

Authorship and the Boundaries of Copyright: Ideas, Expressions, and Functions in Yoga, Choreography, and Other Works*

Christopher Buccafusco[Ⓢ]

One man created a series of bodily movements to be performed with musical accompaniment by a group of people. Another man created a different series of bodily movements to be performed with different musical accompaniment also by a group of people. The first man was Vaslav Nijinsky, and the creation was the choreography for the ballet *Le Sacré du Printemps*.¹ The second man was Richard Simmons, and the creation was *Sweatin' to the Oldies*. Is there a difference between these creations for purposes of their copyrightability? If so, where does it lie?² Now consider a third creator, Alice.

After years of study, research, and practice, Alice develops an original and creative series of physical, bodily movements which, when performed, will produce particular thoughts and feelings in the performer's mind. In addition, performing the sequence of movements will reduce the performer's blood pressure and minimize her risk of injury. Finally, Alice intends that some people will see the sequence performed and that they will think that it is graceful and reminiscent of various animals in motion.

To what extent, if any, has Alice created a copyrightable work of authorship when she describes the series of movements in text and images? According to the Ninth Circuit's opinion in *Bikram's Yoga College of India v. Evolution Yoga*, the answer is likely *none*.³ The court ruled that the series of yoga poses developed by the plaintiff, Bikram Choudhury, was "an idea, process, or system," and thus, ineligible for copyright protection.⁴

This Essay uses the Ninth Circuit's opinion as an opportunity to analyze the

* This Essay is based on a talk that was given on October 2, 2015, at the Kernochan Center Annual Symposium at Columbia Law School.

Ⓢ Professor, Benjamin N. Cardozo School of Law. I am grateful to the Kernochan Center at Columbia Law School for hosting the symposium on "Copyright Outside the Box," and to the students of the *Columbia Journal of Law and the Arts* for their assistance. For helpful discussions I thank Penelope Bartlett, Bruce Boyden, Carys Craig, Jane Ginsburg, James Grimmelmann, Pippa Loengard, and Zahr Said.

1. The music for the ballet was composed by Igor Stravinsky, and the work premiered in Paris in 1913. See MODRIS EKSTEINS, RITES OF SPRING: THE GREAT WAR AND THE BIRTH OF THE MODERN AGE 21–39 (1989) (discussing Nijinsky's and his collaborator Diaghilev's development of modern ballet on the eve of World War I).

2. Other than the fact that the first was created in 1913 and is now in the public domain.

3. *Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015).

4. *Id.* at 1040.

nature of copyrightable authorship and the mechanisms that copyright law uses to screen out uncopyrightable content from copyrightable works. I argue that although the court likely reached the right result in *Bikram*, it did so in a confused and poorly supported manner. Moreover, the court's analysis would likely result in a determination that my hypothetical Alice also could not receive copyright protection, even though a proper understanding of copyright doctrine might lead to a different result. I show how courts should deal with situations like these, in which potentially copyrightable expression is combined with unprotectable functional elements. Essential to these questions is an understanding of the nature of copyrightable authorship.⁵

Part I introduces the Ninth Circuit's opinion, and Part II explores a series of confused and confusing features of the court's treatment of ideas, processes, and functionality. Part III introduces a four-step test for analyzing copyrightability in contested cases.

I. THE NINTH CIRCUIT'S OPINION

Choudhury had been studying yoga since childhood, and after decades of research, he developed a sequence of twenty-six postures, or "asanas," and two breathing exercises that he began teaching and publishing in the 1970s.⁶ Practitioners of Choudhury's version of yoga complete the sequence of postures in the same order every time during a ninety-minute routine in a room heated to 105 degrees Fahrenheit.⁷ Importantly, Choudhury claimed that he selected this series of postures because it had proven health and fitness benefits.⁸ He marketed his yoga sequence as a method to "avoid, correct, cure, heal, or at least alleviate the symptoms of almost any illness or injury."⁹ In addition to these physical benefits, Choudhury also made two other claims about his yoga sequence. He asserted that performing the yoga would produce spiritual or psychological benefits, including a "sense of well-being," and he claimed that the arrangement of postures is "particularly beautiful and graceful."¹⁰

In 2011, Choudhury filed a complaint for copyright infringement against a competing studio for performing and teaching his yoga sequence.¹¹ The district court granted the defendant's motion for summary judgment, ruling that Choudhury's yoga sequence is "a collection of facts and ideas" that is not entitled

5. See Christopher Buccafusco, *A Theory of Copyright Authorship*, VA. L. REV. (forthcoming 2016), <http://ssrn.com/abstract=2664891> [<https://perma.cc/VMY3-6S8J>].

6. *Bikram*, 803 F.3d at 1035.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1039–40. See Karolina Jesien, *Don't Sweat It: Copyright Protection for Yoga . . . Are Exercise Routines Next?*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 623 (2007); 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, 30–36 (2004) (describing Choudhury's sequence).

11. Choudhury had sued other yoga teachers in the past. See *Open Source Yoga Unity v. Choudhury*, No. C 03-3182, 2005 WL 756558 (N.D. Cal. Apr. 1, 2005).

to copyright protection, and Choudhury appealed to the Ninth Circuit.¹² Importantly, there was no dispute about whether Choudhury's sequence of postures was sufficiently original and creative to qualify for copyright protection.

Choudhury had registered copyrights in his various books and also in a "compilation of exercises" contained in the books.¹³ But the defendants did not copy his books. To succeed, then, Choudhury needed to argue that the sequence described in the books was itself a protected work of authorship. He argued that the graceful flow of the sequence was the equivalent of a dance or other choreographic work, which was protectable under § 102(a) of the 1976 Copyright Act.¹⁴

According to the Ninth Circuit, however, the yoga sequence, whatever its aesthetic merit, ran afoul of § 102(b), which indicates that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."¹⁵ To the court, the sequence is "at bottom . . . an idea, process, or system designed to improve health."¹⁶ The court explained, "Copyright protects only the expression of this idea—the words and pictures used to describe the Sequence—and not the idea of the Sequence itself. Because the Sequence is an unprotectable idea, it is also ineligible for copyright protection as a 'compilation' or 'choreographic work.'"¹⁷

In deciding that the plaintiff's claim was barred by the so-called idea/expression dichotomy, the court curiously never explains what "this idea" actually is. In addition, although the court regularly refers to the sequence as an "idea, system, or process," it never defines those terms or explains why Choudhury's sequence of movements is a system or process. It seems like the court is most concerned that the sequence of postures is designed in part to cure, heal, or alleviate injuries, and that, if given copyright protection, Choudhury could avoid the more rigorous demands of the patent system, which are usually demanded of contributions to science and medicine.¹⁸

The court rejected Choudhury's claim that spiritual and psychological benefits associated with performing the sequence constitute copyrightable authorship. More importantly, it rejected his arguments about the beauty or gracefulness of the sequence. The court explained:

12. *Bikram*, 803 F.3d at 1036.

13. *Id.* at 1035.

14. 17 U.S.C. § 102(a) (1976) lists the following categories of copyrightable works of authorship: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual work; sound recordings; and architectural works.

15. 17 U.S.C. § 102(b) (1976).

16. *Bikram*, 803 F.3d at 1036.

17. *Id.*

18. *Id.* at 1039–40. In order to obtain a patent, Choudhury would have to prove that his sequence of postures was useful, novel, and non-obvious. 35 U.S.C. §§ 101–103 (1952).

[T]he beauty of the process does not permit one who describes it to gain, through copyright, the monopolistic power to exclude all others from practicing it. This is true even where, as here, the process was conceived with at least some aesthetic considerations in mind [T]he Sequence remains unprotectable as a process *the design of which primarily reflects function, not expression*.¹⁹

According to the court's reasoning, because the sequence was primarily influenced by functional concerns about physical and mental well-being, it is entirely disqualified from copyright protection. Any aspects of the sequence that were motivated by aesthetic concerns are, thus, bound up with the sequence's function and are unprotected.

The court's finding that the yoga sequence "is an idea, process, or system"²⁰ also meant that it could not be considered a copyrightable choreographic work, even though the sequence did correspond to the Copyright Office's definition of a dance as "static and kinetic successions of bodily movement in certain rhythmic and spatial relationships."²¹ Again, the court was adamant that once a work is characterized as an idea, system, or process it cannot be regarded as copyrightable regardless of the features it shares with other copyrightable works.²² Granting copyright protection to the yoga sequence would be equivalent to copyrighting "a method to churn butter or drill for oil."²³

II. UNDERSTANDING AND APPLYING § 102(B)

The Ninth Circuit's application of § 102(b) in *Bikram Yoga College* is curious, confusing, and, ultimately, concerning. Although the court likely reached the correct outcome in this case, its reasoning could produce incorrect and undesirable outcomes in future disputes. This Part analyzes four problematic features of the Ninth Circuit's application of § 102(b).

A. SECTION 102(B) HAS TWO SEPARATE FUNCTIONS

In rejecting the copyrightability of Bikram's yoga sequence, the court repeatedly calls it "an idea, process, or system."²⁴ In so doing, the court appears to be lumping together disparate aspects of § 102(b) into the same analysis. The section precludes copyright for "any idea, procedure, process, system, method of operation, concept, principle, or discovery." Scholars generally recognize this language as performing two separate functions.²⁵ On one hand, the references to "idea . . . concept, [and] principle" serve to distinguish copyrightable creativity from aspects of works that

19. *Bikram*, 803 F.3d at 1040 (emphasis added).

20. *Id.*

21. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (SECOND), § 450.01 (2d ed. 1984).

22. *Bikram*, 803 F.3d at 1044 ("Even if the Sequence could fit within some colloquial definitions of dance or choreography, it remains a process ineligible for copyright protection.").

23. *Id.*

24. *Bikram*, 803 F.3d at 1040–41, 1044.

25. JULIE COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 81 (3d ed. 2010).

must remain in the public domain. Ideas, concepts, and principles are not subject to intellectual property protection of any sort, in part, because they are understood to be essential building blocks of creativity that creators should not be prevented from using. On the other hand, the references to “procedure, process, system, method of operation, . . . or discovery” distinguish the realm of copyrightable subject matter from that of patent law. One who develops a new procedure or invents a new discovery must seek patent protection and comply with its more rigorous demands; copyright protection is unavailable.

By repeatedly referring to the yoga sequence as an idea, process, or system, the court lumps together these different aspects of § 102(b). In so doing, the court undermines the clarity of its holding. Some aspect of a work might fall afoul of the “idea, concept, principle” component of § 102(b), for example, by being too general or insufficiently original to qualify for protection. Or some aspect of a work might fail under the “procedure, process, system” aspect of § 102(b) by being functional rather than expressive. As we will see below, the distinction between these aspects of the section is key, because the rules that apply to them could be quite different. But it is difficult to understand precisely what the Ninth Circuit held. The court refers to the sequence as a “system designed to yield physical benefits” in one sentence—seemingly referring to the second component of § 102(b)—and then, in the very next sentence, it says that protecting the sequence “is precluded by copyright’s idea/expression dichotomy”—seemingly referring to the first component of § 102(b).²⁶ The court never explains how something can be both an idea capable of expression and also a process or system.

B. THE IDEA/EXPRESSION DISTINCTION IS NOT A BINARY

To the extent that the court treats the yoga sequence as an “idea,” it does so in an unusual and confusing fashion. According to the so-called “idea/expression” dichotomy, copyright protection does not extend to generic ideas but only to the particular manner in which the author expresses those ideas. “Ideas” are unprotectable, as noted above, because they are unoriginal and are essential to all creativity. But the idea/expression dichotomy is better understood as a spectrum rather than as a dichotomy.²⁷ As Judge Learned Hand noted, ideas and expressions are different in degree, not in kind.²⁸ As an author builds greater originality and specificity into her work, she moves away from the “idea” end of the spectrum and toward the “expression” end of the spectrum.²⁹ And at some point along that

26. *Id.* at 13.

27. 2 PATRY ON COPYRIGHT § 4:36 (“The idea-expression dichotomy is not a dichotomy or a test; it is not even an analytical tool.”).

28. *See Nichols v. Univ. Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

29. “Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended. . . . Nobody has ever been able to fix that boundary, and nobody ever can.” *Id.*

spectrum, the author reaches a point of sufficient originality and specificity such that copyright law kicks in.

This is not how the Ninth Circuit seems to understand the relationship between ideas and expressions. The court describes the sequence as “an unprotectable idea,”³⁰ but it never identifies the idea or explains why the sequence constitutes an idea rather than an expression. Read in the most charitable light, the court’s opinion seems to suggest that Choudhury had the idea to organize a series of poses in a certain way and that he expressed that idea in his books about the sequence. The books are copyrightable expression, but the sequence that they describe is simply an idea.

But why should this be the case? Why should we think that the sequence is insufficiently original and specific to qualify for copyright protection? Choudhury’s mental conception wasn’t simply that people might move around in various ways. His conception was that people might move around in very specific ways in very specific conditions. This conception is not obviously as generic and unoriginal as the notion of a story about star-crossed lovers or a movie about a down-on-his-luck boxer. Nor is it clear where and when Choudhury’s idea becomes sufficiently particularized to constitute expression. The court does not doubt that the books are copyrightable, but it also does not explain how and why they are. In treating the sequence as “an idea,” the court seems to be treating ideas and expression as qualitatively distinct rather than as endpoints on a spectrum.³¹ Although the court says that it is construing the scope of Choudhury’s copyright rather than determining its validity,³² it seems to be doing precisely the opposite. Time after time, the court explains that the sequence is not protectable “because it is *an idea*.”³³

C. PROCESSES AND SYSTEMS ARE NOT SELF-DEFINING

In addition to referring to the yoga sequence as an idea, the Ninth Circuit also refers to it as a “process or system.” The court’s references to the sequence as a process or system rely on the second distinction made by § 102(b)—that between copyrightable works and patentable inventions. According to this aspect of § 102(b), certain kinds of creativity cannot receive copyright protection because they are the wrong kind of creativity; they are functional rather than expressive and consequently must meet patent law’s higher burdens. The court, however, never defines a system or a process, and it tells us little about how it reached the determination that the sequence was one (or the other, or both).

In this case, the court seems to be on solid ground in its determination that the sequence is a process or system, since Choudhury himself described it as such. The court notes that he referred to the sequence as a “system” or a “method” “designed

30. *Bikram*, 803 F.3d at 1036.

31. 2 PATRY ON COPYRIGHT § 4:36 (“[A]s a result the idea-expression dichotomy’s principal role should be at the infringement, not at the copyrightability stage . . .”).

32. *Bikram*, 803 F.3d at 1038.

33. *Id.* at 1044 (emphasis added).

to ‘systematically work every part of the body’³⁴ But just because Choudhury used the terms “system” and “method” does not mean that he was using them in the way that § 102(b) does. Indeed, other authors have referred to their works as systems or methods, and courts have still found in favor of copyright protection.³⁵

So what makes the sequence a process or system in violation of § 102(b)? The jurisprudence in this area is unclear,³⁶ and the Ninth Circuit did little to change that. The terms “system” and “process” are not self-defining, and they are not defined in the Copyright Act. Systems suggest principles by which something is done or organized schematically, but the Seventh Circuit upheld the copyrightability of a taxonomy of dental procedures.³⁷ A process seems to involve a series of steps to produce a result. But written musical notation can be described as a process by which a person produces a result, and no one would call a sonata an uncopyrightable process. As the Seventh Circuit noted, “few ‘how-to’ works are systems,” otherwise many works, including architectural blueprints, would not receive copyright protection.³⁸

The Ninth Circuit seems to base its decision that the sequence is a system or process in violation of § 102(b) on Choudhury’s assertions that the sequence was designed to improve physical and spiritual health and that these goals are the wrong sorts of goals for a copyrightable work. Choudhury created the sequence “after many years of research and verification . . . using modern medical measurement techniques,” and the text in his books promises that his “system of Hatha Yoga is capable of helping you avoid, correct, cure, heal, or at least alleviate the symptoms of almost any illness or injury.”³⁹ The court refers to these statements as evidence that Choudhury was attempting “to secure copyright protection for a healing art: a system designed to yield physical benefits and a sense of well-being.”⁴⁰ Accordingly, because “the design of [the system] primarily reflects function,”⁴¹ the court determines that it should fall on the patent side of the § 102(b) line.

The court explains that the sequence “sets forth a method to attain identifiable . . . results,” making it a process or system.⁴² As noted above, however, providing a method to attain results does not necessarily make a work an uncopyrightable process. The court should instead consider the kinds of results that the method produces. Here, the court treats the sequence’s purported physical and

34. *Id.* at 1038.

35. *See Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1349 (Fed. Cir. 2014) (finding that although plaintiff’s computer program looks like a “method of operation” and although its developers refer to it as a “method,” it does not fall afoul of § 102(b)); *see also Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1372 (10th Cir. 1997) (“We conclude that although an element of a work may be characterized as a method of operation, that element may nevertheless contain expression that is eligible for copyright protection.”).

36. *Buccafusco*, *supra* note 5.

37. *Am. Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977 (7th Cir. 1997).

38. *Id.* at 980.

39. *Bikram*, 803 F.3d at 1039.

40. *Id.*

41. *Id.* at 1040.

42. *Id.*

mental health benefits as the wrong kind of results. Little is said, though, about why this is the case. Certainly, curing diseases and alleviating physical symptoms seem like they are the province of patentable inventions rather than copyrightable works of authorship, and I suspect that most courts and scholars would agree.⁴³ More controversial, however, is the court's treatment of the sequence's spiritual benefits, including "a general sense of peace" and "a sense of well-being" as inappropriate for copyright law. It is not clear how the sequence's effects on the minds of its practitioners are different from the effects that a musical composition has on the minds of its audience. And again, no one would claim that a symphony falls afoul of § 102(b) because listening to it produces a sense of peace or well-being.

D. SCREENING FUNCTIONALITY IN COPYRIGHT LAW

The final curious feature of the Ninth Circuit's decision is its treatment of Choudhury's claims that the sequence of postures is "particularly beautiful and graceful."⁴⁴ But, according to the court, "beauty is not a basis for copyright protection."⁴⁵ The court accepted Choudhury's contention that aspects of the sequence "were conceived with at least some aesthetic considerations in mind," but it discarded those considerations.⁴⁶ Having decided that the sequence is a process or system, "the design of which *primarily reflects function*, not expression,"⁴⁷ the court treated it as per se uncopyrightable despite its expressive content.

The court's treatment of the sequence's beautiful elements is unclear and could represent one of two different approaches to treating works that include both expressive and functional elements.⁴⁸ One possibility is that the court is applying a threshold based screening mechanism for excluding some works from copyright protection. The court indicates that although the sequence contains aesthetic or expressive elements, because its design "primarily reflects" functional considerations, the work is not entitled to copyright protection. The court seems to have jotted up the number of design elements that were functional and the number that were expressive, and, having found that the functional ones predominate, it declared the sequence uncopyrightable.

This sort of functionality threshold screening is similar to that applied to pictorial, graphic, or sculptural (PGS) works that qualify as "useful articles" because they have an intrinsic utilitarian function.⁴⁹ Such works are only copyrightable to the extent that they have "features that can be identified separately

43. On the relationship between mind and body in IP law, see Christopher Buccafusco, *Making Sense of Intellectual Property*, 97 CORNELL L. REV. 501 (2012) (discussing IP law's differential treatment of the human senses).

44. *Bikram*, 803 F.3d at 1040.

45. *Id.*

46. *Id.*

47. *Id.* (emphasis added).

48. For a more comprehensive treatment of functionality in IP, see Christopher Buccafusco & Mark A. Lemley, *Functionality Screens in Intellectual Property Law* (on file with author).

49. 17 U.S.C. § 101 (2011) (defining "useful article").

from, and are capable of existing independently of, the utilitarian aspects of the article.”⁵⁰ To determine this “separability” issue, courts have formulated a number of different tests, but they each act, effectively, as functionality thresholds. If a work is deemed too functional, either quantitatively or qualitatively, it gets no copyright protection whatsoever.

Threshold based functionality screening of this sort is, however, only supposed to be used for PGS works, and it is not appropriate for either literary works or choreographic works. For example, in the taxonomy case mentioned above, the Seventh Circuit explicitly rejected the district court’s use of threshold based separability test to a literary work, noting that, “the unique limitations on the protection of [PGS works] do not extend to the written word.”⁵¹ For literary and choreographic works, courts should screen out functionality through filtering rather than through thresholds. Filtering style screening involves the removal, when determining copyright scope, of elements of the work that are functional rather than authorial. No matter how functional the work is, the author still receives copyright protection for those elements of the work that represent original authorship. Thus, computer programs, which are overwhelmingly designed in accordance with functional goals, are nonetheless granted copyright protection for those elements of programs that contain authorship. To the extent that Choudhury was claiming a copyright in either a literary or choreographic work, then, the functional elements of the sequence should have been addressed via filtering rather than via a threshold.

The second possible way in which the Ninth Circuit approached the requirement of screening out functional elements of the sequence was through a rule of per se exclusion. Certain kinds of works do not receive copyright protection simply because Congress has not extended it to them. When Congress utilized its constitutional power under Article I, § 8, cl. 8 to grant copyright to seven categories of works in the 1976 Act, it did not exhaust its power.⁵² Some categories of works that are “Writings” of “Authors” nonetheless did not receive protection, including, at the time, architectural works. Culinary dishes, perfumes, and gardens remain outside of the statutory scheme,⁵³ while architectural works received protection starting in 1990.⁵⁴

Choudhury’s sequence plausibly falls within the scope of statutory protection. Choudhury’s books are clearly protected as literary works, and he also claimed that his sequence could qualify as a choreographic work.⁵⁵ As noted above, these are

50. *Id.* (defining “pictorial, graphic, and sculptural works”).

51. *Am. Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977, 980 (7th Cir. 1997). I can find no case in which a court has analyzed a choreographic work to determine whether it had too many functional components to receive copyright protection.

52. H.R. REP. 94-1476, at 51 (1976) (“In using the phrase ‘original works of authorship,’ rather than ‘all the writings of an author’ now in section 4 of the statute, the committee’s purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase.”); see R. Anthony Reese, *Copyrightable Subject Matter in the “Next Great Copyright Act”*, 29 BERKELEY TECH. L.J. 1489 (2014).

53. Buccafusco, *supra* note 5, at 53.

54. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 703 (1990).

55. Choudhury attempted to register the sequence as a work of performing arts, but was rejected

protected categories of authorship. Possibly, then, the Ninth Circuit simply decided that the sequence was a process or system and, thus, determined that it and all of its aspects were automatically excluded from copyright protection. This approach would place an unusual construction on § 102(b). The court seems to read that section to require that a work (and any aspect of it) cannot receive protection if it is a system or process, notwithstanding expressive elements in it. But this is exactly backwards. Properly read, §§ 102(a) and 102(b) indicate that although a work can qualify for protection if it constitutes an original work of authorship that falls within one of the named categories in § 102(a), no aspect of the work qualifies for copyright protection to the extent that it is a system, process, or method of operation. Just because a work has system-like or process-like features does not mean that the authorial, expressive features of the work do not qualify for protection if they are otherwise copyrightable.⁵⁶

As with other aspects of the court's opinion, its approach to functionality screening is confused and confusing. The rules that it applies, to the extent that we can determine what they are, are not the rules that Congress has provided for determining copyrightability.

III. AUTHORSHIP, YOGA, AND CHOREOGRAPHY: A FOUR-STEP GUIDE

Despite all of the criticisms in Part II, the Ninth Circuit probably reached the correct conclusion in the case. Because the decision's grounds are shaky, however, other cases are likely to come out incorrectly. This Part approaches the issue of yoga copyrightability from the perspective of my theory of authorship, and it explains the proper analysis of ideas, expression, and functionality in these and similar cases. Part III suggests a series of analytical steps that courts should undertake when confronted with these issues. While the discussion here is limited to the copyrightability of yoga sequences, it is applicable to all areas of copyrightable authorship.

Step 1: Does the work contain authorship?

Authorship is a constitutional requirement for copyright law, and no creation that does not entail at least some degree of authorship is eligible for copyright protection. In previous work, I have argued that copyrightable authorship is best understood as the intentional creation of mental effects in an audience. The requirement that a work produce mental effects distinguishes the sort of creativity that is amenable to copyright protection from the sort of functional creativity that is only amenable to patent protection. The term "mental effects" substitutes for the more usual "expression," in an attempt to describe the various ways in which works such as paintings, musical compositions, and choreography entail authorship.⁵⁷

by the Copyright Office. 2 PATRY ON COPYRIGHT § 4:22 (2015).

56. That is, if they are original, creative, and fixed.

57. The notion that authors express ideas is excessively rationalist, and it obscures the ways in

Copyright can exist only in the manner by which the author chooses to create mental effects; aspects of the work that are not so intended cannot receive copyright protection.

From the perspective of a yoga sequence, it should be clear that a creator could specify particular arrangements of the body in a given order with the intention that someone either seeing or performing the arrangement would feel and think certain things.⁵⁸ To the extent that she does, those aspects of the work constitute authorship. Relevant mental effects would include contortion of the body to mimic shapes in nature, as well as poses or sequences of poses that produce certain feelings, like peacefulness, well-being, or oneness with humanity or that give rise to a sense of beauty.⁵⁹

Although Choudhury claimed that aspects of his sequence were designed with these concerns in mind, all of the evidence in the case suggests that he was primarily concerned with physical health.⁶⁰ Curing diseases and treating ailments are functional goals; they are not the kinds of results that copyright law promotes. They are not mental, but rather physical, effects. Any aspect of the sequence which was created for these purposes is automatically excluded from the realm of copyrightability. If anything remains—if there are identifiable aspects of the sequence that were intended to create mental effects—then the author is allowed to continue to the second step.

Step 2: Is the authorship original, creative, and fixed?

In order to obtain copyright protection, authors must prove that their works meet other constitutional requirements. Authorship entails the manner or form in which someone arranges elements—in our case, physical movements of the human body—to create mental effects. But that authorship is only entitled to copyright protection if it is (1) original, in the sense that it is independently created; (2) at least minimally creative, by being more than trivially clever or non-obvious; and (3) fixed in a tangible medium of expression.⁶¹

which many works are not about ideas but instead are intended to produce emotions and feelings. Buccafusco, *supra* note 5, at 35–36.

58. It is not important, for purposes of copyrightability, whether the audience or the performer in fact feel and think the things that the author intended. It is sufficient if the author intended them to feel and think. See Buccafusco, *supra* note 5, at 27 (discussing categorical and semantic intentions).

59. See Klas Nevryn, *Empowerment and Using the Body in Modern Postural Yoga*, in *YOGA IN THE MODERN WORLD: CONTEMPORARY PERSPECTIVES* 120, 129 (Mark Singleton & Jean Byrne eds., 2008) (“Yoga practices may also be accompanied by a particular emotional and imaginative poise, performatively enacted and felt by the person involved.”).

60. *Id.* at 125 (noting that improved health is “probably the most frequently voiced reason for attending yoga classes”); Wade Dazey, *Yoga in America: Some Reflections from the Heartland*, in *THEORY AND PRACTICE OF YOGA: ESSAYS IN HONOUR OF GERALD JAMES LARSON* 409, 422–23 (Knut A. Jacobsen, ed. 2005) (“[W]hat has appealed most to pragmatic Americans, of course, is the physical side of yoga practice: the postures, diet, and breathing exercises that promise health benefits, relaxation, and fitness.”).

61. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be

In a case involving a yoga sequence, we would analyze each of the elements of authorship isolated in Step 1 to determine whether they met these criteria. Presumably all of them are fixed, because they have been reproduced in a book or in an audiovisual work. Whether they are original and creative, however, would involve factual analysis of the author's behavior and of the work's relationship to the medium. In Choudhury's case, if any aspects of the work survived the first step, they would be subsequently tested to determine whether they were also original and sufficiently creative.

At this point, we would have fixed the outer boundary of the author's claim to copyright protection.

Step 3: Does the work fall within a protected category of § 102(a)?

As noted above, Congress did not exhaust its constitutional power in extending copyrights to certain categories of works in the 1976 Act.⁶² Thus, in order to obtain protection, authors must demonstrate that their works fall within one of the enumerated categories of protected works in § 102(a). A yoga sequence is not a literary work, even though it can be described in words and symbols.⁶³ It is a work that is about human bodies and their arrangements in space. Only two statutory categories cover bodies and arrangements in space: dramatic works, and pantomimes and choreographic works.⁶⁴ Given the lack of dramatic or narrative elements in most yoga sequences, the strongest claim for the creator of a yoga sequence is the latter.

Determining whether a yoga sequence can qualify as a choreographic work is an exercise in statutory interpretation. Unfortunately, the 1976 Act did not define choreographic works.⁶⁵ We know, however, that in extending copyright protection to choreographic works, Congress did not intend to protect all forms of bodily movement.⁶⁶ According to the Copyright Office, choreographic works must be

sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.") (citations omitted).

62. See *supra* note 52.

63. See NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 15 (1978) (explaining that a computer program is a literary work because it involves "placing symbols in a medium"). The textual or visual depiction of the yoga sequence may serve as a "copy" of the work, but those depictions are not the work that is claimed. 17 U.S.C. § 101 (defining "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

64. 17 U.S.C. § 102(a)(3)-(4).

65. Prior to the 1976 Act, choreographic works were eligible for copyright protection as dramatic works if they "told a story, developed or characterized an emotion, or otherwise conveyed a dramatic concept or idea." *Horgan v. MacMillan Inc.*, 789 F.2d 157, 160 (2d Cir. 1986). On the history of choreographic copyrights, see Melanie Cook, *Moving To a New Beat: Copyright Protection for Choreographic Works*, 24 UCLA L. REV. 1287 (1977).

66. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (THIRD), § 805.1 (3d ed. 2014). "The legislative history for the 1976 Copyright Act clearly states that 'choreographic works' do not include social dance steps and simple routines." H.R. REP. NO. 94-1476,

“comprised of dance steps, dance movements, and/or dance patterns.”⁶⁷ Thus, the composition of a series of bodily movements which otherwise constitutes copyrightable authorship still may not receive protection if it does not amount to “dance.”⁶⁸ According to the Copyright Office, this means that the composition should be “intended to be performed by skilled dancers, typically for the enjoyment of an audience.”⁶⁹

This reference to the “enjoyment of the audience” is interesting. According to the Copyright Office, when determining whether a given work is choreographic within the meaning of the Act, we should focus solely on the work’s effects on the perceiving audience. The responses of the performers, it seems, are statutorily excluded. Aspects of the work that are directed at performers should be filtered out of our analysis of whether a given set of bodily movements constitutes a dance or not. This is yet another example of copyright law privileging the “higher” senses of vision and hearing over the “lower” senses of feeling (or proprioception), taste, and smell.⁷⁰

Returning to Choudhury’s claim, it seems clear that it would have come to naught—but not for the reasons given by the Ninth Circuit. Choudhury may have had some small amount of original and creative authorship in the yoga sequence, but his work is not a choreographic work because it is not a dance.⁷¹ Although the sequence may be more than a series of “functional physical movements,”⁷² it still clearly lacks essential features that would make it a dance, including that it is not intended to be performed for an audience. The transition from “plough pose” to “wheel pose,” in this context at least, is not a dance movement.

Return, however, to the hypothetical creator, Alice, described in the Introduction. Her composition seems to have features that could qualify for copyright protection. The aspects of the composition that were designed to reduce blood pressure and minimize injury would be eliminated in Step 1, because they do not amount to authorship. Assuming that the compositional aspects that were

at 54 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5667; S. REP. NO. 94-473, at 52 (1975)).

67. *Id.*

68. In a sense, the law in this area resembles previous copyright acts that limited protection to works that met certain artistic criteria. For example, under the 1874 revision to the Act, protection for certain pictorial works was limited to those “connected with the fine arts,” and prints and labels were explicitly excluded from protection. Act of June 18, 1874, ch. 301, 18 Stat. 78. Thus, pictorial works that might have met the other criteria for copyright protection were denied it because they fell into particular disapproved categories. Similarly, in the context of choreography, Congress has only extended protection to the creation of physical movements that can be characterized as “dance movements” even though other sequences of movement might meet the minimal requirements for authorship.

69. U.S. COPYRIGHT OFFICE, *supra* note 66, § 805.5(B)(2).

70. See Christopher Buccafusco, *Making Sense of Intellectual Property Law*, 97 CORNELL L. R. 501 (2012). For example, the textual components of a culinary recipe are potentially copyrightable if they meet the originality and creativity criteria, but the taste of the dish is given no consideration.

71. See Carys Craig, *Bodies in Motion: Contemplating Choreography and Copyright Law* 6 (2015) (unpublished manuscript on file with author) (“The challenge remains how to identify when physical movements are merely such, and in what circumstances physical movements are ‘steps’ properly understood to be in the nature of an ‘expressive’ work?”).

72. U.S. COPYRIGHT OFFICE, *supra* note 66, § 805.5(B)(2).

intended to create mental effects in performers and in viewers survive the originality and creativity inquiries of Step 2, we would then consider whether they can qualify as a choreographic work. Based on the Copyright Office's analysis, the compositional aspects that are directed at performers would not constitute dancing, but those that were intended to cause viewers of the composition to think that it is graceful and reminiscent of animals in motion could plausibly constitute a dance. If so, Alice would have clearly satisfied the first of two statutory hurdles and could progress to the final step.

Step 4: Apply the appropriate functionality screen.

In certain cases, a work that otherwise qualifies for copyright protection will not receive it because a statutorily imposed functionality screen eliminates it. As explained above, the only screen that acts in this fashion is the threshold based screen that is applied to PGS works that constitute useful articles.⁷³ Thus, even though a PGS work contains protectable copyrightable authorship, it will receive no protection at all if it fails the separability inquiry.

For choreographic works, however, the threshold screen does not apply. To the extent that choreographic works contain functional elements, those elements are simply filtered out. But by this point in the inquiry, all of that filtering has already taken place. Step 1 filtered out functional elements from the work in construing the claim to authorship. Then, in Step 3, the requirement that only "dance" movements count for choreographic works further eliminated some works from protection if they did not contain the right kind of body movement authorship. Thus, if Alice's composition meets the statutory requirements for choreographic works, no additional functionality screen is necessary.

CONCLUSION

All works of authorship also include numerous uncopyrightable features. Sometimes those features are unprotectable because they do not represent the right kind of creativity (i.e. copyrightable authorship versus patentable inventorship). In other cases, features are not protectable because they are not original or are insufficiently creative. And some features of otherwise protectable works do not receive copyright protection because Congress has not chosen to extend it to them. These rules govern inquiries about eligibility for copyright protection and about the scope of that protection.

Like many other courts, the Ninth Circuit ran aground trying to apply concepts like "ideas," "process," and "system" without understanding how they fit within the larger copyright scheme. Moreover, the court reified these concepts, treating them as known, stable, and self-defining. Not all instructions for bringing about results are uncopyrightable processes. Only by understanding the goals and outcomes associated with the instructions can we distinguish between the copyrightable

73. See *supra* notes 49–51.

instructions to engage in a dance from the uncopyrightable instructions about how to invest in the stock market. The Ninth Circuit's approach skips this analysis and, in so doing, risks reaching the wrong conclusion.