The Journal of the Gilded Age and Progressive Era (2021), **20,** 301–324
doi:10.1017/S1537781420000821

CAMBRIDGE
UNIVERSITY PRESS

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

ARTICLE

Publish the Picture at Your Peril: Visual Ideas and the Commercial Apparatus of *Life* Magazine

Joshua S. Schwartz*

Columbia University, New York, NY, USA
*Corresponding author. E-mail: jss2253@columbia.edu

Abstract
In the early years of the twentieth century, *Life* magazine had only approximately one hundred thousand subscribers, yet its illustrated images (like the Gibson Girl) significantly influenced fashion trends and social behaviors nationally. Its outsized influence can be explained by examining the magazine's business practices, particularly the novel ways in which it treated and conceptualized its images as intellectual property. While other magazines relied on their circulation and advertising revenue to attain profitability, *Life* used its page space to sell not only ads, but also its own creative components—principally illustrations—to manufacturers of consumer goods, advertisers, and consumers themselves. In so doing, *Life*'s publishers relied on a developing legal conception of intellectual property and copyright, one that was not always amenable to their designs. By looking at a quasi-litigious disagreement in which a candy manufacturing company attempted to copy one of the magazine's images, this article explores the mechanisms behind the commodification and distribution of mass-circulated images.

Keywords: magazines; illustration; publishing; advertising; visual culture

It was late October when the man from LIFE was called down from his office. He wasn't sure why he was going to meet with Mr. Whittier, an agent of the Meek Advertising Company and its client, Huyler's Fine Chocolates, knowing only that he was about to be presented with some sort of proposition. Perhaps he should have been warier, for one of his colleagues had warned him that this matter had been "entirely out of his province." When Whittier appeared, he was carrying a package; from it he produced a painting. The man took one look at it and realized instantly what was happening. "The minute I saw it," he reported later, "I said not in your life."[1]

It was 1909, and the two men were meeting at the headquarters of the Life Publishing Company, at which the man from LIFE worked. The unfurled painting depicted a man and a woman in an embrace, with her face barely visible and his facing away; her arms were draped around him, probably in a muddy brown palette. It was going to be used for an advertisement, as a sign for Huyler's Fine Chocolates. It was not scandalous—that was not the problem. The problem was that to the man from LIFE, it looked a great deal like an illustration by C. Coles Phillips called *Arms and the Man*, and also a cover and

© The Author(s), 2021. Published by Cambridge University Press on behalf of the Society for Historians of the Gilded Age and Progressive Era (SHGAPE)

Figure 1: C. Coles Phillips, "Arms and the Man," Modern Graphic History Library, Washington University in St. Louis. Accessed at http://library.artstor.org/asset/SS7731863_7731863_12357256. Coles' illustration was used as the July 8, 1909 cover of Life.

copyrighted image of *Life* magazine (fig. 1).[2] Whittier, from the Meek Company, knew that. His client, Huyler's, also knew that, having purchased a print of Phillips's original, which was then presumably used to make their new piece. That was why Whittier was here. His proposition was really only a simple question: Was this all okay?

It was not.

Life magazine—the first *Life* magazine, before Henry Luce of *TIME* bought the title in 1936 and discarded everything else—was one of the most significant media institutions of its era.[3] A publication of general interest and satire, its pages were graced by illustrations, prose, poetry, and verse; its opinions both visual and verbal were so widely disseminated

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

that they influenced national trends. Readers of the magazine were among the first to be introduced to a large cohort of famous American illustrators, including Charles Dana Gibson, C. Coles Phillips, and James Montgomery Flagg.[4] This was no small thing in the era that one commentator described as being under the "tyranny of the pictorial." Gibson's illustrations alone were said to cause millions of American women to rethink the way they dressed and posed.[5] During the so-called Golden Age of Illustration, LIFE's pictures defined their era.

But if the magazine was influential, it was also a paradox. Its circulation numbers paled in comparison with other, more well-known magazines: in the first decade of the twentieth century, when *The Saturday Evening Post* and *Ladies Home Journal* passed the one million mark, *Life*'s subscriptions likely numbered close to one hundred thousand at most.[6] At the same time, however, it was not one of the so-called little magazines, renowned for their sophistication and modernism—with its larger subscription list and far-broader appeal, it was a far cry from *The Seven Arts.* It would be tempting to call *Life* middlebrow, but it predates both the term and the phenomenon.[7] It was too small to be large, and too large to be small. It was modern, but familiar; it was crass, yet genteel. And it was also, according to George Harvey of *Harper's Weekly*, "the most successful ten-cent weekly. It is crisp as a doughnut and full of spice as a cooky [sic]."[8]

Scholars have almost begun to pick up on the scent. Turn-of-the-century magazines have increasingly been of academic interest as scholars of American studies, cultural critics, and cultural theorists have sought to understand the strange space that mediates between the massified and the rarified.[9] Feminist scholars, in particular, have been interested in both the illustrated and editorial contents of Golden Age magazines, focusing on how images of femininity may have shaped women's behavioral norms.[10] Consequently, there have been many studies of certain magazines, particularly the *Ladies Home Journal. Life*, being of smaller stature and more ambiguous leaning than its competitors, has largely escaped scrutiny.[11]

Much of this scholarship, meanwhile, has focused on content over operations, presupposing that one can be fully understood without the other. A study of LIFE's business operations shows this supposition to be fraught: the magazine's content and cultural influence can only be understood in concert with the business practices and environment that shaped them. Two factors, then, account for this oversight. First, many scholars have operated under the assumption that that all mass-market magazines operated similarly, according to what Richard Ohmann describes as "a formula of elegant simplicity": price the magazine below the cost of production so that it acquires a large subscription base, and then leverage that subscription base to make money from advertisements.[12] In fact, this was not the extent of LIFE's business model. Second, the business records of only a few magazines survive, and even among those that remain, the information is partial. As a result, we know little about how these magazines were actually run. Many of LIFE's contracts, however, have been preserved, leaving behind a surprisingly detailed picture of how the company functioned.[13]

But the paradox remains. How ought we to understand *Life*, a medium-sized magazine that seems to have done enormous things? How can we pair our understanding of the magazine's national influence with its middling subscription numbers? The answers to these questions reveal something much more intriguing about the nature of the turn-of-the-century media world. For *Life* was more than a magazine: it was the flagship publication of a company that poked, prodded, and probed at an emerging concept of intellectual property—often operating beyond the understanding of its staffers, and sometimes beyond the actual legal possibilities of its era. Its wares were pictorial ideas

as much as prints; its medium was copyright, not paper. And even at the dawn of the age of mass publication and media; even during an era when one historian has suggested that, "topical magazines achieved a centrality in American life never duplicated before or since," LIFE was doing something new.[14] For when other magazines were selling issues, LIFE was selling pictures.

—

Life was the brainchild of John Ames Mitchell, a peripatetic, overeducated man from Massachusetts. In 1882, the thirty-eight-year-old Mitchell had already studied at Harvard and in Paris, twice—once at the Ecole des Beaux Arts, once in the Académie Julian. He had been an architect for several years, and was now an illustrator, but seems to have been perennially dissatisfied. And so, being newly in the of possession of a good fortune, he found himself in want of a magazine.[15]

In 1882 he set out to make one. Relying on his Boston connections, Mitchell came into contact with Andrew Miller, another Harvard alum who became the magazine's business manager.[16] Miller had worked a brief stint at the *New York Daily Graphic*, the country's first illustrated daily paper, and Mitchell had next-to-no publishing experience at all. Overcoming a great deal of skepticism from business partners and printers, the two were able to cobble together the magazine's first issue on January 4, 1883.

LIFE struggled despite early good press from other publications. It took the better part of a year before the magazine broke even, and beyond that point, Mitchell recalled, "with every number the sales increased, not fitfully and with variation but with big, even strides." By 1910, *Life* began to pay Mitchell and Miller each a substantial salary of $54,000 and $18,000, respectively—on top of the dividends they reaped as shareholders. By 1912, these were increased to an astounding $144,000 and $48,000 before being reduced by half several years later, just before the two died. LIFE was Mitchell's project, and he owned the vast majority of the company's shares.[17] To the editors of the magazine throughout his tenure, there was never any doubt about who was in charge: the company was Mitchell's, and so was its vision.[18]

Life's audience was, like Mitchell, upwardly mobile members of the new professional middle class. This social category was very much in flux at the time of *Life*'s publication, as an older order of white-collar clerks was becoming destabilized and simultaneously complemented by the increasing numbers of professionals and middle managers.[19] The magazine referred to its audience as "the class of better people," and deliberately did not compete with more popular publications like *The Saturday Evening Post.*[20] It was purposefully a ten-cent weekly, rather than a more affordable (and thus more popular) five-cent magazine like the *Post* and (initially) the *Ladies Home Journal.*[21] But at the same time, *Life* pointedly and sometimes viciously satirized both the nation's social and economic elites and purveyors of high culture.[22] It railed against the Metropolitan Museum of Art and the Haymarket rioters alike.[23] It was not a muckraking periodical, a few smaller crusades notwithstanding (fig. 2).[24] Its satire was not always entirely direct, or entirely in straight prose: much of its page space was taken up by illustrations with amusing captions, or verse, or imaginary dialogues with prominent figures. And evidently it managed to offend—enough so that someone once left a bomb on the magazine's doorstep.[25]

Interspersed among the verbal satire were pictures, which often as not had little or nothing to do with the prose on the same page. To the turn-of-the-century audience these were what made the magazine so fascinating. Charles Dana Gibson's eponymous girl offers the clearest illustration of the phenomenon; in *Life*'s pages, this "popular

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

Figure 2: An illustration of "Life's targets" in the magazine's 1893 retrospective Jubilee issue. *Life*, January 1983, Jubilee Number, 11.

middle-class ideal" became both unavoidable and irresistible.[26] Other popular image tropes (like C. Coles Phillips's fade-away girl, seen in *Arms and the Man*) followed suit, and over time, the magazine became a familiar institution, and its pictorial content, a cultural touchstone. Certainly it seemed that way to a Toronto judge who, upon reviewing obscenity charges against the magazine, noted in his opinion that "I may tell you that I have heard of discussions which have taken place in social circles about this periodical. It has come to my knowledge that quite a number of young ladies of this City about whose morality I can have no question and of whose purity of mind I have not the faintest doubt … exhibited a great deal of curiosity to see [LIFE's] picture."[27]

This was what made the magazine stand out. Unlike its competitors—at least at first—*Life* was beautifully illustrated, the result of the substantial resources Mitchell poured into the magazine's presentation. *Life* was among the first popular magazines to use the zinc etching image reproduction technique, allowing the faithful reproduction of its artists'

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

lines. As a result, *Life*'s pictures had more stylistic verve and originality than other magazines by the late 1880s.[28] This was intentional: Mitchell was the only former illustrator to own a periodical during the Golden Age of Illustration. His experience informed his business and editorial decisions, but even more than that, it ultimately shaped the peculiar way in which the magazine was run.

—

When Mitchell and Miller reincorporated LIFE in New Jersey in 1893, the first provision of the company's new certificate of incorporation read as follows:

> That the objects of which said company is formed is as follows:
> To prepare, manufacture, electrotype, print, mount, bind, publish and deal in papers, periodicals, magazines, books, drawings, pictures, illustrations, plates, and literary and artistic work of every description and to do all literary, artistic, typographical, and mechanical work pertaining thereto, and in general to do any and all acts and things and to transact any and all business to the foregoing purposes …[29]

This was the difference between Life Publishing Company and—just to name one example—the Curtis Publishing Company, which owned *The Saturday Evening Post* and the *Ladies Home Journal*: the primary purpose of the new Life Publishing Company was not to sell magazines—it was to sell what we might now call content. LIFE sold pictures. And it was fairly agnostic as to how.

An early audit of the company's ledger books reveals this operational philosophy at work. In 1903, when the Gibson Girl fad was at the height of its popularity, *Life* (the magazine) lost money, even including revenue from advertisements. Yet LIFE (the publishing company) still made a profit. The margin was made up entirely in the sale of image licenses and house-published books.[30] These two practices made up the margin of LIFE's profitability in its early years, before the magazine's growing subscription list allowed the company to reach the point of self-generating profitability. In turn, both practices helped the magazine to circulate its images far beyond the auspices of its pages—which was the heart of how LIFE did business.

LIFE arranged for the publication of books of its illustrations—like, for example, 1912's *Life's Gallery of Girls*—in a peculiar way. Sometimes the magazine self-published, but often as not it contracted out to third-party publishers, like R.H. Russell, Scribner's, or Doubleday.[31] These books were quite popular and were a large revenue source for the company. Book profits, in turn, depended upon the company's ownership of the images contained therein—if LIFE's book of Gibson Girls was not the only such book, there would be little reason to buy it and not a competitor's version. As a result, LIFE's contracts with its illustrators were quite strict. Typically, illustrators for the magazine worked for hire, meaning that they did not retain any ownership of the images that they produced for the magazine. Unusually, however, LIFE's contracts almost always contained two clauses about book publication. The first was fairly straightforward and even generous, granting illustrators and authors royalties in the event that the company decided to publish a book including their work. The second was somewhat more confounding: LIFE would permit its illustrators to publish books of their own work, for their own profit—so long as they had the company's permission.[32]

This stipulation seems to contradict the entire purpose of work for hire as a contractual practice. Why would an organization that derived so much of its profits from controlling and selling its illustrated images allow its illustrators to publish their own work?

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

There are several possible answers to this question. It could be that Mitchell's background as an illustrator was to blame, or that the company desired to curry favor with the freelancers it frequently employed (no small thing, considering the egos sometimes involved and the competition from other, more generous potential employers), or simply an attitude of noblesse oblige. But it seems more likely that allowing artists to publish their own work simply coincided with the company's desire to encourage the circulation of its images as much as possible. There was little to lose outside of the unlikely event of a bestseller—and if LIFE thought a bestseller was possible, it likely wouldn't grant permission—and much to gain: more circulating LIFE images meant more interest in the flagship publication, and where someone else was willing to take the financial burden and risk of publication, so much the better. Just as long as *Life* didn't see enough of an opportunity itself, that is.[33]

This same logic extended to LIFE's numerous image licensing deals, in which the company allowed other companies and individuals to reuse its images, and in turn both encourage the circulation of those images (and thus the magazine's "brand") and insulate itself from potential losses. Where this scheme worked, it created a feedback loop: the magazine propagated its images; the images circulated elsewhere and advertised the magazine; people bought the magazine or goods from which the company derived royalties and profits; and *Life*'s cultural influence and profits multiplied accordingly. When licensed images did not sell particular goods, only the licensor stood to lose.[34] And when the royalties generated from the license were not sufficient for LIFE'S liking, the magazine company simply moved the license to another potential partner.

LIFE appears to have adopted this practice fairly early into its run, in 1893, when it first began to advertise "Life's Monthly Calendar." The third-party licensor in this case was a man named James Metcalfe.[35] LIFE'S terms were simple: Metcalfe could assemble and publish a calendar of LIFE's images in return for one-third of the profits he earned. LIFE, itself, printed the calendars for Metcalfe, for which he presumably paid. And if the endeavor failed to make more than $6,000 total, it would be canceled for the following year.

It was not canceled. LIFE's licensed calendar business exploded throughout the turn of the century. By 1914 there were at least three varieties of LIFE calendars printed at one outside company alone. About eleven thousand were printed of this run, and they retailed for two dollars each. Almost all were sold.[36]

This was the typical arrangement for the company: LIFE would allow a third-party seller to make use of its images for a minority share of the profits derived. In 1901, LIFE made a deal to produce Gibson Girl embroidery and stencils.[37] In 1902, it was Gibson Girl wallpaper for 10 percent of sales.[38] Later, it was cloth goods from an illustration by C. Allan Gilbert.[39]

Image licensing evolved beyond the branding of goods to include the direct sale and syndication of art concepts and works. In 1907, LIFE traded the rights to reproduce several Gibson Girl illustrations to the *New York World*, in exchange for some advertising space in the paper. Two years later, they traded Gibson Girl illustrations to the *Evening Mail* for cash. Next it was the *Kansas City Star*.[40] The list expanded dramatically when the magazine joined the Wheeler Syndicate, spreading its pictures from Saginaw to Spokane.[41]

These images were not always current: LIFE had a large stock of both published and unpublished images ready to monetize. In 1913, for example, LIFE licensed a Balfour Ker illustration to the Anheuser Busch Brewing Association that had been published in the magazine close to a decade earlier.[42] Older images were a special case, as the company

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

believed that images lost much of their value if they were used as advertisements.[43] Consequently, images had a certain life cycle: first, purchased by Mitchell and added to the company's stock; second, used in the magazine; third, either printed or resold in the form of an image-centric product like a LIFE calendar or book; and fourth, finally, licensed again—possibly years later—for reuse in third-party advertisements. At nearly every stage the magazine company stood to profit.

Whether this strategy was entirely and deliberately articulated is difficult to say, though Mitchell and Miller may have been among the only people to fully understand what they were doing. After Mitchell died, one of his editors, Thomas Masson, memorialized his passing by noting one of his habits:

> He bought pictures as he felt like it. He paid according to a system of his own, depending upon individual merit, and would never give the slightest attention to the number of pictures on hand. Sometimes this stock grew to immense proportions.

To Masson, it only looked as if Mitchell was collecting pictures without any regard to the magazine's actual page-space needs. He did not seem to realize that Mitchell was purposefully building a stockpile.[44]

LIFE's business people, however, were more aware of what they were handling. In 1902, when the M.H. Birge Company was attempting to negotiate down the price and royalties demanded by the magazine company for a wallpaper license, they were swiftly denied. Noted LIFE:

> … we think you under-estimate the value of this design as a seller. We do not think you quite know the value of Mr. Gibson's name with the public at large, and how such a novel idea as this would appeal to purchasers of wall paper. Of course you know your own business best … We would be willing to give you the xclusive [sic] right to the design for wall paper purposes for a down payment of $100 and a royalty of 10% of your sales. We do not think this is excessive, and believe you will take the same view of it after you have given the matter further consideration.

LIFE knew exactly what it was selling—what it here called a "design" but what we might call a visual idea, or intellectual property.[45] And it knew just how much it was worth.

The company was also interested in spreading its wares beyond the domestic market. In 1913, a French magazine called *La Pratique Automobile & Aeronautique* paid the company 500 francs for the use of 250 images. In 1914, LIFE worked with *Scena Illustrata*, licensing its images and even providing the Florentine magazine with plates. In 1920, it worked with *Vida Illustrada*, of Buenos Aires.[46] Image licenses were extended to manufacturers of consumer goods overseas, as well: in 1921 there was an internationally distributed version of *Life's Illustrated Calendar*, for which the magazine derived a lower royalty rate. And in 1918, Robert Watson & Sons of Belfast, Ireland, sent the magazine $75 for the use of six images—mostly of dogs—to use on the tops of handkerchief boxes.[47]

The result of these licensing deals was that LIFE images appeared on an astounding number of consumer items. There were LIFE-branded calendars—many varieties of them, every year. There was Life pyrography—Gibson Girls burned into leather. There were LIFE movies.[48] There were greeting cards, Christmas cards, and valentines. There were LIFE linens alongside LIFE wallpaper. LIFE images were found on beer bottles and umbrellas and parasols. They were found on picture frames and book covers. In the new world of consumerism, LIFE was ubiquitous.

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

LIFE's images circulated in astonishing numbers. One particularly eye-popping incident involved a single retailer ordering between six and seven *hundred thousand* of "Life's Series No. 1 Post Cards"—at a time when the magazine's subscription list was less than 150,000.[49] And this retailer may have been only one of many. Calendars were printed in the tens of thousands. Prints of LIFE images could sell in similar numbers, and oftentimes the demand was high. In fact, writing to Huyler's, LIFE indicated that it anticipated that *Arms and the Man*, the piece over which the two companies were in dispute, was poised to sell close to twenty-five thousand prints (fig. 3).[50]

Even the Metropolitan Museum of Art, a frequent enemy of the publication in the 1890s, wanted to associate itself with the popularity of *Life*'s images. Henry Watson Kent, the rising administrative star at the museum, wrote to LIFE in the early years of the century asking for an image license for an Orson Lowell illustration entitled "Is Soda Mixing Bad for the Heart."[51] He wanted to use it to advertise one of the museum's programs.[52] So popular were the magazine's images that one of the country's leading bastions of high culture—and frequent target of the magazine's satire—could not resist. Neither, apparently, could LIFE, which obliged.

But ubiquity and its attendant profits were only possible because buyers of LIFE's images knew to look to the publishing company for high-quality images—the sorts of images that were not merely attractive, but also would endow their products with some of the magazine's carefully cultivated caché. And that, in turn, was only possible because the magazine adopted a new and revolutionary pictorial branding strategy that foregrounded its illustrators and their distinctive styles.

It started in 1883, the first year of the magazine's publication. In September of that year, Mitchell departed from the industry standard practice of reusing the same cover image on every magazine issue.[53] Instead, *Life* began to feature a new illustration on its covers. By the end of the year—years before many other magazines followed suit—Mitchell had devised a new system: a new, signed illustration would grace the cover of every issue of *Life*, elegantly framed by a newly created frame-shaped LIFE logo (fig. 4). Over the next several years, *Life* began to favor certain artists for its cover and centerfold pages, helping to make their styles both more recognizable to the magazine's subscribers, and more associated with the magazine in subscribers' minds.[54]

This became the crux of the strategy: at some point, Mitchell must have realized that in each illustrator lay not just artistic labor but also a discrete and marketable style. Knowing this, LIFE could work to generate popularity for its illustrators by featuring them in its pages as distinct and worthy entities—and in so doing associate their growing popularity with itself. It could then simultaneously capitalize on and reinforce that popularity by selling specific artist-branded consumer goods. So: what started out as a general *Life* calendar in 1893 was by 1914 a whole series of calendars branded by the magazine's most famous artists —in addition to the flagship *Life* version, there were also Gibson, Phillips, and Flagg calendars.[55] And so: after the first book of Gibson illustrations was published (and advertised in the magazine's pages) in 1894, numerous other books by LIFE illustrators followed.[56]

This was a very different approach from the anonymized image manufacturing process of *Frank Leslie's*, or even the incidental fame of the illustrators of *Harper's Weekly*.[57] LIFE appears to have actively worked to promote the artists it hired, developing first Gibson, and then eventually Flagg, Phillips, and others into household names. The publishing company could then sell different "product lines," each associated with an artist and their style. In turn, this gave the magazine company a greater incentive to feature those individual artists (to bolster their popularity) and to expand its roster of artists with new offerings and newer styles.[58] The magazine built up the illustrators; the

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

Figure 3: An advertisement for *Life*'s prints published within the magazine. Note that *Arms and the Man* is the central image, and that it's still being sold three years after its original printing. *Life*, July 4, 1912, no. 1549, 1371.

illustrators built up the magazine, and each contributed to LIFE's reputation as a purveyor of cleverness, freshness, artistic quality.[59] In other words, it was no accident that LIFE and Huyler's were arguing over an illustration by C. Coles Phillips. LIFE had made him known over scores of magazine covers, calendar pages, and cards (fig. 5).[60]

Phillips' images may have appeared in board games, too. LIFE worked with Parker Brothers to try to develop a LIFE-branded board game, years before the company would acquire Monopoly. The relationship, however, was not entirely smooth: it took three years, from 1911 to 1914, to develop the game, and sales were never extraordinary. By 1919, the two companies decided to abandon the venture.[61] But declining sales were not the first problem that LIFE's game encountered. The first edition of the game included playing cards featuring LIFE illustrations. It did not, however, feature copyright notices

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

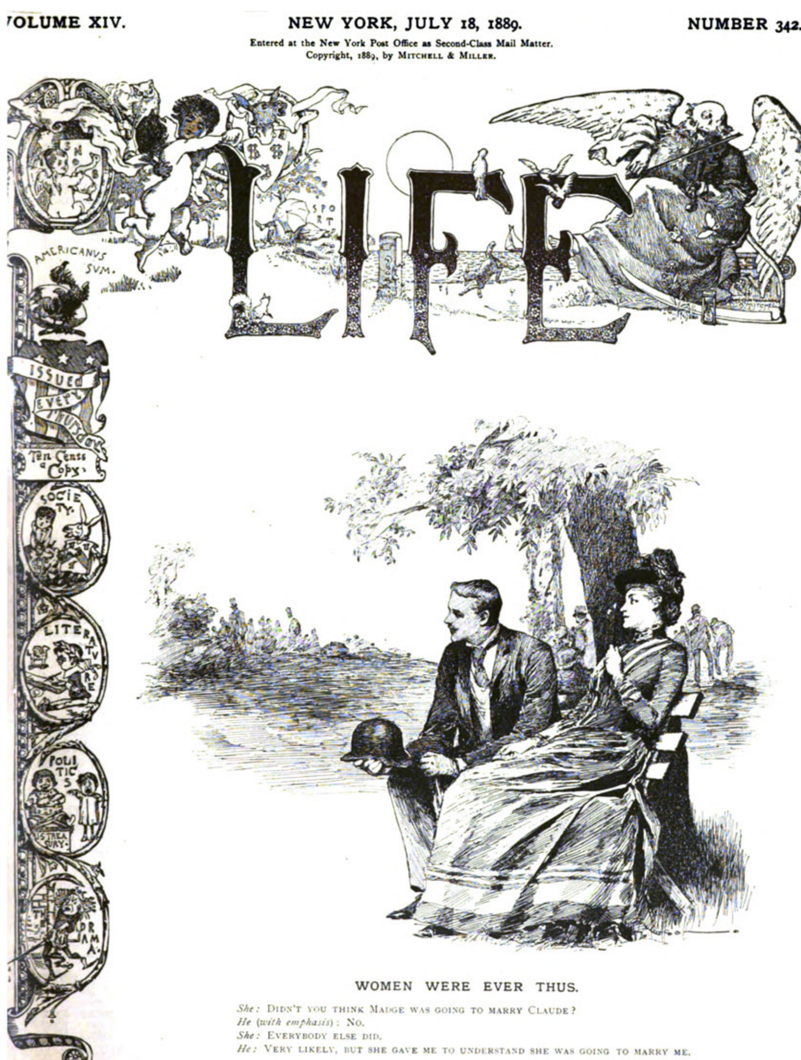

Figure 4: An early *Life* cover. Note the frame-shaped masthead—by Mitchell—surrounding the cover illustration, in this case by Charles Dana Gibson, whose signature is visible in the lower right. The illustrator and his individual work and style is thus prominently featured, but also indelibly associated with *Life*'s brand. *Life*, July 18, 1889, no. 342, cover.

on each individual card. Parker Brothers did not understand the issue, figuring that a single notice on the game's cover was sufficient.[62] LIFE, meanwhile, was incensed.

—

Because LIFE's success depended so heavily upon its control of its vast stock of popular images—and because the value of those images ostensibly depreciated upon certain varieties of reuse—the company had to find some way to protect its illustrations against unauthorized reproduction. And so it did: copyright was the lynchpin of LIFE's business

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

Figure 5: C. Coles Phillips cards from a LIFE series. Box 11, folder 108, Life Magazine Records, Manuscripts and Archives Division, New York Public Library.

model. Disagreements like the one with Parker Brothers' were common, as the company sought to guard its intellectual property with an almost religious zeal. One LIFE staffer put it plainly: "We would say that we guard our pictures very jealously."[63]

Indeed they did. The magazine company's licenses were often very restrictive, limiting the use of licensed images to a narrow range. In 1924, for example, when LIFE licensed several of its images to the Luis F. Dow Company of St. Paul, Minnesota, the magazine company was sure to stipulate repeatedly that transferred copyright was only valid if used precisely for blotters and calendars—meaning that using the licensed images to advertise the calendars that contained them was prohibited.[64]

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

LIFE was liable to get testy about such matters, as it did with Parker Brothers; even the Metropolitan Museum of Art did not escape a lecture on proper use and marking.[65] This anger was apparently warranted, as the magazine's images were frequently copied. In 1914, fed up with years of violations, *Life* featured a column (aptly titled "Life and Its Copyrights") on the matter explaining both its annoyance and its position, and threatening would-be violators with hellfire:

> In spite of LIFE's emphatic and repeated warnings to publishers, to daily newspaper publishers and editors in particular, that its carefully copyrighted pictures must not be used except with permission first obtained, infringements occur with unpleasant regularity …
>
> What LIFE wishes to convey is that hereafter it will accept no excuses or explanation in cases of infringement …
>
> LIFE takes much care and goes to considerable expense in securing the copyrights which insure its originality and enable it to properly recompense its artists and writers. It is, therefore, compelled not by any mean spirit of trying to mulct the unwary, but for self-preservation, to insist by every means in its power on complete respect for its property rights …
>
> In the circumstances, LIFE feels that it has done considerably more than its fair duty in the way of warning and does not propose to accept any excuses of ignorance or inadvertence as a bar to the very definite penalties laid down in the laws of the United States and other countries where LIFE enjoys copyright protections.[66]

True to its word, when the magazine found violations, it could be relentless in demanding reparations. Only several months after LIFE published the above column, the magazine caught the *National Herald* of the Pennsylvania Wholesale Liquor Dealers League using two of its illustrations without permission. The magazine angrily wrote to the paper. Startled, the National Herald stammered back: "We can only pledge that nothing like it will occur again, so far as the National Herald is concerned. Really, it seemed to us that we were doing you a service when we reproduced them in a paper owned, managed, and controlled by the distillers and wholesale liquor dealers of this country, by placing them before nearly 6,000 of them. …"[67]

LIFE was neither appeased nor amused. It wrote back to the *National Herald* reminding of them of its "inflexible rule"—and demanding $50 in payment for each violation. In fact, the magazine explained, it was being merciful in not asking for more, noting that if the *National Herald* was taken to court the penalty would be substantially higher.[68] Indeed it could be: in 1912, *Life* had won $1,043.14 from the *New York Mail and Express*, which had also pirated only two drawings.[69] As much as the magazine wanted its images to circulate, it only wanted them to do so on its own terms—and that meant that where LIFE thought its images could demand monetary value, it expected to profit from their distribution.

But copyright was an unreliable foundation for the company's profitability. It was, to start, incredibly complex and unwieldy: a contemporary account of copyright law by magazine magnate Richard Rodgers Bowker memorably begins one section by noting that "Copyright law is exceptionally confused and confusing," and the confusion was

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

particularly acute as it related to illustrated images. It did not help matters that copyright law changed substantially several times throughout the Gilded Age and Progressive Era.

Legal complexity, in turn, meant that it was not always clear that the staff of LIFE really knew how to do what it was trying to do. One letter from 1898 indicates that the magazine had been copyrighting its images incorrectly for the last several years: it had been attempting to copyright them as "drawings," when, according to its lawyers, it was preferable to protect them as "prints" or "engravings." Another note from LIFE's legal team from 1902 explained to an apparently surprised management that, contrary to their beliefs, reuse rights were not automatically obtained with payment for work.[70]

These problems only compounded as the law changed, making the status of illustrated images somewhat more confounding. Prior to 1909, United States copyright law comprised of an amalgamation of earlier nineteenth-century statutes (many of which were primarily concerned with the written word) and international reciprocal treaties and conventions.[71] The result was a sort of legal morass: in 1906, for example, an American judge decided that an illustrated advertisement was best copyrighted not as a picture, but as a book.[72] In 1909, Congress passed a new act meant to bring clarity to the country's intellectual property law. It was a mixed success. The new act established eleven categories under which intellectual property could be properly protected, three of which—works of art and models or designs for works of art, reproductions of a work of art, and prints and pictorial illustrations—could potentially apply to LIFE's images. The distinctions between these categories were vague enough that a single image might qualify for several.[73] It did not help matters that the final category, pictorial illustrations, seemed to be the most applicable but was also the most elusive. It was defined merely as "all printed pictures not included in the various other classes enumerated above."[74]

But ambiguity aside, the larger problem for LIFE was that copyright law in the United States at the turn of the century, particularly as it applied to mass-produced illustrations, did not do exactly what Mitchell and Co. hoped it would. To illustrate, we must return to the matter of *Arms and the Man*, Mr. Whittier, and the man from LIFE.

In late 1909, Huyler's candy company bought an illustrated advertisement from the Meek Company, an advertising firm. The advertisement looked suspiciously like C. Coles Phillip's *Life* cover *Arms and the Man*. Perhaps detecting that something was wrong—and perhaps feeling a little guilty—Huyler's advertising manager sent Mr. Whitter of the Meek Company to LIFE to ask for either permission or forgiveness. This is where our story starts: with Whittier meeting with an unnamed LIFE employee.

The meeting did not go well: rather than permission, Whittier got "not in your life." Whittier offered several explanations as to how the images could look so similar and may have accidentally let slip that Huyler's had purchased a print of *Arms and the Man*.[75] To LIFE, this seemed to indicate that the original painting had been copied directly—not that there was much doubt, considering the striking visual similarity. The matter was doubly troubling considering that LIFE believed that images lost their value when used as advertisements. And *Arms and the Man* was a popular print.

Both sides sought counsel. The magazine escalated, writing to Huyler's that "we beg to inform you that any publication of the picture by you will be at your peril."[76] The lines were drawn, and it appeared that LIFE had an undeniable legal advantage. But LIFE's lawyer did not think that the magazine had a case.

The problem was that copyright law did not fully protect ideas, as LIFE hoped it would. Instead, it protected ideas as they were tangibly and precisely realized. And so *Arms and the Man* was protected … as long as it was not morphologically changed. Intellectual property ownership was still absolute for visual art: under the new 1909 Act, holders of a copyright in

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

art held sole rights to profit from the sale, exhibition, and reproduction of their works.[77] It was all or nothing, and consequently there were limits to copyright's ability to cope with visual ideas that were similar to and yet somehow different from an original. The law had little notion that visual ideas could be modified without losing their essential character. Visual works were protected from copying, yes—Richard Rodgers Bowker's *Copyright: Its History and Its Laws*, noted that "a copy is not less an infringement because it alters details, provided there is copying of a substantial part"—but at the same time, "a substantial alteration, or adaptation of an existing work, may in itself be copyrightable."[78] What constituted an altered detail versus a substantial alteration was unclear but seemed to favor a narrow reading. If an image had been altered enough, it was no longer protected.

According to LIFE's lawyer, this is precisely what had happened to *Arms and the Man*. The problem was that Huyler's advertisement was not perfectly identical to Phillips's cover. The changes were slight but to the lawyer, substantial: he noted that "the girl's head was on the other shoulder; that you could see the girl's face; that there were rings on the girl's fingers and part of her clothing showing at the elbow." The fact that the Meek Company also offered to change the image's color to blue did not help matters.[79] These changes, seemingly so trivial, might have been enough to void LIFE's claim. In other words, copyright did not protect the idea of *Arms and the Man* (or the wit of its visual pun); it protected its specific design.

Or, as LIFE's lawyer explained, "The idea of a woman embracing a man was an old one and was not likely to be termed by any Court or jury as an original idea with Mr. Phillips, our artist. Furthermore he stated that it was not possible to copyright *any* idea …"[80]

LIFE's lawyer could not separate the design of *Arms and the Man* from the general idea that described it. It was either that LIFE held a copyright on the design of the piece (that is, a man and a woman in a certain pose, with certain adornments, in certain specific colors), or a copyright on the much more general idea of a man and a woman embracing—and copyrighting the latter was not legally permissible. It was not possible, at least in LIFE's lawyer's understanding, to own the visual idea—the wit, the concept—that Phillips had produced. And because enough alterations to Phillips's design had been added to the Meek advertisement, the advertisement was legally distinct. In fact, the Meek Company *also* held a copyright on *their* image. The Library of Congress seemed to agree with LIFE's lawyer: the case was hopeless.

… Except, apparently, the legal staff at Huyler's thought the same thing about the other side's case. After some brief negotiations, the candy company capitulated.

It is difficult to say why Huyler's gave in to LIFE's demands, especially considering that both companies seem to have a fairly limited grasp of the law.[81] Perhaps Huyler's lawyers were likewise convinced that they would lose the case, possibly on account of the losses LIFE claimed it would take if the value of *Arms and the Man* depreciated after being used in the candy company's sign. This was the argument that LIFE's lawyers were going to advance, its dubious merits notwithstanding.

Or perhaps Huyler's gave in because in the end, it got a very good deal. LIFE granted the chocolate company an image license for *Arms and the Man* for only $500—a bargain, considering how much LIFE stood to lose from diminished print sales. Of course, Huyler's could not have known this before they capitulated. And even afterwards, the candy company did not seem particularly grateful or gratified.[82]

Perhaps the clearest explanation for Huyler's capitulation can be found several years later, in another magazine entirely. In a 1911 issue of *McClure's Magazine* appears an image that subscribers to *Life* would have found very familiar (fig. 6).

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

Figure 6: "Marketplace of the World," *McClure's Magazine*, October 1911, 75.

It was another advertisement for Huyler's, this time featuring the Gibson Girl, LIFE's breakout character image. Huyler's evidently still needed images. There was a twist, though: the drawing that Huyler's used was not originally from *Life*.

Instead, Charles Dana Gibson's illustration had first been printed in *Collier's* magazine, one of *Life's* weekly competitors. *Collier's* had poached Gibson from *Life* in the early years of the twentieth century, and with him, they apparently also took some of LIFE's business practices: in small type, right next to the image, there is a small notice: "by permission of *Collier's*."[83] The image, *The Eternal Question*, had originally printed ten years earlier and now had likely reached the final stage of its depreciation cycle; *Collier's* was cashing in by selling it for use in an advertisement. What LIFE had pioneered, others could copy.

But not perfectly. Gibson's popularity was beginning to fade by 1911, in favor of younger artists like Flagg, Harrison Fisher, and *Arms and the Man*'s C. Coles Phillips.[84] All of them worked for LIFE, sometimes exclusively. In fact, it was LIFE that had made them famous. Mitchell had never stopped collecting, and LIFE had not stopped boosting its illustrators.

And that is why, ultimately, it is not very important that the rules of the turn-of-the-century copyright law did not favor LIFE. Instead, the Huyler's dispute shows what LIFE

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

thought *should be* possible—and in so doing, reveals what the company believed itself to be doing. At least on some level, LIFE thought that ideas could be visual, and visual ideas were what it drew from its illustrators, promoted, and sold. And further, it believed—knew, even—that there was much to be gained by doing just that.

LIFE was, in other words, preempting the primacy of the visual over the written word that would so typify the twentieth century across magazines and movies and television. LIFE seemed to realize that visual ideas were what it dealt in; they were what captivated the imagination; what the future would prize. And it understood the link between artist, concept, and popularity and profits necessary to inhabit that future, much as later media institutions would come to understand the same.

And Huyler's seems to have understood that, too. Had it so desired, the candy company could have alienated LIFE. But that might have meant alienating the surest source for new and popular designs —and for a company like Huyler's, for which images had become indispensable, that would have been perilous. LIFE's images were novel and everywhere, the result of shrewd business practices that simultaneously spread the company's illustrators' visual ideas and ensured that the novelty of those ideas was indelibly connected back to the magazine itself—by a fine-print "Copr. Life Publishing Company" if nothing else. Contracts like the one LIFE would ultimately sign with Huyler's, together with a developing copyright system not quite yet able to fully fulfill the magazine's aspirations enabled LIFE to aggressively distribute its images to the point of ubiquity and protect them with moderate success. The magazine was, as a result, so culturally significant—its pictures were so recognizable—that the chocolate company was brought to heel, fairly and legally or not. That, after all, was LIFE.

Notes

1 Information about this incident has been reconstructed from what seems to be testimony about the LIFE/Huyler's debacle. The person testifying is not identified, nor are any of the other figures beyond what is detailed above. "Testimony," box 9, folder 54, Life Magazine Records, Manuscripts and Archives Division, New York Public Library [hereafter cited as LMR].

2 *Arms and the Man* was featured on the cover of the July 8, 1909, issue (Volume LIV, no. 1393)—just several months before this episode occurred. It's worth noting that the original was a painting, not a print.

3 For the purposes of this article, borrowing from the shorthand convention in the Life Publishing Company archive and the magazine's text, I will refer to the Life Publishing Company as LIFE (this nomenclature was used to suggest an editorial personification of the company in the magazine's pages), and *Life* magazine (the principal product of said publishing company) as *Life.* On the periodization of the Golden Age of Illustration, see Walt Reed, *The Illustrator in America, 1880–1980: A Century of Illustration*, eds. Roger Reed and Walt Reed (New York: Published for the Society of Illustrators by Madison Square Press, 1984), 68.

4 The latter of whom began working for LIFE at age 14; his first drawing netted him $8. James Montgomery Flagg, *Roses and Buckshot* (New York: G.P. Putnam's Sons, 1946), 42. It's also worth noting that this was not always for the good. Also associated with the magazine was E.W. Kemble, who helped popularize racist caricatures of African Americans. The magazine's overall stance toward African Americans (and indeed, women, immigrants, and other targeted groups) could be wildly incoherent. One early page, for example, features an anti-racist illustration valorizing the troops of the 54th Massachusetts Regiment—alongside a racist caricature of a contemporary Black soldier. *Life*, no. 241, Aug. 11, 1887, 92–93. Similar juxtapositions include columns of commentary praising the professionalization of women only pages away from cartoons mocking the very same.

5 Writes magazine historian Frank Mott: "In the middle nineties, the American people took the Gibson Girl to their hearts. She and the Gibson man became popular middle-class ideals. The girl of the nineties tried to dress and to stand like the popular idol, and to hold her chin as the picture girl held hers; she said: 'Why do they call me a Gibson girl, a Gibson girl, a Gibson Girl?' while all the time she was doing her best to act so 'they'

would bestow that compliment upon her." Frank Luther Mott, *A History of American Magazines*, vol. 4 (Cambridge, MA: Belknap Press of Harvard University Press, 1957), 564.

6 Mott indicates that circulation was at 50,000 in 1890 and 150,000 in 1916. *History of American Magazines,* 565. In 1912, the first year for which circulation statistics survive in the magazine's archival records, the magazine had close to 140,000 subscribers. "American Newspaper Annual and Directory," box 10, folder 82, LMR. The above, consequently, is just a guess.

7 The Middlebrow Network, a group of British scholars devoted to studying the phenomenon, periodizing the middlebrow between 1920 and 1950. Joan Shelley Rubin, in *The Making of Middlebrow Culture*, is more expansive, identifying middlebrow antecedents that go back far into the nineteenth century—though still situating middlebrow culture in "the three decades following the first world war." Joan Shelley Rubin, *The Making of Middlebrow Culture* (Chapel Hill: University of North Carolina Press, 1992), xi.

8 George Harvey in Mott, *History of American Magazines*, 4:565. *Collier's* was another example of a ten-cent weekly. *The Saturday Evening Post* was a five-cent weekly. *Munsey's* and *McClure's* were ten-cent monthlies.

9 For example, Richard M. Ohmann, *Selling Culture: Magazines, Markets, and Class at the Turn of the Century* (New York: Verso, 1996); or Matthew. Schneirov, *The Dream of a New Social Order: Popular Magazines in America, 1893–1914* (New York: Columbia University Press, 1994). The subject of illustration more specifically has been capably examined by Neil Harris in several articles, including: Neil Harris, "Iconography and Intellectual History: The Half-Tone Effect" in *New Directions in American Intellectual History*, eds. John Higham and Paul Keith Conkin (Baltimore: Johns Hopkins University Press, 1979); "Pictorial Perils: The Rise of American Illustration" in *Cultural Excursions: Marketing Appetites and Cultural Tastes in Modern America* (Chicago: University of Chicago Press, 1990). Regarding the massified and the rarified: take, for example, Rubin, *The Making of Middlebrow Culture.* The formation of the classic high/low dichotomy was best explored in Lawrence W. Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* (Cambridge, MA: Harvard University Press, 1988).

10 For example: Martha Banta, *Imaging American Women: Idea and Ideals in Cultural History* (New York: Columbia University Press, 1987); Carolyn L. Kitch, *The Girl on the Magazine Cover: The Origins of Visual Stereotypes in American Mass Media* (Chapel Hill: University of North Carolina Press, 2001); Martha H. Patterson, *Beyond the Gibson Girl: Reimagining the American New Woman, 1895–1915* (Urbana: University of Illinois Press, 2005).

11 Two counterexamples are worth mentioning: a hagiographic and heavily nostalgic history of the magazine from the 1970s and a more recent article discussing the magazine's relationship with cultural modernism in the 1920s. John Flautz, *Life: The Gentle Satirist* (Bowling Green, OH: Bowling Green University Popular Press, 1972); Céline Mansanti, "Mainstreaming the Avant-Garde: Modernism in Life Magazine (New York, 1883–1936)," *Journal of European Periodical Studies* 1:2 (Winter 2016).

12 Ohmann; *Selling Culture*, 25.

13 This article has been constructed from one of the largest parts of the LMR collection, the "Contracts and Agreements" series, which seems to be the directly transplanted filing cabinets of the company. This series includes roughly four decades' worth of contracts and similar agreements and correspondence between LIFE's business department and third parties that the publishing company worked with.

14 Christopher P. Wilson, "The Rhetoric of Consumption" in *The Culture of Consumption: Critical Essays in American History, 1880–1980*, eds. Richard Wightman Fox and T. J. Jackson Lears (New York: Pantheon Books, 1983), 42

15 And, it should be noted, a wife. He married Mary Mott several years after founding *Life.* Mitchell's journey to LIFE was a long one. As a young man he was mostly provided for by his uncle, the railroad executive Oliver Ames Jr., as his father was confined to an insane asylum. Oliver Ames Jr.'s largess was likely what provided Mitchell with the capital required to start LIFE. By his own account, he founded LIFE while on assignment for another magazine; he was dissatisfied with the subject matter of his assignments. For more information, see Therese L. Lueck, "John Ames Mitchell (17 January 1845–29 June 1918)" in *American Magazine Journalists, 1850–1900*, ed. Sam G. Riley (Detroit: Gale, 1989).

16 At least this is how Mitchell told the story a decade later. Mitchell's account, however, was featured in an issue including a series of satirical notes of congratulations, including one from the sitting president—identified only as "Grover"—as well as one from the czar of Russia ("… in commemoration of your birthday, I have ordered the release of 10,000 Siberian exiles, and have ordered the execution of twenty-five Imperial Tax-Collectors"). So perhaps this story ought not to be taken wholly literally. *Life*, Jubilee Number, Jan. 1893, 15–19.

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

17 In 1892, when the company was reincorporated, Mitchell owned 750 of 1,000 shares. "Minutes of the Board of Directors," box 23, folder 1, LMR.

18 Wrote Edward S. Martin, "Whatever *Life* is, Mr. Mitchell has made it … [he] found sufficient occupation in editing and devising means for the expenditure or investment of profits. His idea of what the paper ought to be has always been reasonably clear in his own mind, and has been the controlling force that has made *Life* what it has been and what it is." "John Ames Mitchell," *The Book Buyer* 13:3 (Apr. 1, 1896): 134. What that was, exactly, is somewhat confusing. Mitchell was a member of a cohort of magazine editors and professionals (like Edward Bok, S.S. McClure, George Lorimer) that changed the face of the American magazine at the turn of the century. He did not entirely fit their mold, though, and is probably best considered as a transitionary figure between the new (e.g., *The Saturday Evening Post*) and old (e.g., *Harper's Weekly; the Century)* types of magazine. Unlike his compatriots, Mitchell did not impose a house style, and seemed to prefer that his illustrators came to him, rather than soliciting. For more on the new generation of magazine professionals, see Christopher P. Wilson, "'Magazining' for the Masses" in *The Labor of Words: Literary Professionalism in the Progressive Era* (Athens: University of Georgia Press, 1985).

19 "In flux" might describe much of the history of the American middle classes throughout the nineteenth century. What at the beginning of the century has been referred to as the "middling sorts"—upper-level artisan manufacturers and yeomen farmers—slowly transitioned in the antebellum years into something quite different, as artisan manufacturers, in particular, transitioned into small-scale entrepreneurs. Alongside a new class of white-collar clerical workers, and, eventually, salaried sales agents, the historian Stuart Blumin argues that this middle class achieved some measure of social distinction and stability in the middle years of the nineteenth century. Typified by discrete social and cultural practices that were invested in the domestic realm alongside career pathways that slowly elevated a white-collar worker's lifetime earnings above his working-class peers, the mid-century middle class achieved a comfortable status quo. At the moment of *Life*'s introduction, however, "the middle class" was transforming once again as the older proprietary order gave way. While older white-collar jobs proliferated alongside the rise of larger corporations, trusts, and retail operations, the seemingly-guaranteed career advancement of the mid-century clerical worker was replaced by multiple tiers of white-collar work: lower-level clerkships that often never offered any advancement (and that were open to the children of previous generations of immigrants); salaried managers that were dependent upon increased education; and, newly, upper-level professionals. Much of what *Life* was doing in the 1880s and '90s can be understood in light of these changes, responding to the shifting anxieties of its shifting middle-class readership. For more on the middle class of the nineteenth century, see Stuart M. Blumin, *The Emergence of the Middle Class: Social Experience in the American City, 1760–1900.* (Cambridge: Cambridge University Press, 1989); for an anthology of more recent scholarship, see *The Middling Sorts: Explorations in the History of the American Middle Class*, eds. Burton J. Bledstein and Robert D. Johnston (New York: Routledge, 2001). Regarding the rise of the white-collar clerkships and the new capitalist economy, see Michael Zakim, *Accounting for Capitalism: The World the Clerk Made* (Chicago: University of Chicago Press, 2018). For the turn toward salaried occupations caused by economic uncertainty, see Edward J. Balleisen, "Epilogue" in *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001). On the relationship between the white-collar and corporate consolidation, see Alfred D. Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA: Belknap Press of Harvard University Press, 1977). Regarding mid-century middle-class social and cultural habits and "domesticity," see Mary P. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790–1865* (Cambridge: Cambridge University Press, 1981); Katherine C. Grier, *Culture & Comfort: People, Parlors, and Upholstery, 1850–1930* (Rochester, NY: Strong Museum, 1988). The classical work on the New Middle Class of *Life*'s readership—often styled as the Professional-Managerial Class or PMC—is Robert H. Wiebe, *The Search for Order*, 1877–1920 (New York: Hill and Wang, 1967).

20 "Letter from Feb. 17, 1910," box 9, folder 56, LMR. In 1883, in one of its first issues, the magazine described itself as: "neither a snob nor a socialist." The "class of better people" was, like the magazine itself, somewhere in between. "American Aristocracy," *Life* 40 (Oct. 4, 1883): 166.

21 To clarify: the *Saturday Evening Post* was a five-cent *weekly*. The *Ladies Home Journal* was a five-cent *monthly*, until the late 1880s, when it became a ten-cent monthly. So, to subscribe to *Life* meant a monthly expenditure of 40 cents; to subscribe to the more popular *Post* cost 20 cents, and to the *Ladies Home Journal*, only 10.

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

22 One *Life* cover, from 1889, described LIFE's audience fairly well. One character addresses the other: "Don't you find New York society rather empty and unsatisfactory?" The other responds: "Not necessarily. You can take your choice in that respect. There is the bohemian set, all brains and no style; society proper with a fair amount of each, and the Four Hundred, all style and no brains." *Life* 316 (Jan. 17, 1889). The magazine continued its willingness to mock across social divides continued through the early years of the twentieth century; Céline Mansanti, in her article on *Life*, notes that the magazine frequently went after Gertrude Stein in its later years for what it perceived to be the pretentious obscurity of her works. *Life* was not a magazine for the everyman, but it seemed to instictively dislike everything that was not.
23 Mott, *History of American Magazines*, 4:562.
24 These included in particular jeremiads against vivisection, support for opening the Metropolitan Museum of Art on Sundays, and a virulently anti-Semitic campaign against theater producer unionization. For more on *Life*'s targets, see "A Little List of Society Offenders" in Flautz, *Life: The Gentle Satirist.* But compared to *Collier's*, its ten-cent weekly competitor, these were small fish to fry.
25 Fairfax Downey, *Portrait of an Era as Drawn by C.D. Gibson; a Biography* (New York: C. Scribner's Sons, 1936), 47.
26 Mott, *History of American Magazines,* 4:564.
27 In the case, LIFE was suing the city of Toronto because, following the passage of an indecency ordinance, the magazine had been banned from the streets. The cause? Pictures of, among other things, Catholic clergy (portrayed negatively) and women dancing (the reverse).
28 Mott, *History of American Magazines*, 4:559
29 "Minutes," box 23, folder 1, LMR.
30 A 1903 audit—the sole surviving from this period—reveals that the *Life* magazine account of LIFE Publishing Company was $1,692.94 in the red as of August 31. This negative figure already includes $5,038.87 of revenue in "sundry receipts"—the sales of cuts ($3,050.57), drawings ($1,225.90), waste paper ($275.90), and other miscellaneous royalties ($487.50). LIFE Publishing Company, however, made $10,594.89 in profit, buoyed largely by $8,136.28 in a separate income stream from a "Books, Proofs, etc" account. Together, then, book sales, print sales, and royalties ($12,899.25) turned what was actually a net loss of over $2,300 into a healthy profit. While these numbers do not come near to the revenue derived from circulation ($28,632.34) and subscriptions (16,161.94), they make up the margin of profitability. "Life Publishing Company Balance Sheet as of August 31, 1903," LMR box 8 "Audit Co." folder.
31 [Scribner's] box 8, folder 27; [Doubleday] box 11, folder 103-A, LMR.
32 This practice was so regularized that a representative of the company explained it directly to illustrator J.R. Shaver: "We frequently arrange for the publishing of a book of our material and whenever we do so the artist, author, receives a royalty of 10 percent of the retail price of the book" ("Letter of May 11"). The same practice also applied to one of the magazine's first famous illustrators, E.W. Kemble, as well as illustrators Burt Levey, J.E. Jackson, and someone the record only refers to as Haskell (possibly Ernest Haskell). Correspondence to illustrators, box 8, folder 13, LMR.

Some particularly high-status illustrators were able to negotiate slightly better terms, however. Harrison Fisher seems to have been able to negotiate a contract in 1908 where he was able to republish his work for profit more freely, and Charles Dana Gibson received limited control over republishing his works in book form, which when exercised overseas caused some contention with the magazine company. "Gibson," box 8, folder 15, LMR.
33 Writing to the illustrator Burt Levey (alternatively spelled Levy), LIFE made this clear: "We are to grant Mr. Levey the right to publish … **provided we do not care to publish the book ourselves**." [emphasis added] "Letter of March 1905," box 8, folder 13, LMR.
34 Intriguingly, image licensing schemes were not always profitable for *Life*'s partners, owing in part to turn-of-the-century Americans' attitudes toward the originality and authenticity of illustrated media. The issue was not whether, in the Benjaminian sense, licensed images lacked aura—for buyers of images available only as reproductions, this could not have been a problem. Rather, consumers were interested in whether the seller of the image was also its original buyer, which would have vested the art and the sale with some sort of authenticity. As a 1913 letter from one of *Life*'s licensing partners explained: "We find today that the better class of people will not buy anything that has been published before by anybody else, and it must be owned and copyrighted by the people offering it." Box 9, folder 36, LMR.
35 Metcalfe was eventually brought onto the magazine's staff as an editor, and, after Mitchell's death, was briefly the lead editor of the magazine.

36 Correspondence with the George H. Doran Company, box 10, folder 77, LMR. During the war years, LIFE printed special army and navy versions of the calendar. Box 13, Unmarked folder (possibly 167b), LMR. In 1921, the roster expanded: there was a Vanity Calendar, Society Calendar, Boy Scout Calendar, and Dog Calendar. Box 13, folder 167-A, LMR.
37 Correspondence with the Charles E. Bentley Co., box 8, folder 7, LMR.
38 Correspondence with the M.H. Birge and Sons Co., box 8, folder 8, LMR.
39 Box 8, folder 12, LMR.
40 "Letter of Nov. 28, 1918." Box 14, folder, 190, LMR.
41 "Gibson Pictures," box 12, folder 140, LMR. News syndicates like Wheeler's and McClure's allowed news organizations to obtain content from the syndicate's contributing members.
42 "Letter of June 19th, 1913," box 12, folder 126, LMR.
43 "Letter of October 30, 1909," box 9, folder 54, LMR.
44 And quite a stockpile it was. In 1903, the company valued its "inventory" of drawings at over $15,000. "Balance Sheet as of August 31, 1903," box 8, Un-numbered "Audit Co. of NYC" folder, LMR. Miller's comprehension is evident from the numerous remaining correspondences he conducted as the company's business manager. Oftentimes image licensing deals were negotiated through him; if not, they frequently had his seal of approval.
45 This term was already being used in legal circles during LIFE's era, though Richard Rodgers Bowker, of *Publishers Weekly* and *Harper's Weekly*, included the term less than five times in his summation of copyright law's sections on the meaning and history of the legal construction. Richard Rogers Bowker, *Copyright: Its History and Its Law* (Boston and New York: Houghton Mifflin Company, Riverside Press Cambridge, 1912), Project Gutenburg Ebook, produced from the Google Print Project.
46 Box 14, folder 200, LMR.
47 Correspondence with Robert Watson & Sons, box 14, folder 191, LMR.
48 In fact, the company pursued the nascent film industry with great interest, particularly in the 1920s when the magazine was supposedly losing its relevancy.
49 Correspondence with Mr. A. B. Coates, 1910, box 9, folder 44, LMR.
50 "Letter of October 20, 1909," box 9, folder 54, LMR.
51 "Letter to Mr. H.W. Kent," box 10, folder 100, LMR.
52 While seemingly incongruous with the Metropolitan Museum's more hierarchical view of culture, this decision is not ultimately that surprising. A new generation of managers like Henry Watson Kent was beginning to rethink the museum's attitude toward the public vis-à-vis public programming, focusing more on the application of "culture" to industry. See Jeffrey Trask, *Things American: Art Museums and Civic Culture in the Progressive Era*, 1st ed. (Philadelphia: University of Pennsylvania Press, 2012).
53 The first time this happened was on the Sept. 27, 1883 issue, though the change didn't stick until a few weeks later. Prior to that time, *Life*, along with most other magazines, reused the same cover image for every issue. It was not until the 1890s that changing covers became a common practice. Kitsch, *The Girl on the Magazine Cover,* 4.
54 Historian Michele Bogart notes that sometime around the turn of the century, other magazines had picked up on this strategy: "Repeat exposures," she writes, "… made certain illustrators into big names … Indeed, both Bok and Lorimer were instrumental in making a new generation of illustrators, and ultimately in boosting the reputation of some, like Maxfield Parrish, Joseph Leyendecker, Jessie Willcox Smith, and (later) Norman Rockwell, to the level of nationally acclaimed 'media stars.'" Michele Helene Bogart, *Artists, Advertising, and the Borders of Art* (Chicago: University of Chicago Press, 1995), 23. Mitchell's efforts preceded Bok's, and may have ultimately inspired them—though as noted later, Bok was an imperfect imitator.
55 Correspondence with the George H. Doran Company, box 10, folder 77, LMR.
56 Though no paperwork remains to confirm it, LIFE appears to have worked with R.H. Russell & Sons as their publishing house of choice for illustration books in the 1890s. Russell published the first Gibson book in 1894; two years later, in 1896, an ad in *Scribner's* indicates that it published books from Gibson, E. W. Kemble, and T.S. Sullivant (all in the LIFE stable). Advertising Section, *Scribner's Monthly Magazine* 6:27 (Dec. 1896). Later books by Kemble, James Montgomery Flagg, and John Ames Mitchell himself were published by LIFE, itself. By the turn of the century, the magazine was both self-publishing and fielding out publishing requests for illustration books sufficiently so frequently that it saw fit to include the contract provision previously

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

mentioned in all of its agreements with illustrators; publishing illustration books seems to have been something that the company at least imagined itself doing fairly frequently.

57 On *Frank Leslie's*, see Joshua Brown, *Beyond the Lines: Pictorial Reporting, Everyday Life, and the Crisis of Gilded Age America* (Berkeley: University of California Press, 2002), 34–40.

58 This practice was different from those of Mitchell's contemporaries. While editors like *The Ladies Home Journal's* Bok shared with Mitchell a desire to associate their magazines with cultural merit, they were more inclined to chase celebrity writers or institute a single recognizable house style of writing to do so. One episode on this subject from Bok's memoirs is illustrative: "[Cyrus Curtis] paid Mr. [William Dean] Howells $10,000 for his autobiography, and Mr. Curtis spent $50,000 in advertising it. 'It is not expense,' he would explain to Bok, 'it is investment. We are investing in a trade-mark. It will all come back in time.'" As quoted in Wilson, *The Labor of Words*, 47. Establishing a "trade-mark" was certainly on Mitchell's mind. The mode of obtaining it—building from scratch a reputation for visual flair among numerous styles—was quite different.

59 What exactly that meant in objective terms or replicable analysis is difficult to qualify; what qualified as a "Life-quality" image ultimately came down to John Ames Mitchell's subjective judgment, informed by his own professional artistic career history. Occasionally, however, Mitchell did comment on what he thought made a good illustration or illustrator. "The American public," he wrote in 1889, "has a weakness for intellectual art. They like an idea in their pictures, and if they can have it well told, graphic, technically good, and with a touch of human nature, they like it all the better." The right sort of illustration, he wrote, referring to caricature, "appeals to intellect, the eye, and worst of all, to the sense of humor of the beholder." From this it is at least possible to discern that wit—or the visual expression of a witty idea—was among the more important elements of what Mitchell sought. And while visual wit does not typify all of the work of all of *Life*'s stable, it is a something of a commonality, stretching from the way that Phillips plays with line and color, to Gibson's games of perspective or value or expression, to Flagg's well-rendered caricatures. Each of these were as much intellectual formations as much as they were aesthetic and visual techniques—they were, in other words, intellectually and technically sophisticated jokes that were in some sense inseparable from the unique perspectives of their producers. Mitchell believed that this was what the picture-viewing public was after, and he appears to have been right. John Ames Mitchell. "Contemporary American Caricature," *Scribner's Magazine* 6 (Dec. 1889): 728–45.

60 Box 11, folder 108, LMR.

61 It sold 1,500 copies, and was in no way related to the vastly more popular Checkered Game of Life of the 1860s, or the Game of Life of the 1960s. Correspondence with Parker Bros., box 10, folder 66, LMR.

62 "Letter of Sept. 26, 1912," box 10, folder 66, LMR.

63 The exact circumstances of this quotation are worth tertiary discussion. LIFE was writing to a correspondent who was asking for the use of an image called "That Ecstatic Moment When You Sit Next to the Judge" for an advertisement. Normally, explained LIFE, they would charge a license fee for its use, however in this case the solicitor was a major donor to LIFE's Fresh Air Fund—a Mitchell pet project that transported tenement-bound children out of the city during the summer—and so the company granted the license for a nominal $1 fee as thanks. LIFE's images were its most significant assets, and so they could be gifted and doled out as favors at will, regardless of the depreciation that would follow their use. "Letter September 28, 1914," Box 12, Folder 143, LMR.

64 Correspondence with the Luis F. Dow Co., box 15, folder 265, LMR.

65 "Letter to Mr. H.W. Kent," box 10, folder 100, LMR.

66 "Life and its Copyrights," *Life*, no. 1627, Jan. 1, 1914, 58.

67 "Letter of September 23," box 12, folder 144, LMR.

68 "September 28 Reply to Letter of September 23," ibid. This "mercy" was on account of Andrew Miller's friendship with one of the Herald's staffers. Penalties for violations in court, explained LIFE, would probably be in excess of $250 per violation, plus fees. This saga concludes without resolution, as records of the National Herald's payments do not appear to survive. The distillery paper tried to negotiate the penalties down, noting that they would have to come out of the pocket of the correspondent (in this case the managing editor, who felt responsible), and again pleading that the magazine ought to count the distillers as friends. In fact, reminded the Herald, in recompense the paper had decided previously purchased 100 copies of *Life* and forwarded them to clergymen throughout the country, evidently admiring the magazine's position on Prohibition.

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

LIFE's threat may itself have been based on a misunderstanding of copyright law. *Copyright: Its History and Its* Laws notes that under the 1909 act, penalties for a violation could range from $250 to $5000 … except in cases involving "a newspaper reproduction of a copyrighted photograph," in which case penalties ranged from $50 to $200. As noted below, it's not quite clear what LIFE's illustrations counted as. Bowker, *Copyright,* loc. 4374.

69 *Publisher's Weekly*, Mar. 16, 1912, 890.

70 Box 8, folder 27, LMR.

71 Prints were not protected until 1802, and then only loosely. Photographs did not receive protection until 1865. "The 19th Century," A Brief History of Copyright in the United States, n.d., www.copyright.gov/timeline/timeline_19th_century.html. (accessed Aug. 2018).

Some protections for images including "paintings, drawings, chromos, statues, statuary, and models or designs" arrived with the 1870 general copyright revision—but only for those images "intended to be perfected as works of the fine arts." The 1870 revision also centralized the process for claiming copyright. Previously, registrants would have to submit their works to the local district court; after 1870, all claims had to be directed to the Library of Congress. Bowker, *Copyright,* loc. 1299–1300.

It took until 1903, when the Supreme Court decided *Bleistein v. Donaldson Lithographing Co.,* for illustrations used for commercial purposes to be fully protected, as the 1870 act was ambiguously worded. Writing for the court, Oliver Wendell Holmes reinterpreted the statue such that it was no longer necessary to judge what was fine art by aesthetic standards. Instead of contrasting "fine art" with popular art, Holmes wrote that the law meant to differentiate aesthetic works of all purposes with works for mechanical or industrial purposes, and thus commercial art (like illustration) could be copyrighted. *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239 (1903). Accessed via https://supreme.justia.com/cases/federal/us/188/239/ (accessed Aug. 2018).

72 The case in question was *Davis v. Benjamin.* Bowker, *Copyright*, loc. 1856.

73 To elaborate: *works of art* refer to actual paintings or sculptures—what Richard Rodgers Bowker referred to as "the fine arts." *Reproductions of works of art* meant reproductions of the former category, including etchings, engravings, and casts, etc. that "contain in themselves an artistic element distinct from that of the original work." Whether this included half-tones or not is unclear; Bowker only mentions half-tones insofar as to say that they are not included under the *Photography* category. It thus follows that a James Montgomery Flagg illustration, for instance, might be eligible for copyright first in its painted form as a *work of art*, and then subsequently in its half-tone form as either a *reproduction* or a *pictorial illustration.* Noteworthy, here, is that a single visual idea only appears to be protectable in its physically realized forms. Bowker, *Copyright,* loc. 4061.

74 Bowker, *Copyright*, loc. 4061.

75 "Testimony," box 9, folder 54, LMR.

76 "Letter of October 21," ibid.

77 Bowker *Copyright*, loc. 4028.

78 Bowker, *Copyright*, loc. 4351.

79 "Testimony," box 9, folder 54, LMR.

80 "Testimony," ibid.

81 For example, both the Meek Company and LIFE argued to each other about where the idea had come from, with the Meek Company claiming that its artist had conceived of its piece independently, and LIFE arguing that he had clearly copied. In fact, none of this actually mattered, at least according to Bowker's *Copyright*: under the 1909 law, intent was not relevant to deciding whether an image had been copied, and ignorance was not an excuse: "Infringement is a question of fact rather than of intent. It is not a valid defense that the infringer is ignorant; nor, on the other hand, can any one be held for intention to infringe, where the act of infringement has not been accomplished." But Bowker also hedged his bets, explaining that "The new American code, nevertheless, recognizes knowledge and intent in certain cases of punishment or damages by the use of the words "willfully" and "knowingly." Bowker, *Copyright*, loc. 4486.

82 After a few letters of brinksmanship, Huyler's agreed to pay LIFE for the use of *Arms and the Man.* It tried to negotiate the price down to $400 but was firmly rejected by the magazine. "Letter of November 10," box 9, folder 54, LMR. The candy company eventually paid $500.

83 There is some reason to believe that Gibson himself was responsible for *Collier's* adoption of LIFE's strategy. Just several years before leaving *Life*, Gibson appears to have tried—much to Miller's ire—to outfox LIFE at its own game: he had attempted to sell a book of his images in Britain without LIFE's consent by taking

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press

advantage of ambiguity in copyright holdings between nations as well as his own standing in the company. He seems to have been foiled but signed on to work with *Collier's* only several years later. "Gibson" and "Henderson," box 8, folder 15, LMR.
84 Mott, *History of American Magazines*, 4:565.

Joshua Schwartz is a PhD candidate at Columbia University. His research focuses on the consolidation of middle-class cultural identity alongside the rise of illustrated popular magazines in the Gilded Age and Progressive Era.

Cite this article: Joshua S. Schwartz, (2021) "Publish the Picture at Your Peril: Visual Ideas and the Commercial Apparatus of *Life* Magazine," *The Journal of the Gilded Age and Progressive Era* **20,** 301–324. https://doi.org/10.1017/S1537781420000821

https://doi.org/10.1017/S1537781420000821 Published online by Cambridge University Press