

Entertainment and Sports Lawyer
Summer, 2005

***18 COPYRIGHT BATTLES OVER YOGA'S 5,000-YEAR-OLD TRADITION**

Shannon M. Wise [FN1]

Copyright © 2005 by American Bar Association; Shannon M. Wise

Yoga, in a basic sense, is the practice of completing various physical postures, many of which are thousands of years old. Currently, more than 15 million Americans practice yoga and that number continues to rise. Also increasing, however, are legal battles between yoga lawyers concerning ownership rights to specific yoga practices.

That issue was the focus of a recent declaratory judgment action, *Open Source Yogan Unity v. Choudhury*, No. 03-3182 (N.D. Cal. 2003), challenging the validity of Bikram Choudhury's copyrights to a sequence of yoga postures he devised and called "Bikram yoga." Because the parties reached an undisclosed settlement on the eve of trial, the validity of Choudhury's copyrights and trademarks to the Bikram yoga sequence remain unresolved.

However, examination of the Open Source court's analysis of the issues gives insight into whether yoga routines deserve copyright protection and raises additional questions regarding the applicability of copyright laws to other sequenced sports activities, such as figure skating or gymnastics.

The declaratory judgment action was filed in 2003 by Open Source Yoga Unity (OSYU), a self-professed "collective" of yoga instructors, studio owners, yoga lawyers and legal professionals that was formed to "resist the enforcement of the copyright protection of any Yoga style." [FN1] OSYU sought a declaration that Choudhury did not have valid copyright or trademark rights to the Bikram yoga sequence.

Choudhury is one of the most well-known "yogis" in the United States and has been at the forefront of the yoga trend that has swept the nation. Choudhury's famous yoga devotees include Madonna, Michael Jackson, Candice Bergen, Brooke Shields and even Richard Nixon. [FN2] It was, in fact, Nixon who encountered Choudhury and his teachings while visiting the South Pacific in 1972 and invited Choudhury to bring his practice to the United States. [FN3]

That practice involves leading students through a series of 26 yoga postures or asanas and two breathing exercises in a room heated to a recommended minimum of 105 degrees Fahrenheit and about 40 percent humidity.

23-SUM Ent. & Sports Law. 18

(Cite as: 23-SUM Ent. & Sports Law. 18)

Choudhury created the Bikram yoga sequence around 1965 or 1970. Choudhury did not devise the postures themselves -- they are unquestionably classical poses that have been in the yoga vernacular for thousands of years -- but he was the first person to arrange the specific poses in the unique Bikram sequence.

Choudhury taught his Bikram yoga classes throughout the 1970s in Southern California and in 1979 published and sought copyright protection for his first book entitled *Bikram's Beginning Yoga Class*. Since then, Choudhury has sought copyright protection for other books, audiotapes and videotapes involving the practice of Bikram yoga.

In 2002, Choudhury first sought to protect the yoga sequence itself and filed a supplemental registration to the copyright for his 1979 book. Choudhury has also registered the trademarks Bikram Yoga, Bikram's Beginning Yoga Class, Bikram's Yoga College of India and Spinal Twist Design.

***19** In addition to taking advantage of the U.S. copyright laws to protect his yoga sequence, Choudhury embraced another aspect of the American way -- franchising. [FN4] The proliferation of Bikram yoga studios all over the United States has earned an appropriate nickname -- "McYoga." [FN5] Like any other franchise, Choudhury seeks control over the who, what, where and when of how Bikram yoga is taught and demands a piece of the profits from his registered studios. The cost to become a certified Bikram instructor is \$5,500 and in order to run a Choudhury-sanctioned studio, instructors must submit a business proposal and adhere to a franchise agreement. [FN6]

After copyrighting the Bikram yoga sequence in 2002, Choudhury started sending out cease-and-desist letters to yoga practitioners across the nation who were teaching yoga classes that were identical or similar to the Bikram yoga sequence. Choudhury is thought to be the first yoga practitioner to enforce a yoga copyright in such a manner. [FN7] Choudhury also filed a copyright and trademark infringement lawsuit against an individual studio, but that action settled in June 2004 prior to reaching the infringement issues.

In response to the threat of similar lawsuits, OSYU formed to challenge Choudhury's copyright and trademark rights to Bikram yoga and filed the Open Source declaratory judgment action seeking a determination of those rights. [FN8]

Faced with cross-motions for summary judgment, the Open Source court addressed the validity of Choudhury's copyrights to the yoga sequence. The court "readily acknowledge[d]" that the case was "very unusual" and that "[o]n first impression, it thus seems inappropriate and almost unbelievable, that a sequence of yoga positions could be any one person's intellectual property." [FN9]

The court recognized, however, that two competing principles of copyright law were at issue. "On the one hand, copyright law does not protect factual or functional information or information that is already in the public domain. On the other hand, copyright law does extend protection to an arrangement of information in the public domain assembled in a sufficiently creative fashion. The question at hand is how to reconcile these two principles." [FN10]

Recognizing the principles set forth in the seminal case *Feist Publications*, ***20** the court noted that "compilations of factual information arranged in an obvious manner, such as alphabetical listings of names, addresses and telephone numbers in a telephone book, c[annot] not be copyrighted simply because of the time and effort it took to collect the information" and that "[s]ome creative contribution must be made to the compilation itself for copyright protection to attach." [FN11]

The court summarized that "while functional and public domain material remains free for all to use, a compilation of that material may nonetheless qualify for copyright protection if the compiler can demonstrate a sufficient level

23-SUM Ent. & Sports Law. 18

(Cite as: 23-SUM Ent. & Sports Law. 18)

of creativity in the selection and arrangement of the elements in the compilation." [FN12]

Applying that principle to Choudhury's copyrights to the Bikram yoga sequence, the court first addressed OSYU's contention that the yoga sequence could not be copyrighted because the individual yoga poses were only functional physical movements, not creative expression. OSYU likened the Bikram yoga sequence to other physical exercise regimens that could not be copyrighted, citing *National Basketball Ass'n and NBA Prop. Inc. v. Motorola Inc.*, 105 F.3d 841, 846 (2d Cir. 1997), a case which held that NBA basketball games themselves were not entitled to copyright protection.

Choudhury disagreed with OSYU's characterization of the yoga sequence as mere physical movements and instead argued that the sequence was actually a creatively selected and arranged compilation of poses that was protected by copyright law.

The Open Source court noted that OSYU "provided no persuasive authority that a compilation of yoga [poses] cannot be protected under the copyright laws in the same manner as other compilations" and concluded that even though "application of the law of compilations to yoga asanas appears to violate the spirit of yoga, [it] has been unable to locate any authority that precludes such application. Therefore, if the trier of fact determines that a sufficient number of the individual yoga asanas are arranged in a sufficiently creative manner, copyright protection for the yoga sequence would be available." [FN13]

The court found that "at a minimum," Choudhury's claims that he arranged the yoga sequence in an aesthetically pleasing manner that was also designed to improve the practitioner's health created a "dispute of fact on the issue of whether sufficient creativity exists in the Bikram yoga routine so that copyright protection attaches and thus summary judgment on both copyright validity and copyright invalidity must be denied." [FN14] The court also recognized that if the Bikram sequence could be copyrighted, Choudhury could enjoin exact or near-exact duplications of the sequence if the yoga routines were substantially similar.

While Open Source did not ultimately resolve the validity of Choudhury's copyrights because the case settled prior to trial, the district court's analysis of the issues certainly encourages other creators of "sufficiently creative" yoga sequences to seek protection of their yoga routines under the copyright laws.

In addition, the opinion raises questions as to whether other sequenced athletic activities similarly deserve copyright protection if they constitute sufficiently creative compilations of postures or activities. Prior to the Open Source opinion, courts found that athletic activities were outside the realm of copyright protection. [FN15]

However, it now appears that copyright protection may extend to elements of activities such as figure skating, karate, gymnastics, synchronized swimming and pro wrestling, to name some examples. [FN16] For example, one commentator suggests that athletes' "sports celebration moves" are copyrightable because they are "creative, original and unique moves that serve only as a tangential part of any game" and do not serve a functional role in athletic competition. [FN17] Another has recognized that copyright protection may apply to scripted sports plays, noting that a Texas football coach successfully registered a football play formation called "the I-Bone formation" with the Copyright Office in 1985. [FN18]

Extending copyright protection to such activities raises further questions such as ascertaining the identities of copyright owners and determining what constitutes infringement. [FN19] The Open Source court, for example, recognized that Choudhury, if successful, "may properly enjoin exact or near-exact duplications of his yoga sequence" and that the infringement issue would require the trier of fact to analyze the allegedly infringing sequences to determine the order of the poses, what modifications from Choudhury's sequence have been made and

(Cite as: 23-SUM Ent. & Sports Law. 18)

whether those sequences involve specific moves that are common to all yoga practices and cannot be copyrighted, along with other pertinent information. [FN20]

While the validity of copyright protection for yoga routines and other scripted sports sequences remains unsettled after Open Source, complicated legal posturing between yoga lawyers and other types of athletes certainly lies ahead.

[FN1]. Shannon Wise is with Anthony Ostlund & Baer, P.A., in Minneapolis. Her e-mail is swise@aoblaw.com.

[FN1]. Open Source Yoga Unity, <http://www.yogaunity.org> (last visited July 18, 2005).

[FN2]. "Hot Yoga" Burns Bright, CBS News, June 8, 2005, <http://www.cbsnews.com/stories/2005/06/06/60II/main700006.shtml>.

[FN3]. Id.

[FN4]. Id.

[FN5]. Id. See also "The litigious yogi," The Economist, June 17, 2004, http://www.economist.com/people/displayStory.cfm?story_id=2765973 ("Bikram is to the yoga world what fast food is to the culinary world. He is supremely responsive to the needs of the modern, western marketplace (15,000,000 people practice yoga in America alone) and thus popular with the yoga 'masses' His main claim to controversy, however, is that he seems determined to take the analogy to fast food to its logical extreme. Just as McDonald's franchises its branches, Bikram wants to franchise his style of yoga to the more than 900 studios around the world that were started by his former students.").

[FN6]. Bikram's Yoga College of India, <http://www.bikramyoga.com> (last visited July 18, 2005).

[FN7]. See The litigious yogi, supra note v (noting that prior to Choudhury's use of an intellectual property strategy, "[n]othing of the sort had ever been attempted before. The closest precedent was an attempt in 2000 by a teacher of Pilates -- a popular fitness method invented in 1914 by a German prisoner-of-war, Joseph Pilates -- to enforce the trademark 'Pilates' against another studio that used the name. The judge rejected that claim, ruling that Pilates had become a generic name and thus not one entitled to protection."). See also *Pilates Inc. v. Current Concepts Inc.*, 120 F.Supp.2d 286, 318 (S.D.N.Y. 2000).

[FN8]. *Open Source Yogan Unity v. Choudhury*, No. 03-3182, 2005 WL 756558, at *1 (N.D. Cal. Apr. 1, 2005).

[FN9]. Id., at *2.

[FN10]. Id.

[FN11]. Id. (citing *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)).

[FN12]. Id., at *3.

[FN13]. *Open Source*, 2005 WL 756558, at *4.

[FN14]. Id.

23-SUM Ent. & Sports Law. 18

(Cite as: 23-SUM Ent. & Sports Law. 18)

[FN15]. See, e.g., *Nat'l Basketball Ass'n v. Motorola Inc.*, 105 F.3d 841, 846 (2d Cir.1997) (basketball games are not copyrightable); *Hoopla Sports and Entm't Inc. v. Nike Inc.*, 947 F.Supp. 347, 354 (N.D. Ill. 1996) ("noticeably absent" from the illustrative list of works of authorship in 17 U.S.C. § 102(a) "is a category for sports events or other analogous organized events.").

[FN16]. William J. Fishkin, Comment, Next on Floor Exercise, Dominique Dawes ©: The Difficulties in Copyrighting Athletic Routines, 11 *Seton Hall J. Sport L.* 331, 331-32 (2001).

[FN17]. Henry M. Abromson, Comment, The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick?, 14 *Marq. Sport L. Rev.* 571, 601 n.12 (2004) (analyzing sports celebration moves in detail and concluding that the moves are copyrightable). See also 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, 808 (1998) (recognizing that "the protection of sports moves and related action have increasingly been sought through existing intellectual property laws. While the average sports fan finds such a notion ridiculous, there are some strong arguments in its favor.").

[FN18]. Proloy K. Das, Note, Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays, 75 *Ind. L.J.* 1073, 1087-88 (2000) (the "conclusion that the legal groundwork for protecting sports play has been laid seems inescapable.").

[FN19]. *Nat'l Basketball*, 105 F.3d at 846 (noting in the context of a basketball game, "the number of joint copyright owners would arguably include the league, the teams, the athletes, umpires, stadium workers and even fans, who all contribute to the 'work.'") (citing 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.09[F] at 2-170.1 (1996)).

[FN20]. Open Source, 2005 WL 756558, at *4-5.

END OF DOCUMENT