



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

June 15, 2022

Sherri De Luca, Esq.
Nixon & Vanderhye P.C.
901 N. Glebe Road, 11th Floor
Arlington, VA 22203

Re: Second Request for Reconsideration for Refusal to Register Fitness Activity Circuit and Fitness Activity Circuit 2 (Correspondence ID: 1-4GK8WOC; SR # 1-8280214141 & SR # 1-8280395390)

Dear Ms. De Luca:

The Review Board of the United States Copyright Office (“Board”) has considered Fit and Fun Playscapes, LLC’s (“Fit and Fun Playscapes”) second request for reconsideration of the Registration Program’s refusal to register the two-dimensional claims in the works titled “Fitness Activity Circuit” and “Fitness Activity Circuit 2” (collectively, the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board finds that the Works exhibit copyrightable authorship and thus may be registered.

The Works are two-dimensional artworks consisting of the following elements: two parallel, straight, blue-colored dashed lines; a red-colored dashed line in a chevron pattern; three broken yellow-colored circles surrounding animated people in different positions; two parallel, straight, orange-colored lines comprised of alternating pairs of footprints; a straight, green-colored line of dots; a non-uniformly curved, purple-colored dashed line; and the words “Sprint,” “Tiptoe,” “Lunges,” “Side jump,” “Squats,” “Hop,” “Jumping Jacks,” and “Tightrope” in various colors. These elements in Fitness Activity Circuit are arranged in a square. These elements in Fitness Activity Circuit 2 are arranged in a vertical zig-zag. Deposit images for both works are included in the Appendix.

While not every combination or arrangement of common or standard design elements will be entitled to copyright registration, some such combinations will contain sufficient creativity with respect to how they are juxtaposed or arranged to meet the test for protectability. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991). A determination of copyrightability in a combination of standard 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). For example, the Office may register a work that consists merely of geometric shapes where the “author’s use of those shapes results in a work that, as a whole, is sufficiently creative.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 (3d ed. 2021) (“COMPENDIUM (THIRD)”); *see also Atari*, 888 F.2d at 883 (“[S]imple shapes, when selected or combined in a distinctive manner indicating some ingenuity, have been accorded copyright protection both by

the Register and in court.”). Thus, the Office would register, for example, a wrapping paper design that consists of circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color, but it would not register a picture consisting merely of a purple background and evenly spaced white circles. COMPENDIUM (THIRD) § 906.1 (the Office would register the wrapping paper because the design “goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement”).

After carefully examining the Works and applying the legal standard discussed above, the Board finds that both of the Works satisfies the requirement of creative authorship necessary to sustain a claim to copyright. The Board’s decision relates only to the Works’ specific combination and arrangement of elements, which include, among other things, dots, dashes, straight and curved lines, footprints, circles, pictorials of people in exercise positions, the names of physical activities (*e.g.*, “Sprint,” “Hop,” “Tightrope”), and six different colors. Those elements, individually, are not copyrightable. *See* 37 C.F.R. § 202.1(a) (“[w]ords and short phrases” and “familiar symbols and designs” are not subject to copyright); COMPENDIUM (THIRD) §§ 313.4(J), 313.4(K), 906.1. As a whole, however, the elements are numerous enough and the Works’ selection, combination, and arrangement of individual elements display sufficient creativity to meet the statutory requirements for copyright 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.”); *see also Enter. Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013) (finding sufficient expressive choices in the arrangement of short labels, rectangles, and arrows because the components were, in part, “arranged . . . from left-to-right in a particular order” and in a manner that suggests how certain elements “build on each other” and “are vitally linked”); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1076 (2d Cir. 1992) (concluding that a diagram consisting of a circle around nine-pointed stars with labels at the points was copyrightable because there were “any number of ways” to construct the diagram). Specifically, the overall combination of colors and different individual elements (*e.g.*, lines, dashes, circles, footprints, words, etc.), asymmetrical arrangement and uneven lengths of the purple dashes, varied orientations of the individual elements, and different positions of human figures contain the modicum of creativity required for copyrightability. *See, e.g., 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”); *Hoberman Designs, Inc. v. Gloworks Imports, Inc.*, No. 14-cv-6743, 2015 WL 10015261, at *4 (C.D. Cal. 2015) (holding that the use of common “geometric shapes like squares, triangles, and trapezoids . . . does not preclude copyright protection”).

To be clear, the Board’s decision is based on the low standard for copyrightability articulated in *Feist*. The decision relates only to the Works as a whole (*i.e.*, the specific combination of colors, shapes, lines, and words) and does not extend individually to any of the standard and common elements depicted in the Works. *See* 37 C.F.R. § 202.1(a)–(b) (“[W]orks not subject to copyright [include] . . . [w]ords and short phrases[,] familiar symbols or designs [and] methods.”); *see also* COMPENDIUM (THIRD) §§ 313.4(J), 906.1. Nor does the decision

relate to the underlying fitness methods or movements depicted in the Works.¹ 17 U.S.C. § 102(b) (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”); *see also Bikram Yoga College of India v. Evolution Yoga, LLC*, 803 F.3d 1032, 1044 (9th Cir. 2015) (series of yoga poses and exercises not protectable by copyright because it was “an idea, process, or system to which copyright protection may ‘in no case’ extend”).

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claims in the Works. The Board now refers this matter to the Registration Policy and Practice division for registration of the Works, provided that all other application requirements are satisfied.

No response to this letter is needed.



U.S. Copyright Office Review Board

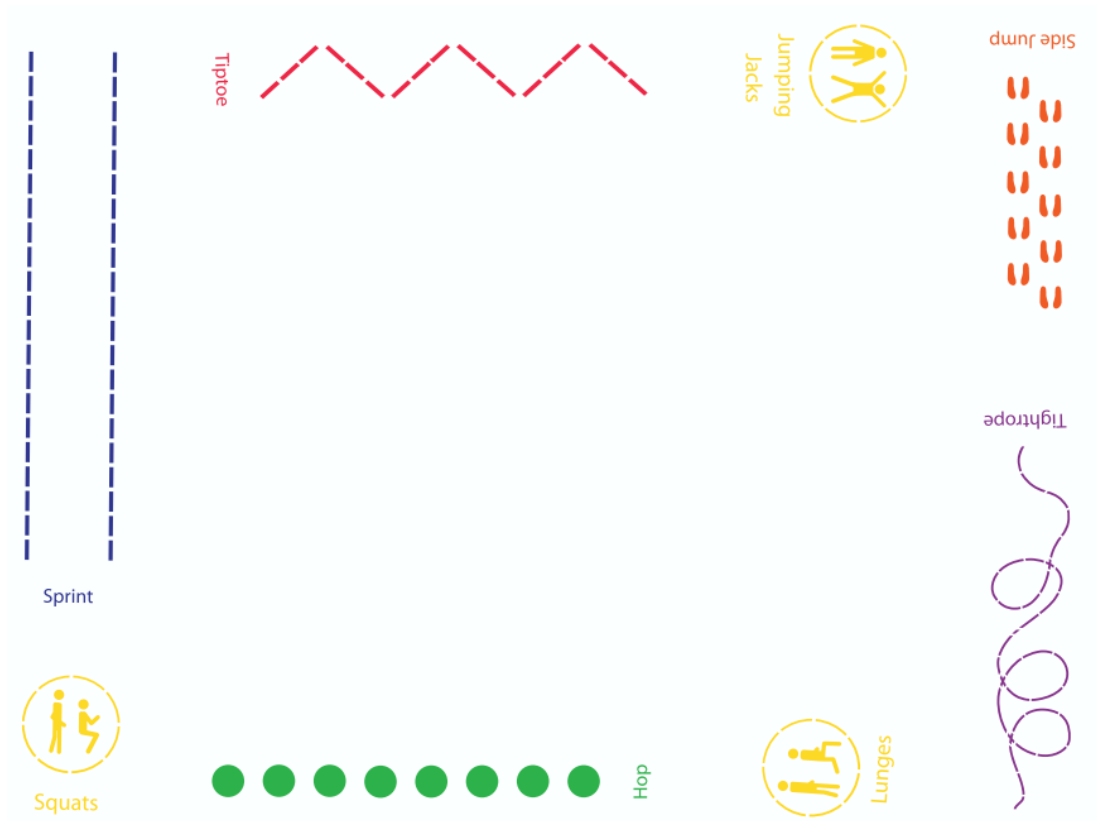
Suzanne V. Wilson, General Counsel and
Associate Register of Copyrights

Kimberley Isbell, Deputy Director of Policy and
International Affairs

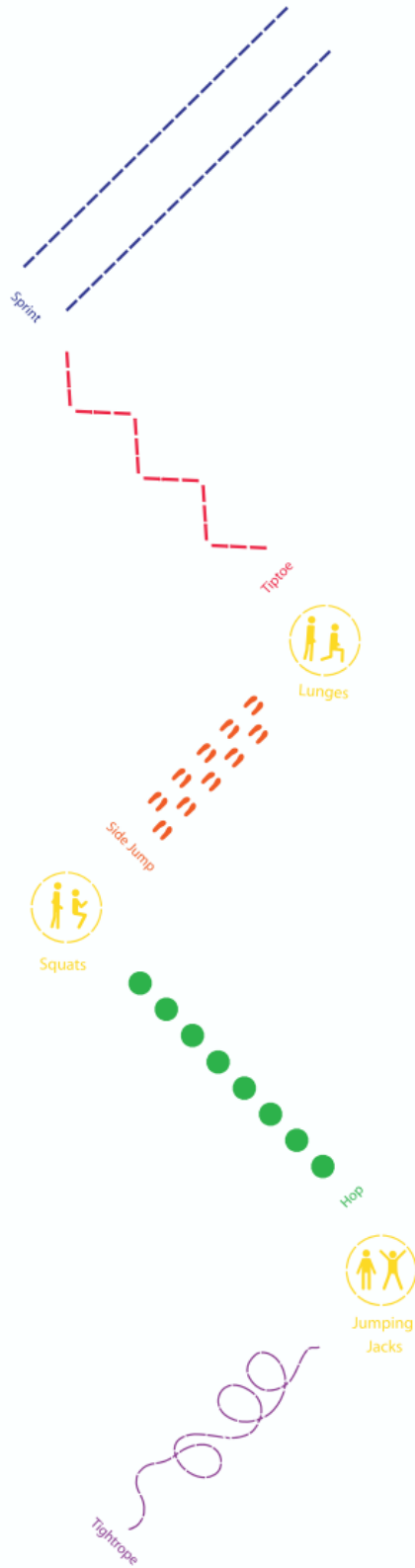
Jordana Rubel, Assistant General Counsel

¹ While the applicant’s Second Request for Reconsideration primarily focuses on the aesthetic expression in the Works, the Request also notes that the Works are designed so that the “viewer perceives a choreographed set of 3D movements.” Letter from Sherri De Luca to U.S. Copyright Office at 3 (Feb. 3, 2021).

Appendix



Fitness Activity Circuit



Fitness Activity Circuit 2