The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VHT, INC., a Delaware Corporation,

Plaintiff,

v.

ZILLOW GROUP, INC., a Washington corporation; and ZILLOW, INC., a Washington corporation,

Defendants.

No. 2:15-cv-1096-JLR

PLAINTIFF'S OPPOSITION TO ZILLOW'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

NOTED ON MOTION CALENDAR:
May 13, 2016

I. INTRODUCTION

Zillow's motion suffers from false premises and telling omissions.

First, Zillow claims that although VHT's photographs are indisputably protected by copyright, VHT is not entitled to core remedies for infringement provided by the Copyright Act – statutory damages and attorneys' fees – unless the Copyright Office has approved the formalities of the registration process before the infringement occurs. That is wrong on two counts. The determination of registrability can be made either by the Copyright Office or by the Court. And once registrability is established, the "effective date" of that registration (after which a plaintiff is entitled to statutory damages for later occurring infringements and attorneys' fees) is the date the application to register was filed in the Copyright Office.

The plain language of the Copyright Act is flatly inconsistent with Zillow's argument:

- Under 17 U.S.C. § 412, the availability of statutory damages and attorneys' fees depends on "***the effective date of registration,***" rather than the date the Copyright Office or a court determines registrability;
- 17 U.S.C. § 410(d) provides that "[t]he effective date of a copyright registration is the day on which an application, deposit, and fee, which are ***later determined*** by the Register of Copyrights ***or by a court of competent jurisdiction*** to be acceptable for registration, have all been received in the Copyright Office" (emphasis added); and
- 17 U.S.C. § 411 provides the statutory mechanism under which a court makes that determination in an infringement action: "In any case … where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by

> entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue."

On April 18, 2016, VHT served the Copyright Office with the requisite § 411 notice so that VHT can put the issue of the registrability of its copyrights before this Court as soon as the Office decides whether to intervene. Two days later, Zillow filed this motion, ***never once so much as mentioning in its moving papers VHT's § 411 Notice, the Court's authority to decide registrability, or that the effective date is the date of filing regardless of by whom and when the registrability determination is made***.

Second, contrary to Zillow's implication, the Copyright Office's initial denials of some (but not all) of VHT's registrations were not based on the substance of VHT's copyright claim—neither the copyrightability of VHT's photos, nor its ownership of them, were disputed by the Copyright Office. To the contrary, the Office expressly acknowledged that VHT's photos were protected by copyright, but nonetheless refused to register them based on a narrow technical issue related to the formalities of the application forms.

Finally, it is disingenuous for Zillow to argue that VHT somehow "obfuscated" the denial of its applications. Dkt. No. 69, p. 4. The fact is, Zillow has known for months about the status of those applications. When the complaint was filed, the applications were pending, as the complaint (Dkt. No. 1) recites. When, thereafter, the denials were issued, VHT disclosed that fact in its reply papers on its later-withdrawn motion to compel filed January 22, 2016 (Dkt. No. 59, ¶¶ 7-8), and shortly thereafter produced the relevant documents to Zillow in discovery (Declaration of Jonathan M. Lloyd ("Lloyd Decl."), ¶ 2).

This motion is but a shallow litigation tactic employed to try to narrow Zillow's exposure and thereby avoid its discovery obligations.[1] The Court's clear statutory authority to

[1] Even if, contrary to law, statutory damages were not available, VHT will be entitled to millions of dollars in actual damages and infringing profits, pursuant to 17 U.S.C. § 504(b). Based on VHT's research of comparable photographic licensing offerings and the significant number of Zillow infringements now known, VHT calculates that its actual damages from lost licenses are in the tens of millions of dollars. (Dkt. No. 57, ¶5). In addition,

decide these issues and VHT's invocation of the statutory mechanisms for the Court to do so are more than sufficient to establish that VHT has a plausible claim to relief including statutory damages and attorneys' fees—all that is required to withstand this Rule 12(c) motion.

II. FACTS

Applications pending when lawsuit filed. When this action was commenced on July 8, 2015, VHT's applications for registration of the photographs at issue had been submitted to the Copyright Office but the Office had yet to make a determination. The Ninth Circuit has expressly approved proceeding with a lawsuit during the pendency of an application for registration. *See Cosmetic Ideas, Inc. v. IAC/Interactive Corp.*, 606 F.3d 612, 621 (9th Cir. 2010).

Nature of Copyright Office's initial rejection. On September 22, 2015, the Copyright Office denied a number of VHT's applications.[2] Those denials were not based on the substance of VHT's copyright claim; the copyrightability of VHT's photos and its ownership of those photos were not disputed by the Copyright Office. The Office took issue only with the particular form of registration VHT was using, namely registration of an automated database and its updates pursuant to 37 C.F.R. § 202.3(b)(5) and Compendium of U.S. Copyright Office Practices (3d ed. 2014) ("Compendium"), § 1117.

The Copyright Office refused to register VHT's photos under this particular provision, but expressly stated that "[t]he photographs can be registered" by other means. *See* Declaration of Patrick C. Bageant ("Bageant Decl."), Exs. A-C. The problem is that the alternate means of registration offered by the Copyright Office (Compendium § 1116.1) is not feasible. The sheer volume of individual works involved - VHT's copyrighted content is embodied in a voluminous database of professional real-estate photography including millions of images,

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VHT has suffered further damages due to lost licensing opportunities for other uses in an amount that is still unknown and that will be proven at trial. (*Id.)*

[2] As of the date of the Request for Reconsideration, VHT had submitted ten applications, only eight of which had been rejected. Since all of VHT's applications concern updates to the same database of photographs and have been filed pursuant to the same method of registration, resolution of the registrability issue with respect to the eight applications previously refused would resolve any issues as to the remaining applications, as well.

updated at the rate of over 10,000 new images each month (Dkt. No. 59, ¶ 3) - renders filing of individual applications for each photo so burdensome as to be impossible. Likewise, the alternative collective filing provision the Office cited would require VHT to file separate applications for each of the dozens of photographers VHT retains each calendar year to take photos of homes on a work-for-hire basis around the country, because although that provision allows for registrations of multiple works under one application, they must all be by the same author. That too is virtually impossible for VHT (and similarly situated photography studios, stock houses and news agencies) as a practical matter.

VHT filed its applications under §1117 of the Compendium because the Office and the courts have long recognized the propriety of that filing. The Copyright Office has granted registrations of automated databases of photographs to stock photography companies pursuant to that very section of the Compendium. Indeed, this Section was designed for this precise purpose; as it states: "The group registration option for photographic databases is only available for database owners, such as stock photography agencies or other copyright owners that wish to register the authorship involved in creating the database, as well as the photographs within the database that were authored by or transferred to the copyright claimant." Compendium Section 1117. *See also id.,* Section 1117.2 (noting that database registration method is appropriate for "text and photographs that appear in a database of real estate listings"); 77 Fed. Reg. 40269 (under 37 C.F.R. 202.3(b)(5), "stock photography agencies have registered all the photographs added to their databases within a three-month period when they have obtained copyright assignments from the photographers."). The Ninth Circuit has expressly upheld the validity of the registrations of stock photography databases using this ***exact method***, to protect both the overall database and the individual photos within it. *See Alaska Stock Photo LLC v. Houghton Mifflin Harcourt Pub. Co.*, 747 F.3d 673, 685 (9th Cir. 2014); *see also*, *Metro. Reg'l Info. Sys. v. Amer. Home Realty Network, Inc.*, 722 F. 3d 591 (4th Cir. 2013).

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