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Beyond fair use: Federal antitrust law as a defense to copyright infringement

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While many copyright lawsuits involve defenses including fair use and acquiescence to the use of a copyright, less visible are allegations against the copyright holder that it is engaging in anticompetitive conduct that is illegal under federal antitrust laws. Yet, a recent decision by the United States District Court in New York in the matter of *Downtown Music Publishing LLC, et al. v. Peloton Interactive, Inc.*, No. 1:19-cv-02426, clarifies that not only are such antitrust claims very much in play, but that there are specific allegations that will be scrutinized by the courts when making these claims.

In the lawsuit, a group of music publishers under the auspices of the National Music Publishers Association ("NMPA") claimed that the popular indoor cycling company Peloton violated music owners' rights by using certain copyrighted songs in Peloton workout classes, and sought $300 million in damages. In turn, Peloton claimed that it had reached licensing agreements with all of the major music publishers and many independent music publishers, and as for the other publishers with whom Peloton had not reached an agreement, it sought to negotiate with those publishers independently, but that the NMPA refused to provide a list of the publishers. Peloton also argued that the music publishers and the NMPA had violated federal antitrust laws by demanding supra-competitive license terms during license negotiations. Peloton claimed that the NMPA's alleged refusal to provide the list of music publishers and by bringing suit was tantamount to an effort to "fix prices and to engage in a concerted refusal to deal with Peloton."

Peloton almost succeeded in maintaining these claims. United States District Court Judge Denise Cote agreed with Peloton that federal law in New York as handed down by the Second Circuit Court of Appeals precludes copyright holders from agreeing to limit an alleged infringer from acquiring future rights before, during, or after a lawsuit. The court, however, ultimately dismissed Peloton's antitrust counterclaims because Peloton failed to identify the "relevant market" targeted by the allegedly competitive behavior.

Specifically, Judge Cote noted that Peloton had admittedly been successful in negotiating certain music licenses with both some of the plaintiffs, as well as other "major" music publishers. Therefore, the court reasoned, songs that were controlled by the NMPA and the plaintiff publishers could "substitute" for songs not controlled by the plaintiffs. The court thus determined that "[i]t is

true that every copyrighted work has at least some modicum of originality. But, recognition of that fundamental tenet of copyright law does not explain why songs not controlled by the music publishers cannot substitute in exercise programming for songs they do control."

The implication of the ruling should clarify the interplay of copyright law and federal antitrust law, and, specifically, the need to properly allege the relevant market and take into account the "elasticity of demand." In less esoteric arenas, the lawsuit has not served Peloton well. Apparently the lawsuit has interrupted certain music and classes that were removed from Peloton's schedule of offerings.

On one hand, the decision seems to protect the intellectual property rights of copyright owners, perhaps even the right to refuse to issue licenses to would-be licensees who reject an owner's license terms. And, ultimately, copyright owners should be aware of the significant protections afforded by federal copyright laws and proactively enforce such protection against infringement. However, while companies with business models that rely upon the utilization of another's intellectual property should always factor in the cost of obtaining required permissions from owners, those companies should also know that there are defenses that go far beyond fair use. The possibility of anticompetitive conduct should always be reviewed as a potential defensive counterclaim.

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