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Copyright's Compilation Conundrum: Modernizing Statutory Damage Awards for the Digital Music Marketplace

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CONUNDRUM: MODERNIZING STATUTORY DAMAGE AWARDS FOR THE DIGITAL MUSIC MARKETPLACE

DAMIAS A. WILSON†

INTRODUCTION

How many songs are on your iPod? For many, it is much easier to answer that question than it is to answer, how many albums do you own.¹ In recent years, the internet has revolutionized the way the world buys and listens to its music.² Consumers recognize the raw talent, hard work, and sacrifice that artists pour into their music, and that recognition has turned the music industry into a major sector of the United States economy.³ The United States government has a long-

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² A 2008 study by Forrester Research predicted that digital music sales are expected to grow from eighteen percent to forty-one percent of total music sales, while sales of physical CDs are expected to shrink from sixty-four percent to forty percent of the market. Brian Braiker, What Will the Music Industry Look Like in Five Years?, ROLLINGSTONE.COM, (Dec. 3, 2008, 2:37 PM), http://www.rollingstone.com/music/news/14844/92080. These estimates are seen as conservative, as Atlantic Records reported in 2008 that fifty-one percent of its total music sales already come from digital sales. See id.

standing tradition of rewarding the hard work and sacrifice that is involved in the creative process with copyright protection.⁴ Among the rights protected by copyright law is the exclusive right to reproduce and distribute copies of the copyrighted work.⁵ The core purposes of the exclusive rights granted by copyright protection are to promote and reward artistic creation⁶ and discourage infringement.⁷ Recently, however, infringers have thrived because the marketplace for music has largely shifted to the internet,⁸ and the law has struggled to respond.⁹

Infringement, which involves copying and distributing copyrighted works without the owner's permission, is more of a problem today than ever before.¹⁰ The dawn of the digital era introduced to infringers an entirely new means of copying songs and instantly distributing them to millions of consumers.¹¹ In recent years, digital piracy has emerged as a parasitic means by which infringers can thrive, and the government's current approach is ill-prepared to tackle the problem.¹² Digital piracy is

⁴ See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, at OV-1 (2011) (“[T]he very first Congress began federal copyright protection in 1790.”).


⁶ See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).


⁸ See Performance Right Hearings, supra note 1, at 30 (“In the absence of corrective action, new technologies will pose an unacceptable risk to the survival of what has been a thriving music industry.”).

⁹ See David Nimmer, Codifying Copyright Comprehensibly, 51 UCLA L. REV. 1233, 1238 (2004) (“[I]n the past decade ... [the 1976 Copyright Act’s] amendments no longer in the main qualify as formal successes; rather, they routinely consist of bloated provisions that do not meet the various criteria of formal lawmaking success.”).

¹⁰ See Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110–403, § 503(4), 122 Stat. 4256, 4279 (2008) [hereinafter “PRO-IP Act” (“[T]he growing number of willful violations of existing Federal criminal laws involving counterfeiting and infringement ... is a serious threat to the long-term vitality of the United States economy and the future competitiveness of United States industry ... ”); see also id. § 503(5) (“[T]errorists and organized crime utilize piracy, counterfeiting, and infringement to fund some of their activities ... ”)].


among the costliest crimes facing the United States today,\textsuperscript{13} draining billions of dollars from one of the largest sections of the nation’s economy.\textsuperscript{14}

Attempting to regulate this twenty-first-century problem with 1976 legislation has left the judiciary in a state of confusion. The 1976 Copyright Act allows plaintiffs to seek statutory damages,\textsuperscript{15} an avenue of recovery that is common in copyright litigation. The award of statutory damages makes sense when dealing with pirates who have willfully infringed the copyright of another because actual damages are often difficult, if not impossible, to calculate.\textsuperscript{16} Difficulties with calculating actual damages to the copyright owner and profits made by the wrongdoer arise, first, because it is difficult to know how many additional sales the copyright owner would have had if the infringing copies were not available for free download; and second, because the illicit nature of the pirate’s activities make calculating the wrongdoer’s profits difficult.\textsuperscript{17} In response to these difficult evidentiary situations, Congress provides courts the option to award statutory damages, eliminating the need for plaintiffs to prove actual damages.\textsuperscript{18} Confusion over whether, and to what extent, statutory damages should be awarded, however, has led to results that are “frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”\textsuperscript{19}

One source of inconsistent and arbitrary results in awarding statutory damages is the last sentence of 17 U.S.C. § 504(c)(1), also known as the compilation clause of the 1976 Copyright Act.

\textsuperscript{17} See id. at 4 (“[C]ounterfeiting and piracy, both uploading and downloading illegally, is growing at a much faster rate than our enforcement efforts can keep pace.”).

\textsuperscript{18} See id. (“The General Accounting Office reports that intellectual property accounted for an average of 18 percent of the U.S. gross domestic product and 40 percent of the U.S. exports of goods and services in 2003 and 2004. An estimated 18 million workers, 13 percent of our labor force, are in industries that rely on intellectual property protection.”).

The compilation clause treats all parts of a compilation as a single work for the purposes of statutory damages.\(^2^0\) The circuit courts have taken two markedly different approaches to the interpretation of the term “compilation” that would yield conflicting results in the digital music context. One approach, used by the Second Circuit of the United States Court of Appeals, is a broad interpretation of the term “compilation” that hinges on the question of “whether the plaintiff—the copyright holder—issued its works separately, or together as a unit.”\(^2^1\) The Second Circuit has held that the willful infringement of an album, regardless of how many copyrighted songs appear on the album, entitles the copyright owner to a single statutory damage award.\(^2^2\) This interpretation is flawed because it is poorly adapted to the modern digital market place, which allows pirates to copy individual songs and sell them apart from the album on which the song was released. This interpretation offers a bargain to the pirate who can profit from fifteen or twenty songs while exposing himself to only one award of statutory damages.

The other approach, used by the First, Ninth, Eleventh, and D.C. Circuits of the United States Court of Appeals, is a “functional test” to determine whether each work has “independent economic value” apart from the compilation and is thus capable of its own copyright life.\(^2^3\) While the independent economic value test corrects the Second Circuit’s outdated view of the compilation clause, it is also lacking because it does not make a distinction between commercial infringers, who willfully infringe for profit, and individuals, who merely download songs for personal use and are often unaware of the potentially severe civil penalties for their actions. Without such a distinction, the major concern is that the potential for unfairly punishing “personal users” outweighs the benefits of awarding damages on a per-song instead of a per-album basis. The conflicting approaches—regarding whether to treat songs on an album as

\(^{20}\) 17 U.S.C.A. § 504(c)(1) (“For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.”).

\(^{21}\) Bryant v. Media Rights Prods., Inc., 603 F.3d 135, 141 (2d Cir.), cert. denied, 131 S. Ct. 656 (2010).

\(^{22}\) See id. (“Based on a plain reading of the statute, therefore, infringement of an album should result in only one statutory damage award. The fact that each song may have received a separate copyright is irrelevant to this analysis.”).

\(^{23}\) See, e.g., Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116–17 (1st Cir. 1993).
individual works or single works for the purposes of statutory damages—exist mainly because the text of the compilation clause of the 1976 Copyright Act is poorly equipped to deal with the modern-day problem of digital piracy.\textsuperscript{24}

Changes in technology have always driven changes in copyright law.\textsuperscript{25} In response to the expansion of internet commerce, Congress has enacted numerous amendments to the 1976 Copyright Act.\textsuperscript{26} The most recent such enactment is the Prioritizing Resources and Organization for Intellectual Property Act of 2008 ("PRO-IP Act"), which amended the 1976 Copyright Act in order to promote the policies of protecting owners and discourage illegal infringement.\textsuperscript{27} The PRO-IP Act initially contained a section that would have eliminated the compilation clause and essentially replaced it with the independent economic value test.\textsuperscript{28} That section, however, was dropped before the PRO-IP Act was adopted.\textsuperscript{29} This decision was appropriate because simply striking the compilation clause without addressing the distinction between commercial infringers and personal users creates a greater potential for unfairly disproportionate judgments against the latter. The result, however, is that the compilation clause has remained unchanged since its enactment in 1976.

This Note argues that Congress should adopt an amendment to the Copyright Act that distinguishes between "collections" and "compilations" for the purpose of statutory damages. In order to

\textsuperscript{24} See PRO-IP Markup, supra note 12. See also Bryant, 603 F.3d at 142 ("We cannot disregard the statutory language simply because digital music has made it easier for infringers to make parts of an album available separately.").

\textsuperscript{25} See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) ("From its beginning, the law of copyright has developed in response to significant changes in technology."); see also ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 414 (5th ed. 2009) ("Since the advent of the printing press, advances in the technologies for creating and distributing works of authorship have played a critical role in shaping copyright law.").

\textsuperscript{26} See Nimmer, supra note 9, at 1307–10 (listing the two dozen amendments to the 1976 Copyright Act enacted between 1992 and 2002).

\textsuperscript{27} See Pro-IP Markup, supra note 12, at 4 (stating that the PRO-IP Act will "make changes to the intellectual property law to enhance the ability of IP owners to effectively enforce their rights.").

\textsuperscript{28} H.R. 4279, 110th Cong. § 104 (2007); see infra Part I.C and accompanying notes.

avoid exacerbating the problem of already high statutory damages, the amendment should also clearly establish a threetiered statutory-damage scheme that would cover innocent infringement, knowing infringement, and willful infringement for commercial advantage or private financial gain. Part I briefly traces the evolution of statutory damages for copyright infringement over the last hundred years. Part II analyzes the confusion surrounding the two opposing views that the federal courts currently take when interpreting the compilation clause and the problems that arise when assessing statutory damages awards for the infringement of digital sound recordings.

Finally, Part III proposes a two-part statutory solution that is designed to add clarity and certainty in cases involving modern digital distribution methods, while recalibrating the maximum damages available according to different degrees of infringement. Such a system will hinder further increases in excessive awards against relatively innocent individuals. This solution is consistent with the Copyright Act’s criminal treatment of infringers and Congress’ prior enactments in this area. It also accords with the tripartite purpose of statutory damages and simultaneously addresses the major failures of the current approaches. First, it tackles these shortcomings by better satisfying the core purposes of protecting the copyright owner and discouraging willful infringement in the digital context by closing the “bulk discount” loophole, which encourages infringers to take multiple songs without the risk of incurring higher levels of damages. Second, this solution is narrowly tailored to meaningfully limit maximum penalties according to the nature of an end-user’s infringement.

30 See Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1051 (D. Minn. 2010) (“[S]tatutory damages for copyright infringement are not only restitution of profit and reparation for injury, but also are in the nature of a penalty, designed to discourage wrongful conduct.”) (internal quotation marks omitted).
I. COPYRIGHT PROTECTION AND STATUTORY DAMAGES SINCE 1909

A. The Copyright Act of 1909

Congress built the Copyright Act of 1909 upon the foundation of copyright law established in the original Copyright Act of 1790. Among the exclusive rights it granted copyright owners were those of reproducing and distributing the copyrighted work. Copying or distributing these works, without the copyright owner’s permission, is known as copyright infringement. The driving force behind copyright law in these early times was the expansion of mechanical reproduction of copyrighted works, including music and printed materials, technological breakthroughs that allowed infringers to copy and distribute works to bigger audiences much faster than before. The 1909 Act provided expanded protections to copyright owners in the face of this growing threat of infringement.

Driven by the policy of protecting copyright owners, the 1909 Copyright Act established the first allowance for statutory damages at the election of the plaintiff. The 1909 Act allowed a plaintiff to sue for actual damages plus the profits made by the infringer, or statutory damages “in lieu of” actual damages. It also increased the total amount of statutory damages a plaintiff could seek and instituted a “per infringing act” basis for calculating damages, allowing for damages for each separate act of infringement rather than the “per-sheet” basis that had previously been employed. This approach yielded a far more punitive approach to damages than the previous per-sheet method.

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34 See H.R. REP. No. 60-2222, at 7–8.
35 See id. at 8–9.
36 See Copyright Act of 1909, Pub. L. No. 60-349 § 25, 35 Stat. 1075 (1909) (“[I]f any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable . . . to pay to the copyright proprietor such damages as the copyright proprietor may have suffered . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just . . . .”).
37 Id.
38 Id.
The 1909 Copyright Act established criminal and civil penalties for certain types of infringement and for certain, specific types of infringed works. For example, the 1909 Act defined infringing copyrights “willfully and for profit” as a misdemeanor offense. The Act also contained specific damage guidelines by the type of work, including “ten dollars for every infringing copy” of a painting, statue, or sculpture; “fifty dollars for every infringing delivery” of a sermon or lecture; and “ten dollars for every infringing performance” of a musical composition. The 1909 Copyright Act did not contain any limitation on damages for compilations or derivative works.

B. The Copyright Act of 1976

Congress began to contemplate changes to the Copyright Act in 1955 in order to keep up with technology, particularly sound recording and broadcasting, which made it easier for pirates to copy and distribute infringing works. In 1971, in response to “the staggering volume of record and tape ‘piracy,’” Congress enacted an amendment to the 1909 Act that recognized “sound recordings” as copyrightable material. Then, in 1976, Congress enacted a major overhaul that expanded copyrights' scope and duration, but increased compulsory licensing and made copyright enforcement more difficult by imposing numerous exemptions and restrictions.

The Copyright Act of 1976 increased the maximum amount that a plaintiff could seek for statutory damages, but it limited that increase in amount by adopting the compilation clause.

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41 See Bryant v. Media Rights Prods., Inc., 603 F.3d 135, 142 n.7 (2d Cir.), cert. denied, 131 S. Ct. 656 (2010) (“In Robert Stigwood Group Ltd. v. O’Reilly, we held that each separately copyrighted song from the musical Jesus Christ Superstar could be the subject of a separate statutory damage award because each song could ‘live [its] own copyright life.’ In Stigwood, however, we were awarding statutory damages pursuant to the Copyright Act of 1909, which provided for a separate statutory damage award ‘for each infringement that was separate’; the Copyright Act of 1909 did not expressly limit the number of awards available for infringement of a compilation.”) (alteration in original) (citations omitted).

42 See NIMMER & NIMMER, supra note 4, § 2.10.

43 See id.

44 See MERGES, MENELL & LEMLEY, supra note 25, at 415.
which states, "For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work."\(^4\) Prior to the 1976 Act, plaintiffs could seek statutory damages for each work infringed, regardless of whether the work was part of a larger collection.\(^4\) The 1976 Act includes "collective works"\(^4\) in its definition of "compilation."\(^4\)

C. PRO-IP Act of 2008

During the years since the Copyright Act of 1976 took effect, myriad technological breakthroughs have forced Congress to respond to new avenues of infringement. Examples of the piecemeal approach Congress has taken include the Semiconductor Chip Protection Act of 1982,\(^4\) the Audio Home Recording Act of 1992,\(^5\) the Digital Performance Right in Sound Recordings Act of 1995,\(^6\) and the Digital Millennium Copyright Act.\(^5\) Each time, Congress cited the familiar policies of protecting copyright owners from new threats posed by technological advances and discouraging the spread of infringement. It did so most recently when it enacted the PRO-IP Act of 2008.\(^5\)

The PRO-IP Act of 2008 was enacted in response to the devastating effects that piracy and counterfeiting have had on the economy, particularly through the use of digital means of production and distribution.\(^4\) Congress explicitly recognized the

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\(^4\) See supra note 41 and accompanying text.
\(^4\) 17 U.S.C.A. § 101 (West 2011) ("A ‘collective work’ is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.").
\(^4\) Id. ("A ‘compilation’ includes collective works.").
\(^5\) See Pro-IP Markup, supra note 12, at 4–5 (statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary) ("[The PRO-IP Act] will . . . make changes to the intellectual property law to enhance the ability of IP owners to effectively enforce their rights. It will make it easier to criminally prosecute repeat offenders . . .").
\(^5\) See supra note 10 and accompanying text.
problem of how to treat statutory damages in a way that would make the remedy more appropriate in the current marketplace, but has yet to reach a conclusion. The version of the PRO-IP Act that was initially brought before the House of Representatives contained a section that would strike the compilation clause from 17 U.S.C. § 504(c)(1) and replace it with a definition that stated:

A copyright owner is entitled to recover statutory damages for each copyrighted work sued upon that is found to be infringed. The court may make either one or multiple awards of statutory damages with respect to infringement of a compilation. In making a decision on the awarding of such damages, the court may consider any facts it finds relevant including whether the infringed works are distinct works having independent economic value.

This section of the PRO-IP Act was dropped by the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property during a March 6, 2008 markup. Opponents of the section voiced concern that individuals and legitimate businesses might be crushed by unduly high awards for unintended infringement. Ultimately, the Subcommittee decided that the statutory language of section 104 was not properly tailored to correct the problems of the compilation clause, and it left the problem to be resolved at a later date after further deliberation.

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55 See PRO-IP Act Markup Pulls 'Compilation' Provision, Narrows Forfeiture, WASHINGTON INTERNET DAILY, Mar. 7, 2008, available at 2008 WLNR 4789656 ("It was clear more time was needed to identify the appropriate legislative solution" to the issue of disproportionately low damages for infringing compilations, he said, promising 'ongoing discussions' on a substitute provision.") (quoting Rep. Howard Berman, Chairman, Subcommittee on Intellectual Property of the House Committee on the Judiciary).
57 O'Scannlain & Halpert, supra note 29.
58 See id.
59 See PRO-IP Act Markup Pulls 'Compilation' Provision, Narrows Forfeiture, supra note 55.
II. THE STRUGGLE TO APPLY THE COMPILATION CLAUSE IN THE TWENTY-FIRST CENTURY

A. What Exactly Is a “Compilation”?  

The Second Circuit of the United States Court of Appeals’s recent decision in *Bryant v. Media Right Productions, Inc.*\(^60\) rejected the independent economic value test, which had been adopted by the First, Ninth, Eleventh, and D.C. Circuits of the United States Court of Appeals when faced with the question of whether independent works that are part of a greater collection qualify as a compilation for the purposes of calculating statutory damages under the 1976 Copyright Act.\(^61\) As a result of the decision in *Bryant*, there is doubt and confusion as to which standard will apply when cases arise outside of the Second Circuit involving the digital copying and distribution of sound recordings.

1. The Independent Economic Value Test  

In 1976, the Second Circuit of the United States Court of Appeals became the first circuit court to consider how to assess statutory damages when multiple copyrights in songs on an album are infringed in *Robert Stigwood Group, Ltd. v. O’Reilly.*\(^62\) At issue in *Stigwood* was whether independent songs from the rock opera “Jesus Christ Superstar” could be considered independent works for the purposes of imposing statutory damages.\(^63\) The court held, “When the copyrights on the songs can live their own copyright life” they should be treated separately for the purposes of awarding statutory damages.\(^64\)

While *Stigwood* was decided under the 1909 Copyright Act, the test established in that case was widely adopted in similar circumstances after the 1976 Copyright Act was passed. Several circuits have taken an approach that looks to the economic value of the infringed works and determines whether they “can live their own copyright life” apart from the larger work in which it is collected. This approach to the compilation clause of the 1976 Copyright Act was adopted in 1990 by the D.C. Circuit of the

\(^{60}\) 603 F.3d 135 (2d Cir.), cert. denied, 131 S. Ct. 656 (2010).  
\(^{61}\) See id. at 141–42.  
\(^{62}\) 530 F.2d 1096 (2d Cir. 1976).  
\(^{63}\) Id. at 1104.  
\(^{64}\) Id. at 1105.
United States Court of Appeals in *Walt Disney Co. v. Powell*. In this case, the defendant was found liable for selling T-shirts with infringing images of Mickey and Minnie Mouse printed on them. The images on the T-shirts were alleged to violate six separate copyrights held by Walt Disney. In deciding whether the various images of Mickey and Minnie should be considered part of a compilation for the purposes of awarding statutory damages, the D.C. Circuit of the United States Court of Appeals relied on the Second Circuit’s decision in *Stigwood* and held that the dispositive question in compilation clause analysis is whether the works are “distinct, viable works with separate economic value and copyright lives of their own.”

In 1993, the Second Circuit of the United States Court of Appeals revisited the compilation clause to determine whether episodes of a television series constitute a compilation under the 1976 Copyright Act. In *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, the defendant wrote a book that involved the characters and plot lines from the television series “Twin Peaks.” The plaintiffs argued that the subject matter that was infringed came from eight different episodes of the show. The Second Circuit of the United States Court of Appeals held that each of the eight episodes of the television series should be treated as independent works for the purposes of calculating statutory damages. In reaching its decision, the court held that “[t]he author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next . . . .” In dicta, the court indicated that the independent copyright life test established in *Stigwood* “may retain some relevance under the 1976 Act in its recognition that three songs performed in the musical would support separate

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65 897 F.2d 565, 569 (D.C. Cir. 1990) (“[S]eparate copyrights are not distinct works unless they can ‘live their own copyright life.’”)
66 Id. at 567.
67 Id.
68 Id. at 569–70.
69 996 F.2d 1366 (2d Cir. 1993).
70 Id. at 1370.
71 Id.
72 Id. at 1381.
73 Id.
statutory damages awards...” 74 The court, however, distinguished Stigwood and decided the case based on other factors such as the fact that each episode was written separately and was aired on a weekly basis. 75

Later the same year, the First Circuit of the United States Court of Appeals adopted the reasoning of Twin Peaks and Walt Disney. In Gamma Audio & Video, Inc. v. Ean-Chea, 76 the court held, that “[t]he term ‘work,’ is undefined under the [1976] Copyright Act” 77 and used the independent economic value test to supply that definition. 78 The court awarded statutory damages for the infringement of four episodes of a television show, even though the copyrights of all four episodes were registered on one form and the episodes were exclusively sold to video stores as a single unit. 79 In reaching this decision, the court also relied heavily on the Second Circuit’s holding in the Twin Peaks case and extended that reasoning to the situation where the episodes were written separately, but issued as a single unit. 80

The Ninth and Eleventh Circuits of the United States Court of Appeals also adopted this approach in awarding separate statutory damages for individual episodes of a television series. In Columbia Pictures, Television v. Krypton Broadcasting of Birmingham, Inc., 81 C. Elvin Feltner, President of Krypton Broadcasting of Birmingham, was found to have infringed the copyrights of several television series, including “Who’s the Boss?,” “Silver Spoons,” “Hart to Hart,” and “T.J. Hooker.” 82 Feltner continued to air reruns of these shows after violating the terms of Krypton Broadcasting’s agreement with Columbia Pictures, the owner of the copyrights. 83 The Ninth Circuit of the United States Court of Appeals held that the “independent economic value test” is the correct test to apply in determining what constitutes a “work” for the purposes of calculating statutory damages under the 1976 Copyright Act and determined

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74 Id.
75 See id.
76 11 F.3d 1106 (1st Cir. 1993).
77 Id. at 1116.
78 Id. at 1116–17.
79 Id. at 1117–18.
80 See id. at 1116–18.
81 106 F.3d 284 (9th Cir. 1997).
82 Id. at 288.
83 Id.
that each episode of a television series is a separate work, even where the episodes were licensed as a series. In rejecting the theory that a series constitutes an “anthology” or a “collection,” the court was persuaded by the fact that the episodes were broadcast over time “and could be repeated and rearranged at the option of the broadcaster.” Similarly, in *MCA Television, Ltd. v. Feltner*, a case involving substantially the same facts as *Columbia Pictures*, the Eleventh Circuit used the independent economic value test to find that each episode of a television series is a separate “work” for the purposes of calculating statutory damages.

The Supreme Court has had the opportunity to review the independent economic value test as it is applied to the calculation of statutory damages, but it did not reach a conclusion on the issue. In reversing the Eleventh Circuit’s holding in *Feltner* on the issue of whether a defendant has a constitutional right to have statutory damages determined by a jury, Justice Thomas’s opinion retraced the independent economic value test as it was utilized by the court. The Supreme Court decided the case narrowly on the constitutional issue of whether a defendant was entitled to a jury for these types of cases and did not approve of or admonish the independent economic value test. The case was thereafter remanded, and the jury, using the independent economic value test, returned an award of statutory damages that was significantly higher than the one initially imposed by the court.

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84 See id. at 295.
85 See id. at 295–96.
86 89 F.3d 766 (11th Cir. 1996).
87 C. Elvin Feltner, president of Krypton Broadcasting of Birmingham, Inc., was the defendant in both cases, *Columbia Pictures*, 106 F.3d at 296 n.8, and “Kojak” and “The A Team,” were likewise amongst the television series infringed in *MCA Television*, 89 F.3d at 767.
88 See id. at 769–70.
89 *Nimmer & Nimmer*, *supra* note 4, § 14.04[E][1][d].
91 *See Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc*, 259 F.3d 1186, 1191, 1198 (9th Cir. 2001); *see also Nimmer & Nimmer*, *supra* note 4, § 14-04[C][3][a].
2. Rejection of the Independent Economic Value Test for Music

When faced with a compilation clause question in the digital music context, the Second Circuit of the United States Court of Appeals distinguished Stigwood and Twin Peaks and rejected the independent economic value test. In Bryant v. Media Right Productions, Inc., the court held that songs issued on an album should be treated as a compilation, regardless of whether they are independently copyrighted or sold individually. In Bryant, the defendant, Media Right Productions ("Media Right"), represented the creators of two folk-music albums. Media Right contracted with plaintiffs to market their albums, but that contract only covered marketing and distribution of physical copies of the albums, not digital copies. Media Right, however, contracted with a third party, Orchard, to sell copies of the plaintiffs' songs in any format. Orchard initially sold only physical copies of the albums, but after four years, began selling the albums and individual songs through internet-based retailers such as iTunes. Orchard never told Media Right or the plaintiffs about these internet sales. In total, forty songs were infringed and resold on the internet. While the court recognized that digital copies of the songs were sold individually, the court held that an album created by the plaintiff is a compilation and therefore eligible for only one statutory damages award. In rejecting the independent economic value test, the court repeatedly stated that treating songs on an album as independent works would undermine the intent of Congress in 1976. In Bryant, the court did not address whether the songs

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92 603 F.3d 135 (2d Cir.), cert. denied, 131 S. Ct. 656 (2010).
93 See id. at 142.
94 See id. at 138.
95 See id.
96 See id.
97 See id. at 138–39.
98 See id.
99 See id. at 137–38.
100 See id. at 140–41 ("An album falls within the [1976 Copyright] Act's expansive definition of compilation. An album is a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album.").
101 See id. at 142 ("[T]o award statutory damages on a per-song basis would 'make a total mockery of Congress' express mandate that all parts of a compilation must be treated as a single "work" for purposes of computing statutory damages.'") (quoting UMG Recordings, Inc. v. MP3.Com, Inc., 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000)).
were written and produced separately, as they did in *Twin Peaks*. In distinguishing *Twin Peaks*, the court held that the dispositive question is whether “the plaintiff—the copyright holder—issued [the] works separately, or together as a unit.”\(^{102}\) This was also the dispositive question in *WB Music Corp. v. RTV Communication Group, Inc.*,\(^{103}\) where the same court awarded separate statutory damages for each of thirteen songs where the songs were compiled by the infringer, and the plaintiffs never released the songs on a single album.\(^{104}\)

3. Problems Caused by *Bryant’s* Rejection of the Independent Economic Value Test

The court’s reasoning in *Bryant* causes four distinct problems that undermine the core purposes of copyright protection and add to the confusion and inconsistency involved with calculating statutory damages awards. First, by treating the infringement of all songs on an album as infringement of a single work, copyright owners are placed in a very difficult evidentiary position if they must prove actual damages where statutory damages are so low as to be unfair compensation. The United States Government Accountability Office, acting under a government mandate to provide information on the economic impact of piracy, recently stated, “[T]he illicit nature of counterfeiting and piracy makes estimating the economic impact of IP infringements extremely difficult.... [M]ost experts observed that it is difficult, if not impossible, to quantify the economy-wide impacts.”\(^{105}\) The illicit nature of counterfeiting and piracy creates a similar problem when attempting to calculate actual damages and profits of the defendant in copyright infringement cases. The losses suffered by the copyright owner are difficult to calculate, especially in peer-to-peer file sharing cases, because it is impossible to determine how many copies of the infringed songs have been distributed and how many illegal

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102 *Id.* at 141.

103 445 F.3d 538, 541 (2d Cir. 2006).

104 *See id.* (holding that an award of statutory damages on a per-song basis is appropriate where the infringer, and not the copyright owner, is the party who assembled the songs on to an album).

downloaders would have purchased songs from the plaintiff. Proving the ill-gotten profits is another incredibly difficult task, because it requires the plaintiff to provide proof of the infringer's gross revenue. Congress granted Plaintiffs the power to seek statutory damages at any point in the litigation, regardless of proof of actual damages, precisely because of these difficulties. But limiting the available damages to such potentially low amounts fails to provide adequate protection to the copyright owner.

Second, by limiting the recovery of statutory damages to a single award, regardless of the number of songs that are infringed, the compilation clause offers a unique "bulk discount" to infringers. A would-be infringer who is only interested in copying songs A and B on an album has no reason to stop there. As the Second Circuit of the United States Court of Appeals currently construes the law, the compilation clause provides an incentive to the infringer also to copy songs C through Z, without incurring any additional liability. Such a broad interpretation of the compilation clause is thus a weak deterrent to copyright infringement in the digital marketplace.

The bulk discount problem is especially troubling in the case of "greatest hits" albums. Often bands who have achieved a degree of success and longevity will select and arrange preexisting songs on a greatest hits album. The bulk discount for infringers is especially attractive in these situations because the infringer can copy a high number of a successful band's best-selling songs, while incurring the risk of only a single

108 See NIMMER & NIMMER, supra note 4, § 14.04[A].
109 See Bryant v. Media Right Prods., Inc., 603 F.3d 135 (2d Cir.), cert. denied, 131 S. Ct. 656 (2010).
110 For example, the album 1 contains twenty-seven songs by the Beatles that each hit number one on the charts in the United States and the United Kingdom. Each of these songs has tremendous independent economic value. The collection features songs that were originally released on twelve separate albums. A commercial infringer could reap tremendous rewards from the copying and sale of these twenty-seven songs; but due to the fact that the songs were collected and arranged by the copyright owner on a single album, the infringer would face a single award of statutory damages.
statutory-damages award. A willful infringer for profit, like the defendants in *Bryant*, has little to fear from civil remedies\(^\text{111}\) when facing such money-making potential.

The third troubling result of an expansive definition of “compilation” is the arbitrary manner in which statutory damages are issued when numerous songs are infringed. If each song on an album gives rise to a single statutory award, but songs from other albums give rise to separate statutory awards, then an infringer who illegally copies ten songs from one album and five songs from other albums can be held liable for six statutory awards. Under the Second Circuit of the United States Court of Appeals’s interpretation, no consideration would be given to how the songs were copied or whether the infringer gave any consideration to which albums these songs came from. Given the fact that an infringer is susceptible to different levels of statutory damages based on whether he or she knowingly infringed a work,\(^\text{112}\) then it should matter whether the infringer thought that all of the songs that he or she was downloading came from the same album. In this situation, a strict interpretation of the compilation clause could allow for the argument that the infringer only intended to copy one album. If that were proven to be the case, then the court may be compelled to find willful infringement for the ten songs that actually were from the album and ordinary infringement of the other five songs. Such distinctions would be completely arbitrary.

Finally, the Second Circuit of the United States Court of Appeals’s approach leaves the most vulnerable class of artists susceptible to deception by infringers. Recently, in *Arista Records L.L.C. v. Lime Group L.L.C.*,\(^\text{113}\) the Southern District of New York narrowed the holding in *Bryant*, stating that where the copyright owner sells its songs individually over the internet, he or she may seek statutory damages on a per-song basis.\(^\text{114}\) In *Arista*, Judge Kimba Wood—who authored the *Bryant* opinion—stated that the key factor is whether the copyright owner ever distributed the songs individually, and since the artists in *Bryant*

\(^{111}\) Criminal penalties exist for willful infringement for profit. The burden of proof, however, is higher, and often the parties harmed by the infringement are best situated to recognize the problem and pursue a remedy.

\(^{112}\) 17 U.S.C.A. § 504(c)(2).

\(^{113}\) No. 06 CV 5936, 2011 WL 1311771 (S.D.N.Y. April 4, 2011).

\(^{114}\) Id. at *3.
only issued the songs as albums, not online, they were not entitled to recover damages on a per-song basis. While the Second Circuit of the United States Court of Appeals has not yet ruled on whether to accept this limitation, the limitation itself offers no protection to plaintiffs like the ones in Bryant who are most vulnerable to unscrupulous managers. Often, when a new artist is starting out in the music business, that artist places a great deal of trust in the decisions of a business manager. If the manager advises the artist to sell physical albums for a period of time, that manager can then sell the songs online, unbeknownst to the artist, and when the manager gets caught, he will only be liable for a single statutory damages award.

This exact situation occurred in Bryant. The fact that this particular plaintiffs' album sales were modest persuaded the court that the statutory damages available were ample compensation. In the case of a hit debut album, however, the artist might lose out on millions—because of statutory limitations on damages—because a manager uses his or her position to gain an unjust personal profit.

B. The Problem of the Willful Standard

While the issue of whether statutory damages should be awarded on a per-song or a per-album basis creates uncertainty in copyright infringement litigation in the digital music context, that issue should not be resolved in such a way that would magnify the problem of often excessively high and arbitrary statutory-damages awards. The district courts have struggled to find a meaningful standard for measuring the amount of statutory damages that are appropriate when a plaintiff has proven willful infringement of music through the digital marketplace. The 1976 Copyright Act contains broad ranges

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115 See id. at *3–4.
117 See id. at 144 ("The District Court awarded a total of $2400 in statutory damages, based on its finding that Appellees' profits from infringing sales of the Albums and songs were meager, and that the award did not need to be higher to achieve deterrence, because deterrence was effectuated here by Appellees having to pay their own attorneys fees.").
118 See Nimmer & Nimmer, supra note 4, § 14-04[B][1][a] (explaining that courts generally disregard "willful" increases and "innocent" decreases in the amount of statutory damages available). See also id. § 14-04[B][3][a] (outlining disagreement.
for statutory damages. The initial statutory-damages range for copyright infringement is $750 to $30,000, with a significant increase to $150,000 in maximum damages for willful infringement.\textsuperscript{119} The Act provides no guidance, however, as to where in that range damages should lie, and it leaves broad discretion to the court to determine a “just” award.\textsuperscript{120} The courts weigh a variety of factors when deciding the amount of statutory damages, including the expense saved and profits reaped by the defendant, the lost profits of the plaintiff, the infringer’s state of mind, and the violation of contractual obligations.\textsuperscript{121} Three major problems exist with the way that statutory damages are currently awarded for copyright infringement. The first problem is that the factors are not weighed uniformly across, or even within, the circuit courts, yielding inconsistent results for similar infringing acts.\textsuperscript{122} Second, there is disagreement as to whether statutory damages should bear a connection to actual damages and whether any punitive aspect should be served by statutory damages.\textsuperscript{123} Third, while the Supreme Court has held that a defendant is entitled to a jury on the issue of statutory damages, courts have repeatedly remitted jury awards in cases where individual users are held liable for willful infringement of digital

\textsuperscript{119} 17 U.S.C.A. § 504(c) (West 2011).
\textsuperscript{120} See id.
\textsuperscript{121} See NIMMER & NIMMER, supra note 4, § 14-04[B][1](a).
\textsuperscript{122} Samuelson & Wheatland, supra note 19, at 485–86 (“Inconsistent statutory damage rulings in factually similar cases are easy to find. In one set of cases, the same recording industry firm challen[ed] comparable acts of infringement (continuing to make and sell records after a compulsory license was terminated) and obtained statutory damage awards of $10,000 per infringed work in one case, $30,000 per infringed work in another, and $50,000 per infringed work in a third. No effort was made to align the awards or explain the discrepancies.”).
\textsuperscript{123} Compare Walker v. Forbes, Inc., 28 F.3d 409, 415 (4th Cir. 1994) (holding that the purpose behind statutory damages under 17 U.S.C.A. § 504(c) is restitution, not punitive damages, and a charge on deterring infringement through statutory damages would have been improper), with Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1053 (D. Minn. 2010) (“[F]actors other than the damages caused and gains obtained by the defendant’s infringement are relevant to the decision of the proper amount of statutory damages. Facts that go to the deterrence aspect of statutory damages, such as a defendant’s willfulness or innocence, and incorrigibility, are also relevant.”).
music, calling the jury awards excessively high. 124 What results from these divergent interpretations, then, is inconsistency and inefficiency of process.

Each of these problems, and the resulting inconsistency and inefficiency are exemplified in the case of Capitol Records Inc. v. Thomas-Rasset. 125 In Capitol Records, the defendant was found liable for willful infringement of twenty-four of the plaintiff’s copyrighted songs. 126 In the first trial of this lawsuit, the jury awarded statutory damages of $222,000 or $9,250 for each song that was infringed. 127 The court, however, granted a new trial on the issue of an error in jury instructions. 128 At the second trial, the jury returned a verdict of $1,920,000 or $80,000 per song infringed. 129 The court then remitted that verdict to $2,250 per song infringed. 130 The plaintiff rejected remittur. 131 Ultimately, a third trial ended with a jury verdict of $1,500,000 or $62,500 per song. 132 In a pre-trial hearing, the district court denied the defendant’s request that the jury be instructed, “Your award of statutory damages must bear a reasonable relationship to the harm suffered by each plaintiff as a result of the defendant’s actions.” 133 Later that year, however, defendants submitted a motion to alter or amend the judgment, stating, “This award violates the Due Process Clause because it bears no reasonable relationship to the actual damages that the defendant caused.” 134 This case has now spanned three trials, over three years of litigation, statutory damages awards ranging from $2,250 to $80,000 per song, countless dollars in attorney’s fees, and there is still no final resolution is in sight.

126 See id. at 1049–50.
127 See id. at 1049.
128 See id.
129 See id. at 1050.
130 See id. at 1061.
133 Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law, Capitol Records, Inc. v. Thomas-Rasset, No. 06-1497, 2010 WL 5147986 (D. Minn. Dec. 6, 2010).
It is abundantly clear that the often-amended Copyright Act is in need of further amendment. In attempting to apply outdated legislation to a very modern problem, the courts have devised two entirely different tests for determining what constitutes a “compilation.” In applying 1976 reasoning to the problems created by internet piracy, the Bryant court reached a decision that compromises the interest of the copyright owner, creates an incentive for wholesale infringement of sound recordings, and promotes arbitrary line drawing. The Capitol Records litigation shows how the 1976 Copyright Act, as currently amended, leads to inconsistent results, judicial inefficiency, and poor guidance for juries that must calculate statutory damages awards.

III. TWO CLARIFICATIONS THAT WILL BRING 17 U.S.C. § 504(c) INTO THE DIGITAL ERA

This Note advocates a two-part solution that will provide guidance on damages to judges and juries in copyright infringement cases. This solution satisfies the policies of protecting copyright owners and deterring infringement that have been at the heart of United States copyright law since the eighteenth century, and it also satisfies the tripartite general purpose for statutory damages. First, Congress should separate “collections” from “collective works” and distinguish between the two for purposes of calculating statutory damages. Second, Congress should redefine the current ranges of statutory damages under the Copyright Act and recalibrate the statutory limits accordingly. In place of innocent infringement, ordinary infringement, and willful infringement, this solution would establish ranges for innocent infringement, knowing infringement, and willful infringement for commercial advantage or personal financial gain. This addresses the concern that eliminating the compilation clause would increase the likelihood of unfairly high results against individuals in peer-to-peer file sharing cases.

A. Differentiating Between Collections and Collective Works

Even under the 1976 Copyright Act as currently written and amended, the definition of a “compilation” does not contemplate songs on an album in the modern digital marketplace. The 1976 Act defines a compilation as “a work formed by the collection and
assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term ‘compilation’ includes collective works.” 135 The terms “materials” and “data” indicate information that might not otherwise be subject to copyright protection.136 Congress used them to protect original works that are created by compiling existing materials with some degree of creativity and those who compile them,137 but only to the extent that the author added something new to the compilation.138 This premise carries over to the definition of a collective work.139

The 1976 Copyright Act’s definition of collective work—“a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole,”140—lists only printed materials. Moreover, each of the “collective works” that are enumerated in the Act are composed of parts that traditionally have minimal economic value apart from some sort of a collection. For example, a single article has little economic value if not published in a periodical or encyclopedia and a single poem would rarely be published apart from an anthology or magazine. These “traditional” printed compilations were among those afforded statutory damages on a per-infringing act basis under the 1909 Act that prompted Congress to adopt the compilation clause in the 1976 Act. Sound recordings, television shows, and live performances all existed in

136 See NIMMER & NIMMER, supra note 4, § 3.02.
137 See H.R. Rep. No. 94-1476, at 11 (1976) (“A compilation or derivative work is copyrightable if it represents an ‘original work of authorship.’”); see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (“Original, as the term is used in copyright, means only that the work . . . possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be.”) (citation omitted) (internal quotation marks omitted).
138 See 17 U.S.C. § 103(b) (2006) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”).
139 See NIMMER & NIMMER, supra note 4, § 3.03 (“A collective work will qualify for copyright by reason of the original effort expended in the process of compilation, even if no new matter is added.”).
1976, and any of these could have easily been listed, but were not. The Copyright Act specifically names “sound recordings” in numerous other areas, including entire sections on licensing, distribution, and notice requirements. While the list is not exhaustive, the omission of sound recordings should not be viewed as incidental.

Even apart from the fact that the enumerated examples of collective works include only printed materials comprised of parts with minimal independent economic value, albums no longer fit the mold of a “collective whole.” Periodicals, anthologies, encyclopedias, and other units that have been considered collective works such as catalogs, and magazines all share the common thread of reaching consumers as a single unit. This is no longer the case for albums. Brick-and-mortar record stores are rapidly disappearing, but music consumption is as high as it has ever been. In the digital marketplace, consumers purchase individual songs with far greater frequency than they purchase entire albums. Moreover, songs reach consumers individually in more ways than simply in the context of an album. For example, songs are available for individual sale on websites like iTunes (over 18 million songs are currently sold on iTunes); they reach consumers in the form of video games (not only on soundtracks, but also as the main function of

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142 See NIMMER & NIMMER, supra note 4, § 3.03.
144 See Performance Right Hearings, supra note 1, at 18 (“[D]espite the industry’s woes, people are listening to at least as much music as ever. [People bought] more than 100 million iPods” between January 2009 and January 2010, and the touring business is thriving.).
145 In the first week that iTunes made a digitally re-mastered version of the Beatles catalog available, over 2 million individual tracks were sold, compared with 450,000 digital albums. Christopher Morris, Beatles Sell 2 Mil iTunes Tracks in One Week, VARIETY (Nov. 23, 2010, 2:53 PM), http://www.variety.com/article/VR1118027940. According to Nielson Soundscan, of the 1,545,000,000 total music units sold in 2009, 1,159,000,000 were digital tracks (individual songs) and 76,400,000 were digital albums. Press Release, Nielsen Company, 2009 U.S. Music Purchases up 2.1% over 2008; Music Sales Exceed 1.5 Billion for Second Consecutive Year (Jan 7, 2010), http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/01/Nielsen-Music-2009-Year-End-Press-Release.pdf.
popular games such as *Guitar Hero* and *Rock Band*); the digital marketplace has changed music consumption to such a degree that even the traditional means of distributing individual songs—such as broadcast and videos, which were once seen as a means of promoting album sales—no longer serve that function. Perhaps, in 1976, when songs were primarily available as a part of a single physical object, either vinyl album, cassette, or eight-track, which generally contained multiple songs, the compilation clause made sense for infringement of the album; however, this is no longer the case. In the digital marketplace, each song is an independent unit for sale.

Songs on an album, much like episodes of a television show, should be considered a “collection” not a “compilation.” The classic example of a compilation is a doll in which the manufacturer owns separate copyrights in the various sculpted limbs. In this case the owner would be entitled to a single recovery of statutory damages if the doll is infringed. This is because the doll is a single unit for sale. In the modern digital marketplace, songs on an album are much more akin to episodes of a television show—considered independent works for the purposes of statutory damages by all circuits that have considered the question—than they are to a doll or an encyclopedia. While the items may be marketed as a part of a greater collection, they are still made available to consumers independently from all other parts of the collection.

147 “[Mötley Crüe] placed its new single, ‘Saints of Los Angeles,’ for sale as a downloadable track on [the video game] ‘Rock Band’ well in advance of the album’s release date . . . . [T]he track was downloaded more than 47,000 times via the Xbox 360 version of the game alone in the first week after it became available.” Antony Bruno, *Game Theory: Can Introducing New Music Through Videogames Boost Sales?*, BILLBOARD, May 31, 2008, at 22, 22.


150 See id. (“Today listeners are not limited to what they hear on traditional radio to inform their choices. Consequently, whatever promotional value that may have existed in 1995 has been diluted by the increase in alternative media . . . .”).

151 See id. § II[A](1), (2).
The independent economic value test should be used to determine whether the component parts constitute a “collective whole.” If the parts have independent economic value, thereby making each part capable of its own copyright life, then taken as a whole, the parts would constitute a “collection.” If the parts lack sufficient independent economic value, then they would constitute a “compilation” and only a single award of statutory damages should be allowed.

In order to implement this solution in a manner that makes sense, two things must happen. First, an addition to 17 U.S.C. § 101 should define a collection as “a series of separate and independent works that are collected and arranged by the author, but which maintain significant independent economic value apart from the collective whole.” This would sufficiently differentiate between a traditional compilation, which is a single work made up of component parts, and a collection, which consists of independent works that are gathered together for marketing purposes or as a part of a greater narrative, but do not necessarily form a “collective whole” because they are not dependent on the collection for economic value. Second, a sentence should be added to the end of 17 U.S.C. § 504(c)(1) that states, For purposes of this subsection, all parts of a collection should be treated as independent works.

B. Recategorizing Levels of Infringement

The 1976 Copyright Act currently provides statutory damages at different levels for infringers who are innocent, willful, or less than willful. The statute establishes an initial range for statutory damages of not less than $750 and not more than $30,000 per infringed work. The maximum increases to $150,000 per infringed work where the plaintiff can prove that the infringer acted willfully and decreases the minimum to $200 per infringed work if the defendant can prove that the infringement was innocent. This essentially creates three categories of infringement: innocent, knowing, and willful. The

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153 Id. § 504(c)(2).
154 See NIMMER & NIMMER, supra note 4, § 14.04[B](1)(a).
Act, however, leaves broad discretion to the judge or jury, which has raised criticism about the application of statutory damages in the modern copyright infringement context.

The public’s fear of unfair damage awards against consumers was a factor in Congress’s decision to keep the compilation clause, but a statutory provision that expressly treats infringement for personal use separately from infringement for profit or commercial gain could alleviate those fears. This Note advocates replacing the “willful” level with separate distinctions for (1) knowing infringement, and (2) willful infringement for commercial advantage or personal financial gain. Under the 1976 Copyright Act, willful infringement means “with knowledge that the defendant’s conduct constitutes copyright infringement.” This creates an uneasy merger between the legal standards of “knowing” and “willful” that essentially usurps any real meaning from the statutory increase in damages. In many contexts, the term “willful” implies an added malicious intent on top of knowledge of a breach of legal duty. Congress, however, has eliminated this intent requirement from its definition of willful copyright infringement. Without malicious intent, which would equate to financial or commercial gain resulting from the infringing activity, there is little value to the “willful” distinction in 17 U.S.C. § 504(c) because virtually all illegal downloads involve a knowledge of copyright infringement, and innocent infringement requires showing “no reason to know” of the infringement, which the courts rarely find.

In order to correct this situation and offer meaningful distinctions in the levels of statutory damages available to plaintiffs, the highest level of damages should be reserved for

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155 17 U.S.C. § 504(c) uses the phrase “as the court considers just.” The term “court” has been held to imply determination by a judge in certain contexts, but the Supreme Court has held that defendants have a constitutional right to a jury determination of statutory damages if they so choose. See Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352–53 (1998).

156 See Samuelson & Wheatland, supra note 19.

157 See O’Scannlain & Halpert, supra note 29 (“[Eliminating the compilation clause] would subject someone who illegally downloads the contents of a compact disc to possible statutory damages for each song on the disc.”).


159 See id.


willful infringement for commercial advantage or personal financial gain. This standard is consistent with the distinctions made in criminal parts of the 1976 Copyright Act as currently amended.\(^{162}\) By expressly acknowledging this distinction in its criminal treatment of copyright infringement, Congress already recognizes the important distinction between infringement for profit and infringement for personal use. With this recognition already established, it makes sense to use this standard as a line of demarcation for the purposes of statutory damages as well. Willful infringers for profit, who take the risk of criminal liability for profit or commercial gain, are the ones most deserving of maximum civil penalties, not only because they act with malicious intent, but also because they cause the most damage to the rightful copyright owner.

If the for-profit distinction were made, that would greatly reduce the risk of unfairly excessive penalties against end-user infringement in the absence of the compilation clause’s single award protection for infringement of multiple songs on an album. To further prevent absurd results, knowing infringement, which equates to the current “willful infringement” standard, should have a more reasonable maximum allowable penalty. This Note advocates a range of $750 to $2,250 per work for knowing infringement. The $2,250 limit, three times the statutory minimum, is consistent with the “broad legal practice of establishing a treble award as the upper limit permitted to address willful or particularly damaging behavior.”\(^{163}\) Adopting this provision in conjunction with the updated definition of a “compilation” would create a meaningful basis for increasing the level of statutory damages, as the highest awards would be reserved for the worst offenders. It would also offer a level of assurance against unconscionable levels of damages against

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\(^{162}\) 17 U.S.C. § 506(a)(1)(A) (2006 & Supp. II) (defining criminal infringement as infringement that was committed “for purposes of commercial advantage or private financial gain”).

\(^{163}\) Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1056. In *Capitol Records*, the court explained, “Federal statutes allow for an increase in statutory damages, up to triple statutory damages, when the statutory violation . . . demonstrates a particular need for deterrence.” *Id.; see also Software Freedom Conservancy, Inc. v. Best Buy Co., No. 09 Civ. 10155(SAS), 2010 WL 2985320, at *3 (S.D.N.Y. 2010) (“Without a better guide for setting enhanced damages, the Court will award treble damages on the basis of . . . willful infringement . . .”).
individuals who download music, movies, or television shows for personal use, while maintaining enough of a penalty to deter the infringement of even a single copyrighted work.

C. Why this Solution Is Better than Other Proposals

Congress and the judiciary have struggled with the problem of protecting musicians from digital piracy for years, and Congress and legal commentators have noticed. Several solutions to the problem of how to deal with online infringement of copyrighted music have been proposed, but each has its shortcomings. Three solutions that were recently proposed include expansion of the performance right for sound recordings,\textsuperscript{164} a common-law guidepost for tying statutory damages calculations directly to actual damages,\textsuperscript{165} and eliminating the compilation clause altogether.\textsuperscript{166}

1. Expansion of the Performance Right

The performance right grants the copyright holder the exclusive right to perform the copyrighted work publicly.\textsuperscript{167} Originally, sound recordings were not included in the performance right.\textsuperscript{168} In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), which granted a limited performance right in sound recordings to the extent that the sound recordings are disseminated in an online or satellite broadcast.\textsuperscript{169} Under this limited performance right, digital broadcasters are required to pay the copyright holder for a license to broadcast the songs.\textsuperscript{170} Marybeth Peters, Register of Copyrights, has suggested that the digital performance right in sound recordings be extended to cover all forms of broadcast, including terrestrial broadcasts.\textsuperscript{171} Peters

\textsuperscript{164} See Performance Right Hearings, supra note 1, at 23 (Statement of MaryBeth Peters, Register of Copyrights).

\textsuperscript{165} See Samuelson & Wheatland, supra note 19, at 502–03.

\textsuperscript{166} See H.R. 4279, 110th Cong. § 104 (2007).


\textsuperscript{168} 17 U.S.C. § 114(a) (West 2011) ("[Sound recordings] do not include any right of performance under section 106(4)").

\textsuperscript{169} See Performance Right Hearings, supra note 1, at 16–17.


\textsuperscript{171} See Performance Right Hearings, supra note 1, at 19 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office, Washington, D.C.).
noted that the primary reason for the exclusion of terrestrial broadcasts from the DPRA was the "mutually beneficial economic relationship between the recording and traditional broadcasting industries," which promoted album sales for the performer by building popularity over the radio. Peters goes on to explain how that relationship has deteriorated to the detriment of the music industry. While the expansion of the performance right is a viable means for adding an alternative source of income to musicians, it does not address the issue of infringement. This proposed solution concedes that artists lose significant revenue due to online infringement and attempts to recover some of that lost revenue by adding an additional revenue stream. It does nothing, however, to discourage infringement. Moreover, it does not address the difficult position that courts are put in when copyright holders decide to bring a suit against an infringer.

2. General Recalibration of Statutory Damages

Recently, Professor Samuelson proposed a multi-faceted set of guidelines that would recalibrate the way that statutory damages are awarded and generally tie the awards to actual damages. The stance that statutory damages should be tied closely to actual damages diminishes the deterrence aspect of statutory damages. At first blush, it makes sense that statutory damages should bear a resemblance to actual damages, but this is not the way that courts have interpreted statutory damages in copyright infringement cases. The difficulties in calculating actual damages are well documented and, if taken to their logical extreme, can lead to even greater damages incurred by

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172 Id.
173 See id. at 19–22.
174 See Samuelson & Wheatland, supra note 19, at 501–05.
175 See, e.g., Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1053 (D. Minn. 2010) ("[F]actors other than the damages caused and gains obtained by the defendant’s infringement are relevant to the decision of the proper amount of statutory damages. Facts that go to the deterrent aspect of statutory damages, such as a defendant’s willfulness or innocence, and incorrigibility, are also relevant."); Sony BMG Music Entm’t v. Cody, No. 1:08-cv-00590-LJO-SMS, 2009 WL 3650923, *5 (E.D. Cal. Oct. 27, 2009) ("The statutory damages serve both compensatory and punitive purposes, so in order to effectuate the statutory policy of discouraging infringement, recovery of statutory damages is permitted even absent evidence of the actual damages suffered by a plaintiff or of the profits reaped by a defendant.") (citing L.A. News Serv. v. Reuters Television Int’l, Ltd., 149 F.3d 987, 996 (9th Cir. 1998)).
176 See supra note 106 and accompanying text.
the infringer. At least one plaintiff has testified that infringement of a single song can cost the copyright owner an immeasurable amount of damages because of the ripple effect of file sharing. Moreover, in order to implement this recalibration of damages without amending the statute, Professor Samuelson lays out a complex scheme for relating the statutory damages award to proof of actual damages in different situations. Among the twenty-two affirmative guideposts are: (1) “consider awarding the reduced minimum damages authorized for ‘innocent’ infringements in close fair use cases or in other cases in which the noninfringement claim was strong, even if ultimately not compelling”; (2) “[award minimum statutory damages when] the defendant had a plausible fair use or other noninfringement argument (unless the plaintiff’s lost profits or defendant’s profits justify a larger award)”; and (3) “[base any enhanced statutory damage award for ‘willful infringement’ on multiples above two to three times damages/profits or a best approximation, but only to the extent there are factors showing egregiousness of the infringement beyond the fact that the defendant knew his acts were infringing . . . ” While the professor’s solution is well thought out, it is far too complex, particularly in cases where juries, instead of judges, are calculating the award. Even Professor Samuelson concedes that a legislative solution may be needed to offer proper guidance to the courts.

3. Elimination of the Compilation Clause

Simply striking the compilation clause and inserting the independent economic value test, as proposed recently by Congress, is a poor solution because it over emphasizes the deterrence purpose of statutory damages to a point where absurd

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178 See Samuelson & Wheatland, supra note 19, at 501–03.
179 In addition to the twenty-two guideposts for what courts should do, Professor Samuelson also lists sixteen guideposts for what courts should not do. See id. at 505–08.
180 Id. at 501.
181 Id. at 502.
182 Id. at 504.
183 Id. at 509–10.
results could ensue. To allow statutory damage awards in the millions of dollars for downloading a handful of songs is not only unfair to the defendant, but also results in damages awards that could never realistically be paid, thus doing the plaintiff little good. The distinction between commercial infringers for profit and private infringers is essential to any proposition that would remove the compilation clause from 17 U.S.C. § 504(c).

CONCLUSION

The United States has consistently approached copyright as an area of the law that must be frequently updated in order to keep pace with new technologies. The recent technological shift to the online marketplace has rapidly made prior copyright legislation obsolete. Congress has already undertaken measures in recent years to address this constantly changing problem, and more changes are in the works. Members of Congress have specifically named the compilation clause as an area that is in need of resolution in the near future. The time is ripe for a statutory solution to the problems caused by applying a 1976 solution to a 2011 problem.

The two-part solution advocated by this Note addresses all of the major shortcomings of the present approach to statutory damages for the infringement of music in the digital marketplace. This solution is in line with existing statutory language, the purposes of copyright protection, and the purposes of statutory damages, generally. This solution also avoids many of the thorny issues that arise from other solutions that have recently been proposed. If the Copyright Act were amended in the manner set forth in this Note, judges and juries; copyright holders and would-be infringers; artists; producers; and consumers alike would have an added level of certainty and protection that is currently lacking. The next wave of new technology will undoubtedly cry out for new solutions at a later date, but the problems that currently exist can and should be resolved now.

185 Without the “for profit” distinction, an individual infringer for personal use could be held liable for damages in the amount of $2,250,000 for downloading a single album containing fifteen songs. While a court would likely remit these damages, the solution proposed in this Note avoids this situation altogether.