Reimagining Bleistein: Copyright for Advertisements in Historical Perspective

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HISTORICAL PERSPECTIVE

by Zvi S. Rosen*

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"Some of the most important statements in our nation’s rich copyright jurisprudence were written by Justice Holmes over a century ago in Bleistein v. Donaldson Lithographing Co.”1 That seminal decision, holding that

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artwork used in circus posters was in fact copyrightable, is shock-full of exalted pronouncements regarding the nature of copyright law, and represented a profound shift in the scope of copyright law.\(^2\) While the factual and procedural history of *Bleistein* has already been told,\(^3\) the statutory background has not been similarly examined. This article surveys the complicated history of copyrightability in advertisements and product labels prior to *Bleistein*, most notably through the 1874 Print and Label Act which removed advertisements and labels from the realm of copyrightability. Understanding that until 1940 copyrightability of advertisements and labels was both a statutory and a constitutional inquiry, the “important statements” regarding copyright law in *Bleistein* can be seen in their proper context — as statements of statutory construction, not copyright principles.

The extent of copyright protection for works related to commerce, of which advertisements and product labels are the most common examples, has long been the subject of debate. In the mid-nineteenth century both court decisions and copyright registration rules held that they were not copyrightable on constitutional grounds. Shortly after copyright registration was centralized in the Library of Congress, the 1874 Print and Label Act was passed barring them from registration there. In 1891, the U.S. Supreme Court held in *Higgins v. Keuffel* that some labels were not copyrightable under the Constitution, in a decision that some read as precluding copyright for all works related to commerce.\(^4\) And to this day authorities assert that advertisements should not be copyrightable.\(^5\)

And yet in 1903, the *Bleistein* decision held that labels and advertisements beyond the very plainest ones were copyrightable. This landmark decision forever changed the landscape by which questions of constitutional copyrightability were focused, offering a liberal approach that was in seeming contrast with the Court’s decision a decade earlier.

At the core of reimagining *Bleistein* is viewing that decision through the story of the 1874 Print and Label Act. For some sixty-five years, from 1874 to 1940, labels and commercial prints (advertisements) could not be


\(^4\) 140 U.S. 428 (1891).

registered as copyrights with the Library of Congress, but rather were registered with the Patent Office. At the time the Act was passed in 1874 it was not clear that labels and commercial prints could be copyrighted under the Constitution, and the statute not only never specified whether prints and labels were being registered as patents, copyrights, trademarks, or some other form of intellectual property, but it gave some indication that prints and labels could not be copyrighted. As it seemingly fit under neither the trademark nor copyright systems, this act survived well beyond both the trademark and copyright laws enacted in 1870, until it was repealed in 1939.6

Attention is also paid to the ebb and flow of registration and application statistics during the Act’s lifetime, and an appendix and several charts documenting these statistics are included.

This Act is regarded nowadays, when regarded at all, as a quaint anomaly passed during an earlier age of copyright and repealed over seventy years ago, and this article is the first substantial account of that Act. This account is far from trivia, however — the Court’s decision in Bleistein is impossible to fully understand without understanding the context of the 1874 Act it was interpreting. Justice Holmes’ ringing language on behalf of expansive copyright protection becomes highly technical statutory interpretation once the full context of his decision is understood. Light is likewise shed on the Court’s mostly forgotten decision in Higgins v. Keuffel. Although Bleistein is generally regarded as a repudiation of Higgins, in fact the two decisions represent two sides of the same coin regarding the copyrightability of labels and advertisements, and the core holding of Higgins remains good law.

Part I of this piece commences with the first legal approaches to copyright in advertising in the late 1840s and documents the passage of the 1874 Act and its early years. Part II documents the Act’s history in the 1880s, and how concerns about the Act’s constitutionality led to the Higgins decision. Part III reviews how questions of copyrightability of advertisements in and out of the Act led to litigation over two decades, culminating in Bleistein. Part IV reviews the final period of the Act, culminating in the Act’s repeal in 1939. Part V reviews the progress of copyright for labels and advertisements over this nearly 100-year period, and explains how it recontextualizes the modern understanding of these decisions. Finally, there is an Appendix of print and label applications and registrations with the patent office from 1874 to 1940.7

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7 Any figures referenced regarding applications and registrations are taken from the annual Report of the Commissioner of Patents for that year, and are reproduced along with several graphs in the Appendix.
I. EARLY YEARS

The proximate cause of the legislation changing the registration place for labels was the vision of the Librarian of Congress for his library. Appointed by Abraham Lincoln in 1864, Ainsworth Rand Spofford would continue to serve as Librarian of Congress through 1897 and then Chief Assistant Librarian Emeritus through his death in 1908. In that time and certainly thereafter his vision of the Library of Congress as the nation’s library was largely realized, and a vital part of that was centralization of copyright registrations in the Library, thus bringing essentially all American literature to the library.\(^8\) Legislation came quickly, with an act establishing registration with the Library of Congress as well as the Patent Office in 1865,\(^9\) a law establishing penalties for failure to timely register with the Library in 1867,\(^10\) and a complete revision of the copyright laws embodying this new approach and removing copyright registration from the Patent Office entirely in 1870.\(^11\) But with this change came a problem — suddenly commercial labels and prints (such as signs advertising a product) were pouring into the Library of Congress. In 1870 there were 1,426 prints (including many labels and commercial prints) registered, while in 1872 there were 4,712, and in 1874 there were nearly 6,000.

A. Prints and Labels Prior to 1870

Whether commercial prints and labels could be copyrighted at all was a murky issue prior to the 1874 Act. They were usually registered as prints,\(^12\) but the case law was doubtful as to whether these copyrights would withstand a legal challenge.\(^13\)

In the most prominent case of this era Justice McLean, riding circuit in Ohio in 1849, was faced with the question of whether a label for a bottle

\(^8\) Registration of copyrights had been vested with the Library before, from 1846 to 1859, with a requirement that another copy be deposited with the Smithsonian Institute. Act of Aug. 19, 1845, ch. 178, § 10, 9 Stat. 106 (1846); 11 Stat. 380 (1859). After 1859, registration was vested with the Patent Office. P.J. Federico, Copyrights in the Patent Office, 21 J. PAT. OFF. SOC’Y 911, 913 (1939). There were apparently severe problems with recordkeeping, though, and many copyright files were lost. Walter J. Derenberg, Commercial Prints and Labels: A Hybrid in Copyright Law, 49 YALE L.J. 1212, 1214 (1940).


\(^10\) Act of Feb. 18, 1867, ch. 43, 14 Stat. 395.


\(^12\) Scoville v. Toland 21 F. Cas. 863 (C.C. Ohio 1848) (No. 12,533).

\(^13\) New Law Concerning Copyrights for Labels, SCI. AM., July 11, 1874 at 17 (noting that copyright registration “was not considered to be of much value.”).
of medicine was copyrightable.\textsuperscript{14} The label promised fantastic cures in block text, but had no further ornamentation or features.\textsuperscript{15} In an analysis heavily rooted in an earlier era of copyright law, Justice McLean held that while a single sheet could indeed be a “book” and thus copyrighted under the 1831 Act, a label which did no more than identify the product was not so copyrightable. He held that if “such labels . . . are the proper subjects of copy right,” then any label with no artistic aspect whose sole purpose is to identify a product is copyrightable, and “the statute will not bear this construction.”\textsuperscript{16}

A few years later, the concerns of the medical establishment regarding quack “patented” medications like the one at issue in \textit{Scoville} would lead to further statements that labels in and of themselves were not copyrightable.\textsuperscript{17} After a private conversation to the same effect with a doctor in Buffalo, N.Y., the clerk for the Northern District of New York, one Aurelian Conkling, wrote an open letter saying that although he would continue to register labels as copyrights since his duties were ministerial, he felt that labels could not be copyrighted under the 1831 Act since labels had no title, but more importantly because labels do not advance the progress of the useful arts.\textsuperscript{18} He further noted that it is doubtful Congress intended copyright law to protect quacks, and that if a medicine was honest it could always receive actual patent protection, rather than the appearance thereof.\textsuperscript{19} Mr. Conkling asked for a rule that he be permitted to deny copyright registration to mere labels, and the Secretary of State

\textsuperscript{14} \textit{Scoville}, 21 Fed. Cas. at 863. Justice McLean held similarly in another case, but there he simply assumed that labels were not copyrightable, but did not explain why. \textit{Coffeen v. Brunton}, 5 F. Cas. 1184 (C.C.D. Ind. 1849) (No. 2946). There is also an unreported case in the Circuit Court at New York during 1855 in which one party sued another for violating his copyright in a label containing directions. The Circuit Court denied the motion for a preliminary injunction by the plaintiff, and the case was stayed and then dismissed consensually. \textit{John B. Wells v. William Taylor}, N.Y. \textit{Times}, Oct. 15, 1855, at 3 (citing John B. Wells and Stephen H. Provost v. William Taylor & Charles Hodgetts, Equity Case No. 1-449 (C.C.S.D.N.Y. 1855)).

\textsuperscript{15} \textit{Scoville}, 21 F. Cas. at 863. The label read: “Doctor Rodgers’ Compound Syrup of Liverwort and Tar. A safe and certain cure for consumption of the lungs, spitting of blood, coughs, colds, asthma, pain in the side, bronchitis, whooping-cough, and all pulmonary affections. The genuine is signed Andrew Rodgers.” \textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Editorial and Miscellanea}, 16 N. Y. J. MED. & COLLATERAL SCI. 421 (May 1856). The term “patented” was a misnomer as purveyors of these tonics and cures had no wish for patents and the required disclosures, but rather sought protection through copyright registration. \textit{Id.}

\textsuperscript{18} \textit{Id.} at 423.

\textsuperscript{19} \textit{Id.} at 423-24.
granted this request.\textsuperscript{20} In a Circular dated April 11, 1856, the Secretary of State ordered that as the 1831 copyright law had specifically been entitled “An Act for the Encouragement of Learning,” and “inasmuch as mere labels are not comprehended within the meaning of said act,” the clerks of the district courts were ordered to refuse registration to labels.\textsuperscript{21}

In 1859, copyright responsibilities were moved to the Interior Department, which delegated them to the Patent Office (although registrations themselves remained the responsibility of the clerks of the district court).\textsuperscript{22} Shortly after this act was put into effect the Patent Office put out a circular to the same effect as the State Department circular a few years earlier, specifically directing the district courts not to register “stamps, labels, and other trade-marks of any manufactured articles, goods, or merchandise” because “the acts of Congress relating to copyright are designed to promote the acquisition and diffusion of knowledge, and to encourage the production and publication of works of art,” and thus labels were not “embraced within the meaning of the [copyright] acts.”\textsuperscript{23} Thus a label, no matter how artful, could not be registered as copyright, but might be registered as a design patent.\textsuperscript{24} There is no evidence the Library of Congress put into place such rules when it was given responsibility for copyright registrations, which unsurprisingly led to the flood of registrations for labels and prints.

\section*{B. The Passage of the 1874 Act}

This flood of commercial labels and prints was first raised in the 1872 Report of the Librarian of Congress.\textsuperscript{25} In his report, he noted that it had been customary for labels to be registered as copyrighted due to a liberal interpretation of the word “prints” in the copyright statute.\textsuperscript{26} However, as the constitutional provision did not encompass such material, the Libra-

\textsuperscript{20} \textit{Quack Medicine Labels Not Patentable}, 4 AM. J. PHARMACY 377 (1856).
\textsuperscript{21} \textit{Id.} While the circular seems to predate the \textit{New York Journal of Medicine} article, the correspondence that led to the circular occurred before its publication. \textit{See supra} note 17.
\textsuperscript{22} Act of February 5, 1859, 35th Cong., 2d Sess., 11 Stat. 380. For thirteen years previously, deposit had been required at both the Smithsonian and Library of Congress, but the 1859 act reversed that. Act of August 10, 1846, 29th Cong., 1st Sess., 9 Stat. 106.
\textsuperscript{23} \textit{The Law of Copyright}, N.Y. TIMES, July 25, 1859, at 5.
\textsuperscript{24} \textit{Labels Not the Subject of Copyright}, BALT. SUN, Aug. 27, 1859. Apparently at the time a patent cost $15 and gave seven years protection, while a copyright cost 50¢ and gave twenty-eight years protection. \textit{Patents and Copyrights}, N.Y. TRIB., Oct 8, 1859, at 5.
\textsuperscript{26} \textit{Id.} at 2.
rian felt they should be registered at the Patent Office as trademarks or designs.\textsuperscript{27} Furthermore, he felt it incongruous that such commercial labels should be in the same category as more exalted works of the mind, and asked that the Congressional Joint Committee on the Library address this concern.\textsuperscript{28}

A little over a month after the Librarian’s report in 1872, Sen. Morrill of Maine introduced S. 1369.\textsuperscript{29} The Congress was already in its third session, so work would need to be fast, and within three weeks the bill was reported back amended.\textsuperscript{30} The structure of the bill was simple enough. In the original version a label was expressly prohibited from copyright, and instead was to be registered as a trademark or design.\textsuperscript{31} The amended bill was even clearer, providing that such labels would need to be registered as trademarks.\textsuperscript{32}

On February 17, the Senate took up the bill, and Sen. Sherman explained that “[t]he only effect of the bill is to relieve the Library from a great mass of little stuff of no account to anybody in the world.”\textsuperscript{33} Following an amendment to the bill’s preamble, it passed the Senate.\textsuperscript{34} However, time was simply too short. The bill did not come up in the House until the last day of the Congress, at which point it was passed-up for other business.\textsuperscript{35}

In his 1873 Report, the Librarian of Congress expressed displeasure at this, and argued that labels “clearly have no proper relation [to copyright].”\textsuperscript{36} By the time the Librarian’s report came out, the Forty-third Congress was all of nine days old; it would act to revive the failed act of the Forty-second on labels. The revived version of the 1873 Bill was introduced as the third section of S. 876 on Jun. 1, 1874.\textsuperscript{37} It was reported directly from the Senate Committee on Patents without prior introduction or referral on the Senate floor; doubtless in part because it had already received consideration in the previous congress. The relevant section read:

\begin{quote}
[I]n the construction of this act, the words “Engraving,” “cut” and “print” shall be applied only to pictorial illustrations or works connected
\end{quote}

\textsuperscript{27} Id. at 2-3.
\textsuperscript{28} Id.
\textsuperscript{29} SENATE JOURN., 42d Cong., 3rd Sess. 149 (1873).
\textsuperscript{30} Id. at 252.
\textsuperscript{31} S. 1369, 42d Cong. (as introduced)
\textsuperscript{32} S. 1369, 42d Cong. (as passed).
\textsuperscript{33} CONG. GLOBE, 42d Cong., 3d Sess. 1420 (1873).
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 2120 (1873).
\textsuperscript{36} ANNUAL REPORT OF LIBRARIAN OF CONGRESS, 1873, Misc. Doc. 20, 43d Cong., 1st Sess. (1872).
\textsuperscript{37} SENATE JOURN., 43d Cong., 1st Sess. 650 (1874).
with the fine arts, and no prints or labels designed for use for any other articles of manufacture shall be entered under the copyright laws, but may be registered in the Patent Office; and the Commissioner of Patents is charged with the supervision and control of the entry or registry of such prints of labels in conformity to the regulations provided by law as to copyrights of prints, except that there shall be paid for recording the title of any print or label not a trade-mark three dollars . . . .

This section received some explanation on the Senate floor, that it was meant to allow the registration of labels that were not trademarks in the Patent Office instead of the Library of Congress, since they had nothing to do with works of art, and there was no place for them in the Library of Congress. The bill would pass in essentially this form. Its effect was to briefly put a dent in the volume of copyright registrations with the Library, but by 1879 they were higher than ever.

The language of the act reveals an immediate source of confusion. The second phrase of the Act states that “no prints or labels designed for use for any other articles of manufacture shall be entered under the copyright laws,” which is clear enough on its own, stating a bar to registration of commercial prints and labels as copyrights. The second phrase does not limit itself to registration as copyrights with the Library of Congress, but rather is categorical. The third phrase states that commercial prints and labels “may be registered in the Patent Office; and the Commissioner of Patents is charged with the supervision and control of the entry or registry of such prints of labels in conformity to the regulations provided by law as to copyrights of prints.” The ambiguity that would bedevil commentators for the next eighteen years would be whether this just moved the place to register copyrights in commercial prints and labels, or whether it removed

38 S. 876, 43d Cong. (as introduced Jun. 1, 1874).
39 1 CONG. REC. 4413 (1874).
40 The only amendment was that the fee was amended to $6 in the House, which the Senate concurred in. Id. at 4875 (Jun. 11, 1874) (House amendments).
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commercial prints and labels from the subject matter of copyright, and set them up as a different class of intellectual property, registered with the same procedures and formalities of copyrights, but with different protections — and implicitly Constitutional status.

While it is tempting to view the motivation of the Librarian of Congress as being just a question of space and efficiency of administration of intellectual property registrations, the contemporary statements of the Librarian are to the contrary. Looking back many years later, Ainsworth Spofford reiterated this. In a 1901 speech to graduates of the New York School of Library Science, the nation’s Librarian for over three decades recalled “endeavors to convince the hard-headed Librarian that a label . . . was not an article of manufacture but a literary production.”42 For the Librarian and others of his generation, copyright was a far narrower and more concrete notion than it is today, and this conception is critical to understanding the 1874 Act.

C. The First Years

The best way to describe the first few years of existence for the 1874 Act would be confusion. What were these labels to be regarded as — trademarks, copyrights, patents, or something else? The original 1873 bill had stated specifically that they were to be registered as trademarks, but the 1874 bill not only did not contain this language, but stated specifically that they were not trademarks. The law itself was unclear . . . it stated that prints and labels were to be registered as if they were copyrights by the patent office. Applicants were no less confused, and frequently sent their applications for registration to the Library of Congress, which usually (but not always) forwarded them on to the Patent Office.43

The meaning of “prints” and “labels” was likewise unclear. The original interpretation of the Commissioner of Patents was that prints were pressed directly into “articles of manufacture,” while labels were slips of paper attached to “articles of manufacture.”44 “Articles of manufacture” was defined as a vendible commodity. In 1881 the Commissioner of Patents revised this view and asserted that prints meant printed labels and nothing more.45 The recognition that “prints” refers to advertisements

42 Story of the Library, WASH. POST, May 5, 1901, at 32 (transcript of speech).
43 Twenty years after the Act’s passage, people still attempted to register labels as copyrights with the Library of Congress with at least some regularity. Julian Hawthorne, The Librarian Among His Books, LIPPINCOTT’S MONTHLY MAG., Apr. 1894, at 519.
44 The Registration of Prints and Labels, CRITIC-RECORD, July 22, 1874. So, for instance, a bottle with the label engraved directly into the glass would be a print, while a paper label glued to the bottle would be a label.
Journal, Copyright Society of the U.S.A.

and provisions for print registrations would not come until 1893, leaving advertisements in legal limbo, unregistrable at either the Copyright Office of the Patent Office.46

In early 1877, the Commissioner of Patents commented on this confusion in his annual report for the previous year, noting that a distinction is made in the law between labels and trademarks, but not defined.47 While the Commissioner noted that there must be a difference, and that the two species receive different protection, it “is very often a distinction without a difference.”48 Nonetheless applications for label registrations did come in, either directly or forwarded from the Library, and excluding the stub year 1874 averaged 625 applications and 391 registrations per year prior to 1879. The first reported decision on the law was also made in 1877, assuming that labels were copyrights and requiring the holders to comply with formalities regarding copyrights save for the substitution of the Patent Office for the Library of Congress.49 On the other hand, in the first edition of his famous treatise on copyright law, Eaton Drone noted the 1874 Act and the Scoville case in asserting that labels could not be copyrighted, implying that they were something else entirely.50 Others, following the practice taken by the district courts, asserted that copyright law does not protect labels, and that labels were in fact quasi-trademarks.51

Even early in the law’s existence there were attempts to amend it. In 1875, a bill was introduced which proposed to protect trademarks and la-


48 Id.; See also Ex parte Parker, 13 Off. Gaz. Pat. Office 323 (Comm’t Patents, 1877) (“The subjects to be protected under the design [patent], copyright, label, and trade-mark acts are often so nearly the same in character that it is difficult always to say to which class they belong, especially in the absence of definitions in the statutes.”).

49 Marsh v. Warren, 16 F. Cas. 821 (C.C.N.Y. 1877) (No. 9121). There was an unreported case two years earlier in the Circuit Court in Illinois, where a defendant asserted that the cigar labels were not the proper subject matter of copyright, but the Judge held that while this objection would have been well taken under the 1874 Act, the copyrights were registered prior to 1874 and thus valid, and further valid under the Constitution. The Court Record, Inter-Ocean, July 19, 1875.


51 Trade Marks, Critic-Record, Nov. 12, 1874 (also calling the act “poorly drafted”).
bels at much lower rates than existed at the time.  

Apparentl[y] the Label act of last year [was already] pronounced a failure.  

This bill died unnoticed, but greater challenges awaited the 1874 Act.

D. The Trade-Mark Cases

In late 1879 the Print and Label Act would have its first great test, with the decision of the Supreme Court in the Trade-Mark Cases. In that case, the Supreme Court held the 1870 Trademark Act unconstitutional, on the grounds that a trademark is not in the proper subject matter of the copyright clause of the constitution, which has a requirement of artistry and ingenuity not fulfilled by a mark used to identify a product for commercial purposes. While that case did not per se involve the 1874 Act, if there was no real difference between labels and trademarks in practice, Congress would equally lack the power to legislate regarding them under the copyright clause.

This problem was immediately clear to contemporary observers, but it does not seem anything was done about it. A leading authority on trademarks of the day noted in a footnote to an article in 1880 that this reasoning would seem to apply with equal force to the 1874 Print and Label Act, and wondered how “such prints or labels of manufacture could be copyright matter,” and not fit more neatly into the category of trademarks. In a speech on the House floor in 1880, Rep. Hammond likewise admitted that the 1874 Act suffered the same Constitutional weaknesses as the 1870 Trademark Act, and “if attacked, may fall under the same condemnation.” Ordinary citizens likewise seemed to have lost faith in the Act, and applications for label registrations in 1880 and 1881 averaged 369, or only slightly more than half those for the previous five years. And yet the 1874 Act survived its first major test mostly unscathed. Part of this was doubtless the relative obscurity of the law, but part was also that neither Congress, courts, nor experts on what we now call intellectual property were entirely sure of what a label was within the taxonomy of intellectual property law. This confusion was illustrated by the

52 H.R. 4065, 44th Cong. (1875).
53 Trade-Marks, N.Y. TIMES, Feb. 1875, at 1.
54 100 U.S. 82 (1879).
56 William Henry Browne, Has Congress Authority to Legisl ate on the Subject of Trade-Marks, 14 AM. L. REV. 156, 158 n.1 (1880).
57 10 CONG. REC. 2702 (1880).
58 While steep, this fall was not as severe as the drop in trademark applications. See Rosen, supra note 55.
1880 decision in *Rosenbach v. Dreyfuss* that label registrations were not copyrights.\(^{59}\)

In that case the Circuit Court for the Southern District of New York was faced with a suit with multiple claims, in which the defendant was charged as having illegally copied patterns for hanging baskets and balloons.\(^{60}\) The court determined that these patterns, which including cutting lines and the like, were prints within the scope of the 1874 Act, and held on reading the Act that:

> It would be such a strange departure from this settled policy of these laws that one particular class of copyrighted articles, namely, this class of “prints and labels,” if they are copyrightable, should be expressly excluded, without any apparent reason, as they are by the third section of the act from being marked as copyrighted; that, whatever may have been the construction of the former laws, this exclusion must be taken to show the intention of congress that thereafter these articles should be excluded from the category of copyrighted articles.\(^{61}\)

In other words, in the court’s opinion the 1874 Act specifically removed what had previously been copyrightable subject matter from the realm of copyright law. The court did not further opine on what prints and labels were, focusing instead on the procedure for pleading a copyright infringement, and holding the plaintiff’s pleading had been inadequate.\(^{62}\) In the next decade the confusion over the 1874 Act would intensify, leading to the decision of the Supreme Court in the case of *Higgins v. Keuffel* in 1891.

**II. HIGGINS v. KEUFFEL**

Applications for label registrations recovered to 532 in 1882, and by 1883 they were higher than they had ever been, averaging 786 applications and 440 registrations per year. And yet, even as the system of print and label registration hit its stride again, confusion over the nature of the 1874 Act continued, culminating in the *Higgins v. Keuffel* decision.

**A. Controversy and Confusion**

The 1874 Act required that the label being registered not be a trademark, doubtless in part to prevent individuals from taking advantage of the lower fee for registration ($6 for a label and $25 for a trademark).\(^{63}\) In


\(^{60}\) Id.

\(^{61}\) Id. at 224.

\(^{62}\) Id. The court held the plaintiffs needed to prove that a copyright was being infringed, since it seemed the infringement could be of uncopyrightable prints and not copyrightable subject matter.

\(^{63}\) This was suggested by a contemporary practitioner in a letter to *Scientific American* in 1884. *Correspondance*, Sci. Am., Sept. 13, 1884, at 165.
one of the first decisions of the Commissioner of Patents regarding labels, the Commissioner upheld the decision of the examiner that there could be no election between trademark and label registration if the label was a trademark.64 This decision also suggested that if a label even contained a trademark, it needed to be registered as a trademark and not a label, but the Commissioner stated that this was not the case a year later.65

As is seen from this, the Patent Office never adopted the practice of the Library of Congress of simply registering without examination — labels were rather examined by trademark examiners and registration numbers often were far lower than the number of applications. Critics of the 1874 Act were skeptical of this practice from the beginning,66 and in 1881 the Supreme Court for the District of Columbia (the forerunner of today’s U.S. Circuit Court of Appeals for the D.C. Circuit) held this approach invalid, and issued mandamus to the Commissioner of Patents to register an application it had denied as being a trademark, because copyright registration is a purely ministerial task.67 Two years later the same court again issued mandamus to register an application for a label registration that had been denied.68 This second case had a unique twist — the Commissioner of Patents argued that the label law was unconstitutional following the Trade-Mark Cases, but the court held that this was not an appropriate argument for the Commissioner to make and declined to rule on it.69 Scientific American took issue with the Commissioner’s recalcitrance in 1884, arguing that the Commissioner of Patents should not engage in examinations — that there was no discretion regarding the registration of copyrights.70 The unsigned editorial asserted that labels were in fact copyrights, and that while the constitutionality of such a law granting copyright to labels was questionable, it was not the purview of the Commissioner to rule on that.71

It is likely no coincidence that the Commissioner of Patents disagreed in upholding an examiner’s ruling less than a month later.72 The Commissioner noted that the 1874 Act raised the fee for a label registration from

64 Ex parte Godillot, 6 Off. Gaz. Pat. Office 642 (Comm’r Patents 1874).
65 Ex parte Orcutt, 8 Off. Gaz. Pat. Office 277 (Comm’r Patents 1875) (stating that the label in the Godillot was in reality just a trademark, whereas here it was a proper label where the trademark was only a small part of it).
66 New Law Concerning Copyright for Labels, supra note 13.
67 United States ex rel. Willcox & Gibbs Sewing Mach. Co. v. E. M. Marble, 1 Mackey 284 (D.C. Sup. 1881). There is no record the mandamus was complied with.
69 Id.
70 Labels as Subjects of Copyright, SCI. AM., Aug 9, 1884, at 80.
71 Id.
$1 to $6, and specifically required that labels not be trademarks. He also noted the Willcox decision but argued it was not well-considered, and declined to follow it. Scientific American took “decided issue” with the Commissioner’s decision, but the Commissioner’s view nonetheless could not be easily challenged if mandamus failed, and the practice of examination continued.

The Rules for label registration published by the Patent Office also manifested this confusion, demonstrating that the Patent Office itself thought that the labels it was registering were not copyrightable. In a note to the rules for label registration, it noted:

The registration of copyright matter is, by law, under the control of the Librarian of Congress at Washington. At the time of the enactment of the trade-mark law of July 8, 1870, it was the custom of the Librarian of Congress to enter, under the provisions of the copyright law, labels and prints of commerce, many of which embraced legal trade-marks. Notwithstanding the existence of a separate statute in 1870 for the registration of trade-marks, the Librarian of Congress, in entering labels and prints of commerce, gave a semblance of protection to many trade-marks, of which the labels and prints entered by him were the mere vehicles. To remedy this difficulty was the object of the amendment to the copyright law of June 18, 1874, referred to herein as the act for the registration of prints and labels. By this amendatory act the Librarian of Congress is restricted, in the registry of copyright matter, to pictorial illustrations or works connected with the fine arts, and is prohibited from registering labels or prints designed to be used for any other articles of manufacture, i. e., articles of commerce. These are now registrable at the Patent Office; while matter properly coming within the definition of copyright subject-matter, as contained in the act of June 18, 1874, is registrable at the office of the Librarian of Congress.

Implicit in this is that the Patent Office did not consider label registrations to be copyrights at all, but rather a form of trademarks.

In 1890, with questions of both the meaning of the Act and the constitutionality of registering commercial labels under the copyright clause continuing, a bill was proposed to remedy these problems by placing label registrations under the commerce clause. The effect would have been to end copyright protection for labels entirely, and place them solidly in the realm of trademark law, but the bill went nowhere in Congress once re-
ported. Nonetheless, registration of labels was about to come to a grinding halt.

B. The Litigation

As had been seen before, constitutional questions had long dogged the 1874 Act, and label registration under it. In the case of Higgins v. Keuffel these questions reached the Supreme Court, and while the Supreme Court’s opinion itself was surprisingly limited, its effect was on one hand to affirm that a label registration is a form of copyright, and on the other hand to shut down nearly all label registrations for several years.76

Charles M. Higgins was an inventor who had developed a unique waterproof ink, which was superior to other inks and quickly became popular.77 The bottles were in a unique shape, and carried a label reading, in type-set letters, “WATERPROOF DRAWING INK.”78 The label was duly registered with the Commissioner of Patents in 1883, but no other protection was sought, either for the ink as a patent or by placing a trademark on the label and registering that.79 The label carried a notice of registration “Registered 3693, 1883.”80 The defendants, partners in the firm of Keuffel & Esser, were in the business of selling inks made by both themselves and others, and had for a time sold Higgins ink.81 The defendants had a history of using a label with the same phrase on their own inks, and after they had agreed to stop using it, reverted to doing so again,82 and Higgins brought suit under the Label Act in the Circuit Court for the Southern District of New York.83

The defendants filed an answer, and asserted that the defendant’s claim was fatally flawed because the label was descriptive of the contents and nothing more, and that that the label was not proper subject matter for a copyright and could not be lawfully registered.84 At the hearing before the circuit court additional arguments were made: that the form of notice of registration on the label was incorrect, that Congress had never meant to apply the copyright law to labels, and that the 1874 Act was

76 140 U.S. 428 (1891).
77 Deposition of Charles M. Higgins [hereinafter Higgins Deposition], Casefile, Higgins v. Keuffel (No. 240), Records and Briefs of the U.S. Supreme Court. While Higgins is obviously biased, there is no reason to gainsay this since it was not at issue.
78 Example Label in casefile. Id.
79 Complaint in casefile. Id. Label reg. no. 3693 (Nov. 20, 1883) in casefile. Id.
80 Sample label in casefile. Id.
81 Higgins Deposition in casefile, supra note 77.
82 The label included with the complaint reads “BLACK WATERPROOF DRAWING INK.” Complaint, Id.
83 Id. This is the old circuit court, and not the modern circuit court of appeals.
84 Answer. Id.
unconstitutional.85 The question of form of notice for a label was not a simple one, complicated by the fact that the statute was vague, and it was unclear whether a label registration even was a copyright. While the registration had been properly received, the copyright law at the time required a specific form of notice, stating that the copyrighted matter had been registered with the Library of Congress, or specifically registered as a copyright.86 The problem was in both cases simple — labels were not registered with the Library of Congress, and it was not copyrights that were being granted in these labels.

Nonetheless, the circuit court held that the label was unprotected because the registration did not conform to the statutory requirements for copyrights.87 Judge Wheeler assumed that label registrations were copyrights, and held that the notice was so defective that it was as if there had been no notice at all, and it practically constituted an abandonment of copyright.88 Constitutional questions were not mentioned by the circuit court, and the case would most likely not be remembered if it had not been appealed.

Of course, it was appealed, and the briefs of both sides to the Supreme Court provide a window into both their arguments and what questions were unsettled. Although both briefs gave substantial space to the procedural questions the lower court decision was based on, they also addressed the broader questions of classification and constitutionality. The lawyers for Higgins asserted that the 1874 Act was simply a change in the place of registration, and that the labels were copyrighted and held the same protections for copyrights registered with the Library of Congress.89 In defending whether a label with such a simple phrase could be copyrighted, Higgins asserted that the level of originality necessary for a copyright was so slight that it need barely be perceptible, and the choice and organization of the words “waterproof drawing ink” was sufficiently original.90 Regarding the constitutionality of the Act, Higgins asserted that if photographs, catalogs, and pamphlets could be copyrighted, it followed that labels could as well.91

The defendant-appellees, on the other hand, made the first argument in their brief a direct assault on the constitutionality of the 1874 Act.92

85 Appellant’s brief in casefile. Id. at 4.
86 DRONE, supra note 50, at 265 n.8.
88 Id. at 628.
89 Appellant’s brief in casefile, supra note 85, at 12.
90 Id. at 21. Higgins asserted while being deposed that he had thought of many other possibilities for the phraseology of the label. Higgins Deposition in casefile. Id.
91 Appellant’s brief in casefile, supra note 85, at 22.
92 Appellee’s brief in casefile, supra note 85, at 3.
Looking to the *Trade-Mark Cases*, they noted that such a law must rest on the commerce or copyright clauses. After noting that the commerce clause could not be used because the 1874 Act was not limited to interstate or international commerce, the appellees turned to the copyright clause, and asserted that labels were not “founded in the creative powers of the mind” by their very definition, thus making them invalid subject matter under the copyright clause. The appellees asserted that Congress had recognized that labels were not copyrightable (as, indeed the Librarian of Congress had been arguing) and rather removed them from the realm of copyrightable subject matter. The argument was further made that even if labels were copyrights, the particular label at issue could not be registered as it was not copyrightable subject matter. The appellees also made an interesting argument in favor of dismissal — if labels were not copyrights there was no federal jurisdiction, since all parties were citizens of New York.

C. The Decision

Argument before the Supreme Court was held April 7–8, 1891, several years after the case was decided in the lower court. The Court’s unanimous opinion came out slightly over a month later, upholding the circuit court, in an opinion written by Justice Field.

Examining the constitutional question first, Justice Field held that the label in question could not be copyrighted, holding that the copyright clause:

> does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles, and no possible influence upon science or the useful arts. A label on a box of fruit, giving its name as “grapes,” even with the addition of adjectives characterizing their quality as “black,” or “white,” or “sweet,” or indicating the place of their growth, as Malaga or California, does not come within the object of the clause. The use of such labels upon those articles has no connection with the progress of science and the useful arts. So a label designating ink in a bottle as “black,” “blue,” or “red,” or “indelible,” or “insoluble,” or as possessing any other quality, has nothing to do with such progress. It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright

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93 *Id.* at 3–4 (quoting Burrows-Giles Lithographic v. Sarony, 111 U.S. 53 (1884)).
94 *Id.* at 4.
95 *Id.* at 6–7.
96 *Id.* at 9.
97 United States Supreme Court, *N.Y. Times*, Apr. 8, 1891, at 9. The reason for this delay is unclear, the case was originally supposed to be heard in the October term of 1888. Notice of hearing in casefile, *supra* note 77.
the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached.99

Following this the Supreme Court quoted Justice McLean’s opinion in the Scoville case at some length, and endorsed its reasoning.100 The Supreme Court then affirmed the circuit court’s decision regarding the form of notice of registration on the label, finding it insufficient.101

Left unsaid in the decision was whether the 1874 Act was unconstitutional. It is certainly a plausible inference that it was, given the language about labels serving no purpose other than the commercial, and that a “mere advertisement” was insufficient for copyright protection. At the same time all the labels discussed in the opinion (and the Scoville case) were simple text labels with no artistic features, and the opinion’s reasoning is focused on this. The opinion makes clear that the labels in question are not even trademarks; they are simply functional slips of paper to identify the contents of a bottle. That such labels are not copyrightable was obvious after the Trade-Mark Cases, and because the Court’s opinion was narrowly focused on the featureless labels before it in this case, it simply did not address labels that had a modicum of artistry to them. The first reaction of many to the decision was that the 1874 Act had been swept away, but a few years later the Act was once again standing strong.

D. Aftermath

With the decision in the Higgins case, registration of labels abruptly stopped. It would be a few years before it resumed, and when they resumed it would be in its modern form — clearly understood as copyright registration.

In 1891, The Commissioner of Patents registered 131 labels, presumably almost all in the stub year prior to the Higgins decision. There were only six registrations in 1892, none for the next three years, one in 1896 and fourteen in 1897. The Higgins case had not been followed closely in the papers, and applications remained in the hundreds (but lower than before) for a few years after the decision, finally crashing to roughly sixty in 1896 and 1897. While the decision didn’t quite hold this, it at first seemed that the 1874 Act was an unconstitutional dead letter.

At first after Higgins if was felt that no label could be sufficiently artful to be a valid copyright,102 and the Commissioner of Patents had declined to register a label solely on those grounds.103 However, a year

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99 Id. at 431.
100 Id. at 431-32.
101 Id. at 434.
later the Commissioner clarified that a sufficiently artful label *would* be registered. The examiner had held that all label registrations were to be denied, but the Commissioner interpreted the *Higgins* decision as leaving room for registration where the label “possess[es] just as much artistic excellence, and no more, as would entitle it to copyright in the office of the Librarian of Congress.” While the “narrow margin” this decision provided would be seldom found applicable in the next few years, it made it clear that the 1874 Act was still operative, at least in theory. Congress also stepped into the fray, once again proposing a bill to lump label registrations along with trademarks under the commerce clause.

Up to this point, labels had been regarded as being the prints referred to in the 1874 Act. But with label registration essentially shut down, and with commercial prints seeming to more easily fit into copyright law, the provisions regarding commercial prints took on new importance. In 1893, Heinz attempted to register a flyer advertising their products, including their still well-known ketchup. It was not a label, but was nonetheless rejected as being one by the examiner. In overturning the examiner, the Commissioner reiterated the points made in the *Palmer* decision, but also went further and asserted that prints were within the 1874 Act separately, and could be registered as prints, rather than labels. He noted that no rationale was given for conflating prints with labels in the Rules of the Patent Office, given that the 1874 Act mentioned them separately, and thus prints should be registered separately. In closing, the Commissioner made clear that he now considered the 1874 Act, along with the label and newly-instituted print registrations under it, part of the copyright law. With this opinion the 1874 Act reached its modern understanding under the copyright law. The Commissioner of Patents also published new rules in 1893, which would set forth procedures for separate print registration with a “pictorial advertisement” as the paradigmatic commercial

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105 *Id.*
106 *Id.*
107 H.R. 9528, 52d Cong. (1892). A similar bill was also proposed in 1896. *See supra* note 75. Congress would also propose numerous other bills related to labels during this period. In 1896, Congress proposed criminal penalties for violations of trademark and label registrations. H.R. 6402, 54th Cong. (1896).
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
print, but also required that no label could have a trademark on it and be registered.\footnote{United States Patent Office Notice, \textit{supra} note 46.} While the theoretical framework was now in place for print and label registrations to resume at full capacity, this was not to be. This was due in large part to rules adopted in 1893 holding that any trademark on a label would make it unregistrable as a label, and this spurred Congress to propose two bills in 1898 to loosen the restrictions on label registrations.\footnote{H.R. 8582, 55th Cong. (1898); H.R. 8620, 55th Cong. (1892); H.R. REP. NO. 55-691 (reporting H.R. 8620 favorably); \textit{New Bills for the Regulation of Print and Label Registration}, 78 SCI. AM. 242 (Apr. 16, 1898) (reporting on the bills and noting that the 1874 Act was essentially a “dead letter” at this point).} This would prove unnecessary, as two decisions of the Commissioner of Patents in that year would finally loosen things sufficiently to allow registrations to resume as before. The first decision allowed for print registrations (which had been a mere trickle until then) to become more commonplace, by holding that a trademark could appear on a print without rendering it unregistrable.\footnote{\textit{Ex parte} U.S. Playing Card Co., 82 Off. Gaz. Pat. Office 1209 (Comm’r of Patents 1898).} The second decision applied this holding to labels, holding that having a trademark on a label only rendered it unregistrable if the totality of the label was a trademark or could be used as a trademark.\footnote{\textit{Ex parte} Mahn, 82 Off. Gaz. Pat. Office 1210 (Comm’r of Patents 1898).} In doing so, the Commissioner turned away from an expansive reading of \textit{Higgins} and interpreted it narrowly — it only prohibited registration of labels like the one in that case — merely typeset words describing the product.\footnote{\textit{Id.}} Labels displaying more creativity could now be registered, and registered they were. The numbers of both applications and registrations skyrocketed, and within a few years were once again higher than ever. There were over 1,000 applications for label registration, a trend which would continue around that level through 1908, while 1904 saw over 1,000 successful label registrations. Prints, meanwhile, saw several hundred applications and registrations a year, separate from labels, over this period.

\section*{III. BLEISTEIN v. DONALDSON LITHOGRAPHING}

While the Supreme Court’s decision in \textit{Higgins} is largely seen as an artifact of an earlier epoch in copyright law, Justice Holmes’ opinion in \textit{Bleistein v. Donaldson Lithographing} remains well-known to this day, one of the first statements of the modern view of copyright law from the Supreme Court.\footnote{188 U.S. 237 (1903).} Understanding the history and practice of the 1874 Act...
Reimagining *Bleistein* allows a fuller understanding of the context and holding of a landmark decision about whether illustrations for advertising posters are copyrightable, under both the Constitution and the 1874 Act.

### A. Confusion over Copyrightability

One wrinkle of the law which bedeviled courts was whether artwork which was then used in advertising or labels was copyrightable, or was only registrable as a print or label. Creators of such artwork naturally preferred standard copyright registration, as it provided more settled remedies and a much lower fee for registration. On one hand, a painting is seemingly connected to the “fine arts” and thus registrable as a conventional copyright. However, a painting can also be “designed for use for any other articles of manufacture,” thus seemingly relegating it to the Patent Office. This seemingly minor technical issue would spawn a great deal of litigation, and lead directly to *Bleistein*.

Two decisions of the circuit court in New York, both brought by Schumacher & Ettlinger, would exemplify this confusion. In 1885, this court issued a decision holding that a small painting which could be used as a label for cigar case could be registered as a regular copyright, since the painting’s utility was not limited to labels (and the plaintiff provided evidence of use beyond labels). In defending the right to copyright these labels, the court used language which is redolent of Justice Holmes’ opinion two decades later, holding that “[t]he fact that copies may be utilized for advertising purposes does not change the character of the original. If the painting itself is to be considered a label because copies may be so used, no masterpiece would escape such desecration. It will hardly do to call the Sistine Madonna, or the Aurora, labels, because by the sacrilege of modern enterprise copies of Raphael’s Cherubs or Guido’s Goddess may be transferred to a blacking box or a perfumery bottle.” However, the court made clear that if it was “conceded that this painting was intended exclusively for a label . . . a much stronger case for the defendants would be presented.”

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119 Schumacher & Ettlinger was a manufacturer of labels for other industries to use on their products and frequent litigant in actions regarding label piracy. Complaint, Schumacher & Ettlinger v. Oscar L. Schwencke, Jr. & Henry Pfitzmayer, Equity Case No. 3769 (C.C.S.D.N.Y. Mar. 15, 1886) (in National Archives, N.Y. Division, copy on file with author).

120 Schumacher v. Schwencke, 25 F. 466 (C.C.S.D.N.Y. 1885), aff’d, 30 F. 690 (C.C.S.D.N.Y. 1887). (When new evidence was submitted that the copying had been from a lithograph of the painting and not the painting itself, the court nonetheless upheld its prior decision, holding that the underlying infringement was still of the validly copyrighted painting.)

121 *Id.* at 467.

122 *Id.*
In 1888, a different judge of the same court asserted that, while a drawing which could be used for a label could be an ordinary (non-label) copyright, a painting which is specifically designed as a label is uncopyrightable and must be registered as a label.\textsuperscript{123} The court also made clear that in its mind label registration was not copyright registration but a form of trademark registration, in spite of the act’s legislative history and plain text.\textsuperscript{124} In this case the plaintiffs had registered the original of a painting meant for a label with the librarian of Congress, in what the court felt was an end-run around the 1874 Act.\textsuperscript{125} The plaintiffs had presumably thought that the court’s decision in 1885 meant they could register paintings as copyrights even if they would be used for labels. The court disagreed, and dismissed the claims of the plaintiffs for infringement.\textsuperscript{126}

During this period doubts continued to swirl as to whether advertisements could be copyrighted at all, mostly regarding copyrights registered prior to 1874. Although the decision in Baker v. Selden was not about advertisements (it concerned whether blank ledger-books could be copyrighted), the court there cited with approval several English and American cases that held that advertising flyers could not be copyrighted.\textsuperscript{127} Soon after that decision, the circuit court in New York reiterated that an advertisement is not copyrightable.\textsuperscript{128} Dealing with a copyright obtained in 1855, (and thus the 1831 law and not the newer acts were relevant), Ehret v. Pierce dealt with cards bearing paint samples, of which the defendant

\textsuperscript{123} Schumacher v. Wogram, 35 F. 210 (C.C.S.D.N.Y. 1888).
\textsuperscript{124} Id. (The 1874 Act “declares in substance that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizes them to be registered and protected as trade-marks in proper cases.”)
\textsuperscript{125} Id at 211.
\textsuperscript{126} Id.
\textsuperscript{128} Ehret v. Pierce, 10 F. 553 (C.C.E.D.N.Y.1880).
had prepared similar cards. In another New York case in 1882, the circuit court held that where an advertisement had artistic merit, it was copyrightable even though it was only an advertisement. The court noted that the copyrighted article, a chromolithograph (usually called a “chromo”) “designed as a symbolic glorification of lager-beer drinking,” was of “evident artistic merit.” Although the copyright had not been received until 1880 the court did not address the 1874 Act, perhaps in part because it was not yet understood to apply to advertisements. Rather, the court asserted that an advertisement was copyrightable so long as it was artistic, no matter its purpose. Nonetheless, the plaintiff’s suit failed because the designer of the chromo was a German national, and copyright protection was not available at that time to those who were not residing in the U.S.

Even as registrations for both prints and labels thawed, the Court’s dicta in *Higgins* that “mere advertisements” could not be copyrighted remained troubling, especially since *Higgins* had embraced the *Scoville* case so thoroughly. In 1897, the Seventh Circuit Court of Appeals held the same thing — that a “mere advertisement” is not copyrightable, in a case involving a plumbing catalog that had been copyrighted yearly between

129 *Id.*; Complaint, Testimony, and Paint Samples in Case File for Michael Ehret, Jr. v. Frederick O. Pierce and Douglas O. Crane, Equity Case No. (C.C.E.D.N.Y.1880).
130 *Id.* at 554.
131 *Id.* at 555 (if defendant had simply copied the card verbatim the plaintiff would not object since “that would occasion him no loss, but the contrary, for it would be a gratuitous advertisement of his paints”).
132 Yuengling v. Schile, 12 F. 97 (C.C.S.D.N.Y. 1882) (saying that the advertisement could be registered, but that it was not done by an American and thus not copyrightable).
133 *Id.* at 98 (“The chromo, by its subject, its brilliant coloring, its excellent finish, and the artistic grouping of its figures, forms a striking picture.”).
134 *Id.* at 100. The decision states that the work:

[1]s a work of the imagination, and has such obvious artistic qualities as, in my judgment, render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make of it. Where the work in question is clearly one of artistic merit, it is not material, in my judgment, whether the person claiming a copyright expects to obtain his reward directly through a sale of the copies, or indirectly through an increase of profits in his business to be obtained through their gratuitous distribution.
In its holding the Seventh Circuit asserted that to be copyrighted required intellectual labor which a basic catalog simply did not encompass.\(^{136}\)

The resultant standard from the Schumacher cases and others, on the eve of the Bleistein decision(s), was that artwork was copyrightable under regular copyright law, so long as its intended use was not limited exclusively to advertisements and labels. While this standard was likely the best reading of the 1874 Act, the problems with such a standard are immediately apparent — it places the judge in the extremely challenging position of determining the intent in creating the work, and requires fairly detailed splitting of hairs. The question is not whether the primary purpose of the artwork was advertising or labels, but whether it was in any way contemplated that the artwork would be used for any purpose beyond advertising or labels. Outcomes from such a test were likely to be purely arbitrary.

\section*{B. The Litigation}

The story of Bleistein v. Donaldson Lithographing Company has been told elsewhere,\(^{137}\) but certain salient facts bear repetition. The plaintiff in this matter designed circus posters, and the defendants copied figures from the posters where the figures were copyrighted chromos of the plaintiff.\(^{138}\) Crucially, the chromos were registered with the Library of Congress, not the Patent Office.\(^{139}\) Beyond technical arguments (like disputing the date of registration), the defendants opposed the copyrightability of the posters on two grounds — (a) that these figures for posters fit under the “commercial print” provisions of the 1874 Act and were thus removed from copyright on statutory grounds, and (b) that underlying art made for advertising posters was not copyrightable under the Constitution. At trial the parties focused on technical questions,\(^{140}\) but the Judge noted early in the proceedings that “the real controversy will be whether this is the subject of copyright.”\(^{141}\)

The district court quoted the relevant statutes, and immediately noted that:

\footnotesize
135 J. L. Mott Iron Works v. Clow, 82 F. 316, 321 (7th Cir. 1897) (affirming J. L. Mott Iron Works v. Clow, 72 F. 168 (C.C.D. Ill. 1896)).
136 Id.; see also Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 274 F. 932 (2d Cir. 1921) (in a similar fact pattern, asserting that Clow had been substantively overruled by Bleistein).
137 Zimmerman, supra note 3.
138 Id.
139 Supreme Court Transcript of Record at 28, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (No. 117) [hereinafter Record].
140 Zimmerman, supra note 3, at 86.
141 Record, supra note 139, at 28. The district court issued its opinion only a day after it had heard testimony. Zimmerman, supra note 3, at 87.
Reimagining Bleistein

[The prime question is whether the things copyrighted here are pictorial illustrations connected with the fine arts, or are such as are intended to be perfected as works of the fine arts. That this must necessarily be the question in this connection seems to be apparent from the language of that part of section 4952 in regard to the construction of the words 'engraving,' 'cut,' and 'print,' as used in the statute.\textsuperscript{142}]

The district court then contemplated whether these posters were copyrightable under the Constitution but reached no conclusion, noting that “If the things copyrighted in this case do not come within the statute, there is no occasion to go further. That the pictures offered in evidence in this case are such as are connected with the fine arts, I do not for a moment agree, nor does the evidence leave any question upon the subject.”\textsuperscript{143}

One reading this decision without knowledge of the 1874 Act might think that, in talking about whether a circus advertisement is part of the fine arts, the district court is asserting that the artwork was not copyrightable under the Constitution. But a close reading of the district court’s opinion combined with knowledge of the 1874 Act makes clear that the entire decision is concerned with \textit{statutory} copyrightability. It is thus curious that on appeal the Sixth Circuit Court of Appeals concerned itself solely with issues of the Constitution, in a decision which amounted to essentially an affirmation of the sentiment in \textit{Higgins} that a “mere advertisement” could not be copyrighted under the Constitution.\textsuperscript{144} The court of appeals interpreted the 1874 Act to require that in order to be copyrighted a work have a connection with the fine arts, effectively holding that the statutory and constitutional bounds of copyrightability were the same.\textsuperscript{145} This decision was peculiar — if none of the subject matter of the 1874 Act was copyrightable, then presumably the Act itself could not be constitutional as a copyright act, and would instead depend on the commerce clause, in spite of authority to the contrary. However, the circuit court did not dwell on this point — the 1874 Act was a clear afterthought to their decision.

In their briefs to the Supreme Court, the two parties unsurprisingly took different tacks to the 1874 Act. The plaintiffs attempted to ignore it,

\textsuperscript{142} Bleistein v. Donaldson Lithographing Co., 98 F. 608, 610 (C.C. Ky. 1898). Section 4952 contained the core language of the 1874 Act regarding commercial prints and labels.

\textsuperscript{143} Id.

\textsuperscript{144} Bleistein v. Donaldson Lithographing Co., 104 F. 993 (6th Cir. 1900). The court of appeals noted that there was caselaw to the contrary, but declined to follow it. The parties did brief the issue of whether the 1874 Act applied in their briefs before the Sixth Circuit. Briefs of Plaintiff and Defendant (on file with National Archives Great Lakes Division, Chicago, copies on file with author).

\textsuperscript{145} Id. at 996.
regarding the district court’s discussion of it as a “minor point.”\textsuperscript{146} In passing over these minor points briefly, the plaintiffs asserted that the act simply changed the place for copyright registration and nothing more.\textsuperscript{147} They also asserted that chromos were not within the scope of the 1874 Act because they were specifically mentioned in the general statement of the copyright law’s scope, but not specifically mentioned in the 1874 Act,\textsuperscript{148} and that the chromos were both “pictorial illustrations” and “works connected with the fine arts” in any case.\textsuperscript{149} The plaintiffs closed by arguing that the 1874 Act “throws no light whatever on the questions involved in this case, and ... has only served to introduce confusion into the decisions of the lower courts.”\textsuperscript{150} In closing, the plaintiffs asserted that the 1874 Act did not look to whether something was intended as an advertisement, and specifically included all “pictorial illustrations” within the scope of regular copyrights. Rather simply changed the place of registration for labels, and not pictorial illustrations.\textsuperscript{151}

The defendants replied to the charges in the plaintiffs’ brief, noting that chromos had previously been held to be within the scope of the 1874 Act.\textsuperscript{152} The defendants quickly reached what would an important aspect of the decision, disputing the plaintiffs’ assertion that the language of the 1874 Act required a connection with the fine arts only applied to “works,” and not “pictorial illustrations.”\textsuperscript{153} The defendants noted that the lack of a comma or other punctuation implied that “connected with the fine arts” was a limitation of both “pictorial illustrations” and “works,” and further that the statute did not make sense if the view of the plaintiffs was taken:

Every “engraving,” “cut” or “print” is in some sense a pictorial illustration of something. That is as true of cuts or prints to be used as advertisements of articles of manufacture as of cuts or prints of advertisements of a circus. To say, as our adversary in effect does, that cuts or prints are made the subject of copyright without limitation, would be practically to annul the first clause of the provision of this section of this statute in question. Our adversary practically asserts that all of the language of this statute relating to the construction of the words “engraving,” “cut” or “print” has no force or effect whatever. Since if the first paragraph of Section three, instead of reading as it does, commenced with the third line of the Section and read as follows: “No prints or labels designed to be used for

\textsuperscript{146} Plaintiffs’ Brief at 16, \textit{in Bleistein} Casefile.
\textsuperscript{147} \textit{Id.} at 33.
\textsuperscript{148} \textit{Id.} at 34.
\textsuperscript{149} \textit{Id.} at 34-35.
\textsuperscript{150} \textit{Id.} at 35.
\textsuperscript{151} \textit{Id.} at 40
\textsuperscript{152} Defendant’s Brief at 6, \textit{in Bleistein} Casefile, \textit{supra} note 146 (citing Yuengling v. Schile, 12 F. 97, 97 (C.C.S.D.N.Y. 1882)).
\textsuperscript{153} \textit{Id.}
any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office,” this statute would have all of the force that our adversary gives to it. It is idle, as it seems to me, to say that the first clause of this section was only intended to distinguish ordinary prints or labels to be used for any other articles of manufacture from other pictorial illustrations, and it would be equally difficult to find a reason why prints designed to be used for articles of manufacture any more than prints designed to advertise such scenes for a circus shall not be entered under the copyright law.\textsuperscript{154}

In effect, to read “pictorial illustrations” as independent of “connected with the fine arts” would read the specific language removing prints and labels from copyright out of the statute. Further, in response to the plaintiffs’ assertion that the 1874 Act did not provide a standard limiting the scope of copyrightability, the defendants noted many of the cases cited above, which did hold the Act to provide such a standard, and specifically held that prints and labels were not copyrightable.\textsuperscript{155}

C. The Decision

Against the background of the 1874 Act, Justice Holmes’ famous decision in \textit{Bleistein} is shown in starkly different light. The two strands of the copyrightability inquiry — statutory and constitutional — were both at issue here. And unlike the circuit court of appeals, Justice Holmes did not attempt to outright sweep the statutory copyrightability issue under the rug — in fact, as will be seen below, the discussion of the scope of the 1874 Act, not the Copyright Clause, forms the bulk of the opinion.

Nonetheless, the constitutional question does play a role in Justice Holmes’s decision. After a brief discussion of the facts and the technical issues which he felt were for a jury to decide, Justice Holmes attacked the constitutional question first.\textsuperscript{156} As an initial matter, Justice Holmes noted that:

\begin{quote}
[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.\textsuperscript{157}
\end{quote}

This statement is a clear assertion of the broad nature of constitutional copyright protection, but the qualification “unless there is a restriction in the words of the act” was hardly an abstract one — rather, this qualification points directly to the 1874 statute at the heart of this case. Following this, still examining the constitutional question, Justice Holmes

\textsuperscript{154} Id. at 6-7. Of course, the Patent Office had previously done that, but that had not been true for the previous decade.

\textsuperscript{155} Id. at 8.

\textsuperscript{156} Bleistein v. Donaldson Lithographing, 188 U.S. 239, 248-49 (1903).

\textsuperscript{157} Id. at 250.
held that the “pretensions” of a work one way or another were not relevant to its copyrightability, and that the simplest drawing could be copyrightable. Accordingly, the drawings which were at issue here were constitutionally copyrightable, without reference to their purpose or quality. While a rather pellucid and eloquent statement of the scope of copyright law in protecting creative works, Justice Holmes’ decision on the Constitution differs little in substance from previous copyright cases.

Justice Holmes then turned to the 1874 Act and addressed the question of whether the terms “pictorial illustration” and “connected with the fine arts” in the 1874 Act were conjunctive or disjunctive. While he asserted it was not necessary to the decision, Justice Holmes agreed with the argument of the plaintiffs that the terms were disjunctive, and that all pictorial illustrations, even if not connected with the “fine arts,” were nonetheless copyrightable and could be registered at the Library of Congress. While from a purely semantic perspective Justice Holmes’ holding is plausible, it makes a hash of the intent of the drafters of the Act, who clearly intended to limit copyright registration to pictorial illustrations connected to the fine arts. To allow any pictorial illustration to be registered in the Library of Congress meant that any label containing more than mere text would be registrable as a standard copyright in the Library of Congress. Justice Holmes would continue along this line, practically eviscerating the 1874 Act.

Nonetheless, assuming that pictorial illustrations needed to be connected with the fine arts, Justice Holmes was faced with the question of whether the designs for use in circus posters at issue were connected with the fine arts or were “prints or labels designed to be used for any other articles of manufacture.” Justice Holmes responded to the question in the positive:

Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use — if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus.

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158 Id. at 249-50.
159 Id. (“There is no reason to doubt that these prints in their ensemble and in all their details, in their design and particular combinations of figures, lines and colors, are the original work of the plaintiffs’ designer.”).
161 Bleistein, 188 U.S. at 250.
162 Id. at 251.
163 Id.
In other words, a connection with the fine arts has no relationship to whether a work is created for commercial purposes. While in a sense this was hardly a radical conclusion, and indeed largely mirrors the holding of *Schumacher v. Schwencke*, it also ignores the statute, which is clear that a commercial purpose is the direct opposite of a connection to the fine arts for purposes of copyrightability. Justice Holmes concluded his opinion with a famous pronouncement that artistic merit is not the province of the courts:

“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value — it would be bold to say that they have not an aesthetic and educational value — and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs’ rights.164

And yet, looking at this language with the full perspective of the over fifty years which had come before it, it is impossible to see this as an appeal for extremely broad copyright protection in the generalized sense. While it is surely also an argument against incorporating public morality into the question of copyrightability, Justice Holmes’ assertion that judges should not judge the merits of an artistic work is, at least in part, a denial of the intent test asserted in the *Schumacher* cases, which required a judge to determine the merits and intent behind an artwork on a case-by-case basis. This section, and Justice Holmes’ entire opinion, is also an attack on the 1874 Act more generally, and its ghettoization of certain artworks to the Patent Office based solely on the nebulous standard of intent. The 1874 Act forced an awkward standard on courts, of determining whether a writing was “designed to be used for any other articles of manufacture.” Clearly repelled by this awkward and problematic requirement Congress had instituted, Justice Holmes attempted to shunt it aside by judicial interpretation.

Justice Holmes’ opinion in *Bleistein* was figuratively and literally the Supreme Court’s first copyright opinion of the twentieth century, setting out the modern expansive approach to copyright which stands to this day.

164 *Id.* at 251-52.
But looking at his opinion with a full understanding of the legal background, it is impossible to ignore that the opinion deals with two exceedingly narrow questions: first whether the 1874 statute includes otherwise copyrightable artwork used in advertisements, and second whether the underlying artwork to an advertisement can be copyrighted under the Constitution. The decision was not even revolutionary as regarded these questions. Generally speaking, the law before that point held that underlying artwork for advertisements was copyrightable provided that it had not been designed solely for an advertisement. Yuengling had gone even farther and said that it was copyrightable even though it was designed specifically for an advertisement, while the argument was made in Bleistein that the chromos had broader uses. The actual holding of Bleistein, as opposed to how it has been read since, did little more than restate what had already been known about the 1874 Act and copyrights for advertisements.

This opinion launched a new century of copyright law, sweepingly broader than the nineteenth century’s vision of copyright. Certainly some parts of the opinion were sweeping and expansive in their view of copyright, such as the cryptic pronouncement regarding personality and copyright. The dissenters saw it this way, and faced with what they saw as Justice Holmes’ sweeping pronouncement about the copyrightability of advertisements, Justices Harlan and McKenna dissented, quoting the opinion of the court of appeals verbatim, with a withering short coda, that “The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.” This dissent’s use of “mere advertisement” referenced the Court’s limited view of copyright law in Higgins v. Keuffel the decade before. But it was a new century, a new Court, and a new age of copyright law.

IV. THE LONG DECLINE OF THE 1874 ACT

One unusual aspect of the 1874 Act was its longevity, and after 1909 it could be best described as an anachronism that had survived two close scrapes. In this last period registrations would reach heights barely dreamt of originally as America metamorphosized almost completely from where it had been in 1874. By the end the only surprise about the Act’s repeal was that it had taken so long.

\[165\] Id. at 251.
\[166\] Id. at 250.
\[167\] Id. at 253.
A. The 1909 Act

During the first decade of the twentieth century, progress was being made on what would become the 1909 Copyright Act, the first full revision of the copyright law since 1870. The record is unclear whether the 1909 Act was meant to repeal the 1874 Act — an earlier draft returned commercial labels to the Library of Congress in no uncertain terms, but this language did not remain for reasons that were obscure then as now. In addition to this the Copyright Office informally acquiesced to taking in prints and labels as the negotiations over the new copyright act progressed, and thus many were of the impression the 1909 Act worked a repeal of the 1874 Act. They were mistaken.

Upon the passage of the 1909 Act, the Commissioner of Patents issued a notice that he would no longer register prints and labels, but would refer them to the Library of Congress. The Library of Congress however also refused to register commercial prints and labels, and after a contentious hearing at the House Committee on Patents, the question was taken to the Attorney General. In his opinion, the Attorney General looked to the plain text of the 1909 Act, and finding no statutory language repealing the 1874 Act, held it had not been repealed. He further found that under the 1874 Act print and label registrations were a class of patent registration and not copyrights, and thus were not impacted by the 1909 Act. Upon this ruling, the Commissioner of Patents resumed registration of prints and labels, now pursuant to procedures of the 1909 Act.

Over the next thirty years, the 1874 Act would weather World War I, the Roaring 20s, and the Great Depression, and the trends regarding print and label applications mirror the pace of the overall economy almost perfectly. During this period, the Attorney General’s opinion regarding the 1909 Act would come under heavy criticism, in both treatises and legal periodicals. Nonetheless, when the issue of the propriety of the Attorney General’s opinion came before the district court in New York two

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168 Chauncey P. Carter, Print and Label Registrations, 6 J. PAT. OFF. SOC’Y 522, 524-25 (1923–1924). Mr. Carter would become the leading lobbyist for the effort to repeal the 1874 Act.
169 Id. at 525.
170 Id. This seems to have been the understanding of the laws at the time. Navy Seeks More Money, WASH. POST, Dec. 16, 1909, at 4.
171 Id.
173 Id. at 118.
175 WILLIAM WEIL, AMERICAN COPYRIGHT LAW 222 (1917).
decades later, the court declined to overrule the Attorney General’s opinion, noting that whether or not it had been correct at the time, it had been followed for two decades and the court was loathe to overturn it.177

B. Demise

In the sixty years leading up to the mid-1930s, the Library of Congress underwent substantial changes — in 1874 the Library was tucked away in a corner of the capital building, and what is now the Thomas Jefferson Building of the Library of Congress was little more than a dream for Ainsworth Spofford. It opened in 1897, and the annex building (now the John Adams Building) opened in 1938. Space to store labels was no longer a serious problem. While America was in the midst of the Great Depression in the 1930s, it was still a major nation, a far cry from the backwater it had been in the 1870s, and its commerce had advanced commensurately. In the midst of this stood the 1874 Act, seeming less logical and more confusing and counterintuitive by the day. The report of the House Committee on Patents in 1939 on what would become the act repealing the 1874 Act enumerated the problems thusly:

Although registered in the Patent Office under the 1874 act, applications, registrations, and renewals are governed by the terms of the 1909 Copyright Act. There is no copyright official in the Patent Office, and the registrations are handled by trade-mark officials. The practice in the Patent Office is quite different from the practice in the Copyright Office and governed by an entirely separate set of rules and decisions. The Patent Office fee is $6; the Copyright Office fee is $2. The Copyright Office issues quite promptly a brief 3-by-5-inch certificate; the Patent Office eventually issues a large, ornate certificate similar to a patent. The Copyright Office furnishes small printed application forms; the Patent Office requires the applicant to prepare his own application. For renewal, the Patent Office requires a fresh application for registration; the Copyright Office does not. The Patent Office refuses registration for reasons unknown to the Copyright Office. The Patent Office justifies renewal by the 1909 copyright law but charges the fee prescribed by the 1874 law. Certain advertisements are apparently eligible for registration in either office, with no assurance that the choice results in a valid registration. Almost daily the Copyright Office receives applications for registration which it must return because the subject matter of the copyright comes within the 1874 law. Thousands of copyright labels are registered in the Patent Office under this 1874 law under the misapprehension that such registration protects the trade-marks appearing on the labels.178

With these problems, repeal was inevitable. And yet the effort to overrule the 1874 Act took the better part of the decade.

The first of the series of bills was introduced in the Senate in 1932, and proposed simply that the system of print and label registration in the Patent Office be discontinued in 1933, and that all files regarding labels and prints be transferred to the Library of Congress along with responsibility for registering labels and commercial prints.179 This measure was proposed at the request of Chauncey P. Carter,180 a local attorney who held himself out as an expert on trademark and copyright matters.181 Mr. Carter had gone to the Commissioner of Patents and Register of Copyrights and obtained both of their agreement in a bill to transfer registration, and then drafted a bill to effect this transfer.182 The bill was reported to the Committee on Patents, and was never heard from again in the Seventy-second Congress. The bill’s drafter requested that the committee hold hearings on several occasions,183 but it does not seem that a hearing occurred.184

Three years later in the Seventy-fourth Congress, a more sustained effort was made to transfer registration to the Library of Congress.185 The bill was identical to the bill proposed two Congresses before, and was once again reported to the Committee on Patents. This time, though, the Committee on Patents reported it, urging its passage.186 The report included several comments from the Register of Copyrights (a position which did not even exist until 1897), commenting that the 1874 Act was “somewhat of an anachronism.”187 He recommended its passage, although he did not feel the matter was of great import, and noted that the Library of Con-

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179 S. 4919, 72d Cong. (1932).
180 Letter from Sen. Felix Hebert, Chair, Senate Committee on Patents, to Mr. H.A. Dickey, Secretary, Label Manufacturers National Association (Jan. 10, 1933) (original in National Archives, copy on file with author).
181 Flyer for Chauncey P. Carter (original in National Archives, copy on file with author).
182 Letter from Chauncey P. Carter to Sen. Felix Hebert, Chair, Senate Committee on Patents (June 24, 1932) (original in National Archives, copy on file with author) (enclosing the draft bill and requesting that it be introduced).
183 Letter from Chauncey P. Carter to Sen. Felix Hebert, Chair, Senate Committee on Patents (June 17, 1932); Letter from Chauncey P. Carter to Sen. Felix Hebert, Chair, Senate Committee on Patents (Dec. 2, 1932) (originals in National Archives, copy on file with author).
184 Letter from Sen. Felix Hebert, Chair, Senate Committee on Patents, to Mr. Chauncey P. Carter (Dec. 20, 1932) (original in National Archives, copy on file with author) (Stating that the matter had not been considered yet, and it was unclear it would be in the current session).
185 S. 3121, 74th Cong. (1935).
186 S. REP. NO. 74-1473 (1936).
187 Id.
gress already registered many commercial prints in practice. The Register of Copyrights did request one amendment though — that the files relating to existing print and label registrations be kept at the Patent Office. The bill was reported back with this amendment and was voted on and passed without any objections being voiced. The ABA Section on Copyright also voiced its approval. It was never voted on by the House.

A similar bill was proposed in the Seventy-fifth Congress in both houses, but surprisingly no action was taken on it. Early in the Seventy-sixth Congress Rep. Fritz Lanham, of Lanham Act fame, proposed a bill with different language than the previous two, but with the same effect — the repeal of the 1874 Act. As in the amended version in the Seventy-fourth Congress, there was no mention of transferring the records to the Library of Congress. The bill was reported back quickly from the House Committee on Patents (Rep. Lanham’s committee), and passage was recommended. The report enumerated the problems of the current 1874 Act, and noted that those who stood in favor of its repeal — the Commissioner of Patents, the Register of Copyrights, the ABA, and the Brookings Institution. It does not seem anyone opposed repeal. The bill reached the House Floor on March 6, 1939, and after some technical amendments by Rep. Lanham was approved without an opposing word.

The bill went to the Senate, whose Committee on Patents reported it favorably, despite the lukewarm support of the Commissioner of Patents. The committee report included a long letter from the Register of

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188 Id.
189 Id.; Letter from William L. Brown, Register of Copyrights, to William G. McAdoo, Chair, Senate Committee on Patents (July 9, 1935) (original in National Archives, copy on file with author).
190 80 CONG. REC. 1453 (1936).
191 1937 ABA SECTION ON PATENTS, TRADEMARKS & COPYRIGHT LAW COMMISSION REPORT 12 (1937).
192 H.R. 8608, 75th Cong. (1937); S. 478, 75th Cong. (1937); see also Letter of the Deputy Clerk of the House Committee on Patents to Mr. Earl Ragan (Jan. 14, 1938) (original in National Archives, copy on file with author) (Stating that no “definitive action [is] contemplated” on H.R. 8608.); Letter from Ernest P. Draper, Assistant Secretary of Commerce to Sen. William G. McAdoo, Chair, Senate Committee on Patents (Apr. 27, 1937) (original in National Archives, copy on file with author) (stating that the measure was tabled since it was “not in accord with the President’s program”)
195 Id. at 2; see also 1939 ABA Sec. Pat. Trademark & Copyright L. Comm. Rep. 23 (1939).
196 84 CONG. REC. 2298 (1939).
197 S. REP. NO. 76-93 (1939).
198 Letter from Conway P. Coe, Commissioner of Patents, to Sen. Homer T. Bone, Chair, Senate Committee on Patents (Jan. 28, 1939) (original in Na-
Copyrights in favor of this change, enumerating many of the confusions occasioned by the 1874 Act in the modern era:

Many lawyers throughout the country take the position that there is a choice in the matter of registration, and that they can register commercial prints and labels either in the Patent Office or in the Copyright Office. And of course there are always certain borderline cases arising. Applications still keep coming to the Copyright Office almost every day for registration of material of this character, notwithstanding that the act has been in force nearly three-quarters of a century.

As a typical example of what happens: Two or more copies of a commercial print or label are received with an application on the regular Copyright Office form for registration as a “print or pictorial illustration” under section 5 (k) of the Copyright Act; and a money order for $2 to pay the fee. The material and fee are returned to the applicant with a letter explaining that this kind of material, while copyrightable, must be filed with the Commissioner of Patents in accordance with the requirements of the act of 1874, and a copy of the Commissioner’s pamphlet of directions is usually enclosed with the letter. Upon receipt thereof, the applicant feels that there has been some misunderstanding on the part of the Copyright Office, and he promptly returns the copies and fee with a letter stating that he is not seeking registration of a trade-mark but of a claim of copyright in his print or label. Again the Office must return the copies and fee with a further letter of explanation. At this stage, the applicant frequently consults a lawyer, and then follows additional correspondence.

Thus there is a constant flow of such material back and forth through the mails in the fruitless effort to register a claim of copyright. Sometimes the work received here does not reveal its real purpose, and registration is made; later on, infringement occurs and the claimant brings suit, whereupon the real nature and use of the work is disclosed as a commercial print; the claimant is told by the court that his registration is invalid because made in the wrong place.199

The bill came to the Senate floor, and several amendments were made, the most notable being the reintroduction of the $6 fee from the 1874 Act. After assurances that the only real change was to move prints and labels back to the copyright office the bill passed without objections.200 The following day the House concurred in the Senate amendments, no doubt eager to get a bill passed without trouble.201

199 Id.
200 84 CONG. REC. 9378 (1939).
201 Id. at 9530-31 (1939).
382 Journal, Copyright Society of the U.S.A.

signed the bill into law, effective January 1, 1940. The bill had earned the support of numerous trade associations, and the committee files do not show any actual opposition to the bill.

C. The Aftermath

With the Act signed, copyright treatment of commercial art entered the modern era, which would be consummated in 1978 with the creation of the VA series of copyrights encompassing visual art including prints and labels. Trademark law was also in the midst of the long march to a modern law by 1940, which would be complete with the enactment of the Lanham Act in 1946. Moving the copyrights in labels and prints was a necessary step in the modernization of these laws, and it is no surprise, in retrospect, that the 1940 Act had been proposed by Fritz Lanham. And yet the story of the files for label registrations hardly ended there.

Shortly after the 1940 Act was signed, the files for prints and labels were transferred to the Copyright Office, in spite of previous resistance on the part of the Register of Copyrights and lack of such a requirement in the Act. They stayed there for forty-five years, but in 1986 the Library of Congress transferred the label files to the National Park Service and its Harper’s Ferry Center. From there, the NPS took labels out of the collection for exhibits at its locations across the country, and allowed the public unrestricted access to the files, leading to many labels going missing. In 1999, the NPS no longer wanted the collection of some 56,000 files and offered it up in its Clearinghouse catalog on the same page as a GE refrigerator from 1938 and an Inuit ulu knife. In 2000, the label files finally came to rest in the National Archives, where they remain to this day.

202 Id. at 10,939 (1939).
203 Letters from U.S. Trademark Association, (Feb. 21, 1939) and National Association of Manufacturers (Mar. 28, 1939) (originals in National Archives, copy on file with author).
204 1976 Act, Copyright Office Circular 40.
206 E-mail conversation with Michael White (July 22, 2009) [hereinafter White e-mail).
207 May 21, 1992, LOC Memorandum at 2. It was suggested that this was done because the records had been microfilmed, and the Library thought it was not required to keep the originals under the appropriate regulations. White e-mail, supra note 205.
208 White email, supra note 206.
209 NPS Clearinghouse Classifieds at 2 (Sept. 1999).
210 White email, supra note 206.
Reimagining Bleistein

V. THE ENDURING PRINT AND LABEL ACT

There is a certain irony that the 1874 Print and Label Act was enacted to keep everything related to trademarks in one place where they belonged, and happened due to the advocacy of a great copyright advocate (Spofford). It was repealed to keep everything related to copyrights in one place where they belonged, and was repealed due to the efforts of a great trademark advocate (Lanham).

Along the way a full understanding of the path of the Print and Label Act illuminates the development of copyright protection for labels and advertisements from the mid-nineteenth century well into the twentieth. It illuminates Higgins v. Keuffel, a mostly forgotten but still relevant decision about the scope of the copyright clause. And most significantly, it shows the landmark case of Bleistein v. Donaldson Lithographing in an entirely new light. While others have noted that the decision did not actually hold advertising copyrightable but rather the underlying artwork, understanding how deeply the decision is intertwined with the 1874 Act and the jurisprudence surrounding it leads to a view of this landmark opinion far removed from the sweeping reputation it has taken on, and repositions it as a decision mostly in line with existing precedent.

There is one final question: were prints and labels copyrights, trademarks, or design patents? It is clear that in the twentieth century the better view of the 1874 Act was that commercial labels and prints were being registered as copyrights, but it seems equally clear that Congress did not intend for these registrations to be copyrights, or trademarks, in 1874. Looking back in 1958, eighteen years after the act was repealed, a casebook noted that labels were “somewhat akin to trade-marks,” but “the relationship is remote if not legitimate.” One interesting thing to note is that until 1891 foreigners were not allowed to register copyrights (although they were allowed to register trademarks), but several registrations were granted to foreigners for labels prior to 1891. The answer for what Congress meant for these prints and labels to be in 1874 seems to most likely be “none of the above.”

While the question of what labels and advertisements were in the taxonomy of intellectual property may seem obscure, given that any immediate legal relevance ceased with the repeal of the 1874 Act, in truth it is invaluable to understanding both the development and structure of intellectual property law. History demonstrates that on one hand advertise-

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211 See, e.g., Ramsey, supra note 5, at 200.
213 White email, supra note 205.
ments and labels were generally seen as outside of the copyright law, but also that attempts were made to protect them as a new species of intellectual property apart from copyright. While the execution of the concept may have been lacking, the 1874 Act demonstrates that paradigms outside of the traditional copyright model have a long history of application to the areas of literary and artistic productions where copyright law is perhaps not the most natural fit.

Further, understanding the history of the 1874 Act is a necessary prologue to the modern law of copyright protection for advertisements and labels. Understanding how labels and advertisements had been repeatedly removed from the scope of copyright protection prior to 1903 shows how they were understood to relate to both copyright statutes and the copyright clause of the Constitution. Further, understanding how *Bleistein* fits into this background — both how it did change the scope of copyright protection for labels and advertisements, and how it did not — allows for a more sophisticated understanding of the scope of copyright law for labels and advertisements today. In the realm of the law, what is past is more than prologue — it is precedent.
### Appendix A: Print and Label Application and Registration Statistics

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<th>Year</th>
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<td>156.56%</td>
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</table>
Percentages refer to percentage of applications registered.
Statistics taken from the annual Reports of the Commissioner of Patents (1874-1924, 1926), Secretary of Interior (1925), and Secretary of Commerce (1927-1940)
* For the first two years of print registrations application figures are not given, and registration figures are given in later reports.

** For the year 1931 and on, the number of applications for print and label registrations were not listed separately.

Appendix B: Applications for Print and Label Registration

As separate figures were not kept for prints and labels after 1930, only the combined data is graphed for those years.
Appendix C: Registrations of Prints and Labels

Appendix D: Registration Rates of Prints and Labels
Appendix E: Application and Registration Rates Compared to Real GDP

GDP figures are in billions of 2005 dollars, courtesy of measuringworth.com, and are divided by two to keep on a similar scale to application and registration figures.