NYSBA SUMMER 2013 | VOL. 24 | NO. 2

Entertainment, Arts and Sports Law Journal

A publication of the Entertainment, Arts and Sports Law Section
of the New York State Bar Association

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Registering Multiple Musical Works in a Single Copyright Registration

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A Reply to: Does Registering Multiple Works in a Single Application Limit Remedies for Copyright Infringement? (*EASL Journal* (Fall/Winter 2012) (Vol. 23, No. 3))

Introduction

The article entitled "Does Registering Multiple Works in a Single Application Limit Remedies for Copyright Infringement," appearing in the Fall/Winter 2012 *EASL Journal*, written by Steve Gordon, Esq., suggests that "if a single application for more than one work is properly completed, visual artists, writers, composers, recording artists and other creators can retain all the legal remedies afforded by the Copyright Act while saving money by avoiding multiple registration fees."[1]

We believe this analysis may not be accurate, particularly as it relates to musical copyrights. We also believe that this subject was not fully analyzed in Steve's article, and is in fact very complicated. Central to our concern is Gordon's anecdote about his role as a music attorney, where he registers his client's albums—consisting of a group of individual sound recordings and musical compositions—with the Copyright Office in a single, streamlined, electronically filed, $35 application. Doing so saves time and money and, according to Gordon, "protects each song and the recording of each song."[2] We believe such protection may exist, but comes not simply from compliance with the registration requirements, but depends on how the works in question are "issued" to the consuming public. Traditional registration of each track and each song may still provide the best possible protection for sound recordings and musical compositions.

Gordon's Assertions

Gordon opens the article with a brief discussion on the advantages of registering one's work in a timely fashion with the Copyright Office, namely gaining the right to "secure statutory damages," per 17 U.S.C. § 504(c) of the Copyright Act. He then outlines the basic rules for registering multiple works in a single application, based on the Code of Federal Regulation Title 37, part 202.3(b)(4), which, for the purpose of registration on a single application and upon payment of a single registration fee, considers a single "work" as:

> (A) In the case of published works: all copyrightable elements that are otherwise recognizable as self-contained works, that are included in a single unit of publication, and in which the copyright claimant is the same; and
>
> (B) In the case of unpublished works: all copyrightable elements that are otherwise recognizable as self-contained works, and are combined in a single unpublished "collection." For these purposes, a combination of such elements shall be considered a "collection" if:
>
> (1) The elements are assembled in an orderly form;
>
> (2) The combined elements bear a single title identifying the collection as a whole;
>
> (3) The copyright claimant in all of the elements, and in the collection as a whole, is the same; and
>
> (4) All of the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.
>
> (ii) Registration of an unpublished "collection" extends to each copyrightable element in the collection and to the authorship, if any, involved in selecting and assembling the collection.

Gordon then mentions his role as music attorney, and how he registers a group of songs in a single application, pursuant to CFR § 202.3. By complying with the registration process, he asserts that his clients may still recover a full statutory damage award for each individual song or "work" infringed, and are not limited to a single statutory damage award for infringement of the album. This assertion concerns us most, and is the catalyst to this response.

The rest of Gordon's article focuses on the special rules that apply to periodicals and photographers, the limits on registering multiple works in a single application and how all the published works must have been first published together as a single unit of publication. None of those provisions, nor the case law upon which Gordon relies, explicitly mentions whether single registration of multiple "works," in the complex area of music,

affects the claimant's right to an individual award of statutory damages per infringement therein.

The simplest way to consider the issue we are addressing is to assume:

a. A copyright claimant registered an entire 10 song album on a single registration,

b. two of the songs were infringed by a third party and released on a compilation album, and

c. the claimant seeks to recover the maximum amount of statutory damages available for the infringement of two songs.

A Need for Clarification

Gordon is correct about the benefit of registering and the advantage of the subsequent right to statutory damages and attorneys' fees, if the registration is timely, but his advice on how to avoid the prospect of losing such rights per song may be misleading and is incomplete. We assert that the analysis, in determining whether statutory damages should be awarded on a per-song or a per-album basis, is based on how the album was "issued," and not solely on how it was registered.

a. Statutory Guidance

According to 17 U.S.C. § 504(c) of the Copyright Act, a plaintiff is entitled to an award of statutory damages for any "work" infringed," which can reach as high as $150,000 per *work*.[3] It also states that "all the parts of a compilation…constitute one *work*"[4] and defines a "compilation" as "a *work* formed by the collection and assembling of preexisting materials…that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[5] The term "compilation" also includes "collective *works*," which are defined as "*work[s]*…in which a number of contributions, constituting separate and independent *works* in themselves, are assembled into a collective *whole*."[6]

So, when Gordon registers his client's album in a single registration, such an album would fall squarely within the Act's definition of a compilation: a single "work" per the language of section 504(c). One can infer from this language, as well as the following case law, that the copyright holder of a registered album may thus theoretically only recover a single statutory award per "album" or "work" infringed. In other words, the infringement of the two works in our hypothetical only results in one award of statutory damages.

b. Case Law

While Gordon may be correct when he says that a single registration of multiple songs does not *preclude* someone from obtaining statutory damages per song within an album—evading such a risk is not a matter of proper adherence to the registration process, as Gordon states. Instead, one must ask if the copyright holder has commercially "issued," or made for sale, each song, *individually*, or *collectively*—i.e., as part of the album as a whole. The 2010 Second Circuit decision in *Bryant v. Media Rights Productions, Inc.*[7] as well as the Southern District of New York's 2011 decision in *Arista Records LLC v. LimeGroup LLC*[8] echoes Gordon's concern, but highlights Gordon's incomplete advice.

In 2010, the Second Circuit in *Bryant* held that, because the copyright holders chose to issue their sound recordings *only* as albums, rather than as individual tracks, the "plain language of the Copyright Act limit[ed] the copyright holders' statutory damages award to one for each album."[9] The plaintiffs in *Bryant* created, produced, and copyrighted two albums and brought suit after finding unauthorized digital copies of their albums online. The Court focused on whether the copyright holder "issued its works separately, or together as a unit."[10] *Bryant* distinguished its facts from earlier decisions, which held that, where plaintiff copyright holders had also issued their copyrighted works as separate individual episodes[11] or sound recordings,[12] they were entitled to statutory damages per individual work. The plaintiffs in *Bryant*, by contrast, issued their sound recordings in album form only, and thus the "work" offered by them was the entire compilation—i.e., the album—not the individual sound recordings contained therein.

In 2011, the Southern District of New York, in *Arista Records v. LimeGroup*, refined this idea, concluding that '[n]othing in the Copyright Act bars a plaintiff from recovering a statutory damage award for a sound recording issued as an individual track, simply because that plaintiff, at some point in time, also included that sound recording as part of an album or other compilation."[13] The court went on to say that "although the Copyright Act states that 'all parts of a compilation...constitute one work,' it does not say that any work included in a compilation cannot also exist as a separate, independent work." The plaintiffs in *Arista* contended that they "*issued* [their]…works separately," and not only "together as a unit," which the court affirmed, after evidence showed that the vast majority of the songs were being sold individually via online outlets like Apple's iTunes. Those individual tracks were thus separate "works," despite being registered with the Copyright Office as a compilation. This allowed the plaintiffs to seek to recover a statutory damage award for each infringed work that was individually released.[14]

Lastly, *Arista* provides us with a hypothetical that perfectly encapsulates the decision and its applicability to this response. It reads:

> Thus, for sound recordings that, like those of the Beatles, were apparently not available as individual tracks from iTunes or other services during the time period relevant to this action, Plaintiffs can recover only one award per album infringed.
>
> For albums that contain sound recordings that are available only as part of the album, and sound recordings that are also available as individual tracks, the Court provides the following example for purposes of illustration. Let us assume that Plaintiffs issued (1) an album containing songs A, B, C, and D, and that Plaintiffs also made available (2) songs A and B as individual tracks, but (3) made available songs C and D only as part of the album as a whole. Let us also assume that songs A, B, C, and D were infringed on the LimeWire system during that time period. Plaintiffs would be able to recover three statutory damage awards: one award for song A, one award for song B, and one award for the compilation (of which C and D are a part).[15]

Gordon's Support

Gordon relied on case law he gathered from secondary source discussions regarding CFR § 202.3, like *Nimmer on Copyright*. Section 7.18(c)(3) of *Nimmer on Copyright* states that under 37 CFR § 2 02.3(b)(4)(i), "courts have validated a single registration to cover a number of songs, citing *Ocasio v. Alfanno*,[16] a 2008 District Court case from Puerto Rico, which did not deal with the issue of published musical works. Gordon cites this case for the idea that the group registration "protects each song and the recording of each song." In *Ocasio*, the only mention of such an assertion is where the Court said that "[w]hile the case law in the First Circuit is silent on this issue, other courts have found that registration of a collection extends copyright protection to each copyrightable element in the collection."[17] *Ocasio* actually relies on a Fifth Circuit case[18] from 1995 and a Third Circuit case from 1986, neither of which deal with the registration of published songs as discussed in Gordon's musical album hypothetical. Most importantly, none of the cases discuss the implications of infringements of multiple "works" within the single registered compilation.

Nimmer states that the possibility of registering a "single work" renders multiple registrations "inappropriate in many scenarios," but gives no single example that applies to music alone, but rather as it applies to other areas of art, like motion pictures and computer software. Thus, Gordon's reliance on *Nimmer* is troublesome, since *Nimmer* barely mentions music and only references the same cases that Gordon incorporates to make his bold assertions.

Conclusion

Again, while Gordon is correct that single registration does not preclude a registrant from recouping multiple statutory damage awards for the individual infringements therein, his analysis as to why is misguided and incomplete. Indeed, there are, as Gordon states, statutory provisions[19] that are designed to compensate and incentivize the freelance or "do it yourself" (DIY) artist whose business model is not conducive to the costs involved in registering each work individually. For example, Gordon mentions provisions that enable photographers whose works were published in various periodicals over a given time period to register those works in one single application. Nevertheless, while some mediums of art are expressly contemplated in these CFR § 202.3, there is no explicit mention of such a benefit for those registering sound recordings, despite Gordon's assertion. The absence of such language is especially troublesome in light of the modern way we obtain music, about which Gordon should have been more sensitive.

We are a "singles" generation and the definition of a "work" is perhaps more amorphous than it was in when purchasing full-length album was the norm (remember when artists made concept albums…?). Nevertheless, *Arista* and *Bryant* make clear that if music is being commercially released exclusively via sale of a complete album, one is only entitled to one statutory damage award for any infringements therein. If, on the other hand, the individual songs on that album, which were registered as part of the single application, are also "issued" individually, those individually released songs gain full statutory damage protection. These conclusions were held without delving into CFR § 202.3 analyses. Gordon asserts, nevertheless, that if one properly adheres to the § 202.3 requirements, irrespective of the fact that an artist has released his or her music as album only, one can recoup a statutory damage award for each song infringed. This holding, as has been stressed throughout this response, is inaccurate.

Practically speaking, the prospect of registering each individual song in order to ensure protection might quickly prove to be too costly, as Gordon sympathizes. Therefore, given the above, it would be wise to ensure that individual tracks are also "issued" separately in order to have a separate remedy for each infringing song, should the case arise. Online retailers like iTunes and Bandcamp allow artists to sell songs individually with ease, which reduces this practical difficulty. The main inquiry is therefore whether a work has been "issued" individually or as part of a compilation. This distinction is critical and merits attention, which Gordon overlooked.

Endnotes

1. See Gordon, Volume 23, Number 3 of the *Entertainment, Arts and Sports Law Journal* (Fall/Winter 2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Entertainment_Arts_and_Sports_Law_Journal&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=4&ContentID=3332 and http://www.futureofthemusicbusiness.biz/2012/12/does-registering-multiple-works-in.html.
2. *Id.*
3. 17 U.S.C. § 504(c)(1).
4. 17 U.S.C. § 504(c)(1) (*emphasis added*).
5. 17 U.S.C § 101 (*emphasis added*).
6. 17 U.S.C § 101.
7. Bryant v. Media Rights Productions, Inc., 603 F.3d 135 (2d Cir. 2010).
8. Arista Records LLC v. Lime Group LLC, 2011 WL 1311771 (S.D.N.Y., 2011); *see generally* Costar Group Inc. v. Loopnet, Inc., 164 F. Supp.2d 688 (D. Md. 2001) (holding that where a national provider of commercial real estate sued for infringement of over 300 of its copyrighted photographs, the crucial fact in determining the scope of damages was "not the single registration, but the nature of what was registered").
9. *Bryant* at 141.
10. *Id.*
11. *See generally* Twin Peaks Productions, Inc. v. Publication International, Ltd., 996 F.2d 1366, 1381 (2d Cir. 1993).
12. *See generally* WB Music Corporation. v. RTV Communications Group, Inc., 445 F.3d 538, 541 (2d Cir. 2006).
13. Arista Records LLC v. Lime Group LLC, 2011 WL 1311771 (S.D.N.Y.), 3 (S.D.N.Y., 2011.)
14. *Id.* at 3, (quoting *Bryant*, 603 F.3d at 141). The *Bryant* decision led the *Arista* Court to subsequently revise the holding in UMG Records, Inc. v. MP3.com, Inc., 109 F.Supp.2d 223, 224 (S.D.N.Y. 2000), upon which defendants relied, since *Bryant* mandated that a court focus on how the plaintiffs had *issued* their sound recordings, as opposed to focusing on *what* the defendant had infringed, as in *UMG*.
15. *Arista*, *supra*, note 8.
16. *See* NIMMER ON COPYRIGHT, § 7.18(c)(3); Ocasio v. Alfanno, 592 F.Supp.2d 242, 245 (D. Puerto Rico, 2008) (Here, the collection at issue was comprised of previously unpublished, original works by the same author, registered under a single title for reasons of convenience and as allowed by applicable regulations (§202.3(b)(4)). Again, this case does not discuss the implications of infringements' of multiple works within the compilation.).
17. *Id.* at 245.
18. Indeed, § 7.18(c)(3) of *Nimmer* states that, regarding the single registration of unpublished songs, the Fifth Circuit held, in Szabo v. Errisson, 68 F.3d 940 (5th Cir. 1995) that Scott Szabo's song "Man v. Man" to have been validly registered thereby, notwithstanding the failure to specifically list its name on the copyright registration, since it met the §202.3 requirement that each component be "by the same author." In addition, the Court did not answer whether statutory damages are affected, and if Szabo had had multiple works under his compilation infringed, whether he'd be entitled to full statutory award per song, or as part of the album only.
19. *See supra*, note 6.

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