

BETWEEN:

GEORGES CUISENAIRE PLAINTIFF;

AND

SOUTH WEST IMPORTS LIMITED DEFENDANT.

Ottawa

1967

Oct. 23-25

Dec. 7

Copyright—Infringement—Coloured rods used for teaching arithmetic— Whether subject to copyright—Whether “artistic work” or of “artistic craftsmanship”—Whether copyrightable as “original production in scientific domain”—Presumptions in favour of copyright and author’s ownership—Extent of—Copyright Act, R.S.C. 1952, c. 55, ss. 2(b) and (v), 4(1), 20(3).

Plaintiff sued for infringement of copyright in sets of coloured rods of different lengths used for teaching arithmetic to children. (Plaintiff was also author of a book which set out a teaching system employing such rods)

Held, dismissing the action, the rods were not subject to copyright in Canada.

1. The rods were not an “artistic work” within the definition of s. 2(b) of the *Copyright Act* for although coloured in a manner to please children they were never intended primarily as artistic articles but as tools for a particular purpose and as such were not entitled to

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protection. Nor were they works of "artistic craftsmanship" within the meaning of s. 2(b) since no craftsmanship was involved in their production. Nor were they "plastic works relative to science" within the meaning of s. 2(v) since, being wood, they were not mouldable or phable.

2. The rods were not subject to copyright under s. 2(v) as an "original production in the ... scientific ... domain". The inclusion of these words in s. 2(v) is not to be construed as altering the ambit of copyright in any substantial way; the work must still be "an original literary, dramatic, musical or artistic work" as required by s. 4(1) in the normal meaning of those words and in the light of the definitions in s. 2.
3. Notwithstanding the presumptions in favour of copyright and of the author's ownership thereof which arise under s. 20(3) in an infringement action where the defendant disputes the existence of copyright or the plaintiff's title thereto the plaintiff must still establish that the work is within the definition of s. 4 as further defined by s. 2 and so subject to copyright.
4. An article does not cease to be subject to copyright because it is functional or utilitarian or because it is patentable.

Cuisenaire v. Reed [1963] Vict. R. 719 discussed; *Baker v. Selden* (1879) 101 US 99, *Gelles-Widmer Co. v. Multon Bradley Co.* (1966) 136 USPQ 240, *King Features Syndicate, Inc. v. O. and M. Kleeman, Ltd.* [1941] A.C. 417, referred to.

ACTION for infringement of copyright.

Christopher Robinson, Q.C., James D. Kokonis and G. Hazlewood for plaintiff.

J. C. Osborne, Q.C. and Rose-Marie Perry for defendant.

NOËL J.:—This is an action for infringement of copyright. The plaintiff alleges that he is the author of the following works: (1) a set of ten coloured rods (known as "réglettes") and (2) a set of 241 coloured rods, of different lengths, for the teaching of the science of arithmetic in primary school grades and claims that he is the owner of any copyright that subsists in Canada in either of these works. He therefore requests relief by way of (1) a declaration that he is the owner of such copyright and that the defendant has by its acts infringed his copyright therein; (2) the issuance of an injunction restraining the defendant from further infringing his copyright; (3) damages in respect of the infringement; (4) such part of the defendant's profits as he has made from such infringement; (5) delivering up of all infringing copies of the said work; (6) damages for the conversion of such infringing copies as are

no longer in the defendant's possession, and (7) a reference to inquire into and report upon the amount of the damages and profits.

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This is one of a number of actions by the plaintiff in this Court against the following defendants: The Board of School Trustees of School District No. 39 (Vancouver), (No. A-661); Columbia Plastics Ltd., (No. A-673) and Benjamin W. Sutherland, carrying on business under the firm name and style of B-Wys Sales Co., also known as B-Wys Nissen Sales Company, *et al.* (No. A-675).

Upon defendant's motion by notice, dated August 11, 1967, for an order to consolidate this action and the three above actions and to try as a special case (pursuant to Rule 149 or 155C) in advance of the trial the issue as to whether the copyright subsists in the works in which it is alleged by the plaintiff to subsist and for such further and other order as this Court might make, the President of this Court on August 15, 1967, ordered that the four actions proceed in accordance with the following directions:

that the said actions come on for hearing before the Court and be heard together on the same evidence on the 23rd day of October, 1967, at 10:30 o'clock in the forenoon or so soon thereafter as the same may be heard, subject to the following conditions:

- (a) that counsel for the parties agree on one Statement of Issues of Fact in Dispute in the four actions;
- (b) that one set of counsel appear for the defendants in all of the said actions;
- (c) that the hearing referred to in this order be with reference to all issues except the issue of infringement. (After the hearing has been conducted, counsel for the plaintiff or counsel for the defendants may apply to the Court for further directions with respect to the hearing of any issue or issues that remain outstanding;)
- (d) that the Court will pronounce its decision with reference to action A-674 but counsel for either the plaintiff or the defendants in the other three of the said actions may move to have the decision made applicable with respect to any such action or actions or may move for judgment in any such action or actions if so advised.

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Pursuant to subparagraph (a) above, counsel for the parties, for the purposes of these actions only, agreed on a statement of issues of fact in dispute in the four actions as follows:

AGREED FACTS

For the purposes of these actions only, the parties agree:

(1) That the plaintiff resides in the City of Thuin, Belgium.

(2) That Belgium is a country which has adhered to the Convention and the additional protocol set out in the Second Schedule of the Copyright Act and that the statements contained in the letter dated August 31st, 1967 (Exhibit 1 hereto) are admitted as facts.

(3) That the statements contained in the leaflet entitled "The Colour-Factor Set in Historical Perspective" (Exhibit 2 hereto) are admitted as facts.

(4) That the box labelled "The Colour-Factor Set" (Exhibit 3 hereto) contains a sample of the colour-factor set referred to in the leaflet Exhibit 2 hereto and that such colour-factor sets are sold in England.

(5) That the box marked "HABA Spiele" (Exhibit 4 hereto) contains a sample of the Froebel sticks referred to in the leaflet Exhibit 2 hereto as sold in Canada, and that the following is the English translation of the German language markings on the said box:

On the Front:

"While playing, count with multi-coloured sticks"

Yellow End:

"Counting stacks" "Highly recommended for school use for learning to count"

(6) That the box labelled "Nombres en couleur—Cuisenaire—Numbers in Colour" (Exhibit 5 hereto) contains a sample of the alleged work described in paragraph 3 of the statements of claim (paragraph 3(2) in Action No. A-674) as sold in certain parts of Canada.

FACTS IN DISPUTE

The facts in dispute between the parties are:

(1) Whether the plaintiff is a citizen of Belgium.

(2) Whether the plaintiff was the author of the alleged work, or works in Action No. A-674, described in paragraph 3 of the statements of claim.

(3) Whether the plaintiff was a citizen of Belgium in 1947 at the date of the alleged making of the alleged work, or works in Action No. A-674 described in paragraph 3 of the statements of claim.

(4) Whether the alleged work, or works in Action No. A-674, described in paragraph 3 of the statements of claim was first published in Belgium by the issue of copies thereof to the public in Belgium in 1952.

(5) The alleged facts set out in paragraph 7 of the statements of claim. (i.e. that the making of the works involved the skill and labour both of selecting the colours for the rods and of selecting the relationship between length and colour of the rods and the work of the set of

241 rods involved in addition to the skill and labour of selecting the number of rods of each different length and colour to be included in the set).

(The words in brackets are mine).

(6) Whether the plaintiff is the owner of any copyright that may subsist in Canada in the alleged work, or either of the alleged works in Action No. A-674, described in paragraph 3 of the statements of claim.

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All the issues are therefore before this Court except the issue of infringement and they can be briefly set out as follows: (1) is there copyright in the plaintiff's works; (2) who is the author and (3) who owns the copyright.

Counsel for the parties further agreed that neither of them would adduce any evidence at this stage beyond what has already been adduced, nor would they put it in anything from discoveries.

The decision of this Court will, therefore, be rendered on the basis of the above statements of agreed facts and facts in dispute between the parties together with the evidence of the plaintiff, Cuisenaire, which was taken on commission on the eighth day of April, 1964, in London, England, and the exhibits produced during the taking of the evidence.

In order to deal properly with the issues involved herein, it will be helpful to describe briefly the manner in which the plaintiff produced his rods (réglettes) and the use made of them.

The plaintiff developed a new method of teaching arithmetic in primary schools with the aid of these wooden rods which are uniform cross-sections being 1 centimeter square of varying colours and lengths and which he described in a book published in 1952. Included in this book (Ex. 5 of Cuisenaire's examination) is a table which sets out the respective numbers of the rods, their length and colour.

He stated that he was born at Quaregnon, near Mons, Belgium, on September 7, 1891, that his father was a Belgian, that he has lived in Belgium all his life and that he is a Belgian national or citizen. He studied music at the Conservatoire de Mons from 1903 to 1907 and between 1907 to 1911 received instruction at the Training College for Teachers at Mons. In 1911, he started teaching at Thuin, in Belgium, and in 1920 was awarded, at Mons, a diploma for the teaching of music. In 1937 he became

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director of education at Thuin and in 1947 retired on pension but retained the honorary post of inspector of schools.

During his teaching career, Cuisenaire states that he encountered difficulties with pupils learning arithmetic and his idea was to produce a set of physical things which would each differ in size and in colour from the others and represent numbers because he found that children had difficulty in grasping the abstract idea of the difference between numbers. In 1925 he first started using buttons without colours to teach arithmetic to children and this produced no reaction. He then observed that if the same buttons of the same size were coloured in the same colour, they produced a reaction. He also observed that if buttons of different sizes and different colours were used, he obtained better results. He found that children were attracted by colour and that they usually have a preference for red. The colours, according to Cuisenaire, have a relationship and a certain wave length adding "we go into yellow which is less strong than red and then green, which are the basic colours with blue, of course". He then realized that there was a relationship between colour and sound and using a sketch of notes and colour strips (produced as Ex. 1 at his examination) he explained that there was some relationship between numbers and musical notes in that to produce a musical note one octave lower than another note, a pipe twice the size of that used to produce the first note would have to be used and that the same would apply to a series of numbers in geometrical progression.

As he saw that the coloured strips could translate the musical idea, he got his pupils to make some coloured strips of paper with the same colours as those which appear on the above mentioned sketch. He then had the children colour these strips first on one side and then on both sides, the colours being chosen from those on the musical chart or sketch. He claims that it took him more than twenty years to obtain the desired colours.

The rods made in accordance with Cuisenaire's system are ten (10) in one case and two hundred and forty-one (241) in the other. They are cut from lengths of wood one square centimeter in cross-section and in length ranging in centimeters from one centimeter to ten centimeters. Each

of the ten rods has a characteristic colour according to its length. They fall into three families based upon the primary colours, yellow, red and blue, together with white and black. The smallest rod, namely, the cm cube, is a sub-multiple of all the numbers and is white. The seven centimeter rod is black, the five and ten centimeter rods are respectively yellow and orange. The three centimeter, six centimeter and 9 centimeter rods are respectively light green, dark green and blue. The series 2, 4 and 8 are red, crimson and brown. The colours in these family groups deepen as the lengths increase, and this together with other features of the rods, according to Cuisenaire, result from the fact that the latter was impressed with the musical relationship of varying depths in pitch.

Cuisenaire states that in 1947 he made the first rods, presumably the ten rod set. Ex. 3, and that "three sets were made by a carpenter in the town". There were 241 rods in one set and although the first set was made by a carpenter, Cuisenaire states that he did help him. He told the carpenter what to do and indicated the length of the rods to him. As for the coloring, he consulted a specialist in colours. The carpenter worked under his direction and the rods were coloured in accordance with the colours discovered by Cuisenaire. In cross-examination, although he stated that the sets of rods were made by a carpenter by the name of Corlte, he added that "It is quite possible that I put my hand to it. He was making them to please me. I did not pay for them." In re-examination he explained that he was present during the operation and told the carpenter what to do. He also admitted, at p. 29 of the examination, that it may have been that these three sets of rods numbered 291, instead of 241, because "at the beginning there were 100 pieces of these 1 centimeter (uncoloured) ones". It was only later, or probably in 1952, that it was realized that 50 of these were sufficient. Asked as to whether it was of any importance what the finished rods looked like, he answered "as a teacher, from the teaching point of view, it was very important to me to see if the results were good or bad They had to be attractive. It has been proven, and still proven in the whole world, that children everywhere are attracted by beautiful colours." Re-examined by his counsel, Cuisenaire stated with respect to the colouring of his rods that they were coloured by experts in the application

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of colours to wood who were artists. He added that the final decision as to the shades of colour was his but that he was not capable of realizing that artistically.

He used the three sets of rods made in 1947 for about five years and then in 1952 they were sold commercially. In order to do this, he had to obtain a publisher and a manufacturer and on March 15, 1952, Duculot-Roulin of Tamines, Belgium, province of Namur, was chosen to manufacture and manufactured his rods. A box of rods (Ex. 4 of the examination) was produced as one of the first editions of the rods manufactured under a contract with the above manufacturer.

Cuisenaire's explanatory book (Ex. 5 at the examination) dealing with his teaching system was also published in 1952 at the same time as the rods were sold by Duculot-Roulin in Belgium. He also stated that the rods were not sold in Belgium before 1952 nor was the book or work published before that date and that he was the author of all the material in his book.

He declared at p. 177 of the examination, that at no time had the Belgian Government or the Belgian Ministry of Education ever claimed rights in his system adding "I would like to see that, they have no right to it . . . This would be incredible".

At p. 25, Cuisenaire states that he does not claim that any part of his book *Les nombres en couleurs* was being infringed by any of the defendants but that the latter were using his book to demonstrate their rods.

Asked by Mr. Osborne at p. 25 whether he considered that any defendant in Canada has infringed any part of the work entitled *Les nombres en couleurs* he answered:

A They are manufacturing part of my system. I think they are infringing upon my invention.

Q Do you claim that any defendant in Canada has produced or reproduced the whole or part of the work entitled "Les nombres en couleurs"?

A. Yes, definitely, a certain part of it by producing those rods without my permission.

He then, lower down, was asked by counsel for the defendants

Q. Am I right in believing that the literary and/or artistic work referred to in paragraph 4 is in fact the set of rods illustrated by Exhibit No 4?

and answered

A. Why ask me this question when I have already proved this morning that this is a literary, artistic and pedagogic work

He then finally admitted to the Commissioner at p. 26 of the examination that the rods, Ex. 4, are those referred to in paragraph 4 of the statement of claim. He also later stated that the "literary compilation and/or artistic work" referred to in paragraph 5 is the set of rods illustrated by Ex. 4.

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He was then asked by counsel for the defendants whether his only complaint in the Canadian litigation is that one or more of the defendants have copied the rods illustrated by Ex. 4, and he answered as follows:

A. I think so, but once again you must know that better than I do.

He agreed on p. 35 that his purpose in designing the rods was to help educate children and that the colour of the rods performs a function in teaching the children and is of capital importance. He stated at p. 36, in answer to the question whether his work in developing his theory to assist in the education of children had been part of his educational work for the Belgian Government, that nobody had helped him and that on the contrary "lots of people try to fight me". Asked whether this work he was doing with regard to his system was part of his duties as an employee of the Government, he answered that he was not made to do research. He was further examined in this respect as follows:

Q. You had no agreement with the Belgian Government or Department of Education with respect to copyright in your work?

A. I have deposited, as it is requested by law in Belgium, at a certain date, my invention, that is, my book and all the material relevant to my system.

Q. I just asked simply this, am I right that in 1947 you did not have any agreement with the Belgian Government or Department of Education with respect to copyright in any of your work?

A. No. There is no contract, one never has a contract and one is completely free. In 1947 I had not published anything, yet I had spent a little fortune in my work and in my research.

The plaintiff herein had a rather difficult task in that he was faced by a decision in Australia in *Cuisenaire v. Reed*¹ where Pape J. held that his rods could not be the subject of copyright because the Australian *Copyright Act* (based on

¹ [1963] V.R. 719.
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the *Imperial Copyright Act* of 1911) did not protect works of craftsmanship *per se*, but only of artistic craftsmanship and that his rods were not artistic. Pape J. also held that as no special skill or training was required to cut the strips of wood in predetermined lengths, and to colour them, no craftsmanship was involved in their production and they were not works of "artistic craftsmanship" within the definition of the Act.

The allegation in the Australian case was that the defendant, by making the rods, had infringed the plaintiff's book or books by constructing in three dimensions articles in accordance with the directions in the tables in the book and that, therefore, these rods were part of the work.

The plaintiff, in the present instance, has taken a different position and claims that these rods, considered by themselves, are a work in which copyright subsists as an artistic work or as a work of artistic craftsmanship, although they must be considered against the background of their development and are part of a larger overall work, his book.

As a matter of fact, the plaintiff, by the amended statement of facts, deliberately excluded, in describing the works on which he relies, his literary work *Les nombres en couleurs* as well as any reference to the system, relying only on two single works, the two sets of rods, one of 10 and the other of 241 pieces, and merely mentioning that the rods are "for the teaching of the science of arithmetic in primary school grades". Pape J. in the Australian case held that the rods were not artistic on two main grounds which were (1) that the definition of "artistic" in section 2(b) is an exhaustive definition and although it uses only the word "includes" it means "means and includes" and, therefore, the artistic works contemplated are restricted to "painting, drawing, sculpture" even if "artistic" here is a generic label which was intended to include subject-matters possessing no elements of artistic quality at all and (2) that "artistic" with the word craftsmanship has a narrower meaning, does not fall within the wider scope of artistic as defined above and must have an artistic element. He also held that the plaintiff's works were not works of craftsmanship.

I should point out here that the definitions of "artistic work" and "literary work" as set out hereunder are exactly

the same in the Canadian statute as they were in the Australian statute that Pape J. had under consideration. They are:

2. In this Act,

. . .

(b) "artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;

. . .

(n) "literary works" includes maps, charts, plans, tables and compilations;

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There is, however, a difference between the Australian Act and the Canadian Act in that the latter, since 1931, contains section 2(v) which appears to have been taken from article 2 of both the Berne (1908) and Rome (1928) Conventions (although the Canadian legislation, in addition to the words literary and artistic, added the words "dramatic" and "musical") and thrown into the Canadian Act in an attempt to comply with its international commitments when it adhered to the Convention on the basis that since Canada had undertaken to protect works defined in that way, it was essential that our statute should so define them. Canada did not adopt the definition which is contained in both the Berne Convention of 1908 and the Rome Convention in 1928, until 1931 because the effect of the requirement of registration under the Act of 1906 was to deny to Canada membership in the International Copyright Union of Berne.

Section 2(v) of the Canadian *Copyright Act* reads as follows:

2. In this Act,

. . .

(v) "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 emphasis is mine).

The plaintiff's position with regard to the Australian decision is that, as the Australian Act did not have a comparable section 2(v), Pape J. could only inquire as to whether the rods were an artistic or literary work within the restrictive definitions of these terms in that Act and

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that all he had decided, therefore, was that they could not fit into either category. Counsel for the plaintiff also submits that Pape J. came to the conclusion that proof of compliance with some of the conditions required in Australia for a foreign author to obtain copyright (the equivalent of our section 4 of the Canadian Act) had not been sufficient. He urges that another reason for the failure in the Australian case was because the presumption sections (of the existence of copyright, of authorship and ownership) are not nearly as strong in Australia, where they disappear once the question of copyright or authorship has been put in issue, as they are in Canada where they subsist even when the question of copyright or authorship is put in issue.

He submits that even assuming Mr. Justice Pape was right, and that the works do not fall within the definition of an artistic or literary work, they do fall within the definition of section 2(v) of the Canadian Act and, therefore, the presumption of section 20(3) of the Act applies and they are presumed to be works in which copyright subsists and the plaintiff is presumed to be the owner of such copyright.

The plaintiff, moreover, takes the position that Pape J. was wrong in holding that his rods did not fall within the definition of an artistic work or that they are not works of artistic craftsmanship and that in any event they do fall within section 2(v) which encompasses the definition of artistic work as defined in section 2(b), of literary work as defined in section 2(n) as well as musical and dramatic works and gives a further real meaning and significance to all of these terms.

It is also submitted on behalf of the plaintiff that all the evidence points toward the plaintiff having fulfilled the condition of citizenship and publication which entitles him to ownership of copyright in Canada of his rods. Furthermore, the plaintiff claims that the evidence is that at the time he made his rods he had no intention of multiplying the design (if one can assume these rods are valid designs) and, therefore, they cannot fall within section 46(1) which would have the effect of taking them out of the *Copyright Act*. This section reads as follows:

46. (1) This Act does not apply to designs capable of being registered under the *Industrial Design and Union Label Act*, except

designs that, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

The position of counsel for the plaintiff is that it is not even necessary to say whether the works are artistic, literary, musical or dramatic because as long as such works are *original productions in the scientific domain*, they are within the expression "every original literary, dramatic, musical and artistic work". He, in other words, takes the position that he does not have to say any more than that these works are an original production in the scientific domain and need not say whether they are artistic, literary, dramatic or musical.

The defendant, on the other hand, submits that section 2(v) should be interpreted as if the words "in one or other of these categories" were inserted therein to read as follows: "every original literary, dramatic, musical and artistic work includes every original production" *in one or other of these categories* "in the literary, scientific or artistic domain" even if in order to do so one must make a repetition and read into the text of the section additional words.

There was apparently nothing novel in saying that copyright could subsist in scientific works as there were areas under the law prior to 1931 in which scientific works were protected. As a matter of fact, a literary work in the scientific domain was always protected as a literary work as well as certain artistic works in the scientific domain such as charts and the question here is whether the inclusion of section 2(v) into our Act in 1931 with the words "*includes every original production in the literary, scientific or artistic domain whatever may be the mode or form of its expression...*" (which are of a descriptively wide scope) has extended the classes of matters that can be the subject of copyright under the Act to a point where it could comprise any original production in the scientific field.

Before dealing with this question, it may be useful to mention at this stage that the *Copyright Act* protects an original work which must be original, not in the sense that it was not thought of before, but in the sense that it originated with the author who must, in addition, have exercised skill and labour in producing it. With regard to such skill and labour, the emphasis is upon the object of

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the author in creating the work rather than on the reaction of the viewer to the completed work, for it is commonplace in copyright law that it is immaterial whether the work has any merit at all (cf. *Walter v. Lane*²). It is also commonplace in copyright law that the protection given by the *Copyright Act* is only to the expression of an idea or an art and not to the idea or art itself.

This was clearly set out in *Baker v. Selden*³ by Mr. Justice Bradley who delivered the opinion of the Court. In this case, a claim to the exclusive property in a peculiar system of bookkeeping by the author of a treatise in which that system is illustrated and explained was rejected for the reasons stated by Bradley J. at p. 102:

. . . there is a clear distinction between the books as such, and the art which it is intended to illustrate . . . A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective,—would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described herein.

Copinger and Skone James on the Law of Copyright, 8th edition, express the same idea at p. 42 of their treatise where they say that:

Copyright protection is given to literary, dramatic, musical and artistic works and not to ideas, and therefore it is original skill or labour in execution, and not originality of thought which is required.

Although there are some old decisions, such as *Baker v. Selden* (*supra*) referred to by Pape J. in *Cuisenaire v. Reed* (*supra*) which refuse the protection of copyright to objects which have a functional use or which could form the subject of a patent or invention, there is nothing that I can see in the *Copyright Act* to support the argument that intended use or use in industry of an article or its patentability otherwise eligible for copyright bars or invalidates registration or protection and I cannot read such a limitation into the *Copyright Act*. I could not, therefore, hold on the basis that the plaintiff's rods are not capable of being the subject of a copyright merely because they are partly functional or utilitarian in the sense that they are tools or counters, or because they could have been the subject of a

² [1900] A.C. 539.

³ (1879) 101 U.S. 99.

patent. I could not, moreover, deal with them as being industrial designs because in my view they are not proper subject matter for an industrial design as they are not ornamentation applied or to be applied to an industrial article.

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There must, on the other hand, I believe, be some limitation to what is protected by copyright as it cannot conceivably have been the intention of Parliament to protect by way of copyright, material of any kind or any type of object. Nor must it have been intended that all original productions in the scientific field be given protection for the life of the author and 50 years thereafter when they can also be patented as inventions and given protection for 17 years only even if the rights of a patentee are not entirely similar to those of a holder of a copyright.

The plaintiff's sets of rods will, therefore, have to be considered in the light of and against the above background and their "copyrightability" determined on a proper interpretation of the *Copyright Act* and particularly those sections which deal with the works contemplated therein.

I should, however, before determining whether plaintiff's rods are covered by our *Copyright Act* deal with his submission with regard to the presumptions of section 20(3) of the Act which reads as follows:

- (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 statute does not define *work* except to say in section 2(v) that "work" includes the title thereof when such title is "original and distinctive". Section 4, on the other hand, states that:

- 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, if . . .*

(The emphasis is mine).

The defendant submits that section 20(3) of the Act should be restricted to the works listed in section 4(1) otherwise they cannot benefit from the presumptions therein contained. Counsel for the plaintiffs on the other

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hand, takes the position that all this section 4(1) says is that copyright will subsist in every work which is an original literary, dramatic, musical or artistic work, if certain conditions are complied with adding that in section 20(3) of the Act, the term work is not qualified at all and that it should in no way be restricted to the works listed in section 4(1) of the Act. He claims that it is deliberately not qualified because if it were qualified, it would reduce the area of the presumptions.

This area of presumptions, according to the plaintiff, provided in section 20(3) extends to everything that is necessary to make a work one in which copyright subsists and he submits that if one comes into Court with a work, then it is assumed that that work is a work in which copyright subsists unless the defendant establishes that it is not. He contends that if in an action for infringement of a copyright in a work, the defendant in his defence merely contests that there is copyright in such work that the plaintiff is not the owner and there is no evidence on the subject and no argument addressed to it, then that is the end of the matter and the work is one in which copyright subsists and the author is the owner.

He indeed takes the position that it is not legitimate to qualify the unqualified word "work" in section 20(3) by a so-called definition of that word appearing in section 4(1) there being here no definition of work but merely a qualification as there is no definition of the word "work" in the Act. The Act, according to counsel for the plaintiff, merely uses the term in its ordinary signification and in some places qualifies the work in a different way.

He, therefore, concludes that as the plaintiff's works are works which are either artistic works or of artistic craftsmanship and, in any event, a production in the scientific domain, the presumptions of section 20(3) come into play and his works "are presumed to be works in which copyright subsists" unless the contrary is proved and he (as the author of the works) is presumed to be the owner of the copyright unless the contrary is proved.

I am afraid that I cannot agree with this submission as I must, I believe, hold that the words in section 20(3) "In any action for infringement of copyright in any work..." do refer to works as listed in section 4(1) of the Act, namely, "...every original literary, dramatic, musical and

artistic work” and the presumptions, therefore, only operate if the action is one for infringement of a work which is clearly within the above categories as defined, however, by sections 2(b), (g), (n) and (p) and as extended, if at all, by a proper interpretation of section 2(v) of the Act. If the works involved do not clearly fall within such provisions then, in my view, section 20(3) does not come into play and, therefore, the presumptions of the provision do not apply. It, therefore, follows that plaintiff can find assistance in the presumptions contemplated in the Act only after he has otherwise established that his rods are works of a class entitled to protection under the Act.

This he attempted to do on the basis that his rods are artistic or of artistic craftsmanship, or both, and that, in any event, even if they are not any one of those, they are a mode or form of expression of an original production in the scientific domain under section 2(v) of the Act even if it is not possible to relate them specifically to any one of the four categories mentioned therein.

I will first deal with plaintiff’s submission that any production in the scientific domain under section 2(v) can be a proper subject matter of copyright and that this is what his rods are as they are at least a partial expression of his scientific work which is his book *Les nombres en couleur*.

I believe that in order to deal properly with section 2(v) of our Act, some consideration should be given to the manner in which it came into the Act as well as to its wording and the inclusion therein of the word scientific which I must say is somewhat confusing. I should mention that the word scientific was in the Canadian Act as far back as the year 1875 and remained therein until the year 1924 when that statute was repealed (cf. *Revised Statutes*, 1875-1886 and 1906 chapter 70). The expression used in those statutes was “literary, scientific and artistic works”. The statute from 1924 to 1931 did not have the word “scientific” in it and this word returned in 1931 when, as already mentioned, section 2(v) was taken from the Rome Convention of 1928, the words “musical and dramatic” were added to the term “artistic and literary works” and the whole was inserted in the interpretation section of the Act probably, as I have already indicated, in an attempt to comply with the obligations undertaken by Canada as a member of the Convention.

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The manner in which the addition of section 2(v) came about and the somewhat confusing language used therein (by which I refer to the word "scientific" between the words literary and artistic) indicate, I believe, that not too much thought could have been given at the time to its possible effect on the subject matter of copyright in this country.

It therefore is at least an ambiguous section and considerable caution should, I believe, be exercised as a matter of construction in interpreting the language used so as to avoid absurd results and so as to avoid concluding that it involves a substantial change in the law that could not have been intended by Parliament.

Before an interpretation is given to this section which would lead to an absurdity or to a construction which would produce impractical or incongruous results (such as that products such as penicillin or tetracyclin, or IBM computers or telephone switchboard with complicated wirings with a colour code in the wiring that are ordinarily proper subject matters of inventions could, in addition to being patented be also copyrighted, and thereby given a longer life) a very close look should, I believe, be taken at this section with a view to restricting it to reasonable proportions and to giving it a meaning in conformity with the object of the *Copyright Act* and in accordance with the general accepted scheme of the protection that is to be given to industrial rights in this country. Indeed, when words used are ambiguous and uncertain, one must resist an interpretation which would lead to a very substantial change in the character of the subject matter involved.

Should I give this section the wide interpretation claimed by the plaintiff so that it covers everything that can be described, as an original production in the scientific field or as purely utilitarian which would indeed involve giving protection under our *Copyright Act* to objects which have been held in the past not to be the proper subject of a copyright (such as in *Hollinrake v. Truswell*⁴ where a cardboard pattern sleeve containing upon it scales, figures and descriptive words for adapting it to sleeves for any dimensions was held to be not "copyrightable" although it might be the subject of a patent as an instru-

⁴ [1894] 3 Ch D 420

ment or tool) and would considerably expand the law in this regard. I must, I am afraid, hold after a careful consideration of this matter, that the law cannot be extended in this manner by such an ambiguous provision.

I am also of the view that the subject matter of copyright must remain in line with the general nature of the works defined in sections 2(b) and 2(n) and with the examples given therein as well as in section 2(v) which all put a limitation on the meaning that would otherwise be given to them and I should add that plaintiff's rods do not fall into any class illustrated by these examples.

I must, therefore, conclude that section 2(v) of the Act has not altered the law in any substantial way, if at all, and that it is still necessary to find that the work in which copyright is claimed is an "original literary, dramatic, musical or artistic work" in the normal meaning of those words and in the light of the definitions in section 2 of the Act.

Indeed the only reasonable solution I can arrive at is that the Act only protects those original literary, dramatic, musical and artistic works referred to in section 4(1) of the Act and it therefore follows that it is still necessary before section 2(v) comes into operation to find that the work falls in one or the other of these four categories.

If such is the case, the question may well be asked what section 2(v) can mean as it should not be presumed that Parliament has spoken uselessly. I should think that the most that it can mean is that it may, within any one of those four categories, give a more extended meaning to the works included therein because of the words "whatever may be the mode or form of its expression" or because of the examples given in the subsection, than was considered right under the statute as it stood immediately before section 2(v) was put in.

Whatever such an extended meaning may be, it cannot, in any event, assist the plaintiff here as his rods clearly do not fall in the category of a dramatic or musical work nor of a literary work nor even in the category of an artistic work with which I will deal later.

I should add that by going to France which, as a member of the convention, has adopted the Berne definition of literary and artistic works by a provision that is very

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similar to our section 2(v), I find some support for the conclusions I have reached with regard to the construction to be given to our own section 2(v).

Although the Berne definition, in addition to the enumeration in section 2 of the Rome Convention, has been amended by additions adopted at the Geneva Convention of 1952 of cinematographical and photographic works it still contains those words which have given some difficulty of interpretation in the present instance as appears from a reproduction of the said section hereunder:

123.—Selon l'article 2, alinéa 1^{er}:

Les termes «œuvres littéraires et artistiques» comprennent toutes les productions du domaine littéraire, scientifique et artistique, quels qu'en soient le mode ou la forme d'expression, tels que: les livres, brochures et autres écrits; les conférences, allocutions, sermons et autres œuvres de même nature; les œuvres dramatiques ou dramatico-musicales; les œuvres chorégraphiques et les pantomimes dont la mise en scène est fixée par écrit ou autrement; les compositions musicales avec ou sans paroles; les œuvres cinématographiques et celles obtenues par un procédé analogue à la cinématographie; les œuvres de dessin, de peinture, d'architecture, de sculpture, de gravure, de lithographie, les œuvres photographiques et celles obtenues par un procédé analogue à la photographie; les œuvres des arts appliqués, les illustrations, les cartes géographiques, les plans, croquis, et ouvrages plastiques, relatifs à la géographie, à la topographie, à l'architecture ou aux sciences.

The comments in French *Juris classer commercial—Propriété littéraire et artistique*, fasc. 23, N° 124, p. 33, are of some assistance in appraising the significance of the word scientific which appears in both our section 2(v) and in the Berne or Brussels definition of "literary and artistic works" adopted by France:

124.—De prime abord, ce texte appelle une observation. Le domaine des œuvres littéraires et artistiques est indiqué par une longue énumération, mais la notion juridique d'œuvre littéraire et artistique n'est pas définie.

L'ensemble des mots précédant l'énumération ne constitue pas une définition suffisante. Les mots: «toutes les productions du domaine littéraire, scientifique et artistique» ne font que reprendre les qualificatifs littéraire et artistique; de plus, ils introduisent une certaine ambiguïté avec le qualificatif scientifique; il faut entendre par là que les écrits, plans, conférences ayant pour objet les questions scientifiques sont protégés au titre du droit d'auteur; il ne s'agit pas de la protection du travail scientifique, mais seulement de l'expression qui en a été donnée. (V. Ladas, 92—*Marcel Plaisant et Olivier Pichot*, p. 39—*Raestadt*, p. 55).

It is also interesting to note the comments which follow immediately after the above quotation on the same page

and which state that countries adhering to the Convention, in view of the generality of the above definition, are entitled to qualify their own legislation insofar as the Convention does not impose a definition:

En raison de l'insuffisance de la définition conventionnelle certaines divergences peuvent apparaître entre les solutions données par les juridictions nationales; celles-ci qualifieront leurs législations nationales respectives dans toute la mesure où la convention n'impose pas une définition. Il faut constater qu'il est difficile qu'il en soit autrement étant donné l'extrême généralité de la nation (V. *Raestadt*, p. 70).

I find additional comments on this matter in the same *Juris classeur* at fasc. 24, p. 33, with respect to the convention held in Geneva in 1952 where at p. 153, dealing with the words "scientific works" the commentator says:

153.—La question de savoir si par «œuvre scientifique» il ne fallait pas entendre les découvertes ou inventions qui devraient faire l'objet d'un éventuel «droit du savant» a été nettement résolue en sens contraire (Doc. DA/SR/5, p. 9). Il a été établi que, par œuvre scientifique, il fallait entendre la littérature scientifique en soi et non pas l'activité, les idées ou les créations des savants, incorporées ou non à un texte écrit. C'est la raison pour laquelle les termes de l'énumération contenue dans l'avant-projet (œuvres littéraires, artistiques et scientifiques) ont été renversés afin de permettre de faire figurer le mot «scientifique» à côté du mot «littéraire». (Doc. DA/SR/17, p. 2).

(The emphasis is mine).

I now turn to plaintiff's contention that if his rods are not original productions in the scientific domain, as contemplated by section 2(v) of the Act, they are either artistic works or works of artistic craftsmanship under section 2(b) of the Act. This section reads as follows:

2. In this Act,

...

(b) "artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;

Here again I must disagree with this submission. In my view, plaintiff's rods are physically little more than tools or counters to be used for a particular purpose. Although they are coloured in a manner such as to interest or please children, the same as blocks for instance, they were never intended primarily as an article regarded as artistic or beautiful in itself even if the artistic requirements required here are not too great. Indeed, even if artistic merit is not a matter of importance in copyright law, the word artistic

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must still be given its ordinary meaning although, may I add, there could be considerable debate as to the merit of a particular work.

It is true, as pointed out by counsel for the plaintiff, that there is originality in the colouring and size, selection and arrangement within the sets and the choice of the colours may well have been arrived at with a view to applying the method he conceived to teach children arithmetic. It is, however, the artistic work itself which is entitled to protection and not the idea behind it. These rods indeed are tools and nothing more, the same as colours, for instance, are tools in teaching children how to paint. They can take on meaning only when considered and integrated with a concept itself which in itself is not entitled to protection. The only relationship between the rods which exists here is by reference to Cuisenaire's theory where it can be seen that there is a connection between the colours denoting certain families of significantly related mathematical values which, however, cannot really be considered as an artistic arrangement. Furthermore, although these coloured rods set out orderly in a box could be considered as an artistic arrangement, there is no claim to such arrangement here and it is difficult to see how colour through these rods could confer copyright on the works even if all these things are claimed in combination.

An artistic work, in my view, must to some degree at least, be a work that is intended to have an appeal to the aesthetic senses not just an incidental appeal, such as here, but as an important or one of the important objects for which the work is brought into being. The plaintiff's rods may have a certain attraction to children, but this, in my view, is a very secondary purpose which, I am afraid, is not a sufficient basis for a finding that the rods are artistic.

I must, therefore, conclude that plaintiff's rods are not and cannot be held to be artistic works under the Act.

Neither can they be held to be works of artistic craftsmanship because they are not artistic and for the additional reason given by Pape J. in *Cuisenaire v. Reed* (*supra*) in that no craftsmanship was involved in their production.

Neither are these rods plastic works relative to science under section 2(v) as although plastic here is not used in the scientific or polyethylene sense all the definitions of plastic suggest that it must be something that is or has

been mouldable or pliable material and, of course, wood is not of that nature. Nor can these rods be assimilated in any way with the artistic meaning of plastic, which involves the art of shaping or modeling such as in the art of sculpture or ceramics.

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It follows that plaintiff's rods are not a proper subject matter of copyright under the Act and his action must, therefore fail.

In view of the conclusion I have reached with respect to the "uncopyrightability" of plaintiff's rods, it is not necessary for me to deal with a number of other matters raised, such as the question whether any skill or labour were put into the works by the plaintiff and whether he actually executed the design or whether he actually coloured the rods except to say that I would have had some difficulty in reaching the conclusion that he had, in view of the fact that he had these rods made by somebody else and admitted that he was not even capable of realizing the colours artistically; I would even have some difficulty in concluding that he even made the 10 rod set, the evidence on this point being of a sketchy nature or that the works were as required by the Act, ever published. Even the matter of what are the essential elements of his works is not too clear and it is also not too clear whether his sets, for instance, consist of 291 pieces or 241 pieces. The question as to whether he was a Belgian citizen at the relevant time was also queried although here, I would hold that he has sufficiently established this point in his evidence taken on commission.

It will not, moreover, be necessary to deal at any length with the matter raised by defendant that under section 12(3) of the Act, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner otherwise than to say that although Cuisenaire was employed by the State of Belgium as a teacher, he was so employed only until 1947, when he took his pension and as his works were produced after 1947, section 12(3) of the Act does not apply.

I feel that I should not part with this case, however, without stating that I have not reached the conclusion that plaintiff's rods are not "copyrightable" under our Act and that he cannot find protection under our law for what can, at least, be called a partial expression of a very impor-

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tant and popular scientific method of teaching arithmetic to children throughout the world, without some hesitation. My apprehension in this regard was due mainly to the all embracing words used in section 2(v) of the Act when describing the original productions contemplated in that they cover "whatever may be the mode or form of its expression". I was also somewhat concerned when I ran across an American decision rendered in 1966 in *The Gelles-Widmer Company v. Milton Bradley Company et al*⁵ where the subject matter dealt with was not too different from the one involved in the instant case.

It was indeed held in that case that a flash card set that was solely utilitarian inasmuch as the cards were designed specifically for use by children in the home as educational aids, was not for that reason incapable of being the subject matter of copyright. These flash cards bore words, numbers and pictures to be shown in school drills to stimulate observation or as an aid in teaching, reading and arithmetic.

I should also point out that in addition to these flash cards containing the arithmetic fact problems, the plaintiff, in this American case, had also drafted testing sheets which could be used for determining the development and progress the child was making as well as explanations and instructions for the child and the parents explaining the proper use of both the flash card and the progress testing sheets.

The cards in the above case were, however, a literary or graphic work and, of course, there is that difference with the instant case where plaintiff's rods could not be related to either an artistic or literary work unless they could be said to be reproductions of the written instructions contained in plaintiff's book *Les nombres en couleur* which contains a table, and in another case, a series of plain and coloured circles which are numbered and set out in the form of a chart. This, however, they cannot be as these rods are not in the nature of a table or compilation and, therefore, do not reproduce the written instructions in his book.

I should also add that the plaintiff in this case took the position that his rods, although related to his teaching

⁵ 136 USPQ 240.

system, must be taken as an artistic work or work of artistic craftsmanship and did not base his action on the allegation that his rods were an expression of his book, and, for that reason alone, the above case can be of no assistance to him.

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It is rather interesting to note, however, that the American decision held these cards "copyrightable" even if such a finding had the effect of protecting not only the expression of the author's idea or system, but also the very idea or system itself and one may well wonder whether there has been an enlargement of the subject matter of copyright in that country.

I should also mention a decision referred to by plaintiff in support of his contention that literary works can be protected from infringement by three dimension objects reproducing them in *King Features Syndicate, Incorporated, and another v. O. and M. Kleeman, Limited*⁶ where defendants were held to have infringed the plaintiffs' copyright in their comic strips published in newspapers embodying as their central figure a grotesque figure dressed in a nautical costume popularly known as "Popeye the sailor", by importing and selling three dimension dolls, mechanical tops, brooches and other articles featuring the figure Popeye. The House of Lords also held:

. . . that the defendants' dolls and brooches were reproductions in a material form of the plaintiffs' original artistic work and were not the less so because they were copied, not directly from any sketch of the plaintiffs, but from a reproduction in material form derived directly or indirectly from the original work, and that s. 22 of the Copyright Act, 1911, did not operate to bring an existing copyright to an end or to absolve pirates from the offence of piracy.

Although the above dolls can be considered as reproductions of the plaintiffs' artistic work in the above case, plaintiff's rods, however, cannot be considered as reproductions of his written text (even if the all embracing words in section 2(v) are considered) for the very reasons set down by Pape J. in *Cuisenaire v. Reid (supra)* at pp. 735 and 736 which I adopt unreservedly:

. . . Where, as here, you have a literary copyright in certain tables or compilations, there is in my view no infringement of the copyright in those tables or compilations unless that which is produced is itself something in the nature of a table or compilation which,

⁶ [1941] A.C. 417.

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whether it be in two dimensions or three dimensions, and whatever its material form, reproduces those tables. 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.

I agree with Pape J. in *Cuisenaire v. Reed* (p. 733) that "there can be no doubt now that copyright in a work in two dimensions may be infringed by the production and sale of an article providing they are in the nature of the things they reproduce. The plaintiff's rods, however, cannot, I repeat, be considered as a reproduction of the tables or compilations in his book and the words of Pape J. in the above case at p. 734 are sufficiently convincing in this regard:

. . . what the defendants have done does not amount to a reproduction of the plaintiff's tables or compilations. Each of the cases referred to was a case in which there was a clear visual resemblance between the alleged infringement and the work in which copyright was alleged to subsist, sufficient to warrant the conclusion that one had been copied from the other. In this case there is no such visual resemblance between either the table referred to in paragraph 1B of the statement of claim, or the chart or compilation referred to in paragraph 1C of the statement of claim.

and at the bottom of the same page he added:

. . . in my view, a set of written directions is not "reproduced" by the construction of an article made in accordance with those directions. A reproduction must reproduce the original, and here the original is in one case a set of words in the form of a table and in the other case a series of plain and coloured circles which are numbered and which are set out in the form of a chart. In my view, the defendants' rods reproduce neither.

I must, therefore, conclude that plaintiff's rods are not a proper subject matter of copyright in this country and that he cannot, therefore, own copyright in them.