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Courts Split on How to Determine Statutory Damages for Copyright Infringement

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The recent decision in *Energy Intelligence Group, Inc. v. CHS McPherson Refinery, Inc.*[1] highlights a circuit split regarding how courts determine the statutory damages available for copyright infringement where multiple copyrighted expressions are at issue.

Under the Copyright Act, two variables fix a copyright holder's recovery where the holder elects statutory damages: (i) an amount awarded within ranges based on the infringer's culpability, multiplied by (ii) the number of "work[s]" infringed.[2] In District Judge Eric Melgren reminds litigants that there are two different approaches by which courts determine the number of "works" at issue: the "independent economic value" standard and the "plain language" standard. Under the independent economic value standard, courts hold that expressions constitute separate works entitled to separate awards of statutory damages if they have "independent economic value." By contrast, under the plain language standard, other courts ask only whether the copyright holder issued the expressions together, potentially resulting in smaller damages awards. **Given this contrast, copyright holders, as well as alleged infringers, should be knowledgeable concerning which test is employed by the courts in their jurisdiction. They should also be prepared to articulate arguments for expanding or contracting the number of works at issue under either standard.**

I. The Independent Economic Value Standard: Greater Recovery Available If Each Expression Is Economically Viable On Its Own

In the First, Ninth, Eleventh, and D.C. Circuits, individual expressions are entitled to separate damages awards, rather than subsumed within a compilation, if "each expression . . . has an

[1] --- F. Supp. 3d ----, No. 16-1015-EFM-GLR, 2018 WL 1316938 (D. Kan. Mar. 14, 2018).

[2] 17 U.S.C. § 504(c)(1) (providing for an award of damages "for all infringements . . . with respect to any one work"). The Copyright Act does not define "work."

independent economic value and is, in itself, viable."[3] For example, in Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc., the Ninth Circuit applied that test in holding that a copyright owner was entitled to an award of statutory damages for each of 440 infringed episodes of several television series, rather than an award for each series. The court rejected the infringer's argument that each series was a "compilation" of several episodes, reasoning that the individual episodes were "separately written, produced, and registered," "broadcast over weeks, months and years," and "could be repeated and broadcast in different orders."[4]

II. The Plain Language Standard: Limiting Recovery Where Expressions Are "Issued" Together By The Copyright Owner

The Second and Fourth Circuits look to the Act's "plain language" and ask whether the copyright holder arranged the individual expressions together in a way that creates an original work of authorship—a "compilation"—under the Act.[5] Thus, a recording artist who issued songs on an album was entitled to only one award of statutory damages per album, because the Act "provides no exception for a part of a compilation that has an independent economic value."[6]

The Eighth and Tenth Circuits have not yet decided the issue, but district court authority in both circuits favors the plain language standard. The court in *Energy Intelligence Group* favorably cited the plain language standard in determining that a publisher was entitled to an award of damages for each issue of its infringed magazines—because there was no evidence that the publisher sold them in groups—but also noted that the publisher's recovery would be the same under the independent economic value standard.[7] In *Kennedy v. Gish, Sherwood & Friends, Inc.*, the Eastern District of Missouri cited and applied Bryant's plain language standard, but it did not acknowledge the circuit split.[8]

III. Implications For Copyright Holders And Alleged Infringers

The distinctions between the independent economic value and plain language standards are particularly likely to produce differing results where things like copyrighted music are at issue, as songs can easily be deemed to have an economic value independent of any album on which they are released. By contrast, either standard may result in fewer "works" than the number of copyrighted expressions involved where the expressions were marketed, sold, or licensed together, such as expressions created and licensed for an advertising campaign, or expressions that are part of a database licensed as a whole. For example, courts applying the independent economic value standard are likely to find that the value of such expressions derives from their collective nature—otherwise, the copyright holder would license the expressions separately. Similarly, courts applying the plain language test may deem each group of expressions a compilation, because the copyright holder chose to group or issue them together, rather than separately. Note that under either standard, the manner by which the copyright holder registers expressions with the Copyright Office—such as the number of registration forms submitted—is unlikely to resolve whether each expression is an independent work, but it can be a persuasive factor, especially if the holder expressly registers them as part of a compilation.

Given this framework, to maximize statutory damages, copyright holders should seek to bring infringement claims in courts applying the independent economic value standard or in courts that have not yet decided the issue.[9] This is because applying the independent economic value standard is more likely (although not certain) to result in a determination that individual expressions constitute individual works. Alleged infringers, however, may be better served in jurisdictions employing the plain language standard.

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[3] *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 (1st Cir. 1993); *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); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990).

[4] 106 F.3d at 295.

[5] See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 142 (2d Cir. 2010); *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 285 (4th Cir. 2003).

[6] See *Bryant*, 603 F.3d at 142.

[7] *See Energy Intelligence Group, Inc.*, 2018 WL 1316938, at *9.

[8] 143 F. Supp. 3d 898, 915 (E.D. Mo. 2015).

[9] As of this publication, the Third, Fifth, Sixth and Seventh Circuits do not appear to have decided the issue.

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