No. 10-415

OCT 27 2010

IN THE

Supreme Court of the United States

ANNE BRYANT, ELLEN BERNFELD, and GLORYVISION, LTD.,

Petitioners,

—v.—

MEDIA RIGHT PRODUCTIONS, INC., DOUGLAS MAXWELL, and THE ORCHARD ENTERPRISES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Where the Copyright Act of 1976: (i) allows only one (1) award of statutory damages per work regardless of the number of infringements; and (ii) requires that all parts of a compilation constitute one (1) work, regardless of whether the individual items are subject to individual copyrights, did the Second Circuit properly determine, following a long line of District Court cases dealing specifically with music recordings, that Congress's mandate expressly requires a per-CD or per album (referred to herein as "Per-CD Album") (as opposed to per-song) calculation of statutory damages.

CORPORATE DISCLOSURE STATEMENT

Appellee Media Right Productions Inc. (hereinafter "Media Right") has no parent corporations and no publicly held companies own 10% or more of its stock.

Appellee The Orchard Enterprises, Inc. (hereinafter "The Orchard") was acquired by Dimensional Associates, LLC in July of 2010. Dimensional Associates, LLC operates as a subsidiary of JDS Capital Management, Inc. JDS Capital Management, Inc. has no parent corporations and no publicly held companies own 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Federal Statutes:

INTRODUCTION

There is no compelling reason for this Honorable Court to grant certiorari to Petitioners in this action. This case presents no conflict between the U.S. Courts of Appeals in their decisions, nor any important question of federal law that must be settled by this Court. *See* Rule 10 of the U.S. Sup. Ct. Rules.

The Second Circuit properly determined that the statutory language of the U.S. Copyright Act unambiguously provides for one (1) statutory infringement award for each compilation, and therefore for each music album or CD. The "independent economic value" test advocated by Petitioners is inapplicable to music albums because its application would trump the express language of Congress.

Furthermore, there is no split in the Circuit Courts. The First, Ninth, Federal and Eleventh Circuit cases cited by Petitioners in support of application of the "independent economic value" test, were guided by Second Circuit case law, and did not involve music albums. The Second Circuit properly declined to adopt the test, or apply it to music albums, because such application would contravene the language of the Copyright Act.

The Petition merely seeks to obtain a higher measure of damages for Appellants. The determination Petitioners seek is inconsistent with the Copyright Act and therefore unsound. The decision to alter the statutory damages calculation for copyright infringement rests solely with Congress. As the Second Circuit properly stated, the advent of digital music is no reason to disregard express

statutory text or the clear Congressional intent set forth in the legislative history of the Copyright Act.

CONCISE COUNTERSTATEMENT OF THE CASE

Petitioners Anne Bryant and Ellen Bernfeld ("Bernfeld") are songwriters who own the record label Petitioner Gloryvision, Ltd. ("Gloryvision"). App. 3, 23. Petitioners created two CD albums titled *Songs for Dogs* and *Songs for Cats* in the late 1990's (the "Albums"). App. 3, 23.

Seeking to boost sales, Petitioner's entered into an agreement with Respondent Media Right (the "Media Right Agreement"), which authorized Media Right to act as agent and representative to market the Albums in exchange for twenty percent (20%) of the sales proceeds. App. 3, 23. The Media Right Agreement required Media Right to use its best efforts to market and promote the recordings to catalogues, shopping networks, internet sites, retailers, and wholesalers. App. 24. The Media Right Agreement contemplated that Media Right would market the products through third party distributors. App. 24.

The Media Right Agreement resulted from conversations between Bernfeld and Respondent Douglas Maxwell, the President of Media Right, during which they discussed distribution through The Orchard—a music wholesaler. App. 4, 25.

Media Right entered into an agreement with The Orchard (the "Orchard Agreement"), which authorized The Orchard to sell, distribute, or oth-

erwise exploit the Albums, and eleven (11) of Media Right's albums, by any and all means and media (whether now existing or in the future), including through E-Stores and via Internet. App. 4, 25. The Orchard Agreement contained a warranty by Media Right that the use of the recordings by The Orchard would not infringe any rights. App. 4, 25-26.

When Media Right entered into the Orchard Agreement, The Orchard only sold physical recordings. App. 4, 26. Sometime around April 2004, The Orchard began selling digital recordings through internet-based music retailers such as iTunes, and made digital copies of the Albums and attempted to sell them further to the Orchard Agreement. App. 4-5, 26.

Media Right's marketing efforts were a remarkable failure, resulting in no sales. App. 24. The Orchard's sales of the Albums were also far short of any measure of commercial success. App. 27. From April 1, 2002 to April 8, 2008, The Orchard generated $12.14 in revenues from sales of physical copies of the Albums, and $578 from digital downloads. App. 5, 27. Media Right' share of these revenues was $413.82, of which $331.06 were to be forwarded to Gloryvision. App. 5, 27.

The Orchard sent royalty checks to Media Right, but because the $413.82 was aggregated with other monies The Orchard paid to Media Right, Media Rights overlooked that it owed $331.06 to Gloryvision. App. 5, 27.

Sometime in 2006, Petitioners discovered digital copies of the recordings online, erroneously crediting Media Right as artist and The Orchard as

the record label. App. 26. On April 16, 2007, Petitioners filed a complaint against Respondents in the Southern District Court of New York. App. 5. The Orchard and Media Right immediately ceased sales of the Albums and recordings when made aware of Gloryvision's copyright claim. App. 37.

The District Court found that The Orchard had proven that its infringement was innocent. App. 6, 37. The District Court also found that Media Right did not act willfully. App. 7, 40-41.

The District Court determined that the Albums were compilations, and therefore Respondents were each liable for one statutory damages award Per-CD Album—rather than per song, as Petitioners requested. App. 6, 34-36. The Court ordered The Orchard to pay minimal statutory damages of $200 per Album, totaling $400. App. 7, 41. The Court ordered Media Right to pay $1,000 per Album, totaling $2,000. App. 7, 41. The total statutory damages awarded by the District Court was $2,400. App. 7, 41. The District Court declined to award Petitioners' attorney's fees. App. 7.

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit alleging District Court error in: (1) granting statutory damages on a Per-CD Album basis; (2) its findings on Respondents' intent; (3) determining amount of damages; and (4) refusing to award Petitioners' attorney's fees. App. 7-8. The Second Circuit affirmed the District Court's decision with respect to each of the foregoing findings. App. 14-19.

With respect to willfulness, the Second Circuit held that "it was not clear error for the District

Court to find that it was reasonable for The Orchard to believe that it had received the right to copy the albums." App. 16. The Second Circuit further held that "it was not clear error for the District Court to find that Maxwell and Media Right's infringement was not willful. App. 17.

The Second Circuit also held that "the District Court did not abuse its discretion in calculating statutory damages" of $2,400 "based in its finding that Appellees' profits from infringing sales of the albums did not need to be higher to achieve deterrence." App. 18-19. With respect to attorney's fees, the Second Circuit held that the District Court did not abuse its discretion by declining to award them. App. 19.

The Second Circuit affirmed the District Court's treatment of each Album as a compilation, subject to one award of statutory damages. App. 14. The Court determined that "[b]ased on a plain reading of the statute . . . infringement of an album should result in only one statutory damage award" and "[t]he fact that each song may have received a separate copyright is irrelevant to this analysis." App. 10.

The Second Circuit reasoned that "[a]n album falls within the [Copyright] Act's expansive definition of compilation" since it "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." App. 10. And, the Court noted, Section 504(c)(1) of the Copyright Act states that "all the parts if a compilation . . . constitute one work"—that can receive "only one award of statutory damages." App. 9.

The Second Circuit distinguished *Twin Peaks Prods., Inc. v. Publ'ns Int'l Ltd.*, 996 F.2d 1366 (2d. Cir. 2006) because "[h]ere, it is the copyright holders who issue their works as 'compilations' [and] chose to issue Albums." App. 10-11. It found that "[i]n this situation, the plain language of the Copyright Act limits the copyright holders' statutory damage award to one for each Album." App. 11.

The Second Circuit considered the "independent economic value" test advocated by Petitioners, observing that no Circuit Courts have applied the test to music albums. App. 12. It stated that "[t]his Court has never adopted the independent economic value test, and we decline to do so in this case." App. 13. In rejecting the test, the Second Circuit explained:

> The Act specifically states that all parts of a compilation must be treated as one work for the purpose of calculating statutory damages. This language provides no exception for a part of compilation that has independent economic value, and the Court will not create such exception.
>
> We cannot disregard the statutory language simply because digital music has made it easier for infringers to make parts of an album available separately. This interpretation of the statute is consistent with Congressional intent expressed in the Conference Report that accompanied the 1976 Copyright Act, which states that the one-award restriction applies even if

> the parts of the compilation are "regarded as independent works for other purposes."

App. 13-14.

The Second Circuit affirmed the District Court's judgment. App. 19. Petitioners' petition for a writ of certiorari followed.

ARGUMENT IN OPPOSITION TO PETITION

A. There is No Conflict Between the Second Circuit and Other Circuit Courts Regarding the "Per-CD Album" Calculation of Statutory Damages Under the Copyright Act.

Contrary to Petitioners' argument, there is no split in the decisions of the Circuit Courts of Appeals regarding the calculation of statutory damages under the U.S. Copyright Act. In fact, the cases cited by Petitioners rely on the seminal Second Circuit case of *Twin Peaks Prods., Inc. v. Publn's Int'l Ltd.*, 996 F.2d 1366 (2d Cir. 2006).

Furthermore, Petitioners' assertion that the Second Circuit allegedly applied a so-termed "form of issuance" test in this case is incorrect. The Second Circuit interpreted the statutory language of the U.S. Copyright Act regarding the provision on statutory damages, considered the legislative history, and determined that, in connection with musical albums, Congress unambiguously provided for one (1) statutory award Per-CD Album as opposed to per-song or per-track. The Second Circuit's determination is consistent with other Court decisions dealing with this specific issue. No alleged "form of issuance" test was adopted by the

Second Circuit—which term was fashioned by Petitioners.

Federal Circuit

The *Walt Disney* case relied on by Petitioners involving infringement of Disney characters, actually rests on case law in the Second Circuit, and holds that only two (2) of the Disney characters—Mickey and Minnie—were infringed, despite the existence of six (6) copyrights of those characters in different poses. *Walt Disney Co. v. Powell*, 897 F.2d 565, 569-70 (Fed. Cir. 1990).

While noting that a copyright must, at a minimum, be a "viable work with separate economic value and copyright li[fe] of [its] own"—the Federal Circuit never expressly adopted this as a test for statutory damages. *Id.* at 570. And, since the *Walt Disney* case did not deal with musical recordings—which are completely different than graphical works—it is distinguishable and inapplicable.

The *Walt Disney* case rested on: (i) a Second Circuit case arising under the 1909 Copyright Act which—unlike the 1976 Act—permitted multiple awards for multiple infringements of the same work, and (ii) a decision of the Southern District Court of New York, which precluded recovery of multiple statutory awards for copyrighted graphics apart from the recording itself. *Id.* at 569 (discussing *Robert Stigwood Group, Ltd. v. O'Reilly*, 530 F.2d 1096 (2d Cir. 1976) and *RSO Records, Inc. v. Peri*, 596 F. Supp. 849 (S.D.N.Y. 1984)).

Because the *Walt Disney* decision was guided by Second Circuit case law, did not involve music recordings, and found only two (2) works infringed

for the purposes of statutory damages—despite Walt Disney's six (6) separate copyrights—it is not in conflict with the Second Circuit's decision in this action.

First Circuit

The First Circuit case of *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993), similarly relies on Second Circuit case law—*Twin Peaks Prods. v. Publn's Int'l Ltd.*, 996 F.2d 1366 (2d Cir. 1993). *Gamma* at 1116. The *Gamma* case and *Twin Peaks* involved television series—not musical albums. Similar to *Twin Peaks,* the First Circuit Court granted four (4) statutory awards to Gamma, reasoning that each episode in a television series was produced independently, and aired independently on television. *Id.* at 1117-18.

In the case at bar, the Second Circuit addressed and distinguished *Twin Peaks.* App. 10-11. The Court noted that in *Twin Peaks* "the plaintiff could receive a separate award of statutory damages for each of the eight teleplays because the *plaintiff* had issued the works separately, as independent television episodes." App. 10-11 (citing *Twin Peaks* at 1381). *See also* App. 11 (distinguishing *WB Music Corp. v. RTV Commun. Group, Inc.*, 445 F.3d 538 (2d Cir. 2006), since the separately copyrighted songs were not included in a compilation by plaintiff). Whereas, in this action, the Court pronounced that "it is the copyright holders who issue their works as 'compilations' [and] chose to issue Albums." App. 10-11. As such, the *Gamma* decision, like *Twin Peaks* is similarly distinguishable.

Ninth and Eleventh Circuits in *Feltner*

Petitioners rely on two (2) related cases involving television shows like in *Gamma*— both of which apply the standard articulated by the Second Circuit in *Twin Peaks*.

In *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997) defendant Feltner attempted to distinguish *Twin Peaks* by arguing that the television programs were "anthologies" or "collected works." *Id.* at 295. The Ninth Circuit rejected the argument, determining that "the evidence was uncontroverted that the episodes were broadcast over the course of weeks, months, or even years, and could be repeated and rearranged at the option of the broadcaster." *Id.* It held that "[b]ecause this evidence supports the conclusion that the episodes were 'not assembled into a collective whole,' it was not error for the district court to reject Feltner's contention that each series was a 'compilation' under § 504(c). *Id.*

In this action, unlike in *Columbia Pictures*, Petitioners' recordings were assembled into collective works or compilations—as the Second Circuit properly determined—and were not released by Petitioners as independent tracks. App. 10-11.

In the related case of *MCA Television Ltd. v. Feltner*, 89 F.3d 766 (11th Cir. 1996), the Eleventh Circuit, relying on *Gamma* and *Twin Peaks*, similarly determined that Feltner failed to demonstrate that each TV episode was part of a "collective work" since the series had individual plots and were not linked together into one cohesive story. *Id.* at 770.

In sum, Petitioners' reliance on completely distinguishable case law involving television programming is unavailing. Indeed, those cases are consistent with the Second Circuit's decision in *Twin Peaks*—on which the cases cited by Petitioners rested.

More pertinently, those cases involved TV shows and not musical compositions. As the Courts have recognized, television shows are separately produced, independently aired, and as such, are very different from the way musical albums or CDs are produced, released, and enjoyed by consumers. *See, e.g.*, *MCA Television supra* at 769 ("Each [TV] episode was produced independently from the other episodes and each was aired independently from preceding and subsequent episodes."). As such different kinds of compilations are treated differently by the courts.

With respect to musical albums, the Courts have considered the exact issue at bar, and properly determined that the statutory language clearly requires a Per-CD Album application of statutory damages. In fact, the Second Circuit has never adopted the "independent economic value" test, and the application of this test by the *Feltner* Courts to cases involving TV episodes, not musical compositions, is unavailing and does not create a Circuit Court conflict.

B. The Copyright Act Expressly Provides for One Damages Award Per Compilation, and Thus Per CD Album.

Unlike the cases involving television series, those cases faced with the issue of whether to apply a Per-CD Album or per-song calculation of

statutory damages for infringement of *music recordings*, have determined that the express language of the Copyright Act requires the Per-CD Album standard applied in this case.

For example, in the pivotal case of *UMG Recordings, Inc. v. Mp3.com, Inc.*, 109 F. Supp.2d 223 (S.D.N.Y. 2000), relied on by the Second Circuit in this action, the Southern District Court of New York accurately rejected plaintiffs' argument Gloryvision makes here that the relevant "work" unit for the purpose of computing statutory damages in each individual copyrighted song on a CD, as opposed to each copyrighted CD as a whole. *Id.* at 224.

In that case, the District Court properly noted that "[t]his argument immediately encounters the objection that the very subsection of the Copyright Act that authorizes the award of statutory damages, § 504(c)(1), expressly states that: 'For the purposes of this subsection, all parts of a compilation or derivative work constitute one work.'" *Id.* (citing 17 U.S.C. § 504(c)(1)).

The *UMG* Court—like the Second Circuit in this case—properly considered Congressional intent, pointing to the House Report related to Section 504(c)(1)—which "makes clear . . . that although they are regarded as independent works for other purposes, 'all the parts of a compilation or derivative work constitute one work' for the purposes of determining an award of statutory damages." *Id.* at 225 (quoting H.R. Rep. No. 14765, 94th Cong., 2d Sess. 162).

In *UMG*, like Petitioners here, plaintiffs erroneously argued that "because each song on each CD has an 'independent economic value,' statutory

damages should be awarded for each song." *UMG* at 225. Like the Second Circuit in this case, the *UMG* Court rejected this argument, holding as follows:

> None of this is relevant in the face of the unequivocal statutory language. . . . [I]t is hard to see the appropriateness on an "independent economic value" test to statutory damages—as opposed to actual damages, for which every copyright holder remains free to sue on a "per-song" other than "per-CD basis." If such a test were applied, the result would be to make ***a total mockery of Congress' express mandate*** that all parts of a compilation must be treated as a single "work" for the purposes of computing statutory damages, since, as the House Report expressly recognizes, the copyrighted parts of a compilation will often constitute "independent works for other purposes."

Id. at 225 (emphasis added) (quoting H.R. Rep. No. 14765, 94th Cong., 2d Sess. 162).

Consistent with *UMG*, the Southern District Court of New York in *Country Road Music, Inc. v. Mp3.com, Inc.*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003) rejected plaintiffs' disagreement with the "Court's repeated prior rulings that statutory damages should be calculated on a 'per-CD' and not a 'per-composition basis.'" *Id.* at 332 (citing *UMG* and *TeeVee Toons, Inc. v. Mp3.com, Inc.*, 134 F. Supp. 2d 546 (S.D.N.Y. 2001). Much like those cases, the *Country Road* Court acknowledged that "the Copyright Act unambiguously provides that a 'compilation,' although composed of 'separate and

independent works,' . . . 'constitutes one work' for purposes calculating statutory damages." *Id.* (quoting 17 U.S.C. §§ 101, 504(c)(1)). The Court concluded that "each CD that defendant copied to its servers constitutes one work and the basis for one statutory damage award, even though it might contain multiple copyrighted musical compositions." *Id.*

The Second Circuit in this action also considered the District of New Jersey case of *Arista Records, Inc. v. Flea World, Inc.*, 2006 U.S. Dist. LEXIS 14988 (D.N.J. Mar. 31, 2006), which is in agreement with the Second Circuit that the proper calculation of statutory damages for infringement of musical recordings is Per-CD Album not per-track, expressly rejecting the "independent economic value" test advocated by Gloryvision. *Id.* at *71, 73 (stating that "the Third Circuit never adopted the 'independent economic value test . . .'").

The *Arista* Court noted that the *UMG* and *Country Road* cases "are well reasoned" and decided that the District Court of New Jersey "will follow the rule established in them." *Id.* at *72. The Court similarly reasoned that "Plaintiffs' argument that statutory damages should be calculated on a 'per-song' basis runs afoul of the very subsection of the Copyright Act that authorizes the award of statutory damages." *Id.* at *72.

The Fourth Circuit came to a similar conclusion in *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003). The issue in Xoom was whether a plaintiff could obtain an award for the compilation, as well as an award for the underlying pre-existing works contained therein, in which plaintiff also owned the copyright. *Id.* at 285. The

Fourth Circuit similarly answered in the negative stating that § 504(c)(1) only permitted one (1) award because plaintiff's registration of the infringed product covered the product in its entirety and the underlying preexisting works contained therein. *Id.* Thus, the Court concluded that a plaintiff, holding a copyright in a compilation, could only receive one (1) award of statutory damages for copyright infringement of that compilation. *Id.*

Petitioners wrongfully maintain that the foregoing cases cited by the Second Circuit are purportedly distinguishable because there was allegedly no "separate and discrete infringement of the individual songs on the CDs." However, this is not clear. For example, in *Country Road*, defendant Mp3.com copied plaintiffs' CDs to its servers and permitted users of its website "to listen to the songs stream over the Internet." *Country Road*, 279 F. Supp. 2d at 331. The Court nonetheless determined that "each CD that defendant copied to its servers constitutes one work." *Id.* at 332.

Petitioners' discussion of a hypothetical involving the *Rocky* series motion pictures is not compelling and distinguishable. Again, the case at bar involves musical albums produced as compilations —not separate movie series subsequently boxed together. Petitioners never published the individual Album songs separately, and as such, they would not be entitled to a separate statutory award for each song—even under the test they advocate.

In each of the cases above cited by the Second Circuit, plaintiffs requested what Petitioners seek in this case—application of a separate statutory

damages award per each song. In each instance, the Courts noted that such methodology was at odds with the express mandates of Congress in the Copyright Act. The Second Circuit in this action dedicated a great deal of its memorandum in decision to the issue of the proper calculation of statutory damages for musical compositions to ward-off repeated rejected attempts by plaintiffs to advocate the "independent economic viability" test to enhance their measure of statutory damages.

In sum, there is no split in the Courts' decisions regarding television programming, and no conflict in the cases involving musical compositions. Those cases which dealt with musical albums or CDs—namely in New York and New Jersey—have consistently applied the Per-CD Album calculation of statutory damages for infringement.

C. Evolution of Digital Technology Does Not Warrant Disregarding Express Statutory Text and Clear Congressional Intent.

Petitioners make repeated references to the availability of digital music on the Internet and evolution of digital technology. However, as the Second Circuit correctly pointed out—these are not compelling reasons to dispense with the express directives of Congress that each compilation constitutes one work for statutory damages, and disregard legislative intent.

As the *UMG* Court powerfully stated:

> When Congress speaks, the courts must listen: so our constitution mandates. When, as here, Congress' statement is clear, to disregard that message would be

> nothing less than an ***unconstitutional arrogation of power by the judiciary. The Court declines plaintiffs' invitation to tread the treacherous path***.

UMG Recordings, 109 F. Supp.2d at 225 (emphasis added).

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied in its entirety.

Respectfully submitted,

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