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A New Kind of MMA Fight: Balancing Statutory Damages for Works in Compilations After the Music Modernization Act and the Rise of Streaming Services

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A NEW KIND OF MMA FIGHT: BALANCING STATUTORY DAMAGES FOR WORKS IN COMPILATIONS AFTER THE MUSIC MODERNIZATION ACT AND THE RISE OF STREAMING SERVICES

ABSTRACT

Due to the ambiguous language of Section 504(c) of the Copyright Act of 1976, judges and legal scholars have been confounded for decades about how statutory damages should be distributed when the copyright of multiple items in a compilation has been infringed. Several circuits hold that separate statutory damages awards can be given for each item in a compilation that has been infringed if the items each have an economic value. In contrast, the Second Circuit holds that only one statutory damages award can be given for an infringed compilation unless the items contained within have been issued separately.

This Note argues that the current market has made this circuit split even more prominent, as music artists are increasingly releasing songs from albums as singles on streaming services, and the Music Modernization Act of 2018 allows songwriters to recover statutory damages for individual musical works from streaming services under some circumstances. These developments should influence the Second Circuit to reconsider the continued viability of allowing only one statutory damages award for the infringement of musical and non-musical compilations. Doing so would resolve a long-standing circuit split and result in a more reasonable interpretation of Section 504(c).

INTRODUCTION

United States copyright law offers two distinct categories for songs that qualify for copyright protection. These categories are musical works, which are the underlying musical compositions in a recording, and sound recordings, which are recorded performances of musical compositions.[1] Musical works and sound recordings have a long and complicated history of copyright protection. The Copyright Act of 1909 provided protection for musical works but did not initially cover sound recordings. Protection for sound recordings made after 1971 was later introduced as an amendment to the 1909 Act.[2] The Copyright Act of 1976 ("Copyright Act"), the source of the nation's current copyright law, initially provided some protection to both musical works and sound recordings.[3] Later acts, such as the Digital Millennium Copyright Act ("DMCA") and the Music Modernization Act ("MMA" or "the Act"), have amended the Copyright Act. These acts have expanded the protection copyright owners of these works receive in response to an increasingly digital marketplace,[4] including extending some protection to pre-1972 sound recordings.[5]

To successfully bring a claim of copyright infringement, the owner of the infringed work must show that they own a valid copyright in the work and that the infringer copied original elements from it without the owner's permission.[6] One controversy that has arisen since the enactment of the Copyright Act of 1976 is the meaning of the last sentence of Section 504(c) of the Act, which provides that "all the parts of a compilation . . . constitute one work" when statutory damages are assigned for copyright infringement.[7] Some federal circuit courts hold that this provision allows for multiple statutory damages awards for the copyright infringement of items in a compilation as long as each item has an

1. Tyler Laurence, Comment, *"Wake Up, Mr. West!": Distinguishing Albums and Compilations for Statutory Damages in Copyright within a Streaming-Centric Music Economy*, 26 UNIV. MIAMI BUS. L. REV. 85, 95 (2018).

2. Adam D. Riser, Note & Comment, *Defining "Compilation": The Second Circuit's Formalist Approach and the Resulting Issuance Test*, 17 ROGER WILLIAMS UNIV. L. REV. 822, 826 (2012); Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS., ENTREPRENEURSHIP & TAX L. REV. 310, 313 (2018).

3. 17 U.S.C. §§ 102(a), 106 (providing, among other rights, the right of the copyright owner to reproduce copyrighted works, to prepare derivative works, and to perform sound recordings publicly by means of a digital audio transmission).

4. Riser, *supra* note 2, at 830–31 (noting that digital rights management systems have been a way that copyright owners protect their works and that under the DMCA, copyright owners can pursue actions for both circumventing the system and for any copyright infringement that occurred after the circumvention); 17 U.S.C. § 115(c)(2)(C)(i) (permitting the digital delivery of a sound recording to be actionable as an act of copyright infringement).

5. 17 U.S.C. § 1401(a)(1).

6. Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

7. 17 U.S.C. § 504(c)(1).

independent value ("the independent economic value test").[8] Another federal circuit only allows for multiple awards if the works in the compilation have been issued separately ("the issuance test").[9]

Complicating matters further are the current popularity of streaming services, which has caused artists to increasingly release songs from their albums as singles,[10] and the MMA, which requires royalties to be paid for individual musical works and allows songwriters to recover statutory damages for musical works from streaming services under certain circumstances.[11] Both of these factors are likely to make the application of the independent economic value and issuance tests more difficult in the future and should lead to the rejection of the issuance test. The MMA, although it only applies to sound recordings and musical works, should also have implications for how the tests are applied to other types of compilations, such as television series and books containing images or illustrations.

This Note will explain the circuit split about how statutory damages should be distributed in copyright infringement cases involving compilations and argue that the popularity of streaming services and the enactment of the MMA should alter the way that the issuance and independent economic value tests are applied. Part II will introduce relevant sections of the current Copyright Act and the MMA. Part III will describe the independent economic value and issuance tests and introduce the current circuit split. The popularity of streaming services and how their impact on the area of music distribution should influence the future use of the issuance test will be covered in Part IV. Part V will discuss the MMA and how its new provisions should change the way that courts apply the issuance and independent economic value tests to music albums and other types of compilations. Finally, Part VI will summarize the arguments of this Note and argue that the current practice of issuing singles independently from albums and the MMA's requirement that royalties be paid for individual musical works on streaming services should lead the Second Circuit to reject the issuance test.

I. THE COPYRIGHT ACT OF 1976 & THE MUSIC MODERNIZATION ACT

The Copyright Act of 1976 affords protection to original works of authorship that are fixed in a tangible medium.[12] The purpose of the Act was to provide protection for more modern forms of expression and create a uniform

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

9. EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79, 101 (2d Cir. 2016), *cert. denied sub nom.* Robertson v. EMI Christian Music Grp., Inc., 137 S. Ct. 2269 (2017).

10. Elias Leight, *Why Your Favorite Artist is Releasing More Singles Than Ever*, ROLLING STONE (May 7, 2018), https://www.rollingstone.com/music/music-features/why-your-favorite-artist-is-releasing-more-singles-than-ever-629130/.

11. 17 U.S.C. § 115(d)(4)(A)(i).

12. *Id.* § 102(a).

body of copyright law by preempting state common law and state statutes that conflicted with the Act.[13]

A. Section 504(c) of the Copyright Act

Section 504(c) of the Copyright Act allows for statutory damages to be given in copyright infringement cases if certain requirements are met. Owners of copyrighted works that have been infringed can generally elect to request statutory damages only if they have registered the work with the Copyright Office before the infringement occurred.[14] However, there is a grace period of three months following first publication of a work during which the work can be registered, even if infringement has already occurred.[15] After a court determines that statutory damages can be granted, the infringing party has the right to demand a jury trial.[16] The amount of a statutory damages award is left to the discretion of the court or the jury, but it generally must be between $750 and $30,000 per work infringed.[17] However, if it is shown that the infringement was willful, a court can award up to $150,000 in damages per work infringed.[18] An infringement is willful when the defendant knew of the infringement or acted with reckless disregard for, or willful blindness to, the copyright owner's rights.[19]

The amount of a statutory damages award does not have to correspond with actual damages, and some courts have awarded statutory damages even when the copyright owner has suffered minimal harm and the infringer has not profited from their actions.[20] Additionally, the number of statutory damages awards depends on the number of works infringed and the number of infringers.[21] The number of times a work is infringed is irrelevant for the purposes of calculating statutory damages.[22] For example, multiple statutory damages awards can be given against a defendant who infringes multiple songs, but only one award can be given if the defendant infringed the same song multiple times.[23] Finally, the Act defines a compilation as a work formed by assembling preexisting materials that are selected or arranged such that the resulting work is an original work of

13. Riser, *supra* note 2, at 826.

14. 17 U.S.C. § 412.

15. *Id*.

16. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).

17. 17 U.S.C. § 504(c)(1).

18. *Id.* § 504(c)(2).

19. Island Software & Comput. Serv. v. Microsoft Corp., 413 F.3d 257, 263 (2d Cir. 2005).

20. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 475 (2009).

21. Mason v. Montgomery Data, Inc., 967 F.2d 135, 143 (5th Cir. 1992).

22. *Id*.

23. Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. UNIV. L. REV. 1, 11 (2010).

authorship and provides that for the purposes of statutory damages, "all the parts of a compilation . . . constitute one work."[24] Importantly, all of the components of a compilation must be created independently and have a "modicum of creativity" to qualify for copyright protection.[25] One of the purposes behind Section 504(c) is to allow plaintiffs to be made whole even if they are unable to recover actual damages, which is especially important in today's environment because it can be difficult to prove actual damages when an item has been infringed through electronic means.[26] Courts have interpreted Section 504(c)'s language in different ways. Some federal circuit courts hold that it allows for separate statutory damages awards for individual items in a compilation if each item has an independent economic value, but the Second Circuit holds that only one statutory damages award can be given for a compilation, regardless of the value of the individual items contained within.[27]

B. Musical Works, Sound Recordings, & Compulsory Licenses

The Copyright Act covers both sound recordings and musical works.[28] Musical works "protect the song's underlying music, lyrics, and structure (known together as the composition), and sound recordings . . . protect the produced and engineered performance of a composition."[29] The Copyright Act further defines sound recordings as a series of fixed musical, spoken, or other sounds.[30] Audiovisual works such as films or television series are not included in this definition.[31] An original piece of music thus contains at least two copyrights: "the rights of the composition performed (historically owned by songwriters and their publishers), and the rights of those songs embodied in a fixed medium (historically owned by artists and their record labels)."[32] The distinction between musical works and sound recordings is important because the Copyright Act offers different degrees of protection for the two types of works. For example, the Act does not protect against the unauthorized distribution of sound recordings that are broadcast on non-digital radio stations, but it does offer protection for the underlying musical works.[33]

24. 17 U.S.C. §§ 101, 504(c)(1).

25. Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

26. Sande Buhai, *Statutory Damages: Drafting and Interpreting*, 66 UNIV. KAN. L. REV. 523, 543–44 (2018).

27. Tierryicah Mitchell, Note, *Statutory Damage Awards and the "Independent Economic Value" Test: Did* Bryant v. Media Right Productions, Inc. *Highlight the Need for New Legislation?*, 12 WAKE FOREST J. BUS. & INTEL. PROP. L. 97, 108–09 (2011).

28. 17 U.S.C. § 102(a).

29. Laurence, *supra* note 1, at 95.

30. 17 U.S.C. § 101.

31. *Id*.

32. Laurence, *supra* note 1, at 95.

33. 17 U.S.C. § 106.

For many years, those who wished to publicly perform a musical work were required to obtain a compulsory license from a performing rights organization ("PRO").[34] After paying a royalty to the PRO and notifying the copyright owner of the musical work of their intent to obtain a license, they had the right to publicly perform the musical work.[35] During this time, it was unclear whether streaming services were required to pay royalties to the copyright owners of musical compositions. Services that did not frequently pay royalties cited the difficulty of identifying and locating the copyright owners as an excuse.[36] Additionally, songwriters and music publishers voiced concerns that streaming services paid significantly more in royalties to record labels for the use of sound recordings than the services did for the musical works themselves.[37] However, songwriters and the associations that represented them could not effectively argue for higher royalties in court because the Copyright Act prevented royalties from sound recordings from being considered in a court proceeding when determining the proper royalty rate for musical works.[38] Several songwriters, including Aloe Blacc and Kevin Kadish, spoke out against this restriction, and performing rights organizations, such as BMI and ASCAP, lobbied for legislation that would lift the restriction and allow courts to consider the royalty rates of sound recordings when determining digital performance rates for the owners of musical works.[39] The MMA was in part a response to these problems.

C. The Music Modernization Act (17 U.S.C. § 115 & § 1401)

In 2018, Congress passed the MMA.[40] Title I of the Act, which is codified in 17 U.S.C. § 115, altered the way compulsory licenses are issued to streaming

34. LaFrance, *supra* note 2, at 312.

35. EMI Ent. World, Inc. v. Karen Records, Inc., 603 F. Supp. 2d 759, 762 (S.D.N.Y. 2009).

36. LaFrance, *supra* note 2, at 318; *see also* Clive Bradley, *Copyright and the Information Explosion: An Overview*, *in* COPYRIGHT IN THE DIGITAL AGE: INDUSTRY ISSUES AND IMPACTS 9, 23 (Trevor Fenwick & Ian Locks eds., 2010) (noting that "[t]he ability of copyright owners to obtain a reward for [digital] uses of their property is limited by the practicality of systems of payment").

37. LaFrance, *supra* note 2, at 317–18; *see also* Ari Herstand, *Congress Wants to Hear Your Songs and Stories to Help Fix the Copyright Law*, DIGITAL MUSIC NEWS (Apr. 28, 2014), https://www.digitalmusicnews.com/2014/04/28/songwriter-equity-act/ (noting that in 2012 the royalties for sound recordings were fourteen times greater than what was paid for the musical work).

38. LaFrance, *supra* note 2, at 318.

39. Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014), https://www.wired.com/2014/11/aloe-blacc-pay-songwriters/; Paul Resnikoff, *My Song Was Streamed 178 Million Times. I Was Paid $5,679*, DIGITAL MUSIC NEWS (Sept. 24, 2015), https://www.digitalmusicnews.com/2015/09/24/my-song-was-played-178-million-times-on-spotify-i-was-paid-5679/; *Songwriter Equity Act Gains Support in Congress*, BMI (Mar. 20, 2014), https://www.bmi.com/news/entry/songwriter_equity_act_gains_support_in_congress.

40. LaFrance, *supra* note 2, at 312.

services. Title I established a nonprofit compulsory license collective called Mechanical Licensing Collective ("MLC"), which offers and administers the compulsory licenses required to digitally transmit a musical work.[41] The collective amasses and distributes royalties from digital music providers and administers the process through which copyright owners can claim ownership of musical works.[42] A digital music provider is defined as a digital service that has a direct contractual, subscription, or other economic relationship with end users of the service or one that exercises direct control over provision of the service if no such relationship exists.[43] Additionally, the collective gathers and provides documentation for use by Copyright Royalty Judges, who oversee statutory licenses of musical works.[44] Title I also allows Copyright Royalty Judges to set the royalty rate and terms for licenses, and their determination is binding on all copyright owners of musical works and those seeking to obtain a compulsory license for a work's digital transmission.[45] The section further addresses the problem created by the provision in the Copyright Act that forbids courts from considering sound recording royalties when setting the royalty rate for musical works. It allows Copyright Royalty Judges to compare the royalty rate for sound recordings when setting royalties for musical works[46] and requires the Judges to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and willing seller" when determining the royalty rate for compulsory licenses.[47]

Additionally, by requiring the royalty for a compulsory license to be paid to MLC rather than to the copyright owner directly, Title I prevents streaming services from legally claiming that they are not subject to compulsory licenses if they are unable to locate the copyright owner of a musical work.[48] To this end, Title I requires that the collective establish and maintain a database with information about musical works, the identity of the copyright owners of those works, and the sound recordings in which those works are contained.[49] Title I also makes the digital delivery of a post-1971 sound recording actionable as an act of infringement and subject to the remedies provided by the Copyright Act, including statutory damages.[50] This provision does not apply if the delivery has been authorized by the sound recording owner and the party making the delivery

41. 17 U.S.C. § 115(d)(3)(A).
42. *Id.* § 115(d)(3)(C).
43. *Id.* § 115(e)(8).
44. *Id*.
45. *Id.* § 115(c)(1)(F).
46. 17 U.S.C. § 114 note (Use in Musical Work Proceedings; Construction).
47. *Id.* § 114(f)(1)(B).
48. *Id.* § 115(d)(4)(A)(i).
49. *Id.* § 115(d)(3)(E)(i).
50. *Id.* § 115(c)(2)(C)(i).

has obtained a compulsory license or has otherwise been authorized by the musical work owner to digitally deliver the work.[51] The provision also does not always apply to digital music providers such as streaming services for any lawsuit filed after December 31, 2017, as copyright owners are limited to collecting unpaid royalties from these entities unless the entities have failed to follow the procedures set out in Section 115(d)(2)(A) or the infringement occurs after the availability of a compulsory license from MLC.[52] Notably, Title I provides that compulsory licenses must be given for the production and distribution of musical works without specifying whether compilations of musical works count as one work for the purpose of assigning statutory damages in infringement lawsuits.[53]

Title II of the Act, which is codified in 17 U.S.C. § 1401, extends federal protection to sound recordings fixed before February 15, 1972 ("pre-1972 sound recordings").[54] Title II gives copyright owners of pre-1972 sound recordings many of the same rights and remedies as the owners of post-1971 sound recordings, including the right to reproduce and sell copies of the work to the public.[55] However, even though pre-1972 recordings receive many of the same protections as post-1971 recordings, the Copyright Act states that these recordings are not protected by copyright.[56] Because of this, some rights that owners of post-1971 sound recordings have, such as the right to terminate an assignment or license of a sound recording's copyright after thirty-five years, do not apply to pre-1972 sound recordings.[57]

Under Title II, pre-1972 sound recordings are now protected for at least ninety-five years after the year of first publication, and the Act will not apply to any pre-1972 sound recordings after 2067.[58] Title II permits statutory damages for the infringement of pre-1972 sound recordings if the copyright owner has filed a form specifying the title, artist, and rights owner of the sound recording with the Copyright Office and the digital audio transmission was made more than ninety days after registration.[59] Finally, Title II requires half of all royalties from license agreements that were entered into after the section was enacted to be paid to SoundExchange, the mechanical licensing collective designated to distribute receipts from the licensing of digital transmissions of sound recordings.[60] Like Title I, Title II covers infringement for individual sound

51. 17 U.S.C. § 115(c)(2)(C)(i).
52. *Id.* §§ 115(d)(10)(A), (d)(2)(A)–(B).
53. *Id.* § 115(a)(1)(A).
54. LaFrance, *supra* note 2, at 325.
55. *Id.* at 325–26.
56. 17 U.S.C. § 301(c).
57. LaFrance, *supra* note 2, at 332.
58. 17 U.S.C. § 1401(a)(2)(A).
59. *Id.* § 1401(f)(5)(A)(i).
60. *Id.* § 1401(d)(2)(A); LaFrance, *supra* note 2, at 321 n.88.

recordings and does not discuss how damages should be assigned when multiple sound recordings in a compilation have been infringed.

II. THE INDEPENDENT ECONOMIC VALUE TEST & THE CIRCUIT SPLIT

A. Differences Between the Circuits' Approaches to Statutory Damages in Compilations

The federal circuit courts have split over how the Copyright Act defines compilations for the purpose of assigning statutory damages.[61] On its face, the language appears clear: if the infringed work is a compilation, only one statutory damages award will be given.[62] However, courts disagree over how this provision should be applied when individual works in the infringed compilation have an independent value.

1. The Independent Economic Value Test

Several federal circuits use the independent economic value test to determine whether statutory damages should be awarded for a compilation as a whole or for each infringed component. This approach originated in the Second Circuit in *Robert Stigwood Group, Ltd. v. O'Reilly*.[63] It was further developed by the D.C. Circuit in *Walt Disney Co. v. Powell* and the First Circuit in *Gamma Audio and Video, Inc. v. Ean-Chea*.[64] The test focuses on whether each work has an independent economic value and is economically viable apart from its inclusion in the compilation.[65] An example of works in a compilation that have an independent economic value includes television episodes that are separately produced and released independently of each other.[66] In *Gamma*, the First Circuit held that statutory damages could be awarded for individual episodes of a television series because each episode had an economic value.[67] The First Circuit also held that the fact that multiple works in a compilation are part of the same copyright registration is irrelevant for the purposes of awarding statutory damages as long as each work has an independent economic value.[68]

This approach was later followed by the Seventh, Ninth, and Eleventh Circuits. The Seventh Circuit acknowledged the applicability of the test before remanding a case for further determination of whether a collection of images

61. Mitchell, *supra* note 27, at 108–09.

62. 17 U.S.C. § 504(c)(1).

63. 530 F.2d 1096, 1105 (2d Cir. 1976) (introducing a version of the independent economic value test based on the 1909 Act, not the current 1976 Act).

64. Walt Disney Co. v. Powell, 897 F.2d 565, 569 (D.C. Cir. 1990); Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116–17, 1119 (1st Cir. 1993).

65. *Gamma*, 11 F.3d at 1116–17.

66. *Id.* at 1117–18.

67. *Id.* at 1118.

68. *Id.* at 1117.

qualified as a compilation.[69] The Ninth and Eleventh Circuits upheld statutory damages of millions of dollars based on the finding that individual television episodes that were infringed had an independent economic value.[70] Additionally, the Fourth Circuit has expressed a willingness to apply the independent economic value test to compilations if the individual works within are contained in separate registrations.[71] Finally, there have been two differing requirements circuits use to determine if a work has an independent economic value. Some circuits only ask whether each work can "live its own copyright life" whereas other circuits also ask whether each work has "a viable copyright life distinct from other works at issue."[72]

2. The Issuance Test

The Second Circuit follows a different test that it refers to as the issuance test. This test was introduced in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, in which the court examined how individual components of compilations were issued to determine whether statutory damages could be assigned for the infringement of each component.[73] In that case, the court held that separately written scripts prepared to become episodes of a television series were not part of a compilation because the episodes for which the scripts were written were broadcast separately from each other.[74] The court expanded on this test's application in *WB Music Corp. v. RTV Communication Group, Inc.*, in which the court held that an unauthorized album that compiled multiple songs was not a compilation because the infringed songs were initially issued separately from each other by the copyright owner.[75]

In *Bryant, Ltd. v. Media Right Productions, Inc.*, the Second Circuit formally rejected the independent economic value test and determined there should only be one statutory damages award for compilations, regardless of whether the individual components are economically viable.[76] In that case, the plaintiffs produced music albums that were copied and sold without authorization by a company that was given the albums by the defendant.[77] The plaintiffs sued the defendant for contributory copyright infringement, and the

69. Sullivan v. Flora, Inc., 936 F.3d 562, 572 (7th Cir. 2019).

70. Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1195 (9th Cir. 2001); MCA Television Ltd. v. Feltner, 89 F.3d 766, 770–71 (11th Cir. 1996).

71. Xoom, Inc. v. Imageline, Inc., 323 F.3d 279, 285 (4th Cir. 2003), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

72. Vanessa Yu, Note, *Calculating Statutory Damages in Copyright Infringement Cases: What Constitutes "One Work"?*, 58 SANTA CLARA L. REV. 375, 386–87 (2018).

73. 996 F.2d 1366, 1381 (2d Cir. 1993).

74. *Id*.

75. 445 F.3d 538, 541 (2d Cir. 2006).

76. 603 F.3d 135, 142 (2d Cir. 2010), *cert. denied*, 562 U.S. 1064 (2010).

77. *Id.* at 137.

Second Circuit upheld the district court's award of damages for the albums instead of for each individual song that was infringed.[78] The court reasoned that because the Copyright Act does not provide an exception for parts of a compilation that have an independent value, the independent economic value test contradicted Congress's intent in drafting the section.[79] The Second Circuit thus adopted a plain meaning approach to interpreting the statute: because the music albums qualified as a single work under Section 504(c), the court was not authorized by the statute to consider whether the songs had an independent economic value.[80] The court, however, did not explicitly reject the issuance test, implying that if the songs had been issued separately instead of as part of albums, the plaintiffs would have been able to recover separate damages awards for each individual song that was infringed.[81]

B. Differences Between the Circuits' Approaches to Statutory Damages in Compilations

The independent economic value test and the issuance test have some similarities, such as the fact that both tests consider the individual components of a compilation. The First Circuit in *Ean-Chea* even based its interpretation of the independent economic value test on the reasoning the Second Circuit used when applying the issuance test in *Twin Peaks*.[82] However, the tests differ in terms of how individual works in compilations qualify for statutory damages. Circuits that follow the independent economic value test are willing to approve a statutory damages award for each individual item in a compilation if the items have an economic value separate from the compilation. To determine whether works in a compilation have an independent economic value, these circuits consider whether the work has a "distinct and discernable value" on its own, such as whether the copyright owner intended for the work to be marketed and released independently of the compilation, and whether the public is buying or consuming the work apart from the compilation.[83] Another consideration courts make is whether the individual works have been registered with the Copyright Office individually or as part of a collection.[84] Including multiple individual works in one registration statement can weigh in favor of the argument that the

78. *Id.* at 142.

79. *Id*.

80. *Id*.

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

82. Betselot A. Zeleke, Comment, *Federal Judges Gone Wild: The Copyright Act of 1976 and Technology, Rejecting the Independent Economic Value Test*, 55 HOW. L.J. 247, 264–65 (2011); *see also* MCA Television Ltd. v. Feltner, 89 F.3d 766, 769–70 (11th Cir. 1996) (also relying on *Twin Peaks* in holding that individual television episodes had an economic value).

83. Sullivan v. Flora, Inc., 936 F.3d 562, 571–72 (7th Cir. 2019); Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1154–56 (2017).

84. Yellow Pages Photos, Inc. v. Ziplocal, 795 F.3d 1255, 1281 (11th Cir. 2015).

works do not have an independent economic value, although doing so is not dispositive.[85]

By contrast, the issuance test does not allow for statutory damages to be given for individual works in a compilation unless those works have also been issued separately from the compilation[86] and each have their own copyright registrations.[87] The issuance test can thus be more lenient than the independent economic value test because there is no inquiry into whether the infringed works have an economic value independent of the compilation.[88] Importantly, the issuance test only applies to what the copyright owner has done with the works in a compilation; the infringer's actions will not affect how the issuance test is applied, regardless of whether the infringer issues the works independently or in an unauthorized compilation.[89] For example, if an infringer separately issues sound recordings that were exclusively released in an album, the issuance test will not allow for multiple statutory damages awards because the infringer, and not the copyright owner, distributed the songs separately.[90] Although the Second Circuit in *Bryant* did not allow for multiple statutory damages awards because the songs had not been issued individually,[91] a later decision by the court indicated that the issuance test is still viable and can be used to support multiple statutory damages awards if the items in a compilation are also available separately when they are infringed.[92]

The difference in these approaches is based on conflicting interpretations of what Congress intended for the words "one work" to mean in the Copyright Act. Courts that use the independent economic value test view the language that each compilation constitutes "one work" as meaning statutory damages can be awarded for individual works in a compilation if they have value independent of the compilation.[93] In contrast, the Second Circuit defines a compilation as "a collection of preexisting materials . . . that are selected and arranged . . . in a way that results in an original work of authorship" and thus deems compilations to

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

86. EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79, 101 (2d Cir. 2016), *cert. denied sub nom.* Robertson v. EMI Christian Music Grp., Inc., 137 S. Ct. 2269 (2017).

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

88. *Id*.

89. WB Music Corp. v. RTV Commc'n Grp., Inc., 445 F.3d 538, 541 (2d Cir. 2006); *see also* Mitchell, *supra* note 27, at 106 (noting that the difference between the outcomes in *Twin Peaks* and *Bryant* turned on whether the copyright holder had issued the individual works separately from the compilation).

90. Mitchell, *supra* note 27, at 106.

91. Bryant, Ltd. v. Media Right Productions, Inc., 603 F.3d 135, 141 (2d Cir. 2010), *cert. denied*, 562 U.S. 1064 (2010).

92. *EMI Christian Music Grp.*, 844 F.3d at 101.

93. Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1193 (9th Cir. 2001).

be a single work for the purposes of assigning statutory damages.[94] Overall, the difference between the independent economic value test and the issuance test can lead to diverse damages awards in cases involving compilations, particularly when the works for which the plaintiff is seeking statutory damages have not been issued separately from the compilation.

III. THE MODERN ENVIRONMENT SHOULD SHAPE THE ISSUANCE TEST

A. EMI Christian Music Group v. MP3tunes & the Rise of Streaming Services Should Change the Second Circuit's Approach

The modern streaming environment and the Second Circuit's adherence to the issuance test incentivize artists to release songs from their music albums as singles. These factors have led to more artists releasing singles over the past ten years, and this trend should cause the Second Circuit to abandon the issuance test in favor of the independent economic value test.

There are two types of digital streaming services: interactive and non-interactive.[95] A non-interactive service does not allow users to choose specific songs or albums, but an interactive service gives users the ability to select which songs or albums to play.[96] Statutory royalties apply for sound recordings on non-interactive streaming services, but the royalties for sound recordings on interactive services are negotiated between the streaming services and the record labels or recording artists that own the copyright in the recordings.[97]

In 2010, the year *Bryant* was decided, streaming services were relatively new. During that year, 86.3 million digital albums and 326.2 million physical albums were sold.[98] Since then, the popularity of streaming services has increased dramatically. In 2019, the streaming market became larger than the entire American recorded music market.[99] In 2018, streaming accounted for 46.8% of global recorded music revenues, physical copies of music albums were down 10.1% in revenues, and digital downloads were down 21.1% in

94. *Bryant*, 603 F.3d at 140–41.

95. Tori Misrok, Note, *How Playlists Broke the Internet: An Analysis of Copyright in Playlist Ownership*, 40 CARDOZO L. REV. 1411, 1424 (2019).

96. *Id*.

97. 17 U.S.C. § 114(d)(2)(A)(i); *see also* LaFrance, *supra* note 2, at 324 (noting that under the MMA, rates for interactive services are still negotiated between streaming services and the copyright owners of sound recordings but that the Act's switch to a "willing buyer/willing seller" system for determining the royalty rate set by the Copyright Royalty Board could also make the rates that interactive streaming services pay for licenses fairer).

98. *The Nielsen Company & Billboard's 2011 Music Industry Report*, BUSINESSWIRE (Jan. 5, 2012), https://www.businesswire.com/news/home/20110106006565/en/Nielsen-Company-Billboard's-2011-Music-Industry-Report.

99. Joshua P. Friedlander, *Year-End 2019 RIAA Music Revenues Report*, RIAA (Feb. 25, 2020), https://www.riaa.com/wp-content/uploads/2020/02/RIAA-2019-Year-End-Music-Industry-Revenue-Report.pdf.

revenues.[100] Also in 2019, revenues from streaming services grew almost 20%, accounting for 79.5% of all recorded music revenues.[101] Additionally, music publishers in the United States received $3.7 billion from streaming services.[102] Finally, non-streaming digital downloads of music decreased to comprise only 8% of the industry's revenues, and physical copies accounted for 10% of total revenues,[103] with only 46.5 million physical albums being shipped.[104] Streaming has thus become the predominant way music is distributed.

Under the MMA, digital music providers such as streaming services are protected from liability for statutory damages for the infringement of musical works unless they do not follow the procedures in Section 115(d)(10)(B) or the infringement occurs after the availability of a compulsory license from MLC.[105] The procedures in Section 115(d)(10)(B) include making a good faith, commercially reasonable effort of locating each copyright owner of the musical work within thirty days of making the work available on the service, obtaining information about the sound recording and musical work, and paying royalties in accordance with the first section of the MMA.[106] Additionally, the popularity of streaming services is causing artists to increasingly release individual songs from their albums as singles.[107] The trend of releasing singles from albums makes the issuance test less useful than it previously was because statutory damages will be indiscriminately awarded for the infringement of an increasing number of songs.

Six years after *Bryant* was decided, the Second Circuit revisited the issuance test and determined that statutory damages could be awarded for individual songs in a music album if the songs had been issued separately when they were infringed.[108] In *EMI Christian Music Group v. MP3tunes*, the court upheld multiple awards of statutory damages for individual songs in an infringed album because the songs were available separately when the infringement occurred.[109] The court found it was irrelevant that the songs were also included in an album; because the songs were made available by the copyright owner for download

100. IFPI GLOBAL MUSIC REPORT 2019 (Apr. 2, 2019), https://www.ifpi.org/ifpi-global-music-report-2019/.

101. Friedlander, *supra* note 99.

102. Ben Sisario, *Bob Dylan Sells His Songwriting Catalog in Blockbuster Deal*, N.Y. TIMES (Dec. 7, 2020), https://www.nytimes.com/2020/12/07/arts/music/bob-dylan-universal-music.html.

103. Friedlander, *supra* note 99.

104. *Id.*; STATISTA, *Physical CD Shipments in the United States from 1999 to 2020* (May 11, 2021), https://www.statista.com/statistics/186772/album-shipments-in-the-us-music-industry-since-1999/.

105. 17 U.S.C. §§ 115(d)(10)(A), (d)(10)(B)(i).

106. *Id.* § 115(d)(10)(B).

107. Leight, *supra* note 10.

108. EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79, 101 (2d Cir. 2016), *cert. denied sub nom.* Robertson v. EMI Christian Music Grp., Inc., 137 S. Ct. 2269 (2017).

109. *Id*.

and sale as singles, statutory damages could be awarded for each infringed song.[110] *EMI Christian* thus upheld the viability of the issuance test and reaffirmed the Second Circuit's position that statutory damages can be awarded for the infringement of individual items in a compilation as long as the copyright owner has issued the items separately from the compilation.

EMI Christian's re-affirmance of the issuance test gives artists an incentive to release singles from their albums even though they are not always able to collect statutory damages from streaming services. Many popular artists today release anywhere from three to six singles separately from the albums in which they are contained and register those singles in individual registrations.[111] Songwriters who release singles can collect statutory damages if their singles were infringed by individuals or entities other than digital music providers.[112] They can also collect statutory damages from digital music providers if those services did not follow the proper statutory procedures for limiting their liability or if the services infringed musical works after the compulsory license was available.[113] Prior to the MMA's enactment, several streaming services, such as Spotify and Apple Music, faced numerous lawsuits for copyright infringement.[114] After the MMA's enactment, some songwriters, such as Eminem, filed additional lawsuits seeking statutory damages for the infringement of their works by streaming services based on the allegation that the services did not follow the procedures in Section 115(d)(10)(B) for limiting their liability.[115] If artists continue releasing songs from their albums as singles, the test for determining whether statutory damages can be awarded for

110. *Id.*; *see also* Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5936(KMW), 2011 WL 1311771, at *4 (S.D.N.Y. Apr. 4, 2011) (clarifying that copyright holders can recover separate statutory damages for individual tracks in an album if they made the recording available separately from the album and the track was infringed during the time that it was issued as an individual recording).

111. Leight, *supra* note 10.

112. 17 U.S.C. § 115(c)(2)(C)(i).

113. *Id.* § 115(c)(2)(B).

114. Robert Levine, *Spotify Settles Class Action Lawsuits Filed by David Lowery and Melissa Ferrick with $43.4 Million Fund*, BILLBOARD (May 26, 2017), https://www.billboard.com/articles/business/7809561/spotify-settles-class-action-lawsuits-filed-by-david-lowery-and-melissa; Daniel Sanchez, *Spotify Settles Two Copyright Infringement Lawsuits with Initial Damages Exceeding $365 Million*, DIGITAL MUSIC NEWS (Jun. 28, 2019), https://www.digitalmusicnews.com/2019/06/28/spotify-bluewater-settlement/.

115. Complaint, Eight Mile Style, L.L.C. v. Spotify U.S.A., Inc., 3:19-cv-00736, at 8–11 (M.D. Tenn. Aug. 21, 2019). This lawsuit is significant because it was one of the first cases alleging that the MMA's qualified prohibition on the collection of statutory damages from digital music providers, including streaming services, is an unconstitutional deprivation of artists' due process and property rights. Depending on how similar cases are decided in the future, the prohibition on assigning statutory damages in Section 115(d)(10)(A) could be struck down as unconstitutional. Because of the severability statute in Title IV of the MMA, the remainder of the Act would not be affected if Section 115(d)(10)(A) was struck down.

individual songs in a music album will likely look increasingly like the independent economic value test because artists have a monetary incentive to seek statutory damages for individual songs whenever possible.

Streaming has influenced the music industry in such a way that continuing to apply the issuance test will be increasingly impractical. The issuance test should give way to the independent economic value test in infringement cases involving albums because streaming has resulted in more individual songs from albums being released as singles. The more often artists release their musical works as singles, the more frequently courts should consider the economic value of individual musical works when assigning statutory damages. It would be unjust for the Second Circuit to consistently award large statutory damages for infringed singles without first considering whether the songs have an economic value. Therefore, the Second Circuit should instead adopt the independent economic value test because it will increasingly have to consider whether infringed singles have an independent value when determining whether to uphold statutory damages awards for the individual songs.

B. The Influence of Streaming Service-Exclusive Albums on the Continued Use of the Issuance Test

Another reason why the prevalence of streaming services should lead to the adoption of the independent economic value test by the Second Circuit is that some musicians have altered their albums after their initial release on streaming services. For example, some songs on Kanye West's album, *The Life of Pablo*, were modified by West after the album's initial release as a streaming service exclusive.[116] The issuance test is challenging to apply to these types of albums because, although the songs were initially released as part of an album, modified versions of them were later released as singles and on platforms other than streaming services.[117] The modified songs would be given separate copyright protection as derivative works,[118] but the issuance test would not allow for separate damages for the infringement of individual songs in the original album because they are not identical to the songs that were released separately.[119] Because applying the issuance test to these streaming service albums could be complicated, the independent economic value test would be helpful to the Second Circuit in resolving these types of infringement cases.

C. Possible Objections to the Abandonment of the Issuance Test

Even though applying the issuance test to music albums will continue to be increasingly confusing and impractical, it is possible the Second Circuit will

116. Laurence, *supra* note 1, at 105–06.
117. *Id.* at 108.
118. 17 U.S.C. § 106(2).
119. *Id*.

continue to adhere to the test. In its decisions, the Second Circuit has offered its support for a literal interpretation of Section 504(c). Specifically, the Second Circuit has criticized the independent economic value test as violating Congress' intent in including the compilation restriction, noting that the "language provides no exception for a part of a compilation that has independent economic value, and the [c]ourt will not create such an exception."[120] The practical benefits of adopting the independent economic value test in today's streaming environment, such as allowing for an inquiry into whether singles actually have an economic value independent of their respective albums, may not be enough for the Second Circuit to abandon its deference to Congress on this matter. However, even if the Second Circuit does not officially abandon the issuance test, it will still be required to consider the economic value of the many singles that are available when determining whether the amount of statutory damages district courts approve are just and reasonable.

IV. THE MUSIC MODERNIZATION ACT SHOULD INFLUENCE THE WAY COURTS VIEW THE INDEPENDENT ECONOMIC VALUE TEST IN THE FUTURE

The MMA should also influence the Second Circuit's use of the issuance test as applied to music albums because it allows for statutory damages for the infringement of individual sound recordings, and courts and juries will increasingly have to consider the economic value of individual works when determining statutory damages awards. Additionally, the Act should affect how the issuance and independent economic value tests are applied to compilations such as television series and collections of images. The Act permits statutory damages arising from the unauthorized digital dissemination of musical works and sound recordings, and these other types of compilations are also increasingly being distributed digitally.

A. The Music Modernization Act Should Impact the Second Circuit's Approach to the Independent Economic Value Test in Relation to Music Albums

The MMA brought several changes to how royalties are distributed for songs on streaming services, and these changes should alter how the Second Circuit applies the independent economic value test to music albums. Provisions that should influence whether the Second Circuit continues to follow the issuance test include those that require compulsory licenses be obtained for each individual musical work on streaming services and that streaming services can be held liable for statutory damages for the infringement of musical works if they fail to follow the procedures in Section 115(d)(10)(B) of the Copyright Act

120. Bryant v. Media Right Prods., 603 F.3d 135, 142 (2d Cir. 2010), *cert. denied*, 562 U.S. 1064 (2010).

or the infringement occurs after a compulsory license is available.[121] These provisions appear to conflict with the restriction on multiple statutory damages for compilations in Section 504(c), and the Second Circuit should find them to be persuasive in considering whether to abandon the issuance test in favor of the independent economic value test for the infringement of musical works.

The Second Circuit should abandon the issuance test for songs in music albums based on the new provisions of the MMA. The MMA makes it clear that separate statutory damages awards can be imposed on digital music providers that do not follow the procedures in Section 115(d)(10)(B) or infringe the musical work after the compulsory license is available and on parties other than digital music providers that infringe on the copyrights of individual musical works by digitally delivering them without paying a compulsory license.[122] Furthermore, many artists are releasing singles independently from their albums. If there continue to be infringement actions filed against parties that provide access to musical works without a compulsory license or a sound recording without authorization from the sound recording owner, the Second Circuit will increasingly need to consider the economic value of the songs in addition to whether they were issued separately from their respective compilations. Furthermore, the fact that Congress mandated that royalties be paid for each musical work on non-interactive streaming services suggests that it views every song on streaming services as having an independent economic value.[123]

These provisions indicate that in drafting the MMA, Congress likely desired for statutory damages to be awarded for the infringement of individual musical works and sound recordings in albums as long as they have a discernable economic value independent of their respective albums. One aspect of the Act that might be viewed with scrutiny by the Second Circuit is the fact that Section 504(c) does not mention the restriction on works in compilations. The MMA thus does not explicitly overrule the purported restriction on assigning multiple statutory damages awards for infringed works in a compilation. However, the Act implicitly overrules Section 504(c)'s prohibition on multiple statutory damages for sound recordings and musical works in music albums by allowing for statutory damages to be given for individual sound recordings that have been digitally delivered without the copyright owner's permission and requiring royalties to be paid for all individual musical works on non-interactive streaming services. Therefore, the language in the Act allowing for statutory damages and royalties to be assigned for individual songs in an album, even if the artists have not issued the songs separately, puts the Second Circuit's interpretation of Section 504(c) in question and should lead to the court's rejection of the issuance test as applied to music albums.

121. 17 U.S.C. §§ 115(a)(1)(A), (d)(10)(A).
122. *Id.* §§ 115(d)(10)(A), (c)(2)(C)(i).
123. *Id.* § 115(d)(4)(A)(i).

B. Other Works to Which the Independent Economic Value Test Has Been Applied

Although the independent economic value test most commonly arises in the context of music albums, the test has also been applied to other types of compilations. One type of compilation to which the test is commonly applied are television series. When individual episodes of television series are infringed, often by a broadcasting company that has aired the episodes without a license from the copyright holder, the copyright owners frequently seek separate statutory damages for each episode.[124] Under both the issuance and independent economic value tests, multiple statutory damages awards are commonly granted for the infringement of television series because the episodes are usually issued separately from each other and have a discernable economic value because they are aired at different times.[125] Another type of compilation to which the test has been applied are books and magazines that contain multiple pieces of independently produced images, such as artwork or photographs.[126] Courts have been more hesitant to grant statutory damages for individual works in these cases. They have typically either remanded the cases to district courts to determine if the images truly have an independent economic value or held the individual images only had an economic value when included together in the compilation.[127] Finally, courts have applied the independent economic value test to compilations that feature multiple images of copyrighted characters and determined only one statutory damages award can be given for each character, even if there are different images of each character in the compilation.[128]

C. The Second Circuit's View of the Independent Economic Value Test with Respect to Other Types of Compilations

Although the Second Circuit has primarily considered music albums when applying § 504(c), its decisions involving other types of compilations and the evolving nature of media distribution provide some insight into whether the Second Circuit should apply the independent economic value test to compilations other than music albums. One case that involved a type of compilation besides music albums was *Twin Peaks v. Publications International*, in which the court affirmed separate statutory damages awards for

124. Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1109 (1st Cir. 1993); Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1189–90 (9th Cir. 2001).

125. Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1371 (2d Cir. 1993); *Gamma*, 11 F.3d at 1117–18.

126. Xoom, Inc. v. Imageline, Inc., 323 F.3d 279, 285 (4th Cir. 2003); Sullivan v. Flora, Inc., 936 F.3d 562, 572 (7th Cir. 2019); Yellow Pages Photos, Inc. v. Ziplocal, 795 F.3d 1255, 1282 (11th Cir. 2015).

127. *Xoom*, 323 F.3d at 285; *Sullivan*, 936 F.3d at 572; *Yellow Pages Photos*, 795 F.3d at 1282.

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

scripts of individual episodes of a television series because the episodes were issued separately from each other.[129] Another type of compilation that courts have considered are those featuring individual images.[130] Although the Second Circuit has not considered a case involving such a compilation, cases such as *Twin Peaks* and *EMI Christian* indicate the court would apply the issuance test and give one statutory damages award for the whole compilation unless the images were also disseminated separately from the compilation.

The MMA only covers musical works and sound recordings, so the language allowing for separate statutory damages for individual songs in a music album does not necessarily apply to works in other compilations. However, based on what the Second Circuit has held in other cases and the fact that television episodes and images, like music, are increasingly being distributed digitally, the court will likely use the issuance test less frequently for these types of compilations in the future and should eventually reject it in favor of the independent economic value test. First, although the Second Circuit has previously held that statutory damages can be awarded for individual episodes of a television series, it should begin to reconsider applying the issuance test to television series in the future because of the manner in which they are released on streaming services. Like in the music industry, streaming has become a popular way to distribute television series,[131] and many streaming services, such as Netflix, release multiple episodes of their own series at once rather than making them available at different times.[132] Because individual episodes are being released separately less often, the issuance test is less likely to allow for multiple statutory damages for the infringement of television series in the future, even if it is shown that the infringer profited from distributing multiple individual episodes. Therefore, if the Second Circuit desires to continue awarding multiple statutory damages awards for television series, it should consider applying the independent economic value test to these works.

Nevertheless, the Second Circuit might be reluctant to apply the independent economic value test to television series exclusive to streaming services. Many series on streaming services are distributed by season rather than by episode.[133]

129. 996 F.2d at 1371.

130. *Sullivan*, 936 F.3d at 566; *Yellow Pages Photos*, 795 F.3d at 1277.

131. *About 6 in 10 Young Adults in U.S. Primarily Use Online Streaming to Watch TV*, PEW RSCH. CTR. (Sept. 13, 2017), https://www.pewresearch.org/fact-tank/2017/09/13/about-6-in-10-young-adults-in-u-s-primarily-use-online-streaming-to-watch-tv/ (noting that sixty-one percent of U.S. consumers aged between eighteen and twenty-nine and thirty-seven percent of consumers aged between thirty and forty-nine use streaming services as their primary way of watching television, and that twenty-four percent of Americans did not subscribe to cable television).

132. Paul Tassi, *No, Netflix Will Not Release More Episodes Weekly Instead of Binge-Dropping*, FORBES (Sept. 4, 2019, 9:28 AM), https://www.forbes.com/sites/paultassi/2019/09/04/no-netflix-will-not-release-more-episodes-weekly-instead-of-binge-dropping/?sh=2de6fe827c8f.

133. Bert I. Huang, *Concurrent Damages*, 100 VA. L. REV. 711, 748–49 (2014).

Because of this, the harm that streaming services suffer relates more to the infringement of an entire season rather than to the infringement of individual episodes.[134] The Second Circuit might then find it appropriate to give one statutory damages award per season. This would be the result under the issuance test, so the court might think there would be no need to switch to the independent economic value test. Also, many of these series contain episodes that are filmed at the same time.[135] This aspect of streaming-exclusive series makes the independent economic value test difficult to apply because it is challenging to determine if the streaming services that own the copyrights in the series intended for the episodes to be independently produced.[136] The Second Circuit might argue that unlike traditional television series, the episodes of which are also often filmed at the same time, courts cannot point to the fact that episodes in streaming-exclusive series are released separately in order to justify applying the independent economic value test. Therefore, because of the complexities of applying the independent economic value test to streaming television series, the Second Circuit might prefer to continue applying the issuance test to these works.

The popularity of distributing images and photos online should also lead to the rejection of the issuance test as applied to compilations including artwork or other images. Until 2004, sharing photos online was relatively difficult due to the limited file size that photo sharing services could accommodate. When Flickr launched in 2004 with a larger file size capacity, sharing photos over the Internet became increasingly popular.[137] By 2014, hundreds of thousands of photos were being uploaded every minute on social networking and photo sharing services.[138] Prior to the introduction of technology that allowed them to easily do so, many people did not share their photos, but some professional photographers and artists did publish their work in books and magazines or created unique ways to share their photos, such as sending them through the mail.[139] Today, there are many more image and photo sharing services for both professional and amateur artists and photographers,[140] and professional artists

134. *Id*.

135. Kaminski & Rub, *supra* note 82, at 1161.

136. *Id*.

137. Bob Leggitt, *The History of Online Photo Sharing: Part 1*, TWIRPZ BLOG (Sept. 26, 2015), https://twirpz.wordpress.com/2015/09/26/the-history-of-online-photo-sharing-part-1/; Bob Leggitt, *The History of Online Photo Sharing: Part 2*, TWIRPZ BLOG (Sept. 30, 2015), https://twirpz.wordpress.com/2015/09/30/the-history-of-online-photo-sharing-part-2/.

138. Aditya Khosla et al., *What Makes an Image Popular?*, INT'L WORLD WIDE WEB CONF. COMM. (2014), http://people.csail.mit.edu/khosla/papers/www2014_khosla.pdf.

139. Jori Finkel, *Tracing the Roots of Photo Sharing, From Mail Art to Instagram*, N.Y. TIMES (Apr. 4, 2019), https://www.nytimes.com/2019/04/04/arts/design/selfies-snap-share-san-francisco-museum-of-modern-art-.html.

140. Mike Prospero, *The Best Photo Storage and Sharing Sites in 2021*, TOM'S GUIDE (Jan. 5, 2021), https://www.tomsguide.com/best-picks/best-photography-sites.

and photographers are increasingly sharing their work online, frequently as individual images.[141] Applying the independent economic value test to online images and photos would make more sense because it would allow for the consideration of whether each image or photo truly has an economic value. Furthermore, the issuance test would be less helpful in a market where images and photos are increasingly being distributed in compilations because it would indiscriminately allow for separate statutory damages as long as the images or photos were issued separately and had their own copyright registrations. Thus, the Second Circuit should also abandon its use of the issuance test as applied to compilations including individual images and photos due to the prevalence of the digital sharing of these items.

D. The Other Circuit Courts Should Apply the Independent Economic Value Test to These Compilations in Light of the Music Modernization Act

The new language of the MMA is unlikely to change how the other circuits apply the independent economic value test to individual television episodes, but it could change how the test is applied to images. Although the Act only applies to music, the provisions allowing for statutory damages for an unauthorized digital delivery of a sound recording and requiring royalties to be paid for those recordings could be influential when considering other types of compilations.

The Act is unlikely to change the application of the independent economic value test to television series. A court applying the test would award separate statutory damages for individual episodes of a television series that are digitally distributed as long as each episode has an economic value.[142] This is consistent with what is required for musical works that lack a compulsory license and are digitally distributed by parties other than streaming services. It is also consistent for streaming services that have not followed the procedures in Section 115(d)(10)(B) or infringe musical works after a compulsory license is available. The only difference is that the Act does not differentiate between works that have an economic value and those that do not when allowing for statutory damages for the infringement of sound recordings or requiring royalties to be paid for individual musical works.[143] Considering these courts have consistently allowed for separate statutory damages awards for television episodes, it seems unlikely the Act would change this approach.

However, the Act should alter the way these courts apply the test to compilations containing artwork or images. Courts considering these types of compilations have generally held that only one statutory damages award can be

141. Finkel, *supra* note 138.

142. Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1195 (9th Cir. 2001); MCA TV, Ltd. v. Feltner, 89 F.3d 766, 770 (11th Cir. 1996).

143. 17 U.S.C. §§ 115(c)(2)(C)(i), (d)(3)(C)(i).

given.[144] However, because images, like the sound recordings covered by the Act, are increasingly being distributed digitally, these circuits should find the Act indicates Congress's intent to do away with the compilation restriction in Section 504(c) as applied to images. As a result, they should begin allowing for separate statutory damages awards for digital images, even if the images are part of a compilation.

The Ninth Circuit's recent decision in *VHT v. Zillow Group, Inc.* indicates that courts may begin applying the independent economic value test to images in compilations. In that case, the court held that digital collections of images that the defendant infringed might be compilations but remanded the case back to the district court to determine if they were compilations and to apply the independent economic value test if they were not.[145] The Ninth Circuit's hesitancy to declare that the individual images in the digital collections did not have an economic value was based in part on the district court's failure to determine whether the collections were compilations and its concern that the jury in the trial was not instructed that the collections might qualify as compilations. However, the holding indicates the Ninth Circuit may begin applying the independent economic value test to individual images in digital collections.[146]

The Seventh Circuit has cited *VHT* in support of its position that the independent economic value test can be applied to individual works in a compilation that have an independent economic value, and other circuits should find this decision to be persuasive when considering whether to award multiple statutory damages for images in these collections.[147] However, it should be noted that some courts have been reluctant to apply the independent economic value test to digital images if the images are not registered in separate copyright registrations.[148]

In conclusion, the Act is unlikely to change the application of the independent economic value test to episodes of television series, but it should alter the way the test is applied to images in compilations because both music and images are increasingly being distributed digitally.

CONCLUSION

There is still much uncertainty about what Congress intended in the last sentence of Section 504(c) of the Copyright Act of 1976. Although the issuance

144. Sullivan v. Flora, Inc., 936 F.3d 562, 572 (7th Cir. 2019); Yellow Pages Photos, Inc. v. Ziplocal, 795 F.3d 1255, 1282 (11th Cir. 2015).

145. 918 F.3d 723, 747–48 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

146. *Id.* at 747.

147. *Sullivan*, 936 F.3d at 570 (citing *VHT v. Zillow* as an example of the Ninth Circuit following the independent economic value test).

148. Cullum v. Diamond A Hunting, Inc., 484 F. App'x 1000, 1002 (5th Cir. 2012).

test has been used by the Second Circuit for decades, it was created long before streaming services became the dominant method of listening to music. Because artists are increasingly releasing sound recordings from their albums as individual singles, the Second Circuit is likely to use the issuance test less frequently in the future and should question the utility of the test in determining the amount of statutory damages awards for individual songs that have been infringed. The other circuits should continue using the independent economic value test because it provides a reliable method for determining how statutory damages should be assigned for singles that are released independently of larger music albums. Furthermore, the MMA's requirement that royalties be paid for individual musical works on streaming services could have implications for both albums and works in other compilations, such as television series and photographs in books and magazines. If items in compilations continue to be distributed individually, courts should use the independent economic value test to determine the individual value of these items before assigning statutory damages. Considering millions of dollars are potentially at stake when statutory damages are given in copyright infringement cases, copyright owners would benefit if this circuit split is resolved.

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