THE IMAGE AS TRESPASS

The Riley Brothers *Ben-Hur* Lantern Slides and American Copyright

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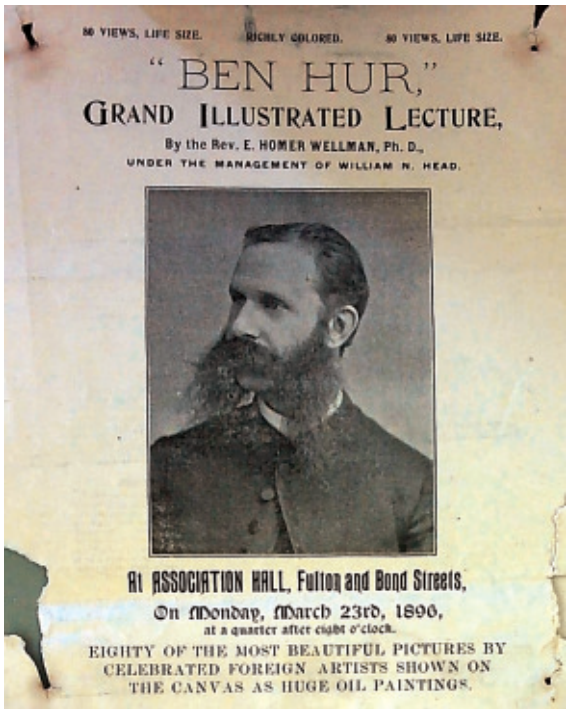
Somewhere in a US federal archive lies a dusty file containing the record of a long-forgotten litigation. The file has seldom, if ever, been disturbed in the last 125 years. The dispute at the core of this case stemmed from a set of 72 magic lantern slides by Riley Brothers based on the novel *Ben-Hur* by Lew Wallace. Cultural historians, as well as magic lantern aficionados, sometimes take notice of the Riley Brothers slides and the tussle they provoked with Lew Wallace and his publishers.[1] But for lawyers, legal scholars and even legal historians the case is completely lost in the mists of time. Seemingly for good reason. *Wallace v. Riley Bros* was not a 'great case'. The decision was never appealed to the higher courts and even in the District Court for the Southern District of New York, where it was litigated, it ended abruptly, probably never advancing beyond deciding the petition for a preliminary injunction. The decision was never reported and it had little precedential value. And yet, for the historian, the case is remarkable. Unfolding at a time of a fundamental transition in American copyright law, the record it left behind is the equivalent of the geologist's stratigraphic column. It allows juxtaposing different strata of legal and social notions about the interface between creativity and commerce, property in the product of the mind and the relationship between text and image. And in doing so it exposes the fundamental change these notions had undergone.

The success of the novel *Ben-Hur*, published in 1880, was not instantaneous, but within a few years it grew to phenomenal proportions. *Ben-Hur* was not merely a bestseller, but, as recently described by Jon Solomon, the first 'blockbuster'.[2] Its cultural and economic successes created a new phenomenon: a network of business and legal relations devoted to extracting every drop of profit in all possible 'derivative' markets – anything from dramatisations to souvenirs – from an exceptionally valuable cultural asset. Wallace himself was at first ambivalent about this trend, expressing concerns that popularised versions of his work, especially on stage, might not treat its subject with the appropriate reverence. He was soon caught, however, in a network of licensing arrangements of the *Ben-Hur* rights that would generate its own momentum. The first extension of licensed exploitation of *Ben-Hur* beyond the realm of print was an authorised *tableau vivant* version licensed in 1889. By the mid-1890s, with *Ben-Hur* already a cultural and commercial powerhouse, magic lantern adaptations began to appear. There were multiple magic lantern sets based on *Ben-Hur* which were used in various presentation formats, usually with the projection accompanied by a lecture, reading or narration of some kind (see Fig. 1).



1. An advertisement pamphlet for the popular magic lantern lecture Ben-Hur *by Rev. Homer Wellman (courtesy of the Indiana Historical Society)*

Riley Brothers, an established magic lantern slide producer from Bradford, England, with a branch in New York, stepped into this lucrative niche in 1896. One advertisement in the campaign accompanying the release hailed: "The Masterpiece of the Nineteenth Century Illustrated with Lantern Slides". Another announced that slides were "drawn by one of the best artists of the day." In fact, the 72 slides, depicting various scenes from the novel, were created by two different artists.[3] The first 25 slides were made by Frank F. Weeks who used his patented technique that involved photographing human models and then heavily reworking the image by painting. A promotional item published in the *Optical Magic Lantern Journal* boasted that the slides were produced "from living Jewish models" in Weeks' Leytonstone studio.[4] Perhaps due to cost concerns, Weeks was replaced midway through the production and the remaining 47 slides were painted by Nannie Preston, described in advertisements only as "the celebrated Artist".

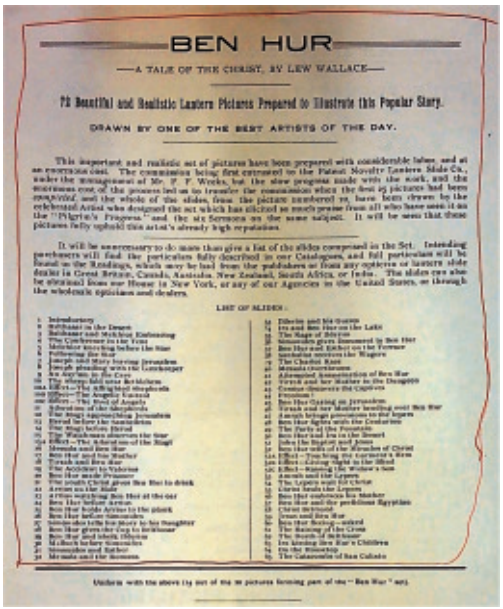
The slides were sold together with a 40-page printed 'reading' to accompany the presentation. The reading consisted of paragraphs of condensed versions of Wallace's descriptions of the scenes depicted. Riley Brothers sold this set across the US directly and through dealers. It was one of their advertisements that attracted Wallace's attention, perhaps the very one that resides in the Wallace Papers Collection kept by the Lilly Library at Indiana University with the list of slides circled in red (Fig. 3). Wallace promptly alerted his publishers, Harper Brothers, who in turn informed Walter Clark the licensee of the profitable *tableau vivant* show. Wallace's main concern might have been, as he wrote in his letter to Harper, that the slides "cheapen the work" but Clark's motivation was clearly economic. Clark saw the slide presentations as a major threat to his stream of profits from the *tableaux* market and he became the propelling force behind the litigation that would ensue. Following a snooping mission in which he purchased a copy of the slides and the reading, Clark returned with alarming news – he was told by the sellers that "the demand is so high they cannot supply it."

Augustus T. Gurlitz, a seasoned copyright lawyer, was quickly drafted by Clark to supply legal advice – which is where copyright law enters the story. Wallace's copyright case against magic lantern adaptations of his work was far from solid. To modern copyright lawyers a case against a pictorial depiction of detailed scenes and characters derived from a copyrighted novel would seem obvious, perhaps even trivially easy to establish. But that was by no means the legal situation in 1896. Early Anglo-American copyright, that emerged in the 18th century out of the previous regulations of the book trade, retained much of its character as the publisher's trade-privilege, even when beginning with the 1710 Statute of Anne the right came to be bestowed on authors rather than stationers. Even when accompanied by declarations about the sanctity or absoluteness of property rights, the traditional understanding of this area of the law was as literally 'copy-right'. The legal right given to authors was seen as limited to a narrow prohibition on others to produce and sell close literal reproductions in print. More remote or abstract adaptations, uses or borrowings were simply not within the scope of copyright and were free for all. Even in 1854

2. Slides 1, 3, 20, 24, 39 and 62 of the Riley Brothers Ben-Hur *set (courtesy of the Museum of Precinema – Minici Zotti Collection – Padua, Italy)*

this traditional framework showed its vitality when Harriet Beecher Stowe's copyright infringement lawsuit against an unauthorised German translation was defeated on the grounds that a translation was not a copy.[5] By the 1890s American copyright law and thought were in transition. The legal rules had been gradually changed by the legislature and the courts to bring within the fold of copyright a broader scope of uses of protected works. Legal scholars, for their part, had developed a new abstract theory of copyright's property as extending to 'the substance of the work' irrespective of changes of mere form. Underlying this new theory was the premise that an author was entitled to control and enjoy the full commercial value of his work in any form and any market. But the transition was incomplete. In particular, copyright's extension to inter-media uses was very limited. By 1896 one could own copyright in various expressive media including not only texts, but also images, sculptures and other subject matter. But there was no generally established principle that one could violate copyright by inter-media borrowing. Copyright in a text could be violated by textual copying and copyright in an image by the taking of pictorial subject matter. But the idea that pictorial representation could infringe the copyright in a text was still foreign. The main and isolated exception to this rejection of inter-media borrowing as implicating copyright was the right to publicly perform a textual dramatic work, created by Congress in 1856 following vigorous lobbying by playwrights and further buttressed in 1870 by the creation of an exclusive right of dramatising literary works. Against this backdrop, when in 1889 Harper Brothers sought legal advice about unauthorised *tableau vivant* adaptations of *Ben-Hur*, they received sound counsel that it was very doubtful the copyright in the novel applied to such adaptations of it. *Tableaux*, an expressive form halfway between drama and imagery, seemed too remote from a text to implicate the copyright in it.

And so Wallace, Harper and Clark faced an uphill battle in trying to challenge the Riley Brothers slides as copyright infringement. Gurlitz acknowledged these difficulties but also predicted that "unless some steps are taken to suppress Riley Brothers the country will be overrun with these performances." The shrewd lawyer that he was, Gurlitz came up with a clever strategy for overcoming the problem of the gap between text and images – presenting the lantern slide shows as dramatic performances and thereby squeezing them into the one special area of inter-media copying recognised by the day's copyright law. This was exactly the strategy that the plaintiffs followed in the legal action that was soon initiated by Gurlitz on their behalf against Riley Brothers. All the legal arguments for plaintiffs in this case, as well as the gist of all the affidavits submitted by them, were aimed at a single purpose: presenting lantern slides shows as dramatic performances and thus bringing them within the dramatisation extension of copyright. Clark's affidavit, describing his experience in attending one of the Riley slides lantern shows, repeatedly used various inflections of the word 'drama' to describe the show. James Thorne Harper, in his affidavit, likened the slide projection to the use of the *ekkyklema* (wheeled platform) in ancient Greek theatre. Riley Brothers' line of defence was a mirror image of this argument. It featured a brazen attempt to claim that they copied nothing from *Ben-Hur* but simply depicted general, well-known biblical scenes, conveniently forgetting that the slides closely corresponded to central scenes from the novel with the first slide proudly displaying the title 'Ben-Hur: A Tale of the Christ' (Fig. 2). The more convincing argument, however, was to flatly deny that lantern slide presentations were drama. As Herbert Riley put it: "A Stereoptican [*sic*] illustration is in no sense a drama, and a stereoptican lecture is not a dramatic entertainment." Once lantern slides were shown not to be within the special category of drama, all


BEN HUR

—A TALE OF THE CHRIST, BY LEW WALLACE—

76 Beautiful and Realistic Lantern Pictures Prepared to Illustrate this Popular Story.

DRAWN BY ONE OF THE BEST ARTISTS OF THE DAY.

3. A Riley Brothers advertisement for their Ben-Hur *magic lantern slides (courtesy of Lilly Library, Indiana University Bloomington)*

4. An advertisement pamphlet depicting the Riley Brothers Ben-Hur *slides submitted as an exhibit in Wallace v. Riley Bros (courtesy of the Indiana Historical Society)*

that Riley Brothers had to do was to point out the traditional principles of copyright – images simply cannot violate copyright in a text.

In September 1896 Judge Emile Henry Lacombe issued his decision with respect to the preliminary injunction sought by the plaintiffs against Riley Brothers, followed by his written opinion. The outcome was a defeat for the plaintiffs. The injunction issued by the judge restrained Riley Brothers from distributing their textual reading. There was nothing surprising about this part of the ruling, given the close resemblance between the two texts. Yet the judge refused to extend the injunction to the lantern slides themselves. While expressing some sympathy for the plaintiffs and even commenting that had the adaptation been into a motion-picture he would have been willing to consider the case, Judge Lacombe felt himself bound by the traditional principles of copyright. Pictorial representations were simply not within the bounds of the property right in a textual work. Lantern slide makers were free to borrow and adapt in pictorial form material from copyrighted popular texts. That this outcome was in line with traditional copyright thinking was expressed by the British magazine *The Photographic News*. It pronounced the decision to be in harmony "not only with United States law, but with the dictates of common sense."[6]

Wallace v. Riley Bros quickly dissolved into oblivion. But the battle over the scope of copyright in the borderlands between text and image was soon resumed. Too much was at stake for the question not to be revisited, especially with the rise of the motion-picture industry. The turning point came over a decade after the Riley Brothers litigation with a case involving, yet again, *Ben-Hur*, this time adapted visually not as lantern slides but in the form of a motion-picture produced in 1907 by the Kalem Company. Presiding over the trial was none other than Judge Emile Henry Lacombe. This time, making good on his comment in *Wallace v. Riley Bros*, he found that the motion-picture adaptation infringed the copyright in the novel. Lacombe offered little reasoning for the result or for how a motion-picture adaptation differed from lantern slides. The case was litigated, however, all the way up to the Supreme Court.[7] In upholding the decision both the Court of Appeals and the Supreme Court offered the same theory to explain how copyright in a textual novel could be violated by a visual motion-picture adaptation. The legal construct was technical and complex, but at its heart stood exactly the manoeuvre devised by Gurlitz more than a decade earlier and rejected in *Wallace v. Riley Bros* – projecting a motion-picture onto a screen is 'dramatisation' of the novel and therefore it comes within the specific extension of copyright. The argument that projection of a motion-picture was dramatisation in the technical sense of the statute was a stretch. The motivation behind it was clear, however. The courts came to adopt the new understanding of copyright as a broad property right that covers the exploitation of an expressive work in all derivative markets, irrespective of media. Once understood as representing another avenue for extracting market value, an image became just another 'form' of the same intellectual creation embodied in a text. The technical legal reasoning about 'dramatisation' was simply a crutch necessary to reach this result, and was soon dropped in succeeding motion-picture adaptation cases. The shift from *Wallace v. Riley Bros* to *Kalem Co. v. Harper Bros* encapsulates the transition from traditional to modern copyright. It highlights the process in which a narrow property right that left many creative uses of copyrighted works outside its bounds was supplanted by the principle that the copyright owner is entitled to control all 'derivative' expressive uses of his work. One could debate which is the more just or attractive society – the one in which everyone is free to unleash their creativity (and entrepreneurial instincts) in order to create their own pictorial adaptations of popular textual works? Or is it a society, more like our own, in which every 'derivative' use of a copyrighted text – even uses as creative and remote as representation by lantern slides – is tightly controlled by the copyright owner and must be licensed or never occur at all? What the largely forgotten case of *Wallace v. Riley Bros* teaches is that there is no eternal, necessary or 'natural' answer to this question. We used to live in a world similar to the former. We have moved to one which is much closer to the latter. It is up for us to judge and choose which is better.

The author is the William C. Conner Chair in Law at the University of Texas School of Law. This article is based on materials researched for a longer study that will be published in Stephanie Delamaire and Will Slauter (eds), Circulation and Control: Art, Copyright, and the Image Revolutions of the Nineteenth Century *(Open Book Publishers).*

NOTES

1. See e.g. Robert E. Morsberger and Katharine M. Morsberger, *Lew Wallace: Militant Romantic*, McGraw-Hill, New York, 1980, pp.455-456; David Henry, 'Ben-Hur: Francis Fredric Theophilus Weeks and Patent No. 8615 of 1894', *The New Magic Lantern Journal*, **5** (1987), pp.2-5; Jon Solomon, 'Lew Wallace and the Dramatization of Ben-Hur', in Stephan Heilen, Robert Kirstein, et al. (eds), *In Pursuit of Wissenschaft: Festschrift für William M. Calder III zum 75, Geburtstag*, Georg Olms, Hildesheim, 2008, pp.431-432; Jon Solomon, *Ben Hur: The Original Blockbuster*, Edinburgh University Press, Edinburgh, 2016, pp.521-525
2. Jon Solomon, *Ben Hur* (*op. cit.*)
3. For more details on the production of the slides see Henry, (*op. cit.*), pp.3-4
4. 'Photique Art', *The Optical Magic Lantern Journal and Photographic Enlarger*, **7**, 1896, p.175.
5. *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D.Pa. 1853)
6. 'Infringement of Copyright. Wallace and others v. Riley Bros.', *The Photographic News*, 25 September 1896, p.618
7. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 1911