

FALK v. T. P. HOWELL & Co.

(Circuit Court, S. D. New York. December 20, 1888.)

COPYRIGHT—PHOTOGRAPHS—INFRINGEMENT.

A copyright of a photograph artistically designed to illustrate a musical composition is infringed by stamping an imitation in raised figure on leathern chair bottoms and backs.

In Equity.

Bill by Benjamin J. Falk against T. P. Howell & Co., a corporation, to restrain the infringement of a copyrighted photograph. The plaintiff is a photographer, and has copyrighted a picture of Geraldine Ulmer as "Yum Yum," in which she is represented as sitting upon the horn of the moon, while uttering the words, "We're very wide awake, the moon and I," it being intended thereby to illustrate a song sung by Miss Ulmer in the "Mikado." Defendant is engaged in the manufacture of chairs, and stamped a raised figure, like the picture, on the leather of which the bottoms and backs of chairs are made. The picture was illustrative of the song, not only by the combination of the figure of the girl with that of the moon, but also by the representation of the moon as a face, the features of both bearing an expression appropriate to the words of the song.

Isaac N. Falk, for complainant.

William C. Wallace, for defendants.

COXE, J. Since the decision of the supreme court in *Burrow-Giles Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. Rep. 279, there can be no doubt that a photograph which has the artistic merits possessed by the complainant's photograph is the subject of a copyright. The only question is, do the defendants infringe? That their design is copied directly from the copyrighted photograph is not denied, but it is urged that infringement is avoided, because it is larger than the photograph, and is stamped on leather, and is intended for the bottom or back of a chair. It is thought that this proposition cannot be maintained. Differences which relate merely to size and material are not important. They may affect the question of damages, but not the question of infringement. The complainant is entitled to the usual decree.

YOUNG *et al.* v. FOERSTER.

(Circuit Court, S. D. New York. January 8, 1889.)

1. PATENTS FOR INVENTIONS—WHO ARE INFRINGERS.

One who acts solely as employe, and has no pecuniary interest in the product of his labor, and is simply employed by the owner to supervise the work of general repair, cannot be charged as an infringer on account of his connection with the machine so repaired.

2. SAME—REPAIRS BY LICENSEE.

The licensee of a patented machine has the right to replace parts which wear out, and, so long as the identity of the machine is not destroyed, to discard useless parts and add new ones to improve its action.

In Equity.

Bill for infringement of patent, brought by Hugh Young and the Young & Farrel Diamond Stone-Sawing Company against Emanuel Foerster. On final hearing.

Edwin H. Brown, for complainants.

Arthur v. Briesen, for defendant.

COXE, J. This is an action of infringement, based upon letters patent No. 224,760, granted to Hugh Young, February 17, 1880, for an improvement in machines for sawing stones. In August, 1879, John R. Smith purchased of Young, for \$4,700, a machine embodying the patented features, and received a license to operate it under patents then owned by Young, and under all patents for improvements on the same which thereafter might be owned by him. On the 8th of July, 1882, Smith entered into another agreement whereby, for the additional sum of \$300, he received a license to use the machine according to the patent in suit, which had been granted since the purchase, and to embody any improvement covered by that patent or any other patent owned or controlled by Young. During the period in controversy Smith was the owner of the machine. The defendant was in Smith's employ, receiving \$3.50 daily wages. He never used the machine, except as an employe of Smith. He had no interest in or control over it. Soon after it was purchased, it broke down, and since that time has been frequently repaired. No machine similarly constructed can run for more than a month without undergoing repair, which involves putting in new parts and changing old ones. In the spring and summer of 1886, on account of the removal of Smith's place of business, a more thorough overhauling was necessary. At that time new feed-screws, fly-wheels, and sash-heads were put in; the old ones being worn out. The crank-shaft and some little bolts, pins, and nuts were worn out also, and new ones were substituted. The slides on which the saw-sash runs were lowered about two feet, and all the attachments for imparting a lift or push motion to the blade were left off. Lift motion is now imparted to the sash by an incline at each end of the guide bars. The defendant had supervision of this work as employe of Smith. The complainants contend that what