The nineteenth century witnessed a series of revolutions in the production and circulation of images. From lithographs and engraved reproductions of paintings to daguerreotypes, stereoscopic views, and mass-produced sculptures, works of visual art became available in a wider range of media than ever before. But the circulation and reproduction of artworks also raised new questions about the legal rights of painters, sculptors, engravers, photographers, architects, collectors, publishers, and subjects of representation (such as sitters in paintings or photographs). Copyright and patent laws tussled with informal cultural norms and business strategies as individuals and groups attempted to exert some degree of control over these visual creations.

With contributions by art historians, legal scholars, historians of publishing, and specialists of painting, photography, sculpture, and graphic arts, this rich collection of essays explores the relationship between intellectual property laws and the cultural, economic, and technological factors that transformed the pictorial landscape during the nineteenth century.

This book will be valuable reading for historians of art and visual culture; legal scholars who work on the history of copyright and patent law; and literary scholars and historians who work in the field of book history. It will also resonate with anyone interested in current debates about the circulation and control of images in our digital age.

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Modern copyright law abounds in distinctions that were delineated differently, if at all, before the twentieth century — such as distinctions that separate idea from expression, ‘fair dealing’ from excessive use, and ‘verbatim’ copies from ‘nonliteral’ copies that use characters or other distinctive aspects of the work. In 1800, the scope of copyright barely extended beyond direct and complete reproduction of a protected work. Language in various eighteenth-century British statutes and legal cases suggested otherwise, but scholars have yet to find a single instance, before 1800, of a plaintiff who won an infringement case when the defendant had copied less than the entire work. During the first half of the nineteenth century, some plaintiffs prevailed in lawsuits over abridgments, and those decisions, in the area of literary copyright, signaled a conceptual shift that allowed for increasingly broad coverage extending to nonliteral uses. Scholars such as Isabella Alexander, Derek Miller, and Oren Bracha, among others, have discussed the expanding scope of literary copyright in nineteenth-century British and American law. The scope of artistic copyright, in relation to these developments,
has received less attention. In what follows, I consider the slower process of its expansion in nineteenth-century England. I focus on two forms of copying: uses that include a significant part of an image without reproducing the whole work, and uses that copy the work in a different medium.

Throughout the nineteenth century, when new questions arose as to how copyright applied to certain varieties of artistic productions, or to certain components of them, the arguments tended to repeat those that had already been rehearsed in discussions of literary copyright during the eighteenth century. In elaborating copyright doctrine for visual works, the courts proceeded more slowly and haltingly than they did for literary copyright, in part because the judges were much more at home on textual terrain. As Jessica Silbey has observed, ‘lawyers and judges are word people and not picture people’. Most of the lawsuits involved plaintiffs who, as publishers or art dealers, had invested a significant amount in purchasing the copyright of a work of art, or in licensing the copyright and commissioning a new work, usually an engraving. If the defendant was in the same business (e.g., a seller of prints), the preferable solution would be an injunction that removed the infringing version from the market. Plaintiffs often complained that it was too slow and expensive to achieve this result; in 1862, new summary judgment provisions in the Fine Art Copyright Act made the process easier. On the other hand, if the infringement occurred in a newspaper or magazine, injunctive relief achieved nothing: the print run would already be exhausted by the time the plaintiff arrived in court. Moreover, the

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6 Will Slauter draws a similar contrast between book publishers and publishers of periodicals, with similar consequences for copyright litigation, in ‘Toward a History of Copyright for Periodical Writings: Examples from Nineteenth-Century America’, in From Text(s) to Book(s): Studies in Production and Editorial Processes, ed. by Nathalie Collé-Bak et al. (Nancy: Éditions universitaires de Lorraine, 2014), pp. 65–84.
cheaply produced illustrations in periodicals (using woodcuts or, later, photographs) would have little effect on the sales of fine art prints. Even if the money damages were trifling, however, the plaintiff could demand that the defendant pay the litigation costs (under the English rule imposing these costs on the losing party). Plaintiffs who specialized in a subject that frequently became newsworthy (e.g., theatrical performers or racing scenes) might anticipate the unauthorized use of their images on a recurring basis, and might hope that the cost of underwriting the litigation, more than the damages award, would make the defendant hesitate before offending again.

Throughout the eighteenth century, the scope of literary copyright was limited to verbatim reproductions of an entire text, leaving room for others to publish abridgments, digests, sequels, and imitations. Objections to these works turned on two sorts of arguments. One argument involved reputational concerns: an unauthorized adaptation could harm the author of the source text, because readers might think the author had approved it. Second, writers and publishers objected that partial and imitative works could undermine the sales of the original work, insofar as readers were satisfied with a market substitute. Various eighteenth-century writers complained about sequels, parodies, and works presenting themselves as ‘in the style of’ a famous author, but litigation stemming from such uses was virtually nonexistent. Samuel Richardson was especially vociferous in his criticisms; he was outraged by the sequels to his novel *Pamela* (1740), and called one of them a ‘notorious Invasion of his plan’; but even so, he did not sue those responsible for this ‘spurious Continuation’.

The copyright litigation that occurred during this period involved unauthorized reprinting, and almost invariably featured booksellers as plaintiffs, prompted by economic concerns. When the statutory

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regulation that served, in effect, to prohibit unauthorized reprinting lapsed in 1695, the leading London booksellers who belonged to the Stationers’ Guild petitioned repeatedly for legislation that would restore the protection they had lost. In the course of their lobbying efforts, the booksellers insisted that a damages regime would do them no good — a fine for infringement would be ineffective, because publishers of unauthorized copies would profit from their misdeeds, conceal or destroy their remaining copies when sued, and use the proceeds to defend themselves in court, rendering the fine ineffective. The booksellers wanted legislation that would help them prevent the circulation of unauthorized copies as soon as they were detected. The Statute of Anne (1710) failed to offer that solution directly, opting for a fine instead; however, the booksellers used that provision as a means of obtaining an injunction in the court of Chancery, converting the fine into a device for restricting the distribution of unauthorized editions — or, in modern parlance, for turning a property rule into a liability rule.⁹

In the eighteenth century, the reputational argument was far more popular among writers than booksellers. This argument could help to explain why verbatim reprints were impermissible (they were invariably criticized as poorly edited and shoddily produced), but it was less successful when applied to partial copies and imitations. Many writers, in fact, doubted that the reputational argument could extend that far.¹⁰

The courts shared those doubts. When the publisher of Samuel Johnson’s novel *Rasselas* sued the owner of the *Grand Magazine of Magazines* for excerpting the book, excising two-thirds of the text by eliminating ‘the moral and useful reflections’, the magazine version was held to be non-infringing.¹¹ The publishers were primarily concerned with market substitution, and when the courts finally began to treat partial copies of

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¹⁰ See Stern, ‘Copyright as a Property Right?’, pp. 463, 481–484.

literary works as infringing, in the course of the nineteenth century, this extension of the law seems to have depended to a significant extent on economic logic.\textsuperscript{12}

In the context of visual copyright, artists and dealers confronted largely the same issues. On the one hand, the protection for engravings, under the 1735 statute known as Hogarth’s Act, expressly applied to partial copies: it prohibited others from making copies ‘in the whole or in part, by varying, adding to, or diminishing from, the main design’, and from reprinting any ‘print or prints, or any parts thereof’, without authorization.\textsuperscript{13} The same language appeared in a 1777 statute that strengthened the provisions for damages.\textsuperscript{14} The significant legislative changes introduced in 1862, again, prohibited ‘copy[ing] [or] colourably imitat[ing]’ various kinds of artistic works, and covered not only the work but also ‘the design thereof’.\textsuperscript{15} Nevertheless, we see no evidence of litigation over partial or imitative uses of visual works during the eighteenth century, and only a few such cases during the nineteenth century; the main concern was with complete reproductions of the same image.

The reasons are not far to seek: as with books, people dealing in unauthorized copies of pictures sought mainly to capitalize on the success of well-known works by offering cheaper copies. In addition, texts and images that revise the source material — even when they use a significant amount — are harder to discover, unless they expressly target the market for the original (for instance, by naming themselves after it, as with the \textit{Pamela} sequels).\textsuperscript{16} In literary copyright, abridgments

\begin{footnotes}
\item[13] Engravers’ Copyright Act 1735 (8 Geo. II, c. 13), s. 1, available in \textit{Primary Sources on Copyright}, ed. by Bently and Kretschmer, http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1735. See also Isabella Alexander and Cristina S. Martinez, ‘The First Copyright Case under the 1735 Engravings Act: The Germination of Visual Copyright?’ (Chapter 2 of the current volume).\textsuperscript{13}
\item[14] Engravers’ Copyright Act 1777 (17 Geo. 3, c. 57), available in available in \textit{Primary Sources on Copyright}, ed. by Bently and Kretschmer, http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1777a.\textsuperscript{14}
\item[15] Fine Art Copyright Act, s. 6\textsuperscript{15}
\item[16] However, digital search and comparison techniques may now make such discoveries easier; see Duhaime, ‘Copyright and the Early English Book Market’.\textsuperscript{16}
\end{footnotes}
accounted for the first significant area of doctrinal extension in the nineteenth century, precisely because they might substitute for the original work — but this development had little significance for artistic copyright, since abridgments do not play that role in the art market.17

One of the first cases that ostensibly tested the prohibition on partial uses was West v. Francis, in 1822.18 The defendant was charged with selling ‘seven prints’ (probably from woodcuts) characterized as ‘copies’, or alternatively ‘copies in part’, of the plaintiff’s engraved prints ‘representing the characters of performers on the stage in popular dramas’.19 The plaintiff, William West, was an artist and publisher who specialized in theatrical prints.20 Because the cursory description quoted above is the only reference in the case report to the particular images in contention, we cannot identify them with any certainty; however, Figure 1, portraying the actress and singer Lucia Elizabeth Vestris in 1820, offers a good example of West’s work in this vein. Commentators praised the ‘execution and accuracy’ of his illustrations, and noted that he ‘published scenes and characters of every play and pantomime of the time which attained any degree of popularity’.21 He was highly entrepreneurial, and has been credited with ‘publish[ing] the first cheap theatrical prints as souvenirs of the spectacular melodramas and pantomimes being performed on the London stage at the period’, which he sold for “‘a penny plain’ and “twopence coloured’’.22 His success brought ‘imitators and plagiarists’, who undercut his prices by using plates ‘carelessly drawn on wood’ (whereas West’s were ‘well executed on copper’) and selling the results for a halfpenny ‘or even less’. The prints may have been inferior, but ‘at least to boys’, West’s most enthusiastic customers, ‘they appeared the same’.23

18 West v. Francis (1822) was reported in 5 B. & Ald. 737, 106 Eng. Rep. 1361, and in 1 Dowl. & Ryl. 400. The latter version is more detailed, and was cited in some contemporaneous treatises, but has been largely overlooked by modern scholars, probably because it was not incorporated into the English Reports.
19 West, 1 Dowl. & Ryl. at 400.
21 Ralph Thomas, ‘West’s Toy-Theatre Prints’, Notes and Queries, 4th series, 12 (1873), 463.
23 Thomas, ‘West’s Toy-Theatre Prints’, 463. Thomas writes that West’s copiers were ‘too numerous to mention’, but singles out Martin Skelt as a particular offender.
As both an artist and proprietor, West would have been particularly sensitive to the threat these imitations posed (in that respect, he recalls Samuel Richardson, who was both a novelist and printer). He sued Francis for violating the Engravings Act of 1777, charging the defendant not with producing the copies but only with selling them (they were created by an unidentified third party).  

The defense turned on a half-hearted argument that although the statute prohibited artists from copying engravings ‘in the whole or in part, by varying, adding to, or diminishing from the main design’, the prohibition against selling unauthorized copies, in the latter part of the same sentence, referred only to ‘any copy or copies’, not to variations. Hence, the defendant hopefully proposed, ‘the seller is only liable where he sells an exact copy’. The court rejected this suggestion and agreed with West that

Since Skelt started his business in the mid-1830s, he could not have been the unnamed person who created the prints in dispute in the 1822 litigation.

24 The defendant’s identity is also unclear. Johnstone’s London Commercial Guide (London: Barnard and Farley, 1818) includes James Frances, a stationer and bookseller in Hatton Garden, and James Francis, a stationer and bookseller in Lambeth (pp. 68, 152, 679). Whether the defendant was either of these, or someone else, may be impossible to discover, given the limited information in the court report.
the prints included only ‘small variations from the main design’ of the original.25

The decision therefore offers little guidance on how substantial the copying must be, to count as infringing, and it might have been forgotten, if one of the judges had not explained that ‘[a] copy is that which comes so near to the original as to give every person seeing it the idea created by the original’.26 Read in context, this is simply a way of rejecting the defendant’s attempted distinction between ‘exact’ copies and copies with minor variations. When the same issue had arisen in literary copyright cases, however, no one had defined copies in this fashion. Even in disputes over literary abridgements that were merely ‘colourable’ and were therefore impermissibly close to the original, jurists had not explained the infringement by observing that a copy elicited the same ‘idea’ in the reader’s mind. When William Blackstone, for instance, had written about literary infringement in the 1760s, he explained that it depended on a duplication of both ‘the sentiment and the language’; repeating the sentiment alone was not enough.27 If images are understood as corresponding with unique ideas in a way that texts do not, this suggests a difference between visual and literary copyright that could impose some limits on the ability to transpose legal standards from one domain to the other.

The same issue at stake in West arose again in Martin v. Wright, decided in 1833, with the significant distinction that the defendant had rendered the work in an entirely different format.28 John Martin, a prominent painter of religious scenes, had achieved a notable success with his large-scale painting of ‘Belshazzar’s Feast’ in 1821. More than 5,000 people paid to see it. According to one commentator, it was ‘the first canvas the Royal Academy was forced to cordon off due to public over-excitement’.29 Capitalizing on this success, Martin made a mezzotint engraving based on the painting and measuring 28 by 18.5 inches; proofs were sold in

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25 West, 1 Dowl. & Ryl. at 400.
26 West, 5 B. & Ald. at 737.
two different states for five or ten guineas, and copies in the regular print edition were sold for two and a half guineas. In 1833, one Wright (seemingly Edward A. Wright), in partnership with the artist Hippolyte Sébron, used the engraving to create a panorama, and exhibited it at the Queen’s Bazaar in Oxford Street, admittance one shilling. The advertisements emphasized its massive scale: ‘Five times as large as the late Mr. B[enjamin] West’s celebrated picture of Death on a Pale Horse [...] [occupying] in magnitude the space of Four Dioramic Views’. The transformation of the engraving into a panorama meant that Wright was not offering an exact copy, but as in West, the image was substantially the same as the one in the engraving. Martin went to court, seeking an injunction to shut down the exhibition. Citing the language in the 1777 statute relating to copies that ‘var[ied] or add[ed] to the main design’, he asked for a preliminary injunction without hearing any argument from the defendants (who had not been notified), because the display interfered with sales of his prints, creating an immediate and irreparable injury. Today, this use of the image would certainly be regarded as infringing, but Martin had no success. At a hearing on 27 July 1833, Vice-Chancellor Shadwell denied Martin’s request, observing that the defendants might have valid arguments for opposing the injunction; for instance, ‘[i]t might be contended that there was a material difference between dioramic views

30 See, e.g., ‘Engravings by Mr. Martin’, inserted at the end of Descriptive Catalogue of the Fall of Babylon (London: Martin, 1832).
33 It was common to use painting exhibitions as a way to sell engravings of the paintings (see the example of Ernest Gambart, discussed below, in the text accompanying note 59). Martin might have been wiser to try to profit from Wright’s exhibition instead of attempting to shut it down.
34 Martin, 6 Sim. at 297.
and paintings’. He added ungenerously that ‘if the view in question was such a daub as had been represented’, there was also some doubt as to whether Martin could be entitled to any damages.\footnote{35 ‘Vice-Chancellor’s Court — Saturday’, \textit{Morning Post} (London), 29 July 1833.}

The case then proceeded with all parties appearing in court to argue their position, and on 9 August 1833 the injunction was again denied. Martin’s lawyers couched their argument in economic terms, contending that ‘there was no difference between selling a copy of a print, and exhibiting it for money; as, in both cases, profit was made of that which was appropriated to another’. The Vice Chancellor, similarly, relied on economic logic in rejecting Martin’s allegations, concluding that the panorama could not harm the sales of the engraving:

Here the Defendant is alleged to have made a copy of the Plaintiff’s print, in oil colours, and of dimensions different from the Plaintiff’s print, not to sell, but to exhibit in a fixed place and in a given manner, so as to produce an optical illusion. Exhibiting for profit is in no way analogous to selling a copy of the Plaintiff’s print, but is dealing with it in a very different manner.\footnote{36 Martin, 6 Sim. at 298.}

Shadwell emphasized both the visual effect of the panorama and the defendants’ method of ‘dealing’ with the public. If the question were simply whether Wright and Sébron had copied ‘the main design’ ‘in the whole or in part’, the answer must have been yes; Martin lost, then, because of the ‘different manner’ of the defendants’ use. The reputational argument fared no better: according to Shadwell, the defendants’ version ‘must be either better or worse [than the original]; if it is better, Martin has the benefit of it; if worse, then the misrepresentation is only a sort of libel, and this Court will not prevent the publication of a libel’.\footnote{37 Ibid. at 299.} Wright celebrated his legal victory in his advertisements for the exhibit, and he later took it to Boston, where it also met with great success.\footnote{38 For the advertisements, see, e.g., \textit{Morning Post} (London), 16 August 1833 (noting that the court had ‘refused the Injunction of H. Sebron’s inimitable copy’ of the image). On the exhibit in Boston, see Coltrin, ‘Apocalyptic Progress’, p. 32.}

\textit{Moore v. Clarke}, in 1842, featured the next plaintiff to raise claims involving partial copying, and he fared no better.\footnote{39 Moore v. Clarke (1842), 6 Jurist 648; the case is also reported in 9 M. & W. 692, 152 Eng. Rep. 293.} In 1839, John Moore, who published prints ‘illustrative of the turf and English
national sports’ at his shop in St. Martin’s Lane, had commissioned an engraving by Charles Hunt of a prize-winning racehorse called Beeswing. The painting furnished the basis for a print, measuring 18 by 15 inches, which Moore sold at his shop for fifteen shillings as an aquatint, and seven shillings sixpence uncolored. William Mark Clark (the court reports misspelt his last name) was the co-owner of a short-lived newspaper, Tom Spring’s Life in London and Sporting Chronicle. In early June 1841, Clark’s paper included a woodcut image that closely resembled the horse in Moore’s print, but that purported to depict Coronation, the horse that had won the Derby a week earlier. In Clark’s version, the horse was flipped horizontally, and the jockey and background were altered. Alleging that Clark had copied the print while ‘varying the main design’, Moore sued for money damages, since an injunction would have been useless by the time the litigation started. He proceeded under the 1777 statute, which provided for ‘double costs’ (i.e., a successful plaintiff would receive twice the litigation costs). At trial, on 19 February 1842, Moore called ‘several engravers and painters […] as witnesses’, who testified that Clark’s version differed from the original only in ‘reversing […] the position of the head of the animal, and in the back-ground’. They claimed that the image had been copied so faithfully that it ‘adopted the sex of Beeswing’, a mare, ‘when professing to give a portrait of Coronation’, a stallion.

Obituary in Gentleman’s Magazine (n.s.) 42 (1854), 639; see also the obituary in Illustrated London News, 7 Oct. 1854, p. 342.

Hunt also specialized in sporting scenes; see, e.g., Benezit Dictionary of British Graphic Artists and Illustrators, ed. by Stephen Bury (Oxford: Oxford University Press, 2012), vol. 1, p. 595. A later description disparaged Moore’s image, saying that his engraving was based on a ‘rough sketch taken on a race-course’ and that it suffered from ‘want of proper time and opportunity’. Sporting Obituary, Sporting Almanack and Oracle of Rural Life (London: Baily, 1843), p. 56. The article then proceeded to commend a ‘splendid’ new engraving, just released by Bailey and Co., the publishers of the Sporting Almanack.


Moore, 6 Jurist at 648.

Engravers’ Copyright Act 1777.


‘Veterinary Jurisprudence’, The Veterinarian, 15 (1842), 238.
However, Lord Abinger, presiding over the trial, found their testimony unpersuasive. In his view, ‘the imitation [occurred only] in points where the eye of an artist alone could detect that there had been a copying’, and on the whole, ‘the two [pictures] seemed very different’. By implication, he suggested that the jury should reject the expert evidence and should instead rely on the perspective of an ordinary observer — such as himself. Only a ‘substantial’ copy could be infringing, he instructed the jury; if the imitative aspects were ‘minute’, then they were ‘not […] within the act’. The defendant’s lawyers also ridiculed the suggestion that Moore had suffered any financial harm, asking the jury to ‘consider whether any sporting gentleman, or any individual’, interested in ‘a portrait of Beeswing […] [for] 15s. and 7s. 6d., would buy a work of such manifold inferior merit as a cheap weekly publication’. Although the judge did not emphasize this point, it doubtless carried some weight with the jury: ‘racing’ or ‘sporting’ papers like Tom Spring’s catered mainly to working-class readers, who shared few other commonalities with Moore’s clientele besides an interest in horses. In light of this distinction and the judge’s instructions, it is hardly surprising that the jury found for the defendant.

Fig. 2 Charles Hunt, Beeswing, engraving commissioned by John Moore (1839).

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Moore appealed, contending that Lord Abinger had misdirected the jury, and reminding the court that ‘the piracy [need not] be an exact copy in every respect, because the act says in whole or in part’.\textsuperscript{51} Thus the question was what counts as substantial copying: if the image of the horse is the most important element, then varying the background and reversing the direction of the horse are insignificant changes. On the other hand, if one must consider all the features of both images, the horse becomes only one element in a larger arrangement. According to the defendant’s lawyer, ‘There were hardly two things in which the pictures resembled each other. The size of the two animals was totally different, the position of the horse was different, and the scenery about was essentially different, so that it was difficult to say in which the piracy consisted’.\textsuperscript{52} Today, this argument would be seen as specious: infringement depends on the ‘nature and quality’ of the use, and in these two images, the horse is the most important feature.

The appellate court held that the jury instructions were correct, and added that if a piracy had occurred, Clark would have been ‘entitled to nominal damages’, but the point ‘[did] not arise’.\textsuperscript{53} However, it would be just as plausible to think that the reasoning underlying the jury’s findings

\textsuperscript{51} Moore, 6 Jurist at 648.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid., at 649.
(and the trial judge’s comments) went the other way: Moore could not have suffered any economic loss from Clark’s use of the image; therefore, no infringement had occurred. Doubtless, the defendant’s lawyers were right about the buying habits of a ‘sporting gentleman’: few of Moore’s customers would have seen the image in Clark’s newspaper (which sold for a penny), and even if they had, the version in the newspaper could hardly have diminished the sales of Moore’s engravings. The question is whether this consideration has any bearing on the determination of infringement. One may suspect that this economic logic guided both the judge and the jury, but that it remained hidden under the finding that any copying was not ‘substantial’.54

Viewed as a single episode, Clark’s use of the image seems too trivial to justify a lawsuit. Since Moore presented no evidence as to damages, his decision to sue must have been prompted by some other reason. Perhaps he was attempting to set an example. That would make sense if he had already experienced other similar episodes — as we might infer, given his area of specialization. He may, then, have been hoping to induce Clark (and the publishers of other sporting newspapers) to desist from such practices, or to pay for a license instead of using the images without authorization.

The cases of John Martin and John Moore suggest that plaintiffs, in this era, had little hope of success when alleging infringement by altering ‘the main design’, despite the expanding scope of literary copyright. In an especially notable American case from the latter part of the century, for instance, Augustin Daly successfully sued a producer for staging a play that shared only one feature with Daly’s: they both included a scene in which a character is tied to a railroad track and is rescued just as a train is about to run her over.55 This case marks out an unusually capacious view of the scope of literary copyright — few

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54 It bears noting that five months after the appellate decision was rendered, Moore’s image was reprinted, with thanks for his permission, in the *Illustrated London News*. See ‘Beeswing’, *Illustrated London News*, 24 Sept. 1842, p. 309. The same issue includes an ad promoting Moore’s pictures of ‘Beeswing, and other winners’. Ibid., p. 319.

other decisions even came close — but it helps to highlight, by contrast, the very different judicial approach to artistic works, which had to be virtually identical in all respects to justify a finding of infringement.

From the question of partial copying, I turn briefly to another issue involving the scope of copyright — the reproduction of images by photography. The invention of photography made it possible to create inexpensive copies of artworks in a new medium. Photographers contended that such copies were not infringements, because the law covered only copies made by ‘lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely’, and photography was a chemical process, not a mechanical one. The Fine Art Copyright Act of 1862 had provided for copyright in photographs (among other forms), but had not expressly provided that photographs of other images in other media were infringing. The result was an extensive amount of litigation aimed at the problem of photographs, and the arguments resembled those we have already seen.

Thus, for example, an 1866 article on this subject in the Art Journal defended the legitimacy of making photographic copies of artworks, which served ‘the interests of [...] that portion of the Art-loving public who cannot afford to pay large sums for works they desire to possess’. The markets for engravings and photographs, the author continued, were entirely different: ‘It is absurd to argue, as some do, that [any financial loss] follows the sale of a shilling photograph of a print for which two or three guineas must be paid’. The customer for the print is ‘a man who can afford to pay more or less expensively for the indulgence of his taste’, and he will be ‘indifferent to the photograph’. Similarly, hardly anyone willing to buy ‘a shilling photograph would ever enter the shop of [...] [an] eminent publishing firm, to buy their high-priced engravings’. Nevertheless, evidently conceding that artists have a right to control this part of the market, the author proposed ‘some plan [...] which might meet the exigencies of all parties’, by which the publisher of a ‘high class and expensive engraving’ would arrange to make ‘small

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57 Fine Art Copyright Act 1862. For discussion of the statute and its treatment of photographs, see Cooper, Art and Modern Copyright, pp. 32–48.
photographic copies for sale at a cheap rate’, thus helping ‘the holder of the copyright, that is, the printseller’ and also ‘prevent[ing] any photographer from re-producing the work; it would not answer his purpose to attempt it’.  

Just a few years before this article appeared, in 1863, the art dealer Ernest Gambart had prevailed in a copyright dispute turning on the issue of photographic copies. Gambart had invested heavily in some of the most popular artists of the day (such as William Powell Frith, Edwin Landseer, and Rosa Bonheur). Expanding on a business model that dated back to the eighteenth century, Gambart promoted the artists’ paintings and exhibited them for a fee, and then sold expensive engravings. For example, he bought Rosa Bonheur’s *The Horse Fair* for £1600 (‘having outbid the French Government’) and paid Landseer £800 to make a mezzotint engraving of the painting. Gambart also paid £210 for the copyright of Holman Hunt’s *The Light of the World* plus another £130 to borrow the painting from the owner, and commissioned an engraving by William Henry Simmons (for 300 guineas). After investing so heavily in these works, and working so assiduously to publicize them, Gambart expected to control the market for reproductions of them. Photography was a menace to this model. He campaigned vigorously against the dealers who sought to exploit that market, and he engaged in a series of copyright disputes aimed at eliminating this threat. He offers a paradigmatic example of a dealer whose economic interests made this sort of litigation feasible.  

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59 Cooper, *Art and Modern Copyright*, p. 222; 228–230. Holman Hunt later blamed photographers for driving down the value of engravings: the publisher’s investment would be lost ‘if the engraving should not sell […] while, if it should prove a source of profit, photographers in number [would] pirate his property’. Hunt concluded that Britain would do better to emulate France, where ‘such piracy is treated as a criminal offence with imprisonment’, giving the photographers good reason ‘to make terms with the possessor of the copyright before reproducing a favourite work of Art’. W. Holman Hunt, ‘Artistic Copyright’, *The Nineteenth Century*, 5 (1879), pp. 418–424 (p. 421).  

In 1863, Gambart sued William Ball, a print-seller based in Middle-Row, Holburn, for selling photographic copies of the Landseer and Simmons engravings of Bonheur and Hunt. Ball rather cynically attempted a defense that blended the reputational and economic arguments, contending that the statutes were concerned only with ‘base copies’ whose ‘sale […] would injure the reputation of the artist’; his ‘little photographs’, he insisted, ‘could not possibly be bought in mistake for the engraving’. The court rejected this argument: ‘[T]he statute […] goes much beyond the evil of lowering [the artist’s] estimation by publishing a spurious article under his name. Engravings are, for the most part, made for the purpose of reward by sale — money reward, commercial value’, and the statute ‘gives to the engraver a protection for the monied value of the products of his mind’. Again, ‘[t]he purpose of the statute […] was not to prevent the name of the original engraver being lowered in estimation, but […] to secure to him the commercial value of his property. He wished to sell a number of his plates; those plates are an object of value, because they give pleasure by the imaginative ideas represented in them’. Therefore, the court reasoned, the aim is to prohibit ‘the transferring from the [engraving] the speculative idea placed thereon’. So long as the photograph ‘represent[s] to the mind exactly the same ideas that give pleasure and make attraction for the plate taken from the original engraving’, it ‘give[s] precisely the analogous pleasure to the purchaser’. Accordingly, a photographic copy would interfere ‘with the commercial value of [Gambart’s] print’ and would erode Gambart’s sales: if customers could not ‘purchas[e] the photograph[ic] copy, they would be likely enough to purchase the other’. Here, as in West v. Francis, the copy is infringing because it transfers ‘exactly the same ideas’ from one work to another. No matter

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63 Ibid.
64 Ibid. The Law Reports gives a fuller elaboration than the Common Bench Reports, which makes substantially the same point, but does not speak about conveying ‘the same ideas’; instead it says that ‘a photographic copy may excite in the mind of the beholder the same pleasurable emotions’ as any other kind of copy. Gambart, 14 C.B. (N.S.) at 316. Since the Law Reports renders the judges’ comments more circumstantially in various other respects, it probably offers the more accurate version of the judgment.
that it did so in a new medium: unlike the diorama exhibition in *Martin v. Wright*, the photographs were being sold in the same fashion, if not to the same clientele, as Gambart’s engravings. The plaintiff and defendant were both ‘dealing’ with the work in the same manner.

The court’s rationale echoes the one in *Daly v. Palmer*, the copyright dispute over the melodramatic railroad scene, mentioned above. In *Daly*, the court held that the second play amounted to an infringement because it ‘convey[ed] substantially the same impressions to, and excit[ed] the same emotions, in the mind’, as the original scene, and that was sufficient for infringement even if the new version was ‘performed by […] different characters, using different language’. All that matters, according to the court, is that ‘the spectator’ experiences the two in the same way, ‘through any of the senses to which the presentation is addressed’.

What makes these two cases so remarkable, then, is that a similar theory of infringement could yield such different results. In the case of visual copyright, the infringement resulted from the photograph’s power to confer ‘the same kind of pleasure’ on the viewer, but only because it was identical to the engraving. If Ball had somehow varied the image, introducing some new elements, the result might nevertheless have produced ‘the same impressions’ and ‘the same emotions’, but the result would very likely have been held to be permissible. The juxtaposition of the *Gambart* and *Palmer* cases thus helps to underscore the great difference between visual and literary copyright in the nineteenth century. Doctrinally speaking, in both areas, the same conception of ‘substantial similarity’ defined the grounds of infringement. For visual copyright, however, courts were reluctant to find any infringement except in cases of complete and identical copying, even as the courts significantly expanded the scope of infringement in cases of literary copyright.

Not until the close of the century did artistic copyright catch up with literary copyright in this respect. In *Brooks v. Religious Tract Society* (1897), the image in contention was a woodcut that borrowed the central feature of the plaintiff’s engraving, but placed it in a different context. George Augustus Holmes’s painting *Can’t You Talk*, portraying an infant gazing at a collie, became one of the most beloved and frequently reproduced images of the century, largely because of the engraving produced by

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66 *Daly*, 6 F. Cas. 1132, 1138.
4. The Scope of Artistic Copyright in Nineteenth-Century England

Benjamin Brooks. Brooks, a prominent fine art publisher with a shop in the Strand, had bought the painting along with the copyright, shortly after seeing it exhibited in 1875, and commissioned an engraving, apparently by George Zobel. The print was an immediate success; piracies were rampant and led to extensive litigation over the following decades. A woodcut with the same collie, now accompanied by two cats, all staring at a tortoise, was used to illustrate the story ‘A Strange Visitor’ in the November 1896 issue of the Child’s Companion and Juvenile Instructor, published by the Religious Tract Society. (see Figures 4 and 5). Brooks sued, seeking an injunction to prevent any further printing and sales of the magazine — and he prevailed, unlike Martin, who had lost the suit over the repurposed image of Beeswing. The defendants’ counsel argued that the ‘meaning of the two [images] is quite distinct’; drawing on the jurisprudence that associated infringement with communication of the same ideas, he insisted that ‘the idea conveyed by the picture is not that of the woodcut’. According to the judge, however, the woodcut copied ‘not only the dog, but the feeling and artistic character’, even the ‘sentiment’ of the engraving, reproducing exactly the dog’s ‘sagacious or benevolent appearance’. The judge therefore had little difficulty concluding that the woodcut was ‘a direct copy of a substantial portion of [the plaintiff’s] work’.

The judgment did not dwell on economic considerations. According to one summary of the case, the defendant’s lawyer argued that because the woodcut presented a different idea, ‘it would therefore interfere neither with the reputation of the artist [...] nor with the commercial value of his work’. This account makes the economic argument stand or fall with the argument concerning substantial copying, but the two could be separated. Despite the magazine’s low price (it sold for a penny an issue), it is difficult to see how the image could have harmed Brooks’s

68 J. Herbert Slater, Engravings and Their Value, 2nd ed. (London: Gill, 1897), pp. 570–571.
70 Brooks, 45 WR 476.
sales: his very popular image was treasured in Victorian England precisely because of the encounter it staged between the infant and the dog. Can’t You Talk without the child is like Hamlet without the prince — as the
defendant’s counsel observed, according to one report, ‘it could not be supposed for one moment that either the dog or the tortoise would say “Can’t you talk?”’

Granting that the copy used a substantial part of the source, one might still doubt that anyone who desired the engraving would have been satisfied with the woodcut. Perhaps, having sought unsuccessfully to distinguish the images’ different effects, the defense concluded that an attempt to distinguish the markets would also fail. Possibly, given the optics of the case, in which an evangelical society was charged with misappropriating a popular icon of childhood charm and innocence, any talk of lucre would have seemed ignominious. Implicitly, at least, the judgment suggests that ‘substantial’ copying constitutes infringement regardless of the economic effects on the market for the plaintiff’s work.

That implication is significant, because it suggests that the question of infringement turns not on the parties’ different manners of ‘dealing’ with the work, as Martin v. Wright had held, but rather on the works’ similarities, including their ability to convey the same sentiment. The result would be to place the scope of artistic and literary copyright largely on the same footing, and eventually to reintroduce economic questions in a new guise. In modern law, the extension of copyright to various kinds of spinoffs (such as sequels, movies, video games, and fanwear) is typically justified on the view that, even if the plaintiff had not yet exploited that market, the new form represents a potential future market that the plaintiff could have exploited. The broad extension of copyright to ‘nonliteral’ uses would constitute a crucial chapter in the law’s development. For literary works, that process was already under way during the nineteenth century, but for visual works, the seeds for this extension were laid only at the dawn of the twentieth century.

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### Statutes

N.B. Digital scans of the statutes listed below are available in *Primary Sources on Copyright (1450–1900)*, ed. by Lionel Bently and Martin Kretschmer, http://www.copyrighthistory.org/cam/index.php.

Engravers’ Copyright Act 1735 (8 Geo. II, c. 13).

Engravers’ Copyright Act 1777 (17 Geo. 3, c. 57).

International Copyright Act 1852 (15 & 16 Vict. c. 12).

Fine Art Copyright Act 1862 (25 & 26 Vict. c. 68).
4. The Scope of Artistic Copyright in Nineteenth-Century England

Legal Cases

Brooks v. Religious Tract Society (1897), 45 WR 476.
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