COMMENT

PIXELATED POLTERGEISTS: SYNCHRONIZATION RIGHTS AND THE AUDIOVISUAL NATURE OF "DEAD CELEBRITY" HOLOGRAMS

HANNAH SKOPICKI*

After Tupac Shakur "rose from the dead" in the form of a hologram at the Coachella Valley Music and Arts Festival in 2012, hologram concerts have only increased in popularity. This Comment examines hologram performances and how they interact with the exclusive rights of reproduction granted to copyright holders of sound recordings. After introducing copyright law more generally, this Comment discusses the trouble courts have with defining the "audiovisual" requirement for synchronization rights. Ultimately, this Comment argues that to prevent infringement claims, synchronization licenses should be necessary for performances including hologram technology.

TABLE OF CONTENTS

* Senior Staff Member, *American University Law Review*, Volume 70; J.D. Candidate, May 2021, *American University Washington College of Law*; B.A., Government (International Politics) and Italian Studies, 2018, *Wesleyan University*. Many thanks to my editor Erin Downey, my faculty advisor Heather Ridenour, and the entire *Law Review* editorial team for the insightful feedback in preparing this piece for publication. I would also like to thank Walker for the unwavering support, my friends for the countless laughs, and my family for their unconditional love that carried me through this process.

If you make a movie 'bout my life, make it right /
Please don't make no holograms, don't wanna do it twice /
You wanna use my likeness, please approve it through my wife /
And if you get the license then you better use it right . . .[1]

INTRODUCTION

Although it is an album about his marriage, Chance the Rapper's self-released album "The Big Day" also emphasizes his uneasiness.[2] What "The Big Day" ultimately contemplates is the future of music, discussing new technology, brand development, and Chance's fears and wishes.[3] It also serves as Chance the Rapper's personal manifesto on the ethics of a new craze in the music industry that has captivated some artists and terrified others.[4] Critic reviews note the album's introspection and its fascination with nostalgia in the face of modern technology in music.[5] The particular technology in question, as reflected in "Sun Come Down," quoted above, is the use of holograms

1. CHANCE THE RAPPER, *Sun Come Down*, *on* THE BIG DAY (Self-released 2019).

2. Danny Schwartz, *Chance the Rapper's 'The Big Day' Is the Sound of a Man in Love and Sometimes that's Awesome*, ROLLING STONE (July 31, 2019, 10:46 AM), https://www.rollingstone.com/music/music-album-reviews/chance-the-rapper-the-big-day-865145.

3. *See id.* (examining the intersection of Chance's fears for the future with his concerns over new hologram technology); *see also* Al Horner, *Chance the Rapper: The Big Day Review—A Pop-Rap Marriage Made in Heaven*, GUARDIAN (July 29, 2019 8:21 AM), https://www.theguardian.com/music/2019/jul/29/chance-the-rapper-the-big-day-review [https://perma.cc/49CX-9DDH] (exploring the themes of Chance's album while commenting on Chance's unique approach to self-releasing music and his control over his brand).

4. *See* Aaron Mak, *Chance the Rapper Does Not Want to Perform as a Hologram After He Dies*, SLATE (July 31, 2019 5:44 PM), https://slate.com/technology/2019/07/chance-the-rapper-doesnt-want-to-become-a-hologram.html [https://perma.cc/6DMN-QFWT] (examining Chance's views on hologram technology in performance).

5. *See* Schwartz, *supra* note 2 (commenting on Chance's hallmark for nostalgia that intermixes with his future look at family and holographic technology in *Sun Come Down*).

to "revive" dead celebrities. As holograms, dead celebrities perform on stage as if they were living.[6]

The hologram craze began at the Coachella Valley Music and Arts Festival in 2012, when Tupac Shakur's hologram performed with living artists Snoop Dogg and Dr. Dre, twelve years after Shakur's death.[7] Since then, several production companies have tried to organize post-mortem celebrity performances, including ones by Michael Jackson, Amy Winehouse, and even opera singer Maria Callas.[8] Whitney Houston's estate recently announced a hologram tour to begin in February 2020, aimed at giving fans "a feeling again of being in her presence."[9] But fans are already pointing out the moral and ethical issues in production companies and venues using a dead celebrity's name and likeness for production companies and venues to gain capital.[10] That said, using a dead celebrity's image is not the sole problem modern hologram concerts have raised.

---

6. KC Ifeanyi, *The Hologram Concert Revolution Is Here, Whether You like It or Not: Meet the Company Touring Whitney Houston and Buddy Holly*, FAST COMPANY (June 19, 2019), https://www.fastcompany.com/90365452/hologram-concert-revolution-like-it-or-not-meet-company-touring-whitney-houston-buddy-holly [https://perma.cc/E9BH-CFC8].

7. *See* Eriq Gardner, *Holograms: A New Dangerous Frontier*, HOLLYWOOD REP. (May 29, 2012 6:00 AM), https://www.hollywoodreporter.com/news/holograms-a-new-dangerous-frontier-329782 [https://perma.cc/7FWG-QTNA] (commenting on the beginnings of hologram use); *see also* Kaitlyn Tiffany, *No Industry Is Weirder than the Dead Celebrity Hologram Industry*, VOX (Oct. 23, 2018 3:10 PM), https://www.vox.com/the-goods/2018/10/23/18010274/amy-winehouse-hologram-tour-controversy-technology (discussing details of the Tupac Shakur "hologram" performance at Coachella).

8. *See, e.g.*, Zach O'Malley Greenberg, *Michael Jackson Returns to the Stage in Vegas—As a Hologram*, FORBES (May 24, 2013 4:01 AM), https://www.forbes.com/sites/zackomalleygreenburg/2013/05/24/michael-jacksons-hologram-rocks-las-vegas-arena/#db010d233699 [https://perma.cc/UN9T-LNUQ]; *see also* Anthony Tommasini, *What a Hologram of Maria Callas Can Teach Us About Opera*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/arts/music/maria-callas-hologram-opera.html; Tiffany, *supra* note 7 (discussing the Amy Winehouse hologram).

9. Ken Simmons, *Whitney Houston Hologram Tour Aims 'to Get a Feeling Again of Being in Her Presence'*, GOOD MORNING AM. (Jan. 21, 2020), https://www.goodmorningamerica.com/culture/story/whitney-houston-hologram-tour-aims-feeling-presence-68424555 [https://perma.cc/FMJ5-UHEK].

10. *See* Ben Henry, *A Whitney Houston Hologram Tour Has Sparked a Huge Backlash from Fans*, BUZZFEED NEWS (Sept. 18, 2019), https://www.buzzfeed.com/benhenry/whitney-houston-hologram-tour-twitter-backlash [https://perma.cc/647F-S3N9] (displaying comments on social media criticizing the plans for a Whitney Houston holographic performance).

Hologram performances have raised many legal issues in patent,[11] contract,[12] and copyright[13] law, as well as ethical[14] and policy concerns.[15] This Comment focuses on one of the issues that hologram performances raise affecting copyright protections. Specifically, this Comment argues that holograms are "audiovisual" works comparable to film, television, and video games for the purposes of copyright law protections under 17 U.S.C. § 114(b).

Section 114(b) protects the copyright holder's interest in the exclusive right to reproductions of his or her sound recording, including the recording's synchronization with audiovisual work.[16] This Comment argues that when producers of concerts want to incorporate holograms,[17] they must obtain synchronization licenses from the sound recording's copyright holders. This Comment also analyzes past and emerging jurisprudence surrounding holograms as part of a statutory interpretation of Section 114(b) to encourage courts to expand the definition of audiovisual work beyond traditional formats. In comparing holograms' novel technology to film and television, courts should consider holograms as audiovisual works under a synchronization license analysis.

---

11. *See* Hologram USA, Inc. v. Pulse Evolution Corp., No. 2:14-CV-0772-GMN-NJK, 2016 WL 199417, at *1 (D. Nev. Jan. 15, 2016) (addressing a patent lawsuit involving the use of hologram technology to create a Michael Jackson performance at the 2014 Billboard Music Awards).

12. *See* Christopher Buccafusco et al., *Preserving Film Preservation from the Right of Publicity*, 2018 CARDOZO L. REV. DE-NOVO 1, 4 (2018) (explaining how the advancement in hologram technology and associated increase in concert tickets for hologram performances has driven artists to factor in the possibility of "digital resurrection" when signing contracts).

13. *See* Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 986 & n.1 (9th Cir. 2012) (discussing posthumous rights of publicity in the context of a potential Marilyn Monroe hologram performance).

14. *See* Laura Snapes, *Amy Winehouse Hologram Tour Postponed Due to 'Unique Sensitivities'*, GUARDIAN (Feb. 22, 2019 6:24 AM), https://www.theguardian.com/music/2019/feb/22/amy-winehouse-hologram-tour-postponed [https://perma.cc/XV2G-DNBG] (examining the ethical issues of the planned holographic Amy Winehouse tour, "[d]espite Winehouse's family supporting the tour").

15. *See* Ifeanyi, *supra* note 6 ("Holographic performances that create a likeness of an artist led music journalist Simon Reynolds to coin the phrase 'ghost slavery.' . . . The more checkered the circumstances of an artist's death, the more controversy there is about their hologram.").

16. 17 U.S.C. § 114(b) (2018); *see* Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 193 (D. Mass. 2009) (explaining the scope of synchronization rights and the right to record).

17. This Comment focuses on hologram concerts, although hologram technology is also expanding into other media.

Part I provides background information on emerging hologram technology and introduces copyright law. It analyzes copyright law covering sound recordings and outlines the importance of obtaining and litigating a synchronization license. Further, it indicates where the dispute lies in adapting synchronization licenses to new technology, like hologram performances. Part II analyzes the current jurisprudence on types of works that need corresponding synchronization licenses. It also proposes a framework for analyzing synchronization rights for holograms, likening the technology to film and television for the purposes of audiovisual analysis. This Comment concludes that venue and production companies must obtain synchronization licenses prior to incorporating sound recordings into hologram performances to withstand copyright challenges, specifically regarding reproduction rights,[18] under Section 114(b).

I. BACKGROUND

Copyright law is a broad field that protects creators in a variety of industries by imposing negative repercussions against copiers of creative work.[19] It protects content creators from those attempting to copy their work for commercial gain and controls the dissemination of original information.[20] Copyright is a necessary, but also complex, area of law. It becomes even more intricate and nuanced when modern technology intersects with established legal methods and principles.

This Part first discusses the foundations of United States copyright law, the agreements into which copyright holders can enter, and the remedies for the unauthorized copying of works that copyright law protects. Then, it establishes how copyright law specifically functions to protect creators in the music industry. Further, it introduces synchronization rights, defined as rights which are granted to a sound

---

18. For the purposes of this Comment, "reproduction right" refers to the copyright term defined as "the [copyright holder's] exclusive right to control the reproduction and the distribution of the copyrighted work." Capitol Records, LLC v. ReDigi, Inc., 910 F.3d 649, 655 (2d Cir. 2018).

19. *See* Elise M. Stubbe, *Copyright Registration Practice for the Non-Copyright Attorney*, 52 LA. B. J. 448, 448 (2005) (explaining basic copyright protections).

20. *See* Cincom Sys., Inc. v. Novelis Corp., 581 F.3d 431, 439 (6th Cir. 2009) (noting the role of copyright law in "prevent[ing] the free flow of information without the author's permission") (internal quotations omitted); *cf.* Pollick v. Kimberly-Clark Corp., 817 F. Supp. 2d 1005, 1010 (E.D. Mich. 2011) (explaining that a copyright gives an artist a "limited monopoly" that is "intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use" (quoting Stewart v. Abend, 495 U.S. 207, 229 (1990))).

recording's copyright holder to protect against the unauthorized incorporation of the sound recording into an audiovisual work. Finally, it asks whether synchronization right negotiations and agreements should be required for hologram concerts.

A. Foundations of Copyright Law and the Copyright Act of 1976

Synchronization rights find their basis in modern copyright law.[21] A copyright is a legal protection that grants ownership of a creative work and prevents or mitigates damages arising from the copying of such a work.[22] Copyrights are meant to inspire innovation in creative fields.[23] The Copyright Act of 1976[24] (the Copyright Act) sets out the rules governing copyright law,[25] which are codified in Title XVII of the United States Code.[26]

To apply for a copyright, an artist must establish that their work meets the three foundational elements of copyright.[27] First, the work must be creative.[28] The work does not need to be novel, but it must demonstrate some originality.[29] Second, the work must be a work of authorship.[30] Works of authorship are broadly defined to include "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (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."[31] Third, the work must be "fixed in a[] tangible

---

21. 4 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS, § 8:3 (3d ed. 2019).

22. Stubbe, *supra* note 19, at 448.

23. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).

24. Copyright Act, 17 U.S.C. §§ 101–805 (2018).

25. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991) (explaining how the 1976 revision to the Copyright Act left "no doubt that originality . . . is the touchstone of copyright protection").

26. 17 U.S.C. §§ 101–805.

27. *See* H.R. REP. NO. 94-1476, at 53 (1976) ("[T]wo essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.").

28. *Feist Publ'ns, Inc.*, 499 U.S. at 345.

29. *See id.* (defining originality as something "independently created" with "some minimal degree of creativity," which stops short of novelty since the work can "closely resemble[] other works so long as the similarity is fortuitous, not the result of copying").

30. 17 U.S.C. § 102.

31. *Id.*

medium."[32] To be "fixed in a tangible medium" means the work must be in a form that is "permanent or stable to permit it to be perceived."[33]

Once the artist has met each element of a copyright, he or she must apply for registration with the United States Copyright Office.[34] Registration with the United States Copyright Office requires the artist to provide personally identifiable information,[35] the title of the work, information about the work's publication, and information about the work's inspiration if the work was derived from another piece.[36] Recently, the United States Supreme Court resolved a circuit split, holding that a copyright is granted only when the Register of Copyrights acts on the copyright application, not upon deposit of the application materials.[37]

After the Register of Copyrights grants the copyright, the artist obtains a number of protections designed to preserve the creative process and respect the artistic integrity of the work.[38] These protections include the right of exclusivity in the work,[39] the right of publicity of the work,[40] and

---

32. *Id.*

33. *Id.* § 101.

34. *Id.* § 409.

35. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO NO. M-07-16, SAFEGUARDING AGAINST AND RESPONDING TO THE BREACH OF PERSONALLY IDENTIFIABLE INFORMATION (2007), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-16.pdf [https://perma.cc/6ZV7-SA8Q] (defining personally identifiable information as "information which can be used to distinguish or trace an individual's identity . . . alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual"). The personally identifiable information required for submission to the Copyright Offices includes names, addresses, nationality, and domiciles. 17 U.S.C. § 409.

36. *Id.*

37. Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 886 (2019).

38. *See* 17 U.S.C. § 106 (outlining the five "fundamental rights" that an artist has exclusive rights to do or authorize to manage creative use of a copyrighted work); *see also* THOMAS M. WARD, INTELLECTUAL PROPERTY IN COMMERCE § 1:7 (2011) (ensuring the copyright holder's artistic integrity by granting "exclusive right to control access to its reproducible value").

39. *See* WARD, *supra* note 38, § 1:7 ("A federal copyright provides its owner with the exclusive right to reproduce, distribute, publicly perform, publicly display, or create derivative works from original works of authorship.").

40. *Right of Publicity*, INT'L TRADEMARK ASS'N, https://www.inta.org/topics/right-of-publicity [https://perma.cc/78YK-NL8B]. The right of publicity is one of the most widely researched areas of copyright law regarding holograms, mostly due to a lawsuit concerning Marilyn Monroe. The U.S. Court of Appeals for the Ninth Circuit found that California's right of publicity statute did not apply to Ms. Monroe's estate because she was domiciled in New York when she passed away, thus distinguishing between

the right to reproduce the work.[41] Breaching any of the rights granted by copyright is termed "infringement."[42] Copyright infringement occurs when a non-owner of the work duplicates elements of a work protected by copyright or otherwise interferes with the conferred rights associated with copyrights.[43]

B. Licensing, Infringement, and Fair Use

Owners of copyrights may grant licenses to others for the use of their copyrighted works, exchanging protections against infringement suits for a fee.[44] Alternatively, works may be used or reproduced without a license if they meet the standards of the fair use doctrine.[45] The fair use doctrine outlines an affirmative defense against claims of infringement when "rigid application of the copyright statute . . . would stifle the very creativity which that law is designed to foster."[46] Courts applying the fair use doctrine consider:

> (1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[47]

New York's right of publicity statute, which does not allow for posthumous enforcement of a right of publicity, and California's right of publicity statute. Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 1000 (9th Cir. 2012).

41. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546–47, 546 n.1 (1985).

42. *See, e.g.*, Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997) ("[D]istributing unlawful copies of a copyrighted work does violate the copyright owner's distribution right and, as a result, constitutes copyright infringement.").

43. Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 984 (9th Cir. 2017) ("To prove copyright infringement, a plaintiff must demonstrate (1) ownership of the allegedly infringed work and (2) copying of the protected elements of the work by the defendant." (citing Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991))).

44. *See* 2 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:92 (3d ed. 2019) ("[T]he . . . license generally will also grant all of the rights necessary for the . . . work to be exploited . . . .").

45. *See* Balsley v. LFP, Inc., 691 F.3d 747, 758 (6th Cir. 2012) (citing 17 U.S.C. § 107 (2018)) (stating the use of a work under the fair use doctrine is not a copyright infringement).

46. *Id.* at 758 (citing Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 581 (6th Cir. 2007)).

47. 17 U.S.C. § 107 (2018).

In certain circumstances—courts weigh the transformative value of the work against its commercialism.[48]

Historically, courts have applied the fair use doctrine to non-profits or educational institutions using copyrighted work.[49] Meanwhile, with more corporate or commercial entities, courts have applied the fair use doctrine when the work is highly transformative, or so "different in purpose, character, expression, meaning, and message" that the work serves an entirely separate function to the copier as it did to the creator.[50] This exception to infringement stems from British common law.[51]

Fair use is an affirmative defense to infringement.[52] When the fair use factors are not met, a court can find infringement where a plaintiff "owned a valid copyright and . . . [a] defendant copied the original elements of that copyright."[53] To be found liable for infringement, an infringer need not copy the entire work.[54] Instead, "[w]here . . . a work is an amalgamation

48. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994) (noting that the more transformative the work, the less significant other factors like commercialism will be).

49. *See, e.g.*, Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1282 (11th Cir. 2014) (applying the fair use doctrine to a university's issuance of portions of copyrighted electronic books because fair use favors nonprofits and educational institutions).

50. Authors Guild v. Google, Inc., 804 F.3d 202, 217 (2d Cir. 2015).

51. *Campbell*, 510 U.S. at 576 ("In copyright cases brought under the Statute of Anne of 1710, English courts held that in some instances fair abridgements would not infringe an author's rights." (internal quotations and footnotes omitted)).

52. Oyewole v. Ora, 291 F. Supp. 3d 422, 433 (S.D.N.Y. 2018), *aff'd*, 776 F. App'x 42 (2d Cir. 2019) ("The fair use doctrine is an affirmative defense and according, the party asserting it bears the burden of proving it.").

53. Humphreys & Partners Architects, L.P. v. Lessard Design, Inc., 790 F.3d 532, 537 (4th Cir. 2015), *as amended* (June 24, 2015).

54. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548–49, 560–61, 564–65, 569 (1985) (holding that the quality, not the quantity, of the copyrighted material is what is pertinent when determining the presence of copyright infringement); Sheldon Abend Revocable Tr. v. Spielberg, 748 F. Supp. 2d 200, 203 (S.D.N.Y. 2010) (explaining the "test for substantial similarity" used to assess whether protectable elements mixed with non-protectable elements in a work are present). When conducting an inquiry for copyright infringement, courts may split a work into its protectible and non-protectible elements so that the court can assess the protectible portions in isolation. *See, e.g.*, Jonathan S. Kim, Note, *"Filtering" Copyright Infringement Analysis in Architectural Works*, 2018 U. ILL. L. REV. 281, 305 (2018) (describing the Second Circuit's approach of "filtering" protectible and non-protectible elements of architecture). The United States Supreme Court's analysis of a factual compilation demonstrates the complexity of analyzing works that mix protectable and non-protectable elements. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991). The underlying facts in such a compilation are non-protectible because they are part of the public domain and there is no requisite creativity found in stating fact.

of protectible and unprotectible elements . . . the court first filter[s] out from consideration any non-protectible elements" then analyses "[t]he remaining, protectible elements . . . for substantial similarity."[55] Remedies for infringement can include injunctive relief or damages for lost profits.[56]

C. Copyright and Music

The arts and other creative mediums lend themselves naturally to a copyright analysis. Music cases concern two major aspects of creation that are eligible for a copyright: music composition and sound recording.[57] A music composition copyright is usually granted to a lyricist, artist, or composer for the content of the recording.[58] It focuses on the music and lyrics themselves.[59] A sound recording copyright is usually granted to a record label or distributor that produced a recording of the work, guaranteeing the exclusive right to reproduce the sound recording.[60] The most distinguishing feature of a sound recording copyright is that the exclusive right to perform the work is not conferred, as it is with a

---

Id. However, the arrangement of the facts and "precise words used to present them" are protectible elements because they represent a creative work of authorship in a fixed medium. *Id.*

55. *Sheldon Abend Revocable Tr.*, 748 F. Supp. 2d at 204.

56. 17 U.S.C. § 502 (2018) (injunctive relief); *id.* § 504 (damages and profits).

57. *See* BTE v. Bonnecaze, 43 F. Supp. 2d 619, 627 (E.D. La. 1999) ("When a copyrighted song is recorded . . . there are two separate copyrights: one on the musical composition and the other in the sound recording.").

58. *See* Taylor L. Condit, *The Need for Songwriters' Control: A Proposal to Prevent Unwanted Uses of Musical Compositions at Political Rallies*, 47 SW. L. REV. 207, 208 (2017) ("A songwriter's copyright in a musical composition protects the music and lyrics that comprise the work but does not cover specific recordings of that composition."); *see also* Jarvis v. A & M Records, 827 F. Supp. 282, 292 (D.N.J. 1993) (observing that "there is a well-established distinction between sound recordings and musical compositions" such that rights to a "recording do not extend to the song itself" and that copyright claimants seeking "protection for a sound recording of musical compositions must be denied if" they have "not lawfully obtained the rights to utilize the musical compositions"); *cf. id.* (defining a sound recording as "the fixation of a series of musical, spoken, or other sounds" (citing 17 U.S.C. § 101)).

59. Gabriel J. Fleet, Note, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1241 (2008).

60. *See id.* at 1242 (examining the scope of the type of work that occurs in recording studios that falls under the definition of sound recordings). Some cases also discuss a performance right to "perform [the] music publicly for profit." 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).

copyright in a musical composition.[61] This Comment focuses on sound recording copyrights.

Under Section 114(b), the holder of a copyright in a sound recording has the exclusive right to the future use of the work, including the right to reproduce, create derivatives of, and distribute the work.[62] Synchronization rights, defined as a 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," are considered a subset of the reproduction right.[63] They are also exclusive to a sound recording copyright holder, protecting the copyright holder from any entity wishing to synchronize the sound recording to an audiovisual work.[64]

Synchronization rights recognize the value in the process of combining two works that may be copyrighted individually by their creators into a third, separate work that meets the three copyright elements.[65] Courts established this right as a subset of the exclusive reproduction rights prescribed by Section 114(b) when motion pictures, rather than having live orchestral accompaniment, began to include sound recordings as scores in the early 1940s.[66]

---

61. *See* Griffin v. J-Records, 398 F. Supp. 2d 1137, 1142 (E.D. Wash. 2005) (explaining that a copyright in a sound recording does not extend to the song itself).

62. 17 U.S.C. § 114(a)–(b); *see id.* note (Historical and Revision Notes House Report No. 94-1476) (explaining the rights referenced in § 114(a)).

63. Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 193 (D. Mass. 2009). The court in *Steele* specified audiovisual works, though this Comment argues that the definition of what type of work requires a synchronization license is expanding.

64. *See* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors, & Publishers, 744 F.2d 917, 920 (2d Cir. 1984) (describing a synchronization right as "one the exclusive rights enjoyed by the copyright owner"); *see also Steele*, 646 F. Supp. 2d at 193 (pointing out that the synchronization right for audiovisual works is associated with the recording right, separate from the right to perform the music).

65. *See* Vlad Kushnir, *Legal and Practical Aspects of Music Licensing for Motion Pictures*, 8 VAND. J. ENT. & TECH. L. 71, 82 (2005) (discussing the practical nature of a synchronization license); *see also* Lewis Rinaudo Cohen, Note, *The Synchronization Right: Business Practices and Legal Realities*, 7 CARDOZO L. REV. 787, 795–96 (1986) (examining scholarship on the theoretical nature of synchronization rights); *cf.* 5 LINDEY & LANDAU, *supra* note 21, § 9:8 (discussing the process of combining sound recordings of a musical composition with visual images).

66. *See* Frederick C. Boucher, *Blanket Music Licensing and Local Television: An Historical Accident in Need of Reform*, 44 WASH. & LEE L. REV. 1157, 1165–66 (1987) (discussing the history of motion pictures and the incorporations of sound recordings).

To transfer synchronization rights, the parties must agree to a synchronization license.[67] The synchronization license allows for the temporary or permanent transfer of the copyright holder's synchronization right based on a contractual agreement.[68] The contractual agreement would specify the use of the material, which in this case would be the incorporation of the sound recording into another work.[69] A synchronization license agreement is typically negotiated by the sound recording copyright holder—usually a studio or record label—and the producer of another work or a venue's agent.[70] Synchronization licenses protect the copyright holder's interest in financial recognition for their work while encouraging artists to share new ideas.[71] They represent a mutual agreement that establishes the payment of a sum of money for the artistic value.[72] The prices negotiated for synchronization rights can range from 100 to 25,000 dollars.[73] With this variance in prices, licenses to preserve synchronization rights also fuel necessary competition in the music industry that supports creativity and innovation.[74]

---

67. *See* SELZ ET AL., *supra* note 44, § 9:92 (providing an overview of the scope of synchronization licenses). In copyright, two types of licenses exist: exclusive and non-exclusive. Exclusive licenses are granted where "the copyright holder permits the licensee to use the protected material for a specific use and further promises the same permission will not be given to others." I.A.E., Inc. v. Shaver, 74 F.3d 768, 775 (7th Cir. 1996). In nonexclusive licenses, "[t]he copyright owner simply permits the use of a copyrighted work in a particular manner." *Id.* Synchronization licenses are generally nonexclusive licenses. 5 LINDEY & LANDAU, *supra* note 21, § 10:67.

68. *See* Michael R. Cohen, *25B West's Legal Forms*, INTELLECTUAL PROPERTY § 23:90, Westlaw (database updated Dec. 2019) (providing a template for a synchronization right transfer agreement).

69. *Id.*

70. *See* Theodore Z. Wyman, Annotation, *Enforceability of Synchronization Rights and Licenses in Copyrighted Music*, 84 A.L.R. Fed. 2d 345, Art. I § 2 (2014) ("Copyright holders often enter agreements that grant full ownership of the proprietor's rights in copyright to music publishers, clearinghouses, or other entities.").

71. M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 850 (D. Minn. 1948) ("[Synchronization rights] would provide for a free competitive market in the motion picture industry for all copyright owners of music suitable for use in sound films.").

72. *See id.* at 847 (emphasizing that the copyright holder receives a "tribute by way of a license fee").

73. Julie Kane-Ritsch, *The Videotape Rental Controversy: Copyright Infringement or Market Necessity?*, 18 J. MARSHALL L. REV. 285, 310 n.166 (1985) (citing Alden-Rochelle, Inc., v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888, 893 (S.D.N.Y. 1948)) (noting that studio synchronization right negotiations were for individual composition, at prices of $100 to $25,000).

74. *Id.* (explaining that the court in *Alden-Rochelle* found the payment arrangements for synchronization rights "increased competition among composers").

D. The Orrin G. Hatch-Bob Goodlatte Music Modernization Act and Copyright of Sound Recordings

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act[75] (Music Modernization Act) was promulgated to address the United States Copyright Office's difficulties in regulating a rapidly modernizing industry.[76] It consolidates three bills: the Musical Works Modernization Act,[77] the Classics Protection and Access Act,[78] and the Allocation for Music Producers Act.[79] The Musical Works Modernization Act established a non-profit agency to create a database for owners of mechanical licenses of sound recordings.[80] It ensured songwriters were paid a portion of mechanical license royalties and increased the efficiency of handling rate disputes in the Southern District of New York, a popular copyright court.[81] The Classics Protection and Access Act enabled sound recordings created prior to February 15, 1972 to obtain copyright protection.[82] The Allocation for Music Producers Act gave SoundExchange, a nonprofit started by Congress to distribute royalties, the responsibility to grant royalties to the producer, sound mixer, and sound engineer of recordings.[83]

Though copyright holders of pre-1972 sound recordings had previously not been granted the same remedies for infringement as copyright holders of post-1972 sound recordings, the Music Modernization Act incorporates pre-1972 sound recordings into the modern copyright system.[84] Title II of the Music Modernization Act brings such sound recordings into the modern federal copyright

---

75. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

76. S. REP. NO. 115-339, at 1–2 (2018); *see* Music Modernization Act § 1401(a)(1), (c)(1) (establishing the Copyright Office's role in managing noncommercial use of sound recordings).

77. Music Modernization Act of 2018, S. 2334, 115th Cong. (2018).

78. CLASSICS Act, S. 2393, 115th Cong. (2018).

79. AMP Act, S. 2625, 115th Cong. (2018).

80. Music Modernization Act § 102(d)(3).

81. David Oxenford, *RMLC Initiates Rate Court Proceeding with BMI to Set Radio Royalties–What Does It Mean?*, BROADCAST L. BLOG (May 21, 2018), https://www.broadcastlawblog.com/2018/05/articles/rmlc-initiates-rate-court-proceeding-with-bmi-to-set-radio-royalties-what-does-it-mean [https://perma.cc/H99W-W6B4].

82. Music Modernization Act § 1401(a)(1).

83. *Id.* § 302(a)(5)(A).

84. Rachel Kim, *6 Things to Know About the Music Modernization Act, S. 2823*, COPYRIGHT ALLIANCE (May 10, 2018), https://copyrightalliance.org/ca_post/6-things-to-know-about-the-music-modernization-act-s2823 [https://perma.cc/32GV-4FAX].

regime, and notably, it allows record labels that hold copyrights in sound recordings to recover under the Federal Copyright Act for infringement.[85] The Music Modernization Act also includes affirmative defenses for infringement including fair use, and specifies the remedies available for infringement like the granting of injunctive relief, damages, and lost profits.[86]

E. The Emergence of Synchronization Rights

At their inception, synchronization licenses emerged from 17 U.S.C. § 114(b). This provision of the Copyright Act discusses the rights granted to sound recording copyright holders.[87] In outlining the scope of exclusive rights in sound recordings, Section 114(b) reads:

> The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.[88]

Courts created the synchronization right from the exclusive right to reproduce sound recordings that has predated the Copyright Act.[89] Courts often refer to this right as the synchronization right, or "sync right," based on the Copyright Act of 1909's grant of reproduction rights.[90]

---

85. Music Modernization Act § 1401(a)(1) ("Anyone who . . . engages in covered activity with respect to a sound recording fixed before February 15, 1972, shall be [liable] to the same extent as an infringer of copyright . . . .").

86. *Id.*

87. 17 U.S.C. § 114(b) (2018).

88. *Id.*

89. *Accord* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1075 (1909) (codified at 17 U.S.C. § 1; *repealed* Jan. 1, 1978) (discussing the exclusive rights to print, publish, copy, and vend musical compositions); *see* M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 846 (D. Minn. 1948) (noting "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 publicly for profit" under the 1909 iteration of the Copyright Act's exclusive rights in sound recordings provision).

90. Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185, 193 (D. Mass. 2009); *M. Witmark & Sons*, 80 F. Supp. at 845–46.

Now, courts frequently cite the modern equivalent, Section 114(b), when discussing synchronization rights.[91]

Synchronization rights are required for artists incorporating sound recordings in timed relation[92] to audiovisual works.[93] 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, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.[94]

The earliest cases discussing synchronization rights were antitrust cases arising when sound was first incorporated into film as part of film scores.[95] In *Alden-Rochelle, Inc. v. American Society of Composers, Authors, & Publishers*,[96] the Southern District of New York heard an antitrust challenge against the American Society of Composers, Authors, and Publishers (ASCAP) that centered on a conspiracy "based upon a splitting of the picture synchronization rights of a musical composition from its picture performing rights."[97] The court found an antitrust violation where the ASCAP allowed a movie producer to acquire the right to use the sound recording in synchronization with a film, but the ASCAP charged separately for the right to then show the film publicly as a performance.[98]

---

91. *See, e.g.*, Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 319 (2d Cir. 1995) (citing 17 U.S.C. § 114(b)); Freeplay Music, Inc. v. Cox Radio, Inc., 409 F. Supp. 2d 259, 261–62 n.1 (S.D.N.Y. 2005) (same); EMI Entm't World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1221 (D. Utah 2007) (same).

92. "Timed relation" for the purposes of this Comment refers to sound recordings and audiovisual components presented to an audience or viewer concurrently and in unison. *See* Wyman, *supra* note 70, at 353 (discussing the need to obtain a separate license for music used in timed relation to audiovisual works).

93. *See, e.g.*, *Agee*, 59 F.3d at 322 (noting synchronization rights "require a producer to obtain authorization from the owner of a sound recording before reproducing that recording in the soundtrack of an *audiovisual* work") (emphasis added).

94. 17 U.S.C. § 101.

95. *M. Witmark & Sons*, 80 F. Supp. at 844; Alden-Rochelle, Inc., v. Am. Soc'y of Composers, Authors, & Publishers, 80 F. Supp. 900, 902 (S.D.N.Y. 1948). Other early cases referencing the synchronization right mainly focused on breach of contract or general copyright infringement. *See, e.g.*, Piantadosi v. Loew's, Inc., 137 F.2d 534, 535 (9th Cir. 1943) (general infringement); Pallma v. Fox, 93 F. Supp. 134, 135, 142 (S.D.N.Y. 1947) (breach of contract).

96. 80 F. Supp. 900 (S.D.N.Y. 1948).

97. *Id.* at 902.

98. *Id.* at 904.

In *M. Witmark & Sons v. Jensen*,[99] the court also considered an antitrust violation stemming from a movie theater owner's showing of films without the producer of the film obtaining both synchronization and performance rights for the music used from the ASCAP.[100] However, the court, sitting in equity, did not grant relief for the plaintiffs, instead holding that it would be simplest to issue both synchronization and performance rights to the producers.[101] While the cost of the performance license would then likely be passed on the venue's owner, the court held that this was not contrary to public interest.[102]

At the emergence of television, the technology was so similar to film that courts intuitively applied synchronization license requirements from film to television broadcasts.[103] In 1984, the Second Circuit considered an antitrust suit reminiscent of *Alden-Rochelle* and *M. Witmark & Sons*. However, in *Buffalo Broadcasting Co. v. American Society of Composers, Authors, & Publishers*,[104] local television station owners, not movie producers, faced the ASCAP.[105] In finding that blanket licensing does not constitute an unreasonable restraint on trade where individual rights are impracticable to acquire, the court considered synchronization licenses to apply to "local stations . . . and program producers."[106]

Less than ten years later, the Second Circuit again considered synchronization licenses for television programs in *Agee v. Paramount Communications, Inc.*[107] to determine whether Paramount Communications, Inc. violated Agee's copyright by using portions of Agee's sound recordings in audio tracks that accompanied television programs.[108] The court found that, despite certain exceptions for rebroadcasting,[109] the synchronization

---

99. 80 F. Supp. 843 (D. Minn. 1948).
100. *Id.* at 845.
101. *Id.* at 850.
102. *Id.*
103. *See* Freeplay Music, Inc. v. Cox Radio, Inc., 409 F. Supp. 2d 259, 261–62 (S.D.N.Y. 2005) (combining analysis of film and television to discuss synchronization rights as applied to video tapes).
104. 744 F.2d 917 (2d Cir. 1984).
105. *Id.* at 919.
106. *Id.* at 927–28.
107. 59 F.3d 317 (2d Cir. 1995).
108. *Id.* at 319.
109. Section 114 carves out an ephemeral recording exception to copyright infringement based on the creation of derivative works for transmitting organizations that satisfy three conditions. *Id.* at 321–22 ("(1) [T]he copy must be used solely by the transmitting organization that made it, and no further copies can be reproduced from it; (2) the copy must be used 'solely for the transmitting organization's own transmissions

of the sound recording with the television program without a license infringed Agee's reproduction rights, and thus synchronization rights under Section 114(b), in part because television was an audiovisual medium.[110] Television and film are highly similar formats for artistic work, but technology has since expanded to include more formats than the traditional projection of moving images on a screen.

F. Expanding the Synchronization Right

Expanding the requirement for synchronization licenses has implicated several novel technologies. Most similar in style to film and television, advertisements and promotional videos have become subject to synchronization license requirements.[111] In *Steele v. Turner Broadcasting System, Inc.*,[112] the District of Massachusetts considered an infringement of synchronization rights where a song written about the Boston Red Sox was used in promotional videos for the Major League Baseball post-season.[113] Although the court found that the use did not violate synchronization rights because the sound recording was not sufficiently within "timed-relation" to the audiovisual work, the court nevertheless conducted a synchronization analysis for the promotional video.[114] In *Beastie Boys v. Monster Energy Co.*,[115] the Southern District of New York heard a breach of contract claim regarding the use of a remix in an online promotional video.[116] Like the court in *Steele*, the court in *Beastie Boys* found synchronization rights applied to audiovisual works including the "use of a song in a . . . commercial soundtrack."[117]

Similarly, courts have also considered synchronization license requirements in infringement suits regarding video games. In *Romantics v. Activision Publishing, Inc.*,[118] the court considered an infringement suit where a sound recording was synchronized in timed relation to a video game.[119] The

---

within its local service area, or for purposes of archival preservation or security'; and (3) unless preserved exclusively for archival purposes, the copy must be destroyed within six months from the date the program was first transmitted to the public.").

110. *Id.* at 322.

111. *See, e.g.*, Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 342, 351 (S.D.N.Y. 2013).

112. 646 F. Supp. 2d 185 (D. Mass. 2009).

113. *Id.* at 188.

114. *Id.* at 193.

115. 983 F. Supp. 2d 338 (S.D.N.Y. 2013).

116. *Id.* at 341.

117. *Id.* at 347.

118. 574 F. Supp. 2d 758 (E.D. Mich. 2008).

119. *Id.* at 762.

court held that videogames were sufficiently audiovisual to require synchronization licenses, but it found that no infringement occurred where the videogame used a new recording, rather than the original recording.[120]

Karaoke machines have continued to pose a question for courts analyzing synchronization license requirements. In *EMI Entertainment World, Inc. v. Priddis Music, Inc.*,[121] the court found synchronization licenses were not necessary for karaoke machines that solely featured digitized text, since the visual images were not sufficiently audiovisual.[122] Conversely, in *Leadsinger, Inc. v. BMG Music Publishing*,[123] the court found karaoke machines were sufficiently audiovisual as to require synchronization licenses when using sound recordings because the machines were composed of images, even if the "images [were] comprised [solely] of song lyrics."[124]

Most recently, in early 2019, music publishers filed a lawsuit against Peloton Interactive, Inc. (Peloton) for failing to obtain a synchronization license.[125] Peloton is a company that sells indoor cycling bicycles featuring classes users can watch on the bicycle's screen.[126] The class instructors choose a playlist of songs to incorporate into the workouts.[127] The dispute centered on whether Peloton obtained adequate synchronization licenses for those songs.[128] Peloton obtained blanket "catalog-wide"[129] synchronization license agreements with many music publishers, but it did not obtain license agreements independently for every song used.[130] In late 2019, the Southern District of New York allowed the music publishers to request double damages for the infringement.[131] Recently, the court

120. *Id.* at 762, 766, 768.
121. 505 F. Supp. 2d 1217 (D. Utah 2007).
122. *Id.* at 1223.
123. 512 F.3d 522 (9th Cir. 2008).
124. *Id.* at 528.
125. Downtown Music Publ'g, LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 760–61 (S.D.N.Y. 2020).
126. Erin Griffith, *Peloton Is a Phenomenon. Can it Last?*, N.Y. TIMES (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/technology/peloton-ipo.html.
127. *Downtown Music Publ'g, LLC*, 436 F. Supp. 3d, at 760.
128. *Id.*
129. *Id.* "'[C]atalog-wide' sync licenses . . . cover all or substantially all of a licensor's repertoire." *Id.*
130. *Id.* This Comment focuses on synchronization licenses generally, making no distinction between blanket or individual licenses.
131. Tatiana Cirisana, *Judge Lets NMPA Double Damages to $300M in Peloton Copyright Suit*, BILLBOARD (Sept. 28, 2019), https://www.billboard.com/articles/business/

dismissed Peloton's antitrust counterclaim against the music publishers.[132] The Southern District of New York has yet to explicitly address whether synchronization licenses are required to incorporate sound recordings into exercise videos; however, the court implicitly addressed the issue by noting the type of synchronization license Peloton needs to obtain to avoid infringement.[133]

G. Holograms and Synchronization

Holograms rose to the forefront of the music industry in 2012 after Tupac Shakur's hologram "performed" at the Coachella Valley Music and Arts Festival.[134] Since then, holograms have raised several legal issues, most prominently those regarding the right of publicity. The right of publicity is a court-created right.[135] Sometimes called the "fourth 'privacy' tort," the right of publicity "protect[s] the interest of the individual in the exclusive use of his [or her] own identity" and protects "against commercial loss caused by appropriation" of that identity "for commercial exploitation."[136] Roughly half of the states recognize this right.[137] Many authors have written extensively on the post-mortem right of publicity regarding dead celebrity hologram performances.[138] However,

---

8531541/nmpa-300-million-peloton-copyright [https://perma.cc/T94U-ZCQ4].

132. *Downtown Music Publ'g, LLC*, 436 F. Supp. 3d, at 760, 768.

133. *Id.* at 760, 763–66.

134. Gardner, *supra* note 7.

135. Dylan M. Spaduzzi, Note, *Publicity Enemy Number One: Federal Immunity for a Virtual World*, 40 U. MEM. L. REV. 603, 612–13 (2010); *see also* 6 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:34 (4th ed. 2019); *cf.* RESTATEMENT (SECOND) OF TORTS § 652A(2)(a)–(d) (Am. Law Inst. 1977) ("The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another . . . ; or (b) appropriation of the other's name or likeness . . . ; or (c) unreasonable publicity given to the other's private life . . . ; or (d) publicity that unreasonably places the other in a false light before the public . . . .").

136. ALTMAN & POLLACK, *supra* note 135, § 22:34 (internal quotations omitted).

137. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:1 (2d ed. 2009).

138. *See, e.g.*, Carol J. Greer, Note, *International Personality Rights and Holographic Portrayals*, 27 IND. INT'L & COMP. L. REV. 247, 275 (2017) ("The creation of lifelike holograms is a highly skilled art. There may be times when the freedom of expression should succeed over a requirement of consent when recreating another person in digital form. But until one principle becomes necessarily apparent, consent should be absolutely required before a digital master . . . exploits human images."); *see also* Lydia B. Yerrick, Comment, *Live! For One Life Only?: The Need to Amend California's Post-Mortem Right of Publicity Statute to Better Protect the Dead and Their Heirs from Holographic Exploitation*, 43 SW. L. REV. 349, 369 (2013) (using a first amendment argument to recommend extending publicity protections under California law to dead celebrities).

this Comment focuses on the lesser-explored synchronization right accorded to copyright holders of sound recordings and its application to hologram technology.

Although the creators of dead celebrity holograms keep much of the development secret, the basis of the technology is a complex series of manipulations of light, glass, and video known as "Pepper's Ghost."[139] Pepper's Ghost is a century-old optical trick that used reflections through plexiglass to enable ghosts to "materialize" on stage despite the actors standing out of the audience's sight.[140] Now, hologram companies use video footage, rather than live actors, to create the illusion.[141] Modern holograms can have their full "body" in motion or move just their "mouth[s]."[142] The concerts are brought to life when hologram technology is used in timed relation to sound recordings of the artist's music. This complex mix of digitized and illusory formats leaves holograms in a gray area concerning synchronization rights while hologram concerts become increasingly more popular.[143]

II. ANALYSIS

As shown by the dearth of case law and policy,[144] historically the courts, Congress, and commentators give little consideration to synchronization rights.[145] As modern technology grows in popularity, courts must address the requirement of synchronization licenses for different works. This Comment poses the following question: are holograms sufficiently audiovisual to require a synchronization license analysis from courts considering sound recording infringement cases? Based on the Copyright Act and past synchronization license jurisprudence, the answer is "yes." Thus, producers of a hologram concert must negotiate

---

139. Brianne Christopher, *Explaining the Pepper's Ghost Illusion with Ray Optics*, COMSOL BLOG (Jan. 11, 2016), https://www.comsol.com/blogs/explaining-the-peppers-ghost-illusion-with-ray-optics [https://perma.cc/MC6Z-S523].

140. *Id.*

141. *Id.*

142. Mark Binelli, *Old Musicians Never Die. They Just Become Holograms*, N.Y. TIMES MAG. (Jan. 7, 2020), https://www.nytimes.com/2020/01/07/magazine/hologram-musicians.html.

143. *Cf.* Dave Thier, *Tupac "Hologram" Wasn't a Hologram at All*, FORBES (Apr. 17, 2012, 11:09 AM), https://www.forbes.com/sites/davidthier/2012/04/17/tupac-hologram-wasnt-a-hologram-at-all/#22ca6c1f6f4c [https://perma.cc/TBC4-PW95] ("People are calling it a hologram. But despite being an impressive optical illusion, what's commonly being described as a hologram isn't a hologram at all.").

144. *See supra* Section I.E–F.

145. Cohen, *supra* note 65, at 788 (footnotes omitted).

a synchronization license agreement with the record label that owns the sound recording copyright of an artist's work to protect themselves from a synchronization right infringement suit.

A. Holograms are Sufficiently Audiovisual to Require Synchronization Licenses when Incorporated with Sound Recordings.

At the crux of every court's application of a synchronization license analysis is the court's discussion of whether the work in question is sufficiently audiovisual. To determine what constitutes audiovisual, this Comment looks to the language and structure of the Copyright Act of 1976. The Copyright Act indicates a broad definition of audiovisual work that courts have supported in their interpretations of synchronization license requirements.[146] As technology has modernized, courts have expanded the definition of audiovisual work. This expanded definition serves as the foundation for this Comment's argument that holograms should require synchronization license agreements.

From a policy perspective, record labels would be disincentivized to provide their recording services if synchronization license requirements were not enforced because synchronization license requirements protect the investments made by record labels in recording sounds for artists.[147] Thus, holograms are sufficiently audiovisual from both a legal and policy standpoint to require synchronization licenses.[148]

1. The language and structure of the Copyright Act of 1976 leads to a broad reading of the term audiovisual

Although the Copyright Act of 1976 did not create the synchronization right, courts have relied on Section 114(b)'s grant of reproduction rights to copyright holders in sound recordings to uphold the requirement of synchronization licenses for sound recordings incorporated into audiovisual works.[149] Notably, Section 114(b) itself

---

146. *See generally* 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); Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 766 (E.D. Mich. 2008); EMI Entm't World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1225 (D. Utah 2007).

147. Heather McDonald, *The Record Label's Role in the Music Industry*, BALANCE CAREERS (Oct. 28, 2019), https://www.thebalancecareers.com/what-is-a-record-label-2460614 [https://perma.cc/RPC3-5RBC].

148. *Id.*

149. Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 322 (2d Cir. 1995) ("A synchronization of previously recorded sounds onto the soundtrack of an audiovisual

contains no reference to the words audiovisual in discussing the reproduction right granted to sound recording copyright holders.[150]

However, other parts of the Copyright Act indicate a broad definition of audiovisual work. Works of authorship are incredibly general under the Copyright Act and include "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (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."[151] The Copyright Act also gives audiovisual a broad and inclusive definition:

> 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.[152]

Both the definition of "work" and of "audiovisual" are sufficiently broad as to allow the courts to include holograms in the definition of audiovisual work.

When interpreting statutes, a court must read them as a whole and "should not confine itself to examining a particular statutory provision in isolation."[153] Therefore, Section 114(b) must be read among other provisions of the Copyright Act. Reading Sections 101 and 102 in conjunction with Section 114(b) demonstrates that, in enacting the Copyright Act, Congress formulated a broad definition of work and audiovisual work for the purposes of defining a copyright holder's rights.[154] Holograms made for the purposes of a concert also incorporate projection, pre-recorded films or tapes, and accompanying sounds, and thus they fall squarely within the Copyright Act's audiovisual definition.[155]

---

work is simply an example of the reproduction right explicitly granted by section 114(b) to the owner of rights in a sound recording.").

150. *See generally* 17 U.S.C. § 114(b) (2018).

151. *Id.* § 102(a)(1)–(8).

152. *Id.* § 101.

153. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

154. 17 U.S.C. §§ 101, 102(a)(1)–(8), 114(b).

155. 17 U.S.C. § 101; Paul Donoughue, *Dead Musicians Are Touring Again, as Holograms. It's Tricky–Technologically and Legally*, AUSTL. BROADCASTING CORP. (Dec. 28, 2018 2:00 PM), https://www.abc.net.au/news/2018-12-29/hologram-technology-letting-dead-musicians-tour-again/10600996 [https://perma.cc/Q7U5-336M].

2. Judicial analyses of synchronization licenses in cases with novel technology indicate the expansion of what courts consider audiovisual

The expansion of the court-created synchronization right has also indicated a broadening definition of what is included within audiovisual works.[156] As discussed in Part I.E,[157] courts originally analyzed synchronization rights as a subsection of the reproduction right for sound recordings incorporated into film soundtracks as part of the score.[158] As technology progressed, courts expanded into the area of television since the technology was so similar to that of film that there was no question that television was sufficiently audiovisual to require a synchronization license.[159]

Where modern technologies such as video games, promotional videos, and karaoke are concerned, courts have continued to expand the definition of audiovisual. For example, in *Beastie Boys*, the court considered an advertisement that used a Beastie Boys song in timed relation with a video.[160] The court found that "the Beastie Boys, as owners of the copyrights to the underlying songs, held the exclusive right to authorize Monster to 'reproduce,' 'prepare derivative works,' 'distribute,' and publicly perform the music, including by synchronizing it with an audiovisual work such as [a promotional] [v]ideo."[161] Although the court in *Romantics* found the defendants sufficiently changed an original song to avoid a synchronization right infringement

---

156. *See, e.g.*, Boucher, *supra* note 66, at 1171 ("Reflecting the Government's thinking is a 1949 memorandum criticizing ASCAP's draft decree revisions: 'The [relief contemplated by *Alden-Rochelle*] should not be limited to exhibition of film in a motion picture theatre since to do so excludes music synchronized in the films used in telecasting.'" (quoting May 19, 1949 Department of Justice memorandum from W.D. Kilgore, Jr. to Sigmund Timberg)).

157. *See supra* Section I.E.

158. M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 844 (D. Minn. 1948); Alden-Rochelle, Inc., v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 900, 902 (S.D.N.Y. 1948).

159. Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 324 (2d Cir. 1995) ("Paramount purchased Agee's sound recording but made no attempt to obtain a license for its reproduction in the soundtrack of its program. It therefore infringed Agee's sound recording at the moment it put portions of his recording on tape to make a segment of [the television show,] *Hard Copy*. Its incorporation of the sound recording without permission violated Agee's reproduction right."). The court in *Agee* also noted that previously recorded sounds incorporated into programming require a synchronization license under 17 U.S.C. § 114(b) even when copies are not immediately distributed to the public. *Id.*

160. Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 340 (S.D.N.Y. 2013).

161. *Id.* at 351 (internal citations omitted).

in using the sound recording in timed relation to a video game, the court still applied synchronization license analysis to video games as an audiovisual medium.[162]

Courts have found it particularly complex to apply synchronization right analysis to songs occurring in timed relation to videos on karaoke machines due to karaoke machines' variety of formats.[163] Although the District of Utah found karaoke machines that featured solely lyrics on the screen were not sufficiently audiovisual for the purposes of a synchronization license, the Ninth Circuit found that similar machines, even if solely displaying text, still provided a sufficient audiovisual basis to require a synchronization license.[164] Neither interpretation is universally binding, but the Ninth Circuit's reasoning is persuasive in suggesting that the definition of audiovisual work is expanding.

The most recent litigation over synchronization licenses stems from home exercise video classes.[165] Although courts have not directly addressed any synchronization license requirements for Peloton, Inc.'s exercise videos, the Southern District of New York's immediate identification of the dispute as centering on the type of synchronization license needed implicitly acknowledges that a synchronization license is necessary for exercise videos.[166] Holograms are similar to the Peloton videos because they are also an emerging technology that incorporates visual and audial elements. Peloton, which emerged in 2012, started harnessing internet connectivity in 2014 to tap into modern indoor-

---

162. *See* Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 766 (E.D. Mich. 2008) (finding "[t]he creation of the [video] [g]ame takes anywhere from six to twelve months and includes choosing a theme; designing graphic characters, locations, and instruments; selecting songs; synchronizing the songs with graphic elements to enable game play; game testing; and game production").

163. Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 529 (9th Cir. 2008); EMI Entm't World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1225 (D. Utah 2007).

164. *Compare Leadsinger, Inc.*, 512 F.3d at 529 ("Leadsinger's [karaoke] device falls within the definition of an audiovisual work. As a result, in addition to any § 115 compulsory licenses necessary to make and distribute phonorecords and reprint licenses necessary to reprint song lyrics, Leadsinger is also required to secure synchronization licenses to display images of song lyrics in timed relation with recorded music."), *with EMI Entm't World, Inc.*, 505 F. Supp. 2d at 1223–24 (holding a synchronization license was not required for karaoke machines displaying lyrics).

165. Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 760–61 (S.D.N.Y. 2020).

166. *Id.* at 760, 766.

cycling trends.[167] Similarly, after Tupac Shakur's holographic appearance in 2012, hologram creators have also harnessed modern technology like computer-generated imagery to make the most realistic projections.[168] Thus, courts must be prepared to address holograms' audiovisual nature as these lawsuits become more frequent and recurring.

Judicial analysis regarding what constitutes audiovisual work has expanded as new technology becomes involved in artistic work. Therefore, based on past jurisprudence surrounding synchronization rights, holograms should be considered sufficiently audiovisual to require synchronization licenses when used in timed relation to a copyrighted sound recording. Otherwise, the sound recording's copyright holder is entitled to remedies for copyright infringement barring an exception, such as fair use.[169]

3. As a matter of policy, the music industry would benefit from courts incorporating hologram technology into the definition of audiovisual work for the purposes of synchronization licenses

Developers of sound recordings, typically record labels,[170] are financially and creatively invested in the reproduction of that recording for their own economic benefit.[171] At the same time, producers of hologram concerts have much to gain economically from staging deceased artists' live

---

167. Lauren Goode, *My Two-Month Ride with Peloton, the Cultish, Internet-Connected Fitness Bike*, VERGE (Apr. 25, 2017, 9:00 AM), https://www.theverge.com/2017/4/25/15408338/bike-peloton-review-indoor-cycle-live-streaming-cycling [https://perma.cc/LNK9-S42U].

168. Ethan Smith, *Rapper's De-Light: Tupac 'Hologram' May Go on Tour*, WALL ST. J. (Apr. 17, 2012), https://www.wsj.com/articles/SB10001424052702304818404577348243109842490.

169. 17 U.S.C. § 501 (2018) (infringement of copyright); *id.* § 107 (fair use doctrine).

170. Usually, the developer of a sound recording—and thus the sound recording copyright holder—is a record label or recording company. Jarvis v. A & M Records, 827 F. Supp. 282, 286, 292 (D.N.J. 1993). However, in the modern technological age, some artists are "going independent"—not using record label representation in the production and marketing of their work. Amy X. Wang, *An Indie Music Expert Explains Why Artists Are Turning Away from Record Deals*, ROLLING STONE (Nov. 1, 2018, 10:36 AM), https://www.rollingstone.com/music/music-news/ditto-music-lee-parsons-interview-749510. Nevertheless, since the production capacity of record labels is still a dominant force in the American music industry, this Comment focuses on the record label as the copyright holder in sound recordings. *See* McDonald, *supra* note 147.

171. *See* Tim Struby, *For Music Fans Who Demand the Dead, Holograms Bring Musicians Back to Life*, FAST COMPANY (June 18, 2012), https://www.fastcompany.com/1839282/music-fans-who-demand-dead-holograms-bring-musicians-back-life [https://perma.cc/GWZ9-S2HY] (discussing revenue and profits for shows versus music sales).

performances.[172] For example, "[w]hile U.S. music sales and licensing revenue are slipping (from 2001 to 2011, sales dropped from $13.7 billion to $3.4 billion), show revenue has spiked ([from] $1.7 billion to $4.3 billion)."[173] As the entity with the most to gain from hologram concerts and a primary party organizing the events, the producer of a show also has the greatest ability to pay infringement damages and would be a primary target of infringement suits should the rights to a sound recording not be sufficiently transferred.[174]

To inspire innovation and maintain competition in the music industry, courts must provide creative protections.[175] Record labels, the copyright holders of most sound recordings,[176] are responsible for carrying out many functions in the music industry.[177] They discover new artists and provide financial and public relations backing for established artists.[178] However, they also have brought numerous suits for infringement of synchronization rights.[179]

---

172. *Id.*

173. *Id.* (emphasis omitted).

174. *Cf.* Jon Bream, *Buddy Holly and Roy Orbison in Minnesota? Hologram Tours of Old Stars Are the Hot New Concert Trend*, STAR TRIB. (Oct. 12, 2019, 5:52 PM), http://www.startribune.com/buddy-holly-in-minnesota-hologram-tours-of-old-stars-are-the-hot-new-concert-trend/562754472 [https://perma.cc/C8M5-GUFB] ("[I]t is the next billion-dollar music business . . . . Holograms can protect—and perhaps immortalize—artists' legacies [and] keep audiences in venues . . . .").

175. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (stating that copyright protections are "a means by which an important public purpose may be achieved. [They are] intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired").

176. *See* McDonald, *supra* note 147. In some circumstances, artists choose to independently record their work without a record label. Wang, *supra* note 170.

177. McDonald, *supra* note 147.

178. *See, e.g.*, Philip Merrill, *RIAA's Mitch Glazier on Why Record Labels Matter in 2019*, GRAMMY (Jan. 10, 2019, 3:43 PM), https://www.grammy.com/grammys/news/riaas-mitch-glazier-why-record-labels-matter-2019 [https://perma.cc/M677-WRFK] ("[L]abels are seizing the moment . . . investing more in A&R, marketing and other artist support activities (like data insights) than ever before, and beefing up their teams to support a vastly more complex, personal, and fast-paced music economy."); Danny Ross, *Why Record Labels Still Matter*, FORBES (Oct. 30, 2017, 10:00 AM), https://www.forbes.com/sites/dannyross1/2017/10/30/in-the-pop-era-the-last-defender-of-rock/#79c10ae22b5e [https://perma.cc/XA6W-ZUBY] ("Same with Joy Division—at first you think that guy's voice is weird until you realize it's amazing. There's always going to be the people who want that sense of discovery, and it's our job to go get those people.").

179. *See, e.g.*, Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 525 (9th Cir. 2008); Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 320 (2d Cir. 1995); Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 342 (S.D.N.Y. 2013); Romantics v.

Thus, to protect record labels' interests in continuing to record sounds and support new and established artists, courts should respect the record label's reproduction rights as they pertain to synchronization license analyses for hologram performances. Although policy is not the sole reason for courts to act, the policy benefits of applying synchronization license requirements to hologram concerts only serve to support the legal expansion of the definition of audiovisual to include new technology.

4. Synchronization licenses should be required for works that are audiovisual and should not require a judicial finding that the work is sufficiently "in motion"

Some scholars argue that the analysis of synchronization licenses should not focus on the audiovisual nature of the work, but rather on whether the work is sufficiently "in motion."[180] Sometimes, holograms are projections based on still images or only move one part of their "body."[181] Thus, holograms would not necessarily require synchronization licenses because they are not sufficiently "in motion" to fall within the definition of "audiovisual."[182] However, even the most simple holograms require the incorporation of projection, images, and mirrors to operate.[183] In the technological era, hologram developers are using computers and video to animate and add depth to almost all commercial holograms, thus enabling them to become more complex audiovisual works.[184]

Moreover, courts have favored "audiovisual" over "in motion" in discussing the matter, and holograms' very nature falls within both historical and modern legal conceptions defining audiovisual works for the purpose

---

Activision Publ'g, Inc., 574 F. Supp. 2d 758, 762 (E.D. Mich. 2008); EMI Entm't World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1219 (D. Utah 2007).

180. Jason D. Arnold, *Licensing Concerns for Virtual Worlds*, 14 J. INTERNET L. 3, 6–7 (2011).

181. Jane C. Hu, *The Whitney Houston of the 3D Hologram Tour Will Be Neither 3D nor a Hologram*, SLATE (May 22, 2019, 2:29 PM), https://slate.com/technology/2019/05/whitney-houston-3d-hologram-tour-technology.html [https://perma.cc/SS4F-VPNH].

182. *See id.* (describing Whitney Houston's "hologram" as a mere 2D image projection).

183. Andrew Tarantola, *Celebrity Holograms Sketch Me out, but Are They the Future?*, ENGADGET (May 10, 2019, 7:25 PM), https://www.engadget.com/2019-05-10-celebrity-holograms-sketch-me-out.html [https://perma.cc/5TGU-W9TY].

184. *Cf.* Thier, *supra* note 143 ("In the Victorian era, Pepper's Ghost [a 'holographic' optical illusion made with glass] was normally used to reflect actual, physical objects or actors, making them appear 'dimensional' in ways that the projected or computer-generated imagery typically used today do not.").

of a synchronization license. Holograms themselves are copyrightable works[185] that consist of an amalgamation of projection, still image, and moving image technologies.[186] Although holograms are not directly equivalent to film or television due to their complexity, they do incorporate similar technologies by utilizing moving images.[187] When a sound recording is incorporated into a hologram performance, the work is inherently and definitionally audiovisual—audio from the recording combined with visual images of a person—in a manner that surpasses the complexity of lyrical text on a screen like in karaoke machines.[188]

As opposed to karaoke machines, holograms are technologically and visually more equivalent to advertisements, promotional videos, and video games. Instead of singular elements, holograms, especially modern ones, utilize many components that go towards a finding of an audiovisual work, such as moving images, projection, videography, and sound.[189] Even if holograms are not as definitionally audiovisual as film or television and are thus treated more similarly to karaoke machines, courts should favor the Ninth Circuit's argument[190] over the District of Utah's[191] because the Ninth Circuit is a more persuasive institution. Therefore, courts should conduct synchronization analyses in cases concerning holograms as a matter of law because of a consistently expanding definition of audiovisual in past cases concerning synchronization rights.

---

185. INTERNATIONAL HOLOGRAM MANUFACTURERS ASSOCIATION, HOLOGRAM COPYRIGHT GUIDELINES 2 (2019), https://www.ihma.org/userfiles/files/Copyright_guidelines.pdf [https://perma.cc/85SS-EE7W].

186. Donoughue, *supra* note 155.

187. *Id.*

188. *Id.*

189. *See* Brett Gold & Jessica Smith, *BASE Entertainment Announces New Cutting Edge Live Entertainment Company: BASE Hologram*, BASE HOLOGRAM (Jan. 11, 2018), https://basehologram.com/news/base-entertainment-announces-new-cutting-edge-live-entertainment-company-base-hologram [https://perma.cc/4YGN-99CT] (discussing how Base Hologram uses laser projection, vivid images, film technology, and augmented reality to bring celebrities back to life as holograms).

190. Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 529 (9th Cir. 2008).

191. EMI Entm't World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1223–24 (D. Utah 2007).

B. Remedies for Copyright Holders Against Infringers who Breach or Fail to Acquire Synchronization License Agreements can be Based on Applying Pre-existing Legal Frameworks

Through Title II of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, copyright holders received federal copyright protections of sound recordings, including pre-1972 sound recordings.[192] Now, federal remedies for infringement and exceptions to infringement, like fair use, apply to sound recordings.[193] After courts conduct a synchronization right analysis because holograms are sufficiently audiovisual, determining infringement remedies would not overwhelm the courts because a legal framework for analysis and infringement remedies already exists. Any breach of the synchronization right should be subject to injunctive relief, damages (including statutory damages), or profits like any other copyright infringement.

Additionally, as technology progresses and becomes less expensive, the possibility arises that nonprofits or educational institutions will use holograms, especially for large-scale events. In considering cases involving these types of institutions, courts have a pre-existing framework to apply the doctrine of fair use as an exception to a finding of liability in infringement suits.

1. The enforcement of synchronization licenses and remedies should mimic federal application of general copyright enforcement and infringement remedies

To implement this Comment's recommendation, a shift must occur in the framework of how courts discuss synchronization rights. Even though synchronization rights stemmed from a definition surrounding audiovisual work in the context of film and television, the advent of new technology has already led courts to expand the definition of audiovisual to include promotional videos, video games, and even (though it is disputed) karaoke machines displaying lyrical text.[194]

In upcoming cases, courts can implement a change in their analytical framework by including language describing holograms and projections within their discussion of synchronization rights. Similarly, the United States Copyright Office could encourage private actors,

---

192. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 1401(a)(1), 132 Stat. 3676, 3728 (2018).

193. *Id.* § 1401(a), (f).

194. Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 351 (S.D.N.Y. 2013) (promotional videos); Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 762 (E.D. Mich. 2008) (video games).

through administrative rulemaking or a shift in industry standards, to adopt broader licensing agreements for synchronization rights. For example, some template forms for synchronization license agreements have already expanded their definition of audiovisual work to simply address "works" generally as anything creative "throughout the world, in any medium or form, whether now known or hereinafter created."[195]

The key to enforcing synchronization license requirements for holograms lies in treating infringement of synchronization rights as a general copyright infringement. The Music Modernization Act incorporated pre-1972 sound recordings into the federal copyright system along with post-1972 sound recordings for the purposes of infringement.[196] Copyright infringement occurs when one who is not the owner of a work copied elements of a work protected by copyright.[197] Breaches of licensing agreements are often raised as copyright infringement actions.[198] Unless an infringer succeeds on an affirmative defense such as fair use, a court can grant the rights holder injunctive relief, as well as damages and profits, or statutory damages.[199]

2. The fair use caveat to infringement liability should apply to synchronization licenses for hologram performances as it does for other similar copyright infringement suits

Although holograms are expensive to create, hologram performances may serve purposes other than commercial gain.[200] For example, non-profit organizations could use hologram concerts could be used to raise morale for and engagement with their causes. In these circumstances, courts should apply the fair use doctrine as they would in any copyright

195. Cohen, *supra* note 68, § 23:90.

196. Music Modernization Act § 1401(a)(1).

197. Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 984 (9th Cir. 2017) ("To prove copyright infringement, a plaintiff must demonstrate (1) ownership of the allegedly infringed work and (2) copying of the protected elements of the work by the defendant." (citing Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991))).

198. 17 U.S.C. § 501(a) (2018) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be.").

199. *Id.* § 502 (injunctive relief); *id.* § 504 (damages and profits, and statutory damages).

200. Tiffany, *supra* note 7 ("Buying the rights to dead people is still complicated, and expensive.").

infringement case.[201] This is supported by the Music Modernization Act that incorporates pre-1972 sound recordings into the modern copyright framework, including in allowing courts to apply doctrines such as fair use as an affirmative defense to infringement suits.[202]

The fair use doctrine considers the "purpose and character of the use," the "nature of the copyrighted work," the "amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "the effect of the use upon the potential market for or value of the copyrighted work," and weighs the transformative value of the work against its commercialism.[203] In fair use cases, no single factor is dispositive.[204] Courts would be asked to consider what type of institution was using a hologram and the type and purpose of the performance given. Even though hologram technology is expensive and commercial nowadays, the fair use elements can be reconsidered as lawsuits arise in the future.

CONCLUSION

Copyright law is broad, and for good reason. It protects artists' interests by rewarding the investment and creativity required to produce new creative works for public consumption.[205] In particular, music is a large field within the realm of copyright law, with copyrights granted both for the composition of new music and for the creation of sound recordings.[206]

The copyright protections afforded for sound recordings are only increasing in breadth as modern technology continues to emerge. This broadening has come at both the statutory level and the judicial level. Prior to the incorporation of film scores as opposed to including a live orchestra at the cinema, synchronization rights were not even formulated.[207]

---

201. Balsley v. LFP, Inc., 691 F.3d 747, 758 (6th Cir. 2012) (citing 17 U.S.C. § 107 (2018)) (stating the use of a work under the fair use doctrine is not a copyright infringement).

202. Music Modernization Act § 1401(f).

203. 17 U.S.C. § 107; *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

204. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 479 (2d Cir. 2004) (citing *Campbell*, 510 U.S. at 578).

205. Mose Bracey, Note, *Searching for Substance in the Midst of Formality: Copyright Registration as a Condition Precedent to the Exercise of Subject-Matter Jurisdiction by Federal Courts over Copyright Infringement Claims*, 14 J. INTELL. PROP. L. 111, 119 (2006).

206. Jarvis v. A & M Records, 827 F. Supp. 282, 292 (D.N.J. 1993).

207. Boucher, *supra* note 66, at 1165.

Now, courts commonly discuss and debate synchronization rights for novel technologies as varied as promotional videos, video games, and karaoke machines.[208]

In summation, the language of Section 114(b) grants the exclusive reproduction rights to copyright holders in sound recordings.[209] Courts have used the exclusive reproduction rights granted by Section 114(b) to create a synchronization right when sound recordings are incorporated into audiovisual works.[210] The synchronization right protects a sound recording copyright holder's interests where the sound recording is incorporated into an audiovisual work.[211]

Neither courts nor the Copyright Act of 1976 expressly define audiovisual works for the purposes of synchronization rights. However, the language and structure of the Copyright Act encourage a broad interpretation for the definition of what constitutes an audiovisual work.[212] Additionally, the jurisprudence surrounding audiovisual works has expanded the definition as well.

Originally, courts applied synchronization right analysis to mediums such as film and television.[213] However, courts have expanded the definition to include promotional videos, video games, and even some karaoke machines.[214] Implicitly, courts have also acknowledged synchronization right requirements for exercise videos.[215] Although commercial holograms have varying degrees of movement,[216] their complex composition of video, still

---

208. *See* Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 525 (9th Cir. 2008) (karaoke machines); Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 342 (S.D.N.Y. 2013) (promotional videos); Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 762 (E.D. Mich. 2008) (video games).

209. 17 U.S.C. § 114(b) (2018).

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

211. M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 846 (D. Minn. 1948).

212. *See* 17 U.S.C. § 101 (defining audiovisual works); *id.* § 102(a)(1)–(8) (defining work of authorship); *id.* § 114(b) (outlining the scope of exclusive rights in sound recordings).

213. Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 919 (2d Cir. 1984); Alden-Rochelle, Inc., v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 900, 902 (S.D.N.Y. 1948).

214. *See* Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 525 (9th Cir. 2008) (karaoke machines); Beastie Boys v. Monster Energy Co., 983 F. Supp. 2d 338, 342 (S.D.N.Y. 2013) (promotional videos); Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 762 (E.D. Mich. 2008) (video games).

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

216. Thier, *supra* note 143.

images, projection, and illusion[217] leads them to be sufficiently audiovisual in the wake of courts expanding the definition of traditional audiovisual works.[218]

Additionally, from a policy perspective, the proper enforcement of synchronization licenses would incentivize record labels, the major holders of sound recording copyrights, to continue providing artist support services.[219] Record labels are key players in the music industry, and their role in discovering new artists, supporting artist publicity, and engaging the public in artist branding is essential to the continued success of musicians, producers, and consumers alike.[220]

Further, the existing enforcement and remedies framework for copyright infringement could easily be transferred to include holograms.[221] Especially after the unanimous passing of the Orrin G. Hatch-Bob Goodlatte Modernization Act through Congress, the incorporation of holograms into a copyright system designed to protect the interests of copyright holders in sound recordings is established and straightforward.[222] Courts would carry no additional burden to construct a new framework solely for evaluating hologram claims. Therefore, hologram concert producers must engage in similar synchronization license negotiations as film and television producers to protect themselves from copyright infringement lawsuits.

While no lawsuits have yet made it to trial regarding holograms and synchronization licenses, the emerging technology is at the forefront of media attention. Hologram creators have faced lawsuits in copyright

---

217. Donoughue, *supra* note 155 ("Hologram USA uses a high-tech, [high-definition] version of the 19th Century Pepper's Ghost technique . . . .").

218. *See generally* Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 324 (2d Cir. 1995) (expanding synchronization rights to include new types of works beyond traditional cinematic or televised works); *Beastie Boys*, 983 F. Supp. 2d at 351 (same); *Romantics*, 574 F. Supp. 2d at 768 (same).

219. McDonald, *supra* note 147.

220. *Id.* ("Throughout the 20th century, record labels were the dominant force behind the most successful artists. Record labels had the power to make or break artists, depending on the amount of money they invested in promoting their music.").

221. *See, e.g.*, 17 U.S.C. § 502 (2018) (injunctive relief); *id.* § 504 (damages and profits, and statutory damages); Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 § 1401(a)(1), 132 Stat. 3676, 3728 (2018) (applicability of exclusive rights and remedies of pre-1972 sound recordings).

222. *See, e.g.*, Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2549 (2019) ("The Music Modernization Act codifies a host of compromises and licensing arrangements worked out among music publishers, record labels, and digital music services.").

law where individuals have challenged the technology on the grounds of right of publicity and right to likeness.[223] Fans are also concerned about how holograms represent the legacy of their dead celebrity icons.[224] Hologram use has also raised more technical patent infringement lawsuits.[225] As technology progresses, complex issues arise with how the mechanism for holograms functions.[226] Additionally, news articles are constantly reporting on upcoming hologram tours' ethical questions, keeping the issue at the forefront of discourse amongst music industry professionals.[227]

Since synchronization rights are so highly litigated by record labels looking to enforce their copyright protections, it is only a matter of time before synchronization right lawsuits emerge in the context of dead celebrity hologram concerts. Courts must be prepared for this inevitability. In interpreting modern technology, innovative solutions are often needed, but with synchronization licenses, innovation is not even necessary. Congress and the courts have already established an expansive framework for analyzing audiovisual works incorporated with sound recordings and providing remedies such as injunctive relief, damages, and lost profits for breaches of exclusive rights protected by copyright. The federal courts may now apply it to any new case arising in the context of hologram performances. As Chance the Rapper warned, "Please don't make no holograms . . . [but] if you get the license then you better use it right."[228]

---

223. Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 986 & n.1 (9th Cir. 2012).

224. Henry, *supra* note 10.

225. *See, e.g.*, Hologram USA, Inc. v. Pulse Evolution Corp., No. 2:14-CV-0772-GMN-NJK, 2016 WL 199417, at *1 (D. Nev. Jan. 15, 2016) (deciding whether a Michael Jackson hologram performance infringed plaintiffs' patents).

226. *See id.*

227. Kory Grow, *Live After Death: Inside Music's Booming New Hologram Touring Industry*, ROLLING STONE (Sept. 10, 2019, 5:06 PM), https://www.rollingstone.com/music/music-features/hologram-tours-roy-orbison-frank-zappa-whitney-houston-873399; Juliet Helmke, *The Ethical Dilemma of Turning Our Heroes into Holograms*, OBSERVER (May 21, 2019, 7:45 AM), https://observer.com/2019/05/whitney-houston-hologram-tour-amy-winehouse-ethical-questions [https://perma.cc/E4D9-QSAX]; Tarantola, *supra* note 183.

228. CHANCE THE RAPPER, *supra* note 1.