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Cycling Through Litigation: The Ultimate Cost of Not Entering into Appropriate Sync Licensing Agreements

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Photo by Andy Luten

As fitness companies transform into entertainment companies,[1] new licensing issues arise regarding music in an at-home work-out video versus music heard in an in-person gym class. Specifically, the usage of music in a gym class requires a public performance license[2] whereas watching that same class from home requires a sync license[3] because the "music is synchronized with visual media output."[4] Over the past 3 years, Peloton has faced a snowball effect in litigation, beginning with an allegation that they did not have the sync licensing required for their at-home workout videos. First, as discussed below, the National Music Publishers' Association ("NMPA") filed suit because of Peloton's lack of licensing for over 57%

of their music library. Although that suit was ultimately settled, it was not the end of Peloton's woes. Following that suit and the removal of more than 5,700 songs from Peloton's library, customers were outraged. They had been promised an "ever-growing library," and were now limited only to the songs that Peloton had obtained licensing for.

In March of 2019, the National Music Publishers' Association ("NMPA") kicked off Peloton's recent run of combatting lawsuits. Although Peloton had licensed *some* of the music used in their video workouts, they had not with a significant number of publishers – thus greatly reducing income provided to songwriters.[5] Members of the NMPA sued Peloton for allegedly failing to obtain sync licenses and, thereby, using unlicensed music in their classes.[6] NMPA sent Peloton a cease and desist letter in April of 2018.[7] In response, Peloton removed nearly 57% of their total available classes from the library.[8] Eventually, after Peloton filed an antitrust counterclaim and it was dismissed by a Manhattan federal judge, the lawsuit was settled.[9]

Despite settling this case, another was headed down the pipeline. Even though Peloton had cut almost 60% of their video content, they continued to advertise their subscription content as a library that was "ever-growing."[10] While this may have been true at the outset, it was no longer the reality following the cease and desist letter for copyright infringement from NMPA.[11]

In response, Peloton subscribers filed thousands of cases in arbitration, in accordance with Peloton's Terms of Service.[12] However, Peloton, in violation of those same Terms of Service, refused to pay the arbitration fees.[13] In breaking their contract, Peloton lost the right to force its customers to pursue arbitration.[14] Soon after, the plaintiffs filed a class action lawsuit against the company, arguing that the "ever-growing" claim was false.[15] The plaintiffs brought suit under the New York General Business Law ("NYGBL")§§ 349 and 350. [16]

Peloton moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Peloton raised multiple arguments in support of their motion to dismiss, most notably that (1) the Terms of Service gave Peloton sole discretion in removing content from their platforms; (2) the phrase "ever-growing" was mere puffery; and (3) even if the "ever-growing" statement was not puffery, it was true.[17]

The Court rejected Peloton's Terms of Service argument and held that while the Terms might have protected Peloton from a breach of contract claim, they do not relieve them "from a deceptive marketing claim based on the allegation that Peloton advertised its library as ever-growing while knowing that it would be diminishing or shrinking in size."[18] They held this in accordance with a Second Circuit opinion which noted that a reasonable consumer would expect that the more detailed information in the Terms of Service would confirm other representations made by the company, not negate it.[19] Under New York law, the Court held that terms of service cannot, as a matter of law, "overcome deceptive marketing practices."[20]

The Court also held that the term "ever-growing" was not puffery, but rather, a factual, objective statement.[21] The Court relied on one of their prior decisions, *Pelman v. McDonald's Corp.,* in which they held that under the NYGBL, the definition of puffery is "exaggerated general statements that make no specific claims on which consumers could rely."[22] As a reasonable consumer would understand that "ever-growing" was to mean that the library would increase in size over time, the statement does not constitute puffery.[23]

Lastly, the Court rejected Peloton's argument that since they were adding new content, the "ever-growing" statement was true, even if the total number of classes in the library was decreasing.[24] Instead, the Court adopted the plain meaning of "ever-growing," determining that it means to grow continually.[25]

Clearly, the motion did not end well for Peloton – Judge Liman of the Southern District of New York denied Peloton's motion to dismiss, thereby allowing the case to proceed.[26] As of November 25, 2020, the Court has set deposition, discovery, and motion deadlines for later this year. So, how will this play out for Peloton?

Plaintiffs in this case have demanded a jury trial,[27] which I believe will bode well considering the statute they have brought suit under. NYGBL § 349 prohibits deceptive acts and practices.[28] NYGBL § 350 prohibits false advertising.[29] Both of these statutes read as particularly plaintiff friendly. For example, unlike in other states, the NYGBL does not require plaintiffs to plead and prove "actual, fraud-style reliance" on the practice they are challenging.[30] Rather, as held by the New York Court of Appeals in *Koch v. Acker, Merrall & Condit Co.*, the imposition of a reliance requirement into NYGBL §§ 349 and 350 would be an error.[31] Neither does New York require consumer-protection cases to be prosecuted by the State Attorney General, as it was amended in 1980 to provide a private right of action to individuals.[32]

If one has any doubts about how plaintiff-friendly NYGBL §§ 349 and 350 are, one mustn't look further than Judge Liman's opinion denying Peloton's motion to dismiss.[33] Given his opinion, I predict that Peloton's fate unfolds in one of two ways. Either Peloton will have read the opinion as too plaintiff friendly and begin settlement negotiations, or this issue will be put in front of a jury – a risky option for Peloton should the jury be more sympathetic to plaintiffs. A plaintiff-friendly statute combined with a sympathetic jury might be the perfect storm that would make a settlement Peloton's best route forward.

The ultimate cost of Peloton not entering into the appropriate sync licensing agreements at the outset has been a seemingly endless cycle of litigation – each of which has had a snowball effect into the next. Had Peloton obtained the appropriate licensing, they would not have been sued by the NMPA. They would not have had to settle with the NMPA, nor removed almost 60% of their class library. They would not have falsely and deceptively advertised an "ever-growing" class library to their customers. By failing to obtain the appropriate licensing, Peloton is now faced with two choices: risk going through a trial with a (possibly sympathetic) jury under a pro-plaintiff statute or agree to settle another multi-million dollar lawsuit in the span of 3 years.

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1. See David Z. Morris, Peloton Claims It's a Media Company, Not a Bike Business. Is It Taking Investors for a Ride?, Fortune (Sept. 25, 2019, 6:00 AM), https://fortune.com/2019/09/25/peloton-ipo-filing-media-company/ (explaining that Peloton's pre-IPO filing, despite being known for exercise machines, suggests that it is also "a technology, media, …, experience, … [and] logistics company.").
2. For an explanation of a public performance license, see Jessica H. Maurer, Music Licensing Laws for Group Fitness Classes, GXUnited, https://gxunited.com/blog/music-licensing-laws-fitness/.
3. Rachel Rizzuto, Yes, You Do Need a Music License for Your Virtual Classes, Dance Bus. Wkly. (Sept. 8, 2020), https://dancebusinessweekly.com/music-license-virtual-classes/ (defining sync licenses as "legal permission to use an artist's copyrighted music in video or via streaming.").
4. Dani Deahl, Peloton is being sued for using music without permission in its video fitness classes, The Verge (Mar. 19, 2019, 3:31 PM) https://www.theverge.com/2019/3/19/18273063/peloton-music-lawsuit-licensing-video-fitness-classes-nmpa.
5. Press Release, National Music Publishers' Association, NMPA Publishers File Copyright Lawsuit Against Peloton (Mar. 19, 2019), https://www.nmpa.org/nmpa-publishers-file-copyright-lawsuit-against-peloton/.
6. Natt Garun, Peloton owners are pissed about bad music after copyright lawsuit, The Verge (Apr. 24, 2019, 1:47PM), https://www.theverge.com/2019/4/24/18514036/peloton-music-copyright-fitness-studios-gym-on-demand-media-strategy.
7. John O'Brien, Peloton, sued after slashing 'ever-growing' content library, tells plaintiffs to read their agreements, Legal Newsline (Apr. 28, 2020), https://legalnewsline.com/stories/534188391-peloton-sued-after-slashing-ever-growing-content-library-tells-plaintiffs-to-read-their-agreements.
8. Jeff Greenbaum, If You Promote Your Class Library as "Ever-Growing," Does It Actually Have to Grow? Lexology (Nov. 16, 2020), https://www.lexology.com/library/detail.aspx?g=d70bd2ec-d612-4953-aa90-c78eb10b46f5.
9. Reuters Staff, Peloton settles music publishers' lawsuit over songs used in workout videos, Reuters (Feb. 27, 2020, 10:42 AM), https://www.reuters.com/article/us-peloton-

interactive-lawsuit/peloton-settles-music-publishers-lawsuit-over-songs-used-in-workout-videos-idUSKCN20L2AL; see also Eriq Gardner, Peloton Reports $49 Million in Legal Costs After Settlement with Music Publishers, The Hollywood Rep. (May 6, 2020, 1:12 PM), https://www.hollywoodreporter.com/thr-esq/peloton-reports-49-million-legal-costs-settlement-music-publishers-1293634 (noting that "Peloton … spent $49.3 million in settlement and litigation costs this past financial quarter, likely reflecting what it took to get [them] out of a massive copyright suit filed by song publishers.").
10. Peloton's Cycle of Broken Promises, Pub. Just. (May 15, 2020) https://www.publicjustice.net/pelotons-cycle-of-broken-promises/.
11. Id.
12. Id.
13. Id.
14. Id.
15. Gonzalo E. Mon, Peloton Faces Uphill Ride on "Ever-Growing" Claims, Kelley Drye: AD L. Access (Nov. 19, 2020), https://www.adlawaccess.com/2020/11/articles/peloton-faces-uphill-ride-on-every-growing-claims/.
16. Complaint, Fishon v. Peloton Interactive, Inc., No. 19-CV-11711 (LJL), 2020 WL 6564755 (S.D.N.Y. Nov. 9, 2020).
17. Greenbaum, supra note 8.
18. Fishon v. Peloton Interactive, Inc., No. 19-CV-11711 (LJL), 2020 WL 6564755, at *3 (S.D.N.Y. Nov. 9, 2020).
19. Mantikas v. Kellogg Co., 910 F.3d 633, 637 (2d Cir. 2018).
20. Fishon, 2020 WL 6564755, at *4.
21. Id. at *7.
22. Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 528 n. 14 (S.D.N.Y. 2003).
23. Fishon, 2020 WL 6564755, at *7.
24. Id. at *8.
25. Id.
26. Id. at *14.
27. Complaint at 39, Fishon v. Peloton Interactive, Inc., No. 19-CV-11711 (LJL), 2020 WL 6564755 (S.D.N.Y. Nov. 9, 2020).
28. N.Y. Gen. Bus. L. § 349.
29. N.Y. Gen. Bus. L. § 350.
30. Jonah M. Knobler, Extreme Pro-Plaintiff Changes Proposed To New York's Consumer-Protection Law, Patterson Belknap: Misbranded (May 15, 2019), https://www.pbwt.com/misbranded/extreme-pro-plaintiff-changes-proposed-to-new-yorks-consumer-protection-law.
31. Koch v. Acker, Merrall & Condit Co., 967 N.E.2d 675, 676 (N.Y. 2012).
32. Fishon, 2020 WL 6564755, at *2.
33. Fishon, 2020 WL 6564755.