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Bryant v. Media Right Productions, Inc.

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In 2008, iTunes surpassed Walmart as the number one music retailer in the United States.¹ iTunes, Apple's online digital music store, offers a music catalogue of over thirteen million songs and has over fifty million customers.² Along with other online music retailers such as Rhapsody, eMusic, and Amazon.com, iTunes offers consumers the choice to purchase various artists' music online either by purchasing the entire music album or by purchasing individual songs. While the online availability of music has increased the number of consumers purchasing music, sales of individual songs often outnumber the sales of entire albums.³ For instance, in 2008, recording artist Katy Perry sold 2.2 million copies of her hit single "I Kissed A Girl," from her album titled *One of the Boys*, on iTunes; however, she sold only 282,000 copies of the album as a whole.⁴ As one commentator has noted, "[t]hat sort of single-to-album sales ratio simply never happened pre-iTunes."⁵

As a result of the wide availability of music online and the popularity of the MP3 player, music is now generally offered and marketed to consumers on a per-song basis. For instance, in 2009, Apple introduced iTunes's three-tiered pricing system for individual songs.⁶ Under this pricing system, iTunes offers the majority of its songs to consumers at \$0.99 per song, while the price of older songs was reduced to \$0.69 per song and the cost of new hit songs or popular songs was raised to \$1.29 per song. By implementing this three-tiered pricing system, "Apple and major music labels [were] betting that . . . the iTunes Music Store [would] boost music sales with a new mix of song-based packages and give consumers more options."⁷ In the world of copyright law, however, the song-based marketing of music creates some problems. When an album is registered with the U.S. Copyright Office, it is for many purposes considered one "work" under the U.S. Copyright Act of 1976 (the "Copyright Act").⁸ For instance, the Copyright Act provides that the infringement of one album, in its entirety, constitutes infringement of one "work." But what if someone breaks an album apart into its

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1. See Press Release, Apple, iTunes Store Top Music Retailer in the U.S. (Apr. 3, 2008), available at <http://www.apple.com/pr/library/2008/04/03iTunes-Store-Top-Music-Retailer-in-the-US.html>. iTunes became the largest music retailer in the United States based on the amount of music sold during January and February 2008. *Id.*
 2. See *id.* See generally *What Is iTunes?*, iTUNES, <http://www.apple.com/itunes/what-is/> (last visited Jan. 27, 2012).
 3. See Ethan Smith & Nick Wingfield, *More Artists Steer Clear of iTunes*, WALL ST. J., Aug. 28, 2008, at B1, available at <http://online.wsj.com/article/SB121987440206377643.html>.
 4. See Bryan Boyd, *iTunes Under Threat as Bands Take Their Business Elsewhere*, THE TELEGRAPH (Sept. 25, 2008, 12:01 AM), <http://www.telegraph.co.uk/culture/music/3561194/iTunes-under-threat-as-bands-take-their-business-elsewhere.html>.
 5. *Id.*
 6. See Yinka Adegoke, *iTune Tiered Pricing Goes Live*, WIRED (Apr. 6, 2009), http://www.wired.com/techbiz/media/news/2009/04/reuters_us_apple_itunes?currentPage=1.
 7. *Id.* (emphasis added).
 8. See 17 U.S.C. § 504(c) (2006).

constituent parts and distributes one, or three, or ten songs to consumers individually? Is this an infringement of one, three, or ten “works”? The unbundling of the album in today’s music industry begs an important legal question: Which is the “work”—the song or the album?

In *Bryant v. Media Right Productions, Inc.*, the U.S. Court of Appeals for the Second Circuit held that a music album, instead of each song on the album, constitutes one “work” for the purposes of calculating statutory damages under section 504(c) of the Copyright Act.⁹ This case comment contends that the Second Circuit erred in its analysis and overlooked the opportunity to adopt the independent economic value test and apply it to music. First, in applying Second Circuit precedent, the court focused its analysis on the artists’ choice to distribute their music in album form, rather than focusing on the defendants’ discrete acts of infringement of each individual song. Second, its narrow interpretation of section 504(c) of the Copyright Act frustrates the purpose of the statute where, as here, an album has been unbundled and its individual songs redistributed. Finally, the court overlooked the opportunity presented by *Bryant* to adopt the independent economic value test, which at least four other circuits follow.¹⁰ Had the court in *Bryant* adopted this test, it would have reached a decision that would better serve two of the main goals of the Copyright Act: to promote the progress and development of the arts and to protect those arts by deterring future infringers.¹¹ The Second Circuit’s holding in *Bryant*, in effect, precludes any copyright owner from obtaining statutory damages for the infringement of individual songs that are part of an album, unless those songs were also separately released, by the copyright owner, as singles. Adopting the independent economic value test, and applying it to music, would better promote the purpose of the Copyright Act while also keeping the Act in line with the new developments and technology that now dominate today’s music industry.

9. 603 F.3d 135 (2d Cir. 2010), *aff’g* Bryant v. Europadisk, Ltd., No. 07 Civ 3050(WGY), 2009 WL 1059777 (S.D.N.Y. Apr. 15, 2009).

10. See *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997); *MCA Television Ltd. v. Feltner*, 89 F.3d 766 (11th Cir. 1996); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993); *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990).

11. See U.S. CONST. art I, § 8 (granting Congress the 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”); 17 U.S.C. § 504 (2006) (granting copyright owners damages for the purpose of deterring future infringers when a copyright owner’s ‘exclusive right’ is infringed); see also Sarah A. Zawada, “Infringed” Versus “Infringing”: Different Interpretations of the Word “Work” and the Effect on the Deterrence Goal of Copyright Law, 10 MARQ. INTELL. PROP. L. REV. 129, 148 (2006) (stating that “the deterrence of prospective infringers” is one of the main goals of copyright law (citing *Schiffer Publ’g, Ltd. v. Chronicle Books, L.L.C.*, No. Civ. A 03-4962, 2005 WL 67077, at *4 (E.D. Pa. Jan. 11, 2005))). “Statutory damages serve the dual purpose of compensation and deterrence: they compensate the plaintiff for the infringement of its copyright, and they deter future infringements by punishing the defendant for its actions.” *Schiffer Publ’g*, 2005 WL 67077, at *4.

Anne Bryant¹² and Ellen Bernfeld,¹³ the appellants in the Second Circuit decision, are accomplished songwriters and owners of the record label Gloryvision, Ltd.¹⁴ In the late 1990s they produced two albums, entitled *Songs for Dogs* and *Songs for Cats*, each containing ten songs.¹⁵ Appellants registered each album, as well as the individual songs from the albums, with the U.S. Copyright Office.¹⁶ All of the songs were composed, arranged, performed, and recorded by the appellants and their record label, Gloryvision, Ltd.¹⁷ Appellants sold their albums in stores, by direct mail order, and through Amazon.com.¹⁸ The albums were sold as physical copies only, and each album was gift packaged and accompanied by a fully illustrated, colorful book.¹⁹ The appellants asserted that it was never their intention to make either the albums or the individual songs available to consumers in any electronic or digital form.²⁰

On February 24, 2000, appellants entered into a marketing agreement with Media Right Productions, Inc.²¹ (“Media Right”) to increase distribution of their

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12. Anne Bryant is a co-owner of Gloryvision, Ltd. *See Anne Bryant*, IMDb, <http://www.imdb.com/find?q=anne+bryant&cs=all> (last visited Feb. 2, 2012). She is a music and video producer and the composer/arranger of numerous enduring themes and songs including the *Jem* show theme and song score and the *Transformers* theme. *Id.* Anne also develops software and creates and edits music videos. *Id.*
 13. Ellen Bernfeld (also known as Norma Human) is a co-owner of Gloryvision, Ltd. *See Ellen Bernfeld*, IMDb, <http://www.imdb.com/name/nm0076739/> (last visited Feb. 2, 2012). She is a singer, songwriter, performance artist-producer, and the singing voice of “Pizzazz” from the *Jem* show and *Menage*, the 80’s Disco Queen. *Id.*
 14. *See Bryant*, 603 F.3d at 138.
 15. *See Bryant v. Europadisk, Ltd.*, No. 07 Civ 3050 (WGY), 2009 WL 1059777, at *2 (S.D.N.Y. Apr. 12, 2004), *aff’d sub nom. Bryant*, 603 F. 3d 135. Titles from *Songs for Dogs* include: “The No Song,” “If I Only Had a Thumb,” “I Stole the Christmas Pie,” “Please Don’t Forget My Birthday,” “The Very First Dog,” “Do the Doggie Salsa,” “I Been Cryin’ All Night Since You’re Gone,” “Follow the Bone Lady,” “Tomorrow’s Another Day,” and “Could You Be An Angel.” Song titles from *Songs for Cats* include: “I’m Sweetie the Gourmet,” “Curious x9,” “Oh, My Little Sushi,” “The Scat Cat,” “Watchin’ Purry Mason,” “I Pray For the World (A Christmas Prayer),” “Allergic To You,” “Catrina, the Ballerina,” “Where Will I Sleep Tonight,” and “I’m Purrfeet.” Complaint at 4–5, *Europadisk*, 2009 WL 1059777.
 16. *See Europadisk*, 2009 WL 1059777, at *2. There has been some discrepancy as to how many of appellants’ songs were actually registered individually. In *Bryant*, the Second Circuit decided the case on the assumption that the appellants registered each album, as well as each of the individual twenty songs from the albums, with the U.S. Copyright Office. *See* Petition for Writ of Certiorari at 3 n.1, *Bryant v. Media Right Prods., Inc.*, 131 S. Ct. 656 (2010) (No. 10–415), 2010 WL 3740540. Appellants’ petition to the Supreme Court states that the appellate record contains only eight copyright registrations out of the twenty songs on the albums. *Id.* However, Petitioners’ counsel represented that fourteen of the songs were individually copyrighted due to the fact that the copyright registrations for the albums themselves indicate that ten of the songs on *Songs for Cats* and four of the songs from *Songs for Dogs* had individual copyrights. *Id.*
 17. *See Europadisk*, 2009 WL 1059777, at *2.
 18. *See id.*
 19. *See id.*
 20. *See id.* “Gloryvision sold the albums in retail stores, by direct mail order, and through Amazon.com (in tangible form, not as digital downloads).” *Id.*
 21. Media Right is a successful music production company that deals with music in film, television, and advertising and works with clients such as Playboy Enterprises, The National Football League, and the

work.²² This agreement did not convey any intellectual property rights to Media Right, nor did it convey any authority to Media Right to manufacture or make either physical or digital copies of appellants' work.²³ The appellants supplied Media Right with all music Media Right was to distribute, in the form of physical copies, either on cassette tape or compact disc.²⁴

Twenty-three days before the agreement between appellants and Media Right went into effect, Media Right signed another agreement with Orchard Enterprises, Inc. (the "Orchard Agreement"). Orchard Enterprises, Inc. ("Orchard") is a distributor of physical and digital media, which it sells online.²⁵ Orchard also supplies third-party music vendors, such as iTunes, eMusic, Rhapsody, and MSN, with digital media for resale online.²⁶ According to the Orchard Agreement, Media Right authorized Orchard to distribute eleven CD titles mostly comprised of works created by Media Right. Notably, the Orchard Agreement also included the two albums produced by the appellants, *Songs for Dogs* and *Songs for Cats*.²⁷ Thus, without the approval of appellants, Media Right entered into the Orchard Agreement and granted Orchard the "non-exclusive rights to sell, distribute and otherwise exploit any and all of [Media Right's] [r]ecordings by any and all means and media . . . including . . . but not limited to, those via the Internet, as well as all digital storage, download and transmission rights."²⁸

In 2006, appellants became aware that Amazon.com had *Songs for Dogs* and *Songs for Cats* available for purchase on its website. However, Media Right and Orchard were listed as the artist and the record label instead of Anne Bryant and Ellen Bernfeld.²⁹ No credit was given to Bryant, Bernfeld, or Gloryvision, Ltd. Upon further investigation, appellants found that both albums, as well as the individual songs from each album, were available to consumers for purchase on several online music sites, including iTunes and Rhapsody.³⁰ Rhapsody even offered consumers free

New York Mets. *See About, MEDIA RIGHT PRODUCTIONS*, <http://www.mediarightproductions.com/about.htm> (last visited Jan. 27, 2012).

22. *See Europadisk*, 2009 WL 1059777, at *2.

23. *See id.*

24. *See id.*

25. Orchard Enterprises, Inc. is a multi-million dollar marketing and distribution company specializing in music and video entertainment. Orchard is headquartered in New York and London with twenty-five offices worldwide. *See About, THE ORCHARD*, <http://www.theorchard.com/about> (last visited Jan. 27, 2012).

26. *See Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 138 (2d Cir. 2010).

27. *See Europadisk*, 2009 WL 1059777, at *3.

28. *Id.*

29. *See id.*

30. *Id.*

streaming access to some of the songs as part of an introductory offer to join.³¹ Again, appellants were not credited.³²

In April 2007, appellants filed suit against Media Right and Orchard in the U.S. District Court for the Southern District of New York, alleging direct and contributory copyright infringement³³ and requesting statutory damages.³⁴ The district court held that both Media Right and Orchard had committed direct copyright infringement by selling unauthorized digital copies of appellants' albums and individual songs.³⁵ According to the district court, however, each album, rather than each song, constituted one "work" under section 504(c) of the Copyright Act.³⁶

In October 2009, appellants appealed the decision of the district court to the U.S. Court of Appeals for the Second Circuit Court of Appeals arguing that, among other things, the district court erred in refusing to grant a separate statutory damage award for each song infringed on both of the albums.³⁷ Relying on decisions from the D.C., First, Ninth, and Eleventh Circuits, the appellants argued that the district court should have determined statutory damages by applying the independent economic value test.³⁸

The independent economic value test provides "that a work that is part of a multi-part product can constitute a separate work for the purposes of [calculating]

31. *Id.*

32. *Id.* at *2.

33. *Id.* at *1.

34. *Id.* at *6.

35. *Id.* at *4–6.

36. *Id.* at *7; *see also* 17 U.S.C. § 504(c) (2006). Subsection (c)(1) allows for statutory damages to be not less than \$750 or more than \$30,000, as the court considers just, per each infringed work. 17 U.S.C. § 504(c)(1). Subsection (c)(2) states that if the court finds "that infringement was committed willfully," the court may increase statutory damages up to \$150,000 per infringement. If, however, the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of the copyright," the court may reduce the statutory damages to as little as \$200 per infringement. 17 U.S.C. § 504(c)(2). In *Europadisk*, the plaintiffs had the burden of proving that the infringement was willful while Media Right and Orchard had the burden of proving that their infringement was innocent. The district court found that Orchard's infringement was innocent in nature because they proved they were unaware that Media Right did not have full rights to appellants' music. *See Europadisk*, 2009 WL 1059777, at *7. Therefore, the district court reduced Orchard's statutory damages from \$750 to \$200 for the infringement of each album, for a total of \$400. *Id.* at *9. Although Media Right was unable to prove that its infringement was innocent, appellants were unable to prove that Media Rights' infringement was willful. *Id.* Accordingly, the court required that Media Right pay \$1,000 for the infringement of each album for a total of \$2,000. *Id.* at *9–10. As far as profits from the infringement of appellants' music, Orchard made a total of \$578.91 in profits from both physical and digital sales of the albums and the individual songs. Of that amount, \$413.82 was to go to Media Right and they were to turn over \$331.06 to appellants, pursuant to the terms of their agreement. *Id.* at *4.

37. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010). Appellants also argued that the district court erred in its findings regarding the intent of both Media Right and Orchard as well as in determining the amount of statutory damages. *See id.*

38. *Id.* at 141–42.

statutory damages if it has ‘independent economic value and . . . is viable.’”³⁹ Furthermore, due to the Copyright Act’s requirement that “works” must be registered prior to the act of infringement to qualify for statutory damages,⁴⁰ courts have held that individual works that are not separately registered, regardless of their independent economic value, will not be eligible for separate awards of statutory damages.⁴¹ Thus, according to the independent economic value test, a separately registered work that is part of a multi-part work can be subject to separate statutory damages if it has its own economic value and can stand on its own. Appellants argued that Media Right and Orchard should be liable for damages on a per-song basis because the two companies, without authorization, split appellants’ two albums apart into each album’s individual and copyrighted parts (i.e., the songs).⁴² Appellants argue that the individual songs on the albums were registered, written, composed, and arranged separately and, therefore, each constituted one “work” because each had independent economic value, highlighted by the fact that Media Right and Orchard sold the songs individually on iTunes.⁴³

In April 2010, the Second Circuit affirmed the district court’s ruling. The circuit court found appellants’ argument to be unpersuasive, stating that

39. *Id.* at 141. (second alteration in original) (quoting *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116–17 (1st Cir. 1993)).

40. *See* 17 U.S.C. § 412 (2006).

Registration as prerequisite to certain remedies for infringement. In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for—

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Id.

41. For instance, in *Phillips v. Kidsoft, L.L.C.*, No. CCB-96-3827, 1999 U.S. Dist. LEXIS 16564 (D. Md. Feb. 17, 1999), the U.S. District Court of Maryland found that thirty individual mazes, published by plaintiff in five books, did not qualify for individual awards of statutory damages because they were not separately copyrighted. *See id.* at *16. The district court in *Phillips* stated that “[i]n order to qualify as a separate ‘work’ under section 504(c)(1) . . . each maze at a minimum would have to be separately copyrighted and have an ‘independent economic value.’” *Id.* at *15. Similarly, in *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992), the Fifth Circuit held that 232 maps created and sold by plaintiff, individually and as sets, were not eligible for separate awards under § 504(c)(1) because they were not individually copyrighted and, therefore, could not have “independent economic value.” *See id.* at 144.

42. *See* Petition for Writ of Certiorari at 11, *Bryant v. Media Right Prods., Inc.*, 131 S. Ct. 656 (2010) (No. 10-415), 2010 WL 3740540.

43. *See id.*

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[the] Court has never adopted the independent economic value test, and we decline to do so in this case. The [Copyright] Act specifically states that all parts of a compilation must be treated as one work for the purpose of calculating statutory damages. This language provides no exception for a part of a compilation that has independent economic value, and the Court will not create such an exception.⁴⁴

In narrowly interpreting on the text of the Copyright Act, the district court found that appellants' albums were considered "compilations" under the Copyright Act and, therefore, each album constituted one "work" for the purposes of calculating statutory damages.⁴⁵ The Second Circuit affirmed the district court's decision and awarded statutory damages for each album infringed.⁴⁶

This case comment contends that the Second Circuit in *Bryant* erred in calculating statutory damages on a per-album basis. First, the court relied on reasoning from prior decisions of the Second Circuit, and from its district courts, that focused on plaintiffs' choice to distribute the music in album form instead of correctly focusing on the discrete infringement of each individual song in *Bryant*. Second, the circuit court's analysis of section 504(c) of the Copyright Act is inapposite when applied to the facts in *Bryant* because the circuit court, again, failed to recognize Media Right's and Orchard's discrete infringement of each individual song when the defendants unbundled the appellants' two albums into their constituent parts and sold them on a per-song basis without authorization. By narrowly construing the text of the Copyright Act, the court's decision in *Bryant* frustrates the purpose of the Act, which is to promote the progress and development of the arts by deterring future infringers. Finally, the court's decision in *Bryant* ignores a trend of cases in the D.C., First, Ninth, and Eleventh Circuits employing the independent economic value test. These circuits have applied the test to works that are part of a multi-part product and can stand on their own because the works are separately registered and have independent economic value. Had the Second Circuit applied the independent economic value test in *Bryant* it would have better accounted for the changes in media technology and the online music industry's focus on single song sales, and therefore would have more effectively promoted the purpose of the Copyright Act.

When a registered copyright⁴⁷ is infringed, the copyright owner may choose to recover statutory damages, instead of actual damages, under section 504(c) of the Copyright Act.⁴⁸ Courts have enjoyed wide discretion in calculating and awarding

44. *Bryant*, 603 F.3d at 142 (footnote omitted).

45. *See id.* at 140–42.

46. *Id.* at 138. The Second Circuit also held that the district court did not commit clear error in finding that appellants had failed to prove willfulness and that Orchard had proven its innocence and that damages were correctly calculated. *See id.*

47. *See* 17 U.S.C. § 412 (2006) (requiring copyright registration as a prerequisite for the remedy of statutory damages in infringement actions).

48. *See id.* § 504(c); *see also* 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), available at <http://hdl.handle.net/2027/mdp.39015008914338>.

statutory damages.⁴⁹ Pursuant to the Copyright Act, a court may award statutory damages of no less than \$750 or no more than \$30,000, “as the court considers just” for “all infringements” of each “work” infringed and involved in the litigation.⁵⁰

The Copyright Act fails, however, to define the term “work,” which has led to different interpretations of what constitutes a “work” under the Act.⁵¹ Some courts have stated that a “work” is an expression that is “viable”⁵² or, in other words, can “live

The need for this special remedy arises from the acknowledged inadequacy of actual damages and profits in many cases:

- The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible and prohibitively expensive to prove.
- In many cases, especially those involving public performances, the only direct loss that could be proven is the amount of a license fee. An award of such an amount would be an invitation to infringe with no risk of loss to the infringer.
- The actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.
- An award of the infringer’s profits would often be equally inadequate. There may have been little or no profit, or it may be impossible to compute the amount of profits attributable to the infringement. Frequently, the infringer’s profits will not be an adequate measure of the injury caused to the copyright owner.

Id.

49. *See* Fitzgerald Publ’g Co. v. Baylor Publ’g Co., 807 F.2d 1110, 1116 (2d Cir. 1986).

50. 17 U.S.C. § 504(c)(1).

51. As one commentator has stated,

generally speaking the work is almost always taken as a given, at least in the liability phase. The one area of law where the absence of a statutory definition of a ‘work’ has challenged courts is in damage calculations, because [§ 504(c) of the Copyright Act] affords statutory damages based on the infringement of each work.

Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 622 (2005); *see also* Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?*, 58 *UCLA L. REV.* 1175, 1175–76 (2011) (“To begin, it strikes me as curious that a law, copyright, whose constitutional source puts its emphasis on ‘Writings,’ not ‘Authors,’ and whose governing statute extends its protection to ‘original works of authorship,’ nowhere in fact delimits the metes and bounds of a copyrighted work, or even prescribes a methodology for locating a work’s boundaries. Copyright law’s well-known idea-expression distinction may be highly indeterminate, but the statute at least provides markers to aid in the rule’s application. By contrast, the statute offers no guide to the boundaries of a copyrighted work, and, indeed, in one important place [§ 504(c)(1)], the statute expressly directs courts to ignore every legal commonsensical understanding of what a copyrighted work might be.” (footnotes omitted)).

52. *See* MCA Television Ltd. v. Feltner, 89 F.3d 766, 769 (11th Cir. 1996) (“The circuits that have defined ‘work’ have held that ‘separate copyrights are not distinct works unless they can live their own copyright life.’ This test focuses on whether each expression has an independent economic value and is, in itself, viable.” (citations omitted) (internal quotation marks omitted)); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) (“[I]n order to qualify for a separate minimum award, the work which is the subject of a separate copyright would have to be in itself . . . viable” (alteration in original) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14-04[E] at 14-40.13 (1989)) (internal quotation marks omitted)).

[its] own copyright life”⁵³ and has its own independent economic value.⁵⁴ Some commentators have stated that copyright registration alone indicates that an expression qualifies as a “work” under the Copyright Act.⁵⁵

Section 504(c)(1) of the Copyright Act states that “[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.”⁵⁶ While the Copyright Act does not provide a definition for the word “work,” the word “compilation” is given an expansive definition in the Act and “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.”⁵⁷ The definition of “compilation” also includes “collective works,” which is defined as “a work . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”⁵⁸ To further illustrate what constitutes a “collective work,” the Act lists examples “such as a periodical issue, anthology, or encyclopedia.”⁵⁹ Relying on the text of the Copyright Act, the Second Circuit in *Bryant* concluded that appellants’ albums fell under the Copyright Act’s definition of compilation and, therefore, each album, not each song, was considered one “work” for the purposes of calculating statutory damages. Instead, *Bryant* should have applied the independent economic value test. The application of the test to the facts of this case would have created a rule that was in line with the current state of the music industry while also deterring future infringers.

First, the *Bryant* court, instead of focusing on the discrete infringement of appellants’ individual “works” (i.e., the songs), improperly emphasized the form in which appellants chose to release their songs. In holding that statutory damages should be calculated on a per-album basis, the court stated that because appellants

53. Robert Stigwood Grp. Ltd. v. O’Reilly, 530 F.2d 1096, 1105 (2d Cir. 1976) (explaining that separate copyrights are not distinct works unless they can “live their own copyright life”).

54. See *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993) (explaining that the test to determine whether statutory damages should apply to individual works focuses “on whether each expression has an independent economic value”); *Walt Disney Co.*, 897 F.2d at 565 (explaining that while Mickey and Minnie are distinct, viable works, six different poses of the two characters only constituted two separate “works” under § 504(c)(1) because the different poses lacked “separate economic value”); *Phillips v. Kidsoft, Inc.*, No. CCB-96-3827, 1999 U.S. Dist. LEXIS 16564, at *15 (D. Md. Feb. 17, 1999) (“In order to qualify as a separate ‘work’ under section 504(c)(1) . . . each [work] at a minimum would have to be separately copyrighted and have an ‘independent economic value.’”).

55. See *Goldstein*, *supra* note 51, at 1176–78 (explaining that the “reflexive answer to the question, what constitutes a copyrighted work, is that the work is whatever the author says it is,” and, therefore, “registration offers a first—and usually final—approximation of the author’s intentions” as to what qualifies as a “work”); see also *Hughes*, *supra* note 51, at 634 (“[R]eference to copyright registration may be particularly appealing when the registration occurred well before litigation. In such circumstances, among alternative conceptions of the work, we can choose the conception the copyright owner chose.”).

56. 17 U.S.C. § 504(c)(1) (2006).

57. *Id.* § 101.

58. *Id.*

59. *Id.*

released the individual songs on *Songs for Dogs* and *Songs for Cats* in album form—a music album falls under the Act’s definition of “compilation”—the Copyright Act mandates that damages must be calculated on a per-album basis.⁶⁰ However, the court fails to acknowledge Media Right’s and Orchard’s unbundling of the albums into their individual component songs and discrete infringement of appellants’ work. To support its holding, the court in *Bryant* examined prior decisions within the Second Circuit. The holdings in these cases, however, were not dependent upon whether plaintiffs released their copyrighted works “separately, or together as a unit,” as the *Bryant* court suggests.⁶¹ Rather, these cases were dependent upon the discrete infringement by the defendants who, in both instances, took plaintiffs’ individual works and created unauthorized compilations of their own.

In *Bryant*, the Second Circuit focused on the fact that it was, after all, appellants’ choice to release the songs on *Songs for Dogs* and *Songs for Cats* in album form, rather than individually.⁶² The court found that a copyright owner’s choice to issue “its works separately or together as a unit” is dispositive as to whether the individual works or the unit will constitute the infringed “work” and, therefore, qualify for separate awards of statutory damages.⁶³ The court relied on two previous Second Circuit decisions, *Twin Peaks Productions, Inc. v. Publications International, Ltd.*⁶⁴ and *WB Music Corp. v. RTV Communications Group, Inc.*,⁶⁵ stating that “[i]n both decisions, we focused on whether the plaintiff—the copyright holder—issued its works separately, or together as a unit.”⁶⁶ However, this reading is misleading because it attempts to define a copyrighted “work” by looking at what the author issues to the public, instead of what the author originally intended the “work” to be.

In *Twin Peaks*, the defendant published a book, entitled *Welcome to Twin Peaks: A Complete Guide to Who’s Who and What’s What*, based on the first eight episodes of *Twin Peaks*.⁶⁷ *Twin Peaks* was a television series that carried out one basic plot (Who killed Laura Palmer?) throughout its entire first season.⁶⁸ The defendant conceded that each of the eight episodes was individually registered with the U.S. Copyright Office but argued that together they constituted one work for the purposes of section 504(c) of the Copyright Act.⁶⁹ The defendant’s argument was that each episode qualified as one constituent part of a larger “work”: the entire *Twin Peaks* series. The

60. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010).

61. *Id.* at 141.

62. *See id.* (“[I]t is the copyright holders who issued their works as ‘compilations’; they chose to issue Albums.”).

63. *Id.*

64. 996 F.2d 1366 (2d Cir. 1993).

65. 445 F.3d 538 (2d Cir. 2006).

66. *Bryant*, 603 F.3d at 141.

67. *Twin Peaks*, 996 F.2d at 1370.

68. *Id.* at 1381.

69. *Id.*

Second Circuit disagreed stating, “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.”⁷⁰ The Second Circuit in *Twin Peaks* affirmed the district court’s award of damages for each of the eight episodes infringed.

Similarly, in *WB Music*, WB Music Corp. owned the copyrights to thirteen individual musical compositions.⁷¹ Defendant, RTV Communications Group, Inc. (“RTV”), created and distributed copies of seven CDs containing the thirteen musical compositions owned by WB Music.⁷² Based on the assumption that each of the seven CDs distributed by RTV constituted a “compilation” under section 504(c) of the Copyright Act, the district court granted seven awards of statutory damages.⁷³ The Second Circuit reversed the district court’s decision to award WB Music statutory damages on a per-album basis and instead granted thirteen awards of statutory damages, one for each of WB Music’s infringed musical compositions.⁷⁴ The circuit court stated:

As in *Twin Peaks*, there is no evidence here that any of the separately copyrighted works were included in a compilation authorized by the copyright owners. Rather, the compilations were created by the defendants. . . . Each of the plaintiffs’ separate copyrighted works constitutes one work for purposes of § 504(c)(1), and accordingly the defendants’ infringement of thirteen copyrights by copying thirteen songs onto seven distinct CD products warrants thirteen statutory damage awards.⁷⁵

The Second Circuit’s decision in *Bryant* erroneously relied on *Twin Peaks* and *WB Music* in mandating that statutory damages should be calculated on a per-album basis. Neither decision heavily relied on how each party chose to distribute their works. Instead in both *Twin Peaks* and *WB Music*, the Second Circuit’s decisions to award damages on a per-episode or per-composition basis, were dependent upon what exactly was infringed. In *Twin Peaks*, the infringement was of *eight individual scripts*. In *WB Music*, the infringement was of *thirteen individual musical compositions*. Likewise, in *Bryant*, the infringement was of *twenty individual songs*. There is little discussion, in either *Twin Peaks* or *WB Music*, regarding those plaintiffs’ decisions to distribute their work. Instead, the discussion focused on the infringers’ choices to create compilations, the book in *Twin Peaks* and the album in *WB Music*, by combining the plaintiffs’ individual works into unauthorized compilations. Furthermore, in *Twin Peaks*, the court dismissed the defendant’s contention that, because the episodes were part of a *single* television series, the individual episodes

70. *Id.*

71. 445 F.3d 538, 539 (2d Cir. 2006).

72. *Id.*

73. *Id.* at 540.

74. *Id.* at 541.

75. *Id.*

should be considered one “work” for the purposes of calculating statutory damages.⁷⁶ In fact, it is the court’s dismissal of this argument in *Twin Peaks* that has served as a starting point for courts that have adopted the independent economic value test.⁷⁷

The Second Circuit in *Bryant* also cited three district court cases involving the infringement of music albums, stating that “[t]he few district courts that have considered whether a compilation is subject to only one statutory damage award have reached the same conclusion,” that statutory damages should be calculated on a per-album basis.⁷⁸ Yet, unlike in *Bryant*, the cited district court cases did not involve infringements of individual songs; the cases involved, instead, the infringement of entire albums only. For instance, in *UMG Recordings, Inc. v. MP3.com, Inc.*,⁷⁹ defendants copied tens of thousands of CDs, in which UMG Recordings owned copyrights, onto its servers to allow subscribers to listen to the CDs through their “My.MP3.com” service.⁸⁰ In order to listen to any of the recordings, a subscriber had to “either ‘prove’ that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer . . . or . . . purchase the [entire] CD from one of defendant’s cooperating online retailers.”⁸¹

These facts are distinguishable from the facts in *Bryant*, where the infringers unbundled the albums and redistributed the songs individually. In fact, the plaintiffs in *UMG* did not allege infringement of their individual songs—only of the albums—until it was time for the district court to award statutory damages.⁸² In determining that plaintiffs would be awarded damages on a per-album basis, the district court in *UMG* emphasized “plaintiffs’ own assertion that what the defendant actually copied were the *complete CDs*.”⁸³ Thus *UMG* is inapposite to the facts of *Bryant*.

76. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993).

77. *See, e.g.*, *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993). In determining that separate episodes of a television series constitute individual “works” for the purposes of statutory damages, the First Circuit began its discussion by stating, “Our discussion is guided by the Second Circuit’s recent decision in *Twin Peaks* The Second Circuit found that *Twin Peaks* was an easy case, and that the eight teleplays or televised episodes clearly constituted eight separate works.” *Id.*

78. *See Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670, 2006 WL 842883 (D.N.J. Mar. 31, 2006) (holding that statutory damages for counterfeit tape cassettes and CDs sold at a New Jersey flea market would be calculated on a per-album basis); *Country Road Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003) (holding that where a music album is infringed, and plaintiffs do not allege infringement of individual songs, statutory damages should be awarded on a per-album basis); *UMG Recordings, Inc. v. MP3.com, Inc. (UMG II)*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000) (holding that where a music album is infringed, and plaintiffs do not allege infringement of individual songs, statutory damages should be awarded on a per-album basis).

79. *See UMG II*, 109 F. Supp. 2d at 223 (denying plaintiff’s motion to have statutory damages calculated on a per-song basis); *UMG Recordings, Inc. v. MP3.com, Inc. (UMG I)*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (granting partial summary judgment motion in favor of plaintiffs for defendants’ infringement of CDs).

80. *UMG I*, 92 F. Supp. 2d at 350.

81. *Id.*

82. *UMG II*, 109 F. Supp. 2d at 224.

83. *Id.* at 225 (emphasis added).

The district court in *UMG* did not see the “appropriateness” of applying the independent economic value test to music, stating that to do so would “make a total mockery of Congress’ express mandate that all parts of a compilation must be treated as a single ‘work’ for purposes of computing statutory damages.”⁸⁴ In a case like *UMG*, where the infringement was of the entire compilation only, the independent economic value test may not have been appropriate. Notably, the district court’s determination in *UMG* of the “appropriateness” of using the independent economic value test in music cases was made a full ten years before the Second Circuit’s decision in *Bryant* and a year before Apple released iTunes.⁸⁵ The landscape of the music distribution industry had yet to transform into one dominated by online retailers and individual song sales.

Additionally, the court in *Bryant* cited two cases involving the infringement of photographs and clip art.⁸⁶ In *Stokes Seeds Ltd. v. Geo. W. Park Seed Co.*,⁸⁷ a Western District of New York case, Stokes Seeds Limited (“Stokes”) commenced an action requesting a declaratory judgment as to whether their drawings infringed a copyright registration owned by Geo. W. Park Seed Co., Inc. (“Park”). Stokes was found to have infringed the individual photographs printed in two books published by Park when they sold seed packets with line drawings copied or derived from Park’s photographs.⁸⁸ While Park had copyright registrations for each book, separate copyright registrations were not obtained for the individual photographs published therein.⁸⁹ The district court held that Park’s books were compilations as defined by the Copyright Act and, therefore, Park would be granted only one award of statutory damages—for the book—instead of one award for each individual photograph infringed.⁹⁰ In *Xoom, Inc. v. Imageline, Inc.*,⁹¹ a Fourth Circuit case, the appellees infringed individual clip art images from two CD-ROM products distributed by the appellants.⁹² While each CD-ROM was registered with the U.S. Copyright Office, each individual piece of clip art stored on either CD-ROM was not.⁹³ The Fourth

84. *Id.*

85. See Press Release, Apple, Apple Introduces iTunes—World’s Best and Easiest to Use Jukebox Software (Jan. 9, 2001), available at <http://www.apple.com/pr/library/2001/01/09Apple-introduces-itunes-worlds-best-and-easiest-to-use-jukebox-software.html>.

86. See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 141 n.6 (2d Cir. 2010) (citing *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003); *Stokes Seeds Ltd. v. Geo. W. Park Seed Co.*, 783 F. Supp. 104 (W.D.N.Y. 1991)).

87. 783 F. Supp. 104 (W.D.N.Y. 1991).

88. See *id.* at 106.

89. *Id.*

90. See *id.* at 107–08 (“Accordingly, Park has but one protected property—the book—and thus is not entitled to 122 separate damage awards corresponding to the individual photographs Stokes copied from the book.”).

91. 323 F.3d 279 (4th Cir. 2003).

92. See *id.* at 282.

93. See *id.* at 281.

Circuit held that, under the Copyright Act, CD-ROMs qualified as “compilations.” Therefore, as in *Stokes*, the Fourth Circuit in *Xoom* held that appellants would be granted only two awards of statutory damages—one for each CD-ROM—instead of one award of statutory damages for each clip art image infringed.⁹⁴

While both of these cases are similar to *Bryant* in that there was discrete infringement of a multi-part product, the Second Circuit in *Bryant* failed to make an important distinction: unlike the songs in *Bryant*, the individual works in both *Stokes* and *Xoom*, i.e., the photographs in *Stokes*, and the clip art images in *Xoom*, were not separately registered with the U.S. Copyright Office. In order for a copyrighted work to qualify for statutory damages, regardless of whether one is relying on the independent economic value test or not, the work must be registered with the U.S. Copyright Office.⁹⁵ The Second Circuit’s second error was its narrow interpretation of the text and legislative history of the Copyright Act in a way that undermines the purpose of the statute, especially in light of the unbundling of the appellants’ two albums and the defendants’ infringement of the individual songs.⁹⁶ Section 504(c) of the Copyright Act allows for one award of statutory damages for each “work” infringed and states, “[f]or the purposes of this subsection, all the parts of a compilation or derivate work constitute one work.”⁹⁷ In *Bryant*, the Second Circuit supports its finding that an album falls under the Copyright Act’s definition of “compilation” by looking to the Act’s legislative history.

The House Report that accompanied the Copyright Act states that “a ‘compilation’ results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright.”⁹⁸ The House Report also states that “[s]ubsection [504] (c)(1) [of the Copyright Act] makes clear . . . that, although they are regarded as independent works for other purposes, ‘all the parts of a compilation or derivative work constitute one work’ for this purpose.”⁹⁹ The Second Circuit then concluded: “Based on a plain reading of the statute . . . 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.”¹⁰⁰

The court’s reasoning in *Bryant* makes clear that, under the text of the Copyright Act and its legislative history, when a compilation, in this case an album, is infringed *in its entirety*, the infringer will be liable for one award of statutory damages. Appellants even conceded this point in their petition for certiorari to the U.S.

94. *Id.* at 285.

95. *See supra* note 52–53 and accompanying text.

96. *See Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140–42 (2d Cir. 2010)

97. 17 U.S.C. § 504(c)(1) (2006).

98. H.R. REP. NO. 94-1476, at 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

99. *Id.* at 162.

100. *Bryant*, 603 F.3d at 141.

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Supreme Court.¹⁰¹ In *Bryant*, however, *Songs for Dogs* and *Songs for Cats* were not only sold as *albums* by the defendants and therefore infringed in their entirety, but also unbundled and transformed into twenty separate works, with the *individual songs* sold by the defendants.¹⁰² For this reason, the actions of Media Right and Orchard should not be limited to only two awards of statutory damages. The *Bryant* court's holding creates a rule that all music albums are automatically "compilations" under the Copyright Act and, therefore, albums will only be entitled to one award of statutory damages if infringed.¹⁰³ Furthermore, while the Copyright Act includes "collective works" in the definition of "compilation," examples of what constitutes a "collective work" includes "a periodical issue, anthology, or encyclopedia."¹⁰⁴ There is no mention of an album. Nowhere in the Copyright Act or in its legislative history does it specifically mandate that statutory damages be calculated on a per-album basis when the "compilation" is split into its constituent parts and infringed piece by piece. In fact, such a mandate would go directly against the deterrent purpose of the Copyright Act. As stated in their petition to the Supreme Court, appellants conceded that their albums could fit into the statutory definition of "compilation."¹⁰⁵ The appellants' primary contention, however, is that Media Right and Orchard should be liable for damages on a per-song basis because Media Right and Orchard, without authorization, split appellants' albums into their individual copyrighted parts.¹⁰⁶

In *Bryant*, prior to the infringement by Media Right and Orchard, *Songs for Dogs* and *Songs for Cats* were never available in any electronic or digital form.¹⁰⁷ The appellants in *Bryant* sold each album in physical copy only, as part of a fully illustrated gift set.¹⁰⁸ Even so, appellants' choice to distribute their songs in a specific manner, in album form, does not change the fact that each of their songs was capable of

101. See Petition for Writ of Certiorari at 10–11, *Bryant v. Media Right Prods., Inc.*, 131 S. Ct. 656 (2010) (No. 10-415), 2010 WL 3740540.

102. See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 138–39 (2d Cir. 2010).

103. As recently as April 2011, courts have been confronted with the stringent rule set forth in *Bryant* and have stipulated ways to work around it. See, e.g., *Arista Records, LLC v. Lime Grp. LLC*, 2011 U.S. Dist. LEXIS 36536 (S.D.N.Y. Apr. 4, 2011). In *Arista*, the court held that plaintiffs were entitled to statutory damages for each individual song infringed, even though they were also included as part of an album, if the songs were also released separately. The court stated, "[n]othing in the Copyright Act bars a plaintiff from recovering a statutory damage award for a sound recording issued as an individual track, simply because that plaintiff, at some point in time, also included that sound recording as part of an album or other compilation." *Id.* at *13. The *Arista* court's holding not only suggests a way, though it may be cumbersome, to ensure that copyright holders of music qualify for statutory damages under the Copyright Act (if you release a song on an album, make sure to also release it as a single), but also recognizes that individual songs are capable of standing on their own as individual "works." See *id.* at *15.

104. 17 U.S.C. § 101 (2006).

105. See Petition for Writ of Certiorari at 11, *Bryant v. Media Right Prods., Inc.*, 131 S. Ct. 656 (2010) (No. 10-415), 2010 WL 3740540.

106. See *id.* at 11.

107. See *Bryant v. Europadisk, Ltd.*, No. 07 Civ 3050(WGY), 2009 WL 1059777, at *2 (S.D.N.Y. Apr. 15, 2009).

108. *Id.*

standing alone as an individual copyrighted work. Media Right's and Orchard's ability to sell the songs individually, for a profit, only highlights this point. It is this fact that made *Bryant* the appropriate case for the Second Circuit to apply the independent economic value test to music.

By focusing on how appellants chose to distribute their songs, rather than on how the infringement occurred, the court in *Bryant*, in effect, is stating that any copyright owner's choice to release a work in album form automatically precludes statutory damages calculated song-by-song even when individual songs from the album are infringed. Furthermore, the Second Circuit's argument that the text of the Copyright Act does not allow for statutory damages to be calculated on a per-song basis suggests that in order for owners of copyrighted music to take advantage of the remedies offered in section 504(c) of the Copyright Act and fully protect their creations, individual songs must be distributed as singles before they are compiled and distributed in an album.

Finally, the court's decision in *Bryant* diverged from a trend of cases in the D.C., First, Ninth, and Eleventh Circuits employing the independent economic value test. *Bryant* provided an opportunity for the Second Circuit to adopt the independent economic value test and apply it to music. Had they done so, the Second Circuit would have created a rule that better accounts for the modern changes in media technology and the realities of the music industry, which emphasizes individual songs over albums. The independent economic value test provides "that a work that is part of a multi-part product can constitute a separate work for the purposes of statutory damages if it has 'independent economic value and . . . is viable.'"¹⁰⁹ Thus, under the independent economic value test, a separately registered work that is part of a multi-part work can be subject to separate statutory damages if it has its own economic value and can stand on its own. As appellants argue, the independent economic value test is appropriately applied to music given the increasing availability of downloadable music online, making it easier for infringers to unbundle albums and distribute and sell music on a song-by-song basis, regardless of the intent of the artist to distribute its work in album form.

The independent economic value test was first set forth in 1990 by the U.S. Court of Appeals for the D.C. Circuit in *Walt Disney Co. v. Powell*.¹¹⁰ Acknowledging that the Copyright Act does not define "work," the D.C. Circuit looked to other courts and legal scholars to determine what constitutes a "work" for the purposes of calculating statutory damages.¹¹¹ The court stated that "separate copyrights are not distinct works unless they can 'live their own copyright life,'"¹¹² and "where separate copyrights 'have no separate economic value, whatever their artistic value, they must be considered part

109. *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 141 (2d Cir. 2010) (alteration in original) (quoting *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116–17 (1st Cir. 1993)).

110. 897 F.2d 565, 569 (D.C. Cir. 1990) (holding that defendant's t-shirts, portraying both Mickey Mouse and Minnie Mouse, infringed two of Disney's "works" because both Mickey and Minnie have "independent economic value").

111. *Id.* at 569.

112. *Id.* (quoting *Robert Stigwood Group, Ltd. v. O'Reilly*, 530 F.2d 1096 (2d Cir. 1976)).

of [a] . . . work for purposes of the copyright statute.”¹¹³ Finally, the D.C. Circuit turned to a leading commentator on copyright law, Professor Nimmer, who stated that, “in order to qualify for a separate minimum award, the work which is the subject of a separate copyright would have to be in itself . . . viable.”¹¹⁴ In *Disney*, the defendant, Carl Powell, infringed Disney’s copyright of Mickey and Minnie Mouse by selling six t-shirts, each portraying mouse faces resembling the two famous mice.¹¹⁵ The lower court found Powell guilty of infringement and awarded six statutory damages to Disney, one for each t-shirt design sold.¹¹⁶ While the D.C. Circuit agreed that Powell had committed copyright infringement, it reduced the number of statutory damages awarded from six to two. The court explained:

While Mickey and Minnie are certainly distinct, viable works with separate economic value and copyright lives of their own, we cannot say the same is true for all six of the Disney copyrights of Mickey and Minnie in various poses which the district court found to be infringed in this case. Mickey is still Mickey whether he is smiling or frowning, running or walking, waving his left hand or his right. Thus, we find that Powell’s mouse-face shirts infringed only two of Disney’s works.¹¹⁷

Therefore, under the independent economic value test, a separately registered work can be subject to separate statutory damages if it has its own economic value and is a distinct, viable work that can stand on its own.

In 1993, the First Circuit applied the independent economic value test set forth in *Disney* in *Gamma Audio & Video, Inc. v. Ean-Chea*.¹¹⁸ There, the circuit court held that each episode of a Chinese soap opera, *Jade Fox*, constituted one “work” when computing statutory damages under the Copyright Act.¹¹⁹ In *Gamma*, plaintiffs had the exclusive right to distribute a Cambodian version of the *Jade Fox* series to video rental stores.¹²⁰ Defendant created copies of the episodes and supplied them to customers at their rental stores in Lowell, Massachusetts, without authorization from Gamma Audio. Since only some of the *Jade Fox* episodes were registered separately with the U.S. Copyright Office, only episodes thirteen through sixteen were at issue in the suit.¹²¹ The district court found that the four episodes were considered one “work” within the meaning of the Copyright Act because the episodes were from the

113. *Id.* (alterations in original) (quoting *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 n.16 (S.D.N.Y. 1984)).

114. *Id.* (alteration in original) (quoting *NIMMER & NIMMER*, *supra* note 52, at 14–40.1.3) (internal quotation marks omitted).

115. *See id.* at 567.

116. *Id.*

117. *Id.* at 570.

118. 11 F.3d 1106 (1st Cir. 1993).

119. *Id.*

120. *Id.* at 1109.

121. *Id.* at 1110.

same series. Thus, the district court granted Gamma only one award of statutory damages.¹²² On appeal, the First Circuit reversed the district court's decision and awarded Gamma four awards of statutory damages—one for each episode infringed.

The First Circuit started its analysis in *Gamma* by stating that “our case strongly resembles *Twin Peaks*.” However, because the Second Circuit in *Twin Peaks* “did not undertake the task of supplying a definition” of what constitutes a “work,” the First Circuit expanded its analysis by looking to *Disney*.¹²³ The First Circuit stated that “the test set forth in [*Disney*] is a functional one, with the focus on whether each expression . . . has an independent economic value.”¹²⁴ The circuit court in *Gamma* focused on two facts in determining that the individual episodes of *Jade Fox*, and not the entire series, constituted one “work” for the purposes of statutory damages. First, the circuit court stated that “viewers who rent the tapes from their local video stores may rent as few or as many tapes as they want, may view one, two or twenty episodes in a single sitting, and may never watch or rent all of the episodes.”¹²⁵ Second, the circuit court noted that each episode in the *Jade Fox* series was separately produced.¹²⁶ Furthermore, and in direct opposition to the Second Circuit's reasoning in *Bryant*, the First Circuit stated that the “*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.”¹²⁷

In 1996 and 1997 the Eleventh and Ninth Circuits, respectively, adopted the independent economic value test, holding that each episode of a syndicated television series, rather than the series itself, was a separate “work” for purposes of awarding statutory damages under section 504(c) of the Copyright Act. In *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*¹²⁸ and *MCA Television Ltd. v. Feltner*,¹²⁹ C. Elvin Feltner, a defendant in both cases, owned a number of television stations licensed to broadcast certain syndicated television programs. Due to Feltner's failure to pay royalties for the programming, the plaintiffs, in both cases, terminated the licensing agreements with Feltner. Feltner's television stations, however, continued to broadcast the television programs, and Feltner was found liable for copyright infringement of each episode that was broadcast.¹³⁰

122. *Id.* at 1116.

123. *Id.*

124. *Id.* at 1116–17 (citing *Walt Disney Co. v. Powell*, 897 F.2d 564, 569 (D.C. Cir. 1990)).

125. *Id.*

126. *Id.*

127. *Id.* at 1117 (emphasis added).

128. 106 F.3d 284 (9th Cir. 1997). The infringed television programs included series such as *Who's the Boss?*, *Silver Spoons*, *Hart to Hart*, and *T.J. Hooker*. *Id.* at 288.

129. 89 F.3d 766 (11th Cir. 1996). The infringed television programs included series such as *Kojak* and *The A Team*. *Id.* at 768.

130. See *Columbia Pictures*, 106 F.3d at 288; *MCA Television*, 89 F.3d at 768.

In *MCA Television*, Feltner argued that statutory damages should be calculated per television series, instead of per episode, because it was industry practice to license programming on a series basis and, therefore, the individual episodes did not have independent economic value.¹³¹ Following the First Circuit's decision in *Gamma*, the Eleventh Circuit disagreed with Feltner, stating that a copyright owner's "decision . . . to sell television series as a block, rather than as individual shows, in no way indicates that each episode in a series is unable to stand alone."¹³² Similarly, in *Columbia Pictures*, the Ninth Circuit also held that statutory damages should be calculated per episode because "as in [*Gamma*], viewers may watch as few or as many episodes as they want [T]he episodes could be repeated and broadcast in different orders. . . . [and] the episodes were separately written, produced, and registered,"¹³³ thus each episode had independent economic value.

In addition, the court in *Bryant* failed to recognize that as recently as 2008 at least one of its district courts had employed the independent economic value test. The U.S. District Court for the Southern District of New York applied the independent economic value test in *U2 Home Entertainment, Inc. v. Hong Wei International Trading, Inc.*¹³⁴ In *U2 Home*, plaintiffs had the exclusive right to distribute Chinese-language films and television programs on videotape, DVDs, and video cassette discs (VCD).¹³⁵ Defendants infringed plaintiff's copyrights in the episodes by unlawfully duplicating and distributing the programs to customers on VCD through its video store located in Manhattan.¹³⁶ Plaintiffs alleged that defendants infringed seventy different television series for a total of 1236 individual episodes.¹³⁷ Relying on the decision in *Gamma*, the district court found that damages should be calculated on a per-episode basis because each episode had independent economic value and, therefore, each qualified as one "work" under section 504(c) of the Copyright Act.¹³⁸

Having found that the television episodes had independent economic value, the district court in *U2 Home* then considered how many of the episodes were separately registered with the U.S. Copyright Office.¹³⁹ The court found that fifty-two of the television titles, instead of the alleged seventy, were under copyright registration. Therefore, only 894 individual episodes, instead of 1236, were eligible for statutory damages.¹⁴⁰ This reduced the amount of statutory damages from \$927,000 to

131. *MCA Television*, 89 F.3d at 769.

132. *Id.*

133. *Columbia Pictures*, 106 F.3d at 295.

134. No. 04 Civ. 6189(JFK), 2008 WL 3906889 (S.D.N.Y. Aug. 21, 2008).

135. *Id.* at *1.

136. *Id.*

137. *Id.* at *4.

138. *Id.* at *13–14.

139. *Id.* at *14.

140. *Id.* at *16.

\$670,500, with the court awarding plaintiffs the minimum award for statutory damages, \$750, per episode infringed.

The independent economic value test is appropriately applied to music in consideration of the wide availability of digital music.¹⁴¹ Like the copyrighted products discussed in the First, Ninth, and Eleventh Circuits' decisions, the individual songs in *Bryant* can stand alone as separately copyrighted works with independent economic value. Media Right and Orchard clearly demonstrated that each of appellants' songs had independent economic value by selling the songs as individual works through online retailers. By making the songs available as individual works, Media Right and Orchard completely changed appellants' original product by unbundling the two albums and allowing consumers to access the individual songs in a completely new way. Like the viewers of the *Jade Fox* series in *Gamma*, purchasers of individual songs from *Songs for Dogs* or *Songs for Cats* from online vendors such as iTunes were able to purchase one, three, or five individual songs without ever having to purchase, or listen to, either album in its entirety. And similar to the television shows at issue in *Columbia Pictures*, purchasers of appellants' songs could have listened to them in any order they chose, regardless of the order appellants had predetermined on the albums. Furthermore, appellants wrote, composed, arranged, performed, recorded, and produced all twenty individual songs, and most of the songs were separately registered with the U.S. Copyright Office.¹⁴² Consistent with *Gamma*, and as upheld in *Columbia Pictures* and *MCA Television*, appellants' decision to distribute the songs from *Songs for Dogs* and *Songs for Cats* in album form "in no way indicates that [the individual songs on the albums are] unable to stand alone."¹⁴³

The Second Circuit in *Bryant* suggested that appellants' request to have statutory damages calculated on a per-song basis was unreasonable and would result in an egregious award in comparison to Media Right's and Orchard's profits.¹⁴⁴ The circuit court stated,

[t]he District Court awarded a total of \$2,400 in statutory damages, based on its finding that Appellees' profits from infringing sales of the [a]lbums and songs were meager, and that the award did not need to be higher to achieve deterrence, because deterrence was effectuated here by Appellees' having to pay their own attorneys fees.¹⁴⁵

Requiring infringers to pay their own attorneys' fees, however, does not change the fact that the circuit court's ruling in *Bryant*, in effect, holds an infringer of one

141. See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 142 (2d Cir. 2010).

142. See *Bryant v. Europadisk*, No. 07 Civ. 3050(WGY), 2009 WL 1059777, at *2 (S.D.N.Y. Apr. 15, 2009).

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

144. Appellees also were reasonable in trying to resolve the case short of trial: Appellees made an Offer of Judgment in the amount of \$3000, which Appellants rejected, in favor of continuing to demand over \$1 million in damages, notwithstanding the evidence that Appellees had received less than \$600 in revenues from infringing sales.

Bryant, 603 F.3d at 144.

145. *Id.* (footnote omitted).

song on an album as liable as an infringer of ten songs on an album. The Second Circuit's decision inherently encourages the infringement of multiple songs on an album, as opposed to one song, because the penalty is the same. As one commentator has stated, "[w]hen a prospective infringer realizes that the damages he or she would be liable for are limited to one . . . statutory award, he or she may be more willing to take the risk of getting caught for infringing the work."¹⁴⁶ Furthermore, calculating damages on a per-song basis would not have created an unreasonable result. If the court in *Bryant* had found that all twenty of appellants' songs had independent economic value, the total amount of damages awarded appellants would have been \$24,000, based on the court's original calculations that Orchard was liable for \$200 per infringed work and Media Right was liable for \$1,000 for each infringed work.

However, this figure is based on the Second Circuit's *assumption* that all twenty of appellants' songs were, indeed, registered with the U.S. Copyright Office.¹⁴⁷ Had the court diligently considered this issue, as the district court did in *U2 Home*, it would have found the actual number of registered songs to be less.¹⁴⁸ It would have been well within the discretion of the Second Circuit to hold Media Right liable for \$750 per infringed work instead of \$1,000. In a per-song calculation of damages, this would lower the award from \$24,000 to \$19,000.¹⁴⁹ While this figure is substantially larger than the \$2,400 award granted to appellants in *Bryant*, a larger award would certainly serve as a stronger deterrent against the future infringement of music.

Under the independent economic value test, the songs in *Bryant* would qualify as separate "works." While the circuit courts that have adopted the independent economic value test have mainly applied it to television series, especially syndicated television, it appropriately applies to music albums. The music industry, like the television industry, continues to evolve and offer consumers multiple ways to access music products. The popularity of the MP3 player and the wide availability of digital music on iTunes illustrate music consumers' desire to purchase music on a song-by-song basis and to opt for the personalized playlist in lieu of the album. The disaggregation of the music album, however, also increases the likelihood of infringement on a song-by-song basis. The song, like the album, is a copyrightable "work" that deserves equal protection from infringers, regardless of whether it was originally released as part of an album or as a single. By refusing to adopt the independent economic value test, the Second Circuit's decision in *Bryant* fails to further the dual goals of the Copyright Act: promoting the progress of future creators and deterring prospective infringers. Had the Second Circuit relied on the guidance of the D.C., First, Ninth, and Eleventh Circuits by adopting the independent economic value test in recognition of the modern trends of the digital music industry, the court would have reached a decision that deters the future infringement of music.

146. Zawada, *supra* note 11, at 150.

147. *See supra* note 16 and accompanying text.

148. *See supra* note 16 and accompanying text.

149. This figure is still based on the assumption that all twenty of appellants' songs were indeed registered with the U.S. Copyright Office.