

020/046

**Community Trade Mark Registration
No 1224831 OSHO In Classes 41 & 42
In the name of Osho International
Foundation ("OIF") and
Application for invalidity No 5063
thereto by Osho Lotus Commune e.V.
("Applicant")**

Second Supplemental Witness Statement

I, Philip Toelkes, also known as Prem Niren, hereby declare that:

1. All the statements made herein are true and from my personal knowledge and recollection. Where I have made statements from another source, I have identified that source and believe the facts to be true. I am competent to make this witness statement. My address is 90 Baywood Village Rd. #51, Sequim, Washington, USA 93882.
2. Scope of statement. This statement responds to questions raised by Lotus in its brief of January 4, 2013, and mischaracterizations of the documents of rights transfer and US copyright, contract and intellectual property. It will not restate the facts set forth in my earlier statements.
3. Qualifications. My first statement set forth generally my background and relevant experience. That material will not be repeated here. My qualifications to address the *legal effect of the documents of rights transfers from Osho, as well as the subsequent transfer documents, under US contract and copyright law* are set forth below in para. 5.
4. Introduction and Summary. *Toelkes' statements factual. Lotus' intemperate characterizations of OIF's statements, including my own, wherein the use of such adjectives moved me to carefully review my earlier statements. I find nothing in the way of unsupported ad hominem attacks, as is unfortunately the case in the Lotus' brief. I find factual statements and some legal characterizations, to which Lotus has not offered controverting evidence, offering instead factually unsupported characterizations.*
5. Toelkes' credentials re legal effect of documents of rights transfer. Lotus is correct in asserting that I have presented no bona fides as an expert in trademark registrations. I had no such experience or credentials in the early 1980s, at the time of the creation of the documents of rights transfers about which I opined, and I have little more now. But I had then a good deal of experience in drafting, working with, and litigating the kinds of documents in question: contracts, powers of attorney, assignments and licenses. In fact, it was the majority of my work in my legal practice.
6. Until mid 1981, I was a partner at Manatt Phelps in Los Angeles, then the fastest growing law firm in the United States, now one of the most respected firms in California and the United States. <http://www.manatt.com/AboutUs.aspx> I was a litigation partner with emphasis on financial institutions and entertainment companies, and prosecuted litigation in a wide range of areas, but primarily concerning contracts, real estate, and intellectual property, including copyright and trademark infringement and misappropriation of name and likeness, the first and last of which bear directly on my experience and competence in the areas in question as discussed below. I litigated several copyright infringement cases in federal district court, including the *Lear* case,

discussed below. As to trademark, I litigated one trademark infringement case in federal district court in Los Angeles. I was a research assistant for two years to Professor J. Thomas McCarthy on the first edition of his trademark treatise, *McCarthy on Trademarks and Unfair Competition* (published by Thomson-Reuters-West) researching a variety of issues relating to US trademark law. (A link describing Prof. McCarthy and his work is <http://www.mofo.com/J-McCarthy/>.) I litigated appropriation of name and likeness cases for several years on behalf of an actor named Shaun Cassidy and a singer named Linda Ronstadt against Universal Studios and the Mars candy company, respectively, as well as several other such cases. After leaving Manatt Phelps, I served as Osho's personal attorney and as the attorney for Rajneesh Foundation International for a number of years as is described in my initial statement in this proceeding.

7. Limited relevance of documents of rights transfer. Those qualifications are relevant here only in light of Lotus' legal characterizations and conclusions concerning the document of rights transfer: 1) the 1982 Assignment and Amendment to Power of Attorney ("Assignment/Amendment") (Exhibit PT2 to my initial statement. A copy is made Exhibit 1 hereto for ready reference.), and; 2) the 1983 Assignment from the agent under the Assignment/Amendment to Rajneesh Foundation International ("RFI") (Exhibit PT3 to my initial statement. A copy is made Exhibit 2 hereto for ready reference.) While the US law of trademark has no relevance to the decision before this body, the documents of rights transfer, addressed at length at pp. 12-18 of the current Lotus brief, are of some, albeit limited, relevance to the issues to be decided in this proceeding. They are relevant to Osho's intent, efforts at the time to give effect to that intent in the legal documents created at the time, and the rights transferred thereunder. While I would not presume to brief the law on EU trademark, I am well qualified to address the controlling US law of contracts and copyright as it relates the documents in question, in contrast to Lotus' apparent and understandable lack of experience with or understanding of the US law of contracts and copyright. In any event, in my experience, we do not expect courts or administrative bodies to take our word for the state of the law. Because of this courts unfamiliarity with the body of US copyright and contract law, I will briefly set out the relevant authority.
8. Legal effect and authentication of documents of rights transfer. Lotus questions both our earlier legal discussion of the 1982 Assignment/Amendment and the 1983 Assignment as well as the authentication thereof. (See pp. 12-18 of Lotus brief of 4 January 2013.) I analyze the issues concerning the intent and validity of the documents under controlling US authority in the paragraphs immediately following. Lotus' questions re authentication are puzzling in light of the lack of a formal authentication requirement in this proceeding, as that has been reported to me, and Lotus' total failure to offer evidence authenticating any document offered by it, precious few as actual supporting documents are. On review of my earlier statement, I note that I did provide authentication though not that required by a court of law in the U.S., because of the lack of formal evidentiary requirements in this proceeding. More complete authentication is provided in the paragraphs below where the documents are specifically discussed. I trust this will satisfy Lotus' legal devotion to OIF authentication, though Lotus' commitment to authentication does not extend to the documents upon which it relies.
9. Lotus brief on legal effect of rights transfer documents. The Applicant's core legal analysis/criticism of the documents of transfer may be found at pages 11 and 12 of their brief, as follows: "The 'legal documents establishing Osho's intent to exclusively grant the exclusive use of his name as a trademark to entities which give effect to Osho's

intention' ...do not exist." "The alleged assignment of 'all copyrights, trade names, trademarks and any other property' by Osho in 1982 ...is irrelevant as it does not contain any assignment of IP rights. The 'assignment' language in this document relates to the purported 'transfer' of powers of attorney and is merely part of the alleged amendment to an earlier power of attorney. Intellectual property rights are mentioned only in the grant of powers. In addition, this document could concern only rights which already existed in 1982.... It is amazing that a person who alleges to have practiced as an attorney for over 40 years does not know a Power of Attorney from an Assignment and does not know that one cannot assign a right that does not exist...."

10. In sum, Lotus states that there is no valid assignment, that there was no grant of IP rights, that no rights to future work can be validly transferred, and that I am an incompetent liar to say so. We will review the facts and law to assess the correctness of Lotus' statements.
11. Primary relevance here is intent, not legal effect. While I will show that the US law is conclusive in establishing the legal effectiveness of the documents in question, please recall that the primary purpose in offering the documents was to show Osho's intention and that of the assignees with respect to the right to disseminate Osho's words and meditations and to use Osho's name in commerce in that work. I will present the law to be applied to the analysis, and then consider the documents in light of the applicable law. But first I will address Osho's intent and that of the agent/assignee and subsequent rights owners.
12. Osho's intent was to grant exclusive control over the use of his name to OIF's predecessors in interest. The 1982 Assignment/Amendment states specifically that it grants a power of attorney and is also an assignment of all the property addressed therein: "I execute this document to more completely state my intention to maintain my separation from worldly activities and **divestiture of all worldly possessions. My grant of power and authority to Ma Anand Sheela includes not only the power to act for me, but also the transfer and assignment of all such power and authority...**" The document further states that the grant of authority and assignment specifically includes: "11. ...my name, likeness, writings, copyrights, trademarks, trademarks, and any other property...to which I am now legally entitled or shall become entitled in the future as if such things were her own...."
13. Osho was aware of the transfer of rights to OIF and the work OIF done by OIF related thereto and never acted to withdraw or modify his clear and total disposition of those rights. In my legal work for OIF from 1986 to Osho's death in 1990, I was personally present and participated in conversations with Osho wherein it was clearly communicated and understood that the work which had been performed in the United States was now being performed by OIF, initially under its earlier name. Osho understood that leaving the United States in November of 1985 resulted in such changes, and he approved same. While Osho was involved in detailed discussion of the legal reasons for the structural changes, or the details of the corporate structures, he did understand that the structures were created and used to implement and control the dissemination of his work and the related use of his name and likeness.
14. Intent of subsequent assignor similarly clear. The 1983 Assignment by the agent appointed under the Assignment/Amendment is clear. It refers to the 1981 power of attorney and the 1982 Assignment/Amendment as the source of authority. It also refers

to the assignment of rights to the agent. It then states: "I hereby grant, transfer and assign to Rajneesh Foundation International (OIF's predecessor in interest) absolutely any and all right, title and interest of any description which is or may remain vested as of this date in Bhagwan Shree Rajneesh, or which may be or become vested in the future with respect to His name, likeness, utterances, writings, copyrights, trademarks and/or tradenames..." The grant is broad and unqualified and applies to present and future works.

15. In drafting the documents of transfer, the broadest possible transfer possible was requested by Osho and given effect in the documents so drafted. In drafting the documents, we were following Osho's stated instructions, which were stated by Osho in my presence, to draft the broadest and most complete transfer of present and future rights that was possible. That is what we did, and the 1982 Assignment/Amendment reflects that effort to comply with the stated wishes of the client, Osho. In including "trademark" as well as "name and likeness" in the documents, we were drafting as broadly as possible, even though Osho personally was not using his name as a trademark. He was, however, giving permission to use his name as a trademark, by giving permission to use his name and likeness to the foundation which does all trading of his assigned IP Rights and work. (See legal discussion below in paragraphs 16 through 23.)
16. A US federal court accepted the 1983 Assignment as valid and admissible evidence, and, in reliance thereon, granted Rajneesh Foundation International, OIF's predecessor in interest, a partial summary judgment ruling that Rajneesh Foundation International was the owner of all the registered copyrights. The case, *Lear v. Rajneesh Foundation International*, was earlier discussed in my initial statement. The court stated as a basis for its decision: "Rajneesh (Foundation International) is the assignee of a properly recorded instrument giving it all rights, title, and interest in and to the copyrighted works of the Bhagwan." The court was referring to Exhibit 2 hereto, PT3 to initial statement, which was submitted as evidence by me in the case. (The partial summary judgment was entered prior to the partial summary judgment offered as Exhibit PT4 to my initial statement in this proceeding. A true copy of the partial summary judgment of October 1, 1984, is made Exhibit 3 hereto. It was obtained from the US federal court archive. I can also personally authenticate the document as having been received by me by mail as attorney for Rajneesh Foundation International in the case shortly after the date thereof and reviewed by me at that time.) **Thus it is established that the parties considered the documents to be valid and binding, as did a U.S. federal court.**
17. US law to be applied to interpretation of rights transfer documents. The 1982 Assignment/Amendment was executed by a resident of Oregon, U.S. granting power and transferring ownership to a resident of Oregon, U.S. as stated in the document. The 1983 Assignment was made by an Oregon resident to a US corporation then based in Oregon. Both documents were prepared by attorneys in Oregon to address and comply with Oregon and US law. Under choice of law principles, US law must be applied to determine the legal effectiveness of the documents.
18. Facts and law require application of US law. The contacts and underlying interests discussed support the application of US law in evaluating the documents discussed. In contrast, Applicant has no contacts with or interest in the documents, nor does this body have any policy interest in applying the law of the EU to documents created in the US by

US residents. C.f. *International Contracts, Aspect of Jurisdiction, Arbitration and Private International Law*, multiple contributors, London Sweet & Maxwell 1996.

19. Certainly an Oregon court would apply Oregon law. "The contract was made in Oregon, and must be construed and enforced according to our laws." *Washington Nat. Bldg. Loan & Inv. Ass'n v. Stanley*, 38 Or. 319, 341, 63 P. 489 (1901)
20. Under US copyright law and Oregon contract law, future works are assignable. The law of copyright in the US is clear that under both copyright and contract law, rights to future works may be assigned. *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290-93 (11th Cir. 2011) is an appellate copyright case addressing the assignability of future copyrights under both US law and the law of India, which is relevant here because the only other country with significant contact to Osho personally is India. In *Saregama*, the Court stated: "We assume without deciding that Indian law governs the assignment issue, since Indian copyright law of assignment is strikingly similar to U.S. copyright law. We would reach the same result under either Indian or American law. Under the ICA (Indian Copyright Act of 1957), the assignment of copyright ownership is described in these terms: **"The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof: Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence."**
21. US and Oregon case authority support the broad right to assign. As noted by the court in *Saregama*, US copyright law is to the same effect as India law. The relevant US statute requires an assignment of copyright to be in "writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 U.S.C.A. 204 (a). As to the language of assignment, no particular form of assignment is required, and an assignment of copyright will be given effect where the intention is clear, especially where the terms "assignment" and "copyright" are used. *Radio Television Espanola S. A. v. New World Entertainment Ltd.* (9th Cir. 1990) 183 F.3d 922, 926-927. Oregon case authority is consistent with federal law. As stated in *Levins v. Stark*, 57 Or. 189, 191, 110 P. 980, 981 (1910): "Any declaration, either in writing or by word of mouth, that a transfer is intended, will be effectual, providing it amounts to an appropriation to the assignee. In equity the rule is that anything showing an intention to assign on the one side, and from which an assent to receive may be inferred on the other, will operate as an assignment if sustained by a sufficient consideration. The form of words used in making the agreement is not alone to receive attention, but all the circumstances of the transaction are to be considered."
22. The 1982 Assignment/Amendment is effective to support subsequent 1983 Assignment. Under Oregon law, a power of attorney creates an agency and the acts of the agent will be enforced when within the scope of authority granted in the power. **A power of attorney creates a form of agency, and is interpreted according to the law of agency and of contract.** *Scott v. Hall* (1945) 163 P.2d 517. While powers of attorney are strictly construed, **"the intention of the donor of the power is the great principle that governs."** *Capps v. Mine Serv.* (1944) 175 Or Reports 248, 252-3; *Ying Loi Ho v. Presbyterian Church* (1992) 116 Or App 115. The broad and clear language of the power of attorney and amendment fully support the subsequent assignment.


23. The 1982 Assignment/Amendment is also effective as an assignment under the authority set forth. The document uses the words "assignment" and "copyright" as well as "name and likeness" and "trademark" and uses broad language of transfer. It is therefore effective to transfer by assignment any and all rights described.
24. Osho's Last Will & Testament negates Lotus' contentions re invalidity of documents of transfer. Though Lotus' claims against the validity of the documents of transfer are shown to be against the applicable law and without foundation, the vulnerability of any of the documents of transfer would not defeat Osho's clearly stated intention to transfer any and all property interests to the persons and entities he entrusted with his work. Osho left a Last Will & Testament, which was created to address the possibility that any of the earlier transfers would not be effective to divest him of all property interests, as had been his stated intention.
25. A true copy of Osho's Last Will & Testament, ("Osho's Will") executed on October 15, 1989, shortly before his death, a copy of which is provided herewith as Exhibit 4, clearly stated again his intention to transfer any and all property rights or interests he had to OIF. His will devises "all right, title and interest on any nature in any and all property including but not limited to all ownership, publishing or related rights, to all my work...in any form..." The breadth of the bequest is clearly sufficient to transfer any and all rights to use of his name and likeness, as well as all of his work.
26. Authentication of Will. I drafted the Will, and witnessed Osho's execution thereof, in the presence of the signing witnesses, as can be seen on the face of the document. The copy provided is a true and correct copy of the Will, and the signatures thereon were made by the persons so identified and were made on the date indicated on the document. Osho asked questions about the legal effect of the document prior to his execution thereof, and was unquestionably mentally alert and in full possession of his faculties at the time of execution.
27. Lotus' statement, quoted above, is thus shown to be incorrect legally and incomprehensible as argument. The 1982 Assignment/Amendment granted authority and assigned rights to present and future copyrights, name and likeness, trademarks and all other property rights. The 1983 assignment further assigned said rights as authorized. The language of the documents is clear and the law fully supports the actions taken.
28. While Osho did not use his name as a trademark, he was acting to protect and control that use by others in executing the 1982 Assignment/Amendment including the assignment and authority to use of his name and likeness. And, as stated earlier, Osho was clear with OIF about how he wanted the name used and presented, which as trademark owner, they did. The attorneys included the right in amendment/assignment in light of US law on the subject. Lotus repeats again and again that Osho never used his name as a trademark. True, but not probative to show he did not transfer the right to use his name as a trademark in the Assignment/Amendment.
29. Appropriation of name and likeness is a statutory and common law tort in the US, akin to trademark. Under that body of law, permission must be obtained to use the name of a person in connection with the sale of a product or service. "Personality rights are generally considered to consist of two types of rights: the right of publicity, or to keep one's image and likeness from being commercially exploited without permission

or contractual compensation, which is similar to the use of a trademark; and the right to privacy, or the right to be left alone and not have one's personality represented publicly without permission. In common law jurisdictions, publicity rights fall into the realm of the tort of passing off. United States jurisprudence has substantially extended this right." Wikipedia article on publicity rights.

https://en.wikipedia.org/wiki/Personality_rights. Many states have passed statutes to prevent such appropriation. Cal.Civ.Code § 3344 provides that: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof." "A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. (See Prosser, *Law of Torts* (4th ed. 1971) § 117, pp. 804-807; Witkin, *Cal. Procedure* (2d ed. 1971) Pleading, § 606, p. 2244.)" *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342, 347 (Ct. App. 1983)

30. Lotus categorically states: "...there was never a trademark "Rajneesh", and no trademark "OSHO" before 1999." Lotus brief, p. 11. This statement is categorically false – shown for example by existing TM registrations of 'Rajneesh' already in 1978 in Germany (Exhibit No. 133). I stated in my initial statement: "The names OSHO and RAJNEESH were always understood to be trademarks during the period of my representation, and were consistently so used in the ongoing publication and dissemination of Osho's works during the time of my representation." That was and is my understanding. And my understanding, then and now, is that in the US a trademark may be established by use even without registration. While the earlier US proceeding is irrelevant to the determination of this body, it is relevant that an unregistered trademark could exist in the US. The names were used to identify the source of Osho's work and were clearly a brand for products and services. It is an uncomfortable admission that my understanding of US law in this respect may have delayed the registrations in the EU and around the world.

The statements made herein are from my personal knowledge and I know all of the statements to be true:


Philip Toelkes

Date: June 4, 2013