BETWEEN:

RAYMOND PHILIP CARDWELL .....PLAINTIFF;

AND

PHILIPPE LEDUC AND JEAN PELLETIER ..... DEFENDANTS.

1961
Nov. 22, 23
1962
Dec. 5

Trade Mark—Copyright—Infringement—Unfair competition—Injunction—Damages—Trade Marks Act, R.S.C. 1952-53, c. 49, s. 7(b)—The Copyright Act, RS.C. 1952, c. 55, s. 2(n, j), 20(3), 36(1), (2)—Speed-L-Opes—Stato-L-Opes—Graphic-Loppes—Similarity of wares.

Plaintiff brings his action for a permanent injunction restraining defendants from infringing his trade mark and for damages or an accounting as he elects. Plaintiff carried on business in Montreal, Quebec, under the trade name of National Men's Business Speed-L-Opes, which business consisted of selling to creditors a set of letters to be sent to their debtors and which were calculated to facilitate and expedite the collection of overdue accounts. These letters were inscribed on return addressed envelopes. In 1959 plaintiff began selling a single and less pretentious type of remittance envelope called *Stato-L-Opes* which included a detailed statement of the debtor's account. Defendants had been engaged for over three years in selling plaintiff's wares on commission. In 1960 the defendant Leduc quit the plaintiff's employ and

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set himself up in Quebec City in the same line of business under the name Graphic-Loppes Reg'd. Defendant Pelletier was discharged by plaintiff and entered the employ of Leduc and has ever since been engaged in selling his wares. Plaintiff alleges that the defendants offered for sale two sets of envelopes called *Graphic-Loppes* which are identical with *Speed-L-Opes* and *Stato-L-Opes* and that they used order forms which are duplicates of plaintiff's order forms, and by so doing they have been directing, to the detriment and loss of the plaintiff, public attention to their wares and services in such a way as is likely to cause, and has caused, confusion between plaintiff's and defendants' wares in contravention of the *Trade Marks Act,* R.S.C. 1952-53 (2 Elizabeth II), c. 49, s. 7(b). Plaintiff further alleges that defendants have infringed his registered trade mark and copyrights of his two sets of envelopes *Speed-L-Opes* and *Stato-L-Opes* in contravention of the *Copyright Act,* R.S.C. 1952, c. 55. The Court found that both defendants in directing public attention to Leduc's wares, services and business, consisting of the sale of *Graphic-Loppes,* did so in such a way as to cause or to be likely to cause confusion in Canada between defendants' *Graphic-Loppes* and plaintiff's *Speed-L-Opes* and *Stato-L-Opes.*

Held: That defendant Leduc, by making use of the trade name *Graphic-Loppes* and by copying the colour, the form and the printed matter of plaintiff's wares entitled *Speed-L-Opes* and *Stato-L-Opes,* and his requisition form, has directed public attention to his business in such a way as to be likely to cause confusion between his business and that of the plaintiff, and that defendant Pelletier, as Leduc's agent, has been a party thereto.

2. That plaintiff is entitled to an injunction restraining both defendants from infringing plaintiff's copyright.

3. That both defendants be enjoined from directing attention in Canada to their business and from selling debt collection letters as *Graphic-Loppes* or any other letters likely to cause confusion between their wares and business and the wares and business of the plaintiff.

4. That plaintiff is entitled to damages or an accounting of profits at his election.

ACTION for injunction and damages for alleged infringement of plaintiff's trade mark and copyright.

The action was tried before the Honourable Mr. Justice Kearney at Montreal.

Maurice Jacques for plaintiff.

Marcel Turgeon for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (December 5, 1962) delivered the following judgment:

This case is one wherein the plaintiff seeks a permanent injunction against the defendants who are former employees

of his and an order for payment of damages or an accounting, as he may elect. The grounds of action are briefly as follows.

The plaintiff, since 1956, has carried on a business with offices in the city of Montreal, province of Quebec, under the trade name of National Business Men's Speed-L-Opes, which business consisted of selling to creditors a set of letters to be sent to their debtors and which were calculated to facilitate and expedite the collection of overdue accounts. Instead of being printed on a sheet of paper, the letters in question were inscribed on return addressed envelopes. Beginning in 1959, the plaintiff commenced selling a single and less pretentious type of remittance envelope called "Stato-L-Opes", which included a detailed statement of the debtor's account.

The defendant Philippe Leduc who, like the defendant Jean Pelletier, had been engaged for over three years in selling the plaintiff's wares on commission, upon quitting his employ, in the fall of 1960, set himself up in the city of Quebec, in the same line of business as that of the plaintiff, under the name of Graphic-Loppes Reg'd. The defendant Jean Pelletier, on being given notice by the plaintiff that his services were no longer required, entered the employ of Philippe Leduc and has ever since been engaged in selling the latter's wares.

According to the plaintiff, the defendants have been offering for sale two sets of envelopes called "Graphic-Loppes" which, for all legal purposes, are allegedly identical with the "Speed-L-Opes" and "Stato-L-Opes" sold by the plaintiff and have been making use of order forms which are practically duplicates of the plaintiff's order forms. The plaintiff also alleges that by so doing they have been directing, to the detriment and loss of the plaintiff, public attention to their said wares and services in such a way as is likely to cause, and has caused, confusion between the plaintiff's and the defendants' wares, in contravention to s. 7(*b*) of *An Act relating to Trade Marks and Unfair Competition* (commonly referred to as "the *Trade Marks Act*"), R.S.C. 1952-53 (2 Elizabeth II), c. 49.

As additional grounds for the issuance of an injunction the plaintiff avers that the defendants have infringed his

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registered trade mark, consisting of the term "Speed-L-Opes", by making use of the name "Graphic-Lappes" in violation of the *Trade Marks Act* (*supra*), and that, furthermore, the plaintiff is the registered owner of separate copyrights in respect of his two sets of envelopes entitled "Speed-L-Opes" and "Stato-L-Opes" and against which the defendants have also committed acts of infringement in contravention of the *Copyright Act*, R.S.C. 1952, c. 55.

By way of defence Philippe Leduc denies that he has committed any act amounting to unfair competition, because the two sets of envelopes complained of are dissimilar to those sold by the plaintiff. The said defendant denies that the name "Graphic-Loppes" infringes the plaintiff's trade mark entitled "Speed-L-Opes". Insofar as the alleged infringement of the plaintiff's copyrights is concerned, the defendant Philippe Leduc denies having copied them or otherwise infringed them and contests the validity of the said copyrights, more particularly on the grounds that neither the collection envelopes called "Speed-L-Opes" nor the remittance envelopes entitled "Stato-L-Opes" are literary works, that they are lacking in originality and consequently not susceptible of protection under the *Copyright Act*.

The defendant Jean Pelletier, apart from denying generally the plaintiff's claim, asserts that the envelopes called "Graphic-Loppes" which he sells for and on behalf of the defendant Leduc are far from being identical to those he sold when in the employ of the plaintiff, and that, in any event, the plaintiff has no right of direct action against him because he was merely a salesman in the employ of Philippe Leduc and had no proprietary interest in the latter's business called Graphic-Loppes Reg'd., nor did he assist him financially or otherwise in bringing it into existence.

Much of the proof offered has been either of a documentary nature or has been admitted and except in regard to the similarity or dissimilarity of the wares sold by the plaintiff and defendants respectively there is little difference between the parties insofar as the facts of the case are concerned.

The plaintiff filed a French version of "Speed-L-Opes" as Exhibit $P^{5-A, B, C, D}$ and an English version as $P^{5-F, G, H, I}$. The

plaintiff also filed, as Exhibit $P^{5-E, J}$, a French and an English version of "Stato-L-Opes".

The Certificate of the Registrar of Trade Marks dated June 7, 1957 evidences the fact that the plaintiff is the proprietor of the trade mark entitled "Speed-L-Opes" Exhibit P^{11}. As appears by Exhibits P^{12} and P^{13}, the plaintiff has been the owner of a copyright on "Speed-L-Opes", which was first published in July 1955 and registered on March 29, 1956, and on "Stato-L-Opes", which was first published in 1959 and registered on April 19, 1961.

It is admitted that after both the defendants had left the plaintiff's employ the defendant Philippe Leduc, on November 29, 1960, registered at the Prothonotary's office, in the city of Quebec, as carrying on business alone under the name of Graphic-Loppes Reg'd., as more fully appears by Exhibit P^1. I might also add in passing that the same defendant, on February 27, 1961, registered at the same office as also doing business under the firm name of Business Credit Bureau Reg'd. (Ex. D^7).

It is also admitted that during the month of November 1960 the defendant Jean Pelletier became an employee of Graphic-Loppes Reg'd. and that both defendants began selling and have continued to sell, under the name of Graphic-Loppes Reg'd., in the territory covered by the plaintiff, a set or series of four coloured envelopes called Graphic-Loppes, written in the French language, a sample copy of which was filed as Exhibit P^2 and a sample in English is contained in Exhibit $D^{2-A, B, C, D}$.

The above-referred to Speed-L-Opes and Stato-L-Opes are adequately described in the plaintiff's amended statement of claim as follows:

> The Speed-L-Opes consist of four double sets of envelopes in each set an outer "Window" envelope bearing printed thereon the name and return (address) of the merchant and an inner folder to be addressed to the debtor bearing printed therein the signature of the merchant under a message requesting payment, which folder may be used to include the remittance due and becomes, when sealed with the gummed edge provided, in turn an envelope already addressed to the same merchant creditor. The first set of Speed-L-Opes is blue in colour and the message therein a polite reminder; the second set is buff or peach in colour with a more direct request; the third set is green, with a more insistent message; and the fourth set is yellow, with a final notice. The "Stato-L-Opes" consist of two envelopes, one of which is an outer "Window" envelope bearing printed thereon the name and return address of the merchant and an inner folder to be addressed to the debtor bearing printed thereon a statement of

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account, which folder may be used to include the remittance due and becomes, in turn an envelope already addressed to the creditor; this set of envelopes is gray in colour;

I might here remark that the plain outer "Window" envelopes which are used by the plaintiff to enclose his inner envelopes called Speed-L-Opes and Stato-L-Opes and by the defendants to enclose their Graphic-Loppes, respectively, were apparently regarded by counsel as unimportant, since they have not been included in Exhibits P^2, P^5 or D^2. Also that in most instances in the exhibits filed by the parties as samples of their wares, the address of the debtor and the return address of the creditor, which are customarily included in their finished product, have been left in blank. The copies of the requisition forms which the plaintiff and the defendants ask the purchasers of their respective wares to sign, the similarity of which of course is disputed, were filed for comparison purposes as Exhibits D^1 and P^4.

Since, in my opinion, in order for a person to obtain the protection afforded by s. 7(*b*) of the *Trade Marks Act,* it is not necessary that his trade name be registered under the *Trade Marks Act* or that the literature found on the wares which he sells be registered under the *Copyright Act,* it follows that the first and perhaps the only question requiring consideration in this case is whether on the proven facts the defendants have contravened the broad provisions above referred to of the *Trade Marks Act,* which reads as follows:

> 7. No person shall
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

For the sake of making the record more complete, I will refer to the following supplementary evidence.

The plaintiff also registered in the Prothonotary's Office of the Superior Court of the district of Montreal, on August 31, 1959, as carrying on business alone under the firm name and style of National Business Men's Speed-L-Opes (Ex. P^{12}).

The defendant Philippe Leduc stated that he hardly sold any of his Graphic-Loppes which were printed in English and that his sales consisted, to all intents and purposes,

entirely of Graphic-Loppes in the French language, as per the samples contained in Exhibit P^2.

From the foregoing it can be seen that the important issue in this case is reduced to a simple question of fact—namely: are the envelopes, particularly those written in the French language, sold by the defendants sufficiently similar to those of the plaintiff to entitle the latter to the relief provided in s. 7(1)(*b*) of the *Trade Marks Act*?

When one compares Exhibit P^2, French version, with the four first envelopes described in Exhibit P^5 as A, B, C and D, in my opinion one is immediately struck by their similarity: They are indistinguishable in point of colour; the form of each envelope is identical; the type of printing used is similar as is the disposition of the text; when the writing on the Speed-L-Opes is in large print or ordinary print, the defendant's Graphic-Loppes follow suit; when the plaintiff made use of capital letters, so did the defendant. If one compares closely the text used in the two exhibits, certain differences between them can be noted but such differences consist principally of inverting somewhat the sequence of the ideas contained in the plaintiff's text; the choice of words is to a large extent the same and those words which are not identical express the same idea.

It was said in *Battle Pharmaceuticals v. The British Drug Houses Ltd.*[1] "that the answer to the question whether two word marks are similar must nearly always depend on first impression", and I think the above dictum is applicable in the present instance.

The get-up of the exhibits in issue, when they are looked at in their totality, in my opinion, makes them appear at first blush to be indistinguishable one from the other.

We are not here dealing with a case where there is only a single instance of what could be termed copying. But apart from the similarity already noted, I consider that the defendant Leduc has gone to unusual lengths in copying the plaintiff's Speed-L-Opes. This is seen, for instance, in the use he made of the trade name Graphic-Loppes Reg'd. He admitted in evidence that, when he was considering registering in the Prothonotary's Office a trade name, he wanted to make use of the name "Rapid-L-Opes" and he altered it

[1] [1946] S.C.R. 50.

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somewhat only because he happened to mention the matter to a lawyer whom he met by chance on the street, who advised him to use the word "Graphic" instead of "Rapid" because the latter was excessively similar to the plaintiff's registered name.

The plaintiff made use of the following slogan emphasizing how important it was for a debtor to preserve his credit:

PROTEGEZ-VOUS EN PROTEGEANT VOTRE CREDIT.

The defendant made use of the same theme by using the slogan:

VOTRE BON CREDIT FERA VOTRE RENOMMEE.

I will now pass on to deal briefly with plaintiff's Exhibit P^{5-E}, which is a sample of his Stato-L-Opes.

When I place the above exhibit alongside the corresponding defendant's Exhibit P^3, my immediate impression is that it would be difficult to imagine how the defendant could make a more deliberate and a more successfully deceitful imitation of the plaintiff's Stato-L-Opes.

Not content with the imitations made of the above-mentioned Speed-L-Opes and Stato-L-Opes, the defendant Leduc went to the length of making use of a requisition or order form (Ex. P^4) which he, like the plaintiff, asked the purchasers of their wares to sign—which, in my opinion he could never have devised unless he made deliberate use of the plaintiff's requisition form Exhibit D^1.

The plaintiff, when asked how he came to publish his work entitled "Speed-L-Opes", stated that, after working on it for about eight months, he was able to complete it in its final form, and that when it started to sell he had it copyrighted and that at the date of trial his sales of Speed-L-Opes were about one million and a quarter sets a year. He did not offer, however, any evidence as to the extent, if any, his sales had been adversely affected by reason of the competition met with from the defendants. But, as may be seen from the authorities conveniently gathered at page 455 in Fox—The Canadian Law of Copyright, ed. 1944, actual damage need not be proved, and failure to do so will not defeat an author's right to an injunction if it be otherwise justified.

The plaintiff also testified that after the defendants had approached some people who had previously purchased through them the plaintiff's Speed-L-Opes with a view to selling such clients the defendant's Graphic-Loppes, several of such parties were confused and telephoned the plaintiff to ascertain if the defendants were still in his employ.

For the above reasons, I consider that both the defendants have at the time they commenced directing public attention to defendant Leduc's wares, services and business, consisting of the sale of Graphic-Loppes, did so in such a way as to cause or be likely to cause confusion in Canada between the defendant's Graphic-Loppes and the plaintiff's Speed-L-Opes and Stato-L-Opes, contrary to the provisions of s. 7(*b*) of the *Trade Marks Act*.

I do not consider that the defendant Jean Pelletier can escape liability on the ground that he was merely a selling agent and not a partner of Philippe Leduc. As appears from Exhibit P[14], when the plaintiff notified Jean Pelletier that his services were no longer required, he advised the plaintiff that, unless he was willing to pay him a commission on any renewal contract that the plaintiff might receive in respect of orders for Speed-L-Opes which he (Jean Pelletier) had been instrumental in obtaining, he would join a Quebec firm (which turned out to belong to the other defendant) and sell the latter's ware in substitution of those of the plaintiff. In my opinion, the defendant Jean Pelletier knowingly and deliberately aided and abetted his co-defendant in violation of the above-mentioned provisions of the *Trade Marks Act*.

In view of the foregoing conclusion which I have reached, I do not think it necessary to determine whether or not the defendants, contrary to the provisions of the *Trade Marks Act*, infringed the plaintiff's registered trade mark "Speed-L-Opes" or his registered copyrights entitled "Speed-L-Opes" and "Stato-L-Opes". However, seeing that counsel for the defendants placed great store on the latter's registered copyright in respect of Speed-L-Opes and in his argument dwelt on this aspect of the case almost to the exclusion of the other remaining issues raised, I propose to deal with the validity of the plaintiff's Registered Copyright No. 31, Serial No. 116642, dated March 29, 1956, in respect of Speed-L-Opes, and, in the event of an affirmative finding, to resolve

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the question of whether such rights have been infringed by the defendants.

In considering the questions of the validity and (if necessary) the infringement of the Copyright entitled "Speed-L-Opes", the provisions of the *Copyright Act*, R.S.C. 1952, c. 55, relevant thereto read as follows:

Section 2(*n*) "literary work" includes maps, charts, plans, tables and compilations;

Section 2(*j*) "infringing", when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act;

Section 20(3): In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,

(*a*) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and

(*c*) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;

36. (1) Every register of copyrights under this Act shall be *prima facie* evidence of the particulars entered therein and documents purporting to be copies of any entries therein or extracts therefrom, certified by the Commissioner of Patents or the Registrar of Copyrights and sealed with the seal of the Copyright Office, shall be admissible in evidence in all courts without further proof or production of the originals.

(2) A certificate of registration of copyright in a work shall be *prima facie* evidence that copyright subsists in the work and that the person registered is the owner of such copyright. R.S., c. 32, s. 36.

I will first deal with the question of whether the four serial envelopes in issue constitute a literary work.

As pointed out by counsel for the defendants, it is well established that both in Canada and Great Britain a distinction must be drawn between the prerequisites necessary to warrant protection under the *Copyright Act* from those required under the *Patent Act*. The latter affords protection to ideas themselves while the former pertains to the manner in which they are expressed. As the learned President of this Court, following the leading case in *Hollinrake v. Truswell*[1], said in the case of *Moreau* and *St. Vincent*[2]:

That no person has any copyright in any arrangement or system or scheme or method for doing a particular thing even if he devised it himself. It is only in his description or expression of it that his copyright subsists.

Now, looking at the evidence, the plaintiff testified (and I have no reason to doubt his veracity) that since 1922 he

[1] [1894] 3 Ch. D. 420 at 427. [2] [1950] Ex. C.R. 198 at 204.

had been engaged in the credit and collection field in the city of Montreal and that in 1955 he conceived the idea of providing clients with a series of letters, to be sent to their debtors, which were calculated to improve collection returns. This idea, he said, was expressed on four coloured envelopes called Speed-L-Opes in language which was "all my own composition, complete, everything in there except the French, which was translated by my secretary."

His evidence also shows that, apart from the choice of wording or composition found on the four envelopes, the plaintiff gave considerable time and attention to what is often referred to as the "get up" of his work. Thus, he carefully selected the size of the envelopes, the sequence of colours, the various types of print and the arrangement thereof, terminating in a slogan calculated to inspire the debtor to meet his obligations—which reads:

PROTECT YOUR CREDIT AND IT WILL PROTECT YOU, all of which required eight months to complete to his satisfaction.

I propose to leave aside such features as the size, shape and the kind of type setting which the plaintiff chose because these features, while relevant when unfair competition or infringement is at issue, are not of the essence when one is concerned with the validity of a copyright, and in considering this latter aspect one must necessarily have regard to the composition of the reading matter appearing in the body of the Speed-L-Opes.

I will observe first of all that, in my opinion, it is not a simple task but one which requires thought, a good and tactful sense of balanced phrasing, to compose a series of succinct messages the subject-matter of which is bound to be disagreeable to the recipient, in language which is mild enough not to give offence, yet sufficiently stern to promote quick results. Assuming for a moment that originality is conceded, I think, particularly as literary merit need not be of a high order, the plaintiff's composition discloses at least a modicum of literary merit attributable to his skill and ingenuity. This added to the considerable time, care and effort which he devoted to it, in my opinion, is more than sufficient to endow the plaintiff's Speed-L-Opes with the quality of "a literary work" as defined in the foregoing s. 2(*n*).

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I will now pass on to the evidence of two witnesses heard in support of the defendant's second line of defence, viz., that the plaintiff's four Speed-L-Opes lack originality, on the ground that they belong to the public, because long before 1956 identical or similar sets of envelopes had been in common use in the United States and Canada and more particularly in the city of Montreal, province of Quebec.

Mr. Jean Piquette testified that in 1956 he caused to be incorporated Pan American Service Inc. and that prior thereto he had been carrying on a collection agency business in the province of Quebec under the registered name of Pan American Credit Service. Beginning in 1958 he caused to be printed a system for collecting debts through a series of four letters (Ex. D^5) which he began selling to and for the use of merchant creditors throughout the province of Quebec.

The witness also testified that he obtained the said idea of the above-mentioned method of debt collection when he saw in the city of New York, as far back as 1952, a type of such envelopes which was being sold in the United States by a company called Triple-Duty Envelopes Inc. No sample of the so-called triple-duty envelopes was produced but Mr. Piquette said he was not aware whether they were protected by copyright and pointed out that they were printed in English, adding naïvely that his envelopes were only printed in the French language.

The above-mentioned evidence might be helpful in establishing that Mr. Piquette's Exhibit D^5 was not copied from the plaintiff's Speed-L-Opes—but with this we are not here concerned—and in other respects his evidence has little worth. His evidence, far from establishing that "the Piquette collection letters" made their appearance in Canada prior to the date of the plaintiff's copyright, proves this occurred two years subsequent thereto and does not supply any convincing evidence that the composition of the plaintiff's Speed-L-Opes was not his own but was copied from literature emanating from the United States or elsewhere.

Mr. Gordon McKenzie, the second witness, who is chief buyer in Montreal for a large oil company, stated that a series of four remittance envelopes were used by his employer, a sample of which was produced as Exhibit D^6. The exhibit consists of four envelopes, marked A, B, C and

D, printed in French. The distinctive colours employed are the same as the plaintiff's Speed-L-Opes but are used in an inverted order. The witness stated that it was not he who gave the printing order, that they were first used in 1959 and that he does not know who was responsible for the choice of their text. If one should go to the length of making a minute comparison, particularly between the phraseology used in envelopes C and D of Exhibit D^6 with the corresponding Speed-L-Opes marked P^5 C and D, one finds that their similarity is even more marked than is the case with the defendant's corresponding Graphic-Loppes, and it becomes apparent that one was copied from the other. Bearing in mind that the envelopes of the above-mentioned oil company only made their appearance three years later than the plaintiff's corresponding Speed-L-Opes, one is almost compelled to conclude that Exhibit D^6 was copied from Exhibit P^5, which may explain why the witness added in his testimony that his company had ceased to make use of them.

The evidence of the two above-mentioned witnesses, in my opinion, is insufficient to rebut even the *prima facie* evidence arising from the production of the plaintiff's certificate of registration, as mentioned in s. 36(2), that the plaintiff is the owner of the copyright in question, and I think it should be disregarded entirely, more particularly in the light of the evidence given by the plaintiff.

In conclusion, I wish to make some short observations in respect of infringement and its necessary constituents.

As Orde J.A. said in *Deeks v. Wells*[1], in order to constitute infringement there must be identity or similarity of language, phraseology or literary style or form. Likewise, it was said in *Kantel v. Grant, Nisbet & Auld Ltd.*[2] that there is no infringement unless a substantial part of a work is copied.

Over a century ago, Shadwell, V-C., made the following observations in *Sweet v. Cater*[3]:

> Under the question of whether there has been a piracy it is not a question of one small passage here and another there, but when such a point is raised as to the quantity of the matter copied, I have always understood that the court at the time of trial, is to look at the two works and satisfy itself, as well as it can, whether there has been such an abstraction as forms a fair subject of complaint.

[1] [1931] O.R. 818 at 840. [2] [1933] Ex. C.R. 84 at 96.
[3] (1841) 11 Sim. 572.

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In view of my previous observations concerning the similarity between the plaintiff's Speed-L-Opes and the Graphic-Loppes sold by the defendants, I do not think I need to dwell on this aspect of the case because, in my opinion, there is abundant evidence that the close resemblance between the plaintiff's and the defendants' wares has been brought about because the defendants have made direct, multiple and, hence, illegitimate use of the plaintiff's copyrighted material.

I might add that it is well recognized that a work may be infringed by a colourable imitation of the whole or any part of it, and, in my opinion, the defendants have been guilty of infringement by making a colourable imitation of the plaintiff's copyrighted work, both in the literal and figurative sense of the term.

For the foregoing reasons I find that the defendant Philippe Leduc, by making use of the trade name Graphic-Loppes and by copying the colour, the form and the printed matter of the plaintiff's wares entitled Speed-L-Opes-Stato-L-Opes and his requisition form, which he has, at all relevant times, used and is continuing to use, has directed public attention to his business in such a way as to be likely to cause confusion between his business and that of the plaintiff, and that the defendant Jean Pelletier, as his agent, has been a party thereto.

In addition I find that the plaintiff is the owner of the sole right to offer for sale or sell in Canada his literary work entitled Speed-L-Opes and that the defendant Philippe Leduc has infringed the plaintiff's copyright in the literary work aforesaid.

In consequence, an order will issue enjoining the defendant Philippe Leduc and his servants, workmen or agents, and particularly his agent Jean Pelletier, from directing attention in Canada to their business and selling debt collection letters of the kind heretofore referred to as Graphic-Loppes or any other letters so designed as to be likely to cause confusion between their wares and business and the wares and business of the plaintiff; and I further direct that both defendants be restrained specifically from infringing the plaintiff's copyright entitled "Speed-L-Opes" by offering for sale letters in any form which would constitute an infringement of the plaintiff's aforementioned copyright.

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The plaintiff is entitled to damages or an accounting of profits, as he may elect, and there will be a reference to the Registrar or the Deputy Registrar to inquire into and report on the amount of such damages or profits for which the defendant Leduc is responsible and as any portion thereof for which the defendant Pelletier is also liable.

The plaintiff is entitled to his taxable costs against both defendants.

Costs of the reference are reserved.

Judgment accordingly.