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PERSPECTIVE

## Bending law to control yoga

By Beatrice Martinet

Although there is no doubt that yoga has deep roots in India — a country where the practice is believed to have seen the light for over 5,000 years — the recent news that Indian Prime Minister Narendra Modi is trying to take over this hugely popular discipline through some kind of geographical indication came as a surprise to many.

This effort to strengthen India's control over what it considers its "traditional knowledge" is not isolated. With the recent creation of a "minister of yoga" — in charge of promoting and protecting the practice of yoga — and of a Traditional Knowledge Digital Library — documenting 1,500 traditional yoga poses to prevent the misappropriation of yoga by commercial enterprises — India has communicated to the world it is ready to go to the mat over yoga.

This is not the first time India has battled over the misappropriation of its traditional knowledge. Two decades ago, India succeeded in challenging a patent applied for by the University of Mississippi Medical Center on the healing properties of turmeric, after it demonstrated this spice had been used for its curative properties in India for as long as anyone could remember.

If the curative properties of turmeric are in the public domain, shouldn't the discipline of yoga, which has been practiced for thousands of year all around the globe, be in the public domain too?

This may sound like a rhetorical question. And yet, in recent years, yoga has been the subject of multiple attempted takeovers, not only through copyright protection, but also through trademark protection. Will this last attempt to take yoga over through geographical indication mark the end of the free practice of yoga?

**Freeze! You're infringing my copyright!**

Shortly after yoga became mainstream in the U.S., notably after its first appearance in U.S. television in 1961, the idea that yoga could become a huge moneymaker started germinating in the head of an Indian businessman and yoga teacher, recently emigrated in the U.S., named Bikram Choudhury. As many successful gurus before him, Bikram published books about his specific prac-

tice of yoga as early as 1979. However, his "big idea" — seeking copyright protection over the very "practice" of yoga — through a compilation of 26 well-known yoga positions (known as "asanas") and two breathing exercises he named "Bikram Yoga" — did not come until the beginning of the new millennium.

With such copyrights in hand, Bikram wrote cease and desist letters to various yoga studios across the countries — often ex-students or friends of his — asking them to pay substantial "indemnities" or "comfortable licensing fees" to be able to continue teaching his specific sequence of well-known yoga poses.

In 2005, a federal court reluctantly dismissed a summary judgment that challenged the validity of his copyright, noting that although "it seems inappropriate and almost unbelievable that a sequence of yoga positions could be any one person's intellectual property," there was nothing in the law preventing a person from claiming property over a compilation of known elements as soon as the compilation itself had the requisite level of creativity. *Open Source Yoga Unity v. Bikram Choudhury*, 03-3182 (N.D. Cal., April 1, 2005).

This was, however, a short-term victory for Bikram. Six years later, in a Dec. 9, 2011, letter to the organization "Yoga To The People," the U.S. Copyright Office stated that it was reversing its earlier position that the selection and ordering of yoga sequence could be copyrighted, taking the position that "exercises, including yoga exercises, did not constitute the subject matter Congress intended to protect as choreography."

Although this decision could not retroactively apply to the copyright granted to Bikram, a federal court has since then refused to grant protection to Bikram's copyrighted sequence, partly based on the revised position of the copyright office. *Bikram's Yoga College of India v. Evolution Yoga LLC and Mark Drost*, 11-5506 (C.D. Cal., Dec. 14, 2012).

Farewell copyright protection... Could trademark offer India some ammunition in its legal battle for yoga?

**Be quiet! You're infringing my trademark!**

To be validly registered under the Lanham Act, a trademark must, among others, avoid to create any confusion with a prior mark and be distinctive, i.e.,

not generic or commonly descriptive. A generic or common descriptive term does not refer to a specific type of product or service, but instead refers to the product or service itself. In determining whether a term is generic, courts often rely on the "who are you/what are you test":

If the name of the mark answers the question, "Who are you?" it is often considered valid, as this means it will work as an indicator of origin, i.e., refer to a particular source of the product or service. If, on the other hand, the mark answers the question, "What are you?" it is most likely a generic mark, as it refers to all goods and services of that kind regardless of their origin. As such, the term won't enjoy trademark protection.

And yet, a quick glance at the U.S. Patent and Trademark Office database shows there are over 1,800 trademarks including "YOGA" in their names. How can one trademark "YOGA" when this is a generic word that is commonly understood as a spiritual practice, a fitness activity or even a metaphysical quest, regardless of its potential origin? The answer is simple: Yoga is a generic word that cannot be trademarked by anybody.

However, if you add a distinctive word to this generic term, e.g., a surname or an invented name, nothing will prevent you from obtaining a trademark on this expression "as a whole." This means that while Bikram Yoga is a valid mark (with no exclusive right being claimed on "yoga" itself), yoga, Hindu yoga, and even "Vedic yoga" are not valid trademarks as these expressions are all considered generic words designating a specific type of yoga.

Exit trademark protection... What about geographical indication?

**Taking yoga back to India: a geographical indication?**

While geographical indications (GIs) are essentially protected in the U.S. through subcategories of trademark law — namely, certification marks and collective marks, they also enjoy, since the adoption of the Trade-Related Aspects of Intellectual Property (TRIPS) treaty in 1994, an international standalone protection.

Article 22(1) of the TRIPS agreement defines GIs as "indications, which identify a good as originating in the territory of a member, or a region or locality

in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin."

To enjoy protection as a GI, a product must not only originate from a specific location, but also draw its quality from specific characteristics attributable to this specific location. Champagne, Roquefort, Chablis, Idaho potatoes, Parmigiano Reggiano, Prosciutto di Parma and Darjeeling are all protected GIs because the products originating from these locations were deemed to have specific qualities based on their geographical origin.

Would such a protection be available for yoga — or at least something such as Indian or Himalayan yoga? Regardless of the controversial questions of whether yoga originates from India or of whether a GI would even be available for services (rather than goods) — two highly controversial questions — the main issue with such protection is that it would be difficult for the Indian government to show there is anything unique — or even consistent — about the practice of yoga in modern India.

First, in the last 20 years, the practice of yoga has known a huge popularity — including among Bollywood stars in India — opening the door to multiple interpretations of yoga. Second, it would be difficult for the Indian government to show that despite several decades of practice of this discipline all over the globe, yoga has a geographical connotation in the mind of the relevant public. A geographical indication on yoga — or even Indian yoga — seems highly unlikely.

Thus no matter how upset the Indian government may be about new trends, such as nude yoga, rave yoga, kickboxing yoga, or even dog yoga — whose philosophy is probably difficult to reconcile with the millennia-old teaching from the monks of the Himalayas — it will probably have to live with it for a little while.

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