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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Cover design by Anna Gacek.
14. ‘Photography VS the Press’

Copyright Law and the Rise of the Photographically Illustrated Press

Katherine Mintie

Introduction

In September of 1895, an article entitled ‘Photography VS the Press’ appeared in Wilson’s Photographic Magazine, a popular American photography journal. Written by Benjamin J. Falk, a successful studio photographer based in New York City, the article begins, surprisingly, with effusive praise for the modern periodical press. As Falk writes,

The modern newspaper is yearly becoming more wonderful, more interesting, and more powerful. Not content with giving its readers a daily record of events [...] it now amplifies and beautifies this colossal task by illustrating its descriptions with actual pictures, marvelous alike in their accuracy and in the speed of their production.¹

The ‘actual pictures’ that Falk marvels at in this passage are halftone reproductions after photographs (see Figure 1). Broadly adopted by publishers in the 1890s, the halftone printing process allowed photographs to be reproduced swiftly and affordably in the popular press as they never had been before.² Neil Harris has called the embrace of this

² The New York Daily Graphic published the first halftone reproduction after a photograph in 1880. However, the printing technology was still being refined, and halftones did not become common features of the press until the 1890s. See Michael L. Carlebach, American Photojournalism Comes of Age (Washington, D.C.: Smithsonian Institute Press, 1997), p. 1.
printing technology the ‘halftone revolution’, for halftones transformed the character and expectations of periodical illustrations. As Falk notes, ‘accuracy’ and ‘speed’ were emerging as key characteristics of this new illustration process, and these qualities of objectivity and immediacy are now central to our conceptions of press photography. Indeed, it is difficult today to imagine newspapers illustrated with anything but photographs.

Fig. 1 Three halftone illustrations after unattributed studio photographs embellishing the front page of the *New York Journal*, Sept. 29, 1898 (Library of Congress).

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The compliments end there, however, and Falk swiftly shifts to his grievances with the photographically illustrated press. His main contention stems from the lack of credit and remuneration accorded to professional photographers like himself for their contributions to the increasingly ‘interesting’ content of the press and the ‘powerful’ status it had attained in the US. As Falk asserts, ‘The camera being thus so closely allied to the printing-press in the production of the highest forms of modern journalism, it would seem only natural that the photographer and publisher should work harmoniously together’. However, Falk notes with frustration that ‘it is nevertheless true that up to now the press, with rare exceptions, has most grudgingly accorded to the photographer proper credit for his share of the work’.5 While we might imagine, as Falk suggests, that the proliferation of halftones in the popular press would have provided professional photographers with new opportunities to sell and circulate their work, he assures us that such a ‘harmonious’ relationship had not materialized. Rather, he argues the opposite: that photographers were denied or only ‘grudgingly’ given ‘proper credit’ both economic and authorial, for their contributions to the success of the photographically illustrated press at the turn of the twentieth century.

Falk’s use of the litigious title ‘Photography VS the Press’ is not accidental, for debates over the illicit reproduction of studio and other professional photographs by the press were waged through copyright litigation and legislative reform during this period. On the side of ‘Photography’, Falk and others turned to copyright law to curb the rampant uncredited reproduction of their photographs by the press and to assert their value by demanding steep monetary penalties from infringers. In opposition, ‘the Press’ leveraged copyright laws in order to disincentivize photographers from suing and thereby maintain a ready, low-cost source of professional photographs to enliven their pages.6 To evoke the key terms of this volume, photographers turned to copyright

6 The desire of the press to transform photographic copyright laws to their advantage is summarized by a frank comment from Don Carlos Seitz, one of the business managers of the New York World: ‘As a matter of fact, the copyright law is a hindrance to the newspaper business and prevents our taking things [photographs] we have seen and admire, which we would like to have’. See ‘Second Meeting: November 1–4, 1905’, Legislative History of the 1909 Copyright Act, ed. by E. Fulton Brylawski and Abe Goldman, 6 vols (South Hackensack, NJ: Fred B. Rothman and Co., 1976), II, 202.
laws for control over their images while the press sought to use the same legislation to enhance the circulation of the news.

This chapter examines these cases and legislation in order to chart an often-neglected period and set of figures in the early history of the photographically illustrated press. Most accounts focus on the rise of photojournalism in the early twentieth century and the heroics of press photographers, a novel figure within the news ecosystem. Before the emergence of photojournalists, however, press publishers of the late 1880s and 1890s frequently reproduced the work of established studio photographers like Falk, especially their portraits of celebrities to accompany columns devoted to politics and gossip. Because press publishers frequently published professional photographs without permission or credit, they proved a very economical source of images. For photographers like Falk, this clear exploitation of their work was intolerable, leading them to pursue vigorous legal action against press publishers, who fought back equally hard to maintain a cheap and ready body of appealing photographs to reprint. These contentious, and often bitter, copyright cases indicate that the emergence of the photographically illustrated press did not smoothly follow the rise of halftone technology — as histories of the periodical press often claim.

While a number of professional photographers pursued copyright cases against the press and participated in lobbying efforts to reform copyright legislation, this chapter will focus on the efforts of Falk. 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. Falk ran a fashionable

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studio in New York City, initially with locations in the theater district and later in the solarium atop the glamorous Waldorf Astoria Hotel.\textsuperscript{10} He specialized in portraits of theater actors and actresses, called theatrical portraits, which enjoyed immense popularity in the United States during the late nineteenth century.\textsuperscript{11} Falk’s success in the genre of theatrical portraits, however, made his work especially attractive to press publishers looking to capitalize on the celebrity of his sitters. In response to the frequent uncredited and unpaid for reproduction of his work by the press, Falk devoted much of his career to campaigning for more robust photographic copyright laws. From the late 1880s to the 1910s, he initiated numerous lawsuits against publishers that reproduced his work without permission, wrote frequent articles encouraging fellow photographers to apply for and enforce their copyrights, founded the Photographers’ Copyright League of America, and traveled to Washington, D.C. to lobby on behalf of professional photographers. Given his sustained efforts to protect photographers’ copyrights against the image-hungry press, Falk is an ideal figure for tracing the conflicts that played out between professional photographers and the periodical press at the turn of the twentieth century.

To document the rocky merger of photography and the press in the US, this essay will examine photographers’ concerns about halftone reproductions, as well as copyright cases and legislation that pitted the interests of photographers against those of the press. First, the business practices of professional photographers like Falk will be considered to understand why he and many others saw the photographically illustrated press as a threat. The chapter will then turn to the 1895 Amendment of the Copyright Act, which press publishers lobbied for

\textsuperscript{10} See Shields, ‘Benjamin J. Falk’ in \textit{Broadway Photographs}, http://broadway.cas.sc.edu/content/benjamin-j-falk.

in response to photographers’ initial success in pursuing copyright cases against them. Finally, it will examine two copyright cases, *Bolles v. Outing Co.* (1899) and *Falk v. Curtis Publishing Co.* (1900), in which the power of the press was further solidified. Though Falk and other photographers sought to constrain the press through the legal system, their strategy backfired; ultimately, it was shifts in copyright law that in part permitted the photographically illustrated press to thrive.

**Sales Killers: Halftones and the Business of Professional Photographers**

To grasp Falk and other professional photographers’ litigious response to the escalating use of photographs by the press, it is important to understand their business practices and the significance of print sales to their bottom lines. The daily operations of Falk’s studio can be glimpsed in the detailed account books he kept with information for the numerous customers who came for portrait sittings, the size and number of prints they desired, and other pertinent details. These account books document the wide range of sitters that flocked to Falk’s studio for portraits: theater actors, prominent members of New York society, and tourists drawn to his glamorous studio with the hope of glimpsing stars of the stage up close. Though Falk was well paid for individual portrait sessions, his success depended on the profits he made from the subsequent sale of photographic prints, primarily of popular theater actors, to the public. Many professional photographers who specialized in fields other than theatrical photography, such as travel or maritime photography, followed this business model, for the sale of prints to a wide audience offered higher rewards than one-off commissions.

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13 To secure profits from his portraits of theater actors, Falk followed a standard procedure that emerged in this period. Falk would photograph the actor in his studio for free or at a reduced rate and agree to provide him or her with complimentary copies of the resulting photographs. In exchange for his services, Falk secured the exclusive right to sell copies of the portraits to the public. 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.

14 The career of Charles E. Bolles, considered later in this chapter, is a case in point. Bolles specialized in maritime photography, primarily picturing ships and yachts.
To ensure that his prints reached a large number of customers, Falk relied on a range of salesmen: specialized dealers, stationers, and street hawkers. Falk kept sample books crammed with miniature versions of his numerous celebrity portraits for this very purpose (see Figure 2). Dealers would leaf through these hefty volumes, note which portraits they wanted copies of, and Falk would provide the requested prints. Barbara McCandless has estimated that, for celebrity portraits alone, dealers of the late nineteenth century sold several hundred thousand dollars' worth of prints per year and that street hawkers brought in over a million dollars annually. As this assessment suggests, the trade in photographic prints was a lucrative business that allowed photographers like Falk to flourish.

Fig. 2 A series of photographs of Minnie Ashley among other actors, from Benjamin J. Falk, 'Illustrated Catalogue of Photographer’s Negatives', vol. 1, ca. 1895 (New York Public Library).

His business depended on his sale of photographic prints through prominent dealers and publishing firms, like the Detroit Photograph Company.

15 On the network of dealers in celebrity portraits that emerged in the 1880s, see McCandless, p. 68.
17 In some instances, dealers took more than a look at these sample books. In the case of Falk v. Gast Lithograph and Engraving Co., a dealer re-photographed a sample image of well-known actress Julia Marlowe and then attempted to sell enlarged versions. See Falk v. Gast Lithograph and Engraving Co. (1891) C.C.S.D. N.Y 48 F. 262.
18 McCandless, p. 68.
Given that Falk and other professional photographers made a substantial portion of their profits from the sale of prints, it was damaging to their business when cheap, low-quality halftones of their work circulated in the popular press without permission or a credit line. During this period, a single mounted photograph of a well-known celebrity could cost up to five dollars, a substantial sum that was out of reach for many consumers.\(^\text{19}\) In contrast, a newspaper replete with halftone reproductions of photographs in various genres could be purchased for pennies. Competition with press halftones thus entailed a significant loss of profits for professional photographers, a fact that Falk emphasized in a report to the professional photographic community in 1899:

> [W]e call your attention again to the anomalous condition existing in this country to-day, whereby illustrated magazines, 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.\(^\text{20}\)

As Falk argues here, photographers were not only denied ‘remuneration’ in the form of a reproduction fee from the press but also lost potential profits from the sale of their photographic prints. Adding insult to injury, the illicit and ‘cheap’ halftone reproductions boosted the demand for periodicals while they ‘killed’ sales for photographers.

In addition to lamenting the loss of profits from the wide circulation of halftones, some professional photographers viewed the poor quality of early halftones as detrimental to their professional reputations. Indeed, halftones lacked the high aesthetic and material qualities of photographic prints. This is evident in a comparison between one of Falk’s aristotype prints of actress Julia Marlowe posing in the role of Parthenia (Figure 3) and a credited halftone reproduction (Figure 4) that appeared in an 1896 issue of *Godey’s Magazine*, a popular women’s periodical that prided itself on the quality of its illustrations. In the photographic print, the details of Marlowe’s face and costume are sharp, the image possesses an even texture, and the lustrous print surface adds

\(^{19}\) McCandless, p. 67.

Photographers’ fears that halftone reproductions would harm the perceived quality of their prints and their professional reputations is clearly communicated in an article entitled ‘Magazine Illustration Work’ that appeared in *The American Annual of Photography and Photographic Times Almanac* in 1900. The author bemoans the low quality of halftone reproductions after photographs, dismissing them as ‘smudges in black and white’ that depict ‘nothing so much as an upset inkstand’. For the author, these pitiful ‘smudges’ gave a bad impression of the skill and aesthetic sensibilities of contemporary photographers. Concerns about the visual and material qualities of photographs were especially keen in the 1890s, when numerous American photographers, led by Alfred Stieglitz, argued vigorously for the recognition of photography as a fine art. Roughly reprinted halftones in the press did little to further this cause. Moreover, the author grumbles about the photographs selected for reproduction in the press, writing that they ‘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’. Though newspapers and magazines were potential sites for professional photographers to showcase their best work to large audiences, the author complains that only the ‘very poorest’

24 Bain, p. 151
Fig. 3 Benjamin J. Falk, *Julia Marlowe*, 1888, aristotype print (Library of Congress).

Fig. 4 Benjamin J. Falk, *Julia Marlowe*, in *Godey’s Magazine*, June 1896, halftone reproduction after a gelatin silver print (New York Public Library).
Photographs were chosen for inclusion and for reasons of convenience or entertainment rather than aesthetic merit. While the author expresses optimism that press publishers 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.’

Despite protests that halftone reproductions in the press were cheap, of poor quality, and reflected badly on the state of the photographic profession, Falk and other photographers did not entirely shun the business of periodicals. Falk allowed his photographs to be reproduced as halftones with his credit line in a number of periodicals, particularly those devoted to theater. Falk likely received licensing fees in these cases, and may have attracted some new customers who sought out his prints after seeing them reproduced as halftones. However, reproduction fees do not seem to have been a major source of income for him. As he bluntly put it in an article from 1900: ‘In how many instances does the photographer profit by this use [by the periodical press] of his work? We venture the answer: not in one instance out of ten.’ For Falk, the vast majority of half-tone reproductions published by press publishers were bad for business.

American Newspaper Publishers Association v. Photographers’ Copyright League of America: The 1895 Amendment to the Copyright Act

Prominent studio photographers like Falk not only wrote about the damage that press halftones had on their profession, but also began to take publishers to court for copyright infringement. In the late 1880s and early 1890s, a number of studio photographers triumphed in copyright cases and were well compensated for their efforts. Their initial success in extracting financial settlements from infringing publishers was due in part to the procedure for calculating monetary penalties during

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26 Falk appears to have developed a good relationship with Godey’s Magazine in the 1890s, for halftones after his theatrical portraits appear regularly and are accompanied by his name and copyright notice. His work also appeared regularly in the New York Dramatic Mirror, a theatrical trade journal.
this period. Called the ‘per-sheet penalty’, this method of accounting required the infringer to forfeit one dollar for each ‘sheet’ or copy of the reproduced image found in his or her possession.\(^{28}\) This method of accounting applied to all media protected by copyright (with the exception of fine artworks) and the dollar rate had been in place since 1802.\(^{29}\)

The per-sheet penalty system of accounting was deeply unpopular with press publishers because it often resulted in steep penalties. Such was the case in *Press Publishing Co. v. Falk* (1894) in which the company that owned the New York *World*, one of the most widely circulated newspapers of the day, attempted to prevent Falk from bringing an infringement case after reproducing one of his portraits of actress Marie Jansen. Falk alleged that the *World* had printed 260,183 copies of the newspaper containing the unauthorized reproduction of his photograph and was thus owed damages amounting to the dizzying sum of $260,183. When the judge rejected Press Publishing Company’s attempt to dismiss the case, the *World* chose to settle with Falk for $5,000 rather than risk paying the full penalty that Falk had levelled against the paper.\(^{30}\)

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*, asserted the influence of his newspaper in its 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 public opinion.\(^{31}\) Compared to the political and economic clout of the

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\(^{29}\) Legal scholars Pamela Samuelson and Tara Wheatland note that the per-sheet penalty was developed in lieu of accounting for the actual monetary damage done to the injured party, which could be difficult to establish. Pamela Samuelson and Tara Wheatland, ‘Statutory Damages in Copyright Law: A Remedy in Need of Reform’, *William and Mary Law Review*, 51 (2009), 439–511 (p. 447 at fn. 22).


\(^{31}\) Hearst is thought to have telegraphed newspaper artist Frederic Remington, who was stationed in Cuba awaiting the first signs of action, ‘You furnish the pictures,
newspapers, studio photographers’ power was insignificant. 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’.32

In the wake of high-profile and high-stakes cases like Press Publishing Co. v. Falk, publishers began to organize to limit the monetary penalties that photographers could seek in court.33 The American Newspaper Publishers Association (ANPA), a conglomerate of powerful newspaper publishers primarily based in New York City, started lobbing Congress to limit monetary penalties in photographic copyright cases.34 The ANPA found a receptive audience in the Committee on Patents of the US House of Representatives, which issued a report in January 1895 in favor of penalty reform in the case of photographs reproduced by the periodical press. The report, written by James M. Covert of New York, stated that the ‘excessive penalties’ that newspapers often paid as a result of the per-sheet penalty system were not only ‘unduly harsh’ but also ‘extremely hazardous’.35 The harm of such high penalties extended not only to periodicals themselves, the report argued, but to consumers, for the ‘value of illustrated news articles naturally depends very largely upon their early publication and illustration’ of current events.36 In other words, the value of the press lies in its ability to inform the public of the news in a timely manner, which, as the report admits, sometimes entailed ‘haste of preparation’ and oversights in securing rights to reproduce images by even ‘the most careful and reputable publishers’.37

33 Don Carlos Seitz recalled another high-stakes copyright case involving a reproduced photograph by the Pach Brothers, popular studio photographers based in New York City, as motivating the formation of the ANPA’s copyright committee. 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, I, 22.
34 For more on the ANPA and the perspective of the newspaper publishers on photographic copyright law during this period, see Slauter, pp. 221–223.
36 Ibid.
37 Ibid.
To ‘moderate the rigors of the penalties’ that could be alleged against
the press, the Committee on Patents proposed a cap of $5,000 ‘in case of
any such infringement of the copyright of a photograph made from any
object not a work of fine arts’.38 This proposal was approved by Congress
with little debate and became law in March of 1895.39 It was a clear win
for the ANPA. With penalties capped at $5,000, publications with high
circulations no longer had to worry about paying staggering sums to
photographers in court.

For studio photographers like Falk who had previously wielded the
unlimited per-sheet penalty as a means to deter press publishers from
reproducing their work and to recover payment for the uncredited use
of their work, this amendment amounted to nothing less than having
‘the right to steal from photographers legalized by the United States
Government’.40 From their perspective, this cap gave large publishers less
reason to pause before reproducing copyrighted photographs. Further,
because the new restrictions on penalties applied only to photographs,
the amendment suggested that photographs were not as esteemed as
other media protected by copyright law, such as prints or books. Indeed,
the amendment was met with little opposition outside a small segment
of the professional photographic community. For photographers, this
was a worrisome indicator that their prints were losing value in the eyes
of lawmakers and the broader public as cheap halftone reproductions
abounded.

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 America (PCLA)
in 1895.41 This association was modelled on the Photographic Copyright
Union, an organization founded by professional photographers in the
United Kingdom only a year earlier to fight infringements by the press,

38 Act of March 2, 1895, in *Copyright Enactments*, p. 56.
39 Covert presented the same arguments from his report to the House when the
amendment was passed. See Congressional Record — House 3212 (March 2, 1895)
and Congressional Record — Senate 3136 (March 2, 1895).
40 Photographers’ Copyright League of America, ‘Concerning Copyright’, *Wilson’s
41 Falk, ‘Concerning Copyright’, p. 221. Falk had been trying to organize US
photographers around the issue of copyright since the late 1880s. See, for example,
Falk, ‘Improved Copyright for Photographers’, *The Photographic Times and American
and that had achieved some success in establishing standard licensing fees for the use of their images. Founding members of the PCLA included some of the most prominent New York-based photographers of the time: Napoleon Sarony, George G. Rockwood, James L. Breese, and Charles E. Bolles. Membership soon expanded to include professional photographers from across the United States. The stated mission of the PCLA was to present a ‘united front’ against the powerful press and other copyists. To do so, the PCLA proposed to pool resources to prosecute infringers who violated the copyright of members. As the PCLA stated, the organization would ‘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’. Though a clever system for enforcing the copyrights of members, the PCLA encountered difficulty in recruiting dues-paying members and was never able to match the power of the ANPA.

While the ANPA wielded considerable influence in Washington, stalwart members of the PCLA were able to fight and defeat legislative proposals aimed at further weakening their copyrights. One of the PCLA’s most important victories over the ANPA was the beating back of the Hicks Amendment. Flush from its success in 1895, the ANPA attempted to go one step further and push through this amendment that would have, in Falk’s apt summary, ‘give[n] newspapers, periodicals, etc., the absolute right to use any of our photographs, whether copyrighted or not, without our consent and without any compensation to us’.

42 On the efforts of his British colleagues, Falk wrote: ‘In England, photographers have already done much to protect their interests in this regard by conjointly adopting resolutions and binding themselves not to supply any newspaper or periodical with any of their pictures for reproduction unless they receive adequate pay for the same. In this way, an income is provided for them, which partially, at least, reimburses them for the losses they sustain owing to the decrease in the sales to the public of their own prints because of these reproductions’. See Falk, ‘Suggestion’, Wilson’s Photographic Magazine (Dec. 1896), p. 562. On the founding and lobbying efforts of the Photographic Copyright Union, see Elena Cooper, Art and Modern Copyright: The Contested Image (Cambridge: Cambridge University Press, 2018), pp. 74–77, 94–98, https://doi.org/10.1017/9781316840993. See also Elena Cooper and Sheona Burrow ‘Photographic Copyright and the Intellectual Property Enterprise Court in Historical Perspective’, Legal Studies (Dec. 2018), pp. 158–160, https://doi.org/10.1017/lst.2018.10.

43 Falk, ‘Concerning Copyright’, p. 223.

44 Ibid., p. 222.

words, the Hicks Amendment would have allowed press publishers to reproduce photographs without seeking permission from, or paying, photographers. To stop this clearly damaging amendment from passing, Falk, along with Bolles and Rockwell of the PCLA, travelled to Washington, D.C. three times to make their case before the Patents Committee of the House of Representatives and ultimately defeated the amendment. The PCLA’s success in this instance suggests the limits of the ANPA’s power and the benefits to professional photographers of collective action. Indeed, if not for the attention of Falk and fellow PCLA members to copyright legislation like the Hicks Amendment, the course of photographic copyright law and press photography in the United States would likely look radically different today.

Loopholes and Letdowns: Bolles v. Outing Co. (1899) and Falk v. Curtis Publishing Co. (1900)

Despite the vigorous efforts of the PCLA, further restrictions on the monetary penalties photographers could seek in copyright cases emerged following the decision in the US Supreme Court case Bolles v. Outing Co. (1899). This lawsuit was initiated in 1894 by Charles Bolles, a Brooklyn-based maritime photographer and PCLA member. After discovering that a popular sports magazine called The Outing had reproduced without permission or a credit line a halftone of his copyrighted photograph of a yacht called The Vigilant (see Figure 5), Bolles sued the publisher. To prove that his copyright had been violated, Bolles purchased a single copy of the magazine that featured the infringing halftone.

As the case worked its way through the lower courts and on to the US Supreme Court, lawyers and judges alike zeroed in on questions regarding when and where infringing copies needed to be found in order to count towards the per-sheet penalty. The clause of the Copyright Act that received the most scrutiny 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,

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either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession.\textsuperscript{47}

Particular attention was paid to the phrase ‘found in his possession’. Did this mean all copies put into circulation by the infringer? Or only those physical copies found on the premises of the infringer? And when did the copies need to be found?

Ultimately, the justices of US Supreme Court determined that the penalty was ‘limited to such [copies] as are found in, and not simply traced to, the possession of the defendant’.\textsuperscript{48} Thus, monetary penalties would no longer be calculated by the circulation of a publication as they had been in previous cases like \textit{Press Publishing Co. v. Falk} (1894). Going forward, only those copies found physically in the possession of the infringer would count toward the calculation of the per-sheet penalty. The opinion in \textit{Bolles v. Outing Co.} also outlined a new limit regarding when the infringing copies were to be found. The justices supported the position of the Circuit Court, which stated: ‘We are of the opinion that the section meant to affix the penalty only when the sheets are shown to have been discovered or detected in the possession of the defendant.


\textsuperscript{48} Ibid.
prior to the bringing of the suit’.\footnote{Bolles v. Outing Co., 77 F. 966, 968 (2d Cir. 1897). Emphasis mine.} As the justices reasoned, the copyright owner needed to retrieve the infringing copies before filing suit, because a case could not proceed without first establishing evidence of infringement. Henceforth, photographers could not report the finding of additional copies after filing a complaint but must have already found them.

In accordance with this new interpretation for calculating monetary penalties in copyright cases, Bolles could seek only $1 from Outing Co., based on the single copy of the magazine he had purchased before filing the complaint. Given that just five years earlier Falk and other photographers were able to seek monetary penalties as high as $260,183 in cases like Press Publishing Co. v. Falk, the opinion in Bolles v. Outing Co. struck many as a major blow to their ability to profit from and control the circulation of their work. An anonymous writer, possibly Falk or another PCLA member, explained the negative effects of the opinion in an article for Wilson’s Photographic Magazine, stating: ‘Not only does it [the Copyright Act] fail to adequately protect the photographer’s rights in his own work, but it also affords several loopholes whereby infringers of the law may escape the consequences of piracy’.\footnote{‘A New Copyright Bill’, Wilson’s Photographic Magazine (Apr. 1900), p. 171.} The ‘loopholes’ that the infringers could leverage to avoid ‘the consequences’ of paying steep penalties were, for the author, a direct result of the decision in Bolles v. Outing Co. As the writer elaborates:

\begin{quote}
In the case of an infringement of copyright by a weekly newspaper, for instance, the infringement is rarely known to the photographer until the paper is published and scattered broadcast, after which, of course, comparatively few copies of the paper may be found in possession of the publisher or his agents.\footnote{Ibid.}
\end{quote}

As the writer suggests, it was often difficult for photographers to detect instances of copyright infringement in the robust press culture of the late nineteenth century. Even when a photographer like Bolles did discover and choose to prosecute an infringer, copies of the offending periodical has already been ‘scattered’ widely and were no longer physically ‘in possession of the publisher or his agents’. Given these obstacles to obtaining recompense for the illicit reproduction of their work by the
press, it is unsurprising that photographers felt that the legal system had ‘fail[ed] to adequately protect’ their work and did not recognize its value.

Falk felt the immediate consequences of the ‘loopholes’ made possible through Bolles v. Outing Co. in a copyright case that he filed in 1899 against Curtis Publishing Company. Falk initiated this suit soon after discovering that one of his portraits of the actress Minnie Ashley had been reproduced as a halftone (see Figure 6) without his permission in the October 1899 issue of The Ladies’ Home Journal, a widely-read women’s magazine owned by Curtis Publishing Company. In response, Falk’s lawyer, Samuel Hyneman, issued two writs simultaneously to the publisher: 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 Company. Through the power of the replevin, Curtis Publishing Company forfeited to Falk over 5,000 copies of the offending issue of The Ladies Home Journal, which enabled him to sue for $5,000, the maximum penalty permitted after the 1895 Amendment to the Copyright Act. Despite this strong show of evidence, Falk was not awarded any monetary penalties because, as the recent opinion in Bolles v. Outing Co. stated, Falk’s lawyer needed to gather the infringing copies of the periodical ‘prior to the bringing of the suit’.52 It is not difficult to imagine Falk’s frustration following this loss that hinged on the strict enforcement of a technicality following the Supreme Court’s decision.

While Falk and members of the PCLA lamented the decision in Bolles v. Outing Co., the periodical press cheered the new regime for determining penalties in copyright cases. The victorious position of the press is strikingly articulated in a Scientific American article titled ‘New Practice in Photographic Copyright’ that appeared in February 1900.53 In contrast to its bland title, the article includes a number of fiery accusations, including the notion that photographers had used copyright law to extract unearned profits from the press: ‘It has been

52 Bolles, 77 F. at 968. Emphasis mine.
53 The article states that portions of the article were reproduced from a ‘recent edition’ of the New York Sun, suggesting the broader interest among the periodical press in the issue of photographic copyright law and the penalties applied in cases of infringement. ‘New Practice in Photographic Copyright’, Scientific American (17 Feb. 1900), p. 102.
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 asserts that ‘the penalty in many cases would amount to many thousands of dollars, while the photograph had, perhaps, no value whatever’. For the author, the per-sheet penalty had allowed photographers to perform a kind of perverse alchemy. Photographs ‘with no value whatever’, once reproduced by unsuspecting publishers, were converted into ‘thousands of dollars’ of undeserving profits for the photographer. However, the author notes that Bolles v. Outing Co. had turned the tides against the supposedly scheming photographers and observes with satisfaction that judges had finally begun ‘reducing the exorbitant damages’ that

54 ‘New Practice in Photographic Copyright’, p. 102. As Slauter notes (p. 222), the accusation that photographers used copyright to blackmail the press was a common refrain among newspaper publishers.
photographers could extract from publishers in copyright cases. In sum, press publishers had gained the upper hand in the ongoing contest of ‘Photography VS the Press’.

**Conclusion**

At the dawn of the halftone era, the relationship between professional photographers and the photographically illustrated press changed dramatically, as did photographic copyright laws. When the press first began to reproduce the work of photographers as halftones, Falk and others were able to use copyright law and the per-sheet penalty to assert control over and affirm the value of their photographs. Undaunted by these early losses, the press leveraged their political and economic power to weaken the areas of copyright law that photographers had levied against them — especially the per-sheet penalty. As we have seen, this strategy was successful, and led even stalwart Falk to seeming hopelessness over the state of photographic copyright laws and the inaction on the part of his fellow photographers. As he wrote in another article for *Wilson’s Photographic Magazine*:

> 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.

Though Falk and others associated with the PCLA continued to advocate for stronger copyright protections into the twentieth century, it was shifts in press illustration practices, rather than the legal system, that began to limit the illicit reproduction of professional photographers’ work by the press. In the first decade of the twentieth century,

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55 ‘New Practice in Photographic Copyright’, p. 102.
57 Members of the PCLA lobbied for stronger protections and increased penalties during the meetings and hearings convened by the Librarian of Congress and the Joint Committee on Patents between 1905–1907 in preparation for an overhaul of US copyright law that resulted in the 1909 Copyright Act. Members of the press also participated in these meetings and continued to denigrate professional photographers and their work as ‘mechanical maker[s] of kodak snap shot[s]’. See
periodicals increasingly began to hire specialized photojournalists as part of their staffs, sending them out in the field to capture images of newsworthy people and events.\(^5^8\) This period also saw a rise, in the US, of picture libraries like Bain News Service, which offered periodicals an array of newsworthy images taken by photojournalists for publication.\(^5^9\) Accompanying the emergence of photojournalism as a profession was the rise of photojournalism as a style. As early press photographer Gilson Willets described the aims of news photography in 1900:

> 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 [...]. Get the subject in the act, get action in the scene; these are the main objects.\(^6^0\)

As Willets suggests, news photography, with its emphasis on capturing a scene at a ‘crucial, newsy moment’ was the opposite of carefully staged and ‘artistic’ studio photography that Falk practiced. With these developments in photojournalism as a profession and aesthetic, press publishers no longer turned to the work of established photographers like Falk to illustrate their pages.

As photojournalism professionalized in the early twentieth century, photographers began to profit from and be recognized for their contributions to the press. Falk himself predicted this outcome in ‘Photography VS the Press’, speculating that ‘The history of the photographer’s struggle for fair recognition whenever his work is used by others will someday [sic] be written, and will show up many curious phases of inconsistency and even of pettiness, practiced during

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\(^5^8\) ‘Copyright Hearings, December 7 to 11, 1906. Arguments before the Committees on Patents of the Senate and House of Representatives, Conjointly’, *Legislative History of the 1909 Copyright Act*, vol. 4, p. 169. For more on how the battle of ‘Photography VS the Press’ played out in the lead up to the 1909 Copyright Act, see Slauter, pp. 223–224.

\(^5^9\) A few photographers, like Jimmy Hare, were offered positions on periodical staffs in the late 1890s. See Gervais, *The Making of Visual News*, pp. 26–37 and Carlebach, *American Photojournalism Comes of Age*, p. 30 and 65–66.


the past five years by the greatest journals’. The early history of the photographically illustrated press and professional photographers’ ‘struggle for fair recognition’ recounted here is indeed marked by ‘inconsistency’ and change as publishers, photographers, and copyright law adapted to the arrival of halftone printing, the possibilities of this new illustration process, and the emergence of new business models to source photographs for reproduction. There was certainly a fair amount of ‘pettiness’, too. While the triumph of the press is not surprising from the vantage of today and our photography-saturated news cycles, the legal resistance on the part of Falk and the PCLA suggests that the alignment of photography and the periodical press was far more ‘curious’ and contentious than is often understood.

Bibliography

Primary Sources


Bolles v. Outing Co., 77 F. 966 (2d Cir. 1897).


Congressional Record — House 3212 (March 2, 1895).

Congressional Record — Senate 3136 (March 2, 1895).


——, ‘Improved Copyright for Photographers’, *The Photographic Times and American Photographer* (Nov. 1888), 511–512.


### Secondary Sources


Daly, Christopher, *Covering America: A Narrative History of a Nation’s Journalism* (Amherst: University of Massachusetts Press, 2012).

“Photography VS the Press”


