In the United States Court of Appeals

for the Ninth Circuit

BIKRAM'S YOGA COLLEGE OF INDIA, L.P. AND BIKRAM CHOUDHURY,	)	
Plaintiffs-Appellants,	)	No. 13-55763
vs.	)	(C.D. Cal. No. 2:11-CV-11-05506-ODW (SSx))
EVOLATION YOGA, LLC, MARK DROST, and ZEFEA SAMSON,	)	
Defendants-Appellees.	)	

BRIEF OF AMICUS CURIAE YOGA ALLIANCE

IN SUPPORT OF DEFENDANTS-APPELLEES

AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Yoga Alliance does not have any parent corporation, and no public company has a ten percent or greater ownership interest in Yoga Alliance.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Yoga Alliance ("Amicus") respectfully submits this amicus brief in support of defendants-appellees and affirmance.[1]

Yoga Alliance is a non-profit membership trade association that represents yoga teachers, yoga teacher training schools, and yoga studios around the world. Yoga Alliance was founded in 2011 by its sister organization, Yoga Alliance Registry,[2] an educational and charitable organization founded in 1999 to ensure public access to safe and competent yoga instruction. Yoga Alliance Registry maintains a voluntary international credentialing system for Registered Yoga Teachers whose training, experience and continuing education meet core minimum standards and for Registered Yoga

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amicus states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than Amicus and its members.

[2] Yoga Alliance Registry is a non-profit 501(c)(3) organization organized under the laws of the state of Washington. YAplus d/b/a Yoga Alliance is a non-profit 501(c)(6) membership organization organized under the laws of the Commonwealth of Virginia.

Schools that have curriculums that meet core minimum standards. Yoga Alliance Registry is widely recognized as the premier form of professional recognition for yoga teachers and schools, with over 44,000 registered teachers and more than 3,000 registered schools in 76 countries.

All registered yoga teachers and registered yoga schools are also members of Yoga Alliance, the professional and trade association for the yoga community. Yoga Alliance provides a forum of communication for the yoga community, for whom it serves as a watchdog and advocate, and holds an annual conference and provides regular educational offerings on the business of yoga.

The key issue presented on appeal—whether a sequence of yoga poses is copyrightable—is critically important to Yoga Alliance and the international yoga community. The district court's ruling—that a compilation of exercises or yoga poses is not copyrightable—is essential to the future of the yoga community and the freedom to teach and practice yoga. The contrary position advocated on appeal by plaintiffs-appellants Bikram's Yoga College of India, L.P., et al. ("Plaintiffs") would be devastating to the yoga community. Expanding copyright protection to include Plaintiffs' sequence of

yoga poses (the "Sequence") would thwart the ability of others to teach yoga and to develop other sequences of yoga poses in the future. Thus, Yoga Alliance has a strong interest in the legal issues presented by Plaintiffs' claim that their sequence of yoga poses is copyrightable.

Amicus fully supports the position of defendants-appellees Evolation Yoga, et al. ("Defendants"), and submits that the judgment should be affirmed. However, Amicus submits that there is a necessity for additional argument. This brief places the legal issues in the context of the fundamental question—what is yoga?

Viewed in that context, the district court properly held that Plaintiffs' sequence of yoga poses is not copyrightable. Copyright protection for Plaintiffs' sequence of yoga poses is precluded under Section 102(b) of the Copyright Act because it is a "system" of movement.[3] Moreover, expanding copyright protection to include Plaintiffs' sequence of yoga poses would be contrary to the objectives of copyright law.

For all of these reasons, the judgment should be affirmed.

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[3] Unless otherwise stated, references to "Section" are to sections with Title 17 of the United States Code.

ARGUMENT

I. BACKGROUND: WHAT IS YOGA?

Yoga was developed up to 5,000 years ago in India as a comprehensive system for wellbeing on all levels: physical, mental, emotional and spiritual. While yoga is often equated with Hatha Yoga, the well-known system of postures and breathing techniques, Hatha Yoga is only a part of the overall discipline of yoga. Today, many millions of people use various aspects of yoga to help raise their quality of life in such diverse areas as fitness, stress relief, wellness, vitality, mental clarity, healing, peace of mind and spiritual growth. More than 20 million Americans, or 8.7 percent of U.S. adults, practice yoga, according to a 2012 *Yoga Journal* study. *See* http://www.yogajournal.com/press/yoga_in_america. The top five reasons cited by study participants for starting the practice of yoga are flexibility, general conditioning, stress relief, improved overall health, and physical fitness.

Yoga is a system of techniques and guidance for enriched living. Among yoga's many source texts, the two best known are the Yoga Sutras and the Bhagavad Gita. Both explain the nature of—and obstacles to—higher awareness and fulfillment, as well as a variety of

methods for attaining those goals. The modern practice of yoga is typically comprised of a physical system of exercises, coupled with breathwork and mindfulness practices. Contemporary yoga involves participation in numerous poses (or "*asanas*") which vary depending on the specific type of yoga being practiced, and include everyday movements such as standing, sitting, and laying down.

As in any field, some aspects of yoga are too subtle to be learned from books or lectures; they must be acquired through experience. Yoga accordingly has a time-honored emphasis on the student-teacher relationship, in which the teacher helps the student develop a practice that brings deeper understanding through personal experience. Since the individual experience of yoga is quite personal and may differ for each practitioner, there are many approaches to its practice. All approaches to yoga, however, are intended to promote some aspect of wellbeing.

II. THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFFS' SEQUENCE OF YOGA POSES IS NOT COPYRIGHTABLE.

A. Section 102(b) precludes Copyright Protection for Systems or Processes Like Plaintiffs' Sequence of Yoga Poses.

The district court correctly held that Section 102(b) precludes copyright protection for systems or processes like the Sequence:

> "The Sequence—Choudhury's compilation of exercises and yoga poses (and not the book or videos depicting the compilation)—is merely a procedure or system of exercises. Regardless of the categories enumerated in § 102(a), copyright protection does not '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. § 102(b). According to the Copyright Office, 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.' 77 Fed. Reg. 37605, 37607 (June 22, 2012). Choudhury admits that the Sequence helps to prevent, cure, and alleviate disease. UF 19-22. The Court can only conclude that the Sequence is a system or process that is not copyrightable subject matter under § 102(b)."

Appellants' Excerpts of Record ("ER"), pp. 5-6.

Amicus fully supports the position of Defendants, which addresses and rebuts each of Plaintiffs' arguments on this point. Section 102(b) precludes copyright protection for the Sequence, because it is a "system" of movements. As discussed above, yoga itself is indeed a system for well-being. A sequence of yoga poses is a system that is not copyrightable.

B. Plaintiffs' Sequence of Yoga Poses Is Not Copyrightable as a Compilation.

The Sequence is not copyrightable as a compilation under Section 103. As the district court noted, the Copyright Office has squarely considered the issue and concluded that a compilation of yoga poses would not be copyrightable subject matter. ER 7; citing 77 Fed. Reg. 37605, 37607 (June 22, 2012). Amicus fully supports

the position of Defendants that the Sequence is not copyrightable as a compilation. *See* Appellees' Answering Brief ("Appellees' Br."), pp. 28-35.

C. Plaintiffs' Sequence of Yoga Poses Is Not Copyrightable as a Choreographic Work.

The Sequence also is not copyrightable as a choreographic work under Section 102. The district court correctly concluded that "Congress contemplated copyright protection for dramatic works to be something significantly more than what Plaintiffs offer here." ER 6. The district court noted that "the Sequence of 26 yoga poses hardly seems to fall within the definition of a pantomime or a choreographic work because of the simplicity of the Sequence and the fact that it is not a dramatic performance." ER 7. That is consistent with the view of the Copyright Office: "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. . . . [T]he mere selection and arrangement of physical movements does not in itself support a claim of choreographic authorship." 77 Fed. Reg. at 37607. And, the district court's holding is consistent with the

common definition of choreography—the Sequence does not involve dance or music.

In challenging the district court's ruling, Plaintiffs point to features that they view as making the Sequence similar to a "performance" — the staging of the Sequence, mirrors in the studio, the Dialogue delivered by the instructor. App. Opn. Br., pp. 40-41. None of that, however, is part of the Sequence that Plaintiffs now claim is copyrightable as a choreographic work. The Sequence is a sequence of yoga poses — Plaintiffs themselves state that the Sequence is comprised of "26 asanas and two breathing exercises, all of which must be performed in a specific order." App. Opn. Br., p. 8. The district court correctly concluded that such a sequence of yoga poses is not copyrightable as a choreographic work.

III. THERE IS NO PRESUMPTION OF VALIDITY.

Plaintiffs are wrong in arguing that they are entitled to a "presumption of validity" because the Copyright Office has issued a copyright registration for the Sequence. App. Opn. Br., p. 59. The copyright registrations that were issued were for a book, "Bikram's Beginning Yoga Class." ER 599. That is the "Title of This Work" listed in both the original certificate of registration and the

supplemental registration. ER 599, 641. Here, the Copyright Office has never issued a certificate of the registration for the Sequence. *See* Appellees' Br., pp. 13-15.

In the proceedings below, Defendants argued, and the district court agreed, that "the copyright registrations are only for [Bikram Choudhury's] books and audiovisual works, which depict and describe the Yoga Sequence." ER 4. The district court explained:

- "The copyright office did not issue to Choudhury a copyright registration for a pantomime or choreographic work, exercise routine, or compilation of postures." ER 4.
- "Plaintiffs contend that the Supplemental Registration TX 5-624-003 is a registration for the Sequence… This is not true. This registration is for a supplement to the 1979 copyright for Choudhury's book, adding the notation that Choudhury is the author of a 'compilation of exercises.'" ER 4.
- "In other words, the supplemental registration clarifies that Choudhury's contribution includes the Sequence; not that the registration was for the Sequence itself." ER 4.

The district court's conclusion is fully supported by the law. *See L.A. Printex Industries Inc. v. Aeropostale, Inc.*, 676 F. 3d 841, 853 (9th

Cir. 2012) (quoting 17 U.S.C. § 408(d); "The information contained in a supplemental registration augments but does not supersede that contained in the earlier registration.")

Thus, the only certificates of registration that have been issued to Plaintiffs by the Copyright Office are for books, not for the Sequence. A copyright protecting an author's expression in a book does not protect the ideas within the book. *See Shaw v. Lindheim*, 919 F. 2d 1353, 1356 (9th Cir. 1990) ("Copyright law protects an author's expression; facts and ideas within a work are not protected"). Here, the copyright registrations issued by the Copyright Office protect the books; the copyrights do not protect the sequence of yoga poses described in the books. Thus, there is no "presumption of validity" for any copyright for the Sequence.

IV. EXPANDING COPYRIGHT PROTECTION TO INCLUDE PLAINTIFFS' SEQUENCE OF YOGA POSES WOULD BE CONTRARY TO THE OBJECTIVES OF COPYRIGHT LAW.

"'[C]opyright is intended to increase and not impede the harvest of knowledge,' while also 'assur[ing] contributors to the store of knowledge a fair return for their labors.'" *New York Mercantile*

Exchange, Inc. v. Intercontinental Exchange, Inc., 497 F.3d 109, 118 (2nd Cir. 2007); quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-546 (1985). Expanding copyright protection to include Plaintiffs' sequence of yoga poses would be contrary to the objectives of copyright law.

Certainly, yoga teachers do not need copyright protection as an incentive to develop their sequence of yoga poses. *Cf. New York Mercantile Exchange*, 497 F.3d at 118 ("NYMEX needs no such incentives here… Even without copyright … we are confident that NYMEX will not 'direct [its] energies elsewhere."). Indeed, Plaintiffs have represented to this Court that Bikram Choudhury himself "satisfie[d] a desire to create a yoga program that has aesthetic appeal" (App. Opn. Br., p. 9; quoting ER 270); he developed the Sequence long before he sought copyright protection for it (*see* ER 607). Given that, it is improbable that the incentive of copyright protection is needed to ensure that yoga teachers like Bikram Choudhury will choose new sequences of yoga poses. Copyright protection is not, and has never been, needed as a carrot to motivate yoga teachers to create new sequences. Indeed, yoga has transcended boundaries of geography, religion, language and culture, and spread to

every corner of the globe precisely because its teachers have adapted new sequences and other innovations to ensure that the ancient practice meets the needs of local, contemporary populations.

Expanding copyright protection to include Plaintiffs' sequence of yoga poses would thwart the ability of others to teach yoga, to practice yoga, and to develop other sequences of yoga poses. Now, yoga teachers are free to choose whatever sequence of yoga poses they like, without fear of triggering a copyright infringement lawsuit. They are free to innovate, to develop their own sequences of yoga poses without fear that someone else may have already copyrighted a similar sequence of yoga poses. All of that would change dramatically if copyright protection were expanded to include sequences of yoga poses, as Plaintiffs urge. Certainly, one might expect a flood of copyright applications for yoga poses—if for no other reason than the fact that yoga teachers might want to protect their ability to continue teaching their preferred sequences, which would be threatened if someone else first obtained a copyright for that sequence. The end result would be chaos—innovation would be suppressed, rather than promoted.

To hold that the Sequence is copyrightable is simply contrary to the fundamental principles of copyright law. The Copyright Office has stated unequivocally in its Statement of Policy that "[e]xercise is not a category of authorship" (77 Fed. Reg. at 37607) and thus that a sequence of yoga poses cannot be covered by copyright law:

> "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."

Id. Although this Statement of Policy is not binding precedent on this Court, it reflects the considered judgment of our government's experts on copyright law, and it is the right outcome. Indeed, an expansion of copyright law to cover yoga sequences, contrary to the Copyright Office's Statement of Policy, would have far-ranging and damaging ramifications.[4]

[4] While the Copyright Office's Statement of Policy particularly addressed attempts to obtain copyright registration for sequences of yoga poses, the principles underlying its rejection of those attempts

Plaintiffs' theory would create the potential for widespread innocent infringement of copyright. Copyright infringement does not require intent to infringe or knowledge that the infringed work is protected by copyrights. In copyright actions, "the innocent intent of the defendant constitutes no defense to liability." *Nimmer on Copyright* , § 13.08[B][1]. A copyright infringement that arises from copying does not even require that the allegedly infringing work and the copyrighted work be identical. Rather, liability can be found if the two works are "substantially similar." *Id.,* § 13.01[B]. Thus, if Plaintiffs can claim copyright protection for the Sequence, any yoga teacher could be sued if he or she, without Bikram Choudhury's permission, teaches a sequence of yoga poses even substantially similar to those described in Bikram Choudhury's book.

In essence, Plaintiffs seek a monopoly over one form of the practice of yoga. "[T]he essence of a copyright interest is the power to exclude use of the copyrighted work by those who did not originate it or who are not authorized to use it." *Lucasarts Enter Co. v.*

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apply with equal force to other kinds of exercises. Thus, a ruling in favor of Plaintiffs could be used, for example, by makers of fitness videos to assert copyright infringement whenever someone performed a similar calisthenics routine in a group setting.

Humongous Enter. Co., 870 F.Supp. 285, 290 (N.D. Cal. 1993). Giving the Sequence copyright protection would mean that thousands of people would unwittingly infringe copyrights when they perform yoga poses in a similar order to what they had previously seen or practiced in a Bikram-style yoga class. *See* 17 U.S.C. § 101 (definition of performing "publicly" includes performing at a place open to the public).

Although Plaintiffs' suit is directed against Defendant-Appellee Evolation Yoga, LLC, expanding copyright protection to include the Sequence would mean that any individual who had taken an allegedly infringing yoga class at Evolation Yoga could also be liable for infringement. Under Plaintiffs' theory, the violation would lie not just in teaching a copyrighted Sequence, but in performing it in public at all. Nothing in copyright law distinguishes between infringement by a teacher or by a student. Under the principles espoused by Plaintiffs, therefore, any yoga student or practitioner would be liable for copyright infringement simply by performing yoga poses in an order similar to the Sequence in the company of others. Such an outcome would contort the principles of copyright law far beyond the intentions of Congress. Permitting a sequence of yoga poses to be

protected by copyrights would give the copyright owner the ability to monopolize the order in which public domain yoga poses are performed. As a matter of policy, copyright law should not permit anyone to monopolize an arrangement of exercise movements, including a sequence of yoga poses.

The district court properly held that Plaintiffs' sequence of yoga poses is not copyrightable. Its holding is correct as a matter of law, is consistent with the position of the Copyright Office, and reflects sound policy consistent with the objectives of copyright law.

CONCLUSION

For the reasons stated above, amicus curiae Yoga Alliance respectfully submits that the judgment should be affirmed.

Dated: January 21, 2014

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 13-55763

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 3,127 words.

Dated: January 21, 2014.

s/ Kevin M. Fong
Kevin M. Fong