

# Bending Over Backwards for Copyright Protection: Bikram Yoga and the Quest for Federal Copyright Protection of an Asana Sequence

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## I. INTRODUCTION

In some form or another, the practice of yoga, with its roots in ancient India, has existed for over 5,000 years. Bikram Yoga, a comparatively recent addition to this yoga tradition, is now one of the fastest growing styles of yoga in the United States.<sup>1</sup> Founded by Bikram Choudhury over 30 years ago, Bikram Yoga consists of twenty-six postures, conducted in precisely the same order each time, over a ninety minute period, in a room heated up to 115 degrees. Recently, Bikram

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<sup>1</sup> Nora Isaacs, *Hot, Sweaty, and Scandalous*, Salon.com (Apr. 4, 2003) at [http://www.salon.com/mwt/feature/2003/04/04/bikram/index\\_np.html](http://www.salon.com/mwt/feature/2003/04/04/bikram/index_np.html).

Yoga has been making headlines across the country not only as an increasingly popular form of yoga, but also as the subject of ongoing intellectual property litigation.<sup>2</sup> Bikram Choudhury has gradually acquired a portfolio of copyrights and trademarks for various aspects of his Bikram Yoga series. In the past few years, he has sought to enforce his intellectual property rights against yoga instructors and studio owners across the country who have allegedly violated his rights by using his registered trademarks and by using and teaching his yoga series, and using and teaching the dialogue he developed to accompany it.

This paper assesses the scope and enforceability of Bikram's various copyrights. In particular, it analyzes whether Bikram's copyrights confer on his yoga sequence a patent-style protection, as he claims they do. First, this paper describes the evolution of Bikram Yoga and the lawsuits its copyrights have spawned. Next, the paper considers a number of Bikram's copyrighted works – a book describing and detailing the beginning yoga series, a forty-four page accompanying dialogue for his yoga class, and the Bikram Yoga Asana Sequence – and discusses what rights each of these copyrights, if valid, in fact affords Bikram, as well as what sorts of activities would constitute infringement of these copyrights. In turn, these conclusions are applied to recent lawsuits, one that was settled, and one that is pending, in order to predict how the former might have been resolved had it been decided on the merits, and to predict how the latter may be resolved. Finally, this paper addresses whether it would be a wise policy decision to extend intellectual property protection to the actual yoga series.

## II. BACKGROUND

### A. *History of Bikram Yoga*

Bikram, born in Calcutta in 1946, began practicing yoga at age four with his guru, Bishnu Ghosh.<sup>3</sup> Ghosh was a celebrated physical culturalist convinced of yoga's ability to cure chronic ailments and pro-

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<sup>2</sup> See, e.g., Julian Guthrie, *Yogis Go to Court Over Poses: Copyright Dispute Turns Yoga into Legal Exercise*, S.F. CHRON., Feb. 5, 2004, at A1; Melissa Dribben, *It's a Calcutta-to-California Tale of How a Vigorous Brand of Yoga, Called Bikram, Led to Great Wealth—and Litigation*, THE PHILADELPHIA INQUIRER, Nov. 23, 2003 at M4; Bernice Yeung, *Bickering Bikram: A Copyright Dispute Pits Yoga King Bikram Choudhury Against Competitors and Followers Alike*, S.F. WEEKLY at 16-17, July 16, 2003, available at <http://www.sfweekly.com/issues/2003-07-16/bayview.html>.

<sup>3</sup> About Bikram, Bikram's Yoga College of India at <http://www.bikramyoga.com/bikram.htm>.

mote physical as well as mental health.<sup>4</sup> Bikram claims to have developed his system of yoga while he was Ghosh's student.<sup>5</sup>

Bikram held the National India Yoga Competition title for three years in his early teens, but at seventeen crushed his knee in a weight lifting accident and was predicted never to walk again.<sup>6</sup> Bikram refused to accept this pronouncement and returned to Bishnu Ghosh in the hopes of healing his knee.<sup>7</sup> According to Bikram, when Ghosh was approached by a student with a medical ailment, he prescribed a system of poses that would best treat the student's ailment.<sup>8</sup> From this tradition, Choudhury developed the idea of creating a standardized system of poses that would address and help to alleviate the most common health problems, so that he could teach yoga in a group setting, thereby reaching and healing more students than one-on-one practice permitted.

The twenty six postures that comprise Bikram's Beginning Yoga series were derived from eighty-four classic Hatha Yoga postures, which have been around for centuries but were selected and arranged by Bikram himself.<sup>9</sup> Bikram claims to have discovered and developed his series of twenty-six postures and breathing exercises after years of research and verification, using methods taught to him by his guru and medically approved measurement techniques.<sup>10</sup> Bikram asserts that the Bikram Yoga series, practiced regularly, offers tremendous physical, mental, and other benefits, and guarantees that regular practice will prevent the recurrence of certain chronic symptoms.<sup>11</sup> Students and teachers of Bikram Yoga further claim that Bikram's Beginning Yoga System expands lung capacity, tones the body, causes weight loss, increases flexibility, improves the metabolism, improves heart function,

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<sup>4</sup> *Id.*

<sup>5</sup> Loraine Despres, *Yoga's Bad Boy: Bikram Choudhury*, YOGA JOURNAL, March/April 2000, available at <http://www.yogajournal.com/views/328.cfm>.

<sup>6</sup> About Bikram, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> Despres, *supra* note 5.

<sup>9</sup> BIKRAM CHOUDHURY & BONNIE JONES REYNOLDS, BIKRAM'S BEGINNING YOGA CLASS xi-xii (2d Ed. 2000); see also Guthrie, *supra* note 2.

<sup>10</sup> See First Amended Complaint, Choudhury v. Morrison, No. SA02-565, 3 (C.D. Cal. June 30, 2003), available at [http://yogaunity.org/law/law\\_downloads/exhibitA.pdf](http://yogaunity.org/law/law_downloads/exhibitA.pdf); *dismissed per stipulation*, Stipulation and Order For Permanent Injunction Against Defendants Kim Schreiber-Morrison, and Prana Incorporated at 1-2, Choudhury v. Morrison, No. SA02-565 (C.D. Cal. June 30, 2003) (No. SA02-565).

<sup>11</sup> Yoga offers two guarantees with the cure: Guarantee One: If you continue to perform Bikram's Beginning Yoga Class regularly – all twenty-six poses – exactly as directed – the chronic symptoms will not return. Guarantee Two: If you don't continue your Yoga faithfully, fully, or as directed, your symptoms will return.

The Benefits, Bikram's College of Yoga at <http://www.bikramyoga.com/benefits.htm> (last visited Mar. 20, 2004).

helps to create a more peaceful mind, builds mental strength and focus, and improves the lives of those who practice regularly in a multitude of ways.<sup>12</sup>

Bikram came to the United States in the late 60's and opened his first Bikram Yoga Studio in Beverly Hills in 1973. His series has been growing in popularity ever since. In 1994 he launched the Bikram Yoga teacher-training course, under which individuals who wish to instruct others in Bikram Yoga receive training in the Bikram Yoga method and style.<sup>13</sup> The course currently runs nine weeks long and costs \$5,500 to attend.<sup>14</sup> Upon successful completion of the course, prospective teachers receive certain limited licensed rights to teach Bikram's Beginning Yoga System and use his trademarks and copyrighted works. In exchange, they must agree to teach Bikram's Basic Yoga System exactly as it was taught to them and to abide by strict guidelines set by Bikram himself. For example, teachers must use the precise dialogue created by Bikram to lead the class, without significant additions or subtractions.<sup>15</sup> Bikram certifies 500 to 600 teachers each year, approximately one third of whom go on to open studios of their own.<sup>16</sup> There are over 1600 Bikram Studios open worldwide today.<sup>17</sup>

## B. *The Legal Battles*

Since developing his yoga series over thirty years ago, Bikram has amassed a portfolio of copyrights and trademarks relating to his yoga practice. He has trademarked Bikram Yoga, Bikram's Yoga College of India, the image of Bikram in a spinal twist, and a pictorial representation of Bikram's Asana Sequence of twenty-six yoga postures.<sup>18</sup> His copyrights include two editions of *Bikram's Beginning Yoga Class*, a book detailing his method of yoga, offering pictures and descriptions of each posture, and describing the benefits of the series and each pose contained therein; *Bikram's Yoga College of India Beginning Yoga Dialogue*, forty-four pages of verbal instructions to be delivered by teachers while leading a Bikram Yoga class; Bikram's Yoga College of India yoga teacher training course curriculum outline; and Bikram's Begin-

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<sup>12</sup> *Id.*

<sup>13</sup> Despres, *supra* note 5.

<sup>14</sup> First Amended Complaint, Choudhury v. Morrison *supra* note 10, at 4.

<sup>15</sup> *Id.* at 4-5.

<sup>16</sup> Elizabeth Marglin, *McBikram's: An Indian Yoga Guru Beats Americans at Their Own Game* (Dec. 14, 2002) (unpublished paper), at <http://www.newmedia.colorado.edu/editing/pages/5773.html>.

<sup>17</sup> Dribben, *supra* note 2.

<sup>18</sup> First Amended Complaint, Choudhury v. Morrison *supra* note 10, at 6-7.

ning Yoga Class Sound Cassette.<sup>19</sup> Upon successful completion of Bikram's teacher certification course, teachers receive limited rights to use these copyrights and trademarks. These copyrights and trademarks also form the basis of the current legal battles surrounding Bikram Yoga.

Throughout 2002, Bikram, through his attorneys at the time, sent cease and desist letters to at least twenty-five yoga proprietors engaged in teaching his yoga system.<sup>20</sup> He claimed that they were violating his copyrights and trademarks by teaching the Bikram Yoga series and variations thereof, employing instructors who had never been certified by the training course, teaching others to become Bikram Yoga instructors, teaching classes without the full dialogue, and teaching advanced yoga classes.<sup>21</sup> The cease and desist letters demanded that the businesses stop using Bikram's trademarks and copyrighted works, stated the recipients' limited licenses to use those works was thereby terminated, and demanded that recipients disclose a wide variety of information intended to assist Bikram in calculating his damages resulting from the allegedly infringing activities. All but one of the studios that received the letter agreed to his demands sufficiently to avoid being sued; Kim-Schreiber Morrison and Mark Morrison, the owners of a yoga studio in Costa Mesa, California, did not.

On June 17, 2002, Bikram filed suit against the Morrisons for copyright infringement, trademark infringement, unfair competition, and related state law claims arising from their use of Bikram's copyrighted works and trademarks.<sup>22</sup> Kim-Schreiber Morrison was a Bikram certified instructor; Mark Morrison had never completed Bikram's teacher certification course.<sup>23</sup> Bikram made the following allegations against the Morrisons: Mark taught Bikram Yoga even though he was not certified; Mark used Bikram's copyrighted dialogue to teach yoga classes at the studio; the Morrisons used Bikram's trademarks to advertise yoga classes, some of which were based on Bikram's series; the Morrisons taught derivations of Bikram's Beginning Yoga System, some of which were based on Bikram's Yoga series; the Morrisons taught derivations of Bikram's Beginning Yoga System; the Morrisons used dialogue to

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<sup>19</sup> See *id.* at 5-6.

<sup>20</sup> See Dribben, *supra* note 2; First Amended Complaint, Choudhury v. Morrison *supra* note 10, at 6.

<sup>21</sup> Letter from Jacob C. Reinbolt, of Procopio, Cory, Hargreaves, & Savitch LLP, to Mr. Bill McCauley and Mrs. Sandy McCauley, Owners of Yoga Loka, Inc. (June 5, 2002) available at [http://www.yogaunity.org/law/law\\_downloads/exhibitB.pdf](http://www.yogaunity.org/law/law_downloads/exhibitB.pdf).; See also, First Amended Complaint, Choudhury v. Morrison *supra* note 10, at 8

<sup>22</sup> See First Amended Complaint, Choudhury v. Morrison *supra* note 10, at 1.

<sup>23</sup> *Id.* at 7,9.

teach Bikram Yoga; and Kim-Schreiber Morrison offered “teacher certification” courses for Bikram Yoga.<sup>24</sup> The lawsuit requested that the court enjoin the Morrisons from engaging in further infringing activities.

The parties resolved the lawsuit when the Morrisons agreed to a settlement, many terms of which have remained confidential. The settlement order, among other things, permanently enjoined the Morrisons from using *Bikram’s Basic Yoga Class*, *Bikram’s Beginning Yoga Dialogue*, and Bikram’s teacher training materials, as well as any derivative works thereof. The order also required the Morrisons to cease any infringing use of Bikram’s registered trademarks.<sup>25</sup>

Although the case was settled on confidential terms, Bikram openly and publicly claims that he was victorious in the lawsuit. He asserts, on his website, that, “This outcome represents a significant legal victory for Bikram, Rajashree, and the Bikram community, and fully vindicates Bikram’s conviction in the originality and legal enforceability of Bikram’s Yoga.”<sup>26</sup> According to Bikram and his lawyer Bikram has:

[Secured] federal copyright registration under 17 U.S.C. Section 410 for his original work of authorship in his [A]sana sequence of 26 postures and 2 breathing exercises. Through registration of this work, the United States Copyright Office acknowledges Bikram’s exclusive right to the distinct series of postures and breathing exercises comprising the sequence and Bikram’s Beginning Yoga Class.<sup>27</sup>

He further claims that this copyright prohibits others from directly copying his sequence and from creating derivative works based on the sequence. He states:

Virtually all modifications or additions to the sequence will constitute copyright infringement, including: the unauthorized use of even a small number of consecutive postures, the addition of different postures or breathing exercises to the sequence or portions of the sequence; the teaching or offering of the sequence with or without dialogue; or by the addition of extra elements to the sequence, like music.<sup>28</sup>

Regardless of whether the Morrison lawsuit was in fact a victory for Bikram, he has made it clear through the Morrison case pleadings,

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<sup>24</sup> *Id.* at 13-21.

<sup>25</sup> Stipulation and Order For Permanent Injunction, Choudhury v. Morrison, *supra* note 10 at 1-2.

<sup>26</sup> Jacob C. Reinbolt, *Bikram Obtains Copyright Registration for His Asana Sequence* (Feb 3, 2003) [hereinafter Press Release], at <http://www.bikramyoga.com/press/press19.htm> (last visited Apr. 30, 2004).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

statements made to the media, and declarations on his website, that he believes his copyrights relating to Bikram Yoga confer what amounts to patent-style protection.

A second lawsuit, also arising out of Bikram's intellectual property claims, has recently been filed, but this time Bikram is the one being sued. Open Source Yoga Unity (OSYU),<sup>29</sup> a non-profit group of yoga proprietors who oppose the idea that any form of yoga is proprietary,<sup>30</sup> filed a complaint for declaratory judgment and copyright misuse against Bikram in the Northern District of California on December 3, 2003. OSYU is comprised of yoga instructors and owners of businesses engaged in yoga training, including instructors who have been certified to teach Bikram Yoga and studio owners who received the cease and desist letters sent out by Bikram's lawyers in 2002.<sup>31</sup> Although OSYU does not dispute that some of Bikram's intellectual property rights are valid, OSYU claims that they are entitled only to narrow protection and do not give Bikram the right to enjoin others from benefiting from the ideas, knowledge, systems, or methods described in the copyrighted works.<sup>32</sup> The group also claims that Bikram has committed copyright misuse by attempting to obtain a broad monopoly on teaching the Bikram Yoga series and its variations and that therefore his copyrights are unenforceable. The Complaint for Declaratory Judgment requests that the court determine the "validity, enforceability, and scope of [Bikram's] claimed copyrights and trademarks. . ." so that members of OSYU will "be able to conform their conduct so as not to infringe such copyright and trademark rights but will be able to take full advantage of their rights to share and use the public domain knowledge not covered by [Bikram's] copyright."<sup>33</sup> This case is currently pending in the Northern District of California.

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<sup>29</sup> Open Source Yoga Unity at <http://www.yogaunity.org> (last visited Mar. 20, 2004).

<sup>30</sup> Open Source Yoga Unity (OSYU), a non-profit California corporation, was formed to provide a common voice, and the pooling of resources to oppose the litigious position Bikram Choudhury is taking against the yoga community by his attempted enforcement of copyright protection. It is OSYU's mandate to resist the enforcement of the copyright of any yoga style. . .

Open Source Yoga Unity at <http://www.yogaunity.org/>.

<sup>31</sup> See Amended Complaint for Declaratory Relief at 2, Open Source Yoga Unity v. Choudhury, No. C03-3182 (N.D. Cal. filed July 9, 2003) [hereinafter Amended Complaint, Open Source Yoga Unity v. Choudhury], Open Source Yoga Unity available at <http://www.yogaunity.org/law>.

<sup>32</sup> See Joint Case Management Conference Statement at 4, Open Source Yoga Unity v. Choudhury, No. C03-1382, (N.D. Cal. filed Nov. 13, 2003), Open Source Yoga Unity available at <http://www.yogaunity.org/law>.

<sup>33</sup> Amended Complaint Open Source Yoga Unity v. Bikram Choudhury, *supra* note 31 at 10-11.

### III. ANALYSIS OF BIKRAM'S COPYRIGHTS

In assessing whether Bikram's yoga series actually has the legal protection that Bikram publicly claims it has, it is necessary to determine the scope of protection granted by a number of his registered copyrights. These include: 1) *Bikram's Beginning Yoga Class*, a book describing and detailing the Bikram yoga series, and 2) *Bikram's Yoga College of India Beginning Yoga Dialogue*, a set of oral instructions and commands that yoga teachers must give in instructing a Bikram Yoga class. Additionally, as of February 5, 2003, Bikram claims to have copyrighted "his original work of authorship in his [A]sana sequence of 26 postures and 2 breathing exercises."<sup>34</sup> It is unclear, however, what type of copyright Bikram is referring to in this statement.<sup>35</sup> His most recently registered copyright was for a supplement to *Bikram's Beginning Yoga Class*, and, notwithstanding public statements likening his series to a choreographed work, none of Bikram's copyrights are for choreographed works. Despite confusion regarding this "copyright," this paper assesses the 'copyright' by considering whether Bikram *could* copyright his sequence, as a choreography or otherwise, and if so what the scope of that protection would be.

#### A. *The Book: Bikram's Beginning Yoga Class*

Bikram obtained his first copyright relating to his yoga series, in 1979 for *Bikram's Beginning Yoga Class*,<sup>36</sup> the 211-page book describing the entire Bikram Yoga series of twenty-six postures and breathing exercises, with numerous photographs and detailed instructions for each pose. The book is interspersed with anecdotes by Bikram about yoga, his life, and his students, as well as conversations between Bikram and his students as they practice the Beginning Yoga series. Bikram copyrighted a second edition of this book in 2000.<sup>37</sup>

Section 102(a) of the Copyright Act establishes the two fundamental requirements for copyright protection: originality and fixation.<sup>38</sup> The acts states that, "[c]opyright protection subsists in . . . original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated. . . ." Although the Supreme Court has held that originality is the

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<sup>34</sup> See *id.*

<sup>35</sup> Even Open Source Yoga Unity's lawyers are not sure what Bikram means when he claims that he copyrighted his actual sequence, and Choudhury's lawyers have not been willing to clear up this confusion.

<sup>36</sup> See CHOU DHURY & REYNOLDS, *supra* note 9, at x.

<sup>37</sup> See *id.*

<sup>38</sup> See 17 U.S.C. 102(a) (2004).

“*sine qua non* of copyright,”<sup>39</sup> the threshold requirement of originality is not a hard one to meet; the necessary degree of originality is low and the work need not be aesthetically pleasing in order to be protectable.<sup>40</sup> Independent creation, in addition to a modest quantum of creativity is sufficient. Independent creation simply means that the claimant did not duplicate the work of another. The quantum of creativity is a *de minimis* one, requiring only that the claimed work be a detectable variation from the prior art. The fixation requirement merely necessitates that the work be produced in one of two fixed forms, a copy or a phonorecord.

The Copyright Act enumerates eight broad categories of works which may qualify as copyrightable “works of authorship.” The list includes: literary works; musical works; dramatic works; pantomime and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.<sup>41</sup> According to the House Report to the Act, however, this list is not intended to be exhaustive, and copyright protection could be granted to works which do not fall squarely into one of these categories so long as it is sufficiently analogous to one of them.<sup>42</sup>

Bikram’s book, *Bikram’s Beginning Yoga Class*, is registered with the Copyright Office as a literary work.<sup>43</sup>

*Bikram’s Beginning Yoga Class* meets the fundamental requirements of fixation and originality. Bikram’s book is fixed in a tangible form, a hard copy. The book also meets the originality requirement because it was independently created by Bikram and his co-author and exhibits more than the very minimal quantum of creativity required. Although the poses pictured and described in the book have been around for centuries and are not original to Bikram,<sup>44</sup> the book nonetheless exhibits the necessary creativity. It includes an introduction which tells the story behind Bikram Yoga, an index describing various ailments which Bikram Yoga may help to prevent or alleviate, and

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<sup>39</sup> Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 348 (1991).

<sup>40</sup> *Id.* at 345.

<sup>41</sup> 17 U.S.C. § 102(a) (2004).

<sup>42</sup> See Nat’l Conference of Bar Exam’rs v. Multistate Legal Studies, Inc., 495 F. Supp. 34, 36 (N.D. Ill. 1980) (quoting H.R.REP.NO. 94-1476, at 53 (1976) *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666: “The House Report which accompanied this statute in 1976 stated: “The use of the word “include” makes it clear that the list is “illustrative and not limitative,” and that the seven categories do not necessarily exhaust the scope of “original works of authorship” that the bill is intended to protect”), *aff’d in part, rev’d in part*, 692 F. 2d 478 (7th Cir. 1982).

<sup>43</sup> United States Copyright Office, at <http://www.copyright.gov/records> (last visited Mar.10, 2005).

<sup>44</sup> See CHOUDHURY & REYNOLDS, *supra* note 9 at xi.

pages of detailed instructions developed by Bikram to effectively guide the reader through each pose.<sup>45</sup> Additionally, the book is filled with stories and anecdotes about Bikram Yoga, Bikram's life, Bikram's students, and narrated conversations between Bikram and his students during and after classes.<sup>46</sup>

The more interesting issue with regard to Bikram's book is not whether the copyright is valid, but rather the scope of protection offered by the copyright. A literary work copyright grants the author the exclusive rights of reproduction, adaptation, distribution, performance, display, and the digital sound recording transmission.<sup>47</sup> A violation of any of these rights constitutes infringement. Thus, Bikram has the right to prevent others from reproducing, in whole or in part, *Bikram's Beginning Yoga Class*, by fixing it in any tangible medium of expression. He also has the exclusive right to create derivative works, in which the pre-existing work is recast, reformed, or adapted into a new work. For example, Bikram may prevent others from copying copyrightable portions of his book into their own book describing the yoga system. Bikram's performance right gives him the exclusive right to control who may publicly "recite, render, play, dance or act [out]" his book.<sup>48</sup> He may not, however, prevent others from reading or using the book as often as they wish.

Do Bikram's exclusive rights to reproduce, adapt, and perform his copyrighted book also give him the right to prevent others from reproducing, adapting, and performing the yoga series described and pictured in that book? Bikram seems to think so. Bikram has stated that, "The book, *and the Bikram Sequence as expressed therein*, was first registered with the United States Copyright Office in 1976. . ."<sup>49</sup> He has also represented that "he is the exclusive owner of the federally registered copyright to the Book, and thus is the owner of all protectable expression contained in the book . . . said protectable expression includes the Bikram Sequence."<sup>50</sup>

This question raises a central principle of copyright law - that copyright protection is available for the expression of an idea, but not for an idea itself. This principle is codified in Section 102(b) of the Copyright Act: "In no case does copyright protection for an original work of au-

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<sup>45</sup> See *id.* at x-xii, 201-05.

<sup>46</sup> See, e.g., *id.* at 1-5.

<sup>47</sup> 17 U.S.C. § 106 (2004).

<sup>48</sup> 17 U.S.C. § 101 (2004).

<sup>49</sup> See Joint Case Management Conference Statement at 2, *Open Source Yoga Unity v. Choudhury*, available at <http://www.yogaunity.org/law>.

<sup>50</sup> *Id.* at 5.

thorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>51</sup> Copyright protection encompasses an author’s particular expression of an idea, system, or process, but at no point extends to the substance of the expression.

In the leading case on the idea-expression dichotomy, *Baker v. Selden*,<sup>52</sup> the Supreme Court affirmed that ideas and systems themselves cannot be protected via copyright law. In *Baker*, the plaintiff sought copyright protection for a book, *Selden’s Condensed Ledger, or Book-keeping Simplified*, which explained a new system of book-keeping.<sup>53</sup> The book contained a set of blank forms with lines and headings designed to be used with the bookkeeping system described in the book. The defendant used a similar system of bookkeeping, using forms almost identical to those appearing in the copyrighted book. The court found that the defendant, even if he had copied the forms and used them in his own book explaining a similar style of book-keeping, had not infringed plaintiff’s copyright because the forms and the system of book-keeping described in the book were not proper subjects of copyright protection.<sup>54</sup> Although the book was clearly copyrightable, the copyright on the book did not extend to the system being described in that book, but rather only to the expression of that idea, contained in the book:

“[T]here is a clear distinction between the book, as such, and the art which it is intended to illustrate . . . the same distinction may be predicated of every other art as well as that of bookkeeping . . . . A treatise on the composition and use of ploughs . . . would be the subject of copyright, but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein.”<sup>55</sup>

The court further concluded that where the use of an idea or system described in a copyrighted work requires duplication of that work, the duplication does not constitute infringement. “Where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book . . . such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public.”<sup>56</sup> This principle has come to be known as the “merger doc-

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<sup>51</sup> 17 U.S.C. § 102(b) (2004).

<sup>52</sup> *Baker v. Selden*, 101 U.S. 99 (1879).

<sup>53</sup> *Id.* at 100.

<sup>54</sup> *Id.* at 107.

<sup>55</sup> *Id.* at 102.

<sup>56</sup> *Id.* at 103.

trine.” Pursuant to the merger doctrine, an idea and expression are said to merge if copying a particular expression is necessary in order to express the idea. In such a case, the expression is not afforded copyright protection.

While Bikram’s copyright to the book is valid and enforceable, it does not extend so far as to prevent people from using the yoga system described in the book *Bikram’s Beginning Yoga Class*, similar to the copyrighted work in *Baker v. Selden*, describes a system or idea, a style of yoga practice developed by Bikram. It describes a method of performing something, in this case yoga postures, in a specific order, within a set period of time, in a room heated to an exact temperature. As stated previously, Section 102(b)’s prohibition on the copyrighting of ideas and systems makes it clear that copyright protection is not available for a process or method of doing something.<sup>57</sup> Moreover, *Baker* specifically held that a copyrighted book describing a system of art does not prohibit others from using that system. Additionally, because the methods described in Bikram’s book must be copied in order to effectively make use of the system of yoga he describes in the book, copying of those methods is not infringement. Thus, like any other system or process described in a copyrighted book, Bikram’s particular method of performing yoga postures cannot be protected via the copyright he holds on the book. Bikram cannot, therefore, prevent others from performing, using, or teaching his system of yoga by virtue of his copyright to the book, *Bikram’s Beginning Yoga Class*. To grant him such a right would be to confer a property right over the idea expressed in the book, not merely on Bikram’s particular expression of that idea.

### B. *Bikram’s Yoga College of India Beginning Yoga Dialogue*

Bikram has also copyrighted the dialogue he developed in order to verbally lead a class through his beginning yoga series.<sup>58</sup> *Bikram’s Yoga College of India Beginning Yoga Dialogue*, which Bikram describes as “a rigidly prescribed series of oral instructions and commands,”<sup>59</sup> consists of forty-four pages of instructions on how to move into, hold, breathe during, and move out of, each of the twenty-six postures in the yoga series. Some poses, such as the initial breathing exercise, “Paranayama Breathing,” have multiple sets of directions the

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<sup>57</sup> See 17 U.S.C. § 102(b) (2004).

<sup>58</sup> Bikram only permits copies of the dialogue to be distributed to those who have attended, or plan to attend, his teacher certification course. Some version of the dialogue is always recited by the teacher during Bikram Yoga classes.

<sup>59</sup> First Amended Complaint, *Choudhury v. Morrison*, *supra* note 10, at 3.

teacher may choose when instructing the class. The directions for each posture vary from one to three pages of written instructions.

“The Dialogue,” as it is commonly referred to, is registered with the Copyright Office as a literary work, and must meet the minimum requirements of originality and fixation in order for the copyright to be valid and enforceable. The dialogue is fixed in a tangible medium of expression, a printed copy. Bikram independently created it, and it is likely that its forty-four pages of uniquely worded, detailed instructions, meets the very minimal quantum of creativity required for a work to be copyrightable.

Nonetheless, the dialogue is essentially a functional work. The primary purpose of these instructions is to lead students through the yoga series; the expressive elements of the dialogue are only incidental to this purpose. Courts are well aware of the dangers inherent in granting copyrights to functional works. Because there is often little distinction between the expression and the actual idea being expressed, granting copyright protection to the expression may essentially amount to a grant of protection to the idea as well, which is prohibited by Section 102(b) and the *Baker* doctrine.<sup>60</sup> Nonetheless, a work that has a primarily functional purpose may be copyrightable. In fact, many functional works have obtained copyright protection.<sup>61</sup> In determining the copyrightability of functional works, courts must attempt to distinguish between the underlying, unprotectable idea and the expression of that idea embodied in the author’s work. Oftentimes, the merger doctrine applies to functional works, barring protection for the expression because the idea and the expression are so indistinguishable that to protect the expression would also protect the idea.

In assessing the copyrightability of the dialogue, it is helpful to look to an analogous area of the law—the copyrightability of instructions and directions for games, that are also functional works. The dialogue, which contains detailed directions to follow in order to complete Bikram’s Yoga series, is very similar to instructions for how to play, or win, a game because it informs yoga practitioners how to effectively use the yoga system. There is significant and informative caselaw dealing

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<sup>60</sup> See 17 U.S.C. § 102 (2004); see also *Baker v. Seldon*, 101 U.S. 99, 107 (1879).

<sup>61</sup> See, e.g., *Am. Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977, 978 (7th Cir. 1997) (holding that a taxonomy codifying dental knowledge and technology was copyrightable although it was entirely functional and was “designed and used for business . . . rather than aesthetic purposes.”); *Edwin K. Williams & Co., Inc. v. Edwin K. Williams & Co.-East*, 542 F.2d 1053, 1061 (9th Cir. 1976) (finding a form that contained instructions for its completion to be copyrightable, because, although the lines and boxes making up the forms were not copyrightable, the instructions were); *Educational Testing Services v. Katzman*, 793 F.2d 533, 543 (3d Cir. 1986) (finding that the Scholastic Aptitude Test was copyrightable).

with the copyrightability of instructions and rules for games. While it is widely held that games themselves are not copyrightable,<sup>62</sup> there is no per se rule when it comes to the rules, instructions, or strategies for games, which may, in contrast, be copyrightable.

In determining whether particular sets of instructions and rules for games are copyrightable, courts have essentially applied the merger doctrine. If the particular instructions or rules at issue could only be expressed in one or very few ways, courts will find that the idea of the instructions and the expression thereof merge such that no protection is available even for the expression. Where, however, the instructions at issue are susceptible to various vehicles of expression and the particular expression vying for protection displays the minimal creativity necessary, they may be protected. For example, in *Morrissey v. Procter & Gamble Co.*, the First Circuit held that the plaintiff's contest instructions for a sweepstakes game were not copyrightable because there were only a limited number of ways to express the instructions, such that the expression of the instructions merged with the idea of them.<sup>63</sup>

When the uncopyrightable subject matter is very narrow, so that 'the topic necessarily requires,' if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.<sup>64</sup>

The court applied a classic merger doctrine analysis in finding that the expression (i.e., the instructions for the contest) and the idea (i.e., the contest) were so nearly identical that the former could not be protected without also granting protection to the latter.

It is interesting, however, that the appellate court specifically rejected the lower court's reasoning in reaching the same holding. The district court found the instructions to be uncopyrightable simply because the *underlying contest* was not the proper subject of copyright.<sup>65</sup> The appellate

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<sup>62</sup> See, e.g., *Whist Club v. Foster*, 42 F.2d 782, 782 (S.D.N.Y. 1929) (finding no infringement where defendant restated in his own language the rules of Whist, because "[i]n the conventional laws or rules of a game, as distinguished from the forms or modes of expression in which they may be stated, there can be no literary property susceptible of copyright"); *Chamberlin v. Uris Sales Corp.*, 56 F. Supp 987, 989 (S.D.N.Y. 1944) ("[I]t is very doubtful if rules of a game can, in any event, be copyrightable subject matter."); *Hoopla Sports & Entm't, Inc. v. Nike, Inc.*, 947 F. Supp 347, 354 (N.D. Ill. 1996) (holding that plaintiff's basketball-tournament idea was not copyrightable because copyright law does not protect ideas and "most courts have concluded that a sports game . . . itself is not copyrightable"); *Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F. Supp 1071, 1088 (S.D.N.Y. 1996) (holding that an actual NBA game is not copyrightable).

<sup>63</sup> *Morrison v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

<sup>64</sup> *Id.* (citations omitted) (quoting *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905)).

<sup>65</sup> See *Morrisey v. Procter & Gamble, Co.*, 262 F. Supp. 737, 738 (D. Mass. 1967).

court stated that this conclusion “does not follow” because copyright attaches to form of expression, and although a subject may not be copyrightable, certain ways of expressing that subject may nonetheless be.<sup>66</sup> The court made it clear that there was no per se rule prohibiting the extension of copyright protection to the instructions or directions of games, even though games themselves are per se uncopyrightable.<sup>67</sup> Instructions and directions can be copyrighted, but are subject to merger doctrine limitations.

Like the *Morrison* court, a number of other courts have applied the merger doctrine in holding that instructions or rules for a game were not protected. In *Landsberg v. Scrabble Crossword Game Players, Inc.*, the Ninth Circuit held that the defendant did not infringe plaintiff’s copyright when it copied a strategy for playing Scrabble from plaintiff’s copyrighted book and included this strategy in its own scrabble handbook.<sup>68</sup> The defendant did not copy plaintiff’s strategy verbatim, but appeared to paraphrase portions of plaintiff’s work and described the strategy very similarly to the plaintiff.<sup>69</sup> The court found that there were so few ways to effectively express the Scrabble strategy that substantial similarity between the two works was inevitable. “There is no more than the similarity that must unavoidably be produced by anyone who wishes to use and restate the unpredictable ideas . . .”<sup>70</sup> contained in the copyrighted work. To prohibit the expression of the strategy in this case would be to protect the idea of the strategy as well as plaintiff’s expression thereof.

Similarly, in *Allen v. Academic Games Project*, the Ninth Circuit again applied the merger doctrine, finding rules in a gamebook to be uncopyrightable because the plaintiff could not show that “it is possible to distinguish the expression of the rules of the game manuals from the idea of the rules themselves.”<sup>71</sup>

In contrast, many courts have held that game rules or instructions were protectable in instances where the merger doctrine did not apply because the particular rules or instructions were indistinguishable from the games ideas underlying them. In *Selchow & Righter Co. v. Goldex Corp.*, the court found that the rules and card sets for a Trivial Pursuit game were copyrightable.<sup>72</sup> The defendant, an importer and seller of

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<sup>66</sup> *Morrissey*, 379 F.2d at 678.

<sup>67</sup> *Id.*

<sup>68</sup> *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984).

<sup>69</sup> *Id.* at 487.

<sup>70</sup> *Id.* at 489.

<sup>71</sup> *Allen v. Academic League of America, Inc.*, 89 F.3d 614, 618 (9th Cir. 1996).

<sup>72</sup> *Selchow & Righter Co. v. Golden Corp.*, 612 F. Supp. 19, 25 (S.D.Fla. 1985).

Canadian-brand trivia games in the United States, was engaged in selling certain trivia games that contained copies of plaintiff's rules and card sets. The court found that the "rules and card-sets used in conjunction with the game" were "copyrightable material" and that the defendants had imported and sold games that used these materials.<sup>73</sup> The court therefore held that the defendants had infringed the plaintiffs' copyrights. Likewise, in *Gelles-Widmer Co. v. Milton Bradley Co.*, the Seventh Circuit held that a set of explanations and instructions accompanying educational flash cards were properly copyrighted.<sup>74</sup> The defendant was found to have infringed these copyrights by "substantially plagiarizing plaintiff's instructions and directions" for use in its own educational materials.<sup>75</sup> The Sixth Circuit held similarly in *Wagner v. Meccanno Ltd.*,<sup>76</sup> in which it affirmed the district court's holding that an instruction manual telling the purchaser "how to use the strips of metal and wheels and nuts and angles and plates" in a child's game was "properly copyrighted."<sup>77</sup> In each of the aforementioned cases, the court found that the rules or instructions accompanying the games were distinct enough from the games themselves as to be copyrightable. Because it was possible to copyright the expression of the rules without thereby protecting the games themselves, the merger doctrine did not apply and the court found the copyrights to be valid.

Bikram's dialogue should also be protected because the expression of the instructions contained in the dialogue does not merge, or nearly merge, with the underlying practice to which the instructions apply. Unlike the instructions held unprotectable in *Morrissey*, *Landsberg*, and *Allen*, Bikram's dialogue does not merely contain simple, straightforward directions for how to perform an operation.<sup>78</sup> Rather, the dialogue is a detailed, lengthy, and involved way of how to perform the poses comprising the Bikram Yoga series. While some of the directions in the dialogue do consist of straightforward stock instructions, which alone would not be copyrightable, the dialogue also contains many expressions that are entirely unique to Bikram. The following is a short excerpt from the dialogue for the "standing-head to knee posture," in which the student stands on one locked-out leg, while holding onto the foot of the other leg with both hands gripped underneath the foot, and kicking that leg out in front of the body until it is parallel to the ground:

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<sup>73</sup> *Id.*

<sup>74</sup> *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143, 147 (7th Cir. 1963).

<sup>75</sup> *Id.* at 146.

<sup>76</sup> 246 F. 603 (6th Cir. 1918).

<sup>77</sup> 234 F. 912, 921 (D. Ohio 1916).

<sup>78</sup> *Cf. Morrissey v. Procter & Gamble*, 379 F.2d 675, 678 (1st Cir. 1967).

Before you even start, make up your mind not to give up.  
Use your english [sic] bulldog determination, will power, and Bengal  
Tiger strength. Mind over the matter.

Kick the mirror.

If you do 1% correct, or 90% correct,  
you get 100% benefit,

medically, biochemically, [and] physiologically.

As long as you are trying the right way, psychologically,  
and you don't give up

that's the ultimate destination.

As long as your standing knee is locked, you're getting 100%  
benefit.<sup>79</sup>

For each of the twenty-six poses that comprise the series, Bikram Yoga teachers must recite instructions as detailed, and often even more unusual sounding, than the ones above. When telling the class how to fold into a standing forward bend, the dialogue states that the student's body should look like a "Japanese ham sandwich."<sup>80</sup> Once the students are in that pose, the instructor tells them to pull down on their feet with their hands, and touch their foreheads to their shins with "your smiling happy faces."<sup>81</sup> The dialogue for "full locust" pose" in which the student lies on his stomach and raises his arms and feet off the ground simultaneously, with his arms out to the side like wings, includes the instruction that one should look like a "747 flying in the air," but not like an "F-16 fighter jet," while practicing the posture.<sup>82</sup> For the standing-head-to-knee pose, the student is told that their body should look like an "upside down 'L' like in Linda;" and for the balancing stick pose, like a "'T' as in Tom."<sup>83</sup>

Certainly, there must be a multitude of different expressions which could be used to instruct a ninety-minute class consisting of twenty-six postures, only one form of which is embodied in Bikram's dialogue. The words and expressions used in the dialogue are entirely original to Bikram and certainly go above and beyond what is necessary to direct a class through the Bikram Yoga series of poses. One could probably use a shorter and simpler set of instructions, but Bikram instead developed this elaborate and very unusual set of directions for the class. The dialogue contains unique, original elements, which must be protectable, regardless of whether the underlying system is. Because Bikram's dialogue is so extensive, detailed, and expressive, the merger doctrine

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<sup>79</sup> Bikram Choudhury, Bikram's Yoga College of India Beginning Yoga Dialogue, in Beverly Hills, Cal.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

should not apply to these instructions so as to prevent them from being copyrighted.

The merger doctrine typically bars protection of an expression when there is a danger that protecting the expression would also in effect protect the underlying idea being expressed.<sup>84</sup> This danger does not exist with regard to Bikram's dialogue; even if his expression in the dialogue is protected, there are plenty of other ways to instruct a class in how to perform Bikram Yoga, without copying the expressive elements of his dialogue. Because there is significant room for creativity in developing different instructions for the class, the expression of the instructions does not merge with the underlying idea of the Bikram Yoga series. As such, the underlying system of yoga is not protected simply because this particular expression of the instructions is.

Having determined that Bikram's dialogue is a copyrightable work, the next step is to understand the rights this copyright affords to Bikram. As a literary work, the dialogue is protected from reproduction, adaptation, distribution, performance, display, and digital sound recording by anyone other than Bikram, the copyright holder.<sup>85</sup> Obviously, this prevents people from copying it word for word and reproducing it in their own version of a print copy (a "reproduction"). More importantly for Bikram, this prevents others from publicly performing the Bikram Yoga dialogue. One of the accusations Bikram has leveled against non-licensed yoga instructors is that they have used his copyrighted dialogue to teach yoga classes, without his permission. Based on his public performance right to the dialogue, Bikram may in fact be able to prevent others from using the dialogue he created to teach a yoga class, unless and until they obtain his express permission.

"To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process."<sup>86</sup> A public performance is one that is "at a place open to the public or at any place where a substantial number of persons outside a normal circle of a family and its social acquaintances is gathered."<sup>87</sup> Any performance that is

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<sup>84</sup> See, e.g., *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984) ("If we were to hold S & R's work to be an infringement, we do not see how anyone could state Landsberg's ideas without also being held to have infringed. Landsberg would in effect have obtained a copyright on the ideas contained in his work."); *Morrissey v. Procter & Gamble*, 379 F.2d 675, 678-79 (1st Cir. 1967):

When the uncopyrightable subject matter is very narrow . . . to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance . . . the subject matter would be appropriated by permitting the copyrighting of its expression.

<sup>85</sup> See 17 U.S.C. § 106 (2004).

<sup>86</sup> See 17 U.S.C. § 101 (2004).

<sup>87</sup> See *Id.*

open to the public will be considered public for the purposes of the Copyright Act, and non-licensed public performances of copyrighted literary works will be considered infringement.

Based on copyright law's definition of public performance, the use of Bikram's dialogue to lead a yoga class would probably constitute an infringing public performance. Using Bikram's Dialogue in order to teach a yoga class would certainly constitute a performance, because this involves "reciting" the dialogue. Provided that the yoga class was open to the public, use of the dialogue to teach the class would be considered a public performance, regardless of how many people attended the class or heard the dialogue being recited.<sup>88</sup> In order to prove that such a performance was an infringement, Bikram would only have to show that he had a valid copyright in the work at issue and that the defendant copied original elements of the copyrighted work.<sup>89</sup> Even the incorporation of just a portion of the dialogue into instructions for a class could constitute infringement, if there was 'substantial similarity' between the two works.<sup>90</sup>

Although use of the dialogue in order to lead a yoga class would qualify as an instructional purpose — for which there are certain exceptions to the performance right — neither of the two applicable exemptions would be available in this instance.<sup>91</sup> Section 110(1) exempts from the public performance category performances of copyrighted works given by instructors in live teaching situations.<sup>92</sup> The problem, however, is that this applies only to non-profit educational institutions, and not to for-profit yoga studios. Similarly, Section 110(2)'s exemption for any transmission (including face-to-face as well as other transmissions) of a non-dramatic literary work in an educational institution and related to systematic teaching activities, is limited to

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<sup>88</sup> As long as the performance is "open to the public," the size and composition of the audience is irrelevant to determining whether it was a public performance. *See generally* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984) (finding that private screening rooms in video-cassette stores were public although only four people at a time could view films, because they were open to the public); Columbia Pictures Indus., Inc. v. Aveco 612 F.Supp. 315 (N.D. Pa 1985), *aff'd*, 800 F.2d 59 (3d Cir. 1986) (finding private screening rooms with 20 person capacity to be public).

<sup>89</sup> *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548 (1985).

<sup>90</sup> *See, e.g.*, Horgan v. MacMillan, Inc., 789 F.2d 157, 162 (2d Cir. 1986) (finding that still photographs of portions of plaintiff's choreographed dance in defendant's book infringed plaintiff's copyright to the choreography); Roy Export Co. v. Columbia Broad. Sys., Inc., 672 F.2d 1095 (2d Cir. 1982) (short film clips found to infringe copyright to full-length films); Elsmere Music, Inc. v. Nat'l Broad. Co., 623 F.2d 252 (2d Cir. 1980) (copying of four notes from a musical composition consisting of one hundred measures was found to be infringement).

<sup>91</sup> *See* 17 U.S.C. § 110 (2004)

<sup>92</sup> *See id.* § 110(1).

governmental and non-profit institutions.<sup>93</sup> This exemption would therefore also be unavailable for a yoga instructor who used Bikram's dialogue in the studio.

The Copyright Act also enables Bikram to prevent others from creating and using derivative works based on his dialogue.<sup>94</sup> Section 101 defines a derivative work as one "based upon one or more preexisting works . . . . A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship . . . ." <sup>95</sup> A derivative work is an infringement of the work upon which it was based, if the original work was copyrightable, and the author of the derivative work duplicated copyrightable elements of the original.

Bikram has accused other yoga teachers of copyright infringement based on their use of variations and modifications of his dialogue to teach classes, and has publicly claimed that any use of even a modified version of his dialogue will constitute copyright infringement. Based on Bikram's right to prevent others from creating derivative works, this claim is probably meritorious. Any set of instructions given by a teacher that are based upon the dialogue, even if they leave certain words out or make original additions to the dialogue, will be considered a derivative and infringing work, if the modified instructions are found to be substantially similar to the copyrightable elements of his dialogue. Alternatively, if the dialogue also contains certain very straightforward and simple instructions for how to perform individual postures, and the only similarity between the two works was with respect to these stock instructions, then the dialogue would probably not be considered an infringement. To the extent that the copying of certain aspects of Bikram's dialogue is necessary in order to effectively use his yoga system, it would not be considered an infringement.<sup>96</sup>

### C. *The Asana Sequence*

As was previously mentioned, Bikram also claims a copyright to the actual Asana sequence of twenty-six postures and breathing exercises comprising the Bikram Yoga Beginner series. Having extensively researched this "copyright" and contacted lawyers involved in the Open Source Yoga case pending in the Northern District of California, the nature of this "copyright" is still unclear. None of his registered copyrights are categorized as choreographic works. The only copyright

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<sup>93</sup> See *id.* § 110(2).

<sup>94</sup> *Id.* § 102.

<sup>95</sup> *Id.* § 101.

<sup>96</sup> See *Baker v. Seldon*, 101 U.S. 99, 103 (1879).

which was filed anywhere close to the time when Bikram claims to have copyrighted the sequence was a supplemental registration in connection with his book, *Bikram's Beginning Yoga Class*. A supplemental application, however, is not typically intended to widen the scope of a previously registered work. Therefore it remains unclear how this could be the copyright to which he is referring. Nonetheless, on February 5, 2003, Bikram, through his lawyers, released a statement to the press in which he claimed to have recently copyrighted the Asana sequence:

With great pleasure we would like to announce that Bikram recently secured federal copyright registration under 17 U.S.C. Section 410 for his original work of authorship in his [A]sana sequence of 26 postures and 2 breathing exercises. Through registration of this work, the United States Copyright Office acknowledges Bikram's exclusive right to the distinct series of postures and breathing exercises comprising the sequence and Bikram's Beginning Yoga Class. . . In addition to exact copying of the sequence, the copyright prohibits others from creating 'derivative' works of the sequence. Virtually all modifications or additions to the sequence will constitute copyright infringement, including: the unauthorized use of even a small number of consecutive postures; the addition of different postures or breathing exercises to the sequence or portions of the sequence; the teaching or offering of the sequence with or without the Dialogue; or by the addition of extra elements to the sequence, like music. . .<sup>97</sup>

It is unclear what the grounds are for Bikram to have made such claims about a copyright in the Asana sequence. Nevertheless, it is possible and useful to consider whether or not under current copyright law Bikram could obtain a copyright like the one described in the above press release.

Many individuals within the yoga community have disputed Bikram's ability to copyright his Asana sequence on the grounds that the poses comprising the series are in the public domain and therefore cannot belong to him.<sup>98</sup> Yoga has been around for over five thousand years, and even Bikram admits that he did not invent the individual poses in his series, but rather took them from a group of eighty-four classic Hatha yoga postures. But Bikram is not claiming a copyright in the individual postures; instead, he claims to have a copyright in the particular sequence and selection of postures in his series. As explained by one litigant:

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<sup>97</sup> Reinbolt, Press Release, *supra* note 26.

<sup>98</sup> See, e.g., Open Letter from James P. Harrison, Attorney for Open Source Yoga Unity (April 2, 2003) (*available at* <http://www.yogaunity.org/law/harrisonletter.shtml>) ("No individual style of Yoga can be copyrighted because Yoga has existed in the public domain for thousands of years.").

Choudhury said he has copyrighted the sequence, not the postures. He arranged the poses in a certain way, matched each pose to a precise dialogue used by the instructor and set the ninety minutes of exercises in a mirrored, carpeted room heated like a sauna. That, he says, is his intellectual property.<sup>99</sup>

The public domain argument made by many who oppose Bikram's copyrights fails to recognize that although the poses are in the public domain and are therefore not themselves copyrightable,<sup>100</sup> Bikram might nonetheless be able to copyright his particular sequence as an original compilation of those poses.

A compilation is defined by the Copyright Act as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."<sup>101</sup> Copyright in a compilation protects those original elements that an author infuses into the compiled materials or data, including the author's judgment in selection and arrangement of the compilation, but never extends to the compiled facts or public domain materials themselves.<sup>102</sup> The Supreme Court held in *Feist Publications, Inc. v. Rural Telephone Service Co.* that in order to obtain copyright protection for a compilation, the author must display a *de minimis* level of creativity in his selection or arrangement of the compiled materials.<sup>103</sup> The court held that the plaintiff's telephone directory was not protectable as a compilation because the selection, coordination, and arrangement of the listings did not display even this minimal level of originality.<sup>104</sup> However, an author who compiles facts or other public domain materials in an original way, displaying at least this *de minimis* level of creativity, may

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<sup>99</sup> Guthrie, *supra* note 2 at A1.

<sup>100</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985). ("[N]o author may copyright facts or ideas"); see also *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340 (1991). "'No one may claim originality as to facts' . . . [b]ecause facts do not owe their origin to an act of authorship." *Feist, Publ'ns, Inc.*, 499 U.S. at 347 (citation omitted) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §§ 2.01[A], [B] (1990)).

<sup>101</sup> 17 U.S.C. § 101 (2004).

<sup>102</sup> *Feist Publ'ns*, 499 U.S. at 348:

The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data . . . these choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.*

obtain copyright protection for the original elements of that compilation.<sup>105</sup>

The question then, is not whether the individual poses comprising Bikram yoga are in the public domain—they clearly are—but whether there is a sufficient degree of originality in the way Bikram has selected and arranged the twenty-six poses and breathing exercises to warrant copyright protection. Bikram claims to have developed, or discovered, his system of yoga after years of research and testing, and seems to offer this as a justification for his copyrights. “In about 1971, *after years of research, Bikram discovered and developed* his unique brand of yoga known as ‘Bikram Yoga.’”<sup>106</sup> Despite the research and talent which went into this discovery, the Supreme Court has concluded that copyright law is not intended to reward the labor, talent, and effort which went into producing a work of authorship, but rather the original expression contained within that authorship.<sup>107</sup>

Therefore, rather than looking to the labor and research involved in the development of Bikram Yoga, it is necessary to examine whether Bikram’s series was original—that is, did his particular selection and arrangement of the poses render the series distinguishable from prior styles or practices of yoga? The answer to this question, I think, has to be “yes.” Bikram selected the twenty-six postures from eighty-four classic yoga poses and arranged them in an entirely unique and original way. Thus, Bikram displayed originality both in his selection and in his arrangement of the postures. These elements of the yoga are the original contribution of Bikram, even though the poses themselves are not. Given that the amount of creativity required for a compilation to be copyrightable is based on a *de minimis* threshold, Bikram’s series should qualify as a sufficiently original compilation and it is irrelevant that the individual poses comprising the series are in the public domain.

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<sup>105</sup> See *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143, 146 (7th Cir. 1963) (holding that the plaintiff’s educational flash card sets and accompanying instructions were copyrightable and stating that “the basic materials and arithmetical problems may have been old and in the public domain, but . . . the arrangement, the plan and manner in which they were put together by the author, does constitute originality”); *Eckes v. Card Prices Update* 736 F.2d 859 (2d Cir. 1984) (finding a selection of 5000 baseball cards from a choice of 18,000 copyrightable); *CCC Info. Servs. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994) (finding red-book valuations in a book of used car values copyrightable because they were based on a review of multiple data sources chosen by the authors, thus displaying a *de minimis* level of originality).

<sup>106</sup> First Amended Complaint, *Choudhury v. Morrison* (emphasis added), *supra* note 10, at 3.

<sup>107</sup> *Feist Publ’ns*, 499 U.S. at 353-54 (rejecting the ‘sweat of the brow’ doctrine, according to which copyright protection for compilations was treated as a reward for the hard work that went into creating the compilation).

Despite the originality of Bikram's yoga sequence, any copyright in the Asana sequence remains doubtful because yoga is probably not the proper subject of copyright protection. In fact, as has been discussed at length, Section 102 of the Copyright Act specifically prohibits the copyrighting of an "idea, procedure, process, system, method of operation, concept, principle, or discovery."<sup>108</sup> Section 102 is essentially a prohibition on the copyrighting of certain functional works—works whose primary purpose is to achieve a goal or complete a task, and whose expressive features are merely incidental to the functionality of the work. Based on this principle, games,<sup>109</sup> sporting activities,<sup>110</sup> other organized events,<sup>111</sup> business methods,<sup>112</sup> a system of shorthand,<sup>113</sup> and recipes<sup>114</sup> have all been held unprotectable under copyright law.

Functional works may, of course, still obtain intellectual property protection. However, patent laws, not copyright laws, are the proper

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<sup>108</sup> 17 U.S.C. § 102(b) (2004) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.")

<sup>109</sup> See, e.g., *Whist Club v. Foster*, 42 F.2d 782, 782 (S.D.N.Y. 1929) (finding no infringement where defendant restated in his own language the rules of Whist, because "[i]n the conventional laws or rules of a game, as distinguished from the forms or modes of expression in which they may be stated, there can be no literary property susceptible of copyright"); *Chamberlin v. Uris Sales Corp.*, 56 F. Supp. 987, 988 (S.D.N.Y. 1944) ("[I]t is very doubtful if rules of a game can, in any event, be copyrightable subject matter."); *Anti-Monopoly, Inc. v. Gen. Mills Fun Group, Inc.*, 611 F.2d 296, 300 n.1 (9th Cir. 1979) (discussing intellectual property protection for the game of Monopoly, the court stated, "copyright laws are not involved in this case because business ideas, such as a game concept, cannot be copyrighted").

<sup>110</sup> See, e.g., *Hoopla Sports Entm't v. Nike, Inc.*, 947 F.Supp 347, 354 (N.D. Ill. 1996) (holding that the plaintiff's basketball-tournament idea was not copyrightable because copyright law does not protect ideas and "most courts have concluded that a sports game itself is not copyrightable"); *NBA v. Sports Team Analysis & Tracking Sys., Inc.*, 931 F.Supp at 1124, 1142-45 (S.D.N.Y. 1996) (holding that an NBA game is not copyrightable, and explaining that a lack of caselaw on the subject is attributable to a "general understanding that athletic events were, and are not copyrightable") (quoting *NBA v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997)).

<sup>111</sup> See, e.g., *Prod. Contractors, Inc. v. WGN Continental Broad. Co.*, 622 F. Supp. 1500, 1505 (N.D. Ill. 1985) (finding that a Christmas parade was not a work of authorship entitled to copyright protection).

<sup>112</sup> See, e.g., *Baker v. Seldon*, 101 U.S. 99, 107 (1879) (finding no infringement where defendant copied forms from plaintiff's book describing a method of book-keeping).

<sup>113</sup> See, e.g., *Brief English Sys., Inc. v. Owen*, 48 F.2d 555, 556 (2d Cir. 1931) (denying copyright protection to plaintiff's system of shorthand, whereby written words are condensed into less than the usual number of letters required to express them).

<sup>114</sup> See, e.g., *Publications Int'l, Ltd. v. Merideth Corp.*, 88 F.3d 473, 482 (7th Cir. 1996) (holding that recipes contained in a cookbook of yogurt dishes were not copyrightable because neither the list of ingredients nor the accompanying directions were functional and did not contain any expressive elaboration).

means through which to secure such protection.<sup>115</sup> Patent protection is much stronger than copyright protection. Patent protection provides a powerful economic monopoly over the patented product, idea, system, or process; copyright protection does not. Whereas the owner of a patent obtains the right to exclude others from using the patented invention, copyright protection does not give the author the right to prevent others from using the copyrighted work. Because the rights conferred by a patent are so much more powerful than those granted through copyright protection, patent protection for functional works is much harder to obtain than copyright protection for expressive works. In contrast to copyright protection, patent law requires that the invention display both novelty and non-obviousness. To allow copyrights for functional works would be to extend patent-like protection, i.e., monopoly power, to works that have not been forced to meet the much stricter requirements of patent laws.<sup>116</sup>

Some of the hardest cases in determining whether a work should receive copyright or patent protection arise where a work displays *both* functional and expressive elements. While copyright protection admittedly may be granted to functional works in these situations,<sup>117</sup> that protection extends only to the expressive elements of those works, and never to the functional ones.<sup>118</sup> And such expressive elements will be copyrightable only if they can be successfully differentiated from the functional elements of the work and otherwise qualify for copyright protection.

Unfortunately for Bikram and his quest for copyrights, his Asana sequence is fundamentally a functional work and does not contain copyrightable expressive elements. Therefore the work probably can-

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<sup>115</sup> See *Brief English Systems*, 48 F.2d at 556 (“[T]he way to obtain the exclusive property right to an art, as distinguished from a description of the art, is by letters of patent and not copyright.”).

<sup>116</sup> See *id.* at 102 (“To give the author of a book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.”).

<sup>117</sup> See *Mazer v. Stein*, 347 U.S. 201, 218 (1954) (finding that statuettes which were used as table lamps were nonetheless copyrightable because there is “nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration.”).

<sup>118</sup> For example, the expression of the directions or instructions for how to complete or perform a game, which itself may not be copyrighted, may be copyrightable where they are sufficiently original and expressive. See, e.g., *Selchow & Righter Co. v. Goldex Corp.*, 612 F. Supp. 19 (S.D. Fla. 1985); *Meccano, Ltd. v. Wagner*, 246 F. 603 (6th Cir. 1917). Copyright protection may also be available for the labels of games and for the pattern or design of a board game or playing cards and pieces. See, e.g., *Selchow*, 612 F. Supp. at 25-26 (stating that the plaintiff’s copyrights to the board game design for a trivial pursuit game was valid, as was the copyright to the written rules).

not be protected under copyright law. The poses comprising Bikram's yoga series all help to induce certain medical, physical, and mental benefits in those who perform them. Some of the intended benefits of the series include: expanded lung capacity; injury prevention and cures for symptoms of chronic illness; promotion of better sleep; body toning; beneficial weight loss or gain; improved posture; improved T cell function; lengthening & strengthening muscles; improved metabolism & digestion; prevention of osteoporosis; improved heart health; reduced back pain & misalignment; improved spine strength & flexibility; increased mental strength & discipline; and an improved sense of well being and peace of mind.<sup>119</sup> Bikram, himself, insists:

The very essence of Bikram Yoga is that its postures are performed in exactly the same order, with exactly the same instructions and commands, in a room heated to 105 degrees Fahrenheit, in every class. The intended benefits from Bikram Yoga can only be derived if the yoga class is performed precisely as Bikram developed it.<sup>120</sup>

If Bikram had contributed original elements to this otherwise functional series that were in and of themselves expressive rather than functional, these elements might be copyrightable. For example, assume Bikram designed a wallpaper and rug print and required every Bikram studio owner to use that print inside their Bikram Yoga studios to teach Bikram Yoga. Furthermore, assume that Bikram never claimed that the print was necessary in order to help students achieve the overall benefits of Bikram Yoga, but did claim it was an essential aspect of his system because he liked this design and thought it well-suited to the yoga series. Bikram would probably be able to obtain a copyright on the print as a pictorial or graphic work, and would be able to prevent non-licensed individuals from copying that design and using it in their studios without his permission. The print design would be an expressive aspect of his yoga style, one that could be copyrighted as distinguished from the functional elements of his system.

However, the original aspects that Bikram in fact brought to his yoga series — i.e., his selection and arrangement of the poses, the heating of the studio, and the use of mirrors in the room — are all functional rather than expressive. Bikram himself has emphasized that his series is primarily a functional work, and has never indicated that there is an expressive aspect to the yoga. He claims that his sequence of postures—both in terms of *the selection* of postures and *the order* in which they are performed—is the optimal one for bringing about the intended

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<sup>119</sup> See Bikram Yoga Benefits, quickfityoga, at <http://www.bikram-yoga-noosa-australia.com/Whatarethebenefitsofbikramyoga.com.htm> (last visited Mar. 20, 2002).

<sup>120</sup> First Amended Complaint, Choudhury v. Morrison, *supra* note 10, at 3.

beneficial physical and mental responses in the body. He admits that each of the individual postures has certain benefits, but claims that each posture, performed alone, does not bring about the same, intended benefits as when performed in the manner he prescribes.<sup>121</sup> The heating of the studio, also an original contribution of Bikram, is functional as well. The heat “accelerates improvement in many of the benefits of your yoga practice . . . regular exercisers recognize that peak performance occurs when fully warmed up and your body generates heat from the inside radiating out and into your muscles.”<sup>122</sup> Bikram also claims that sweating while performing the yoga postures, which is induced both by the heat and by the ‘optimal humidity’ level of 60-70%, helps to protect against colds, influenza, and respiratory problems.<sup>123</sup>

In order for Bikram to copyright his Asana sequence, or various aspects of that sequence, as a compilation, he would have to show that the original elements which he contributed to the series — i.e., his selection and arrangement of the postures — were expressive and not merely functional. Furthermore, even if he demonstrated that there were expressive elements, he would have to show that these elements could somehow be separated from the functional ones, which clearly are not copyrightable. At no point has Bikram claimed that his system of yoga or any aspect thereof is artistically, or otherwise, expressive. Instead, he has continually emphasized the *utility* of the system he *discovered* and the *necessity* of every rigidly prescribed aspect of that system. Absent any indication that Bikram’s ‘compilation’ of yoga postures, or aspects thereof, contain any original, expressive elements, it seems that copyright protection simply is not available for Bikram’s Asana Sequence as a compilation work. Perhaps, as Open Source Yoga Unity has claimed, “to the extent Choudhury claims rights in the sequence itself as a new and useful invention, he should have sought patent, not copyright, protection, in the seventies.”<sup>124</sup>

However, supporters of Bikram’s Asana copyright have suggested, and some legal scholars have agreed, that Bikram Yoga might be copyrightable in the same way that choreography has been copyrighted.<sup>125</sup>

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<sup>121</sup> The Benefits, Bikram’s Yoga College of India at <http://www.bikramyoga.com/benefits.htm> (last visited Mar. 20, 2004).

<sup>122</sup> Why is Bikram Yoga Performed in a Heated Room?, quickfityoga, at <http://www.bikram-yoga-noosa-australia.com/Sowwhydoweheattheroom.htm> (last visited Mar. 20, 2004)

<sup>123</sup> *Id.*

<sup>124</sup> See Joint Case Management Conference Statement, Open Source Yoga Unity v. Choudhury (Nov. 13, 2003), 4-5 available at [http://www.yogaunity.org/law/law\\_downloads/show\\_case\\_doc\\_15138701.pdf](http://www.yogaunity.org/law/law_downloads/show_case_doc_15138701.pdf).

<sup>125</sup> See, e.g., Vanessa Grigoriadis, *Controlled Breathing in the Extreme*, N.Y. TIMES, JULY 6, 2003, at Sunday (quoting Mary Kevlin, a copyright and trademark specialist at the law firm

Based on what some see as a significant parallel between the yoga series and a choreographed composition, some have argued that they should be afforded similar protection under the Copyright Act.<sup>126</sup>

The Copyright Act contains no explicit definition of choreography, presumably because the term has a generally accepted meaning,<sup>127</sup> but it is clear that a work does not need to display dramatic content in order to obtain protection as a choreographed work.<sup>128</sup> Webster's dictionary defines choreography as "(1) The art of symbolically representing dancing, 2) The composition and arrangement of dances especially for ballet."<sup>129</sup> Similarly, The American Heritage Dictionary defines it as, "The art of creating and arranging dances or ballets."<sup>130</sup> The Copyright Office has provided some additional guidance by defining choreography, in its Compendium of Copyright Office Practices, as:

[T]he composition and arrangement of dance movements and patterns, usually intended to be accompanied by music. Dance is defined as static and kinetic successions of bodily movement in certain rhythmic and spatial relationships . . . Social dance steps and simple routines are not copyrightable.<sup>131</sup>

Hence, the issue becomes whether or not Bikram Yoga fits these definitions of a choreographed work, or is so closely analogous to the concept of a choreographed work to warrant copyright protection under this category. As mentioned previously, the list of copyrightable subject matter in the Copyright Act is not intended to be exhaustive; copyright protection may be granted to works that do not fit squarely into one of the enumerated categories but are sufficiently analogous to

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of Cowan, Liebowitz, & Latman as stating that "yoga sequences might receive the kind of copyright protection granted works of choreography. 'Steps are public domain, but the order that you put them in might not be.'"; Yeung, *supra* note 2 (quoting Stanford Law Professor Peggy Radin, "The interesting suggestion is whether you can copyright yoga in the same way you copyright choreography.")

<sup>126</sup> Cf. Sally Poole, *Star Brand of Yoga gets Caught in a Legal Tangle*, THE DAILY TELEGRAPH (London), Feb. 23, 2004 (stating that Bikram's lawyer, Jacob Reinbolt, compared the copyrighting of Bikram Yoga to the copyrighting of the choreography of a ballet).

<sup>127</sup> See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 3.21 (3d ed. 1999); See also H.R. REP. NO. 94-1476, at 53 (1976).

<sup>128</sup> See Compendium II of Copyright Office Practices § 450.01 (1984) (Choreographic works need not tell a story in order to be protected by copyright.); See also, *Horgan v. MacMillan*, 789 F.2d 157, 160 (2d Cir. 1986) (Offering a brief history of copyright protection for choreographic works and stating that, under the 1909 Act, choreography was only as a "species of 'dramatic composition.' Dance was only if it told a story, developed or characterized an emotion, or otherwise conveyed a dramatic concept or idea . . . . By including choreographic works as a separate copyrightable form of expression, the 1976 Act broadened the scope of its protection considerably.").

<sup>129</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 202 (10th ed. 1998).

<sup>130</sup> THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002).

<sup>131</sup> Compendium II of Copyright Office Practices, *supra* note 128, § 450.01.

one of them.<sup>132</sup> The Bikram Yoga series consists of a compilation of pre-set poses strung together with prescribed movements, to be performed in exactly the same order and manner each time.<sup>133</sup> It is undeniable that there is at least a certain intuitive similarity between a series of flowing dance steps and series of successive yoga postures. However, yoga postures are not dance moves—while they do involve both static and kinetic movements, they are not rhythmic. Furthermore, unlike a choreographed work, the series is not intended to be set to music. Even under the expanded definition of copyrightable choreographed works under which no dramatic content is required,<sup>134</sup> the Bikram Yoga series does not fit the description of a choreographed work.

Furthermore, there is an additional, crucial difference between choreographed dance and the Bikram Yoga series. While choreographed dance is an expressive art, the Bikram Yoga series is a functional system. As has been discussed at length, the Bikram Yoga series is essentially a functional work, “discovered” and “researched” by Bikram, intended to be used to derive certain physical and mental benefits in the body, as Bikram himself has admitted. Bikram has never claimed that there is nothing artistic or expressive about the series. Choreographed dance, on the other hand, is primarily an expressive, artistic work. Although a dancer may benefit in certain ways from choreographed dancing—by improving his health and fitness level, increasing his flexibility, or deriving pleasure from the experience—this is certainly not the intended purpose of choreographed dance. Rather, a copyrightable, choreographed dance is intended to express the original, creative talent of the choreographer and is valued primarily for this reason.

The purpose of copyright law is to reward creative, expressive works of authorship with copyright protection. Choreographed dances contain precisely the sort of creative expression meant to be protected through copyright law. While the Bikram Yoga series is original in its sequencing and organization, it is not, in these or any other respects, expressive rather than functional. In contrast to choreographed works, The Bikram yoga series lacks the creative, artistic expression meant to be protected by Copyright law, and therefore cannot successfully be analogized to choreography for the purposes of obtaining copyright protection. The series cannot, therefore, be copyrighted by virtue of any analogous relationship to choreographed dances.

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<sup>132</sup> Nat'l Conference of Bar Exam'rs v. Multistate Legal Studies, Inc., 495 F. Supp. 34, 36 (N.D. Ill. 1980), *aff'd in part, rev'd in part* 692 F.2d 478 (7th Cir. 1982).

<sup>133</sup> First Amended Complaint, Choudhury v. Morrison, *supra* note 10, at 3.

<sup>134</sup> See *supra* text accompanying note 128.

Although this paper has consistently argued that Bikram cannot successfully copyright his Asana sequence—by virtue of his book about the yoga or otherwise—it is worth mentioning what important rights Bikram would acquire with respect to the series, were he to obtain such a copyright. Most importantly, Bikram would be able to prevent the unlicensed public performance of his series via the exclusive performance right. This would prevent teachers who had not received the limited license to use Bikram’s copyrighted works, i.e. those who have not completed the \$5,500 teacher training course, from teaching the series or derivations thereof, regardless of whether they called it Bikram Yoga. Furthermore, even if a *student* were to publicly perform the series against Bikram’s will, Bikram could sue the student for infringing his copyright in the sequence. For example, each time I take a Bikram Yoga course open to the public, and perform his Asana sequence, without a license from Bikram to do so, I would be infringing this copyright. Of course, it is unlikely that Bikram would ever bother to enforce this right against students, as it is unclear what economic damages a student’s performance of the series would inflict.

#### IV. APPLICATION TO THE LAWSUITS

This paper has argued that Bikram has obtained an enforceable copyright to his dialogue, by virtue of which Bikram can prevent unlicensed individuals from using his dialogue or derivations thereof to instruct yoga classes. This paper has also argued, however, that Bikram does not have the right to prevent others from using, teaching, or performing his Asana sequence, by virtue of his book describing the series or otherwise. If these conclusions are correct, they have serious implications for how Bikram’s suit against Kim and Mark Morrison would have been resolved, had the case been decided on the merits, as well as how Open Source Yoga Unity’s Complaint for Declaratory Relief will likely be decided.

Based on the conclusions I have drawn in this paper, Kim and Mark Morrison, the Costa Mesa studio owners sued by Bikram in 2003, might have been better off having their case decided on the merits than settling the suit with Bikram.<sup>135</sup> According to the terms of their voluntary settlement with Bikram, Kim and Mark Morrison agreed to stop teaching *Bikram’s Basic Yoga Class* or derivations thereof at their studio or elsewhere. In addition, they were required to stop using

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<sup>135</sup> Admittedly, many terms of the settlement between Bikram and the Morrisons remain confidential, thus it is impossible to know what financial reward the Morrisons received for their settlement.

*Bikram's Yoga College of India Beginning Yoga Dialogue*.<sup>136</sup> If the Morrison suit had been decided on the merits, Bikram would probably have succeeded in obtaining an injunction against the Morrisons for any future use of his copyrighted dialogue or derivations thereof. He would not, however, have been able to prevent the Morrisons from teaching the Asana sequence he developed, because he has no valid copyright to the actual sequence. In this respect, the Morrisons might have benefited from not settling, because they would still be able to teach Bikram's Basic Yoga System at their studio.

However, Bikram will probably be unable to prevent any future studio owners or yoga teachers from teaching his Basic Yoga System. If Open Source Yoga Unity's complaint for declaratory relief is decided in accordance with the conclusions I have drawn in this paper, the court will find that Bikram cannot prevent others from teaching or practicing his Basic Yoga System, and that instructors who teach the series are not infringing his copyrights. In turn, the court will likely also find that teaching derivations and modifications of Bikram's Basic Yoga System is not an infringement of any of Bikram's copyrights. Such a ruling will enable teachers to create their own, modified versions of Bikram Yoga, without facing liability for copyright infringement.

## V. CONCLUSION

The conclusions that have been drawn in this paper regarding Bikram's copyrights square not only with existing, relevant precedent, but also with the overarching policy goals which form the basis of copyright and patent law. Copyright law is intended to encourage the production of a wide range of expressive works. Patent law, on the other hand, is intended to encourage technological innovation and the production of other functional, useful goods. In order provide strong incentives for this production, patent holders are granted a powerful economic monopoly over their inventions. However, in order to obtain such strong protection, the burden is much higher. The patent holder must show that his or her invention is a substantial advancement over the prior technology or art. No similar showing is required in order to obtain copyright protection. For this reason, courts must be particularly careful not to inadvertently extend copyright protection to inventions which really ought to be protected, if at all, via patent law.

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<sup>136</sup> Stipulation and Order For Permanent, Choudhury v. Morrison, *supra* note 10. at 1-2. The injunction also required the Morrisons to cease use of Bikram's registered trademarks, *Id.* at 2, however, I will not address this aspect of the settlement.

If Bikram were permitted to copyright his Asana sequence, he would obtain patent-style protection for his yoga series, without ever having had to illustrate that his functional work could meet the higher standards of patent law. He would be able to prevent others from using his system, modifying his system, and perhaps most importantly, *improving* on his system of yoga. Many of the members of Open Source Yoga Unity have been targeted by Bikram because they have attempted to modify Bikram's Beginning Yoga series.<sup>137</sup> Some have added musical accompaniment, others have made the class shorter than ninety minutes, and still others have reduced the temperature in the studio. While Bikram argues that these instructors are destroying the purity of his system and preventing students from obtaining the full benefits of Bikram Yoga,<sup>138</sup> the instructors, and students who attend their classes, obviously believe that these alterations are improvements on his system. Some people are more inspired to practice yoga in a lively atmosphere with musical accompaniment, others simply can't afford to spend ninety minutes of their day practicing yoga. For either group, modifications to Bikram's Beginning Yoga System represent improvements, indeed, an innovation, over the prior art. But if Bikram were permitted to copyright his sequence, he could forbid any of these modifications as derivative works, and stifle innovation upon the system he developed.

Admittedly, if Bikram had obtained a patent on his sequence, he could probably prevent these sorts of modifications of his system via that patent. But in order to obtain this right, he would first had to have shown that his system was such a novel and non-obvious invention, and represented such a vast improvement on any prior system of yoga, that it deserved to be protected by the full force of patent law. It is unlikely that he would ever have been able to meet such a high standard.

Although I am a very strong believer in the benefits of Bikram Yoga, and can even personally attest to many of them, I nevertheless have no reason to be confident that Bikram's system of yoga cannot be improved upon. Furthermore, although the system, as it is currently practiced in licensed Bikram Studios suits me very well, it may not suit all yoga students or teachers equally as well. Individual modifications may be necessary in order to make the practice more appealing to students with different needs and desires. Bikram obviously believes that his system, discovered after years of research and testing, is the ideal one, *for all students*, for bringing about many physical and mental bene-

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<sup>137</sup> See First Amended Complaint, Choudhury v. Morrison, *supra* note 10, at 6; Letter from Jacob C. Reinbolt, *supra* note 26.

<sup>138</sup> See, e.g., Reinbolt, *supra* note 26.

fits in the body.<sup>139</sup> Perhaps he is right. But if he is, why not allow other teachers to *try* to compete with him by attempting modifications and alterations of his system? By attempting to stifle all innovation upon his yoga, Bikram is signaling that his system of yoga may not prevail over new alterations. Without competition, how will we ever really know if Bikram's system is the best one, or if, on the other hand, it could be improved upon? If his method of yoga is in fact superior, over time it will prevail in a competitive marketplace, and that outcome will only serve to prove that his system is the best, if in fact it is.

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<sup>139</sup> See, e.g., First Amended Complaint, *Choudhury v. Morrison*, *supra* note 10, at 3; see also *The Benefits*, quickfityoga at <http://www.bikramyoga.com/benefits.htm>.

