

"When the board of education of any city, village, exempted village or rural school district is satisfied that a child compelled to attend school is unable to do so because in want of shoes, clothing, medical attention, or other necessities, and those upon whom the child is dependent are unable to support or care for themselves and the child, such board of education at any time prior to December 31, 1935, may provide such necessities as may enable the child to attend school.

Upon satisfactory proof to the county commissioners that the board of education of any of the above mentioned school districts has no funds over and above all other school operating expenses available to meet such needs, the county commissioners may allocate to such boards of education funds for the purpose of providing relief for school children from the emergency relief fund *or other fund available for the relief of dependent persons.*" (Italics the writer's.)

As the funds allocated to a county by authority of Section 1 of Amended Senate Bill No. 61, supra, may be used for the relief of dependent persons, with the approval of the state relief commission, such funds clearly may be allocated to boards of education by virtue of Section 1 of Senate Bill No. 64, quoted above, as these funds would come within the class of funds described in the statute as "other funds available for the relief of dependent persons."

I am therefore of the opinion, in specific answer to your question, that funds made available to a board of county commissioners for poor relief under and by virtue of Section 1, of Amended Senate Bill No. 61, of the 90th General Assembly, may be allocated by said board of county commissioners to boards of education for providing relief for school children by authority of Section 1 of Senate Bill No. 64, of the 90th General Assembly.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1655.

OHIO STATE UNIVERSITY—"FORM 2097" USED IN SCORING INTELLIGENCE TESTS UNDER STANFORD REVISION OF BINET-SIMON SCALE IS NOT VIOLATION OF COPYRIGHT ON "RECORD BOOKLET."

SYLLABUS:

The printing and use by Ohio State University of "Form 2097" for the recording and scoring of individual intelligence tests conducted in accordance with the Stanford Revision of the Binet-Simon Scale, as expounded by Professor Lewis M. Terman in his textbook "The Measurement of Intelligence", does not constitute an infringement of any copyright rights that the publishers of a similar record blank known as "Record Booklet" may have.

COLUMBUS, OHIO, September 29, 1933.

DR. GEORGE W. RIGHTMIRE, *President, Ohio State University, Columbus, Ohio.*

DEAR DR. RIGHTMIRE:—This will acknowledge receipt of a communication from Dr Francis Maxfield, Professor in the Department of Psychology, con-

cerning the claim of Houghton Mifflin Company that Ohio State University, in printing and using a certain record blank for the recording and scoring of intelligence tests, is guilty of an infringement of its copyright on a similar blank.

It appears that what is known as the "Binet-Simon Scale" for measuring intelligence, which originated with Professor Alfred Binet in Paris, was first published in French. Several translations and adaptations to American standards took place in the United States. One of them was the work of Professor Lewis M. Terman of Leland Stanford University. The result of his translation and revision is known as "The Stanford Revision of the Binet-Simon Test." Professor Terman prepared and had published through Houghton Mifflin Company, an explanation and guide for the use of the Stanford Revision and extension of the Binet-Simon Intelligence Scale under the title of "The Measurement of Intelligence." In addition to this test, the same publisher put out a smaller book, containing the standard procedure adapted from the larger work, also an envelope of cards on which are printed pictures, colors, words, sentences, symbols and other characters used in giving the test, and a twelve page booklet or folder designed for recording, scoring and summarizing results of individual examinations or so-called tests. This latter booklet or folder is designated "RECORD BOOKLET FOR the Stanford Revision of the Binet-Simon Tests as described in Terman's THE MEASURE OF INTELLIGENCE." At the top of the first page of this "Record Booklet" there is printed "Copyright, 1916 and 1922, by Houghton Mifflin Company. All rights reserved, including the right to reproduce this work or parts thereof in any form."

The need for a briefer, more practical and less expensive form of record and scoring chart was felt, and therefore, a four page scoring blank following the method of the Stanford Revision was prepared and printed by the university on its printing press for the use of students of the university taking work in clinical psychology, to whom these blanks are furnished without charge and for the university psychological clinic. This four page folder is known as "FORM 2097." This designation is printed at the bottom left hand corner of the first page of this blank, followed by the statement: "Not for sale."

It was not originally intended that any of these blanks should be sold. I am informed, however, that a few were sold to former students of the university. They have never been placed on the market generally, however, and at present none are being sold or used outside of the university.

A claim is now being made by Houghton Mifflin Company that the printing and use of "Form 2097" constitutes an infringement of the copyright on its publication known as "Record Booklet" described above.

You therefore submit for my consideration, three questions:

(1) "Does the printing of 'Form 2097' for private use, constitute an infringement of the copyright on Houghton Mifflin Company's 'Record Booklet?'"

(2) If it does, could a modification of 'Form 2097' be devised that would not be an infringement?"

(3) What steps should the university take to deal fairly with Houghton Mifflin Company?"

The conducting of intelligence examinations or tests in accordance with the method described by Professor Terman, in his "Measurement of Intelligence" consists of the asking of certain questions of the subject, the presentation of simple mathematical problems, the making of comparisons and the repetition of

words, syllables, sentences and numbers in sequence. Appropriate methods of testing the perception and memory of the subject, his powers of deduction, comprehension and differentiation, his ability to describe physical objects and interpret physical relationships and his sense of justice, are used.

The purpose of the scoring sheets or charts, both "Form 2097" and "Record Booklet" is to record the reactions and responses of the subject of the test to the branches of the test and the proper evaluation of these reactions, all looking to the finding of his "Intelligence Quotient", commonly referred to as his "I. Q."

Both forms are drawn almost precisely in accordance with the manner of conducting the test as set out in Professor Terman's book "The Measurement of Intelligence." The same questions are used, the same words, syllables, sentences and digits for repetition are recited. They are so arranged as to make testing accurate, rapid and convenient. They contain words, dissected sentences, numbers and selections for memory tests, vocabulary lists, arithmetical problems, comprehensive questions, fables, lines, figures and objects for comparison, etc., almost, if not entirely identical with those in the text.

The importance of following the stereotyped formulae in conducting these tests is stressed by the author in his text. On page 131 it is stated:

"It cannot be too strongly emphasized that unless we follow a standardized procedure the tests lose their significance."

And on page 144:

"Always use the list of objects here given, because it has been standardized."

And on page 132:

"The exact method of scoring the individual tests is set forth in the following chapters."

The last two hundred and twenty pages of Professor Terman's book, "The Measurement of Intelligence" are directed to the detailed manner of conducting intelligence tests in accordance with the Stanford Revision of the Binet-Simon Test and the manner of scoring and evaluating these tests.

The copyright for this book was originally granted to Professor Terman, a statement of which appears on the fly-leaf of the book. The "Record Booklet" mentioned above, printed and copyrighted by Houghton Mifflin Company, for use in scoring these tests, obviously, was compiled from Professor Terman's book, as was also "Form 2097", printed and used by the university. There is no claim made, nor could such a claim be successfully advanced, that "Form 2097" is an infringement on the rights in the copyright of Professor Terman's book, but that the printing and use of this form constitutes piracy as respects the "Record Booklet." Obviously, the two are similar although not precisely the same inasmuch as the material for both is taken almost verbatim from the text of Professor Terman's book.

This similarity may well be illustrated by an extract from each of the scoring blanks. On both forms there appears a blank for the recording of the results of the test for "YEAR IV". This test is outlined in Professor Terman's text-book, Chapter 10, as; IV, 1—Comparison of Lines; IV, 2—Discrimination of

Forms; IV, 3—Counting four pennies; IV, 4—Copying a Square; IV, 5—Comprehension, first degree; IV, 6—Repeating four digits. Following each heading there is mentioned the proper method of scoring the same. The "Record Booklet" contains the following section for recording and scoring the test for YEAR IV:

- *1. Compare lines. (3 of 3, or 5 of 6.) 1.....2.....3.....
 - 2. Discrimination of forms. (Kuhlmann. 7 of 10.)
Circle.....Square.....Triangle.....Other errors.....
- *3. Counts 4 pennies. (No error.).....
- *4. Copies square. (Pencil, 1 of 3. Score leniently,) 1.....2.....3.....
- *5. Comprehension, 1st degree. (2 of 3.) 'What must you do:
 - a. 'When you are sleepy?.....
 - b. 'When you are cold?.....
 - c. 'When you are hungry?.....
- 6. Repeat 4 digits. (1 of 3. Order correct. Read about 1 per second.)
4-7-3-9.....2-8-5-4.....7-2-6-1.....
- Alt. Repeats 12-13 syllables. (1 of 3 absolutely correct, or with 1 error each.)
 - a. 'The boy's name is John. He is a very good boy.'
'When the train passes you will hear the whistle blow.'
'We are going to have a good time in the country.'"

In "Form 2097" there appears the following for recording and scoring test YEAR IV:

- "1. Compare lines (3 of 3) or (5 of 6) 1. 2. 3. 4. 5. 6.
- 2. Discriminates forms (7 of 10) Number right.
- 3. Counts 4 pennies.
- 4. Copies square (Pencil, 1 of 3) 1. 2. 3.
- 5. Comprehends (2 of 3). What must you do:
 - 1. When you are sleepy?
 - 2. When you are cold?
 - 3. When you are hungry?
- 6. Repeats (1 of 3) 4739, 2854, 7261.
- Alt. Repeats (1 of 3). 1. The boy's name is John. He is a very good boy.
 - 2. When the train passes you will hear the whistle blow.
 - 3. We are going to have a good time in the country."

Investigation reveals that all of the questions to be asked as set out in the two report forms quoted above, all the digits and sentences to be repeated are taken verbatim from the textbook. In other words, the textbook, in explaining test "YEAR IV" prescribes that these specific questions be asked and that these specific sentences and digits be repeated.

In pursuance of the power conferred upon Congress by Article I, Section 8, Clause 8 of the Federal Constitution 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 laws have been passed by Congress from time to time, beginning in 1790, relating to copyrights. The present law with respect to this subject is contained in Title 17, Sections 1 to 63, inclusive, of the United States Code.

Broadly speaking, the granting of a copyright confers upon the owner thereof the exclusive right to print, re-print, publish, copy and vend the copyrighted work. I do not understand that there is any claim that the Ohio State University has infringed the copyright of Houghton Mifflin Company on the "Record Booklet" by printing or re-printing the same. A mere glance at the two forms would convince anyone that "Form 2097" is not a re-print or an exact copy of the "Record Booklet". Such a claim could not be substantiated and would be so far-fetched that I shall spend no time discussing it. The claim, as I understand it, is that "Form 2097" is a copy of the "Record Booklet" as the word "copy" is used in the copyright statutes. Copying, so as to amount to an infringement need not consist of an exact reproduction of an original, but may be merely a substantial reproduction. However, it must be a reproduction and not an independent production of the same thing. (*West Pub. Co. vs. Thompson*, 169 Fed. 833.) The protection afforded by a copyright is substantially different from that afforded by a patent. (*Bobbs Merrill Co. vs. Strauss*, 210 U. S. 339; *Baker vs. Selden*, 101 U. S. 99.) One radical difference is that a patent confers an exclusive right to use, whereas, a copyright contemplates and permits fair use by all persons of the copyrighted work. (*Eichel vs. Marcin*, 241 Fed. 404.) The copyright in a book does not extend to and protect the art or system of which the work is an exposition, such as a system of bookkeeping, of advertising, or of stenography, or a plan of organization. Protection of the art or system which a book explains or illustrates is the province, not of copyright, but of letters patent. Theories, speculations, ideas, or opinions, however original they may be, are not covered by the copyright of a book in which they are propounded or expressed, and hence the adoption and use of them by another is not an infringement of copyright. But the association, arrangement, and combination of ideas and thoughts makes a particular literary composition, and the appropriation and use of them in that arrangement and combination is an infringement. Protection is afforded only to the material or tangible semblance in which the intellectual conception is expressed. This rule is sometimes expressed by saying that copyright resides only in the order of words selected by the author to express his ideas. (See *Corpus Juris*, Vol. 13, pages 1107 and 1108.)

In the case of *White-Smith Music Pub. Co. vs. Apollo Co.*, 209 U. S. 1, it was said by Justice Day, with reference to the Copyright Act:

"Throughout the act it is apparent that Congress has dealt with the concrete and not with an abstract right of property in ideas or mental conceptions."

The authorities seem to make it clear that no claim could be successfully made that either the "Record Booklet" or "Form 2097" infringed upon the copyrights of the author of "The Measurement of Intelligence." The sole question here is whether or not "Form 2097" is such a "copy" of the "Record Booklet" as to constitute piracy, if in fact the "Record Booklet" is such a publication as may be copyrighted so as to give the person to whom the copyright is granted, an exclusive right to print, publish, distribute and vend the publication.

Judge Story, in *Emerson vs. Davies*, 8 Fed. Cas. No. 4,436 said:

"The true test of piracy or not is to ascertain whether the defendant has, in fact, used the plan, arrangements and illustrations of the plaintiff, as the model of his own book, with colorable alterations and variations only to disguise the use thereof; or whether his work is the result of

his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources."

The leading case on this subject is *Baker vs. Selden*, 101 U. S. 99. In that case Selden, the complainant, secured a copyright of a book entitled "Selden's Condensed Ledger or Bookkeeping Simplified," the object of which was to exhibit and explain a peculiar system of bookkeeping. The bill of complaint was filed against the defendant, Baker, for an alleged infringement of these copyrights. The defendant denied that Selden was the author or designer of the books, and denied the infringement charged, and contended in the argument that the matter alleged to be infringed was not a lawful subject of copyright. The book or series of books of which the complainant claimed the copyright consisted of an introductory essay explaining the system of bookkeeping referred to, to which is 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 effected the same results as bookkeeping by double entry; but, by a peculiar arrangement of columns and headings, presented 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 used a similar plan so far as results were concerned; but made a different arrangement of the columns and used different headings. At page 103 in the opinion Justice Bradley said:

"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. * * 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 when 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. * * The copyright of a book on bookkeeping cannot

secure the exclusive right to make, sell, and use account books prepared upon the plan set forth in such book. * * The conclusion to which we have come is, that blank account-books are not the subject of copyright; and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book."

In *Cobbett vs. Woodward* (Law Rep. 14, Eq. 407) there was a claim to copyright in a catalogue of furniture which the publisher had on sale in his establishment, illustrated with many drawings of furniture and decorations. The defendants being dealers in the same business, published a similar book, and copied many of the plaintiff's drawings, though it was shown that they had for sale the articles represented thereby. The court held that these drawings were not subjects of copyright.

The facts upon which rests the decision of the court in the case of *Page vs. Wisden* (20 L. T. N. S. 435) resemble in many respects the facts before us in the instant case. A copyright was claimed in a cricket scoring sheet. The vice-chancellor held that it was not a fit subject for copyright, partly because it was not new but also because "to say that a particular mode of ruling a book constituted an object for a copyright is absurd."

It is difficult to conceive how any blank form for recording and scoring the results of an intelligence test made in accordance with the Stanford Revision of the Binet-Simon Test as expounded by Professor Terman in his book, could differ materially from either "Record Booklet" or "Form 2097." The textbook clearly outlines the exact procedure to be used in conducting the test even to the extent of prescribing the questions to be asked in giving the test, the numbers, sentences, etc., to be repeated and other concrete formulae for the test. In addition thereto, the textbook stresses the importance of following the exact procedure and using the identical concrete methods of giving the test. For that reason the authorities seem to be clear that a scoring sheet or blank for recording and scoring an individual intelligence test in accordance with the method set out in Professor Terman's text is not a proper subject for copyright. This conclusion is based largely on the authority of *Baker vs. Selden, supra*. The first branch of the syllabus of this case is as follows:

"The exclusive property in a system of bookkeeping cannot be claimed, under the law of copyright, by means of a book in which that system is explained."

Even though it should be successfully contended that "Record Booklet" is a proper subject for copyright, it still would not be established that the printing and use of "Form 2097" constituted an infringement on the "Record Booklet" unless it could be further shown that the two were identical, and that "Form 2097" was copied from the "Record Booklet" rather than prepared to record the results of the test independently of, and without reference to the "Record Booklet".

As stated above, a proper chart for scoring these intelligence tests could not properly differ materially from either of the forms here under consideration and if it were shown that a scoring chart for this purpose was prepared from the textbook "The Measurement of Intelligence" it could not by any course of reasoning be regarded as an infringement on the copyright on another scoring sheet taken from the same text, regardless of the similarity between the two and even if they were exactly the same.

There is clear evidence, by a comparison of these two forms, that "Form 2097" was not copied from the "Record Booklet". It seems apparent that "Form 2097" was compiled from the textbook, and more nearly follows the text in some respects, at least, than does the "Record Booklet". This is shown by a comparison of No. 3 of "YEAR III" on each of the blanks with the text. In the text under this head on page 146 it is said:

"In giving the test always present the pictures in the same order, first Dutch Home, then River Scene, then Post-Office."

On "Form 2097" under this heading the identical terms, "Dutch Home", "River Scene" and "Post-Office" are used, whereas, in the "Record Booklet" the terms used under this heading are "Dutch Home", "Canoe" and "Post-Office."

It is apparent to my mind, that whoever compiled "Form 2097" compiled it directly from Professor Terman's text and did not compile it from the "Record Booklet". This seems evident from a comparison of the forms and the text. If that be true, and I believe the facts so show, it is clear from the authorities that the printing and use of "Form 2097" does not constitute an infringement of the copyright rights of Houghton Mifflin Company in the "Record Booklet", even though it could be successfully established that the "Record Booklet" is such an instrument or publication as to be the proper subject of a copyright which is very doubtful in the light of the authorities cited above.

I am therefore of the opinion, in specific answer to your question that the printing and use of "Form 2097" by the university, does not constitute an infringement of any copyright rights of Houghton Mifflin Company in its publication known as "Record Booklet."

Respectfully,
JOHN W. BRICKER,
Attorney General.

1656.

COUNTY AGRICULTURAL AGENT—COUNTY COMMISSIONERS NOT
REQUIRED TO APPROPRIATE MONEY THEREFOR WHEN.

SYLLABUS:

It is not mandatory for the county commissioners to appropriate money for the payment of a county agricultural agent appointed by the trustees of the Ohio State University pursuant to the provisions of Section 9921-1a, even though in the budget estimate filed with the county budget commission pursuant to the provisions of Section 5625-20, General Code, there was included an item designated "for personal services."

COLUMBUS, OHIO, September 29, 1933.

HON. CHAS. D. HAYDEN, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—In your recent request you ask my opinion as to,

"Whether or not it is a mandatory duty of the county commissioners to appropriate money for the salary of a county agricultural agent.