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Pelaton Suit Shows Sync Licensing Is Next Copyright Horizon

By Sekou Campbell

Who doesn't enjoy music while working out? Often, people stay fit by relying on a good pair of headphones and their own purchased music to get through a grueling workout. Most gyms in America pump the latest tunes into their facilities and workout classes to keep their patrons happy using performance rights organizations' blanket licenses.

Peloton Interactive Inc.'s innovative stationary bikes synchronize recorded music with an instructor-led workout streamed through an app or on those bikes' screens. However, Peloton, and others like it, face a significant challenge with their musical offerings: a synchronization licensing gap.

Synchronization rights refer to the right to create a derivative work by combining (synchronizing) an existing copyrighted song with an audiovisual image like a television show, commercial, film or, in this case, a workout video. In contrast to other licenses, like public performance (the right to play recorded music in public) or mechanical (the right to reproduce music in audio-only format), sync rights to each individual song must be individually negotiated. While obtaining such rights is generally burdensome, television, film and commercial producers have enough lead time to curate and obtain sync licenses to the necessary songs for their works.

Peloton, on the other hand, sometimes only has a matter of hours. Unlike live workout classes that can use public performance blanket licenses issued by performance rights organizations like the American Society of Composers, Authors and Publishers, Broadcast Music Inc. and SESAC Inc. to gain access to their entire catalog as soon as a song is released, classes streamed on Peloton's bikes cannot solely rely on those licenses for its offerings.

Other companies interested in how sync licenses affect their bottom line would include Mirror home gym maker Curiouser Products Inc., fitness app Aaptiv Inc. and any other interactive home entertainment company interested in pushing out the latest music with its video content as quickly as possible.

Peloton, like prior innovators, [1] faces challenges in the complex world of music licensing precisely because of its innovation. Most recently, it did so in response to a copyright infringement suit brought by members of the National Music Publishers Association by counterclaiming antitrust and related business tort claims against the publisher plaintiffs in Downtown Music Publishing LLC v. Peloton Interactive Inc [2]

U.S. District Judge Denise Cote of the U.S. District Court for the Southern District of New York granted the publisher plaintiffs' motion to dismiss those claims, holding that Peloton could find reasonable market substitutes for the works at issue and thus did not suffer from the anti-competitive effects of the challenged restraint. In short, while copyright, so held the court, vests solely in original works of authorship, such originality does not prohibit Peloton from substituting one piece of music with another.

The Southern District of New York's dismissal relied heavily on Peloton's definition of the relevant product market affected by the alleged anti-competitive conduct. Peloton argued Sekou Campbellthat because music has nonfungible qualities, music publishers can demand supracompetitive pricing for their particular songs, relying on a similar rationale in Meredith Corp. v. SESAC LLC.[3]

In that case, television stations challenged a performance rights organization's public performance license, not sync license, pricing on previously recorded syndicated shows. The Southern District of New York court rejected Peloton's argument, holding that television stations could not change the music in the shows it acquired due to "entrenched industry practice," while Peloton could and, in fact, did make individualized music selections. [4]

Given the novelty of Peloton's business, no entrenched industry practice yet exists, but if courts refuse to make analogies to existing industries, new businesses like Peloton's will need to navigate the intentionally monopolistic pressures of licensing copyrighted materials when risks like the sync licensing gap arise.

Peloton teaches some ways to deal with the sync licensing gap by curating and licensing music through supervisors, as entrenched industries do, as well as coordinating with artists to develop and commission uses of existing and new works respectively.

Music supervisors are used by many content-heavy companies like film and television production companies, video game companies and advertising agencies. They generally have established relationships in the industry and experience with both curation and negotiation of necessary licenses.

The time and expense of this approach imposes a significant cost to companies like Peloton, which relies on having the latest music to appeal to its customers. Peloton can leverage its wide user base to negotiate with popular artists and musicians to come up with unique offerings, but this, too, requires a significant investment from companies who may not feature music as prominently in their offerings as Peloton.

Some alternatives to Peloton's solutions include: (1) leveraging technology to comply with copyright law; (2) developing a capital reserve for unlicensed works; and (3) lobbying Congress for a statutory licensing scheme or collective rights administrator.

From Sony Corp. of America v. Universal City Studio Inc. [5] through Authors Guild Inc. v. HathiTrust, [6] courts have long found certain technologies capable of fair use, not infringement. Solutions could range from the technology used to sync the audio to the audiovisual work, on the one hand, to the production of the music itself, [7] on the other.

For instance, Peloton could publish playlists with its existing audio-only streaming partners and allow users, if technologically feasible, to self-sync their playlists with the workout videos. The devil, here, is in the details, and the company would remain exposed to the risk that any fair use analysis does not match the court's due to the novelty of the technology.

Capital reserves for litigation and related transaction costs involved in the use of unlicensed works can help a company prepare for the claims like those Peloton faces. However, the statutory damages for copyright infringement are so high and the number of works so variant that the amount of reserves necessary may be untenably high.

The longest, hardest but likely best solution is to lobby Congress for statutory reform. Laws like the Music Modernization Act, the Digital Millennium Copyright Act and the Fairness in Music Licensing Act address many gaps in music licensing, but they do not substantially address flaws in the synchronization license market, as highlighted in Downtown Music. Namely, no available blanket or compulsory licensing scheme exists for sync licenses, and such schemes likely would not work given the variation in the uses of sync licenses.

So, while benefits redound to services like Apple Inc.'s Apple Music largely from the Music Modernization Act, which establishes a nonprofit collective to administer mechanical licensure; [8] to YouTube Inc. from the DMCA, which establishes a safe harbor for the website when adhering to a take down regime for user-generated works that do not own a sync license in music; and to a significant number of small retail establishments, bars and restaurants under the Fairness in Music Licensing Act, which expands an exemption to liability for the public performance right,[9] Peloton and others like it do not enjoy such advantages.

A clearinghouse for synchronization rights combined with technological advances in steganography, cryptography and blockchain could help fill the sync licensing gap in the existing statutory and licensing framework. For instance, Congress could set up, without mandating, a clearinghouse like the Mechanical Licensing Collective (from the Music Modernization Act), which now administers compulsory mechanical licenses.

While sync licensing is not now compulsory under the U.S. Copyright Act, those new technologies could be deployed to track music synchronized with audiovisual works and create either a streamlined rate negotiation via, for example, blockchain, as opposed to rate setting for mechanicals, between the user and owner of the music. The law could

mandate that if the parties cannot agree to terms after a set safe harbor period, the owners of the relevant work(s) remove the music at issue.

Such a scheme could encourage music rights owners to participate in the clearinghouse, giving them the power to take down or obtain fair prices for their works, without compelling them to issue a license. It would also encourage users to participate by allowing them to lessen the administrative burden of rights clearances for all the music in their works. This, of course, would take years of wrangling and negotiation with Congress as well as a lot of details on exactly how the clearinghouse would work. Thus, such a solution does not address any short-term concerns about the purported anti-competitive effects of sync licensing.

In any event, it seems clear that the next horizon for music and music licensing is the sync license, and all affected parties should continue to develop ways to accommodate broader licensing of music in audiovisual works.

Sekou Campbell is a partner at Culhane Meadows PLLC in the firm's Philadelphia office. An innovative transactional lawyer focused on utilizing the law as a tool for improving rather than stymying business operations and methods for intellectual creatives: artists, entrepreneurs, and growth-oriented businesses.

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[1] "From its beginning, the law of copyright has developed in response to significant changes in technology." Sony Corp. of Am. v. Universal City Studios, Inc. , 464 U.S. 417, 430, 104 S. Ct. 774, 782 (1984) (governing the use of home video recording equipment) (citing White-Smith Music Publishing Co. v. Apollo Co. , 209 U.S. 1 (1908) (playerpianos); Fortnightly Corp. v.United Artists Television, Inc. , 392 U.S. 390 (1968) and Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974) (together retransmission of television programs); Williams & Wilkins Co. v.United States , 203 Ct. Cl. 74, 487 F.2d 1345 (Ct. Cl. 1973), aff'd by an equally divided Court, 420

U.S. 376 (1975) (photocopying)); see also Ferrick v. Spotify USA, Inc. , No. 16-cv-8412 (AJN) (S.D.N.Y.).

[2] Downtown Music Publ'g LLC v. Peloton Interactive, Inc., No. 19-cv-2426 (DLC), 2020 U.S. Dist. LEXIS 15650 (SDNY Jan. 29, 2020).

[3] Meredith Corp. v. SESAC, LLC, No. 09-cv-9177 (NRB), 2011 WL 856266, at *9 (S.D.N.Y. 2011)

[4] Downtown Music Publ'g, 2020 U.S. Dist. LEXIS 15650, at *17.

[5] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[6] Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

[7] See, e.g., DJ Girl Talk, who somehow evaded copyright litigation despite using hundreds of samples in his work.

[8] Spotify, however, is not yet fully in the clear, as it faces one post-MMA lawsuit from Eight Mile Style (controlling rapper Eminem's catalog) Eight Mile Style, LLC, et al. v. Spotify USA, Inc., No. 19-cv-00736 (AAT) (M.D. Tenn.).

[9] Graeme B. Dinwoodie, The Development and Incorporation of International Norms in the Formation of Copyright Law, 62 Ohio St. L.J. 733, 752 (2001).