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Synchronizing Copyright and Technology: A New Paradigm for Sync Rights

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ABSTRACT

Embedded in a copyright owner's musical work or sound recording is the synchronization, or sync right, the exclusive right to use music in sync, or in timed-relation, with audiovisual works. Considerations about sync rights, one of the least discussed aspects of music copyright, have come to the fore as the world has increasingly moved from the real world to the virtual. The COVID-19 pandemic has spurred thousands of activities and events to go online. With many of these involving music, the shift to the virtual world has raised new questions about the extent of sync rights.

Traditionally, sync rights were meant to require licenses for the use of music in timed-relation to a film or television show. Charting the historical trajectory of judge-made sync rights law, this Article finds that courts have largely continued to confine sync rights to movies, TV shows, and closely related media. At the edges, however, courts have started to disagree and many newer forms of audiovisual work media – such as streaming – have been unexamined, leaving creators without proper guidance. To help draw some clarity, this Article hopes to offer the first comprehensive overview of sync right case law in decades. Drawing from these findings, this Article then proposes utilizing a two-part test drawn from case law – (1) a reproduction in an audiovisual work (2) with music played in timed-relation – to limit the boundaries of sync rights and better achieve balance between rightsholders' rights and public access to works. In particular, the timed-relation prong of this test has been largely ignored, but revitalizing this intent-driven element could provide more

[*]J.D., University of Michigan Law School (2020); A.B., University of Chicago (2016). I would like to thank Todd Larson for his invaluable suggestions and insights into music copyright. I would also like to thank Michael Modak-Truran for always engaging in discussion on the topic of this piece and my other scholarship. Finally, I thank the editors of the *Missouri Law Review* for their helpful comments and suggestions throughout the editing process.

useful and clearer analysis of sync rights and novel media in the future.

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I. INTRODUCTION

The novel coronavirus disease 2019 ("COVID-19") pandemic forced the world to go virtual.[1] As offices laid empty and entertainment venues remained shuttered,[2] society had to find remote ways to work, play, and live. COVID-19 forced artists and audiences to adapt, with concerts, plays, and other forms of entertainment going virtual,[3] leading to a surge in streaming.[4] With the vast majority of live events on pause due to the pandemic, streams on social media and video platforms such as Instagram, YouTube, and Twitch have become vital for connecting musical artists to their fans,[5] fitness enthusiasts to their instructors,[6] and trivia fanatics to their pub trivia.[7] In just the first two months of the COVID-19 quarantine in the United States, the streaming content sector grew by forty-five percent.[8] By January 2021, 645 billion hours were watched per month on Twitch, the largest streaming platform.[9] At the core of these streaming industries is music.[10]

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[1] *See* John Seabrook, *Has the Pandemic Transformed the Office Forever*, NEW YORKER (Jan. 25, 2021), https://www.newyorker.com/magazine/2021/02/01/has-the-pandemic-transformed-the-office-forever [https://perma.cc/93T6-AHWQ].

[2] *Id.*; Laura Cooper, *Live Music Is Back, but New York City Is Barely Rocking*, WALL ST. J., https://www.wsj.com/articles/live-music-is-back-but-new-york-city-is-barely-rocking-11618246496 [https://perma.cc/P8AV-Y5MK] (last updated Apr. 12, 2021, 4:28 PM).

[3] Alan Brandit & Jameson Tibbs, *Music Licensing in the Video Streaming Era*, FAY SHARPE, https://faysharpe.com/music-licensing-in-the-video-streaming-era [https://perma.cc/PKL5-4XMF] (last visited May 11, 2021).

[4] *Live Streaming Your Show: A 3 Step Copyright Guide*, BARBERSHOP HARMONY SOC'Y (May 19, 2020), https://www.barbershop.org/live-streaming-your-show-a-guided-copyright-checklist [https://perma.cc/XZ94-HS86].

[5] Gwendolyn Seale, *Legal Issues in a Livestreaming World*, LAW.COM (Jan. 8, 2021, 10:01 AM), https://www.law.com/2021/01/08/legal-issues-in-a-livestreaming-world [https://perma.cc/PA2G-LFAR].

[6] Christina Criddle, *Coronavirus Creates Boom in Digital Fitness*, BBC (Dec. 16, 2020), https://www.bbc.com/news/technology-55318822 [https://perma.cc/U22Y-X3UV].

[7] Steven Melendez, *From Bar Trivia to Fantasy Role Playing, Zoom Is the World's New Game Room*, FAST CO. (Apr. 26, 2020), https://www.fastcompany.com/90489339/from-bar-trivia-to-fantasy-role-playing-zoom-is-the-worlds-new-game-room [https://perma.cc/KH7X-K4WC].

[8] Seale, *supra* note 5.

[9] *Id.*

[10] *See, e.g.*, Bijan Stephen, *In Twitch's Fight with the Music Industry, Streamers Are Paying the Price*, VERGE (Nov. 12, 2020, 3:50 PM), https://www.theverge.com/2020/11/12/21562372/twitch-soundtrack-riaa-music-youtube (noting that thousands of streamers use music).

In the physical world, musicians, fitness instructors, and others frequently had to contend with music copyright.[11] But with new forms of media come new questions: "Can I perform a cover song on Instagram?" "Can I upload a live broadcast of a radio show to YouTube?" "Can I record my DJ set onto Twitch?" The combination of visual imagery with music online raises an additional music copyright question: the synchronization ("sync") right.[12] Judges have interpreted the Copyright Act to give owners of copyrights in musical works and sound recordings a sync right, an additional sub-right deriving from the rightsholders' exclusive reproduction or derivative works right. This right gives copyright owners the exclusive right to use music in timed-relation to, or in sync with, audiovisual works.[13]

The purpose of synchronization in media creation is to enhance an audiovisual production by using underlying music to create a specific effect or mood.[14] Synchronization can be a significant addition to a work, adding a dynamic layer to an artist's story.[15] Courts originally interpreted sync rights to apply to movies, television shows, and commercials, which specifically use certain songs at particular moments.[16] More recent jurisprudence has not strayed far from these originally implicated media.[17] Yet more novel forms of media, such as on-demand or interactive

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[11] *See, e.g.*, Joy Butler, *Using Music In Your Work: Copyright Tips for Companies*, LAW360 (July 20, 2017, 11:39 AM), https://www.copyright.com/wp-content/uploads/2017/07/Using-Music-In-Your-Work-Copyright-Tips-For-Companies.pdf [https://perma.cc/H9PL-ULUH] (explaining how businesses can obtain licenses to use music).

[12] *See, e.g.*, REGISTER OF COPYRIGHTS, COPYRIGHT AND THE MUSIC MARKETPLACE 55–56 (Feb. 2015) (describing the sync right as deriving from either the reproduction right, the derivative works right, or a combination thereof). The reproduction right is the right "to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1). The derivative works right is the right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2).

[13] *See* Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 193 (D. Mass. 2009) (defining the sync right).

[14] Theodore Z. Wyman, *Enforceability of Synchronization Rights and Licenses in Copyrighted Music*, 84 A.L.R. FED. 2D 345, § 2 (2014) ("Creators of media such as motion pictures, television programming, TV or radio advertisements, video games, and karaoke tracks often seek to enhance their productions by synchronizing underlying music with their audiovisual images for specific effect.").

[15] *See* Matt Block, *When Should You Consider Sync*, SONGTRUST, https://blog.songtrust.com/when-should-you-consider-sync [https://perma.cc/RA9L-LBC2] (last updated Apr. 9, 2020) ("[S]ync is an art form that can add a dynamic layer to an artist's story while also providing a significant revenue stream.").

[16] *See* ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62 n.4 (2d Cir. 1996) (abrogated on other grounds by Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010)) ("Most commonly, synch licenses are necessary when copyrighted music is included in movies and commercials.").

[17] *See infra* notes 196–222 and accompanying text (describing the evolution of sync right case law).

streaming or recorded classes or concerts, also seem to implicate the sync right as they qualify as audiovisual works.[18] As the only wholly unregulated part of music copyright,[19] sync licenses – negotiated permission to sync a copyrighted work without infringing it – can prove an enormous burden to prospective creators and new types of media.[20]

Yet despite the potential hurdles that sync licensing can create for new technology and innovations, little attention has been paid to sync rights by either courts or legal scholars. Fewer than two dozen cases have addressed sync licenses with more than a fleeting mention.[21] Extant

[18] *See* Calvin R. Nelson et al., *Legal Implications of Syncing Copyright Music with Other Content*, LEXOLOGY (July 27, 2020), https://www.lexology.com/library/detail.aspx?g=4ce6ee91-2404-455a-8f9e-d4deecdae617 [https://perma.cc/2KMF-ENA2] (describing sync license issues for streaming video games and fitness classes).

[19] *See infra* notes 116–29, 154–66 and accompanying text (discussing the licensing landscape for musical works and sound recordings, including the various available compulsory licenses).

[20] Joseph Storch, Stephanie Morrison & Jack Bernard, *Synching Your Teeth into Copyright Law: Legal and Practical Considerations for Public Performances of Video and Photos Synchronized to Copyrighted Music*, 15 NAT'L ASSOC. COLL. & UNIV. ATT'YS 1, 9 (May 8, 2017) (noting that obtaining sync licenses can potentially involve high costs and may require creators to change the songs they use if the price is untenable); *What Is a Synchronization License?*, EASY SONG LICENSING, https://www.easysonglicensing.com/pages/help/articles/music-licensing/what-is-a-synchronization-license.aspx#:~:text=Challenges%20of%20obtaining%20synchronization%20licenses,and%20reject%20the%20license%20outright (last visited June 2, 2021) ("Note that synchronization licensing can be challenging because, by law, synchronization rights holders maintain total control of their works when it comes to video. This means they can set any fee, take all the time they need, and reject the license outright.").

[21] *See generally* Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 194 (D. Mass. 2009); ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62–63 (2d Cir. 1996) (abrogated on other grounds by Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010)); Woods v. Bourne Co., 60 F.3d 978, 987 (2d Cir. 1995); Agee v. Paramount Comm'ns, Inc., 59 F.3d 317, 322 (2d Cir. 1995); Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 920 (2d Cir. 1984); Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 760 (S.D.N.Y. 2020); Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 347 (S.D.N.Y. 2013); Freeplay Music, Inc. v. Cox Radio, Inc., 404 F. Supp. 2d 548, 552 (S.D.N.Y. 2005); Ohio Players, Inc. v. Polygram Records, Inc., No. 99-civ-0033, 2000 WL 1616999 at *5 (S.D.N.Y. Oct. 27, 2000); Bourne Co. v. Walt Disney Co., No. 91 Civ. 0344, 1992 WL 204343 at *4 (S.D.N.Y. Aug. 7, 1992); Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 579 n.3 (6th Cir. 2007); Bridgeport Music, Inc. v. Still N The Water Publ'g, 327 F.3d 472, 481 n.8 (6th Cir. 2003); House of Bryant Publ'ns, LLC v. A & E Television Networks, No. 3:09-0502, 2009 WL 3673055 at *9 (M.D. Tenn. Oct. 30, 2009); Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 527 (9th Cir. 2008); Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 885 (9th Cir. 1996); Kihn v. Bill Graham Archives, LLC, 445 F. Supp. 3d 234, 253 (N.D. Cal. 2020); EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217. 1221 (D. Utah 2007).

scholarship on sync rights is even more lacking, with the most detailed discussions of sync rights coming from student notes. In 1986, Lewis Rinaudo Cohen provided an overview of the sync right and offered a reconsideration of it that would weaken music publishers' claims to re-use fees and purportedly create better balance between movie producers and music copyright owners.[22] Most of the case law on sync rights occurred after Cohen's article was published, however, and it would be three decades until an academic article directly focused on sync rights would be published again.[23] More recently, Nicholas Thomas DeLisa argued in favor of a compulsory license system for sync licenses and Hannah Skopicki suggested requiring sync licenses for hologram performances.[24] More practice-focused articles provide analyses of the existing law,[25] but do not suggest how courts should modernize their jurisprudence to address substantial audiovisual innovations.

This Article hopes to achieve two goals that substantially build on the limited pre-existing sync right scholarship. First, it offers a thorough examination of all existing case law on sync rights, providing a much-needed update to Cohen's 1986 work. Second, it proposes revitalizing the evaluation for sync right infringement by parsing a two-part test – the use must (1) be a reproduction in an audiovisual work and (2) play the music in timed-relation to moving images – from the case law and giving requisite weight to the "timed-relation" prong, which has been almost completely ignored by courts and commentators alike. This test serves the purpose of copyright by balancing the interests of copyright owners with public access to new creative works, much in the same vein as other judicial and legislative adaptations to novel technological innovations.

In Part II, this Article lays out the purposes of copyright, which provide the overarching guiding principles for copyright law. Part III then discusses how courts and Congress have historically achieved this purpose in the face of novel technologies, always keeping an eye towards a balance between copyright owners' rights and public access. After establishing these background considerations, Part IV provides an overview of music copyright, first describing the overarching musical work and sound recording rights, and then addressing sync rights specifically. Part V then analyzes existing sync rights case law to provide an authoritative overview

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[22] *See* Lewis Rinaudo Cohen, Note, *The Synchronization Right: Business Practices and Legal Realities*, 7 CARDOZO L. REV. 787, 805–14 (1986).

[23] *Id.*

[24] Nicholas Thomas DeLisa, Note, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, 81 BROOK. L. REV. 1275, 1301–12 (2016); Hannah Skopicki, Comment, *Pixelated Poltergeists: Synchronization Rights and the Audiovisual Nature of "Dead Celebrity" Holograms*, 70 AM. U. L. REV. F. 1, 22–29 (2020).

[25] *See, e.g.*, Storch, Morrison, & Bernard, *supra* note 20, at 1 (providing an overview of when and how to obtain a sync license).

of the state of the law. After explaining the status quo, Part VI addresses the historical understanding of sync rights and how novel media forms have presented new, unanswered complications about where sync rights begin and end. Finally, Part VII offers a solution to this problem, drawing inspiration from historical adaptations of copyright to new technologies while advocating for the simple but effective solution of officially establishing a two-part test for sync right infringement that has effectively already been cited by courts, with a particular eye to the timed-relation prong that has long been relegated to the shadows of infringement analyses.

II. THE PURPOSE OF COPYRIGHT

From the start, copyright has had to balance public access to works with protecting the rights of copyright owners.[26] The goal of copyright, as articulated by the U.S. Constitution, is "[t]o 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."[27] By giving creators a package of exclusive rights, "they are given an incentive to create."[28] This incentive leads to a proliferation of creative content, which ultimately, according to this theory, will enrich public welfare in the United States by achieving progress in the sciences and arts.[29]

While these incentives are an important part of copyright law, the overarching purpose of copyright is to promote the spread of knowledge and technology.[30] Renowned authority on copyright law Melville Nimmer concluded that the "primary purpose of copyright [i]s not to reward the author" but promote creation.[31] The Supreme Court has similarly

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[26] Skopicki, *supra* note 24, at 10.

[27] U.S. CONST. art. I, § 8, cl. 8.

[28] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting).

[29] JULIE COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7–8 (4th ed. 2015). This rationale stretches back to at least the Statute of Anne, an early British copyright law in the eighteen century from which modern U.S. copyright law descends. *Id.* at 24–25; Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 747 (2013).

[30] *See* Malla Pollock, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 809 (2001) (concluding from a linguistics study that the term "progress," as used in the Intellectual Property Clause of the Constitution, refers to disseminating knowledge and technology); *see also* Stewart v. Abend, 495 U.S. 207, 228 (1990) (recognizing that "dissemination of creative works is a goal of the Copyright Act").

[31] 1 MELLVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2021).

concluded that promoting access is the ultimate goal of copyright.[32] If the purpose of copyright is to encourage learning[33] and progress,[34] a policy emphasis on public access is a logical conclusion.

Thus, access to newly generated knowledge and expression is just as important as protecting the incentivizing rights of copyright owners. As articulated by a group of law professors in the Copyright Principles Project, "[a] well-functioning copyright law carefully balances the interests of the public and of copyright owners."[35] Courts and Congress have strived to strike a balance between the two interconnected but often competing interests of protection and access.[36] Particularly with new technological advancements, it is important to periodically reevaluate extant copyright law to determine if this balance is met.

III. ADAPTABILITY OF COPYRIGHT LAW TO TECHNOLOGY

Copyright law has always grown and adapted to technological change. This adaptation is exemplified by how Congress gave more types of works copyright protection over time.[37] The original Copyright Act of 1790 only protected maps, charts, and books.[38] But over the course of the nineteenth century, prints (1802),[39] music (1831),[40] dramatic compositions (1856),[41] photographs (1865),[42] and works of art, including paintings, drawings, statues, and models (1870) were included within the ambit of copyright.[43] While the inclusion of photographs showed how copyright could be expanded to include novel types of works, this trend accelerated

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[32] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); *see also* Abend, 495 U.S. at 228 ("[D]issemination of creative works is a goal of the Copyright Act.").

[33] COHEN ET AL., *supra* note 2929, at 24–25. The Statute of Anne explicitly stated this. *Id.*

[34] U.S. CONST. art. I, § 8, cl. 8.

[35] Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1181 (2010).

[36] *See, e.g.*, *infra* Part III.

[37] *See generally* Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 PITT. L. REV. 17, 21–27 (2016) (discussing the historical evolution of copyright subject matter); *see also* Mazer v. Stein, 347 U.S. 201, 208–14 (1954) (tracing the expansion of copyrighted subject matter in the United States during the nineteenth century).

[38] Copyright Act of 1790, ch. 15, 1 Stat. 124.

[39] Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

[40] Copyright Act of 1831, ch. 16, 4 Stat. 436.

[41] Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

[42] Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

[43] Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212.

in the twentieth century to include new technological creations.[44] Motion pictures received independent copyright protection in 1912.[45] In 1972, the Sound Recordings Act granted federal copyright protection to sound recordings.[46] The Copyright Act was amended in 1980 to protect computer programs.[47] Finally, in 1990, copyright was extended to architectural works.[48]

But while the ambit of copyright has continued to grow, so have modifications to the rights of copyright holders in response to technological development.[49] Significant adaptations to copyright took place in response to the advent of the player piano, television program retransmission, photocopying, home video recording equipment, and a myriad of Internet innovations such as Google Books.[50] For all of them, the goal was striking a balance between copyright holders' exclusive rights and public access.[51]

One of the earliest twentieth century modifications to exclusive rights in the Copyright Act in response to technology was the mechanical license.[52] In 1900, Edwin S. Votey received a patent for the player piano, or pianola.[53] The player piano was a self-playing piano which contained a pneumatic mechanism which "read" programmed music recorded on perforated paper.[54] Votey later gave his patent rights to the Aeolian Company, of which he was a director.[55] The player piano enjoyed considerable popularity, selling over 200,000 units per year.[56] But this new form of musical performance threatened the rights of musical work

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[44] *See., e.g.*, Act of Aug. 24, 1912, ch. 356, 37 Stat. 488.

[45] *Id.* They previously were only copyrightable by depositing a series of still photographs. *See* Edison v. Lubin, 122 F. 240, 240–43 (3d Cir. 1903) (holding that a series of 4,500 pictures was copyrightable as a "photograph").

[46] Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391. Sound recordings made prior to 1972, however, were still only protected by state law, where applicable, until the Music Modernization Act added federal protection for pre-1972 sound recordings in 2018. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

[47] Act of Dec. 12, 1980, Pub. L. No. 96-517, § 117, 94 Stat. 3015, 3028.

[48] Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701–704, 104 Sat. 5089, 5133 (1990).

[49] *See infra* notes 54–94 and accompanying text.

[50] *See infra* notes 54–94 and accompanying text.

[51] *See infra* notes 54–94 and accompanying text.

[52] Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 545–47 (2014).

[53] U.S. Patent No. 650,285 (filed Jan. 25, 1897) (issued May 22, 1900).

[54] *Player Piano History & Development*, PLAYER PIANO PAGE, http://www.pianola.com/pphist.htm [https://perma.cc/DQX2-7JFN] (last revised Jan. 25, 2006).

[55] Loren, *supra* note 52, at 546.

[56] *Id.*

copyright owners.[57] To play a song, the player piano required a roll of paper that had been perforated in line with the music – effectively a code for the piano player to follow.[58] Aeolian produced millions of these rolls to feed the popularity of the player piano.[59] Yet these rolls were quite distinct from the sheet music that came before, whose reproduction was undoubtedly the exclusive prerogative of the copyright owner.[60]

In 1908, the U.S. Supreme Court had to decide whether these rolls infringed upon the rights of the owners of copyrights in musical works.[61] In *White-Smith Music Publishing Co. v. Apollo Co.*, the Court held that the rolls were not copies of the musical works, and therefore there was no infringement.[62] This ruling could have seriously harmed composers, and the Supreme Court acknowledged that this ruling effectively allowed free-riding by the player piano companies.[63] In response, Congress included a provision in the 1909 Copyright Act that granted the copyright owner of a musical work the right to control mechanical reproductions of that work, subject to a compulsory mechanical license.[64] This preserved the revenue stream of composers and, for the first time in the history of U.S. copyright law, subjected a copyright owner to a compulsory license.[65] The purpose of this mechanical license, now codified in Section 115 of the Copyright Act, was to readjust the balance in music copyright law after *White-Smith*

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[57] *Id.*

[58] *History of the Pianola – Music Roll Manufacture*, PIANOLA INST., http://www.pianola.org/history/history_rolls.cfm [https://perma.cc/L4RL-2RGX] (last visited May 21, 2021).

[59] *Id.* ("It was an accepted maxim amongst Aeolian Company staff that its profits came from the sale of instruments, and that rolls were manufactured as a means to that end."); Loren, *supra* note 52, at 546 ("[O]ver five million rolls [were] sold each year.").

[60] Loren, *supra* note 52, at 546.

[61] White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 9 (1908).

[62] *Id.* at 18.

[63] *Id.* ("It may be true that the use of these perforated [player piano] rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value.").

[64] Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075 ("That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof.").

[65] Loren, *supra* note 52, at 547 ("[F]or the first time in the history of U.S. copyright law, Congress subjected this new right granted to the copyright owner to a compulsory license."); Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA HIGH TECH L.J. 215, 219–21 (2010) (discussing the background and establishment of the Section 115 mechanical license).

was decided and protect both copyright owners and access to creative works.[66]

Congress stepped in again when technological advances allowed the retransmission of television signals.[67] In two cases in 1968 and 1974, the Supreme Court held that amplification of an existing broadcast by retransmission through cable did not constitute a public performance.[68] In the latter decision, the Supreme Court noted, like it had in *White-Smith*, that the Copyright Act was outdated and had not kept pace with new technologies, such as cable television ("CATV").[69] Congress took note and again overhauled the Copyright Act in 1976. One of Congress' main reasons for this substantial change was to overturn these decisions and reestablish a balance that protected copyright owners' rights.[70] The result was a similar compromise to that of 1909.[71] Congress redefined a public performance of an audiovisual work as "show[ing] its images in any sequence or to make sounds accompanying it audible" and enacted the Transmit Clause, which together made retransmissions performances subject to copyright.[72] However, Congress also created a compulsory licensing scheme for cable systems to retransmit broadcasts.[73] Again, Congress had balanced the rights of the copyright holder and access to the works.[74]

But not all modifications to copyright law to accommodate technological change relied on compulsory licenses.[75] In the case of photocopying, fair use provided protection for users.[76] Hand copying of

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[66] Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1626–27 (2001); *see also* Abrams, *supra* note 65, at 220 (explaining how a mechanical reproduction right without a compulsory license would have created conditions for a potential monopoly).

[67] Ginsburg, *supra* note 66, at 1627.

[68] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400–401 (1968) ("We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry."); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 408, 412–15 (1974) ("The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.").

[69] *Teleprompter*, 415 U.S. at 414.

[70] Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 439–41 (2014) (explaining why and how Congress rejected the holdings in *Fortnightly* and *Teleprompter*).

[71] *See id.*

[72] *Id.* at 441–42.

[73] *Id.* at 442.

[74] *See id.*

[75] *See, e.g.*, 17 U.S.C. § 107.

[76] Fair use is one of the statutory limitations on the exclusive rights of the copyright owner. *Id.* Fair uses of a copyrighted work – as determined by a four-factor test evaluating the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the potential

articles had been considered outside of the scope of U.S. copyright law.[77] But the introduction of the Xerox photocopier in the 1960s and the subsequent profusion of billions of photocopies raised anew concerns by publishers about the lack of copyright protection against photocopying.[78] In particular, publishers of periodical journals – which were until then usually only available through a subscription or purchased as an expensive single back issue – worried that potential consumers could obtain free photocopies from the library rather than pay the market price.[79] Even if a single photocopy could be a benign use, billions of photocopies in the aggregate posed a significant problem to these publishers.[80] For example, in *Williams & Wilkins Co. v. United States*, scientific journal publishers presented evidence that in 1970 the National Library of Medicine and the National Institutes of Health filled requests for 93,000 photocopies of articles per year – articles that would have otherwise been purchased.[81] The Court of Claims found the photocopying at issue to be fair use, but cited *White-Smith* and *Fortnightly Corp. v. United Artists Television, Inc.* and echoed the Supreme Court in those cases, encouraging Congress to act to address these technological advancements.[82] In response, Congress included Section 108 in the 1976 Copyright Act, which carved out a specific exemption from copyright liability for library copying in certain circumstances.[83] While this provided some much-needed guidance, courts continue to attempt to maintain balance by addressing how photocopying technology, and its modern corollary of scanning, squares with fair use.[84]

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market for the work – are not considered infringements. *Id.* Examples of fair use include criticism, parody, comment, news reporting, and scholarship. *Id.*

[77] Louise Weinberg, *The Photocopying Revolution and the Copyright Crisis*, PUB. INT. 99 (Winter 1975).

[78] *Id.* at 100.

[79] *Id.* at 104.

[80] *See id.* at 108 (explaining that even if an individual act of photocopying was fair use, many individuals undertaking that act posed a different problem).

[81] Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1348 (Ct. Cl. 1973), *aff'd* 420 U.S. 376 (1975).

[82] *Id.* at 1362–63 ("Hopefully, the result in the present case will be but a 'holding operation' in the interim period before Congress enacts its preferred solution.").

[83] 17 U.S.C. § 108 (2018) ("[I]t is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section.").

[84] Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1271–75 (11th Cir. 2014) (holding that in evaluating a scanned document under the third factor of the fair use test, the court must consider the quantity and quality of the copied portion rather than a fixed 10% of the work figure); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994) (holding that the photocopying of scientific articles was not fair

The trend of adapting copyright to new technologies continued after the 1976 Act was passed.[85] In *Sony v. Universal City Studios*, the Supreme Court remarked that "the law of copyright has developed in response to significant changes in technology."[86] The Court faced such a significant change in that case, in which it needed to answer whether videotape recorders violated copyright law.[87] The *Sony* court held that new technologies that were "capable of substantial noninfringing uses," such as the Betamax video recorder, did not constitute copyright infringement.[88] Indeed, time-shifting – changing the time when someone viewed a program – actually yielded social benefits by furthering access to the copyrighted work and was a fair use.[89]

Perhaps the greatest challenge for copyright law, however, was the Internet. This monumental change gradually spurred the courts and Congress to address the novel questions posed by it. In 1998, Congress passed the Digital Millennium Copyright Act in response to the Internet, which established safe harbors for websites with third-party content as long as they follow a statutorily required notice and takedown regime.[90] In decisions around the country, courts held that novel online uses such as thumbnail images in searches and online searchable books qualified as fair use.[91] Many other cases also addressed copyright in the era of the Internet, attempting to strike the right balance.[92] Then, in 2018, Congress passed

use because it copied the entire articles for the purpose of multiplying the number of copies in their possession, which harmed licensing and subscription revenue).

[85] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 457–58 (1984).

[86] *Id.* at 430.

[87] *Id.* at 419.

[88] *Id.* at 442, 456. It further held that the unauthorized home time-shifting of television programs was fair use. *Id.* at 455.

[89] *Id.* at 455.

[90] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

[91] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that Google's use of copyrighted thumbnails in its search engine was fair use); Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) (holding that the use of copyrighted images as thumbnails in a search engine was fair use); Authors Guild v. Google, Inc., 804 F.3d 202, 225 (2d Cir. 2015) (holding that Google's digitization of books was a transformative use because it balanced providing access via its search function while limiting that access in a way that did not usurp the copyright owners' market); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 101 (2d Cir. 2014) (holding that libraries' digitization of copyrighted works for the purpose of permitting full-text searches was fair use).

[92] *See, e.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1209 (2021) (holding that "where Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google's copying of the Sun Java API was a fair use of that material as a matter of law"); Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 656 (2d Cir.

the Music Modernization Act in response to, *inter alia*, interactive music streaming platforms such as Spotify and Apple Music substantially changing the music licensing landscape.[93]

Modifications to copyright law such as these have been critical for preserving the balance between copyright holders' rights and public access.[94] This historical trend of courts and Congress adapting copyright to new technologies is needed once again. As will be explored in this rest of this Article, copyright owners' synchronization rights now encompass a much wider range of content than was originally envisioned by the courts, suggesting a need for rebalancing.

IV. MUSIC COPYRIGHT AND SYNC RIGHTS

To understand sync rights, the reader must first apprehend the broader landscape of music copyright. Accordingly, this section first provides an overview of copyrights in musical works and sound recordings before then describing sync rights.

A. Musical Works and Sound Recordings

Synchronization, and the music copyright law in which it is housed, only makes up a discreet corner of the copyright universe. Copyright law protects authored original creative works fixed in tangible form.[95] The Copyright Act grants copyright protection to eight categories of works of authorship: (1) literary works, (2) musical works, (3) dramatic works, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architectural works.[96] Copyright owners of these works are entitled to a set of exclusive rights, the exact set varying depending on the type of work: (1) reproduction, (2) preparation of

2018) (holding that the first sale doctrine did not apply to the sale of music files through ReDigi); MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) ("holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties").

[93] *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018); *The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/music-modernization/creation.html [https://perma.cc/N776-EZ65] (last visited June 12, 2021) ("The late 20th and early 21st centuries saw the rise of the internet and the advent of online music distribution and streaming services using pre-internet laws. Specifically, the rise of interactive streaming services such as Spotify or Apple Music exposed a significant gap in the licensing system for musical works.").

[94] *Id.*

[95] 17 U.S.C. § 102 (2018).

[96] *Id.*

derivative works, (3) distribution, (4) public performance, (5) public display, and (6) public performance by means of a digital audio transmission.[97] The copyright owner also has the right to convey each of these exclusive rights separately.[98]

Out of these eight categories of works, music copyright is a particularly complicated area of law due to the many rights potentially implicated and the complicated licensing regimes that govern them.[99] First, a work of music contains two separate copyrights: the musical work and the sound recording.[100] A musical work is a composition: the notes, rhythms, and lyrics that comprise a song.[101] For example, the lyrics and music Bob Dylan wrote for the 1967 song "All Along the Watchtower" form a musical work.[102] The author of a musical work possesses five of the six rights enumerated in the Copyright Act: (1) reproduction, (2) preparation of derivative works, (3) distribution, (4) public performance, and (5) public display.[103]

A sound recording, on the other hand, is the fixed performance of the musical work in a physical medium, such as a CD or digital music file.[104] For example, "All Along the Watchtower" was performed by Dylan and later by Jimi Hendrix.[105] Assuming for the purposes of this example that both works were recorded after 1972,[106] a digital recording of the song by Dylan contains Dylan's copyrights in both the underlying musical work and his sound recording.[107] Hendrix' rendition, however, is comprised of Hendrix' copyright in the sound recording and Dylan's copyright in the

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[97] 17 U.S.C. § 106.

[98] 17 U.S.C. § 201(d)(2).

[99] *See Types of Copyright*, BMI, https://www.bmi.com/licensing/entry/types_of_copyrights [https://perma.cc/2BBF-4LCT] (last visited May 11, 2021); *see also* 17 U.S.C. §§ 106, 112, 114–115 (2018) (explaining the rights of copyright owners and the compulsory licenses available for musical works and sound recordings).

[100] REGISTER OF COPYRIGHTS, *supra* note 12, at 16.

[101] *Musical Works, Sound Recordings & Copyright*, U.S. COPYRIGHT OFF. 1, https://www.copyright.gov/music-modernization/sound-recordings-vs-musical-works.pdf [https://perma.cc/WTY6-Y53P] (last revised Feb. 2020).

[102] Steve Masur, *Understanding the Two Types of Copyright in Music*, MGA (Feb. 11, 2011), https://masur.com/songs-and-records-two-types-of-music-copyrights/#:~:text=As%20the%20songwriter%2C%20Bob%20Dylan,%2C%5B3%5D%20is%20paid [https://perma.cc/Y85T-RH8M].

[103] REGISTER OF COPYRIGHTS, *supra* note 12, at 25.

[104] *Musical Works*, *supra* note 101, at 2.

[105] Masur, *supra* note 102.

[106] The Copyright Act does not subject sound recordings fixed prior to February 15, 1972, to the usual § 106 protections of federal copyright law, but, following the Music Modernization Act, it provides the same federal remedies for unauthorized uses of sound recordings fixed before February 15, 1972. 17 U.S.C. §§ 106, 1401 (2018).

[107] *Id.*

musical work, and Dylan's sound recording is not implicated.[108] This is because the rights of the sound recording copyright owner "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[109] Instead, that exact recording – not just a similar sounding soundtrack – must be used to implicate the copyright in the sound recording.[110] Additionally, the rights encompassed in a sound recording copyright are slightly more limited than those in a musical work.[111] The author of a sound recording only has the exclusive right to: (1) reproduce, (2) prepare derivative works, (3) distribute, and (4) publicly perform by means of a digital audio transmission, which does not include terrestrial broadcasts.[112]

As most digital music consists of a sound recording, playing such a recording usually implicates both the copyright in the sound recording and in the underlying musical work.[113] Depending on the use of that music, the user will often need to license several copyright rights.[114] For example, if one wanted to play Hendrix's cover of "All Along the Watchtower" at a party in New York's Central Park on a CD version burned from Hendrix's cover, they would need to obtain three copyright licenses: (1) the right to reproduce Dylan's musical work; (2) the right to publicly perform Dylan's musical work; and (3) the right to reproduce Hendrix's sound recording.[115]

This series of required licenses could present a significant barrier for a potential user. For most types of copyrights, licenses are individually negotiated, which would require contacting Dylan and Hendrix (or rather, Hendrix's estate) and hammering out agreeable terms.[116] Music copyright, however, has a series of compulsory licenses that have been established by Congress and third-party intermediaries that serve as clearinghouses for licenses.[117] Section 115 of the Copyright Act – created in the wake of *White-Smith* – establishes a compulsory license for the reproduction and

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[108] *Id.*

[109] 17 U.S.C. § 114(b) (2018).

[110] *Id.*

[111] 7 U.S.C. § 114(d)(4)(B).

[112] REGISTER OF COPYRIGHTS, *supra* note 12, at 43.

[113] Masur, *supra* note 102.

[114] *See id.*

[115] Note that because the sound recording public performance right only applies to performances via digital audio transmissions, it is not implicated in a live performance in Central Park.

[116] *See* Brian T. Yeh, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, CONG. RES. SERV. 4 (Sept. 22, 2015) ("Some licenses are negotiated instruments between a copyright holder and a third party. . . . Other licenses are created by statute.").

[117] *See* 17 U.S.C. § 115 (2018).

distribution of musical works.[118] Section 115 also establishes set rates for the mechanical reproduction of music, as determined by the Copyright Royalty Board ("CRB") and reviewed every five years.[119] Compulsory licenses do not exist for the musical work public performance right, although there are consent decrees imposed upon the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") that effectively establish compulsory licensing upon request.[120] Section 114 contains a compulsory license for the public performance of sound recordings for satellite and non-interactive streaming services, and Section 112 contains reproduction and distribution licenses under certain circumstances for ephemeral copies created by such services, and both also have rates set by the CRB every five years.[121]

Although these compulsory license regimes are important,[122] in reality, most prospective licensees obtain licenses through third-party collective rights organizations that serve as clearinghouses for the various rights encompassed by music copyright.[123] Most one-off mechanical musical work reproduction and distribution licenses are acquired through the Harry Fox Agency.[124] For musical work public performance rights, four performing rights organizations ("PROs")[125] – ASCAP, BMI, SESAC, and Global Music Rights ("GMR") – offer licenses.[126] Sound recording public performance rights for digital non-interactive services are administered by SoundExchange.[127] The only one of these rights to not have a collective rights organization is the sound recording copyright owner's reproduction/distribution right, although record labels usually

[118] *Id.*

[119] 17 U.S.C. §§ 115, 802(b) (2018); *see also* REGISTER OF COPYRIGHTS, *supra* note 12, at 27–29.

[120] REGISTER OF COPYRIGHTS, *supra* note 12, at 34, 37 (noting that, under the consent decrees, ASCAP and BMI "must grant a license to any user that applies, on terms that do not discriminate against similarly situated licensees").

[121] 17 U.S.C. §§ 112, 114, 802(b).

[122] For example, even if most would-be licensees do not take advantage of the statutory licenses, these licenses can still operate as effective rate caps on the negotiated rates. Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 938 (2020)

[123] These are popular because having the licenses available at a central location significantly lowers transaction costs. *See* Loren, *supra* note 52, at 539 ("The resulting exceedingly high transaction costs are ameliorated through different collective rights management systems."); Victor, *supra* note 122, at 955 ("The PROs' rights aggregation . . . is the quintessential example of a transaction-cost-saving licensing technique.").

[124] REGISTER OF COPYRIGHTS, *supra* note 12, at 21.

[125] *Id.* at 3. Which are also referred to as collective management organizations ("CMOs").

[126] *Id.* at 20.

[127] *Id.* at 22.

license these rights.[128] Overall, these collective rights organizations process most of the musical work and sound recording licenses in the United States, although some copyright owners will still have prospective licensees negotiate directly with them, their publishers, or their labels.[129]

B. The Synchronization Right

As demonstrated in the previous section of this Article, the music copyright landscape is quite complex with the panoply of rights and licensing structures articulated in the Copyright Act.[130] In addition to these explicit rights, however, is an additional, unwritten one: the synchronization, or "sync" right.[131] Sync rights appear nowhere in the Copyright Act or any other statute.[132] However, courts have recognized sync rights as exclusive rights of the copyright owner.[133] Specifically, they have interpreted sync rights to flow from the copyright owner's Section 106 reproduction right and/or derivative works right.[134] Sync rights are, however, independent of public performance rights.[135]

Courts have defined synchronization as the use, or reproduction, of music in "timed-relation" to audiovisual works such as films or videotapes.[136] For example, a sync right is "the right to synchronize . . .

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[128] *See id.* at 43 (Licenses to reproduce and distribute sound recordings "are obtained through direct negotiation between a licensee and the sound recording owner.").

[129] *See id.* at 30–31 ("Although the use of the section 115 statutory license has increased in recent years with the advent of digital providers seeking to clear large quantities of licenses, mechanical licensing is still largely accomplished through voluntary licenses that are issued through a mechanical licensing agency such as HFA or by the publisher directly.").

[130] Wyman, *supra* note 14.

[131] *Id.*

[132] *Id.*; Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 527 (9th Cir. 2008).

[133] *Leadsinger*, 512 F.3d at 527.

[134] *See, e.g.*, Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 920 (2d Cir. 1984) (describing the sync right as a form of the reproduction right); Peter DiCola & David Touve, *Licensing in the Shadow of Copyright*, 17 STAN. TECH. L. REV. 397, 408 (2014) (describing the sync right as implicating the derivative works right); REGISTER OF COPYRIGHTS, *supra* note 12, at 55–56 (describing the sync right as deriving from either the reproduction right, the derivative works right, or a combination thereof).

[135] Affiliated Music Enters. Inc., v. Sesac, Inc., 160 F. Supp. 865, 867 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959); M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 846 (D. Minn. 1948).

[136] *See* Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 193 (D. Mass. 2009); Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 33 n.23 (1979); *Leadsinger*, 512 F.3d at 527.

music with [a] film."[137] A separate right exists for both musical works and sound recordings.[138] For musical works, a sync right is implicated wherever a composition is used in timed-relation with an audiovisual work.[139] The owner of a copyright in a sound recording also has a synchronization right, as "the statutory language pertaining to the sound recording reproduction right is broad enough to include a synch right." [140] If a specific copyrighted sound recording is synched to an audiovisual work, then the sync right in the sound recording (more commonly referred to as the "master use" right) is invoked.[141]

In addition to the copyright licenses previously described,[142] a prospective user must therefore obtain a "synch license if an existing musical composition is to be used in synchronization or 'timed-relation' with an audiovisual work, such as a theatrical or television motion picture or commercial."[143] As there are two distinct sync rights in both musical works and sound recordings, prospective licensees must potentially confront obtaining licenses from both copyright owners.[144] These licenses are crucial to industries such as television and movies, which are perhaps their most common use.[145] These rights are at the center of music being

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[137] Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 884 (9th Cir. 1996).

[138] Wyman, *supra* note 14, at § 2; Bridgeport Music, Inc. v. Still N The Water Publ'g, 327 F.3d 472, 481 n.8 (6th Cir. 2003) ("[A]n entity wishing to synchronize music with visual images in a video, motion picture, etc., must obtain a synchronization license from the musical composition copyright holder and must also obtain a license from the sound recording copyright holder.").

[139] *Common Licensing Terms Defined*, ASCAP, https://www.ascap.com/help/ascap-licensing/licensing-terms-defined#:~:text=A%20synchronization%20or%20%22synch%22%20right,music%20video%20or%20commercial%20announcement.&text=Synchronization%20rights%20are%20licensed%20by,of%20the%20movie%20or%20program [https://perma.cc/5SLL-AYKF] (last visited May 18, 2021).

[140] Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 322 (2d Cir. 1995); *see also* Ohio Players, Inc. v. Polygram Records, Inc., No. 99CIV.0033, 2000 WL 1616999, at *5 (S.D.N.Y. 2000).

[141] *See Agee*, 59 F.3d at 322.

[142] *See supra* Part IV(a).

[143] MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.02[F][3] (2021); *see also* Darren M. Richard, *Music Licensing 101: A Legal Guide for Creators of Motion Pictures*, INDIE SLATE (Oct. 2011), https://www.dinsmore.com/content/uploads/2017/06/indie20slate20-20richard.pdf [https://perma.cc/X3WB-974A] ("When seeking to use a specific master sound recording that embodies a specific artist's performance of a musical composition, a licensee must, in addition to clearing the rights for the composition, obtain a 'master use' license.").

[144] Richard, *supra* note 143.

[145] ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62 n.4 (2d Cir. 1996).

integrated into a film.[146] For example, the movie *Eurovision Song Contest* likely had to license copyrighted songs such as ABBA's "Waterloo," but likely not original songs specifically commissioned for the movie, such as "Double Trouble," which would presumably be works for hire.[147] Similarly, a sing-along videocassette with songs from Disney hits such as *Pinocchio* coordinated to play with video clips clearly implicates a sync right.[148]

While the sync right for musical works is implicated wherever a composition is synched with an audiovisual work, the sound recording sync right only applies when a specific copyrighted recording is used.[149] If an original cover of a song is created for the audiovisual work, only the musical work is implicated.[150] However, if a specific sound recording is used, the sync rights in the sound recording must also be cleared through a "master use" license, which allows the licensor to synchronize the sound recording in timed-relation with the relevant audiovisual work.[151] Similarly to the sync license, the master use license allows the licensee to use the sound recording in an audiovisual work and make copies of the audiovisual work.[152] A key task for a producer, therefore, is "obtain[ing] authorization from the owner of a sound recording before reproducing that recording in the soundtrack of an audiovisual work."[153]

Sync and master use licenses are required for the full creation of many audiovisual works, and this can pose a significant hurdle to

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[146] M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 844 (D. Minn. 1948) (noting that through these copyright licenses "music by such synchronization will be integrated with the film").

[147] *See* Elena Nicolaou, *The Songs on Netflix's Eurovision Soundtrack Are Destined to Be Hits*, OPRAH DAILY (June 29, 2020), https://www.oprahdaily.com/entertainment/a33000216/eurovision-movie-soundtrack [https://perma.cc/6K2X-7NTH] (listing the songs in the movie, including both copyrighted songs necessitating a sync license and original songs); *see also* 17 U.S.C. § 101 (2018) (defining a work for hire, including for "a work specially ordered or commissioned for use . . . as a part of a motion picture or other audiovisual work").

[148] *See* Bourne Co. v. Walt Disney Co., No. 91 Civ. 0344 (LLS), 1992 WL 204343, at *2 (S.D.N.Y. Aug. 7, 1992).

[149] Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 768 (E.D. Mich. 2008).

[150] *Id.*

[151] Tuneen E. Chisolm, *In Lieu of Moral Rights for IP-Wronged Music Vocalists: Personhood Theory, Moral Rights, and the WPPT Revisited*, 92 ST. JOHN'S L. REV. 453, 466 (2018) ("[I]f-and only if-a copyrighted sound recording is used, a master license for the use of the sound recording is also required."); Richard, *supra* note 143.

[152] Richard, *supra* note 143; *see also* Platinum Record Co. v. Lucasfilm, Ltd., 566 F. Supp. 226, 226-27 (D.N.J. 1983) ("Under this Agreement Chess Janus gave Lucasfilm the right to use the 'master recordings' or 'matrixes' of four popular songs for use on the soundtrack of the motion picture American Graffiti.").

[153] Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 322 (2d Cir. 1995).

producers and others.[154] Unlike some other music copyright rights, there is no regulation of sync licenses, so the prices of these licenses are negotiated solely on the open market.[155] In addition, while the musical work reproduction and distribution rights and digital non-interactive performances of sound recordings all have compulsory licenses, sync rights do not.[156] Instead, whoever wants to sync music to an audiovisual work must obtain a sync license on the open market at the whim of the copyright owner.[157] Due to this lack of regulation, sync licenses, although they are usually one-time flat fees, can vary wildly in amount, from a nominal sum to tens of thousands of dollars or more for including it in an audiovisual work; or a rights owner can simply refuse to allow the use of their song or recording.[158]

In addition, it can be difficult to find who possesses the sync right and contact them.[159] If someone wishes to use a musical work or a sound recording in their audiovisual work, they generally need to negotiate directly with either the author or artist directly, or their publisher or record label.[160] Unlike other music rights, there are no official "clearinghouses" or collective rights organizations in the United States for sync licenses,[161] although some entities have started to offer such services on a smaller scale.[162] For example, PretzelAux offers a library of music that allows

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[154] *See* Richard, *supra* note 143.

[155] REGISTER OF COPYRIGHTS, *supra* note 12, at 56; RUDOLF LEŠKA, DIGITAL PERIPHERIES: THE ONLINE CIRCULATION OF AUDIOVISUAL CONTENT FROM THE SMALL MARKET PERSPECTIVE 277 (Petr Szczepanik et al., eds., 2020) (describing the role of collective management organizations in music licensing for film).

[156] REGISTER OF COPYRIGHTS, *supra* note 12, at 56.

[157] Kihn v. Bill Graham Archives, LLC, 445 F. Supp. 3d 234, 253 (N.D. Cal. 2020) (on appeal) (Synchronization licenses "are voluntary and negotiated, not compulsory."); REGISTER OF COPYRIGHTS, *supra* note 12, at 56.

[158] Richard, *supra* note 143 ("The fees can range from nominal amounts to tens of thousands of dollars depending upon the specific rights needed, the scope and budget of the project, and the relative leverage and bargaining power of the parties involved.").

[159] *See Live Streaming Your Show*, *supra* note 4.

[160] *See* Leška, *supra* note 155, at 277 (Petr Szczepanik et al., eds., 2020) ("Unless the rightsholder appoints a CMO to administer the synchronization right . . . the producer needs to seek synchronization approval directly from the publisher or, if there is no publisher, the author.").

[161] Peter K. Yu, *How Copyright Law May Affect Pop Music Without Our Knowing It*, 83 UMKC L. REV. 363, 387, 392 (2014) ("[N]o U.S. CMO has thus far been established to grant synchronization licenses to audiovisual contents, such as MTV or YouTube videos.").

[162] *Live Streaming Your Show*, *supra* note 4, ("Unfortunately there are no official US 'clearinghouses' available to easily secure synchronization licenses; however, independent entities offering these services can be found by an internet search using key phrases such as 'synchronization license services' or 'synchronization clearance services.'").

streamers to play their music on their audiovisual work.[163] Other intermediaries also exist,[164] but in a much more segmented market than the other collective rights organization-dominated music licenses. Larger entities have entered into direct relationships with music publishers, such as YouTube, which licenses sync rights for user-uploaded videos on its platform,[165] but this is not the case for smaller licensees or licensors, for whom it is much less common to appoint a collective rights organization to administer their sync rights.[166]

V. SYNC RIGHTS IN THE COURTS

In addition to sync rights being difficult for creators and users to understand and license, there is limited guidance on them. Compared to many areas of copyright law, sync rights have gotten short shrift in scholarship and in the courts. Historically, scholars have given little consideration to sync rights, with only three law review articles primarily discussing U.S. sync rights.[167] Several hundred-page copyright law casebooks gloss over sync rights in a few sentences.[168] Even Melville and David Nimmer, in their leading copyright treatise, provide few insights into the confines of sync rights, limiting their commentary primarily to contractual terms for sync licenses.[169]

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[163] *What Is Pretzel?*, PRETZEL, https://www.pretzel.rocks/for/livestreamers [https://perma.cc/JS8C-KPAV] (last visited May 11, 2021).

[164] *See, e.g.*, Jay Rosenthal & Christos P. Badavas, *Additional Comments of the National Music Publishers' Association, Inc. and the Harry Fox Agency, Inc. in Response to July 23, 2014 Second Notice of Inquiry*, *in* U.S. COPYRIGHT OFFICE, MUSIC LICENSING STUDY: COMMENTS IN RESPONSE TO THE JULY 23, 2014 REQUEST FOR ADDITIONAL COMMENTS DUE ON SEPT. 12, 2014 (2014) (citing examples such as the Harry Fox Agency, Greenlight Music, Dashbox, Songfreedom, CueSongs, SynchTank, Rumblefish, and others).

[165] REGISTER OF COPYRIGHTS, *supra* note 12, at 57–58; DeLisa, *supra* note 24, at 1276.

[166] Leška, *supra* note 155, at 277 (noting that it "rarely happens").

[167] For example, few articles have addressed the sync right in more than passing. *See* Cohen, *supra* note 22, at 788 (summarizing sync right law and proposing weakening copyright owners' claims to re-use fees); Skopicki, *supra* note 24, at 21 (proposing requiring sync licenses for holographic performances); DeLisa, *supra* note 24, at 1301–12 (proposing a compulsory license system for sync licenses).

[168] *See, e.g.*, JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 376–77 (2d ed. 2020); COHEN ET AL., *supra* note 29, at 416.

[169] *See generally* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 30.02, 30.04 (2021).

This lack of attention has, in part, been due to a dearth of case law on sync rights.[170] Since 1990, there have been less than two dozen judicial opinions addressing sync rights in any detail.[171] An even smaller subset of this limited body of case law addresses the substantive sync rights, with some cases instead addressing the terms of sync licenses[172] or the viability of sync rights for purposes of a fair use analysis.[173]

A. Film, Television, and Commercials

Most of the early synchronization cases involved antitrust allegations by the film and television industries against music rights organizations.[174] For example, in *M. Witmark & Sons v. Jensen* – often understood to be the first major case on sync rights – the plaintiffs alleged copyright infringement of their musical work copyright and the defendants countered that plaintiffs were engaged in anti-competitive behavior in violation of antitrust law.[175] The plaintiffs were members of ASCAP, which adopted a uniform plan for its members to license copyrighted music to motion picture producers for the purpose of synchronization with

[170] Skopicki, *supra* note 24, at 15–20 (2020) (surveying the lack of case law on sync rights).

[171] Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 193 (D. Mass. 2009); ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62–63 (2d Cir. 1996); Woods v. Bourne Co., 60 F.3d 978, 984 (2d Cir. 1995); Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 322 (2d Cir. 1995); Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 920 (2d Cir. 1984); Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 754, 760 (S.D.N.Y. 2020); Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 351 (S.D.N.Y. 2013); Freeplay Music, Inc. v. Cox Radio, Inc., 404 F. Supp. 2d 548, 551 (S.D.N.Y. 2005); Ohio Players, Inc. v. Polygram Records, Inc., No. 99CIV.0033, 2000 WL 1616999, at *5 (S.D.N.Y. 2000); Bourne Co. v. Walt Disney Co., No. 91 Civ. 0344 (LLS), 1992 WL 204343 (S.D.N.Y. Aug. 7, 1992); Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 579 (6th Cir. 2007); Bridgeport Music, Inc. v. Still N The Water Publ'g, 327 F.3d 472, 480–81 (6th Cir. 2003); House of Bryant Publ'ns, LLC v. A & E Television Networks, No. 3:09-0502, 2009 WL 3673055, at *1 (M.D. Tenn. 2009); Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 529 (9th Cir. 2008); Maljack Productions, Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 888 (9th Cir. 1996); Kihn v. Bill Graham Archives, LLC, 445 F. Supp. 3d 234, 253 (N.D. Cal. 2020); EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1225 (D. Utah 2007).

[172] *See, e.g.*, *Woods*, 60 F.3d at 983–84 (discussing sync licenses for the song *When the Red, Red, Robin Comes Bob, Bob, Bobbin' Along*); *Walt Disney*, 1992 WL 204343, at *3 (regarding whether the sing-along version of a song from *Pinocchio* violated the terms of the sync license).

[173] *See, e.g.*, *House of Bryant*, 2009 WL 3673055, at *1 (describing the plaintiff's prior sync licensing arrangements, including to the University of Tennessee at Knoxville).

[174] Skopicki, *supra* note 24, at 16–18.

[175] M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 844 (D. Minn. 1948).

the film to be produced.[176] This plan effectively required producers to "enter into a blanket license with ASCAP for the performance rights of the copyrighted music integrated in sound films."[177] The defendants alleged that ASCAP had "monopolistic control over the copyrighted films in which their music is integrated" and that this control extended beyond that which was granted by the Copyright Act.[178] The U.S. District Court for the District of Minnesota agreed that ASCAP's plan constituted copyright misuse.[179] In denying recovery to the plaintiffs,[180] it emphasized that ASCAP controlled 80% of the licensing of music to films and that "[t]hrough Ascap, these plaintiffs and their associates by a refusal to license, or by the imposition of an exorbitant performance license fee, can sound the death knell of every motion picture theatre in America."[181]

Despite *Witmark* primarily focusing on copyright misuse,[182] it is also notable as one of the first cases to recognize sync rights.[183] The decision explains that a music license "permit[s] the producers to synchronize the copyrighted music on the sound track of the motion picture film to be produced. . . . [these] are merely synchronization rights"[184] It later notes that "it may be assumed that a copyright owner of music may have the right to license the recording of his composition on a film and also the exclusive right to license the performance of the synchronized composition."[185] While on its face this distinction is between the reproduction and public performance right, recording a composition on a film also refers to the separate synchronization right and its distinction from other rights held by the copyright owner.[186]

Starting in the 1990s, music copyright cases started to more directly address sync rights. In *Bourne Co. v. Walt Disney Co.*, the U.S. District Court for the Southern District of New York made explicit what was hinted at in *Witmark*: "The right to print the lyrics . . . is qualitatively different from the right to synchronize that song with a visual image."[187]

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[176] *Id.*

[177] *Id.* at 849.

[178] *Id.* at 846.

[179] *Id.* at 850 (extending the patent misuse doctrine to copyright).

[180] *Id.*

[181] *Id.* at 847.

[182] *See* Roger Arar, Note, *Redefining Copyright Misuse*, 81 COLUM. L. REV. 1291, 1293–94 (1981) (discussing how the *Witmark* court applied the copyright misuse defense).

[183] Skopicki, *supra* note 24, at 16 (describing *Witmark* as one of the earliest sync cases).

[184] *Jensen*, 80 F. Supp. at 844.

[185] *Id.* at 846.

[186] *Id.* at 846–47.

[187] Bourne Co. v. Walt Disney Co., No. 91 Civ. 0344, 1992 WL 204343, at *4 (S.D.N.Y. Aug. 7, 1992).

Three years later, in *Agee v. Paramount Communications, Inc.*, the Second Circuit faced the question of whether sound recordings had their own sync right.[188] In *Agee*, Paramount created an audiovisual work that synchronized part of a duplicated sound recording to visual images of two men perpetrating a burglary.[189] Paramount tried to argue that commercial copying for time-shifting purposes did not violate the reproduction right, like in the seminal Supreme Court case of *Sony*.[190] The Second Circuit avoided this specific question, determining that Paramount had duplicated and synchronized Agee's sound recording to not just time-shift, but also enhance the performance by ensuring that viewers would not see any mistakes.[191] The district court had held that there were no sync rights in a sound recording copyright owner's reproduction right.[192] The Second Circuit disagreed, holding that synchronizing previously recorded sounds on the soundtrack of an audiovisual work is part of the reproduction right granted by § 114(b) to the owner of rights in a sound recording.[193]

Meanwhile, courts also started to define the breadth of sync rights. In *Buffalo Broadcasting Co. v. American Society of Composers, Authors and Publishers*, the Second Circuit referred to sync rights as "the right to reproduce the music onto the soundtrack of a film or a videotape in synchronization with the action."[194] Similarly, in *Bridgeport Music, Inc. v. Still N The Water Publishing*, the Sixth Circuit explicitly said that synchronization licenses refer to the "use of a composition in a film, pre-recorded radio or television program, or radio or television commercial."[195]

B. Video Games

The sync right cases up to this point exclusively addressed these classic audiovisual works. One of the first cases to implicitly broaden this definition was *Romantics v. Activision Publishing, Inc.*, which addressed whether a use of a song in a video game infringed the copyright of the

[188] 59 F.3d 317, 319 (2d Cir. 1995).

[189] *Id.*

[190] 464 U.S. 417, 447–55 (1984) (holding that recording a television program for later viewing was a permissible time shifting that did not violate the copyright in the program due to fair use).

[191] *Agee*, 59 F.3d at 323–24 (2d Cir. 1995). Although the court held that Paramount was liable for violating Agee's sync rights, it held that the stations were not liable for violating Agee's sync rights, however, because they were protected by the ephemeral recording exemption under 17 U.S.C. § 114(a). *Id.* at 326–27.

[192] *Agee*, 59 F.3d at 320.

[193] *Id.* at 322.

[194] 744 F.2d 917, 920 (2d Cir. 1984).

[195] 327 F.3d 472, 481 n.8 (6th Cir. 2003).

plaintiffs' musical composition.[196] The video game in question was Guitar Hero, which allows players to perform well-known rock songs in time with the music.[197] The court noted that the "graphic video elements of the game require complex synchronization with each song to enable the realistic simulation of guitar play."[198] The defendant could sync the song with the video game graphics because it had acquired the requisite proper sync license from the musical work copyright owner.[199] It did not have to obtain a master use license because it had recorded a cover of each musical work, and the plaintiffs' sound recording copyright was therefore not implicated.[200] While this expanded the scope of sync rights, the inclusion of video games was unsurprising, especially with a game where songs are synched to specific timed graphics such as Guitar Hero.[201]

C. Karaoke

A more controversial question is whether karaoke machines require sync licenses, on which courts have come to different conclusions. The first court to address this question was the Second Circuit in *ABKCO Music, Inc. v. Stellar Records, Inc.*[202] The court recognized that "[a] synchronization license is required if a copyrighted musical composition is to be used in 'timed-relation' or synchronization with an audiovisual work."[203] But does a device merely showing the lyrics on a screen, without any accompanying images, implicate synchronization?[204] The defendant in the case specifically questioned whether Congress had kept pace with technological advancements or whether the definition of "phonorecord," as compared to "audiovisual work,"[205] was underinclusive.[206] But the

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[196] 574 F. Supp. 2d 758, 766 (E.D. Mich. 2008).

[197] *Id.* at 762.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 768.

[201] *Id.* at 762.

[202] 96 F.3d 60, 62 (2d Cir. 1996).

[203] *Id.* at 63 n.4.

[204] *Id.* at 65.

[205] Phonorecords are defined as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (2018). Audiovisual works are defined as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." *Id.*

[206] *ABKCO*, 96 F.3d at 65. The court, however, noted that it was Congress' role to redefine terms in the future, not theirs. *Id.* This echoed concerns about copyright

court concluded that this method of display constituted an audiovisual work because it consisted "'of a series of related images' – the lyrics – 'together with accompanying sounds' – the music."[207] Therefore, according to the *ABKCO* court, the use of a video image – even stock ones such as a sun-drenched beach – and lyrics in combination with music must first clear sync rights with the copyright owners.[208]

The question of sync rights and karaoke was next raised in the District of Utah in *EMI Entertainment World, Inc. v. Priddis Music, Inc.*[209] In that case, plaintiff EMI argued that karaoke machines required a sync license as they "displayed songs' lyrics in timed relation to music."[210] But defendant Priddis countered that "courts have recognized synchronization rights only with reference to films, motion pictures, videotapes, television programs and commercials, all of which have significant visual image content, and that the video display of the text of song lyrics not accompanied by such image content falls beyond the scope of synchronization rights as defined by the existing case law."[211] The court agreed; "a copyright holder's synchronization right [does not] extend[] to the graphical display of written text, without more."[212] Here, Priddis had simply digitally reprinted copies of the lyrics,[213] unlike in *ABKCO*, where the karaoke disks contained lyrics and graphics.[214] Without more visual image content, the karaoke machines did not qualify as an audiovisual work, but merely as a visual work.[215] Therefore, the sync right was not implicated and the court granted Priddis' motion for summary judgment on the sync license question.[216]

Similarly to *EMI*, in the Ninth Circuit case of *Leadsinger, Inc. v. BMG Music Publishing*, BMG requested that karaoke companies pay for a sync license to use their karaoke devices.[217] Like in *ABKCO* and *EMI*, the decision turned on whether the karaoke devices qualified as audiovisual works, as the copyright owner's sync right is their "right to control the synchronization of musical compositions with the content of

law not keeping pace with technology and the necessity of Congress to remedy it, like those in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908), and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 414 (1974).

[207] *ABKCO*, 96 F.3d at 65 (quoting 17 U.S.C. § 101).

[208] *Id.* at 62–63.

[209] 505 F. Supp. 2d 1217, 1219 (D. Utah 2007).

[210] *Id.*

[211] *Id.* at 1221.

[212] *Id.* at 1222.

[213] *Id.* at 1223.

[214] ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62–63 (2d Cir. 1996).

[215] *EMI*, 505 F. Supp. 2d at 1223.

[216] *Id.* at 1225.

[217] 512 F.3d 522, 525 (9th Cir. 2008).

audiovisual works."[218] The Copyright Act defines audiovisual works as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any."[219] The Ninth Circuit held that karaoke devices are audiovisual works under this definition, as the projected lyrics are "a series of related images" that match the accompanying music.[220] It disagreed with the *EMI* court's analysis, concluding that, unlike printed song lyrics, "images of song lyrics embedded in a karaoke device are part of a series of images, and must be shown by a machine so that the consumer knows when to sing each lyric."[221] Therefore, the Ninth Circuit held that Leadsinger needed to secure sync licenses "to display images of song lyrics in timed relation with recorded music."[222]

VI. COMPLICATIONS WITH NEW CONTENT INNOVATIONS

For most of the twentieth century, sync rights appeared to be narrowly cabined to only include movies, television shows, and commercials. The early cases that defined sync rights were decided decades ago, citing sync rights exclusively for the soundtrack of a film or a videotape.[223] In *EMI*, the defendant argued that courts "have recognized synchronization rights only with reference to films, motion pictures, videotapes, television programs and commercials," and the court agreed.[224] Even as recently as 2013, a court defined the sync right as the right "to authorize the use of a song in a movie or commercial soundtrack."[225] In the twenty-first century, courts started to gradually broaden the scope of sync licenses to include media such as advertisements, promotional videos, and video games.[226] As we have seen, courts have expressly confronted the questions of whether video

[218] *Id.* at 527.

[219] 17 U.S.C. § 101.

[220] *Leadsinger*, 512 F.3d at 527–28.

[221] *Id.* at 528 n.2.

[222] *Id.* at 529.

[223] Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 33 n.23 (1979); Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 920–21 (2d Cir. 1984).

[224] EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1221, 1224 (D. Utah. 2007).

[225] Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 347 (S.D.N.Y. 2013).

[226] *See* Skopicki, *supra* note 24, at 18 (describing how sync cases gradually started to address commercial advertisements).

games and karaoke machines qualify as audiovisual works that necessitate sync licenses.[227]

Some commentators have argued that as technology has advanced, so have courts' definitions of audiovisual works, but, at their core, these types of works are very similar to the traditional audiovisual works of film and television programs.[228] Once courts started to face questions further afield from the core of audiovisual works, uniformity of understanding around what constituted an audiovisual work started to break down.[229] For example, the District of Utah and the Ninth Circuit are at odds over whether a text-only karaoke machine requires a sync license.[230] While sync rights' relationship with karaoke machines – a machine invented over fifty years ago[231] – is still being worked out, novel technologies and forms of audiovisual content have arisen which pose new questions for sync rights. While movie or television show soundtracks clearly require a sync license, it is less apparent whether new types of media would require one.[232]

Perhaps the most significant question about synchronization and technology at the moment is whether sync licenses are required for all forms of streamed content. For truly live streams that are in real time and not recorded, the work is not reproduced and therefore doesn't implicate

[227] Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 762 (E.D. Mich. 2008); ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62–63 (2d Cir. 1996); Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 528 (9th Cir. 2008); *EMI*, 505 F. Supp. 2d at 1222. Zomba Ent., Inc. v. Panorama Records, Inc., 491 F.3d 574, 578 (6th Cir. 2007) (addressing whether copying lyrics on the screen for karaoke in sync with songs was fair). Another sync case that addressed karaoke machines was *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, but that case instead addressed whether copying lyrics on the screen for karaoke in sync with songs was fair use. The court held that it was not. 491 F.3d 574, 584 (6th Cir. 2007).

[228] *See* Skopicki, *supra* note 24, at 24–26 (arguing that courts have increasingly taken a broad interpretation of what constitutes an audiovisual work and that holograms should qualify as such).

[229] *Id.* at 30.

[230] *EMI*, 505 F. Supp. 2d at 1223 (holding that sync licenses were not necessary for karaoke machines that featured only digitized text, as the work was not sufficiently audiovisual); *Leadsinger*, 512 F.3d at 528 (holding that karaoke machines were sufficiently audiovisual because the machines used images, even if the images were solely song lyrics).

[231] Matt Alt, *The Man Who Invented Karaoke Is 95 and His Machine Still Works*, KOTAKU (June 26, 2020, 2:00 PM), https://kotaku.com/the-man-who-invented-karaoke-is-95-and-his-machine-stil-1844154550 [https://perma.cc/8YLL-A3UR] (explaining that Daisuke Inoue is often credited as the inventor of the first karaoke machine in 1971, but Shigeichi Negishi was actually the first inventor of the machine in 1967).

[232] COHEN ET AL., *supra* note 2929, at 416.

the copyright owner's exclusive sync rights.[233] But any time there is a reproduction, such as with a movie, TV show, commercial, or other audiovisual work with music in timed-relation, there must be a sync license.[234] The same would appear to be true for online audiovisual content.[235] Therefore, if the work is later posted or can be replayed, the creator almost certainly requires a sync license.[236]

This distinction between live and recorded streams has become especially important during the COVID-19 pandemic, when traditionally live events such as concerts, DJ sets, and fitness classes have moved online.[237] Even before the pandemic, streaming content such as video games and online workout classes was starting to become popular.[238] For example, the rise of at-home fitness classes from entities such as Peloton and Mirror have expanded the types of uses that potentially require sync licenses.[239] If sync rights apply to these types of works, these entities and others that post recorded content that happens to contain music online

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[233] Gregory Pryor & Eric Zwilling, *Reed Smith's Guide to Live Streaming U.S. Edition* REED SMITH 20 (Apr. 2020); Seale, *supra* note 5 (arguing that a pure livestream, which is not archived, would not require a sync license because the work is not fixed (it disappears after the performance is over)). A pure livestream would, however, require a musical composition public performance license. Seale, *supra* note 5. *But see* Jon Blistein, *Twitch Licenses Music Now. But the Music Industry Says It's Skirting the Rules*, ROLLING STONE (Oct. 1, 2020, 2:06 PM), https://www.rollingstone.com/pro/features/twitch-soundtrack-licensing-sync-1069411 [https://perma.cc/6V32-HBQP] (According to Noah Downs, a lawyer, "[t]he idea that playing music during a livestream does not require a synchronization license is wrong. It's bad interpretation of copyright law. . . . because the music is definitely synchronized in timed relation with images and video.").

[234] Pryor & Zwilling, *supra* note 233, at 20.

[235] *Id.*

[236] Pryor & Zwilling, *supra* note 233, at 20; Brandit & Tibbs, *supra* note 3 (proposing that if an artist uploads their video for playback, they need not only a public performance license, but also a sync license, which gives the licensee permission to pair a video with music and save it for playing on demand.); Seale, *supra* note 5 (arguing that an archived livestream, on the other hand, requires both a sync license and, if a sound recording is used, a master use license.).

[237] Jess Cording, *How COVID-19 Is Transforming the Fitness Industry*, FORBES (July 13, 2020, 4:07 PM), https://www.forbes.com/sites/jesscording/2020/07/13/covid-19-transforming-fitness-industry/?sh=57436c7b30a7.

[238] *See id.* ("virtual workouts were in existence prior to the COVID-19 pandemic"); Adam Epstein, *How Watching Other People Play Video Games Took Over the World*, QUARTZ, https://qz.com/1985927/how-video-game-streaming-took-over-the-world [https://perma.cc/ZV8W-73D3] (last updated Mar. 29, 2021).

[239] Sekou Campbell, *Peloton Suit Shows Sync Licensing Is Next Copyright Horizon*, LAW360 (Feb. 19, 2020, 1:35 PM), https://www.law360.com/articles/1244986/peloton-suit-shows-sync-licensing-is-next-copyright-horizon [https://perma.cc/CBS2-MKV8].

would have to undertake the onerous sync licensing process,[240] which could chill the content we have come to experience – and expect – online.

This ambiguity about how far sync rights reach has even contributed to nefarious attempts of police officers to "weaponize" copyright.[241] There have been reports of officers playing copyrighted music during potentially contentious altercations.[242] The logic is that if they are recorded, those recordings will contain copyrighted music, which will trigger song recognition software on major platforms such as YouTube and Instagram that will cause them to be taken down.[243] This practice has become common enough that some law enforcement departments have even instructed their officers to engage in this so-called "copyright hacking."[244]

In addition to the question of how far sync rights stretch, new content forms also face an onerous battle to obtain sync licenses for their purposes.[245] Unlike recordings of artists playing music, which can rely on compulsory reproduction licenses under § 115, recorded audiovisual events, even candid ones, must rely on individually negotiated sync licenses.[246] There are no compulsory licenses for sync rights either, which

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[240] *See supra* notes 155–66 and accompanying text.

[241] *See, e.g.*, Tim Cushing, *Latest Anti-Accountability Move By Cops Involves Playing Music While Being Recorded In Hopes Of Triggering Copyright Takedowns*, TECHDIRT (Feb. 10, 2021, 9:31 AM), https://www.techdirt.com/articles/20210209/19152846222/latest-anti-accountability-move-cops-involves-playing-music-while-being-recorded-hopes-triggering-copyright-takedowns.shtml [https://perma.cc/YTK5-3M88].

[242] *Id.*; Sarah Rose Sharp, *Cop Admits to Playing Copyrighted Music to Keep Activist Recording off Youtube*, HYPERALLERGIC (July 2, 2021), https://hyperallergic.com/660912/cop-plays-copyrighted-taylor-swift-music-to-keep-activist-recording-off-youtube [https://perma.cc/65KF-3K93].

[243] Tim Cushing, *Law Enforcement Officer Openly Admits He's Playing Copyrighted Music To Prevent Citizen's Recording From Being Uploaded To YouTube*, TECHDIRT (July 6, 2021, 9:41 AM), https://www.techdirt.com/articles/20210702/11260847107/law-enforcement-officer-openly-admits-hes-playing-copyrighted-music-to-prevent-citizens-recording-being-uploaded-to-youtube.shtml [https://perma.cc/HG23-WQ6B].

[244] *See, e.g.*, Matthew Gault, *Cop Was Instructed to Use Music to Disrupt Filming*, VICE (Sept. 9, 2021, 9:39 AM), https://www.vice.com/en/article/93y77y/cop-was-instructed-to-use-music-to-disrupt-filming?utm_medium=social&utm_source=motherboardtv_facebook&fbclid=IwAR1XmtBjaqjqiShWsmvoykryhQACoIxEmjTfcpi7a8QXh6nZ9VCZdpjWrwY [https://perma.cc/55RZ-EVZV]; Tim Cushing, *Officer Claims Sheriff's Office Told Him To Play Copyrighted Music To Shut Down Citizens' Recordings*, TECHDIRT (Sept. 13, 2021, 11:58 AM), https://www.techdirt.com/articles/20210911/21360647545/officer-claims-sheriffs-office-told-him-to-play-copyrighted-music-to-shut-down-citizens-recordings.shtml [https://perma.cc/TD4G-4T73].

[245] Campbell, *supra* note 239.

[246] *Id.*

means the copyright owner can reject a use that would have likely been allowed to proceed in a different medium through compulsory licenses and collective rights organizations.[247] The necessity of individually negotiating these sync licenses generates significant transaction costs, especially for smaller content creators that may not have the time or resources to ascertain, contact, and obtain rights from the relevant copyright owners.[248]

While sync licenses can pose a significant burden to old and new audiovisual content generators alike, the online streaming world faces additional obstacles: short lead time and limited time use.[249] For example, in a recent case involving Peloton, the fitness company articulated how modern uses of music square poorly with extant sync licensing processes.[250] Peloton explained that "[b]ecause instructors provide Peloton with limited notice of the music that they intend to play in class, Peloton . . . is 'ill-suited' to the 'traditional' method by which music publishers license rights to third parties for use in derivative works with audio and visual components."[251] This lack of advance notice and need to negotiate rights quickly makes obtaining sync rights almost impossible for uses such as Peloton's.

Another problem is the limited time and use usually negotiated under sync licenses. Sync licenses typically specify the work in which the music will be included, the media where it will be offered, and the time period during which it will be offered, and are thus limited licenses.[252] If a user negotiates a license for a specific segment of Video A, they could not then use that license to justify their inclusion of that song on another segment in Video A or in Video B, unless of course they specifically contracted for that.[253] This has manifested itself as a problem, for example, where old television programs are reshown on streaming services.[254] These shows

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[247] *See supra* Part IV(b).

[248] Yu, *supra* note 161, at 387, 393 ("As the need for performance and synchronization licenses in the digital environment continues to grow, transaction costs are likely to substantially increase.").

[249] Nelson, *supra* note 18.

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

[251] *Id.*

[252] Vlad Kushnir, *Legal and Practical Aspects of Music Licensing for Motion Pictures*, 8 VAND. J. ENT. & TECH. L. 71, 82 (2005) (describing the "limited videogram license" clause usually present in sync license agreements).

[253] Yu, *supra* note 161, at 392 ("[I]t is understood that a synchronization license granted for Video A may not be used for Video B").

[254] David Oxenford, *Missing Music on Streamed TV Programs Highlights Rights Issues for Podcasters and Video Producers*, BROADCAST LAW BLOG (Apr. 28, 2021), https://www.broadcastlawblog.com/2021/04/articles/missing-music-on-streamed-tv-programs-highlights-rights-issues-for-podcasters-and-video-producers/#page=1

are now missing music that was featured on the original broadcast due to the original sync licenses only covering over-the-air broadcasts or short periods of time.[255] Such restrictions on sync licenses in contracts have limited the exploitation of audiovisual works by their creators.[256]

Finally, the uncertainty of when sync rights apply to these new forms of content has caused over-enforcement and apprehension about being liable for copyright infringement.[257] In the online video game streaming space, gamers record and upload streams of themselves playing video games as video on demand ("VOD").[258] These VODs may be muted if they appear to violate the sync rights through playing not just music in the background, but even through just playing in-game music, which is of course embedded in the game itself.[259] In addition to the risk of having one's content blocked, the monetary penalties for sync right violations can be enormous.[260] This is due to the amount of statutory damages that can be available to the copyright owner, which can be as high as $150,000 per infringement.[261] This can lead to enormous claims, such as those of several music publishers against Peloton, where they claimed $300 million in damages for Peloton's use of more than 2,000 musical works in their online fitness classes.[262]

To contract around these problems, some online platforms have negotiated agreements with musical work and sound recording copyright owners.[263] Most notably, YouTube and Meta both have content identification ("Content ID") and management systems, as well as arrangements with major music publishers that cover at least some sync rights.[264] But other platforms, such as Twitch, lack such blanket sync

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[https://perma.cc/AAH9-V4XA] (explaining why old TV programs on streaming services are missing their original accompanying music).

[255] *Id.*

[256] *Id.* (describing how sync rights issues have delayed or limited the introduction of old television programs onto streaming outlets).

[257] *Id.*

[258] Nelson, *supra* note 18.

[259] *Id.*

[260] 17 U.S.C. § 504(c).

[261] *Id.* (stipulating that for non-willful acts of infringement, the copyright owner shall receive $750-$30,000, and for willful acts, up to $150,000).

[262] Second Amended Complaint, Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 19-cv-02426, 2019 WL 8621796, at ¶ 1 (S.D.N.Y. Sept. 27, 2019). The case later settled in February 2020. Bill Donahue, *Peloton Ends Copyright War with Music Publishers*, LAW360 (Feb. 27, 2020, 10:55 AM), https://www.law360.com/articles/1248063 [https://perma.cc/C94N-SVHM].

[263] Seale, *supra* note 5.

[264] *Id.*; Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1512, 1519 (2008) ("All of the major labels have struck partnership deals with YouTube, some even allowing the synchronization of recordings from the label's collection into user-generated videos.").

license agreements.[265] While such high-level arrangements can streamline creation, they only provide access to some works and only on select (generally, well-funded) platforms.[266] Significant sync obstacles remain for prospective creators.

To address these obstacles, some commentators have suggested strategies for limiting the reach of sync rights.[267] For example, attorneys have proposed that consumers self-sync music in workout classes.[268] Others have recommended that Congress set up a mechanical licensing collective for administering sync licenses.[269] Meanwhile, others still have suggested utilizing the existing defense of fair use.[270]

But these suggestions are limited in the assistance they provide. Self-synching music provides an end run around sync rights for purposes such as fitness classes, but not other novel uses such as documentaries or online, downloadable video recordings of radio shows.[271] A mechanical licensing collective that would cover sync licenses may be a promising dream, but at present, that is all it is; it would need to be established by Congress. Fair use is potentially the most promising of these three suggested solutions. The synchronization of music as background in a film can, on occasion, qualify as fair use.[272] For example, in *Lennon v. Premise Media Corp.*, the U.S. District Court for the Southern District of New York found that a movie studio's use of only fifteen seconds and ten words from John

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[265] Blistein, *supra* note 233. Twitch did reach an agreement with the National Music Publishers' Association ("NMPA") in September 2021, but that agreement did not establish a license for Twitch users, but instead created a new reporting process for infringing content. *NMPA and Twitch Announce Agreement*, NMPA (Sept. 21, 2021), https://www.nmpa.org/nmpa-and-twitch-announce-agreement [https://perma.cc/ZTB4-RH5R]. Before the agreement, music publishers submitted thousands of DMCA complaints to Twitch over violations of music copyrights. *See* Timothy Geigner, *Twitch Manages to Get Out Some 'Disappointment' With Music Industry Over Latest Round of DMCA Claims*, TECHDIRT (June 3, 2021, 8:08 PM), https://www.techdirt.com/articles/20210603/11085146924/twitch-manages-to-get-out-some-disappointment-with-music-industry-over-latest-round-dmca-claims.shtml [https://perma.cc/CN9L-XRW7].

[266] Campbell, *supra* note 239.

[267] *Id.*

[268] *See, e.g.*, *id.*

[269] *See, e.g.*, *id.*; DeLisa, *supra* note 24, at 1301 (arguing in favor of a compulsory sync license, at least for user-generated content platforms).

[270] *See, e.g.*, Storch, Morrison, & Bernard, *supra* note 20, at 5 ("Use of short sound clips alongside images in a talk on copyright or a lecture on music and art at a scholarly society would be classic examples of fair use, and subject to powerful fair use arguments.").

[271] *See* Campbell, *supra* note 239 (noting that Peloton could allow users to self-sync their playlists, but not addressing this option (or rather, the lack thereof) in other contexts).

[272] Lee, *supra* note 264, at 1528, 1530 ("Even the synchronization of music as background in a film sometimes is fair use.").

Lennon's song "Imagine" was intended to criticize the song and its stance on religion, and thus was transformative and a fair use.[273] However, fair use is very fact-specific and can be difficult to predict accurately due to its *ex post facto* nature.[274] In addition, few cases have been decided on sync rights in general,[275] let alone on fair use and sync rights together. No cases to date have directly decided whether a sync license is unnecessary because the use is fair.[276] This makes fair use a potential, but largely undefined and uncertain path forward.

These shortcomings leave broad sync rights largely intact. The uncertainty of whether sync rights apply to these new content forms and the difficulties in licensing for them jeopardize their viability. Sync rights were defined for the twentieth century world of film and television. While academic and judicial commentary on sync rights has been lacking, further analysis is critical to preserving streaming and other novel content forms against the constraints of sync rights. Instead of contracting around them, sync rights *themselves* must be reinterpreted against the background of recent technological adaptations, following in the tradition of adapting copyright to new technological innovations to create more precise and progressive rights.

VII. RE-CRAFTING A MODERN SYNC RIGHT TEST

New forms of audiovisual content follow a long line of innovations in media and expressive arts. As with player pianos, cable TV, and

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[273] 556 F. Supp. 2d 310, 324–27 (S.D.N.Y. 2008). However, this case just discussed the broader musical work and sound recording rights rather than sync rights specifically. *Id.*

[274] *See* Michael P. Goodyear, *Fair Use, the Internet Age, and Rulifying the Blogosphere*, 61 IDEA 1, 6, 13 (2020) (explaining how fair use decisions can be difficult to predict and can even be contradictory due to their *ex post*, compared to *ex ante*, nature).

[275] *See supra* Part V.

[276] *See, e.g.*, Lee v. Karaoke, 18-cv-8633-KM-SCM, 2019 WL 2537932, at *8 n.9 (D.N.J. June 19, 2019) ("The moving defendants' motion only addresses public performance. I confine my analysis to that aspect, and do not independently address synchronization."); Lee v. Karaoke City, No. 18 CIV. 3895 (PAE), 2020 WL 5105176, at *5 n.3 (S.D.N.Y Aug. 31, 2020) (Aug. 31, 2020) ("Defendants also contend that Lee lacks standing because only producers and distributors, and not owners, can sue for infringement of 'synch rights,' namely the right to reproduce copyrighted lyrics on a karaoke screen. But defendants did not raise this argument in their motion to dismiss briefs. It is thus inappropriate for the Court to consider it here.") (internal citations omitted); Threshold Media Corp. v. Relativity Media, LLC, No. CV10-09218DMGAJWX, 2013 WL 12331550, at *13 (C.D. Cal. Mar. 19, 2013) (discussing the synchronization license market in determining whether a use was fair, but only for the purpose of determining whether the use usurped the existing market for the copyrighted sound recording).

photocopiers,[277] these novel technologies raise important questions and concerns about the breadth and limitations of extant copyright law. Audiovisual works have expanded far beyond the movies and television shows for which sync rights were originally licensed.[278] By reinvigorating the "timed-relation" prong of the sync rights test, courts can achieve the goal of copyright: a greater balance between rightsholders' exclusive rights and public access to musical works and sound recordings.

Historically, sync rights were implicated by film and television, and the courts referred to the rights as such.[279] As explained above in Part V, until the late 1990s, sync rights cases only involved these traditional audiovisual works.[280] But even as late as 2013, the Southern District of New York still explained that sync rights refer to the right "to authorize the use of a song in a movie or commercial soundtrack."[281]

In addition to the focus on film and television for sync rights, courts have also primarily focused on whether the use of music is contained in an audiovisual work. For example, in *Agee*, the court found that Agee had created an audiovisual work by playing a sound recording while a video of two burglars appeared on the screen.[282] The karaoke cases also grappled with this question.[283] In *ABKCO*, the Second Circuit held that karaoke machines were audiovisual works because they consisted "'of a series of related images' – the lyrics – 'together with accompanying sounds' – the music."[284] The Ninth Circuit agreed in *Leadsinger*,[285] but in *EMI* the District of Utah held that karaoke machines were only visual works rather than audiovisual works.[286] This focus on what qualifies as an audiovisual

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[277] *See supra* Part III.

[278] *See supra* Part V.

[279] Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 33 n.23 (1979) (Stevens, J., dissenting) ("The 'synch' right is the right to record a copyrighted song in synchronization with the film or videotape, and is obtained separately from the right to perform the music."); Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 920 (2d Cir. 1984) (describing the synch right as "the right to reproduce the music onto the soundtrack of a film or a videotape in synchronization with the action").

[280] *See supra* notes 174–95 and accompanying text.

[281] Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 347 (S.D.N.Y. 2013).

[282] Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 319 (2d Cir. 1995).

[283] ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 65 (2d Cir. 1996) (quoting 17 U.S.C. § 101); EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1223 (D. Utah 2007); Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 528 n.2 (9th Cir. 2008).

[284] *See ABKCO*, 96 F.3d at 65 (quoting 17 U.S.C. § 101).

[285] *See EMI*, 505 F. Supp. 2d at 1223.

[286] *See Leadsinger*, 512 F.3d at 528.

work may, in part, stem from the fact that audiovisual works are defined in the Copyright Act.[287]

Yet, case law has developed what is in effect a two-part test, the second part of which (timed-relation) has been largely ignored by courts.[288] Courts have included this aspect of synchronization in their definition of sync rights.[289] In *ABKCO*, the Second Circuit recognized that "[a] synchronization license is required if a copyrighted musical composition is to be used in 'timed-relation' or synchronization with an audiovisual work."[290] Other courts around the United States have followed suit. In *EMI*, the District of Utah cited to *ABKCO* for this definition of when a sync license is required.[291] In *Leadsinger*, the Ninth Circuit also quoted language from *ABKCO*.[292] The District of Massachusetts similarly determined that "synch rights are an additional right that a user must acquire when it seeks not only to perform the protected work but also to use it in timed-relation with an audiovisual work."[293]

These definitions, in effect, create a two-step test: to necessitate a sync license, compared to just a reproduction license, the use (1) must be a reproduction in an audiovisual work and (2) must play the music in timed-relation to moving images.[294] While courts have liberally quoted the language from *ABKCO*, however, they have rarely considered how this language mentions two elements. One of the rare exceptions is the *EMI* court.[295] It recognized that the karaoke machine at issue in the case played music in timed-relation with the projected lyrics.[296] This is logical, as the lyrics were intended to display exactly in line with where they appeared in the music.[297] The court determined, however, that although the images were being shown in timed-relation, the karaoke machine did not constitute an audiovisual work.[298] Since the machine was not an

[287] Audiovisual works are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any." 17 U.S.C. § 101.

[288] *See ABKCO*, 96 F.3d at 62 n.4.

[289] *Id.*

[290] *Id.*

[291] *Leadsinger*, 512 F.3d at 527.

[292] EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1195 (D. Utah 2007).

[293] Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 193 (D. Mass. 2009).

[294] *See ABKCO*, 96 F.3d at 62 n.4

[295] *EMI*, 505 F. Supp. 2d at 1222.

[296] *Id.* at 1219.

[297] *Id.*

[298] *Id.* at 1224.

audiovisual work – thus failing the first prong of the sync rights test – it failed to implicate sync rights.[299]

While audiovisual works are defined by statute and have been discussed in detail by courts,[300] the meaning of timed-relation is much murkier at present. There are two possible definitions. Timed-relation could refer to music played at the same time as visual images are present. But this meaning would at least partially overlap with the meaning given to audiovisual works under the Copyright Act: "works that consist of a series of related images which are intrinsically intended to be shown . . . together with accompanying sounds."[301] Such a reading of timed-relation would run against a central cannon of legal interpretation, the rule against surplusage, under which, if possible, every word and provision of a statute is to be given independent meaning.[302]

The more likely reading, therefore, is that timed-relation adds some additional element to an audiovisual work. Renowned copyright practitioners and scholars Melville and David Nimmer have asked, "[d]oes a synchronization require timing with visual content?"[303] The answer is yes, timed-relation should include an intent element. Timed-relation can better be defined as where the creator of the audiovisual work specifically lines up separate images to an accompanying music file.

Some have pushed back against this intent-based reading. For example, some observers have interpreted timed-relation to refer broadly to "sound recordings and audiovisual components presented to an audience of viewer concurrently and in unison."[304] At least according to one court, any violation of the copyright owner's reproduction right deserves the label "synchronization."[305] In *Freeplay Music, Inc. v. Cox Radio, Inc.*, the U.S. District Court for the Southern District of New York concluded that synchronization does not require "including a musical

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[299] *Id.* at 1223.

[300] 17 U.S.C. § 101 (2018); *see, e.g.*, Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 527–29 (9th Cir. 2008) (holding that a karaoke device falls within the definition of an audiovisual work); *EMI*, 505 F. Supp. at 1222–23 (discussing whether a karaoke machine constitutes an audiovisual work).

[301] 17 U.S.C. § 101.

[302] United States v. Alaska, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'") (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995)); Freytag v. Commissioner, 501 U.S. 868, 877 (1991) ("Statutory interpretations that 'render superfluous other provisions in the same enactment' are strongly disfavored."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW app. B, at 440 (2012) ("[I]f possible, every word and every provision is to be given effect.").

[303] MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8.06[A][5] n.47 (2021).

[304] Skopicki, *supra* note 24, at 16 n.92.

[305] Freeplay Music, Inc. v. Cox Radio, Inc., 404 F. Supp. 2d 548, 551, 552 n.2 (S.D.N.Y. 2005).

work on the soundtrack of an audiovisual work, 'synchronized' to the action on the video recording," because synchronization is really just "the right to reproduce the music onto the soundtrack of a film or a videotape in synchronization with the action."[306] But this very broad definition has only been followed in one other case, an unpublished and noncitable California state court opinion.[307] The majority of courts have instead interpreted the synchronization right as parallel to the reproduction right, noting that reproduction licenses are distinct from sync licenses.[308] A broad reading of sync rights such as that in *Freeplay Music* also reads out any meaning in the term timed-relation, improperly conflating the terms audiovisual work and timed-relation.

The two-part test with a robust timed-relation definition frees up creative opportunities. For example, under this test, a streamed, downloadable fitness class involving bodyweight and free weight exercises would likely not necessitate a sync license. The video of the class would qualify as an audiovisual work, as it has both images and music. But it would not meet the definition for timed-relation. The trainer may have selected the songs he or she wanted to play to galvanize his or her viewers, but it is unlikely that he or she coordinated exact movements during each of the notes in the songs. Instead of a sync license, a reproduction license would still be required, which could be easier to acquire than a sync license, especially for mechanical reproductions through a Section 115 license or a license from the Harry Fox Agency.

On the other hand, works that depend on timed-relation between visuals and music would be captured by this definition of timed-relation. For example, fitness classes such as Zumba or SoulCycle depend in large part on the coordination of movements to music. Zumba involves dancing to Latin and World music, following an instructor to perform specific moves in time with the music.[309] SoulCycle also requires attendees to match the speed of the music's beat and to follow the instructor's

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[306] *Id.*

[307] Steiner v. CBS Broad., No. B190839, 2007 WL 2178542, at *4 (Cal. Ct. App. July 31, 2007).

[308] *See, e.g.*, EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1219 (D. Utah 2007) (noting that the defendant already paid for reproduction licenses but at issue was whether they also had to pay for sync licenses); Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 529 (9th Cir. 2008) (holding that in addition to its § 115 compulsory reproduction license, Leadsinger also had to secure sync licenses).

[309] *See Classes*, ZUMBA, https://www.zumba.com/en-US/pages/class [https://perma.cc/6X2J-FV9E] (last visited June 1, 2021) ("We take the 'work' out of workout, by mixing low-intensity and high-intensity moves for an interval-style, calorie-burning dance fitness party. Once the Latin and World rhythms take over, you'll see why Zumba® Fitness classes are often called exercise in disguise.").

choreography.[310] This involves both a visual of the instructor and on-screen instructions for how fast to bike. Both exercise classes would seem to fit squarely inside this definition of timed-relation.

In a very different setting, a video stream of an in-studio radio show would not meet the timed-relation definition. A streamed, downloadable video of a radio show would be fixed and qualify as an audiovisual work. However, the music playing on the radio show is not lined up beat-by-beat with any images on the video. Therefore, while the radio station hosts are reproducing a song, their actions should not implicate a sync right as compared to a reproduction one.

Another example of a use that would be permissible under this timed-relation definition is incidental or background use of music. Documentary filmmakers or the press, for example, often film live scenes.[311] These scenes may involve background music playing during an interview in a coffee shop or while filming an interaction on the street.[312] The director or filmmaker likely did not choose to have these exact songs playing in the background; instead, they were merely playing by chance. This sort of recorded scene would, at present, necessitate a sync license, but, under the proposed timed-relation definition, it would not. Similarly, in response to police officers playing copyrighted music to trigger takedowns,[313] a sync license would not be required under this definition of timed-relation.

This robust timed-relation definition achieves a better balance between rights holders and public access. At present, sync rights are required for a wide array of digital content. The crux of courts' analysis on sync rights has been on whether the work constitutes an audiovisual work.[314] Yet, despite the synchronization label, users do not always time

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[310] *Who We Are*, SOULCYCLE, https://www.soul-cycle.com/our-story [https://perma.cc/4BFF-4D5M] (last visited June 1, 2021) ("Set in a dark candlelit room to high-energy music, our riders move in unison as a pack to the beat and follow the signature choreography of our instructors.").

[311] *See* Peter Biesterfeld, *Unscripted Storytelling: Finding the Story in Documentary*, VIDEOMAKER, https://www.videomaker.com/how-to/documentary/unscripted-storytelling-finding-the-story-in-documentary [https://perma.cc/YVF9-W6VD] (last visited June 1, 2021) ("Thus, independent non-fiction stories are typically shot without knowing what comes next, let alone how the film will end.").

[312] *See* KEITH AOKI, JAMES BOYLE & JENNIFER JENKINS, TALES FROM THE PUBLIC DOMAIN: BOUND BY LAW? 7–9 (2006) (for several example scenarios of when a filmmaker may want to capture live music that they themselves did not choose to play).

[313] *See supra* notes 24241–44 and accompanying text.

[314] *See, e.g.*, Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 527–29 (9th Cir. 2008) (holding a "karaoke device" to be an audiovisual work); Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 340 (S.D.N.Y. 2013) (holding that an online promotional video constituted an audiovisual work); Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 766 (E.D. Mich. 2008) (holding that a videogame was an

the visual images to the licensed music.[315] Emphasizing and reimagining the timed-relation requirement adds back this crucial element of intent, which has not been considered in evaluating whether novel forms of media implicate sync rights, as compared to reproduction rights. This would allow content creators to forego complicated and prohibitive sync licensing and permit those works that innocently contain background music and those that sync rights were not originally intended to cover.

This intent-driven definition of timed-relation fulfills the original purpose of copyright, as it has been achieved by courts and legislatures for decades when confronting new technologies. Emphasizing the second element of the sync rights test does not add a new test that would imbalance copyright; instead, it brings to light an element that has long remained in the shadows of music copyright jurisprudence. This element is important for guarding against an overexpansion of sync rights beyond the type of uses – such as television shows and movies – which were originally intended to be covered by synchronization. Like the courts and Congresses of prior decades, reinvigorating this rule strikes a balance between preserving the sync rights given to copyright owners and ensuring public access to more works, the overarching goal of copyright.

VIII. CONCLUSION

With the proliferation of new media that could implicate sync rights, the time is ripe for courts to acknowledge and provide guidance on the two-part sync rights test. Music copyright is mired in a web of overlapping rights and licensing structures, and sync rights are perhaps the most obfuscated. Even fairly simple new media that possibly implicate sync rights, such as karaoke machines, have led to dissimilar outcomes in different courts. The COVID-19 pandemic has led to more events and entertainment moving online in saved and downloadable video format, posing additional licensing obligations for a myriad of industries.

The solution can be achieved by looking back and applying the complete rule that courts intended. While courts have largely focused on whether a use creates an audiovisual work, that is only one part of the test. By analyzing the second part of sync rights – timed-relation – courts can follow in the historical approach of achieving the goal of balance in copyright protection and public access. The two-part test checks for copyright infringement, but does not inhibit any existing defenses, such as fair use, that can be and should remain important limitations on the overextension of copyright. It also does not change the other exclusive rights of the musical work or sound recording copyright owner, who can

audiovisual work); EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1225 (D. Utah 2007) (holding that a karaoke machine was not an audiovisual work).

[315] Yu, *supra* note 161, at 392.

continue to enforce infringements of their broader reproduction right. Understanding and utilizing this long misunderstood test to the full presents a positive advancement in interpreting and protecting both music copyright and novel forms of media in the twenty-first century.

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