United States Copyright Office
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March 7, 2006

David Youssefi, Esq.
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Best Western International, Inc.
6201 North 24th Parkway
Phoenix, AZ 85016-2023

Re: BEST WESTERN LOGO
Copyright Office Control Number: 61-319-7499(B)

Dear Mr. Youssefi:

I write on behalf of the Copyright Office Review Board ("Board") in response to your Second Request for Reconsideration, dated September 26, 2006, in which you request the Copyright Office ("Office") to reconsider its refusal to register a graphic design entitled "Best Western Logo." The Board has carefully examined the application, the deposit and all correspondence concerning this application, and affirms the denial of registration of this work.

I. DESCRIPTION OF WORK

The subject graphic design consists of a blue, soft-angled pentagon reminiscent of the shape of a house or other dwelling. A yellow border traces the inside of the pentagon. The words "Best Western" appear one on top of each other in yellow in the center of the pentagon. Above the text is a red, stylized graphic design of a "crown" or a "W."



II. ADMINISTRATIVE RECORD

A. Initial Application and the Office's Refusal to Register

On December 7, 2004, the Office received from you a Form VA application on behalf of your client Best Western International, Inc. to register a graphic design. In a letter dated February 4, 2005, Visual Arts Section Examiner Kathryn Sukites refused registration of this work because she concluded it lacks the authorship necessary to support a copyright claim. Letter from Sukites to Youssefi of 02/04/05, at 1.

B. First Request for Reconsideration

In a letter dated April 28, 2005, you requested reconsideration of the Office's refusal to register the Best Western Logo. Letter from Youssefi to Copyright R&P Division of 04/28/05, at 1. You noted that the requisite amount of creativity to support a copyright claim is "extremely low," and argued that the subject work meets this threshold. *Id.* You explained that the work's use as a trademark is irrelevant to a determination of its copyrightability, and identified several other logos that the Copyright Office has registered, that courts have held to be copyrightable and that you contend embody the same amount or less creativity than does the Best Western Logo. *Id.* at 1-3. You argued that the following artistic elements satisfy the creativity and originality requirements for copyrightability: i) a blue, irregularly shaped polygonal design; ii) curvilinearly shaped corners; iii) yellow pin-striping; and iv) an abstract rendition of a red crown. *Id.* at 3. You claimed that these "original design elements" are not in the public domain and are individually protectible because the Applicant created them through a process of artistic decision making. *Id.* In the alternative, you argued that the work as a whole is copyrightable by virtue of its selection and arrangement of elements and embodies more creativity than a polka dot design or a row of roses, both of which designs the Office has registered. *Id.*

C. Examining Division's Response to First Request for Reconsideration

In response to your first request for reconsideration, Attorney Advisor Virginia Giroux of the Examining Division reexamined the application. She too determined that the subject graphic design does not contain a sufficient amount of original and creative artistic or graphic authorship upon which to support a copyright registration. Letter from Giroux to Youssefi of 08/09/05, at 1. She concluded that the elements comprising the Best Western Logo consist of names, typographic ornamentation, lettering, coloring, common geometric shapes and/or minor variations thereof, none of which, either alone or in combination, possesses more than a *de minimis* quantum of creativity as necessary for copyright protection to apply. *Id.* at 1-4.

D. Second Request for Reconsideration

In a letter dated September 26, 2005, you requested the Office to reconsider for a second time its refusal to register the copyright claim in the "Best Western Logo" graphic design. Letter from Youssefi to Copyright R&P Division of 09/26/05, at 1. You argue that the Copyright Office has applied a higher standard of copyrightability than the minimal requisite creative spark, and has therefore erroneously refused to register this "highly abstract composition . . . which is clearly the result of original artistic expression." *Id.* You contend that neither the five-sided design nor the "crown" or "W" design are in the public domain or are trivial variations of something in the public domain. *Id.* at 2-3. You claim that the Copyright Office has denied registration of this work based on its own views regarding artistic merit, evidenced by the fact that the Office has already acknowledged that the legal standard for copyrightability is extremely low, the Best Western Logo consists of multiple elements, these elements are coupled with coloring and arrangement and that a work should be viewed in its entirety. *Id.* at 4. You point to several other works which the Copyright Office has registered, and argue that the Best Western Logo is much more creative and complex, and thus should also be registered. *Id.* at 5.

III. DECISION

A. The Legal Framework

1. Copyrightable Subject Matter

Graphic designs, including (as you point out) advertisements, commercial prints and labels, are indeed eligible for copyright protection. Letter from Youssefi to Copyright R&P Division of 04/28/05, at 2 (citing U.S. Copyright Office Information Circular No. 40 "Copyright Registration for Works of the Visual Arts," *available at* http://www.copyright.gov/circs/circ40.html). *See also*, 17 U.S.C. § 102(a)(5); *Compendium of Copyright Office Practices II*, § 502 (1984) ([hereinafter *Compendium II*]). However, the fact that some graphic designs can qualify for copyright protection does not mean that all graphic designs necessarily will.

All copyrightable works, be they graphic designs or otherwise, must also qualify as "original works of authorship." 17 U.S.C. § 102(a). As used with respect to copyright, the term "original" consists of two components: independent creation and sufficient creativity. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. The Copyright Office accepts at face value your assertion on the subject application for registration that your client Best Western International, Inc. acquired any copyright in and to this work by means of an assignment from Lister Butler Inc. Therefore, the first component of the term "original" is not at issue in the

analysis set forth herein. Second, the work must possess sufficient creativity. For the reasons set forth below, the Board has determined that the subject graphic design fails to embody the requisite amount of creativity, and therefore it is not entitled to copyright registration.

2. The Creativity Threshold

In determining whether a work embodies a sufficient amount of creativity to sustain a copyright claim, the Board adheres to the standard set forth in *Feist*, where the Supreme Court held that only a modicum of creativity is necessary to support a copyright. As you noted, the Court explained that the "requisite level of creativity is extremely low; even a slight amount will suffice." Letter from Youssefi to Copyright R&P Division of 04/28/05, at 1 (citing *Feist*, 499 U.S. at 345); *see also,* Letter from Youssefi to Copyright R&P Division of 09/26/05, at 1 (noting the "minimal creative spark" necessary for copyright registration).

However, the *Feist* Court also ruled that some works (such as the work at issue in that case) fail to meet the standard. 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," 499 U.S. at 363, and that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359; *see also,* 37 C.F.R. § 202.10(a) ("In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(B) (2002) ("[T]here remains a narrow area where admittedly independent efforts are deemed too trivial or insignificant to support a copyright.").

Even prior to the *Feist* Court's decision, the Office recognized the modest, but existent, requisite level of creativity necessary to sustain a copyright claim. *Compendium II* states, "Works that lack even a certain minimum amount of original authorship are not copyrightable." *Compendium II*, § 202.02(a). With respect to pictorial, graphic and sculptural works, *Compendium II* states that a "certain minimal amount of original creative authorship is essential for registration in Class VA or in any other class." *Compendium II*, § 503.02(a).

In implementing this threshold, the Office and courts have consistently found that standard designs, figures and geometric shapes, such as a pentagon, are not sufficiently creative to sustain a copyright claim. *Compendium II*, § 503.02(a) ("[R]egistration cannot be based upon the simplicity of standard ornamentation . . . . Similarly, it is not possible to copyright common geometric figures or shapes . . . ."); *id.* § 202.02(j) ("Familiar symbols or designs . . . or coloring, are not copyrightable."). *See also, id.* § 503.03(b) and 37 C.F.R. § 202.1(a).

Moreover, making simple alterations to otherwise standard shapes or familiar designs will not inject the requisite level of creativity. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (What "is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"); *Compendium II*, § 503.02(a) ("[Registration cannot be based upon] a simple combination of a few standard symbols such as a circle, a star, and a triangle, with minor linear or spatial variations."). While the Board agrees with your assertion that the inclusion of non-copyrightable elements will not negate the copyrightability of a work as a whole, letter from Youssefi to Copyright R&P Division of 04/28/05, at 3, all copyrightable works must include elements which are copyrightable in and of themselves or with respect to their particular selection, coordination and arrangement.

3. Selection, Coordination and Arrangement

It is true that some combinations of common or standard shapes or other unprotectible elements can embody sufficient creativity with respect to how the elements are combined or arranged to support a copyright. *See Feist*, 499 U.S. at 358 (the Copyright Act "implies that some 'ways' [of compiling or arranging uncopyrightable material] will trigger copyright, but that others will not"; determination of copyright rests on creativity of coordination or arrangement). However, merely combining non-protectible elements does not automatically establish creativity where the combination or arrangement itself is simplistic. For example, in *Jon Woods Fashions, Inc. v. Curran*, 8 U.S.P.Q.2d 1870 (S.D.N.Y. 1988), the district court upheld the Register of Copyrights' decision that a fabric design consisting of striped cloth over which a grid of 3/16" squares was superimposed, even though distinctly arranged and printed, did not contain the minimal amount of original artistic material to merit copyright protection. Similarly, the Eighth Circuit upheld the Register's refusal to register a simple logo consisting of four angled lines which formed an arrow and the word "Arrows" in cursive script below the arrow. *John Muller & Co. v. New York Arrows Soccer Team*, 802 F.2d 989, 990 (8th Cir. 1986). Similar to these cases, the Board has determined that the Best Western Logo does not embody the requisite level of creativity with respect to the combination of its constituent elements, the reasoning of which is set forth below in more detail.

B. Analysis of the Work

You argue that given the minimal amount of creativity necessary to sustain a copyright registration, the Best Western Logo unquestionably meets this threshold. Letter from Youssefi to Copyright R&P Division of 09/26/05, at 1. Although the Board agrees that the creativity standard is very low, the Board disagrees with your conclusion that the Best Western Logo satisfies this standard.

You describe the elements of the Best Western Logo as: i) a blue, irregularly shaped polygonal design; ii) curvilinearly shaped corners; iii) yellow pin-striping; and iv) an abstract rendition of a red crown. Letter from Youssefi to Copyright R&P Division of 04/28/05, at 3. You appropriately do not appear to claim copyright in the words "Best Western" or their particular typeface. *See* 37 C.F.R. § 202.1(a) ("[w]ords and short phrases such as names, titles; lettering" and "[t]ypeface as typeface" "are examples of works not subject to copyright").

The five-sided polygon, or pentagon, is a public domain geometric shape not subject to copyright protection in and of itself. The Board recognizes that the pentagon featured in the Best Western Logo does not have equilateral sides or angles as is often found in a representation of a pentagon. However, the Board deems these differences to be at most trivial variations. The work is still by definition a pentagon, a common shape not capable of sustaining a copyright registration. Even if this shape is viewed as a building, such as a hotel, it is a standard representation of a generic building which does not warrant copyright protection. The curvilinearly shaped corners which soften the pentagon's angles are similarly trivial variations from rigid angles and do not qualify for copyright protection. The pin-striping simply follows the general contours of the pentagon, and therefore lacks the necessary creative spark as does the pentagon itself. Similarly, the blue and yellow coloring of the pentagon and the pin-striping, by themselves, do not embody a sufficient amount of creativity on which to base a copyright registration.

The only other element of the Best Western Logo is the red "crown" or "W." Regardless whether it is viewed as a "crown" or a "W," this element is a commonplace design which embodies insufficient creativity to support a copyright. As a crown, it is a standard, albeit stylized, representation consisting of a horizontal plane at the bottom, multiple vertical tines or prongs angling outward from a center axis and an additional element positioned in the top center where an emblem, cross or other flourish would typically appear. As a W, it is also a standard representation as found in several typographies. Copyright is not available for a letter of the alphabet nor its particular typeface.[1]

"If the work consists entirely of uncopyrightable elements, registration is not authorized." *Compendium II,* § 503. Therefore, the only means by which the various non-protectible elements in the Best Western Logo could possibly sustain a copyright would be if their particular combination or arrangement exhibited a sufficient level of creativity. Unfortunately, they do not.

The pentagon is the background and the yellow pin-striping simply outlines it. The "crown/W" and the "Best Western" text are centered in the pentagon. Although these elements may

[1]Although the subject graphic design is not typeface per se, the prohibitions on copyrighting typeface provide insight into the inability to copyright a letter of the alphabet. *See* 37 C.F.R. §§ 202.1(a); 202.1(e); 506.03 and 202.02(j).

have been purposefully placed in this arrangement, the arrangement itself does not embody sufficient creativity. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a *combination* of unprotectible elements may qualify for copyright protection. (citations omitted) But it is not true that *any* combination of unprotectible elements automatically qualifies for copyright protection. A combination of unprotectible elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.") (emphasis in the original). The totality of this simplistic combination of public domain and non-protectible elements, even with the "crown/W" and text superimposed on the outlined pentagon, is simply not sufficiently creative to support a copyright registration.

You argue that the Examining Division erroneously applied a "minor variation" standard with respect to public domain shapes, rather than a "trivial variation" standard. Letter from Youssefi to Copyright R&P Division of 09/26/05, at 2. Regardless of the verbiage, the proposition is consistent; standard shapes and designs are not copyrightable in and of themselves, and something more than a negligible or trivial variation to that shape or design is necessary to transform it into copyrightable subject matter. This is not to say that the variation has to be novel or unique; it simply must embody a distinguishable amount of creativity from the standard representation. The Board rejects your argument that any change resulting from artistic effort necessarily qualifies as a sufficient variation to warrant copyright protection. *See* Letter from Youssefi to Copyright R&P Division of 09/26/05, at 2-3. The process by which a work or variation is created, be it due to a thunderclap or shaky hand, as in the examples you provide, or due just to pure inspiration, is irrelevant to copyrightability. Only the resulting work is evaluated, regardless how it came to be. Moreover, the Supreme Court made clear in *Feist* that effort or "sweat of the brow" itself, regardless of the amount, is simply not an element to be considered in determining the copyrightability of a work. *Feist*, 499 U.S. at 353-54.

You also claim that the Examining Division has denied registration of this work based on its own views regarding artistic merit, evidenced by the fact that it has already acknowledged that the legal standard for copyrightability is extremely low, the Best Western Logo consists of multiple elements, these elements are coupled with coloring and arrangement and that a work should be viewed in its entirety. Letter from Youssefi to Copyright R&P Division of 09/26/05, at 4. However, you have overlooked several other important points that the Examining Division also made. First, the Office agrees that the artistic merit or aesthetic appeal of a work, or lack thereof, has no bearing on the copyrightability of that work and has consistently said so. *See* Letter from Sukites to Youssefi of 02/04/05, at 1; Letter from Giroux to Youssefi of 08/09/05, at 1. Second, although we also agree that the legal standard for copyrightability is extremely low as enunciated by the Supreme Court, it is not non-existent. Copyright is not available for every work simply because someone authored it. It is available only for works embodying *creative* authorship. Some works, such as the Best Western

Logo, simply do not meet the admittedly low threshold. Third, we do not dispute that the logo consists of a number (albeit a small number) of elements which have been arranged and colored. The fatal defect in this logo in terms of copyrightability is that it does not consist of *creative* elements or embody any *creative* arrangement. Finally, the Office examines a work both as to its individual elements as well as to their particular combination in the work as a whole. From neither vantage point does the Best Western Logo evidence a sufficient amount of creativity to qualify for copyright protection.

In support of your argument that the subject graphic design is copyrightable, you point to several other works which the Office registered and which you argue embody less creativity than the Best Western Logo. *See* Letter from Youssefi to Copyright R&P Division of 04/28/05, at 2; Letter from Youssefi to Copyright R&P Division of 09/26/05, at 5. It is important first to note that the Office does not compare works as part of its evaluation process. The Office must independently evaluate each work submitted for registration to determine if it meets the minimal, but existent, statutory requirements. It is simply not the Copyright Office's role to compare and contrast works submitted for registration. *See e.g.,* 37 C.F.R. § 201.2(a) ("The Copyright Office, however, does not undertake the making of comparisons of copyright deposits to determine similarity between works.") Moreover, the comparison you have drawn to *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 356 (4th Cir. 2001), *cert. denied*, 532 U.S. 1038 (2001), wherein the court found to be copyrightable a graphic design featuring a open-winged raven holding in its beak a shield decorated with the letter "B," the word "Ravens" and a cross, despite the fact that it consisted of, as you describe them, "simple, well-known elements," does not advance your cause. Letter from Youssefi to Copyright R&P Division of 04/28/05, at 2. The Copyright Office's view is consistent with the court's, as evidenced by the fact that the Copyright Office did indeed register that design. The Ravens logo is not analogous to the subject Best Western Logo. The Ravens logo embodies sufficient creativity in individual elements, such as the artistic rendering of the raven itself, as well as in the particular combination of all of the elements. In contrast, the Best Western Logo contains no elements which are copyrightable in and of themselves or in their particular combination for the reasons already discussed.[2]

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[2] The Board finds your citations to *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991) (finding copyrightability in a particular arrangement of "clip art" roses positioned in varying directions in horizontal rows against an ornate background) and *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121 (S.D.N.Y. 1997) (finding copyrightability in a multi-colored dot design where the dots featured crescent shadows and were positioned according to irregular diagonal lines) similarly unpersuasive due to the reasoning explained by Attorney Advisor Giroux. *See* Letter from Youssefi to Copyright R&P Division of 04/28/05, at 3; Letter from Giroux to Youssefi of 08/09/05, at 3.

C. Other Considerations

The Board agrees with you that a work's use as a trademark (*e.g.*, a logo) is irrelevant to the evaluation of the work's copyrightability. Letter from Youssefi to Copyright R&P Division of 04/28/05, at 1-2. The trademark status of the subject graphic design has had no bearing on the Board's analysis and determination set forth herein.

However, several other arguments and conclusions that you make also have no impact on the determination of whether or not copyright registration is available for this work. For example, you state that the design elements of the Best Western Logo were "created by Applicant through a process of artistic decision making, and are therefore copyrightable." Letter from Youssefi to Copyright R&P Division of 04/28/05, at 3. Besides the fact that processes are ineligible for copyright protection, 17 U.S.C. § 102(b), it is only the resulting expression that is evaluated for copyrightability, not the number or character of the decisions an artist may make in creating a particular design.

You also note that the Best Western Logo is "a highly abstract composition." Letter from Youssefi to Copyright R&P Division of 09/26/05, at 1. Again, while this statement may be true, it has no bearing on the copyrightability of the work. Copyright can subsist in works that range from a highly abstract work of modern art to a life-like representation of a subject such as a portrait. The character or aesthetic value of a work is simply not relevant to the determination of its copyrightability.

IV. CONCLUSION

For the reasons stated herein, the Copyright Office Review Board affirms the refusal to register the graphic design entitled "Best Western Logo." This decision constitutes final agency action on this matter.

Sincerely,

/s/

David O. Carson
General Counsel
for the Review Board
United States Copyright Office