Proskauer

Second Circuit Rules That Per-Song Statutory Damages Are Unavailable For Infringement Of Music Album Compilations

May 21, 2010

A recent Second Circuit decision may serve to limit statutory damage awards for copyright infringement in the context of music albums. In *Bryant v. Media Rights Products*, No. 09-CV-2600, 2010 U.S. App. LEXIS 8657 (2d Cir. April 27, 2010), the Second Circuit held that a music album is a compilation subject to a single award of statutory damages, notwithstanding the fact that the individual songs on the album may be separately copyrighted.

Background

Appellants Anne Bryant and Ellen Bernfeld are songwriters and the owners of the record label Gloryvision Limited. They created and produced two music albums, "Songs for Dogs" and "Songs for Cats." Both of the albums were registered with the United States Copyright Office. Bryant and Bernfeld also separately registered several of the individual songs on the albums.

The appellants entered into an agreement with appellee, Media Right Productions, Inc., pursuant to which Media Right would market the albums in exchange for a percentage of sales revenue. The agreement gave Media Right permission to sell only physical copies of the albums, which would be provided by the appellants. Media Right also received permission to distribute the albums through appellee music wholesaler Orchard Enterprises, Inc.

At the outset, the appellees sold only physical copies of the albums, but in 2004 Orchard began making digital copies of the albums to be sold through internet-based retailers. Orchard made the albums available for download along with individual tracks.

Between 2002 and 2008, the albums generated $12 in revenue from sales of physical copies and nearly $600 in revenue from digital downloads of the albums and individual songs. Bryant and Bernfeld were due approximately $330 of this revenue pursuant to the revenue distribution formula in their contract with Media Right, but the money was never paid.

After discovering digital copies of the albums were available online, in 2007 the appellants sued for copyright infringement in the U.S. District Court for the Southern District of New York. They alleged, among other things, direct and contributory copyright infringement and sought statutory damages of not less than $1 million.

Both sides filed motions for summary judgment. The district court found that Media Right and Orchard had committed direct copyright infringement by making and selling digital copies of the albums and the individual songs contained therein. However, it also found that each album constituted a compilation, and that therefore only one award of statutory damages per album was available from each individual appellee. The court went on to set damages at $2,400 after finding Orchard's infringement was innocent and Media Right's infringement was not willful. The district court did not award attorneys' fees.

Musical Albums as "Compilations" Under the Copyright Act

On appeal, the Second Circuit upheld the district court's holding that the albums were compilations limited to a single award of statutory damages.

The court looked first to the language of the Copyright Act. *Bryant*, 2010 U.S. App. LEXIS 8657 at *10-11. Section 504(c)(1) of the Copyright Act allows only one award of statutory damages for infringement of any "work," and states that "all the parts of a compilation…constitute one work." Under the Copyright Act, 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. The Copyright Act further defines "compilation" as including "collective works," which are in turn defined as works "in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective work. *Id.* The court also looked to the legislative history contained in the Conference Report accompanying and explaining the Copyright Act, which states that a "compilation" is born "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. 1476, 94th Cong., 2d Sess. 162, *reprinted in* 1976 U.S.C.C.A.N. 5659.

The court thus held:

> An album falls within the 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. 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.

Bryant, 2010 U.S. App. LEXIS 8657 at *11. The court noted in a footnote a number of prior decisions at the district court level that had similar holdings in the context of music albums,[1] as well as similar decisions in other contexts.[2]

The Second Circuit distinguished two of its prior decisions in which individual works within a compilation were subject to separate statutory damages awards. The court noted that in each case, the plaintiff copyright holder had issued the individual works separately and the defendant had created the compilation at issue. *See Twin Peaks Prods., Inc. v. Publ'ns. Int'l Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993) (television program episodes issued sequentially at different times and defendant combined teleplays into one book); *WB Music Corp. v. RTV Comm. Group, Inc.*, 445 F.3d 538, 541 (2d Cir. 2006) (plaintiff's separately issued songs were combined into an album by defendant). By contrast, the Second Circuit held that "[h]ere, it is the copyright holders who issued their works as 'compilations'; they chose to issue Albums. In this situation, the plain language of the Copyright Act limits the copyright holders' statutory damages award to one for each Album." *Bryant*, 2010 U.S. App. LEXIS 8657 at *12-13.

Second Circuit Rejects "Independent Economic Value" Test

The Second Circuit rejected the "independent economic value" test applied by other circuit courts in determining whether a compilation of separately copyrighted works is subject to one or more statutory damages awards.[3] The court found the independent economic value of an individual work within a compilation irrelevant to the determination of statutory damages for infringement of the compilation.

Bryant and Bernfeld argued that because internet customers could listen to and purchase copies of each independently copyrighted song, each song had "independent economic value" and therefore should be subject to separate statutory damages awards. The appellants argued that the "independent economic value" test is particularly appropriate in the context of musical albums, where infringers may easily convert an album to digital form and sell individual tracks separately.

The Second Circuit held that the "independent economic value" test is inconsistent with the plain language of the Copyright Act, which "provides no exception for a part of a compilation that has independent economic value.…We cannot disregard the statutory language simply because digital music has made it easier for infringers to make parts of an album available separately." *Bryant*, App. LEXIS 8657 at *16-17.

Calculation of Statutory Damages and Award of Fees

The Second Circuit upheld the district court's calculation of statutory damages and finding that neither of the appellees acted willfully and that Orchard acted innocently. The court held that the district court did not abuse its "wide discretion" in setting the statutory fee award at a total of $2,400 given that the profits from the infringement were meager and deterrence was achieved because the defendants-appellees paid their own attorneys' fees.

The Second Circuit also held that the district court did not abuse its discretion under Section 505 of the Copyright Act in denying the appellants their attorneys' fees. The Second Circuit noted that the defendants-appellees made a settlement offer of $3,000 which the appellants rejected, notwithstanding evidence that the defendants-appellees had received less than $600 in revenue from the infringing sales.

Impact on Moving Forward

Given the Second Circuit's emphasis on the manner in which a plaintiff chooses to distribute his or her works, it is unclear to what extent this decision would apply to a case in which single track downloads are made available by a copyright holder. This may be a point of emphasis as lower courts seek to apply this ruling to the commercial realities of music distribution through iTunes and other internet-based music retailers as well as streaming music sites.

It is not immediately clear whether other circuits will adopt this ruling, or whether other courts may instead choose to apply the "independent economic value" test to music albums. Given the possibility of a circuit split regarding statutory damages for music albums, the most immediate impact may be that plaintiffs seeking statutory damages may seek to avoid the Second Circuit.[4]

(Special thanks to Robert D. Forbes, author of this alert)

[1] *See Arista Records, Inc.v. Flea World, Inc. v. Flea World, Inc.*, No. 03-CV-2670, 2006 U.S. Dist. LEXIS 14988, at *72-*73 (D.N.J. Mar. 31, 2006); *Country Road Music, Inc. v. MP3.COM, Inc.*, 279 F. Supp. 2d 325, 223 (S.D.N.Y. 2003); *UMG Recordings, Inc. v. MP3.COM, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000).

[2] *See Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 285 (4th Cir. 2003) (one statutory damage award available for each computer clip art software program); *Stokes Seeds Ltd. v. Geo. W. Park Seed Co.*, 783 F. Supp. 104, 106 (W.D.N.Y. 1991) (seed catalog containing individually copyrighted photographs constituted compilation for purposes of statutory damages award).

[3] *See Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 295 (9th Cir. 1997), *rev'd on other grounds*, 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 (1st Cir. 1993); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990). The court noted that the Circuit Courts in these cases were not applying the "independent economic value" test to an album of music.

[4] Also uncertain is whether the Second Circuit's reasoning with respect to when a music album constitutes a compilation will be extended to other areas of copyright law, such as the work for hire context. This may eventually become an issue in connection with the brewing conflict over termination rights.

Related Professionals

- **Charles S. Sims**