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INTRODUCTION

The principal purpose of copyright law in the United States is to protect the pecuniary rights of copyright holders.[1] The law ensures that copyright holders retain exclusive rights to reproduce and distribute their original works, to prepare derivative works, and to publicly perform and display certain types of works.[2] Thus, the law—codified in the Copyright Act of 1976 [1976 Act]—primarily concerns the economic value of a copyright.[3]

In copyright infringement cases, two types of remedies are generally available upon determining liability: (1) the copyright holder's actual damages and any additional profits of the infringer,[4] or (2) statutory damages.[5] The first remedy involves a relatively straightforward evaluation of evidence; the copyright holder is required only to provide proof of the infringer's gross revenue, while the infringer must prove both deductible expenses and profits not attributable to the copyrighted work.[6] By contrast, calculating statutory damages in such cases is comparatively more complicated.

To compute statutory damages, the court examines, among other factors, evidence of willful infringement and potential fair use defenses.[7] But because statutory damages are decided on a "per work" basis,[8] the difficulty lies in accurately defining what constitutes "one work," and the Circuits are split on the issue.[9] The 1976 Act reads, in relevant part: "[T]he copyright holder may elect . . . to recover . . . an award of statutory damages for all infringements involved in the action, with respect to any *one work* . . . all the parts of a compilation or derivative work constitute

1. Roberta Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better than the U.S. Copyright Law?*, 27 J.C. & U.L. 53 (2000).
2. *Id.*
3. *Id.*
4. 17 U.S.C.A. § 504(a)(1) (West 2017).
5. § 504(a)(2) (West 2017).
6. § 504(b) (West 2017).
7. § 504(c)(2) (West 2017).
8. § 504(c)(1) (West 2017).
9. BMG Rights Mgmt. (US) LLC v. Cox Comm., Inc., 199 F. Supp. 3d 958, 983 (E.D. Va. 2016), *aff'd in part, rev'd in part*, 881 F. 3d 293 (4th Cir. 2018) ("The circuits are split as to how to determine what constitutes 'one work' for purposes of statutory damages calculations.").

one work" (emphases added).[10]

The Circuits disagree as to the correct interpretation of "one work,"[11] and this lack of uniformity among the courts leads to uncertainty in awarding damages in copyright infringement cases. For *each* infringed work, the copyright holder may receive statutory damages ranging from $750 to $30,000,[12] depending upon the court's judgment of fair compensation.[13] If, for example, the infringed work is *one album* and the copyright holder elects to recover statutory damages, the award would total at least $750, but no more than $30,000, for a single work. By contrast, if the court considers each of the album's ten music tracks as separate works (and finds that all of them have been infringed), then statutory damages could amount to $300,000 (four hundred times the amount awarded to the copyright holder of the lone infringed album).[14] Certainly, the court's determination of the number of infringed works in a particular case "strongly impacts the amount of the statutory damage award."[15]

Therefore, the Circuit split, on the issue of deciding the number of infringed works in any given case, creates ambiguity that should be eliminated to provide consistency in awarding statutory damages. This note will first review the history of copyright law in the United States as it relates to statutory damages (focusing on the development of the 1976 Act), then assess the two tests for "one work" currently employed by the courts, and finally propose a solution for resolving the divide among the Circuits by blending the two approaches together to balance the economic value of a copyright with the obligation to uphold copyright law as the fundamental mechanism for protecting creation.

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10. 17 U.S.C.A. § 504(c)(1) (West 2017).

11. *BMG Rights Mgmt.*, 199 F. Supp. 3d at 983.

12. 17 U.S.C.A. § 504(c)(1) (West 2017).

13. If the court finds that the infringer did not know and had no reason to know that his or her acts constituted copyright infringement, the court may reduce the statutory damages award to a minimum of $200. But in cases where the infringement was committed willfully, the court may increase the statutory damages award to a maximum of $150,000. 17 U.S.C.A. § 504(c)(2) (West 2017).

14. *See generally* Sarah A. Zawada, *"Infringed" Versus "Infringing": Different Interpretations of the Word "Work" and the Effect on the Deterrence Goal of Copyright Law*, 10 MARQ. INTELL. PROP. L. REV. 129 (2006) (providing examples to highlight the effect of the court's determination of the number of infringing works on statutory damages calculations).

15. *Id.*

I. BACKGROUND

A. Statutory Damages: The Copyright Acts of 1790, 1909, and 1976

At common law, copyright holders were entitled only to actual damages and profits as compensation for infringement.[16] In some circumstances, however, the courts could not ascertain these figures with sufficient accuracy.[17] Consequently, Congress implemented statutory damages as an alternative to actual damages and profits.[18]

The earliest provision for statutory damages, the 1790 Act, "'specifically . . . recognize[d] the rights of authors.'"[19] During the nineteenth century, Congress expanded the remedies available to victims of copyright infringement, and all such legislation was eventually consolidated into the 1909 Act.[20] This newer Act was the first to offer copyright holders the option to choose between actual damages and profits and "such damages as to the court shall appear just."[21] In addition to other provisions, the 1909 Act offered guidelines to assist the court in assessing statutory damages.[22] Even at its inception, statutory damages presented a question of interpretation—in this case, of the number of infringing performances: at least one court understood these guidelines as indicating that "one 'infringement' may nevertheless result in more than one 'performance.'"[23] The 1909 Act limited statutory damages to no less than $250 and no more than $5,000 per infringement.[24]

Despite having combined then-current copyright legislation into one cohesive document, the 1909 Act was not without defects, necessitating Congress to revise the law again in 1976.[25] The 1976 Act purported to clarify unclear phrasing in the 1909 Act with regard to calculating statutory damages,[26] but post-1976 courts have nonetheless diverged in their interpretation of the word "work" to include both

16. *Id.* at 130.
17. *Id.* at 131.
18. *Id.*
19. *Id.* (quoting William F. Patry, Latman's The Copyright Law 4 (6th ed. 1986)).
20. Zawada, *supra* note 14, at 131.
21. *Id.*; *see also* Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 25(b), 35 Stat. 1074 (1909), *superseded by* 17 U.S.C. § 101 (1976) section 101(b) of the Copyright Act of 1909.
22. Zawada, *supra*, note 14 at 132.
23. *Id.* at 133.
24. *Id.*
25. *Id.* at 133.
26. *Id.*

infring*ing*[27] works and infring*ed* works.[28] Moreover, the Circuits remain divided over the proper definition of "one work": "To be sure, the last sentence of § 504(c)(1) is facially ambiguous as to . . . whether a compilation that infringes multiple separate copyrights . . . constitutes 'one work.'"[29]

B. Compensatory Versus Non-Compensatory (Punitive) Damages: Compensation, Deterrence, and Punishment

The primary purpose of statutory damages is to compensate the copyright holder whose rights have been infringed.[30] Prior to 1909, the law merged compensatory, deterrent, and penal functions into one remedy for infringement.[31] Through the Copyright Act of 1909, Congress separated these objectives by devising a criminal provision "to punish infringements that were both willful and for profit," and by constructing "a nonpenal statutory damage regime" to compensate copyright holders in cases where actual damages were difficult to prove, with a stated range of awards that could serve to deter infringement.[32]

But when, in 1976, Congress revised the Copyright Act, the compensatory and penal functions again became entwined.[33] The 1976 Act introduced "very modest damages for the exceptional cases of innocent infringement, a rather broad range of damages for ordinary infringement, and enhanced levels of damages for the exceptional cases of willful infringement."[34] The resulting case law does not reflect the "tripartite structure"[35] of 17 U.S.C. § 504.[36] Often, instead, the courts have granted awards on the basis of "the largely compensatory impulse underlying statutory damages" for cases of innocent and ordinary infringement, while "focus[ing] too heavily on deterrence and punishment" in finding ordinary infringers to be willful.[37]

Furthermore, in light of the risks that statutory damages awards "can be arbitrary and excessive,"[38] some in the legal field advocate that

27. *See generally* Broadcast Music, Inc. v. Larkin, 672 F. Supp. 531 (1987); Milene Music, Inc. v. Gotauco, 551 F. Supp. 1288 (1982).

28. Zawada, *supra* note 14, at 134.

29. WB Music Corp. v. RTV Communication Group, Inc., 445 F.3d 538, 540 (2006).

30. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 444 (2009).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 445.

35. *Id.* at 444.

36. Samuelson & Wheatland, *supra* note 30, at 445.

37. *Id.*

38. Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright*

"extra-compensatory" damages should receive the due process review afforded to punitive damages:[39]

> When aggregated over large numbers of works . . . even the minimum statutory damage award has a punitive effect and imposes an unconstitutional grossly excessive penalty. 17 U.S.C. § 504(c) merely specifies a very wide range within which a statutory damage award per work infringed must fall, leaving gross discretion to the judge or jury, but even the minimum statutory damage amount can be excessive when aggregated based on the number of works infringed.[40]

And while the law is settled that "grossly excessive" punitive damages awards violate the Due Process Clause of the Constitution,[41] the Supreme Court has also recognized that, in certain circumstances, "large awards of statutory damages can raise due process concerns."[42] The Court studies the ratio between punitive damages and compensatory damages in cases where punitive damages may be excessive.[43] Embracing this rationale, lower courts have found that an exorbitant award of statutory damages may violate due process if the amount is "out of all reasonable proportion"[44] to the harm caused by defendant's conduct—in the interest of this note, the copyright infringer's infringing actions.

C. 17 U.S.C. § 504 and the "One-Work Limitation"

Copyright law is codified in Title 17 of the United States Code; § 504 specifies the remedies for infringement, including actual damages, profits, and statutory damages. The relevant portions of § 504(c)(1) and (2), pertaining to statutory damages, are reproduced below:

> (1) [T]he copyright holder may elect . . . to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work . . . in a sum of not less than $750 or more than $30,000 as the court

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Infringement Liability: Balancing Copyright and Innovation in the Digital Age, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 307 (2009).

39. *Id.*

40. *Id.* at 308.

41. In re Napster, Inc. Copyright Litigation, No. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at *10 (N.D. Cal. June 1, 2005) (first citing State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003), then citing 1 BMW of North America, Inc. v. Gore, 517 U.S. 559, 562 (1996)).

42. *Id.*

43. *Id.* (citing BMW of North America, Inc. v. Gore, 517 U.S. at 580) (the ratio between punitive damages and compensatory damages is "the most commonly cited indicium of an unreasonable or excessive . . . award").

44. *Id.*

> considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.[45]
>
> (2) In a case where the [court finds] that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the [court finds that the] infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200.[46]

As § 504 indicates, and as the Circuits' differing tests exemplify, predicting the amount of statutory damages awarded in any given copyright infringement case is not easily done, despite the seemingly formulaic approach described above, largely because an award may fall within a broad statutory range.[47] Non-willful infringers are liable for $750–$30,000 per work infringed.[48] The maximum penalty increases to $150,000 per work infringed for willful infringers, and even "innocent" infringers are liable for at least $200 per work infringed.[49]

The unpredictability of statutory damages awards is compounded by the issue under dissection in this note: the "one-work limitation" in § 504(c)(1). To the infringer's advantage, the "one-work limitation," when applicable, "significantly reduces" liability since "one infringed work merits only one grant of statutory damages, no matter how many times the work has been infringed."[50] The last sentence of § 504(c)(1) appears unambiguous: "*all the parts* of a compilation[51] or derivative work[52] constitute *one work*" (emphases added). But the confusion arises

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45. 17 U.S.C.A. § 504(c)(1) (West 2017).

46. 17 U.S.C.A. § 504(c)(2) (West 2017).

47. Andrew Berger, *Why It's Difficult to Predict the Amount of Statutory Damages Plaintiff Will Be Awarded in Copyright Litigation-Revised Version*, IP In BRIEF (Jan. 10, 2012), http://www.ipinbrief.com/whyitsdifficultpredictstatutorydamages/.

48. *Id.*

49. *Id.*

50. Andrew Berger, *Here Are Some More Answers to End the Confusion About Statutory Damages in Copyright Litigation (Part II)*, IP IN BRIEF (Apr. 5, 2010), http://www.ipinbrief.com/ending-confusion-statutory-damages-ii/ [hereinafter Berger, *Statutory Damages in Copyright Litigation*].

51. "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. The term 'compilation' includes collective works." 17 U.S.C.A. § 101 (West 2017).

52. "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C.A. § 101 (West 2017).

because the statute does not clarify whose compilation or derivative work it refers to.[53] That is, the compilation or derivative work could be either plaintiff's copyrighted work that defendant infringed *or* defendant's work created from a number of plaintiff's separately copyrighted works.[54]

The courts disagree as to whether § 504(c)(1) addresses the plaintiff or the defendant as the owner of the compilation or derivative work. Most courts assume that the "one-work limitation" applies to plaintiff's copyrighted works, which defendant has infringed,[55] while other courts have found that the limitation bears upon defendant's works, regardless of how many of plaintiff's separate copyrighted works may be infringed.[56]

D. The Circuit Split: Two Approaches

In deciding what constitutes "one work" for the purposes of calculating statutory damages in copyright infringement cases, the Circuits are split between two approaches.[57] The first is a "'functional [test], with the focus on whether each expression . . . has an independent economic value and is, in itself, viable.'"[58] The second test, sometimes referred to as the "issuance test,"[59] assesses "'whether the plaintiff—the copyright holder—issued its works separately, or together as a unit.'"[60] At least four Circuits have adopted the independent economic value test,[61] while at least one Circuit has specifically rejected it in favor of the issuance test.[62]

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53. Berger, *Statutory Damages in Copyright Litigation*, *supra* note 50.

54. *Id.*

55. *Id.*

56. *See id.* (In a case where the defendant packaged 64 of plaintiff's photographs into four magazine compilations, the court found that plaintiff was still limited to only four statutory damages awards).

57. BMG Rights Mgmt. (US) LLC v. Cox Comm., Inc., 199 F. Supp. 3d 958, 983 (E.D. Va. 2016), *aff'd in part, rev'd in part*, 881 F. 3d 293 (4th Cir. 2018).

58. *Id.* (quoting Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116 (1st Cir. 1993)).

59. Adam D. Riser, *Defining "Compilation": The Second Circuit's Formalist Approach and the Resulting Issuance Test*, 17 ROGER WILLIAMS U. L. REV. 822, 824 (2012) (discussing "the Second Circuit's issuance test developed in Bryant II").

60. BMG Rights Mgmt. (US) LLC v. Cox Comm., Inc., 199 F. Supp. 3d 958, 983 (E.D. Va. 2016), *aff'd in part, rev'd in part*, 881 F. 3d 293 (4th Cir. 2018) (quoting Bryant v. Media Right Prods., Inc., 603 F.3d 135, 142 (2d Cir. 2010)).

61. Andrew Berger, *When Does a Copyrighted Work Qualify as a "Work" for Purposes of Fixing Statutory Damages?*, IP In BRIEF (May 25, 2010), http://www.ipinbrief.com/mcsmusic/ [hereinafter Berger, *Copyrighted Work*] (listing the First, Ninth, Eleventh, and D.C. Circuits as having adopted the independent economic value test).

62. *BMG Rights Mgmt.*, 199 F. Supp. 3d at 983 (citing *Bryant*, 603 F.3d at 142, decided

1. The Independent Economic Value Test

The First Circuit, in *Gamma Audio & Video, Inc. v. Ean-Chea*,[63] articulated the independent economic value test. There, the exclusive licensee of videotape recordings of television programs filed suit for copyright infringement against a video rental store operator.[64] The district court entered judgment for plaintiff-licensee[65] and ordered defendant-video rental store operator to pay plaintiff $2,500 in statutory damages for one work infringed.[66] On appeal, the First Circuit agreed with the lower court's finding that defendant-store operator had infringed copyrights for the original recordings of the television programs and that plaintiff-licensee had exclusive rights to distribute the copyrighted recordings.[67] Because the court found that plaintiff-licensee had exclusive rights, the plaintiff was entitled to recover statutory damages for defendant-store operator's copyright infringement of the recordings.[68] But at this point, the court of appeals reversed the district court's finding as to the number of works infringed for which defendant was liable.[69]

The district court found that defendant-store holder had infringed one work (comprising four episodes of a television program, *Jade Fox*) for the purposes of calculating statutory damages[70] based on two facts. First, plaintiff-licensee sold or rented only complete sets of *Jade Fox* to defendant-store holder; accordingly, the court inferred that plaintiff regarded *Jade Fox* episodes "as one work for economic purposes notwithstanding the rental by customers of only a few episodes at a time or its production in separate episodes."[71] Second, the copyrights for the four episodes of *Jade Fox* in question were registered with the Copyright Office on a single form,[72] suggesting to the court that "[the author of *Jade Fox*] considered at least these four episodes to be one work."[73] The court of appeals was not persuaded by the district court's reasoning with regard to either fact.[74]

Instead, the First Circuit, counting each episode of *Jade Fox* as a

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by the Second Circuit).

63. *Gamma Audio & Video*, 11 F.3d at 1106.
64. *Id.* at 1109.
65. *Id.* at 1110.
66. *Id.* at 1119.
67. *Id.* at 1110.
68. *See id.* at 1117–18.
69. Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1117 (1st Cir. 1993).
70. *Id.* at 1108.
71. *Id.* at 1117 (quoting the district court's opinion).
72. *Id.*
73. *Id.* (quoting the district court's opinion).
74. *Id.*

separate copyrighted work, stated that defendant had infringed four works, not merely one.[75] On the district court's first argument, the First Circuit asserted that "[a] distributor's decision to sell or rent complete sets of a series to video stores in no way indicates that each episode in the series is unable to stand alone."[76] The court pointed expressly to the fact that renters may rent and watch "as few or as many tapes as they want"—perhaps without ever renting or watching all of the episodes in a series—[77] and, furthermore, each episode of *Jade Fox* was separately produced.[78]

On the district court's second argument, the First Circuit could not find supporting authority for the district court's conclusion that registering multiple works with the Copyright Office on a single form equates to registering a single work for purposes of awarding statutory damages.[79] Studying the language of the Copyright Office's regulations with respect to registration,[80] the court found that a copyright holder may register multiple works on a single form *as a single work for the purposes of registration* without forfeiting the option of recovering statutory damages in future for infringement for *each* work registered.[81]

A Ninth Circuit district court reached a similar outcome on the issue of the number of works that qualify for statutory damages in *Playboy Enterprises, Inc. v. Sanfilippo*,[82] where defendants operated a website through which they provided and sold access to thousands of unauthorized copies of plaintiff's copyrighted photographs.[83] Defendants argued that they were liable for infringing only one copyrighted work because the images in question appeared as a collection in only one of plaintiff's copyrighted magazines.[84] The court rejected this contention, finding defendants guilty of 7,475 incidents of copyright infringement, and plaintiff recovered statutory damages in the amount of $500 for *each* infringed work (totaling $3,737,500).[85]

In explanation, the court cited the independent economic value test applied in *Gamma Audio & Video*, looking to whether each of plaintiff's photographs "has an 'independent economic value' and is viable on its

75. *Gamma Audio & Video*, 11 F.3d at 1119.
76. *Id.* at 1117.
77. *Id.*
78. *Id.*
79. *Id.*
80. *See* 37 C.F.R. § 202.3(b)(4)(A).
81. *Gamma Audio & Video*, 11 F.3d at 1117.
82. Playboy Enterprises, Inc. v. Sanfilippo, No. 97–0670–IEG (LSP), 1998 WL 207856 (S.D. Cal. Mar. 25, 1998).
83. *Id.* at *1.
84. *Id.* at *5.
85. *Id.*

own."[86] That is, "separate copyrights are not distinct works unless they can 'live their own copyright life.'"[87] The court found that each image had an independent economic value and was viable on its own, elaborating that "although each of these images may have appeared in a [single magazine], these images are subject to re-use and redistribution in accordance with various licensing arrangements."[88] In approving an award of statutory damages for 7,475 incidents of copyright infringement, the court further reasoned that each of plaintiff's photographs constituted a separate copyrighted work because (1) each image represented an independent and "copyrightable" effort involving a particular model, photographer, and location, (2) all of the images remained individual efforts despite being compiled into one magazine, and (3) defendants provided and sold access to each image separately.[89]

Several courts continue to employ the independent economic value test as expressed in *Gamma Audio & Video* (1993),[90] though some, such as the *Playboy Enterprises* court (1998), have contributed to or modified the list of factors to consider in determining what constitutes "one work" for the purposes of calculating statutory damages.[91] Thus, some inconsistency exists among the Circuits that favor this approach, as demonstrated by a case predating *Gamma Audio & Video* and one succeeding *Playboy Enterprises*.[92]

In *Walt Disney Co. v. Powell*,[93] a 1990 case, defendant sold shirts featuring Minnie and Mickey Mouse in six different poses.[94] The district court found defendant guilty of six incidents of infringement and awarded Disney $15,000 in statutory damages per infringement.[95] On appeal, however, the D.C. Circuit vacated the district court's judgment.[96] Although the court acknowledged that "Mickey and Minnie are certainly distinct, viable works with separate economic value and copyright lives of their own," it could not extend the independent economic value test to include each of defendant's six shirt designs depicting different poses

86. *Id.* (quoting *Gamma Audio & Video*, 11 F.3d at 1116–17).

87. *Id.* (quoting Walt Disney Co. v. Powell, 897 F.2d 565, 569 (D.C. Cir. 1990)).

88. *Playboy Enterprises*, 1998 WL 207856, at *5.

89. *Id.*

90. Berger, *Copyrighted Work*, *supra* note 61 (listing the First, Ninth, Eleventh, and D.C. Circuits as having adopted the independent economic value test).

91. *Playboy Enterprises*, 1998 WL 207856, at *5.

92. *See Disney*, 897 F.2d 565; MCS Music America, Inc. v. Yahoo! Inc., No. 3:09-cv-00597, 2010 WL 500430 (M.D. Tenn. Feb. 5, 2010).

93. *Disney*, 897 F.2d at 565.

94. *Id.* at 567.

95. *Id.*

96. *Id.* at 570.

by the mice, limiting the number of works infringed to only two.[97] In calculating statutory damages, the court held that the number of works, not the number of infringements, is determinative: "Mickey is still Mickey whether he is smiling or frowning, running or walking, waving his left hand or his right."[98]

More recently, in 2010, the court in *MCS Music America, Inc. v. Yahoo! Inc.*[99] added "a further wrinkle" to the independent economic value test, holding that multiple musical compositions—all of which may have independent economic value—do not qualify for statutory damages if the works are essentially the same.[100] In *MCS Music America*, plaintiffs owned exclusive copyrights of 215 musical compositions; defendants digitally transmitted 308 sound recordings embodying all 215 of plaintiff's copyrighted works, though plaintiffs did not claim ownership of these recordings.[101] Plaintiffs sought to recover statutory damages for each of defendant's recordings (all 308), claiming that each was a separate and independent work.[102] Defendants disagreed, arguing that plaintiffs could not recover for defendant's recordings since plaintiffs had no ownership rights to them.[103]

Following the reasoning in *Disney*, the court declared that "even though each musical composition is a distinct, viable work with separate economic value and copyright lives of their own, any variation of that 'work' is still simply one 'work' for the purposes of statutory damages."[104] To recover statutory damages, a work must be registered with the Copyright Office, and plaintiffs had neither ownership nor registration rights to defendant's recordings.[105] Thus, defendant's sound recordings, as variations of plaintiffs' copyrighted works, did not constitute separate works for which plaintiffs could recover statutory damages.[106]

The independent economic value test, therefore, exists today as some combination of the rules set forth by various courts, including those that decided *Gamma Audio & Video*, *Playboy Enterprises*, *Disney*, and *MCS Music America*. All variations of the test inquire into whether

97. *Id.*
98. *Id.*
99. MCS Music America, Inc. v. Yahoo! Inc., No. 3:09-cv-00597, 2010 WL 500430 (M.D. Tenn. Feb. 5, 2010).
100. Berger, *Copyrighted Work*, *supra* note 61.
101. *MCS Music America*, 2010 WL 500430, at *2.
102. *Id.*
103. *Id.*
104. *Id.* at *3.
105. *Id.*
106. *Id.*

a work has independent economic value and is viable on its own.[107] Some courts have phrased these requirements as asking whether each work can "live [its] own copyright life."[108] Other courts have emphasized that an award of statutory damages is available only to works that have "a viable economic life as well as a viable copyright life distinct from other works at issue."[109]

2. The Issuance Test

Whereas the first approach may be termed a functional test—computing the number of awards as a function of the economic viability, if any, of each work[110]—the second test focuses on "whether the plaintiff—the copyright holder—issued its works separately, or together as a unit."[111] In *Bryant v. Media Right Productions, Inc.*,[112] songwriters and their record label brought suit for copyright infringement against a production company and a music wholesaler, on the grounds that the production company authorized the music wholesaler to create digital copies of individual songs from plaintiffs' albums that were available online.[113] The district court held that plaintiffs' albums were compilations and granted only one award of statutory damages per album infringed, irrespective of the number of songs copied by defendants.[114]

On appeal, *Bryant* required the Second Circuit to address one of the ambiguities inherent in the language of the statutory damages provision in 17 U.S.C. § 504(c)(1), namely whether the word "compilation" in the "one-work limitation" ("all the parts of a compilation or derivative work constitute one work") alludes to the *infringed* work created by plaintiff or the *infringing* work that defendant devised from plaintiff's copyrighted works.[115] The Second Circuit affirmed the district court's award of statutory damages on a per-album basis,[116] relying on two of its previous decisions on the issue of "what

107. Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116–17 (1st Cir. 1993).

108. Walt Disney Co. v. Powell, 897 F.2d 565, 569 (D.C. Cir. 1990).

109. Berger, *Copyrighted Work*, *supra* note 61.

110. BMG Rights Mgmt. (US) LLC v. Cox Comm., Inc., 199 F. Supp. 3d 958, 983 (E.D. Va. 2016), *aff'd in part, rev'd in part*, 881 F. 3d 293 (4th Cir. 2018).

111. Bryant v. Media Right Prods., Inc., 603 F.3d 135, 141 (2d Cir. 2010).

112. *Id.* at 135.

113. *Id.* at 138–39.

114. *Id.* at 139.

115. Andrew Berger, *Bryant v. Media Rights: The Second Circuit Provides Some Further Answers About the "One-Work Limitation" on Grants of Statutory Damages Involving an Infringing Compilation*, IP In BRIEF (May 6, 2010), http://www.ipinbrief.com/bryant/ [hereinafter Berger, *Bryant v. Media Rights*].

116. *Bryant*, 603 F.3d at 142.

constitutes a compilation subject to § 504(c)(1)'s one-award restriction":[117] *Twin Peaks Productions, Inc. v. Publications International, Ltd.*[118] and *WB Music Corp. v. RTV Communication Group, Inc.*[119]

In *Twin Peaks*, plaintiff "issued each episode of a television series sequentially, each at a different time"; defendant "printed eight teleplays from the series *in one book*" (emphasis added).[120] There, the Second Circuit granted plaintiff a separate award of statutory damages for each of the eight teleplays because *plaintiff* had issued its works separately.[121] The court, deferring to the "plain language" of § 504(c)(1), distinguished *Bryant* from *Twin Peaks*: "[h]ere, it is the copyright holders who issued their works as 'compilations'; they chose to issue [a]lbums."[122] Thus, the *Bryant* plaintiffs' recovery is limited to one award of statutory damages per album.[123]

WB Music Corp. likewise failed to support the *Bryant* plaintiffs' claim for statutory damages on a per-*song* basis. In that case, plaintiff had issued thirteen songs separately.[124] Again, *defendant* gathered the individual works into one compilation—an album.[125] Plaintiff recovered a separate award of statutory damages for each of the thirteen songs because defendant presented no evidence "that any of the separately copyrighted works were included in a compilation authorized by the [*plaintiff*]" (emphasis original).[126]

In explicitly declining to adopt the independent economic value test approved by some other Circuits,[127] the Second Circuit stressed that the language of § 504(c)(1) permits "no exception for a part of a compilation that has independent economic value."[128] The court recognized that infringers can now more easily copy parts of an album separately due to the increasing availability of music digitally and online,[129] but ultimately refused to endorse the independent economic

117. *Id.* at 141.
118. Twin Peaks Productions, Inc. v. Publications Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993).
119. WB Music Corp. v. RTV Comm. Group, Inc., 445 F.3d 538 (2d Cir. 2006).
120. *Bryant*, 603 F.3d at 141 (citing *Twin Peaks Productions*, 996 F.2d at 1381).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* (citing *WB Music Corp.*, 445 F.3d at 541).
125. *Id.*
126. *Bryant*, 603 F.3d at 141.
127. "This Court has never adopted the independent economic value test, and we decline to do so in this case." *Id.* at 142.
128. *Id.* (citing UMG Recordings, Inc. v. MP3.COM, Inc., 109 F. Supp. 2d 223 (S.D.N.Y. 2000)).
129. *Id.*

value test because doing so would contradict Congress's intent in drafting § 504(c)(1).[130] The "one-work limitation" "applies even if the parts of the compilation are 'regarded as independent works for other purposes.'"[131]

Hence, the issuance test for determining what constitutes "one work"—which endeavors to identify copyrighted works as either separately issued or released as parts of a unit—presents a seemingly simple formula, as established by the Second Circuit in a series of cases. The deciding factor appears largely to be plaintiff's intent[132] in each case—that is, whether plaintiff produced the infringed works individually or as a single compilation. Nonetheless, the issuance test is not without some vagueness: an infringer is liable only for as many awards of statutory damages as matches the total number of separate works, despite the fact that the individual parts of a compilation may be "regarded as independent works for other purposes."[133]

II. IDENTIFICATION OF THE LEGAL PROBLEM

The Circuits are divided in their approaches to deciding what constitutes "one work" for the purposes of recovering an award of statutory damages under 17 U.S.C. § 504. Because the Copyright Act of 1976 does not define the word "work," the courts differ in their interpretations of the "one-work limitation" imposed by § 504(c)(1),[134] that "all the parts of a compilation or derivative work constitute one work."[135] Some courts, including the First, Ninth, Eleventh, and D.C. Circuits, have adhered to a functional approach, the independent economic value test, holding that "a distinct 'work' must be able to live its own copyright life."[136] Other courts, notably the Second Circuit, apply the issuance test, prioritizing the number of works issued separately—each retaining its own copyright—as opposed to those created as a unit, all of which are protected by a single copyright.[137]

Federal courts "have exclusive jurisdiction over actions that arise under federal copyright laws."[138] Thus, the lack of homogeneity among

130. *Id.* (citing H.R.Rep. No. 94-1476 (1976)).
131. *Id.* (quoting H.R.Rep. No. 94-1476 (1976)).
132. *Bryant*, 603 F.3d at 141.
133. H.R.Rep. No. 94-1476 at 162 (1976).
134. Zawada, *supra* note 14, at 142.
135. 17 U.S.C.A. § 504(c)(1) (West 2017).
136. Zawada, *supra* note 14, at 142.
137. *See Bryant*, 603 F.3d 135; *Twin Peaks Productions*, 996 F.2d 1366; *WB Music Corp.*, 445 F.3d 538.
138. Topolos v. Caldewey, 698 F.2d 991, 993 (9th Cir. 1983) (citing 28 U.S.C. § 1338(a)) ("The district courts shall have original jurisdiction of any civil action arising under any Act

the federal courts in adjudicating awards of statutory damages in copyright infringement cases generates uncertainty:[139] the courts' differing approaches could be problematic for copyright holders that are victims of infringement in multiple jurisdictions.[140] The entertainment industry, which is "at the center of many copyright disputes,"[141] is especially likely to encounter the most unpredictability as a result of the Circuit split,[142] owing to the fact that New York and Los Angeles "now face different [statutory] award possibilities depending on the jurisdiction."[143]

Therefore, the inherent variability in awards of statutory damages under 17 U.S.C. § 504[144]—a consequence of the courts' discretionary power[145]—is compounded by the Circuits' contrasting interpretations of and tests for determining what constitutes "one work" for copyright infringement purposes, and a means of resolving this dispute is necessary to achieve uniformity of the law in every jurisdiction.

III. ANALYSIS

A. The Independent Economic Value Test

1. Unsupported by the Plain Language of the Copyright Act of 1976 and Its Legislative History

Though several of the Circuits have implemented and continue to employ the independent economic value test for addressing the "one-work limitation," some in the legal field contend that these Circuits have interpreted § 504(c)(1) too broadly.[146] Attesting to the involvement of special interest groups in drafting copyright laws, opponents of the independent economic value test argue that § 504(c)(1) "should be

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of Congress relating to patents, plant variety protection, copyrights and trademarks.").

139. Riser, *supra* note 59, at 846.

140. For example, forum shopping in internet piracy cases. *Id.*

141. *Id.* at 846–47.

142. *Id.* at 846.

143. *Id.*

144. Statutory damages range from $200 per work infringed in cases of "innocent" infringement to $150,000 per work infringed in cases of willful infringement. 17 U.S.C.A. § 504(c)(1)–(2) (West 2017).

145. "In a case where the [court finds] that infringement was committed willfully, *the court in its discretion* may increase the award of statutory damages to a sum of not more than $150,000. In a case where the [court finds that the] infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, *the court in its discretion* may reduce the award of statutory damages to a sum of not less than $200" (emphases added). 17 U.S.C.A. § 504(c)(2) (West 2017).

146. Betselot A. Zeleke, *Federal Judges Gone Wild: The Copyright Act of 1976 and Technology, Rejecting the Independent Economic Value Test*, 55 HOW. L.J. 247, 268 (2011).

narrowly construed against infringement so as not to confer any benefit on a special interest group that has not bargained for such an advantage during negotiations."[147] Accordingly, these critics support the Second Circuit's narrower interpretation[148]of the statute and its adoption of the issuance test, under which a court should grant multiple awards of statutory damages only if the copyright holder issued its works independently.[149]

One facet of the independent economic value test at odds with the 1976 Act and its legislative history is that judiciary discretion may still allow "excessive statutory damages,"[150] despite the "per infringed work" provision in the 1976 Act intended to counter the wording in the 1909 Act that permitted multiple awards of statutory damages for a single infringed "work."[151] Under the 1909 Act, a copyright holder was entitled to recover statutory damages "per infringement" from the infringer.[152] The 1976 Act, however, limits statutory damages to one award "per infringement work," regardless of the number of infringements of the same "work."[153] But the independent economic value test weakens the 1976 Act's limits on the court's discretion by "allowing a judge to inquire into the economic viability of parts of a compilation of 'work.'"[154] By contrast, the issuance test strictly enforces the "one-work limitation" where compilations, not individual works, have been infringed.

2. The Dangers of Enhancing Excessive Statutory Damages

Further detracting from the feasibility of the independent economic value test is the risk of exacerbating excessively large awards of statutory damages.[155] Statutory damages for copyright infringement may be as low as $200 and as high as $150,000 per work infringed.[156] In a jurisdiction that endorses the independent economic value test, courts may be inclined to grant multiple awards of statutory damages as a punitive measure.[157] Copyright infringers then face the prospect of pecuniary liabilities "so extreme as to amount to a criminal penalty

147. *Id.*
148. *Id.*
149. *See infra* Section I.D.2.
150. Zeleke, *supra* note 146, at 268.
151. *Id.* at 269.
152. *Id.*
153. *Id.*
154. *Id.* at 270.
155. *Id.* at 278.
156. 17 U.S.C.A. § 504(c)(2) (West 2017).
157. Zeleke, *supra* note 146, at 279.

imposed without providing the defendant[s] with the benefits of the safeguards the criminal law system provides,"[158]—perhaps so extreme as to be unconstitutional.[159]

Playboy Enterprises serves as an example of multiple awards of statutory damages amounting to an immensely (and possibly excessively) large payout: the court found defendants guilty of infringing 7,475 of plaintiff's photographs and plaintiff recovered $500 for *each* infringed work—totaling $3,737,500.[160] The *Playboy Enterprises* court authorized this hefty compensatory sum under the independent economic value test, but critics of this approach discriminate between the compensatory and non-compensatory (punitive) components of statutory damages.[161]

While the compensatory component grants relief to the copyright holder for the actual loss he or she suffered,[162] the non-compensatory component punishes the infringer and deters others from committing the same offense.[163] The 1976 Act, through 17 U.S.C. § 504(c)(2), provides for punitive damages by allowing the court to increase awards of statutory damages in cases of willful infringement[164] (to the statutory maximum of $150,000 per work infringed). And because the 1976 Act affords the court the discretion to award both compensatory and non-compensatory damages, the independent economic value test, at least as currently enforced, unjustifiably magnifies the punitive impact of statutory damages for copyright infringement.

158. *Id.* (citing Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601 (2005) ("Since punitive damages act in a quasi-criminal manner, 'straddling' civil and criminal penalties, they run the risk of imposing what amount to criminal penalties without the increased safeguards that criminal law offers.").

159. *Id.* (citing J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 526 (2004) ("These [copyright] lawsuits illustrate that the punitive effect of even the minimum statutory damage award, when aggregated across a large number of similar acts, can grow so enormous that it becomes an unconstitutionally excessive punishment.").

160. Playboy Enterprises, Inc. v. Sanfilippo, No. 97–0670–IEG (LSP), 1998 WL 207856, at *5 (S.D. Cal. Mar. 25, 1998).

161. Zeleke, *supra* note 146, at 279 (citing Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601 (2005)).

162. *See generally id.*

163. *See generally id.* at 280.

164. *See generally id.*

B. The Issuance Test

1. Shielding Infringers

Despite the issuance test's strict adherence to the legislative intent of the "one-work limitation,"[165] its narrower approach effectively "shelters infringement,"[166] accomplishing the opposite goal of copyright law, which purports to encourage creation by protecting the creators—the copyright holders.[167] The issuance test "shields infringers from multiple awards of statutory damages no matter how many works they infringe" merely because the copyright holder chose to issue the infringed works as a compilation and not as separate works.[168]

Bryant highlights this paradox. In that case, plaintiffs sought to recover statutory damages for each of several songs that defendants copied from plaintiff's digital albums, but the court held that each album constituted a compilation and granted plaintiffs only one award of statutory damages per album.[169] The *Bryant* court's decision underscores the "shielding" that the "one-work limitation" affords copyright infringers under the issuance test. Digital technology readily aids infringers in dissociating compilations (albums) into separate works (individual songs),[170] yet 17 U.S.C. § 504(c)(1) only compensates the copyright holder for one incident of infringement, "irrespective of the number of songs copied" by the infringer.[171]

2. Incentivizing Infringement

The issuance test defeats, at least in part, the goal of copyright law—encouraging creation by protecting the creators[172]—not solely because its interpretation of § 504(c)(1) "shelters infringement." The test also "incentivizes infringement."[173] In a jurisdiction that follows the issuance test, potential copyright infringers "may be more likely to increase infringement"[174] of compilations if they are aware that the court will, at most, grant only one award of statutory damages for each compilation infringed, not separate damages for each individual work infringed. For example, an infringer intending to illegally download a

165. *Id.* at 268.
166. Berger, *Bryant v. Media Rights*, *supra* note 115.
167. "The one-work limitation, instead of stimulating creation, shelters infringement." *Id.*
168. *Id.*
169. Bryant v. Media Right Prods., Inc., 603 F.3d 135, 138–39 (2d Cir. 2010).
170. Berger, *Bryant v. Media Rights*, *supra* note 115.
171. *Id.*
172. *Id.*
173. Riser, *supra* note 59, at 849.
174. *Id.*

single copyrighted song is "incentivized" to obtain the entire album because the issuance test imposes no additional awards of statutory damages for infringing the album as opposed to infringing one or more songs.[175]

Awarding statutory damages advances two objectives: providing relief for a plaintiff whose copyrights have been infringed and penalizing defendant's infringing conduct.[176] Under the issuance test, however, infringers are subject to relatively smaller penalties[177] and are consequently less inclined to refrain from infringing.[178] Although Congress has regularly expanded the scope of copyright protections over time,[179] the incentivizing nature of the issuance test impedes the goal of copyright law, which is to promote creation. Authors may be less willing to create new works—or, at least, to share them with the public—if they are unlikely to receive adequate compensation in the event of infringement.[180]

The holdings in *Twin Peaks* and *WB Music Corp.* compared with the outcome in *Bryant* demonstrates the fallibility of the issuance test. In *Twin Peaks*, plaintiff issued several episodes of a television series "sequentially, each at a different time,"[181] eight of which defendant printed as teleplays in one book. The Second Circuit awarded plaintiff separate statutory damages for each of the eight teleplays because *plaintiff* had issued the episodes individually. The same court likewise upheld separate awards of statutory damages in *WB Music Corp.*, where plaintiff had issued thirteen songs independently that defendant compiled into an album. In each case, because *defendant* created *one* infringing compilation, plaintiff recovered statutory damages for *multiple* works. By contrast, the *Bryant* plaintiff received only one award of damages because *defendant* separated plaintiff's compilation (album) into independent works (songs). Thus, the issuance test performs inconsistently, predominantly depending upon, in the words of

175. *Id.*

176. *Id.*

177. The court may grant a maximum of $150,000 per work infringed in statutory damages for willful infringement, but the infringer would potentially be found liable for fewer incidents of infringement in an issuance test jurisdiction than in an independent economic value test jurisdiction (i.e., in the Second Circuit versus the First Circuit, respectively). *See* 17 U.S.C.A. § 504(c)(2); *see e.g.*, Bryant v. Media Right Prods., Inc., 603 F.3d 135 (2d Cir. 2010); Twin Peaks Productions, Inc. v. Publications Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993); Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116 (1st Cir. 1993).

178. Riser, *supra* note 59, at 849.

179. Congress has expanded the scope of copyright protections "to extend additional protections and term limits to copyright holders." *Id.*

180. *Id.*

181. *Twin Peaks Productions*, 996 F.2d at 1381 (2d Cir. 1993).

the Second Circuit, whether defendant is able to prove "that any of the separately copyrighted works were included in a compilation authorized by the [plaintiff]."[182]

3. The Lack of Punitive Measures

Beyond its deficiencies with regard to shielding infringers and even incentivizing infringement, the issuance test is an ineffective approach to defining the "one-work limitation" because it lacks sufficient punitive measures.[183] The inadequacy of the punitive provisions of 17 U.S.C. § 504, manifest in the issuance test, favors the infringer. For example,[184] a trial court may order a willful infringer to pay multiple awards of substantial statutory damages for infringing numerous songs,[185] but on appeal, a Circuit court employing the issuance test may reduce the infringer's liability by finding that only a small number of *groups* of songs were infringed.[186] In these circumstances, requiring merely that the infringer receives a favorable ruling on the issue of the number of works infringed, "an infringer may profit in spite of a judgment awarding maximum statutory damages. . . ."[187]

The issuance test for awarding statutory damages fails to deter infringement in a second scenario, in which infringement occurs "vertically" via a "distribution network."[188] To take another example,[189] consider the chain of infringement that could befall a copyright holder of a sound recording through a distribution network:

> If the distributors violated only the distribution right . . . and the manufacturers violated only the reproduction right, then [plaintiff] may have been able to seek a separate award [of statutory damages] from each defendant . . . But imagine that the defendants controlled both manufacturing and distribution, rather than just distribution, and vertically integrated the creation of each infringing [work] into its distribution network.[190]

182. Bryant v. Media Right Prods., Inc., 603 F.3d 135, 141 (2d Cir. 2010).

183. *See* R. Collins Kilgore, *Sneering at the Law: An Argument for Punitive Damages in Copyright*, 15 VAND. J. ENT. & TECH. L. 637, 640 (2013).

184. Example adapted. *See id.* at 664.

185. *Id.*

186. Additionally, if the infringer chose "not to defend at the trial level to avoid discovery and the costs of litigation" and received a favorable ruling on the issue of the number of works infringed, no appeal would be necessary, "saving [the infringer] substantially on legal fees." *Id.*

187. *Id.*

188. *Id.* at 661.

189. Example adapted. *See* Kilgore, *supra* note 183, at 661.

190. *Id.*

Defendants' various infringing actions would no longer be separate and, correspondingly, the number of awards of statutory damages decreases;[191] the distribution network acts a loophole undermining the deterrent power of § 504. Additionally, minimizing the number of infringers exacerbates the incentivizing effect of the issuance test:[192] "an infringer [such as a distribution network] may profit in spite of a judgment awarding maximum statutory damages. . . ."[193] Willful infringers need no greater inducement. The issuance test, therefore, is a defective deterrent against copyright infringement.

C. One Test for the "One-Work Limitation"

Circuit splits in the field of intellectual property are common because the Supreme Court is simply unable to hear every case for which it receives petitions, not to mention resolve every issue over which the lower courts are divided.[194] During both the 2009 and 2010 terms, the Court reviewed only one copyright case.[195] The Circuit courts' dockets are similarly brimming with non-copyright cases: in 2009, the Federal Circuit decided 312 patent cases on the merits, while all of the other courts of appeals *combined* only decided 168 trademark, copyright, and patent cases on the merits.[196] For these reasons, copyright holders whose works have been infringed have ample motive to forum shop among the Circuit courts.[197]

Copyright holders have even greater enticement to select the most advantageous court when seeking statutory damages due to the ambiguity of 17 U.S.C. § 504(c)(1)'s "one-work limitation." Congress could have—and probably should have, in light of the split in authority—defined what constitutes "one work" for the purposes of calculating statutory damages, but Congress did not do so.[198] Hence, to rectify the uncertainty clouding the adjudication of often exceptionally large sums of money, to ensure that creation is protected, and to deter future illegal conduct, the independent economic value test and the

191. *Id.*
192. *Id.* at 662.
193. *Id.* at 664.
194. Samantha M. Basso, *When National Law Means Regional Law: A Look at the Non-Uniformity of Copyright Law and How the Federal Circuit Can Help*, 21 FED. CIR. B.J. 355, 356–57 (2011).
195. The author notes that patent law has "benefited greatly from the creation of the Federal Circuit." Inventors now receive more guidance with regard to the validity of their patents across the country, and the Federal Circuit judges are well-versed in patent law. "The 'other' forms of intellectual property, however, do not enjoy such treatment." *Id.* at 356.
196. *Id.* at 363–64.
197. *Id.* at 357.
198. Zeleke, *supra* note 146, at 280.

issuance test should be reconciled in a new formulation that draws upon the assets of both.

IV. PROPOSAL

An ideal test for the "one-work limitation" of 17 U.S.C. § 504(c)(1) achieves equilibrium between the undisputed economic value of a copyright and the imperative that copyright holders are assured protection for their creations.

The independent economic value test, by itself, accords plaintiffs (in some cases) "absurd amounts of damages."[199] Shifting the standard for "one work" from "per infringement" to "per infringed work"[200] commits perhaps too much economic value to each of plaintiff's infringed works, with such value to be appraised at the judge's discretion and nothing else.[201] A new test for the "one-work limitation" should limit measures of economic value to predetermined (statutory) parameters[202] to preclude obscenely excessive awards as well as awards so small as to have no significant compensatory (or punitive) effect. These parameters should be reevaluated and, if appropriate, increased or decreased periodically to accurately reflect the "current" value of the copyrighted works at issue. Thus, the number of works that qualify for awards of statutory damages depends upon whether each "work" in question satisfies the statutory minimum threshold for sufficient economic value.

The issuance test, on its own, recoups the inordinate payouts that its counterpart may award, but demands a punitive element to deter would-be infringers. Although due process prohibits "grossly excessive" punitive damages awards,[203] in a new test for the "one-work limitation," Congress could implement statutory parameters to prevent unconstitutional "extra-compensatory"[204] damages, and the court could adjust these parameters to suit individual defendants. For example, the punitive aspect of statutory damages awards may be exactly enough to

199. *Id.*

200. *Id.*

201. Judges are, of course, limited by the statutory minimum and maximum awards, as stated in 17 U.S.C. § 504(c)(1), (2).

202. This author considered drafting a new test that would permit expert testimony, in very limited circumstances, to supplement the statutory parameters. Inviting such testimony, however, could lead to grossly excessive awards if not checked by judicial or statutory guidance.

203. In re Napster, Inc. Copyright Litigation, No. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at *10 (N.D. Cal. June 1, 2005).

204. Berg, *supra* note 38, at 307.

negate defendant's profits;[205] this threshold amount is necessary to persuade copyright holders to "invest in and enforce their copyrights"[206]when they are unable to prove actual damages. But beyond ensuring that copyright holders "break even," the statutory scheme for punitive damages should impose a minimum penalty independent of the compensatory damages awarded on the basis of economic value. One component of the award remedies plaintiff's injury; the other punishes infringement and deters future illegal conduct.

CONCLUSION

The Circuit courts, limited and influenced by the particular cases brought before them, have attempted individually to define what constitutes "one work" in copyright infringement cases for the purposes of calculating statutory damages under 17 U.S.C. § 504. As a result, two leading approaches have emerged, the independent economic value test and the issuance test. But the lack of uniformity among the Circuits regarding the "correct" interpretation of the "one-work limitation" of § 504 has engendered uncertainty as to whether a court will, in any given case, award exorbitant compensatory damages to a copyright holder or impose punitive damages upon the infringer sufficient to deter potential future wrongdoers. Therefore, until the Supreme Court mandates otherwise, a new test for the "one-work limitation" should encompass the advantages of each of the two current tests with modifications to better serve the twin goals of copyright law: fostering creation and deterring misappropriation of others' creative efforts.

205. Kilgore, *supra* note 183, at 640.
206. *Id.* at 642.