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BUREAU JUVENILE RESEARCH—FORMS—COPYRIGHT—NO INFRINGEMENT ON PUBLISHER'S COPYRIGHT OF FORM L TO PRINT OR MIMEOGRAPH—SALE OR USE—NOT PROPER SUBJECT OF COPYRIGHT—BINET-SIMON INTELLIGENCE TEST—"THE MEASUREMENT OF INTELLIGENCE."

SYLLABUS:

1. *The printing or mimeographing of the forms proposed to be used by the Bureau of Juvenile Research would not be an infringement upon the publisher's copyright of Form L whether or not such forms so reproduced are offered for sale or use outside the Bureau of Juvenile Research.*

2. *The forms which the Bureau of Juvenile Research proposes to use are not the proper subject of a copyright and could therefore not be copyrighted by the Bureau or a member of its staff.*

COLUMBUS, OHIO, October 2, 1939.

HON. CHARLES L. SHERWOOD, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR: I have your recent letter enclosing a communication from the Bureau of Juvenile Research requesting my opinion as to whether the printing or mimeographing of a form submitted therewith for recording responses made by subjects undergoing the New Revised Stanford-Binet Intelligence Test infringes upon the copyright of other forms used for similar purposes.

The Stanford revision of the Binet-Simon Intelligence Test is a result of the work of Professor Lewis M. Terman of Stanford University. Professor Terman was the author of a book entitled "The Measurement of Intelligence" which was published in 1916 and which was designed to explain the Stanford revision of the Binet-Simon Intelligence Test and to assist in the proper use thereof. In 1937 Professor Terman and Maud A. Merrill further revised the Stanford revision of the Binet-Simon Test and their revision is known as the New Revised Stanford-Binet Test of Intelligence. In addition, Terman and Merrill wrote a book entitled "Measuring Intelligence" which has been published by Houghton Mifflin Company and which was copyrighted by the authors in 1937.

In connection with the administration of the new Revised Stanford-Binet Test there was devised by Terman and Merrill what is known as Form L which is designed to be used for recording the answers and responses of the subject of the examination. There is also provided on said form space for summarizing the result of the examination.

The form which the Bureau of Juvenile Research proposes to use is in its essentials very similar to Form L devised by Terman and Merrill and set forth at length in their book.

The object of the questions and problems put in both forms to the subject for solution is to determine, among other things, his powers of perception, memory, reasoning, understanding, differentiation, description and the like. In "Measuring Intelligence" at page 53, it is said by the authors:

"It cannot be too strongly emphasized that unless a standard procedure is followed, the tests lose their significance. The chief danger is in unintentionally and unconsciously introducing variations which will affect the subject's response. One who has not had thorough training in psychometrics is unable to appreciate how seriously the omission, alteration, or addition of a single phrase may influence the response."

The authors also state that it is of the utmost importance for the examiner to acquaint himself thoroughly with the scoring rules laid down in the work which are set forth in detail in the book.

Section 8 of Article I of the Constitution of the United States provides in part as follows:

"The Congress shall have power * * *

"To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Pursuant to the power so granted it, Congress has passed laws from time to time providing for copyrights, and the present law, which was adopted in 1909 with some subsequent amendments thereto, is now found in Title 17, Sections 1 to 63, inclusive, of the United States Code.

It may be stated generally that the granting of a copyright vests in the owner thereof the exclusive right to print, reprint, publish, copy and vend the copyrighted work if it is in fact a proper subject of copyright. However, it seems to be well settled that the granting of a copyright does not give a monopoly to the author of the ideas expressed in his book. If he expounds or explains the principles or rules of art or science in a publication and the same is copyrighted, any person may make use of his explanation without infringing upon his copyright. The protection of an idea or scientific discovery is not the proper function of copyright but of letters patent.

For example, if a physician should discover some new method of treating a disease and should publish and have copyrighted a book explaining his method of treatment, such copyright would grant to him no monopoly of the ideas and methods so expressed in the copyrighted work and

they could be adopted and used at will by anyone without infringing the copyright laws.

In the case of *Baker v. Selden*, 101 U. S., 99, it appears that Selden obtained a copyright of a book entitled "Selden's Condensed Ledger, or Bookkeeping Simplified", which expounded a peculiar system of bookkeeping. In the opinion of the court by Mr. Justice Bradley it was said :

"The book or series of books, of which the complainant claims the copyright, consists of an introductory essay explaining the system of bookkeeping referred to, to which are annexed certain forms or blanks, consisting of ruled lines and headings, illustrating the system and showing how it is to be used and carried out in practice. This system effects the same results as bookkeeping by double entry; but, by a peculiar arrangement of columns and headings, presents the entire operation, of a day, a week or a month, on a single page or on two pages facing each other, in an account-book. The defendant uses a similar plan so far as results are concerned; but makes a different arrangement of the columns, and uses different headings. If the complainant's testator had the exclusive right to the use of the system explained in his book, it would be difficult to contend that the defendant does not infringe it, notwithstanding the difference in his form of arrangement; but if it be assumed that the system is open to public use, it seems to be equally difficult to contend that the books made and sold by the defendant are a violation of the copyright of the complainant's book considered merely as a book explanatory of the system. Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way."

Later in the opinion it is further said by Mr. Justice Bradley :

"The copyright of a book on perspective no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book, without getting a patent for the art, the latter is given to the public. The fact that the art described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams, which merely stand in the place of words, there could not be the slightest doubt that others, applying the art to practical use, might lawfully

draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book.

"The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application."

In "Measuring Intelligence" the authors have strongly emphasized the necessity of following a standardized procedure in giving the intelligence test and have urged that the very questions and formulae which they have devised must of necessity be used if an accurate result is to be obtained. In other words, the science which they have explained and the method of applying it can be properly used only where the author's directions and instructions are implicitly followed. The authors were not content merely to explain in general terms how to conduct an intelligence test but went so far as to formulate the very test to be given and it is believed that these tests, as set forth by the authors in their work, are merely examples as to how the science should be properly applied and that the questions become public property and may be used by anybody in conducting the test. The test in itself contained in Form L conveys no information and where the questions and material contained therein are printed and sold they are designed for use and not to impart knowledge. In 13 C. J., Section 124, page 1035, it is said:

"Except, perhaps, such perforated music rolls, disc and cylinder records, for the mechanical reproduction of dramatic and musical compositions, articles designed for physical use rather than to convey information or intellectual conceptions are not copyrightable, and must be protected, if at all, under the patent laws."

The material contained in Form L does not explain the science on which the authors are writing and is not designed to convey any intellectual concept to the reader, but its sole purpose is for use to determine

intelligence accorded to the New Revised Stanford-Binet Test. As was said by Mr. Justice Bradley in the case of *Baker v. Selden*, supra :

“The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent.”

Since Form L is not an explanation of the science but rather a method of applying it, it is not subject to copyright and may be used by anybody without violating the copyright laws.

Mr. Justice Bradley in the case of *Baker v. Selden* cites with approval the English case of *Page v. Wisden*, 20 L. T. (M. S.), 435, where it was attempted to copyright a cricket scoring sheet and in which it was held that :

“To say that a particular mode of ruling a book constituted an object for a copyright is absurd.”

The authorities seem to be clear that an art or science is not the proper subject of a copyright and that an article or thing designed for physical use in the application of such art or science is also not the proper subject of copyright. Since Form L is not designed to and does not explain the science but merely is to be used in its application, I am of the opinion that it is not subject to copyright and that the form which the Bureau of Juvenile Research proposes to use does not infringe upon the rights of the authors thereof.

You have referred me to an opinion of my predecessor rendered September 29, 1933, and being Opinion No. 1655 for said year. I have examined this opinion carefully and feel that my conclusions are in agreement with the conclusions reached therein.

In view of the foregoing, I am therefore of the opinion that :

1. The printing or mimeographing of the forms proposed to be used by the Bureau of Juvenile Research would not be an infringement upon the publisher's copyright of Form L whether or not such forms so reproduced are offered for sale or use outside the Bureau of Juvenile Research.

2. The forms which the Bureau of Juvenile Research proposes to use are not the proper subject of a copyright and could therefore not be copyrighted by the Bureau or a member of its staff.

Respectfully,

THOMAS J. HERBERT,
Attorney General.