Copyright for Yoga Poses

Thomas G. Field, Jr.

Professor Field casts a jaundiced eye on a recursive definition of choreography.

Over a span of seven years, two court and one agency opinion have addressed the copyrightability of a yoga sequence as a compilation. All involve Bikram Choudhury who has achieved fame as the creator of Bikram Yoga.

Having trained some 2,000 instructors, he was justifiably upset to find that many had become competitors and sent multiple cease and desist letters alleging trademark and copyright infringement. *See, e.g., The litigious yogi*, The Economist, Jul. 17, 2004. As many as 50 yoga instructors then banded together seeking declaratory relief. The court, in Open Source Yoga Unity v. Choudhury, 2005 WL 756558 (N.D. Cal.), is skeptical about the copyright claim but does not resolve it on cross motions for summary judgment. *See also*, David Kravets, *Yoga guru settles claim*, Associated Press, May 14, 2005 (read at Recordnet.com Mar. 3, 2013).

Apparently undeterred, Choudhury soldiered on, managing to bring the Register into the fray. *See* U.S. Copyright Office, *Statement of Policy; Registration of Compilations*, 77 Fed. Reg. 37605, June 22, 2012 (USCO Statement). Citing that roughly six months later, Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC, 2012 WL 6548505 (C.D. Cal.), finds the sequence uncopyrightable. It does not, however, address seven other claims, including trademark infringement. That case settled, too. The principal defendant "will no longer teach the sequence… Bikram's Beginning Yoga Class." *See* the parties' *Joint Press Release* at http://yogatothepeople.com/joint-press-release-issued-12312/. That page also links to an explanation by Gregory Gumucio, the principal defendant.

The Office often seems to avoid confronting subject matter by hiding behind the originality requirement. *See, e.g., When the Copyright Office Hides the Ball*, iP Frontline, July 2, 2008. This time it did not. Yet it seems to have taken roughly seven years to work that one out, so perhaps it is not surprising that the Office avoids and evades if possible.

As recited in the later court opinion, "Bikram Choudhury developed the Bikram Yoga brand and its yoga system, which includes 26 yoga poses and two breathing exercises…." *Evolation Yoga*, at *1. In 1979, he obtained one of several registrations for books, and, in 2002, Choudhury obtained a supplemental registration alleged to cover the sequence itself. *Id*. But a 2002 attempt to register the sequence was unsuccessful. *Id*.

The court finds no copyright for two reasons. Because he "claims that his yoga system… is capable of helping to avoid, correct, cure, heal, and alleviate the symptoms of a variety of diseases and health issues," protection is precluded by § 102(b). *Evolation Yoga*, at *1, *2. Unfortunately the opinion refers to facts and ideas, both outside the scope of a case the section codifies. *See* Baker v. Seldon, 101 U.S. 99, 102 (1879) ("By publishing the book, without getting a patent for the art [technology], the latter is given to the public.").

That and another reason for invalidity given by the court are discussed in the *USCO Statement*. Instead of *Baker*, the Office cites Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (U.S. 1991), saying "a question that was not present in the facts of *Feist* and therefore not considered by the Court, is whether the selection, coordination, or arrangement of preexisting materials must relate to the section 102 categories of copyrightable subject matter." *USCO Statement* at 37605.

Feist seems unhelpful, particularly because it leads to the observation, "unless a

compilation of materials results a work of authorship that falls within one or more of the eight [listed] categories… the Office will refuse registration…. Thus, the Office will not register a work in which the claim is in a 'compilation of ideas,' or… a 'compilation of rocks.'" *Id*. at 37607. It will, however, register "an original compilation of the names of the author's 50 favorite restaurants." *Id*. The juxtaposition of rocks and restaurants seems confusing, particularly when the web is replete with images of Cairns as sculpture.

When the Office turns to choreographic works, the discussion is no more lucid. It notes legislative history indicating "that the subject matter of choreography does not include 'social dance steps and simple routines.'" *Id*. Thus, "A compilation of simple routines, social dances, or even exercises would not be registrable unless it results in a category of copyrightable authorship. 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." *Id*. But nothing defines "sufficient attributes of a work of choreography."

For that, it is useful to consider, as the Office does, Borge Varmer, *Copyright in Choreographic Works* (1959), the 28th in an important series of studies reproduced at http://www.copyright.gov/history/studies.html. It indicates agreement (of those whose views were sought) that works such as the "Cha-Cha Slide" or "Macarena" would not be protected. With one exception, guidance is sparse.

Agnes George DeMille, however, in the second of two letters says, "let me make it clear that what the choreographers want is not protection against the performance of their dances, but performance for pay. … [I]f an exhibition piece of ballroom steps is devised and this combination is copied and performed for money, I think some infringement of rights has taken place. …[C]opyright must be based on the principle and not on the quality or type of performance." That echoes Justice Holmes in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903), where he writes, for example, "if

[illustrations] command the interest of any public, … it would be bold to say that they have not an aesthetic and educational value, — and the taste of any public is not to be treated with contempt…."

Although Ms. DeMille's comments are not free from ambiguity, I read them to mean that protected works should be intended for spectators, not participants. From that perspective, yoga sequences performed *for* rather than *by* audiences should be protected. In the unlikely event there would be a need, that seems more useful than the observation that, to be protected, choreographic works require attributes of choreography.

Note: Professor Field makes no claim to choreographic credentials; those are limited to twice being in an all-male performance of Swan Lake.