COPYRIGHT — STATUTORY DAMAGES — SECOND CIRCUIT HOLDS THAT AN ALBUM OF MUSIC IS A COMPILATION. — *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135 (2d Cir.), *cert. denied*, No. 10-415, 2010 WL 3740393 (U.S. Nov. 29, 2010).

The holder of an infringed copyright may pursue a congressionally determined range of statutory damages from the infringer or infringers in lieu of actual damages.[1] A plaintiff choosing statutory damages recovers based on the number of "work[s]" infringed.[2] There is no statutory definition of "work,"[3] but "all the parts of a compilation or derivative work constitute one work."[4] A "compilation" is defined 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."[5] In several circuits, the "test [for determining what constitutes a work] focuses on whether each expression has an independent economic value and is, in itself, viable."[6] Recently, in *Bryant v. Media Right Productions, Inc.*,[7] the Second Circuit explicitly rejected this definition and announced a new "issuance" test[8] — the first appellate court to do so.[9] The Second Circuit's rejection of the "independent economic value" test in favor of an inquiry into how a work is "issued"[10] does not follow from the Second Circuit's precedent and undermines the centrality of works of authorship to U.S. copyright law.

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1 *See* 17 U.S.C. § 504(c)(1) (2006).

2 *Id.*

3 *See id.* § 101 (defining many copyright terms but not "work"); Alicia Morris Groos, *Developments in U.S. Copyright Law 2000–2001: From Revising the Old South to Redefining the Digital Millennium*, 10 TEX. INTELL. PROP. L.J. 111, 166 (2001) (noting that § 504(c)(1) does not define "work" except in the compilation or derivative work context); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 622 (2005) ("The one area of law where the absence of a statutory definition of a 'work' has challenged courts is in damage calculations, because copyright law affords statutory damages based on the infringement of each work.").

4 17 U.S.C. § 504(c)(1).

5 *Id.* § 101.

6 MCA Television Ltd. v. Feltner, 89 F.3d 766, 769 (11th Cir. 1996) (citing Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116 (1st Cir. 1993); Walt Disney Co. v. Powell, 897 F.2d 565, 568 (D.C. Cir. 1990); Robert Stigwood Grp. Ltd. v. O'Reilly, 530 F.2d 1096, 1105 (2d Cir. 1976)).

7 603 F.3d 135 (2d Cir.), *cert. denied*, No. 10-415, 2010 WL 3740393 (U.S. Nov. 29, 2010).

8 In their petition for certiorari, the plaintiffs refer to this test as the "form of issuance" test. Petition for a Writ of Certiorari at 9, *Media Right*, 603 F.3d 135 (No. 10-415), 2010 WL 3740540, at *9.

9 *See Media Right*, 603 F.3d at 141–42; Petition for a Writ of Certiorari, *supra* note 8, at 6–10, 2010 WL 3740540, at *6–10 (arguing that *Media Right* created a circuit split).

10 *See Media Right*, 603 F.3d at 141.

Anne Bryant, Ellen Bernfeld, and their company, Gloryvision, Ltd., registered the copyrights in the albums *Songs for Dogs* and *Songs for Cats* and the copyrights of "at least some of the twenty songs" contained therein.[11] Bryant, Bernfeld, and Gloryvision contracted with Media Right Productions, Inc., on February 24, 2000, to permit Media Right "to market the [a]lbums in exchange for twenty percent of the proceeds from any sales."[12] The contract did not grant Media Right a license to copy either album.[13] On February 1, 2000, Media Right had entered into a contract with Orchard Enterprises, Inc., and granted it the right to distribute eleven albums of music, including *Songs for Dogs* and *Songs for Cats*.[14] This contract authorized distribution "throughout E-stores including . . . those via the Internet, as well as all digital storage, download and transmission rights."[15] Orchard began making and selling digital copies of the albums in 2004.[16] Total revenue from sales of physical and digital copies of the albums and their constituent tracks between April 1, 2002, and April 8, 2008, equaled $591.05.[17] Media Right should have remitted $331.06 to Gloryvision and its owners but failed to do so.[18]

Gloryvision and its owners sued Orchard, Media Right, and Douglas Maxwell, the president of Media Right,[19] on April 16, 2007, for copyright infringement, trade dress violations, breach of fiduciary duty, breach of contract, and unjust enrichment.[20] Judge Young, sitting by designation, ruled in favor of the plaintiffs on the copyright infringement claim.[21] On the issue of statutory damages, which Gloryvision elected to pursue in lieu of actual damages,[22] the court determined that "statutory damages must be calculated on a per-album basis rather than per-song" because 17 U.S.C. § 504(c)(1) requires that compilations be counted as only one work for statutory damages purposes.[23] The

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11 *Id.* at 138.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* (alteration in original) (quoting Orchard Agreement).

16 *Id.*

17 *Id.* at 139.

18 *Id.*

19 Bryant v. Europadisk, Ltd., No. 07 Civ. 3050(WGY), 2009 WL 1059777, at *3 (S.D.N.Y. Apr. 15, 2009).

20 *Id.* at *1.

21 *Id.* at *10.

22 *See* 17 U.S.C. § 504(a) (2006) ("[A]n infringer of copyright is liable for either . . . the copyright owner's actual damages . . . or . . . statutory damages . . . .").

23 *Europadisk*, 2009 WL 1059777, at *7 (citing Country Rd. Music, Inc. v. MP3.com, Inc., 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003)).

court cited the statutory definition of "compilation" in a footnote,[24] but it did not analyze why an album of music fits that definition. Because the songs and artwork on each album constituted one copyrighted work for the purposes of statutory damages, there were two works in total.[25] The court ordered Media Right to pay $2000 and Orchard to pay $400[26] — the absolute minimum in possible statutory damages for the latter and close to the minimum for the former.[27]

Unsatisfied with these damages, the plaintiffs appealed.[28] The Second Circuit affirmed.[29] Writing for the court, Judge Wood,[30] sitting by designation, held that an album qualifies as a compilation under the 1976 Copyright Act.[31] The court noted that "collected works," which are "works 'in which a number of contributions, constituting separate and independent works in themselves, are assembled,'" are a type of compilation.[32] Furthermore, "[a]n 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."[33] The court noted that two previous Second Circuit decisions on the issue of statutory damages for compilations, *WB Music Corp. v. RTV Communication Group, Inc.*[34] and *Twin Peaks Productions, Inc. v. Publications International Ltd.*,[35] focused on "whether the plaintiff — the copyright holder — issued its works separately, or together as a unit."[36] Whereas those cases involved compilations assembled by the infringers,[37] Gloryvision and its owners were the ones who

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[24] *See id.* at *7 n.2.

[25] *Id.* at *7.

[26] *Id.* at *9.

[27] *See id.* at *7 (citing 17 U.S.C. § 504(c)(2)).

[28] *See Media Right*, 603 F.3d at 139–40.

[29] *Id.* at 144.

[30] Judge Wood was joined by Judge Livingston. Judge Pooler was assigned to the panel but took no part in the appeal.

[31] *Media Right*, 603 F.3d at 140.

[32] *Id.* (quoting 17 U.S.C. § 101).

[33] *Id.* at 140–41.

[34] 445 F.3d 538, 541 (2d Cir. 2006).

[35] 996 F.2d 1366, 1381 (2d Cir. 1993).

[36] *Media Right*, 603 F.3d at 141. The court also cited a Fourth Circuit decision, *see id.* at 141 n.6 (citing Xoom, Inc. v. Imageline, Inc., 323 F.3d 279, 285 (4th Cir. 2003), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010)), and the decisions of several district courts, *see id.* (citing Arista Records, Inc. v. Flea World, Inc., Civ. No. 03-2760 (JBS), 2006 WL 842883, at *21 (D.N.J. Mar. 31, 2006); Country Rd. Music, Inc. v. MP3.com, Inc., 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003); UMG Recordings, Inc. v. MP3.com, Inc., 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000); Stokes Seeds Ltd. v. Geo. W. Park Seed Co., 783 F. Supp. 104, 106 (W.D.N.Y. 1991)).

[37] *See id.* at 141.

"chose to issue [a]lbums" in this case, so they could only recover one statutory damage award per album.[38]

The court next addressed the plaintiffs' contention that the independent economic value test adopted by several other circuits[39] requires statutory damages on a per-song basis.[40] Observing both that the Second Circuit "has never adopted the independent economic value test" and that no circuit "has applied the test to an album of music," the court held that the test is inconsistent with the relevant statutory language.[41] Specifically, the statutory language suggests no independent economic value test that would create an "exception" to the compilation rule.[42] The court stated that its approach cohered "with the Congressional intent expressed in the Conference Report that accompanied the 1976 Copyright Act," which demands specifically that "even if the parts of the compilation are 'regarded as independent works for other purposes,'" they must not be so regarded with respect to the calculation of statutory damages.[43]

The Second Circuit's *Media Right* issuance test, novel at least at the appellate level,[44] represents a far less satisfactory interpretation of "compilation" than the independent economic value test. Specifically, the latter test looks primarily at the act of *authorship* in determining whether an expression forms part of a compilation, thus better furthering the constitutional mandate that copyright protect only the "original intellectual conceptions of the author."[45] By contrast, the issuance test, which looks at what was released to the public rather than whether the "resulting work as a whole constitutes an original work of author-

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[38] *Id.*

[39] *See id.* at 141–42 (citing Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 295 (9th Cir. 1997), *rev'd on other grounds sub nom.* Feltner v. Columbia Pictures Television, 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, 1116–18 (1st Cir. 1993); Walt Disney Co. v. Powell, 897 F.2d 565, 569 (D.C. Cir. 1990)).

[40] *See id.* at 142.

[41] *Id.* In support, the court cited a district court case describing per-song damages as "a total mockery of Congress' express mandate." *Id.* (quoting *UMG Recordings*, 109 F. Supp. 2d at 225).

[42] *Id.*

[43] *Id.* (quoting H.R. REP. NO. 94-1476, at 162 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778).

[44] *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010), which the court cited, *see Media Right*, 603 F.3d at 141 n.6, does not support the issuance test. Although the *Xoom* court neglected to explain why the work at issue constituted a compilation, *see Xoom*, 323 F.3d at 285, it certainly did not advocate anything like a test that looks at how works are released to the public. *Xoom* probably did not address the authorship issue because the plaintiffs conceded that the works formed compilations. *See id.* at 283.

[45] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)) (internal quotation marks omitted).

ship,"[46] conflicts with copyright's focus on authorship[47] as well as with the statutory definition of "compilation."[48]

Cormack v. Sunshine Food Stores, Inc.[49] explicitly grappled with the "authorship" concept and found that a pair of tests sold together as a unit did not form a compilation.[50] Two important principles emerged from *Cormack*: First, "[m]arketing . . . is not part of authorship. The ultimate issue . . . does not depend on the marketing strategies adopted by the copyright owner."[51] Second, the ability of a third party to consume the works separately indicates that they do not form a compilation.[52] These guidelines focus on the *work* itself. Courts utilizing the independent economic value test follow both *Cormack* principles.[53] These courts, moreover, underscore the importance of *authorship* by examining the creative process: how the authors created their expressions.[54] In *Gamma Audio & Video, Inc. v. Ean-Chea*,[55] the First Circuit held that four episodes in a television series that were sold together in a bundle constituted four separate works.[56] The court stated 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"[57] and determined that the production and

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[46] 17 U.S.C. § 101 (2006).

[47] *See, e.g.*, *id.* § 102(a) ("Copyright protection subsists . . . in original works of authorship . . . ."); *Feist*, 499 U.S. at 347 (noting that copyright does not protect facts because they "do not owe their origin to an act of authorship"); Evans v. Eaton, 16 U.S. (3 Wheat.) 454, 500 (1818) (noting that "copyright can only be granted to an . . . author"); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 455 (calling authorship "arguably the most central, and certainly the most resonant, of the foundational concepts associated with Anglo-American copyright doctrine"); Jisuk Woo, *Genius with Minimal Originality?: The Continuity and Transformation of the "Authorship" Construct in Copyright Case Law Regarding Computer Software*, 15 ALB. L.J. SCI. & TECH. 109, 110 (2004) ("The notion of authorship is arguably the most central concept of the Anglo-American copyright doctrine.").

[48] *See* 17 U.S.C. § 101.

[49] 675 F. Supp. 374 (E.D. Mich. 1987).

[50] *See id.* at 377–78.

[51] *Id.* at 378.

[52] *See id.* at 379.

[53] In this sense, "independent economic value test" is a misnomer. *But see* Petition for a Writ of Certiorari, *supra* note 8, at 7, 2010 WL 3740540, at *7 ("Because the songs are distinct creative works with *economic value* independent of the album, they should be treated as separate works . . . ." (emphasis added)); Hughes, *supra* note 3, at 623–27 (analyzing the test from a truly economic perspective). Professor Justin Hughes, however, finds the test "dissatisfying" from an economic standpoint. *Id.* at 625.

[54] The Supreme Court has held that authorship "presupposes a degree of originality," which in turn "requires independent creation plus a modicum of creativity." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

[55] 11 F.3d 1106 (1st Cir. 1993).

[56] *Id.* at 1119.

[57] *Id.* at 1117.

consumption of the episodes are the relevant matters.[58] In *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*,[59] the Ninth Circuit concluded that because "the viewers may watch as few or as many episodes [of a series] as they want" and because "the episodes were separately written, produced and registered," the episodes were separate works.[60] Also, because the episodes "could be repeated and rearranged at the option of the broadcaster,"[61] they were not "assembled into a collective whole."[62] In *MCA Television Ltd. v. Feltner*,[63] the Eleventh Circuit on similar facts arrived at the same result.[64] Finally, the D.C. Circuit held in *Walt Disney Co. v. Powell*[65] that several different poses of two cartoon characters did not constitute more than two separate works.[66] Again, the nature of the works — two discrete characters — led to the result.[67]

Although the *Media Right* court contended that both *Twin Peaks* and *WB Music* "focused on whether the plaintiff — the copyright holder — issued its works separately, or together as a unit,"[68] in neither case was there any suggestion that the copyright owner's issuance

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[58] *See id.* Hughes calls the consumption inquiry in this case a "marketing" matter, Hughes, *supra* note 3, at 623, but the court's inquiry does not directly depend on the form of distribution: the court's analysis suggests that these four episodes could be enjoyed individually whether they were released separately, together as a four-episode package, or as part of an even larger bundle. The form of distribution is relevant only insofar as it implies how the work could be consumed. Although the court noted that the renters' ability to "rent as few or as many tapes as they want" suggested that each episode could "stand alone," *Gamma*, 11 F.3d at 1117, the fact that the court held that four episodes distributed on two tapes were four and not two works, *id.* at 1117 n.8, and the court's hypothetical example illustrating that the five *Rocky* movies distributed together would not turn them into one work, *id.* at 1117 n.9 (citing Cormack v. Sunshine Food Stores, Inc., 675 F. Supp. 374, 377 (E.D. Mich. 1987)), indicate that distribution may be suggestive of whether two or more works form a compilation, but is by no means what *makes* such works compilations.

[59] 106 F.3d 284 (9th Cir. 1997), *rev'd on other grounds sub nom.* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).

[60] *Id.* at 295. The court found the fact that "the different episodes were broadcast over the course of weeks, months, and years" relevant only insofar as it led to the inference that "viewers may watch as few or as many episodes as they want." *Id.*

[61] *Id.* at 296.

[62] *Id.* at 295 (quoting 17 U.S.C. § 101 (2006)) (internal quotation mark omitted).

[63] 89 F.3d 766 (11th Cir. 1996).

[64] Hughes points to the fact that "the court . . . noted that '[e]ach episode . . . was aired independently from preceding and subsequent episodes'" as evidence that marketing played a role in the court's decision. Hughes, *supra* note 3, at 623 (quoting *MCA Television*, 89 F.3d at 769). However, as with *Gamma*, Hughes's conflation of marketing with consumption seems unwarranted. *See supra* note 58. The *MCA Television* court was simply noting here that the fact that the episodes were released separately indicated that they did not need to be released together as a bundle (as the defendant released them) at all, which indicates that the form of issuance made no difference. *See MCA Television*, 89 F.3d at 769.

[65] 897 F.2d 565 (D.C. Cir. 1990).

[66] *Id.* at 570.

[67] *See id.*

[68] *Media Right*, 603 F.3d at 141.

of its works together would have, by itself, created a compilation. *WB Music* held merely that a compilation unauthorized by the copyright holder is not a compilation for statutory damages purposes,[69] implying only that authorization by the copyright owner is necessary, not that it is sufficient. Indeed, this requirement coheres with an authorship-centered definition of "compilation," for an unauthorized collection cannot represent the artistic and expressive vision of the author.

Twin Peaks went a step further and contradicted the issuance test outright. *Twin Peaks* held that "*separately written teleplays* prepared to become episodes of a weekly television series" did not constitute a compilation.[70] While "prepar[ation] to become [separate] episodes" might imply a kind of issuance test, the court expressed uncertainty regarding whether infringement of multiple television episodes in a mini-series adapted from one book would support multiple awards.[71] Such uncertainty arises precisely because it is unclear whether episodes are released separately due to the producer's artistic vision or because a mini-series is the most strategic way to release the product. An issuance test renders this point moot: separately released episodes would not form a compilation.

The issuance test protects as compilations collections of materials that are *not* works of authorship. *Media Right* correctly asserted that the statutory "language provides no exception for a part of a compilation that has independent economic value,"[72] but the independent economic value test does not create exceptions — it determines whether multiple works form a compilation *at all* by examining whether the works together comprise a new single work by the author that cannot be enjoyed in pieces by a consumer. *Media Right*'s issuance test, by contrast, protects any combination of materials that are bundled when released to the public. *Cormack* recognized that bundling two surveys "require[d] no new exercise of authorial judgment," only "a staple or a paper clip."[73] This situation is not unusual. Distinct intellectual products issued together but not conceived or consumed as a single work are common: applications on a new computer, a portfolio containing a composer's complete output, hundreds of photographs taken over the course of a year uploaded together to a social networking website. Most people would not consider these examples to be unified "works," but they are compilations under *Media Right*.

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[69] WB Music Corp. v. RTV Commc'n Grp., Inc., 445 F.3d 538, 541 (2d Cir. 2006).

[70] Twin Peaks Prods., Inc. v. Publ'ns Int'l Ltd., 996 F.2d 1366, 1381 (2d Cir. 1993) (emphasis added).

[71] *Id.*

[72] *Media Right*, 603 F.3d at 142.

[73] Cormack v. Sunshine Food Stores, Inc., 675 F. Supp. 374, 378 (E.D. Mich. 1987).

It is not clear how the *Media Right* court determined that the albums were works of authorship. One possibility is that the issuance test itself determined that the albums were works of authorship, but this conclusion contradicts the constitutional limitation of copyright to "Writings."[74] Alternatively, the court may have determined that it did not need to analyze seriously whether the albums constituted works of authorship. That conclusion would also be erroneous, risking both inconsistency and unconstitutional expansion of copyright protection.

The Second Circuit, like other courts and commentators, may be leery of statutory damages and seeking ways to reduce them.[75] Nonetheless, the Second Circuit did not need to abandon the "work of authorship" inquiry just because it found the independent economic value test unsatisfactory.[76] Furthermore, it is not clear in this case that the independent economic value test would necessarily dictate that the individual tracks do not form compilations, as it could have been the case that the plaintiffs created each of their albums as a single indivisible work that could not reasonably be consumed in pieces.[77] Even if limiting statutory damages on this theory were something of a stretch, doing so would have been superior to the adoption of the issuance test, which threatens one of copyright's basic premises.

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[74] U.S. CONST. art. I, § 8, cl. 8; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) ("The writings which are to be protected are *the fruits of intellectual labor* . . . ." (quoting The Trade-Mark Cases, 100 U.S. 82, 94 (1879)) (internal quotation mark omitted)); Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 636 (2002) ("[T]erms such as 'author,' 'writing,' and 'expression,' suggest an expectation by Congress, as well as by the Framers, that the works subject to copyright would be works of imagination, mental exertion, and the purposeful communication of ideas.").

[75] *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, Civ. No. 07cv11446-NG, 2010 WL 2705499, at *3 (D. Mass. July 9, 2010); Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1053–54 (D. Minn. 2010); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009); J. Cam Barker, Note, *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).

[76] *See* Hughes, *supra* note 3, at 628–34 (evaluating two alternate inquiries for determining what constitutes an independent work: whether an expression is a "composition," *id.* at 628–33, and the copyright owner's "own understanding" at the time of registration, *id.* at 634).

[77] This result seems likely, for the album titles, *see Media Right*, 603 F.3d at 138, and song titles, *see* Brief for Plaintiffs-Appellants at 9–10, *Media Right*, 603 F.3d 135 (No. 09-2600), 2009 WL 7071289, at *9–10, suggest thematic unity. Kathryn Starshak, however, suggests that thematic unity itself would preclude an album from being a compilation. *See* Kathryn Starshak, Note, *It's the End of the World as Musicians Know It, or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 108 (2001) ("[A]n album lacks the necessary creativity to be considered an 'original work of authorship.'"). She suggests that an "album [is] a unitary whole, and as such, it cannot be considered a compilation." *Id.* at 108 n.296. Even if this analysis is accurate, however, the thematic unity may suggest that the album is a single *work*, if not technically a *compilation*.