Yoga, exercise or dance?

Kristen McCallion and **Sara O'Coin** from the law firm Fish & Richardson discuss how US copyright law protects 'choreographic works'

US copyright law protects "original works of authorship" that are "fixed in a tangible medium of expression".[1] Section 102(a) of the US Copyright Act sets forth eight specific categories of works that are protected by copyright, "pantomimes and choreographic works" being one of them.[2] The US Copyright Office explains on its website that "choreography is the composition and arrangement of dance movements and patterns usually intended to be accompanied by music".[3] Congress has stated that copyrightable choreography does not include "social dance steps and simple routines".[4]

Nearly forty years ago, US legislators explained that the categories of copyrightable works set forth in the Copyright Act "do not necessarily exhaust the scope of 'original works of authorship'... Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.[5] But while there may have been an intention to allow for flexibility in determinations of whether a particular work is subject to copyright protection, neither the US Copyright Office nor the courts have the power to create brand new categories of copyrightable works such that the so-called "flexibility granted to the courts is limited to the scope of the categories designated by Congress in section 102(a)".[6]

Whereas Section 102(a) of the US Copyright Act sets forth the types of works that may include copyrightable subject matter, Section 102(b) of the US Copyright Act proscribes copyright protection to ideas, procedure, processes, systems, methods of operation, concepts, principles and discoveries.[7] Also, copyright law is universally understood not to provide any protection to facts. As explained by the US Supreme Court many years ago, "no author may copyright his ideas or the facts he narrates".[8]

However, copyright protection may be afforded to a compilation of facts when the underlying facts are arranged or selected in an original manner.[9] A "compilation" is defined in the US 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".[10] This limited form of copyright protection for "compilations" does not protect the underlying factual material in a work, but only to the selection or arrangement of that material.[11]

Uncopyrightable yoga: Bikram feels the heat

In 1971 Choudhury Bikram developed a system of yoga consisting of twenty-six yoga poses and two breathing exercises always performed in the same order for ninety minutes in a room heated to 105 degrees Fahrenheit. Bikram, now nearing 70, began teaching yoga in the 1970s after immigrating to the US.

Today, Bikram Yoga[12] is a very popular style of yoga in the US and is practiced frequently by yogis at Bikram-licensed yoga studios. Bikram promotes his system of yoga as "capable of helping to avoid, correct, cure, heal, and alleviate the systems of a variety of diseases and health issues".[13] Over the years, Bikram obtained copyright registrations from the US Copyright Office for several books and audiovisual works that describe and depict his yoga series, including a registration for a book titled 'Bikram's Beginning Yoga Class' in 1979 and a registration for a supplement to this book in 2002.[14]

In or around 2010 or 2011, Bikram learned that a number of his former students were teaching the Bikram yoga method in their own independent yoga studios without his authorisation. Bikram initiated lawsuits for copyright infringement against a number of his former students and in 2011 he filed suit against the Evolation Yoga studio in California alleging, among other things, copyright infringement.[15]

Bikram asserted that his yoga sequence was a copyrightable "choreography" and clearly fell into the fourth category of works, ie, "pantomimes and choreographic works," expressly protected by Section 102(a) of the US Copyright Act.[16] In the alternative, Bikram argued that his yoga routine was a copyrightable "compilation" due to his original selection and arrangement of the individual yoga poses that comprise the ninety-minute sequence.[17]

Bikram further argued that the copyright registrations issued by the US Copyright Office for his books and videos provided registration protection to the Bikram yoga sequence embodied therein and consequently, that anyone performing his sequence infringes his registered copyrights.[18]

Defendants disagreed and filed a motion for partial summary judgment asserting that Bikram's copyrights only covered the literary text of his books and the audio-visual elements of his videos, but not the yoga sequence described and displayed therein. This was apparent, according to the defendants, because the US Copyright Office did not issue to Bikram a copyright registration for a choreographic work, exercise routine, or compilation of postures. Further, defendants asserted that Bikram's yoga sequence was simply uncopyrightable.[19]

US District Judge Otis Wright II agreed with the defendants, noting that, "Congress contemplated copyright protection for dramatic works to be something significantly more than what [Bikram] offer[s] here."[20]

The court explained that the US Copyright Office "did not issue to [Bikram] a copyright registration for a pantomime or choreographic work, exercise routine, or compilation of postures," but rather registered his literary and audio-visual works.[21] Notably, in 2002, Bikram attempted to register a copyright for "Bikram's Asana Sequence" as a work of the performing arts, but this was never registered by the US Copyright Office.[22] And the court went a step further, concluding that the Bikram yoga sequence is an uncopyrightable compilation of exercises:

> The Sequence is a collection of facts and ideas. There is a distinction between a creative work that compiles a series of exercises and the compilation of exercises itself. The former is copyrightable, the latter is not.[23]

Noting that the types of works afforded copyright protection are limited to the categories set forth in Section 102(a), the court concluded that Bikram's selection and arrangement of twenty-six yoga poses and two breathing exercises, each individually created thousands of years ago, was not a copyrightable choreography because choreography does not include "simple routines" and a "mere compilation of physical movements does not rise to the level of choreographic authorship unless it contains sufficient attributes of a work of choreography".[24] The court also found that Bikram's sequence of yoga poses was not an artistic arrangement, but rather a scientific method with intended benefits, specifically the health benefits that Bikram prominently promoted for years.[25] In January 2013 Bikram appealed the court's decision to the Ninth Circuit Court of Appeals.

The court's conclusion was rooted in, and well supported by, a Statement of Policy that had been issued by the US Copyright Office six months prior concerning the copyrightability and registerability of compilations. In its Statement of Policy the Register of Copyrights explained that:

> Interpreting the statutory definition of 'compilation' in isolation could lead to the conclusion that a sufficiently creative selection, coordination or arrangement of public domain yoga poses is copyrightable as a compilation of such poses or exercises. However, under the policy stated herein, a claim in a compilation of exercises or the selection and arrangement of yoga poses will be refused registration...
>
> A compilation of yoga poses, may be precluded from registration as a functional system or process in cases where the particular movements and the order in which they are to be performed are said to result in improvements in one's health or physical or mental condition.[26]

The position taken by the US Copyright Office is clear: "A claim in a choreographic work must contain at least a minimum amount of original choreographic authorship. Choreographic authorship is considered, for copyright purposes, to be the composition and arrangement of a related series of dance movements and patterns organised into an integrated, coherent, and expressive whole."[27]

Choreographic copyright registrants beware

While the US Copyright Office's public statement is certain to provide clarity going forward, the position taken by the Register of Copyrights applies retroactively. Explaining that the Office found that it had issued a number of registration certificates that included "nature of authorship" statements such as "compilations of exercises" or "selection and arrangement of exercises". The Register stated that such registrations were "issued in error" in light of the "office's closer analysis of legislative intent".[28]

A choreographer who did receive such a registration from the US Copyright Office, who choreographed a work that is more than merely a selection of exercises, because it comprises a related series of dance movements and patterns organized into an integrated, coherent, and expressive whole, may consider it wise to attempt to re-register the work, or correct the now invalid registration.

It appears clear that no compilation of yoga poses will be deemed copyrightable subject matter, at least in the US, where it is regarded as an un-copyrightable exercise that is not afforded protection by Section 102 of the US Copyright Act. But where does this leave other types of choreographed routines that are popular exercise workouts, for example, Zumba, Tae Bo, the Insanity Workout, or even pole dancing? The US Copyright Office has registered pole dancing routines as choreographic works. Generally speaking, the views recently expressed by the US Copyright Office and by the Bikram court are in sync with the way in which athletic performances have been treated historically by copyright law. Athletes may be able to control their public image but they are not the owner of their moves, techniques, or skills. Andy Roddick's serve, Tiger Woods' golf swing or Michael Jordan's dunk, even if fixed in a tangible medium may be copied freely by anyone.[29]

Footnotes

1. 17 USC § 102(a).
2. 17 USC § 102(a)(4). The other categories are: literary works, musical works (including accompanying words), dramatic works (including accompanying music), pictorial graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. 17 USC § 102(a).
3. http://www.copyright.gov/fls/fl119.html.
4. HR Rep 94–1476 at 54 (1976).
5. HR Rep 94-1476 at 53 (1976).
6. 77 Fed Reg, 37605, at 37607 (June 22, 2012). 7. See also *Bikram's Yoga College of India LP et al v Evolation Yoga LLC et al,* 2:11-cv-5506, 2012 WL 6548505 (C.D. Cal., Dec. 14, 2012) ("[O] nly certain categories of creative works may be copyrighted. Under 17 USC §102 (a) copyright protect subsists in orginal works of authorship, which are limited to these [8] categories.").
7. 17 USC § 102(b).
8. *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 U.S. 539, 556 (1985).
9. 17 USC § 103.
10. 17 USC § 101.
11. 17 USC § 103(b).
12. BIKRAM YOGA is a federally registered trademark in the US. (Registration Number 2,746,346).
13. *Bikram's*, at *1
14. US Copyright Reg. Nos. TX 179-160, TX 5-624-003.
15. See eg, *Bikram's Yoga College of India LP et al* v Evolation Yoga LLC et al, 2:11-cv-5506, 2012 WL 6548505 (C.D. Cal. Dec. 14, 2012).
16. See 17 USC §102(a)(4); *Bikram*, at *1.
17. id
18. *Bikram*, at *3, n. 4.
19. *Bikram*, at *1.
20. *Bikram*, at *3.
21. id
22. *Bikram*, at *1.
23. *Bikram*, at *3.
24. *Bikram*, at *3 (citing H.R. Rep. 94–1476 at 54 (1976)).
25. Bikram, at *4.
26. 77 Fed Reg 37605, 37607 (June 22, 2012).
27. 77 Fed Reg 37605, 37607 (June 22, 2012).
28. 77 Fed Reg 37605, 37607-8 (June 22, 2012).
29. See *Nat'l Basketball Ass'n v Motorola*, 105 F.3d 841, 846 (2d Cir. 1997) ("A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try.").

Authors

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