

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ALEXANDER STROSS,

Plaintiff,

v.

CENTERRRA HOMES OF TEXAS, LLC,
et al.,

Defendants.

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1:17-CV-676-RP

ORDER

On August 19, 2022, Defendants Centerra Homes of Texas, LLC, et al (“Centerra Homes”) filed a pretrial brief on statutory damages. (Def.’s Brief, Dkt. 179, at 1). After considering the parties’ arguments and the relevant law, the Court issues the following order.

I. BACKGROUND

Plaintiff Alexander Stross (“Stross”), a professional photographer, brings this copyright claim against Defendant Centerra Homes. In his Third Amended Complaint, Stross requested statutory damages under 17 U.S.C. § 504(c) and 17 U.S.C. § 1203(c). (Third Amend. Compl., Dkt. 58, at 9). Centerra Homes filed a brief on August 19, 2022, asking this court to limit the number of statutory damage awards they will owe if the jury finds infringement. (Def.’s Brief, Dkt. 179, at 1). Stross filed a response on September 6, 2022. (Pl.’s Brief, Dkt. 192). Centerra Home contends that, because Stross only filed two copyright registrations, he is limited to two counts of statutory damages. (Def.’s Brief, Dkt. 179, at 1). Stross contends that he is entitled to fifty counts because there were fifty “infringed works” (i.e., photos). (Pl.’s Brief, Dkt. 192, at 5). At the final pretrial conference on August 31, 2022, the parties requested the court decide Centerra Homes’ motion on statutory damages before trial. (*See* Minute Entry, Dkt. 188).

II. DISCUSSION

In a copyright infringement suit, a plaintiff may elect to pursue either actual or statutory damages. 17 U.S.C. § 504(a)–(c)(1). In his Third Amended Complaint, Stross requested, “For each work infringed, an award of actual damages and/or statutory damages under 17 U.S.C. § 504(c)” and an “award of statutory damages under 17 U.S.C. § 1203(c).” (Third Amend. Compl., Dkt. 58, at 9). Here, the Court is addressing a limited question: assuming the jury finds that Centerra infringed on Stross’s copyrighted works, how many counts of statutory damages should Stross be awarded? This order does not address whether Centerra did in fact infringe Stross’s works, whether the alleged infringements were willful, nor how much Stross should be awarded within the permissible range for each count of statutory damages.

When a party elects statutory damages under the Copyright Act, “all the parts of a compilation or derivative work constitute one work.” 17 U.S.C. § 504(c). A compilation is defined as a “work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term ‘compilation’ includes collective works.” 17 U.S.C. § 101. Awards of statutory damages may range from a minimum of \$750 to a maximum of \$30,000 per infringement of one work. *Id.* If the court finds the infringement willful, it may enhance the maximum to \$150,000 each. *Id.*

The parties dispute whether Stross is entitled to two counts of statutory damages—based on the number of copyright registrations filed—or fifty counts—based on the number of photographs allegedly infringed. This turns on whether Stross’s photographs constitute a “compilation” under the Copyright Act. In 2010, this Court heard a similar case about statutory damages for a collection of photographs and found that damages should be based on the number of copyrights registered.

Cullum v. Diamond A Hunting, Inc., 2010 WL 3655863 (W.D. Tex. Sept. 13, 2010), *report accepted in*

relevant part, 2010 WL 5817541 (W.D. Tex. Dec. 22, 2010), *aff'd*, 484 F. App'x 1000 (5th Cir. 2012). There, the Court concluded that “the manner of registration [is] controlling.” *Id.* Because the plaintiff only registered one copyright for seven photos, he was only entitled to one award of statutory damages. *Id.*

The Fifth Circuit upheld this ruling in an unpublished opinion but has otherwise never directly addressed the issue. *Cullum v. Diamond A Hunting, Inc.*, 484 F. App'x 1000, 1002 (5th Cir. 2012) (unpublished). Stross argues that *Szabo v. Errisson*, 68 F.3d 940 (5th Cir. 1995), addresses the compilation issue. But *Szabo* deals with whether copyright protection extends to all parts of a work if only the collection is copyrighted. It does not answer the central question here, which is whether each part of a compilation is entitled to its own award of statutory damages. *Szabo*, 68 F.3d at 943.

Instead, most circuits have employed the “independent economic value” test. *See, e.g., Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255 (11th Cir. 2015); *Robert Stignwood Grp., Ltd. v. O'Reilly*, 530 F.2d 1096, 1105 (2d Cir. 1976); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723 (9th Cir. 2019). Under this standard, courts examine the economic value of an individual work compared to the value of the collection. *Yellow Pages Photos*, 795 F.3d at 1281. In Stross's case, as in *Cullum*, it is “questionable the photos . . . have independent economic value.” Stross registered the 50 photos as part of two collections. He was paid based on each home photographed, not on the number of photos taken. (Def.'s Brief, Dkt. 79 at 3). Each photo was taken with the same economic purpose: to market homes for Centerra Homes and showcase the same set of four homes. *Id.*

Stross cites *Sullivan v. Flora*, 936 F.3d 562, 571–72 (7th Cir. 2019), but even that case suggests photos must be “marketed and available at the individual level” to maintain independent economic value. Stross's photos were sold as sets for each home rather than marketed at the individual level. (Def.'s Brief, Dkt. 79, at 3). Independent from each other, these photos did not qualify as

independent works under the economic value test. *See Yellow Pages Photos*, 795 F.3d at 1279 (“[N]umerous district courts have applied the independent economic value test to find that groups of photos should be collectively treated as compilations under § 504(c)(1) of the Copyright Act and thus a single work for statutory damages purposes.”). Accordingly, the works qualify as a compilation under 17 U.S.C. § 504(c). Because he filed two copyright registrations, Stross is entitled to, at most, two counts of statutory damages in the event that the jury finds infringement.

III. CONCLUSION

Accordingly, **IT IS ORDERED** that Stross is entitled to a maximum of two awards of statutory damages under 17 U.S.C. § 504(c).

SIGNED on September 12, 2022.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE