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STRETCHING COPYRIGHT TO ITS LIMIT: ON THE COPYRIGHTABILITY OF YOGA AND OTHER SPORTS MOVEMENTS IN LIGHT OF THE U.S. COPYRIGHT OFFICE'S NEW CHARACTERIZATION OF COMPILATIONS

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ABSTRACT

On June 22, 2012, The U.S. Copyright Office (the “Office”) released a statement of policy indicating that a compilation is uncopyrightable unless the compilation fits within the enumerated categories of works of authorship found in 17 U.S.C. § 102(a). Accordingly, the Office indicated that a compilation of sports moves such as yoga poses are not copyrightable, and any copyright the Office has previously registered—such as the one for Bikram Yoga, which has been the center of an ongoing debate over the copyrightability of yoga for several years—is now invalid. While the new statement from the Copyright Office has chosen the best policy, it fails to explain adequately why a yoga routine does not fit within the Office’s own definition of a choreographic work. Furthermore, the statement does not adequately distinguish between uncopyrightable sports movements like exercise routines and those that warrant greater consideration for copyrightability such as figure skating routines. This comment identifies the arguments that could undermine the Copyright Office’s statement, while explaining the policy considerations that refute those arguments and support the Office’s statement.

I. INTRODUCTION

Exercise fads come and go. During the 1970s and the fitness-crazed 1980s, Jane Fonda and Richard Simmons popularized aer-

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obics. Then there was Jazzercise and Billy Blanks's Tae Bo which was popularized during the 1990s.¹ More recently, Tony Horton's P90X and Insanity have popularized "muscle confusion" and bootcamp style workout routines.² Meanwhile, yoga has existed as a form of exercise for both the body and the mind for thousands of years.³ Bikram yoga, a comparatively recent addition to the yoga tradition, is now one of the fastest growing styles of yoga in the United States.⁴ In fact, it has become so popular that in 2003, founder Bikram Choudhury obtained a copyright of a compilation of twenty-six yoga poses.⁵ As of May 2007, the U.S. Copyright Office had issued 150 yoga-related copyrights (many in books describing techniques rather than the underlying exercise).⁶ Since it was issued, Bikram has used and arguably over-enforced his copyright on many occasions. But in late 2011, Laura Lee Fischer, the acting Chief of the U.S. Copyright Office's Performing Arts Division, declared that copyrights in yoga sequences were no longer valid.⁷ Furthermore, in an official statement of policy, the Office declared that a compilation of exercise movements is not a valid copyrightable

1. See generally JAZZERCISE, <http://www.jazzercise.com/> (last visited July 15, 2012) (defining jazzercise as fun, effective workout combining dance-based cardio with strength training and stretching); see also Penelope Green, *Mirror, Mirror: Punching and Kicking All the Way to the Bank*, N.Y. TIMES, Mar. 21, 1999, at 6, available at <http://www.nytimes.com/1999/03/21/style/mirror-mirror-punching-and-kicking-all-the-way-to-the-bank.html> (explaining Tae Bo fitness as workout system that is "a cocktail of tae kwon do, boxing and aerobics").

2. See generally TONY HORTON, <http://www.tonyhortonworld.com/> (last visited July 15, 2012) (defining P90X system as home fitness program designed to constantly challenge muscles with variety of intense movements); see also *Insanity*, BEACH BODY, <http://www.beachbody.com/> (last visited July 15, 2012) (identifying insanity as "hardest fitness program ever put on DVD").

3. See Katherine Machan, *Bending over Backwards for Copyright Protection: Bikram Yoga and the Quest for Federal Copyright Protection of an Asana Sequence*, 12 UCLA ENT. L. REV. 29, 29 (2004) (acknowledging that yoga has existed for over 5,000 years).

4. See generally *id.* (describing history and legal battles of Bikram Yoga).

5. See *Bikram Obtains Copyright Registration for His Asana Sequence*, BIKRAM YOGA (July 30, 2003), <http://www.bikramyoga.com/press/press19.htm> (declaring permanent injunction banning use and exploitation of Bikram yoga "significant victory" in protection of Bikram's copyright and trademark infringement).

6. See Suketu Mehta, *A Big Stretch*, N.Y. TIMES, May 7, 2007, at A21, available at <http://www.nytimes.com/2007/05/07/opinion/07mehta.html> (recognizing that "US government has issued 150 yoga-related copyrights, 134 patents on yoga accessories and 2,315 yoga trademarks," amounting to \$3 billion in America each year).

7. See Ellen Rosen, *Yoga Pose Copyright Bid Too Big of a Stretch, Regulator Says*, BUSINESSWEEK, Dec. 10, 2011, available at <http://www.businessweek.com/news/2011-12-12/yoga-pose-copyright-bid-too-big-of-a-stretch-regulator-says.html> (announcing yoga "stretches and sequences are 'exercises' rather than 'choreography'" and thus no longer copyrightable).

subject matter and sports movements are not classifiable as choreographic work.⁸

Although the Office's statement of policy was a step in the right direction regarding copyrightable subject matter and compilations, its argument about the classification of sports movements was incomplete. Some athletic activities such as yoga and exercise should not be copyrightable, but an argument can be made that they do, in fact, fit within the Office's own definition of a choreographic work. The Office could have better reinforced its statement by examining policy considerations in addition to the functionality doctrine. Furthermore, the Office's characterization of sports movements was overbroad and failed to distinguish between exercise-type routines and more creative works such as figure skating routines and other routine-based athletics.

This article considers the arguments in opposition to the Office's recent statement. It then considers the underlying policies that support the Office's statement and refutes oppositional arguments. Further, it attempts to better differentiate between non-copyrightable sports movements and more expressive athletic routines that are likely copyrightable.

Part II of this paper provides a background of copyrightable subject matter.⁹ It first briefly examines the Copyright Act and identifies attempts found in case law to copyright sports and related activities, including the Bikram yoga copyright. Part III considers more closely how yoga and exercise routines have previously been squeezed into classifications of choreography and compilations.¹⁰ Part IV carefully examines the Office's statement of policy regarding compilations and sports movements.¹¹ It identifies where the justifications in the statement are lacking and provides arguments that could be used to refute the validity of the statement. Part V then explains why, even though the Office provided a refutable argument about the classification of yoga and exercise routines, its decision was in fact correct.¹² This Part considers policies and theories that justify copyright protection to explain that some, but not all, athletic activities and sports movements should not be copyrightable. Finally, Part VI identifies a method of classifying these

8. Registration of Claims to Copyright, 77 Fed. Reg. 37,605 (June 22, 2012) (to be codified at 37 C.F.R. pt. 201).

9. See *infra* notes 14-71 and accompanying text.

10. See *infra* notes 72-103 and accompanying text.

11. See *infra* notes 104-133 and accompanying text.

12. See *infra* notes 134-159 and accompanying text.

activities into a spectrum of copyrightability.¹³ It provides a distinction between uncopyrightable sports movements such as yoga and exercise routines, and those that should be copyrightable such as figure skating and gymnastics floor routines.

II. BACKGROUND

While one may not frequently consider the copyrightability of sports and exercise routines, the topic has been contemplated often since copyright was extended beyond books, maps and charts.¹⁴ For example, in a 1938 decision, the Southern District of California held that under the 1909 Copyright Act, an author's copyright in a book that described the rules and procedures for a roller derby competition was not infringed when the format was copied for an actual roller derby competition.¹⁵ However, since that decision, the Copyright Act of 1976 ("Act") broadened copyrightable subject matter considerably.¹⁶ An understanding of that statute is necessary before further considering any copyright in exercise routines such as yoga.

A. Copyrightable Subject Matter

Article I, Section 8, Clause 8 of the U.S. Constitution provides "[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."¹⁷ This Clause has been understood to give Congress great discretion "to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause."¹⁸ Accordingly, the word "author" in this Clause has been interpreted to mean "he to whom anything owes its origin; originator; maker; [or] one who completes a work

13. See *infra* notes 160-166 and accompanying text.

14. See generally *Seltzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938) (holding that reproducing description of roller derby rules and procedures was not violation of copyright); see also *Hoopla Sports & Entm't, Inc. v. Nike, Inc.*, 947 F. Supp. 347 (N.D. Ill. 1996); see also *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); see also *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841 (7th Cir. 1997).

15. See generally *Seltzer v. Sunbrock*, 22 F. Supp. 621 (S.D. Cal. 1938) (holding that reproducing description of roller derby rules and procedures was not violation of copyright).

16. See generally 17 U.S.C. § 101 (2006) (defining literary works, motion pictures, performances, graphic and sculptural works, and phonorecords as all examples of copyrightable material).

17. U.S. CONST. art. I, § 8, cl. 8.

18. *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

of science or literature.”¹⁹ Furthermore, the Court has indicated that the laws passed by Congress pursuant to this Clause should be construed “fairly or even liberally.”²⁰ Thus, it is clear that copyright in the United States has been applied broadly and with great ease to many creations with increasing frequency and for increasing terms.²¹

Copyrightable subject matter is set forth in section 102 of the Copyright Act, stating that protection exists “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.”²² The statute then indicates that “works of authorship *include* . . .

- (1) literary works;
- (2) musical works . . . ;
- (3) dramatic works . . . ;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures . . . ;
- (7) sound recordings; and
- (8) architectural works.”²³

The use of the word “include” here suggests that the list of works of authorship is not all-encompassing. In fact, a House report indicated that what Congress understood as worthy of copyright protection can change over time. “[T]he bill does not intend . . . to freeze the scope of copyrightable subject matter at the present stage of

19. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

20. *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 10 (1913). Note, however, that this case was decided long before copyright law was expanded under the 1976 act.

21. *See generally* 17 U.S.C. § 101 (detailing current copyright law). The 1790 act provided a 28 year copyright only for books, maps, and charts. In 1831, that term was extended to 42 years. *See Act of Feb. 3, 1831*, 4 Stat. 436 (amending copyright laws). The Copyright Act of 1909 extended the copyright term to 56 years. *See Copyright Act of 1909*, 35 Stat. 1075 (1909). Starting in 1962, a series of laws were passed in anticipation of the upcoming copyright overhaul that extended the term of copyrights set to expire between September 19, 1962 and December 31, 1976 to the end of 1976. The Copyright Act of 1976 set the general copyright term to the life of the author plus 50 years. *See Copyright Act of 1976*, 90 Stat. 2541 (1976) (amending copyright laws). The same statute eliminated the requirement of registration. *See id.* (amending copyright laws). Finally, in 1998, the Sonny Bono Copyright Term Extension Act brought the general term of a copyright up to the life of the author plus 70 years. *See Sonny Bono Copyright Term Extension Act*, 112 Stat. 2827 (1998) (amending copyright laws).

22. 17 U.S.C. § 102(a) (2012).

23. *Id.* (emphasis added).

communications technology The historic expansion of copyright has . . . 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.”²⁴ However, the House report also warned that the statute does not intend “to allow unlimited expansion into areas completely outside the present congressional intent.”²⁵ So although athletic activities are not expressly included in the statute’s list of enumerated works of authorship, it is not beyond the realm of possibilities that such creations could be copyrighted.

The Act provides further insight into what may be copyrightable in section 103, which states that “subject matter of copyright as specified by section 102 includes compilations and derivative works.”²⁶ The word “compilation” is defined as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”²⁷ Preexisting materials and data are unquestionably not copyrightable. Accordingly, by including compilations in the subject matter of copyright, Congress has made it possible to receive protection for a creative grouping of uncopyrightable information. Such a copyright is generally understood as being “thin,” however.²⁸ That is, the protection afforded to such a work will only protect against exact or near-exact reproductions, and it does not extend to the use of the individual pieces of information within the compilation.²⁹

B. Copyright and Athletic Activity

While athletic activity is not one of the enumerated types of copyrightable subject matter, the issue of the copyrightability of athletic activity or sports has come up occasionally in the courts. As previously mentioned, the Southern District of California held in

24. H.R. Doc. No. 94-1476, at 51 (1976).

25. *Id.*

26. 17 U.S.C. § 103 (2012).

27. § 101.

28. *See generally* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][4] (describing how shallow creativity, like that which produces a compilation, is only entitled to shallow copyright protection).

29. *See* Feist Publ’ns., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349 (1991) (“Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”).

Seltzer v. Sunbrock that a roller derby competition did not infringe upon the copyright of the book that described the derby.³⁰ The *Sunbrock* court noted that “protection is afforded, not to the ideas therein expressed, but to the original wording, the distinctive word order, the literary style in which the ideas are presented.”³¹ As an example of this, the court explained that an author may copyright his description of the Battle of Gettysburg, but doing so would not preclude future historians from describing the battle in their own words.³² The court further held that a description of an athletic competition could not be copyrighted as a drama because it lacked plot and characters.³³ Instead, the rules and procedures described in plaintiff’s book were a “system,” which is something that can never be copyrighted.³⁴

More recently, in *Hoopla Sports & Entertainment v. Nike*,³⁵ Hoopla Sports sued Nike for copying Hoopla’s “U.S. vs. The World” all-star basketball game format.³⁶ But as with the rules in the roller derby case, the all-star game format was merely an idea, and, as the Supreme Court has held since its 1879 decision in *Baker v. Seldon*,³⁷ ideas cannot be copyrighted.³⁸ In dicta, the *Hoopla* court also mentioned that “it is doubtful whether a sports event is a copyrightable work.”³⁹

That question—whether a sports event is a copyrightable work—has been considered in at least two circuits. In the Seventh Circuit case *Baltimore Orioles v. Major League Baseball Players*,⁴⁰ profes-

30. See *Seltzer v. Sunbrock*, 22 F. Supp. 621, 626 (S.D. Cal. 1938) (finding that “[t]he official program of the defendants is in no way an infringement of plaintiff’s copyrighted books.”).

31. *Id.* at 627 (explaining basis upon which copyright protection is legally afforded).

32. See *id.* (“[I]f John Doe has copyrighted a description of the Battle of Gettysburg, he has not precluded any other historian from discussing or describing the events of that battle. He has merely pre-empted the right to narrate the incidents in that particular, original wording which he has employed. Another may relate exactly the same incidents, but in different words, and not thereby infringe the copyright, insofar as it covers a book, as such.”).

33. See *id.* at 628-29 (requiring story to contain “a thread of consecutively related events” to qualify as dramatic composition).

34. See *id.* at 630 (citing *Baker v. Seldon*, 101 U.S. 99 (1879)).

35. *Hoopla Sports & Ent., Inc. v. Nike, Inc.*, 947 F. Supp. 347 (N.D. Ill. 1996).

36. See *id.* at 350 (describing Hoopla’s development of game theme of international peace and Nike sponsoring it).

37. *Baker v. Seldon*, 101 U.S. 99 (1879).

38. See *id.* at 101-02 (holding that books explaining well-known systems may be copyrighted, but art book conveying or explaining may not be).

39. *Hoopla*, 947 F. Supp. at 354.

40. *Baltimore Orioles v. Major League Baseball Players*, 805 F.2d 663 (7th Cir. 1986).

sional baseball players argued that their right of publicity interest in their performances during games was not preempted by federal copyright law because sporting events were not copyrightable subject matter.⁴¹ While the court did not directly address whether the game itself was subject to copyright law, it did hold that the telecast of the game was copyrightable as an audiovisual work, and that the players had no interest in that copyright because the telecast was a work made for hire under 17 U.S.C. § 201(b).⁴² It even went as far as stating that the “[p]layers’ performances” contain the “modest creativity required for copyright ability,” without explicitly stating that the events themselves are copyrightable.⁴³

The Second Circuit considered more directly whether a sports event is a copyrightable work in *National Basketball Association v. Motorola, Inc.*⁴⁴ In that case, Motorola provided a service that would display live scores and other information about NBA basketball games based on the service provider’s observation of broadcasts of those games.⁴⁵ NBA argued that this was an infringement of their copyright in the games or the broadcast of those games.⁴⁶ The court explained that the Copyright Act of 1976 “expressly afford[ed] copyright protection to simultaneously-recorded broadcasts of live performances such as sports events. Such protection was not extended to the underlying events.”⁴⁷ It held that a sports event is neither among the eight categories of “works of authorship” in section 102 of the Act, nor such an event similar or analogous to any of the enumerated categories, and as such, should not be protected by copyright law.⁴⁸ The Second Circuit disagreed with

41. *See id.* at 667-74 (reasoning that works made for hire are considered to be work of employer unless expressly agreed upon otherwise under 17 U.S.C. § 201(b), therefore professional athletic performances in telecast are considered work of team owner and players’ rights of publicity are preempted by owner’s telecast copyrights).

42. *See id.* at 668 (listing tangibility, originality, and subject matter as requirements of copyrightable works and concluding that telecast meets those requirements).

43. *Id.* at 669 n.7 (“That the Players’ performances possess great commercial value indicates that the works embody the modicum of creativity required for copyrightability.”).

44. *Nat’l Basketball Ass’n v. Motorola*, 105 F.3d 841 (7th Cir. 1997).

45. *See id.* at 843-44 (describing Motorola’s SportTrax pager service for disseminating information about NBA games).

46. *See id.* at 845 (describing NBA’s assertions).

47. *Id.* (citations omitted).

48. *See id.* at 846 (“Section 102(a) lists eight categories of ‘works of authorship’ covered by the act, including such categories as ‘literary works,’ ‘musical works,’ and ‘dramatic works.’ The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.”).

the Seventh Circuit's characterization of athletes' creativity in sporting events, stating:

[s]ports events are not 'authored' in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it.⁴⁹

Ultimately, the Second Circuit concluded that if Congress had intended for sports events to be protected by copyright, it would have included them in the list of § 102 works of authorship.⁵⁰

These cases suggest that the underlying events in sports are not copyrightable, but sports events are not entirely analogous to all athletic activities, including exercise routines or competitive routine-based sports like figure-skating, which some authors have suggested are in fact analogous to choreographic works.⁵¹

That some choreographic works can be copyrighted is indisputable.⁵² But in *Miller v. Civil City of S. Bend*,⁵³ the Seventh Circuit considered whether exotic dancing could be protected as a choreographic work.⁵⁴ The court held that with or without clothing, "dance as entertainment inherently embodies the expression and communication of ideas and emotions" which are required for cop-

49. *Id.*

50. *See id.* at 847 ("Congress found it necessary to extend such protection to recorded broadcasts of live events. The fact that Congress did not extend such protection to the events themselves confirms our view that the district court correctly held that appellants were not infringing a copyright in the NBA games.").

51. *See, e.g.,* Karolina Jesian, *Don't Sweat It: Copyright Protection for Yoga . . . Are Exercise Routines Next?*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 623 (2007) (distinguishing between sports events and scripted sports plays like yoga, and legal repercussions); *see also* Jordan Susman, *Your Karma Ran Over My Dogma: Bikram Yoga and the (Im)possibilities of Copyrighting Yoga*, 25 LOY. L.A. ENT. L. REV. 245 (2005) (discussing copyrightability of Bikram yoga); *see also* Wm. Tucker Griffith, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performances with Copyright Law*, 30 CONN. L. REV. 675 (1998) (discussing unique qualities of routine-based athletic performance, and legal implications).

52. *See* 17 U.S.C. § 102(a)(4) (2012) (listing works of authorship which qualify for copyright protection).

53. *Miller v. Civil City of S. Bend*, 904 F.2d 1081 (7th Cir. 1990).

54. *See id.* at 1087 (explaining State's concession that exotic dances can qualify as protected expression if they are choreographed).

right protection.⁵⁵ Justice Holmes has stated that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”⁵⁶ The *Miller* court likewise held that “[a]ny attempt to distinguish ‘high’ art from ‘low’ entertainment based solely on the advancement of *intellectual ideas* must necessarily fail.”⁵⁷ Thus, whether the expression embodies a particularly intellectual purpose is irrelevant to the copyright analysis. As such, if exercise routines and other athletic activities fit among the “works of authorship” considered in § 102, they most certainly may be copyrightable.⁵⁸

C. Bikram Yoga

Yoga is a form of exercise routine and meditation that has been in existence for thousands of years.⁵⁹ Bikram Choudhury developed what came to be known as Bikram Yoga after recovering from a knee injury at age seventeen.⁶⁰ Bikram Yoga is a sequence of twenty-six postures, or asanas, that are performed in the same order every time in a room heated above 100 degrees Fahrenheit.⁶¹ Over the last decade, Bikram Yoga has grown greatly in popularity, resulting in considerable economic success for its creator.⁶²

In 2003, Bikram Choudhury issued a press release indicating that he had successfully copyrighted “his original work of authorship in his asana sequence of twenty-six postures and two breathing exercises.”⁶³ The copyright is a compilation of otherwise uncopyrightable asanas, creatively arranged in a specific sequence.⁶⁴ Bikram vehemently enforced this copyright registration, sending

55. *Id.*

56. *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239, 251 (1903).

57. *Miller*, 904 F. 2d at 1086.

58. *See* 17 U.S.C. § 102 (2012) (outlining general boundaries of copyright protection).

59. *See Machan, supra* note 3, at 29 (“In some form or another, the practice of yoga, with its roots in ancient India, has existed for over 5,000 years.”).

60. *See id.* (describing origins of Bikram Yoga).

61. *See id.* (“Bikram Yoga consists of twenty-six postures, conducted in precisely the same order each time, over a ninety minute period, in a room heated up to 115 degrees.”).

62. *See id.* at 32 (describing rise in popularity of Bikram Yoga and associated costs).

63. *See* Jacob C. Reinbolt, *Bikram Obtains Copyright Registration for His Asana Sequence*, BIKRAM YOGA (Feb. 5, 2003), <http://www.bikramyoga.com/press/press19.htm> (describing outcome of copyright infringement litigation).

64. *See* *Open Source Yoga Unity v. Choudhury*, No. C 03-3182 PJH, 2005 WL 756558, at *2-3 (N.D. Cal. Apr. 1, 2005) (summarizing position on contents of compilation).

out cease and desist letters to numerous infringers and claiming that “[v]irtually all modifications or additions to the sequence will constitute copyright infringement.”⁶⁵ Bikram used his copyright registration to his advantage in a civil suit between himself and an unlicensed Bikram Yoga instructor.⁶⁶ The case eventually settled, but according to Bikram, the confidential settlement vindicated his rights and was a substantial legal victory for the Bikram Yoga community.⁶⁷

In response to Bikram’s yoga copyright, Open Source Yoga Unity (OSYU), a California organization, filed a lawsuit seeking a declaratory judgment that Bikram’s copyright was invalid.⁶⁸ OSYU argued that Bikram could not copyright his sequence of asanas because the poses were thousands of years old and therefore, a part of the public domain.⁶⁹ Further, OSYU argued that yoga is a functional routine that cannot be copyrighted.⁷⁰ The court was not convinced. It stated that

what is at issue are two competing principles of copyright law. On the one hand, copyright law does not protect factual or functional information, or information that is already in the public domain. On the other hand, copyright law does extend protection to an arrangement of information in the public domain assembled in a sufficiently creative fashion. The question at hand is how to reconcile these two principles.⁷¹

The court ultimately sidestepped the issue and determined that whether the asanas were arranged in a sufficiently creative manner to warrant copyright protection as a compilation was a question of fact.⁷²

65. See Susman, *supra* note 51, at 249 (“Bikram issued cease and desist letters to yoga studios throughout the world, threatening the studios with litigation if they continued to violate his copyright.”) (citations omitted); see also Reinbolt, *supra* note 63 (quoting press release).

66. See Choudhury v. Morrison, No. SA02-565, 3-12 (C.D. Cal. June 30, 2003), available at http://yogaunity.org/law/law_downloads/exhibitA.pdf (recounting position of case).

67. See Reinbolt, *supra* note 63 (summarizing outcome of settlement in founder’s perspective).

68. See *Open Source Yoga Unity*, 2005 WL 756558, at *1 (“Plaintiff Open Source Yoga Unity (“OSYU”) has filed a declaratory relief action, seeking a declaration that Choudhury does not have valid copyright or trademark rights in a series of yoga exercises he has compiled under the name ‘Bikram yoga.’”).

69. See *id.* at *2 (summarizing plaintiff’s argument against valid copyright).

70. See *id.* (continuing summary of plaintiff’s argument against copyright).

71. *Id.*

72. See *id.* at *4 (citing Swirsky v. Carey, 376 F.3d 841, 851 (9th Cir. 2004)).

III. COPYRIGHTING YOGA AND EXERCISE ROUTINES

In the words of the OSYU court, “[o]n first impression, it . . . seems inappropriate, and almost unbelievable, that a sequence of yoga positions could be any one person’s intellectual property,” yet the issue is not so obvious.⁷³ This part examines how one might construe the copyright act to afford protection to yoga and other similar exercise routines.

There are a number of issues to consider when determining the copyrightability of yoga and exercise routines. First, these athletic activities are most closely related to choreographic works. If they cannot be classified as choreographic works, then one might argue that yoga and exercise routines could fall back on the protection of compilations like the Bikram example, at least prior to the Office’s recent statement of policy. But even if yoga and other exercise routines can be contorted to fit within either of these categories, they must still overcome a number of issues, including originality, the merger doctrine, and the functionality doctrine. This part examines how yoga and exercise routines are affected by each of these issues.

A. Yoga and Exercise as Choreography

When Congress passed the Copyright Act of 1976, it assumed that pantomimes and choreographic works had “fairly settled meanings.”⁷⁴ Despite failing to provide a definition for these works, the House did indicate that “‘choreographic works’ do not include social dance steps and simple routines.”⁷⁵ This likely rules out the Macarena and the waltz, but the term “simple routines” is not without its own ambiguities.

In 1984, the Office picked up what Congress left undone, providing its own definition of choreographic works in the Compendium II of Copyright Practices.⁷⁶ The Office states that

73. See *id.* at *2 (quoting court’s skepticism).

74. See H.R. REP. NO. 94-1476, at 53 (1976) (“The three undefined categories— ‘musical works,’ ‘dramatic works,’ and ‘pantomimes and choreographic works’— have fairly settled meanings.”).

75. See *id.* at 54 (commenting that choreographic works “do not include social dance steps and simple routines.”).

76. See COPYRIGHT OFFICE, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES, § 450, at 400-19 [hereinafter COMPENDIUM II] (setting forth U.S. Copyright Office’s definition of choreographic works). As of this writing, the Compendium is undergoing revision by the Copyright Office. For a summary of the Office’s priorities as they pertain to the Compendium, see U.S. COPYRIGHT OFFICE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE (2011), available at <http://www.copyright.gov/docs/priorities.pdf>.

[c]horeography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.⁷⁷

The Compendium further states that choreographic works need not be presented in front of an audience to receive protection.⁷⁸ But they must be “more than mere exercises, such as ‘jumping jacks’ or walking steps.”⁷⁹ In describing unprotectable social dance steps and simple routines, the Office stated that the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. However, this is not a restriction against the incorporation of social dance steps and simple routines, as such, in an otherwise registrable choreographic work. Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material.⁸⁰

While the Office’s conclusions are not binding, the courts generally heed their recommendations as long as they are reasonable.⁸¹ Based on this understanding, it is clear that a single yoga pose or basic aerobic movement would not be copyrightable. At the same time, a unique combination of ballet steps would almost certainly be copyrightable as a choreographic work. Accordingly, a combination of basic aerobic movements or yoga postures, if combined in some creative order and set to music would, at least on first glance, fit quite comfortably into the definition as a “succession of bodily movement” that is usually “accompanied by music.”

B. Yoga and Exercise as Compilations

Even if an exercise routine would not be classified as a choreographic work, it might be considered a compilation—notwithstand-

77. See COMPENDIUM II, *supra* note 76, § 450.01, at 400-19 (quoting definition of choreographic works).

78. See *id.* § 450.02, at 400-19 (stating no performance in front of audience required for protection of choreography).

79. See *id.* § 450.03(a), at 400-19 (indicating choreography must contain unique characteristics).

80. See *id.* § 450.06 (declaring unprotectable dance steps may be included in protectable choreographic works).

81. See, e.g., *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (endorsing Copyright Office’s definition of “choreographic work” found in COMPENDIUM II).

ing the Office's recent statement. Section 101 of the Copyright Act defines a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."⁸² *Feist Publications, Inc. v. Rural Telephone Service Co.* identified three elements required for copyrighting a 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."⁸³

Many works that would generally be considered choreographic works probably fit more comfortably in this category. That is, a ballet is traditionally made up of a number of classic movements that are not copyrightable alone not only because they are simple, but also because they are already in the public domain.⁸⁴ But a ballet is copyrightable, nonetheless, because it (1) assembles pre-existing dance moves, and (2) arranges them into (3) an original work.

In *OSYU*, Bikram argued that his yoga routine was in fact copyrighted as a compilation of asanas because he coordinated the pre-existing postures in a new, original fashion.⁸⁵ And, apparently, neither the court nor the Office opposed this argument at the time.⁸⁶ But even if a yoga or exercise routine fits into this category, or the category of choreographic works, there are still a number of hurdles to clear in order to receive copyright protection.

C. Limitations on Copyrighting Yoga and Exercise Routine

1. *Fixation and Originality*

As previously mentioned, all copyrightable subject matter must be an "original work of authorship fixed in any tangible medium of

82. See 17 U.S.C. § 101 (2006) (citing definition of compilation).

83. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991) (detailing Court's three requirements for copyrighting compilations).

84. See Katie M. Benton, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purpose of the Copyright Clause*, 36 PEPP. L. REV. 59, 79-80 (2008) (discussing relationship between public domain and Copyright Clause).

85. See *Open Source Yoga Unity v. Choudhury*, C 03-3182 PJH, 2005 WL 756558, *1 (N.D. Cal. Apr. 1, 2005) (describing defendant's argument that routine was coordination of pre-existing moves in new way).

86. For further discussion, see *infra* notes 105-134 for a description of the Office's new understanding of a compilation.

expression.”⁸⁷ The fixation requirement is easily overcome. Simply recording a routine on video is sufficient to fix the work.⁸⁸ Originality, however, is not as straightforward.

As *OSYU* explained, originality is generally a question of fact.⁸⁹ But the standard is fairly low. In *MLB*, the Seventh Circuit held that baseball players’ performances in a baseball game are sufficiently creative to overcome the originality requirement, even though in most instances they merely react to the movements of the ball and other players.⁹⁰ The *Feist* court held that arranging names in alphabetical order was insufficiently original to garner copyright protection in a phonebook.⁹¹ However, in another case the court held that a phone book that selected business based on their interest to a Chinese community was sufficiently original.⁹² It seems then, that some arrangements of simple exercise steps could satisfy the originality requirement.

2. *Idea/Expression Dichotomy & the Merger Doctrine*

The idea/expression dichotomy, which is similar to the merger doctrine, was first discussed in the nineteenth century case *Baker v. Selden*.⁹³ In that case, the plaintiff, Selden, attempted to enforce a copyright in relation to a book that described a method of bookkeeping and included copies of a number of bookkeeping forms.⁹⁴ Selden attempted to enjoin another from selling a book that included very similar forms.⁹⁵ The court held that “there is a clear distinction between the book, as such, and the art which it is in-

87. See 17 U.S.C. § 102(a) (2012) (explaining criteria for copyrightable material).

88. See 17 U.S.C. § 101 (2012) (stating that work is fixed “if it is in a form that is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).

89. See *Open Source Yoga Unity*, 2005 WL 756558, at *4 (citing *Swirsky v. Carey*, 376 F.3d 841, 851 (9th Cir. 2004)) (trier of fact determines originality of work).

90. See *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 676 (7th Cir. 1986) (finding that “[r]egardless of the creativity of the Players’ performances, the works in which they assert rights are copyrightable works which come within the scope of § 301(a) because of the creative contribution of the individuals responsible for recording the Players’ performances.”).

91. See *generally Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (holding that white pages did not meet constitutional for copyright protection).

92. See *Key Publ’ns, Inc. v. Chinatown Today Pub. Enters.*, 945 F.2d 509 (2d Cir. 1991) (applying *Feist*).

93. See 101 U.S. 99 (1879) (holding that blank account-books are not subject of copyright).

94. See *id.* at 100 (stating that defendant utilized similar method of bookkeeping as system created by plaintiff).

95. See *id.*

tended to illustrate.”⁹⁶ In other words, the book is copyrightable, and an exact duplication of the book would have been copyright infringement, but the *system* described in the book is not copyrightable because it is merely an idea. Ideas cannot be copyrighted. Such a system might be protectable under patent law, but not under copyright.⁹⁷

The Ninth Circuit explains merger like this: “[w]hen the ‘idea’ and its expression are . . . inseparable, copying the ‘expression’ will not be barred, since protecting the ‘expression’ in such circumstances would confer a monopoly of the ‘idea’ upon the copyright owner free of the conditions and limitations imposed by the patent law.”⁹⁸ William Patry explains that if the merger doctrine applies, then the expression cannot possibly be considered original in the first place.⁹⁹

These doctrines present only minor trouble for athletic activities. Any copyright in a yoga or exercise routine would be thin to begin with because of its nature as a compilation.¹⁰⁰ But the idea/expression dichotomy and merger doctrine would really only limit one’s interest in a specific motion or posture. A combination of motions or postures that is sufficiently robust would not be further thinned by these doctrines. That is, the idea of yoga or exercise is moving the body in certain ways to achieve physical, mental, and/or psychological fitness. Because this can theoretically be achieved by any number of combinations of motions and postures, a single routine that expresses this idea is not precluded from copyright protection based on these doctrines.

3. *Functionality Doctrine*

Section 102(b) of the Copyright Act indicates that protection does not “extend to any idea, procedure, process, system, method

96. See *id.* at 102 (elaborating on idea that treatise referencing act does not copyright act itself).

97. See *id.* at 103 (finding that plaintiff “must obtain a patent for the mixture as a new art, manufacture, or composition of matter.”).

98. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

99. See 2 PATRY ON COPYRIGHT § 4:46 (describing history of merger doctrine and its limited applicability).

100. See 17 U.S.C. § 103(b) (2012) (“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.”).

of operation, concept, principle, or discovery.”¹⁰¹ In other words, if a workout routine is considered a method of operation or procedure for achieving fitness, it might not be copyrightable. However, in *Mazer v. Stein*, the Supreme Court held that functional aspects may be severable from non-functional aspects.¹⁰² Further, the Ninth Circuit has held that “[t]he theory that the use of a copyrighted work of art loses its status as a work of art if and when it is put to a functional use has no basis in the wording of the copyright laws.”¹⁰³ This suggests that a routine may be both functional and expressive. In the case of Bikram Yoga, Bikram has described his routine as “the only ‘safe and lasting way to cure, or relieve the symptoms of chronic ailments and achieve total health.’”¹⁰⁴ This description makes his routine seem dangerously like an uncopyrightable “system,” and illustrates the importance of how one describes his or her work when attempting to maneuver the copyright act.

The fact is, though, that in order to develop a strong exercise routine, its creator needs to describe it to the public as a routine using text that will ultimately make it seem more like a process or system than a form of expression. Consequently, this could make it very difficult to receive any copyright protection. This, in conjunction with a court’s adoption of the Office’s updated understanding of a compilation, as described below, will likely preclude any future protection for yoga or other exercise routines.

IV. A NEW UNDERSTANDING OF “COMPILATION”

A. The U.S. Copyright Office Statement of Policy on Registration of Compilations

1. *Redefining “Compilation”*

On June 22, 2012, the Office issued “a statement of policy to clarify its examination practices with respect to claims in ‘compila-

101. 17 U.S.C. § 102(b) (2012).

102. See *Mazer v. Stein*, 347 U.S. 201 (1954) (finding that statuettes, utilized as table lamps, were copyrightable works of art).

103. *Rosenthal v. Stein*, 205 F.2d 633, 635 (9th Cir. 1953).

104. See Michael J. Thomas, *The OSYU v. Bikram Choudhury Copyright Case: Analytical Approaches to Fleshing Out A Paper Tiger*, 10 INTELL. PROP. L. BULL. 31, 44 (2005) (quoting OSYU’s Motion for Partial Summary Judgment on Claim I – Copyright, 2 (17 U.S.C. § 102) at 2, *Open Source Yoga Unity v. Bikram Choudhury*, No. C 03-3182 PJH, 14 (N.D. Cal. Dec. 15, 2004)).

tion authorship.’”¹⁰⁵ The statement indicates that the definition of a compilation, which is found in § 101 of the Copyright Act, when viewed in light of §§ 102 and 103 of the Act suggests that in order to be copyrighted, a compilation must fit within one of the eight categories of copyrightable subject matter listed in § 102.¹⁰⁶ Based on the plain meaning of the text, the Office provides a fairly compelling argument for this new interpretation.

Section 103(a) states that “the subject matter of copyright *as specified by section 102* includes compilations.”¹⁰⁷ “Compilation” is defined in § 101 as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole *constitutes an original work of authorship*.”¹⁰⁸ Finally, § 102 provides a list of categories that can constitute a work of authorship.¹⁰⁹ Consequently, a compilation must arrange information in such a way to fit within one of the categories specified in § 102—“Section 103 makes it clear that compilation authorship is a subset of the section 102(a) categories, not a separate and distinct category.”¹¹⁰

The greatest concern with this deduction is that § 102 introduces the list of eight categories of works of authorship with the word “include.”¹¹¹ This suggests – and the Office’s statement recognizes – that the list is not all-encompassing. But the statement indicates that this problem is solved by considering the legislative history.¹¹² The legislative history, according to the Office, suggests that “[t]he 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.”¹¹³

105. See Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,605 (June 22, 2012) (to be codified at 37 C.F.R. pt. 201) (clarifying practices and policies relating to copyright authorship claims).

106. See *id.* (detailing categories of copyrightable subject matter).

107. 17 U.S.C. § 103(a) (2012) (emphasis added).

108. 17 U.S.C. § 101 (2012) (emphasis added).

109. See 17 U.S.C. § 102 (2012) (including literary works, musical works, dramatic works, etc).

110. Registration of Claims to Copyright, 77 Fed. Reg. at 37,606.

111. See § 102 (outlining list of categories which constitute “a work of authorship”).

112. See Registration of Claims to Copyright, 77 Fed. Reg. at 37,606 (discussing legislative history of Copyright Act).

113. *Id.* at 37,607.

2. *Athletic Activities Under the New Definition*

Next, the Office goes on to explain that a copyright in a compilation of public domain yoga asanas would be invalid under this new understanding, and that those registrations approved in the past were a mistake.¹¹⁴ The argument here is slightly less compelling. The Office points out the obvious fact that one cannot copyright a physical collection of rocks or an arrangement of hand tools.¹¹⁵ Likewise, according to the Office, one cannot copyright an “arrangement of preexisting exercises, such as yoga poses” because “[e]xercise is not a category of authorship in section 102.”¹¹⁶ So, while a compilation of photos or textual descriptions of yoga poses would be copyrightable subject matter, that copyright would not extend to the actual performance of the exercises themselves.¹¹⁷

However, the Office does not touch on the fact that a copyright in a literary work affords its owner with the exclusive right to perform the work publicly. While this does not visibly provide the copyright owner with an exclusive right to “act out” the literary description of yoga poses, e.g., or compilation thereof, there is an argument to be made that it does. As discussed above, one court has ruled that performing a sporting event for which the rules are described in a copyrighted book is not an infringement, but that case did not consider a literal performance of the exact sequence of events described in the literature.¹¹⁸ Case law indicates that a copyright extends from one medium to another. In *Horgan v. MacMillan*, the plaintiff was able to enjoin the defendant from publishing a series of photographs depicting a copyrighted ballet.¹¹⁹ The court reasoned by way of Judge Hand’s “ordinary observer” test that the photographs were substantially similar to the ballet.¹²⁰ Though it

114. *See id.* (“[U]nder the policy stated herein, a claim in a compilation of exercises or the selection and arrangement of yoga poses will be refused registration.”).

115. *See id.* (noting that collection of photographs of rocks are incapable of being registered as compilation of pictorial works).

116. *See id.* (“Exercise is not a category of authorship in section 102 and thus a compilation of exercises would not be copyrightable subject matter.”).

117. *See id.* (noting that per statutory definition of “compilation,” “sufficiently creative selection, coordination or arrangement of public domain yoga poses” would be “copyrightable as a compilation of such poses or exercises” but that statutory definition is not meant to be taken in isolation).

118. *See supra* notes 35-39 and accompanying text.

119. *See Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986) (holding that district court erred in applying wrong test and finding that no recreation was possible instead of determining whether photographs were “substantially similar”).

120. *See Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.1960) (“[T]he ordinary observer, unless he set out to detect the disparities,

may be a stretch to claim that an ordinary observer would consider the aesthetic appeal of a performance of a series of yoga asanas to be substantially similar to a literary description of such, the Office did not adequately address why such an argument might fail.¹²¹

Nonetheless, the Office does address the analogy between an exercise routine and a choreographic work. It reasons that because Congress indicated that “social dance steps and simple routines” do not fall within the category of choreographic works, a compilation of exercise movements would not fit in that category.¹²² However, without a bright-line rule indicating the distinction between a “simple routine” and something more complicated, this argument is not helpful. The Office explains:

[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.¹²³

The Office further provides:

[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 re-

would be disposed to overlook them, and regard their aesthetic appeal as the same.”); *see also Horgan*, 789 F.2d at 162 (stating correct test is that articulated by Judge Learned Hand in *Peter Pan*).

121. *See* Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (proposed June 22, 2012) (to be codified at 37 C.F.R. pt. 201) (supporting that though strongest opposing argument might be that performance of series of yoga asanas is actually “procedure” or “system,” and therefore not subject to copyright according to § 102(b), which is addressed independently, later in Office’s statement).

122. *See id.* (quoting H.R. REP. 94-1476, at 54 (1976)) (“Congress has stated that the subject matter of choreography does not include “social dance steps and simple routines.”).

123. *Id.*

lated series of dance movements and patterns organized into an integrated, coherent, and expressive whole.¹²⁴

But the Office's own definition of dance would certainly include a series of yoga asanas, and U.S. courts have long held that "the requisite amount of creativity for copyright is extremely low."¹²⁵ The Office's circular reasoning often leaves the reader unconvinced.

Finally, the Office discusses the functionality aspect of yoga and exercise routines: "[t]he 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."¹²⁶ The Office states that because these routines are said to improve one's health, they are a "functional system or process," even though they may be aesthetically appealing.¹²⁷

The Office fails, however, to consider the severability of function from aesthetics as discussed in *Mazer v. Stein*.¹²⁸ As any copyright on a choreographic compilation would be thin, the author of such routines would not own exclusive rights in the use of the individual poses to improve one's health; he would merely have a copyright in performing a very specific series of poses (provided the series is sufficiently complicated—a threshold that no one has attempted to define yet). Further, the subject matter of a work of authorship should not hinge solely on claims its author makes. Just because Bikram claimed that his form of yoga is the only "safe and lasting way to cure, or relieve the symptoms of chronic ailments and achieve total health" does not make it so.¹²⁹ An author of a self-help book may claim that reading his book is the only way to en-

124. *Id.*

125. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (holding that names and other such information of utility's subscribers are facts and thus not protected under copyright); *see also supra* notes 76-80 ("Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships").

126. Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (June 22, 2012) (to be codified at 37 C.F.R. pt. 201).

127. *See id.* (stating that functional processes that improve health are not copyrightable).

128. *See* *Mazer v. Stein*, 347 U.S. 218 (1954) (quoting *Stein v. Rosenthal*, D.C., 103 F. Supp. 227, 231 (S.D. Cal. 1952)) ("[A]rtistic articles are protected in 'form but not their mechanical or utilitarian aspects.'").

129. *See supra* note 104 and accompanying text.

lightenment, but such a claim does not make the book a system, per se—the text of the book would still be copyrightable.

The Office's statement seems even less convincing when it comes to exercise routines that resemble dance, such as Alberto Perez's Zumba. Zumba is a form of aerobics that incorporates Latin dance moves.¹³⁰ While Perez has not attempted to copyright Zumba and "does not charge licensing fees" to teach classes, a set Zumba routine would look more like a choreographic work than yoga does, but the Office's argument applies equally because it functions to improve one's health.¹³¹

3. *Beyond Exercise*

The Office's statement about "sports movements" is quite broad. Even assuming the statement is right about yoga and exercise routines, it leaves little room for the copyrightability of routine-based athletic events such as figure skating, competitive cheerleading, or gymnastic floor routines. While these athletic events are sporting events like the basketball game in *NBA*, and they incorporate "sports movements," they should be distinguished from head-to-head competitions and mere exercise routines.

The gymnastics floor routine incorporates music with a number of tumbling movements accompanied by various dance elements that show agility, flexibility, and even personality. Cheerleading, likewise, includes much of the same elements but is generally performed as a team, requiring even more complicated choreography. Finally, figure skating involves a number of athletic movements and dance moves set to music, often incorporating costumes and lighting. But each event also serves a functional purpose in that the choreography is intended to achieve the highest score at a competitive event, and performing the events most certainly improves the health of the performer just as a choreographed exercise routine does.

In *NBA*, the Second Circuit indicated that sports events are not a copyrightable subject matter.¹³² However, that court obviously

130. See *About Zumba Fitness*, ZUMBA FITNESS, <http://www.zumba.com/en-US/about/> (last visited Dec. 1, 2012) (summarizing history and philosophy of Zumba Fitness).

131. See Amber Parcher, *Zumba Shakes the Monotony Out of Ordinary Aerobics Classes*, WASH. POST, July 31, 2008, at GZ05, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/30/AR2008073001580.html> (describing enjoyable differences between Zumba and other forms of aerobics).

132. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997) ("Sports events are not 'authored' in any common sense of the word.").

had a certain kind of sports event in mind: head-to-head competitions like basketball or baseball. No court has addressed the copyrightability of a figure-skating routine. But figure-skating routines that are virtually identical to those used in competition are also used during professional tours that have no competitive element and are merely meant to entertain.¹³³ Surely, a choreographic work of figure-skating at such an event would be subject to copyright protection, so copyright should seemingly also extend to the routine used in competition.¹³⁴ But both are a compilation of “sports movements” under the Office’s statement of policy. It is possible that the incorporation of music and costume would be enough “choreographic authorship” to satisfy the Office’s new statement, but the Office failed to indicate such, leaving the distinction between athletic activity and dance quite vague.

In the current climate of unrestricted promulgation of copyright protection, the Office’s statement limiting the applicability of copyrights is commendable. It may even be sound. But without further argument from the Office, the statement is left wanting in clarity and not entirely convincing.

V. SHOULD EXERCISE BE COPYRIGHTABLE?

As the *OSYU* court indicated “[o]n first impression, it . . . seems inappropriate, and almost unbelievable, that a sequence of yoga positions could be any one person’s intellectual property.”¹³⁵ Also, despite the argument presented above in contrast to the Office’s statement of policy, the inappropriateness of a copyright for yoga and similar exercises still holds true. If the Copyright Office had considered various policy considerations and examined copyright justification theory, it may have presented a stronger case against such copyrights. This Part examines policy considerations that support foreclosing such protections. Then it will analyze various intellectual property theories as applied to yoga and exercise routines to explain why such copyrights are inappropriate notwithstanding their choreographic nature.

133. See Griffith, *supra* note 51, at 678 (discussing idea that exercise routines or competitive routine-based sports, e.g., figure skating, are similar to choreographic works).

134. For more discussion on the copyrightability of routine-based athletics, see Griffith, *supra* note 51; see also William J. Fishkin, *Next on Floor Exercise, Dominique Dawes(c): The Difficulties in Copyrighting Athletic Routines*, 11 SETON HALL J. SPORT L. 331 (2001).

135. *Open Source Yoga Unity v. Choudhury*, No. C 03-3182, 2005 WL 756558, at *2 (N.D. Cal. Apr. 1, 2005).

A. Policy Considerations

1. *Restriction on Fitness*

The primary policy consideration that should discourage allowing copyrights in exercise routines is that it would limit an individual's options to improve his or her own fitness. Issuing a copyright can lead to an over-enforcing of that right, as has been seen with Bikram. Even if Bikram's copyright was valid prior to the Office's recent statement, it was certainly a thin protection and did not afford him all the rights he has claimed.¹³⁶

A copyright gives its owner an exclusive right to perform the work publicly.¹³⁷ Courts have interpreted "public" quite broadly to include private viewing rooms in a public store.¹³⁸ Applied to exercise routines, this understanding of public performance would preclude an individual from performing a copyrighted exercise in a gym. That person may still have the option of performing the exercise in his or her own home, however.

Copyrights also ensure exclusive rights of reproduction.¹³⁹ This reproduction right would likely foreclose the option of recording oneself performing a copyrighted exercise, as the recording would be substantially similar to the original. This makes one wonder about a video camera in a gym where the exercise is being performed (legally or illegally). Arguably, that recording could be an inadvertent copyright infringement on the part of the gym. These imposing restrictions would contradict the public policy of encouraging healthy behavior.

2. *Issues in Broadcasting*

If athletic routines or exercises were copyrightable, then a television channel interested in broadcasting such routines would have more cumbersome licensing issues with which to deal. In *Coleman v. ESPN*,¹⁴⁰ a music publisher sued ESPN for copyright infringe-

136. See Jacob C. Reinbolt, *Press Release of July 30, 2003*, BIKRAM YOGA (July 30, 2003), <http://www.bikramyoga.com/press/press19.htm> (claiming that all similar forms of yoga were infringement of Bikram copyright).

137. See 17 U.S.C. § 106 (2012) (enumerating exclusive rights of copyright owners).

138. See *Columbia Pictures Indust. v. Redd Horne*, 749 F.2d 154 (3d Cir. 1984) (holding that "transmission of a performance to members of the public, even in private settings such as hotel rooms or Maxwell's [store] viewing rooms, constitutes a public performance").

139. See 17 U.S.C. § 106 (2012) (enumerating exclusive rights of copyright owners).

140. See 764 F. Supp. 290 (1991) (discussing music publisher's copyright infringement suit against ESPN).

ment when it broadcast a cheerleading competition that included a routine featuring the publisher's song.¹⁴¹ While the court never determined whether such a use was an infringement, the case hints at the troubles that might be encountered if athletic routines are copyrighted.

If every gymnastics routine at the 2012 Olympics had been copyrighted by its creator, NBC would have been forced to seek licenses to broadcast each one. This requirement would be further complicated by the fact that it is an international competition, featuring gymnasts from numerous countries with numerous different copyright laws. It would obviously create a headache for NBC. Nevertheless, the cumbersome nature of licensing is no excuse for precluding copyright protection. Anyone who has attempted to wade through the restrictions governing copyrights in musical recordings knows this all too well.

3. *Fair Use*

Fair use is a confusing and unpredictable doctrine.¹⁴² Applying the fair use doctrine might solve the above-mentioned issues; but then again, they might not.

The fair use doctrine allows an individual to use copyrighted material in certain situations in a way that would normally be an infringement of the owner's rights.¹⁴³ Those situations include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."¹⁴⁴ However, this list is not exclusive. In determining if a use is fair under this doctrine, one must consider four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

141. *See id.* (concluding that factual issues, disputing whether copyright taking was substantial and if it could hurt market value of copyrighted work, barred summary judgment).

142. *See Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (identifying copyright as "the most troublesome doctrine in the whole law of copyright").

143. *See* 17 U.S.C. § 107 (2012) (listing limitations on exclusive rights).

144. *See id.* (listing factors to consider when deciding whether something is fair use).

(4) the effect of the use upon the potential market for, or value of, the copyrighted work.¹⁴⁵

Unfortunately, these factors have not proven to be terribly useful, as courts apply the doctrine inconsistently.

This doctrine would not be of any use for the issues that would accompany broadcasting if athletic routines were copyrightable. Such broadcasts are commercial, and, generally, show the whole routine. The thin nature of an athletic copyright would weigh in favor of the broadcaster, but the other factors would not. Accordingly, broadcasters would not be able to rely on this doctrine.

It is more likely, however, that fair use would apply to personal exercise. While an instructor teaching a copyrighted routine to a paying class of students would likely not fit into fair use, a student in that class might. The student's use is not commercial in nature, and it is not completely obvious that his or her use of the exercise would have any significant impact on that market of the work. This, in conjunction with the fact that the copyright on an exercise routine is inherently thin, would provide a strong argument for fair use; however, no fair use argument is a sure thing.

To conclude, a number of policy issues point away from affording copyright in athletic routines that are at least partially functional, as well as—though to a lesser degree—routine-oriented sports. However, none of these arguments were considered in the Office's statement on the copyrightability of athletic activity.

B. Copyright Theory

While the intellectual property clause of the U.S. Constitution is generally understood to incorporate an economic utilitarian justification for the near-monopolies it confers to authors, scholars have identified numerous other theories that could justify copyright, some of which are often considered by lawmakers and courts.¹⁴⁶ These theories include labor theory, personality theory, and what is sometimes called distributive justice theory. Each will be briefly considered below.

1. *Utilitarian Theory*

Judge Richard Posner and Professor William Landes state that:

145. *Id.*

146. See U.S. CONST. art. I, § 8, cl. 8 (providing patents and copyrights clause); see generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989) (discussing how copyright law can be explained as “means of promoting efficient allocation of resources.”).

[a] distinguishing characteristic of intellectual property is its “public good” aspect. While the cost of creating a work subject to copyright protection . . . is often high, the cost of reproducing the work, whether by the creator or by those to whom he has made it available, is often low Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.¹⁴⁷

This is the foundational basis of the utilitarian theory of copyright. Put simply, copyright should only be afforded to an author of a work if that work requires some incentive to offset the cost of creating.

So the question is: does the creator of an original exercise routine require protection of that routine as incentive to create it? Probably not. In the case of Bikram Yoga, Bikram created his routine without any expectation of monetary gain. In fact, he initially offered his classes for free.¹⁴⁸ Since the idea of copyrighting a new exercise routine is such a foreign concept, most routines are likely created without even considering copyright. If copyright is part of the incentive, it is in the copyright of the video or the literature that explains the routine. The copyright in an exercise video, which merely controls reproduction and display of *that video*, is probably enough incentive to create a new workout routine. This is evident based on the number of workout videos and exercise fads that come and go with time.

The answer is likely similar, though less convincingly so, for routine-based sports. The incentive to create a figure skating routine is based on the desire to win the competition, and the disincentive to copy is driven by community norms—a figure skater who copies another’s performance would surely be shunned by the figure skating community. However, when those skating routines transition into non-competitive performances, some incentive is needed to create new routines. Non-competitive routine-based sports performances are much more analogous to a dramatic performance or a ballet, which have long been justified for copyrightability under the utilitarian theory.

147. See *id.* at 326 (discussing “public good” aspect of copyright law).

148. See Susman, *supra* note 51, at 245 (explaining how Bikram Choudhury learned and taught yoga in its initial stages).

2. *Labor Theory*

The labor theory of intellectual property is based primarily on the philosophy of John Locke found in *Two Treatises of Government*.¹⁴⁹ Though this theory has largely been disregarded as a justification for basic copyright law in the United States, it is, nonetheless, one of the most prominent theories for general property law, and frequently referenced when considering copyright policy.¹⁵⁰ At its most basic level, this theory suggests that a person deserves a copyright in his or her creation because of the labor he or she put into that creation.¹⁵¹ Under this interpretation, it would seem that the creator of a specific exercise routine should have a copyright in that routine because of the work he or she put into creating it, but the Supreme Court has rejected this as a justification for copyright. Labor theory may apply to patent law, but copyright requires more than just “sweat of the brow.”¹⁵²

Furthermore, a more nuanced interpretation of Locke’s labor theory might suggest that exercise routines should not be protected by intellectual property of any kind.¹⁵³ Professor Shiffrin explains that labor theory requires a determination of whether the property is the kind of thing that warrants ownership,¹⁵⁴ and it is not obvious that a copyright in a workout routine would qualify. Also, Locke’s theory has two provisos that must be met to justify individual ownership of property: (1) one’s property (the fruit of his labor) must be included in the commons for others to improve upon unless removing it would leave “enough and as good” in common for others to use; and (2) property should not be wasted.¹⁵⁵ Applying these provisos to workout routines makes it harder to justify copyright protection. By taking an effective workout routine out of the public domain, it makes it more difficult for the public to improve their fitness. This is a strong argument against copyright protection for exercise routines.

149. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1689) (discussing John Locke’s labor theory of intellectual property).

150. See *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991) (rejecting “sweat of the brow” doctrine of copyright).

151. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 297 (1988) (explaining Locke’s property theory).

152. See *Feist*, 499 U.S. at 354 (discussing differences between burden for copyright law as opposed to patent law).

153. See generally Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138 (Stephen R. Munzer ed., 2001) (discussing Locke’s labor law).

154. See *id.* at 146-47 (discussing one view of labor theory).

155. See Shiffrin, *supra* note 153, at 146-47 (noting Locke’s provisos).

As for routine-based athletics, by taking the functional aspect out of the picture, it seems more logical to provide protection to a routine's creator. Still, the problem that the Supreme Court has rejected this theory for copyright still exists.¹⁵⁶ Therefore, any attempt to justify a copyright law of any kind under the labor theory may prove futile.

3. *Personality Theory*

Personality theory is the basis for copyright in much of Europe, and is based on the philosophy of Georg Wilhelm Friedrich Hegel.¹⁵⁷ Hegel's basic argument was that a person's creations are an extension of their self, and, therefore, that person should have a degree of control over those creations.¹⁵⁸ This may be the strongest justification for copyrighting exercise routines, as it is generally favorable to strong intellectual property rights. The goal of copyright under this theory, however, is not to promote monetary gains. Instead, personality theory values recognition and integrity.¹⁵⁹

If a copyright can only be justified by personality theory, then the economic rights of reproduction, display, and public performance are likely still impossible to justify. Moral rights that ensure that a creator's name accompanies the work and that the work is not attributed to the creator if its integrity is changed are, however, justifiable. Accordingly, it may be reasonable to provide moral rights to the creator of an exercise routine, but these rights would not give him the option to enjoin others from performing his routine. Furthermore, there is no vehicle in U.S. law that allows for moral rights outside of the economic rights of copyright.

The argument for routine-based sports is similar. A gymnast's floor routine is certainly an expression of her personality. As such, it deserves protection under this theory. Furthermore, the fact that such a performance is not so clearly precluded by utilitarian theory strengthens the argument for the copyrightability of routine-based sports.

156. See *Feist*, 499 U.S. at 354 (discussing Supreme Court's rejection of labor theory). The athletic performance may be functional to the athlete, but to everyone else, it serves primarily as entertainment, which is not generally understood to be function as it pertains to 17 U.S.C. § 102(b). See *id.*

157. See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (exploring relationship between property and personhood, and discussing Hegel's personhood perspective).

158. See Hughes, *supra* note 151, at 330-34 (discussing Hegelian justification of property).

159. See *id.* at 349 (recasting Hegel's theory into framework of personality theory).

4. *Distributive Justice Theory*

The distributive justice theory of copyright is not yet well settled. Professor William Fisher explains, however, that this theory aims to use intellectual property rights to promote justice, welfare, cultural progress, and respect.¹⁶⁰

Justifying individual ownership over a means to promote health would be quite difficult under this theory. Despite the fact that functionality and aesthetics are theoretically severable, allowing copyrightability of an exercise routine would potentially foreclose access to that exercise to the poor, and the distributive justice theory aims to use intellectual property to unite classes and encourage health. Instead, a copyright in an exercise routine would likely promote elitism. This is evident where one gym is offering Bikram Yoga classes for twenty-five dollars and a gym across the street merely has “hot yoga” for eight dollars.¹⁶¹ Such a result would be unacceptable under this theory. Furthermore, as with the utilitarian theory, a copyright in video or literature explaining an exercise would likely be a sufficient incentive to create the routine—those who can afford it will purchase the video, and those who do not purchase the video may still have the option of learning about the exercise through other means such as a local community center or library. Accordingly, exercise routines themselves should not be copyrightable.

The analysis for routine-based sports is somewhat more favorable. A copyright in a cheerleading routine would not prevent an individual from using cheerleading to improve his or her health; it would merely prevent other cheerleading teams from using the same routine. This increases the diversity between routines. At the same time, however, a copyright-based incentive to create new routines is likely unnecessary due to the competitive nature of the activity and the community norms. As mentioned above, however, these norms do not apply when the routines move out of the competitive arena and into strict entertainment. This theory would favor a robust selection of routines in each sport, as long as the protections that promote that robustness do not hinder access to the routines as entertainment. This seems to be an entirely realistic possibility.

160. See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 169, 192 (Stephen R. Munzer ed., 2001) (discussing distributive theory of justice as it applies to copyright law).

161. See Meredith Hoffman, *Off the Mat, Into Court: Lawsuit Pits Bikram and Yoga to the People*, *N.Y. TIMES* (Dec. 1, 2011, 7:22 PM), <http://cityroom.blogs.nytimes.com/2011/12/01/off-the-mat-into-court-lawsuit-pits-bikram-and-yoga-to-the-people/> (discussing issues involved in Bikram case).

In sum, of the four most prominent theories used to justify copyright laws, only the personality theory seems to support copyrighting exercise routines. However, that theory is not widely accepted in U.S. law, and is incompatible with its economic rights. Other justifications fail to find room for a copyright in exercise routines. On the other hand, routines in sports like figure skating, gymnastics, and competitive cheerleading seem to fit more comfortably within the confines of each copyright theory, especially as they move out of the competitive arena.

VI. SOLUTION

The Office's statement is not binding. Though courts will give such opinions deference, they may choose to diverge from following if they prefer another argument. The previous parts have demonstrated that some athletic activities, such as figure skating routines, may be deserving of copyright protection, whereas others, such as exercise and yoga routines, are much less deserving. Unfortunately, the Office's statement of policy failed to establish a strong distinction between these two forms of athletic activity in determining that sports movements are not copyrightable.

Karolina Jesian has identified four categories pertaining to copyright into which sports movements may fall: “[1] sports events; [2] scripted sports plays; [3] routine-oriented competitive sports; and [4] routine-oriented non-competitive sports.”¹⁶² Jesian explains that the categories are arranged in order from least-copyrightable to most-copyrightable.¹⁶³ Figure-skating and gymnastics fall into category three, but they may move into category four when removed from the competitive arena. Jesian also puts yoga and exercise routines into category four, but as discussed in Part V, policy considerations and an understanding of copyright theory jurisprudence removes yoga and exercise from category four into a fifth category that likely lies somewhere between category two and category three on the copyrightability spectrum: function-based athletic routines. Rather than simply calling yoga and exercise a functional routine, I use the term “function-based” because it is important to note that functionality is severable from the more copyrightable aspects of a work, yet yoga and exercise is foremost about achieving fitness results. Accordingly, a better spectrum would be this:

162. See Jesian, *supra* note 51, at 635 (discussing four categories of copyright law into which sports can fall).

163. See *id.* (discussing spectrum of copyright categories).

- (1) Sports events;
- (2) Scripted sports plays;
- (3) Function-based athletic routines;
- (4) Routine-oriented competitive sports; and
- (5) Routine-oriented non-competitive performances.

Courts have all but ruled out the possibility of copyrighting categories one and two, and the Copyright Office's new statement of policy would have category three fall on the side of un-copyrightability.¹⁶⁴ Category five would include figure skating and gymnastics pro-tours that are simply designed to entertain a crowd and should certainly be copyrightable as a choreographic authorship "organized into an integrated, coherent, and expressive whole."¹⁶⁵ This leaves category four.

Though copyrighting routine-oriented competitive sports seems unnecessary due to the community norms that encourage progress outside of copyright, copyright is justifiable for this category of work.¹⁶⁶ The routines performed at these events are identical to the routines performed at non-competitive performances. The fact that these routines can move from the competitive sports category into the non-competitive performances strengthens the argument for copyrightability.

VII. CONCLUSION

The Copyright Office's statement of policy regarding a stricter understanding of compilations under 17 U.S.C. §§ 101-103 provides a solid argument to limit copyrightable compilations to those that fall into one of the enumerated categories of copyrightable subject matter in section 102(a). And the Office's instincts about the un-copyrightability of works, such as Bikram's series of 26 yoga asanas, are valid. Unfortunately, in explaining that yoga and exercise routines are uncopyrightable, the Office failed to adequately justify its argument that such routines are not choreographic works. Furthermore, in explaining that sports movements were uncopyrightable, the Office's statement was overly broad as it failed to distinguish between function-based routines like yoga and exercise, and more

164. See generally *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841 (7th Cir. 1997) (leaving only last three categories of copyright spectrum copyrightable); see also *Registration of Claims to Copyright*, 77 Fed. Reg. 37,605 (June 22, 2012) (to be codified at 37 C.F.R. pt. 201) (discussing registration of claims to copyright).

165. See *Registration of Claims to Copyright*, 77 Fed. Reg. at 37,607 (giving examples of sports routines that would fall under category five).

166. For a discussion of why copyright is justifiable for routine-oriented competitive sports, see *supra* notes 135-161.

expressive routines like figure skating, gymnastics floor routines, and competitive cheerleading.

After analyzing copyright through its underlying policies and justifying theories, it is apparent that the Office's decision about the uncopyrightability of exercise and yoga, despite the existence of valid arguments to the contrary, is in fact the best policy. However, one must recognize that the mere fact that a work is athletic in nature, or performed as part of a competitive sports event, does not preclude choreographic categorization, or, therefore, copyrightability.

