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JOYRIDING WITH *PELOTON*: HOW VIRTUAL FITNESS CLASSES CAN VIOLATE FEDERAL COPYRIGHT LAW

I. PRE-CLASS STRETCH: AN INTRODUCTION TO THE RISE OF VIRTUAL FITNESS CLASSES

The COVID-19 pandemic altered almost every aspect of people’s lives across the globe.¹ In order to adapt to self-quarantining and state-wide stay-at-home orders, businesses found creative solutions to keep themselves afloat and to provide consumers with a sense of “normalcy” in their lives at home.² One large-scale shift was from in-person activities—work, meetings, school—to a variety of virtual platforms.³ The exercise and fitness industry did exactly that—shifted workout classes from in-person, in-studio workouts to both “live,” online, synchronous workout classes and pre-recorded, on-demand workout classes that users could download.⁴ Although online fitness classes were already available, their popularity grew dramatically in 2020.⁵ While the pandemic brought many changes and forced business to quickly adjust, copyright law was likely not on the forefront of many business owners’ or workout instructors’

1. See *Ten Ways COVID-19 Has Changed The American Consumer*, PYMNTS (Apr. 8, 2020), <https://www.pymnts.com/coronavirus/2020/the-10-ways-covid-19-has-changed-the-american-consumer/> [<https://perma.cc/XNL8-YDC5>] (highlighting ten ways coronavirus pandemic changed American consumer).

2. See Victoria Masterson, *6 Ways the Pandemic Has Changed Businesses*, WORLD ECON. F. (Nov. 13, 2020), <https://www.weforum.org/agenda/2020/11/covid-19-innovation-business-healthcare-restaurants/> [<https://perma.cc/9Q46-WEMR>] (emphasizing six ways coronavirus pandemic changed businesses).

3. See Lara Fishbane & Adie Tomer, *As Classes Move Online During COVID-19, What are Disconnected Students to Do?*, BROOKINGS (Mar. 20, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/20/as-classes-move-online-during-covid-19-what-are-disconnected-students-to-do/> [<https://perma.cc/WU8K-UQYC>] (estimating 104,000 schools have shifted to online learning); see also Greg Rosalsky, *COVID-19 Forces More People to Work From Home. How’s it Going?*, NAT’L PUB. RADIO (May 8, 2020), <https://www.npr.org/2020/05/08/852527736/covid-19-forces-more-people-to-work-from-home-hows-it-going> [<https://perma.cc/ZN3R-59UH>] (estimating one third of Americans are working from home due to pandemic).

4. See Lauren McAlister, *Here’s How COVID-19 Has Changed Fitness*, MINDBODY BUS., <https://www.mindbodyonline.com/business/education/blog/heres-how-covid-19-has-changed-fitness> [<https://perma.cc/L456-LPM8>] (last visited Nov. 8, 2021) (emphasizing “[v]irtual fitness classes have become the ‘new normal.’”).

5. See Amaya Becvar Weddle, *Virtual Workout Trends During Shelter-at-Home*, MINDBODY BUS., <https://www.mindbodyonline.com/business/education/blog/virtual-workout-trends-during-shelter-home> [<https://perma.cc/P29H-AUZU>] (last visited Nov. 8, 2021) (discussing trends of virtual fitness classes during COVID-19 pandemic).

minds.⁶ However, shifting from in-person workout classes to online or virtual workout classes without a shift in existing music licensing and copyright agreements can present an array of unintentional or inadvertent violations of federal copyright law.⁷

This Article will focus on the issues that arise under federal copyright law with respect to the music played during workout classes.⁸ Specifically, this article concludes that copyright law is appropriately flexible to withstand industry changes such as the shift from in-person to online fitness classes, but fitness providers need to be aware of the differences that arise over different mediums.⁹ Section II of this Article discusses Peloton's music use in its online workout platform, as well as the background copyright law that is necessary to understand Peloton's legal trouble.¹⁰ Section III analyzes how online fitness classes can more easily run afoul of federal copyright law.¹¹ Section IV highlights the lessons learned from Peloton's recent lawsuit, and how those lessons apply to any studio or company posting virtual fitness classes with background music online.¹²

II. WARM UP: PELOTON'S JOYRIDE WITH IMPROPERLY LICENSED MUSIC AS A BACKGROUND TO THE ISSUE

A. Peloton's Music Use

The ramifications of improperly licensed music in virtual fitness classes can be seen in the case of *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*¹³ Peloton Interactive, Inc. ("Peloton") is an

6. Cf. *Music Legality for Virtual Classes*, AM. COUNCIL ON EXERCISE, (NOV. 2, 2020), <https://www.acefitness.org/education-and-resources/professional/expert-articles/7706/music-legality-for-virtual-classes/> [<https://perma.cc/5K7G-5S2Q>] ("Music legality has often been a source of confusion for group fitness instructors; this is compounded by the new and complex reality of classes moving online.")

7. See *id.* (indicating different music licenses are required for in-person group workout classes from those required for virtual group fitness classes).

8. For further discussion of the federal copyright issues that are implicated during workout classes, see *infra* notes 13-176 and accompanying text.

9. For further discussion of different copyright laws that come into play across different mediums, see *infra* notes 13-176 and accompanying text.

10. For further discussion of the lawsuit Peloton faced regarding its improperly licensed music, see *infra* notes 13-40 and accompanying text.

11. For further discussion of ways in which online fitness classes can run afoul federal copyright law, see *infra* notes 13-270 and accompanying text.

12. For further discussion of how lessons learned from Peloton's legal trouble can be applied to virtual fitness classes in general, see *infra* notes 177-270 and accompanying text.

13. *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 760-61 (S.D.N.Y. 2020) (discussing litigant's claim Peloton failed to properly license songs included in its library of on-demand or live-stream workout classes).

exercise equipment and media company based in New York City that is known for its internet-connected stationary bicycles.¹⁴ The bicycles encompass large screens and allow subscribers to access live-stream and pre-recorded workout classes on demand from the comfort of their own homes.¹⁵ The live-stream and on demand workout videos feature hit songs in the background so users can ride along in tune.¹⁶ Many subscribers report selecting workouts specifically because of the music played, suggesting that music is a key component to Peloton's success.¹⁷ Peloton's music-based workout classes took off, and the company rode directly to the courtroom.¹⁸

In March of 2019, nine current members of the National Music Publishers' Association ("NMPA"), an organization that represents American music publishers and songwriters, filed a lawsuit against Peloton seeking more than \$300 million in damages over Peloton's alleged use of 2468 unlicensed songs.¹⁹ The claimants alleged that Peloton "knowingly used their music during classes without ob-

14. See Peloton Interactive, Inc., Registration Statement (Form S-1) (Aug. 27, 2019) ("We are an innovation company at the nexus of fitness, technology, and media. We have disrupted the fitness industry by developing a first-of-its-kind subscription platform that seamlessly combines the best equipment, proprietary networked software, and world-class streaming digital fitness and wellness content, creating a product that our Members love."). Peloton's S-1 Registration with the Securities and Exchange Commission lists New York City as its principal place of business. See *id.* (listing New York City address as principal executive office).

15. See *id.* ("Both our Bike and Tread include a state-of-the-art touchscreen that streams live and on-demand classes.").

16. See *The Peloton Story*, PELOTON, <https://www.onepeloton.com/company> [<https://perma.cc/C9VE-QK5A>] (last visited Oct. 23, 2021) ("Our library of classes with curated music is designed to keep you coming back."); Peloton Interactive, Inc., *supra* note 14 (noting subscribers can pick class based on music genre).

17. See *NMPA Publishers File Copyright Lawsuit Against Peloton*, NAT'L MUSIC PUBLISHERS' ASS'N, (Mar. 19, 2019) <https://www.nmpa.org/nmpa-publishers-file-copyright-lawsuit-against-peloton/> [<https://perma.cc/Y64H-RK6N>] ("Music is a core part of the Peloton business model and is responsible for much of the brand's swift success. Thousands of exclusive videos and playlists are a major reason hundreds of thousands of people have purchased Peloton products.").

18. For further discussion of the ramifications Peloton faced for improperly licensing music for their virtual fitness classes, see *infra* notes 19-36 and accompanying text.

19. See *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 761 (S.D.N.Y. 2020) (stating music publishers commenced litigation against Peloton on March 29, 2019). The original music publishers requested leave to amend their complaint on September 12, 2019, to join additional music publishers as plaintiffs and to add additional compositions to the list of infringed works. See Todd Spangler, *Peloton Settles Legal Fight with Music Publishers*, VARIETY (Feb. 27, 2020), <https://variety.com/2020/digital/news/peloton-settles-music-publishers-lawsuit-1203517495/> [<https://perma.cc/H4D7-94A5>] (describing NMPA's lawsuit against Peloton, including allegations therein).

taining proper licensing.”²⁰ NMPA claimed that Peloton used unlicensed songs from artists such as Nicki Minaj, Lady Gaga, Bruno Mars, Drake, Rihanna, Taylor Swift, the Beatles, and Adele during its fitness classes.²¹

When Plaintiffs asserted that Peloton owed them more than \$300 million in damages, Peloton had already spent over \$50.6 million in licensing fees.²² Peloton specifically states in its SEC filings that the company is aware of copyright in music, and that the company entirely relies on third-party licenses for its music.²³ Peloton had obtained public performance rights from performance rights organizations, such as the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music Inc. (“BMI”), that license rights to public performance of popular songs.²⁴ While Peloton entered some licensing agreements, it did not enter enough to avoid the suit filed against it.²⁵

In their complaint, members of the NMPA asserted synchronization licenses were required for the on-demand and live-stream classes that Peloton provides.²⁶ In response to the infringement complaint, Peloton countersued the NMPA, alleging anticompeti-

20. See *Peloton’s Infringement Lawsuit is a Warning to Gym Owners and Fitness Pros Who Play Music in Their Classes and Facilities Without a Proper License*, L. OFF. OF JASON H. ROSENBLUM, PLLC, <https://jhrlegal.com/pelotons-infringement-lawsuit-is-a-warning-to-gym-owners-and-fitness-pros-who-play-music-in-their-classes-and-facilities-without-a-proper-license/> [https://perma.cc/WC6N-QM3X] (last visited Sept. 25, 2021) [hereinafter *Warning Gym Owners*] (relaying NMPA, member artists’ claim assertions against Peloton).

21. See *id.* (listing Lady Gaga, Bruno Mars, Drake, Rihanna as artists whose songs Peloton used without proper authorization); see also Nicole Lyn Pesce, *Peloton Has Spent \$50.6 Million on Music—But This Suit Says it Owes \$300 Million More*, MARKETWATCH (Sept. 16, 2019), <https://www.marketwatch.com/story/peloton-has-spent-506-million-on-music-but-this-suit-says-it-owes-300-million-more-2019-09-16> [https://perma.cc/RE7M-L753] (listing Beatles, Taylor Swift, Adele as artists who songs Peloton used without proper authorization).

22. See Pesce, *supra* note 21 (reporting amount Peloton spent on music, amount Plaintiff Publishers claim Peloton owed).

23. See Peloton, Interactive, Inc., *supra* note 14 (“We depend upon third-party licenses for the use of music in our content. An adverse change to, loss of, or claim that we do not hold necessary licenses may have an adverse effect on our business, operating results, and financial condition.”).

24. See *id.* (“Music is an important element of the overall content that we make available to our Members. To secure the rights to use music in our content, we enter into agreements to obtain licenses from rights holders such as record labels, music publishers, performing rights organizations, collecting societies, artists, and other copyright owners or their agents. We pay royalties to such parties or their agents around the world.”).

25. For further discussion of how Peloton failed to secure proper licenses for the music used in its workout videos, see *infra* note 26 and accompanying text.

26. See *Downtown Music Publ’g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 760 (S.D.N.Y. 2020) (alleging Peloton needed synchronization licenses).

tive behavior.²⁷ Peloton asserted that the NMPA engaged in price fixation efforts to prevent Peloton from reaching deals with copyright holders on an individual basis.²⁸ However, Peloton's assertions were dismissed in January of 2020.²⁹ While battling the claims, Peloton removed hundreds of classes containing unlicensed music from its on-demand platform.³⁰

In February of 2020, the two parties settled the dispute for an undisclosed amount and entered an agreement allowing Peloton to continue to use music during its classes while properly compensating the copyright holders.³¹ The President and CEO of NMPA, David Israelite, released a statement saying, in pertinent part:

We are pleased the music publishers and their songwriter partners in this case have reached a settlement with Peloton that compensates creators properly and sets forth the environment for a positive relationship going forward. Peloton is an innovative company, and we are impressed with the company's investment in technology and commitment to delivering a powerful, authentic music experience. We look forward to our ongoing collaboration to find solutions that will benefit all songwriters.³²

The Peloton suit serves as a warning—it shows that artists, and the label groups whom represent them, are actively protecting their intellectual property.³³ Large corporations are not the only organiza-

27. See Pesce, *supra* note 21 (stating Peloton countersued NMPA for anti-competitive behavior).

28. See Claudia Rosenbaum, *Peloton and NMPA Agree to Settle Copyright Infringement Lawsuit*, BILLBOARD (Feb. 27, 2020), <https://www.billboard.com/articles/business/9324022/peloton-nmpa-settlement-lawsuit> [<https://perma.cc/NJ5S-VJLK>] (detailing Peloton's countersuit against NMPA alleging anti-competitive behavior).

29. See *Downtown Music Publ'g LLC*, 436 F. Supp. 3d at 754 (dismissing Peloton's counterclaims); see also Rosenbaum, *supra* note 28 (emphasizing judge's dismissal of Peloton's countersuit in January 2020).

30. See *Warning Gym Owners*, *supra* note 20 (emphasizing Peloton was forced to remove hundreds of videos containing unlicensed music from its platform as result of litigation).

31. See Spangler, *supra* note 19 (noting financial terms of settlement agreement were not disclosed).

32. See Press Release, *NMPA and Peloton Announce Settlement of Litigation, Joint Collaboration Agreement*, PELOTON, (Feb. 27, 2020), <https://investor.onepeloton.com/news-releases/news-release-details/nmpa-and-peloton-announce-settlement-litigation-joint> [<https://perma.cc/LMS6-NQBZ>] (announcing settlement of suit, including statement made on behalf of both parties).

33. See *Warning Gym Owners*, *supra* note 20 ("While designing classes centered around great tunes is an increasingly important part of a fitness instructor's job, a recent lawsuit filed against the popular digital fitness company, Peloton, is a reminder that music used during commercial classes or at gyms must be licensed or risk getting slapped with an expensive copyright suit.").

tions music licensing groups and authors are targeting.³⁴ In fact, smaller yoga studios have also been hit with lawsuits over unlicensed use of music during group classes.³⁵ Lawsuits against smaller studios illustrate that copyright holders and beneficial owners are active in defending their intellectual property rights, and that smaller studios need to be cognizant of federal copyright law just as larger corporations, like Peloton, do.³⁶

However, as Peloton teaches us, complying with copyright law in the virtual fitness industry is not easy.³⁷ Peloton draws attention to the complexities that surround music licensing in virtual fitness classes, such as identifying the proper rights holder and determining what licenses are needed in its SEC Registration statement.³⁸ In fact, Peloton stated in its SEC Registration:

Although we expend significant resources to seek to comply with the statutory, regulatory, and judicial frameworks, we cannot guarantee that we currently hold, or will always hold, every necessary right to use all of the music that is used on our service, and we cannot assure you that we are not infringing or violating any third-party intellectual property rights, or that we will not do so in the future. These challenges, and others concerning the licensing of music on our platform, may subject us to significant liabil-

34. For further discussion of who music licensing groups are targeting, see *infra* note 35 and accompanying text.

35. See Keeley Mitchell, *Could Silence be the New Thing in Yoga Classes? ASCAP Goes After Yoga Studios for Music Licensing Fees*, YOGA LUNCHBOX (July 15, 2014), <https://theyogalunchbox.co.nz/could-silence-be-the-new-thing-in-yoga-classes-as-cap-is-going-after-yoga-studios-for-music-licensing-fees/> (noting yoga studios have been targets for music licensing suits).

36. See *id.* (emphasizing smaller studios have been hit with copyright lawsuits over music licensing rights); see also *Warning Gym Owners*, *supra* note 20 (asserting Peloton's lawsuit is warning to other gyms: they must play music with proper license or bear risk of lawsuit).

37. See Peloton Interactive, Inc. *supra* note 14 (highlighting difficulty of obtaining proper intellectual property rights for music in videos); see also *id.* (declining to guarantee company complied with all relevant laws when incorporating music, despite obtaining blanket licenses); see generally Pesce, *supra* note 21 (emphasizing Peloton spent copious amounts on music licenses, yet was still not fully in compliance).

38. See Peloton Interactive Inc., *supra* note 14 ("The process of obtaining licenses involves identifying and negotiating with many rights holders, some of whom are unknown or difficult to identify, and implicates a myriad of complex and evolving legal issues across many jurisdictions, including open questions of law as to when and whether particular licenses are needed.").

ity for copyright infringement, breach of contract, or other claims.³⁹

Music licensing in virtual fitness classes is a complex issue—even a publicly-traded company that generated \$4.02 billion in revenue in the 2021 fiscal year, with nearly unlimited resources, could not get it right.⁴⁰

B. A Group Class in Copyright Law

To fathom how the shift from in-person to online workout classes can violate federal copyright law, it is important to understand current provisions of federal copyright law.⁴¹ This comment will focus solely on copyright law in the United States of America.⁴² This section will provide a background to copyright law as a whole, and more specifically, what sections are applicable to group fitness classes.⁴³

1. *Let's Start With the Basics: What is Copyrightable?*

Copyright law in the United States can be traced back to the United States Constitution.⁴⁴ Article 1, Section 8, Clause 8 of the Constitution gives Congress the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁴⁵ As an incentive to create works, authors are given a limited monopoly to control the uses of their intellectual property.⁴⁶

39. See *id.* (emphasizing Peloton cannot guarantee it holds all necessary rights to music that is incorporated into its service).

40. See Motley Fool Transcribing, *Peloton Interactive (PTON) Q4 2021 Earnings Call Transcript*, MOTLEY FOOL (Aug. 26, 2021), <https://www.fool.com/earnings/call-transcripts/2021/08/27/peloton-interactive-pton-q4-2021-earnings-call-tra/> (“Our fourth quarter brought a remarkable year to a close. We finished the year with \$4.02 billion of revenue, up 120% year on year and up 340% versus fiscal 2019.”). For further discussion of how Peloton expended significant resources to comply with copyright law and still encountered a lawsuit, see *supra* notes 17-38 and accompanying text.

41. For further discussion of the ways federal copyright law intertwines with group fitness classes, see *infra* notes 45-50 and accompanying text.

42. For further discussion of U.S. Copyright Law, see *infra* notes 44-83.

43. For further discussion of how copyright law applies to group fitness classes, see *infra* notes 44-176.

44. For further discussion of copyright law in the U.S. Constitution, see *infra* note 45 and accompanying text.

45. See U.S. CONST. art. I, § 8, cl. 8 (providing Copyright Clause of U.S. Constitution).

46. See *Copyright Basics*, LA. STATE UNIV. LIBS., <https://www.lib.lsu.edu/services/copyright/basics> [<https://perma.cc/CL5L-D7SM>] (last visited Feb. 10, 2021) (detailing basics of copyright law).

Section 102 of Article 17 of the United States Code, which codifies federal copyright law, allows any original work of authorship fixed in a tangible medium of expression to be copyrighted.⁴⁷ An original work of authorship does not require that the work be novel; instead, it requires that the work originates with the author.⁴⁸ Under the current statutory regime, copyright attaches to a work the moment it is fixed.⁴⁹ The typical duration of copyright is the full life of the author plus seventy years.⁵⁰ If the work was made for hire or if the author is unknown, then the copyright will last for ninety-five years following its original publication, or 120 years following its creation, whichever expires first.⁵¹

For musical works and sound recordings, there are two distinct copyright holders: one for the sheet music itself, and another for the sound recording embodied on a phonorecord.⁵² Typically, the artist who wrote the song (or, in the case of a work for hire, the artist for whom the song was written) owns the copyright to the sheet music.⁵³ However, industry standard contracts typically allo-

47. See 17 U.S.C.S. § 102 (LexisNexis 1992) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from any which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

48. See *Feist Publ’ns v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991) (noting “originality does not signal novelty,” but rather origination with author).

49. See *Copyright in General*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-general.html> [<https://perma.cc/YQ9V-LRLW>] (last visited Feb. 10, 2021) (“Your work is under copyright protection the moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device.”); see also 17 U.S.C.S. § 101 (LexisNexis 1992) (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”).

50. See *Circular 92: Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code*, U.S. COPYRIGHT OFF., (May 2021), <https://www.copyright.gov/title17/title17.pdf> [<https://perma.cc/3LBP-BNXX>] (noting Sonny Bono Copyright Term Extension Act amended Chapter 3 of Title 17 to extend copyright term of most works to life of author plus seventy years).

51. See *Copyrights—Term Extension and Music Licensing Exemption*, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.) (extending federal copyright terms through acts commonly known as “Sonny Bono Copyright Term Extension Act,” “Fairness in Musical Licensing Act of 1998”).

52. See PETER S. MENELL, ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2019, Volume II*, 873 (2019) (emphasizing distinct copyright of sound recording, separate from underlying musical composition).

53. See Brian Day, *Note: The Super Brawl: The History and Future of the Sound Recording Performance Right*, 16 MICH. TELECOMM. TECH. L. REV. 179, 182 (2009)

cate the copyright of the sound recording to the producer or record label.⁵⁴ Understanding who has the right is vital for making sure licensing is proper and for anticipating who may assert a viable claim of alleged infringement.⁵⁵

2. *Exclusive Rights of Copyright Holders*

Under current federal copyright law, a copyright holder is given a bundle of exclusive rights.⁵⁶ This list of rights includes: the right to make copies, the right to prepare derivative works, the right to distribute the work publicly, the right to perform the work publicly, and the right to display the work publicly.⁵⁷ At the intersection of copyrights of music and workout classes are the right to make copies, the public performance right, and the public distribution right.⁵⁸

a. Public Performance Rights

The main right at issue in traditional, in-person workout classes is the right to perform a work publicly.⁵⁹ A performance is considered public when it is in front of a “substantial number of [people] outside a normal circle of family or social acquaintances is gathered.”⁶⁰ Work is performed when it is transmitted or otherwise communicated in a public place, regardless of whether the members of the public who are capable of receiving the performance or display receive it in the same place or separate places at separate

(“The copyright in the musical work (the lyrics and melody) belongs to the author or composer of the song . . .”).

54. *See id.* (“The sound recordings produced by artists are often deemed works made for hire in recording agreements, granting all copyright interest therein to the record label.”).

55. *See* Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 18–21 (2004) (emphasizing difficulty in determining copyright holders, what rights are necessary, who can bring claim for infringement).

56. *See* 17 U.S.C.S. § 106 (LexisNexis 1992) (codifying exclusive rights copyright holders have); *see also* Gorman, *infra* note 177 (characterizing exclusive rights under Section 106 as bundle of rights).

57. *See* 17 U.S.C.S. § 106 (LexisNexis 1992) (listing statutorily granted exclusive rights given to copyright holders).

58. For further discussion regarding copyright holders’ exclusive rights, *see infra* notes 59-69 and accompanying text.

59. *See Music Licensing for Group Fitness Classes: Are You Covered?*, INT’L SPORTS SCIS. ASS’N, <https://www.issaonline.com/blog/index.cfm/2020/music-licensing-for-group-fitness-classes-are-you-covered> [<https://perma.cc/P9EN-XQ3Z>] (last visited Jan. 14, 2021) (emphasizing requirement for public performance licenses in group fitness classes).

60. *See* MENELL, *supra* note 52 (defining publicly in context of public performance right).

times.⁶¹ The copyright holder's right to perform the work publicly is the main right at play when it comes to in-person fitness classes.⁶² Under the common law interpretation of public performance, a typical fitness class qualifies as a public performance.⁶³

b. Public Distribution Rights (“Mechanical Rights”)

Another right given to copyright holders under Section 106 of the Copyright Act is the exclusive right 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.⁶⁴ This right is frequently referred to as the “mechanical right.”⁶⁵ This exclusive right is strict; the distribution of even a single copy may constitute infringement.⁶⁶ In *Playboy v. Hardenbaugh*,⁶⁷ the court found that making an authorized copy of work available for download by the public infringes the copyright holder's distribution right.⁶⁸ However, this mechanical or distribution right is needed for pure sound recordings, or sound recording without a visual component.⁶⁹

c. The Right to Make Copies

Not only does the music playing in a workout video posted online constitute a public performance and possibly public distribu-

61. See *id.* (indicating public performances are not limited to in-person contexts, they include publicly available over internet).

62. See Am. Council on Exercise, *supra* note 6 (noting requirement for public performance license if playing music in in-person fitness class).

63. See Jessica H. Maurer, *Music Licensing Laws for Group Fitness Classes*, GX-UNITED, <https://gxunited.com/blog/music-licensing-laws-fitness/> [<https://perma.cc/46MU-WAJC>] (last visited Jan. 17, 2021) (emphasizing “[t]o play music in a public arena, you need to purchase additional licensing called public performance license,” explaining later group fitness classes need public performance rights).

64. See 17 U.S.C.S. § 106(3) (LexisNexis 2002) (codifying exclusive right of copyright holders to distribute copyrighted work publicly).

65. See *The Committee on Entertainment Law of the Association of the Bar of the City of New York* (Jan. 2003), https://www.nycbar.org/pdf/report/Music%20Rights%20Primer%20-%20v.4%20_LH002381;4_.pdf [<https://perma.cc/3W6B-BD6Y>] (interchanging mechanical right with distribution right).

66. See MENELL, *supra* note 52 (emphasizing even one distribution is enough for liability).

67. *Playboy Enters. v. Russ Hardenbaugh*, 982 F.Supp. 503 (N.D. Ohio 1997).

68. See *id.* at 513 (finding copyright infringement by placing copyrighted photos online available for download).

69. See StringOctavian Team, *Posting Performance Recordings Online Without Violating Copyright Laws*, CONNOLLY, <https://www.connollymusic.com/stringovation/posting-performance-recordings-online-without-violating-copyright-laws> [<https://perma.cc/ANN7-JC8V>] (Apr. 17, 2018) (noting mechanical or distribution rights are just for sound recordings).

tion, but an actual copy of the music is being made.⁷⁰ Therefore, the copyright holder's exclusive right to reproduction is infringed upon as well.⁷¹ Typically, the reproduction right is inherently included in licensing agreements where a copy is being made.⁷²

d. Synchronization Rights

Synchronization rights refer to a copyright owner's right to use its musical composition in an audiovisual recording, such as a film.⁷³ Thus, synchronization rights are required when a third-party incorporates a copyright holder's musical composition into an audiovisual recording.⁷⁴ For example, when a film producer wishes to add a copyrighted song in the background, that producer must obtain a synchronization license.⁷⁵ Even if the third-party seeking to incorporate another's musical composition wishes to re-record the song before incorporating it into a video, such as creating a "cover," a synchronization license is still required.⁷⁶ Synchronization rights are not explicitly labeled in the Copyright Act as an exclusive right under Section 106.⁷⁷ However, they harken on the statutory reproduction right, as the musical composition is reproduced when it is incorporated into a video.⁷⁸ The majority of on-demand, virtual group-fitness classes playing copyrighted music will need synchronization rights in addition to public performance

70. See *How to Acquire Music for Films*, *infra* note 222 (explaining master licenses cover right to reproduce a song in a film); see generally 17 U.S.C.S. § 106 (LexisNexis 2002) (codifying an exclusive right "to reproduce the copyrighted work").

71. See MENELL, *supra* note 52 (emphasizing recording music can infringe on copyright holder's right to make copies).

72. For further discussion of how the right to reproduce is often tied in with synchronization license, see *infra* notes 73-74 and accompanying text.

73. See generally William Bee Ravanel Lewis, *Feature: The Next Big Hit: Protecting and Exploiting (In A Good Way) Your Musician-Client's Intellectual Property*, 26 S. C. LAWYER 46, 49 (July 2014) (explaining synchronizing musical composition to audiovisual work requires obtaining synchronization license from copyright owner of musical composition).

74. See StringOctavian Team, *supra* note 69 (emphasizing music recordings containing visual element—even black screen—require synchronization licenses).

75. See Lewis, *supra* note 73 (explaining third parties who wish to use copyright owner's song in audiovisual film must obtain synchronization license).

76. See *id.* (emphasizing synchronization licenses pertain to underlying musical composition, meaning even re-recording musical work requires synchronization license).

77. See Case Collard, *Syncing Workout Music With Licensing Requirements*, JD SUPRA (Jan. 10, 2020), <https://www.jdsupra.com/legalnews/syncing-workout-music-with-licensing-92639/> [<https://perma.cc/R5EA-WYD5>] ("The Copyright Act does not explicitly label synchronization rights.").

78. See *id.* (noting synchronization rights typically include reproduction right).

rights, or the rights to play the music in front of a group of people outside of a normal group of social acquaintances.⁷⁹

e. Master Rights

A distinct copyright interest exists in the physical embodiment of a performance of a musical composition on a phonorecord.⁸⁰ This copyright, known as a master recording, is different than the copyright to the underlying musical composition being performed and recorded.⁸¹ When a third party wishes to incorporate a pre-recorded, copyrighted song to an audiovisual work, a master license must typically be obtained.⁸² Unlike synchronization licenses, master licenses are only needed when a third-party wishes to use the original “master” recording of a song, not when a third-party is recording its own version of the song.⁸³

C. Properly Acquiring Rights to Use Copyrighted Music in Virtual Fitness Classes

1. *Determining the Rights Holder*

The first step towards properly acquiring music rights is to determine what rights you need and who you need to acquire the rights from.⁸⁴ Because copyright law provides a bundle of exclusive rights, those rights can be split up among a variety of individuals or organizations.⁸⁵ For example, for a song itself, the singer or author typically has the rights to the lyrics and musical composition itself, but the producer typically only has the rights to the sound recording.⁸⁶ Because copyright holders can lease some of their exclusive rights to others, in addition to the complexities of different owners having different rights to different parts of the copyright, determin-

79. See Am. Council on Exercise, *supra* note 6 (noting in-person group fitness classes require public performance rights).

80. See 6 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.03 (rev. ed. 2021) (defining master recording).

81. See *id.* (explaining different copyright interest exists in physical recording of musical composition than copyright interest in musical composition itself).

82. See *id.* (expanding upon when master license must be obtained).

83. See *id.* (distinguishing masters licenses from synchronization licenses, as masters licenses are only necessary when master version of song is being used in audiovisual work).

84. See Litman, *supra* note 55 (emphasizing importance of acquiring proper rights from proper copyright holder).

85. See *id.* (highlighting one song may have multiple copyright holders user needs to negotiate rights with).

86. See *Newton v. Diamond*, 388 F.3d 1189, 1190 (9th Cir. 2014) (litigating dispute where user obtained license from only one of multiple copyright holders).

ing who you need to acquire rights from can be complicated.⁸⁷ Additionally, certain licenses, such as synchronization licenses, can require anyone wishing to acquire a license to obtain rights from two different copyright holders.⁸⁸

2. *Music Licensing Agreements*

A common form of acquiring music rights includes music licensing agreements.⁸⁹ A music licensing agreement is an agreement between a third-party and a copyright holder, where the third party can obtain rights to use the copyrighted music for specific circumstances for a price.⁹⁰ Third parties hoping to use a specific song may need to enter music licensing agreements with various copyright holders, just to use one song, depending on how the user intends to use the music.⁹¹

a. Performance Rights Organizations

One of the easiest ways to procure rights to music for use during in-person group fitness classes is by purchasing a license from one of the major performance rights organizations (“PRO”), such as ASCAP, BMI, SESAC Performing Rights (“SESAC”), or Global Music Rights.⁹² Instead of reaching out to individual artists, users can contact a PRO.⁹³ These organizations cover some of the most

87. See Litman, *supra* note 55 (“[L]argely because of the adoption of divisibility of copyright, in many if not most cases, it can be difficult and sometimes impossible to discover who the copyright owners of all those rights are.”).

88. See *id.* (noting licenses may need to be obtained from different copyright holders).

89. See Lewis, *supra* note 73 (emphasizing third parties who wish to use copyrighted music in a film must obtain licenses from applicable copyright owners to do so); see also 6 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.03 (rev. ed. 2021) (explaining music rights can be granted through licensing agreements).

90. See Andreas Kalogiannides, *The Basics of a Music Licensing Deal*, AURA LLP <https://aurallp.com/the-basics-of-a-music-licensing-deal/> [<https://perma.cc/HM5N-9Z8B>] (“A licensing agreement is a contract between two parties: the licensee (the person(s) receiving the license), and the licensor (the person(s) granting the license). In this type of deal, a licensor grants the licensee the authority to something that only the licensor has the exclusive right to do.”).

91. See Lewis, *supra* note 73 (emphasizing no statutory price for synchronization licenses, subjecting the cost to factors such as sophistication of client, intended use of copyrighted song, number of times copyrighted song will be used).

92. See Am. Council on Exercise, *supra* note 6 (delineating four major performance rights organizations).

93. See *Fitness Facilities*, ASCAP, <https://www.ascap.com/music-users/types/fitness-landing-page> [<https://perma.cc/KMS6-Y4MN>] (last visited Feb. 10, 2020) (“Instead of reaching out to hundreds of thousands of music creators yourself, a single ASCAP license agreement gives you permission to play music from any ASCAP member.”).

well-known artists and provide blanket licensing plans to users such as fitness studios.⁹⁴ ASCAP covers over 800,000 songwriters, composers, and music publishers, and has over a million songs in its repertoire.⁹⁵ BMI is another well-known music performance rights organization, representing more than 1.1 million copyright holders and over seventeen million musical works.⁹⁶ Under a blanket license, a user can play any song in the PRO's repertoire for a monthly or annual fee.⁹⁷

b. Synchronization Licenses

A synchronization license is an agreement between a copyright holder and a third-party licensee looking to include the musical composition in an audiovisual recording.⁹⁸ Synchronization licenses may be more difficult to obtain than the aforementioned options.⁹⁹ Unlike blanket licenses, synchronization licenses often require the user to make an agreement with the publisher directly, as opposed to going through a major PRO—such as ASCAP or BMI—who represents thousands of musicians simultaneously.¹⁰⁰ In addition, some synchronization licenses will not cover the performance right.¹⁰¹ If that is the case, then performance rights will need to be obtained from one of the PROs in addition to the synchroni-

94. *See id.* (providing blanket licenses to fitness facilities).

95. *See id.* (providing information on artists, songs in ASCAP's repertoire).

96. *See Music Users*, BROAD. MUSIC INC., <https://www.bmi.com/licensing> [<https://perma.cc/E95R-22LP>] (last visited Feb. 10, 2021) (summarizing what BMI is).

97. *See What is a Blanket License?*, ASCAP, <https://www.ascap.com/search-results?q=blanket%20license> [<https://perma.cc/QV7V-YU8>] (last visited Feb. 10, 2020) (“A blanket license is a license that provides unlimited access to an entire repertoire during the term of a license for a single fee. The ASCAP blanket license enables you to perform any or all of the entire ASCAP repertoire as many times as you want for a single low annual fee.”).

98. *See* Heather McDonald, *Sync Licensing Vs. Master Licensing*, BALANCE CAREERS (Sept. 6, 2019), <https://www.thebalancecareers.com/sync-licensing-versus-master-licensing-3971888> [<https://perma.cc/MUN2-FE5X>] (defining synchronization license).

99. For further discussion of how synchronization rights can be more difficult to obtain, see *infra* notes 100-104 and accompanying text.

100. *See How to Acquire Music for Films*, *infra* note 222 (noting synchronization licenses require contacting copyright holder as opposed to going through one of major PROs).

101. *See FAQs*, HARRY FOX AGENCY LLC, <https://www.harryfox.com/#/faq> [<https://perma.cc/8E6M-HCKE>] (last visited Feb. 10, 2021) (noting some synchronization licenses will not require performance rights, which may need to be obtained separately).

zation license.¹⁰² Performance Rights Organizations such as ASCAP provide contact information to the publishers for those who are interested in obtaining synchronization licenses.¹⁰³ Prices for these are typically negotiated with the music publisher, and often depend on how the music will be used.¹⁰⁴ Synchronization licenses can be crucial for fitness instructors who post pre-recorded workout videos online with copyrighted music in the background to avoid liability.¹⁰⁵

c. Master Licenses

A fitness instructor who wishes to incorporate a pre-recorded song in a workout video that will be published online will likely need to obtain a master license and a synchronization license.¹⁰⁶ The master license covers the physical recording itself, while the synchronization license covers the underlying musical composition in the recording.¹⁰⁷ Master licenses are often negotiated with synchronization licenses, and both typically require the third-party licensee to negotiate directly with the publisher.¹⁰⁸

3. *Alternative Options for Music in Virtual Fitness Classes*

a. Royalty Free Music

One way for users such as group fitness instructors or organizations to avoid liability and decrease the amount of licensing fees

102. *See id.* (noting synchronization licenses may not include public performance rights, meaning if user plans to perform audiovisual work with public performance, right from one of major PROs is required).

103. *See* How to Acquire Music for Films, *infra* note 222 (noting ASCAP has contact information to reach publishers for purpose of obtaining synchronization licenses).

104. *See id.* (explaining prices of synchronization licenses very depending on how music is used).

105. *See* Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 761 (S.D.N.Y. 2020) (litigating music publishers' claim Peloton failed to obtain synchronization licenses, as required, before incorporating music in on-demand workout videos posted online); *see also* Lewis, *supra* note 73 (identifying when synchronization licenses must be obtained).

106. *See* Lewis, *supra* note 73 (noting when synchronization licenses are required versus when master licenses are required, including overlap). *See generally* Downtown Music Publ'g LLC, 436 F. Supp. 3d (asserting online, on-demand workout videos need synchronization licenses when incorporating copyrighted music).

107. *See* Lewis, *supra* note 73 (distinguishing synchronization licenses from master licenses).

108. *See id.* (explaining synchronization, masters licenses are often negotiated together, which usually involves going directly to the publisher).

required is to opt solely for royalty-free music.¹⁰⁹ Using royalty-free music allows fitness instructors to pay a one-time fee to use the song, as opposed to an annual license as provided by the performance rights organizations.¹¹⁰ Once the music is paid for, it can be used unlimited times in front of unlimited audiences.¹¹¹ Royalty-free music is itself a licensing agreement, and the prices per songs can vary significantly.¹¹² Artists sharing their music on the royalty-free PretzelAux allow users to use those songs for streaming purposes.¹¹³

b. Music in the Public Domain

One safe and affordable option for users who want to limit the costs of using music is to only play music that is in the public domain during group fitness classes.¹¹⁴ A copyright is a limited monopoly, and once the duration of the copyright expires, that music is officially in the public domain.¹¹⁵ Once in the public domain, users are able to freely use that intellectual property without obtaining rights.¹¹⁶ Music in the public domain can be publicly performed, copied, or incorporated into videos without need for a license.¹¹⁷ Because there have been several revisions to federal copyright law, music that was published prior to January 1, 1978 where

109. See Am. Council on Exercise, *supra* note 6 (noting royalty-free music is often “the most cost-effective route to meet your virtual class needs,” because using royalty-free music avoids annual licensing fees).

110. See *id.* (noting royalty-free music avoids paying annual licensing fees, as user only needs to purchase license to song once).

111. See Gilles Arbour, *What is Royalty Free Music? What Does it Mean Exactly?*, PREMIUMBEAT (Apr. 29, 2011), <https://www.premiumbeat.com/blog/what-is-royalty-free-music/> [<https://perma.cc/AXC2-ZMFA>] (noting price for royalty free music is same no matter how many visitors you have or how long you use music for).

112. See *id.* (“You can find royalty free music for \$30 and you can find it for \$600.”).

113. See Calvin R. Nelson, *Legal Implications of Syncing Copyrighted Music with Other Content*, VENABLE LLP (July 14, 2020), <https://www.venable.com/insights/publications/2020/07/legal-implications-of-syncing-copyrighted-music> [<https://perma.cc/VKF7-XDX6>] (“Artists who upload their music to Pretzel have agreed to permit users to play their music in streaming content. Pretzel offers both a free and a paid subscription.”).

114. See *Public Domain*, ROYALTY SOLS. CORP. (June 6, 2021), <https://tunelicensing.com/blog/post?page=public-domain> [<https://perma.cc/EF6Y-J2AL>] (explaining music in the public domain is free to use).

115. See *id.* (emphasizing music enters public domain when its copyright expires).

116. See *id.* (highlighting anything in public domain can be used without permission).

117. See *id.* (specifying music in public domain is not subject to same constraints as music held by valid copyright).

the author failed to comply with proper statutory requirements, such as notice of the copyright, may be in the public domain as well.¹¹⁸ However, using only music in the public domain will certainly limit options, given the long duration of a copyright.¹¹⁹

c. Self-Created Music

If an artist creates their own sheet music and lyrics and fixes them in a tangible medium of expression, such as written down on paper, the artist owns the rights to that song.¹²⁰ If the artist then creates a sound recording to the song, the artist owns the rights to the sound recording.¹²¹ This means the artists owns the exclusive bundle of rights for that sheet music and the sound recording.¹²² Therefore, listeners, including fitness studios, that create their own music are free to use it how they please.¹²³ For example, Zumba, a popular dance-based fitness class, provides instructors with original Zumba compositions to use during class.¹²⁴

118. See Gorman, *infra* note 177 (noting federal copyright in works published before 1978 required notice, but if notice requirement was not met, work fell into public domain).

119. See *The Limitations of Public Domain Music for In-Store or Commercial Use*, CLOUDCOVER MUSIC, <https://cloudcovermusic.com/brick-and-mortar-guide/public-domain-limitations/> [<https://perma.cc/W2VP-L94S>] (last visited Feb. 10, 2021) (emphasizing most music in public domain was created nearly 100 years ago, thus might not fit company's "brand image").

120. See 17 U.S.C.S. § 102 (LexisNexis 1990) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

121. See Lewis, *supra* note 73 ("As soon as Ms. Silverfolk captured her music and lyrics on paper, she proudly vested herself with various exclusive rights with respect to her musical composition.").

122. See 17 U.S.C.S. § 106 (LexisNexis 2002) (listing exclusive rights to copyright holders).

123. See *id.* (providing copyright holders exclusive rights to their independent creations).

124. See *ZIN's License Agreement*, ZUMBA FITNESS, LLC. <https://www.zumba.com/en-US/terms> [<https://perma.cc/E9TS-KFBP>] (last visited Oct. 22, 2021) ("Music. Instructor may use Zumba's original compositions and such other original tracks that may be released in the future as background music on Instructor's site. Instructor must not use any other music on Instructor's site unless he/she has obtained an appropriate license.").

4. *Delivering Virtual Group Fitness Classes: Terms and Conditions of Online Platforms*

The virtual platform through which a group fitness class is delivered can add another set of rules to be aware of.¹²⁵ Websites such as YouTube have their own Terms of Service Agreements and their own method of detecting and reporting copyright infringement.¹²⁶ Uploading a pre-recorded fitness class on YouTube with unauthorized music can lead to the video being removed from the site and a potential ban from uploading content to the platform altogether.¹²⁷ Other social media platforms, such as Facebook or Instagram, also police for unauthorized use of music and can take down infringing videos.¹²⁸

D. Infringement Suits for Improperly or Inadequately Licensed Music

A successful infringement suit can lead to statutory damages, actual damages, and attorney's fees.¹²⁹ Fines can run up to \$150,000 for each copyrighted song used without authorization.¹³⁰ While paying licensing fees might sound expensive, it is only a fraction of the amount of litigating a copyright infringement suit.¹³¹

1. *Who Can be Held Liable for Infringement?*

Direct infringers are those who directly infringe the rights of copyright holders.¹³² Indirect infringers are those who encourage or assist a third party to infringe.¹³³ Those who profit from infringing activity where an enterprise has the right and ability to prevent infringement can be held liable under vicarious liability.¹³⁴ Generally, a person or organization who has the right and ability to supervise the activity or has a direct financial interest at stake can be held

125. See Am. Council on Exercise, *supra* note 6 (noting social media platforms can have different policies).

126. See *id.* (emphasizing YouTube has its own detection method for copyright infringement).

127. See *id.* (explaining infringing videos can be taken down).

128. See *id.* (highlighting social media sites can be diligent in taking down videos constituting copyright infringement).

129. See *id.* (explaining potential damages).

130. See *id.* (providing potential costs of copyright infringement damages).

131. See *id.* (emphasizing cost of using copyrighted songs).

132. See MENELL, *supra* note 52, at 631 (noting anyone who violates exclusive rights codified in Section 106 is liable for copyright infringement).

133. See *id.* at 731 (tracing contours of liability for those who contribute to infringement).

134. See *id.* at 732 (explaining who can be held vicariously liable).

vicariously liable.¹³⁵ To be held liable for vicarious liability, one does not need to have knowledge of the infringing activity.¹³⁶ Additionally, under respondeat superior, a subsection of vicarious liability, the master is liable for what employees do, even if against orders.¹³⁷ Finally, one who, with knowledge of infringing activity, induces, causes, or materially contributes to the infringing activity can be held liable as a contributory infringer, even if only a contributor.¹³⁸

2. *Fair Use as a Possible Defense to Claims of Infringement*

Not every use of copyrighted material violates federal copyright law.¹³⁹ If a fitness class were distributing or publicly performing a song in class without the proper license, they still have the potential to argue fair use under the fair use exception, codified under Section 107 of the Copyright Act.¹⁴⁰ The fair use doctrine “promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.”¹⁴¹ Fair use does not require permission from the copyright holder to use the work.¹⁴²

The main focus of fair use is “whether the progress of human thought would be better served by allowing the use than preventing it.”¹⁴³ In a fair use inquiry, the court will weigh four factors: (1) the

135. *See id.* (explaining test for vicarious liability); *see also* *Fonovisa, Inc. v. Cherry Auction*, 76 F.3d 259, 262 (9th Cir. 1996) (“Even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”).

136. *See Fonovisa*, 76 F.3d at 262 (noting knowledge is not required).

137. *See* MENELL, *supra* note 52, at 732 (discussing master-servant principles of respondeat superior).

138. *See id.* at 733 (defining contributory liability); *see also Fonovisa*, 76 F.3d at 263 (“One who, with knowledge of infringing activity, induces, causes, or materially contributes to infringing conduct of another, may be held liable as a contributory infringer.”).

139. For further discussion of the fair use of copyrighted material, see *infra* notes 140-142 and accompanying text.

140. *See* Richard Stim, *Fair Use: The Four Factors Courts Consider in a Copyright Infringement Case*, Nolo, <https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html> [<https://perma.cc/2YLH-DZL8>] (last visited Jan. 16, 2021) (noting defendant accused of copyright infringement can argue alleged infringement is permitted under doctrine of fair use).

141. *See More Information on Fair Use*, U.S. COPYRIGHT OFF. (May 2021), <https://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/UZ59-XT3S>] (explaining purposes of fair use).

142. *See id.* (noting copyrighted material fairly used does not require permission from copyright holder).

143. *See* *Brammer v. Violet Hues Prods., LLC*, 922 F.3d 255, 262 (4th Cir. 2019) (stating ultimate test of fair use defense).

purpose and character of the use, (2), the nature of the copyrighted work, (3) the amount and substantiality of the work used, and (4) the effect upon the potential market of the copyrighted work.¹⁴⁴ However, weighing fair use factors is often subjective, so the defense provides no guarantees of a finding for the alleged infringer.¹⁴⁵ The Copyright Office itself notes that courts review fair use on a case-by-case basis, and that there is “no formula to ensure that a predetermined percentage or amount of work . . . may be used without permission.”¹⁴⁶ Therefore, a fitness instructor or company will not know whether their use is fair until a judge or jury decides.¹⁴⁷

a. The Purpose and Character of the Use

The first step in a fair use inquiry is to look at the purpose and character of the use.¹⁴⁸ Certain uses of a copyrighted work are not infringement, including for comment, criticism, parody, education, and news.¹⁴⁹ While education is preferred use under fair use, it typically only applies to non-profit, academic educational activities.¹⁵⁰ However, uses outside of this list can still fall in favor of the alleged infringer, particularly if that use is considered “transformative.”¹⁵¹ The test for transformative use is “whether the new work merely ‘supersedes the objects’ of the original creation, or instead adds something new, with a further purpose or different character,

144. See 17 U.S.C.S. §§ 107(1)–(4) (LexisNexis 1992) (codifying four factors to be considered in fair use inquiry).

145. See Rich Stim, *Fair Use*, STAN. LIBS. (Oct. 2016), <https://fairuse.stanford.edu/overview/fair-use/> [https://perma.cc/QP76-XJEV] (“Unfortunately, weighing the fair use factors is often quite subjective. For this reason, the fair use road map can be tricky to navigate.”).

146. See *More Information on Fair Use*, *supra* note 141 (“Courts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry. This means that there is no formula to ensure that a predetermined percentage or amount of work—or specific number of words, lines, pages, copies—may be used without permission.”).

147. For further discussion of why fair use inquiry comes down to the judge or jury, see *supra* notes 145-146 and accompanying text.

148. See 17 U.S.C.S. §§ 107(1)–(4) (listing “purpose and character of the use” as first of four fair use factors); see also *Brammer*, 922 F.3d at 262 (starting inquiry into fair use by evaluating “purpose and character of the use”).

149. See 17 U.S.C.S. § 107 (listing uses immune from copyright infringement).

150. See Joy Butler, *Music Licensing: What is Considered Fair Use?*, COPYRIGHT CLEARANCE CTR.: VELOCITY OF CONTENT BLOG (June 6, 2017), <https://www.copyright.com/blog/music-licensing-fair-use/> (noting limitations on educational use).

151. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting more transformative work is, more likely use will be considered fair).

altering the first with new expression, meaning, or message.”¹⁵² When the use of the copyrighted work is transformative, the court essentially finds that the goal of copyright law, to promote the sciences and useful arts, is better served by allowing the alleged infringer to use the copyright in this particular way.¹⁵³

Under the first factor, courts will also consider whether the use of the copyrighted work was commercial or for nonprofit purposes.¹⁵⁴ In evaluating the commercial versus nonprofit dichotomy in *American Geophysical Union v. Texaco*,¹⁵⁵ the court asserted “the greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely [this] factor will favor the copyright holder and the less likely the use will be considered fair.”¹⁵⁶ For example, when assessing commerciality in *Brammer v. Violet Hues*,¹⁵⁷ the court asked whether others pay to engage in similar conduct.¹⁵⁸ There, it was customary for websites to buy licenses to display copyrighted photographs on their webpages, which cut against the use of the copyrighted material under fair use.¹⁵⁹

b. Nature of the Copyrighted Work

Copyright protects creative expression more than facts.¹⁶⁰ In *Campbell v. Acuff-Rose*,¹⁶¹ the court found a song to be an artistic work that is closer to the core of copyright protection, meaning this

152. *See id.* (citation omitted) (explaining test for transformative use).

153. *See* *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006) (finding goal of copyright law was better served by allowing artist’s incorporation of copyrighted photo into collage than by not allowing this transformative use).

154. *See* *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 918-21 (2d Cir. 1994) (asserting “unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work.”); *see also* *Brammer v. Violet Hues Prods., LLC*, 922 F.3d 255, 262 (4th Cir. 2019) (stating courts consider “whether such use is of a commercial nature or is for nonprofit educational purposes”).

155. *Am. Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994).

156. *See id.* at 919 (distinguishing between commercial versus nonprofit use).

157. *Brammer v. Violet Hues Prods., LLC*, 922 F.3d 255 (4th Cir. 2019).

158. *See id.* at 265 (assessing whether other people pay to use copyrighted work when engaging in similar conduct as alleged infringer as part of commercial use inquiry).

159. *See id.* (noting websites customarily pay licensing fee to photographers when displaying their photographs).

160. *See* 17 U.S.C.S. § 102(b) (LexisNexis 1992) (stating facts are not copyrightable subject matter); *see also* MENELL, *supra* note 52 (“[T]he copyright protection afforded factual works is much ‘thinner’ than for works of fiction, because the facts themselves cannot be protected.”).

161. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

factor weighed in favor of the copyright holder.¹⁶² Under the court's finding in *Campbell*, when analyzing musical works, this factor weighs in favor of the copyright holder.¹⁶³ However, many courts have given this factor minimal weight.¹⁶⁴

c. Amount and Substantiality Used

The third factor in a fair use inquiry analyzes “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁶⁵ This inquiry requires the court to look at not only “the quantity of materials used, but also their quality and importance, too.”¹⁶⁶ This factor can be fact specific as to whether the whole song was played during the workout, or whether merely a snippet was played.¹⁶⁷ If the whole song, or a significant portion was played, the court is likely to find this factor in favor of the copyright holder.¹⁶⁸ The court may also look to whether the “heart” of the copyrighted work was incorporated.¹⁶⁹ The heart of a song may refer to the chorus, the beat, or otherwise highly-recognizable parts of the song.¹⁷⁰ Because fair use is a factual inquiry, there is no clear rule of how many seconds of a song may be considered fair.¹⁷¹

162. *See id.* at 571 (“This factor calls for recognition that some works are closer to the core of intended copyright protection than others. . . .”).

163. *See generally id.* at 572 (finding musical composition to be type of work entitled to greater copyright protection).

164. *See Fox News v. TVEyes*, 883 F.3d 169, 181 (2d Cir. 2018) (describing factor two as “neutral” while weighing other factors more heavily); *see also Campbell*, 510 U.S. at 582 (noting factor two is not likely to help much in separating “fair use sheep from the infringing goats” in cases involving parody).

165. 17 U.S.C.S. § 107(3) (LexisNexis 1992).

166. *See Campbell*, 510 U.S. at 587 (affirming Court of Appeal’s approach to evaluate both quantity of song used plus quality of song used in fair use inquiry).

167. *See Gorman*, *infra* note 177 (explaining fair use inquiry step regarding amount of work used).

168. *See Am. Geophysical Union v. Texaco*, 60 F.3d 913–14, 925–26 (2d Cir. 1994) (finding alleged infringer’s photocopying of copyrighted articles in entirety to weigh in favor of copyright holder).

169. *Compare Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 602 (1985) (finding factor two weighed in favor of copyright holder when alleged infringer copied “heart” of copyright holder’s unpublished novel), *with Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006) (finding alleged infringer did not use heart of copyright holder’s photograph when incorporating only legs of model in copyrighted photograph in collage).

170. *See generally Campbell*, 510 U.S. at 588 (characterizing opening riff, opening bass as “heart” of Plaintiff’s song because it is what “conjures up the song”).

171. *See More Information on Fair Use*, *supra* note 141 (noting fair use is factual inquiry).

Whether the part of a song played amounts to substantial is determination made at the end of trial.¹⁷²

d. The Effect Upon the Market

To evaluate the fourth factor, courts look to the “effect upon the potential market for the copyrighted work.”¹⁷³ As the court in *Philpot v. WOS*¹⁷⁴ notes, this inquiry is into the market for the copyrighted work, not the market for the work allegedly infringing upon the copyright.¹⁷⁵ In addition, the court in *Brammer* specifically stated that if others were to act like the alleged infringer, the copyright holder would not make money, and therefore, the use had an effect on the market of the copyright holder’s work.¹⁷⁶

III. THE WORKOUT: ANALYZING THE COMPLEXITIES THAT SURROUND MUSIC LICENSING IN VIRTUAL FITNESS CLASSES

A. Copyright Law Specific to Online Fitness

Section 102 of the Copyright Act provides an inclusive, yet not exhaustive list of works of authorships that are protected.¹⁷⁷ A central copyright issue of fitness classes surrounds musical works and sound recordings that are played in the background.¹⁷⁸ Back-

172. *See generally id.* (emphasizing fair use is factual inquiry, in which whether amount of song used is considered fair is question of fact).

173. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (describing how courts evaluate fourth factor in fair use inquiry).

174. *Philpot v. WOS, Inc.* 2019 WL 176728 at *9 (W.D. Tex. Apr. 22, 2019).

175. *See id.* (emphasizing inquiry is into effect on market for specific copyrighted work).

176. *See Brammer v. Violet Hues Prods., LLC*, 922 F.3d 255, 268 (4th Cir. 2019) (finding if other infringers used Plaintiff’s copyrighted photograph without paying licensing fee same way defendant had, Plaintiff would not make money, thus affecting potential market).

177. *See* 17 U.S.C.S. § 102 (LexisNexis 1992) (listing literary works, pictorial, graphic, sculpture works, architectural works, musical works, sound recordings, dramatic, choreographic, pantomime works, motion pictures, other audiovisual works as copyrightable); *see also* GORMAN, GINSBURG, & REESE, *COPYRIGHT CASES AND MATERIALS*, 86 (9th ed. 2017) (“The use of the word ‘include,’ as defined in Section 101, makes clear that the listing is ‘illustrative and not limitative,’ and that the seven categories do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect . . .”).

178. *See Maurer, supra* note 63 (noting blanket licenses are required to play music in “health club classes”); *see also* Matthew Feldman, *The Three P’s of Music Licensing for Fitness Instructors*, NAT’L FED’N OF PRO. TRAINERS (July 26, 2021, 1:29 PM), <https://www.nfpt.com/blog/3-ps-music-licensing-fitness-instructors> [<https://perma.cc/RT9S-6H6W>] (listing mechanical rights, performance rights, public airways rights as copyright holders’ rights music instructors need to be aware of); *Is Your Gym Guilty of Music Piracy*, CLIMBING BUS. J. (July 26, 2021), <https://www.climbingbusinessjournal.com/is-your-gym-guilty-of-music-piracy/> [<https://perma.cc/ZT4Q-D76S>] (emphasizing music played at gyms often constitutes pub-

ground music is a common component of fitness classes; in fact, several classes are known for matching their workout routine to the beat of the music.¹⁷⁹ In order for class instructors to legally play music in the background of their classes, there are several copyright provisions they need to comply with.¹⁸⁰

Copyright attaches to an original work of authorship as soon as it is fixed in a tangible medium of expression, and copyright protection subsists well-beyond the lifespan of the creator.¹⁸¹ As a result, most of the music played today is held under a valid copyright.¹⁸² Because most music published after 1932 is held under a valid copyright, any fitness class using current music without a negotiated license to use the copyrighted music can result in a violation – this helps to explain why the complaint in the lawsuit against Peloton included so many counts of copyright violations.¹⁸³ Peloton was using current songs by artists such as Taylor Swift, Adele, Drake, and Rihanna.¹⁸⁴ Any songs by these artists would be held under a valid copyright.¹⁸⁵

In order for Peloton to comply with the copyright laws governing the music they used in several classes, it would need to com-

lic performance, which requires license); Am. Council on Exercise, *supra* note 6 (asserting group fitness instructors must obtain music licensing rights to play music during class, but type of license needed depends upon how class is delivered).

179. See Lauren Pardee, *6 Workout Classes That Turn Up the Volume*, POPUGAR, (Jan. 16, 2020), <https://www.popsugar.com/fitness/music-based-workout-classes-that-feel-like-party-47110341> [<https://perma.cc/4YSN-DW3Y>] (listing Flywheel, Rumble, 305 Fitness, Y7 (type of yoga), AKT (dance), Zumba as workout classes centered around music); see also Pesce, *supra* note 21 (“Peloton’s virtual sweat sessions have become popular in large part due to the hit songs that spin during workouts.”).

180. For further discussion of copyright provisions workout instructors need to be aware of when implementing music in their classes, see *supra* notes 56-83 and accompanying text.

181. See 17 U.S.C.S. § 102 (LexisNexis 1992) (codifying copyright protection subsists as soon as work is fixed in tangible medium of expression); see Sonny Bono Copyright Term Extension Act; Fairness in Musical Licensing Act of 1998, 105 Enacted S. 505, 112 Stat. 2827 (expanding copyright protection to life of author plus seventy years).

182. But see StringOctavian Team, *supra* note 69 (emphasizing as general matter music published prior to 1923 is in public domain).

183. See generally *id.* (highlighting most music in the public domain was published prior to 1923); see generally *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 760, (litigating plaintiffs’ claims of copyright infringement); see generally 17 U.S.C.S. § 102 (LexisNexis, 1976), (indicating copyright protection attaches as soon as work is fixed); see generally *id.* (discarding notice requirements for valid copyright).

184. For further discussion of the artists whose songs Peloton unlawfully used, see *supra* note 21 and accompanying text.

185. For further discussion of how music under current musicians would be held under a valid copyright, see *supra* note 181 and accompanying text.

ply with licensing requirements that protect the exclusive rights of copyright holders.¹⁸⁶ Since in-person classes surround different rights than classes online, it is crucial in understanding how the shift to online—without updating current licensing agreements—can result in violations of federal copyright law.¹⁸⁷ For example, under an artist’s public performance rights it is easy to see that music played during an in-person workout class qualifies as a public performance.¹⁸⁸ However, it is not as easy to see how virtual fitness classes may qualify as public performances.¹⁸⁹ Because a performance still occurs when members of the public are receiving the performance at separate places or separate times, music played during a virtual workout class can also be considered a public performance.¹⁹⁰ If a fitness instructor were to record a video of a particular yoga sequence and post it on YouTube with background music while viewers watch at different times from their homes, a public performance still occurs.¹⁹¹ For the reasons stated above, music played during a virtual fitness class will often require a public performance right.¹⁹²

Public distribution rights, which do not contain a visual component, may also be implicated in virtual fitness settings.¹⁹³ Group fitness classes that are audio only—such as Aaptiv, which consists of a coach telling users to adjust their treadmill at certain speeds and inclines over a set duration while playing background music—fall under this category.¹⁹⁴ This means that even in situations where

186. For further discussion of the exclusive rights a copyright holder has, and how a user must obtain proper licensing, see *supra* notes 56-108 and accompanying text.

187. See Am. Council on Exercise, *supra* note 6 (emphasizing group fitness instructors can violate federal copyright law if they shift classes online without proper licenses).

188. For further discussion of what constitutes public performance, see *supra* notes 59-63 and accompanying text.

189. For further discussion of difficulties of complexities regarding music licensing rights for online fitness classes, see *infra* notes 190-201.

190. For further discussion of public performance that occurs over the internet, see *supra* notes 64-69 and accompanying text.

191. See *FAQ’s For YouTube Content Uploaders*, ASCAP, <https://www.ascap.com/help/music-business-101/youtube-faq-uploaders> [https://perma.cc/5BHW-MHDU] (last visited Jan. 14, 2021) (warning people who wish to upload to YouTube songs played in video constitute public performances when on YouTube’s site).

192. See Litman, *supra* note 55, at 19-20 (“[m]aking any material available over the Internet . . . constitutes . . . a public display or performance of the material.”).

193. For further discussion of how public distribution rights can be required for virtual fitness classes, see *supra* notes 64-66 and accompanying text.

194. See Janet Ingber, *Workout with the Aaptiv Audio Exercise App*, AM. FOUNDATION FOR THE BLIND (Jan. 2020), (describing Aaptic as an audio-only fitness class

Peloton's classes only contain audio, they are not immune from copyright violations.¹⁹⁵

As far as synchronization rights, there are a variety of ways virtual fitness classes are being presented—some are pre-recorded and uploaded, while others are “live,” synchronous classes.¹⁹⁶ For the on-demand virtual fitness classes that contain both a visual and audio component, the fitness class must obtain the synchronization right.¹⁹⁷ Several fitness classes are also known for using portions of songs as opposed to entire songs during the workout.¹⁹⁸ However, only playing part of a song does not make the user immune from copyright infringement.¹⁹⁹ Even using only a portion of a song still requires a synchronization license, unless there are strong factors weighing in favor of fair use.²⁰⁰

application); *see generally* *Notice of License*, (Jan. 28, 2021) <https://themlc.com/sites/default/files/2021-03/MLC%20NOI%20Sub75.pdf> [<https://perma.cc/4WMS-XQ9Y>] (submitting notice of Aaptiv's mechanical license agreement).

195. *See The Making of Peloton's Outdoor Classes*, PELOTON <https://blog.onepeloton.com/making-of-peloton-outdoor-classes/> <https://perma.cc/4WMS-XQ9Y> [<https://perma.cc/M7QV-ARPU>] (last visited Nov. 15, 2021) (describing Peloton's audio-only, instructor led workout classes available on app, designed for outdoor workouts such as running).

196. *See* Stefani Sassos, *25+ Fitness Studios and Gyms Offering Live-Stream Workouts During the Coronavirus Outbreak*, GOOD HOUSEKEEPING (Apr. 30, 2020), <https://www.goodhousekeeping.com/health/fitness/a31792038/coronavirus-live-stream-workout-classes/> [<https://perma.cc/GP6Z-2R2A>] (listing twenty-five fitness studios or gyms offering live-stream workouts during coronavirus pandemic); *see also* Julia Malacoff, *Turn to These Streaming Workouts When You Can't Break a Sweat at the Gym*, SHAPE (Apr. 27, 2021), <https://www.shape.com/fitness/trends/boutique-fitness-studios-offer-home-streaming-classes> [<https://perma.cc/838C-K8JE>] (noting Peloton has “pre-recorded and live” fitness classes); Lee Bell, *Netflix of Gyms the Best on Demand Fitness Streaming Platforms*, FORBES (Feb. 27, 2019), <https://www.forbes.com/sites/leebelltech/2019/02/27/netflix-of-gyms-the-best-on-demand-fitness-streaming-platforms-for-the-home/?sh=7a0f547f5188> [<https://perma.cc/722T-8WP4>] (listing on-demand workout classes).

197. *See* Am. Council on Exercise, *supra* note 6 (noting audiovisual works incorporating songs need synchronization licenses).

198. *See* Julia Malacoff, *6 Ways to Maximize Popular Mashup Classes*, MYFITNESSPAL (July 5, 2018), <https://blog.myfitnesspal.com/6-ways-to-maximize-popular-mashup-classes/> [<https://perma.cc/9B6L-DG4Q>] (listing fitness classes using mashup music).

199. *See* Calvin R. Nelson & Nicholas W. Jordan, *Legal Implications of Syncing Copyrighted Music with Other Content*, VENABLE LLP (July 14, 2020), <https://www.venable.com/insights/publications/2020/07/legal-implications-of-syncing-copyrighted-music> [<https://perma.cc/XN3U-D82V>] (emphasizing user does not need to play whole song to be held liable for copyright infringement).

200. For further discussion of fair use, *see supra* notes 148-153 and accompanying text.

B. Online Fitness and Acquiring Rights to Copyrighted Material

Peloton alluded to the complexities of determining proper rights holders in order to ensure compliance with copyright laws in its registration with the Securities and Exchange Commission (SEC).²⁰¹ Peloton is correct in asserting the difficulty of complying with copyright laws – for example, because copyright law can be quite confusing to understand, group fitness instructors may think that paying for a music streaming service, like Spotify or Pandora, allows them to use music from those service providers during group classes.²⁰² However, that is not the case.²⁰³ Streaming platforms allow the music for only *personal* use, not public use.²⁰⁴ Additionally, purchasing a CD only provides rights for personal use.²⁰⁵ While buying a CD provides you with a physical copy of the song, it does not give you the copyright to the song.²⁰⁶

If a group fitness class includes members from outside of a normal circle of friends, playing music from personal streaming services is a violation of the public performance right.²⁰⁷ This means that group fitness instructors or organizations wishing to include music during their in-person or virtual fitness classes should obtain proper licensing in order to avoid a violation of federal copyright law and a potential infringement suit.²⁰⁸ There are a variety of music licensing agreements the owner of a fitness studio or an instruc-

201. See Peloton, Interactive, Inc., *supra* note 14 (“The process of obtaining licenses involves identifying and negotiating with many rights holders, some of whom are unknown or difficult to identify, and implicates a myriad of complex and evolving legal issues across many jurisdictions . . .”).

202. See *Warning Gym Owners*, *supra* note 20 (“We’ve talked to a number of fitness pros lately who think that just because they pay for a subscription to a streaming service like Spotify or Pandora, that they are free to use this music during classes.”).

203. For further discussion of how purchasing subscription of music streaming service does not allow music to be played in group fitness classes, see *supra* note 202 and accompanying text.

204. See *Warning Gym Owners*, *supra* note 20 (explaining subscriptions to streaming services are only for personal use); see also Am. Council on Exercise, *supra* note 6 (noting purchasing CDs or subscribing to streaming service allows music for only personal use, so using music beyond personal use requires music licenses).

205. See Feldman, *supra* note 177 (noting purchasing CDs grants personal use, but not public performance).

206. See *id.* (noting physical copy of CD is not same as copyright).

207. See Maurer, *supra* note 63 (playing private use music outside of group of friends is illegal).

208. See Am. Council on Exercise, *supra* note 6 (stating fitness instructors in United States need blanket licenses from performance rights organizations).

tor can choose from.²⁰⁹ Most in-person workout classes have licenses that cover the public performance right.²¹⁰ That means they are allowed to play those licensed songs during their workout classes.²¹¹

Many group fitness classes that were purely in-person prior to the pandemic do not have synchronization rights.²¹² This is likely because they did not need those rights while they were operating as in-person fitness studios.²¹³ There was no need to pay for an additional bundle of rights.²¹⁴ However, when shifting to online classes, those synchronization rights suddenly come in to play.²¹⁵ Therefore, before switching to virtual platforms, fitness instructors or companies must review their existing music licensing agreements to determine what exactly their agreements cover.²¹⁶ Fitness instructors or companies need to be cognizant of what rights are at play in order to avoid significant copyright liability.²¹⁷ Peloton offers fitness classes both with and without visual components. Peloton's on-demand library includes audiovisual, instructor-guided workout

209. See *Music Licenses for Fitness Facilities*, ASCAP, <https://www.ascap.com/music-users/types/fitness-landing-page> [<https://perma.cc/TZS9-Z2WL>] (last visited Jan. 17, 2021) (providing options for music license agreements for variety of artists); see also *Music Licensing for Health and Fitness Clubs*, BROAD. MUSIC INC., https://www.bmi.com/licensing/entry/fitness_clubs [<https://perma.cc/8J9L-CTND>] (last visited Jan. 17, 2021) (providing options for music license agreements for variety of artists).

210. See Maurer, *supra* note 63 (noting most in-person group fitness classes use public performance licenses); Rich Humphrey, *Music Licensing for Online Fitness*, MOBILEFIT, <https://blog.mobilefit.com/music-licensing-for-online-fitness/> [<https://perma.cc/4GCC-97ZN>] (last visited Jan. 17, 2021) (noting many gyms licensing through ASCAP or BMI are only licensing public performance rights).

211. See *id.* (highlighting fitness facilities can play songs they properly license during group classes).

212. See *id.* (asserting many fitness facilities have only been paying for performance rights prior to posting virtual classes).

213. See Am. Council on Exercise, *supra* note 6 (noting synchronization rights are not necessary for in-person group fitness classes).

214. See *Music Licensing for Fitness Facilities*, *supra* note 209 (noting licenses for fitness facilities are based on how they use music).

215. See *FAQ's for YouTube Content Uploaders*, *supra* note 191 (warning uploaders of mechanical right).

216. Cf. Meaghan H. Kent, *COVID-19: Copyright Concerns in Online Classrooms*, VENABLE LLP (Apr. 1, 2020), <https://www.venable.com/insights/publications/2020/04/covid19-copyright-concerns-in-online-classrooms> [<https://perma.cc/QFC3-34AJ>] (noting school educators likely have agreements in place for in-classroom use, but may or may not have licenses extending to electronic distribution).

217. See *Music Licensing for Fitness Facilities*, *supra* note 214 (explaining licenses for fitness facilities are required to avoid breaking law).

rides, as well as audio-only, instructor-guided options.²¹⁸ Thus, Peloton needs to be aware of when they must obtain mechanical rights versus synchronization rights.²¹⁹ Therefore, if a fitness class only has the music licensing rights that cover public performance without synchronization rights, posting a video of the workout for people to watch and follow along with at a distance will violate the synchronization right, as Peloton did.²²⁰

Additionally, and unfortunately for Peloton and similar online fitness providers, PRO's are not always the safest option for such providers.²²¹ While PROs can be the easiest way to secure music licensing rights for in-person group fitness classes, they can fall short when it comes to music licensing rights for online audiovisual fitness classes.²²² PROs cover only public performance rights for live performances that occur publicly, or outside of the normal group of social acquaintances.²²³ They do not cover performances that will be recorded in a video with a visual component.²²⁴ Most of Peloton's virtual fitness classes are pre-recorded videos of instructors with music in the background.²²⁵ PROs do not license for music for this specific use, which how most virtual fitness classes use music.²²⁶

218. See *The Making of Peloton Outdoor Classes*, *supra* note 195 (highlighting availability of audio-only Peloton classes); Peloton, Interactive Inc., *supra* note 14 (describing Peloton's on-demand and live-stream classes).

219. For further discussion of when synchronization licenses are required see *supra* notes 73-79 and accompanying text. For further discussion of when mechanical licenses are required, see *supra* notes 80-85 and accompanying text.

220. For further discussion of how online video of fitness class with music can violate public distribution right, see *supra* notes 64-69 and accompanying text.

221. See *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 760 (2020) (filing suit against Peloton for improperly licensed music, despite Peloton obtaining blanket licenses from PROs.)

222. See *How to Acquire Music For Films*, ASCAP, <https://www.ascap.com/help/career-development/How-To-Acquire-Music-For-Films> [<https://perma.cc/4A22-8X8P>] (last visited Feb. 10, 2021) (explicitly stating synchronization licenses need to be obtained from copyright holder directly).

223. See Meghan Dougherty, *Note: Vountary Collective Licensing: The Solution to the Music Industry's File Sharing Crisis?*, 13 J. INTELL. PROP. L. 405 (2006) (stating Congress defined "performing rights society" as "an association, corporation or other entity that licenses the public-performance of nondramatic musical works on behalf of the copyright owners of such works.").

224. See *BMI and Performing Rights*, BMI, https://www.bmi.com/digital_licensing/more-information/business_using_music_bmi_and_performing_rights [<https://perma.cc/KT8L-N3M4>] (last visited Dec. 20, 2021) (emphasizing BMI does not offer synchronization licenses or licenses for dramatical use).

225. See *Peloton Interactive, Inc.* *supra* note 14 (describing Peloton's on-demand workout videos with music).

226. See generally *BMI and Performing Rights*, *supra* note 224 (emphasizing BMI, does not cover synchronization licenses for music to be used in videos).

As mentioned above, the majority of fitness groups need synchronization licenses to play on demand workout videos in front of people outside of normal acquaintances.²²⁷ Synchronization licenses are not easy to obtain—they typically require working an industry-specific attorney who is aware of the pricing range.²²⁸ While synchronization licenses and fees are negotiated between the user and publisher, the average cost to license one song for a film ranges between \$15,000 and \$60,000.²²⁹ Such costly licensing is likely more accessible to a large, \$4 billion company such as Peloton, as opposed to a smaller yoga studio.²³⁰ Finally, for acquiring the appropriate rights to copyrighted music online, providers such as Peloton need to consider master licenses.²³¹ Obtaining a master license can cost an additional \$15,000 to \$70,000 per song.²³² As Peloton pointed out in its registration statement with the SEC, determining the proper rights holder or holders from whom to obtain the license can be a difficult, yet crucial task.²³³

Music is a key feature that makes the Peloton experience so attractive to users.²³⁴ Peloton built its brand on inclusion of music,

227. For further discussion of how a majority of online group fitness classes with background music require synchronizations licenses, see *supra* notes 73-79 and accompanying text.

228. See Lewis, *supra* note 73 (“Negotiation of such licenses can be complex and requires knowledge of the prevailing rates in various media. As such, it is recommended that a general practitioner consult with an entertainment lawyer on such negotiation and related matters.”).

229. See Jeffrey Brabec and Todd Brabec, *Music, Money, Success & the Movies: Part One*, ASCAP, <https://www.ascap.com/help/music-business-101/music-money-success-movies> [<https://perma.cc/Q2PA-PGM8>] (last visited Dec. 20, 2021) (“The synchronization fees charged by music publishers for major studio films are usually between \$15,000 and \$60,000 (with the majority ranging from \$20,000 to \$45,000) but can be lower if the music budget is small or higher if the song is used several times in the motion picture, if the use is under the opening or closing credits, if the song is a major hit, or if it is vital to the plot or particular scene of the motion picture.”).

230. See Lewis, *supra* note 73 (emphasizing industry-specific attorneys are necessary for negotiating licenses, which can be quite profitable for copyright holders).

231. See *id.* (explaining masters licenses may be required in addition to synchronization licenses, if users plan to use master recording of song in audiovisual work).

232. See Brabec & Brabec, *supra* note 230, *Music, Money, Success & the Movies: Part One*, ASCAP, <https://www.ascap.com/help/music-business-101/music-money-success-movies> [<https://perma.cc/2R4S-57HK>] (last visited Dec. 20, 2021) (providing price ranges for synchronization licenses and master licenses for songs to be used in films).

233. For further discussion of how locating the proper copyright holder can be a difficult task, see *supra* notes 85-88 and accompanying text.

234. See Peloton Interactive, Inc., *supra* note 14 (“Members consistently rank the music we provide as one of their favorite aspects of the Peloton experience.”).

and has monetarily benefitted from the inclusion of popular songs.²³⁵ In its registration statement with the SEC, Peloton specifically points out that the company “control[s] the intersection of fitness and music in an engaging way.”²³⁶ Because Pelton has built their company around the intersection of fitness and music, self-created music, royalty-free, or public domain-music would likely be insufficient to achieve its mission.²³⁷

C. Infringement Suits for Improperly or Inadequately Licensed Music

The *Peloton* case illustrates that music publishers are actively protecting their intellectual property rights.²³⁸ The NMPA is not the only organization guarding their rights.²³⁹ In fact, both ASCAP and BMI bring hundreds of copyright infringement suits annually.²⁴⁰

1. *Who Can be Held Liable for Infringement?*

Determining who can be held liable for copyright infringement depends on the how the group fitness class is delivered.²⁴¹ For copyright infringement occurring during typical in-person group fitness classes, copyright holders can go after the physical location, or that specific studio, where the alleged infringement is occurring.²⁴² However, when infringement is occurring during vir-

235. *See id.* (“We have developed a proprietary music platform that fuels the workout experience with thoughtfully curated playlists that align with our Members’ musical preferences. We have over a million songs under license, representing the largest audiovisual connected fitness music catalog in the world. Our curated music is as diverse and dynamic as the Members we serve, delivering a custom-fit-and-finish musical experience created by instructors and music supervisors on our production team.”).

236. *See id.* (highlighting Peloton’s reliance on music).

237. *See generally* Peloton Interactive (emphasizing music is essential to the Peloton experience).

238. *See Warning Gym Owners, supra* note 20 (illustrating music publishers actively protecting music intellectual property rights when suing peloton for unlicensed use).

239. For further discussion of additional copyright holders bringing infringement suits, see *infra* note 242 and accompanying text.

240. *See Is Your Gym Guilty of Music Piracy?*, CLIMBING BUS. J. (Nov. 11, 2013), <https://www.climbingbusinessjournal.com/is-your-gym-guilty-of-music-piracy/> [<https://perma.cc/599T-ZBQR>] (noting organizations like ASCAP, BMI file hundreds of copyright infringement suits each year).

241. For further discussion of how class format affects who can be held liable, see *infra* notes 244-245 and accompanying text.

242. *See* Am. Council on Exercise, *supra* note 6 (stating responsible party for in-person class is owner of particular studio).

tual on-demand fitness classes, the copyright holders can seek to hold the instructor or organization providing the class liable.²⁴³

a. Direct Infringers

In an in-person group fitness class, the person playing the unlicensed music would be a direct infringer.²⁴⁴ In the case of online, on-demand fitness classes, the person or organization uploading the video could be directly infringing the copyright holder's rights.²⁴⁵ However, in a typical copyright infringement case, artists, publishers, or organization representing them typically sue the corporation or fitness studio that is responsible for incorporating the infringing music into the class.²⁴⁶ Therefore, it is usually the fitness studio's responsibility to properly attain music licenses.²⁴⁷ In the case of Peloton, it was the company's responsibility to obtain licenses for the music integrated into the audiovisual fitness classes, not the instructors leading the classes themselves.²⁴⁸

b. Indirect Infringers

Under the indirect infringer theory, one who owns a group-fitness company could be held liable for infringement activities by its employees.²⁴⁹ Therefore, owners or fitness studios should take steps to procure the proper licensing agreements for music during classes in order to avoid infringement liability by employees.²⁵⁰ Owners of music copyrights are likely to go after the fitness studio or company, as they are likely in the position to pay damages, something that should have been common knowledge to Peloton as well.²⁵¹ This puts a strong burden on large companies like Peloton to ensure that all the classes are licensed properly, and can even be

243. *See id.* (noting individual instructors or organizations are responsible parties when it comes to on-demand or livestreamed virtual fitness classes).

244. *See id.* (differentiating direct liability from contributory liability).

245. *See ABC v. Aereo*, 134 S. Ct. 2498, 2510 (2014) (transmitting unlicensed audiovisual works constitutes public performance, violating federal copyright law).

246. *See generally* *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 760 (S.D.N.Y. 2020) (litigating copyright claims against Peloton Interactive, Inc., as opposed to instructors in workout videos themselves).

247. *See Maurer*, *supra* note 63, (noting if you are employee of fitness studio it is studio's responsibility to obtain proper licensing).

248. *See generally* *Peloton Interactive*, *supra* note 14 (indicating Peloton entered music licenses for the corporation).

249. *See Music Users*, *supra* note 96 (noting business or organization is responsible for acquiring rights, even if people they hire are ones doing infringing).

250. *See id.* (noting supervisors can be held liable for actions of employees).

251. *See MENELL*, *supra* note 52, at 733 (emphasizing plaintiffs may go after parties indirectly liable, as they may be in better position to provide damages).

a difficult burden for smaller studios that have to supervise individual instructors to avoid being held liable.²⁵²

2. *Fair Use Exception*

Under the first factor, a group fitness class at a for-profit studio would likely not qualify as an educational purpose or another purpose for which the fair use exception is applied in court.²⁵³ Similarly, it is customary for group fitness classes to pay licensing fees for music played during class.²⁵⁴ Therefore, a court following the approach used in *Brammer* will likely find the nature of the use to be commercial.²⁵⁵ The court will likely find that a group fitness class's use of unlicensed songs is of commercial use, which is not a purpose often favored in a fair use inquiry.²⁵⁶

Under the second factor, musical works weigh in favor of the copyright holder, as they are the creative expression copyright was intended to protect.²⁵⁷ However, as mentioned above, this factor usually carries minimal weight for courts.²⁵⁸ Under the third factor, the amount and substantiality of a work used is very specific, and would depend on the amount of each song used.²⁵⁹ If a workout class were using all or significantly all of songs, the court would likely find this factor to weigh in favor of the copyright holder.²⁶⁰ Finally, when analyzing the effect of a fair use exception on the market, the court would likely note that there is a music licensing market to cover this exact use of music.²⁶¹ There are per-

252. See generally *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 760 (S.D.N.Y. 2020) (litigating case against Peloton, despite music being used in classes with individual workout instructors).

253. See *id.* (noting educational use is typically limited to non-profit, academic education).

254. See Maurer, *supra* note 63 (noting gyms must pay customary licensing fee to play music).

255. For further discussion of court's reasoning in *Brammer*, see *supra* notes 157-159 and accompanying text.

256. For further discussion on why court will likely find factor four weighs in favor of copyright holder, see *supra* notes 175-176 and accompanying text.

257. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (finding factor two in favor of copyright holder, as music is creative work).

258. For further discussion of the second factor of the fair use defense, see *supra* notes 160-164 and accompanying text.

259. For further discussion of how the court would look at the amount of each song used under the third fair use factor, see *supra* notes 160-164 and accompanying text.

260. Cf. *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 918-21 (2d Cir. 1994) (finding third factor in favor of copyright holder when defendant copied entire articles).

261. See *Am. Council on Exercise*, *supra* note 6 (stating fitness instructors need to contact performance rights organizations to obtain licenses to use copy-

formance rights organizations to license performance rights, and synchronization licenses can be obtained by agreements with musicians or publishers.²⁶² The copyright holder has a market to license use of their songs in for an agreed-upon price.²⁶³ Under the framework set forth by the cornerstone fair use cases, the court will likely find that the market for the copyright holder is being harmed.²⁶⁴ Further, courts will look to whether other types of the same unauthorized use will hurt the market.²⁶⁵ Therefore, the unauthorized use of a single song by one person can still be enough to find an effect on the market.²⁶⁶ This factor will likely weigh heavily in favor of the copyright holder.²⁶⁷ Because the fourth factor, which is “undoubtedly the single most important element of fair use,” succeeding on a fair use defense for Peloton or similarly situated defendants could be an uphill battle.²⁶⁸

IV. COOL DOWN: CONCLUDING THE JOYRIDE

Group fitness classes that wish to incorporate copyrighted music need to enter proper licensing agreements to avoid liability under federal copyright law.²⁶⁹ Determining which licenses are necessary depends on how the class is delivered, such as whether it is in-person, virtual on demand, or virtual livestreamed, as different rights of copyright holders come into play in each of these con-

righted songs in their fitness classes while subsequently listing several organizations providing licenses).

262. See *How to Acquire Music for Films*, *supra* note 223 (noting ASCAP sells performance rights, but synchronization rights need to be obtained directly from copyright holders).

263. See *id.* (noting synchronization licenses can be negotiated directly with copyright holders).

264. See *Brammer v. Violet Hues Prods., LLC*, 922 F.3d 255, 268-69 (4th Cir. 2019) (finding copyright holder of photograph was harmed because there was market for licensing for photographs to be used on webpages, exactly how defendant used photograph).

265. See *Philpot v. WOS*, No. 1:18-CV-339-RP, Inc. 2019 WL 176728, at *9 (W.D. Tex. Apr. 22, 2019) (assessing whether unauthorized use of photos damaged any possible market for photos).

266. For further discussion of how courts can find one single use can affect the market, see *supra* notes 175-176 and accompanying text.

267. See *Brammer*, 922 F.3d at 268-69 (finding defendant’s use of plaintiff’s photograph was not fair because there was market for licensing photograph, plus plaintiff had in fact licensed it to other users).

268. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 602 (1985) (Brennen, J., dissenting) (characterizing factor four as most important element in fair use inquiry).

269. See *Am. Council on Exercise*, *supra* note 6 (noting music beyond personal use requires various music licenses to ensure writers, musicians, producers, record labels are all properly compensated).

texts.²⁷⁰ If group fitness instructors switch the method of delivery without reviewing their current music licensing agreements, they may inadvertently violate federal copyright law and infringe on an artist's or producer's copyright.²⁷¹ Cases such as *Peloton* show us that copyright owners are active in protecting their work, and that fitness instructors or organizations who are using unauthorized music may find themselves amidst a lawsuit.²⁷² While fitness instructors or organizations accused of copyright infringement may potentially claim fair use, the defense is highly subjective and does not guarantee a finding in favor of the use.²⁷³ The best way to avoid infringement suits and the possibility of paying large settlements is to consult with an entertainment lawyer or another expert in the field and negotiate proper licensing agreements.²⁷⁴ Despite various complexities, copyright law is flexible enough to withstand industry changes, provided that users are aware of the different rights that are implicated in different mediums.²⁷⁵

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270. See *id.* (charting which rights are necessary for different mediums in which group fitness classes are delivered).

271. For further discussion of how group fitness instructors or organizations can inadvertently violate federal copyright law, see *supra* notes 27–160 and accompanying text.

272. See *Warning Gym Owners*, *supra* note 20 (noting Peloton's lawsuit serves as warning violators of copyright law may find themselves in lawsuit).

273. See *More Information on Fair Use*, *supra* note 141 (warning fair use is highly subjective, unpredictable defense).

274. See *Warning Gym Owners*, *supra* note 20 (stating "music used during commercial classes or at gyms *must be licensed* or risk getting slapped with an expensive copyright suit").

275. For further discussion of how copyright law is adequately flexible to withstand industry changes, see *supra* notes 13–176 and accompanying text.

* J.D. Candidate, 2022, Villanova University Charles Widger School of Law; I dedicate this piece to my selfless parents, Timothy and Maureen Raczka, for their unconditional support and encouragement throughout my academic career.