

HOW MUCH IS AN ALBUM WORTH?: THE SEVENTH CIRCUIT’S APPROACH TO DEFINING ONE STATUTORY “WORK” UNDER THE COPYRIGHT ACT OF 1976

Abstract: On August 21, 2019, in *Sullivan v. Flora*, the U.S. Court of Appeals for the Seventh Circuit adopted the Independent Economic Value Test (IEV Test) to ascertain whether the constituent elements of a copyrighted material were multiple “individual works” or a “compilation” for purposes of statutory damages. In practice, this means that copyright owners, particularly in the music industry, can obtain significantly larger damages by permitting individual awards for each song within an album. The Seventh Circuit, in adopting the IEV Test, joined a growing list of federal circuit courts that rejected the U.S. Court of Appeals for the Second Circuit’s more limited issuance test, which evaluates the group nature of the copyrighted material as promulgated by the copyright holder. This Comment argues that the IEV Test adopted in *Sullivan* is the better of the two approaches because it respects Congress’s intent to allow for an objective and particularized analysis of the constituent elements of large collections of copyrighted material. Furthermore, it argues that the IEV Test could be further enhanced with structured jury instructions and the addition of a Fifth Amendment constitutional due process defense that defendants can assert when the aggregate award of statutory damages is excessive.

INTRODUCTION

The father of American literature, Mark Twain, famously stated, “Only one thing is impossible for God: to find any sense in any copyright law on the planet.”¹ Indeed, copyright law has long been regarded as one of the most intricate and convoluted practice areas, both within the realm of American intellectual property law and the broader landscape of American jurisprudence.²

¹ MARK TWAIN, *THE COMPLETE WORKS OF MARK TWAIN: MARK TWAIN’S NOTEBOOK* 381 (Albert Bigelow Paine ed., Brigham Young Univ. 2007) (1935). Mark Twain was a lifelong advocate of expanding authors’ copyright rights and famously advocated for a copyright term of “the author’s life and fifty years afterward,” which eventually came into fruition long after Twain’s death in the Copyright Act of 1976. See 17 U.S.C. § 302 (stating copyright holders have rights in their work for the duration of their life and an additional seventy years thereafter); Steve Courtney, *Mark Twain’s Copyright Fight*, U.S. PAT. & TRADEMARK OFF. (Nov. 13, 2017), <https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/mark-twains-copyright-fight> [<https://perma.cc/EE4C-9PWG>] (stating that Twain believed it was fair for a copyright holder’s works to financially support themselves and their children, but not their grandchildren).

² See Edward Lee, *Copyright, Death, and Taxes*, 47 WAKE FOREST L. REV. 1, 1–2 (2012) (attributing the increasing complexity of American copyright law to a convergence of factors, including the

This intricacy was exemplified in 2019, in *Sullivan v. Flora*, when the U.S. Court of Appeals for the Seventh Circuit attempted to untangle the competing judicial tests used to calculate statutory copyright damages.³ The court ultimately adopted the IEV Test and remanded so a jury could determine whether a Wisconsin-based freelance graphic design artist's thirty-three infringed animated illustrations were entitled to separate statutory damages.⁴

Part I of this Comment examines the current state of statutory damages in copyright law and the factual and procedural history of *Sullivan*.⁵ Part II discusses competing judicial approaches to determining the number of separate statutory damages to award.⁶ Part III contends that a subtly adjusted iteration of the IEV Test adopted in *Sullivan* is favorable because it aligns with Congress's intent to enable an objective and detailed analysis of the individual components within large collections of copyrighted material.⁷

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *SULLIVAN V. FLORA*

In 2019, in *Sullivan v. Flora*, the U.S. Court of Appeals for the Seventh Circuit joined the majority of federal circuit courts in holding that the IEV Test should be used to determine whether each illustration in a collection of works constitutes "one work" or a compilation of works for purposes of statutory damages awarded under the Copyright Act of 1976 (1976 Act).⁸ Section A of this

introduction of intricate international copyright treaties and exponential technological advancements since the enactment of the last copyright act nearly four decades ago); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 495–96 (2009) (stating that "Congress did not foresee or appropriately calibrate statutory damages" to deal with emerging technology cases); see also Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679–97 (2003) (arguing that musical copyrights have become immensely complicated due to historical developments within the music industry).

³ See *Sullivan v. Flora, Inc.*, 936 F.3d 562, 571 (7th Cir. 2019) (stating that "Section 504(c)(1) is hardly a model of clarity," particularly in cases that involve multiple copyrighted works and the plaintiff is seeking multiple statutory damages awards).

⁴ *Sullivan*, 936 F.3d at 565. Amy Sullivan did her work out of the small town of Baraboo, Wisconsin. Deposition of Amy Lee Sullivan at 7, *Sullivan v. Flora*, No. 15-CV-298 (W.D. Wis. May 24, 2016); see also *Baraboo City, Wisconsin*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/baraboocitywisconsin/PST045222> [<https://perma.cc/B675-7SYG>] (showing that Baraboo has a population of 12,633 residents). Baraboo is most notable for being the birthplace of the Ringling Brothers and home to the Circus World Museum. See *Explore Circus World*, WISC. HIST. SOC'Y, <https://circusworld.wisconsinhistory.org/> [<https://perma.cc/NK9L-VZHC>] (stating Circus World is a "Wisconsin national treasure").

⁵ See *infra* notes 8–37 and accompanying text.

⁶ See *infra* notes 38–65 and accompanying text.

⁷ See *infra* notes 66–88 and accompanying text.

⁸ *Sullivan*, 936 F.3d at 565, 572; see *infra* notes 38–65 and accompanying text (discussing the majority and minority view).

Part discusses the 1976 Act and the copyright infringement statutory damages standard.⁹ Section B discusses the factual and procedural history of *Sullivan*.¹⁰

A. The Copyright Act of 1976 and the Statutory Damages Standard

The modern copyright regime is governed by the 1976 Act.¹¹ The 1976 Act provides authors with the exclusive rights to reproduce, distribute, and display their copyrighted “works of authorship,” among additional protections.¹² Under 17 U.S.C. § 501, copyright infringement occurs anytime a defendant violates these exclusive rights.¹³ To prove infringement of the reproduction right, the most implicated of the rights, the copyright holder must show that the defendant copied their work.¹⁴

⁹ See *infra* notes 11–23 and accompanying text.

¹⁰ See *infra* notes 24–37 and accompanying text.

¹¹ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–1332). The foundation for the modern regime of statutory damages in copyright law is the Copyright Act of 1909 (1909 Act), which allowed copyright holders to forego actual damages and alternatively choose damages the court found equitable. Copyright Act of 1909, ch. 320, 35 Stat. 1075 § 25(b). A key drawback of the statutory damages provision of the 1909 Act, however, was that it focused on the number of infringing acts committed. See 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, 131–36 (2006) (explaining that the difficulties courts had experienced in distinguishing infringements under the 1909 Act was one of the main catalysts behind Congress’s adoption of the Copyright Act of 1976 (1976 Act), which overhauled the damages provision of the former). This meant it provided the copyright owner with one set of statutory damages for each infringing act. See Copyright Act of 1909 § 25(b) (suggesting that a defendant pay \$10 for every infringing copy created of a painting, statute, or sculpture and \$50 for every infringing delivery of a lecture, address, or sermon). After decades of district courts grappling with the ambiguity in defining what constituted one infringing act, Congress passed the 1976 Act, which established the current framework for calculating statutory damages in copyright infringement. See 17 U.S.C. § 504(c)(1) (promulgating the current statutory framework for damages copyright holders are entitled to); see, e.g., *Davis v. E.I. DuPont de Nemours & Co.*, 249 F. Supp. 329, 331 (S.D.N.Y. 1966) (describing the statutory damages provision of the 1909 Act as “an ambiguous hodgepodge of improvisations”).

¹² 17 U.S.C. § 106. Additionally, the 1976 Act provides copyright holders with the exclusive rights to perform and create derivative works in their works. *Id.* § 106(2). With respect to sound recordings, Congress later amended the Act to give copyright holders a sixth exclusive right to “perform the copyrighted work publicly by means of a digital audio transmission.” Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

¹³ 17 U.S.C. § 501(a). Plaintiffs can also assert indirect infringement against a party that contributes to or induces a third party to commit direct copyright infringement. See *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 935–37 (2005) (rationalizing the adoption of contributory and induced infringement from patent law into copyright jurisprudence).

¹⁴ *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020); see *What Rights Do Copyright Owners Have?*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/faqs/what-rights-copyright-owners-have/#:~:text=The%20reproduction%20right%20grants%20the,in%20most%20copyright%20infringement%20disputes> [<https://perma.cc/C7ST-X2L4>] (noting that the reproduction right is the most implicated right in infringement disputes). Copying can be proven through direct evidence that the defendant copied the work, or indirect evidence if the defendant had access to the plaintiff’s work and the allegedly infringing work is substantially similar. *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946); see

Prior to bringing an infringement action, the copyright holder must register their work.¹⁵ Copyright applicants have the option to perform a “group registration” of multiple works by listing them in one registration application or file a separate application for each work.¹⁶ 17 U.S.C. § 504(c)(1) enumerates the remedies for infringement that a copyright holder can seek, including actual damages, profits by the infringer, and statutory damages.¹⁷

One of the most important aspects of the 1976 Act is it allows courts to award statutory damages for “any one work” that an infringer infringes, rather than for every infringing act.¹⁸ This is qualified with the requirement that all parts of a “compilation” only constitute one work for purposes of statutory damages.¹⁹

also John Thurston, *Ask Permission: The Second Circuit's Transformative Fair Use Inquiry*, 64 B.C. L. REV. 84, 84–85 (2023), <https://bclawreview.bc.edu/articles/3078> [<https://perma.cc/FH9M-9WKE>] (explaining that even if a jury finds that the defendant copied, the defendant may raise the affirmative defense of fair use to evade liability from their copying). See generally Alan Latman, “*Probative Similarity*” as *Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COL-UM. L. REV. 1187, 1189 (1990) (explaining the nuances of proving infringement).

¹⁵ 17 U.S.C. § 412; see also *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019) (holding that registration for purposes of § 411 occurs when the U.S. Copyright Office grants the registration and not when the application is filed). Registration is also required for a plaintiff to seek statutory damages. 17 U.S.C. § 411. The U.S. Copyright Office is the agency that reviews all copyright applications. *Id.* § 408.

¹⁶ See *id.* § 408(c)(2). Having been nearly seven decades since the last substantial copyright statute in the United States, Congress felt it was imperative to address the evolving needs of copyright holders, particularly with the developments in technology such as television, motion pictures, and sound recordings. H.R. REP. NO. 94-1476, at 47 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5660; see also *The Law: Righting Copyright*, TIME, Nov. 1, 1976, at 2 (quoting U.S. Register of Copyrights, Barbara Ringer) (stating that “[the 1976 Act] . . . comes down on the authors’ and creators’ side in almost every instance”).

¹⁷ 17 U.S.C. § 504(a)–(c). Courts can award anywhere between \$750 and \$30,000 for each statutory damages award. *Id.* § 504(c)(1). After Congress passed the 1976 Act there was a split among federal circuit courts as to whether the court or the jury should decide the issue of statutory damages. *Compare* *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 121 (4th Cir. 1981) (holding that there is a right to have the question of statutory damages go to the jury), *with* *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 292–93 (9th Cir. 1997) (holding that there is no right to have the question of statutory damages go to the jury). The U.S. Supreme Court settled the issue in 1998, in *Feltner v. Columbia Pictures Television, Inc.*, ruling that the defendants were entitled to elect to have a jury determine all aspects of statutory damages. 523 U.S. 340, 342 (1998).

¹⁸ 17 U.S.C. § 504(c)(1).

¹⁹ *Id.* A compilation is defined as a set of multiple preexisting works or pieces of data that are arranged in a manner which creates an original work. *Id.* § 101; see also *Copyright Complications in Compilations, Music, Images*, UNIV. OF WASH., <https://copyrightresource.uw.edu/using-copyright/copyright-complications-in-compilations-music-images/> [<https://perma.cc/8NLX-XNKKX>] (providing examples of compilations, including periodicals, databases, anthologies, and webpages). Moreover, a compilation encompasses any “collective work” that consists of multiple independent works unified into a cohesive whole. 17 U.S.C. § 101; *cf.* *Sullivan v. Flora, Inc.*, 936 F.3d 562, 568 (7th Cir. 2019) (explaining that the U.S. District Court for the Western District of Wisconsin mistakenly identified compilations and collective works as non-overlapping concepts). A copyright of a compilation does not necessarily include copyrights in all the composite elements within the compilation. See e.g., *Circular 14 Copyright Basics: Copyright in Derivative Works and Compilations* 1, U.S. COPYRIGHT OFF. (July 2020),

The significance of the distinction between a compilation or collective work and multiple individual works is most apparent in the context of copyright infringement litigation.²⁰ If the fact finder categorizes the copyright holder's material as a compilation, the copyright holder can only receive one set of statutory damages total instead of one set for each constituent element within the compilation.²¹

When the copyrighted material is comprised of numerous subsidiary components, this makes a significant difference in the overall number of statutory damages the copyright holder can be awarded.²² The Seventh Circuit, in *Sullivan*, considered the question of what test should be applied to make this determination.²³

B. Factual History of *Sullivan v. Flora*

Flora, Inc. (Flora) is a company that produces herbal supplements and other health-related products.²⁴ In 2013, Flora began an advertisement campaign for two of its new products, "7-Sources" and "Flor-Essence."²⁵ Flora subcontracted graphic design artist Amy Sullivan to develop illustrations for two animated promotions of the new products.²⁶ Sullivan produced thirty-three

<https://www.copyright.gov/circs/circ14.pdf> [<https://perma.cc/3PYE-8JD6>] (explaining that a copyrighted anthology of Shakespeare's work does not include a copyright in Shakespeare's individual works).

²⁰ 17 U.S.C. § 504(c)(1); *see infra* notes 38–64 and accompanying text (explaining the different approaches federal circuit courts have adopted to distinguish a compilation from a group of independent works, and their effect on litigation outcomes).

²¹ 17 U.S.C. § 504(c)(1); *see also Sullivan*, 936 F.3d at 568–69 (explaining that Sullivan received thirty-three separate statutory damages instead of the two she would have gotten if her works had been ruled as compilations).

²² *See Sullivan*, 936 F.3d at 565–66 (stating that Sullivan was awarded \$3.6 million in statutory damages because "the jury found infringement on each of the [thirty-three] illustrations," which otherwise would have been at most \$300,000, had her copyrighted material been defined as two compilations).

²³ *See Sullivan*, 936 F.3d at 567–72 (discussing which approach to apply).

²⁴ *Our Story*, FLORA, INC., <https://www.florahealth.com/pages/our-story> [<https://perma.cc/7XV5-GC7V>]. The defendant, Flora, Inc. (Flora), was originally established in 1965 in Burnaby, British Columbia, Canada. *Id.* The company's principal owner Thomas Greither owned a natural foods store in Burlington, Vermont before starting the company. *Id.* Although the company began by selling natural laxatives and herbal teas, it now focuses on selling "cold-pressed, unrefined oils for medicinal use or food preparation." *Id.* Since 1988, the company has expanded into the U.S. market, with a U.S. manufacturing plant in Lynden, Washington. *Id.*

²⁵ *Sullivan*, 936 F.3d at 565. Flor-Essence liquid tea blend, which costs approximately \$33.75, is one of Flora's best sellers. *Our Best Sellers*, FLORA, INC., <https://www.florahealth.com/> [<https://perma.cc/WH45-JUC6>].

²⁶ *Sullivan*, 936 F.3d at 565. Flora enlisted independent production expert Joseph Silver to be the principal developer of the two animated videos, who in turn contracted with Sullivan. *Id.* Sullivan markets herself as being available for projects of all kinds when she is "not lost in the woods or staring at rocks." *About*, AMYLEESULLIVAN, <https://amyleesullivan.com/about> [<https://perma.cc/QTH2-VSSV>].

graphic designs and authorized Flora to use her works exclusively for the two advertising campaigns.²⁷

The graphic designs were not registered copyrights at the time Sullivan initially licensed with Flora.²⁸ Soon after, however, she registered her works under two group copyright applications, one for seventeen of her designs and the other for sixteen designs.²⁹

In 2013, Sullivan discovered that Flora was using her animations to promote products other than those previously agreed to.³⁰ After failed settlement discussions, Sullivan brought a copyright infringement suit against Flora in the U.S. District Court for the Western District of Wisconsin.³¹

As trial approached in district court, Sullivan elected to have the jury award statutory damages pursuant to 17 U.S.C. § 504(a)–(c).³² The parties dis-

²⁷ *Sullivan*, 936 F.3d at 565. Sullivan and Silver entered into two separate licensing agreements on February 15, 2013, and June 3, 2013, for use of Sullivan’s animated works in the “Flora 7-Sources” and “Flor-Essence Video,” respectively. Declaration of Steven P. Fallon re: 26 Motion for Leave to File, Exhibit 5 - Licensing Agreements and Invoice, *Sullivan v. Flora*, No. 15-CV-298 (W.D. Wis. Apr. 14, 2016). Each license allowed Flora to use the works exclusively in a one-minute-and-thirty-second animated advertisement. *Id.* After discovering Flora’s unauthorized use of her works, Sullivan proposed a second set of licensing agreements between both Silver and Flora, which would have required them to pay \$39,000 and \$72,000, respectively. *Id.* Flora and Silver did not agree to either license. *See id.* (showing that Flora and Silver never signed the proposed agreements).

²⁸ *Sullivan*, 936 F.3d at 565–66.

²⁹ *Id.* Before the owner of a U.S. work can bring suit for copyright infringement in federal court, they must attempt to register the mark with the U.S. Copyright Office. *Circular 1 Copyright Basics* 5, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ01.pdf> [<https://perma.cc/RV93-K7JA>] (Sept. 2021). Furthermore, a copyright holder cannot seek statutory damages for infringement unless the infringement occurred after the effective date of registration. *Id.* The sole exception to this, however, is when the work is registered within three months of its publication, in which case the copyright holder can seek statutory damages for infringement prior to its registration. *Id.*

³⁰ *See Sullivan*, 936 F.3d at 565 (noting that it was unclear from the evidential record when exactly Flora began its infringing uses of Sullivan’s works). Sullivan initially became aware of the infringement when Flora released an unauthorized video titled “Floradix” on its website, which contained Sullivan’s illustrations. *See* Complaint ¶ 29, *Sullivan v. Flora*, No. 15-CV-298 (W.D. Wis. May 20, 2015) (showing Flora’s first unauthorized use of Sullivan’s designs). Shortly thereafter, on October 16, 2023, Sullivan sent a letter to Flora informing it of its copyright infringement of her illustrations. *Sullivan*, 936 F.3d at 565–66. Ultimately, Flora used Sullivan’s illustrations in at least five different unauthorized permutations of the initial Flor-Essence video, all of which were produced in different languages for international marketing. *See* Complaint, *supra*, ¶ 53 (stating that Flora copied Sullivan’s works in advertisement campaigns that were released in Canada, China, Greece, Norway, Spain, and the United States).

³¹ *See* Complaint, *supra* note 30, ¶¶ 1, 35, 37 (alleging that Flora’s sole and final settlement offer to Sullivan was \$2,000 for the exclusive rights to all of Sullivan’s animated works used in the advertisements, which Sullivan rejected).

³² *Sullivan*, 936 F.3d at 566. The plaintiff must select their preferred method of damages before final judgment is rendered. 17 U.S.C. § 504(c)(1). Although typically plaintiff is entitled to select the defendant’s profits as damages, the court did not allow Sullivan to select this form of damages. *See generally* Opinion and Order on Damages at 2, *Sullivan v. Flora*, No. 15-CV-298 (W.D. Wis. Apr. 25, 2017) (reasoning that there was no specific sale of a product, thus no nexus to defendant’s profits). This is because the court determined that Sullivan’s works played a minor role in Flora’s advertise-

agreed, however, on the number of separate statutory damages entitled to Sullivan, which hinged on whether each illustration in Sullivan's two collections constituted independent works.³³

The district court held that each illustration in the two collections were separate works entitled to their own statutory damages.³⁴ The Court did so by adopting the IEV Test, which based its determination of damages on whether each illustration had its own copyright life.³⁵ Ultimately, Flora appealed to the Seventh Circuit, arguing that the district court improperly adopted the IEV Test in determining whether Sullivan's illustrations were independent works.³⁶ The Seventh Circuit rejected Flora's contentions, affirming the IEV Test and remanding for a jury proceeding consistent with the test.³⁷

II. THE CIRCUIT SPLIT ON DEFINING ONE STATUTORY WORK

In *Sullivan v. Flora*, the U.S. Court of Appeals for the Seventh Circuit aligned itself with a majority of federal circuit courts by embracing the IEV Test for ascertaining whether the constituent components of a copyrighted material qualify as distinct works eligible for statutory damages.³⁸ The U.S. Court of Appeals for the Second Circuit has opted for an alternative method, the Issuance Test, which hinges on an evaluation of the copyright holder's registration process and marketing strategies to determine the eligibility of composite

ments, making any causal relationship between Sullivan's works and the profits generated from the advertisements speculative at best. *Id.*

³³ *Sullivan*, 936 F.3d at 566. During trial, Flora filed a motion in limine objecting to the appropriateness of statutory damages under 15 U.S.C. § 412, arguing that Flora's infringement occurred prior to when Sullivan registered the relevant works, making statutory damages unavailable. Post-Trial Brief in Support of Flora's Prior Motion for Directed Verdict Regarding Statutory Damages at 2, *Sullivan v. Flora*, No. 15-CV-298 (W.D. Wis. Apr. 21, 2017). Even though Sullivan had not registered her works within the requisite three-month safe harbor period to receive statutory damages for infringement of unregistered works, the court ruled that Flora had waived its right to raise this argument. *See* Opinion and Order Rejecting Defendant Flora Inc.'s Challenge to the Jury's Award of Statutory Damages to Amy Sullivan at 2, *Sullivan v. Flora*, No. 15-CV-298 (W.D. Wis. May 16, 2017) (stating that the appropriate time for Flora to have objected to statutory damages was via a Rule 12(b)(6) or Rule 56 motion).

³⁴ Opinion and Order on Statutory Damages at 2, *Sullivan v. Flora, Inc.*, No. 15-CV-298 (W.D. Wis. Apr. 17, 2017).

³⁵ *See id.* (acknowledging the circuit split on when to award multiple statutory damages, yet stating the split was irrelevant because Sullivan's works were illustrations and not compilations).

³⁶ *See* Brief of Defendant-Appellant Flora, Inc. at 47–55, *Sullivan v. Flora, Inc.*, 18-2534 (7th Cir. Sept. 17, 2018) (arguing that the U.S. Court of Appeals for the Seventh Circuit should adopt the statutory damages analysis of the Second and Fourth Circuits).

³⁷ *See Sullivan*, 936 F.3d at 572 (holding that the district court erred in not putting the IEV Test to the jury).

³⁸ *See Sullivan v. Flora, Inc.*, 936 F.3d 562, 571 (7th Cir. 2019) (stating that the U.S. Court of Appeals for the Seventh Circuit would adopt "the approach of the First, Ninth, Eleventh, and D.C. Circuits").

works for statutory damages.³⁹ Section A of this Part analyzes the IEV Test.⁴⁰ Section B discusses the issuance test.⁴¹

A. The IEV Test

In 1976, in *Walt Disney Co. v. Powell*, the U.S. Court of Appeals for the D.C. Circuit was the pioneering circuit to explicitly adopt the IEV Test.⁴² In *Walt Disney*, the defendant was the owner of a wholesale souvenir business that sold unlicensed t-shirts to tourists, bearing various depictions of Mickey and Minnie Mouse.⁴³ Disney sued, seeking statutory damages against the defendant for infringing six different copyrighted poses of the characters.⁴⁴ The D.C. Circuit held that Disney was only entitled to two statutory damages awards, one for Mickey and one for Minnie.⁴⁵ The court explained that both Mickey and Minnie had “separate economic value” and their own “copyright lives,” but the individual poses of them did not.⁴⁶

Following *Walt Disney*, in 1993, in *Gamma Audio & Video, Inc. v. Ean-Chea*, the U.S. Court of Appeals for the First Circuit adopted the IEV Test, ex-

³⁹ See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140–42 (2d Cir. 2010) (holding that multiple songs, copyrighted in a group registration and commercialized together as an album, constituted one individual work). The term “issuance test” was first coined in a law review article as the name of the Second Circuit’s approach to defining multiple works. 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).

⁴⁰ See *infra* notes 42–56 and accompanying text.

⁴¹ See *infra* notes 57–65 and accompanying text.

⁴² See *Walt Disney Co. v. Powell*, 897 F.2d 565, 569–70 (D.C. Cir. 1990) (stating that separate works cannot be works unless “they have ‘separate economic value, whatever their artistic value’” (quoting *RSO Recs., Inc. v. Peri*, 596 F.Supp. 849, 862 n.16 (S.D.N.Y.1984))). Technically, the *Walt Disney* court never used the term “independent economic value,” but, nevertheless, applied the test in all but name. See *id.* at 570 (referring to its test as the “separate economic value” test).

⁴³ *Id.* at 567.

⁴⁴ See *id.* (noting that the District Court for the District of Columbia awarded Disney six different awards of \$15,000 for the six copyrights). After nearly a century of copyright protection, as of January 1, 2024, Disney’s original copyrighted version of Mickey Mouse, Steamboat Willie, passed into the public domain. Jennifer Jenkins, *Mickey, Disney, and the Public Domain: A 95-Year Love Triangle*, DUKE LAW, <https://web.law.duke.edu/cspd/mickey/> [<https://perma.cc/K9T3-RQNH>]. Nevertheless, there remain serious concerns that Disney will be able to use its trademark rights in Mickey Mouse to prevent the public from taking advantage of the now uncopyrighted Mickey. *Id.*

⁴⁵ *Walt Disney*, 897 F.2d at 570. The U.S. Court of Appeals for the D.C. Circuit, in rejecting the district court’s reasoning, emphasized that two of the copyrighted poses, which were from the movie “Steamboat Willie,” could not have value in themselves, but rather in the copyrightable expression of the characters. *Id.* at 570 n.10.

⁴⁶ *Id.* Ironically, the court in *Walt Disney Co.* imported the term “copyright life” from the Second Circuit’s decision in *Robert Stigwood Group, Ltd. v. O’Reilly*, which has since disavowed the IEV Test. *Walt Disney Co.*, 897 F.2d at 569 n.8 (quoting *Robert Stigwood Group, Ltd. v. O’Reilly*, 530 F.2d 1096, 1105 (2d Cir.1976)).

cept this time in the context of a copyrighted movie series.⁴⁷ In *Gamma Audio*, the plaintiff was the exclusive licensee of the rights to dub a television program into Cambodian and distribute it to several states within the United States.⁴⁸ The defendant operated two video rental stores and sold four episodes of the copyrighted program without authorization.⁴⁹ Ultimately, the First Circuit held all four episodes had independent “copyright li[ves]” because customers rented them separately, and each episode was produced independently.⁵⁰

More recently, in a case adjacent to *Sullivan*, the U.S. Court of Appeals for the Ninth Circuit embraced the IEV Test when faced with the peculiar issue of mass copying on the internet.⁵¹ In 2019, in *VHT, Inc. v. Zillow Group*, VHT, the largest professional real estate photography company in the United States, sought statutory damages on thousands of its copyrighted home photographs

⁴⁷ See *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116–17 (1st Cir. 1993) (explaining that defining a “work” for purposes of the statutory damages provision of the 1976 Act is a functional test, which focuses on whether each, individual expression has “independent economic value”).

⁴⁸ See *id.* at 1109 (stating that Television Broadcasts Limited (TVB), a producer of Chinese language programs based out of Hong Kong, gave plaintiff Gamma Audio the exclusive rights to distribute the television shows *Jade Fox* and *Hunters Prey* in thirty-seven states). TVB is the largest Chinese television program provider in the world, producing Chinese language series translated to various Asian languages. See *TVB USA Official Website*, TVB (USA), <http://www.tvbusa.com/> [https://perma.cc/TF33-XE6P] (listing various current and upcoming episodes in multiple Asian languages). The show *Jade Fox* was part of the Chinese “Wuxia” movie genre, which focuses on the adventures of heroes that perform kung-fu and other forms of martial arts. See Ced Yong, *A Beginner's Guide to Chinese Wuxia*, OWLICATION, <https://owlcation.com/humanities/A-Beginners-Guide-to-Wuxia> [https://perma.cc/2GBW-7WY4] (Jan. 12, 2024) (stating that Wuxia is a “Chinese pop-fiction genre,” which involves a Chinese martial artist, otherwise known as a “pugilist,” and takes place “between the Tang and middle Ching dynastic periods”).

⁴⁹ See *Gamma Audio*, 11 F.3d at 1109 (stating that defendant Ean-Chea’s infringement was discovered when a Gamma Audio employee went into Ean-Chea’s store in Lowell, Massachusetts and rented the *Jade Fox* episodes). Ean-Chea had previously been a licensed distributor of TVB’s Cambodian language programs in the United States, but his license was not renewed by TVB and instead given to Gamma Audio. *Id.* Interestingly, Lowell is home to the second highest number of Cambodians in the country, due in large part to the influx of Cambodian immigrants to the town following the Cambodian Genocide of the 1970s. Dan Adams, *Lowell Monument Marks Cambodians’ Trials, Arrival*, BOS. GLOBE (June 9, 2014), <https://www.bostonglobe.com/metro/2014/06/08/monument-lowell-cambodian-community-past-and-its-progress/4YcAuLibteDmMoVyJqaMqM/story.html> [https://perma.cc/CZ6G-XW3D].

⁵⁰ *Gamma Audio*, 11 F.3d at 1117. In reaching its conclusion, the U.S. Court of Appeals for the First Circuit explicitly rejected the U.S. District Court for the District of Massachusetts’ reasoning that the television shows were a compilation because (1) the plaintiff only distributed the episodes in complete sets and (2) the copyrights in all four episodes were registered in one application. *Id.* The First Circuit rejected the first argument because the distributor’s decision to sell or rent in sets has no bearing on whether an episode can “stand alone.” *Id.* Moreover, it rejected the second argument because it found no language in either the statute or the regulations that makes a copyright holder’s registration method relevant to the inquiry of defining a work. *Id.*

⁵¹ See *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 738, 747 (9th Cir. 2019) (characterizing the case as involving an internet-based facility provider that allows users to post content); Complaint, *supra* note 30, ¶¶ 29, 38, 53 (noting that Flora’s infringement involved posting Sullivan’s illustrations in advertisements throughout the internet).

that Zillow posted in its listings.⁵² The Ninth Circuit held that independent economic value “informs [the] analysis” of whether each photo was a work, and remanded to the district court to issue a supplemental jury instruction that explicitly asked whether the photographs were a compilation.⁵³

Finally, the Seventh Circuit, in adopting the IEVT Test, echoed the sentiments of its sister circuits, emphasizing that district courts need to take a holistic approach, which evaluates whether each copyrighted work can sustain its own “copyright life.”⁵⁴ Simultaneously, the court repudiated the issuance test for constraining copyright holder’s available remedies based on their registration method and subsequent public commercialization.⁵⁵ Currently, the Eleventh Circuit has joined the D.C., First, Seventh, and Ninth Circuits in adopting the IEV Test, which has created a majority emphasizing that Congress did not intend to constrain a copyright holder’s available remedies based on the procedural nuances of their copyright application.⁵⁶

⁵² See *VHT*, 918 F.3d at 730, 735–36 (noting that VHT initially alleged infringement of 28,125 photos). VHT offers numerous services to consumers, including interior photography, virtual floor plans, and drone photography. *Services*, VHT, <https://vht.com/services/our-services> [<https://perma.cc/FY5U-S3U9>]. Importantly, VHT emphasizes that “[t]he first showing is NOT in the home, it is online.” *Id.*

⁵³ *VHT*, 918 F.3d at 747–48. It is arguable that the *VHT* court adopted a more nuanced version of the test, which conceptualized a work having independent economic value and being part of a compilation as independent concepts. See *id.* (noting that independent economic value was not dispositive of the photo being a work); see also *infra* notes 83–84 (explaining that having a bifurcated independent economic value analysis is desirable).

⁵⁴ *Sullivan v. Flora, Inc.*, 936 F.3d 562, 571–72 (7th Cir. 2019); see also *Gamma Audio*, 11 F.3d at 1116 (explaining that irrespective of individual copyright protections for various items, the central inquiry for defining “distinct works” is whether each item can survive its “own copyright life” (internal quotations omitted)).

⁵⁵ See *Sullivan*, 936 F.3d at 570 (stating that the issuance test has a “limiting effect” because it penalizes the copyright holder for taking advantage of the group registration process made available by 17 U.S.C. § 408(c)(1)). The *Sullivan* court emphasized the negative incentivization the issuance-test approach creates by forcing copyright holders to go through the tedious and unnecessary process of filing separate registration applications for large volumes of items, instead of utilizing the more efficient group registration method as Congress intended. See *id.* (criticizing the U.S. Court of Appeals for the Second Circuit for putting “dispositive weight” on the artist’s “bundling of songs”). Some scholars argue this issuance test defeats the goal of copyright law and incentivizes infringement of compilations by shielding infringers from more than one award of statutory damages. See Vanessa Yu, *Calculating Statutory Damages in Copyright Infringement Cases: What Constitutes “One Work?”* 58 SANTA CLARA L. REV. 375, 393–94 (2018) (stating that an infringer, otherwise intending to illegally download one copyright song online, is encouraged to download the entire album under the issuance test).

⁵⁶ See *Sullivan*, 936 F.3d at 572 (holding multiple animated illustrations that were copyrighted and licensed as a group could be independent works); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 748 (9th Cir. 2019) (holding that the group manner of registration is relevant to the inquiry of independent economic value, but that a collection of thousands of photographs could be independent works); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768–70 (11th Cir. 1996) (holding that multiple episodes of a television program constituted as independent works); *Walt Disney Co. v. Powell*, 897 F.2d 565, 570 (D.C. Cir. 1990) (holding that T-shirts bearing various copyrighted poses of Minnie and

B. The Issuance Test

The Second Circuit has diverged by embracing an alternative approach centered around how copyright holders present their material, whether as a collective entity or as individual works.⁵⁷ The issuance test prioritizes the copyright holder's choice to register and promote their material as a group, rather than considering the copyright viability of each constituent component.⁵⁸

In 2010, in *Bryant v. Media Right Productions, Inc.*, the Second Circuit adopted the issuance test.⁵⁹ In *Bryant*, the plaintiff sued their media marketing company for distributing unapproved copies of their two albums.⁶⁰ The Second Circuit held that the plaintiffs were only entitled to two statutory damage awards because an album is a classic example of a compilation, and the plaintiffs chose to market their songs as an album rather than individual hits.⁶¹

The Second Circuit reasoned that Congress did not intend for the 1976 Act's statutory damages provision to necessitate an exhaustive economic anal-

Mickey Mouse were not independent works because only Mickey and Minnie have independent economic value).

⁵⁷ See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 142 (2d Cir. 2010) (adopting the issuance test). Prior to its ruling in *Bryant*, the Second Circuit appeared to be charting course towards adopting the IEV Test, with at least two decisions holding that a television series and an album were eligible for multiple awards of statutory damages for each individual episode and song, respectively. See *WB Music Corp. v. RTV Comm. Grp., Inc.*, 445 F.3d 538, 541 (2d Cir. 2006) (holding each episode of a television series was an independent work); *Twin Peaks Prods., Inc. v. Publ'ns Int'l Ltd.*, 996 F.2d 1366, 1381 (2d Cir.1993) (holding that each song on a CD was an independent work). Nevertheless, in *Bryant*, the court distinguished its two prior decisions on grounds that they had focused on whether the *copyright holder* and not the *defendant* had issued the works in a compiled format. See 603 F.3d at 141 (stating that in *Twin Peaks*, the defendant chose to print eight separately printed teleplays in one book, and in *WB Music*, the defendant chose to issue thirteen songs in an album (internal citations omitted)).

⁵⁸ See Riser, *supra* note 39, at 840 (explaining that the issuance test's emphasis on the manner a copyrighted material is issued resulted in a departure from the interpretation of the word "compilation" that was already adopted by most other circuits). Some within the scholarly community have advanced a constitutional due process argument in favor of the issuance test, claiming that the IEV Test enables a grossly disproportionate award of statutory damages in comparison to the actual damages experienced by the copyright holder. Pamela Samuelson & Ben Sheffner, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. 53, 55 (2009).

⁵⁹ *Bryant*, 603 F.3d at 142.

⁶⁰ See *id.* at 138 (stating that appellants owned their own independent record label named Gloryvision Ltd., which produced the appellants' only two albums, *Song for Dogs* and *Song for Cats*). The Gloryvision contract with the appellee, Media Right Production (Media Right), authorized Media Right to be the sole marketer of the two albums in exchange for 20% of the sales' proceeds. *Id.* In turn, Media Right entered into a licensing agreement with music wholesaler Orchard Enterprises to distribute physical copies of the album. *Id.* Orchard then breached the agreement when it began selling digital copies of the two albums, triggering the infringement suit. *Id.* at 138–39.

⁶¹ *Bryant*, 603 F.3d at 140–42. The U.S. District Court for the Southern District of New York also found that both albums were compilations. *Bryant v. Europadisk, Ltd.*, No. 7:07-cv-03050, 2009 WL 1059777, at *7 (S.D.N.Y. Apr. 15, 2009). Although the district court did not explicitly apply the IEV Test, it emphasized that the plaintiffs' songs generated a mere \$578 total in sales. *Id.* at *4.

ysis of individual elements in a compilation.⁶² This stance was firmly rooted in the court's interpretation of the House Report on the 1976 Act, which underscores that a compilation exists independently of the copyright status of its constituent items.⁶³ Instead, the court looked to whether the copyrighted material meets the conventional definition of a compilation.⁶⁴ This rigid formalism is exactly why the more functional IEV Test is desirable.⁶⁵

III. A LESS PUNITIVE INDEPENDENT ECONOMIC VALUE TEST

The IEV Test recently adopted by the U.S. Court of Appeals for the Seventh Circuit in *Sullivan v. Flora*, offers a nuanced approach to defining an “independent work” in line with Congress’s intent within 17 U.S.C. § 504(c)(1).⁶⁶ It achieves this by providing a framework for a detailed analysis of each copyright element’s individual viability and simultaneously disregarding extraneous factors.⁶⁷ Section A of this Part explains how the IEV Test is congruent with the unique meaning Congress intended for independent work in the statutory

⁶² See *Bryant*, 603 F.3d at 140, 142 (stating that 17 U.S.C. § 504(c)(1) does not allow an exception for subsidiary elements of compilations with independent economic value). The U.S. Court of Appeals for the Fourth Circuit seems to have more hesitantly embraced the issuance test, with a note in dicta suggesting that under certain conditions, multiple works within one registration application may qualify for separate statutory damages. See *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 285 (4th Cir. 2003) (stating that one registration “does not bar” multiple statutory damage awards).

⁶³ See *Bryant*, 603 F.3d at 142 (giving controlling authority to Congress’s language in the House Report on the 1976 Act, stating that a compilation exists even when copyrighted material is “regarded as independent works for other purposes” (quoting H.R. REP. NO. 94-1476, at 162 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5778)). This interpretation of Congress’s intent behind § 504(c)(1) comes into direct tension with the circuits that have adopted the IEV Test and reaches the crux of the underlying arguments between the two approaches. Compare *id.*, with *Sullivan v. Flora, Inc.*, 936 F.3d 562, 571 (7th Cir. 2019) (stating that Congress intended the courts to give more “fulsome effect” to the distinction it drew between “one work” and a “compilation” in the context of § 504(c)(1)).

⁶⁴ See *Bryant*, 603 F.3d at 140 (emphasizing that a copyrighted material must be categorized as a “compilation” anytime it “results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds” (quoting H.R. REP. NO. 94-1476, at 162)). See generally *Compilation*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining compilation as “[a] literary production, composed of the works of others and arranged in a methodical manner”).

⁶⁵ See *infra* notes 66–88 (explaining why the IEV Test is the better approach).

⁶⁶ See *Sullivan v. Flora, Inc.*, 936 F.3d 562, 568–69 (7th Cir. 2019) (explaining that the relevant distinction in the 1976 Act is whether Sullivan’s thirty-three illustrations are thirty-three works, not whether they are a compilation or collective work). The goal of statutory damages in the 1976 Act is to be both compensatory and deterrent, and in the case of willful infringement, punitive as well. See Betsetlot A. Zeleke, *Federal Judges Gone Wild: The Copyright Act of 1976 and Technology, Rejecting the Independent Economic Value Test*, 55 HOW. L.J. 247, 255 (2011) (noting that the 1976 Act expressly omitted language from the Copyright Act of 1909, which prohibited the use of statutory damages to serve penal purposes); see also Riser, *supra* note 39, at 834 (stating that the potential for a large disparity in the degree of the plaintiff’s harm and the size of the damages award under the IEV Test is a result of the law’s deliberate deterrent effect).

⁶⁷ See discussion *infra* Part III.B; see also *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) (stating that a work must be “in itself . . . viable” in order to qualify for a separate award of statutory damages (internal quotations omitted)).

damages provision of the 1976 Act.⁶⁸ Section B outlines why the test's objective and particularized analysis is preferable to that of the issuance test.⁶⁹ Section C explains how the IEV Test could be further improved with specific jury instructions and a Fifth Amendment constitutional due process defense.⁷⁰

A. Congress Intended to Give Unique Meaning to the Term "Independent Work" and not "Compilation" in Section 504(c)(1)

Circuits adopting the IEV Test have effectively resolved the statutory ambiguity surrounding an "individual work" in Section 504(c)(1) by utilizing Congress's intent.⁷¹ Most instructive to this point is language in the Conference Report on the 1976 Act, which explains that a compilation is one work irrespective of whether the constituent elements could be individual works for other purposes.⁷² Importantly, this clarifies the complexity of the provision, as compilations are required to consist of multiple individual works, a requirement that contradicts the definition of a compilation in Section 504(c)(1).⁷³

Indeed, Congress intended to create an exception in Section 504(c)(1) to the conventional copyright usage of the term "independent work" to delineate

⁶⁸ See *infra* notes 71–75 and accompanying text.

⁶⁹ See *infra* notes 76–81 and accompanying text.

⁷⁰ See *infra* notes 82–88 and accompanying text.

⁷¹ See *Sullivan v. Flora, Inc.*, 936 F.3d 562, 571 (7th Cir. 2019) (explaining that Congress wanted to create a framework which provided a substantive analysis of copyrighted photos and songs, which are commonly infringed collectively (e.g., an album), yet the market has only assigned value to a fraction of the collection); see also *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), 124 HARV. L. REV. 851, 854 (2011) (explaining that the IEV Test better furthers the U.S. Constitution's directive to protect only the author's "original intellectual conception[.]"). As a threshold matter in any dispute of statutory interpretation, there must be legitimate ambiguity within the statute before congressional intent can be evaluated. See *King v. Burwell*, 576 U.S. 473, 486, 492 (2015) (providing that courts only apply the canons of statutory interpretation when the statutory language is ambiguous; otherwise, the statute will be interpreted as plainly written).

⁷² H.R. REP. NO. 94-1476, at 162 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5778. See generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863 (1992) (explaining that conference reports can be used as a dictionary to interpret ambiguous language within a statute).

⁷³ Compare 17 U.S.C. § 101 (stating that "[a] 'collective work' is a work . . . in which a number of . . . independent works . . . are assembled into a collective whole" (emphasis added)), and *id.* (stipulating that the "[t]he term 'compilation' includes collective works"), with *id.* § 504(c)(1) (stating that "all the parts of a compilation or derivative work constitute one work"). It is apparent that a compilation can be a collective work and a collective work comprises multiple independent works, meaning that a compilation can be comprised of multiple independent works. See *id.* § 101 (providing relevant statutory definitions for these terms); *id.* § 504(c)(1) (same). This is in direct contradiction to § 504(c)(1)'s requirement that a compilation can only be "one work." See *id.* § 504(c)(1) (stipulating that "[a]ll the parts of a compilation or derivative work constitute one work").

the term from a compilation.⁷⁴ This then empowers federal courts to engage in a substantive assessment of each constituent element's ability to endure its "own copyright life."⁷⁵

B. The Independent Economic Value Test Is the More Objective and Equitable Analysis

Although congressional intent does not provide further guidance on how to conduct the substantive analysis for statutory damages, the IEV Test provides an objective and holistic analysis of the viability of each work for damages purposes.⁷⁶ The majority's approach is particularly effective by focusing on two tangentially related but distinct aspects of the work: (1) the ability of

⁷⁴ See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140–41 (2d Cir. 2010) (citing H.R. REP. NO. 94-1476, at 162 (1976)) (stating that because a "compilation" deductively includes an "independent work" based on § 101, an album, which otherwise may constitute independently copyrighted songs, "falls within the Act's expansive definition of compilation"). The U.S. Court of Appeals for the Second Circuit's faulty interpretation of Congress's guidance in the House Report is largely predicated on an underappreciation of the term "preexisting" within the definition of a compilation in § 101. See *Bryant*, 603 F.3d at 140–41 (stating that "[a]n album is a collection of preexisting materials"). Indeed, the term "preexisting" was never meant to encompass a typical album or any other group of copyrighted items that were originally produced by the author for the express purpose of being put into a collection. See *Circular 14 Copyright Basics* 1, *supra* note 19, at 1–2 (listing examples of "compilations" and explicitly omitting an album). To illustrate the nuance in the concept of a "collection of preexisting works," take a normal album and an album comprised of a singer's greatest hits from a certain period; the former is not a compilation because every song was made with the intent to be in a collection, whereas the latter is a compilation because it is a collection of unrelated pre-existing songs. See *id.* (listing "[a] collection of sound recordings of the top hits of 2004" as a compilation); Riser, *supra* note 39, at 843 (noting that the Second Circuit's interpretation is incongruent with the dictionary definition of compilation, which indicates that "a compilation involves putting together 'materials gathered from several sources'" (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 385 (3d ed. 1996))).

⁷⁵ See *Sullivan*, 936 F.3d at 571 (explaining that "separate copyrights are not distinct 'works' unless they can live their own copyright life" (quoting *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993))). The idea of a "copyright life" is somewhat misleading in that the literal copyright status of the work is not part of the inquiry, as all works must be copyrighted to receive separate statutory damages. See *id.* (explaining that the IEV Test evaluates whether "*copyrighted materials*" have distinct viable copyright lives (emphasis added) (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 570 (D.C. Cir. 1990))). Instead, the inquiry is more akin to the concept of "utility" within the patent context in that it evaluates whether an individual copyrighted item is valued in some form by society—the marker of this being economic value. See 35 U.S.C. § 101 (stating that an invention must be "useful" to be patentable); *Brenner v. Manson*, 383 U.S. 519, 534 (1966) (explaining that the central inquiry for patent utility "is the benefit derived by the public").

⁷⁶ See *Sullivan*, 936 F.3d at 571 (explaining that the statute provided limited assistance in defining a "work"); Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1113 (2017) (arguing that this missing definition of a "work" is a "feature and not a bug in our copyright law" because it allows for a flexible approach that promotes "socially desirable copyright policy"). Melville Nimmer, a leading scholar in copyright law, had suggested that Congress explicitly define a "single work" within the statute, but this approach was ultimately rejected. Kaminski & Rub, *supra*, at 1111 (citing H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION 145 (Comm. Print 1964)).

the work to be profitable in a standalone manner, and (2) said profitability not being derived from the works association with other copyrighted material.⁷⁷

The first component of the analysis affirms that an objective third party—the market—sees value in the work, whereas the second component ensures that value of the work is derived from its own merit and not as a trivial sidekick to another work.⁷⁸ Collectively, this ensures the work can sustain its own copyright life and is worthy of an individual assessment of statutory damages.⁷⁹

Conversely, the issuance test misplaces controlling emphasis on the copyright holder's decision to register and market their copyrighted material as a group, allowing registrants to manipulate the scope of their available statutory damages.⁸⁰ The IEV Test, however, attempts to tether the availability of statutory damages to the *actual damages* incurred on the work by including an assessment of individual economic viability.⁸¹

⁷⁷ See *Walt Disney*, 897 F.2d at 570 (holding that the defendant only infringed the two works of Minnie and Mickey Mouse, even though the defendant sold shirts with six different copyrighted poses of the two mice). *Walt Disney* illustrates a scenario where factor one of the two-part analysis above is met but factor two is not. See *id.* at 570 n.10 (stating that the defendant profited off copyrighted material with “distinct economic value,” however, the value was derived exclusively from its association to the individual copyrights of Mickey and Minnie). Conversely, some courts have included subfactors that attempt to emphasize the first prong of the analysis above. See *Sullivan v. Flora, Inc.*, 63 F.4th 1130, 1141 (7th Cir. 2023) (noting on the appealed remand that the structure of invoices, method of registration, content's specificity, and nature of marketing efforts are all relevant to the inquiry of independent economic value).

⁷⁸ See *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 747–48 (9th Cir. 2019) (emphasizing that sperate economic value is only one factor in determining whether a work is independent).

⁷⁹ See *Sullivan*, 936 F.3d at 572 (explaining that sellers of copyrighted material will typically allow interested parties to buy only parts or sections of the entire material, which in turn enables the market to assign value accordingly).

⁸⁰ See Tyler Laurence, “Wake Up, Mr. West!”: Distinguishing Albums and Compilations for Statutory Damages in Copyright Within a Streaming-Centric Music Economy, 26 U. MIA. BUS. L. REV. 85, 94 (2018) (explaining that the issuance test is not conducive to the modern streaming era, which has “blur[ed] the lines between traditional albums, playlists, and audiovisual bundles”). For example, many record labels will release a series of singles over a year and then re-package them as extended plays (EPs) and long plays (LPs) because the streaming services will still count the earlier individual song sales as album sales, which have a significantly higher royalty. See *id.* (noting that Drake's “Hotline Bling” was released as a single in July of 2015 but was not repackaged into his album *Views* until nearly one year later).

⁸¹ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (emphasis added) (stating that statutory damages must have a “reasonable relationship” to the actual compensatory damages). See generally Colin Morrissey, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059, 3102–05 (2010) (discussing various factors that can be applied to determine if there is a sufficient nexus between statutory and actual damages).

*C. Improved Jury Instructions and a Constitutional Due Process Defense:
The Key to an Even Better Independent Economic Value Test*

Nevertheless, a key criticism of the IEV Test is that it lacks effectual safeguards to prevent juries from finding excessive amounts of independent works in cases with large volumes of copyrighted material.⁸² One way to address this is through a jury instruction comprised of two parts, which instructs the jury to determine (1) whether each work has a multi-customer market *and* (2) if so, whether that market is derived from association with another work.⁸³ This will force the jury to deliberate through the nuances of the test and remove from it the responsibility of discerning the ambiguous notion of independent economic value unassisted.⁸⁴

⁸² See 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, 525–26 (2004) (arguing that large record companies are taking advantage of the multiple statutory damages available under the IEV Test to target small time infringers who have illegally downloaded and shared thousands of songs). Even when the minimum \$750 statutory damage award is given per work, the total of statutory damages can amount to millions of dollars when there are thousands of songs. *Id.* This leads to instances where the infringer, who otherwise would be facing a few thousand dollars in actual damages, is forced to accept excessively large settlements. *Id.*; see also Laurence, *supra* note 80, at 101 (stating that Congress “intend[ed] to limit ‘exorbitant’ statutory damages” when it switched from a per-infringement to per-work statutory damages formula with the 1976 Act, and the IEV Test could operate in contrary to this intention).

⁸³ See *supra* notes 77, 82 and accompanying text (explaining the two main components of the IEV Test and one potential weakness with the test). A potential jury instruction would proceed as follows: If you find that the copyrighted item has a market comprised of consumers other than the infringer *and* if so, that market is not derived from an association with another copyrighted item, you *may* find that the copyrighted item is a work with independent economic value. See Morrissey, *supra* note 81 (explaining why there needs to be safeguards on statutory damage awards). The first part of the instruction emphasizes a *multi-consumer* market to prevent excessive damages in the instance that the copyrighted item was made significantly specialized for the infringer, and it is highly unlikely any other consumer would have purchased it. See Opinion and Order on Damages, *supra* note 32, at *2 (explaining that actual damages are likely minimal when the copyrighted material is only used in an infringing advertisement as opposed to being sold on a tangible infringing product, which is likely to be purchased by multiple consumers); cf. *Sullivan v. Flora, Inc.*, 936 F.3d 562, 567 (7th Cir. 2019) (noting that Sullivan was awarded \$3,600,000 in statutory damages, yet the jury only found \$143,500 in actual damages); accord *Tang v. Putruss*, 521 F. Supp. 2d 600, 610 (E.D. Mich. 2007) (holding that “photographs of models wearing [the d]efendants’ dress line is of no economic value to [the p]laintiff”). It is important to note there would be a separate jury instruction asking the jury to determine if any of the works were part of a compilation. See *infra* note 84 and accompanying text (explaining the U.S. Court of Appeals for the Ninth Circuit’s adoption of separate instructions for determining a “work” and a “compilation”).

⁸⁴ See *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 747 (9th Cir. 2019) (holding that the U.S. District Court for the Western District of Washington’s instruction to jury, which only asked whether each item had independent economic value, was overly ambiguous because it failed to separately ask whether the items were collectively a compilation). The ambiguity for a jury in defining “independent economic value” is highlighted by the divergence among circuits in their recommended factors for the jury to consider. Compare *id.*, with *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1277 (11th Cir. 2015) (stating that the manner of registration is a relevant but non-dispositive factor for jury to consider).

Finally, a Fifth Amendment constitutional due process defense predicated on excessively punitive civil damages can serve as a last line of defense for the defendant if the two-part jury instruction is not able to prevent an egregious award of statutory damages.⁸⁵ Although a seemingly radical concept at first pass, in 2022, in *Wakefield v. ViSalus, Inc.*, the U.S. Court of Appeals for the Ninth Circuit adopted this exact defense in the context of class action lawsuits.⁸⁶

Instructively, the *Wakefield* court provided multiple factors for trial judges to evaluate the constitutionality of an aggregate statutory damages award.⁸⁷ This defense could be seamlessly incorporated into the trial by allowing the defendant to raise it on a motion for remittitur following the jury's verdict, in which event the trial judge would evaluate the *Wakefield* factors.⁸⁸

⁸⁵ U.S. CONST. amend. V; see *supra* note 58 and accompanying text (explaining that excessively punitive statutory damages may violate the Due Process Clause by being overly criminal in nature). Compare R. Collins Kilgore, *Sneering at the Law: An Argument for Punitive Damages in Copyright*, 15 VAND. J. ENT. & TECH. L. 637, 669 (2013) (suggesting that the Due Process Clause would limit statutory damages in copyright “to a 1:1 or even a 2:1 compensatory-to-punitive-damages ratio—the latter when there was only one reprehensibility factor present” (internal quotations omitted)), with Morrissey, *supra* note 81, at 3102 (arguing that the ratio between statutory and actual damages should not be dispositive and instead, courts should adopt a holistic approach, which evaluates whether the statutory damages are “severe and oppressive” or “obviously unreasonable” (citation omitted)).

⁸⁶ See *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1123 (9th Cir. 2022) (holding that the market-ing-company defendant was entitled to a constitutional due process defense against a nearly one-billion-dollar award of statutory damages by the jury). In *Wakefield*, the jury awarded the class of plaintiffs the statutory minimum of \$500 for each of the nearly two million illegal robocalls made by the defendant. *Id.* at 1113. The U.S. Court of Appeals for the Ninth Circuit emphasized that while typically there should be a presumption that legislatively enacted statutory damage ranges are constitutional, in the aggregate they may unconstitutionally exceed the punitive goals of the statute. See *id.* at 1123 (stating that a trial court must contemplate the “magnitude” of the aggregate award of statutory damages considering the relevant statutory “goals of compensation, deterrence, and punishment”). See generally Samuelson & Wheatland, *supra* note 2, at 497 (arguing that copyright damages are no more difficult to calculate than other forms of damages that regularly receive constitutional due process review (e.g., injury to reputation, pain and suffering, etc.), and thus, deserve the same scrutiny).

⁸⁷ *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1123 (9th Cir. 2022). The court embraced seven non-dispositive factors: (1) the substantive or technical nature of the violations, (2) the extent of the defendant's culpability, (3) the awards in similar cases, (4) the amount awarded to each plaintiff, (5) the total award, (6) the extent of defendant's culpability, and (7) the circumstances of the case. *Id.*

⁸⁸ See Casey Hultin, *Remittitur and Copyright*, 28 BERKELEY TECH. L.J. 715, 740 (2013) (stating that when a jury issues a copyright infringement verdict against a peer-to-peer file sharer, the court should determine if the damages “bare some relationship” to the demonstrable harm, and if not, the judge should grant remittitur and lower the damages appropriately). District courts in peer-to-peer file sharing copyright infringement cases have been split on the appropriateness of granting remittitur on statutory damage awards. Compare *Sony BMG Music Ent. v. Tenenbaum*, No. CIV.A. 07-11446-RWZ, 2012 WL 3639053, at *1, *3 (D. Mass. Aug. 23, 2012) (holding that a jury award of \$675,000 in statutory damages for sharing files involving thirty different works did not merit a grant of remittitur), *aff'd*, 719 F.3d 67 (1st Cir. 2013), with *Capitol Recs. Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050, 1061 (D. Minn. 2010) (holding that remittitur was appropriate for jury award of \$1,920,000 for infringement of twenty-four songs (\$80,000 per song)), *vacated on other grounds*, 692 F.3d 899 (8th Cir. 2012). Technically, a trial judge is able to lower the jury's verdict on remittitur without addressing the constitutionality of the verdict. See *Sony BMG Music Ent. v. Tenenbaum*, 721 F. Supp. 2d 85, 93 (D. Mass. 2010) (stating that remittitur is a common law doctrine, which is distinct

CONCLUSION

In 2019, in *Sullivan v. Flora*, the U.S. Court of Appeals for the Seventh Circuit expressly adopted the IEV Test for assessing whether multiple elements within a copyrighted material constituted “individual works” eligible for separate statutory damages. In doing so, the Seventh Circuit joined a majority of federal circuit courts to recognize that each constituent copyright element requires a particularized analysis of its capacity to survive its own copyright life. In comparison, the U.S. Court of Appeals for the Second Circuit’s decision in *Bryant v. Media Right Productions, Inc.*, has adopted a more limited approach that focuses exclusively on the copyright holder’s issuance and commercialization of their works. Absent U.S. Supreme Court guidance in interpreting a “work,” circuits that have yet to address this issue should adopt a refined version of the IEV Test, which includes enhanced jury instructions and a constitutional due process defense to protect against excessive awards of statutory damages.

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from reducing an unconstitutionally excessive punitive damage award), *aff’d in part, vacated in part, rev’d in part*, 660 F.3d 487 (1st Cir. 2011). This avenue, however, requires the plaintiff to accept the reduced damages, or they are entitled to a new trial. *See id.* (stating that remittitur is more difficult because the plaintiff must cooperate).