

May 10, 2010

Second Circuit: Copyright Statutory Damages Not Available For Each Song In A Music Album

The U.S. Court of Appeals for the Second Circuit recently affirmed a district court decision finding that a copyright owner was entitled to only one award of statutory damages for its music album compilation even though individual songs on the album were registered independently with the U.S. Copyright Office. *Bryant v. Media Right Productions, Inc.*, No. 09-2600, 2010 WL 1659113, at *3-*5 & n.4 (2d Cir. Apr. 27, 2010). The appellate court also affirmed the district court's award of only \$2,400 in statutory damages based on the copying of twenty songs on two music albums. *Id.*, at *5-*6. This decision may reduce the amount of statutory damages that copyright holders can obtain for infringement of music albums and compilations in the Second Circuit. The decision also may decrease the incentive for potential infringers to avoid engaging in wholesale copying of albums and compilations.

The copyright owners in *Bryant* alleged that a distributor and a music wholesaler infringed their copyrights by selling digital copies of two albums without permission. *Id.* at *1-2. The owners registered the two works with the U.S. Copyright Office and also had independent registrations for some of the twenty songs on the albums. *Id.* at *1. The owners contracted with a distributor to distribute physical copies of their albums but did not authorize the distributor to make further use of the works. *Id.* at *1. The distributor in turn contracted with a music wholesaler to distribute the albums. The wholesaler's contract purported to allow it to distribute the albums " 'throughout E-stores including . . . those via the Internet, as well as all digital storage, download and transmission rights, whether now known or existing in the future.' " *Id.* at *2. In 2000, when the parties made these agreements, neither the distributor nor the music wholesaler were selling the albums online, but in 2004 the wholesaler began to sell the albums and the individual songs on the Internet in online stores such as iTunes. *Id.* The copyright owners sued when they discovered that the distributor and music wholesale were selling copies of their albums and songs online without permission. *Id.*

The district court found that both the distributor and the music wholesaler infringed the copyrights by copying the albums without permission. *Id.* at *2-*3. Because the actual damages were only a few hundred dollars, the owners sought statutory damages under 17 U.S.C. § 504(c). Under § 504(c), a statutory damages award may range from \$750 to \$30,000 per registered work for non-willful infringement, and the court may reduce this award to \$200 per work if the infringement is innocent or increase it to \$150,000 per work if the infringement is willful. *Id.* (citing 17 U.S.C. § 504(c)(2)).

On the damages question, the district court found the following: (1) the owners were entitled to only one award of statutory damages per album, not one award per song as they requested; (2) the music wholesaler's infringement was innocent thus entitling it to a reduction in statutory damages to the statutory minimum of \$200 per work; and (3) the distributor's infringement was not innocent or willful, but because the owners' actual damages were only a few hundred dollars, the statutory damages award should be set at \$1,000 per work. *Id.* at *3.

On appeal, the Second Circuit affirmed the district court's decision to award statutory damages on a per-album basis. *Id.* at *3-*5. The court explained that the Copyright Act of 1976 allows "only one award of statutory damages for any 'work' infringed" and "defines a 'compilation' as a 'work formed by the

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assembling of preexisting materials . . . in such a way that the resulting work as a whole constitutes an original work of authorship.’ ” *Id.* at *3 (quoting 17 U.S.C. §§ 504(c) & 101). Citing the legislative history, the court also explained that a “ ‘compilation’ ‘results from . . . 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.’ ” *Id.* (quoting H.R. Rep. No. 1476 (1976)).

The Second Circuit distinguished two of its prior decisions that allowed separate awards of statutory damages for each work in a compilation. In those cases, the court explained that the copyright holder had issued each of the works separately and only later collected them into a compilation. *Id.* at *4 (citing *Twin Peaks Prods., Inc. v. Publ’ns. Int’l Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993) (separate TV episodes) and *WB Music Corp. v. TRV Comm. Group, Inc.*, 445 F.3d 538, 541 (2d Cir. 2006) (separate songs collected in an album by the infringer)). In this case, however, the owners chose to release their songs in two albums instead of releasing the songs individually. The court therefore found that only one statutory damages award per album was allowed.

The Second Circuit rejected as inconsistent with the Copyright Act the functional “independent economic value” test applied by the First, Ninth, and Eleventh Circuits. *Id.* at *4–*5. This test would have resulted in separate statutory damages awards for any independently copyrighted work in a compilation that “has ‘independent economic value and . . . is viable’ ” on its own. *Id.* at *4. The Second Circuit declined to adopt this test because the court found that the test disregards the statutory language requiring courts to treat all parts of a compilation as one work for purposes of calculating statutory damages. *Id.* at *5. The court also remarked that it cannot disregard the statute merely “because digital music has made it easier for infringers to make parts of an album available separately.” *Id.*

The Second Circuit also affirmed the intent findings and the decision to reduce the amount of the statutory damages award within the permissible range of \$200 to 30,000 per work. *Id.* at *5–*7. Accordingly, the court affirmed the \$2,400 award.

Although several strategies exist to cope with the Second Circuit’s decision, this ruling may have serious implications for any artist or distributor releasing copyrighted works in a compilation or album format that must enforce their copyrights in the Second Circuit. As described above, several other circuits provide at least the opportunity for multiple statutory damages awards.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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