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1 **I. INTRODUCTION**

2 This Court has all the information it needs to decide this case on summary judgment. It  
3 has the book, *Bikram's Beginning Yoga Class*, on which Mr. Choudhury has a supplemental  
4 copyright registration that states his claim of authorship in a compilation of exercises. It has  
5 OSYU's pleaded allegations and testimony that at least one of its members teaches the exact  
6 sequence described in the book and that others of its members teach the same twenty-six  
7 public domain asanas in different combinations. It has Mr. Choudhury's public  
8 announcement of his copyright registration, his cease and desist letters, and his misleading  
9 description of the settlement of another lawsuit, each of which contains Mr. Choudhury's  
10 claims that his copyright registrations give him exclusive rights to teach the compilation of  
11 exercises described in his book. OSYU simply seeks judgment that the teaching acts that *Mr.*  
12 *Choudhury claims* infringe his copyrights and subject the teacher to statutory damages cannot  
13 as a matter of law, infringe, because Mr. Choudhury's rights are not as broad as he claims.  
14 The same threats by Mr. Choudhury that gave OSYU standing to bring this suit are those that  
15 define the scope of OSYU's claim that teaching yoga classes cannot infringe copyright in a  
16 compilation, in a book, of public domain exercises.

17 Copyright in compilations often can be registered. But the copyright on a compilation  
18 of public domain elements is razor-thin. And compilations do not escape the basic limit on  
19 the scope of copyright protection, that copyrights protect expression, not ideas. And Mr  
20 Choudhury has not shown that a compilation is the kind of work that can be infringed by  
21 teaching facts or by doing exercises (rather than only by reproducing the text of the book or  
22 distributing a book that is substantially similar to his book). For several years, Mr.  
23 Choudhury's lawyers have compared his work to choreography and music, and with good  
24 reason: these are the rare kinds of copyrightable works that can be infringed by physical acts,  
25 singing, playing instruments and dancing. This is why Mr. Choudhury's lawyers tried hard to  
26 pass his exercise routine off as choreography, a claim the Copyright Office instantly rejected.  
27 Instead, the Copyright Office performed its job -- it told Mr. Choudhury what form to use and  
28 what words to use to record his claim of authorship in a compilation of public domain

1 exercises inseparably embodied in the text of a book, and it registered his claim. Mr.  
2 Choudhury now takes that form and, ignoring what the Copyright Office told him about the  
3 scope of his rights, insists that it gives him patent-like protection for his method, including the  
4 right to stop others from teaching even a small number of postures in the same order that they  
5 appear in his compilation. The Court can properly rule on summary judgment that Mr.  
6 Choudhury’s copyrights do not give him the right to stop others from teaching his exact  
7 sequence, let alone different sequences of the same postures.

## 8 9 **II. ARGUMENT**

### 10 11 **A. This Court Can Decide the Scope and Validity of Defendant’s Copyright Claims on Motion for Summary Judgment.**

12 Courts routinely decide the validity and scope of *registered* copyrights on motion for  
13 summary judgment—considering questions including originality, functionality, and merger.  
14 *See, e.g., Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140 (9th Cir. 2003);  
15 *Entm’t Research Group v. Genesis Creative Group*, 122 F.3d 1211 (9th Cir. 1997); *Bibbero*  
16 *Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104 (9th Cir. 1990); Mr. Choudhury presents no  
17 authority to the contrary. Instead, he tries to paint this as a factually complicated infringement  
18 case, which it is not. *See Opp.* at 1-2. Whether specific individuals have infringed any valid  
19 copyrights Mr. Choudhury may own is not at issue here. But even in traditional cases in  
20 which a plaintiff alleges infringement by a specific party, summary judgment is common.

21 Mr. Choudhury has represented, through his attorney, that “Registration of the asana  
22 sequence [as a supplemental textual work] with the U.S. Copyright Office represents a  
23 significant milestone for Bikram in his efforts to formalize the *intellectual property rights*  
24 *which encompass the Bikram Yoga style and method.*” Opening Br., Harrison Decl., Exh. E at  
25 ¶ 21. Further, he has claimed that not only “identical copying” but also “*virtually all*  
26 *modifications or additions to the sequence will constitute copyright infringement including:*  
27 *the unauthorized use of even a small number of consecutive postures; the addition of different*  
28 *postures or breathing exercises to the sequence or portions of the sequence; the teaching or*

1 offering of the sequence with or without the Dialogue; or by the addition of extra elements to  
2 the sequence like music.” See Opening Br. at 6-7 (emphasis added).

3 It is these expansive claims, made in a public press release (still prominently posted on  
4 his website to this very day) and echoed in individual cease-and-desist letters and other  
5 comments in the press, that gave rise to this declaratory judgment action. This Court has  
6 ample, undisputed facts before it to determine the scope and validity of Mr. Choudhury’s  
7 copyright claims.

8 “Copyrightability is often resolved on summary judgment . . . because ‘very often no  
9 issues of material fact are in dispute and the only task for the court is to analyze the allegedly  
10 copyrightable item in light of applicable copyright law.’” *Sem-Torq, Inc. v. K Mart Corp.*, 936  
11 F.2d 851, 853 (6th Cir. 1991). The following material facts, sufficient for a judgment on the  
12 scope and validity of Mr. Choudhury’s copyright claims, are undisputed:

13 1. Mr. Choudhury has made expansive claims and threats about the scope of his  
14 registered copyrights, in public statements and in individual cease-and-desist letters,  
15 including that they prevent other teachers and practitioners from re-ordering, adding to,  
16 “sampling,” or using in sequence even a few of the 26 postures included in his book  
17 *Bikram’s Beginning Yoga Class*. See OSYU’s Opening Br. at 6.

18 2. Mr. Choudhury has consistently represented, up to the time of this lawsuit, that  
19 the sequence was “scientifically” selected and arranged to provide benefits to physical  
20 health and must be executed “exactly in the order and in the manner described” to  
21 realize its intended health benefits. See OSYU’s Opening Br. at 14-17, quoting  
22 *Bikram’s Beginning Yoga Class*.

23 3. The Copyright Office allowed Mr. Choudhury a supplementary registration  
24 clarifying the nature of his authorship claim in the basic registration in the book  
25 *Bikram’s Beginning Yoga Class*, while reminding him that “the compilation and the  
26 text in which the compilation is fixed . . . are inseparable elements” and that “a  
27 supplemental registration will not stand on its own apart from the basic registration.”  
28 Choudhury Decl., Exh. L at D1291.

4. The Copyright Office expressly informed Mr. Choudhury that “The concept or  
idea for a particular manner or style of exercise is not registrable” and directed him to

1 a Copyright Office circular about the limits of copyright protection. Choudhury Decl.,  
2 Exh. K at D1294.

3 Despite Mr. Choudhury's attempts to introduce immaterial factual disputes and cast  
4 issues of law as questions of fact, on the evidence before it, the Court can properly hold that,  
5 as a matter of law, Mr. Choudhury's copyrights cannot be enforced to prevent others from  
6 teaching or practicing the yoga sequence at issue.

7 **B. Mr. Choudhury's Copyrights in Expressive Matter Do Not Grant a Patent-like**  
8 **Monopoly Over Use of Ideas or Facts.**

9 While OSYU does not dispute the validity of Mr. Choudhury's copyright registrations  
10 *insofar as they protect only the expressive matter in his textual and audiovisual works*, it  
11 absolutely disagrees that these registrations restrict others from practicing or teaching the  
12 sequence or from developing, practicing, and teaching their own routines based on the twenty-  
13 six public domain asanas and breathing exercises.

14 Mr. Choudhury's repeated references to other exercise-related copyrights, such as  
15 copyright on videotapes about Tae Bo and Ananda yoga, Opp. at 7, 14, 20, also are unavailing.  
16 Copyright is registered in many commercial videotapes, because registration gives the creators  
17 additional remedies, such as attorneys fees, should they need to sue someone for literally  
18 duplicating the videotapes or producing counterfeit videotapes. But there is no evidence either  
19 that the owners of copyrights in the Tae Bo or yoga videotapes have made the same, expansive  
20 claims about copyright scope that Mr. Choudhury has, or tried to sue anyone for simply  
21 teaching the Tae Bo routine depicted or other martial arts moves. At any rate, the Copyright  
22 Office's decision to register a claim to authorship is not binding authority on this Court  
23 concerning the validity or scope of such a registration. Mr. Choudhury has cited no case in  
24 which a court enforced a copyright in a compilation of exercise against teachers for teaching  
25 the "compilation," let alone for teaching "derivative works" in the nature of different  
26 combinations of the same exercises.

27 Mr. Choudhury fails to distinguish, or even acknowledge, authority, cited by OSYU,  
28 holding that copyright in textual expression does not prevent the reader from "mak[ing] full  
use of any fact or idea she acquires" in a book, for example, building and selling machines  
Reply in Support of Plaintiff's Motion for  
Partial Summary Judgment on Claim I – Copyright

1 described in it which are not independently protected by patent law. Opening Br. at 8 (citing  
2 17 U.S.C. § 102, *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003), and *Am. Dental Ass’n v. Delta*  
3 *Dental Plans Ass’n*, 126 F.3d 977, 981 (7th Cir. 1997)). He cites only a single case, discussing  
4 design patents, that he claims stands for the proposition that a single item can be protected by  
5 both copyright and patent law. Opp. at 18. While some items have *both* separable functional  
6 or idea elements protected by patent law *and* expressive elements protected by copyright  
7 law—computer software programs are the classic example—it is well-established that  
8 copyright protects only the expressive content. *See, e.g., Sony Comp. Entm’t, Inc. v. Connectix*  
9 *Corp.*, 203 F.3d 596, 599, 605 (9th Cir. 2000) (“Copyrighted software ordinarily contains both  
10 copyrighted and unprotected or functional elements. . . . to obtain a lawful monopoly on the  
11 functional concepts in its software, it must satisfy the more stringent standards of the patent  
12 laws.”).

13 Of course, Mr. Choudhury could have both applied for a patent on his yoga system and  
14 also registered copyright in textual and audiovisual works relating to it. He did only the latter.  
15 Having failed to patent the yoga system, however, he cannot simply leverage his copyrights to  
16 gain patent-like protection to prevent others from using the ideas or systems embodied in his  
17 copyrighted works. *See Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“Unlike a patent, a  
18 copyright gives no exclusive right to the art disclosed; protection is given only to the  
19 expression of the idea—not the idea itself.”)

20 OSYU offered a sample of abstract of issued patents to help illustrate that methods of  
21 physical exercise are properly protected by patents, not copyrights. Mr. Choudhury now  
22 seems to argue that if he could not patent his method, this is evidence that he is entitled to a  
23 copyright on the same subject matter. This is nonsense. First, OSYU does not contend that  
24 Mr. Choudhury’s yoga invention could have been patented. The Patent Office might well  
25 have considered combining public domain asanas with known physical benefits, in order to  
26 produce more physical benefits, to be obvious over 5,000 years of prior art. OSYU’s point is  
27 that a patent is the only way under the United States intellectual property scheme to gain  
28 exclusive rights to use an invention, even an invention relating to exercise. There are many  
works that simply cannot be protected under copyright, trademark or patent, especially works



1 that are merely combinations of public domain elements, like Mr. Choudhury's. A copyright  
2 is not a consolation prize for inventions that do not qualify for patent protection.

3 The Court need not consider whether the Patent Office actually would have issued Mr.  
4 Choudhury a patent on his Yoga system, to conclude that an exercise method is  
5 noncopyrightable subject matter. *See* Opp. at 2, 5, 20. The yoga system could be ineligible  
6 for patent protection, based on the patentability requirements, and its ideas still would not be  
7 protectable under copyright law. *See Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 168  
8 (1989) ("offering patent-like protection for ideas deemed unprotected under the present federal  
9 scheme . . . conflicts with the 'strong federal policy favoring free competition in ideas which  
10 do not merit patent protection.'") (internal citation omitted). Thus, this is not a disputed issue  
11 of fact. *See* Opp. at 2. It is a very simple issue of law.

12 Mr. Choudhury's fallback argument is that the Copyright Office, by granting him a  
13 supplementary registration to the book *Bikram's Beginning Yoga Class*, has somehow given its  
14 imprimatur to his novel theory that the asana sequence is the kind of work that can be  
15 infringed by practicing the ideas in it. His own exhibits show that this is not so. There is no  
16 evidence that the Copyright Office fully examined the registration application for validity, for  
17 example, by assessing its originality. But to the extent that it did consider the subject matter of  
18 this registration, it in fact refused the very same overexpansive claims Mr. Choudhury attempts  
19 to make to the Court. In response to Mr. Choudhury's October 21, 2002 Form PA application  
20 for registration of a "selection, arrangement, and ordering of physical movements," derived  
21 from "Public domain asanas," the Copyright Office informed his attorney, Jacob Reinbolt, that  
22 "The concept or idea for a particular manner or style of exercise is not registrable and the  
23 application should not refer to it either directly or indirectly." Opp., Exh. \_\_\_\_ (D1294). It  
24 also indicated that it was attaching for him a circular on "the limits of copyright protection."  
25 *Id.* That Circular, No. 31, on "Ideas, Methods, or Systems," reads in relevant part:

26 Copyright protection extends to a description, explanation, or  
27 illustration of an idea or system, assuming that the requirements of the  
28 copyright law are met. Copyright in such a case protects the particular  
literary or pictorial expression chosen by the author. However, it gives  
the copyright owner no exclusive rights in the idea, method, or system  
involved.

1           Suppose, for example, that an author writes a book explaining a new  
2           system for food processing. The copyright in the book, which comes into  
3           effect at the moment the work is fixed in a tangible form, will prevent  
4           others from publishing the text and illustrations describing the author's  
5           ideas for machinery, processes, and merchandising methods. But it will  
6           not give the author any rights to prevent others from adopting the ideas  
7           for commercial purposes or from developing or using the machinery,  
8           processes, or methods described in the book.

9           *Id.* (D1298). Senior Examiner James Holloway explained to Mr. Choudhury's attorney that a  
10          supplementary registration form could be used to clarify that "the previous registration's  
11          unlimited claim in text [for the book *Bikram's Beginning Yoga Class*]" included a  
12          "compilation of exercises." Choudhury Decl., Exh. L (emphasis added). The Copyright  
13          Office does not provide legal advice and counsel to applicants. A dispute about what the  
14          Copyright Office may have told Mr. Reinbolt about the scope of his copyright if he filled out  
15          the right form is not a material issue of fact precluding summary judgment. Copyrightability  
16          is an issue of law that this Court can properly decide.

17          An claim of authorship in a compilation of elements is not unusual in registrations for  
18          books, for example, cookbooks. The Copyright Office reminded Mr. Choudhury's attorney,  
19          however, that "*the compilation and the text in which the compilation is fixed . . . are*  
20          *inseparable elements*" and that "a supplemental registration will not stand on its own apart  
21          from the basic registration." *Id.* at D1291 (emphasis added). Despite this, Mr. Choudhury  
22          persists in his sweeping claims, arguing in his Opposition that "Bikram does not rely on his  
23          exclusive rights in the Book and the Dialogue to prevent others from publicly performing the  
24          Sequence; *unlike his rights in the Book and Dialogue, Bikram's rights in the Sequence derive*  
25          *from supplemental registration* [in the Book] No. TX 5-624-003." Opp. at 15, 23. This  
26          apparent attempt to bypass OSYU's merger arguments flies in the face of both the Copyright  
27          Office's express statements to Mr. Choudhury and copyright law, which does not allow a party  
28          to "rely on [a] supplementary registration as a separate basis for [a] lawsuit" or use it to change  
        or supercede the content of the original registration. *Gallup, Inc. v. Kenexa Corp.*, 2004 U.S.  
        Dist. LEXIS 22717 (E.D. Pa. Nov. 8, 2004); 37 C.F.R. § 201.5(b)(2)(iii)(B); 17 U.S.C. §  
        408(d). That supplementary registrations do not provide protection above and beyond that

1 vested in the original registration which they clarify is not, as Mr. Choudhury suggests, a  
2 disputed question of fact, Opp. at 23—it is a well-settled issue of law.

3 The Copyright Office allowed Mr. Choudhury to register his claim to authorship in a in  
4 a book and allowed him to clarify, using a supplementary registration, that his claim to  
5 authorship included a compilation of exercises. No one disputes that books are generally  
6 copyrightable. *See, e.g., Bridgeman Art Library v. Corel Corp.*, 36 F. Supp.2d 191, 200  
7 (S.D.N.Y. 1999) (“No one disputes that most photographs are copyrightable. In consequence,  
8 the issuance of a certificate of registration for a photograph proves nothing. And while the  
9 certificate is prima facie evidence of the validity of the copyright, including the originality of  
10 the work, the presumption is not irrebuttable.”). But this fact simply does not prove that a  
11 supplementary registration in a book gives him a valid legal claim to stop others from  
12 practicing or teaching the exercises depicted in the book or that the Copyright Office promised  
13 him this scope of protection. In fact, the Copyright Office’s correspondence with Mr.  
14 Choudhury, as well as black letter copyright law, compels the opposite conclusion: that  
15 copyright protection in a book protects only against others publishing its expressive content  
16 and not against using its ideas. Therefore, this Court should hold that Mr. Choudhury’s  
17 expressive copyrights are not infringed when others practice or teach the unprotected yoga  
18 system described in them.

19 **C. Refiguring a Functional Arrangement or System as a Compilation of Facts**  
20 **Does Not Make it Copyrightable.**

21 Functional matter, regardless how it is described, or its physical benefits, is not entitled  
22 to copyright protection. Mr. Choudhury insists that because the Bikram Basic Yoga System is  
23 a “compilation” or “selection or ordering” of exercises it is copyright-protected, *see* Opp. at  
24 11. This is false. Virtually all functional matter, including systems, methods, and processes,  
25 can be refigured as a compilation of parts or steps designed to achieve an end. *See* Opening  
26 Br. at 13-14. This does not make it copyrightable. For example, heart surgery may constitute  
27 a physically beneficial arrangement of surgical techniques, but it is not an original work of  
28 authorship copyright law protects. *See 1 Nimmer on Copyright* § 2.09(F). And the author

1 cannot use copyright in an article about his invention to sue surgeons who learn the technique  
2 from his article and then perform the technique on their patients.

3 In fact, compilations driven by “utilitarian, functional or mechanical purposes” are not  
4 protected by copyright law. *Entm’t Research Group v. Genesis Creative Group*, 122 F.3d  
5 1211, 1222 (9th Cir. 1997). A good example is recipes, compilations of ingredients, which  
6 lack sufficient originality to be copyrightable because both selection of the component parts—  
7 different food items—and their arrangement are “dictated by functional considerations.” 1  
8 *Nimmer on Copyright* § 2.18[I] (further explaining even if recipes were copyrightable, *which*  
9 *they are not*, creator could stop only identical copying and not bar others from making culinary  
10 dishes); *see also Pub. Int’l v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996) (“We do not  
11 view the functional listing of ingredients as original within the meaning of the Copyright  
12 Act.”).

13 In *Entertainment Research Group*, the Ninth Circuit affirmed a summary judgment  
14 motion holding certain registered costumes were noncopyrightable. 122 F.3d at 2221 Because  
15 the costumes were derivative of existing pictorial works, much as the Asana System is  
16 compiled from public domain yoga postures, the costume creators claimed copyright on the  
17 basis of their adaptations. *Id.* The Ninth Circuit, however, found that the addition or  
18 arrangement of any features of the costumes, including “form, texture and proportionality,”  
19 “stemmed from functional considerations” or were “necessitated by the fact that a human body  
20 must fit inside” it and thus lacked sufficient originality to merit copyright protection. *Id.* at  
21 1223.

22 Extending this reasoning in *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d  
23 1140 (9th Cir. 2003), the Ninth Circuit held, also on a summary judgment motion, that a  
24 registered copyright in a lamp design that was a “compilation” of four preexisting or public  
25 domain elements was invalid as a matter of law. *Id.* at 1146-47. According to the court, the  
26 compilation of elements was driven by functional not expressive concerns and therefore lacked  
27 requisite originality. *Id.* at 1147.

28 Other circuits similarly have rejected claims to copyright in functional systems that  
were compilations of subsidiary matter. In *Palmer v. Braun*, 287 F.3d 1325, 1327-28 (11th

1 Cir. 2002), a case Mr. Choudhury cites, *Opp.* at 17, the Eleventh Circuit held uncopyrightable  
2 a sequence of exercises and techniques designed to teach students to explore their  
3 consciousness called “The Avatar Course.” The Court opined that while “Braun’s exercises  
4 are virtually identical to Palmer’s exercises,” “Palmer’s exercises, while undoubtedly the  
5 product of much time and effort, are, at bottom, simply a process for achieving increased  
6 consciousness. Such processes, even if original, cannot be protected by copyright.” 287 F.3d  
7 at 1334. Similarly, the Second Circuit, in *Arica Inst. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992),  
8 held others were free to copy, in sequence, a series of nine “ego fixations” that made up “The  
9 Arica system,” used in training programs “aimed at the total development of the human  
10 being,” because the system was noncopyrightable subject matter under § 102(b). *Id.* at 1070,  
11 1075.

12 Finally, in *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 906 (3d Cir. 1975),  
13 the Third Circuit considered the scope of copyright in a chart featuring a series of stick figures  
14 performing “approved methods to develop physical prowess on a weight-lifting machine.”

15 The court found that

16 it is obvious . . . plaintiff’s primary concern was not with defendants’ use of the  
17 stick figures but with the ideas that they conveyed. Thus, its expert on damages  
18 testified to the cost of obtaining the medical and physiological bases for the  
19 various exercises which were illustrated. . . . Underlying Universal’s claim of  
20 infringement was a feeling of resentment that the defendants had utilized  
21 knowledge which had been secured without their own independent research. In  
22 short, it was the protection of the idea that was the foremost consideration of  
23 the plaintiff. But, copyright does not protect ideas—only expressions.

24 *Id.* at 908. Thus, the plaintiff’s competitor, who had created a chart with similar figures  
25 engaged in the same “positions . . . for each exercise,” was not liable for infringement because  
26 the positions themselves were not protected expression. *Id.* at 909.

27 Here, for years Mr. Choudhury has represented the System to the public as  
28 scientifically tested recipe or method for physical health and well-being that must be executed  
“*exactly in the order and in the manner described*” to realize its intended health benefits. *See*  
Opening Br. at 14 (emphasis added). He is estopped from now claiming, for the purposes of  
this lawsuit, that he arranged the postures because he “just liked them together” or for their

1 “aesthetic flow” rather than for functional ends he has professed all along. *See* Opp. at. 13;  
2 Choudhury Decl. at ¶ 8-9; Opp. at. 13; *Arica*, 970 F.2d at 1075 (““having expressly  
3 represented to the world” that “The Arica system” was a scientific discovery, the Institute was  
4 “not now permitted to make an inconsistent claim so as to better serve position in litigation.”).  
5 This is a declaratory judgment action, in which even fact issues are for the Court, not a jury, to  
6 decide. There is no need to hold a trial on the issue of whether Mr. Choudhury arranged the  
7 postures entirely scientifically, as he claims in the copyrighted work, or whether he arranged  
8 them for “aesthetic flow” as he says almost thirty years later, apparently for the first time, in  
9 this lawsuit. The Court can look at the copyrighted book, *Bikram’s Beginning Yoga Class*, and  
10 conclude that the compilation described in it is an exercise method , not an expressive work.  
11 Because the sequence is a functional yoga system barred from copyright protection, this Court  
12 should hold that Mr. Choudhury can not prevent others from teaching or practicing it.

13  
14 **D. Even Valid Compilations of Facts Are Entitled To Only Very Thin Copyright Protection.**

15 Even Mr. Choudhury’s tortured reading of copyright law would not entitle him to the  
16 expansive rights to control others’ yoga teaching and practice that he repeatedly has claimed.  
17 It is axiomatic that copyright in a compilation of facts, or other derivative work, does not give  
18 its author a monopoly over the source matter. 17 U.S.C. § 103(b) (“The copyright in a  
19 compilation or derivative work extends only to the material contributed by the author of such  
20 work, as distinguished from the preexisting material employed in the work, and does not imply  
21 any exclusive right in the preexisting material.”). As a result, copyright in even non-  
22 functional, protected compilations of facts is “thin.” As the Supreme Court explained in *Feist*  
23 *Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991):

24 Notwithstanding a valid copyright, a subsequent compiler  
25 remains free to use the facts contained in another's publication to  
26 aid in preparing a competing work, so long as the competing  
27 work does not feature the same selection and arrangement. . . .  
28 ‘No matter how much original authorship the work displays, the  
facts and ideas it exposes are free for the taking. . . . The very  
same facts and ideas may be divorced from the context imposed  
by the author, and restated or reshuffled by second comers, even  
if the author was the first to discover the facts or to propose the  
ideas.

1 *Id.* at 349. Thus, even were this Court to accept that the sequence were a copyrightable  
2 “compilation of facts” somehow independent from the text in which it is embodied and  
3 registered, Mr. Choudhury would be entitled to protect only against virtually identical copying  
4 of his compilation. *Apple Computer v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994)  
5 (“When the range of protectable . . . expression is narrow, the appropriate standard for illicit  
6 copying is virtual identity.”); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205  
7 (9th Cir. 1989) (“As with factual compilations, copyright infringement of compilations  
8 consisting largely of uncopyrightable elements should not be found in the absence of ‘bodily  
9 appropriation of expression.’”). He cannot prevent “sampling” of the sequence as implied in a  
10 2003 “Facts and Fallacies” handout. *See* Rader Decl., Exh. C. And he cannot, contrary to  
11 what he claimed in his press release, prevent “unauthorized use of even a small number of  
12 consecutive postures; [or] the addition of different postures or breathing exercises to the  
13 sequence or portions of the sequence,” Opening Br. at 6-7, regardless whether other yogis  
14 might have access to alternative public domain source materials. Opp. at 5.

15 Mr. Choudhury now attempts to back-pedal from this untenable position by claiming  
16 that he is not “seeking to prevent others from performing any specific yoga postures . . . or  
17 even a combination of such postures, merely because those postures are referenced in his Book  
18 and Dialogue.” Opp. at 15. But here he directly contradicts his past statements, which gave  
19 rise to this lawsuit for declaratory relief: For example, in a letter directed at stopping OSYU  
20 member Jimmy Barkan from teaching “adaptations” of the sequence at Kripalu Center, dated  
21 February 3, 2003 (which OSYU first introduced when this Court ruled on standing), Mr.  
22 Choudhury wrote:

23 Unauthorized teaching of my yoga series constitutes a violation of my exclusive  
24 performance rights in the Copyrighted Works. The right of performance under  
25 § 106 protects the copyright holder’s right to “recite, render, dance or act” any  
26 literary, choreographic or other audiovisual works. Further, the related  
27 adaptation right is infringed when a third party makes an unauthorized  
28 derivative work in which my pre-existing work is recast, reformed or adopted.  
Teaching my yoga class – or a substantially similar adaptation thereof, without  
my permission infringes upon my exclusive rights. Jimmy Barkin does not have  
my permission to teach my yoga class. Jimmy Barkin would violate each of my  
copyrighted works by performing my works at Kripalu. For Jimmy to lead the  
public through his perversion of my series would constitute an unauthorized

1 performance of Bikram’s Asana Sequence, Bikram’s Yoga Book and the Audio  
2 Tape.

3 \* \* \*

4 The 26 posture Bikram Asana Sequence, as expressed in the Copyrighted  
5 Works, compose the constituent elements of my yoga routine. *Jimmy’s attempts  
6 to modify the routine by adding poses or changing the order of the poses is not  
7 enough: he still copies the constituent elements of Bikram’s Asana Sequence.*

8 Rader Decl., Exh. B. This letter is an egregious misrepresentation of Mr. Choudhury’s legal  
9 rights, misusing copyright to try to obtain a monopoly over a whole style of teaching.

10 OSYU’s member are entitled to a judgment clarifying, for yoga teachers and for institutions  
11 like Kripalu Center, the true scope of Mr. Choudhury’s legal rights.

12 In another cease-and-desist letter, dated December 5, 2002, to the San Francisco Bay  
13 Club, Mr. Choudhury’s attorney again represented that unauthorized “derivative work[s]”  
14 would be actionable:

15 Variations in the sequence of poses, the number of poses, and certain of  
16 the poses themselves will not sufficiently distinguish your routine from  
17 Bikram’s Copyrighted Works so long as it is based on his material. Even  
18 if you were to modify the routine by adding poses or *changing the order*,  
19 you would still be copying the essence of Bikram’s Asana Sequence.

20 Rader Decl., Exh. D (emphasis added).

21 These expansive claims by Mr. Choudhury are significant misrepresentations of the  
22 scope of even a protectable “compilation of facts.” They represent an attempt by Mr.  
23 Choudhury to seize the public domain postures for his own exclusive use and suppress  
24 innovation by other yogis.

25 **E. OSYU Is Entitled To A Declaratory Judgment That the Bikram yoga  
26 Sequence Is Not Choreography And Mr. Choudhury’s Copyright In His Book  
27 Cannot Be Enforced Like A Copyright In Choreography**

28 Despite the fact that his attorneys have publicly compared Mr. Choudhury’s copyright  
claims in the sequence to copyrights in choreography, Mr. Choudhury now contends that he  
“does not purport to claim that his Sequence is a choreographic work or a pantomime, and did  
not register the Sequence as such.” Rader Decl., Exh. E (“Reinbolt compared it [Bikram’s  
copyright claim in the sequence] to copyrighting the choreography of a ballet.”)); Opp. at 21.



1 In fact, Mr. Choudhury did attempt in 2002 to register the sequence (in the Pregnancy Video  
2 and as a performing arts work, claiming it as choreography and, as he concedes, the Copyright  
3 Office informed him the sequence is not a copyrightable work of choreography or pantomime.  
4 Opp. at 21. Nor did the Copyright Office's refusal stop his attorneys from publicly likening  
5 the sequence copyright to choreography as late as last year. Rader Decl., Exh. E (Jennifer  
6 Davies, *Spiritual sensation; Entrepreneurs cash in on yoga's recent stretch of popularity*, *San*  
7 *Diego Union-Tribune*, Feb. 8, 2004, at H-1). Therefore, to alleviate the fear occasioned by Mr.  
8 Choudhury's over-expansive copyright claims, the Court should grant OSYU a judgment that  
9 Mr. Choudhury's copyright in his book is not enforceable to the extent that a registration of  
10 choreography would be enforceable—to prohibit public performances of the physical acts  
11 described.

### 13 III. CONCLUSION

14 For the reasons stated above, OSYU is entitled to summary judgment that Mr.  
15 Choudhury's copyrights do not give him exclusive rights to teach an asana sequence or to  
16 teach other combinations of the public domain asanas that are part of his compilation.

17 Dated: January 12, 2005

Respectfully submitted,

19 /s/

20 \_\_\_\_\_  
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