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March 7, 2001

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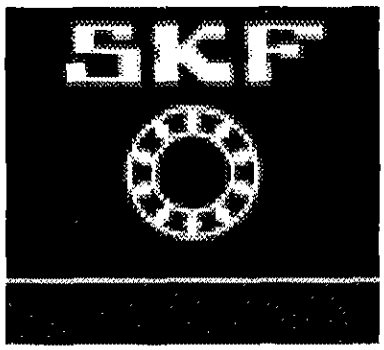
Re: SKF USA, Inc.
Bearing Device *and* Letters & Bearing Device
Copyright Office Control Number: 60-701-047 (G)

Dear Mr. Rinkerman:

The Copyright Office Board of Appeals has reviewed your request for reconsideration of the Office's refusal to register two works submitted for copyright registration by your client, SKF USA, Inc. The Appeals Board reviewed Bearing Device and Letters & Bearing Device, which were submitted as two-dimensional artwork. The Board has reviewed the claims and all correspondence from your firm regarding these applications, but has determined that the above-referenced works cannot be registered because they contain de minimis amounts of originality and do not rise to the level of copyrightability.

Administrative Record

On August 18, 1999 , the Copyright Office received applications, deposits and fees for three works by SKF USA, Inc.; the works were described as Bearing Device, Letters and Bearing Device, and Letters and Escutcheon. All three works appear to be essentially identical, varying only in size. The deposits are small cardboard boxes, on which appear the two-dimensional artwork in which a claim of copyright was made. The artwork consists of a blue rectangular background with a horizontal red stripe at the bottom of the blue rectangle, and with the letters "SKF" and a depiction of a ball bearing, both in white, superimposed on the blue rectangle. The depiction of the ball bearing consists of two concentric circles, with ten small solid white circles spaced evenly between the two concentric circles.



In a letter from copyright examiner James L Shapleigh dated August 26, 1999, the Office notified you that registrations for Bearing Device, Letters and Bearing Device, and Letters and Escutcheon were denied because they lacked the artistic or sculptural authorship necessary to support copyright claims. Mr. Shapleigh also noted that copyright does not protect familiar symbols and designs, minor variations of geometric shapes, lettering and typography, or mere variations in coloring.

First Appeal

In a letter received October 1, 1999, addressed to the Visual Arts Section of the Examining Division, you sought reconsideration of the refusal to register Bearing Device and Letters & Bearing Device, arguing that each of the works "includes a stylized drawing, suggesting (but not depicting) a ball bearing" and the selection, coordination, and arrangement of the elements of the works demonstrated sufficient originality to be registered under the Copyright Act.

Second Refusal to Register

On November 1, 1999 Attorney-Advisor Virginia Giroux of the Examining Division responded to your request for reconsideration of the refusal to register Bearing Device and Letters and Bearing Device. Ms. Giroux wrote that although the letters and design are conceptually separable from the utilitarian aspects of the item, they do not contain sufficient copyrightable authorship.

Ms. Giroux concluded that the graphic material on the boxes consisted of common and familiar geographic shapes, coloring and lettering, none of which are copyrightable, citing Copyright Office regulations at 37 C.F.R. 202.1. She also concluded that the selection and arrangement of the elements in the works was too minimal to support a claim of compilation authorship. Accordingly, she upheld the initial refusal to register the works.

Second Appeal

You replied in a letter received March 27, 2000 requesting reconsideration of the Office's refusal to register Bearing Device and Letters and Bearing Device.

You disagreed with the Attorney-Advisor's analysis of the originality and creativity of the works, claiming that she had improperly dissected the works into their constituent elements. You also argued that the works are not mere collections of stock elements. You suggested that the original combination of features into a new work is the creative aspect that makes the work copyrightable. In addition, you argued that a work need not be complex to be copyrightable.

De Minimis Authorship

The Board agrees that only a "modicum of creativity" is necessary for copyrightable expression, under the Feist standard. Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). Moreover, the Board agrees that the two-dimensional design elements on the packaging are separable from its utilitarian aspects. See Compendium of Copyright Office Practices, Compendium II, §505.03. However, the Board has determined that either taken as a whole or viewed as discrete elements, the separable design

elements in Bearing Device and Letters & Bearing Device do not exhibit copyrightable authorship.

Both works, red, white, and blue in coloring, are identical except for their size. The design in question, appearing on the top portion of each package, superimposed on a blue background, consists of the letters "SKF" under which are placed two white concentric circles between whose circumferences lie ten small equally spaced solid white circles which also form a circle. The result is clearly a depiction of a ball bearing. A horizontal red stripe appears at the bottom.

You have identified as copyrightable aspects of the works: their fanciful lettering, the three-color design, the stylized arrangement of circles, the decision to depict a ball bearing (as distinguished from at least five other types of bearings), and the number of small circles (10) depicting the balls in the ball bearing. You also argue that the combination of these aspects of the works involves copyrightable selection, coordination and arrangement.

A. Lettering

Lettering is not copyrightable. See 37 C.F.R. §202.1(a); Compendium II §202.02(j) (1984). That the lettering that appears on the packaging might be "distinctive, artistic, and stylized" does not immunize it from this rule. It is clearly intended to be and is recognizable as the three letters "SKF," which happens to be the name of the claimant, and it appears that these three letters, in the identical typeface, have been the registered trademark of the clamant or its predecessor in interest for several decades. See, e.g,. U.S. Trademark Registration No. 502840 (registered October 12, 1948). Under these circumstances, the Board can recognize no registrable authorship in the logo itself, because it is, at best, preexisting authorship. 17 U.S.C. §103(b),

B. Coloring

Coloring is not copyrightable. See 37 C.F.R. §202.1(a). The use of only three colors -- and especially the primary colors of red, white, and blue -- is also insufficient as a color variation to warrant a registration based on artwork. As the section of the Compendium relating to works of the visual arts states, "Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. For example, it is not possible to copyright a new version of a textile design merely because the colors of red and blue appearing in the design have been replaced by green and yellow, respectively." Compendium II, §503.02(a).

C. Depiction of a Ball Bearing

As you note, in Feist the Supreme Court confirmed that the degree of creativity required for copyright protection is modest. The Court held that the originality required for copyright protection consists of "independent creation plus a modicum of creativity." Feist at 346. However, the Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity," *id.* at 363, and that there can be no copyright in works in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. Even before Feist, the Copyright Office followed this standard, refusing to register "works that lack even a certain minimum amount of original authorship." Compendium II, §202.02(a)(1984).

Under longstanding Copyright Office practice, and consistent with Feist, common shapes or designs, or simple arrangements of such comment elements do not embody copyrightable authorship. 37 C.F.R. §202.1(a). With respect to pictorial, graphic and sculptural works such as the works involved in this appeal, the Compendium states in §503.02(a) that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." The Compendium recognizes that it is not aesthetic merit, but the presence of creative expression that is determinative of copyrightability, *id.*, and that

> registration cannot be based upon the simplicity of standard ornamentation such as chevron stripes, the attractiveness of a conventional fleur-de-lys design, or the religious significance of a plain, ordinary cross. Similarly, it is not possible to copyright common geometric figures or shapes such as the hexagon or the ellipse, a standard symbol such as an arrow or a five-pointed star. Likewise, mere coloration cannot support a copyright even though it may enhance the aesthetic appeal or commercial value of a work. For example, it is not possible to copyright a new version of a textile design merely because the colors of red and blue appearing in the design have been replaced by green and yellow, respectively. The same is true of a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations.

Id.

Whether viewed as a stylized arrangement of circles or as a depiction of a ball bearing, the circular image that appears beneath the SKF logo is a common depiction, utilizing a common shape: circles. Although there may have been other ways to represent a ball bearing and perhaps other types of ball bearings to choose to represent, the fact remains that the depiction used on the packaging is a commonplace representation of a ball bearing consisting of two concentric circles with a number of solid circles placed at regular intervals around the circumference of the inner circle, and touching the outer circle. Circles are a basic and common geometric shape for which copyright protection is not available. This simple combination of circles does not meet the requisite threshold of creativity. Moreover, the choice of 10 balls when as few as 7 or as many as 14 might have been made is too trivial to constitute protectible expression.

Professor Fantuzzi's conclusion that each work "evidences a deliberation and aesthetic" is not relevant to copyright analysis. The amount of deliberation or other effort that goes into the creation of a work does not satisfy the creativity requirement. See Feist, 499 U.S. 340 (1991). Further, copyrightability depends on the presence of creative expression, and not on aesthetic merit, commercial appeal, or symbolic value. Compendium II, §503.02(a).

D. The Works as a Whole

You have argued that even if the individual elements discussed above are not sufficiently creative or original to warrant copyright protection, the selection and arrangement of these elements are sufficient to protect the works as a whole. Relying on cases involving computer programs and compilations of data and of literary works, you assert that the creators of the graphic material on the packaging had a wide

range of choices in how to arrange the graphic material, and that the selection and arrangement of the blue background, the red stripe at the bottom, the SKF trademark and the depiction of the ball bearing constitute protectible authorship.

Of course, any author creating any work has, theoretically, an unlimited choice of alternatives. The fact remains, however, that in this case what was selected, and the manner in which it was arranged, are too modest to qualify for copyright protection. The choice of a solid blue background with a red stripe at the bottom falls far short of the minimum threshold of creativity. The choice of SKF's longstanding trademark is, if not necessary, virtually dictated by the fact that the box is designed to contain SKF's goods. The decision to include, in the center of the box, the simple depiction of a ball bearing also betrays not even a modicum of creativity. This simple combination of commonplace elements does not qualify for copyright protection even under the compilation analysis urged in your letter. The Compendium explains that:

> A compilation is registrable if its selection, coordination, or arrangement as a whole constitutes an original work of authorship. The greater the amount of material from which to select, coordinate, or order, the more likely it is that the compilation will be registrable. Where the compilation lacks a certain minimum amount of original authorship, registration will be refused. Any compilation consisting of less than four selections is considered to lack the requisite original authorship.

Id., §307.01. The selection of the SKF trademark, the depiction of the bearing, and the blue and red background, and their commonplace arrangement, do not constitute sufficient authorship.

CONCLUSION

For the reasons stated above, the Copyright Office Board of Appeals concludes that Bearing Device and Letters and Bearing Device cannot be registered for copyright protection. This decision constitutes final agency action.

Sincerely,

David O. Carson
General Counsel
for the Appeals Board
U.S. Copyright Office