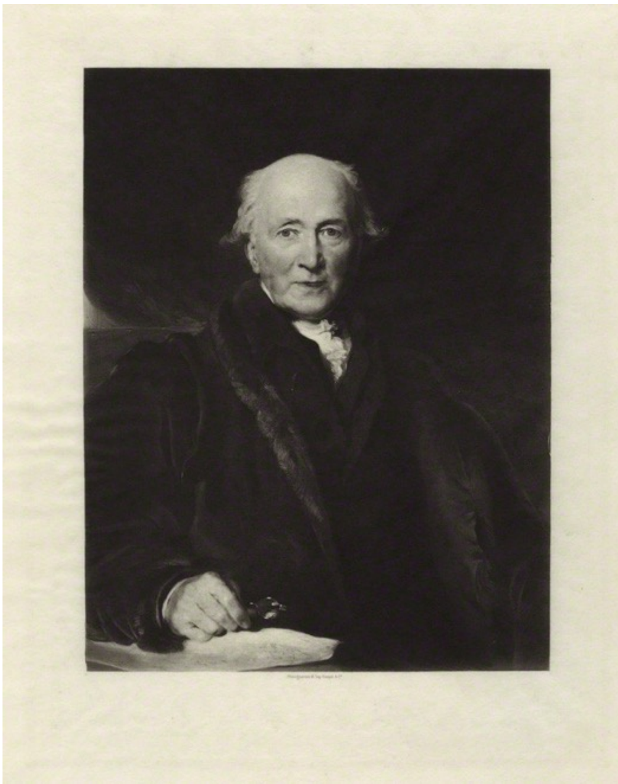

Fig. 30: Goupil & Cie, *John Julius Angerstein,* c. 1880, photogravure after an oil painting by Sir Thomas Lawrence. National Portrait Gallery, London.

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Fig. 31: Unknown photographer, *Newton Free Library, Old Main, Centre St., Newton, MA,* c. 1900, gelatin silver print. Boston Public Library.

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Fig 32: Benjamin J. Falk, *Minnie Ashley, No. 4* in *The Ladies Home Journal,* October 1899, halftone print. Collection of the author.

Fig. 33a: Benjamin J. Falk, Page from Record Book for 1886. New York Public Library.

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Photographic Register.

STYLE	PROMISED	PRICE	CASH	DELIVERED. Number	How	Date	REMARKS	CASH BOOK
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Fig. 33b: Benjamin J. Falk, Page from Record Book for 1886. New York Public Library.

Fig. 34: A series of photographs of Minnie Ashley among other actors from Benjamin J. Falk, “Illustrated Catalogue of Photographer’s Negatives” vol. 1, c. 1895. New York Public Library.

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THE LADIES' HOME JOURNAL 5

The American Girl

By Rudyard Kipling

Fig. 35: Rudyard Kipling, “The American Girl” in *The Ladies’ Home Journal,* October 1899. The halftone portrait of Minnie Ashley is at bottom left. Collection of the author.

Fig. 36: Henry J. Newton*, A Scene in Shanty Town, New York* from the *New York Daily Graphic,* March 4, 1880, halftone print. Library of Congress.

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Fig. 37: Spread showing various illustration processes, *New York Daily Graphic,* March 4, 1880. *A Scene in Shanty Town, New York* is at bottom left. Library of Congress.

Fig. 38: *The Merchant's Exchange Fire* in the New York *Herald,* December 21, 1835, scan after a woodcut. Library of Congress.

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Fig. 39a: Winslow Homer, *Our National Exercise—Skating* in *Frank Leslie's Illustrated Newspaper,* January 1866, wood engraving. The Clark Museum.

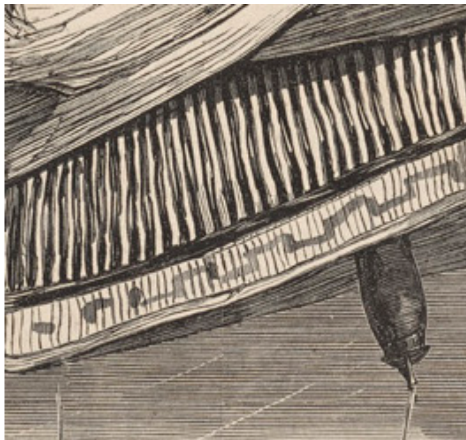

Fig. 39b: Detail of Winslow Homer, *Our National Exercise—Skating* in *Frank Leslie's Illustrated Newspaper,* January 1866, wood engraving. The Clark Museum.

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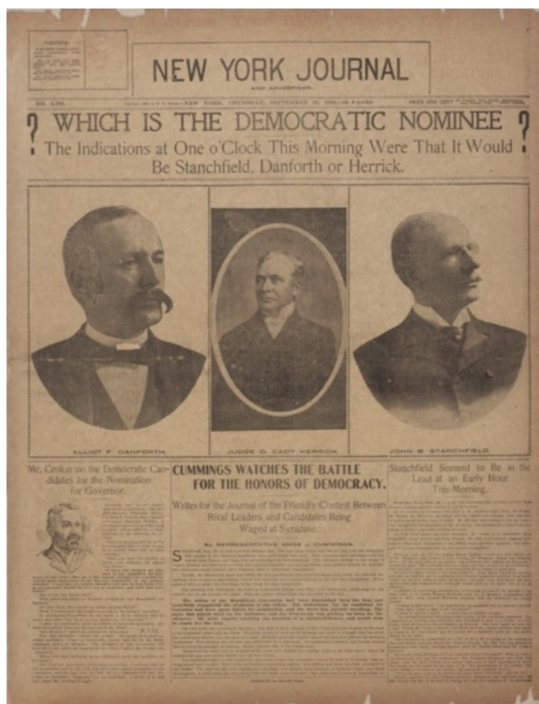
Fig. 40: A.R. Waud, *The Battle of Gettysburg* in *Harper's Weekly,* August 8, 1863, wood engraving. Library of Congress.


NEW YORK JOURNAL

WHICH IS THE DEMOCRATIC NOMINEE?

The Indications at One o'Clock This Morning Were That It Would Be Stanchfield, Danforth or Herrick.

ELLIOT F. DANFORTH

JUDGE D. CADY HERRICK

JOHN B. STANCHFIELD

Mr. Croker on the Democratic Candidates for the Nomination for Governor.

CUMMINGS WATCHES THE BATTLE FOR THE HONORS OF DEMOCRACY.

Writes for the Journal of the Friendly Contest Between Rival Leaders and Candidates Being Waged at Syracuse.

By REPRESENTATIVE AMOS J. CUMMINGS.

Stanchfield Seemed to Be in the Lead at an Early Hour This Morning.

Fig 41: Cover of the New York *Journal,* January 29, 1898, halftone prints and wood engravings. Library of Congress.

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Fig 42: "A Photographic Lesson on 'How to Remove Wrinkles'" in New York *Journal,* November 28, 1898, tinted halftone prints and wood engraving. Library of Congress.

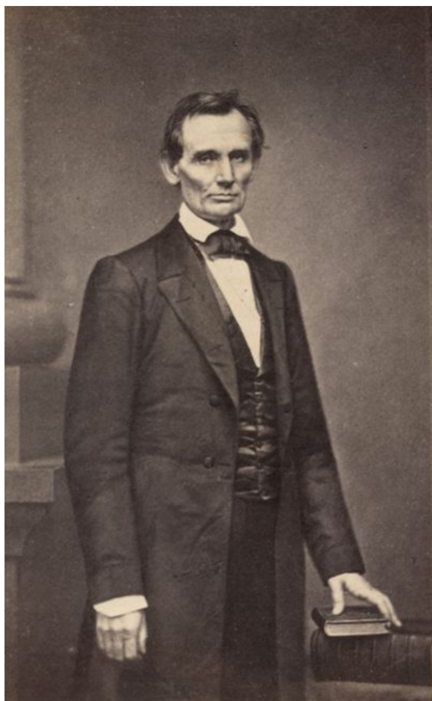

Fig. 43: Mathew Brady, *Abraham Lincoln,* 1860, salted paper print. Smithsonian Institution.

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Fig. 44: Napoleon Sarony, *Ada Rehan* [as Patti from "The Country Girl"], c. 1884, gelatin silver print. Harvard Theater Collection.

AMERICAN WOMAN'S HOME JOURNAL. 13

NEW YORK'S SWAGGER SET OUT FOR AN AFTERNOON AMONG THE HORSES.

Fig. 45: "New York's Swagger Set Out for an Afternoon Among the Horses" in the Sunday Supplement to the New York *Journal,* June 13, 1897. This spread includes halftone prints after news photographs taken of prominent New Yorkers at play, including Cornelius Vanderbilt Jr., Alice Claypool Gywwne (Mrs. Cornelius Vanderbilt Jr.), Marian Robbins van Rensselaer Kennedy, and others. Library of Congress.

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Fig. 46: Journal Artist, *Col. Roosevelt at His Sister's House, Just Before Going to Albany* in the New York *Journal,* December 31, 1898, halftone print. Library of Congress.

Fig. 47: Benjamin J. Falk, *Theodore Roosevelt,* 1898, gelatin silver print. Library of Congress.

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Fig. 48: William H. Rau, *Market Street,* 1911, ferrotyped silver gelatin print. Note the © symbol in the bottom right corner. Library Company of Philadelphia.

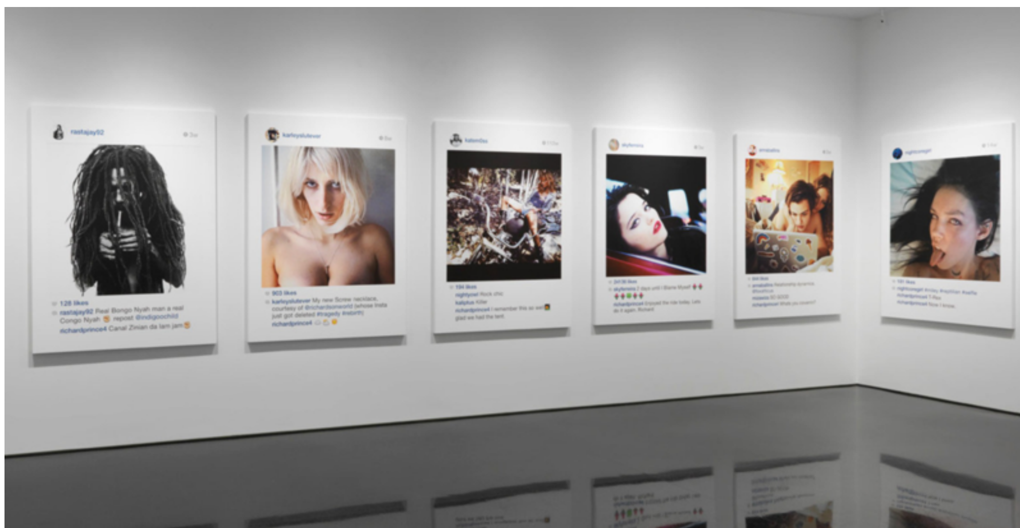

Fig. 49: Paddy Johnson, Installation View of "New Portraits" by Richard Prince at the Gagosian Gallery, 2014. Gagosian Gallery.

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Fig. 50a and 50b: Donald Graham, *Rastafarian Smoking a Joint,* 1997, gelatin silver print. Donald Graham; Richard Prince, work from the "New Portrait" series, 2014, digital print on canvas. Gagosian Gallery.

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