



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

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Re: Second Requests for Reconsideration for Refusal to Register FITNESS SPACE SAVER ROLL-OUT ACTIVITY and SENSORY SPACE SAVER ROLL-OUT ACTIVITY (SR # 1-8744015811, 1-8744016033; Correspondence ID: 1-4NXN7ZE, 1-4NNC9KC)

Dear Ms. De Luca:

The Review Board of the United States Copyright Office (“Board”) has considered Fit and Fun Playscapes, LLC’s second requests for reconsideration of the Registration Program’s refusal to register the two-dimensional artwork claims in the works titled “FITNESS SPACE SAVER ROLL-OUT ACTIVITY” and “SENSORY SPACE SAVER ROLL-OUT ACTIVITY” (collectively, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second requests for reconsideration, the Board affirms the Registration Program’s denial of registration for “FITNESS SPACE SAVER ROLL-OUT ACTIVITY” (“Fitness Space Saver”) and reverses the denial of registration for “SENSORY SPACE SAVER ROLL-OUT ACTIVITY” (“Sensory Space Saver”).

I. DESCRIPTION OF THE WORKS

The Works are two-dimensional artworks consisting of a vertically arranged series of illustrations representing various fitness activities. Each component illustration is separated by a colored rectangular band with the name of the activity centered within the band and the Fit and Fun Playscapes logo on the left side of the band. For Fitness Space Saver, the five component illustrations depict, from top to bottom:

- lunges (purple)
- an agility ladder (green, light blue, and dark blue, with grey and white footprints)
- sit-ups (dark blue)
- a second agility ladder (purple, light blue, and green, with grey and white footprints)
- squats (green)

For Sensory Space Saver, the component illustrations are labeled, from top to bottom:

- tree pose (a white figure in a luminous green circle, surrounded by the words “I am calm” repeated in black)
- crab crawl (handprints and footprints in various shades of red)
- daisy hopscotch (a flower in various colors with a head wearing sunglasses and an insect on each side of the flower’s stem)
- heel to toe (a curving pattern of footprints in various shades of blue)

The Works, as depicted in the deposits submitted to the Office, are reproduced below:



Fitness Space Saver



Sensory Space Saver

II. ADMINISTRATIVE RECORD

On April 17, 2020, Fit and Fun Playscapes filed separate applications to register copyright claims in the Works. The applications disclaimed as preexisting material the component illustrations, including several works previously registered with the Office, such as the Fit and Fun Playscapes logo. Both applications explained that registration was being sought for the overall selection, coordination, and arrangement of the Works and the adaptation of the component elements.

Each application was considered individually. In June 2020, a Copyright Office registration specialist refused to register the claim in Fitness Space Saver, determining that “the new material does not contain a sufficient amount of original authorship.” Initial Letter Refusing Registration of Fitness Space Saver from U.S. Copyright Office to Sheryl De Luca at 1 (June 4, 2020). A month later, a Copyright Office registration specialist also refused to register the claim in Sensory Space Saver “because it lacks the authorship necessary to support a copyright claim.” Initial Letter Refusing Registration of Sensory Space Saver from U.S. Copyright Office to Sheryl De Luca at 1 (July 16, 2020).

In separate submissions, Fit and Fun Playscapes sought reconsideration of the Office’s initial refusals to register the Works, arguing in support of both Works that “[b]y the selection, combination and arrangement of the different elements, the author contributed something recognizably its own.” Letter from Sherri De Luca to U.S. Copyright Office at 6 (Sept. 3, 2020) (“Fitness Space Saver First Request”); Letter from Sherri De Luca to U.S. Copyright Office at 6 (Sept. 3, 2020) (“Sensory Space Saver First Request”). For both Works, Fit and Fun Playscapes cited a series of cases that it argued show that “the selection and arrangement of certain lettering, and the manner of presentation, including background, letter size, and spacing, and of other artwork, including simple shapes, and text can be combined to give a work sufficient independent authorship for copyright protection.” Fitness Space Saver First Request at 3–6; Sensory Space Saver First Request at 3–6.

Fit and Fun Playscapes also made separate arguments in support of each Work. For Fitness Space Saver, it claimed that despite including preexisting material, “the present work includes significant new material including the selection, coordination and arrangement of the artwork; adaptation of the designs for this work, including dividing the agility ladder design, changing the color of the Sit-ups and Fitness Agility Ladder designs, and proportionally reducing the scale of the works.” Fitness Space Saver First Request at 2. For Sensory Space Saver, Fit and Fun Playscapes pointed to “the selection, coordination and arrangement of the artwork; adaptation of the designs for this work, adapted crab crawl and toe to heel designs with fewer feet and hands to make the designs shorter and smaller and revisions to spacing of the elements and changes to color and shading, and proportionally reducing the scale of the works.” Sensory Space Saver First Request at 2.

After reviewing the Works in light of these points, the Office reevaluated the claims and again concluded that the Works could not be registered. Refusal of First Request for Reconsideration of Fitness Space Saver from U.S. Copyright Office to Sheryl De Luca at 4 (Feb. 9, 2021) (“Fitness Space Saver Second Refusal”); Refusal of First Request for Reconsideration of Sensory Space Saver from U.S. Copyright Office to Sheryl De Luca at 4 (Feb. 3, 2021)

(“Sensory Space Saver Second Refusal”). Specifically, the Office observed that the Works “consist[] of a simple graphic rendering of physical actions, arranged into a ladder configuration.” Fitness Space Saver Second Refusal at 5; Sensory Space Saver Second Refusal at 5. The Office determined that in both Works this “simple combination in no way demonstrates the necessary creativity required to support a claim in copyright.” Fitness Space Saver Second Refusal at 5; Sensory Space Saver Second Refusal at 5. The letters explained that “a visual art work must contain a sufficient amount of creative expression. Merely bringing together only a few standard forms or shapes with minor linear or spatial variations does not satisfy this requirement.” Fitness Space Saver Second Refusal at 5 (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 905 (3d ed. 2021) (“COMPENDIUM (THIRD)”); Sensory Space Saver Second Refusal at 5 (same).

In letters dated May 3, 2021, and May 8, 2021, addressing each Work separately, Fit and Fun Playscapes requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Sherri De Luca to U.S. Copyright Office (May 8, 2021) (“Fitness Space Saver Second Request”); Letter from Sherri De Luca to U.S. Copyright Office (May 3, 2021) (“Sensory Space Saver Second Request”). Both requests contend that the Office wrongly characterized the Works as “consist[ing] of a simple graphic rendering of physical actions, arranged into a ladder.” Fitness Space Saver Second Request at 2; Sensory Space Saver Second Request at 2. Fit and Fun Playscapes argues that each Work “embodies unique design elements represented in an artistic manner in a design that illustrates creative choice in the positioning of the elements in the overall Work.” Fitness Space Saver Second Request at 3; Sensory Space Saver Second Request at 3. Fit and Fun Playscapes maintains that the “unique design elements” and “creative choice in the positioning of the elements in the overall Work” meet the low threshold for creativity required for copyright. Fitness Space Saver Second Request at 3; Sensory Space Saver Second Request at 3.

III. DISCUSSION

A work may be registered if it qualifies as an “original work[] of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). In this context, the term “original” consists of two components: independent creation and sufficient creativity. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. 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. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works fail to meet even this low threshold. *Id.* at 362–63. The Court has 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.

Some combinations of common or preexisting design elements may contain sufficient creativity to support a copyright claim with respect to how they are juxtaposed or arranged. *See, e.g., Runstadler Studios, Inc. v. MCM Ltd.*, 768 F. Supp. 1292, 1295 (N.D. Ill. 1991) (stating that “combinations of standard shapes may possess the requisite creativity necessary for copyright protection”). Nevertheless, not every combination or arrangement will be sufficient to meet this test. *See Feist*, 499 U.S. at 358 (finding the Copyright Act “implies that some ‘ways’ [of selecting, coordinating, or arranging uncopyrightable material] will trigger copyright, but that

others will not”). A determination of copyrightability in the combination of preexisting design elements depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship. *Id.*; *see also Atari Games Corp. v. Oman*, 888 F.2d 878, 883 (D.C. Cir. 1989); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498–99 (S.D.N.Y. 2005). A mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[A] combination of unprotectable 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.”).

The Office’s regulations implement the longstanding requirement of originality set forth in the Copyright Act. *See, e.g.*, 37 C.F.R. § 202.1(a) (prohibiting registration of, among other things, “[w]ords and short phrases such as names, titles, and slogans”); *id.* § 202.10(a) (stating “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”); *see also* COMPENDIUM (THIRD)§ 906.1 (noting that common geometric shapes are not protectable). The *Compendium of U.S. Copyright Office Practices* further explains that “the more creative the selection, coordination, and/or arrangement, the more likely it is that the author’s compilation will be registered.” *Id.* § 312.2. The *Compendium* adds that “[a] standard or common selection, coordination, and/or arrangement of specific content or simple variations thereof will not support a claim of compilation authorship and cannot be registered with the Office.” *Id.* § 313.3(E).

A. Fitness Space Saver Roll-Out Activity

After carefully examining the Work and considering the arguments made in the First and Second Requests in light of the legal standard described above, the Board finds that Fitness Space Saver does not contain the creativity necessary to sustain a claim to copyright.

As Fit and Fun Playscapes acknowledges, the individual elements composing Fitness Space Saver are not a basis for registration. *See* Fitness Space Saver Second Request at 1, 3. The Work consists of preexisting illustrations as well as familiar symbols and shapes, such as footprints, which are uncopyrightable. *See* 37 C.F.R. § 202.1; COMPENDIUM (THIRD) §§ 313.4(J), 503.5(A), 906.1. Fit and Fun Playscapes nevertheless argues that the combination of the Work’s elements meets the necessary threshold for copyright protection. Fitness Space Saver Second Request at 3.

The Board concludes that the combination of elements in Fitness Space Saver is not protected by copyright. The arrangement of the component illustrations here is a mechanical and routine vertical sequence. While Fit and Fun Playscapes objects to the examiner’s use of the word “ladder” to describe this arrangement, *see id.* at 2, the Work nevertheless joins each component illustration in a standard vertical arrangement reflecting the order in which the fitness activities are to be performed. A “selection, coordination, and/or arrangement that is mechanical or routine, such as . . . arranging geometric shapes in a standard or symmetrical manner” fails to exhibit sufficient creativity. *See* COMPENDIUM (THIRD) § 312.2. The Office typically refuses to register visual works that consist of only “[m]ere spatial placement or format of trademark, logo, or label elements.” *Id.* § 914.1. Because Fitness Space Saver arranges unprotectable elements in a routine, symmetrical manner, it lacks sufficient creativity to be protected by copyright.

Besides pointing to the “creative choice in the positioning of the elements in the overall Work,” Fit and Fun Playscapes also contends that the “visual arrangement is unique due to the sequence, coloring, shading and proportions.” Fitness Space Saver Second Request at 3. It cites details such as “the 1-3-1-3-1, rhythmic patterns created by the large color blocks” and “the cool color palette of greens, blues and purples,” which it suggests are unexpected considering the exercise movements called for by the illustrations. *Id.* at 2–3.

Even when considered in combination, the changes in color, shading, and proportion in the Work are not sufficient to make the Work copyrightable. *See Satava*, 323 F.3d at 811; COMPENDIUM (THIRD) § 906.1. In the case of the coloring and shading, the *Compendium* states that the Office may refuse registration for a work that “added or changed a few colors that appear in a preexisting work of authorship.” COMPENDIUM (THIRD) § 313.4(K). The changes in proportion are also minor; and, as the *Compendium* explains, “minor linear or spatial variations” do not constitute sufficient creative expression. *See id.* § 905.

Finally, Fit and Fun Playscapes notes that color theory informed the author’s choice of colors. Fitness Space Saver Second Request at 3. Copyright, however, protects expression, not ideas. 17 U.S.C. § 102(b). In determining whether the design contains the requisite minimal amount of original authorship necessary for registration, the Board does not consider the espoused intentions or reasons of the design’s author. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 422–23 (2017) (explaining that the “inquiry is limited to how [works] are perceived, not how or why they were designed”); COMPENDIUM (THIRD) § 310.5. Because copyright does not protect ideas, “the fact that creative thought may take place in the mind of the person who created a work . . . has no bearing on the issue of originality unless the work objectively demonstrates original authorship.” COMPENDIUM (THIRD) § 310.5. Accordingly, the motivations underlying the design choices are not relevant to our analysis to the extent that they provide context beyond what can be perceived from the Work itself.

B. Sensory Space Saver Roll-Out Activity

After carefully examining the Work and considering the arguments made in the First and Second Requests in light of the legal standards described above, the Board finds that Sensory Space Saver does exhibit the creative authorship necessary to support a claim in copyright.

As with Fitness Space Saver, Fit and Fun Playscapes acknowledges that the individual illustrations composing Sensory Space Saver cannot be registered because they are preexisting works. *See Sensory Space Saver Second Request* at 1, 3. Fit and Fun Playscapes nonetheless contends that the overall arrangement of these illustrations and adjustments made to the colors, shading, and proportions are sufficient to satisfy the threshold of creativity needed for copyright. *Id.* at 3.

The Board agrees. In its view, there is enough originality in the selection and arrangement of the combined elements, including the selection of and shading of colors and the arrangement of elements, to support a copyright claim in the two-dimensional Work as a whole. Sensory Space Saver’s component elements, like those of Fitness Space Saver, are arranged in a vertical format. In this case, however, the component parts fit together in a manner that is neither mechanical nor routine. *See* COMPENDIUM (THIRD) § 312.2. As Fit and Fun Playscapes

points out, “the curved line of the footprint design segues into the curved line segments of the flower element,” and the design elements seem to narrow as the sequence culminates at the green circular yoga illustration. Sensory Space Saver Second Request at 3. Fit and Fun Playscapes also points to the sequence and arrangement of the colors (“with cooler colors flanking warmer colors”). *Id.* 2–3. As a result, the elements of Sensory Space Saver are creatively “arranged . . . in a particular order” and in a manner suggesting that certain elements “build on each other” and “are vitally linked.” *Enter. Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013); *see also Boisson v. Banian Ltd.*, 273 F.3d 262, 271 (2d Cir. 2001) (noting that “even though a particular color is not copyrightable, the author’s choice in incorporating color with other elements may be copyrighted”). As in *Boisson*, “[t]hese expressive choices push [the Work] into the realm of copyrightability.” 273 F.3d at 1119.

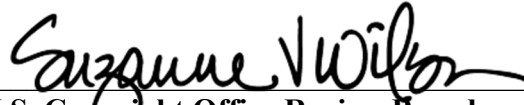
The Board’s decision is based on the low standard for copyrightability articulated in *Feist*. The decision relates only to the new authorship reflected in the Work as a whole (*i.e.*, the specific combination of the elements) and does not extend individually to any of the standard or preexisting elements depicted in the Work. *See* 37 C.F.R. § 202.1(a)–(b) (noting that copyright does not apply to words and short phrases, familiar symbols or designs, and plans and methods); COMPENDIUM (THIRD) §§ 311.2, 313.4(J), 503.5(A), 906.1.

Nor does the decision relate to the underlying fitness methods or movements depicted in the Work. *See* 17 U.S.C. § 102(b) (stating that copyright does not protect “any idea, procedure, process, system, method of operation . . . regardless of the form in which it is described, explained, illustrated, or embodied”). That is, although Fit and Fun Playscapes states that the individual elements of Sensory Space Saver “are positioned in a linear pattern to evoke a perception or feeling by the viewer of a choreographed set of 3D movements that clearly have a beginning and end,”¹ Sensory Space Saver Second Request at 2, the actual exercise system or series of movements is not copyrightable. *See Bikram’s Yoga Coll. of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 803 F.3d 1032, 1044 (9th Cir. 2015) (explaining that a series of yoga poses and exercises “is not copyrightable as a choreographic work for the same reason that it is not copyrightable as a compilation: it is an idea, process, or system to which copyright protection may ‘[i]n no case’ extend” (quoting 17 U.S.C. § 102(b))).

¹ In addition, the Board’s conclusion is not dependent on an assessment of what the positioning is intended to evoke. As mentioned, in determining whether the design contains the requisite minimal amount of original authorship necessary for registration, the Board does not assess the espoused intentions or reasons of the design’s author (or creative thought occurring in the mind of a person viewing the work). *See Star Athletica*, 580 U.S. at 422–23; COMPENDIUM (THIRD) § 310.5.

IV. CONCLUSION

For all these reasons, the Board affirms the refusal to register the copyright claim in Fitness Space Saver. The Board reverses the refusal to register the copyright claim in Sensory Space Saver. The Board now refers the Sensory Space Saver Work to the Registration Policy and Practice division for registration, provided that all other application requirements are satisfied. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

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