

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.