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Defining "Compilation": The Second Circuit's Formalist Approach and the Resulting Issuance Test

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Notes & Comments

Defining "Compilation":

The Second Circuit's Formalist Approach and the Resulting Issuance Test

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I. INTRODUCTION

While copyright law has existed in one form or another since 1790, the Copyright Act of 1976 forms the basis of modern copyright law in the United States.[1] Section 504 of the Copyright Act[2] allows copyright owners to seek either actual damages or

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1. Mark B. Radefeld, Note, *The Medium is the Message: Copyright Law Confronts the Information Age in* New York Times v. Tasini, 36 AKRON L. REV. 545, 551 (2003).

2. For purposes of this Comment, "Copyright Act" shall refer to copyright law generally as based on the Copyright Act of 1976 and all subsequent acts and revisions. If used to refer to a specific iteration of copyright law, a reference will be made to the name or year of the law (i.e. Copyright Act of 1790).

statutory damages for infringements of their copyrights.[3] The last sentence of § 504(c)(1) has recently attracted debate based on differing interpretations by different courts. Specifically, this sentence provides that "[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work."[4] The debate over this section centers around two different interpretations of what constitutes a "compilation" under the Copyright Act.[5]

In April 2010, the Second Circuit determined, in *Bryant v. Media Right Productions, Inc.* (*Bryant II*) that, for purposes of statutory damages, albums were "compilations" under the Copyright Act.[6] That determination means that copyright holders can receive only a single award for an album rather than an award for each individual song on that album.[7] The *Bryant II* decision stands in direct contrast to the decisions of other circuits that have used an independent-economic-value test.[8] This independent-economic-value test allows copyright holders to receive damages for individual works so long as they are independently economically viable.[9] The Second Circuit's decision not only misinterpreted the statute but also created a scheme for determining damages that harms copyright owners.[10] The United States Supreme Court has denied certiorari in this case.[11] Thus, unless the Second Circuit chooses to abandon this precedent in a

3. *See* 17 U.S.C. § 504 (2006).

4. *Id.* § 504(c)(1).

5. *See infra* Parts III.B and III.C (discussing and explaining the independent economic value test and the Second Circuit's issuance test).

6. *See* 603 F.3d 135, 141 (2d Cir.), *cert. denied*, 131 S. Ct. 656 (2010).

7. *See id.*

8. *See* Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 295-96 (9th Cir. 1997), *rev'd on other grounds*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998); MCA Television Ltd. v. Feltner, 89 F.3d 766, 768-69 (11th Cir. 1996); Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1115-18 (1st Cir. 1993); Walt Disney Co. v. Powell, 897 F.2d 565, 570 (D.C. Cir. 1990).

9. *See Columbia Pictures*, 106 F.3d at 295; *MCA Television*, 89 F.3d at 769; *Gamma*, 11 F.3d at 1117; *Walt Disney Co.*, 897 F.2d at 569; *see also* Cormack v. Sunshine Food Stores, Inc., 675 F. Supp. 374, *passim* (E.D. Mich. 1987) (stating that if the works are available separately to consumers, the combined work is not a compilation).

10. *See infra* Part IV (discussing the various flaws of the Second Circuit's decision and how those flaw harm copyright holders).

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

future case, the burden of increasing protection placed on works will rest with the music industry—likely to the detriment of consumers.[12]

This Comment seeks to explain the varying approaches used to calculate an award for statutory copyright damages and the need for a uniform interpretation of the word "compilation" under the Copyright Act. Part II will offer a brief history of copyright law including its original purpose, expanding scope, and attempts to adapt to the Digital Age. Part III will discuss available damages under section 504 of the Copyright Act, the independent-economic-value test used by several circuits, and the Second Circuit's issuance test developed in *Bryant II*. Part IV will explain the flaws inherent in the Second Circuit's decision of *Bryant II* and the importance of uniformity in determining what constitutes a "compilation." Potential solutions that copyright holders may use to ensure the protection of their works in the Second Circuit are discussed in Part V. Finally, Part VI concludes that based on the case law, statutes, and potential solutions discussed in preceding sections of this Comment, increased use of digital rights management systems may be the music industry's best hope of protecting its copyrighted works.

II. HISTORY AND DEVELOPMENT OF COPYRIGHT LAW

Copyright law was developed to protect "original works of authorship fixed in a tangible medium of expression."[13] When first created, copyrights were monopolies granted to book printers to protect them from unauthorized copying of their books by third parties.[14] The protections copyright provided were extended over time to other forms of expression including sculptures, paintings, musical compositions, sound recordings, and the like. The origin of copyright can be found in the United States Constitution, which grants Congress the power "To promote the Progress of Science

12. *See infra* Part V (discussing why increased digital rights management or changes in issuance practice would be harmful to consumers).

13. *Copyright in General*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/help/faq/faq-general.html#what (last updated Jul. 12, 2006).

14. *See* 8 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT app. 7-5 [A] (2009). England's 1709 Statute of Anne was the original embodiment of copyright. *See id.* (providing the full text of the Statute of Anne).

and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[15]

Copyright is a form of property; however, there are many differences between intellectual property and tangible or real property, both in importance and in nature, which prompted the Framers to include the Copyright Clause in Article I of the Constitution. Thomas Jefferson attempted to describe this difference between intellectual property rights and other rights in property by stating:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. . . . That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, . . . like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.[16]

Realizing this difference, Congress first codified copyright law in the Copyright Act of 1790.[17] This Act expanded protections offered by the Statute of Anne to include not only books but also maps and charts.[18] At the time, a copyright offered protection for only fourteen years.[19] However, if the author survived beyond the fourteen-year life of the original copyright, the copyright could be

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15. U.S. CONST. art. I, § 8, cl. 8.

16. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THE COMPLETE JEFFERSON 1015 (Saul K. Padover ed.).

17. *See* Robert Meitus, Note, *Interpreting the Copyright Act's Section 201(c) Revision Privilege with Respect to Electronic Media*, 52 FED. COMM. L.J. 749, 753 (2000).

18. *See* U.S. COPYRIGHT OFFICE, *Copyright Act of 1790*, COPYRIGHT.GOV, http://www.copyright.gov/history/1790act.pdf (last visited Mar. 13, 2012).

19. *Id.* This first American copyright act required registration of the copyright to receive protection "for the term of fourteen years from the recording the title thereof in the clerk's office." *Id.*

extended for a second fourteen-year term.[20] This brief term-limit placed on copyright protection ensured the balance between "[p]rogress of . . . [a]rts"[21] and the open, intangible nature of intellectual property by providing protections to the copyright holder that encouraged innovation but also allowed the works to enter the public domain after a reasonable amount of time.

A. Copyright Act of 1976

Important changes to the copyright statutes were made in 1831 and 1870, and the existing copyright statutes were overhauled in 1909.[22] The next overhaul occurred in 1976. This new copyright scheme was codified in the Copyright Act of 1976. This Act was passed in response to the need for protection of new forms of expression that had not existed at the time of the last update to copyright law in 1909. For example, television, films, and sound recordings became popular in the mid-twentieth century and required copyright protection.[23]

This Act expressly preempted all prior federal copyright legislation as well as state common law and statutes that dealt with copyright issues to the extent that they were in conflict with the Act.[24] The Act extended a copyright to "a term consisting of the life of the author and fifty years after the author's death."[25] Copyright law grants the author the following six rights:

(1) to reproduce the copyrighted work in copies or

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20. *Id.*

21. U.S. CONST. art. I, § 8, cl. 8.

22. Meitus, *supra* note 15.

23. *See* Pub. L. No. 94-553, § 102, 90 Stat. 2544-45 (1976) (codified at 17 U.S.C. § 102(a) (2006)). Section 102 of the Copyright Act of 1976 offered protection to "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings." *Id.*

24. *See* Pub. L. No. 94-553, § 301, 90 Stat. 2541, 2572 (1976) (codified at 17 U.S.C. § 301 (2006)). The Copyright Act of 1976 did this by creating one national system for copyright registration that preempted the registration systems used by individual states. *See* Terry Masters, *Full Preemption & Copyright Law*, EHOW, http://www.ehow.com/facts_6901377_full-preemption-copyright-law.html (last visited Mar. 15, 2012).

25. Pub. L. No. 94-553, § 302, 90 Stat. 2572 (1976) (codified as amended at 17 U.S.C. § 302 (2006)). There is, however, some variance in terms under the current scheme depending on the type of work involved.

> phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[26]

Section 107 of this Act has also become quite important to the modern copyright climate. That section codified the common law fair-use doctrine into federal law.[27]

B. Late Twentieth Century Updates and Amendments

Over the last two decades, Congress has made a number of updates to the nation's copyright laws. Each of these updates expanded copyright protections in different ways; however, most

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26. 17 U.S.C. § 106 (2006). The first five rights were present in the 1976 Act, and the sixth right was added by a 1995 amendment. *See* Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (1976), *amended by* Pub. L. No. 104-39, § 106, 109 Stat. 336 (1995) (current version at 17 U.S.C. § 106 (2006)).

27. Fair use was codified to include four factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

See Pub. L. No. 94-553, 90 Stat. 2541, 2546 (1976) (codified at 17 U.S.C. § 107 (2006)).

of them were enacted in response to emerging issues created by technological advancements and the Internet. The expansions found in these amendments to copyright law reflect a shift toward an emphasis on ensuring the copyright owner is adequately compensated and, therefore, encouraged to produce more works that would further the arts and sciences. Some of these updates included the Copyright Term Extension Act, the No Electronic Theft Act, and the Digital Millennium Copyright Act. Additional attempts to expand copyright law in the early twenty-first century have failed to pass.

1. Copyright Term Extension Act

Arguably the most significant update to copyright law in terms of general scope was the Copyright Term Extension Act (CTEA). As part of the increasing emphasis on ensuring the adequate compensation of copyright holders, U.S Representative Sonny Bono introduced the CTEA, which was passed in 1998.[28] The CTEA extended the protections offered to copyright holders by further extending a copyright's term to the life of the author plus 70 years—an additional twenty years of protection.[29]

Highlighting the increasingly global nature of copyright disputes, the CTEA was passed to ensure that compensation is paid to American artists for use of their works abroad.[30] As the Senate Judiciary Committee's Report on the CTEA states, that Act's purpose was:

> [T]o ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. . . . Such an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American

28. *See* Linda Greenhouse, *Justices to Review Copyright Extension*, N.Y. TIMES, Feb. 19, 2002, at C2 ("The 1998 extension was a result of intense lobbying by a group of powerful corporate copyright holders, most visibly Disney, which faced the imminent expiration of copyrights on depictions of its most famous cartoon characters.").

29. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302 (2006)).

30. *See* S. REP. NO. 104-315, at 3 (1996).

creators who deserve to benefit fully from the exploitation of their works.[31]

2. Attempting to Deter Digital Infringement

Around the same time as the CTEA, Congress passed the No Electronic Theft (NET) Act.[32] This Act was introduced as a legislative response to *United States v. LaMacchia*, a 1994 case decided in the District of Massachusetts.[33] In that case, a federal judge dismissed a criminal infringement suit filed against LaMacchia after finding that he had not intended to profit from the infringement and, therefore, § 506 of the Copyright Act, which establishes criminal penalties for certain copyright infringements,[34] did not apply.[35] Outraged by this result, the computer software industry successfully lobbied for the 1997 passage of the NET Act, which removed the intent-to-profit requirement for infringement of all copyrighted works exceeding $1,000 in value.[36]

In 1999, Congress took further steps to deter copyright infringement in emerging online and digital markets.[37] The legislation passed at this time was called the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999

31. *Id.*

32. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified in scattered sections of 17 U.S.C. and 18 U.S.C.). The NET Act actually preceded the CTEA. It was enacted on December 16, 1997, while the CTEA was not enacted until October 27, 1998. Maria A. Pallante, *Preface*, *in* COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE, at vii (2011), *available at* http://www.copyright.gov/title17/92preface.pdf.

33. *See* H.R. REP. NO. 105-339 (1997).

34. 17 U.S.C. § 506 (2006).

35. *LaMacchia*, 871 F. Supp. 535, 541-43 (D. Mass. 1994). In dismissing the case, Judge Stearns determined from the legislative history "that Congress meant what it said when it required copying for the 'purpose of commercial advantage or private financial gain.'" Michael Coblenz, *Intellectual Property Crimes*, 9 ALB. L.J. SCI. & TECH. 235, 249 (1999) (quoting *LaMacchia*, 871 F. Supp. at 539-40).

36. Coblenz, *supra* note 32, at 250. *See* No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678, 2678 (1997).

37. Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (codified in 17 U.S.C.); *see* Pallante, *supra* note 29, at viii.

(Digital Theft Act).[38] As the name implies, this law amended certain preexisting provisions of the Copyright Act to increase statutory damages, thereby deterring infringement.[39] Both the NET Act and the Digital Theft Act expanded copyright protections to meet the increasing demands of digital technologies. These additions to copyright law were consistent with copyright law's steady movement away from the Copyright Clause's mandate to protect works and towards a scheme that ensures the copyright owners are compensated for their works.

3. Digital Millennium Copyright Act

In 1998, Congress also passed the Digital Millennium Copyright Act (DMCA), which has become well known for creating new rights for copyright holders and essentially extinguishing certain aspects of the fair use doctrine.[40] This is another part of the shift toward ensuring author compensation. The DMCA did not extend the copyright term like its predecessors; however, it did establish "anti-circumvention" provisions.[41] The anti-circumvention provisions further protected copyright owners by creating liability for the circumvention of technological protection measures on a work.[42]

This circumvention liability is not the same as copyright infringement liability; rather, the DMCA created for copyright holders an additional cause of action which many view as having been extremely detrimental to the public domain and the doctrine of fair use.[43] For example, digital rights management (DRM)

38. Sec. 1, 113 Stat. at 1774.

39. *Id.*

40. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

41. *See* Pub. L. No. 105-304, 112 Stat. 2860, 2863-64 (1998) (codified at 17 U.S.C. § 1201 (2006)).

42. *Id.*

43. *See* Michael J. Chang, Comment, *Digital Copyrightability of Lexmark Toners and Cartridges Under the Digital Millennium Copyright Act*, 17 ALB. L.J. SCI. & TECH. 559, 580 (2007) ("Because the DMCA protects copyright owners from unauthorized circumvention of access to their protected works, the doctrine of fair use would be largely irrelevant in DMCA litigation."); Jeffrey D. Sullivan & Thomas M. Morrow, *Practicing Reverse Engineering in an Era of Growing Constraints Under the Digital Millennium Copyright Act and Other Privisions*, 14 ALB. L.J. SCI. & TECH. 1, 32 (2003) ("While the legislative history of the DMCA clearly shows some congressional

systems[44] have become a common means of protecting copyrighted works.[45] Under the DMCA, circumvention of DRM systems for purposes of copyright infringement would allow copyright owners to pursue both circumvention-liability actions (for bypassing the DRM system) and copyright infringement actions (for any copyright infringement that followed the circumvention).

4. Failed Legislation in the Early Twenty-First Century

As part of its continuing goal to deter copyright infringement, Congress made several attempts in the early twenty-first century to pass various pieces of legislation dealing with issues created by the internet and technological advances.[46] These proposed acts attempted to deal with everything from preventing the "induce[ment of] another to engage in copyright infringement"[47] to deterring piracy.[48] These acts failed because Congress could not compromise on the specific language despite the fact that piracy has been described as "the single greatest threat to the world's entertainment industries."[49]

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consideration of the doctrine of fair use during the formulation of the Act, it appears that Congress's seeming efforts to give some effect to these considerations were too narrowly framed and have proven largely ineffectual in practice.") (footnote omitted)).

44. Digital rights management systems are technologies placed on copyrighted media and hardware that attempt to control what consumers can and cannot do with those copyrighted works. For example, when cell phone manufacturers place restrictions on a cell phone that limit the consumer's ability to use the device with particular service providers, the manufacturer has used a digital rights management system. *DRM*, ELECTRONIC FRONTIER FOUND., http://www.eff.org/issues/drm (last visited June 8, 2012).

45. *See infra* Part V.A (discussing digital rights management systems and why they may be the music industry's best hope for protecting copyrights in the Second Circuit).

46. *See* Patrick Murck, Comment, *Waste Content: Rebalancing Copyright Law to Enable Markets of Abundance*, 16 ALB. L.J. SCI. & TECH. 383, 395-400 (2006) (offering a history of several failed pieces of legislation that sought to deal with regulation of copyright infringement on the internet).

47. *Id.* at 396-97 (Inducing Infringement of Copyrights Act).

48. *Id.* at 398-99 (Piracy Deterrence in Education Act of 2004). Congress considered the Piracy Deterrence in Education Act of 2004 both individually and as part of the Cooperative Research and Technology Enhancement Act of 2004, but both acts failed. *Id.*

49. Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH L.J. 795, 796 (2006). *See also infra* Part IV.B.2 (discussing music piracy relative to the Second Circuit's decision in *Bryant II*).

III. DAMAGES: CALCULATION AND INTERPRETATION

These failed pieces of legislation in the early twenty-first century show effective legislation requires corresponding penalties to ensure compliance. A lack of penalties for violation of a law would render enforcement impossible and result in a failure of the law. Such penalties range in type from temporary restraining orders and permanent injunctions to monetary damages and criminal penalties. While each of these penalties serves a unique purpose, monetary damages have become the most frequent remedy for civil actions in the United States.[50]

The unique appeal of monetary damages is its versatility. This versatility exists because of the numerous types of awards available. For example, liquidated damages allow parties to agree upon an award in advance of an actual breach of contract, compensatory damages remedy various forms of debt (actual damages), and statutory damages serve as a substitute meant to remedy a harm that cannot be precisely determined in a dollar amount.[51]

A. Damages Available Under Copyright Law

There are two types of monetary damages available under the Copyright Act. Plaintiffs seeking an award of damages for copyright infringement may seek either actual damages to compensate them for the harm caused by the infringement or statutory damages, which are predetermined in § 504 of the copyright code.[52] However, these damages are mutually exclusive, allowing copyright owners to choose either actual or statutory damages but not both.[53]

The relevant provision of the copyright code that allows for statutory damages is 17 U.S.C. § 504, which states:

> (c) Statutory Damages.—
>
> > (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover,

50. *See* Stephen C. Yeazell, CIVIL PROCEDURE 268 (7th ed. 2008).
51. *Id.* at 269-70, 272.
52. *See* 17 U.S.C. § 504 (2006).
53. *See id.* § 504(a).

> instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. *For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.*
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.[54]

This provision allows for statutory damages between $750 and $30,000 per infringement as well as the much larger amount of not more than $150,000 in cases where the plaintiff can prove that the infringement was willful.[55]

By placing such high limits on statutory copyright damages and by giving the choice of actual or statutory damages, Congress has created a scheme that can properly discourage infringement, punish infringers, and compensate copyright owners for profits lost as a result of infringement. Importantly, however, large awards of statutory damages may not be realistic in all cases because a party's ability to actually collect a court-ordered award will depend on the type of defendant involved and whether it has the funds to pay the award.[56]

B. The Independent-Economic-Value Test

Over the past few years, several of the federal circuit courts

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54. *Id.* § 504(c) (emphasis added).

55. *See id.*

56. *See, e.g.*, Steven Musil, *Jammie Thomas hit with $1.5 million verdict*, CNET (Nov. 3, 2010), http://news.cnet.com/8301-1023_3-20021735-93.html. Ms. Thomas-Rasset's case has gained notoriety because of extreme statutory damages awarded by a jury for her illegal downloading of approximately twenty songs. Unable to pay the judgments from her trial and retrials, she continues to challenge the awards, which have been in excess of one million dollars, as being so excessive that they violate her Due Process rights. *Id.*

have interpreted the term "compilation" in the Copyright Act using the independent-economic-value test. This test has become the most common standard for calculating the amount of statutory copyright damages that a defendant will pay.[57] Using this functional approach, courts have awarded damages for infringement of each work that can be considered economically "'viable'" on its own.[58] Thus, an album created and marketed by a musician would be economically viable as a work in its entirety, but the individual tracks should also be considered economically viable on their own.[59]

Infringers of a music album containing ten songs could potentially be liable ten times in circuits that use this standard. Consequently, such infringers would be liable for between $750 and $30,000 ten times (receiving one award per work infringed), resulting in an enormous award that may be much greater than the harm actually caused to the copyright holder.[60] This disparity between the size of the harm and the size of the damage award can most likely be explained as an intended deterrent effect of the law.

The independent-economic-value test was first used in 1990 by the D.C. Circuit. In *Walt Disney Co. v. Powell*, the defendant paid two awards of statutory damages, one each for violating Disney's copyright in Mickey and Minnie Mouse.[61] The court looked to Nimmer on Copyright, which stated that "'to qualify for a separate minimum award, the work which is the subject of a

57. *See* Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 295 (9th Cir. 1997), *rev'd on other grounds*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998), *rev'd on other grounds*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998); MCA Television Ltd. v. Feltner, 89 F.3d 766, 769 (11th Cir. 1996); Gamma Audio & Video, Inc., v. Ean-Chea, 11 F.3d 1106, 1116-17 (1st Cir. 1993); Walt Disney Co. v. Powell, 897 F.2d 565 569-70 (D.C. Cir. 1990).

58. *See Walt Disney Co.*, 897 F.2d at 569 (citation omitted).

59. *See id.* No prior case from another circuit has dealt with this problem as it relates specifically to an album of musical tracks; however, the principles in those cases can and should be applied to cases involving music as they arise. See Columbia Pictures, 106 F.3d at 295; MCA Television, 89 F.3d at 769; Gamma, 11 F.3d at 1117; Walt Disney Co., 897 F.2d at 569.

60. *See* 17 U.S.C. § 504. Statutory damages need not correlate to actual harm to the copyright owner, as shown by the fact that plaintiffs can recover either actual damages or statutory damages. *See id.*

61. 897 F.2d at 570.

separate copyright would have to be in itself . . . viable.'"[62]

In 1993, the First Circuit also applied the independent-economic-value test. In *Gamma Audio & Video, Inc. v. Ean-Chea*, the court, relying on a Second Circuit decision, determined that four episodes of a television show, *Jade Fox*, were each independently viable works and the defendant should receive an award for each episode rather than one award for the series.[63] The court also looked to the registration rules of the U.S. Copyright Office, and stated:

> Under regulations promulgated by the Copyright Office, the copyrights in multiple works may be registered on a single form, and thus considered one work for the purposes of registration, while still qualifying as separate "works" for purposes of awarding statutory damages. We are unable to find any language in either the statute or the corresponding regulations that precludes a copyright owner from registering the copyrights in multiple works on a single registration form while still collecting an award of statutory damages for the infringement of each work's copyright.[64]

However, the registration of multiple works on a single form may not be determinative.[65]

The most recent circuit court to adopt the independent-economic-value test was the Ninth Circuit. In 1997, that court adopted the test in *Columbia Pictures v. Krypton Broadcasting of Birmingham, Inc.*[66] The Ninth Circuit also relied on the Second Circuit's decision in *Twin Peaks*, determining that each episode of a television show rather than each series was a work for purposes of statutory copyright damages.[67] The court also noted that the Eleventh Circuit had "agreed that each episode of a television

62. *Id.* at 569 (alteration in original) (quoting 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT §§ 14-04[E], -40.13 (1989)).

63. 11 F.3d 1106, 1115-18 (1st Cir. 1993) (citing Twin Peaks Prods. v. Publ'ns Intern, 996 F.2d 1366, 1381 (2d Cir. 1993)). The court also relied on *Walt Disney Co. Id.* at 1116-17 (citing *Walt Disney Co.*, 897 F.2d at 569).

64. *Id.* at 1117 (footnote omitted) (citation omitted).

65. *See id.*

66. 106 F.3d 284, 295 (9th Cir. 1997).

67. *Id.*

series was a separate work."[68]

Thus, the independent-economic-value test has been recognized in four circuits. This consensus in the circuits that have taken up the issue makes the Second Circuit's decision in *Bryant II* that much more troublesome. For the reasons stated below, the Second Circuit's decision in *Bryant II* misinterpreted what constitutes a "compilation" under the Copyright Act.

C. The Second Circuit's Formalist Approach

1. Bryant v. Europadisk Ltd.

In April 2009, the Southern District of New York decided *Bryant v. Europadisk* (*Bryant I*).[69] In that case, two songwriters named Anne Bryant and Ellen Bernfeld (collectively "Bryant") and their record label Gloryvision brought a copyright claim[70] against several parties for the unlawful copying and online distribution of Bryant's copyrighted songs.[71]

The District Court found that "in the late 1990s, Bryant . . . created and produced two albums, *Songs for Dogs* and *Songs for Cats*."[72] Bryant had registered for copyright protection of each album, each individual song, and the album artwork with the United States Copyright Office.[73] Gloryvision then entered an agreement with Media Right Productions (MRP) that gave MRP "the authority to act as agent and representative on a non-exclusive basis to market the albums."[74] There was no right to make copies conveyed to MRP as part of this agreement.[75] In fact, the agreement required that if MRP needed additional copies of

68. *Id.* at n.8 (citing MCA Television Ltd. v. Feltner, 89 F.3d 766, 768-70 (11th Cir. 1996)). Interestingly, the defendant, C. Elvin Feltner, was the same in both *Columbia* and *MCA*. *Id.*

69. Bryant v. Europadisk Ltd. (Bryant I), No. 07 Civ. 3050(WGY), 2009 WL 1059777 (S.D.N.Y. Apr. 15, 2009).

70. *Id.* at *1. The original complaint filed by Gloryvision on April 16, 2007, contained eight counts: "1) trademark/service mark infringement; 2) common law trade dress infringement and unfair competition; 3) trade dress violation under the Lanham Act; 4) direct copyright infringement; 5) contributory copyright infringement; 6) breach of contract; 7) breach of fiduciary duty; and 8) unjust enrichment." *Id.*

71. *Id.* at *1.

72. *Id.* at *2.

73. *Id.*

74. *Id.*

75. *Id.*

the album, it request them from Gloryvision.[76]

MRP attempted to market the albums but failed to sell any of them.[77] Prior to signing its agreement with Gloryvision, however, MRP had entered an agreement with a music wholesaler called The Orchard.[78] This agreement "authoriz[ed] The Orchard to distribute eleven 'audio CD titles,' seven of which were [MRP]'s own recordings."[79] MRP had included Bryant's albums on this list, in anticipation of their agreement with Gloryvision.[80] At the time, The Orchard sold only physical copies of musical recordings; however, in April 2004, the company began its digital sales business.[81] This change resulted in digital copies of Bryant's recordings being made and distributed through "various retailers including iTunes and Amazon.com."[82] Upon discovering that their albums were available at various online retailers as digital downloads, Bryant filed suit.[83]

The court simply determined that copyright infringement had occurred. Such an infringement requires: "1) ownership of a valid copyright" and 2) unauthorized copying of original elements from the copyrighted work.[84] Looking at these elements, the district court held that The Orchard had infringed the copyright (although innocently).[85] In determining that MRP had also infringed Bryant's copyrights, the court stated that "'an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.'"[86]

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76. *Id.*
77. *Id.*
78. *Id.* at *3.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id*
84. *Id.* at *4 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)).
85. *Id.* at *5. "Although it did so only after obtaining an explicit warrant from [MRP] that use of the recordings would not infringe anyone's rights, copyright infringement is a strict liability offense. Gloryvision 'need not prove wrongful intent or culpability in order to prevail.'" *Id.* (quoting Faulkner v. Nat'l Geographic So'y, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008)).
86. *Id.* at *4 (quoting Sony Corp. of Am. v. Universal City Studios, 464

Bryant sought statutory damages for these infringements by The Orchard and MRP.[87] Section 504(c)(1) of the Copyright Act provides for:

> [A]n award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.[88]

Relying on this statute, the district court then moved on to a determination of what amount to award Gloryvision.[89] After properly noting that the court enjoys "wide discretion" in setting statutory damage awards,[90] the court determined that the total number of awards "'depends on the number of works that are infringed . . . regardless of the number of infringements of those works.'"[91] This determination made it necessary for the court to decide whether each copyrighted song on Bryant's albums was a "work" or whether only the albums themselves were "work[s]."[92]

Relying on two previous cases from the Southern District of New York, the court found that "statutory damages must be calculated on a per-album basis rather than per song."[93] This

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U.S. 417, 435 n.17 (1984)).

87. *Id.* at *6. The Copyright Act provides that "[t]he owner of a registered copyright that has been infringed may elect to recover either actual damages or statutory damages." *Id.* (citing 17 U.S.C. §§ 504(a)(1)-(2), 504(c) (2006)).

88. *Id.* (citing 17 U.S.C. § 504(c)(1)).

89. *Id.* at *6.

90. *Bryant I*, 2009 WL 1059777, at *6 (citing Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co., Inc., 807 F.2d 1110, 1116 (2d Cir. 1986)). "It is well-established that district courts have broad discretion in setting the amount of statutory damages within the minimum and maximum amounts prescribed by the Copyright Act." *Id.* (quoting Nat'l Football League v. PrimeTime 24 Joint Venture, 131 F. Supp. 2d 458, 472 (S.D.N.Y. 2001)).

91. *Id.* (quoting WB Music Corp. v. RTV Commc'n Group, Inc., 445 F.3d 538, 540 (2d Cir. 2006)).

92. *Id.*

93. *Id.* at *7 (citing Country Road Music, Inc. v. MP3.Com, Inc., 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003); UMG Recordings, Inc. v. MP3.Com, Inc., 109 F. Supp. 2d 223, 224-25 (S.D.N.Y. 2000)).

decision was based on the statute's definition of "compilation" and as a result, Bryant received only two awards of damages for a total of $400 from The Orchard and $2,000 from MRP.[94]

2. Bryant v. Media Right Productions

In April 2010, the Court of Appeals for the Second Circuit affirmed the district court's *Bryant I* decision.[95] Importantly, the Second Circuit's decision agreed with the district court's determination that, under the language of 17 U.S.C. § 504(c), an album is considered a compilation and should be awarded statutory damages for each album rather than for each of the tracks that had been registered.[96] The question of what constitutes a "compilation" was reviewed *de novo* by the Second Circuit.[97]

Specifically, the language of the statute states that "[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work."[98] Bryant argued that the court should use the independent-economic-value test and award damages for each of the twenty songs that had been infringed because each of the songs was independently copyrighted and The Orchard sold the songs individually.[99] The Second Circuit, however, rejected the independent-economic-value test, stating that it "cannot disregard the statutory language simply because digital music has made it easier for infringers to make parts of an album available separately."[100] Furthermore, the court held that "this interpretation . . . [wa]s consistent with the Congressional intent . . . that accompanied the 1976 Copyright Act."[101]

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94. *Id.* at *7, *9 (citing 17 U.S.C. § 504(c)). Even the cover art for each album was considered to be part of the compilation for the purposes of statutory damages. *Id.*

95. Bryant v. Media Right Prods., Inc. (Bryant II), 603 F.3d 135, 144 (2d Cir. 2010). Because Europadisk Ltd. was voluntarily dismissed in the early stages of the case in the district court, the case on appeal was called Bryant v. Media Right Productions. *See Bryant I*, 2009 WL 1059777, at *1 ("On July 13, 2007, the action was dismissed without prejudice against Europadisk, LTD.").

96. *Bryant II*, 603 F.3d at 140-41.

97. *Id.* at 140.

98. 17 U.S.C. § 504(c)(1).

99. *Bryant II*, 603 F.3d at 140.

100. *Id.* at 142.

101. *Id.* The House Report on the Copyright Act of 1976 stated that a

The court discussed two of its prior decision which both emphasized the manner in which the copyright owner had issued the works. For example, in *Twin Peaks*, eight episodes of a television series were issued separately and sequentially.[102] The plaintiff was then allowed to receive individual statutory-damage awards for the infringement of each episode when the defendant placed teleplays (stories or play prepared for television production) of all eight episodes into one book.[103]

In another case, *WB Music Corp.*, thirteen songs had been issued separately and the plaintiff was allowed to receive individual statutory damage awards because the defendant placed all thirteen songs onto a single album.[104] Thus, because the court emphasized how the works were issued, the plaintiffs were unable to receive a damage award for each individual song because the songs were issued only as part of the albums. This focus on how a work is issued is central to the Second Circuit's analysis of the issues involved. Despite the fact that the Second Circuit's opinion in this case diverged from the interpretation of the word "compilation" as used by other circuits in discussing other media, a petition for writ of certiorari to the United States Supreme Court was denied on November 29, 2010.[105]

IV. ANALYSIS OF *BRYANT II*'S FLAWS

A. Flaws in the Second Circuit's Decision

There are two major flaws in the Second Circuit's decision of this case. First, the court misinterprets the statute and determines that an album is a "compilation" for purposes of assessing statutory damage awards.[106] Second, the court fails to comprehend the full importance of changes in music distribution. More specifically, the court writes off the fact that digital music

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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." H.R. REP. NO. 94-1476, at 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670.

102. *Twin Peaks Prods., Inc.*, 996 F.2d at 1381.

103. *Id.*

104. *WB Music Corp.*, 445 F.3d at 540-41.

105. Bryant v. Media Rights Prods., Inc., 131 S. Ct. 656 (2010).

106. *See Bryant II*, 603 F.3d at 140-141.

now constitutes a majority of the music distribution market and erroneously rejects the independent-economic-value test in favor of an issuance test.[107] This issuance test benefits copyright infringers and thus violates the basic purpose of copyright law.[108]

1. Using Common Sense to Define "Compilation"

The major flaw in the Second Circuit's decision in *Bryant II* is the court's misinterpretation of what constitutes a compilation under the Copyright Act.[109] Ultimately, the court determined that "[a]n album falls within the Act's expansive definition of compilation" because it "is a collection of preexisting materials . . . that are selected and arranged by the author in a way that results in an original work of authorship."[110]

The court's determination that an album is a "compilation" under the Copyright Act's definition is flawed because it ignores a concept in copyright law—authorship. Authorship focuses on the work's producer's creative process.[111] This focus on the authorship of a work is mandated by the Constitution as the way that the progress of the arts is to be promoted: "by securing for limited Times *to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*"[112] Thus, when focusing on the authorship concept, a song would be considered a work of authorship under the Constitution because it was authored independently.

Demonstrating this principle, the Eastern District of Michigan noted two important principles of authorship in

107. *Id.* at 142.

108. As stated in the U.S. Constitution, the purpose of Copyright is "To promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. As part of the ever increasing scope of copyright law, this mandate has transformed from a protection of artistic works to a series of protections for the copyright owner. *See supra* Part II.

109. "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (2006).

110. *Bryant II*, 603 F.3d at 140-41.

111. Recent Cases, Bryant v. Media Right Prods., Inc., 603 F.3d 135 (2d Cir. 2010), 124 HARV. L. REV. 851, 855 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) [hereinafter Harvard Casenote].

112. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

Cormack v. Sunshine Food Stores, Inc.[113] The first principle is that "'[m]arketing . . . is not part of authorship. The ultimate issue . . . does not depend on the marketing strategies adopted by the copyright owner.'"[114] In other words, the format in which the copyright owner chooses to distribute its works is irrelevant to the determination of whether those works constitute individual works or compilations for the purposes of determining an award of statutory damages. The second principle that emerged from *Cormack* is that if consumers can obtain the works separately, that fact is an indication that the works do not form a compilation.[115] Thus, in *Bryant II*, the ability of consumers to download individual songs from each album on iTunes, Amazon.com, and Rhapsody indicated that these albums did not constitute a compilation under the Copyright Act's definition.

Rather than adhering to these principles laid out in *Cormack*, the Second Circuit created an issuance test that focused not on authorship but rather on how the author marketed their works.[116] This focus was in direct contrast to the principles stated in *Cormack* and the independent-economic-value test used by other circuits.[117] In creating the issuance test, the Second Circuit stated that the statute "provides no exception for a part of a compilation that has independent economic value."[118] The independent-economic-value test does not create any exceptions; rather, it

113. 675 F. Supp. 374, 378 (E.D. Mich.1987).

114. Harvard Casenote, *supra* note 108 (quoting *Cormack v. Sunshine Food Stores, Inc*, 675 F. Supp. 374, 378 (E.D. Mich. 1987)).

115. *Id.* (citing *Cormack*, 675 F. Supp. at 379).

116. *See Bryant II*, 603 F.3d at 141 ("[W]e focu[s] on whether the plaintiff—the copyright holder—issued its works separately, or together as a unit."). There is no precedential value in the *Cormack* decision or any of the other Circuit Court of Appeals' decisions for the Second Circuit. However, those courts offer a much better way of interpreting the Copyright Act that allows for increased protection for the copyright owner. *See generally* Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284 (9th Cir. 1997), *rev'd on other grounds*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998); 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).

117. *Cormack*, 675 F. Supp. at 378 ("The marketing of copyrighted matter may be relevant as *evidence* in cases where it is not otherwise possible to determine the respective protected purposes of two or more copyrights. Marketing, however, is not a part of authorship.").

118. *Bryant II*, 603 F.3d at 142.

determines whether a work is a compilation "by examining whether the works together comprise a new single work by the author that cannot be enjoyed in pieces by a consumer."[119]

The issuance test also fundamentally misinterprets the Copyright Act's definition of "compilation" by failing to recognize how albums are made. Section 101 of the Copyright Act says that a compilation is "formed by the collection . . . *of preexisting materials* . . . that are selected . . . and arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[120] This definition coincides with the plain English understanding of the word "compilation." An album does not fit within this definition because, although it is made up of separate materials that are strategically placed together in a certain order, each of the individual songs is authored as part of the creative process of creating an album. Accordingly, the individual songs cannot be "preexisting materials" because the author creates them specifically to be put on the album.

As further evidence that the method of issuance is irrelevant to a determination of whether something is a compilation, dictionary definitions indicate that the act of creating a compilation involves putting together "materials *gathered from several sources*."[121] Thus, an album is not always a compilation because artists create individual songs for inclusion on an album rather than gathering them from preexisting sources. For example, there is no question that an artist seeking to release a greatest hits album would be releasing a compilation featuring songs from numerous original albums released over a number of years. However, that situation is clearly different from albums released containing new, original works. Indeed the reason compilations are only allowed a single award of damages is that, in theory, the individual works found on those compilations already exist elsewhere in their original form. Allowing works on a compilation to receive individual damage awards in addition to an award for the entire compilation would be allowing a second bite at the apple in terms of receiving damages.

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119. Harvard Casenote, *supra* note 108, at 857.

120. 17 U.S.C. § 101 (2006).

121. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 385 (3d. ed. 1996).

Thus, the Second Circuit's issuance test misinterprets "compilation" by focusing on how an artist chooses to market their work and failing to take into account the process by which albums are produced.

2. The Importance of Online Digital Music Distribution

Another flaw in the Second Circuit's decision is that it downplays the importance and impact of online digital music distribution. Digital recording was developed in the 1970s but did not become the mainstream norm for audio recording until the 1980s.[122] The process of digitally recording is "[a] method of recording in which samples of the original analog signal are encoded on tape or disk as binary information for storage or processing. The signal can then be copied repeatedly with no degradation."[123]

The key feature of digital recording is the ability to make exact copies with no reduction in sound quality.[124] Digital recording combined with the creation of MP3 technology[125] and the launch of Napster in 1999 signaled the beginning of online digital music distribution.[126] Initially, the music industry fought against these developments because of the massive increase in copyright infringement via illegal music downloads on peer-to-peer services such as Napster, Grokster, and a number of

122. *See* Shuman Ghosemajumder et al., *Digital Music Distribution*, MASSACHUSETTS INSTITUTE OF TECHNOLOGY ALFRED P. SLOAN SCHOOL OF MANAGEMENT 2-3 (Rev. Mar. 3, 2002), http://shumans.com/digital-music.pdf.

123. *Filmmaker's Dictionary - D*, MICROFILMMAKER MAGAZINE, http://www.microfilmmaker.com/tipstrick/diction/d_dictn.html (last visited Mar. 18, 2012).

124. The History of Magnetic Recording, H2G2 (Dec. 20, 2004), http://www.bbc.co.uk/dna/h2g2/A3224936.

125. Lori A. Morea, *The Future of Music in the Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 197 (2006). ("MPEG-1 Audio Layer 3 (more commonly referred to as an MP3). . . . makes it possible to compress large amounts of audio material into small files that can quickly and easily be transferred over the Internet.").

126. Ghosemajumder et al., *supra* note 119. "Napster was the first of the peer-to-peer (or P2P) systems which allowed many users (e.g. hundreds of thousands or more) to connect to a sub-network which allowed them to share files they each stored on their computers. Napster was optimized for sharing music files – and thus let users search for songs by artist, title, sampling quality, and other characteristics." *Id.*

others.[127] This type of mass piracy of copyrighted works is a very serious problem for the music industry, resulting in as much as $300 million in lost profits per year in the United States alone.[128]

In addition to pursuing claims against both those facilitating the copyright infringement (e.g., Napster) as well as those engaged in infringement,[129] the music industry began to embrace technological advancements and offer legal alternatives to peer-to-peer file sharing. Thanks to that proactive stance toward online infringement and the music industry's use of online retail shops,[130] digital music downloads from the internet increase steadily each year. For example, Apple's iTunes Store sold seventy millions songs during 2003, its first year of operations, and by 2006 was able to sell in excess of one billion songs per year.[131] More recently, "[s]ales of digital tracks and albums accounted for 40 percent of overall music market share in the first quarter (Q1) of 2010."[132] During that same period, Apple alone accounted for 28% of all music purchased by U.S. consumers.[133]

This proliferation of online digital music downloading through stores like iTunes, Rhapsody, and Amazon.com renders the issuance test created by the Second Circuit even less effective. Unlike physical copies of albums sold in stores, these online music distributors allow users to purchase individual tracks from albums. Under the principles of *Cormack*, this fact may be

127. Morea, *supra* note 122, at 195, 198-201.

128. *Id.* at 197.

129. *See id.* at 198-204. Originally, the music industry pursued claims only against companies facilitating illegal music downloads due to the difficultly in pursuing claims against individual infringers. The difficulty in pursuing individual infringers was two-fold: infringers were numerous and they were difficult to locate. *Id.* at 198. Passage of the DMCA in 1998, however, allowed the Recording Industry Association of America (RIAA) to "quickly obtain the private information of Internet users." *Id.* at 201. This was what first allowed the RIAA to pursue claims against individuals. *Id.*

130. For example, Apple's introduction of iTunes in 2003 coupled with the popularity of the iPod made legally downloading MP3 files a viable option for consumers. *See* Mark Harris, *iTunes Store History – The History of the iTunes Store*, ABOUT.COM, http://mp3.about.com/od/history/p/iTunes_History.htm (last visited Mar. 18, 2012).

131. *Id.*

132. Press Release, The NPD Group, Amazon Ties Walmart as Second-Ranked U.S. Music Retailer, Behind Industry-Leader iTunes (May 26, 2010), *available at* http://www.npd.com/press/releases/press_100526.html.

133. *Id.*

considered as an indication, although not determinative, that albums sold online in this manner are not compilations under the Copyright Act's definition. Additionally, by allowing online music retailers such as iTunes to sell their music, most copyright owners are aware that tracks may be sold individually, making the format in which they choose to issue their materials irrelevant.

The Second Circuit erroneously created the issuance test despite the fact that "digital music has made it easier for infringers to make parts of an album available separately."[134] This lack of comprehension regarding the importance of online music distribution renders the Second Circuit's decision of *Bryant II* out of touch with the realities of modern music distribution practices. The Second Circuit's failure to understand modern music distribution practices coupled with their previously discussed misinterpretation of the word "compilation" make *Bryant II* a precedent that is dangerous for copyright owners seeking to protect their works in the Second Circuit.

B. The Importance of Uniformity

By rejecting the more functional independent-economic-value test, the Second Circuit created an issuance test that, if adopted by circuits that have not yet considered the issue, could create a major circuit split in the interpretation of what constitutes a "compilation" under the Copyright Act.[135] The entertainment industry will be most noticeably affected by this potential circuit split. This is because the entertainment industry, which is at the center of many copyright disputes, has its major centers in New York and Los Angeles and will now face different award possibilities depending on the jurisdiction.

There is a need for uniformity in the way lower federal courts interpret federal statutes. In particular, there are numerous reasons as to why uniform interpretation is important in calculating an award for statutory copyright damages. Some of those reasons are that: (1) these varying approaches can create problems for copyright holders experiencing infringement in both

134. Bryant v. Media Right Prods., Inc. (Bryant II), 603 F.3d 135, 142 (2d Cir. 2010).

135. The First, Ninth, Eleventh, and D.C. Circuit Courts of Appeals all use the independent-economic-value test. It is only the Second Circuit that has developed the issuance test in *Bryant II*.

jurisdictions (i.e. forum shopping in internet piracy cases); and (2) the Second Circuit's formalist approach could actually result in increased music piracy.

1. Forum Shopping

Black's Law Dictionary defines "forum-shopping" as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."[136] The uniform interpretation of federal statutes is important to avoid this practice. In particular, copyright infringers who place music on the Internet to be downloaded onto personal computers across the country make themselves vulnerable to suit in any jurisdiction where the music is downloaded. This is possible because the Supreme Court has stated that there is personal jurisdiction over any defendant who has "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[137]

A look at later personal jurisdiction cases confirms that online copyright infringers would be subject to suit in jurisdictions across the country. Plaintiffs would assert that infringers were subject to the "specific jurisdiction" of the forum state. Specific jurisdiction exists when "a [s]tate exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum."[138] In cases of copyright infringement that occurred over the Internet, there could be specific jurisdiction over defendants in various jurisdictions under a "purposeful availment" theory. Courts have held that:

> [t]he purposeful availment inquiry . . . focuses on the defendant's intentionality. This prong is only satisfied when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on [his contacts with the

136. BLACK'S LAW DICTIONARY 681 (8th ed. 2004).

137. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

138. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

forum].[139]

Under these personal jurisdiction standards, plaintiffs seeking to recover statutory copyright damages could theoretically file suit anywhere in the country where they are located or where online music is downloaded illegally. This would allow for a great deal of forum shopping to avoid courts in the Second Circuit.[140] Admittedly, defendants would not be subject to suit in any jurisdiction at any time. There are a myriad of other concerns that would need to be satisfied for the suit to continue including, but not limited to, subject-matter jurisdiction, proper venue, and a finding that there is no undue burden on the defendant. The problems created by this increase in forum shopping would be increased burdens on the courts of other jurisdictions and increased costs for copyright owners who are forced to litigate their claims outside of the Second Circuit.

2. Music Piracy

Another reason that a uniform approach to copyright-statutory-damage awards is needed is because the Second Circuit's decision in *Bryant II* may actually encourage music piracy. Despite indications that Internet piracy is decreasing in the United States,[141] piracy remains a serious problem for the entertainment industry, costing as much as $300 million per year in the United States alone.[142] If the Second Circuit's

139. United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 623-24 (1st Cir. 2001).

140. Conflict/choice-of-law issues would also determine whether suits could move forward, and under which state's law such cases would be adjudicated; however, these issues are beyond the scope of this Note.

141. *See* Lauren Indvik, *U.S. Internet piracy is on the decline*, USA TODAY (Mar. 3, 2011), http://content.usatoday.com/communities/technologylive/post/2011/03/us-internet-piracy-is-on-the-decline/1#.T2Y3M5j9fao.

142. Morea, *supra* note 122, at 197. Indeed, a study by the Institute for Policy Innovation concluded that because of global music piracy, "the U.S. economy loses $12.5 billion in total output annually" and "71,060 U.S. jobs," "U.S. workers lose $2.7 billion in earnings annually," and "U.S. federal, state and local governments lose a minimum of $422 million in tax revenues annually." Stephen E. Siwek, The True Cost of Sound Recording Piracy to the U.S. Economy, Institute for Policy Innovation (Aug. 21, 2007), http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement.

determination that Bryant's albums were "compilations" for statutory copyright damages is interpreted broadly to imply that all albums may be compilations, would-be copyright infringers located in the Second Circuit may be more likely to increase infringement, knowing that they will be subject to awards only for the album as a whole rather than the individual songs. For example, someone seeking to download a single song is encouraged by the Second Circuit's issuance test to download the entire album instead because there is no additional risk of damages to limit these potential infringements.

One of the main purposes of providing relief in the form of damages is to penalize infringing conduct. Knowing that they will face a smaller possible penalty for their infringing conduct, individuals are less likely to curb their behavior out of fear of penalty. Such increased infringement goes directly against the purpose of the Copyright Clause's mandate "[t]o promote the Progress of Science and useful Arts."[143] The scope of copyright protections has increased steadily over time to extend additional protections and term limits to copyright owners.[144] Following an interpretation of the Copyright Act's damages provisions that actually incentivizes infringement directly contradicts this ongoing expansion of copyright law because it will make authors less likely to produce new works knowing that they will have limited recourse in counteracting those who choose to infringe their works.

The relevance of this argument to the Second Circuit is particularly important because of the music industry's strong presence in New York City.[145] With nine percent of Internet users (16 million people) still using peer-to-peer file-sharing services,[146] it was inappropriate for the Second Circuit to limit copyright protections and damages available to the music industry. For example, between 2004 and 2009, the music industry suffered a thirty percent decline in global revenue.[147] This decline is due in large part to online music piracy.[148] Accordingly, the music

143. U.S. CONST. art. I, § 8, cl. 8.
144. *See supra* Part II.
145. *See* Indvik, *supra* note 138.
146. *Id.*
147. *Id.*
148. FRANCES MOORE, INT'L FED'N OF THE PHONOGRAPHIC INDUS., DIGITAL

industry must be able to pursue damages that will serve a deterrent effect and hopefully curb some of this piracy. Congress recognized this need when it increased damages for copyright infringement under the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.[149] The Second Circuit failed to recognize this same need in its decision of *Bryant II* and copyright owners must now seek alternative methods of protecting their albums in the Second Circuit.

V. HOW CAN COPYRIGHT HOLDERS PROTECT THEMSELVES?

Protection of copyrighted works in the Second Circuit has become increasingly important to music industry insiders since the decision of *Bryant II*. *Bryant II*'s limitation on copyright-statutory-damage awards for music albums coupled with the music industry's ever-present fight against music piracy requires that the music industry seek additional ways of limiting piracy and increasing the availability of legal options in pursuing copyright infringers. The most realistic and effective solution in the fight against music piracy is the increased use of digital rights management (DRM) systems.

However, this is not the only option the music industry can pursue in fighting music piracy. To counteract the Second Circuit's issuance test, the music industry could choose to alter its issuance practices. Alternatively, the most effective long-term solution to the problems created by the Second Circuit's rejection of the independent-economic-value test would be increased lobbying by interest groups favoring the music industry. Clarification in the copyright statutes over what does or does not constitute a compilation under the Copyright Act would prevent courts from reaching varying interpretations as illustrated by comparing *Bryant II* with cases from other circuits.

MUSIC REPORT 2012: EXPANDING CHOICE. GOING GLOBAL 9, 16 (2012), *available at* http://www.ifpi.org/content/library/DMR2012.pdf. As of 2011, more than a quarter of the world's internet users (twenty-eight percent) continued to access unauthorized services, such as peer-to-peer networks. *Id.* at 9. The International Federation of the Phonographic Industry (IFPI) notes that such "[w]idespread piracy is the biggest factor undermining the growth of the digital music business." *Id.* at 16.

149. Pallante, *supra* note 29, at viii.

A. Digital Rights Management as a Solution

The ideal solution to the Second Circuit's approach would be for the court to correct its decision either en banc or in a future case; however, as previously mentioned, this is unlikely and the Supreme Court has denied certiorari, so there is no chance of reversal on that front.[150] As a result, the music industry will have to devise ways to protect its own interests. One of these solutions is the utilization of increasingly complex digital rights management (DRM) systems. DRM "is a broad term that refers to any technique for controlling access and use of digitized content."[151] These protections have been commonly placed on copyrighted works for years, prompted by music industry fears of increased infringement from the digital audio tape recorder.[152] These protections are still frequently used in new ways at technology evolves. Sony, for example, first shipped compact discs encoded with DRM protections in 2005.[153] If it wishes to have true control over its copyrighted works, the music industry will have to continue this type of DRM innovation to handle the challenges of new and changing distribution media.

1. Increased DRM as a Tool of the Music Industry

The purpose of the DRM systems used by the music industry is to "track and/or prevent" unauthorized copying and distribution of music made possible by MP3 technology and the Internet.[154]

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150. *See* Part III.C.2. The United States Supreme Court denied a petition for writ of certiorari on November 28, 2010. Bryant v. Media Rights Prods., Inc., 131 S. Ct. 656 (2010).

151. Murck, *supra* note 42, at 407.

152. *Id.*

153. J. Thomas Rosch, *Keynote Address: A Different Perspective on DRM*, 22 BERKELEY TECH. L.J. 971, 972 (2007).

154. Damon Lussier, *Beyond Napster: Online Music Distribution and the Future of Copyright*, 10 U. BALT. INTELL. PROP. L.J. 25, 28 (2001). "Digital watermarking" is the process by which information is hidden in digital media content, giving the content a unique, digital identity. *Quick Facts*, DIGITAL WATERMARKING ALLIANCE, http://www.digitalwatermarkingalliance.org/quickfacts.asp (last visited July 13, 2012). A "digital envelope" is the "electronic equivalent of putting your email into a sealed envelope to provide privacy and resistance to tampering." Lawrence E. Hughes, *Digital Envelopes and Signatures*, WINDOWS IT PRO (Sept. 1, 1996, 12:00 AM), http://www.windowsitpro.com/article/internet/digital-envelopes-and-signatures. A "digital wallet" is "[e]ncryption software that works like a

DRM systems come in various forms including "digital watermarking," "the digital envelope," and "the digital wallet."[155] While these systems vary as to how they perform their functions, each one attempts to either track down infringers or prevent unauthorized copying entirely.[156]

Use of DRM is now standard practice in the music industry. For example, the major record labels in the music industry will not license their music to online music stores unless their product is encrypted with DRM to prevent piracy.[157] Making certain that online music stores encrypt music with DRM protections allows the music industry copyright owners to extend their legal rights beyond the "bundle of rights" that is associated with the copyright itself.[158] Some suggest that DRM protections, when combined with the DMCA's anti-circumvention provisions,[159] work to privatize copyright by extending protections available to copyright owners beyond the standard bundle of rights created by copyright law.[160]

While concern over privatization of copyright law is valid, privatization is a necessary step for the music industry to ensure the ongoing protection of its copyrighted works. Congress has recognized that changing realities in the entertainment industry require increasing protections of copyrighted works.[161] This can be seen in the extension of copyright terms under the CTEA,[162] the addition of criminal liability for copyright infringement, and in the creation of new causes of action such as those created by the DMCA's anti-circumvention provisions.[163] Now, the Second Circuit's decision in *Bryant II* further necessitates this privatization of copyright law by way of increased DRM usage, circumvention of which will allow copyright owners to pursue

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physical wallet during electronic commerce transactions." *Digital Wallet*, WEBOPEDIA, http://www.webopedia.com/TERM/D/digital_wallet.html (last visited July 13, 2012).

155. *Id.* at 29.
156. *See id.*
157. *See* Rosch, *supra* note 148, at 978-79.
158. *See* Murck, *supra* note 42, at 409, 410.
159. *See supra* Part II.B.3.
160. Murck, *supra* note 41, at 409-10.
161. *See supra* Part II.
162. *See supra* Part II.B.1.
163. *See surpa* Part II.B.3.

claims under the DMCA's anti-circumvention provisions.[164] Thus, for its own protection from rampant music piracy, the music industry will likely have to increase its use of DRM systems to prohibit illegally copying of songs and albums.[165] And while DRM encryption and the DMCA's anti-circumvention provisions are not perfect even in combination, they work together in a way that "would keep the 'piracy' rate lower than either could alone."[166]

2. Consumer Protection and Antitrust Concerns When Using DRM

While increased sophistication of DRM systems may seem like a straightforward solution to the music industry's concerns in protecting its works, there are concerns raised by DRM systems. In particular, the manner in which DRM systems are used may trigger consumer protection concerns, and the extent of the restrictions DRM systems create may trigger antitrust concerns.[167] All of these concerns, however, can be overcome by DRM usage that is mindful of the potential problems that arise when copyright owners attempt to maintain too much control over their copyrighted works.

One example of the consumer protection issues involved in the use of DRM systems is the Sony BMG practices that led to a settlement with the Federal Trade Commission.[168] There were a number of reasons that Sony was forced to pay a settlement to the FTC. First, it installed DRM systems onto its products prior to sale but failed to inform consumers that the products were encrypted and that the consumers' usage rights were restricted by

164. *See supra* Part II.B.3.

165. One difficulty in the increased usage of DRM encryption would be in creating DRM systems that allow for certain fair uses. WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 157 (2004). "Designing those gates could be difficult and expensive." *Id.*

166. *Id.*

167. For example, DRM systems that are too restrictive on consumer use are likely to create legal trouble. *See, e.g.*, Cory Doctorow, *Antitrust and ebooks: Regulators Miss the Big DRM Lock-in Picture*, (Apr. 12, 2012, 3:29 PM) http://boingboing.net/2012/04/12/antitrust-and-ebooks-regulato.html (discussing the practice by retailers and manufacturers of e-books and e-book readers of locking customers into a single bookstore for all purchasers on a particular device).

168. *See* Rosch, *supra* note 148, at 972.

the DRM systems used.[169] Second, Sony's DRM included "root kits," which are cloaking technologies that hid the DRM system and made it hard to remove.[170] For these two reasons, the FTC determined that DRM was subject to the same consumer protection standards as everything else within the FTC's jurisdiction and that "any material limitations of use rights . . . must be clearly and conspicuously disclosed before a sale of those media is made."[171] This straightforward standard allows the music industry to continue pursuing DRM as a viable option for extending the protections available for its copyrighted works so long as distributors abide by this disclosure requirement.

Another concern that arises with the use of DRM is that of potential violations of United States antitrust law. Such violations are most likely when DRM systems are used to prohibit interoperability of products. The most noticeable example of interoperability in DRM systems can be found in the practices of Apple's iTunes Store. Apple has come under criticism for the DRM encryptions placed on their products.[172] For example, DRM is used by Apple to limit portable MP3 player compatibility to only iPod and other Apple devices.[173] This type of "tying" products together by making them only compatible with each other borders on a violation of antitrust laws.

A tying agreement is an agreement "to sell one product but only on the condition that the buyer also purchases a different product (often known as a positive tie), or at least agrees that he will not purchase that product from any other supplier (often known as a negative tie)."[174] Apple's business practices do not venture across this line. For example, there is no requirement that someone purchase an iPod in order to use iTunes—users

169. *Id.*
170. *Id.*
171. *Id.* at 973.
172. *The Customer Is Always Wrong: A User's Guide to DRM in Online Music*, ELECTRONIC FRONTIER FOUNDATION, http://www.eff.org/pages/customer-always-wrong-users-guide-drm-online-music (last visited Mar. 18, 2012) ("Apple reserves the right to change at any time what you can do with the music you purchase at the iTunes Music Store.").
173. *Id.*
174. Arik Johnson, Tying Arrangements: Illegal tying is one of the most common antitrust claims, http://www.aurorawdc.com/arj_cics_tying_arrangements.htm (last visited Mar. 18, 2012).

could easily use the iTunes Store to purchase music that was then copied onto compact discs.

Thus, it is possible to avoid antitrust concerns when using DRM-encrypted products. Even Apple, with its poor reputation in this realm, has expressed a willingness to remove DRM encryption from music sold in its iTunes Store.[175] In fact, Apple even removed DRM encryption from all EMI songs available on iTunes in 2007.[176] However, because the availability of music in iTunes depends entirely on licensing agreements with the major record labels,[177] this type of completely DRM-free world is not only unlikely but also a misguided goal because it would simply increase the infringement issues faced by the entertainment industry, making businesses less likely to contract with Apple or companies that refused to allow DRM encryption.

Particularly in light of the limitations placed on statutory-damage awards in the Second Circuit's decision of *Bryant II*, the music industry needs more sophisticated DRM systems to protect their interests and reduce piracy. Increasing DRM protections would be a delicate process requiring close observation of antitrust laws to avoid potential violations as well as mindfulness of consumer protection issues. However, increasing DRM encryption in a careful and calculated manner would allow DRM encryption to remain a viable option for protection of these interests despite the potential pitfalls. That said, increased use and sophistication of DRM encryption is not an ideal solution to the music industry's problem in that it creates merely an obstacle to infringement rather than a complete barrier.

B. Other Potential Solutions

While use of DRM encryption is the solution to this problem most easily managed by the music industry in attempting to protect its own interests, several other potential solutions exist

175. *See* Rosch, *supra* note 148, at 978; *see also* Jacqui Cheng, *A look at Apple's love for DRM and consumer lock-ins*, ARS TECHNICA http://arstechnica.com/apple/news/2010/01/a-look-at-apples-love-for-drm-and-consumer-lock-ins.ars (last visited Mar. 18, 2012).

176. *See* Press Release, Apple, Apple Unveils Higher Quality DRM-Free Music on the iTunes Store (Apr. 2, 2007), http://www.apple.com/pr/library/2007/04/02itunes.html.

177. *See* Rosch, *supra* note 148, at 979.

that would create long-term protection of copyrighted music. First, the music industry could change its issuance practices in online distribution markets. Additionally, any number of interest groups could lobby Congress for clarification of the Copyright Act's definition of "compilation" to determine whether an album does or does not constitute a compilation in all situations.

1. Overhaul of Music Industry Issuance Practices

Though online music distribution gains an increasing portion of the market each year, physical copies of CDs remain important to the music industry's overall revenue.[178] For online music retailers such as Apple's iTunes Store, songs may normally be downloaded either individually or as part of the larger album. This would seem to make the *Bryant II* decision's issuance test irrelevant in online marketplaces; however, the Second Circuit was of the opinion that such differences in online distribution are irrelevant, instead focusing on whether the copyright owners chose to initially issue an album or only individual songs.[179] Thus, in online markets, the music industry could easily control how works were issued and, to increase damages under the Second Circuit's issuance test, could release songs only individually rather than as albums.

However, this would not solve the music industry's dilemma in the Second Circuit when it comes to physical copies of sound recordings. In 2004, the undiscounted retail price of a compact disc was eighteen dollars, of which the record company received only fifty-three percent.[180] And while that number may seem sufficient to sustain the music industry's needs, a breakdown of how the industry's portion is further subdivided shows that much of that money goes merely to repayment of funds used to market discs and pay for manufacturing, or is allocated to artists or company salaries.[181] In fact, only nineteen cents of each eighteen-dollar album sale "stays with the company in the form of profit."[182]

Given this information, it is obvious that changing issuance

178. *See* Press Release, *supra* note 129.
179. Bryant v. Media Right Prods., Inc. 603 F.3d 135, 141 (2d. Cir. 2010).
180. FISHER, *supra* note 159, at 19.
181. *See id.*
182. *Id.*

practices of compact discs in a way that required a larger number of discs for the same amount of profit is not a viable solution to combat the *Bryant II* decision's issuance test.[183] Thus, it would appear that increased use and sophistication of DRM encryption is the best hope for the music industry to protect compact discs containing copyrighted works. However, in online markets, there would be no hardship on the music industry to issue each song separately rather than as part of an album. In part because online retailers already allow downloading of individual songs in most circumstances, this would be an easy way for the music industry to ensure that *Bryant II*'s issuance test did not encourage additional music piracy over the Internet. The downside to this, however, would be the inevitable complaints of consumers wishing to purchase entire albums without the hassle of finding each individual song.

2. Clarification from Congress

While changing issuance practices is an option for the music industry in online marketplaces, a more feasible and permanent long-term solution for the music industry would be to lobby Congress for clarification to the Copyright Act's definitions. Interest groups began to dominate modern discussions on copyright law in the late twentieth century with the availability of the Internet and a corresponding increase in illegal file-sharing through peer-to-peer networks.[184] Indeed, these same interest groups played a large role in the late-twentieth century shift of the copyright system to a scheme focused on ensuring adequate compensation for the copyright owner.[185] In addition to groups representing the interests of content providers, interest groups have also emerged that are interested in "innovation, civil liberties, consumer protection, and artists' rights."[186] The

183. For example, for an eighteen-dollar album, $1.42 "is paid to the firms (typically quasi-independent companies) that manufacture the disc and the accompanying artwork and packaging." *Id.* Issuing only individual songs is, therefore, not a feasible way of combating *Bryant II* because the music industry would lose huge sums of money to produce discs for each single. In fact, if CD singles remained as reasonably priced as they are today, this increased cost of manufacturing would be entirely cost prohibitive.

184. *See supra* Part IV.A.2.

185. *See supra* Part II.

186. Aaron Burstein et al., *Foreword: The Rise of Internet Interest Group*

Recording Industry Association of America (RIAA), a trade organization comprised of the major music labels, was created "to protect the intellectual property and First Amendment rights of artists and music labels."[187]

Having the RIAA lobby Congress for clarification that an album is not a compilation under the Copyright Act would completely solve the problem created by the Second Circuit's decision of *Bryant II*. Realistically, this would be time intensive and a very expensive undertaking for the music industry. It would certainly not be the first time that copyright law was updated to reflect the needs of content industries. For example, when Judge Stearns in the Federal District Court for the District of Massachusetts dismissed a copyright infringement action in *United States v. LaMacchia*,[188] it was the outrage of the software industry that led to the eventual passage of the NET Act,[189] which allowed copyright suits whether or not the infringers intended to receive a financial benefit from their infringement.[190]

However, the costs of this lobbying may ultimately be prohibitive unless other circuits follow the Second Circuit's issuance test. The reason for this is the popularity of the emerging "copyleft" movement[191] and that movement's interest groups. Groups such as the Electronic Frontier Foundation[192] that seek to protect the digital rights of artists and consumers

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Politics, 19 BERKELEY TECH. L.J. 1, 10 (2004).

187. *See About*, RIAA, http://www.riaa.com/aboutus.php (last visited Mar. 18, 2012).

188. United States v. LaMacchia, 871 F. Supp. 535, 539-40, 545 (D. Mass. 1994).

189. *See* Coblenz, *supra* note 32, at 249-50 (citing *LaMacchia*, 871 F. Supp. at 539-40).

190. *Id.*; *see also* No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678, 2678 (1997); Pallante, *supra* note 29, at vii.

191. "Copyleft is a general method for making a program (or other work) free, and requiring all modified and extended versions of the program to be free as well." *What is Copyleft?*, GNU OPERATING SYSTEM, http://www.gnu.org/copyleft/ (last visited Mar. 18, 2012). At the forefront of the copyleft movement are organizations such as Creative Commons. Creative Commons is a non-profit organization that allows users to share their work through a variety of customizable licenses, allowing artists to retain only the combination of rights they deem appropriate. *See About*, CREATIVE COMMONS, http://creativecommons.org/about/ (last visited Mar. 18, 2012).

192. About EFF, Electronic Frontier Foundation, https://www.eff.org/about (last visited Mar. 18, 2012).

would fight the RIAA along the way. Thus, while congressional clarification through statutory amendments would be the ultimate long-term solution to any disagreement over what constitutes a compilation under the Copyright Act, it is not an immediately feasible solution.

VI. CONCLUSION

For the time being, there is no easy resolution to the problem created by the Second Circuit's decision in *Bryant II*. The problem arises from the Second Circuit's misinterpretation of the term "compilation" under the Copyright Act. By creating a test that focuses on how a music album is issued rather than the process by which it is prepared or the individual economic value of the individual songs, copyright owners are now subject to different damage awards in the Second Circuit than in other circuits that use the independent-economic-value test. On November 29, 2010, the United States Supreme Court denied certiorari in this case,[193] removing Supreme Court reversal as a viable option for rejecting the issuance test created by the Second Circuit. It is, of course, possible that the Supreme Court could take up the issue in a future case if other circuits adopt the Second Circuit's issuance test thereby creating a larger circuit split.

Thus, for the time being, it is necessary for copyright owners to seek alternative methods of protecting their works in the Second Circuit. This search for additional protections is important to avoid music piracy, one of the single greatest threats to the entertainment industry. The ideal solution to this problem would be for the Second Circuit to abandon the issuance test either by reversing *Bryant II* en banc or by adopting the independent economic value test in a future case, resulting in an interpretation of § 504(c) of the Copyright Act across the Circuit Courts of Appeals that is uniform and that benefits copyright owners. Such benefits to copyright owners have become the core feature of American copyright law and should be maintained.

However, because such a result is unrealistic, copyright owners will be forced to invest in more advanced digital rights management systems to control access to their works and prevent unauthorized copying. Use of such protections would allow

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

copyright owners to pursue not only copyright infringement actions but also claims for the circumvention of these DRM systems under the cause of action created by the DMCA's anti-circumvention provisions. At the same time, the music industry can pursue a long-term solution by increasing their lobbying efforts. Effective lobbying could ultimately result in some form of an amendment to the copyright statutes clarifying when a music album is or is not considered a compilation. Such a clarification from Congress would unify interpretation of the copyright laws as all federal courts would be bound by the statute.

In a society that places such a strong emphasis on copyright ownership and the corresponding protections that are provided for under the Copyright Act, the Second Circuit's decision of *Bryant II* represents a clear deviation from a longstanding tradition of increasing copyright protections and damage awards. Given the ever-increasing popularity of online digital music distribution and the serious problems created by music piracy, the music industry should lobby for legislative clarification of what constitutes a "compilation" so that the *Bryant II* decision does not become accepted in other circuits that have not yet considered the issue.