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**NOTE: STATUTORY DAMAGE AWARDS AND THE
“INDEPENDENT ECONOMIC VALUE” TEST: DID *BRYANT v.
MEDIA RIGHT PRODUCTIONS, INC.* HIGHLIGHT THE NEED
FOR NEW LEGISLATION?**

Tierryicah Mitchell[†]

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[†] J.D. candidate, 2012, Wake Forest University School of Law; Staff Member, *Wake Forest Journal of Business and Intellectual Property Law*. In loving memory of my grandmother, Mrs. Hazel Lee Bennett. Many thanks to my mother, Dana Stubblefield, for always believing in me, and my best friend, Tiffany Johnson, for her love and support.

INTRODUCTION

How should one calculate the cost of a copyright infringement of one album with ten songs, five of which were illegally downloaded? Better stated, should statutory damages be calculated on a per-song or per-album basis where a copyright infringer makes an unauthorized digital copy of a music album, then sells or distributes the individual songs from the album?¹ The answer depends on how that court defines “work.” Some circuits would find each song constituted an individual work, placing focus on “whether each expression . . . has an independent economic value and is, in itself, viable.”² A few circuits look at the way in which the work was infringed, that is, some circuits focus on whether the defendant stole the work and subsequently used it as either a compilation or an individual work. However, in an arguably circuit-splitting decision, the Second Circuit held in *Bryant v. Media Right Productions, Inc.*³ that the total number of awarded statutory damages is contingent upon whether the copyright holder issued its works together as a unit or separately. Thus, applying *Media Right*, the copyright holder would receive damages for only one work.

The present issue arose after songwriters Anne Bryant and Ellen Bernfeld (collectively “songwriters”) discovered that Douglas Maxwell (“Maxwell”) of Media Right Productions, Inc. (“Media Right”) had given music wholesaler, the Orchard Enterprises, Inc. (“The Orchard”), express permission to make and distribute digital copies of their record label’s songs without their authorization. The songs were taken from two music albums entitled, *Songs for Dogs and the People Who Love Them* (“*Song for Dogs*”) and *Songs for Cats and the People Who Love Them* (“*Song for Cats*”), both of which were registered with the Copyright Office as collective works. Selected songs⁴ from each album were independently registered as well. The songwriters brought suit against Media Rights and The Orchard alleging, among other things,⁵ copyright infringement.

¹ See Petition for Writ of Certiorari, *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135 (2d Cir. 2010) (No. 10-415), 2010 WL 3740540.

² *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116–17 (1st Cir. 1993); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990); see *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 296 (9th Cir. 1997), *rev’d on other grounds sub nom. Feltner v. Columbia Pictures Television*, 523 U.S. 340, 355 (1998).

³ *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 142 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010).

⁴ See Petition for Writ of Certiorari, *supra* note 1, at 3 n.1. The actual copyright registrations for the albums indicate that ten of the songs from *Song for Cats* and four of the songs from *Song for Dogs* were separately copyrighted.

⁵ See *Bryant v. Europadisk, Ltd.*, No. 07 Civ. 3050(WGY), 2009 WL 1059777 *continued . . .*

Prior to receiving a ruling in their favor, the songwriters elected to seek statutory damages instead of actual damages.⁶ The district court awarded the songwriters limited statutory damages, finding that the two albums each constituted a compilation under the Copyright Act, thus holding that “statutory damages must be calculated on a per-album basis rather than per-song.”⁷

On appeal, the Second Circuit affirmed the judgment, expressly rejecting the “independent economic value” test with the arguable advent of its own “issuance” test.⁸ According to the “independent economic value” test, multiple works that possess distinct and creative value independent of the larger work should be treated as separate works for the purpose of determining statutory damages.⁹ The issuance test, on the other hand, focuses on whether the copyright holder “issued its works separately, or together as a unit.”¹⁰ The songwriters appealed the judgment, but the Supreme Court denied certiorari,¹¹ missing an important opportunity to settle what surely has become an ever-present issue in today’s age of digital technology.

In the wake of the Court’s willful silence on the issue, at least two questions remain unanswered. First, which test best achieves the Copyright Act’s implicit goal of deterrence¹²—the Second Circuit’s issuance test or the more common “independent economic value” test? And secondly, in a time where copyright infringement of intellectual

at *1 (S.D.N.Y. Apr. 15, 2009) (stating that in addition to copyright infringement, the songwriters brought claims for trade dress violations, breach of fiduciary duty, breach of contract, and unjust enrichment).

⁶ Pursuant to 17 U.S.C. § 504(c)(1) (2006) of the Copyright Act, the copyright holder may elect to recover an award of statutory damages in lieu of actual damages, at any time prior to final judgment.

⁷ *Europadisk*, 2009 WL 1059777, at *7 (citing *Country Road Music, Inc. v. MP3.com, Inc.*, 279 F.Supp. 2d 325, 332 (S.D.N.Y. 2003)).

⁸ The term, issuance test, was first used in the plaintiff-petitioners’ petition for certiorari. Petition for Writ of Certiorari, *supra* note 1, at 9. But the defendant-respondents categorically deny the creation of such a test in their brief in opposition. Brief of Respondents in Opposition at 7, *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135 (2d Cir. 2010) (No. 10-415), 2010 WL 4278720.

⁹ *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116–18 (1st Cir. 1993); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) [hereinafter *Cases*]; see *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 295 (9th Cir. 1997), *rev’d on other grounds sub nom.* *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998).

¹⁰ *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 656 (2010).

¹¹ *Bryant v. Media Right Prods., Inc.*, 131 S. Ct. 656 (2010).

¹² H.R. REP. NO. 94-1476, at 5779 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045.

property is more rampant with the prevalence of the Internet, is it sound policy to leave the issue of statutory damage calculation unanswered?

This comment examines the two approaches to calculating statutory award damages under the Copyright Act of 1976. Part I begins with an overview of the Copyright Act, including the scope of said law prior to *Media Right* and a discussion of other decisions and rationales. Part II provides an analysis of the Second Circuit's holding by comparing and contrasting its rationale to that of prior case law. In Part III, I will outline and evaluate the implications of the Second Circuit's decision. Part IV will conclude this comment with an opinion on the Supreme Court's denial of the songwriters' petition for certiorari and the possible ramifications the Court's decision could have on copyright law.

I. INTERPRETATIONS OF 17 U.S.C. § 504(C) OF THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976 authorizes two ways in which a copyright holder may seek recovery for infringements upon its work: actual damages or statutory damages.¹³ If the holder elects statutory damages, recovery is available “for all infringements involved in the action, with respect to any one work.”¹⁴ More to the point, if the copyright holder elects a statutory damage award, damages could range anywhere from a minimum of \$250 to a maximum of \$10,000 for any *one* infringed work.¹⁵ Although the Copyright Act fails to provide a definition for what constitutes a “work,” the Act provides that “all the parts of a *compilation* or *derivative* work constitute one work,”¹⁶ where a compilation is defined as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”¹⁷

Even still, confusion remains as to what exactly Congress meant by “work” in drafting the Act. In an attempt to give full effect to the terms of the Act, courts have looked to the legislative history in interpreting the statutory damages provision of the Act.

¹³ 17 U.S.C. § 504(c)(1) (2006).

¹⁴ *Id.*

¹⁵ 17 U.S.C. § 504 (2006) (accessed through Westlaw's Editor's and Revisor's Notes under “Statutory Damages”).

¹⁶ 17 U.S.C. § 504(c)(1) (2006).

¹⁷ 17 U.S.C. § 101 (2006).

A. Legislative history of 17 U.S.C. § 504(c) of the Copyright Act of 1976

When the Copyright Act of 1976 replaced its predecessor, the Copyright Act of 1909, its primary goals were to update the law to address the new technological advances of the time, as well as to clarify some of the more ambiguous portions of the 1909 Act.¹⁸ One of the effects of the updated Act was to change the way in which statutory damages were calculated. Contrary to the 1909 Act, which allowed statutory damages for each individual infringement, the 1976 Act “shifts the unit of damages inquiry from number of infringements to number of works.”¹⁹

The legislative history of the Copyright Act of 1976 reads in relevant part:

2. . . . A single infringer of a single work is liable for a single amount . . . no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated or occurred in a related series . . .

3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded . . . Subsection (c)(1) makes clear, however, that, although regarded as independent works for other purposes, “all the parts of a compilation or derivative work constitute one work” for this purpose.²⁰

B. Case law interpreting the 17 U.S.C. § 504(c) of the Copyright Act of 1976 pre-*Media Right* and the “independent economic value” test

The lack of direction in the Copyright Act of 1976 left many circuit courts around the nation in search of the correct manner in which to interpret what exactly constitutes a “work.” Looking for a

¹⁸ See H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045. The House Report provides in pertinent part: “Since [1909] significant changes in technology have affected the operation of copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing uses of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future.”

¹⁹ *Twin Peaks Prods. v. Publ’ns Intern.*, 996 F.2d 1366, 1381 (2d Cir. 1993).

²⁰ H.R. REP. NO. 94-1476, at 162.

functional test to provide a framework for evaluating what qualifies as a “work,”²¹ the courts, whether inadvertently or purposely, mimicked one of the earliest decisions applying a form of the “independent economic value” test under the Copyright Act of 1909.²² In *Robert Stigwood Group Ltd. v. O’Reilly*, the Second Circuit held individual copyrights are not separate works unless they can “live their own copyright life.”²³

Even with the evolution of the jurisprudence, courts have continued to hold that separate statutory damage awards are permissible for “distinct viable works with separate economic value and copyright lives of their own.”²⁴ In 1990, the D.C. Circuit held that while Mickey Mouse (“Mickey”) and Minnie Mouse (“Minnie”) each constituted a separate “work” for the purpose of calculating statutory damages, the six different copyrighted poses of the characters were not.²⁵ The court, in applying the “independent economic value” test, found that Mickey and Minnie were indeed distinct, viable works with separate economic value and copyright lives of their own.²⁶ According to the court, the same could not be said for the six copyrighted poses of Mickey and Minnie. The court explained, “Mickey is still Mickey whether he is smiling or frowning, running or walking, waving his left hand or right.”²⁷

Similarly, in the 1993 case, *Twin Peaks Productions, Inc. v. Publications International Ltd.*,²⁸ the Second Circuit decided whether eight separately written teleplays of a television program constituted eight works or a single work.²⁹ The court, affirming the district court’s holding, concluded that the copyright holder was entitled to separate awards of statutory damages for each of the eight teleplays.³⁰

²¹ See *Cases*, *supra* note 9.

²² See Copyright Act of 1909, Pub. L. No. 60-349, §§ 6, 25, 35 Stat. 1077, 1081–82 (1909). *But see* 17 U.S.C. §§ 101, 103 (2006). Unlike its successor, which expressly provides that multiple infringements of one work by an individual infringer constitute only one statutory violation, the 1909 Act remained silent on the number of awards available for the infringement of a compilation.

²³ *Robert Stigwood Group, Ltd. v. O’Reilly*, 530 F.2d 1096, 1105 (2d Cir. 1976) (arising under the Copyright Act of 1909, the predecessor to the Act at issue, the Copyright Act of 1976).

²⁴ *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990).

²⁵ *Id.*

²⁶ *Id.* at 570.

²⁷ *Id.*

²⁸ It is debatable whether the court actually adopted the “independent economic value” test. While it can be argued that in practice the test was applied, the Second Circuit never discussed the test.

²⁹ *Twin Peaks Prods., Inc. v. Publ’ns Int’l Ltd.*, 996 F.2d 1366 (2d Cir. 1993).

³⁰ *Id.* at 1381.

The court explained that, “the author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next and hold the viewers’ interest without furnishing a resolution.”³¹

In that same year, the First Circuit, in *Gamma Audio & Video, Inc. v. Ean-Chea*, looked at whether four television episodes in a series sold together as a unit each constituted a separate work.³² At the district court level, the court held that the four episodes together constituted one “work” for two principle reasons: first, only complete sets of the television series were used, and second, each of the four episodes were registered on a single registration form.³³ On appeal, the First Circuit reversed the trial court and held that the four episodes each constituted a separate “work” for the purposes of determining statutory damages in spite of the single registration³⁴ and method of issuance. The court, noting that each episode was separately produced and that customers could rent and view the episodes individually or collectively, reasoned that “[a] distributor’s decision to sell or rent complete sets of a series to video stores in no way indicates that each episode in the series is unable to stand alone.”³⁵

In much the same way, the Ninth Circuit, in the 1997 case, *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*,³⁶ held that where different episodes were broadcast over an extended span of time, viewers could watch as few or as many episodes as they wanted, and the episodes could be replayed and broadcast in different orders. The episodes each constituted a separate work as each episode had an independent economic value.³⁷ A year prior to *Columbia Pictures*, the Eleventh Circuit rendered the same holding on a similar set of facts in *MCA Television Ltd. v. Feltner*.³⁸

³¹ *Id.*

³² *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993).

³³ *Id.* at 1117.

³⁴ *See id.* In regards to the district court treating the single registration form as one of the dispositive factors weighing in favor of finding only one work, the First Circuit stated, “there is simply no authority for drawing such an inference.” The court then distinguished the act of registration from the calculation of statutory damage awards. “[T]he copyrights in multiple works may be registered on a single form, and thus considered one work *for the purposes of registration*, . . . while still qualifying as separate ‘works’ for purposes of awarding statutory damages.”

³⁵ *Id.*

³⁶ *Columbia Pictures Television v. Krypton Broad. of Birmingham*, 106 F.3d 284, 295 (9th Cir. 1997).

³⁷ *Id.*

³⁸ *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996). The Eleventh Circuit held that each episode in a series broadcast is a separate work,
continued . . .

C. Case Law Interpreting § 504(c) pre-*Media Right* as Rejecting the “Independent Economic Value” Test

Not all case law pre-*Media Right* supported the “independent economic value” test. In fact, of the cases that rejected the test, a few even did so within the context of musical recordings.³⁹ Much of the case law originated in the Southern District Court of New York (“Southern District Court”). For example, in 2000, the Southern District Court in *UMG Recordings, Inc. v. Mp3.com, Inc.*, expressly rejected the test when considering whether to assess statutory damages for an album on a per-album or per-song basis.⁴⁰ In *UMG Recordings*, the Defendant internet company made entire albums available for online streaming as individual songs after it had ‘ripped’ those albums from Plaintiff recording label.⁴¹ The court, in response to the argument that each song on each infringed-upon CD should be awarded separate damages because each song had an independent economic value, concluded:

None of this is relevant in the face of the unequivocal statutory language . . . [I]t is hard to see the appropriateness of an “independent economic value” test to statutory damages—as opposed to actual damages, for which every copyright holder remains free to sue on a “per-song” other than “per-CD basis.” If such a test were applied, the result would be to make a total mockery of Congress’ express mandate that all parts of a compilation must be treated as a single “work” for the purposes of computing statutory damages, since as the House Report expressly recognizes, the copyrighted parts of a compilation will often constitute “independent works for other purposes.”⁴²

Three years later, the Southern District Court defended its prior

explaining that the copyright holder’s choice to sell the broadcast in a bundle rather than individually does not erase the fact that each episode in a series can stand alone.

³⁹ *TeeVee Toons, Inc. v. Mp3.com, Inc.*, 134 F. Supp. 2d 546 (S.D.N.Y. 2001); *UMG Recordings, Inc. v. Mp3.com, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000); *Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670(JBS), 2006 WL 842883 (D.N.J. Mar. 31, 2006); *see generally* *Country Road Music, Inc. v. Mp3.com, Inc.*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003).

⁴⁰ *UMG Recordings*, 109 F. Supp. 2d at 223–24.

⁴¹ *Id.* at 224–25.

⁴² *Id.* at 225 (quoting H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778, 1976 WL 14045).

rulings⁴³ that statutory damages should not be calculated on a per-song basis, but rather on a per-album basis, in *Country Road Music, Inc. v. Mp3.com, Inc.*⁴⁴ As it had done previously, the court cited to the House Report pertaining to Section 504(c)(1) and explained that the Congressional intent clearly indicated that even if a work is considered independent for other purposes, “all the parts of a compilation or derivative work constitute one work for the purposes of determining an award of statutory damages.”⁴⁵ Thus, each CD that has been infringed upon—in spite of the fact that it may have multiple copyrighted songs—constitutes one work for the purpose of calculating statutory damages. In 2006, the District of New Jersey court in *Arista Records, Inc. v. Flea World, Inc.*⁴⁶ adopted the reasoning of the Southern District Court’s *UMG* and *Country Road* holdings that the appropriate measure of statutory damage awards for musical recordings is per-album rather than per-song.⁴⁷

II. BRYANT V. MEDIA RIGHT PRODUCTIONS, INC.

In *Media Right*, the Second Circuit held that the text of the Copyright Act of 1976 clearly specifies that *all* parts of a compilation are entitled to only one award of statutory damages, where “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁴⁸ The court first determined that an album falls squarely within the Act’s purview of what constitutes a compilation, where an album is defined as “a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album.”⁴⁹ In so doing, the court explained that the term “compilation” encompassed collected works, that is—works in “which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective work.”⁵⁰ Thus, the court concluded that the statute’s plain language unambiguously provides that album infringement results in a single statutory damage award, regardless of whether each song

⁴³ *TeeVee Toons*, 134 F. Supp. 2d at 546; *see id.*

⁴⁴ *See Country Road*, 279 F. Supp. 2d at 332.

⁴⁵ *See id.* (citing H.R. REP. NO. 94-1476, at 162).

⁴⁶ *Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670(JBS), 2006 WL 842883 (D.N.J. Mar. 31, 2006).

⁴⁷ *Id.* at *22.

⁴⁸ *Bryant v. Media Right Prods.*, 603 F.3d 135, 141 (2d Cir. 2010) (citing 17 U.S.C. § 101 (2006)).

⁴⁹ *Id.* at 140–41.

⁵⁰ *Id.* at 140 (citing 17 U.S.C. § 101 (2006)).

receives a separate copyright.

A. Method of Issuance

In explaining its rationale, the Second Circuit drew a sharp distinction between its holding in *Media Right* and its holding in *Twin Peaks*. In *Twin Peaks*, the court held that the copyright holder was entitled to one award of statutory damages for each of the eight teleplays because the copyright holder chose to issue the works separately, as independent television episodes.⁵¹

The *Media Right* court first noted that in both cases, its primary focus was placed on “whether the . . . *copyright holder* [had] issued its works separately, or together as a unit.”⁵² In *Twin Peaks*, the copyright holder *chose* to issue each of the eight episodes sequentially, at different times.⁵³ In *Media Right*, the infringer took it upon himself to issue the songs separately, not the actual copyright holder—who issued the works as album compilations.⁵⁴ Thus, in looking at the method in which the *copyright holder* chose to issue its work, the court explained that in *Media Right*, the plain reading of the statute would restrict the statutory award to one for each album.⁵⁵

B. Rejection of the “independent economic value” test

In granting the songwriter-copyright holders limited statutory damages, the court expressly declined to use the “independent economic value” test. The court refused to recognize as dispositive the number of individual infringements from the individual songs, stating that a music album is a compilation and the statute clearly provides that a compilation (including its requisite parts) must be treated as a single work for the purposes of a statutory damages calculation. Further, after examining the text of the statute, the court found that the statute provided “no exception for a part of a compilation that has ‘independent economic value.’”⁵⁶

Acknowledging and subsequently refusing to take exception for the relative ease of copyright infringement in the digital age, the court stated:

We cannot disregard the statutory language simply because the digital music age has made it easier for

⁵¹ *Twin Peaks Prods. v. Publ’ns Int’l Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 2010).

⁵² *Media Right*, 603 F.3d at 141.

⁵³ *Twin Peaks*, 996 F.2d at 1381.

⁵⁴ *Media Right*, 603 F.3d at 141.

⁵⁵ *Id.*

⁵⁶ *Id.* at 142.

infringers to make parts of an album available separately. This interpretation of the statute is consistent with Congressional intent expressed in the Conference Report that accompanied the 1976 Act, which states that the one-award restriction applies even if the parts of the compilation are regarded as independent works for other purposes.⁵⁷

Thus, the court, in declining to use the “independent economic value” test, opted instead to adhere to a plain reading of the statute, holding that infringement of an album should result in only a single damage award where that album constituted a compilation within the meaning of the statute.⁵⁸

C. Petition for Certiorari

The petitioners-songwriters (“songwriters”) filed a writ for certiorari alleging that the Second Circuit created a circuit split in refusing to follow the rulings of the four circuits⁵⁹ that endorsed the “independent economic value” test.⁶⁰ According to the songwriters, the conflict is “especially critical” concerning musical recordings because of the all-encompassing nature of the Internet and the ease with which a potential infringer can distribute and sell individual songs.⁶¹

The songwriters argued that the appropriate rule should be that “where a copyright infringer chooses to make individual songs available for sale or distribution on the Internet separately from the album, the statutory damages should be calculated on a per-song rather than per-album basis.”⁶² Citing the “independent economic value” test, the songwriters explained that songs are distinct and separate creative works that have an economic value independent from the album.⁶³ Therefore, the songwriters argued that the songs should be treated as a separate work for the purposes of assessing statutory damage awards.

The songwriters argued that the Supreme Court should grant the

⁵⁷ *Id.* at 142 (citing H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778, 1976 WL 14045).

⁵⁸ *Id.*

⁵⁹ Petition for Writ of Certiorari, *supra* note 1, at 6. The petitioner-songwriters alleged that the Second Circuit failed to follow the authorities from the First, Ninth, Eleventh, and D.C. Circuits.

⁶⁰ *Id.*

⁶¹ *Id.* at 7.

⁶² *Id.*

⁶³ *Id.*

petition because (1) a circuit split had been created, (2) the Second Circuit's result contravened the Copyright Act, and (3) the issue was timely and important.⁶⁴

I. Creation of a Circuit Split

According to the songwriters, in affirming the lower court's holding that statutory damages under the Copyright Act are assessed on a per-album versus a per-song basis, the Second Circuit failed to follow the decisions of at least four other circuits that have held to the contrary.⁶⁵ Prior to *Media Right*, other circuits calculated statutory damage awards separately "where the constituent parts of a larger work [were] themselves distinct and 'viable' works with 'independent economic value.'"⁶⁶

Noting that the Copyright Act expressly authorizes a single statutory award "for all infringements involved in the action, with respect to any one work,"⁶⁷ but remains silent on what constitutes a "work," the songwriters cited and adopted the "functional"⁶⁸ working definition as implemented by other circuits⁶⁹ in the form of the "independent economic value" test. That is, a separate award of statutory damages is available where a distinct and viable work has a separate economic value and a copyright of its own.⁷⁰ The songwriters contend that the Second Circuit, although "acknowledging" the test, declined to follow it, choosing instead to follow an alternative method of assessing statutory award damages. This method, which the songwriters dubbed as a "form of issuance" test,⁷¹ "focused on whether the plaintiff—the copyright holder—issued its work separately, or together as a unit."⁷² In application, this test limits the

⁶⁴ *Id.* at iii.

⁶⁵ *Id.* at 6 (failing to follow authorities from the First, Ninth, Eleventh, and D.C. Circuits).

⁶⁶ *Id.*

⁶⁷ *Id.* at 7–8 (citing 17 U.S.C. § 504(c)(1) (2006)).

⁶⁸ *Id.* at 8 ("The test set forth in *Walt Disney* is a functional one, with the focus on whether each expression . . . has an independent economic value and is, in itself, viable." (quoting *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116–17 (1st Cir. 1993))).

⁶⁹ *See id.* The D.C. Circuit appears to have been one of the pioneers of the "independent economic value" test. The songwriters cite first to *Walt Disney* in establishing the "independent economic value" test, then list and briefly explain the holdings of the other three circuits that adopted the test.

⁷⁰ *Id.* at 8 (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 570 (D.C. Cir. 1990)).

⁷¹ *Id.* at 9. The songwriters, not the Second Circuit, originally referred to this alternative method of assessing statutory damages as a "form of issuance" test.

⁷² *Id.*

copyright holder’s award because it measures statutory awards on the basis of a per-album rather than per-song basis if the copyright holders issued their works as a compilation.⁷³

The songwriters argue that the Second Circuit’s implementation of this alternative test creates a circuit split with the First Circuit’s decision in *Gamma*, which rejected the notion that one copyright holder was entitled to only one statutory damage award for the infringement of four episodes out of a television series because the copyright holder issued the series as a single product.⁷⁴ The songwriters, aligning themselves with the First Circuit, argue that the songwriters decision to “distribute their songs as part of an album in no way indicates that each song is unable to stand alone.”⁷⁵

2. “Issuance Test” Contravenes the Copyright Act

The songwriters also argued that the Second Circuit’s rationale in adopting its “issuance test” falls outside the scope of the congressional intent of the Copyright Act. More specifically, the songwriters argue that Congress never intended the authorization of only one statutory award for: “(1) infringement of a compilation, plus (2) a *separate and discrete* infringement of one or more of the works included in the compilation”⁷⁶ where a compilation is defined as an “original selection, coordination, or arrangement of materials.”⁷⁷

While the songwriters conceded that the “single act of copying an entire album would support only one award of statutory damages,” they also asserted that separate and distinct infringements of that album should result in an additional award for each individual infringement.⁷⁸ Holding to the contrary would only lead to “absurd and unfair results.”⁷⁹ In support of its argument, the songwriters cited the following hypothetical⁸⁰ that the First Circuit provided in *Gamma*: “If the distributor of the *Rocky* series of motion pictures required video

⁷³ *Id.*

⁷⁴ *Id.* (citing *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 (1st Cir. 1993)).

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* at 11.

⁷⁷ *See id.* at 11 n.2 (citing 17 U.S.C. § 101 (2006)).

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 12.

⁸⁰ *See* Brief for Respondents in Opposition, *supra* note 8, at 15. In response to the songwriters’ *Rocky* hypothetical, the respondents, discounting it as “not compelling and distinguishable,” explained that the “case at bar involves musical albums produced as compilations – not separate movie series subsequently boxed together.”

stores to purchase all five of the movies, or alternatively, packaged the movies as a boxed set for resale, the five movies would not suddenly become one ‘work’ for the purpose of damages.”⁸¹ Stated another way, copyright holders should not be limited to a single statutory award simply because they choose to issue their work as part of a larger compilation of works.⁸²

3. *Timely and Important Issue*

Lastly, the songwriters sought to press the importance of the method of assessing statutory damage awards upon the court in highlighting the relative ease in which one can acquire music in the digital age.⁸³ In the midst of this new environment, the songwriters argued that copyright law must be clear and consistent, particularly the provisions governing the calculation of statutory damage awards. “Statutory damages are available in order to effectuate two purposes underlying the remedial purpose of the Copyright Act: to provide adequate compensation to the copyright holder and deter infringement.”⁸⁴

The songwriters argued that the Second Circuit’s opinion detracts from the Act’s deterrent value because an infringer who illegally copies a single album will not be held additionally liable for then distributing the individual songs on that album.⁸⁵

D. Respondents in Opposition

The production company-respondents (“Media Right”) rejected the songwriters’ arguments made in brief stating that the Second Circuit’s holding concerning the assessment of statutory damage awards was properly determined and did not necessarily diverge from decisions of the other U.S. Courts of Appeals. More specifically, Media Right argued that the use of the “independent economic value” test in the context of music albums contravenes the explicit language of the Copyright Act.⁸⁶

In so arguing, Media Right rejected the songwriters’ assertion that

⁸¹ Petition for Writ of Certiorari, *supra* note 4, at 12 (citing *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 n.9 (1st Cir. 1993)).

⁸² *Id.* at 13.

⁸³ *Id.* at 14. The evolution of digital technology has led to the decline of consumers purchasing music from an actual record store and the rise of digitally downloaded music from the Internet, both legally and illegally.

⁸⁴ *Id.* (citing *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1554 (9th Cir. 1989)).

⁸⁵ *Id.*

⁸⁶ Brief for Respondents in Opposition, *supra* note 8, at 1.

the Second Circuit created and applied a “form of issuance” test. Rather, Media Right contended that the Second Circuit interpreted the statutory language of the Copyright Act with the aid of the legislative history to hold that Congress was clear in providing for one statutory damage award measured on a per-album basis for music albums.⁸⁷ Because none of the other Circuits’ cases deal with musical recordings, Media Right argues those cases are both inapplicable and distinguishable from *Bryant*.⁸⁸ Media Right pointed out that courts handling cases involving musical recordings found similarly to the Second Circuit.⁸⁹

While Media Right conceded that the evolution of digital technology had made digital music more available on the Internet, Media Right—in agreement with the Second Circuit—declined to find this to be a compelling enough reason to ignore the Act’s plain language and unambiguous congressional intent.⁹⁰ Rather, Media Right, citing language from the Southern District Court of New York, concluded: “When Congress speaks, the courts must listen: so our constitution mandates. When, as here, Congress’ statement is clear, to disregard that message would be nothing less *than an unconstitutional arrogation of power by the judiciary*. The Court declines plaintiffs’ invitation to tread the treacherous path.”⁹¹

The Supreme Court denied the songwriters’ petition for certiorari.⁹² In so doing, the Court implicitly accepted the Second Circuit’s interpretation of the Copyright Act, which found that statutory award damages should be calculated on a per-album rather than per-song basis because an album falls within the Act’s definition of a “compilation.”

⁸⁷ *Id.* at 7.

⁸⁸ *Id.* at 8. The *Walt Disney* case arising from the Federal Circuit concerned the depiction of two cartoon characters. *Gamma, Columbia Pictures, and MCA Television* in the First, Ninth, and Eleventh circuits, respectively, concerned episodes that were a part of a television series.

⁸⁹ *Id.* at 12; *Country Road Music v. MP3.com, Inc.*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003); *TeeVee Toons v. MP3.com, Inc.*, 134 F.Supp. 2d 546 (S.D.N.Y. 2001); *Arista Records Inc. v. Flea World, Inc.*, 2006 WL 842883 (D. N.J. Mar. 31, 2006) (holding that the proper calculation of statutory damage awards for music albums is per-album, not per-track); see *UMG Recordings v. MP3.com, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000).

⁹⁰ Brief for Respondents in Opposition, *supra* note 8, at 16.

⁹¹ *Id.* at 16–17 (citing *UMG Recordings*, 109 F. Supp.2d at 225) (emphasis added).

⁹² *Bryant v. Media Right Productions, Inc.*, 131 S. Ct. 656 (2010).

III. EVALUATION

In the immediate wake of Court's certiorari denial, the practical and legal ramifications of the Court's silence concerning the assessment of statutory damage awards are unclear. The possible implications of the Court's denial are two-fold. While the Second Circuit's interpretation of the assessment of statutory damages concerning music albums was a correct reading of the Copyright Act's plain language, in practice such an interpretation can, and probably will, have the following negative policy implications: (1) forum shopping; and (2) minimizing the Act's deterrence goal, thereby promoting bad policy. In realizing the harmful implications of the continued application of an outdated provision, hopefully Congress will recognize the need for updated legislation.

A. Negative Policy Implications

The Supreme Court's denial of certiorari was a missed opportunity to settle the conflict in the Copyright Act's provision pertaining to the calculation of statutory award damages. According to the language of the Act, statutory damage awards are available for all damage infringements involved in the action, with respect to any one work where all parts of a compilation constitute one work.⁹³ The Act further provides that a compilation is "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."⁹⁴

The general consensus among other circuits that have decided this issue is that "because . . . songs are distinct creative works with economic value independent of the album, they should be treated as separate 'works' for the purpose of assessing statutory damages."⁹⁵

Therefore, because the Act provides that a court has the discretion of awarding damages of not less than \$750 or more than \$30,000 for all infringements with respect to one work,⁹⁶ a statutory award multiplied by the individual number of songs infringed could be almost ten times greater than an award that only takes into account the number of albums infringed. The natural consequence of such a huge disparity in the law is an almost open invitation to litigants to forum shop for the "best" jurisdiction in which to file their lawsuits, thus

⁹³ 17 U.S.C. § 504(c)(1) (2006).

⁹⁴ 17 U.S.C. § 101 (2006).

⁹⁵ Petition for Writ of Certiorari, *supra* note 1, at 7.

⁹⁶ *See* 17 U.S.C. § 504(c)(1).

decreasing the likelihood of litigants engaging in settlement discussions prior to trial.

While this incongruence does not necessarily encourage copyright infringement, it does not help further the remedial Copyright Act’s goal of deterrence. The Constitution provides Congress with the express authority to enact laws “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁹⁷ In furtherance of this Constitutional provision, Congress enacted the Copyright Act with a statutory damages provision to both compensate copyright owners and deter further infringement.⁹⁸

According to the Second Circuit, statutory damages for a music album are limited to a single award, regardless of whether the infringer sells and distributes digital copies of each individual song independent from the album.⁹⁹ The effect of such a holding is clear. If and when a prospective infringer comes to the realization that he or she would be held liable for only one statutory award, he or she may be likely to use a “cost-benefit analysis and determine whether infringing will be profitable even if they are caught.”¹⁰⁰ Therefore, if a business stood to make a \$1 million profit on an album that contained ten infringed songs with a cost of \$300,000 in statutory damages where each infringed song was valued at the statutory maximum of \$30,000, it would likely assess that the benefit of copyright infringement far outweighed the cost of statutory damages.¹⁰¹

The problem of this “cost-benefit analysis” is exacerbated when one takes into consideration the relative ease with which an infringer can sell, copy, and distribute individual digital downloads of songs in the digital age with the evolution of technology. In *Bryant*, Media Right was able to sell the songwriters’ albums as well as their individual songs online through its digital partners, which included Amazon.com and iTunes.¹⁰²

⁹⁷ U.S. CONST. art. I, § 8, cl. 8.

⁹⁸ See STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 102–03 (Comm. Print 1961).

⁹⁹ See *Bryant v. Media Right Productions*, 603 F.3d 135, 140 (2d Cir. 2010).

¹⁰⁰ Peter Thea, *Statutory Damages for the Multiple Infringement of a Copyrighted Work: A Doctrine Whose Time Has Come, Again*, 6 CARDOZO ARTS & ENT. L. J. 463, 489 (1988).

¹⁰¹ See generally *id.*

¹⁰² See Petition for Writ of Certiorari, *supra* note 1, at 4.

B. Need for Updated Legislation

After looking at both the Second Circuit's method and the other circuits' use of the "independent economic value" test in the context of both the evolving times and the Copyright Act, it becomes apparent that while the "independent economic value" test is a better measure for damages in the digital age, the Copyright Act—as written—does not provide for such a test in the context for music albums. A music album, which is a "collection of preexisting materials—songs—selected and arranged by the author in a way that results in an original work of authorship—the album," fits neatly within the purview of statutorily defined "compilation."¹⁰³ The express language of the Act provides that *all* parts of a compilation are properly treated as one work with no mention of an exception that would parse out separate damage awards based on "independent economic value." As the Second Circuit properly determined, "[b]ased on a plain reading of the statute, therefore, infringement of an album should result in only one statutory damage award. The fact that each song may have received a separate copyright is irrelevant to this analysis."¹⁰⁴

Considering the present text of the Copyright Act, the Second Circuit correctly held that since a music album constitutes a compilation, it must be treated as one work for the purposes of calculating statutory damages. This is not to say that this is the most logical assessment of statutory damages. Rather, as the songwriters pointed out, since digital music has been made available on the Internet, an increasing number of individuals acquire their music by illegally downloading digital copies of songs from the Internet.¹⁰⁵ Following the Second Circuit's reasoning, no additional statutory damages would be awarded if the infringer illegally copied an entire album, and subsequently distributed the individual songs from the album on the Internet. Under the "independent economic value" test, the infringers would be held liable for each individual song that has a separate economic value and a copyright life of its own, and statutory damages would be measured on a per-song rather than per-album basis.¹⁰⁶

Arguably, the "independent economic value" test indeed provides a viable remedy to the increasing trend of illegally downloading and distributing music on the Internet. While logical and praiseworthy, the language of the Copyright Act does not support such a test in the

¹⁰³ *Media Rights*, 603 F.3d at 140–41; *see also* 17 U.S.C. § 504(c)(1) (2006).

¹⁰⁴ *Media Rights*, 603 F.3d at 141.

¹⁰⁵ *See* Petition for Writ of Certiorari, *supra* note 1, at 13.

¹⁰⁶ *See id.* at 8.

context of music albums. The solution begins and ends with Congressional action. The courts are using an Act last amended in 1976 to address a more advanced and pervasive technology that was not in existence at the time the Act was passed. Just as when Congress updated the 1909 Act to adequately address the “wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds,”¹⁰⁷ Congress now needs to update key provisions within the Copyright Act to reflect the digital age’s effect on copyright infringement in order to preserve the deterrence goals of the remedial Act and provide adequate compensation to copyright holders.

IV. CONCLUSION

The jurisprudence concerning the calculation of statutory award damages has, until recently, assessed damages using the “independent economic value” test. The Second Circuit’s rejection of that test in the context of music albums in *Bryant v. Media Right Productions, Inc.*, coupled with the Supreme Court’s denial of the songwriters’ petition for certiorari raises several significant issues regarding the future of the Copyright Act and its method of assessing statutory damages in the digital age.

This comment recognizes the illogical nature of assessing statutory damage awards for music albums on a per-album basis when technology in the digital age has made it easier and more convenient to illegally download and distribute individual songs on the Internet. Such a method ultimately contravenes the Act’s goal of deterrence and could lead to forum shopping. However, complete abdication of the actual language of the Copyright Act in favor of applying the “independent economic value” test would likely result in bad policy and would be an overstretch of judicial authority. The only option lies, not with the judiciary, but rather with Congress. Only Congress can update the legislation to better and more accurately reflect the evolution of technology since the 1976 amendment of the Copyright Act. Until such a time, the law in the area of statutory damage awards will remain unsettled.

¹⁰⁷ H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045.