

The Honorable James L. Robart

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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-01096-JLR

**RULE 59(E) MOTION TO  
AMEND JUDGMENT TO ADD  
PERMANENT INJUNCTION**

**Note on Motion Calendar:**  
April 14, 2017

Pursuant to the jury’s verdict finding that Defendants Zillow, Inc. and Zillow Group, Inc. (together, “Zillow”) directly, contributorily and/or vicariously infringed VHT’s copyright in 28,125 photographs (the “VHT Photos”) by reproducing, creating derivative works of, displaying and/or distributing (collectively, “copying”) them on or in connection with Zillow’s Digs platform, VHT hereby moves for a permanent injunction to prevent the continued copying of those images on or in connection with Digs. *See* Third Amended Complaint [Dkt. 123] at 42 (Prayer for Relief ¶ B). Injunctive relief is warranted here, as (1) the continued copying of the 28,125 VHT Photos on or in connection with Digs will cause VHT irreparable harm; (2) that harm cannot be remedied by money damages, (3) the balance of hardships tips sharply in favor of entering VHT’s limited proposed injunction against future infringing copying of the VHT

1 Photos; and (4) the public interest supports entry of that injunction to prevent future infringing  
2 acts by Zillow and its users on and in connection with the Digs platform.

3 **I. FACTUAL BACKGROUND**

4 VHT filed this lawsuit against Zillow on July 10, 2015. Dkt. 1. In its original  
5 Complaint, VHT sought both monetary damages and injunctive relief, including:

6 For a permanent injunction requiring that defendants and their  
7 agents, servants, employees, officers, attorneys, successors,  
8 licensees, partners and assigns, and all persons acting in concert  
9 or participation with each or any of them, cease directly or  
10 indirectly infringing, or causing, enabling, facilitating,  
encouraging, promoting, inducing or participating in the  
infringement of any of VHT's copyrights or exclusive rights  
protected by the Copyright Act, whether now in existence or  
hereafter created.

11 Dkt. 1 at 30, ¶ B. Each of VHT's subsequent amended complaints sought the same injunctive  
12 relief, Dkt Nos. 53, 105 & 123, and the parties addressed certain aspects of VHT's requested  
13 injunction in briefing Zillow's motion to dismiss the complaint under Federal Rule of Civil  
14 Procedure 19, which this Court denied. Dkt. 98 (Mot.) at 9-11; Dkt. 116 (Opp'n) at 7-9; Dkt.  
15 118 (Reply) at 8; Dkt. 211 (Order).

16 On February 9, 2017, at the conclusion of the trial in this matter, the jury returned a  
17 verdict finding Zillow liable for direct, contributory, and/or vicarious copyright infringement  
18 for each of the 28,125 VHT Photos. Dkt. 281 (Verdict Form). This included a finding that  
19 Zillow's infringement was willful as to the 3,373 images eligible for statutory damages that  
20 Zillow chose to include in searchable set of images on Digs. *Id.*

21 On February 22, 2017, the Court issued judgment in favor of VHT ("the Judgment").  
22 Dkt. 296. The Judgment did not refer to or resolve VHT's claims for injunctive relief.  
23 Pursuant to 17 U.S.C. § 502 and Federal Rules of Civil Procedure 59(e) and 65, VHT now  
24 moves to amend the Court's Judgment to include the following permanent injunctive relief:  
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1 amend judgment under Rule 59(e) in order to provide form of relief requested in complaint and  
2 not addressed in original judgment). The Court should amend its previously-issued judgment  
3 [Dkt. 296] to grant VHT the permanent injunction it seeks in this Motion.

4 **A. VHT Has Suffered Irreparable Injury**

5 VHT has suffered several forms of irreparable injury, each of which independently  
6 suffices to meet this requirement for entry of a permanent injunction. *First* and most  
7 importantly, there is a real threat of continuing and future infringement of the VHT Photos by  
8 Zillow and its users. As the jury necessarily found, Zillow was on notice of its own and its  
9 users' infringement of VHT Photos on and in connection with Digs for more than two years,  
10 yet failed to take appropriate and timely steps to end that infringing activity. *See, e.g.*, Trial  
11 Exs. 98; 506. Zillow's failure to take appropriate action to address the infringement, after  
12 receiving notice, creates a threat of continued infringement. *See, e.g., Broad. Music, Inc. v.*  
13 *McDade & Sons, Inc.*, 928 F. Supp. 2d 1120, 1136 (D. Ariz. 2013) ("A permanent injunction is  
14 especially appropriate where a threat of continuing infringement exists."). Like the defendants  
15 in *McDade*, Zillow "received numerous calls, letters, and cease and desist notices . . . but did  
16 not cease infringement." *Id.* *See also Broad. Music, Inc. v. Benchley Ventures, Inc.*, 131 F.  
17 Supp. 3d 1097, 1105 (W.D. Wash. 2015) (granting permanent injunction based on the fact that  
18 "Defendants continued to infringe even though they have been repeatedly notified that they  
19 were doing so and given repeated notices to cease and desist the behavior."); *Origami Owl LLC*  
20 *v. Mayo*, No. CV-15-00110-PHX-DGC, 2017 WL 413075, at \*6 (D. Ariz. Jan. 31, 2017)  
21 (injunction granted against defendant who "ignored multiple warnings, notices, and requests to  
22 cease the infringement").

23 *Second*, Zillow's infringements did not occur in a vacuum. As shown at trial, Zillow  
24 not only infringed VHT's copyrights by displaying, copying, distributing, and making  
25 derivative works from the VHT Photos on the Digs platform, it also encouraged its users to  
26 further distribute those works from the Digs platform, including on social media. Dkt. 291  
27 (Trial Tr. Vol. 3) at 210:18 – 211:6 (Acker). "This inducement greatly erodes Plaintiffs' ability

1 to enforce their exclusive rights. It also promises no realistic mechanism through which  
 2 statutory damages can be collected for all of the inevitable subsequent infringements occurring  
 3 outside of the [Digs platform].” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F.  
 4 Supp. 2d 1197, 1217–18 (C.D. Cal. 2007) (citing *A & M Records, Inc. v. Napster, Inc.*, 239  
 5 F.3d 1004, 1029 (9th Cir. 2001)); see *Apple Inc. v. Psystar Corp.*, 673 F. Supp. 2d 943, 948  
 6 (N.D. Cal. 2009), *aff’d*, 658 F.3d 1150 (9th Cir. 2011) (“Psystar’s illegal acts have enabled and  
 7 will continue to enable third parties to infringe Apple’s copyrights . . . [which] provides  
 8 compelling support for a finding of irreparable harm.”); *Columbia Pictures Indus., Inc. v. Fung*,  
 9 No. 2:06-cv-05578-SVW(JCx), 2013 WL 12098334, at \*1 (C.D. Cal. Aug. 5, 2013)  
 10 (“Plaintiffs’ power to control their rights has been so compromised by the means through which  
 11 [Defendants] encouraged end users to infringe (digital files plus the internet) that the  
 12 inducement amounts to irreparable harm.”). Zillow’s inducement and enabling of widespread  
 13 distribution of the VHT Photos via Digs has irreparably harmed VHT in the same manner.

14 **Third**, Zillow’s infringing conduct has likely irreparably harmed VHT’s ability to  
 15 license the VHT Photos to paying customers. “[I]t is axiomatic that the availability of free  
 16 infringing copies of Plaintiffs’ works through Defendants’ websites irreparably undermines the  
 17 growing legitimate market for consumers to purchase access to the same works.” *Fung*, 2013  
 18 WL 12098334, at \*1. As this Court recently recognized, in the photo licensing business, loss of  
 19 exclusivity in rights-managed images can cause a “potential loss of customers, goodwill, and  
 20 reputation” which are “intangible injuries [that] support a finding of irreparable harm.” *Getty*  
 21 *Images (U.S.), Inc. v. Virtual Clinics*, No. C13-0626-JLR, 2014 WL 1116775, at \*6 (W.D.  
 22 Wash. Mar. 20, 2014). VHT’s CEO Brian Balduf and Mike Emerson, the VHT board member  
 23 tasked with developing VHT’s licensing plan, each testified that Zillow’s infringement had  
 24 precisely that effect. Dkt. 57 at ¶ 5; Dkt. 174 Ex. 5 at 91:7-12, 97:17-23.

25 **Finally**, Zillow’s use of the VHT Photos on the Digs platform and its inducement of  
 26 users to display, reproduce, and distribute those images by sharing them on social media, with  
 27 or without the accompanying watermarks, has likely led to marketplace confusion as to the

1 origin or source of VHT's photos, which courts have specifically found to constitute irreparable  
 2 injury in copyright infringement cases. *See Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010)  
 3 (*citing Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96-97 (2d  
 4 Cir. 2002)). The consequent injury to VHT's reputation, as well as the harm to its potential  
 5 licensing efforts, from this confusion will be difficult if not impossible to measure and  
 6 therefore to compensate by monetary damage.

7 VHT has therefore shown irreparable harm warranting issuance of a permanent  
 8 injunction.

### 9 **B. Monetary Damages Are Inadequate to Compensate VHT**

10 For many of the same reasons, monetary damages are inadequate to compensate VHT.  
 11 The jury's award of monetary damages will compensate VHT only for the specific acts of  
 12 infringement that were the subject of VHT's claims in this action:

13 However, this award will not compensate Plaintiffs when these  
 14 same files are subsequently shared outside [Digs]. And it would  
 15 simply be untenable for Plaintiffs to track and proceed against  
 16 every infringer who continues to illegally reproduce and  
 17 distribute elsewhere the files originally obtained through  
 [Zillow's] inducement. The only realistic method for remedying  
 such future harm resulting from [Zillow's] inducement is by way  
 of a permanent injunction.

18 *Grokster*, 518 F. Supp. 2d at 1220 (internal citations omitted). It is axiomatic that a "remedy  
 19 may be inadequate if . . . obtaining the remedy would require a multiplicity of suits." *Getty*  
 20 *Images*, 2014 WL 1116775, at \*6. The monetary relief awarded by the jury therefore does not  
 21 adequately compensate VHT for the harm to its copyrights already caused by Zillow's actions,  
 22 and cannot compensate VHT for the substantial threat of continuing violations.

### 23 **C. The Balance of Hardships Tips Sharply Towards VHT**

24 As a rule, copyright infringers cannot argue that an injunction to stop infringing would  
 25 cause them harm. *See City of Carlsbad v. Shah*, 850 F. Supp. 2d 1087, 1113 (S.D. Cal. 2012)  
 26 ("There is no harm to Shah since an injunction would merely require Shah to comply with the  
 27 law."); *Triad Sys. Corp. v. Se. Exp. Co.*, 64 F.3d 1330, 1337 (9th Cir. 1995), *superseded by*

1 *statute on other grounds*, 17 U.S.C. § 117(c) (“Putting this burden [of complying with  
2 injunction] on Southeastern is appropriate because Southeastern is the infringer.”). In this case,  
3 Zillow has even less grounds to complain, as the injunction VHT has proposed ensures that  
4 Zillow will not suffer undue harm in complying with it. So long as the defendant can be placed  
5 on notice of particular “offending content,” the defendant can be forced to “bea[r] the burden of  
6 policing the system within the limits of the system.” *Napster*, 239 F.3d at 1027. Here, VHT’s  
7 proposed injunction applies only to those VHT Photos the jury has *already found* Zillow to  
8 have infringed. Thus, as crafted, Zillow knows exactly the set of VHT Photos it will be  
9 enjoined from infringing or allowing its users to infringe, and VHT’s proposed injunction will  
10 not unduly harm Zillow. *See Grokster*, 518 F. Supp. 2d at 1220 (specific terms of injunction  
11 “alleviate . . . concerns” that a “proposed injunction would be technologically impossible to  
12 comply with”).

13 Zillow may also argue that no injunction is necessary because it has already removed  
14 the 28,125 VHT Photos at issue in this suit from Digs. Even if true, that would not be  
15 sufficient, as courts routinely reject this type of late-arriving change of heart. *See id.* at 1221  
16 (“The Court is inherently suspicious of StreamCast’s statements, as it is entirely too easy for an  
17 adjudicated infringer to claim a reformation once the specter of a permanent injunction looms  
18 near.”); *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-CV-00106-LRH-PAL, 2016 WL  
19 5213917, at \*3 (D. Nev. Sept. 21, 2016) (“Rimini’s claim that it no longer engages in the  
20 conduct adjudged by the court and jury to infringe Oracle’s copyrights is not a basis to deny  
21 issuance of an injunction.”); *National Products, Inc. v. Gamber-Johnson LLC*, 734 F. Supp. 2d  
22 1160, 1171-72 (W.D. Wash. 2010), *citing Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d  
23 1132, 1135 (9th Cir. 1986) (rejecting defendant’s argument that “the injunction is unnecessary  
24 because it has already ceased distribution of the video” because the defendant had not  
25 “irrefutably demonstrated that it will not use the video” again in the future).

26 In sum, the scope of VHT’s proposed injunction tips the balance of hardships sharply  
27 towards VHT.

**D. The Public Interest Favors Entry of a Permanent Injunction**

“Courts usually find that ‘the public interest is ... served when the rights of copyright holders are protected against acts likely constituting infringement.’” *Getty Images*, 2014 WL 1116775, at \*7 (quoting *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2001)). Here, the public interest will be served by entry of VHT’s requested injunction in several ways. First, “it will protect [VHT’s] copyrights against increased infringement” by enjoining further infringement by Zillow and its users on and in connection with the Digs platform. *Grokster*, 518 F. Supp. 2d at 1222. Second, “issuing an injunction in this action ‘ultimately serves the purpose of enriching the general public through access to creative works’ by giving [VHT] an incentive to continue to” create residential real estate photographs and to license them to its clients. *Oracle USA*, WL 5213917, at \*4 (quoting *Kirtsaeng v. John Wiley & Sons, Inc.*, — U.S. —, 136 S. Ct. 1979, 1986 (2016)). Finally, assuming that Zillow will comply with the Court’s orders, entry of VHT’s requested injunction will reduce the likelihood of future infringing activity by Zillow and users of its Digs platform.

**III. CONCLUSION**

For all of the reasons set forth above, VHT respectfully requests that the Court amend its prior Judgment [Dkt. 296] to include a permanent injunction in the form set forth above and submitted concurrently with this Motion.

DATED this 22nd day of March, 2017.

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**CERTIFICATE OF SERVICE**

1 I hereby certify that on March 22, 2017, I electronically filed the foregoing with the  
2 Clerk of the Court using the CM/ECF system, which will send notification of such filing to  
3 those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be  
4 served in accordance with the Federal Rules of Civil Procedure.  
5

6 DATED this 22nd day of March 2017.

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