DON'T STOP THE MUSIC: MUSIC LICENSING AND ANTITRUST POLICY IN THE FITNESS STREAMING INDUSTRY

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The music licensing legal landscape is complicated and fragmented. Music users like movie producers, bar owners, and radio broadcasters must navigate a tangled web in order to avoid liability when using copyrighted music. Due to the complexities of the system, the distribution of the most common type of music license, the public performance license, has been subject to the supervision of the federal government since the 1940s when the Department of Justice became concerned about anticompetitive behavior in the industry. The DOJ imposed consent decrees on the primary distributors of public performance licenses which purportedly limit the distributors' ability to impose burdensome terms on licensees. These agreements remain in place today and have streamlined the process of obtaining that type of license. Meanwhile, the framework for obtaining other types of licenses remains convoluted. In 2019, Peloton Interactive was sued by a group of music publishers responsible for distributing a type of license known as a sync license. The publishers alleged that Peloton was using thousands of popular songs in its workout videos without obtaining the proper sync licensing. In response, Peloton argued that the current framework for obtaining sync licenses was ill-suited to its needs and asserted antitrust counterclaims against the publishers. The parties ultimately settled, but the lawsuit highlighted how the current method of distributing sync licenses is unworkable for many of the modern world's music users. This Note argues that the DOJ should consider taking action to supervise the distribution of sync licenses, in the same way it currently supervises the distribution of public performance licenses.

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I. INTRODUCTION

Music licensing is at work behind the scenes of our lives every day.[1] It has important implications not only for songwriters, performers, and record companies but also for movie producers, bar owners, and radio broadcasters.[2] Whenever a copyrighted song is played, there is a range of license varieties that may be necessary depending on the context.[3] For example, when we hear a song play in the background of a TV show, a certain set of licenses have been acquired to make that possible.[4] When we play a song from an app on our phones, a different set was required.[5] And when we stream a workout video on a fitness platform like Peloton, Mirror, or Tonal, yet another combination of licenses may be in play.

Today's music licensing legal landscape is complicated, fragmented, and outdated.[6] In order to comply with the law and avoid liability, music users must navigate a maze of various regulations, agencies, and organizations.[7] The steps required to obtain one type of music license might be very different from the steps required for another; each process involves various players with their own practices and policies.[8] A single song may have several parties who played a role in writing, producing, and distributing it, and therefore each of those parties may have an ownership stake in the song.[9] This creates a complicated web of artists, writers, and agents, all of whom may be entitled to payment when a copyrighted song is used.[10] For music users operating on a large scale, obtaining the proper licensing is no simple task.[11]

1. Buck McKinney, *Creating the Soundtrack of Our Lives: A Practical Overview of Music Licensing*, 48 TEX. J. BUS. L. 1, 3 (2020).
2. *Id.*
3. *Id.*
4. *Id.* at 7.
5. *See id.* at 6, 8.
6. Stasha Loeza, *Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes*, 31 BERKELEY TECH. L.J. 725, 725 (2016) ("Since the early twentieth century, Congress has dealt with music industry developments by enacting piecemeal reforms. Consequently, music licensing takes place in a disjointed system created primarily before the Internet Age.").
7. *Id.*
8. *Id.*
9. *Id.* at 726–27.
10. *See id.*
11. *See id.*

Due to the complexities of the music licensing distribution system, certain corners of it are subject to government oversight.[12] The distribution of the most common type of music license, the public performance license, has been subject to the supervision of the federal government since the 1940s.[13] At that time, the Department of Justice became concerned about potentially anticompetitive behavior in the music licensing industry and entered agreements with the primary distributors of public performance licenses.[14] Under those agreements, the distributors agreed to operate under a set of terms that purportedly limit their ability to impose burdensome terms on licensees.[15] Those decrees have been amended over the years, but they remain in place today.[16]

Meanwhile, the framework for distributing other types of licenses remains convoluted and difficult to navigate.[17] Legislative updates in the field have been few and far between.[18] For example, while digital streaming services like Apple Music have been on the rise since the early 2000s,[19] only recently has music copyright legislation been updated to streamline the licensing process for those services.[20] Still, even this updated legislation does not address the unique challenges faced by an even newer player on the scene: the booming fitness streaming industry.[21] Companies like Peloton are using music in new and innovative ways, but that innovation can lead to trouble thanks to a music licensing legal landscape that is unworkable for their needs.[22] In 2019, Peloton was sued by a group of music publishers responsible for distributing a type of license called a synchronization license, also known as a sync license.[23] The publishers alleged that Peloton was using thousands of popular songs in its workout videos without obtaining the proper sync licensing.[24] In response, Peloton argued that the current

12. *See* Gabriella A. Conte, Note, *"Waiting on the (Music) World to Change": Licensing in the Digital Age of Music*, 83 BROOK. L. REV. 323, 323, 326 (2017).

13. *See id*. at 325–27.

14. Brontë Lawson Turk, Note, *"It's Been a Hard Day's Night" for Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493, 508–09 (2016).

15. *Id.* at 509.

16. *See id*. at 509–11.

17. *See, e.g.*, Helen Durkin, *Why All Gyms Need to Follow the Peloton Music Copyright Case*, IHRSA (May 15, 2020), https://www.ihrsa.org/improve-your-club/why-all-gyms-need-to-follow-the-peloton-music-copyright-case/# [https://perma.cc/7KN4-9B7S] (describing how difficult it can be for music users to secure synchronization rights for their projects).

18. *See* Sekou Campbell, *Peloton Suit Shows Sync Licensing Is Next Copyright Horizon*, LAW360 (Feb. 19, 2020, 1:35 PM), https://www.law360.com/articles/1244986/peloton-suit-shows-sync-licensing-is-next-copyright-horizon [https://perma.cc/493N-NBRK].

19. Conte, *supra* note 12, at 347.

20. *See* Campbell, *supra* note 18.

21. *Id*.

22. *See id*.

23. *See* Complaint at 2, Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754 (S.D.N.Y. Jan. 29, 2020) (No. 1:19-cv-02426), 2019 WL 1274921 [hereinafter Complaint].

24. *Id*. at 2.

framework for obtaining sync licenses was ill-suited to its needs.[25] It alleged that it had tried to obtain the proper licensing for the songs it used but fell short due to an unworkable system and bad-faith practices of the players in that system.[26] The parties ultimately settled, but the lawsuit highlighted how the current method of distributing synchronization licenses is problematic and how that process is not working for many of the modern world's music users.[27]

While the long-term solution to Peloton's licensing problem may lie in new legislation, recent history indicates that the law cannot keep up with the ever-evolving music industry in the short term.[28] Fitness streaming industry players need solutions now in order to keep innovating when it comes to music.[29] This Note argues that the Justice Department should consider taking action to supervise the distribution of synchronization licenses, in the same way it currently supervises the distribution of public performance licenses. Part II will provide background information, including an explanation of the intersection between music licensing and antitrust policy and an introduction to Peloton's services. Part III will analyze the copyright infringement lawsuit that was brought against Peloton in 2019, including the antitrust counterclaim the company filed in response and the practical effect of the court's ruling on that claim. It will explain how previous courts have ruled on antitrust questions in the music industry context and analyze how federal oversight of the distribution of public performance licenses has affected those decisions. Part IV will assess various solutions Peloton could pursue, ultimately providing a recommendation that the Justice Department should consider extending its oversight of music licensing to include the distribution of sync licenses in an effort to make the system more workable for companies like Peloton.

25. Answer to Complaint and Counterclaims Against Nat'l Music Publishers Ass'n, Inc. and Plaintiff Publishers at 16–17, 23–24, Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754 (S.D.N.Y. April 30, 2019) (No. 1:19-cv-02426) [hereinafter Answer].

26. *Id.*

27. *See* Bill Donahue, *Peloton Ends Copyright War With Music Publishers*, LAW360 (Feb. 27, 2020, 10:55 AM), https://www.law360.com/articles/1248063/peloton-ends-copyright-war-with-music-publishers [https://perma.cc/UUU2-6WFK].

28. *See id.*; *see also* Donald E. Biederman, *Entertainment Law: Playing Catch-Up with New Technologies*, 25 L.A. LAW 40, 40 (2002) ("The most significant development in the last 25 years in entertainment law is the fact that the law continually lagged behind technological advances and business realities. The classic example of this trend occurred in the record and music industries.").

29. Campbell, *supra* note 18.

II. BACKGROUND

A. Introduction to Music Licensing

The Copyright Act of 1976 sets forth the basic structure of copyright law.[30] Section 106 of the Act provides six exclusive rights to the owner of a copyright, including the right to reproduce the work, distribute copies of it, and perform it.[31] There are several types of music licenses flowing from these six rights, each of which serves different purposes and may be appropriate in different contexts.[32] By reproducing or distributing a musical work without the proper licensing in place, a user opens herself to legal liability.[33] It is therefore important for all music users, large and small, to understand the range of music licenses in existence, the contexts in which they become necessary, and the ways in which they intersect.

In determining which licenses may be required for a given project, the first distinction to understand is that there are two separate copyrights involved in a piece of recorded music.[34] The first is for the "musical composition," commonly thought of as the "song."[35] It is made up of both written lyrics and accompanying music and is likely owned by a combination of writers, performers, and other parties.[36] If, for example, a user wants to record a cover of an existing song, she must obtain a license from the owner or administrator of the musical composition.[37] The second copyright is for the "sound recording," often referred to as the "master."[38] If a user wants to use the original recorded version of a song in a movie or show, she must obtain a license not only from the owners of the musical composition but also from the owners or administrators of the sound recording.[39]

The licenses required for a given project will depend on whether the licensee needs the musical composition or the sound recording, as well as how those copyrights are being used.[40] For example, a mechanical license may be required if a project involves any physical reproduction and distribution of an artist's

30. 17 U.S.C. § 106. The Copyright Act provides that copyright owners have the rights to do or authorize the following with respect to musical works: "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of . . . musical . . . works . . . , to perform the copyrighted work publicly; (5) in the case of . . . musical . . . works . . . , to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." *Id.*

31. *Id.*

32. *Types of Music Licenses*, MUSICBED, https://www.musicbed.com/knowledge-base/types-of-music-licenses/28 (last visited Apr. 9, 2023) [https://perma.cc/PBP4-V6B3].

33. *Id.*

34. McKinney, *supra* note 1, at 3.

35. *Id.*

36. James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, 80 N.Y. ST. BAR J. 23, 23 (2008).

37. McKinney, *supra* note 1, at 3.

38. *Id.*

39. *Id.*

40. *Types of Music Licenses*, *supra* note 32.

work, including the production of CDs, the offering of permanent digital downloads, or interactive streaming.[41] Alternatively, a print rights license may be required to print or reproduce physical copies of sheet music.[42] These are just two examples of several types of licenses that a licensee may be obligated to obtain when using copyrighted music.[43] This Section now turns to two more: the public performance license and the synchronization license.

1. Public Performance Licenses

The most common type of music license is the public performance license.[44] It is required whenever a work is "performed," whether that performance be a live act, radio broadcast, or background music in a TV show.[45] Public performance licenses are administered by collectives representing hundreds of thousands of songwriters, publishers, record companies, and performers.[46] These organizations are referred to as performing rights organizations ("PROs"), and there are only a few of them distributing public performance licenses for musical compositions in the United States.[47] Two of these PROs—the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music Inc. ("BMI")—control approximately 90% of the market.[48] Their dominance is well-established, dating back to their founding in the early twentieth century.[49] ASCAP was founded in 1914 and grew substantially in the following years as radio stations began broadcasting music.[50] BMI was established in 1939 as a direct competitor to ASCAP.[51] A third PRO, the Society of European Stage Authors and Composers ("SESAC"), began operating around this time as well and continues to operate today, although not on a scale to significantly rival ASCAP or BMI.[52]

In their early years, ASCAP and BMI offered only blanket licenses, meaning licensees were required to pay a fee for access to the PRO's entire library of songs rather than the specific music they needed.[53] ASCAP and BMI also owned their members' public performance rights exclusively, such that members were not allowed to enter any agreement with licensees directly.[54] The Department of Justice soon became concerned that this structure might constitute

41. McKinney, *supra* note 1, at 6.

42. *Types of Music Licenses*, *supra* note 32.

43. In general, there are six types of music licenses: synchronization licenses, mechanical licenses, master licenses, public performance licenses, print rights licenses, and theatrical licenses. *Id.*

44. *Id.*

45. Under the Copyright Act, a work is "performed" when it is recited, rendered, or played, either directly or by means of a device or process. McKinney, *supra* note 1, at 5.

46. *Id.*

47. Durkin, *supra* note 17.

48. *Id.*

49. Turk, *supra* note 14, at 508.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

anticompetitive conduct and filed a complaint against ASCAP in 1941.[55] The government alleged that ASCAP's blanket license was an illegal restraint of trade under § 1 of the Sherman Antitrust Act because it eliminated competition among ASCAP's members and allowed the organization to fix prices.[56] ASCAP agreed to enter into a consent decree with the Justice Department rather than concede liability.[57] BMI eventually entered its own consent decree, which was practically identical to ASCAP's.[58]

In the following decades, the consent decrees were amended multiple times in response to various developments in the entertainment industry.[59] In their current form, the consent decrees impose several key requirements on ASCAP and BMI.[60] First, they require that ASCAP offer per-program licenses in addition to blanket licenses, under which a licensee is authorized to use all songs in the PROs' library for a flat fee depending on the total number of specific programs that the songs are used in, which essentially translates to a discount off the blanket license.[61] The decrees also require that the PROs allow licensees to enter into agreements upon request and that they allow membership to any artist with at least one musical work.[62] Furthermore, and importantly for this Note, the consent decrees require that the PROs' licensing arrangements be nonexclusive, meaning licensees must be free to contract directly with copyright owners if they so choose.[63]

Because ASCAP and BMI control a vast majority of the public performance rights market, the effect of the consent decrees is that obtaining these licenses is relatively straightforward today.[64] Consider a producer who puts together a playlist of songs for use in an audiovisual project. To obtain public performance rights for all the songs on the playlist, there is a good chance the producer will only need to gain access to the libraries of ASCAP and BMI.[65] Under the consent decrees, both PROs are required to work with any user that is willing to pay.[66] Therefore, once she pays the standard rates, the producer is free

55. *Id.* at 508–09.

56. *Id.*

57. A consent decree is an agreement between the government and a party accused of wrongdoing that has the same force and effect of any other type of judgment and may be in effect in perpetuity. *Id.* at 509. It does not, however, bar private parties from bringing suit for the same claims that the government has settled, in this case unreasonable restraint of trade or unlawful monopoly. Bernard Korman, *U.S. Position on Collective Administration of Copyright and Anti-trust Law*, 43 J. COPYRIGHT SOC'Y U.S.A. 158, 160 (1995).

58. Turk, *supra* note 14, at 510.

59. Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 356 (2001).

60. *See* United States v. Am. Soc'y of Composers, Authors, Publishers, No. 41-1395(WCC), 2001 WL 1589999, at *6 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., No. 64 CIV. 3787, 1994 WL 901652, at *2 (S.D.N.Y. Nov. 18, 1994).

61. Einhorn, *supra* note 59, at 355.

62. Turk, *supra* note 14, at 509.

63. Einhorn, *supra* note 59, at 353.

64. Durkin, *supra* note 17.

65. *Id.*

66. *Id.*

to use any of ASCAP's or BMI's songs.[67] Furthermore, because the consent decrees require that ASCAP and BMI own nonexclusive rights to the copyrights, the producer is free to avoid interacting with the PROs altogether if she so chooses.[68] She has the option to negotiate directly with each copyright owner for every song on her playlist, although this process is likely to be time-consuming and expensive because obtaining the proper licensing for a single work will likely require obtaining permission from multiple parties.[69]

2. Sync Licenses

The use of copyrighted music in audiovisual projects presents an additional set of licensing hurdles. If our producer is pairing prerecorded compositions with visual content, perhaps for a movie or TV show, she will need to acquire master-use licenses from the administrators of the sound recordings, in addition to the public performance licenses she has already obtained.[70] But she is not finished yet. Our producer will need to obtain synchronization rights as well.[71]

A synchronization license, commonly referred to as a sync license, allows the user to synchronize a musical composition with an audiovisual work.[72] The process of obtaining sync rights is notoriously complicated.[73] In order to obtain the proper licensing for all the songs in her playlist, our producer must go to dozens of music publishers.[74] These music publishers are not subject to federal consent decrees in the same way that the PROs are, and therefore the process is not as straightforward.[75] Publishers are not required to provide blanket licenses and are free to deny a business access to a song under its purview.[76] Furthermore, while the rates for public performance licenses are standardized, the rates for sync licenses are not.[77] Fees may vary depending on the length of use and other factors.[78] There is no comprehensive database of ownership of musical compositions available to the public, so it can be difficult to determine who has an ownership stake in a given song.[79] Therefore, our producer must obtain the sync rights for each song, one by one, from potentially dozens of publishers—a process that can be lengthy, expensive, and opaque.[80]

67. *Id.*
68. *See* Einhorn, *supra* note 59, at 353.
69. *See id.*
70. McKinney, *supra* note 1, at 8.
71. *Id.* at 7.
72. *Id.*
73. *See id.*
74. *Id.*
75. *Id.* at 8.
76. *Id.* at 7.
77. *Id.*
78. *Id.*
79. Conte, *supra* note 12, at 330.
80. *See id.*

Sync licenses are commonly used in the film and television industry, where works are produced over the course of many months or years.[81] This means that producers have plenty of time and budget to navigate the complex system.[82] If the sync rights for a given song are too difficult to obtain, perhaps due to a stubborn publisher determined to drive a hard bargain, the producer may be free to move on to a second or third choice of song.[83] But this process is not nearly as straightforward for producers in other industries that create content at faster paces.[84] The fitness streaming industry is a perfect example.[85]

B. Peloton and the Fitness Streaming Industry

The fitness industry is massive, with an estimated revenue of over $33 billion in the United States alone, but recent years have brought some turbulence to traditional industry players.[86] When the COVID-19 pandemic began in early 2020, gyms and fitness studios around the country were forced to close their doors.[87] As the public settled into new routines, the industry's future seemed uncertain.[88] But while traditional fitness establishments floundered, other actors in the industry flourished.[89] Americans increasingly streamed workout classes from their devices while stuck at home,[90] and former gym-goers started spending heavily on at-home fitness equipment.[91] From March 2020 to October 2020, fitness equipment revenue doubled to $2.3 billion, sales of treadmills rose 135%, and sales of stationary bikes nearly tripled.[92] Even as the pandemic waned and the world slowly reopened, many people saw lasting benefits in getting quality workouts from home.[93]

Peloton quickly emerged as an impressive leader in this growing fitness streaming industry.[94] The company sells high-end stationary bikes and treadmills and offers subscription-based memberships allowing access to guided workout classes.[95] It employs an ever-growing roster of pseudocelebrity fitness instructors who teach a vast variety of cycling, running, strength, yoga, and meditation

81. Durkin, *supra* note 17.
82. *See id.*; *see also* Campbell, *supra* note 18.
83. McKinney, *supra* note 1, at 7.
84. Durkin, *supra* note 17.
85. *See id.*
86. Majella Mark, *2022 New Workout Plan As Gym Industry Hits $33 Billion*, NASDAQ (Jan. 3, 2022, 8:35 AM), https://www.nasdaq.com/articles/2022-new-workout-plan-as-gym-industry-hits-%2433-billion [https://perma.cc/6DBW-CEDS]; *see* Hamza Shaban, *The Pandemic's Home-Workout Revolution May Be Here to Stay*, WASH. POST (Jan. 7, 2021, 8:04 AM), https://www.washingtonpost.com/road-to-recovery/2021/01/07/home-fitness-boom/ [https://perma.cc/S9YL-CMHL].
87. *See* Shaban, *supra* note 86.
88. *See id.*
89. *Id.*
90. *See id.*
91. *Id.*
92. *Id.*
93. *See id.*
94. *Id.*
95. Answer, *supra* note 25, at 17–18.

classes.[96] These classes are conducted from Peloton's studios in New York and London and are live-streamed directly to the company's equipment in millions of homes around the world.[97] The classes are recorded and added to a growing library of over 8,000 videos available to members on-demand.[98] Up to ten or more new classes are livestreamed every day, each of which spans anywhere from five to sixty minutes or more.[99]

Although Peloton was flourishing before COVID-19 hit, the pandemic allowed it to grow even more rapidly.[100] In 2020, the company's stock rose 400%, and it reported a revenue of $758 million—a 232% increase from the same period in the previous year.[101] Peloton expanded vigorously in all directions, releasing new products, hiring new instructors, acquiring other companies, and ramping up production capacities.[102] Other at-home streaming fitness companies like Mirror and Tonal experienced similar growth as well.[103] While Peloton has experienced some setbacks following its initial phase of meteoric growth, it certainly appears that the company and the broader fitness streaming industry are here to stay.[104]

C. Peloton's Sync Licensing Problem

Because Peloton plans, creates, and releases content on short timelines, obtaining the proper music licensing is a daunting task.[105] The company's vast video library is expanded daily as new workouts are released, and instructors rely on the ability to access the hottest music to keep members engaged.[106] This

96. Tom Huddleston Jr., *How Peloton Exercise Bikes Became a $4 Billion Fitness Start-Up With a Cult Following*, CNBC: MAKE IT (Feb. 12, 2019, 6:01 PM), https://www.cnbc.com/2019/02/12/how-peloton-exercise-bikes-and-streaming-gained-a-cult-following.html [https://perma.cc/V5GN-AUZ8]; *see* Amanda Hess, *This Is Your Brain on Peloton*, N.Y. TIMES (Mar. 22, 2021), https://www.nytimes.com/2021/03/16/arts/peloton-cody-rigsby-content.html [https://perma.cc/ER5V-L3TE].

97. Brian Dean, *Peloton Subscriber and Revenue Statistics*, BACKLINKO (Jan. 6, 2022), https://backlinko.com/peloton-users [https://perma.cc/WW9N-NQZC].

98. Chris Lewis, *Peloton Removes Classes from On-Demand Library–February 2021 Peloton Purge*, PELOBUDDY (Feb. 27, 2021), https://www.pelobuddy.com/peloton-purge-feb-21/ [https://perma.cc/CF5G-3HY4].

99. *See* Ingrid Skjong & Amy Roberts, *Peloton Review: What to Know Before You Buy*, N.Y. TIMES: WIRECUTTER (Feb. 9, 2022), https://www.nytimes.com/wirecutter/reviews/peloton-review-what-to-know-before-you-buy/ [https://perma.cc/C47A-HKZB].

100. Shaban, *supra* note 86.

101. *Id.*

102. *Id.*; *see also* Samantha Hissong, *At Work With Gwen Riley, Peloton's Music Mastermind*, ROLLING STONE (Nov. 20, 2020, 11:53 AM), https://www.rollingstone.com/pro/features/at-work-with-gwen-riley-pelotons-music-whisperer-beyonce-1092790/ [https://perma.cc/X2KM-E73Q].

103. "After Mirror, the maker of the reflective-glass fitness device, was acquired by Lululemon Athletica, it expected to have ended 2020 with $150 million in revenue, up from a previously projected $100 million, according to company forecasts. And Tonal, the wall-mounted, strength-training home gym, reported a staggering 700 percent year-over-year increase in sales in 2020." Shaban, *supra* note 86.

104. *See id.*

105. Durkin, *supra* note 17.

106. *See* Answer, *supra* note 25, at 18–19; Mary Hanbury, *Peloton Removed Songs by Taylor Swift and Rihanna After It Was Hit by a $300 Million Copyright Lawsuit—And Owners of the $2,000 Fitness Bike Are Complaining That They Have to Work Out to Terrible '80s Music,* BUS. INSIDER (Oct. 21, 2019, 11:38 AM),

means that the traditional process for obtaining sync rights, under which a user must chase down multiple publishers and haggle over terms and fees for each individual song, is quite burdensome for Peloton.[107] It is perhaps not surprising that as the company grew, it found itself in hot water for the way it approached the challenge.[108]

Peloton's licensing troubles began in 2019 when ten music publishers sued the company for $150 million (which later doubled to $300 million) for violations of music copyright law.[109] The publishers alleged that Peloton used thousands of songs by popular artists like Rihanna and Lady Gaga over the course of many years without obtaining the necessary sync rights.[110] They alleged that Peloton "reproduced and synchronized copyrighted musical works owned and/or controlled by Plaintiffs" without permission, that this conduct was intentional and willful, and that it infringed on the publishers' exclusive rights under the Copyright Act.[111]

The lawsuit struck at one of the core pillars of Peloton's recipe for success: music. Although much goes into crafting the perfect at-home workout, music is a key component of Peloton's ability to keep its members hooked.[112] Peloton instructors plan their classes in the days and hours leading up to the time they are scheduled to be livestreamed.[113] As part of that planning process, they couple their programming with the perfect playlist.[114] Music plays a huge role in setting the mood of a given workout, so instructors are intentional about the songs they play.[115] For example, they may design their playlists in a way that complements the structure of the workout by seeking out songs that match the rhythm at which they want riders to be pedaling.[116] Many of Peloton's classes are planned around a specific musical genre or theme, while others feature choreographed movements that correspond with the beat of the music.[117] The Peloton user interface

https://www.businessinsider.com/peloton-users-complain-of-80s-music-after-300-million-lawsuit-2019-10 [https://perma.cc/8PCV-QP9S].

107. *See* Answer, *supra* note 25, at 23–24 ("[T]raditional sync licensing of musical works has historically been conducted on an individual song-by-song basis where the songs are pre-determined by the licensee well in advance of their intended use. In contrast, Peloton's service offering is that such catalog-wide licenses (covering, in many cases, yet-to-be-selected songs) are more appropriate.").

108. *See generally* Complaint, *supra* note 23.

109. Durkin, *supra* note 17; Bobby Olivier, *Peloton's Head of Music Talks on Fitness Phenom's Stellar Growth, Despite Copyright Lawsuit*, BILLBOARD (Jan. 29, 2020) https://www.billboard.com/music/music-news/peloton-head-of-music-lawsuit-interview-8549528/ [https://perma.cc/NL9S-A77N].

110. *See* Olivier, *supra* note 109.

111. Complaint, *supra* note 23, at 19–20.

112. *See* Answer, *supra* note 25, at 17–19.

113. *Id.* at 16.

114. *Id.* at 18–19; *see also* Georgia Slater, *Tunde Oyeneyin Reveals Her Process for Creating Some of Peloton's Toughest Classes*, PEOPLE (Sept. 22, 2021, 3:14 PM), https://people.com/sports/tunde-oyeneyin-peloton-interview-how-create-classes/ [https://perma.cc/89R3-9SJ3].

115. *See* Answer, *supra* note 25, at 18–19.

116. *Id.*

117. *Peloton Bike Class Descriptions*, PELOTON SUPPORT, https://support.onepeloton.com/hc/en-us/articles/201319045-Peloton-Bike-Class-Descriptions (last visited Apr. 9, 2023) [https://perma.cc/5SX4-ZT9B]; *A Closer Look: Our Groove Classes*, PELOTON: THE OUTPUT (Mar. 6, 2018), https://blog.onepeloton.com/closer-look-groove-classes/ [https://perma.cc/L8J8-53VL].

also allows members a high degree of direct engagement with the musical component of their workouts.[118] During the course of a class, members can view what song is playing at all times and can even add the song to their personal Spotify libraries with a single touch.[119] Members can filter on-demand classes by music genre and can even search for workouts featuring a particular song or artist of their choice.[120] These features allow users to "actively tailor" their workouts based on their music preferences and illustrate the central role that music plays in Peloton's offerings.[121]

By its own admission, Peloton sees music as a foundational building block of its service.[122] The company considers itself an innovator at the intersection of fitness, technology, and music.[123] It has framed itself not just as an exercise company that happens to use music but independently as a unique tool for the promotion and discovery of new music.[124] Given the centrality of music to Peloton's business model and the complicated nature of the music licensing world, the company has acknowledged that licensing would be one of the biggest issues it would face going forward.[125] Indeed, the company saw just how much its users care about music in 2019 when the copyright infringement case was filed. In the wake of the lawsuit, the company was forced to purge classes featuring the disputed songs from its on-demand library.[126] Disgruntled members flooded the Internet with complaints about the quality of the remaining music and how it negatively affected their motivation to work out.[127] Some users even sued the company directly, claiming diminished user experience.[128] The incident confirmed that music is of utmost importance to keeping Peloton's user base engaged. Moreover, it showed why the lawsuit brought against the company presented such a threat to Peloton's continued success as a leader in the fitness streaming industry.

118. *See* Nitish Pahwa, *How the Heck Is Peloton the Best-Paying Music Streaming Service?*, SLATE (July 12, 2021, 1:13 PM), https://slate.com/culture/2021/07/peloton-music-royalties-spotify-apple-music.html [https://perma.cc/2RWF-BTZN].

119. *Peloton Playlist*, PELOTON SUPPORT, https://support.onepeloton.com/hc/en-us/articles/360024272872-Peloton-Playlist (last visited Apr. 9, 2023) [https://perma.cc/F9LJ-ATA2].

120. Pahwa, *supra* note 118.

121. *Id.*

122. Peloton Interactive, Inc., Form S-1 Registration Statement (Aug. 27, 2019), https://www.sec.gov/Archives/edgar/data/1639825/000119312519230923/d738839ds1.htm [https://perma.cc/M2WW-BSJ6].

123. *See id.*

124. *Id.* ("We control the intersection of fitness and music in a deeply engaging way, motivating Members to achieve their fitness goals while discovering great music in the process. Peloton is a discovery resource for new artists and songs while also providing the opportunity for our Members to re-discover music they love. Members consistently rank the music we provide as one of their favorite aspects of the Peloton experience.").

125. Hanbury, *supra* note 106.

126. *Id.*

127. *Id.*

128. Pahwa, *supra* note 118; Peter Hayes, *Peloton Gets Early Win in Suit Over Classes But Shares Fall*, BLOOMBERG L. (Jan. 20, 2022, 4:18 PM), https://news.bloomberglaw.com/product-liability-and-toxics-law/peloton-beats-class-certification-in-suit-over-fitness-classes [https://perma.cc/4ZJ8-NEBZ].

III. ANALYSIS

A. The Downtown Music Publishing Lawsuit

In their 2019 complaint, the plaintiff music publishers began by outlining the role they play in the music licensing industry.[129] They explained that the Copyright Act grants them an exclusive bundle of rights with respect to the copyrights they own, including the right to authorize others to reproduce, perform, and distribute those works.[130] They also explained that their role includes providing licensing for the works in their catalog, collecting the requisite fees, and distributing the appropriate portion of those fees to songwriters.[131] They pointed out that many musical works are written by multiple songwriters, who may be affiliated with different publishers, so even if Peloton obtained proper licensing from other publishers, those licenses do not "convey rights with respect to the copyright interests of Plaintiffs or their administered songwriters in those works."[132]

Throughout the complaint, the publishers contextualized their allegations by highlighting the importance of music to Peloton's business model.[133] They alleged that "[m]usic is the lifeblood of the Peloton workout experience" and that subscribers are inspired to work out "harder, faster and more often" because of the songs featured in the company's workout videos.[134] Ultimately, the publishers claimed that Peloton's "highly successful and lucrative business" has been built "in part on its unauthorized use of the copyrighted musical works of Plaintiffs and other rightsholders."[135]

In its answer to the publishers' complaint, Peloton emphasized that traditional avenues for obtaining sync rights, while perhaps manageable for the typical movie producer, are "ill-suited" for a company like Peloton due to the "largely nonpublic, fractionalized, and opaque nature" of the industry.[136] The company claimed that, despite these challenges, it had tried to work "proactively and collaboratively with the music publishing industry to develop a licensing structure . . . to address its unique case."[137] Peloton emphasized that it had "invested heavily in creating the infrastructure and systems to facilitate appropriate licensing" and even alleged that it had in fact secured the necessary licensing from all "major" as well as "independent" record labels and publishers.[138]

The publishers conceded that Peloton had obtained sync licenses from other copyright owners for other songs but did not view this as absolving the company

129. Complaint, *supra* note 23, at 7.
130. *Id*.
131. *Id*.
132. *Id*. at 8.
133. *Id*. at 18.
134. *Id*.
135. *Id*. at 19.
136. Answer, *supra* note 25, at 14, 16, 24.
137. *Id*. at 16–17.
138. *Id*. at 16.

of the infringement it now alleged.[139] Rather, they used this fact to bolster their argument that Peloton was a "textbook willful infringer" because it showed that the company was fully aware of the necessity of obtaining this licensing.[140] Some observers have speculated that Peloton's securing some sync licenses while neglecting others may have been a strategic business decision, given the high costs associated with obtaining them.[141] Perhaps the company took a calculated risk that no one was watching but then became too prominent to avoid closer inspection.[142] Regardless of whether Peloton's license deficiencies were purposeful, the company alleged that it was making at least some effort to make the system work for its business.[143]

Peloton alleged those efforts were stymied in April 2018, however, when the National Music Publishers' Association ("NMPA") announced its intention to "collectively negotiate a licensing arrangement on behalf of an untold number of its member companies."[144] NMPA is a trade association representing the interests of the music publishing industry.[145] It describes its mission as "to protect, promote and advance the interests of music's creators . . . [and] protect its members' property rights on the legislative, litigation, and regulatory fronts."[146] Notably, NMPA represents virtually the entire music publishing industry in the United States and claims to control the copyrights to the vast majority of musical compositions in the country.[147] Although NMPA was not a plaintiff in the original suit against Peloton, all twelve publishers who sued Peloton were members.[148] According to Peloton, NMPA threatened to turn the music publishing industry against the company if it did not engage, so Peloton moved forward with negotiations with the organization rather than with individual publishers.[149]

Peloton pointed to several issues of contention that arose during the course of these negotiations.[150] In particular, Peloton alleged that NMPA wanted compensation for all its member publishers, regardless of whether Peloton wanted to use any songs owned by them and despite the fact that Peloton—unlike music streaming services—did not need licenses to all the music to provide a

139. Complaint, *supra* note 23, at 2.

140. *Id*. The publishers alleged that "Peloton fully understood what the copyright law required, having entered into sync licenses with certain other copyright holders, while trampling the rights of Plaintiffs by using their musical works for free and without permission." *Id.*

141. Pahwa, *supra* note 118.

142. *See id.* ("If you've got a little spin studio in Park Slope and you want to play Beyonce all day, no one cares. But if you've got 30,000 people doing your ride, you can't just play Beyonce.").

143. Answer, *supra* note 25, at 25 (outlining how Peloton allegedly invested "substantial time and resources" into developing an infrastructure to facilitate licensing).

144. *Id.*

145. *Our Mission*, NMPA, https://www.nmpa.org/mission/ (last visited Apr. 9, 2023) [https://perma.cc/AD8Z-K6YA].

146. *Id.*

147. Michelle M. Wahl et al., *ABA Entertainment & Sports Lawyer Journal–Litigation Update*, 36 ENT. & SPORTS L. 42, 47 (2020); Answer, *supra* note 25, at 19.

148. Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 760 (S.D.N.Y. 2020).

149. Answer, *supra* note 25, at 25–26.

150. *Id.* at 25–28.

"compelling experience" for users.[151] When Peloton asked for a list of NMPA publishers to gain some clarity on this issue, NMPA, "seeking to capitalize on this information asymmetry in its negotiations with Peloton," refused to disclose the identities of its members.[152] According to Peloton, NMPA demanded that the company deal through them exclusively and not with individual publishers.[153] The company said that without information as to the identities of the publishers NMPA was purporting to represent, it had no choice but to move forward on NMPA's terms.[154]

Peloton alleged that as negotiations continued throughout 2018, the company's good-faith approach was not reciprocated.[155] Peloton believed NMPA was "deliberately obfuscat[ing] to member publishers the substance of its discussions with Peloton, including by mispresenting Peloton's position during those negotiations."[156] As time passed, NMPA became increasingly unresponsive, driving the company to return to its strategy of dealing with the publishers directly.[157] In early 2019, however, Peloton said the publishers "suddenly ceased communications . . . in a near-simultaneous and identical fashion," which the company alleged was "the product of a concerted refusal to deal with Peloton instigated by NMPA and its leadership."[158]

B. Peloton's Sherman Act Counterclaim

Having asserted this series of events in its answer, Peloton argued that the lawsuit against it came about due to the "anticompetitive and tortious conduct" of NMPA.[159] The company, therefore, asserted several counterclaims against the NMPA and the original plaintiff publishers.[160] Thanks to these counterclaims, what began as a copyright infringement lawsuit morphed into an antitrust case. Peloton asserted that, among other things, NMPA "sought to extract supracompetitive license terms from Peloton by negotiating collectively on behalf of a large (though unidentified) number of member publishers" in violation of § 1 of the Sherman Antitrust Act.[161]

The Sherman Antitrust Act was passed in 1890 with the goal of prohibiting activities that restrict interstate commerce and competition.[162] Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several

151. *Id.* at 26.
152. *Id.*
153. *Id.* at 27.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 28–29.
158. *Id.* at 29.
159. *Id.* at 17.
160. *Id.*
161. Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 761 (S.D.N.Y. 2020).
162. *See generally* 15 U.S.C. §§ 1–38.

States."[163] Over time, the Supreme Court has interpreted "in restraint of trade" to mean "unreasonable restraints" only.[164] Certain types of restraints are considered per se unreasonable and therefore prima facie violations of the Sherman Act.[165] If a restraint is not considered per se unreasonable, it is analyzed under a "rule of reason" analysis to determine whether "under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition."[166]

Central to the decision in *Downtown Music Publishing* was the concept of the relevant market.[167] In § 1 claims analyzed under the rule of reason, the burden is on the proponent to show that the "challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[168] A relevant market is defined as "the area of effective competition," which is typically the "arena within which significant substitution in consumption or production occurs."[169] It is determined by the choices available to consumers; if consumers treat products as substitutes for each other, those products will be considered reasonably interchangeable.[170] In its antitrust counterclaim, Peloton argued that the relevant product market was "licenses to the copyrighted works controlled (in whole or in part) and collectively negotiated by the [Music] Publishers through NMPA."[171] Because licenses from other publishers would not provide necessary rights for the works in question, they are not reasonably

163. 15 U.S.C. § 1.

164. *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 189 (2010) ("[E]ven though, 'read literally,' § 1 would address 'the entire body of private contract,' that is not what the statute means."); Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 342–43 (1982) (holding that while "Section 1 of the Sherman Act of 1890 literally prohibits *every* agreement 'in restraint of trade,'" the Court has "recognized that Congress could not have intended a literal interpretation of the word 'every'").

165. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

166. *Maricopa*, 457 U.S. at 343; s*ee also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911) ("[T]he construction which [the Court has] deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied."); Nat'l Soc'y of Pro. Eng'rs. v. United States, 435 U.S. 679, 691 (1978) ("[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.").

167. *See* Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 765 (S.D.N.Y. 2020).

168. The relevant market analysis does not end here. If the plaintiff can meet its burden, "the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (citations omitted). Note that if a practice is considered a per se violation of antitrust law, this relevant market analysis is not required. *See id.* at 2283–84.

169. *Id.* at 2285 (citations omitted).

170. *See* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395–96 (1956) (explaining that the cellophane market includes other substitutable flexible wrapping materials as well). The Court said that "[i]n considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal." *Id.* at 395.

171. Answer, *supra* note 25, at 35.

interchangeable with those negotiated by NMPA.[172] Therefore, because Peloton was not free to simply turn to a different product, NMPA was in violation of antitrust laws by engaging in "unlawful agreements in restraint of trade to obtain higher payments" for those rights.[173]

In making its argument, Peloton argued that its proposed relevant market was consistent with how other courts had ruled in the music-rights context.[174] The company relied on the 2011 case *Meredith Corp v. SESAC* to make this point.[175] There, the plaintiffs were owners of commercial television broadcast stations who brought suit against SESAC, a small performance rights organization, as well as a number of composers and publishers.[176] In its opinion, the *Meredith* court explained how television stations regularly broadcast programming produced by third parties that come to the stations "already in the can," "with music and other creative elements already irrevocably embedded."[177] Stations do not receive music performance rights for this music when they obtain the programming from its producers and therefore, in accordance with "longstanding industry practice," must independently obtain performance rights for every song included in the shows they intend to broadcast.[178]

The *Meredith* plaintiffs alleged violations of §§ 1 and 2 of the Sherman Act, claiming that the defendants had "entered into unlawful agreements in restraint of trade" and had "unlawfully monopolized the market for performance rights to songs in the SESAC repertory."[179] More specifically, the plaintiffs alleged that the defendants violated the Sherman Act by making a blanket license the only option for obtaining performance rights to songs in SESAC's library.[180] They argued that because this was the only option, SESAC was able to charge supracompetitive prices.[181]

The *Meredith* plaintiffs proposed that the relevant market was "the market for performance rights to the copyrighted material in the SESAC repertory."[182] This definition relied on the premise that the plaintiffs could not avoid songs in SESAC's library because they are contractually obligated to use songs embedded in their third-party programming.[183] SESAC challenged this definition, arguing that the proposed relevant market was based "entirely on [plaintiffs'] own voluntary acceptance of contractual constraints" and that "the only reason why performance rights to [SESAC] songs' are not freely interchangeable with rights to ASCAP and BMI songs is that local stations have agreed not to remove or alter

172. *Id*.
173. *Id*.
174. Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 766 (S.D.N.Y. 2020).
175. *Id*.
176. Meredith Corp. v. SESAC, LLC, No. 09 Civ. 9177 (NRB), 2011 WL 856266, at *1 (S.D.N.Y. Mar. 9, 2011).
177. *Id*. at *2.
178. *Id*. at *3.
179. *Id*. at *1.
180. *Id*. at *3.
181. *Id*.
182. *Id*. at *5.
183. *Id*. at *6.

the music embedded in the programs whose broadcast rights they purchase."[184] SESAC suggested that the products at issue here were really the songs in the programming, the rights to which could be owned by any of the three PROs, and therefore the plaintiff's proposed relevant market excluded the potential substitutes of songs in BMI's and ASCAP's libraries.[185] This argument suggested that because SESAC controls less than 10% of the market for performance rights, the stations could easily avoid dealing with SESAC if they did not render themselves contractually obligated to use the songs pre-embedded in third-party programming.[186] But the *Meredith* court was not convinced by SESAC's argument.[187] It said that what the plaintiffs were really alleging was that the performance rights to songs by SESAC-represented artists were not interchangeable with performance rights to songs by non-SESAC-represented artists and allowed the suit to proceed.[188]

The *Downtown Music Publishing* court was not persuaded by Peloton's relevant market analogies to *Meredith*.[189] NMPA and the publishers filed a motion to dismiss in late 2019, arguing (among other things) that the company failed to identify a relevant product market.[190] In ruling on the motion, the court distinguished the two cases by pointing to the *Meredith* court's reliance on the fact that "as a matter of entrenched industry practice, music was irrevocably embedded" in the third-party programming, and therefore the plaintiffs could not avoid obtaining licenses from the defendant.[191] Peloton, the court said, failed to allege the same.[192] Therefore, the company's definition of the relevant market was legally insufficient because it did not encompass all interchangeable substitute products:

> Peloton argues that sync licenses are not interchangeable because every song has "nonfungible qualities." It is true that every copyrighted work has at least some modicum of originality. But, recognition of that fundamental tenet of copyright law does not explain why songs not controlled by the Music Publishers cannot substitute in exercise programming for songs they do control.[193]

In other words, even if television stations could not substitute songs embedded in programming for other songs due to entrenched industry practice, the *Downtown Music Publishing* court did not see why Peloton could not simply substitute the songs for which it had not obtained proper licensing with songs for which it had.[194] The court accordingly granted NMPA's motion to dismiss Peloton's antitrust counterclaims on this ground.[195]

184. *Id.*
185. *Id.* at *9.
186. *Id.*
187. *Id.*
188. *Id.* at *9–10.
189. Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 766 (S.D.N.Y. 2020).
190. *Id.* at 763–64.
191. *Id.* at 766.
192. *Id.*
193. *Id.*
194. *See id.*
195. *Id.* at 768.

This decision underestimates the importance of music to Peloton's business model. As Peloton saw when it purged its library in 2019, its members do not consider one song to be as easily substituted for another as the *Downtown Music Publishing* court seems to suggest.[196] Furthermore, as Peloton continuously pointed out in its counterclaim, the company is a leading innovator in its industry,[197] and that innovation is the very reason it faces challenges in music licensing.[198] This decision penalizes Peloton for being unable to point to any "entrenched industry practices" to support its argument when there simply is no entrenched industry practice in the fitness streaming industry.[199] The court's refusal to draw analogies to other industries puts the company in a difficult position, one where companies like Peloton will need to find creative solutions in the face of "intentionally monopolistic pressures" of the licensing industry.[200]

After Peloton's counterclaims were dismissed, the parties ultimately reached a settlement in February 2020.[201] The financial terms of the agreement were not disclosed, but the parties said they had reached "a joint collaboration agreement" and aimed to "further optimize Peloton's music licensing systems and processes."[202] In the years since, the road for Peloton has not been completely smooth,[203] but the company has regained some of its footing when it comes to music, specifically through a variety of creative endeavors.[204] Especially prominent is the platform's Artist Series, through which it partners with artists directly to create a series of classes featuring that artist's music.[205] In many ways, partnering with Peloton is becoming a desirable strategic move for artists.[206] The company has even collaborated with artists to release new songs and remixes exclusively on the platform.[207] Even immediately following the dismissal of Peloton's counterclaims in the *Downtown Music Publishing* suit, Peloton's head of music said that instructors have access to over a million songs to choose

196. *See* Hanbury, *supra* note 106.

197. Answer, *supra* note 25, at 23–25.

198. *See* Campbell, *supra* note 18.

199. *Id.*

200. *Id.*

201. Donahue, *supra* note 27.

202. *Id.*

203. In recent years, Peloton has faced several serious challenges. After seeing astronomical growth during the beginning phases of the pandemic, many say the company misjudged the demand for its product and expanded too quickly. The company has faced product recalls, layoffs, slowing sales, a plummeting stock price, and the resignation of its charismatic CEO John Foley. *See* Andrew Ross Sorkin & Lauren Hirsch, *Peloton's New C.E.O. on the Tough Road Ahead*, N.Y. TIMES (Feb. 19, 2022) https://www.nytimes.com/2022/02/19/business/dealbook/barry-mccarthy-interview-peloton.html [https://perma.cc/52NM-PRLM]; Annie Sklaver Orenstein, *Peloton Could Have Seen Its Troubles Coming, if Only It Had Asked These Questions*, FAST CO. (Feb. 14, 2022), https://www.fastcompany.com/90721127/peloton-could-have-seen-its-troubles-coming-if-only-it-asked-these-questions [https://perma.cc/BY74-RTCH].

204. *See* Cathy Applefeld Olson, *Taylor, Bowie & Beyond: How Peloton Will Continue Taking Stock of Its Music Empire*, FORBES (Jan. 17, 2022, 2:48 PM), https://www.forbes.com/sites/cathyolson/2022/01/17/taylor-bowie—beyond-how-peloton-will-continue-taking-stock-of-its-music-empire/?sh=351ae1ec58be [https://perma.cc/C6B4-4MG9].

205. *Id.*

206. *Id.*

207. *Id.*

from when building their classes, so it appears unlikely that variety of music will be a concern for users any time soon.[208]

C. The Importance of BMI v. CBS

Notwithstanding any success Peloton has found in creative workarounds, it seems that there must be a better answer. *Meredith Corp v. SESAC* offers one perspective on how the *Downtown Music Publishing* lawsuit might have gone in a different direction, but there is another more established antitrust case that offers insight as well.[209] In 1979, the Supreme Court decided *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*.[210] There, CBS brought suit against the PROs, ASCAP, and BMI, alleging that "the composers and publishing houses [had] joined together into an organization that sets its price for the blanket license it sells."[211] CBS alleged that these blanket licenses amounted to illegal price fixing and were per se violations of the Sherman Act.[212] The Court sided with ASCAP and BMI, holding that the structure of the blanket licenses was not a per se violation of the Sherman Act for two important reasons.[213]

First, the Court noted that it had never considered an issue like this one, situated at the intersection of copyright law and antitrust law.[214] Therefore, even as the Court acknowledged that the definition of price fixing may have technically been met here, it held that more careful analysis was needed before declaring the practice plainly anticompetitive.[215] In conducting that analysis, the Court noted that ASCAP and BMI were no strangers to antitrust litigation and summarized how they both came to be subject to consent decrees imposed by the federal government.[216] It was not lost on the Court that the very reason the government became concerned about ASCAP and BMI in the first place was due to their blanket license offerings.[217] In their early days, ASCAP and BMI were in the practice of obtaining exclusive licensing power from their members, meaning licensees had no choice but to work with the companies if they intended to use the songs in their repertoires.[218] The government was concerned that arbitrary prices could be charged under this arrangement and that it amounted to an illegal restraint of trade.[219] The consent decrees, therefore, imposed a new requirement on ASCAP and BMI: that copyright owners only grant them *nonexclusive* rights to license their works.[220] This meant that members now retained the rights to

208. Olivier, *supra* note 109.
209. *See infra* notes 210–34 and accompanying text.
210. 441 U.S. 1 (1979).
211. *Id.* at 8.
212. *Id.*
213. *Id.* at 7.
214. *Id.* at 10.
215. *Id.* at 9.
216. *Id.* at 10.
217. *Id.*
218. *Id.* at 10–11.
219. *Id.* at 10.
220. *Id*. at 11.

distribute licenses themselves, and there was nothing to prevent licensees like CBS from negotiating with those members directly.[221] In other words, under the consent decrees, CBS now had a choice of whether to engage with ASCAP and BMI for its licensing needs or with copyright owners directly. This weighed against a finding of anticompetitive behavior.[222]

The *BMI* Court also considered the uniqueness of the music licensing industry.[223] The Court noted that there must be some kind of central licensing organization that allows copyright owners to offer their works in a common pool to those who want to use them:

> The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. This case appears to us to involve such a situation.[224]

The blanket license was a product of the realities of the music licensing industry, the Court said.[225] The Court pointed out that copyright owners benefit in many ways from ASCAP's and BMI's services.[226] Without an arrangement like this, copyright owners would be unable to monitor the use of their works, collect payments, and enforce copyright rules themselves due to the sheer number of users and the frequency with which performances are broadcast in the modern world.[227] In light of these unique market characteristics, the Court said that a middleman was necessary to protect the interests of both copyright owners and potential licensees.[228] ASCAP and BMI provide a valuable service by significantly reducing transaction costs associated with obtaining licenses.[229] Instead of spending time and money engaging in negotiations with individual copyright owners, CBS was able to pay ASCAP or BMI once for access to its library.[230] Therefore, the blanket license was composed not only of individual songs but also an aggregating service.[231] According to the Court, "the whole is truly greater than the sum of its parts; it is to some extent, a different product."[232]

Because CBS was challenging the blanket licensing scheme as a per se violation of antitrust law, the Court focused on whether the effect and the purpose of the practice "facially appear[ed] to be one that would always or almost always tend to restrict competition and decrease output . . . , or instead one designed to increase economic efficiency and render markets more, rather than less,

221. *Id.* at 12.
222. *Id.* at 24.
223. *See id.* at 14–15.
224. *Id.* (citing the Justice Department's amicus brief filed in a similar case).
225. *See id.* at 20.
226. *Id.*
227. *Id.* at 20–21.
228. *Id.* at 20.
229. *See id.* at 21–22.
230. *Id.* at 21.
231. *Id.* at 22.
232. *Id.* at 21–22.

competitive."[233] The Court found it to be the latter, emphasizing that not all arrangements among competitors that impact price are unreasonable restraints of trade.[234] Here, although the fees for the blanket licenses were set by the PROs rather than by competition among individual copyright owners, the product offered was quite different from anything the copyright owners could provide themselves.[235] Additionally, there was nothing stopping CBS from obtaining individual licenses; the fact that they chose to avail themselves of ASCAP's and BMI's aggregating services was their choice.[236] Viewed through this lens, it was clear to the Court that this blanket license arrangement was not a per se violation of antitrust laws.[237]

The fact that CBS had the option of negotiating directly with copyright owners if they chose to do so was key to the *BMI* decision.[238] The Court noted that "the substantial restraints placed on ASCAP and its members by the consent decrees must not be ignored."[239] Because of those restraints, CBS "had a real choice," and therefore the PROs' actions were not violative of antitrust law.[240] This proposition was tested a few years later in *Buffalo Broadcasting Company, Inc. v. ASCAP*.[241] The PROs found their blanket license arrangements challenged again by local television stations, who claimed the licenses were priced too high.[242] Although the district court ruled in favor of the plaintiff television stations,[243] the Second Circuit reversed, finding that the blanket licenses did not restrain trade as long as "alternative means of acquiring performance rights are 'realistically available.'"[244] The consent decrees saved the PROs a third time in the early 1990s when again a court held that their blanket licenses did not restrain trade due to the possibility of obtaining licenses directly from copyright owners.[245] Of course, the consent decrees are not without their flaws and have garnered their fair share of criticism over the decades. The law in this area has developed through a piecemeal approach largely before the age of the Internet.[246] Many argue that the PRO consent decrees are outdated and have not sufficiently evolved to keep up with technology that changes at lightning speed.[247] Despite

233. *Id*. at 19–20 (quotations omitted).
234. *Id*. at 23.
235. *Id.*
236. *See id.* at 24.
237. *Id.*
238. *See id.*
239. *Id.*
240. *Id.*
241. *See* Einhorn, *supra* note 59, at 358. *See generally* 744 F.2d 917 (2d Cir. 1984).
242. Einhorn, *supra* note 59, at 358.
243. *See id.*
244. *Id.*
245. *See* Korman, *supra* note 57, at 174; Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc., 772 F. Supp. 614, 627 (D.D.C. 1991).
246. Loeza, *supra* note 6, at 725.
247. *See generally* Loeza, *supra* note 6; Conte, *supra* note 12; Turk, *supra* note 14; Scott Hanus, *Deregulating the Music Industry: A Push to Give Power Back to the Songwriters*, 16 DEPAUL BUS. & COM. L.J. 129, 138–39 (2018); Steven J. Gagliano, *Consent Decrees in the Streaming Era: Digital Withdrawal, Fractional Licensing, and § 114(i)*, 10 J. BUS. ENTREPRENEURSHIP & L. 317 (2017).

these criticisms, the fact remains that they have played some role, albeit an imperfect one, in leveling the field for players in the music licensing world.

The *BMI* case and its progeny deal with public performance rights, but direct parallels can be drawn to Peloton's sync rights difficulties. According to Peloton's counterclaim in the *Downtown Music Publishing* lawsuit, the company tried to negotiate directly with music publishers, only to have their efforts stymied by NMPA.[248] Peloton alleged that:

> By agreeing to make NMPA the designated negotiator of their copyrights and engaging in the conduct described above, including both efforts to fix prices for the collectively negotiated copyrights and then engaging in a group boycott, NMPA and the [publishers] have agreed to make it either impossible or, at a minimum, uneconomical for Peloton to negotiate direct licenses.[249]

According to Peloton's allegations, NMPA tried to force the company to deal exclusively through it by thwarting their attempts to work with publishers directly.[250] This closely resembles the exclusive licensing practices that ASCAP's and BMI's consent decrees sought to prohibit.[251] Considering the weight the *BMI* Court gave to the fact that the PROs' licensing rights were nonexclusive, it seems likely that the Court could have decided differently if they were behaving more like NMPA did in its negotiations with Peloton.

IV. RECOMMENDATION

In the wake of the *Downtown Music Publishing* lawsuit, Peloton needs solutions for its music licensing dilemmas. And it is not just Peloton that is affected by this issue—there are plenty of other companies in the fitness streaming space and other industries that are facing the same challenges.[252] There are several possible options that Peloton could pursue going forward, none without its own challenges.[253] The company could simply continue to pursue an imperfect approach to music licensing while maintaining cash reserves for future litigation and transaction costs, but this strategy is expensive and does not address the root of the problem.[254] This approach would also not be tenable for other smaller companies with smaller budgets and less-established brands who face similar challenges.[255] Peloton could also work with a music supervisor that would help it navigate the complicated music licensing landscape like other players in entrenched industries currently do, but this too would require a significant amount of time and money because Peloton relies heavily on having access to large volumes of the

248. Answer, *supra* note 25, at 29.
249. *Id.* at 36.
250. *Id.*
251. *See* discussion *supra* Section II.C.
252. Campbell, *supra* note 18.
253. *See id.*
254. *Id.*
255. *See id.*

latest music.[256] Of course, Peloton could continue its efforts to work with artists in an effort to cut out any troublesome middlemen.[257] The company is already doing this with its Artist Series and other endeavors.[258] This strategy has been successful for Peloton so far because its brand name is strong enough to allow the company real leverage in engaging with popular artists directly.[259] But it likely wouldn't be as effective for smaller, less-established companies facing similar licensing challenges and does not solve the underlying problem for the majority of Peloton's videos.[260]

Of course, one long-term solution for Peloton would be to lobby for new legislation.[261] Existing music copyright legislation, like the Digital Millennium Copyright Act and the Fairness in Music Licensing Act, simply do not address the unique challenges faced by companies like Peloton.[262] Even the brand-new Music Modernization Act ("the Act") does not provide much help. The Act attempts to modernize music copyright issues for the new world of digital streaming by establishing blanket royalty rates for paying artists when their songs are used by streaming services.[263] But sync rights specifically are not substantially addressed, so while the Act may be of help for platforms like Spotify and Apple Music, it is not likely to resolve any headaches for Peloton.[264] Of course, the problem with pushing for new legislation is that it takes a very long time and cannot help in the short term.[265]

BMI v. CBS may give some insight into another possible solution.[266] In many ways, ASCAP and BMI were playing a very similar role in their relationship with CBS as NMPA now is with Peloton.[267] The *BMI* Court acknowledged that there was an important role for the PROs to play when it comes to the performance license market, and the same is true of NMPA.[268] The transaction costs for licensees to go out and obtain sync licenses from each individual copyright owner are simply too high for a company like Peloton who puts out a large volume of content in short amounts of time.[269] NMPA can certainly add value to the industry in the same ways BMI and ASCAP did: by aggregating sync rights and developing a streamlined system for distribution that enables licenses to be readily accessible and affordable for licensees while ensuring that copyright owners

256. *Id.*; *see also* Paul Resnikoff, *Tuned Global Is Helping the $26 Billion Fitness App Industry Figure Out Music—Without the Legal Headaches*, DIGIT. MUSIC NEWS (Apr. 29, 2021), https://www.digitalmusicnews.com/2021/04/29/tuned-global-fitness-tech-billion/ [https://perma.cc/W5WW-YGH5].

257. Campbell, *supra* note 18.

258. *Id.*; Hissong, *supra* note 102.

259. Campbell, *supra* note 18.

260. *See id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *See generally* 441 U.S. 1 (1979).

267. *See id.* at 20–21.

268. *See id.*

269. *See* Answer, *supra* note 25, at 16.

get compensated property.[270] Such an arrangement is beneficial to all parties involved.[271] The key, however, lies in the fact that ASCAP and BMI did not have exclusive rights to license their members' performance rights.[272] That is what kept their practices from crossing the line into anticompetitive behavior and what differentiates their practices from NMPA's.[273] By disallowing its members from working with Peloton directly, NMPA was able to control the entire process.[274] It was able to leave Peloton with no choice but to comply with their anticompetitive terms or suffer the legal consequences.[275]

This is why the Justice Department should consider imposing some requirements on the sync licensing market in the same way it has done for the public performance licensing market. Before ASCAP and BMI were subject to the Justice Department's consent decrees, they did have exclusive rights to license their members' works.[276] It is only because of those consent decrees that their licenses are nonexclusive.[277] Because licensees always have the choice to negotiate with copyright owners directly, the PROs are precluded from imposing unreasonable terms.[278] The same could be accomplished in the sync licensing world to ease the burden on companies like Peloton and allow them to continue innovating when it comes to using music.

Under such a decree, NMPA could be precluded from sabotaging music users' attempts to negotiate directly with individual copyright owners. If negotiations between a music user and NMPA became unworkable, the user would always have the option to go around NMPA and negotiate directly with individual copyright owners, without interference by NMPA. Of course, it would likely be the case that the transaction costs of direct negotiations may be too high for many music users as was clearly the case for Peloton. NMPA would still have the advantage of offering a superior service that eliminates those costs, one where a user need only make one stop for its sync licensing needs, and as a result, the organization would have plenty of freedom in setting its terms. Still, the playing field would be more level for all parties involved. Companies like Peloton would have legitimate options for obtaining the proper sync licenses, free from anticompetitive pressures. Organizations like NMPA would retain the ability to lead the marketplace by serving as the primary facilitator for the sync licensing process. And individual artists and publishers would retain the benefits that come

270. *See Broad. Music*, 441 U.S. at 21.

271. *See id.* ("This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses.").

272. *See id.* at 24.

273. *See id.*

274. *See* Answer, *supra* note 25, at 25–29.

275. *See id.* at 27 ("Peloton felt it had no choice but to accede to the ground-rules laid out by NMPA, especially given NMPA's refusal to identify the publishers that it was purporting to represent in the negotiations.").

276. Turk, *supra* note 14, at 508–09.

277. *See id.*

278. *See Broad. Music*, 441 U.S. at 24.

with working through an organization like NMPA, while also maintaining the ability to conduct their own negotiations on their own terms as well.

V. CONCLUSION

Peloton's licensing woes provide a fascinating look at the intricate ways in which music licensing intersects with other industries. As the world around us evolves, music licensing must evolve with it. Public performance licenses have been so widely used for so long that it is no wonder the corresponding license distribution system has been under federal supervision since the 1940s.[279] The Department of Justice's consent decrees, though not without legitimate flaws, allow this unique industry to exist on terms that are fairer for all parties than they otherwise would be. As the music industry experiences continued growth and innovation, it is time to consider doing the same for sync licensing for the same reasons.

279. *See supra* note 13 and accompanying text.