1968

*May 30, 31
*June 3
Dec. 20

GEORGES CUISENAIRE (*Plaintiff*) .....APPELLANT;

AND

SOUTH WEST IMPORTS LIMITED (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Coloured rods for the teaching of arithmetic—Explanatory book written by plaintiff—Whether rods subject to copyright—Copyright Act, R.S.C. 1952, c. 55, ss. 2(v), 4(1), 20(3).

The plaintiff sued the defendant company for infringement of an alleged copyright in coloured rods used for teaching arithmetic in primary school grades. These rods were made in conformity with a method of teaching arithmetic which was fully described in a book written by the plaintiff, and were referred to in the plaintiff's pleadings as "works". The plaintiff is not alleging the infringement of a copyright in any part of his book. The Exchequer Court dismissed the action and held that the rods were not a proper subject matter of copyright in this country. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The rods are not things in which copyright can be had. The originality consisted in the ideas as they were expressed in the book and the rods are merely devices which afford a practical means of employing and presenting the method. The "original" work or production, whether it be characterized as literary, artistic or scientific, was the book. In seeking to assert a copyright in the rods which are described in his book as opposed to the book itself, the plaintiff is faced with the principle that one may have a copyright in the description of an art; but, having described it, you give it to the public for their use; and there is a clear distinction between the book which describes it, and the art or mechanical device which is described.

Droit d'auteur—Violation—Réglettes coloriées pour servir à l'enseignement de l'arithmétique—Livre d'explication écrit par le demandeur—Réglettes ne sont pas susceptibles de faire l'objet d'un droit d'auteur—Loi sur le droit d'auteur, S.R.C. 1952, c. 55, art. 2, 4(1), 20(3).

Le demandeur a poursuivi la compagnie défenderesse pour violation d'un droit d'auteur qu'il prétend avoir sur des réglettes coloriées employées pour enseigner l'arithmétique dans les écoles primaires. Ces réglettes ont été fabriquées d'après une méthode d'enseigner l'arithmétique, décrite en détail dans un livre écrit par le demandeur, et sont désignées dans la plaidoirie du demandeur comme étant des «œuvres». Le demandeur ne prétend pas qu'il y a eu violation d'un droit d'auteur découlant de son livre. La Cour de l'Échiquier a rejeté l'action et a statué que les réglettes ne pouvaient pas faire l'objet d'un droit d'auteur dans ce pays. Le demandeur en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Ritchie and Hall JJ.

Les réglettes ne sont pas de objets sur lesquels on peut avoir un droit d'auteur. L'originalité se trouve dans les idées telles qu'elles sont exprimées dans le livre et les réglettes ne sont que des dispositifs fournissant un moyen pratique d'employer et de présenter la méthode. L'œuvre ou la production «originale», qu'elle soit caractérisée comme littéraire, artistique ou scientifique, c'était le livre. En cherchant à revendiquer un droit d'auteur dans les réglettes qui sont décrites dans le livre par opposition au livre lui-même, le demandeur va à l'encontre du principe qu'on peut avoir un droit d'auteur dans la description d'un art; mais, une fois que vous avez décrit l'art, vous le donnez au public pour son usage; et il y a une distinction claire et nette entre le livre qui décrit cet art, et l'art ou le dispositif mécanique qui est décrit.

APPEL d'un jugement du juge Noël de la Cour de l'Échiquier du Canada[1] dans une action pour violation d'un droit d'auteur. Appel rejeté.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1] in an action for infrigement of copyright. Appeal dismissed.

Christopher Robinson, Q.C. for the plaintiff, appellant.

John C. Osborne, Q.C. and *R. M. Perry,* for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Noël of the Exchequer Court of Canada[1] on a "special case" directed to be tried by order of the President of that Court, in accordance with the rules thereof, for the purpose of determining certain issues which were common to four separate actions brought by the plaintiff and consolidated for the purpose of determining the issues raised by the "special case".

The actions were for the infringements of the plaintiff's alleged copyright in two sets of "coloured rods of uniform square at centre cross section and of ten different lengths and colours for the teaching of the science of arithmetic in primary school grades". The issues raised by the "special case" were:

1. Is there a copyright in the plaintiff's "rods" which he described as "works" in his various statements of claim?

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[1] [1968] 1 Ex. C.R. 493, 37 Fox Pat. C. 93, 54 C.P.R. 1.

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2. Who is the author?

3. Who owns the copyright?

It is obvious that a negative answer to the first question is sufficient to dispose of the case and Mr. Justice Noël, in a most comprehensive decision, concluded by saying that the "rods are not a proper subject matter of copyright in this country".

The rods in question were made in conformity with a system or method of teaching arithmetic which is fully described in a book written by the appellant and entitled *Les Nombres en Couleurs,* and, as has been indicated, they were referred to in the plaintiff's pleadings as "works". Paragraph 8 of the Statement of Claim reads as follows:

> Each of the said works is an original production in the scientific domain and is one of the works referred to by the expression 'every literary, dramatic, musical and artistic work' in section 4(1) of the *Copyright Act.*

The relevant provisions of the *Copyright Act,* R.S.C. 1952, c. 55, read as follow:

> 4. (1) Subject to the provisions of this Act, copyright shall subsist in Canada for the term hereinafter mentioned, *in every original literary, dramatic, musical and artistic work,...*

The italics are my own.

Section 2.(*v*) provides that:

> 'every original literary, dramatic, musical and artistic work' includes every original production in the literary, *scientific* or artistic *domain,* whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and *plastic works* relative to geography, topography, architecture, or *science.*

The italics are my own.

In aid of the construction which appellant's counsel seeks to place upon these sections of the statute, he relies upon the presumption which he contends is created by s. 20(3) of the Act which reads:

> 20. (3) In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,
>
> (*a*) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
>
> (*b*) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;...

The question which lies at the threshold of this appeal is whether the rods in question are things in which copyright can be had, and if that question is answered in the negative, it does not appear to me to be necessary to comment on the close analysis to which the learned trial judge has subjected the various statutory provisions.

The evidence discloses, and indeed it appears to me to have been admitted, that the plaintiff is not alleging the infringement of copyright in any part of his book *Les Nombres en Couleurs*. I take, for example, one question and answer on cross-examination where Mr. Osborne asked:

> Q. Here is Exhibit No. 5, a book entitled "Les Nombres en Couleurs". Do you claim that any defendant in Canada has copied any part of this book? A. No, I do not think so; my book, no. They are using my book to illustrate the rods that they are manufacturing.

Even if Mr. Cuisenaire's method of teaching could be considered as an "original production... in the... scientific domain" within the meaning of s. 2(*v*) of the Act, the originality consisted in the ideas as they were expressed in his book and in my opinion the rods are merely devices which afford a practical means of employing the method and presenting it in graphic form to young children. The "original" work or production, whether it be characterized as literary, artistic or scientific, was the book. In seeking to assert a copyright in the "rods" which are described in his book as opposed to the book itself, the appellant is faced with the principle stated by Davey L.J. in the case of *Hollinrake v. Truswell*[2], where he says:

> No doubt one may have copyright in the description of an art; but, having described it, you give it to the public for their use; and there is a clear distinction between the book which describes it, and the art or mechanical device which is described.

This principle was discussed and adopted by President Thorson in the Exchequer Court of Canada in *Moreau v. St. Vincent*[3], where he said:

> It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law

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[2] [1894] 3 Ch. 420 at 428.

[3] [1950] Ex. C.R. 198 at 203, 10 Fox Pat. C. 194, 12 C.P.R. 32, 3 D.L.R. 713.

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of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent.

This principle is recognized by Dr. Fox in the 2nd edition (1967) of his work *The Canadian Law of Copyright and Industrial Designs* where he says, at page 45:

> Not only is it not required that there should be any originality in the idea of the work, but a novel idea as distinct from the form in which the idea is expressed is not capable of being the subject of copyright protection.

I have considered the many Canadian cases cited by Dr. Fox, all of which appear to illustrate this principle.

What is alleged in the present case is that the respondent has distributed to school trustees and others sets of rods which are substantially the same as those which the appellant claims to have made and that the respondent has thereby "without consent of the plaintiff reproduced and authorized the reproduction of the said works or a substantial part thereof . . ." What has in fact happened is that the respondent has adopted and used the ideas contained in the appellant's literary work and I find that its actions come directly within the language employed by President Thorson in the above quoted excerpt from his reasons for judgment. The matter is graphically illustrated by the brief quotation from the reasons for judgment of Page J. in *Cuisenaire v. Reed*[4], cited by the learned trial judge, where the question at issue was whether the use and distribution of "rods" made in conformity with the directions contained in the present appellant's book, constituted a breach of copyright under the *Copyright Act* then in force in Australia. Pape J. said, at page 735:

> Were the law otherwise, every person who carried out the instructions in the handbook in which copyright was held to subsist in *Meccano Ltd. v. Anthony Hordern and Sons Ltd.* (1918) 18 S.R. (N.S.W.) 606, and constructed a model in accordance with those instructions, would infringe the plaintiff's literary copyright. Further, as Mr. Fullagar put it, everybody who made a rabbit pie in accordance with the recipe of *Mrs. Beeton's Cookery Book* would infringe the literary copyright in that book.

[4] [1963] V.R. 719.

For these reasons I do not think that the "rods" in question are things in which copyright can be had and I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.