Frank MORRISSEY, Plaintiff, Appellant,

v.

The PROCTER & GAMBLE COMPANY et al., Defendants, Appellees.

No. 6882.

United States Court of Appeals
First Circuit.
June 28, 1967.

ALDRICH, Chief Judge.

This is an appeal from a summary judgment for the defendant. The plaintiff, Morrissey, is the copyright owner of a set of rules for a sales promotional contest of the "sweepstakes" type involving the social security numbers of the participants. Plaintiff alleges that the defendant, Procter & Gamble Company, infringed, by copying, almost precisely, Rule 1. In its motion for summary judgment, based upon affidavits and depositions, defendant denies that plaintiff's Rule 1 is copyrightable material, and denies access. The district court held for the defendant on both grounds.

* * *

The second aspect of the case raises a more difficult question. Before discussing it we recite plaintiff's Rule 1, and defendant's Rule 1, the italicizing in the latter being ours to note the defendant's variations or changes.

> "1. Entrants should print name, address and social security number on a boxtop, or a plain paper. Entries must be accompanied by * * * boxtop or by plain paper on which the name * * * is copied from any source. Official rules are explained on * * * packages or leaflets obtained from dealer. If you do not have a social security number you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for prize.
>
> "Use the correct social security number belonging to the person named on entry * * * wrong number will be disqualified."

(Plaintiff's Rule)

> "1. Entrants should print name, address and *S*ocial *S*ecurity number on a Tide boxtop, or *on* [a] plain paper. Entries must be accompanied by Tide boxtop *(any size)* or by plain paper on which the name 'Tide' is copied from any source. Official rules are *available* on Tide Sweepstakes packages, or *on* leaflets *at* Tide dealers, *or you can send a stamped, self-addressed envelope to:* Tide 'Shopping Fling' Sweepstakes, P.O. Box 4459, Chicago 77, Illinois.
>
> "If you do not have a *S*ocial *S*ecurity number, you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for a prize.
>
> "Use the correct Social Security number, belonging to the person

named on *the* entry—wrong numbers will be disqualified."

(Defendant's Rule)

The district court, following an earlier decision, Gaye v. Gillis, D.Mass., 1958, 167 F.Supp. 416, took the position that since the substance of the contest was not copyrightable, which is unquestionably correct, Baker v. Selden, 1879, 101 U.S. 99, 25 L.Ed. 841; Affiliated Enterprises v. Gruber, 1 Cir., 1936, 86 F.2d 958; Chamberlin v. Uris Sales Corp., 2 Cir., 1945, 150 F.2d 512, and the substance was relatively simple, it must follow that plaintiff's rule sprung directly from the substance and "contains no original creative authorship." 262 F.Supp. at 738. This does not follow. Copyright attaches to form of expression, and defendant's own proof, introduced to deluge the court on the issue of access, itself established that there was more than one way of expressing even this simple substance. Nor, in view of the almost precise similarity of the two rules, could defendant successfully invoke the principle of a stringent standard for showing infringement which some courts apply when the subject matter involved admits of little variation in form of expression. E. g., Dorsey v. Old Surety Life Ins. Co., 10 Cir., 1938, 98 F.2d 872, 874, 119 A.L.R. 1250 ("a showing of appropriation in the exact form or substantially so."); Continental Casualty Co. v. Beardsley, 2 Cir., 1958, 253 F.2d 702, 705, cert. denied, 358 U.S. 816, 79 S.Ct. 25, 3 L.Ed.2d 58 ("a stiff standard for proof of infringement.").

Nonetheless, we must hold for the defendant. When the uncopyrightable subject matter is very narrow, so that "the topic necessarily requires," Sampson & Murdock Co. v. Seaver-Radford Co., 1 Cir., 1905, 140 F. 539, 541; cf. Kaplan, An Unhurried View of Copyright, 64–65 (1967), if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated. Cf. Baker v. Selden, supra.

Upon examination the matters embraced in Rule 1 are so straightforward and simple that we find this limiting principle to be applicable. Furthermore, its operation need not await an attempt to copyright all possible forms. It cannot be only the last form of expression which is to be condemned, as completing defendant's exclusion from the substance. Rather, in these circumstances, we hold that copyright does not extend to the subject matter at all, and plaintiff cannot complain even if his particular expression was deliberately adopted.

Affirmed.