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YOUR KARMA RAN OVER MY DOGMA

BIKRAM YOGA AND THE (IM)POSSIBILITIES OF COPYRIGHTING YOGA

“I’m beyond Superman . . . I have balls like atom bombs, two of them, 100 megatons each. Nobody fucks with me.”¹ - Bikram Choudhury

I. INTRODUCTION

Bikram Choudhury was born in Calcutta, India in 1946.² He began to learn yoga at the age of four from Guru Bishnu Ghosh, a brother of Paramahansa Yogananda, founder of the Self-Realization Fellowship and author of the landmark book “Autobiography of a Yogi.”³ At age eleven, Bikram won the National India Yoga contest—the youngest winner in its history.⁴ At seventeen, Bikram injured his knee weightlifting, and European doctors said he would never walk again.⁵ However, with the help of Ghosh’s training, Bikram fully recovered within six months.⁶

At Ghosh’s urging, Bikram established yoga schools throughout India.⁷ Bikram expanded the schools to Japan, then headed to the United States.⁸ He opened his first American studio in a Beverly Hills basement in the early 1970s, where he slept on the floor.⁹ The classes were free, as they had been in India.¹⁰ However, the days of free classes soon came to an end.

1. Paul Keegan, *Yogis Behaving Badly*, BUSINESS 2.0, Sept. 2002, at 118, available at <http://www.business2.com/b2/web/articles/0,17863,514969,00.html>.

2. Bikram’s Yoga College of India, *About Bikram*, at <http://www.bikramyoga.com/Bikram.htm> (last visited Jan. 15, 2005).

3. *Id.*

4. Keegan, *supra* note 1.

5. *About Bikram*, *supra* note 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Reborn in the USA*, THE TIMES OF INDIA, Oct. 20, 2002, available at <http://www.bikramyoga.com/press/press9.htm>.

10. *Id.*

In the past decade, the popularity of yoga has boomed.¹¹ Ten years ago, only three million Americans practiced yoga.¹² Today, an estimated thirty million people practice it in North America.¹³ According to the Yoga Research and Information Center, in 2003, eighty-five percent of health clubs offered yoga classes, up from thirty-one percent in 1996.¹⁴ This has made yoga big business, with sales of twenty-seven billion dollars annually.¹⁵ According to Bikram, he began charging for his classes at the insistence of his students who, he says, told him, "This is not Calcutta; this is America. You have to charge money or else nobody will believe you know something."¹⁶

With the explosion of all things yoga in the past decade, Bikram has thrived.¹⁷ It is estimated that seven percent of Americans doing yoga practice Bikram Yoga.¹⁸ Nowadays, a ninety-minute class at his institute costs twenty dollars.¹⁹ Bikram's students include a who's who of celebrities: Madonna, Raquel Welch, and Serena Williams.²⁰ He is "the Donald Trump of asanas"²¹ and owns a fleet of forty Rolls Royces.²² He is a multi-millionaire, drawing revenue from his certification classes that annually train 500 teachers for \$5,000²³ each and from the 900 studios worldwide that were started by former students.²⁴ Bikram runs over 600

11. See generally, Julie Schmit, *Big Business Lunges for a Piece of Fat Yoga Profit*, USA TODAY, Aug. 31, 2004 at 3B (discussing the sales explosion of yoga products and services).

12. Melissa Dribben, *Beverly Hills Yogi: It's a Calcutta-to-California Tale of How a Vigorous Brand of Yoga, Called Bikram, Led to Great Wealth—and Litigation*, THE PHILA. INQUIRER, Nov. 23, 2003, at M04.

13. Daphne Gordon, *Is it a Stretch to Call it Yoga?*, TORONTO STAR, Aug. 8, 2003.

14. Dribben, *supra*, note 12.

15. Julian Guthrie, *Yogis Go to Court over Poses*, S. F. CHRONICLE, Feb. 5, 2004 at A10.

16. Nora Isaacs, *And Now, the Litigation Position*, THE INDEPENDENT (London), Apr. 23, 2003.

17. Not all is rosy for Bikram. On several occasions he has been blackmailed into having sex with students. He says, "What happens when they say they will commit suicide unless you sleep with them? What am I supposed to do? Sometimes having an affair is the only way to save someone's life." Keegan, *supra* note 1.

18. Dribben, *supra* note 12.

19. Keegan, *supra* note 1.

20. Sally Pook, *Star Brand of Yoga Gets Caught in a Legal Tangle*, DAILY TELEGRAPH (London), Feb. 23, 2004; see also Keegan, *supra* note 1 (referring to his celebrity clients, Bikram stated, "All of them are my students! All of them! ALL OF THEM! My name is Guru to the Stars.").

21. An asana is a yoga pose. Bikram's Yoga College of India, *Yoga, Paths of Yoga*, at <http://www.bikramyoga.com/yoga2.htm> (last visited Jan. 27, 2005).

22. Dribben, *supra* note 12.

23. Isaacs, *supra* note 16.

24. *The Litigious Yogi*, THE ECONOMIST, June 19, 2004, at 64.

yoga studios in the United States alone.²⁵

Just as no one in India ever thought of charging money for yoga classes,²⁶ the idea of claiming a proprietary interest in yoga was also rejected.²⁷ Speaking of Indian spirituality and scientific research in general, one famous Indian scientist stated:

Through regular publication of the work of the Institute, these Indian contributions will reach the whole world. They will become public property. No patents will ever be taken. The spirit of our national culture demands that we should forever be free from the desecration of utilizing knowledge only for personal gain.²⁸

Bikram fervently disagreed with this sentiment and decided that because his system of yoga was an original creation it required protection that would allow him to create a world-wide franchise in which every Bikram Yoga studio would provide the exact same regimen.²⁹ According to the Los Angeles Times, Bikram hopes franchising “will keep his yoga pure and his workout as reliable as a cup of Starbucks coffee.”³⁰ In order to protect his yoga and to ensure he profits from it, Bikram copyrighted his series of yoga poses, not the postures themselves.³¹ According to Bikram, “To stop [other yoga studios] from stealing, I must go to the lawyers. When in Rome, I must do as the Romans do. When in America, make Bikram [sic] copyright and trademark.”³²

Copyright is a form of protection to the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works.³³ Things that are not copyrightable include “ideas, procedures, methods of operation, systems, processes, concepts, principles,

25. *Reborn in the USA*, *supra* note 9.

26. See Hilary E. MacGregor, *Had Your McYoga Today?*, L. A. TIMES, July 7, 2002, at E3, available at <http://www.bikramyoga.com/press/press3.htm>.

27. James Greenberg, *Asana*TM, *Yoga Journal*, Dec. 2003 (“In yoga’s development through antiquity, no one ever claimed ownership in it.”), available at http://www.yogajournal.com/views/1143_1.cfm.

28. Paramahansa Yogananda, *AUTOBIOGRAPHY OF A YOGI*, 68-69 (1946) (quoting J.C. Bose); see also Judy Muller, *Bikram Yoga Method Offers Intense Workout*, ABC NEWS, Oct. 14, 2002 (“Yoga is based on five principles, including one that discourages greed.”), at <http://abcnews.go.com/business/story?id=86918page=1>.

29. See MacGregor, *supra* note 26.

30. *Id.*

31. Guthrie, *supra* note 15, at A1.

32. Isaacs, *supra* note 16.

33. See 17 U.S.C. § 102(a)(2004); see also U.S. Copyright Office, *Copyright Basics, What Works Are Protected?*, at <http://www.copyright.gov/circs/circ1.html#wci> (last visited Jan. 27, 2005).

discoveries, or devices, as distinguished from a description, explanation, or illustration.”³⁴ According to Nimmer on Copyright, “The primary purpose of copyright is not to reward the author, but is rather to secure ‘the general benefits derived by the public from the labors of authors.’”³⁵ Although remuneration is not the “primary purpose of copyright,” rewarding the author of a copyright is considered essential to the copyright regime.³⁶

In February 2003, Bikram’s attorney, Jacob C. Reinbolt, announced on the Bikram website that Bikram secured federal copyright registration under 17 U.S.C. § 410 for his series of twenty-six asanas and two breathing exercises.³⁷ According to the United States Copyright Office, Bikram holds eight registered copyrights.³⁸ In his press release, Reinbolt claimed, the United States Copyright Office acknowledges Bikram’s exclusive right to the series of postures and breathing exercises that comprise the Bikram Yoga sequence.³⁹

In obtaining copyright protection, Bikram made it clear that he would not tolerate any infringement of the sequence.⁴⁰ According to Reinbolt, Bikram will pursue legal action against anyone who copies his sequence or creates a derivative work that makes “unauthorized use of even a small

34. 17 U.S.C. § 102(b) (2004); see also U.S. Copyright Office, *Copyright Basics, What Is Not Protected By Copyright?*, at <http://www.copyright.gov/circs/circ1.html#wci> (last visited Jan. 27, 2005).

35. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (quoting *New York Times Co. v. Tasini*, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting)).

36. See *id.*; see also S. REP. NO. 104-315 (1996) (“[B]y stimulating the creation of new works and providing enhanced economic incentives to preserve existing works, such an extension will enhance the long-term volume, vitality, and accessibility of the public domain.”).

37. Press Release, Jacob C. Reinbolt, Bikram Obtains Copyright Registration for His Asana Sequence, Bikram’s Yoga College of India, at <http://www.bikramyoga.com/press/press19.htm> (last visited Jan. 27, 2005).

38. See U.S. Copyright Office, *Search Records, Books, Music, etc.*, at <http://www.copyright.gov/records> (last visited Jan. 27, 2005) (enter the appropriate information to access the following copyright registrations: Rajashree Choudhury and Bikram Choudhury, *Yoga for Pregnancy*, PA-1-053-535 (a videocassette); Bikram Choudhury with Bonnie Jones Reynolds, BIKRAM’S BEGINNING YOGA CLASS, TX-179-160 (a book); Bikram Choudhury with Bonnie Jones Reynolds, BIKRAM’S BEGINNING YOGA CLASS (2nd edition) TX-5-259-325 (an audiocassette); Bikram Choudhury, BIKRAM’S BEGINNING YOGA CLASS, TX-5-499-622 (a training manual); Bikram Choudhury, BIKRAM’S YOGA COLLEGE OF INDIA: YOGA TEACHER TRAINING COURSE: CURRICULUM OUTLINE, TXu-934-417 (a manual); Bikram Choudhury, BIKRAM’S YOGA COLLEGE OF INDIA BEGINNING YOGA DIALOGUE, TXu-1-022-657 (a correspondence); Bikram Choudhury, BIKRAM’S BEGINNING YOGA CLASS, TX-5-624-003, (Oct. 24, 2002)).

39. See Reinbolt, *supra* note 37. In addition, Bikram trademarked a series of names associated with his Yoga: Bikram’s Beginning Yoga Class, Bikram’s Yoga College of India, Bikram Yoga.

40. Reinbolt *supra* note 37.

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.”⁴¹ Bikram announced that he will seek damages of \$150,000 per infringement and all attorney fees.⁴²

This was no idle threat. In June 2002, Bikram filed suit against one of his former students, Kim Schreiber-Morrison.⁴³ Schreiber-Morrison was a licensed Bikram instructor who, among other alleged violations, deviated from the regimen by not heating the room to the prescribed temperature and playing music during classes.⁴⁴ The suit was settled out of court for an undisclosed sum, and Bikram proclaimed victory.⁴⁵

After settling with Schreiber-Morrison, Bikram issued cease and desist letters to yoga studios throughout the world, threatening the studios with litigation if they continued to violate his copyright.⁴⁶ On his website, Bikram announced, “No one may teach Bikram Yoga classes unless he/she is a certified and licensed Bikram Yoga teacher. No one may teach or certify others to become Bikram Yoga teachers other than Bikram Choudhury. No one may offer obvious, thinly disguised copies of Bikram Yoga and represent to the public that it is ‘their’ yoga.”⁴⁷

Bikram’s actions shook the normally placid yoga world.⁴⁸ In response, yoga instructors, studio owners, yoga practitioners and legal professionals⁴⁹ banded together to establish a non-profit California corporation named Open Source Yoga Unity (“OSYU”) to fight Bikram’s

41. *Id.*

42. *Id.*; This is the maximum statutory damage amount for a willful infringement of copyright. 17 U.S.C.S. §§ 504(c)(2), 505 (2004).

43. First Amended Complaint, *Choudhury v. Schreiber-Morrison*, June 17, 2002, available at http://yogaunity.org/law/law_downloads/exhibitA.pdf.

44. *Id.* (The complaint further alleged that Schreiber-Morrison and her husband Mark Morrison offered “unauthorized Bikram Yoga teacher certification courses,” and copied, distributed, and sold unauthorized copies of “Rajashree’s Pregnancy Yoga” videotape.).

45. See Reinbolt, *supra* note 37. “This outcome represents a significant legal victory for Bikram . . . and the Bikram Yoga community, and fully vindicates Bikram’s conviction in the originality and legal enforceability of Bikram’s Yoga.” *Id.*

46. See Letter from Jacob C. Reinbolt, of Procopio, Cory, Hargreaves & Savitch, LLP to Mr. and Mrs. McCanley, Yoga Loks, Inc. (June 5, 2002), available at http://yogaunity.org/law/law_downloads/exhibitB.pdf. (last visited Feb. 12, 2005) (sample of Cease and Desist Letter Mailed by Bikram’s Attorneys to Various Yoga Studios).

47. Reinbolt, *supra* note 37.

48. Pook, *supra* note 20 (“In the peaceful and harmonious world of yoga, lawsuits are about as rare as a teacher laughing at your tree pose.”).

49. Open Source Yoga Unity, *Who Are We?*, at <http://yogaunity.org/learn/#who> (last visited Jan. 27, 2005).

litigious threats and his underlying copyright.⁵⁰ In July 2003, OSYU filed suit against Bikram, seeking declaratory relief that would protect all yoga practitioners from any and all intellectual property infringements, because, according to OSYU, “no individual style of yoga can be the subject of intellectual property protection.”⁵¹ In a direct rebuke of Bikram’s goals, OSYU contends that “no form, style or routine of Yoga is proprietary and . . . Yoga cannot be owned, transferred, franchised, trademarked or copyrighted.”⁵² According to OSYU, Bikram’s asanas, like all yoga asanas, are “constantly being performed in varying sequences, none of which are ownable under Copyright law.”⁵³ Elizabeth Rader, a copyright attorney representing OSYU, stated, “We are not disputing that Mr. Choudhury did something creative and useful in the putting postures together in a certain order. . . . Our belief is that you can’t treat the poses as private property.”⁵⁴

As yoga grows in popularity and new schools of yoga continue to emerge, OSYU’s lawsuit raises a critical fundamental issue as to whether yoga is copyrightable.⁵⁵ On one hand, there are over 8,600 asanas⁵⁶ in the world, some over 5,000 years old,⁵⁷ and the traditional yoga practitioners in India typically did not charge money for yoga lessons.⁵⁸ On the other hand, Bikram arranged twenty-six asanas in a specific order and, through the sweat of his brow,⁵⁹ his name is indelibly associated with a particular form of “hot yoga.”⁶⁰ This note explores the issue of whether “Bikram Yoga” is copyrightable in the context of OSYU’s suit against Bikram. Part II provides the background and development of copyright law in general. Part III analyzes how courts have treated yoga in other contexts, because how yoga is ultimately defined (e.g., as a sport, religion, health regimen, etc.) may determine whether it is copyrightable. Because there has been no

50. See Open Source Yoga Unity, *Home*, at <http://yogaunity.org/> (last visited Jan. 27, 2005).

51. See *Complaint for Declaratory Relief, Open Source Unity Yoga v. Choudhury*, Docket # CV-03-3182 PJH (July 9, 2003), available at http://yogaunity.org/law/law_downloads/complaint_osyu.pdf.

52. *Id.*

53. Open Source Yoga Unity, *supra* note 50.

54. Pook, *supra* note 20.

55. See *Complaint for Declaratory Relief, supra* note 51.

56. Baba Hariji, Address during Navarati ‘99, SRI SARVESHWARI TIMES, Feb. 2001, available at http://aghor.org/publications/2001_02.html (quoting speech of Baba Hariji).

57. See *The Litigious Yogi, supra* note 24.

58. See Keegan, *supra* note 1 (“[Y]oga is not a business at all, but a service through which [devoted teachers] simply provide themselves with life’s necessities.”).

59. See Guthrie, *supra* note 15 (Bikram states, “I am defending my spirit, sweat, blood and tears.”).

60. See Keegan, *supra* note 1.

Supreme Court ruling to even mention “yoga,” Part III also examines how the courts have treated other activities that may be analogized to yoga. Part IV applies the different definitions and analyses of yoga and related activities to the context of Bikram Yoga. It also delineates the arguments that the court might employ in deciding *OSYU v. Choudhury* and theorizes, analyzes, and suggests how yoga can be defined in a number of ways depending on how it is practiced. Finally, this note concludes that in choosing to narrowly define his yoga as a system that primarily (if not solely) exists to promote health, Bikram made his yoga subject to little or no copyright protection.

II. BACKGROUND AND DEVELOPMENT OF COPYRIGHT LAWS

A. Background

The Copyright Clause of the Constitution, which extends legislative power to Congress to enact copyright laws, states that, “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶¹ In this country, copyright is not seen as an inherent, inalienable right of the creator, but as a mix between private enterprise and the public good.⁶² In other words, copyright rewards the author, but its primary purpose is public good.

On one hand, copyright laws incentivize creativity by rewarding creative work.⁶³ A copyright grants the author of a work a monopolistic property interest in the work for a limited period of time.⁶⁴ The court in *Universal City Studios, Inc. v. Sony Corp. of America* stated:

Despite what is said in some of the authorities that the author’s interest in securing an economic reward for his labors is ‘a secondary consideration,’ it is clear that the real purpose of the copyright scheme is to encourage works of the intellect, and that this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the copyright

61. U.S. CONST. art. I, § 8, cl. 8.

62. *New York Times Co. v. Tasini*, 533 U.S. 483, 495 (2001) (“[T]he conviction that encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare”) (internal citations omitted).

63. See generally NIMMER, *supra* note 35, at § 1.03 (explaining the dual purpose of copyright law).

64. *Id.*

scheme.⁶⁵

On the other hand, this private profit is encouraged for the public good. As the Court stated in *Twentieth Century Music Corp. v. Aiken*:

[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.⁶⁶

Thus, personal gain through copyright is but a station on the road to bettering society.

Congress first used its constitutional copyright powers in 1790 when it passed a law granting "basic copyright protection to authors of books, [and] also extended protection to maps and charts."⁶⁷ By not restricting the term "writings" in the Copyright Clause to the printed word alone, Congress laid the groundwork for expanding the notion of copyrightable material.⁶⁸ Over time, the Copyright Clause has been read liberally to continually increase the material that is copyrightable.⁶⁹ As one author stated, "The rights which had originally been afforded only to the authors of books have been extended over the years to composers, artists, choreographers, and photographers, among others. These developments have occurred because Congress has the power to expand protection when it so elects."⁷⁰

In revising the scope of the copyright law in 1976, Congress emphasized the need for protecting new subject matter which could be classified into one of two general categories.⁷¹ First, copyright classification could be applied to forms of expression which had already been in existence but had only recently been recognized as creative, and

65. *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 965 (9th Cir. 1981), *rev'd on other grounds*, *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

66. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

67. See Tucker Griffith, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 686 (1998). See also Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124, ch. 15 (1850) (granting protection to maps, charts, and books).

68. See Griffith, *supra* note 67, at 686.

69. *Id.* at 692 ("Quite clearly, the Framers could not have imagined the advanced concepts which eventually created modern replication devices such as the audio or video recorder, the computer, fax machine, compact disc, or laser disc.").

70. *Id.* at 685.

71. 17 U.S.C.S. § 102 (2000) (citing text of H.R. NO. 94-1476 (1976)).

therefore worthy of protection.⁷² Second, classification could be accorded to new forms of expression that had never previously existed but became possible due to scientific discoveries and technological developments.⁷³ If yoga is copyrightable, it is because it falls into the first classification as something already in existence but only recently recognized for its creative expression.

B. Compilations

According to Bikram, his yoga takes preexisting material, the asanas, and combines them in a new and original way.⁷⁴ Thus, for copyright purposes, Bikram argues that it is a “compilation” that is made of component parts, which are not, by themselves, copyrightable because they are already in the public domain.⁷⁵

According to the current U.S. Code, “[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”⁷⁶ In general, three criteria must be met to copyright a compilation: 1) preexisting material must be collected or assembled; 2) the author must coordinate or arrange the material; and 3) the selection and collection must be an original work of authorship.⁷⁷ Thus, components that are “neither original to the [new creator] nor copyrightable [by themselves]” may, when combined, create a “separate entity [that] is both original and copyrightable.”⁷⁸ Viewed this way, the asanas are seen as part of the public domain, free for anyone to mix and match.⁷⁹ Bikram claims that he assembled them in an original sequence, and thereby created something new.⁸⁰

As with all copyrightable material, it is essential that the work be

72. *Id.*

73. *Id.*

74. See Guthrie, *supra* note 15.

75. See Griffith, *supra* note 67, at 713.

76. 17 U.S.C. § 103(6) (2000).

77. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991)

78. *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388 (5th Cir. 1984); see also 17 U.S.C. § 102(a) (1996) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”).

79. *Feist Publ'ns, Inc.*, 499 U.S. at 345 (holding that compilations of facts are within subject matter of copyright, even though facts themselves are not copyrightable).

80. Guthrie, *supra* note 15. (Bikram does not claim to have invented any new poses. Had he done so, it would present a whole other set of copyright issues beyond the scope of this note).

“original.”⁸¹ The threshold for deeming a work original is extremely low.⁸² The U.S. Supreme Court has claimed that, “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”⁸³ However, the author must contribute “something more than a ‘merely trivial’ variation, something recognizably ‘his own.’”⁸⁴

In terms of independent creation, the work must “owe[] its origin to the author.”⁸⁵ As set forth in the Copyright Act, “‘Compilation’ is a work formed by 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.”⁸⁶

Finally, “[c]opyright protection subsists from the time the work is created in fixed form.”⁸⁷ This can be satisfied in the most cursory fashion,⁸⁸ and a new creation is accorded protection as soon as it is fixed in a tangible medium.⁸⁹ In the current instance, Bikram claims his sequence was “rigidly prescribed” into a medium in or about 1971, and that he copyrighted his “Dialogue” in 2002.⁹⁰ Because there is little doubt that Bikram Yoga is a compilation, this issue will not need to be revisited. The fundamental question regarding its copyrightability is whether it is a system of utility or a creative expression.

C. System

When speaking about his yoga, Bikram puts the practical health benefits foremost.⁹¹ According to Bikram, his yoga is capable of curing

81. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §2.01 (2004).

82. *Feist Publ'ns, Inc.*, 499 U.S. at 345 (stating that the work need only contain a modicum of creativity).

83. *Id.*

84. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2nd Cir. 1951).

85. *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800, 806 (D.C. Cir. 1987).

86. 17 U.S.C. § 101 (2000).

87. U.S. Copyright Office, *Copyright Basics*, at <http://www.copyright.gov/circs/circ1.html> (last visited Jan. 18, 2005).

88. *Id.* (“Copyright is secured *automatically* when the work is created, and a work is ‘created’ when it is fixed in a copy or phonorecord for the first time. ‘Copies’ are material objects from which a work can be read or visually perceived either directly or with the aid of a machine or device, such as books, manuscripts, sheet music, film, videotape, or microfilm.”).

89. See 17 U.S.C. § 102(a) (2000).

90. First Amended Complaint, *supra* note 43.

91. See Bikram's Yoga, at <http://www.bikramyoga.com/yoga.htm> (last visited Jan. 27, 2005).

every known ailment from heart disease to hepatitis C.⁹² Practitioners claim that Bikram Yoga “helps the lame walk, combats disease, and relieves pain and suffering.”⁹³ Bikram’s website states that:

Nothing about Bikram’s Beginning Yoga Class is haphazard. It is a twenty-six asana series designed to scientifically warm and stretch muscles, ligaments and tendons in the order in which they should be stretched . . . Bikram Yoga’s twenty-six posture exercises systematically move fresh, oxygenated blood to one hundred percent of your body, to each organ and fiber, restoring all systems to healthy working order, just as Nature intended. Proper weight, muscle tone, vibrant good health, and a sense of well-being will automatically follow.⁹⁴

According to Bikram, the benefits of his yoga can only be achieved when his sequence is followed; therefore, his yoga comprises a “system.”⁹⁵ The Copyright Act specifically states that a system cannot be copyrighted.⁹⁶ This limitation on copyright is intended to protect a First Amendment interest in the free exchange of ideas,⁹⁷ by recognizing that a system or method of utility represents “necessary incidents” of the idea.⁹⁸ However, the courts have carved out exceptions that provide for a system or method to receive a “thin” degree of copyright protection,⁹⁹ which only protects against an actual or literal duplication of the material.¹⁰⁰ These exceptions were originally developed in the case of *Baker v. Selden*,¹⁰¹ which involved a book that explained a new method of bookkeeping.¹⁰²

92. Isaacs, *supra* note 16; *see also The Litigious Yogi, supra* note 24 (quoting Bikram, “What is yoga? Shit together. Bullet proof. Sex proof. Fire proof. Wind proof. Everything proof . . . If you can take my shit, one day you will become a better person.”).

93. Dribben, *supra* note 12.

94. Bikram’s Yoga, *supra* note 91.

95. *See generally* First Amended Complaint, *supra* note 43 at 3. (“The intended benefits from Bikram Yoga can only be derived if the yoga class is performed precisely as Bikram developed it.”).

96. *See Copyright Basics, supra* note 87.

97. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.10[B][2] (2004) (stating that if it were possible to copyright ideas, “there would certainly be a serious encroachment upon First Amendment values”).

98. *Baker v. Selden*, 101 U.S. 99, 103 (1880).

99. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (stating that copyrights that represent “scant” creativity are only afforded a “thin” copyright protection).

100. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994) (“When the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity.”).

101. *See Baker*, 101 U.S. 99.

102. *See id.* (holding that the author’s original writing was subject to copyright, but that the

Baker was essential to developing the concept that an idea cannot be copyrighted, only the expression of that idea can be copyrighted.¹⁰³ In *Baker*, the book had no value as literature; its sole value was its utility.¹⁰⁴ The key to the *Baker* decision lies in this statement: “[W]here the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public.”¹⁰⁵ This doctrine allows someone to copy a copyrighted work so long as such copying is for “use,” rather than for explanation or expression.¹⁰⁶

In *Baker*, because there was only one way in which to complete the process correctly, the idea and its expression became inseparable.¹⁰⁷ This inseparability of the idea and its expression is known as “merger”¹⁰⁸ and it is only afforded a “thin” copyright, if any at all.¹⁰⁹ As the Second Circuit explained, “To the extent the expression merges with the idea, the merger doctrine precludes protection of that expression.”¹¹⁰ Further, one court held that if an idea or system can only be expressed in a limited number of ways, then none of those ways are protected.¹¹¹ The merger doctrine has significant implications for copyright protection because it acknowledges that the thinner the copyright, the more substantial the similarity must be in

knowledge explained by the writing was not.).

103. NIMMER, *supra* note 35, at §2.18 [B][1]; *see generally* 17 U.S.C. § 102 (explaining that copyrights do not apply to ideas, but to expression of ideas).

104. NIMMER, *supra* note 35, at § 2.18 [C][2] (referring to a similar case, *Am. Inst. of Architects v. Fenichel*, 41 F. Supp. 146 (S.D.N.Y. 1941)).

105. *Baker*, 101 U.S. at 103.

106. NIMMER, *supra* note 35, at § 2.18; *see also Am. Inst. of Architects v. Fenichel*, 41 F. Supp. 146 (S.D.N.Y. 1941); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967); the holding in *Baker* is still good law. *See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Kregos v. Assoc. Press*, 3 F.3d 656 (2d Cir. 1993).

107. NIMMER, *supra* note 97, at § 13.03 [B][3] (“In some circumstances, however, there is a ‘merger’ of idea and expression, such that a given idea is inseparably tied to a particular expression.”).

108. *Id.*

109. NIMMER, *supra* note 35, at § 2.11 [D] (citing *Feist Publ'ns, Inc.*, 499 U.S. at 348).

110. *Kregos*, 3 F.3d at 663.

111. *Morrissey*, 379 F.2d at 678-79 (“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. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated”) (internal citations omitted).

order for someone to infringe upon it.¹¹²

However, the doctrine represented in *Baker* exists as a defense, not as a means of denying a copyright to a utilitarian work.¹¹³ In other words, it is not the Copyright Office's job to enforce copyrights. Registration merely establishes a public record of a copyright claim, not a validation of the copyrightability of the underlying material.¹¹⁴ As it states on the Copyright Office's website, "No publication or registration or other action in the Copyright Office is required to secure copyright."¹¹⁵ At most, registration creates a rebuttable presumption that the registered work is copyrightable.¹¹⁶ Thus, registration itself is superfluous to securing a copyright—it just makes it easier to enforce.¹¹⁷ Whether Bikram's copyright is valid remains to be seen.

D. Expression or System?

Copyright law is intended to protect creative expression,¹¹⁸ not utilitarian systems.¹¹⁹ Therefore, in examining copyright law, courts have determined that creative expressions receive the highest level of protection, whereas functional systems receive the lowest.¹²⁰ As one court explained, "The [Copyright] Act has created a hierarchy in terms of the protection afforded to these different types of copyrights. A creative work is entitled to the most protection, followed by a derivative work, and finally by a compilation."¹²¹ Therefore, whether Bikram has an enforceable copyright

112. NIMMER, *supra* note 97, at § 13.03 (citing *Francorp, Inc. v. Siebert*, 210 F. Supp. 2d 961, 966 (N.D. Ill. 2001)) ("At the limiting case of 'the thinnest of copyright protection,' entire duplication would be required.").

113. NIMMER, *supra* note 35, at § 2.18[C][1] ("The mere fact that the plaintiff intends his work to be put to an industrial or commercial, rather than an artistic, use is no grounds for denying copyright to the work.").

114. U.S. Copyright Office, *Copyright Registration*, at <http://www.copyright.gov/circs/circ1.html#cr>.

115. U.S. Copyright Office, *How to Secure a Copyright*, at <http://www.copyright.gov/circs/circ1.html#wci>.

116. 17 U.S.C. § 410(c) (2000) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.")

117. NIMMER, *supra* note 35, at § 2.18[C][1].

118. See 17 U.S.C. § 102 (2000).

119. U.S. Copyright Office, *Copyright Office Basics, What Is Not Protected By Copyright?*, at <http://www.copyright.gov/circs/circ1.html#wci>.

120. See *Warren Pub'g., Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1515 n.16 (11th Cir. 1997).

121. *Id.*

will likely turn on whether his series of asanas is an expression or system. In order to determine this, it is essential to examine how the courts have classified yoga and similar activities to determine the scope of the protections that will be afforded to Bikram Yoga.

III. COURT TREATMENT OF YOGA AND ANALOGOUS ACTIVITIES

Whether yoga should be afforded copyright protection will likely hinge on determining what exactly yoga is.¹²² Although it appears that the Supreme Court has never considered yoga, other federal courts have come to different, and often conflicting, conclusions on how to classify and define yoga.¹²³ It is necessary to examine other courts' categorizations of yoga and then see how copyright law is applied to those specific categories. In addition, because yoga has not been the source of much litigation, it is necessary to examine court treatment of activities with which yoga may be categorized in the future.

A. The Roots of Modern Yoga

The few court cases that have examined yoga have done so in the context of the free exercise of religion.¹²⁴ Thus, the first question to ask is whether yoga is inherently a religious practice. In order to properly analyze this question, some history of yoga is required. To summarize, "The word 'yoga' is derived from the Sanskrit root 'yuj,' which means 'to yoke,' 'to unite' or 'to be whole.' There are numerous styles of yoga, but the ultimate goal in each is the balance of body, mind and spirit."¹²⁵ The physical aspects of yoga were developed in order to facilitate meditation; yoga "prepared the body, and particularly the nervous system . . . for stillness, creating the necessary physical strength and stamina that allowed the mind to remain calm."¹²⁶ Thus, "[i]n classical yoga . . . meditation and postures go hand-in-hand."¹²⁷

122. For example, Bikram has written books on yoga that, like all books, clearly deserve copyright protection. U.S. Copyright Office, *Copyright Basics, What Works Are Protected?*, at <http://www.copyright.gov/circs/circ1.html#wci> (last visited Jan. 27, 2005).

123. See generally *Malnak v. Yogi*, 592 F.2d 197, 197-98 (3d Cir. 1979) (holding that transcendental meditation is a religion which cannot be taught in public schools); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 65-66 (2d Cir. 2001) (finding that yoga presentation in a public school was not necessarily a religious act).

124. See, e.g., *Malnak*, 592 F.2d 197; *Altman*, 245 F.3d 49.

125. Patricia Corrigan, *Yoga: Hot, Cool, Mellow*, ST. LOUIS POST-DISPATCH, Apr. 28, 2003.

126. MARA CARRICO, *YOGA BASICS 4* (Henry Holt & Co. 1997).

127. Alan Reider, *Take a Seat: If You're Not Meditating Are You Really Doing Yoga?*,

But is yoga itself inherently a religious practice akin to, for example, the Eucharist? According to *Yoga Journal*, it is not.¹²⁸ Instead, *Yoga Journal* claims that yoga is a philosophy for spiritual growth that “sometimes interweaves other philosophies such as Hinduism or Buddhism.”¹²⁹ However, by labeling yoga, Hinduism, and Buddhism as “philosophies,” *Yoga Journal* only obfuscates the answer.¹³⁰ This confusion is echoed by academics. According to Daniel Akin, dean of the school of theology at Southern Baptist Theological Seminary, “Yoga is rooted in Eastern mysticism and Eastern mysticism is incompatible with Christianity.”¹³¹ This view is disputed by K.L. Seshagiri Rao, professor of Hinduism at the University of Virginia and editor of the *Encyclopedia of Hinduism*, who claims that yoga complements all religions.¹³² Rao stated, “No matter what religion you practice, you become a better person if you follow the principles of yoga.”¹³³ Thus, even Bikram acknowledges that yoga’s historical roots are clearly in religion.¹³⁴ However, scholars, laypeople and practitioners disagree over whether yoga remains bound to those religious roots.¹³⁵

B. Court Treatment of Yoga

It is not surprising that courts are divided on the question of yoga as religion as well.¹³⁶ As millions of non-Buddhist and non-Hindu Americans can attest, yoga can also simply be a form of exercise.¹³⁷ Speaking about her yoga practice, Julia Roberts told *In Style* magazine, “I don’t want to

YOGA JOURNAL, Jan.-Feb. 2001, available at <http://www.yogajournal.com/meditation/143.cfm>.

128. Cyndi Lee, *FAQ*, YOGA JOURNAL available at http://www.yogajournal.com/newtoyoga/820_1.cfm.

129. *Id.*

130. *Id.*

131. Alexandra Alter, *Yoga Stretches Traditional Christian Boundaries*, THE STAR LEDGER, July 20, 2003.

132. *Id.*

133. *Id.*

134. Bikram’s Yoga College of India, *Yoga* (“Yoga is one of six classic systems of Hindu philosophy whose roots date back 5,000 years.”), at <http://www.bikramyoga.com/yoga.htm> (last visited Jan. 18, 2005).

135. Compare Lee, *supra* note 128, (“Yoga is not a religion . . . It is also not necessary to surrender your own religious beliefs to practice yoga”) available at http://www.yogajournal.com/newtoyoga/820_1.cfm, with Alter, *supra* note 131.

136. See, e.g., *Malnak*, 592 at 197-98; *Altman*, 245 F.3d at 65-66.

137. See, e.g., THE FREE DICTIONARY.COM (stating that “[w]hile Yoga is a religion to many, most practitioners in the west separate yoga from their spiritual beliefs, causing yoga to strictly stay within the containment of an exercise class or just within the ‘keeping healthy’ aspect of life.”), available at <http://encyclopedia.thefreedictionary.com/yoga>.

change my life. Just my butt.”¹³⁸ Similarly, the Second Circuit determined that yoga is not an inherently religious practice.¹³⁹ The court in *Altman v. Bedford* examined the complaints of parents whose children had been taught yoga in their public school by a Sikh minister who led the class through a series of stretches, breathing exercises, and recitations of affirmations such as “I am happy, I am good.”¹⁴⁰ The panel in *Altman* stated that, “although the presenter was dressed in a turban and wore the beard of a Sikh minister, he did not in his yoga exercise presentation advance any religious concepts or ideas.”¹⁴¹ Thus, the trial court in *Altman* held that yoga can be separated from religion. Consistent with this opinion, a district court in the Second Circuit stated that “yoga is a method of exercise that is properly classified as a genus, [as opposed to a species].”¹⁴²

A Third Circuit court that examined the issue came to a different conclusion.¹⁴³ In *Malnak v. Yogi*, the court concluded that teaching a course entitled “the Science of Creative Intelligence—Transcendental Meditation” in public schools constituted an establishment of religion in violation of the First Amendment.¹⁴⁴ Of particular interest, the court held that the course was a religion despite the “protestations of secularity by those espousing th[e] ideas.”¹⁴⁵ According to the concurrence, transcendental meditation “has been defended as wholly consistent with other religious views, and attacked by adherents of those religions as permeated with Hinduism.”¹⁴⁶ Given the correlative link between meditation and yoga,¹⁴⁷ it is likely that the *Malnak* court would have held the same for yoga. Thus, in certain circumstances, yoga may be a religious

138. Gordon, *supra* note 13.

139. See *Altman*, 245 F.3d at 65-66.

140. *Id.* at 60.

141. *Id.* at 65-66.

142. *Pilates, Inc. v. Current Concepts, Inc.*, 120 F. Supp. 2d 286, 305 (S.D.N.Y. 2000) (determining that Pilates is a generic trademark).

143. *Malnak*, 592 F.2d 197.

144. *Id.* at 197-98. This opinion was echoed by the dissent in another Third Circuit case. *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1391 (3d Cir. 1990) (Stapleton, J., dissenting) (“Nothing in this record suggests that if a group of adult evangelical christians approached the Evening School Director asking for classroom space, it would not be able to discuss evangelical christianity in the same manner that others are permitted to discuss yoga or transcendental meditation.”) *Id.*

145. *Id.* at 200 (Adams, C.J., concurring) (“[T]his is the first appellate court decision, to my knowledge, that has concluded that a set of ideas constitutes a religion over the objection and protestations of secularity by those espousing those ideas.”).

146. *Id.* at 213 n.54 (Adams, C.J., concurring).

147. CARRICO, *supra* note 126 (“Initially, the discipline of hatha yoga. . . was developed as a vehicle for meditation.”).

practice, and, therefore, the form and strength of copyright protections it receives should be determined accordingly.

C. Court Treatment of Analogous Activities

Due to the limited amount of litigation concerning yoga, it is possible that no court has thus far properly categorized it. Perhaps yoga, at least as it is practiced in the United States, is substantially similar to a dance, sport, or medical procedure, and will receive a similar degree of copyright protection as one of these activities. It is, therefore, imperative to analyze the type of copyright protection that is afforded to activities with which yoga might be categorized or analogized in the future.

1. Dance

Bikram's attorney, Jacob C. Reinbolt, has compared Bikram Yoga to the choreography of a ballet.¹⁴⁸ "We are not talking about copyrighting the individual steps, but the selection and arrangement of steps," Reinbolt stated.¹⁴⁹ Indeed, a room full of people moving in sync with one another is clearly reminiscent of a choreographed dance.

Dance received special copyright recognition relatively recently.¹⁵⁰ Section 102(a)(4) of the 1976 Copyright Act accorded full protection to pantomimes and choreographic works.¹⁵¹ However, because both terms were considered well-settled, neither was defined.¹⁵² In contrast to the earlier Act, a dance does not require dramatic content, nor, in order to qualify as a choreographic work, does it need to be prepared for an audience.¹⁵³ According to the 1976 Act, pantomimes and choreographic works "do not include social dance steps and simple routines."¹⁵⁴

In a "major judicial interpretation of the Act" regarding choreography, the Second Circuit considered a book containing photographs of renowned choreographer George Balanchine's production of the Nutcracker.¹⁵⁵ In the case of *Horgan v. Macmillan*,¹⁵⁶ the court held

148. Pook, *supra* note 20.

149. *Id.*

150. 17 U.S.C. § 102(a)(4) (2000).

151. *Id.*

152. H.R. REP. NO. 94-1476, at 5667 (1977).

153. NIMMER, *supra* note 35, at § 2.07[B].

154. H.R. REP. NO. 94-1476, at 5667 (1977).

155. Edwina M. Watkins, *May I Have This Dance?: Establishing a Liability Standard for Infringement of Choreographic Works*, 10 J. INTELL. PROP. L. 437, 441 (2003).

156. *Horgan v. Macmillan*, 789 F.2d 157 (2nd Cir. 1986).

that the standard of protection for dance was quite broad.¹⁵⁷ Despite the different means of expression, the court in *Horgan* determined that the photographs were “substantially similar” to the choreographed piece and therefore infringed upon the original work.¹⁵⁸ Thus, expressive dance receives extremely broad copyright protection.

2. Sport and Exercise

As Julia Roberts stated, yoga can be about getting one’s buttocks into shape.¹⁵⁹ The “Pretty Woman” star is not alone in extolling the benefits of yoga as a sport or exercise regimen.¹⁶⁰ IBM, Intel, and Exxon are among the companies that offer on-site yoga classes to their employees to reduce stress, build team spirit, and reduce illnesses.¹⁶¹ For these companies and many others, the health benefits of yoga are of paramount importance.¹⁶² In examining sports and copyright laws, courts and legal scholars have pursued three avenues that might be relevant to an analysis of yoga.

First, there is the issue of whether a particular move or action by an athlete may be copyrighted. In general, courts have held that athletic performances are outside the realm of “property.”¹⁶³ While an athlete may control rights of publicity to his image,¹⁶⁴ he does not own the moves or techniques he displays in competition.¹⁶⁵ Thus, an athlete’s particular

157. *See id.* at 162-63.

158. *Id.*

159. Gordon, *supra* note 13.

160. *See* Julie Sevens, *Companies Offer Yoga as Work Perk*, SUNDAY GAZETTE-MAIL, (Charleston, W.Va.), July 5, 1998, at 6E.

161. *See id.*; *see also* Nancy Wolfson, *Incorporating Yoga*, YOGA JOURNAL, Mar.-Apr. 1999, (listing Nike, HBO and Apple as other companies that offer on-site yoga to employees), available at http://www.yogajournal.com/views/294_1.cfm.

162. Sevens, *supra*, note 160.

163. Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 802 (2001).

164. John M. Glionna, *The Late, Great (and Profitable): Advertising: Beverly Hills Lawyer Guards Against Trademark Infringement for Heirs of 45 Celebrities. Some Spots He OKs; Tasteless Ones Don't Stand a Chance*, L.A. TIMES, Oct. 6, 1997, at B1 (Attorney Shirley Hufstedler, a former federal secretary of education who now specializes in celebrity rights cases states, “When people create a valuable image by winning the Nobel Peace Prize or by becoming a world-famous athlete, others want to take advantage of that image for their own profit, doing some perfectly dreadful things. But the image doesn’t belong to them.”).

165. Wm. Tucker Griffith wrongly claims in his Comment, *supra* note 67 at 701, that the Seventh Circuit ruled that athletes have valid copyright claims. In the case that he cites to support this proposition, *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, the court only considered rights of publicity, not copyright. 805 F.2d 663, 667 n.2 (7th Cir. 1986) (“Although the Players generally claim ‘property rights’ in their performances, they specifically assert only the right of publicity. Hence, we shall consider the Players’ mention of property rights to refer

tennis serve, volleyball spike, or golf swing may be unique and original, but it will not be afforded copyright protection.¹⁶⁶

Second, regarding games and sporting events, there is a “general understanding” that sporting events are not subject to copyright protection.¹⁶⁷ For example, basketball games have specifically been denied copyright protection.¹⁶⁸ Additionally, in a case that suggested copyright protection for baseball clubs, the only right discussed concerned the broadcasts of games, not the events themselves.¹⁶⁹ Thus, team performances, like individual performances, are beyond copyright protection, and individuals are free to duplicate what they see on the field.¹⁷⁰ As the court in *National Basketball Ass’n v. Motorola, Inc.* wryly observed, “A claim of being the only athlete to perform a feat doesn’t mean much if no one else is allowed to try.”¹⁷¹

Third, the final sporting issue, which is perhaps most pertinent to the discussion of Bikram Yoga, is whether a scripted sports play is copyrightable. One examiner at the Copyright Office dismissed the possibility completely, stating in a 1989 interview that “[g]ame plays themselves are not copyrightable. They’re considered ideas.”¹⁷² In other words, a sports play does not express anything other than an idea itself and is therefore ineligible for protection.¹⁷³

A theory on the topic exists even though there is a lack of case law on

only to their right of publicity.”).

166. See generally Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 *COLUM. VLA J.L. & ARTS* 317, 360-61 (2000) (arguing that copyright protection should be extended to sports moves); but see Carl A. Kukkonen, III, *Be a Good Sport and Refrain from Using my Patented Putt: Intellectual Property Protection for Sports Related Movements*, 80 *J. PAT. & TRADEMARK OFF. SOC’Y*, 808, 821 (1998) (explaining how a patent given to a golf putt “is believed to be the first pure sports method patent issued by the Patent Office since the only reference to the putter (or any other article) in the claims of the patent is that the dominant hand grips the putter.”).

167. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846-47 (2d Cir. 1997) (citing 1 Melville B. Nimmer and David Nimmer, *NIMMER ON COPYRIGHT* §2.09[F] (2004)).

168. See *id.*, at 843-45; See also *Nat’l Basketball Ass’n v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F. Supp. 1071 (S.D.N.Y. 1996) (“an NBA game does not fall within the subject matter of copyright protection under 17 U.S.C. §§ 102, 103”).

169. See *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 670 (7th Cir. 1986).

170. See *NIMMER*, *supra* note 35, at § 2.09[F](2004).

171. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d at 846.

172. Brent C. Moberg, *Football Play Scripts: A Potential Pitfall for Federal Copyright Law?*, 14 *MARQ. SPORTS L. REV.* 525, 540 (2004) (citing Craig Neff, *Whose Bone is it, Anyway?*, *SPORTS ILLUSTRATED*, Jan. 23, 1989, at 7 (quoting Julia Huff, an examiner in the U.S. Copyright Office)).

173. See U.S. Office of Copyright, *Copyright Basics, What is Copyright?*, at <http://www.copyright.gov/circs/circ1.html#wci>.

the copyright of sports plays.¹⁷⁴ According to more than one law review note, sports plays should be as copyrightable as choreography.¹⁷⁵ Proloy K. Das, for example, argues, “A play, in diagram form, essentially tells a player how and when to move throughout the course of the play As such, this constitutes protection for human movement through space.”¹⁷⁶ However, Das believes that if scripted plays are to receive copyright protection, they must fall into one of the categories enumerated in the Copyright Act and that choreography is “[t]he most compelling.”¹⁷⁷ Both Das and Brent C. Moberg, who also wrote a note on the possibility of copyrighting scripted plays, argue that such plays should be treated as choreography—an enumerated protected category.¹⁷⁸ The advocates of copyrighting scripted plays base their arguments on an analogy to choreography.¹⁷⁹ Therefore, analogizing yoga to scripted plays creates an intermediate comparison between yoga and choreography. In such an analysis, yoga is ultimately analyzed on the basis of whether it is substantially similar to choreography.

3. Health Benefits

Although Bikram and his attorneys have analogized his yoga to other types of protected expression,¹⁸⁰ the purported health benefits of Bikram Yoga are the core of his copyright claim.¹⁸¹ This automatically presents a complication for copyright protection, because health benefits are generally covered by patent law.¹⁸² The law draws a line between functional works and expressive works.¹⁸³ As one law professor with a Ph.D. in electrical engineering explains, “a work is ‘functional’ for the purpose of distinguishing between patent and copyright subject matter if it performs

174. See, e.g., Proloy K. Das, *Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays*, 75 IND. L.J. 1073, 1086 (2000); Rice Ferrelle, *Combating The Lure of Impropriety in Professional Sports Industries: The Desirability of Treating a Playbook as a Legally Enforceable Trade Secret*, 11 J. INTELL. PROP. L. 149, 150 (2003).

175. Das, *supra* note 174, at 1086; Weber, *supra* note 166, at 320.

176. Das, *supra* note 174, at 1089-90.

177. *Id.* at 1091.

178. See *id.*; see also Moberg, *supra* note 172, at 541 (finding that there is “seemingly clear justification for [a football play’s] protection as a choreographic work . . .”).

179. See Das, *supra* note 174 at 1091; Moberg, *supra* note 172 at 541.

180. Pook, *supra* note 20, at 03.

181. *The Litigious Yogi*, *supra* note 24.

182. *Id.* (stating that by solely touting Bikram Yoga’s therapeutic benefits, Bikram makes his yoga only eligible for patent protection which it would be unlikely to get).

183. 17 U.S.C. § 102 (1976) (citing H.R. Rep. No. 94-1476, which states, “only elements . . . which can be identified separately from the useful article as such are copyrightable.”).

some utilitarian (or useful) task other than to inform, entertain, or portray an appearance to human beings.”¹⁸⁴ For example, medical procedures are covered under patent law because they are functional inventions (as opposed to “nonfunctional authorship”).¹⁸⁵ Therefore, if yoga is primarily about functional health benefits, then it will receive scant copyright protection.

IV. HOW COURTS SHOULD CATEGORIZE BIKRAM YOGA

A. Court Treatment of Yoga as a Religion

Although courts are split on whether yoga is a religion, it might not make much difference with regard to copyright law. If it is determined that yoga in general, and Bikram Yoga in particular, is a religious practice, current law is unclear on whether it would be afforded copyright protection. On the one hand, “[r]eligious copyrights are generally believed by their adherents to be divine, or divinely inspired, abrogating concern over ‘uncompensated’ use,” and the United States only protects authorship by a person.¹⁸⁶ On the other hand, the Free Exercise of Religion Clause in the First Amendment¹⁸⁷ does not provide a defense against copyright infringement.¹⁸⁸ Courts have consistently held that written religious works are copyrightable.¹⁸⁹ For example, new translations of ancient religious texts, like new religious writings, receive copyright protection.¹⁹⁰ This indicates that Bikram could copyright a book that collates and arranges

184. Dennis S. Karjala, *The Relative Roles of Patent and Copyright in the Protection of Computer Programs*, 17 J. MARSHALL J. COMPUTER & INFO. L., 41, 46 (1998).

185. *Id.* at 45.

186. Jed Michael Silversmith & Jack Achiezer Guggenheim, *Between Heaven and Earth: The Interrelationship Between Intellectual Property Rights and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. 467, 478 (2001).

187. U.S. CONST. amend. I.

188. *See* *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000).

189. *See id.*; *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 100 (2d Cir. 2002); *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist*, 829 F.2d 1152, 1159 (D.C. Cir. 1987) (“Normally, a grant of a copyright on a religious work poses no constitutional difficulty. Religious works are eligible for protection under general copyright laws . . .”).

190. *See e.g.*, *Merkos L'Inyonei Chinuch*, 312 F.3d at 97 (holding that a translation of ancient Jewish prayers was original and therefore subject to copyright protection); *United Christian Scientists*, 829 F.2d at 1159-60 (stating that the foundational text of Christian Science, *Science and Health*, like any religious text, was copyrightable, however, it was ineligible for a private copyright because that implicated First Amendment Establishment Clause issues).

ancient religious teachings, including yoga.

The issue of whether a religious practice as opposed to a published work can be copyrighted appears to be a novel one.¹⁹¹ However, what would happen if an author were to make a new arrangement of the poses of a Hebrew sage, assuming they existed? Would this be like copyrighting a book of prayers that existed in the public domain? In fact, Bikram himself has analogized his sequence in this fashion, stating, “[t]he English language is public domain but if you write a book, on any subject, you get a copyright.”¹⁹²

According to the logic of *Merkos L'Inyonei Chinuch*,¹⁹³ this might be a winning strategy. Bikram could argue that the asanas are the equivalent of a new translation of ancient texts with the requisite degree of originality required for a valid copyright.¹⁹⁴ The key to succeeding in this argument is to expand the definition of the word “text.” According to the literary theorists known as deconstructionists, the “definition of ‘text’ is not limited to writing on paper . . . but embraces other forms of communication, including the structure of society itself.”¹⁹⁵ Jacques Derrida, one of the most famous deconstructionists, asserted that “any cultural product, from a Shakespeare sonnet to a building by architect Frank Gehry” could be a text.¹⁹⁶ Employing this broad notion of texts, Bikram could argue that his new arrangement of asanas is an ancient text, and therefore deserves protection. Despite the fact that Bikram’s arrangement is functional in nature, courts appear willing to grant copyright protection when functional texts are tied to a religion.¹⁹⁷ In a number of cases involving the Church of Scientology, courts have upheld the Church’s copyright claims, even when the material was functional.¹⁹⁸

191. See *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231, 1252 (N.D. Cal. 1995) (holding religious practices appear deserving of trade secret protection).

192. Guthrie, *supra* note 15.

193. *Merkos L'Inyonei Chinuch* 312 F.3d at 97.

194. *Id.* (“We have explained that “‘originality’ in [the copyright] context ‘means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.’”) (internal citations omitted).

195. Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1485 (1994).

196. Elaine Woo, *Jacques Derrida, 74: Intellectual Founded Controversial Deconstruction Movement*, LOS ANGELES TIMES, Oct. 10, 2004, at B16.

197. See, e.g., *Religious Tech. Ctr. v. Lerma*, 40 U.S.P.Q.2d (BNA) 1569, 1572-73 (E.D. Va. 1996) (finding that merger of idea and expression has not occurred in this case because the ideas and concepts of the Scientology religion can be discussed independently of the operating thetan documents.).

198. See, e.g., *Religious Tech. Ctr.*, 923 F. Supp. 1231; *Religious Tech. Ctr.*, 40 U.S.P.Q.2d,

However, such a strategy is fraught with potential pitfalls. For example, Bikram has deliberately avoided calling his yoga a religion.¹⁹⁹ Thus, the functional nature of his sequence would likely not receive the deference that functional religious texts have received.²⁰⁰ Moreover, even if Bikram Yoga is seen by a court as a religion, it might be perceived as an offshoot of another, more established religion (*i.e.*, Hinduism). In that case, the dispute over his sequence could be construed as an intra-religious dispute, and the courts would not likely get involved.²⁰¹

Yoga can certainly be a part of a religion, as the dissent in *Gregoire* realized.²⁰² However, taken together, the courts that have examined yoga have determined that it is not inherently a religious practice, and that the asanas can be divorced from any spirituality even when presented in a spiritual manner.²⁰³ Even in *Gregoire*, the dissenting judge merely categorized yoga and transcendental meditation with evangelical Christianity without a genuine analysis of yoga or transcendental meditation's religious (and non-religious) roots.²⁰⁴

Further, Bikram himself has been stridently non-religious, if not anti-religious, his entire life.²⁰⁵ According to Bikram, he spent ten days with Pope Paul VI trying to brainwash him out of religion.²⁰⁶ Speaking of the experience, Bikram concluded, "Religion is the biggest shit in the world. I

1569.

199. See generally Gordon, *supra* note 13, at 2; but see L. Ron Hubbard, ST. JAMES ENCYCLOPEDIA OF POP CULTURE, available at http://www.findarticles.com/pl/articles/mi_g1epc/is_bio/ai_2419200569insert:/print (Bikram's approach to religion is easily distinguished from that of L. Ron Hubbard, the founder of Scientology. Hubbard consciously created a new religion. Years before he embarked on that quest, Hubbard supposedly stated that the easiest way to become a millionaire in America was to found a religion).

200. See, e.g., *Religious Tech. Ctr.*, 923 F. Supp. 1231; *Religious Tech. Ctr.*, 40 U.S.P.Q.2d, 1569.

201. See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710-11 (1976) (citing *Watson v. Jones*, 13 Wall. 679, 728-29 (1872), which states that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.").

202. See *Gregoire*, 907 F.2d at 1391 (Stapleton, J., dissenting).

203. See, e.g., *Altman v. Bedford Cent. School Dist.* 45 F. Supp. 2d 368, 385 (S.D.N.Y. 1999) (reversed on other grounds in *Altman v. Bedford Cent. School Dist.*, 245 F.3d 49 (2d Cir. 2001)).

204. *Gregoire*, 907 F.2d at 1391 (Stapleton, J., dissenting).

205. See Ericka Schickel, *Body Work*, LA WEEKLY, Sep. 26, 2003, available at <http://www.laweekly.com/ink/03/45/features-schickel.php>.

206. *Id.* at 6.

believe in people.”²⁰⁷ In his yoga classes, Bikram discourages his teachers from discussing anything spiritual, insisting that they focus on the poses.²⁰⁸ While many yoga practitioners imbue their classes with religious tropes, that is not the intention of Bikram.²⁰⁹ He is adamant that his yoga is *not* a religion and that teachers should focus on how to perform the poses.²¹⁰

Bikram divorced his yoga from its religious roots and promised his followers the cure to cancer — not a path to inner peace or union with God.²¹¹ By not asserting that his yoga sequence is part of a religion, Bikram has waived the argument that it should be treated as a religion. In any event, the extent of protection afforded a religion would not be very strong. Therefore, an analysis of Bikram Yoga based upon any religious claims to copyright would not likely find favorable treatment by the courts.

B. Court Treatment of Activities Analogous to Bikram Yoga

1. Dance

Bikram has paid lip-service to calling his yoga a dance.²¹² If Bikram Yoga is an expressive dance, then it would receive the highest copyright protection. Dance was specifically recognized in the Copyright Act and receives the broadest protections.²¹³ Although specific dance steps are not copyrightable, original compilations of pre-existing material receive copyright protection.²¹⁴ As the court in *Horgan* stated, “Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material.”²¹⁵ Thus, in analogizing Bikram Yoga to a dance, the asanas are the building blocks of the sequence like traditional folk dance steps may make up an original dance routine.²¹⁶

Since the Act considers choreography and pantomime well-settled, perhaps it is best to see how the Copyright Office defines the terms and

207. *Id.*

208. Gordon, *supra* note 13, at 2.

209. *See id.*

210. *See id.*

211. *See* Gordon, *supra* note 13, at 2; *see also* Dribben, *supra* note 12, at 3.

212. Pook, *supra* note 20 (stating that Bikram’s attorney compared his yoga to the choreography of a ballet).

213. *See* U.S. Copyright Office, *supra* note 33, at 5.

214. *See Horgan*, 789 F.2d at 161.

215. *Id.* (citing COMPENDIUM OF COPYRIGHT OFFICE PRACTICES, COMPENDIUM II § 450.03(a) (1984)).

216. *Id.*

whether those definitions apply to Bikram's sequence. According to the Compendium of Copyright Office Practices, "Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movements in certain rhythmic and spatial relationships."²¹⁷ A pantomime is "the art of imitating or acting out situations, characters, or some other events with gestures and body movements."²¹⁸ Although yoga does not appear to be a pantomime, since it is not intended to imitate or act out anything, it could easily be considered a dance. A reasonable observer could certainly describe a yoga class as "static and kinetic successions of bodily movements in certain rhythmic and spatial relationships."²¹⁹ Therefore, as *The Economist* stated, "If Bikram Yoga is indeed, for legal purposes, akin to 'Swan Lake', Bikram might actually have a case."²²⁰

However, Bikram "does not claim that his classes are performances with inherent artistic or expressive value."²²¹ Instead of extolling the aesthetic beauty of his classes, he boasts about their health benefits.²²² Even in his complaint against his former student Schreiber-Morrison, Bikram claimed, "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."²²³

This focus on such a narrow aspect of his yoga sequence is a formula for failure. Had Bikram called his sequence an expressive dance, and if it would be considered a dance, then Bikram Yoga would receive the most vigorous protection.²²⁴ However, Bikram did not call Bikram Yoga a dance or expression in his complaint against Schreiber-Morrison,²²⁵ in his answer to OSYU,²²⁶ or even in his press release when he obtained the copyright.²²⁷

217. COMPENDIUM OF COPYRIGHT OFFICE PRACTICES, COMPENDIUM II § 450.01 (1984).

218. *Id.*, § 460.01.

219. *Id.*, § 450.01.

220. *The Litigious Yogi*, *supra* note 24.

221. *Id.*

222. *Id.*

223. First Amended Complaint, *supra*, note 43, at 3.

224. U.S. Copyright Office, *Copyright Basics, What Is Not Protected By Copyright?*, available at <http://www.copyright.gov/circs/circ1.html> (last visited Jan. 27, 2005).

225. See First Amended Complaint, *supra* note 43.

226. See Answer, *Open Source Yoga Unity v. Choudhury*, July 9, 2003 available at http://yogaunity.org/law/law_downloads/Bikram_Answer.pdf.

227. Bikram's Yoga College of India, *supra* note 37.

Instead, Bikram always chose to focus on the practical applications, for example, stating in his press release: "This latest development reinforces the strength and value inherent in the Bikram Yoga system."²²⁸ In other words, Bikram chose to focus on his sequence's utility and to avoid its expressive choreographic elements. This was a mistake. Dance is an enumerated category in the Copyright Act²²⁹ and is afforded extremely broad protections, as the court in *Horgan* demonstrated.²³⁰ Therefore, in choosing not to argue that his yoga is an expressive dance, Bikram appears to have precluded himself from arguing for this broad, and potentially potent, form of copyright protection.

2. Sport and Exercise

It is unlikely that Bikram Yoga will receive much copyright protection as a sport or exercise for several reasons. Bikram Yoga is not sufficiently analogous to a spectator sporting event, or to the moves or techniques of an individual athlete.²³¹ Although yoga can sometimes be a competitive sport,²³² Bikram's sequence is generally not a competition that people pay money to observe, and his poses are not components of such events.²³³ Besides, sporting events and athletic techniques are afforded almost no copyright protection.²³⁴

Bikram Yoga is more similar to scripted sports plays.²³⁵ Assuming Bikram successfully compares his yoga to a scripted play, this argument would be based upon an analogy of Bikram Yoga to choreography and would therefore require an analysis as choreography.²³⁶ Since the strength of the scripted play argument lies in its similarity to choreography,²³⁷ it makes more sense to analogize yoga directly to choreography as a dance

228. *Id.*

229. 17 U.S.C. § 102(a)(4) (2000).

230. *Horgan*, 789 F.2d at 161.

231. *See Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 846 (1997).

232. Bikram himself was a national yoga champion in India. Keegan, *supra* note 1, at 120.

233. An exception to this is the "International Yoga Asana (Posture) Championship - Bishnu Charan Ghosh Cup" of which Bikram is the Executive Producer. Press Release, Yoga Expo 2003 to Present First Major Yoga Asana (Posture) Championship Ever Held in the U.S., Bikram's Yoga College of India, at <http://www.bikramyoga.com/yogaexpo/pressrel.htm> (last visited Feb. 22, 2005).

234. *Nat'l Basketball Ass'n*, 105 F.3d at 846-47 (stating that basketball games do not qualify for copyright protection because "they do not constitute 'original works of authorship' under 17 U.S.C. § 102(a)").

235. *See generally id.* at 847 (explaining that sports broadcasts are afforded protection).

236. *See, e.g., Weber, supra* note 166, at 356-57.

237. *See Moberg, supra* note 172, at 541.

rather than go through the arduous and detached scripted play analysis.²³⁸

3. Health

Health is the aspect of his yoga on which Bikram based his claim to copyright,²³⁹ and it is a thin reed. In general, health systems do not receive strong copyright protection.²⁴⁰ Taking Bikram's claims at face value, the only way to achieve health benefits is to perform his yoga in the exact sequence he copyrighted.²⁴¹ On his website, Bikram guarantees relief from chronic ailments to practitioners of his sequence.²⁴² Unlike the other activities to which Bikram Yoga might be analogized, providing health benefits is clearly utilitarian in nature. Whereas a dance is performed for its aesthetic beauty, and professional sports are played as entertainment, people practice yoga for its utilitarian benefits.²⁴³ Moreover, although yoga can be aesthetically pleasing, to the extent that aesthetics cannot be separated from a practice's useful components, there is a merger of idea and expression.²⁴⁴

With regard to Bikram Yoga and enforcing his copyright, there is a merger between the idea (perfect health) and its expression (Bikram's sequence). The idea is perfect fitness that affects every fiber²⁴⁵ of one's body, and it can only be achieved through precise practice of his yoga. Thus, if copyright protection is available, it will be thin.

As noted previously, medical benefits and surgical procedures are covered by patent law, but even patent law would not protect Bikram's

238. See, e.g., *Nat'l Basketball Ass'n*, 105 F.3d at 846-47.

239. See Bikram's Yoga College of India, *Yoga*, available at <http://www.bikramyoga.com> (last visited Jan. 27, 2005).

240. See *The Litigious Yogi*, *supra* note 24 (summarizing that by boasting about his sequence's health benefits, Bikram extols its "functional" process, which is covered by patent and not copyright).

241. First Amended Complaint, *supra* note 43.

242. Bikram's College of Yoga, *The Benefits*, ("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.") at <http://www.bikramyoga.com/benefits.htm>.

243. See Wolfson, *supra*, note 161 (discussing the numerous corporations that offer on-site yoga instruction to their employees because of its purported benefits).

244. See, e.g., *Brandir Int'l., Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) ("[I]f design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements.") (referring to Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741 (Apr. 1983)).

245. Bikram's Yoga, *supra* note 91.

interest.²⁴⁶ If Bikram Yoga is like a surgical procedure, then there is a strong public interest in the sequence being widely available.²⁴⁷ In 1995, the American Medical Association's Council on Ethical and Judicial Affairs declared that "it is unethical for physicians to seek, secure or enforce patents on medical procedures."²⁴⁸ Moreover, according to Chisum on Patents, "Congress in 1996 enacted 35 U.S.C. Section 287(c), which provides that the remedies against patent infringement shall not apply to medical practitioners and related health entities for performance of a medical activity."²⁴⁹ Therefore, an analysis of yoga based upon its purported health benefits will afford yoga little copyright or patent protection.

C. Yoga Qua Yoga

Given the difficulties in analogizing yoga to other activities, it is possible that courts will view it as something *sui generis*—not a religion, dance, sport or anything else. In that case, how should Bikram Yoga be analyzed? At its inception, yoga was developed to facilitate something, namely meditation.²⁵⁰ Thus, from time immemorial, yoga has been a utilitarian system. Nevertheless, it is possible that yoga could be publicly performed as part of a choreographed dance routine or construed as a deconstructed "textual" aspect of a religion. One could argue that since there are innumerable ways to combine the asanas, all of which aid in health, there is no merger of idea and expression. In these scenarios, it is possible that yoga could escape from its origins as a method of utility and perhaps be copyrightable. However, that is not what Bikram has done. Although Bikram and his attorneys have paid lip service to the creative aspects of his sequence,²⁵¹ they have steadfastly asserted its functional attributes.²⁵²

246. *The Litigious Yogi*, *supra* note 24.

247. *See generally* *Martin v. Wyeth, Inc.*, 96 F. Supp. 689, 695 (D. Md. 1951) ("[T]he professional ethics of doctors and surgeons are more consistent with the widespread use of their medical and surgical discoveries for the benefit of mankind than in obtaining a monopoly to control their discoveries for personal commercial advantage.").

248. Joel J. Garris, *The Case for Patenting Medical Procedures*, 22 AM. J. L. & MED. 85, 86 n.10 (1996) (citing Brian McCormick, *A Question of Ethics: Guidelines Address Method Patents, Role in Executions*, AM. MED. NEWS, Jul. 3, 1995, at 3, 60).

249. 1 DONALD S. CHISUM, CHISUM ON PATENTS § 1.03 (3).

250. CARRICO, *supra* note 126.

251. *See, e.g.*, Guthrie, *supra* note 15 (Bikram comparing his sequence to creating an original work out of the English language); Pook, *supra* note 20 (Bikram's attorney analogizing Bikram's sequence to a dance).

252. *See, e.g.*, Isaacs, *supra* note 16 (discussing the purported health benefits of the

Nevertheless, the yogi who does not assert yoga's health benefits will face substantial hurdles to claiming a valid copyright. Unlike other activities that are protected by copyright, yoga has never been about its aesthetics.²⁵³ Even when yoga seeks to achieve something as ephemeral as "attaining God,"²⁵⁴ it remains a system for attaining a result. The various schools of yoga employ different methods of achieving something of functional value.²⁵⁵ According to Bikram himself, his yoga sequence was created for one purpose, the health of the practitioner.²⁵⁶ Therefore, despite the possibility of someone using yoga in a non-utilitarian manner, Bikram has made it clear that his yoga sequence is a system that deserves only the thinnest of copyright protection.

V. CONCLUSION

Bikram seeks to save the world and profit handsomely. However, copyright law stands in his way because, if his yoga is all he claims it to be, then there is an overwhelming public interest in its dissemination. By hyping the purported health benefits of his sequence, Bikram created a successful business but sowed the seeds of his own failure with regard to copyright protection.

In 1893, Swami Vivekananda visited Chicago and spoke at the World Parliament of Religions.²⁵⁷ This was the West's introduction to yoga, and Vivekananda came as an emissary, teaching by example that yoga was not a business, but a service through which its teachers could "simply provide themselves with life's necessities."²⁵⁸ In the more than one hundred years since, something has been lost. Yoga has changed America, but in turn, America has changed yoga.²⁵⁹ Big money met spiritual needs, and

sequence).

253. See, e.g., More About Yoga, Bikram's Yoga College website (explaining the historical roots of yoga) at <http://www.bikramyoga.com/Yoga.htm>.

254. Paths of Yoga, Bikram's Yoga College website (describing Bhakti Yoga) at <http://www.bikramyoga.com/yoga2.htm>

255. See generally Paths of Yoga, Bikram's Yoga College website (describing the practices and goals of Bhakti, Hatha, Karma, Kundalini, Raja and Tantra Yoga) at <http://www.bikramyoga.com/yoga2.htm>

256. BIKRAM CHOUDHURY, BIKRAM'S BEGINNING YOGA CLASS 204 (J.P. Tarcher, Inc., 1978) ("[T]he only safe and lasting way to cure, or relieve the symptoms of, chronic ailments and achieve total health is to perform the twenty-six poses I have given you exactly in the order and in the manner described, and on a regular basis.").

257. Asim Chaudhuri, *Swami Vivekananda in Chicago*, THE HINDU, Aug. 14, 2001, available at <http://www.hindu.com/thehindu/2001/08/14/stories/1314017d.htm>.

258. Keegan, *supra* note 1, at 124.

259. *Id.*

instructors who did not care for the spiritual roots of yoga filled the space.²⁶⁰

Had Bikram been more modest in his assertions and in his ambitions, he would have claimed that his sequence was an expressive dance and accentuated its aesthetic value. Although this might not have attracted huge throngs of followers, it would have afforded him maximum possible copyright protection. However, Bikram chose to be a savior—the man who developed the cure for all known illness. In the short run, this was very good for business. However, in the long run, it will not allow him much copyright protection for his life's work. Other yoga teachers will be allowed to teach the Bikram sequence and Bikram will not be able to stop them. As Bikram watches courts reject his copyright claim, he will have no one to blame but himself.

*Jordan Susman**

260. *Id.* (quoting one prominent yoga teacher: “Yoga has become cutthroat, Mafia-like Many of these people are the biggest thieves, bullies, and sex addicts—all of it under this veil of spirituality.”)

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