

Appeal No. 13-55763

United States Court of Appeals
FOR THE
Ninth Circuit

BIKRAM'S YOGA COLLEGE OF INDIA, L.P. and BIKRAM CHOUDHURY,
Plaintiffs-Appellants,

v.

EVOLUTION YOGA, LLC, MARK DROST, and ZEFEA SAMSON,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE OTIS D. WRIGHT, DISTRICT JUDGE
CASE NO. 2:11-CV-11-05506-ODW (SSX)

APPELLANTS' OPENING BRIEF

O'MELVENY & MYERS LLP

DANIEL M. PETROCELLI

CARLA CHRISTOFFERSON

IVANA CINGEL

1999 AVENUE OF THE STARS

LOS ANGELES, CA 90067-6035

TELEPHONE: (310) 553-6700

FACSIMILE: (310) 246-6779

Attorneys for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Appellant Bikram's Yoga College of India, L.P. by and through its counsel of record hereby states that there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

Dated: November 14, 2013

DANIEL M. PETROCELLI
CARLA CHRISTOFFERSON
IVANA CINGEL
O'MELVENY & MYERS LLP

By: /s Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Plaintiffs-Appellants
Bikram's Yoga College of India, L.P.
and Bikram Choudhury

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INTRODUCTION

Drawing on thousands of years of yoga tradition, hundreds of poses and postures, millions of variations and combinations, and decades of personal study, Bikram Choudhury¹ selected and arranged a precise sequence of movements that has become his worldwide signature: the Bikram Sequence. From the vast universe of asanas, as the yogic postures are known, the Sequence features 26—always performed in the same order, at the same pace, with the same verbal guidance, in a studio heated to the same febrile temperature—introduced and concluded by the same two breathing exercises. Unlike a gym workout, the Sequence is an integrated, coherent, expressive whole, a 90-minute routine with an “aesthetic appeal and graceful ‘flow’” that reflects Bikram’s unique perspective on the synergy of body, mind, and spirit.

Because it is a fixed, original work, carefully selected and arranged, the Sequence is entitled to protection under the Copyright Act (the “Act”) as both a compilation of yoga asanas and as a choreographic work. In granting Evolution’s Motion for Partial Summary Judgment—brought by former Bikram students who now copy and capitalize on his methods—the district court erred by holding that Bikram’s unique sequence of yoga asanas is not a proper subject of copyright.

¹ Plaintiffs-Appellants Bikram’s Yoga College of India, L.P., and Bikram Choudhury are referred to as “Bikram.” Defendants-Appellees Evolution Yoga, LLC, Mark Drost, and Zefea Samson are referred to as “Evolution.”

Although this appeal challenges the court's conclusion, Bikram's primary objection is to the Copyright Office's June 22, 2012 Statement of Policy on Registration of Compilations ("Policy Statement" or "Statement"), to which the court gave undue deference. That Statement, which the court erroneously treated as carrying the force of law, proposes momentous limits on both the subject matter of copyright and judicial authority to determine the subject matter of copyright. But the Copyright Office is an administrative agency, not a lawmaking authority, and the court, as the final authority on statutory construction, was obligated to conduct its own statutory analysis.

Had the court conducted the appropriate independent analysis, it would have had no trouble determining Congress's intent. The Act makes clear that the works of authorship enumerated under Section 102(a) are illustrative, not limitative—and that the term "include" precedes a non-exclusive list. Contrary to the Copyright Office's interpretation, a unique sequence of asanas need not fall squarely within a specific category to be copyrightable. As a compilation, the Sequence is protected as an additional category of authorship. As a series of continuous, non-repetitive movements that follow a deliberate and aesthetically pleasing cadence, the Sequence is also protected as a choreographic work.

Finally, the Sequence is not subject to any of the Section 102(b) exclusions that withhold copyright protection from any "procedure," "process," or "system."

Bikram does not claim a copyright in the idea of yoga, which takes countless forms, nor does he purport to control a singular method for achieving a particular result. His copyright in the Sequence protects only his creative expression in the selection and arrangement of the movements that constitute the Sequence, a principle that is, after all, the purpose of copyright law: to protect the author's original expression of an idea without creating a monopoly over that idea. Even if the Sequence were deemed a "procedure," "process," or "system," it would still be entitled to protection from exact duplication—which is what Bikram's suit alleges and, indeed, what Evolution acknowledges having done.

STATEMENT OF JURISDICTION

This appeal arises from a December 14, 2012 Order granting Evolution partial summary judgment on Bikram's first claim for copyright infringement under 17 U.S.C. § 101 *et seq.* and granting Evolution's first counterclaim seeking declaratory judgment that it was not infringing a valid copyright. The United States District Court for the Central District of California had subject matter jurisdiction over these claims under 28 U.S.C. §§ 1331 and 1338.

On April 4, 2013, the parties dismissed with prejudice the remainder of the district court action, consisting of all claims and counterclaims not resolved by the Order, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). This Court thus has jurisdiction over the claims on appeal because they were fully and finally

adjudicated below. 28 U.S.C. § 1291. On May 2, 2013, Bikram filed a timely Notice of Appeal challenging the Order.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred as a matter of law in ruling that works of authorship enumerated in Section 102(a) of the Copyright Act are exclusive.
2. Whether the district court erred as a matter of law in ruling that a protectable compilation must qualify as one or more works of authorship enumerated in Section 102(a) of the Copyright Act.
3. Whether the district court erred as a matter of law in ruling that the Sequence does not qualify as a protectable compilation under Section 103 of the Copyright Act.
4. Whether the district court erred as a matter of law in ruling that the Sequence does not qualify as a “choreographic work” under Section 102(a)(4) of the Copyright Act.
5. Whether the district court erred as a matter of law in ruling that the Sequence may be refused protection as a procedure, process, or system under Section 102(b) of the Copyright Act.
6. Whether the district court misapplied *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and its progeny in determining

that the Policy Statement, addressing the issues set forth in questions 1-5 above, was entitled to deference.

7. Whether the district court erred in finding that the Sequence was not entitled to the statutory presumption of copyright validity despite Bikram's 1979 and 2002 registrations of the Sequence.

STATEMENT OF THE CASE

On July 1, 2011, Bikram filed a Complaint in the United States District Court for the Central District of California alleging eight claims against Evolution, including a claim of copyright infringement. (EOR009-95.) Bikram claimed, among other things, that Evolution infringed Bikram's copyright in a sequence of 26 yoga asanas and two breathing exercises (the "Sequence"), in the series of instructions and commands that accompany, and correspond to, each asana in the Sequence (the "Dialogue"), and in other copyrighted works. (EOR016-18.)

In February 2012, Evolution filed an Answer to the Complaint and Counterclaims for Declaratory Judgment. (EOR097-119.) Evolution's first and second claims for relief asserted that Evolution was not infringing a valid copyright in the Sequence and the Dialogue, respectively. (EOR114-15.) Evolution conceded, however, that "[o]f the several types and styles of yoga offered by Evolution [], one of those styles is similar to Bikram's That style, sometimes known as 'hot yoga,' includes 26 postures and two breathing exercises and is done

for 90 minutes accompanied by a series of oral instructions, in a room heated to approximately 105 degrees Fahrenheit.” (EOR113.)

On November 12, 2012, Evolution filed a Motion for Partial Summary Judgment (“Motion”) on a portion of Bikram’s claim for copyright infringement and on Evolution’s first counterclaim, arguing that Evolution is not infringing a valid copyright in the Sequence. (EOR127-46.) The Motion did not challenge the validity of Bikram’s copyright in the Dialogue. In support of its Motion, Evolution submitted the Policy Statement, which the Copyright Office issued to “clarify [its] practices relating to the examination of claims in compilations, and particularly in claims of copyrightable authorship in selection and arrangement of exercises . . . [and relating to] registration of choreographic works.” 77 Fed. Reg. 37605. (EOR148.) The Statement addressed the copyrightability of the selection and arrangement of yoga poses and concluded that “a claim in a compilation of exercises or the selection and arrangement of yoga poses will be refused registration.” *Id.* at 37607.

Without holding oral argument, on December 14, 2012, the district court issued an Order Granting Defendants’ Motion for Partial Summary Judgment (“Order”). (EOR001-08.) The Order deferred with rote implementation to the analysis in the Policy Statement, finding that the Sequence was not copyrightable on the grounds: (1) that only categories of creative works expressly set out in

Section 102(a) of the Act may be copyrighted, and that the Sequence did not fall within any of those categories; (2) that a compilation under Section 103 of the Act must qualify as one or more categories of creative works expressly set out in Section 102(a) of the Act; (3) that yoga poses are not copyrightable subject matter, and a compilation of yoga poses, even if arranged in a unique manner, is not copyrightable; (4) that the Sequence does not qualify as a copyrightable “choreographic work” under Section 102(a)(4) because it is simplistic, not dramatic, and not properly fixed; and (5) that the Sequence is merely a functional system or process of exercise said to result in improvements in one’s physical or mental condition to which copyright protection does not extend pursuant to Section 102(b) of the Act. (EOR005-08.) The court also denied the statutory presumption of copyright validity to the Sequence, finding that it had not been registered by the Copyright Office. (EOR005-06.)

On April 2, 2013, Bikram and Evolation entered into a Settlement Agreement and Mutual Release under which they agreed to dismiss with prejudice all claims and counterclaims that were not resolved by the Order, and expressly reserved the right to appeal the Order to this Court. (EOR924-25.) On April 4, 2013, the parties dismissed the remainder of the district court action with prejudice. (EOR923-27.)

STATEMENT OF FACTS

I. BIKRAM CHOUDHURY AND THE SEQUENCE

Bikram Choudhury is recognized as one of the preeminent yoga gurus living today. (EOR226.) After years of studying and adapting various yoga routines, Bikram created a 90-minute “Sequence” comprising 26 asanas and two breathing exercises, all of which must be performed in a specific order. (EOR267.) To create a unique and original routine, Bikram selected the asanas used in the Sequence from hundreds of asanas available. (EOR267-69.)

Bikram framed the Sequence with two breathing exercises, which serve as “an introduction and conclusion” to the performance, and arranged the 26 asanas in complementary succession, grouping the movements to stimulate opposing muscle groups. (EOR268.) Bikram also achieved variety by selecting both standing and prone asanas and selected asanas that would be simple enough for a beginner yet still challenging to advanced students. (EOR267-68.)

Although Bikram could have accomplished his desired effects in myriad ways given the number of available asanas, the ultimate selection, modification, and progression of movements he selected was dictated by his desire to create a work that “had an aesthetic appeal and graceful ‘flow’ that is unique.” (EOR268.) Bikram’s personal preferences played a significant role. He selected and arranged certain poses because he “just liked them together,” and even modified certain

poses to further suit his personal aesthetics. (EOR268.) His unique combination of movements resulted in a Sequence that is “particularly graceful and beautiful,” and allows those performing it to “feel graceful and beautiful themselves just like a ballet dancer does.” (EOR270.) Moreover, this beauty extends beyond the individual performer, as group performances allow “students who see others performing the same poses at the same time feel the beauty of community.” (EOR270.)

Each movement in the Sequence is deliberate, and the completion of each individual asana involves a series of sequential movements and pauses. (EOR536-37.) While some individual asanas are repeated in succession, the Sequence is otherwise non-repetitive and the entire Sequence is completed only once in the 90-minute performance. (EOR530-73.) The Sequence also includes transitional movements that guide performers from one asana to the next and contribute to its “graceful flow.” (EOR268, 530-73.) Through the Sequence, Bikram created a work that both provided the health benefits “inherent in all types of yoga” and “satisfie[d] a desire to create a yoga program that has aesthetic appeal.” (EOR270.)

II. “BIKRAM YOGA” AND THE DIALOGUE

Bikram also developed a series of recitations, the Dialogue, to guide students through the performance of each movement of every asana in the Sequence.

(EOR269.) In addition to setting the pace for the entire 90-minute routine, the Dialogue presents a “unique way” of describing how to perform movements within each asana, the asanas themselves, and the movements that connect them, and provides “emotional guidance and vivid imagery to enhance [the performer’s] yoga practice.” (EOR269, 909.) The Dialogue thus ensures that the class is precisely choreographed with the right rhythm and tempo, and serves as a mantra that complements the “graceful ‘flow’” of the Sequence by providing spiritual and meditational guidance. (EOR016, 268.)

Bikram also created an environment to enhance the performance of the Sequence. To simulate his native Indian climate, Bikram began heating his yoga studios to 105 degrees. (EOR269.) He also transformed the yoga studio into a performance space by adding mirrored walls, specific markings on the floor to designate the position of each student, and a raised platform on which to stand as he recited the Dialogue and directed the class. (EOR269.) The Sequence, along with these accompaniments, is popularly known as “Bikram Yoga.” (EOR014.)

III. BIKRAM’S COPYRIGHTS

Bikram has obtained copyrights in many different works associated with Bikram Yoga. In 1978, Bikram wrote a book titled *Bikram’s Beginning Yoga Class*, which he published and copyrighted in 1979 (the “1979 Registration”). (EOR274, 599.) In this text, Bikram described the Sequence in detail and included

photographs of each chosen asana, as well as anecdotes and general information relating to his yoga practice. (EOR274.)

In October 2002, Bikram filed an application with the Copyright Office for a separate registration of the Sequence. (EOR605-13.) He submitted an application for a registration of a performing arts work, a videotape deposit of the performance of the Sequence, and an application fee. (EOR605-13.) In response, the Copyright Office explained that the Sequence, through its fixation in *Bikram's Beginning Yoga Class*, was already “presented . . . for registration,” and was “inseparable” from the text in which it was described. (EOR631-32.) The Office further informed Bikram that, because the Sequence was already fixed, an additional basic registration of the same work was unnecessary. (EOR631-33.)

The Copyright Office instead offered that Bikram “may . . . further refine the [1979 Registration] by adding the term ‘compilation of exercises’ or ‘selection and arrangement of exercises’ to the nature of authorship line” through a supplementary registration form. (EOR615-29, 631-32.) It also advised Bikram that such supplementary registration would relate back to the 1979 Registration and would ensure that the Sequence accrued the statutory benefits under 17 U.S.C. §§ 410-412. (EOR632-33.) Bikram submitted the supplementary registration according to the Copyright Office’s specifications and, on December 5, 2002, received a certificate of registration (the “2002 Supplementary Registration”).

(EOR212, 635-39.) Bikram also obtained a copyright in the written text of the Dialogue in 2002 and in various other works. (EOR200-04, 644-51.)

IV. BIKRAM'S TEACHER TRAINING PROGRAM

To meet the growing demand for Bikram Yoga classes, Bikram began personally training students to become certified Bikram Yoga instructors. (EOR271.) Once students complete the nine-week course, which requires memorization of the Dialogue and teaches proper performance of the Sequence, Bikram grants successful graduates limited licenses in his copyrighted works for three years. (EOR014-15, 037-41.) These licenses allow graduates to teach Bikram Yoga “in strict conformity with the guidelines established by Bikram, in his sole discretion.” (EOR039.) Before enrolling in the Teacher Training Program, all participants must sign a contract agreeing to comply with the license terms related to the use of Bikram’s works. (EOR014-15.) Through this credentialing and licensing process, Bikram ensures that students worldwide share the same Bikram Yoga experience. (EOR015-16, 269-70.) This uniformity has been critical to Bikram Yoga’s popularity, as students anywhere can anticipate the specific combination of elements that makes Bikram Yoga unique. (EOR015-16, 269-70.)

V. INFRINGEMENT BY EVOLUTION

Mark Drost and Zefea Samson are yoga practitioners and former students of Bikram. (EOR113.) They completed Bikram's Teacher Training Program and became certified Bikram instructors. (EOR011, 113, 163, 166.) Bikram subsequently barred Drost from "any and all involvement in Bikram Yoga" in 2008. (EOR021.) In 2009, Drost and Samson started Evolution Yoga, where Drost continued to hold himself out as a Bikram Yoga instructor. (EOR089, 091.)

Evolution has admitted that it offers classes teaching yoga routines that were substantially similar, if not identical, to Bikram's Sequence. (EOR022, 103, 113, 134-35, 153, 164, 247-48, 910.) The record also established that Evolution's classes utilizing the Sequence are accompanied by a scripted text that is substantially similar, if not identical, to the Dialogue, and are performed in rooms heated to approximately 105 degrees. (EOR113, 246-48.)

SUMMARY OF ARGUMENT

On appeal is the district court's Order holding that the Sequence is not the proper subject of copyright. (EOR001.) As Bikram establishes here, the Sequence is copyrightable as a compilation of public domain yoga asanas and as a choreographic work.

The district court's holding to the contrary is in all respects colored by the court's failure to apply the requisite presumption of validity owed to Bikram's

1979 Registration and its 2002 Supplementary Registration, which clearly cover the Sequence. The Order itself is based on an erroneous interpretation and application of the Copyright Act, which was the result of the court's complete deference to the Policy Statement. The court should have afforded the Statement no deference. Congressional intent can be gleaned through independent review of the Act using conventional tools of statutory construction and must be given effect without any deference to the agency's interpretation. Even if the Act were ambiguous as to congressional intent, the interpretation embodied in the Statement is not entitled to *Chevron* deference because the Act does not give the Copyright Office the authority to issue an interpretative rule "as a statement with the force of law" on the questions at issue. The interpretation is also not entitled to *Skidmore* deference because the Policy Statement analysis is unpersuasive.

First, the Copyright Office's conclusion that the categories of authorship enumerated under Section 102(a) of the Act are exclusive is contrary to the plain language of the Act. These categories are illustrative and the Office's contrary interpretation should not have been adopted by the court.

Second, the Copyright Office's conclusion that compilations must fall within the categories of authorship enumerated under Section 102(a) is not supported by the plain language or the overall statutory scheme, and it should not have been adopted by the court. Under Sections 102 and 103, the Act treats compilations as

an *additional* category of authorship, not as a subset of the Section 102(a) categories.

Third, contrary to the Copyright Office's and the court's conclusions, the Sequence qualifies as a protectable compilation under the Act and *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), because the arrangement of its component asanas, culled from hundreds in the public domain, along with the breathing exercises, is exceedingly original.

Fourth, contrary to the Copyright Office's and the court's conclusions, the Sequence qualifies as a choreographic work. The Sequence is a complex, integrated, coherent, and expressive work performed over a 90-minute period through a series of continuous and largely non-repetitive movements, set to the rhythm and pacing of the Dialogue, inspired by a desire for a yoga program with an "aesthetic appeal," and set in a staged space heated to over 100 degrees.

Moreover, even if this Court were to find that the Sequence does not fit squarely within choreography or one of the other non-exclusive categories of protected works, the Sequence should be afforded copyright protection because, like the enumerated categories of authorship, it fosters the primary objective of copyright—the promotion of science and useful arts.

Fifth, contrary to the Copyright Office's and the court's conclusions, the Sequence should not be denied copyright protection as a functional system or

process under Section 102(b) or because its performance is “said to result in improvements in one’s health or physical or mental condition.” Section 102(b), which embodies the idea/expression dichotomy, denies copyright protection only when the system seeking protection is the most fundamental way to achieve a particular result. The Sequence is not that, as there are many ways of achieving the identified benefits. The Sequence also does not fall within the category of works for which the existence of functional or utilitarian elements affects copyrightability.

STANDARD OF REVIEW

This Court reviews de novo the district court’s grant of partial summary judgment and statutory interpretation of the Copyright Act. *See MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 937 (9th Cir. 2010); *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1014 (9th Cir. 2012).

ARGUMENT

I. THE COPYRIGHT OFFICE POLICY STATEMENT IS NOT ENTITLED TO ANY DEFERENCE

The district court erred in concluding that the Policy Statement was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). “*Chevron* deference” refers to the principle that when Congress expressly delegates authority to an agency to elucidate a specific provision of a statute by regulation, any ensuing regulation is binding in the courts

unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Congress, however, delegated no such authority here.

Instead, the deference standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), applies. “*Skidmore* deference” refers to the principle that when Congress has not expressly delegated authority to the agency to elucidate a specific statutory provision, the respect accorded to an agency’s interpretation is proportional to the interpretation’s power to persuade. *See Mead*, 533 U.S. at 236. Under that standard, the court should have given the Statement no deference.

A. The District Court Erred by Failing to Engage in the Necessary First Step of Independent Statutory Analysis

As “the final authority on issues of statutory construction,” courts addressing deference issues are to examine as the threshold inquiry the unadorned language of the statute and employ “traditional tools of statutory construction” to determine whether Congress “had an intention on the precise question at issue.” *Chevron*, 467 U.S. at 843 n.9. If traditional tools of statutory construction reveal Congress’s intention, “that intention is the law and must be given effect,” without regard to any conflicting agency opinion. *Id.* at 842-43.

Deference to an agency’s statutory interpretation is “called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.” *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600

(2004); *see also Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (declining to choose level of appropriate deference because the court’s interpretation was correct based on its independent review of the statute’s text using conventional tools of statutory construction).

Rather than undertake its own analysis of the Act as required by *Chevron*, the court simply repeated the Copyright Office’s interpretation. By skipping the first *Chevron* step—and according deference to the Statement without assessing if any was deserved—the court erred. As discussed in Section II below, the Copyright Act is clear on the key issues before this Court and can be readily interpreted using conventional tools of statutory interpretation.

B. The Copyright Office Policy Statement Is Not Entitled to *Chevron* Deference

Rejecting Bikram’s argument below that the Statement should be given little or no deference, the district court cited *Chevron* for the proposition that “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer” and then proceeded to defer—with nearly no independent analysis—to the Statement on almost every relevant issue raised by Evolation’s Motion. (EOR006.)²

² While the court also cited *Skidmore*, it clearly applied *Chevron* deference, as it conducted no independent analysis of the Policy Statement’s persuasiveness and instead treated the Statement as if it carried the force of law. (EOR006.) It also cited *Cablevision Systems Development Co. v. Motion Picture Ass’n of America*,

Even if this Court were to conclude through an independent examination of the Act that the statute is ambiguous or contains a gap, *Chevron* deference would still be unwarranted absent a showing that Congress expected the Copyright Office—and not the courts—to fill that gap or resolve that ambiguity. *See Mead*, 533 U.S. at 229. Under *Mead*, an “administrative implementation of a particular statutory provision qualifies for *Chevron* deference” only when Congress “delegated authority to the agency generally to make rules carrying the force of law” and the relevant agency interpretation “was promulgated in the exercise of that authority.” *Id.* at 226-27. Delegation of such authority “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.” *Id.* at 227. There is no such indication here.

1. The Copyright Office Lacks Statutory Authority to Promulgate a Policy Statement with the Force of Law on the Questions at Issue

Congress has delegated no rulemaking authority to the Copyright Office that would support the district court’s treatment of the Statement as a rule carrying the force of law entitled to *Chevron* deference. And no such authority is cited either in the court’s Order or in the Statement. Section 701 of the Act, which sets out the general responsibilities and organization of the Copyright Office, provides no

Inc., 836 F.2d 599, 609 (D.C. Cir. 1988), a case applying *Chevron* deference to a Copyright Office regulation.

general substantive regulatory or lawmaking authority; the duties prescribed are primarily advisory, educational, or informational. *See* 17 U.S.C. § 701. Similarly, Section 702 of the Act, which addresses the authority of the Copyright Office to establish regulations, limits that authority to the “establish[ment] [of] regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.” 17 U.S.C. § 702.

The Statement advances a substantive interpretation of the Act and is not a regulation related to the “administration of the functions and duties” of the Copyright Office. Indeed, if given the force of law, the Statement fundamentally limits both the subject matter of copyright (by asserting that Section 102 limits copyrightable subject matter to the statutorily identified categories of works of authorship) and judicial authority to determine the subject matter of copyright (by asserting that only Congress can expand the categories of protected works of authorship). (*See* EOR150). Such momentous determinations go far beyond the “administration of functions and duties” contemplated by Section 702 and the advice-giving function of Section 701.

The Supreme Court has made clear that there is no default presumption of implicit agency authority to issue statements with the force of law. *See Mead*, 533 U.S. at 229. It also has rejected claims of interpretive and regulatory authority based on narrow statutory grants, including those broader than Section 702. For

example, in *Gonzales v. Oregon*, the Supreme Court held that statutory authorization to “promulgate and enforce any rules, regulations and procedures which [the Attorney General] may deem necessary and appropriate for the efficient execution of his functions” did not delegate “authority to carry out or effect all provisions of the [statute]” and rejected the Attorney General’s claimed authority to issue an interpretative rule as a statement with the force of law. 546 U.S. 243, 259, 268 (2006). Under *Mead* and *Gonzales*, the limited administrative authority conferred on the Register of Copyrights in Sections 701 and 702 cannot properly be inflated into plenary authority to issue interpretive statements carrying the force of law and entitled to *Chevron* deference.

Pertinent precedent further establishes that, absent specific congressional delegation of authority to the Copyright Office supplementary to Sections 701 and 702, determinations such as those in the Statement are the proper province of the courts. Thus, in *Bonneville International Corp. v. Peters*, the court’s majority observed that Section 702 is “insufficient to shift the responsibility of interpreting what is copyright-protected from the courts, the traditional stewards of such property rights, to the Copyright Office, which has no history of, or significant expertise in, such a role.” 347 F.3d 485, 490 & n.9 (3d Cir. 2003). Similarly, in *Morris v. Business Concepts, Inc.*, the Second Circuit conducted an independent analysis of the disputed section of the Act despite the Copyright Office’s own

interpretation and observed that “the Copyright Office has no authority to give opinions or define legal terms, and [that] its interpretation on an issue never before decided should not be given controlling weight” under *Chevron*. 283 F.3d 502, 505-6 (2d Cir. 2002).³

Nor does *Cablevision*, cited by the district court, support treating the Statement as a rule carrying the force of law entitled to *Chevron* deference. *Cablevision* involved express statutory delegation to the Copyright Office of the authority to “prescribe by regulation” certain requirements related to Section 111 of the Act, which is inapplicable here. 836 F.2d at 608 (quoting 17 U.S.C. § 111(d)(1)). In granting *Chevron* deference to the regulation, the D.C. Circuit briefly took note of Section 702, but relied “more specifically” on the statutory grant of authority in Section 111 and then made clear that its “holding on deference due the Office does not extend beyond the bounds of its interpretation of section

³ While the Ninth Circuit observed in two pre-*Mead* opinions that the Register’s interpretations of the copyright laws are “entitled to judicial deference if reasonable,” neither opinion analyzed the specific level of deference owed and neither suggests that *Chevron* deference would be appropriate here. In *Marascalco v. Fantasy, Inc.*, the Ninth Circuit found that no Copyright Office regulation addressed the substantive issues before the Court, *rejected* a party’s effort to rely on a declaration that discussed the Register’s practices, and concluded that there was “no authoritative agency interpretation . . . to which deference is due.” 953 F.2d 469, 473-74 (9th Cir. 1991). In *Batjac Productions Inc. v. GoodTimes Home Video Corp.*, this Court’s opinion makes clear that it “deferred” to the Register only in the sense that the Register’s position was “consistent with” the Court’s own interpretation of certain authorities. 160 F.3d 1223, 1231 (9th Cir. 1998).

111.” 836 F.2d at 608; *see also Satellite Broad. & Commc’ns Ass’n of Am. v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) (following *Cablevision* to grant *Chevron* deference based on additional statutory authority granted to the Copyright Office in Section 111). No such additional, specific statutory grant of authority to the Copyright Office applies here, precluding the court’s treatment of the Statement as a pronouncement carrying the force of law under *Chevron*.

Moreover, the Statement was not a result of formal adjudication, notice-and-comment rulemaking, or any comparable formal agency process. As such, the Statement is closely analogous to agency interpretations to which courts have consistently denied *Chevron* deference. In *Christensen v. Harris County*, for example, the Supreme Court declined to grant *Chevron* deference to the Department of Labor’s opinion letter, because interpretations in the letter—“like interpretations contained in policy statements”—lack the force of law and “do not warrant *Chevron*-style deference.” 529 U.S. 576, 586-87 (2000).

Similarly, in *Mead*, the Supreme Court concluded that tariff classification rulings by the United States Customs Service were not meant to have the force of law and observed that they are instead “best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines,’” which are “beyond the *Chevron* pale.” 533 U.S. at 234-35 (citing *Christensen*). The Sixth Circuit has recently applied the principles of *Mead* and *Christensen* to conclude

that an opinion letter issued by the Copyright Office was entitled to neither *Chevron* nor *Skidmore* deference. *See Broad. Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 778 (6th Cir. 2005) (emphasis added) (“While statutory interpretations adopted by the Copyright Office *pursuant to authority delegated it by Congress* and which enjoy the force of law are entitled to deference if reasonable . . . , interpretations suggested in opinion letters—which lack the force of law—are entitled to respect only insofar as they are persuasive.”).

C. The Copyright Office Policy Statement Is Unpersuasive and Thus Not Entitled to Deference Under *Skidmore*

Absent *Chevron* deference, the interpretation in the Statement is “entitled to respect” under *Skidmore*, but only to the extent that it has the “power to persuade.” *Christensen*, 529 U.S. at 587; *see also Mead*, 533 U.S. at 234-35. Under *Skidmore*, the respect accorded to an administrative interpretation “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140; *see also Tablada v. Thomas*, 533 F.3d 800, 806 (9th Cir. 2008) (identifying logic and expertness of the agency decision, care in reaching the decision, and formality of the process as additional factors considered under *Skidmore*). As discussed below, the Statement’s interpretation is not entitled to *Skidmore* deference: it is

unpersuasive and contrary to the plain statutory language and the Copyright Office's prior policy.

Courts have routinely declined to defer to Copyright Office interpretations of the Act on the ground that the analysis was unpersuasive. In *De Sylva v. Ballentine*, 351 U.S. 570 (1956), the Supreme Court declined to give weight to a Copyright Office regulation interpreting the Act because the regulation was not a “result of a confident interpretation of the statute.” *Id.* at 577-78. More recently, the Sixth Circuit in *Broadcast Music* held that a Copyright Office interpretation of a statute articulated in an opinion letter was not entitled to deference as it was not persuasive, particularly given that the Copyright Office there, as here, had taken different positions on the issue over time. 396 F.3d at 779. Similarly, in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), the Second Circuit declined to grant *Skidmore* deference to the Copyright Office's report because that report ignored certain statutory language and was unpersuasive. *Id.* at 129.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE SEQUENCE WAS NOT COPYRIGHTABLE

The district court's Order is premised, in part, on two erroneous interpretations of the Act lifted from the Statement—interpretations that marked a substantial departure from the Copyright Office's prior course of registering “compilations of exercises” and “selection and arrangements of exercises” as

protectable works. (EOR150-51.) First, in apparent deference to the Statement, the court concluded that the categories of authorship enumerated under Section 102(a) are exclusive, not illustrative, meaning that a work must fall squarely within one of those express categories to obtain copyright protection. (EOR005.)

Second, also in deference to the Statement, the court concluded that a protectable compilation (and even the underlying material) must also fall within the enumerated categories of Section 102(a). (EOR007-08.)

Relying on these conclusions and the Statement, the court went on to hold that the Sequence is not copyrightable because it is simply a collection of exercises—a category not expressly identified as protectable under Section 102(a)—rather than pantomime or choreographic work. (EOR005-08.)

A. Contrary to the Copyright Office’s Interpretation, the Works of Authorship Enumerated Under Section 102(a) Are Illustrative

The district court’s holding that “only certain categories of creative works may be copyrighted” appears to be premised on the Copyright Office’s conclusion that the categories of authorship enumerated under Section 102(a) are exclusive and cannot be expanded by federal courts. (EOR005.) The Copyright Office is wrong. One need look no further than the plain language of the Act. Section 102, which defines the general subject matter of copyright, sets forth the two touchstones of copyright—fixation and originality—and then lists the categories of works of authorship, providing that:

(a) ***Copyright protection subsists***, in accordance with this title, ***in original works of authorship fixed in any tangible medium of expression***, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. ***Works of authorship include*** the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

17 U.S.C. § 102(a) (emphasis added). Notably, the list of works of authorship is introduced by the term “include,” which Section 101 expressly defines as “illustrative and not limitative.” 17 U.S.C. § 101 (“The terms ‘including’ and ‘such as’ are illustrative and not limitative.”). Given this definition, no inferences need be drawn. Congress’s intent is evident from the plain language of the Act—the categories of authorship are non-exclusive. *Accord NBA v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997) (observing that the categories of authorship in Section 102(a) are “concededly non-exclusive”).

The statutory scheme of the Act is consistent with this interpretation. The terms “include” or “including” are used hundreds of times throughout the Act, to introduce factors, offer examples, or provide clarity. Most notably, Congress used the terms “including” and “include” in Section 107 to introduce examples of fair

use and the factors courts should consider when determining whether an allegedly infringing work constitutes fair use. *See* 17 U.S.C. § 107. The Supreme Court has twice interpreted these terms and concluded each time that they precede non-exclusive lists. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (Section 107 “employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given . . . which thus provide *only general guidance* about the sorts of copying” that is fair use); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (accord).

Rather than look to the plain language of Section 102, to the definition of the term “include” set forth in Section 101, to controlling Supreme Court precedent interpreting the term “include,” or even to the term’s common usage, the Copyright Office examined the legislative history of the Act—namely, the 1976 House Report—and then concluded that the term “include” should be read to mean “include only” and that the categories of authorship in Section 102(a) are therefore exclusive. Because the Act unambiguously states that the enumerated categories of authorship are illustrative, the Copyright Office’s reliance on the House Report was improper. *See Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 808 n.3 (1989) (“Legislative history is irrelevant to the interpretation of an unambiguous statute.”) (citation omitted); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The

purpose of this principle is to give effect to congressional intent. *See New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 662-63 (1875). And where, as here, the congressional intent is plain from the language of the statute, neither courts nor agencies are at liberty to suppose that the legislature intended something other than what the plain language imports. *See Chevron*, 467 U.S. at 842-43.

The Copyright Office’s interpretation that the Section 102(a) categories are exclusive—and that “include” actually means “include only”—also fails to give the term “include” the same meaning throughout the Act. *See Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 86 (2006) (“Generally, ‘identical words used in different parts of the same statute are . . . presumed to have the same meaning.’”) (citations omitted). One need not look far to appreciate that the Copyright Office’s interpretation would render the Act dysfunctional, as the term “include” is used even within the Section 102(a) categories in a non-limitative manner. *See* 17 U.S.C. § 102(a)(2)-(3) (works of authorship include “(2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music”).

The Copyright Office’s interpretation of Section 102(a) also renders the statutory use of the term “include” superfluous. Had Congress intended to limit the categories of authorship to those expressly enumerated, it would not have used

the term “include”—which it expressly defined as “illustrative not limitative”—to introduce the categories. Instead, it would have stated what the works of authorships “are,” and then set forth a list. Contrary to principles of statutory construction, the Copyright Office’s interpretation fails to give effect to each word in the statute. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Cartoon Network*, 536 F.3d at 129 (Copyright Office’s interpretation unpersuasive where, as here, it failed to “explain why Congress would include language in a definition if it intended courts to ignore that language.”).

The Copyright Office also relies exclusively on the House Report to read into a single word—“include”—an elaborate interpretation that limits judicial authority to recognize new categories of authorship and “reserves” for Congress the right—which Congress already has as a matter of basic constitutional principles—to amend a federal statute to recognize such categories. (EOR150 (“Congress did not delegate authority to the courts to create new categories of authorship. Congress reserved this option to itself.”).) The statutorily defined word “include” simply does not bear that interpretive weight.

In sum, the Copyright Office’s interpretation, which represents a reversal of its prior course of affording protection to arrangements of exercises (EOR150-51), is unpersuasive and not entitled to deference under *Skidmore*.

B. Compilations Are a Separate, Additional Category of Authorship

Relying exclusively on the Statement, the district court also held that compilations are not a separate, protectable category of works but instead must fall within one of the categories of authorship under Section 102(a). (EOR007.) But this conclusion is premised on an interpretation of a single phrase plucked from Section 103(a) for which the Copyright Office happened to find support in the legislative history. And this methodology—construing phrases in isolation, resorting to legislative history—is an affront to basic principles of statutory construction.

Relying on an introductory phrase from Section 103(a)—“[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works”—the Statement proclaims that “Section 103 makes clear that compilation authorship is a subset of section 102(a) categories, not a separate and distinct category.” (EOR149.) The plain language of Section 103(a), however, does not demand that conclusion. Section 103 contains no express reference to Section 102(a) and certainly does not state that compilations must squarely fall within one of the categories enumerated by Section 102(a). Instead, the opening phrase refers to the entirety of Section 102, which generally defines those works that are and are not the proper subject of copyright. Had Congress wanted to

shoehorn compilations into the categories of authorship enumerated in Section 102(a), it could have expressly done so.⁴

The better interpretation is that the introductory phrase from Section 103(a) treats compilations as separate and additional categories of authorship. Subsequent references to Sections 102 and 103 support this interpretation. For example, Section 104, which addresses the subject matter of copyright as it pertains to national origin, twice refers to the “works specified by sections 102 and 103.” 17 U.S.C. § 104(a), (b). Undoubtedly, the “works” referenced in Section 104 are those “works of authorship” enumerated under Section 102(a) and the compilations and derivative works afforded copyright protection under Section 103. There is no indication in Section 104 of any intent to treat compilations as a subset of the Section 102(a) categories. Rather, Section 104 demonstrates the opposite—Sections 102 and 103 coextensively define the subject matter of copyrightable works. *See also* 17 U.S.C. § 301(a) & (b) (similarly discussing “subject matter of copyright as specified by sections 102 *and* 103”) (emphasis added).

In addition, the references to Section 103 in both Sections 104 and 301 would be rendered superfluous if, as the Copyright Office advocates, compilations

⁴ While the House Report notes that “Section 103 complements section 102” and that “[a] compilation . . . is copyrightable if it . . . falls within one or more of the categories listed in Section 102” (), the Copyright Office’s use of the Report is not instructive. The Office uses the Report not to resolve an ambiguity apparent on the face of the statute, but to introduce ambiguity where there is none.

must fall within the categories of works enumerated under Section 102. If Section 103 compilations were a subset of the categories of works enumerated under Section 102(a), the works referenced in Section 102 would encompass those in Section 103 and there would be no need for repeated statutory references to both section. The Office's interpretation thereby fails to give effect to every word in the Act and yet again runs afoul of a principle of statutory construction. *See TRW*, 534 U.S. at 31.

Even if this Court concludes that the Section 102(a) categories of authorship are exclusive, that does not foreclose the recognition of compilations as an additional and separate category of authorship given that Section 103(a) expressly identifies these “works” as the subject matter of copyright. The use of the term “include” in Section 102(a) supports this interpretation. Even if the term “include”—which the Act defines as “illustrative not limitative”—were interpreted to mean that this Court does not have the authority to extend copyright protection to categories other than those expressly enumerated under Section 102(a), the term must, at minimum, mean that the “works” of Section 103(a) are incorporated as separate and additional categories of authorship. Such interpretation actually gives effect to the Act's definition of “include.” The Copyright Office's interpretation to the contrary is unpersuasive and not entitled to deference under *Skidmore*.

C. The Sequence Qualifies as a Protectable Compilation

The district court never reached the question of whether the Sequence is sufficiently original under *Feist*, 499 U.S. at 355, to constitute a protectable compilation. Instead, relying again on the Office’s interpretation, it concluded that “even if the manner in which [Bikram] arranged the Sequence is unique, the Sequence would not be copyrightable subject matter because individual yoga asanas are not copyrightable subject matter.” (EOR007-08.) This is a fundamental misstatement of copyright law and the principles enunciated in *Feist*.

1. The District Court’s Conclusion That the Underlying Yoga Asanas Must be Copyrightable For the Sequence to Be Entitled to Protection Was Error

It is a bedrock principle of copyright law that facts are not protectable. *Feist*, 499 U.S. at 344. Yet *Feist* made clear that while “[n]o one may claim originality as to facts[,] . . . [f]actual compilations, on the other hand, may possess the requisite originality.” *Id.* at 347-48; *see also CDN Inc. v. Kapes*, 197 F.3d 1256, 1259 (9th Cir. 1999); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 204 (9th Cir. 1989). By extension, copyright protection of a compilation cannot be refused exclusively because the underlying materials do not fall within one of the categories of authorship enumerated under Section 102(a).

2. The Manner in Which the Sequence Was Developed Evinces Sufficient Creativity

Under the Act, a “compilation” is “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,” 17 U.S.C. § 101, and is entitled to copyright protection if it is also “fixed.” *Id.* § 102(a). As the Supreme Court explained in *Feist*, a protectable compilation requires:

- (1) the collection and assembly of pre-existing material, facts, or data;
- (2) the selection, coordination, or arrangement of those materials; and
- (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an “original” work of authorship.

499 U.S. at 357. The Sequence easily meets these requirements. First, the Sequence is “the collection and assembly of pre-existing material,”—Bikram collected the 26 asanas and two breathing exercises constituting the Sequence from hundreds of ancient asanas in the public domain. (EOR163, 166, 267-69.) Second, the Sequence is the “selection, coordination, or arrangement” of those asanas into a coherent and expressive composition. (*Id.*)

Bikram also meets the critical third element—the originality requirement. *Feist*, 499 U.S. at 357. The third inquiry focuses on the “manner in which the collected facts have been selected, coordinated, and arranged” and whether that manner is “sufficiently original to merit protection.” *Id.* at 357-58. “Originality”

refers to the requirement that “the author contribute[] something more than a merely trivial variation, something recognizably his own.” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 n.5 (9th Cir. 1977) (citation omitted). Originality does not require novelty. “[T]he requisite level of creativity is extremely low; even a slight amount will suffice.” *Feist*, 499 U.S. at 345.

The Sequence undoubtedly exhibits the requisite degree of originality demanded by the Act. From hundreds of asanas, Bikram selected the 26 for numerous reasons, including to ensure a variety of positions (both standing and prone), accessibility to all levels of ability, and the balanced use of all muscle groups. (EOR268.) Bikram also selected particular versions of some asanas. (EOR268.) For example, Bikram selected a version of the Triangle Pose that is visibly different from other versions of the same pose. (EOR268, 514-29.)

As with the initial selection, the arrangement of the asanas performed between the introductory and closing breathing exercises also involved a variety of considerations. (EOR268-69.) Some were paired because they complement each other. (EOR268.) Others were arranged so that the Sequence had an “aesthetic appeal” and a “graceful ‘flow.’” (*Id.*) And, in a telling description of his creative process, Bikram sometimes arranged certain asanas for reasons he “simply cannot explain” or because he “just liked them together.” (*Id.*)

Moreover, the Dialogue, which narrates the flow of body movements and asanas, demonstrates that asanas are not static positions but a choreographed series of movements and holding patterns, performed to the pacing of Bikram's Dialogue. (EOR269, 530-73, 909.) Bikram selected these movements and holding patterns within each asana, as well as the intercessional movements between each asana, and the duration of each movement and holding pattern. (EOR533-35.) Each asana lasts for several minutes—or an amount of time needed for the recitation of the relevant, multi-page portion of the Dialogue. (EOR533-35.) Performed correctly, each of the hundreds of individual body movements that form the full 26-asana Sequence occurs in the same order and lasts for the same duration each time the Sequence is performed. (EOR014, 163, 166.) Coupled with the breathing exercises, the single performance of all these movements together lasts exactly 90 minutes. (EOR014, 016, 269-70.)

The manner in which Bikram selected, arranged and ordered the asanas and breathing exercises clearly meets the minimal creativity required by the Supreme Court and the Sequence qualifies as a “compilation” under Section 101. *Feist*, 499 U.S. at 360. Courts routinely uphold copyright protection for works that, like Bikram's Sequence, compile public domain facts or data. *See CDN, Inc.*, 197 F.3d at 1260 (estimated coin value protectable as data compilations); *Urantia Found. v. Maaherra*, 114 F.3d 955, 958-59 (9th Cir. 1997) (selection and arrangement of

religious teachings sufficiently creative and protectable as compilation); *United States v. Hamilton*, 583 F.2d 448, 451-52 (9th Cir. 1978) (mapmaker's selection, arrangement, and presentation of terrain features protectable as compilation). And the manner in which Bikram created the Sequence certainly matches, if not exceeds, the creativity involved in other compilations found protectable in this Circuit. *See CDN Inc.*, 197 F.3d at 1260 (estimated coin value resulting from data collection and number-crunching); *Harper House*, 889 F.2d at 204-05 (selection and arrangement of component parts—hinges, pockets, calculator, graph paper, calendar pages—of personal organizers).

D. The Sequence Is a Choreographic Work

The Sequence qualifies for copyright protection not only as a compilation but also as a choreographic work. While the court did not articulate a precise definition of choreographic works, it erred by concluding that a choreographic work must be more complex than the Sequence, as well as dramatic and fixed in a particular manner. (EOR006-07.)

1. Bikram's Composition Is an Integrated, Coherent, and Expressive Whole

The district court dismissed the Sequence as a “compilation of exercises”⁵ and then refused to extend copyright protection to the Sequence as a choreographic work because of its “simplicity.” (EOR007.) In doing so, the court failed to examine the nature of the Sequence, and its conclusion is contrary to the record, which is replete with descriptions of the intricacies and complexities of the Sequence. (*See, e.g.*, EOR015-16, 226, 244, 267-71, 530-73.)⁶

The Sequence is the result of decades of study and yoga practice by Bikram under the tutelage of his guru. (EOR266-67.) The finished composition—an arrangement of the 26 asanas and two breathing exercises into an integrated, coherent, expressive whole—resulted from much deliberation and consideration, including whether the arrangement of the selected asanas would express and evoke the “aesthetic appeal” and “graceful ‘flow’” that Bikram aimed to convey. (EOR268, 270.)

⁵ While the Supplemental Registration describes the Sequence as a “compilation of exercises,” Bikram used this phrase instead of describing the Sequence as a work of performing art at the direction of the Copyright Office. (EOR605, 631-33.)

⁶ Having mischaracterized the Sequence as just a “compilation of exercises,” the court concluded that the Sequence is not copyrightable per se. (EOR007.) This holding misapplies even the Policy Statement, which concludes that an arrangement of physical movements *could* qualify for protection if it contains sufficient attributes of choreographic authorship. (EOR150).

Although not performed in the manner of a ballet before an audience (nor is that required, *see* 1 *Nimmer on Copyright* § 2.07[B] (hereinafter “*Nimmer*”)), the Sequence is nonetheless a performance during which Bikram believes that his students “see themselves performing these beautiful postures [and] feel graceful and beautiful themselves.” (EOR270.) And similar to performances of more traditional choreographic works, the Sequence is staged in a yoga studio—studios are heated to over 100 degrees (EOR014, 016, 113, 134, 163, 166, 269, 909), markers are placed on the floor directing students where to stand while performing (EOR269), and the walls of the studio are hung with mirrors so that students can observe the grace and beauty of their performance (EOR269-70).

At the front of each studio is a raised platform, on which the instructor stands and delivers the Dialogue, much like a conductor directs the symphony or a director queues dancers. (EOR269.) The Dialogue is the score—the equivalent of musical accompaniment—and it leads students much like orchestral music leads a ballerina. (*See* EOR269, 530-73, 909.) The 90-minute performance begins with the same introduction, a breathing exercise. (EOR531-32.) The Dialogue then guides students to the first asana. (EOR531-32.) From that first asana to the 26th, the Dialogue drives the pace of the performance, and its verbal cues provide the cadence and rhythm that guide students through hundreds of continuous movements culminating in the performance of 26 asanas in an aesthetically

pleasing and graceful flow. (EOR226, 269, 530-73, 909.) While certain asanas are performed in succession, the movements in the 90-minute sequence are otherwise non-repetitive. After the 26th and final asana, the proverbial curtain closes with one last breathing exercise. (EOR573.)

2. The District Court Applied the Wrong Definition of Choreographic Works

In addition to dismissing the Sequence as too simple to be protectable, the district court also refused to afford the Sequence protection on the theory that a choreographic work must be dramatic and “fixed” in the Laban system of notation or in a motion picture. (EOR006-07.) This definition is contrary to both the weight of authorities and the plain language of the Act.

a. Choreographic Works Need Not Be Dramatic Works

While Congress declined to define “choreographic works” in the statute and caselaw has not yet articulated a single, comprehensive definition, those who have considered the issue affirm that a choreographic work does not have to be dramatic. *See Horgan v. MacMillan, Inc.*, 789 F.2d 157, 161-62 (2d Cir. 1986); *Nimmer* § 2.07[B].⁷ This interpretation comports with the plain language of Section 102(a), both standing alone and in comparison to a prior version of the Act.

⁷ There is also consensus that choreographic works need not be created for presentation to an audience. *See, e.g., Nimmer* § 2.07[B].

Section 102(a) separately identifies “dramatic works” and “choreographic works” as examples of works of authorship. To conclude, as the court did, that a choreographic work must also be a “dramatic work” renders the phrase “choreographic works” meaningless, in violation of fundamental rules of statutory construction. *See TRW*, 534 U.S. at 31; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Had Congress intended to limit copyright protection to dramatic works, it would not have included choreographic works as a separate work of authorship.

This interpretation is further supported by the fact that, before the enactment of the present version of the Act, choreography was copyrightable only if it was dramatic. *See Horgan*, 789 F.2d at 160-61; *Nimmer* § 2.07[B]. The 1909 Copyright Act did not identify choreographic works as a separate, protectable category of works for purposes of classifying works for registration. *See* 17 U.S.C. § 1 *et seq.* (1909) (repealed 1978). And its implementing regulations explicitly treated choreographic works as a subcategory of dramatic works. *See Horgan*, 789 F.2d at 160; *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc.*, 380 F.3d 624, 632 (2d Cir. 2004). Thus, express inclusion of choreographic works as a separate category of protected works demonstrates congressional intent to extend copyright protection to non-dramatic, choreographic

works. *See Nimmer* § 2.07[B] (“choreography is now protectible regardless of whether or not it is dramatic in content” (citations omitted)).

b. Choreographic Works May Be Fixed in a Variety of Ways

The district court also erred when it concluded that the Sequence was not a choreographic work because it was not “fixed” in either the Laban system of notation or as a motion picture. (EOR007.) This conclusion misapplies Section 102(a)’s fixation requirement which allows works to be fixed in a variety of ways. *See* 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship *fixed in any tangible medium of expression . . .*” (emphasis added)); *accord Nimmer* § 2.07[C].

E. Recognizing the Sequence As a Protectable Work Is in Accord with the Primary Objective of the Act

Even if this Court were to find that the Sequence does not fall squarely within one of the non-exclusive categories enumerated in Section 102(a), it is still entitled to copyright protection because it is analogous to the categories of authorship under *stare decisis* in that its protection fosters the primary objective of copyright—“[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.” U.S. Const. art. 1, § 8, cl. 8; *Feist*, 499 U.S. at 349-50.

The “primary objective” of copyright is promoted by “assur[ing] authors the right to their original expression, but encourag[ing] others to build freely upon the ideas and information conveyed by a work.” *Feist*, 499 U.S. at 349-50 (noting that the “primary objective” embodies the idea/expression dichotomy of copyright law). This is the unifying thread that ties the enumerated categories of authorship together. *Cf. NBA*, 105 F.3d at 846-47 (conceding that the categories of authorship are non-exclusive and encompass analogous works but declining to extend protection to “sports events” partly to avoid impeding competition, i.e., the growth and development of those events).⁸

As Bikram claims copyright only in his creative expression of the practice of yoga—not in the practice of yoga itself—recognizing the Sequence as a protectable work will not impede the development of yoga and its associated sciences and arts, nor will it preclude others from integrating the asanas used by Bikram into their own yoga practice or into unique sequences of yoga asanas. In that light, affording protection to the Sequence strikes the intended balance of the law. *Feist*, 499 U.S. at 349-50 (citations omitted).

⁸ Unlike traditional sporting events, the Sequence is authored (and its author is readily identifiable), fixed, and predictable, and there is no competitive element.

III. THE SEQUENCE IS NOT SUBJECT TO ANY OF THE SECTION 102(b) EXCLUSIONS

The district court's Order was based, in part, on its erroneous conclusion that the Sequence is precluded from copyright protection as a functional "system or process" under Section 102(b) because its performance is "said to result in improvements in one's health or physical or mental condition." (EOR005-6.)

A. The Sequence Is Not a Procedure, Process, or System

The district court's conclusion that the Sequence was not copyrightable because it was a procedure, process, or system similarly relied on the Copyright Office's erroneous interpretation of unambiguous sections of the Act. Citing the Copyright Office's conclusion that an arrangement 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," the court held, without any independent analysis, that the Sequence is "merely a procedure or system of exercises" under Section 102(b), and that as a "system or process . . . [it] is not copyrightable subject matter." (EOR005-06.)

While Section 102(b) formally withholds copyright protection from "any idea, procedure, process, system, method of operation, concept, principle, or discovery," courts rarely distinguish between these terms. While the terms "procedure," "process," and "system" are not specifically defined in the caselaw, it

is clear that Section 102(b) in its entirety is the codification of the long-applied, fundamental principle that the idea/expression dichotomy extends copyright protection to an author's expression of an idea embodied in an original work, but not to the ideas therein. *See, e.g., Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (recognizing that Section 102 incorporates the idea/expression dichotomy); *Toro Co. v. R&R Prods. Co.*, 787 F.2d 1208, 1211 (8th Cir. 1986) (“[S]ection [102(b)] is nothing more than a codification of the idea/expression dichotomy.”).

Under this principle, courts broadly invoke the Section 102(b) exclusion when an author claims copyright protection for a work that may nominally be designated a “procedure,” “process,” or “system,” but the work is more appropriately understood as an idea. *See, e.g., Brooks-Ngwenya v. Indianapolis Pub. Schs.*, 564 F.3d 804, 808 (7th Cir. 2009) (holding that author's general “system of rewards” was an uncopyrightable “idea”).

Neither the Copyright Office nor the court defined these terms to support their conclusory holdings, but the premise on which they seem to rest is that works colloquially termed procedures, processes, or systems—merely because they involve a series of steps—are uncopyrightable. This is contrary to courts' routine application of the statute. Even works that are explicitly described by these terms are not automatically excluded under Section 102(b). Instead, courts preclude copyright protection under Section 102(b) only if the works reflect the core idea or

the sole or most fundamental way to achieve a particular result. By refusing copyright protection to singular methods for obtaining a particular outcome, courts remain faithful to the purposes of copyright law, which is to protect authors' expressions and not their ideas or scientific or factual discoveries. *See, e.g., Baker v. Selden*, 101 U.S. 99, 102-03 (1880) (observing that copyright extends to the author's expression of discoveries, not to the discoveries themselves).

The Sequence clearly falls on the expressive side of the idea/expression dichotomy. Bikram does not claim a copyright in the idea of yoga, heated yoga, or the performance of yoga to improve one's health. (EOR269.) Bikram's copyright in the Sequence protects his creative expression in the selection and arrangement of the movements that constitute the Sequence, and this particular arrangement is but one of myriad ways to obtain whatever results accrue from repeated performance of a yoga routine. (EOR718 (noting the innumerable ways to arrange the 75 traditional poses in a 26-pose routine); EOR270 (noting that physical benefits are "inherent in all types of yoga").)

This Court has repeatedly refused to apply the Section 102(b) exclusion to works that can nominally be described as procedures, processes, or systems but are merely one of many ways to obtain a particular result. It has also found that the existence of alternative methods to obtain such a result was determinative on the issue of exclusion. For instance, in *Practice Management Information Corp. v.*

American Medical Ass’n, this Court held that the plaintiff’s system of coding medical procedures was not an uncopyrightable idea under Section 102(b) because extending copyright protection would not prevent “competitors from developing comparative or better coding systems.” 121 F.3d 516, 520 n.8 (9th Cir. 1997). Similarly, in *Johnson Controls, Inc. v Phoenix Control System, Inc.*, this Court held that the particular “structure, sequence and organization” in the plaintiff’s “process control system” was not an uncopyrightable idea under Section 102(b) because discretion in the structure left many “opportunit[ies] for creativity.” 886 F.2d 1173, 1175-76 (9th Cir. 1989), *implied overruling on other grounds* recognized by *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011). And in *Sega Enterprises Ltd. v. Accolade, Inc.*, this Court considered the copyright infringement of an operating system and recognized that “[t]o the extent that there are many possible ways of accomplishing a given task . . . the [author’s] choice of program structure and design may be highly creative and idiosyncratic,” and thus protected by copyright. 977 F.2d 1510, 1524 (9th Cir. 1992). Other Circuits are in accord. *See, e.g., Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981) (author’s “romantic love” scale was not an uncopyrightable idea because “[t]here are an infinite number of ways of stating [the author’s] theory and an infinite number of questions which may be asked” to assess compatibility.)

Additionally, works that have been denied copyright protection on the grounds that they were uncopyrightable procedures, processes, or systems bear no similarity to the Sequence. The Supreme Court in *Baker*, the seminal case establishing the idea/expression dichotomy on which Section 102(b) is based, held that an author could not assert a copyright over a “system” of using forms containing columns and headings to implement an accounting method, and thus he could not maintain an infringement action against another individual who published a differently organized form intended for the same use. 101 U.S. at 100. As the Court found, recognizing copyright in any such “system” to implement an accounting method would mean that the author would own the idea of the accounting method itself. *Id.* at 103. Similarly, in *Publications International, Ltd. v. Meredith Corp.*, the Seventh Circuit denied copyright protection to an author’s purely factual recitation of recipes consisting only of “lists of required ingredients and the directions for combining them” because granting protection to these recipes would create a monopoly over the “ideas for producing certain foodstuffs.” 88 F.3d 473, 480-81 (7th Cir. 1996).

By contrast, *Palmer v. Braun*, 287 F.3d 1325 (11th Cir. 2002), exemplifies the distinction between an uncopyrightable “process” and copyrightable expression. The court held that under Section 102(b) an author could not claim a copyright in his “process for achieving increased consciousness” through a series

of mental exercises. *Id.* at 1334. The court also held, however, that the specific exercises used by the plaintiff could be protected against exact duplication because their “ostensible purpose is to teach mental control . . . [which] might be served by any phrases, regardless of their content.” *Id.*

Thus, even where the work is explicitly identified as a procedure, process, or system, the defining inquiry is whether the copyright claims ownership over the sole means of achieving a particular goal, and would therefore entitle the copyright holder to a monopoly in the underlying idea. The Sequence, like the specific exercises in *Palmer*, the scale in *Rubin*, and the structure in *Sega*, is not the sole means to realize any particular outcome, and thus it is protectable expression.

The Copyright Office, through its Statement, essentially redefined the statutory terms “system” and “process” to encompass any physical performance that “is said to result in improvements in one’s health or physical or mental condition.” (EOR150.) The statutory terms in Section 102(b) were not ambiguous and have been applied uniformly by courts since its codification without any need for interpretation by the Copyright Office. The Sequence is not merely, or even primarily, a means to accomplish a specific end or to produce a specific product or outcome. If it may be designated as a procedure, process, or system merely because it includes predetermined movements and the possibility of physical or mental benefits as a result of repeated performance, then nearly all choreography

must be held uncopyrightable under the Copyright Office's novel and unpersuasive reinterpretation of Section 102(b).

B. The Sequence Is Entitled to Copyright Protection Against Exact Duplications Even If It Is a Procedure, Process, or System or a “Compilation of Facts and Ideas”

Even if the Sequence were a procedure, process, or system, it would nonetheless be protected from exact duplication, which Bikram alleged against Evolution. (EOR011-12, 015, 022.) As this Court has recognized, even “[w]hen [an] idea and expression coincide, there will [still] be protection against . . . identical copying of the work.” *Sid & Marty Krofft*, 562 F.2d at 1168; *see also Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992) (applying Ninth Circuit law) (“Even for works warranting little copyright protection, verbatim copying is infringement.”).

Courts have consistently applied this principle to afford copyright protection to works held otherwise uncopyrightable under Section 102(b). *Cf. Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (author could not copyright idea of glass jellyfish sculptures but was protected against “virtually identical copying” of his work); *Brooks-Ngwenya*, 564 F.3d at 808 (author could not copyright idea or system for educating children but could establish infringement if her words were copied); *Situation Mgmt. Sys. v. ASP Consulting LLC*, 560 F.3d 53, 61-62 (1st Cir. 2009) (author's “creative choices” in describing its system for effective

communication entitled to copyright protection against exact duplication); *Palmer*, 287 F.3d at 1334 (author could not copyright his consciousness-raising process but defendant's use of nearly identical thought exercises may infringe on copyright).

Bikram alleged that Evolation performs a yoga routine that is "identical" to the Sequence, including its 26 poses and two breathing exercises, the exact version of each pose selected by Bikram, the order of each pose, and the timing and pacing of each movement so that the entire progression lasts 90 minutes. (EOR011-12, 015, 022) Evolation has admitted to such copying, and others have observed it to be true. (EOR103, 113, 134-35, 164, 167, 246.) The court did not consider Evolation's admitted duplication of the Sequence, a fact that, taken alone, was sufficient to preclude partial summary judgment for Evolation.

Similarly, the Act protects against infringement of an author's expression embodied in the selection and arrangement of elements, including otherwise uncopyrightable ideas. *Feist*, 499 U.S. at 348 ("A factual compilation . . . copyright is limited to the particular selection and arrangement [of the work]."); *Harper House*, 889 F.2d at 204-05 ("While many of the elements making up the [work] may not be copyrightable in and of themselves, the unique 'selection, coordination, or arrangement' of such elements . . . is copyrightable as a compilation."). Therefore, once the court recognized the Sequence as "a collection of facts and ideas," it was compelled to conclude that the Sequence was protected

at least against exact duplication. See *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc.*, 945 F.2d 509, 514-15 (2d Cir. 1991) (applying *Feist* to hold that a phonebook was protected against the substantial infringement of its selection and arrangement of information). The court's failure to recognize that the Sequence was entitled to copyright protection against Evolution's conduct is untenable under the facts alleged.

C. The Sequence Cannot Be Denied Copyright Protection Because It Is "Said to Result" in Health Improvements

The Statement asserted, without citing any legal basis, that a compilation of yoga poses could be denied copyright protection as a "*functional* system or process" where the performance is "said to result in improvements in one's health or physical or mental condition." (EOR150 (emphasis added).) Relying exclusively on this unsupported and unpersuasive assertion in the Statement and on Bikram's alleged "admission" that the Sequence "helps to prevent, cure and alleviate disease," the court concluded that the Sequence "is a system or process that is not copyrightable subject matter under § 102(b)." (EOR006.) The Copyright Office's assertion and the court's conclusion are erroneous on multiple grounds.

1. Functionality Only Limits the Copyrightability of Pictorial, Graphic, or Sculptural Works

The Copyright Office's and court's consideration of functionality in determining copyrightability was improper because the Sequence does not fall within the statutorily defined categories of works for which the existence of functional or utilitarian elements affect the extent of the work's copyrightability. Under the so-called "useful articles" limitation, Section 101 limits the consideration of functionality only to pictorial, graphic, and sculptural works, which are not at issue here. *See* 17 U.S.C. § 101 ("Pictorial, graphic, and sculptural works . . . shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.").

This Circuit and others have repeatedly recognized that the functionality limitation for "useful articles" does not extend to other types of works. *See, e.g., Harper House*, 889 F.2d at 202 ("The 'useful article' exception is intended to apply only to [pictorial, graphic, and sculptural] works"); *ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 707 n.3 (6th Cir. 2005) ("section 101 only limits the extent to which useful articles can receive copyright protection in the context of 'pictorial, graphic, and sculptural works'"); *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 980 (7th Cir. 1997) ("the unique limitations on the protection of [pictorial, graphic, or sculptural] works do not extend to the written word"). Moreover, courts have consistently

held that utilitarian works that are not characterized as pictorial, graphic, and sculptural works are entitled to copyright. *See, e.g., Feist*, 499 U.S. at 360 (phonebook copyrightable if sufficiently creative); *CDN Inc.*, 197 F.3d at 1262 (price list for coins); *Key Publ'ns*, 945 F.2d at 514 (business directory); *see also Am. Dental Ass'n*, 126 F.3d at 980 (taxonomy of dental procedures).

Rather than provide statutory or caselaw support for the premise that the existence of health benefits transforms a compilation or a choreographic work into an uncopyrightable functional work, the Statement appears to adopt this proposition because it is reasonable public policy. The court, in turn, erred in endorsing the Copyright Office's expansion of functionality in a manner that is "obviously wrong." *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 916 n.12 (9th Cir. 2010) (rejecting Copyright Office's interpretation).

2. Even If the Sequence Were Subject to the Useful Articles Limitation, Its Expressive Elements Would Still Be Entitled to Copyright Protection

Even when the application of the useful article limitation is appropriate, a finding that the work has some utilitarian function does not compel a conclusion that the work is uncopyrightable as a whole. Properly applied, the exclusion precludes copyright protection for the utilitarian elements of a work, while simultaneously affording copyright protection to the non-utilitarian elements of the same works. *See* 17 U.S.C. § 101 (copyrightable works include "features that can

be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article”).

This Circuit and others have faithfully applied this statutory command. *See, e.g., Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1080 (9th Cir. 2000) (determining the copyrightability of a bottle by first considering whether it possessed any separable artistic, non-utilitarian features); *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1147 (9th Cir. 2003) (recognizing the copyrightability of features separable from the utilitarian aspects of the work); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980) (holding that a decorative belt buckle was conceptually separable from its utilitarian elements and therefore copyrightable); *see also Mazer v. Stein*, 347 U.S. 201, 212-13, 218 (1954) (holding that the actual or intended utility of an otherwise copyrightable sculptural work did not “bar[] or invalidate[] its registration”).

The court and the Copyright Office, however, did not even attempt to analyze which elements of the Sequence were functional as opposed to artistic. Evolution, too, failed to establish—as a matter of law for purposes of summary judgment—that the Sequence contains no conceptually separable, non-utilitarian elements. Nor could it, as the record is replete with evidence that much of Bikram’s selection and arrangement of asanas in the Sequence was driven by purely aesthetic concerns, not “functional” ones. (EOR268.) Thus, even if it could

be shown that the performance of an elaborate 90-minute yoga routine in a heated room is “utilitarian,” there is ample evidence that the selection and arrangement of poses—elements that are conceptually separable from the mere performance of hot yoga—serve no functional purpose and are protectable. Because Evolution itself offers a wide range of yoga routines that differ from the Sequence in length, temperature, and arrangement but all purport to make customers “healthier, happier, and more in touch with [their inner-selves]” (EOR065, 084), the “artistic decisions” employed by Bikram cannot be said to have been “necessitated solely by . . . functional consideration[s].” *Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1223 (9th Cir. 1997); *cf. Atari Games Corp. v. Oman*, 979 F.2d 242, 246 (D.C. Cir. 1992) (granting copyright protection for the selection and arrangement of elements that did “not appear to follow ‘a convention’ that is ‘purely functional’”).

Assuming that the functionality analysis applies to the Sequence, it was still improper for the court to grant summary judgment because there were material disputed facts as to whether elements of the work are functional rather than artistic. In the Ninth Circuit, such error demands reversal. *See Poe v. Missing Persons*, 745 F.2d 1238, 1242-43 (9th Cir. 1984) (holding that the district court could not determine whether the work was an artistic or utilitarian piece as a matter of law, and remanding the useful article question for jury determination).

The court also erred by failing to construe the facts in the light most favorable to Bikram and by not considering evidence that the Sequence was selected and arranged based on aesthetic preference. The only “fact” that the court appears to consider—that “Choudhury admits that the Sequence helps to prevent, cure, and alleviate disease”—is itself a misstatement of the record in a manner unfavorable to Bikram. (EOR006.) Bikram actually claimed only that the Sequence was “*capable* of helping to avoid, correct, cure, heal and alleviate the *symptoms* of a variety of diseases and health issues.” (EOR157 (emphasis added).)

Bikram’s own statements on this matter are, in any event, insufficient to establish, as a matter of law, that the functionality exclusion applies. Just as general, subjective statements about a product are not treated as facts for purposes of false advertising claims, neither should a statement that repeated performance of the Sequence is “capable” of alleviating “symptoms” of illnesses constitute irrefutable proof that the work is functional in its entirety. *Cf. Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) (“a general, subjective claim about a product is non-actionable puffery”).

3. The Copyright Office’s Extension of the Useful Article Limitation Creates an Unworkable Policy

Applying the useful article limitation beyond categories of pictorial, graphic, and sculptural works—and doing so whenever the work is “said to result in improvements in one’s health or physical or mental condition”—would

unreasonably expand this limitation. If followed, the broadened limitation would preclude copyright protection for a modern dance routine if its performance led to “improvements in . . . physical condition,” or for a book of brainteasers if its use led to increased mental agility and “improvements in . . . mental condition.” Such an approach would stifle creativity and goes against the fundamental purpose of copyright law—“to promote the Progress of Science and useful Arts.” U.S. Const. art. 1, § 8.

IV. BIKRAM’S COPYRIGHT IN THE SEQUENCE IS ENTITLED TO A PRESUMPTION OF VALIDITY

The court’s grant of summary judgment was colored by its failure to apply the statutory presumption of validity to Bikram’s copyrights. (EOR004.)

The Act bestows a number of benefits on authors who register their works with the Copyright Office, chief among them being the presumption of validity that accrues to works copyrighted within five years of publication. *See* 17 U.S.C. § 410(c); *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 619 (9th Cir. 2010). Under the Act, such registration “constitute[s] prima facie evidence of the validity of the copyright and of the facts stated in the certificate.” 17 U.S.C. § 410(c). As a result, the defendant in an infringement action bears the burden of proving invalidity. *See United Fabrics Int’l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011); *Lamps Plus*, 345 F.3d at 1143-44.

Bikram obtained the copyright in *Bikram's Beginning Yoga Class*—the book in which the Sequence was first fixed—in 1979, the same year as publication. (EOR599.) The regulations implementing the Act recognize that one registration can cover “all copyrightable elements that are otherwise recognizable as self-contained works, that are included in a single unit of publication, and in which the copyright claimant is the same.” 37 C.F.R. § 202.3(b)(4)(i)(A). With a few inapplicable exceptions, works may also be fixed in “any tangible medium of expression.” 17 U.S.C. § 102. Thus, the 1979 Registration encompasses both the text of the book *and* the Sequence, as the work of choreography or compilation that was fixed within the book. This was confirmed by the Copyright Office, which informed Bikram that the Sequence already “was presented . . . for registration [in] text” when Bikram attempted to separately copyright the Sequence and had deposited a videotaped performance. (EOR631-33.) As the Copyright Office recognized, the Sequence was “inseparable” from the text in the 1979 Registration and was entitled to the statutory presumption of validity. (EOR631-33.)

Moreover, the 2002 Registration explicitly acknowledged that the 1979 Registration included a “compilation of exercises” and thus further established that the original copyright encompasses the Sequence. (EOR212.) Under the Act, supplementary registrations are a means to “amplify the information given in a registration.” 17 U.S.C. § 408(d); 37 C.F.R. § 201.5(b). A supplementary

registration “augments but does not supersede” the earlier registration, and “supplement[s] or clarify[ies]” the description of the originally deposited work. 17 U.S.C. § 408(d); 37 C.F.R. §§ 201.5(b)(2)(ii)-(iii), (d). Amendments in the supplementary registration relate back to the date of the original registration. *See, e.g., Gener-Villar v. Adcom Grp., Inc.*, 560 F. Supp. 2d 112, 127 (D.P.R. 2008). Thus, even if there were ambiguity in the scope of the 1979 Registration, the 2002 Supplementary Registration explicitly established copyright in the Sequence as of the effective date of the original registration.

The burden therefore was, and remains, on Evolation to overcome the presumption of validity in Bikram’s copyright in the Sequence. *See, e.g., N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992) (applying presumption of validity to place burden on defendant to prove that copyrighted work was not copyrightable).

As the court’s Order makes plain, however, the court did not apply the statutory presumption of validity to Bikram’s copyrights and instead burdened Bikram with reestablishing their validity. Specifically, after acknowledging that Evolation did not “dispute the validity of Choudhury’s copyrights,” the court nonetheless concluded, incorrectly, that the Sequence was not copyrighted. (EOR004.) This conclusion was unwarranted, as the Sequence is covered by both the 1979 Registration and the 2002 Supplementary Registration.

CONCLUSION

For the foregoing reasons, Bikram respectfully requests that this Court either (1) reverse the district court's partial summary judgment Order and remand this matter to the district court for further proceedings; or (2) vacate the district court's partial summary judgment Order and remand this matter to the district court for reconsideration in accordance with the appropriate level of deference owed to the Copyright Office's interpretation of the Act.

Dated: November 14, 2013

DANIEL M. PETROCELLI
CARLA CHRISTOFFERSON
IVANA CINGEL
O'MELVENY & MYERS LLP

By: /s Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Plaintiffs-Appellants
Bikram's Yoga College of India, L.P.
and Bikram Choudhury

REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Civil Procedure 34(a), Bikram hereby requests oral argument in the above-captioned matter.

STATEMENT OF RELATED CASES

Counsel for Bikram are not aware of any related cases pending in this Court.

Dated: November 14, 2013

DANIEL M. PETROCELLI
CARLA CHRISTOFFERSON
IVANA CINGEL
O'MELVENY & MYERS LLP

By: /s Daniel M. Petrocelli

Daniel M. Petrocelli
Attorneys for Plaintiffs-Appellants
Bikram's Yoga College of India, L.P.
and Bikram Choudhury

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(56) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type.

Dated: November 14, 2013

DANIEL M. PETROCELLI
CARLA CHRISTOFFERSON
IVANA CINGEL
O'MELVENY & MYERS LLP

By: /s Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Plaintiffs-Appellants
Bikram's Yoga College of India, L.P.
and Bikram Choudhury

ADDENDUM

(9th Cir. R. 28-2.7)

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17 U.S.C. § 101 Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An “anonymous work” is a work on the copies or phonorecords of which no natural person is identified as author.

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

“Audiovisual works” are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The “Berne Convention” is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The “best edition” of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person’s “children” are that person’s immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A “compilation” is 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. The term “compilation” includes collective works.

A “computer program” is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

“Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A “Copyright Royalty Judge” is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

A “device”, “machine”, or “process” is one now known or later developed.

A “digital transmission” is a transmission in whole or in part in a digital or other non-analog format.

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An “establishment” is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term “financial gain” includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A “food service or drinking establishment” is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The “Geneva Phonograms Convention” is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The “gross square feet of space” of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms “including” and “such as” are illustrative and not limitative.

An “international agreement” is—

- (1) the Universal Copyright Convention;
- (2) the Geneva Phonograms Convention;
- (3) the Berne Convention;
- (4) the WTO Agreement;
- (5) the WIPO Copyright Treaty;
- (6) the WIPO Performances and Phonograms Treaty; and
- (7) any other copyright treaty to which the United States is a party.

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

“Literary works” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature

of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

The term “motion picture exhibition facility” means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.

“Motion pictures” are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A “performing rights society” is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

For purposes of section 513, a “proprietor” is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

A “pseudonymous work” is a work on the copies or phonorecords of which the author is identified under a fictitious name.

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

“Registration”, for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

“State” includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A “transmission program” is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A “treaty party” is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The “United States”, when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a “United States work” only if—

(1) in the case of a published work, the work is first published—

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the

case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”.

The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.

The “WIPO Copyright Treaty” is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The “WIPO Performances and Phonograms Treaty” is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A “work of the United States Government” is a work prepared by an officer or employee of the United States Government as part of that person’s official duties.

A “work made for hire” is–

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment–

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law

106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

The terms “WTO Agreement” and “WTO member country” have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

17 U.S.C. § 102 Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

**17 U.S.C. § 103 Subject matter of copyright:
Compilations and derivative works**

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The 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. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 408 Copyright registration in general

(a) Registration permissive. At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

(b) Deposit for copyright registration. Except as provided by subsection (c), the material deposited for registration shall include—

(1) in the case of an unpublished work, one complete copy or phonorecord;

(2) in the case of a published work, two complete copies or phonorecords of the best edition;

(3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published;

(4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require. The Register shall also prescribe regulations establishing requirements under which copies or phonorecords acquired for the Library of Congress under subsection (e) of section 407, otherwise than by deposit, may be used to satisfy the deposit provisions of this section.

(c) Administrative classification and optional deposit.

(1) The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would

normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(2) Without prejudice to the general authority provided under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, under the following conditions:

(A) if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

(B) if the application identifies each work separately, including the periodical containing it and its date of first publication.

(3) As an alternative to separate renewal registrations under subsection (a) of section 304, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, upon the filing of a single application and fee, under all of the following conditions:

(A) the renewal claimant or claimants, and the basis of claim or claims under section 304(a), is the same for each of the works; and

(B) the works were all copyrighted upon their first publication, either through separate copyright notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; and

(C) the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after the thirty-first day of December of the calendar year in which all of the works were first published; and

(D) the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

(d) Corrections and amplifications. The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the

information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) Published edition of previously registered work. Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.

(f) Preregistration of works being prepared for commercial distribution.

(1) Rulemaking. Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.

(2) Class of works. The regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

(3) Application for registration. Not later than 3 months after the first publication of a work preregistered under this subsection, the applicant shall submit to the Copyright Office—

(A) an application for registration of the work;

(B) a deposit; and

(C) the applicable fee.

(4) Effect of untimely application. An action under this chapter for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in proper form within the earlier of--

(A) 3 months after the first publication of the work; or

(B) 1 month after the copyright owner has learned of the infringement.

17 U.S.C. § 410 Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

(c) 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.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

**17 U.S.C. § 701 The Copyright Office:
General responsibilities and organization**

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian's general direction and supervision.

(b) In addition to the functions and duties set out elsewhere in this chapter, the Register of Copyrights shall perform the following functions:

(1) Advise Congress on national and international issues relating to copyright, other matters arising under this title, and related matters.

(2) Provide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters.

(3) Participate in meetings of international intergovernmental organizations and meetings with foreign government officials relating to copyright, other matters arising under this title, and related matters, including as a member of United States delegations as authorized by the appropriate Executive branch authority.

(4) Conduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright Office, or any function vested in the Copyright Office by law, including educational programs conducted cooperatively with foreign intellectual property offices and international intergovernmental organizations.

(5) Perform such other functions as Congress may direct, or as may be appropriate in furtherance of the functions and duties specifically set forth in this title.

(c) The Register of Copyrights shall adopt a seal to be used on and after January 1, 1978, to authenticate all certified documents issued by the Copyright Office.

(d) The Register of Copyrights shall make an annual report to the Librarian of Congress of the work and accomplishments of the Copyright Office during the

previous fiscal year. The annual report of the Register of Copyrights shall be published separately and as a part of the annual report of the Librarian of Congress.

(e) Except as provided by section 706(b) and the regulations issued thereunder, all actions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c.324, 60 Stat. 237, title 5, United States Code, Chapter 5, Subchapter II and Chapter 7).

(f) The Register of Copyrights shall be compensated at the rate of pay in effect for level III of the Executive Schedule under section 5314 of title 5. The Librarian of Congress shall establish not more than four positions for Associate Registers of Copyrights, in accordance with the recommendations of the Register of Copyrights. The Librarian shall make appointments to such positions after consultation with the Register of Copyrights. Each Associate Register of Copyrights shall be paid at a rate not to exceed the maximum annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of title 5.

17 U.S.C. § 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

37 C.F.R. § 201.5 Corrections and amplifications of copyright registrations; applications for supplementary registration.

(a) General.

(1) This section prescribes conditions relating to the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration, under section 408(d) of title 17 of the United States Code, as amended by Pub. L. 94-553. For the purposes of this section:

(i) A basic registration means any of the following:

(A) A copyright registration made under sections 408, 409, and 410 of title 17 of the United States Code, as amended by Pub. L. 94-553;

(B) a renewal registration made under section 304 of title 17 of the United States Code, as so amended;

(C) a registration of claim to copyright made under title 17 of the United States Code as it existed before January 1, 1978; or

(D) a renewal registration made under title 17 of the United States Code as it existed before January 1, 1978; and

(ii) A supplementary registration means a registration made upon application under section 408(d) of title 17 of the United States Code, as amended by Pub. L. 94-553, and the provisions of this section.

(2) No correction or amplification of the information in a basic registration will be made except pursuant to the provisions of this § 201.5. As an exception, where it is discovered that the record of a basic registration contains an error that the Copyright Office itself should have recognized at the time registration was made, the Office will take appropriate measures to rectify its error.

(b) Persons entitled to file an application for supplementary registration; grounds of application. (1) Supplementary registration can be made only if a basic copyright registration for the same work has already been completed. After a basic registration has been completed, any author or other copyright claimant of the work, or the owner of any exclusive right in the work, or the duly authorized agent of any such author, other claimant, or owner, who wishes to correct or amplify the

information given in the basic registration for the work may file an application for supplementary registration.¹

(2) Supplementary registration may be made either to correct or to amplify the information in a basic registration. For the purposes of this section:

(i) A correction is appropriate if information in the basic registration was incorrect at the time that basic registration was made, and the error is not one that the Copyright Office itself should have recognized;

(ii) An amplification is appropriate:

(A) To supplement or clarify the information that was required by the application for the basic registration and should have been provided, such as the identity of a co-author or co-claimant, but was omitted at the time the basic registration was made, or

(B) To reflect changes in facts, other than those relating to transfer, license, or ownership of rights in the work, that have occurred since the basic registration was made.

(iii) Supplementary registration is not appropriate:

(A) As an amplification, to reflect a change in ownership that occurred on or after the effective date of the basic registration or to reflect the division, allocation, licensing or transfer of rights in a work; or

(B) To correct errors in statements or notices on the copies of phonorecords of a work, or to reflect changes in the content of a work; and

(iv) Where a basic renewal registration has been made for a work during the last year of the relevant first-term copyright, supplementary registration to correct the renewal claimant or basis of claim or to add a renewal claimant is ordinarily possible only if the application for supplementary registration and fee are received in the Copyright Office within the last year of the relevant first-term copyright. If

¹If the person who, or on whose behalf, an application for supplementary registration is submitted is the same as the person identified as the copyright claimant in the basic registration, the Copyright Office will place a note referring to the supplementary registration on its records of the basic registration

the error or omission in a basic renewal registration is extremely minor, and does not involve the identity of the renewal claimant or the legal basis of the claim, supplementary registration may be made at any time. In an exceptional case, however, supplementary registration may be made to correct the name of the renewal claimant and the legal basis of the claim at any time if clear, convincing, objective documentation is submitted to the Copyright Office which proves that an inadvertent error was made in failing to designate the correct living statutory renewal claimant in the basic renewal registration.

(c) Form and content of application for supplementary registration. (1) An application for supplementary registration shall be made on a form prescribed by the Copyright Office, shall be accompanied by the appropriate fee identified in § 201.3(c), and shall contain the following information;

(i) The title of the work as it appears in the basic registration, including previous or alternative titles if they appear;

(ii) The registration number of the basic registration;

(iii) The year when the basic registration was completed;

(iv) The name or names of the author or authors of the work, and the copyright claimant or claimants in the work, as they appear in the basic registration;

(v) In the case of a correction:

(A) The line number and heading or description of the part of the basic registration where the error occurred;

(B) A transcription of the erroneous information as it appears in the basic registration;

(C) A statement of the correct information as it should have appeared; and

(D) If desired, an explanation of the error or its correction;

(vi) In the case of an amplification:

(A) The line number and heading or description of the part of the basic registration where the information to be amplified appears;

(B) A clear and succinct statement of the information to be added; and

(C) If desired, an explanation of the amplification;

(vii) The name and address:

(A) To which correspondence concerning the application should be sent; and

(B) To which the certificate of supplementary registration should be mailed;
and

(viii) The certification shall consist of:

(A) The handwritten signature of the author, other copyright claimant, or owner of exclusive right(s) in the work, or of the duly authorized agent of such author, other claimant or owner (who shall also be identified);

(B) The typed or printed name of the person whose signature appears, and the date of signature; and

(C) A statement that the person signing the application is the author, other copyright claimant, or owner of exclusive right(s) in the work, or the authorized agent of such author, other claimant, or owner, and that the statements made in the application are correct to the best of that person's knowledge.

(2) The form prescribed by the U.S. Copyright Office for the foregoing purposes is designated "Application for Supplementary Copyright Registration (Form CA)." Copies of the form are available on the U.S. Copyright Office Web site or for free upon request at the address specified in § 201.1.

(3) Copies, phonorecords or supporting documents cannot be made part of the record of a supplementary registration and should not be submitted with the application.

(d) Effect of supplementary registration. (1) When a supplementary registration is completed, the Copyright Office will assign it a new registration number in the appropriate class, and issue a certificate of supplementary registration under that number.

(2) As provided in section 408(d) of Title 17, the information contained in a supplementary registration augments but does not supersede that contained in the basic registration. The basic registration will not be expunged or cancelled.

Federal Register / Vol. 77, No. 121 / Friday, June 22, 2012 / Rules and Regulations at 37605-37608

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2012-6]

Registration of Claims to Copyright

AGENCY: Copyright Office, Library of Congress.

ACTION: Statement of Policy; Registration of Compilations.

SUMMARY: The Copyright Office issues this statement of policy to clarify the practices relating to the examination of claims in compilations, and particularly in claims of copyrightable authorship in selection and arrangement of exercises or of other uncopyrightable matter. The statement also clarifies the Office's policies with respect to registration of choreographic works.

DATES: *Effective* June 22, 2012.

FOR FURTHER INFORMATION CONTACT: Robert Kasunic, Deputy General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024-0400. Telephone (202) 707-8380; fax (202) 707-8366.

SUPPLEMENTARY INFORMATION: The Copyright Office is issuing a statement of policy to clarify its examination practices with respect to claims in "compilation authorship," or the selection, coordination, or arrangement of material that is otherwise separately uncopyrightable. The Office has long accepted claims of registration based on the selection, coordination, or arrangement of uncopyrightable elements, because the Copyright Act specifically states that copyrightable authorship includes compilations. 17 U.S.C. 103.

The term "compilation" is defined in the Copyright Act:

A "compilation" is 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.

17 U.S.C. 101 (“compilation”). This definition’s inclusion of the terms “preexisting material” or “data” suggest that individually uncopyrightable elements may be compiled into a copyrightable whole. The legislative history of the 1976 Act supports this interpretation, stating that a compilation “results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, *regardless of whether the individual items in the material have been or ever could have been subject to copyright.*” H.R. Rep. 94-1476, at 57 (emphasis added).

Viewed in a vacuum, it might appear that *any* organization of preexisting material may be copyrightable. However, the Copyright Act, the legislative history and the Supreme Court’s decision in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (U.S. 1991), lead to a different conclusion.

In *Feist*, interpreting the congressional language in the section 101 definition of “compilation,” the Supreme Court found protectable compilations to be limited to “a work formed by the collection and assembling of preexisting material or data that are selected, coordinated, or arranged *in such a way that* the resulting work as a whole constitutes an original work of authorship.” *Feist* at 356, *quoting* 17 U.S.C. 101 (“compilation”) (emphasis by the Court). The Court stated:

The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable per se. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) The collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an “original” work of authorship * * *.

Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. * * * [W]e conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.

Feist, 499 U.S. at 357-358 (U.S. 1991)

The Court’s decision in *Feist* clarified that some selections, coordinations, or arrangements will not qualify as works of authorship under the statutory definition of “compilation” in section 101. However, 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.

In *Feist*, Rural Telephone's alphabetical directory was found deficient due to a lack of originality, i.e., of sufficient creativity. Had the items contained in the directory (names, addresses and telephone numbers) been selected, coordinated, or arranged in a sufficiently original manner, there is no question that the resulting compilation would have fit comfortably within the category of literary works—the first category of copyrightable authorship recognized by Congress in section 102. But what if an original selection, coordination, or arrangement of preexisting material did not fall within a category of section 102 authorship? For instance, is a selection and arrangement of a series of physical movements copyrightable, if the resulting work as a whole does not fit within the categories of pantomime and choreographic works or dramatic works, or any other category?

Although the *Feist* decision did not address this question, the Copyright Office concludes that the statute and relevant legislative history require that to be registrable, a compilation must fall within one or more of the categories of authorship listed in section 102. In other words, if a selection and arrangement of elements does not result in a compilation that is subject matter within one of the categories identified in section 102(a), the Copyright Office will refuse registration.

The Office arrives at this conclusion in accordance with the instruction of the Supreme Court in *Feist*: “the established principle that a court should give effect, if possible, to every clause and word of a statute,” citing *Moskal v. United States*, 498 U.S. 103, 109-110 (1990). Applying this principle, the Office finds that in addition to the statutory definition of “compilation” in section 101, Congress also provided clarification about the copyrightable authorship in compilations in section 103(a) of the Copyright Act:

The *subject matter of copyright as specified by section 102 includes compilations* and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

17 U.S.C. 103(a). (emphasis added).

Section 103 makes it clear that compilation authorship is a subset of the section 102(a) categories, not a separate and distinct category. Section 103 and the

definition of “compilation” in Section 101 also mark a departure from the treatment of compilations under the 1909 Act, which listed composite works and compilations as falling within the class of “books.” The 1976 Act significantly broadened the scope of compilation authorship to include certain selection, coordination, or arrangement that results in a work of authorship. But that expansion also makes it clear that not every selection, coordination, or arrangement of material is copyrightable. Only selection, coordination, or arrangement that falls within section 102 authorship is copyrightable, i.e., is selected, coordinated, or arranged *in such a way* that the resulting work as a whole constitutes an original work of authorship. Moreover, section 103 provides that compilations fall within “[t]he subject matter of copyright as specified by section 102,” and the legislative history of the 1976 Act confirms what this means: “Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an ‘original work of authorship’ *and falls within one or more of the categories listed in section 102.*” H.R. Rep. 94-1476 at 57 (1976) (emphasis added).

This requirement indicates that compilation authorship is limited not only by the tripartite structure of the statutory definition of “compilation,” but that in addition, a creative selection, coordination, or arrangement must *also* result in one or more congressionally recognized categories of authorship.

Although the statute together with the legislative history warrant this conclusion, it is far from obvious when the statutory definition of “compilation” is read in isolation. Moreover, other portions of the legislative history have obscured this interpretation.

The legislative history states that the term “works of authorship” is said to “include” the seven categories of authorship listed in section 102 (now eight with the addition of “architectural works”), but that the listing is “illustrative and not limitative.” H.R. Rep 94-1476, at 53. If these categories of authorship are merely illustrative, may courts or the Copyright Office recognize new categories of copyrightable authorship? Given that Congress chose to include some categories of authorship in the statute, but not other categories, did Congress intend to authorize the courts or the Copyright Office to recognize authorship that Congress did not expressly include in the statute? For instance, the decision to include “pantomimes and choreographic works” as a new category of authorship that did not exist under the 1909 Act was the subject of much deliberation, including a commissioned study and hearings. Copyright Office Study for Congress. Study No. 28, “Copyright in Choreographic Works,” by Borge Varmer; Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Comm. on the Judiciary

(February 1963) at 8-9. Similarly, the decision not to include typeface as copyrightable authorship was a deliberate decision. H.R. Rep 94-1476, at 55. Could Congress have intended the courts or the Office to second-guess such decisions, or accept forms of authorship never considered by Congress?

Again, the answer lies in the legislative history. First, the legislative history states that “In using the phrase ‘original works of authorship,’ rather than ‘all the writings of an author,’ the committee’s purpose was to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase.”H.R. Rep 94-1476, at 51. Thus, one goal of the illustrative nature of the categories was to prevent foreclosing the congressional creation of new categories:

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into one of two categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms—electronic music, filmstrips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only “maps, charts, and books”; major forms of expression

such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by explicit recognition of all forms of choreography, *there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.*

Id. (emphasis added.)

This passage suggests that Congress intended the statute to be flexible as to the scope of established categories, but also that Congress also intended to retain control of the designation of entirely new categories of authorship. The legislative history goes on to state that the illustrative nature of the section 102 categories of authorship was intended to provide “sufficient flexibility to free the courts from rigid or outmoded concepts of *the scope of particular categories.*” *Id.* at 53 (emphasis added). The flexibility granted to the courts is limited to *the scope* of the categories designated by Congress in section 102(a). Congress did not delegate authority to the courts to create new categories of authorship. Congress reserved this option to itself.

If the federal courts do not have authority to establish new categories of subject matter, it necessarily follows that the Copyright Office also has no such authority in the absence of any clear delegation of authority to the Register of Copyrights.

Interpreting the Copyright Act as a whole, the Copyright Office issues this policy statement to announce that unless a compilation of materials results a work of authorship that falls within one or more of the eight categories of authorship listed in section 102(a) of title 17, the Office will refuse registration in such a claim.

Thus, the Office will not register a work in which the claim is in a “compilation of ideas,” or a “selection and arrangement of handtools” or a “compilation of rocks.” Neither ideas, handtools, nor rocks may be protected by copyright (although an expression of an idea, a drawing of a handtool or a photograph of rock may be copyrightable).

On the other hand, the Office would register a claim in an original compilation of the names of the author’s 50 favorite restaurants. While neither a restaurant nor the name of a restaurant may be protected by copyright, a list of 50 restaurant names may constitute a literary work—a category of work specified in

section 102(a)—based on the author’s original selection and/or arrangement of the author’s fifty favorite restaurants.

An example that has occupied the attention of the Copyright Office for quite some time involves the copyrightability of the selection and arrangement of preexisting exercises, such as yoga poses. 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. Exercise is not a category of authorship in section 102 and thus a compilation of exercises would not be copyrightable subject matter. The Copyright Office would entertain a claim in the selection, coordination or arrangement of, for instance, photographs or drawings of exercises, but such compilation authorship would not extend to the selection, coordination or arrangement of the exercises themselves that are depicted in the photographs or drawings. Rather such a claim would be limited to selection, coordination, or arrangement of the photographs or drawings that fall within the congressionally-recognized category of authorship of pictorial, graphic and sculptural works.

As another example, Congress has stated that the subject matter of choreography does not include “social dance steps and simple routines.” H.R. Rep. 94-1476 at 54 (1976). 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. And although a choreographic work, such as a ballet or abstract modern dance, may incorporate simple routines, social dances, or even exercise routines as elements of the overall work, the mere selection and arrangement of physical movements does not in itself support a claim of choreographic authorship.

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 organized into an integrated, coherent, and expressive whole.

Simple dance routines do not represent enough original choreographic authorship to be copyrightable. *Id.* Moreover, the selection, coordination or arrangement of dance steps does not transform a compilation of dance steps into a

choreographic work unless the resulting work amounts to an integrated and coherent compositional whole. The Copyright Office takes the position that a selection, coordination, or arrangement of functional physical movements such as sports movements, exercises, and other ordinary motor activities alone do not represent the type of authorship intended to be protected under the copyright law as a choreographic work.

In addition to the requirement that a compilation result in a section 102(a) category of authorship, the Copyright Office finds that section 102(b) precludes certain compilations that amount to an idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. In the view of the Copyright Office, a selection, coordination, or arrangement of exercise movements, such as 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. *See, e.g., Open Source Yoga Unity v. Choudhury*, 2005 WL 756558, *4, 74 U.S.P.Q.2d 1434 (N.D. Cal. 2005) (“Here, Choudhury claims that he arranged the asanas in a manner that was both aesthetically pleasing and in a way that he believes is best designed to improve the practitioner's health.”).¹ While such a functional system or process may be aesthetically appealing, it is nevertheless uncopyrightable subject matter. A film or description of such an exercise routine or simple dance routine may be copyrightable, as may a compilation of photographs of such movements. However, such a copyright will not extend to the movements themselves, either individually or in combination, but only to the expressive description, depiction, or illustration of the routine that falls within a section 102(a) category of authorship.

The relationship between the definition of compilations in section 101 and the categories of authorship in section 102(a) has been overlooked even by the Copyright Office in the past. The Office has issued registration certificates that included “nature of authorship” statements such as “compilations of exercises” or “selection and arrangement of exercises.” In retrospect, and in light of the Office's closer analysis of legislative intent, the Copyright Office finds that such registrations were issued in error.

The Office recognizes that in one unreported decision, a district court concluded, albeit with misgivings, that there were triable issues of fact whether a

¹ The court in *Open Source Yoga Unity* did not address section 102(b). *See also* the discussion of *Open Source Yoga Unity* below.

sufficient number of individual yoga asanas were arranged in a sufficiently creative manner to warrant copyright protection. *See Open Source Yoga Unity*, discussed above. However, that court did not consider whether section 102(a) or (b) would bar a copyright claim in such a compilation.

The Copyright Office concludes that the section 102(a) categories of copyrightable subject matter not only establish what is copyrightable, but also necessarily serve to limit copyrightable subject matter as well. Accordingly, when a compilation does not result in one or more congressionally-established categories of authorship, claims in compilation authorship will be refused.

Dated: June 18, 2012.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2012-15235 Filed 6-21-12; 8:45 am]

9th Circuit Case Number(s) 13-55763

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