



No Copyright for Product Part Numbers

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From auto supplies to computer codes to cuts of meats sold through a catalog, companies use numeric codes to accurately represent their products. But do these numbers qualify for copyright protection? The U.S. Court of Appeals for the Third Circuit said no, copyright law does not extend to product numbers.

The case—*Southco Inc. v. Kanebridge Corp.*—marks a departure from earlier opinions, finding that product numbers can qualify for copyright protection under some conditions. However, even the court wasn't in complete agreement on the matter. In fact the Third Circuit reversed the district court twice on appeal; first reversing a preliminary injunction for the plaintiff, then reversing summary judgment for the defendant. After the second reversal, the Third Circuit reheard the case *en banc*. Eventually eight judges concluded that part numbers are not copyrightable, three judges concurred two others dissented.

Number crunching

Southco manufactures various products, including rivets, latches, handles and fasteners. It had developed a numbering identification system using nine digits, where each digit or group of digits signified a relevant characteristic of the respective product. This enabled customers to easily identify the particular Southco fastener they would need to complete their project. To facilitate ordering, Southco included these product numbers in its annual handbook publication, several of which were copyrighted.

Southco sued Kanebridge, another manufacturer of fasteners, for copyright infringement, based on Kanebridge's use of Southco's product numbers in comparative advertising pieces. These advertisements displayed Kanebridge's and Southco's numbers for equivalent fasteners in adjacent columns, making it clear that the two companies' parts are interchangeable, and that Kanebridge's fasteners cost less. Southco sought a preliminary injunction by asserting copyright infringement of the product

numbers. They argued that the product numbers were an expression of its numbering system, which it called "a unique, non-intuitive and highly complex expression of creative thought." Initially the district court agreed and granted the injunction.

Missing that spark

Four years and two reversals later, the Third Circuit finally held that the product numbers weren't entitled to copyright protection. It based its holding on two separate grounds: (1) the product numbers lacked originality, and (2) the product numbers constituted the equivalent of a short phrase, something which has long been held non-protectable by copyright.

- **Originality.**

Under Federal law, copyright protection is granted only to "original works of authorship." In order to satisfy the "original works" requirement, a work must be original in the sense that it was not copied from another's work and in the sense that it shows creativity ("the creativity requirement"). In this case, the majority found that Southco's part numbers lacked creativity, because each number was rigidly dictated by the rules of the Southco numbering system.

The Court conceded that a certain degree of thought went into the development of the numbering system, but once the rules of the system applicable to a particular product class were set, the numbers were generated by a mechanical application of the rules and didn't reflect a "spark of creativity." In fact, the absence of creativity was an essential attribute of Southco's numbering process; otherwise the numbers would have no meaning to consumers. For this reason the Court found Southco's numbers "purely functional," serving only to convey information about objective characteristics.

- **Phrases.**

The Third Circuit also found the product numbers not protectable by copyright because they were analogous to short phrases. Since at least 1899, it has been the practice of the Copyright Office to deny registration to “words and phrases.” The government’s reason for rejecting words and phrases is because the owner of a copyright has the exclusive right to reproduce the copyrighted work. If a word or phrase were copyrighted any use of the word or phrase by another would potentially infringe the copyright; this would essentially amount to a monopoly in words. Because this concept naturally extends to numbers, the court opted to give deference to the Copyright Office’s longstanding practice.

And another thing

The concurring opinion, however, disagreed with the majority holding equating the numbers with short phrases. It contended that the product numbers fall into a gray area between a short phrase and more extensive work, making the court’s deference to Copyright Office’s practice

inappropriate. But the concurrence also provided additional grounds for withholding copyright protection for the numbers. The concurrence cited the concept of *scenes a faire*, which means the “scene that must be done.” This concept has been most commonly employed in the literary or dramatic context to describe those otherwise expressive elements of a work that are “standard, stock, or common to a particular topic or that necessarily follow from a common theme or setting.” In this case, a fastener is expected to have a certain length, thread size, composition, and finish; without these attributes a fastener could not be a fastener. Simply describing these standard attributes makes the product numbers undeserving of copyright protection under *scenes a faire*.

Protecting part numbers

As of now, manufacturers shouldn’t depend on copyright law to prevent their competitors from using their product or part numbers. But manufacturers may consider seeking trademark registrations for those numbers that qualify as trademarks. Unfair competition laws also may offer a remedy if the competitor’s use of the part number violates the prohibitions against, for example, passing off a product as a competitor’s.

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