

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-1096-JLR

JOINT STATEMENT PURSUANT
TO THE COURT'S ORDER ON
THE PARTIES' CROSS-
MOTIONS [DKT. 347]
REGARDING PROCEEDINGS
AFTER REMAND

1 The parties submit this Joint Statement as directed in the Court’s May 8, 2020 Order on
2 Cross-Motions [Dkt. 347]. A joint proposed amended judgment is attached at Exhibit A.

3 **I. VHT’S POSITION**

4 In VHT’s view, no issues remain for adjudication, and the Court should enter VHT’s
5 version of paragraphs 1 and 2 in the joint proposed amended judgment (Exhibit A). Because
6 the Ninth Circuit’s directions guide VHT’s position, VHT sets forth its conclusion in full:

7 We affirm the district court’s summary judgment in favor of Zillow on direct
8 infringement of the Listing Platform photos. With respect to direct liability on
9 the Digs photos, we affirm the district court’s grant of judgment notwithstanding
10 the verdict on the 22,109 non-displayed photos and the 2,093 displayed but not
11 searchable photos. We uphold summary judgment in favor of VHT on the 3,921
12 displayed, searchable photos.

13 We affirm the district court’s judgment notwithstanding the verdict on
14 secondary liability, both contributory and vicarious, on the Digs photos.

15 We reverse the district court’s denial of judgment notwithstanding the verdict on
16 the issue of willfulness and vacate the jury’s finding on willfulness.

17 *We remand consideration of the compilation issue to the district court.*

18 *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 750 (9th Cir. 2019) (emphasis added). The Ninth
19 Circuit thus specified only one purpose for remand: “consideration of the compilation issue.”
20 *VHT, Inc.*, 918 F.3d at 750. And the Ninth Circuit has “repeatedly held ... that a district court is
21 limited by [its] remand in situations where the scope of the remand is clear.” *Mendez-Gutierrez*
22 *v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir. 2006). Nothing in the Ninth Circuit’s opinion
23 “indicates that [it] issued an open remand.” *Twentieth Century Fox Film Corp. v. Entm’t*
24 *Distrib.*, 429 F.3d 869, 883 (9th Cir. 2005). Instead, it limited remand to one issue, which this
25 Court has addressed. Having satisfied the remand, the Court should enter final judgment.

26 The proposed amended judgment, including VHT’s version of paragraphs 1 and 2,
27 responds to this Court’s direction to “account[] for the Ninth Circuit’s reversal of the court’s
denial of Zillow’s motion notwithstanding the verdict on the issue of willfulness and vacating
of the jury’s willfulness determination.” Order [Dkt. 347] at 36:9-11. Recital C describes the
jury’s finding of willfulness; proposed recital J(5) sets forth the Ninth Circuit’s ruling vacating
that finding; and VHT’s version of paragraph 2 of the judgment enters “[j]udgment as a matter

1 of law ... in favor of defendants Zillow Inc. and Zillow Group, Inc. and against plaintiff VHT,
2 Inc., on VHT's claims of willful infringement." Proposed Amended Judgment at 2, 4, 5. In
3 addition, new recitals I through M describe other developments since the Court entered Final
4 Judgment [Dkt. 322] on July 10, 2017. Because the Ninth Circuit generally affirmed this
5 Court, however, the proposed amended judgment largely replicates the 2017 judgment. In
6 particular, because the Ninth Circuit did *not* vacate or disturb the jury's statutory damage
7 award, VHT's version of paragraph 1 reiterates the earlier judgment amount of \$4,053,867.64.

8 Zillow, however, apparently believes the Court has a great deal more work to do on this
9 five-year-old case. With due respect, Zillow's arguments rely on a misunderstanding of the
10 Ninth Circuit's decision, the scope of the remand, and this Court's recent order on compilation.

11 *First*, Zillow argues its infringement of the 2,700 searchable images was innocent as a
12 matter of law (or that it has the right to try that issue to a new jury), even though the innocent
13 infringement issue went to the jury, Zillow lost, and it chose *not* to challenge that aspect of the
14 verdict on appeal. The Court instructed the jury on the elements of innocent infringement.
15 Dkt. 275 at 31-32 (Instr. Nos. 24, 25). The jury returned a verdict finding Zillow engaged in
16 innocent infringement as to some images, Dkt. 281 at 6, and the Court sustained that verdict as
17 to two images, Dkt. 316 at 45-46. Zillow *made no argument on appeal* to set aside the jury's
18 refusal to find innocent infringement as to the 2,700 searchable images. Allowing Zillow to
19 revisit the jury's innocent infringement finding would run afoul of the rule of mandate, which
20 holds that "a district court [can] not revisit its already final determinations unless the mandate
21 allowed it." *United States v. Cote*, 51 F.3d 178, 181 (9th Cir.1995) (citations omitted). And it
22 would violate the law of the case, which "generally preclude[s] [a court] from reconsidering an
23 issue previously decided by the same court, or a higher court in the identical case." *VHT, Inc. v.*
24 *Zillow Grp., Inc.*, 2020 WL 2307492, at *9 (W.D. Wash. 2020) (citation & quotation omitted).

25 *Second*, Zillow argues it has a right to a new jury trial on the amount of statutory
26 damages for the 2,700 searchable photos on Digs, on which the Ninth Circuit affirmed Zillow's
27 liability for infringement. The rule of mandate also bars this relief. Had this experienced Ninth

1 Circuit panel intended *also* to remand for a new determination of damages, it knew how to say
2 so; indeed, opinions specifically remanding for new trials on damages are legion.

3 Zillow, however, suggests vacating the jury’s willfulness finding necessarily results in
4 vacating the statutory damages award of the images found to have been willfully infringed,
5 relying on the fact that the jury chose to specify its \$1,500.00 per image award adjacent to the
6 space where it filled in the number of images it found willfully infringed. But Zillow never
7 made that argument before. Its post-trial brief to this Court simply asserted that “the jury’s
8 verdict finding Zillow liable for willful infringement as to certain images should be vacated.”
9 Zillow’s Renewed Motion for Judgment [Dkt. 301] at 3:5-6. Zillow’s reply brief confirmed it
10 sought that relief only to avoid “the stigma associated with a finding of willful infringement,”
11 Zillow’s Reply on Motion for Judgment [Dkt. 307] at 14:24-27, n.16, and this Court noted that
12 Zillow sought “judgment notwithstanding the verdict on the jury’s finding of willfulness due to
13 the ‘stigma associated with’ that finding”—*not* because the finding affected damages, Order
14 [Dkt. 315] at 43:20-22 n.27. In the Ninth Circuit, Zillow again argued only that “[t]he
15 willfulness component of the jury’s verdict is unsupported and should be reversed,” without
16 requesting relief as to statutory damages. Zillow Br. [9th Cir. Dkt. 7] at 49. As VHT pointed
17 out, on appeal and in this Court, “the jury award of \$1,500 for each eligible searchable image
18 was at the lower end of the ‘regular’ infringement range and would stand even if Zillow’s
19 conduct was not willful.” VHT’s Principal & Response Br. [9th Cir. Dkt. 25] at 77; *see also*
20 VHT’s Opp. to Post-Verdict Motions [Dkt. 304] 25:12-18 (same). Zillow never responded—or
21 otherwise argued for setting aside the damages award for the 2,700 images.

22 Even if Zillow had preserved this argument, it does not follow as a logical matter that
23 the jury’s willfulness finding affected its award of \$1,500.00 per image in statutory damages.
24 A willfulness finding *may* have “significant financial consequences,” in that “the jury may
25 increase damages up to \$150,000 per violation.” *VHT, Inc.*, 918 F.3d at 748. But those
26 consequences did not ensue here, as the jury’s award for the images on which it found willful
27 infringement fell at the lower end of the range for *ordinary* infringements—not close to the

1 enhanced range for willful infringements. More important, the Court’s damages instruction
 2 made no distinction between damages for ordinary infringement as opposed to willful
 3 infringement—except for the direction that a willfulness finding would allow the jury to
 4 “award as much as \$150,000.00 for each work willfully infringed.” Dkt. 275 at 31 (Instr. 24).
 5 The jury did *not* exercise its discretion to award damages in the enhanced range for willful
 6 infringement; it awarded only 5% of the maximum allowed for ordinary infringements. *Id.*

7 *Third*, for the first time Zillow argues this Court should invalidate VHT’s registrations
 8 because it has now found Zillow infringed individual images, not a compilation. But the form
 9 of registration “is not controlling” in determining whether VHT can recover more than one
 10 statutory damages award. *VHT, Inc.*, 918 F.3d at 748; *see also Sullivan v. Flora, Inc.*, 936 F.3d
 11 562, 569 (7th Cir. 2019) (same). Thus, the Court’s finding that Zillow did not infringe a
 12 compilation, entitling VHT to multiple awards of statutory damages, does not mean VHT
 13 improperly registered its searchable photographic database as a collection—a registration that
 14 covered “both the collection as a whole and the individual images” in the collection. *Alaska*
 15 *Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 682 (9th Cir. 2014).

16 In a classic “gotcha” argument, Zillow latches on to this Court’s statement “as a matter
 17 of law that VHT’s database does not constitute a ‘compilation’ under 17 U.S.C. § 101,” Order
 18 [Dkt. 347] at 35:14-15, and argues “VHT knowingly included inaccurate information in its
 19 copyright application that, if known to the Registrar, would have led to refusal of registration.”
 20 *Infra*. This distorts the Order, which distinguished between “VHT’s organization of its images
 21 *prior to issuance*,” i.e., in a searchable database registered as a compilation, and “how VHT’s
 22 images are organized or arranged *when issued*,” i.e., when they are licensed “on a per-image or
 23 per-property basis.” Dkt. 347 at 34:21-35:3. The Court then found that the form of VHT’s
 24 registration was “outweighed by the form in which VHT issues its images” and licenses them
 25 to users like Zillow. Thus, the images Zillow infringed were not a compilation as a matter of
 26 law under 17 U.S.C. § 101—the dispositive point. But that finding that has no bearing on
 27 whether VHT’s much larger indexed database was properly registered as a compilation—the

1 issue addressed in VHT's submissions to the Copyright Office. VHT respectfully suggests that
2 the Court clarify its ruling in that respect to facilitate review in response to Zillow's appeal.

3 In any event, the case on which Zillow relies, *Gold Value Int'l Textile, Inc. v. Sanctuary*
4 *Clothing, LLC*, 925 F.3d 1140, 1147 (9th Cir. 2019), has no bearing. There, a copyright holder
5 knowingly submitted "inaccurate information" when it "included previously published designs
6 in its application to register an unpublished collection." Zillow cannot point to any "inaccurate
7 information" VHT submitted when registering its database as a collection. See TX 244.029-30.

8 Finally, Zillow asks the Court to certify its Order [Dkt. 347] for immediate appeal under
9 28 U.S.C. § 1292(b). Of course, entering the proposed amended judgment would obviate the
10 need for certification, as that judgment would be appealable.

11 But if the Court declines to enter judgment, VHT disagrees that the Order should be
12 certified. Under § 1292(b), only orders involving a "controlling question of law" may be
13 certified. "A 'question of law' means a 'pure question of law,' not a mixed question of law and
14 fact or an application of law to a particular set of facts." *Young v. One West Bank*, 2012 WL
15 13051112, at *2 (D. Or. 2012) (citations omitted). Here, the Order applies the statutory
16 standard to the facts; Zillow simply disagrees with *how* the Court applied the standard, a matter
17 not appropriate for certification. In any event, certification lies within the Court's "unfettered
18 discretion." *Id.* And the party seeking to appeal must show "'exceptional circumstances' that
19 justify departure from the basic policy of postponing appellate review until after the entry of
20 final judgment." *In re Mastro*, 2010 WL 11618305, at *1 (W.D. Wash. 2010) (Robart, J.)
21 (citation omitted). "The long and tortuous procedural history of this litigation ... demonstrates
22 why further delaying this [five]-year-old litigation for immediate appellate review is
23 unwarranted." *In re Google Inc. Gmail Litig.*, 2014 WL 294441, at *1 (N.D. Cal. 2014).

24 VHT respectfully requests that the Court conclude this case and enter VHT's version of
25 the two disputed paragraphs in the proposed judgment. If the Court agrees with Zillow that
26 issues remain to be litigated, VHT requests that the matter be set for trial on the amount of
27 statutory damages, between \$750.00 and \$30,000.00 per image. Dkt. 275 at 31 (Instr. No. 24).

II. ZILLOW'S POSITION

VHT's position that a final judgment can be entered without additional work rests on its incorrect and unsupported conclusion that the rule of the mandate and law of the case doctrine prevent the court from considering both entirely new, previously undecided issues as well as issues that were vacated and for which there is no jury finding. But even the cases relied on by VHT belie this conclusion. *United States v. Cote*, 51 F.3d 178, 182 (9th Cir. 1995), held that the district court's view that the mandate prevented it from retrying the defendants *was overly narrow*. The Court explicitly stated that on remand a lower court "may consider and decide any matters left open by the mandate of [the] court." *Id.* (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256, 16 S. Ct. 291, 293, 40 L. Ed. 414 (1895)). Similarly, the narrower law of the case doctrine only applies where "the issue in question [was] decided explicitly or by necessary implication in the previous disposition." *United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014)¹ (concluding that the law of the case doctrine did not apply) (quoting source omitted). Neither doctrine applies to prevent the questions that still need resolution.

A) Issue 1: In light of the Court's May 8 order, is Zillow entitled to judgment as a matter of law on the grounds that VHT's copyright registrations are invalid?

a. *The Court must consider new questions not barred by judicial doctrines.*

This is a new question arising from the Court's determination in its May 8 Opinion that VHT's photography database is not a compilation under 35 U.S.C. § 101, which neither VHT nor Zillow have ever asserted, and recent Ninth Circuit precedent developed *after* the mandate issued in this case. *See Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1147 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020) (referencing 17 U.S.C. § 411(b)(1)). This issue has never been previously decided, let alone finally determined.

b. *Gold Value renders the patent applications invalid.*

There is no dispute that VHT applied for registration of its images under a statutory provision that required compilation authorship and that VHT's registration applications were initially rejected on the grounds that there was not "sufficient compilation authorship." TX 405.

¹ Zillow notes that the *Lummi Nation* case is the case cited to in *VHT, Inc. v. Zillow Grp., Inc.*, 2020 WL 2307492, at *9 (W.D. Wash. 2020), which VHT quotes.

1 There is also no dispute that to overcome this problem, VHT’s CEO Brian Balduf requested
 2 reconsideration from the copyright office and submitted a declaration stating that “the VHT
 3 database meets the requirements for original compilation authorship.” TX 244.005. The Court
 4 has now conclusively determined in its May 8, 2020, order that this statement was inaccurate.
 5 ECF No. 347 at 35 (“conclud[ing] as a matter of law that *VHT’s database* does not constitute a
 6 ‘compilation’ under 17 U.S.C. § 101” and denying Zillow’s motion for partial summary judgment
 7 on the compilation issue on that basis (emphasis added)).²

8 As a result of this determination and in light of *Gold Value*, Zillow is now entitled to
 9 judgment as a matter of law in this action on the grounds that VHT knowingly included inaccurate
 10 information in its copyright application that, if known to the Registrar, would have led to refusal
 11 of registration. 925 F.3d at 1147 (stating that “knowingly” does not “necessarily have any
 12 reference to a culpable state of mind or to knowledge of the law” and that an innocent mistake
 13 based on ignorance of law can still lead to invalidation).

14 In *Gold Value*, the registrant’s application statement that the collection was “unpublished”
 15 required invalidation of the registrations where: (1) the registrant was aware of the facts regarding
 16 its sales, (2) the registrant was aware that its sales included designs that it knew had been sold,
 17 and (3) the case law was clear that sales of the design equated to publication. 925 F.3d 1140 at
 18 1147-48. The same is true here. Balduf was aware of the facts surrounding his database, and the
 19 body of case law that this Court relied on to conclude that the database is not a compilation
 20 existed prior to Mr. Balduf’s December 14, 2015, declaration. *See, e.g.*, ECF 347 at 25-35 (citing
 21 pre-2015 cases to determine that form of issuance, not storage, controls question of compilation).
 22 VHT’s attempt to distinguish *Gold Value* also fails since that case did not, as VHT contends,
 23 require a “factual” misstatement given that publication is a legal issue. Zillow requests entry its
 24 amended judgment on that basis.

25 ***c. If the Court disagrees, it should certify interlocutory appeal of the May 8 Order.***

26 _____
 27 ² VHT’s attempt to wriggle out from under the thumb of *Gold Value* by contending that the May 8 opinion only
 found the photos as issue were not a compilation (as opposed to the database as a whole) contradicts the very
 words used by this Court.

1 To the degree the Court disagrees that Zillow is entitled to judgment as a matter of law on
 2 the grounds that the registrations are now invalid, Zillow requests that this Court certify an
 3 interlocutory appeal of the Court's May 8 Order holding that the VHT database "does not
 4 constitute a 'compilation' under 17 U.S.C. § 101." ECF No. 347 at 35. This case satisfies the
 5 requirements warranting interlocutory appeal because it involves "a controlling question of law
 6 as to which there is substantial ground for difference of opinion and that an immediate appeal
 7 from the order may materially advance the ultimate termination of the litigation." *Douglas v.*
 8 *Xerox Bus. Servs., LLC*, No. C12-1798-JCC, 2016 WL 4017407, at *2 (W.D. Wash. Feb. 29,
 9 2016) (citing 28 U.S.C. § 1292(b)) (certifying case for interlocutory appeal).

10 That such grounds exist here is evident at least from the Court's (1) statement that it "has
 11 been unable to locate a case that draws a bright-line distinction between the question of whether
 12 something is a 'compilation' and whether something is a single 'work' for the purpose of
 13 statutory damages," (ECF No. 347 at 31); (2) perception of the need to "reconcile" "the Ninth
 14 Circuit's opinions in this case and in the *Columbia Pictures* line of cases . . .," (*id.* at 32); (3)
 15 resort to the Second Circuit's opinion in *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 142
 16 (2d Cir. 2010), to determine that "the form in which VHT issues its images" and not "VHT's
 17 organization of its images prior to issuance" that is controlling (*id.* at 34–35); and (4)
 18 acknowledgment that even so, "[a]pplying *Bryant's* analysis is not a perfect solution" (*id.* at 33).
 19 In addition, to the extent that the Court may determine that VHT should be excused under *Gold*
 20 *Value* for falsely representing to the Copyright Office that its database is a compilation because
 21 the law prior to the Court's order in this case was unsettled at the time, the grounds for certifying
 22 an interlocutory appeal now are clearer still. Such an appeal would not unduly prolong the
 23 resolution of this suit or prejudice VHT because, as discussed further below, Zillow is entitled to
 24 jury trial on the amount and character of VHT's statutory damages, and such a trial is unlikely to
 25 occur any time soon in view of the current COVID-19 pandemic and the indefinite continuance
 26 of civil matters scheduled for an in-Court appearance, General Order No. 01-20.

27 **B) Issue 2: Is Zillow entitled to judgment as a matter of law on innocent infringement**

1 **or, alternatively, a new trial for the 2,700 searchable VHT photos for which the Ninth**
 2 **Circuit reversed the jury’s willfulness finding?**

3 **a. There is no surviving jury finding relating to the 2,700 “willfulness” images.**

4 Even within VHT’s recitation of the “full” conclusion of the Ninth Circuit opinion, the Court
 5 said: “We ... vacate the jury’s finding *on* willfulness.” 918 F.3d at 750 (emphasis added). The
 6 jury’s willfulness finding includes both the *fact* of the willful infringement, and the *amount* of
 7 damages per willfully infringed image. Specifically, the vacated finding consists of a response to
 8 a single question that directed the jury categorize the images it found to have been infringed
 9 “based on whether Zillow infringed willfully, innocently, or neither willfully nor innocently,”
 10 with blanks for each category. ECF. No. 281 at Question 15. In the blank for willfulness the jury
 11 entered the number of images it found to have been infringed in that manner followed by the
 12 notation “x 1500.” *Id.* This is the only indication on the verdict form of the amount of damages
 13 that the jury awarded for the images that it erroneously found to have been willfully infringed,
 14 and it is expressed as part of the “finding on willfulness” that the Ninth Circuit vacated.

15 The notion that the amount of damages that the jury awarded for infringement of those
 16 images is severable from the jury’s vacated finding on willfulness misconstrues both the verdict
 17 and the Ninth Circuit’s opinion. The jury was given a range of \$750.00 to \$30,000.00 dollars for
 18 regular infringement and a range of \$750.00 to \$150,000.00 for willful infringement. ECF. No.
 19 274 (Instruction No. 24). This had the potential to influence the amount of the damages awarded
 20 as “x 1500” in the willfulness line of the verdict form. Any argument by VHT that Zillow waived
 21 this issue by not raising it on appeal is likewise unfounded; the challenge to the willfulness
 22 finding necessarily included a challenge to the finding that infringement was not innocent
 23 because these were stated in the alternative in the same question on the jury verdict form.

24 Because there presently is *no* finding from the jury on the amount of damages to be awarded
 25 on the 2,700 images, neither the law of the case doctrine nor the rule of mandate bar consideration
 26 of this issue, which the Court left “open” by way of its vacatur. VHT’s interpretation that the
 27 mandate did not leave this issue open flies in the face of the “presumption that a remand is
 general.” *See United States v. Moore*, 634 F. App’x 483, 487 (6th Cir. 2015). It also contradicts

1 the “action” statement at the end of the Ninth Circuit Opinion. 918 F.3d at 750 (“Affirmed in
2 part, reversed in part and remanded.”). Indeed, if VHT were correct that the mandate was limited
3 to the compilation issue, there would be no surviving award of damages for the 2,700 images to
4 apply, leaving VHT entitled to nothing on those photos.

5 **b. *Zillow is entitled to judgment as a matter of law on innocent infringement.***

6 In reversing the Court’s denial of judgment notwithstanding the verdict and vacating the
7 jury’s finding on willfulness, the Ninth Circuit concluded that there was not “substantial
8 evidence” showing that Zillow was “‘actually aware’ of its infringing activity.” 918 F.3d at 749.
9 Instead it concluded as a matter of law that Zillow’s “belief that feed providers had properly
10 licensed its uses and that its system effectively respected those rights was reasonable.” *Id.* Given
11 the Ninth Circuit’s express finding that Zillow had a reasonable, good-faith belief that it was
12 operating under licenses when it engaged in the infringing conduct, Zillow is entitled to judgment
13 as a matter of law that its infringement of the 2,700 images eligible for statutory damages for
14 which the Ninth Circuit affirmed the jury’s finding of liability was innocent. 17 U.S.C.
15 § 504(c)(2) (noting that innocent infringement occurs when “the infringer was not aware and had
16 no reason to believe that his or her acts constituted an infringement of copyright”); *see also* 4
17 Nimmer on Copyright § 14.04 (2019) (noting that innocence is present where there was a
18 reasonable good-faith belief of non-infringement and further stating that “intermediate between
19 willful and innocent conduct lies in the domain of ‘knowing infringement’”). If the Court does
20 not enter judgment in favor of Zillow based on *Gold Value*, it should enter judgment in the amount
21 of \$200 per image, which is the statutory minimum for innocent infringement. *See* Exhibit A.

22 **c. *Zillow is entitled to a jury trial on the issue of the amount of damages.***

23 Zillow is entitled to a jury trial on *both* the character *and* the amount of statutory damages.
24 *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) (“[T]he Seventh
25 Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages
26 under § 504(c) of the Copyright Act, including the amount itself.”). At the very least, a new trial
27 on the *amount* of damages is required on the 2,700 images.

1 DATED this 29th day of May, 2020.

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s/ Ian B. Crosby

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12 *Attorneys for VHT, Inc.*

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CERTIFICATE OF SERVICE

1
2
3 I hereby certify that on May 29, 2020, I electronically filed the foregoing with the Clerk
4 of the Court using the CM/ECF system, which will send notification of such filing to those
5 attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served
6 in accordance with the Federal Rules of Civil Procedure.
7

8
9 s/ Stephen M. Rummage
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Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VHT, INC.,

**AMENDED FINAL JUDGMENT IN A
CIVIL CASE**

Plaintiff,

CASE NO. C15-1096JLR

v.

ZILLOW GROUP, INC., et al.,

Defendants.

The disputes between and among the parties in the above-captioned case have been resolved through a series of Opinions and Orders from this Court, a jury verdict, stipulations between the parties, and a decision of the Ninth Circuit, as follows:

A. On December 23, 2016, the Court entered an Order [Dkt. 211] granting in part and denying in part the parties' cross-motions for summary judgment, including granting summary judgment to defendants Zillow, Inc., and Zillow Group, Inc. (together, "Zillow") on VHT's claims relating to use of 54,257 VHT Photos on Zillow's Listing Site; and granting summary judgment to VHT, Inc. ("VHT") on Zillow's counterclaims.

B. On January 19, 2017, the Court entered an Order [Dkt. 236] addressing VHT's motion for reconsideration and renewed motion for summary judgment, as well as several issues relating to the parties' cross-motions for summary judgment and motions in limine.

C. From January 23 through February 9, 2017, a jury trial was held, at the conclusion of which, the jury submitted a completed verdict form [Dkt. 281] awarding VHT, on its copyright infringement claims for all 28,125 VHT Photos at issue at trial, alternative awards of \$8,247,300

in statutory damages and \$79,875 in actual damages. The jury found that Zillow had willfully infringed VHT's copyrights in 3,373 images.

D. On February 10, 2017, VHT elected statutory damages on its claims for all VHT Photos eligible for statutory damages, and actual damages on all remaining VHT Photos [Dkt. 274].

E. On February 22, 2017, the Clerk of the Court entered judgment in favor of VHT and against Zillow in the amount of \$8,272,328.92 [Dkt. 296].

F. On March 22, 2017, Zillow timely moved for judgment as a matter of law under Federal Rule of Civil Procedure 50, and alternatively for a new trial under Federal Rule of Civil Procedure 59 [Dkt. 301], and VHT moved to amend the Clerk's judgment and for entry of a permanent injunction under Federal Rules of Civil Procedure 59(e) and 65 [Dkt. 300].

G. On June 20, 2017, the Court entered an Order [Dkt. 315] on the post-trial motions in which the Court:

1. granted Zillow's motions for judgment as a matter of law with respect to VHT's direct copyright infringement claims for 24,202 of the VHT Photos and VHT's indirect copyright infringement claims for 27,994 of the VHT Photos;
2. denied Zillow's motions for judgment as a matter of law and for a new trial with respect to VHT's direct copyright infringement claims for 3,921 "displayed, searchable" VHT Photos and 2 VHT Photos copied via email and/or blog post, as well as the jury's damages award for each of those VHT Photos; and
3. granted a new trial on VHT's indirect copyright infringement claims for 114 VHT Photos that VHT had specifically identified to Zillow prior to the first infringing act by

Zillow and for which the Court had not denied Zillow's motions for judgment as a matter of law and alternatively for a new trial.

Based on these rulings, the Court held that of the 3,923 VHT Photos for which the direct infringement liability verdict remained intact, 2,702 were eligible for statutory damages and 1,221 were ineligible for statutory damages. Of the 2,702 VHT Photos eligible for statutory damages, the jury awarded \$1,500.00 apiece in statutory damages for 2,700 images, and \$200.00 apiece in statutory damages for two images. Accordingly, the Court reduced the statutory damages award to \$4,050,400.00. Because the jury awarded \$2.84 in actual damages per infringement, and VHT opted to receive actual damages only for infringement of images that were ineligible for statutory damages, the Court reduced the actual damages award to \$3,467.64. Based on these calculations, the Court reduced the total damages award to \$4,053,867.64.

H. On June 27, 2017, the parties filed a joint submission [Dkt. 316] in which they stipulated and agreed to waive their rights to file motions for costs and for attorneys' fees, and to the dismissal without prejudice of VHT's indirect copyright infringement claims with respect to the 114 VHT Photos on which the Court granted a new trial in its Order of June 20, 2017 [Dkt. 315];

I. On July 10, 2017, the Court entered a Final Judgment, embodying the rulings described above, from which Zillow and VHT cross-appealed;

J. On March 15, 2019, the Ninth Circuit decided Zillow's and VHT's cross-appeals as follows:

1. affirmed this Court's summary judgment in favor of Zillow on direct infringement of photos used on Zillow's Listing Platform;

2. affirmed this Court's grant of judgment notwithstanding the verdict in favor of Zillow for direct liability as to 22,109 non-displayed photos and 2,093 displayed but not searchable photos on the Digs site;
3. affirmed this Court's summary judgment in favor of VHT on 3,921 displayed, searchable photos on the Digs site;
4. affirmed this Court's judgment notwithstanding the verdict in favor of Zillow on secondary liability, both contributory and vicarious, on the Digs photos;
5. reversed this Court's denial of Zillow's motion for judgment notwithstanding the verdict on willfulness and vacated the jury's finding on willfulness; and
6. remanded the case to this Court for reconsideration of the compilation issue.

K. On October 7, 2019, the United States Supreme Court denied VHT's Petition for a Writ of Certiorari.

L. On May 8, 2020, the Court entered an order [Dkt. 347] on Zillow's motions for judgment on the pleadings and for partial summary judgment, as well as VHT's motion for partial summary judgment on compilation issues. Construing Zillow's motion for judgment on the pleadings as part of its motion for partial summary judgment, the Court denied Zillow's motion for partial summary judgment, and granted VHT's motion for partial summary judgment.

M. On May 29, 2020, the parties submitted (a) a joint statement specifying each party's view as to the remaining issues left for adjudication, and (b) a joint proposed amended judgment with certain competing provisions. Following those submissions, the Court [Dkt. ---] determined that it had completed the sole task specified in the Ninth Circuit's remand and that an amended judgment could be entered without further proceedings.

Based on these Opinions and Orders, the jury verdict and stipulations between the parties, the Ninth Circuit's decision, and all other orders issued in this case, it is hereby **ORDERED** that, for the reasons set forth in the above-referenced Opinions and Orders, jury verdict, and stipulations, that an **AMENDED FINAL JUDGMENT IS ENTERED** as follows:

Direct Infringement

1. **VHT Proposal:** Judgment is entered in favor of plaintiff VHT, Inc. and against defendants Zillow Inc. and Zillow Group, Inc., on VHT's direct copyright infringement claims for the 3,923 VHT Photos identified in the Court's Order of June 20, 2017 [Dkt. 315], in the amount of \$4,053,867.64, along with (a) pre-judgment interest for the 1,221 VHT Photos not eligible for statutory damages, running with respect to each photo from the date that photo was first made available on Zillow's Digs site (as reflected in Column P of Trial Exhibit 512), through July 10, 2017, as well as (b) post-judgment interest on the full award (including prejudgment interest) as to all 3,923 VHT Photos, running from July 10, 2017, through the date of payment, both at the statutory rate pursuant to 28 U.S.C. § 1961;

1. **Zillow Proposal:** Judgment is entered in favor of plaintiff VHT, Inc. and against defendants Zillow Inc. and Zillow Group, Inc. on VHT's direct copyright infringement claims for the 1,221 VHT Photos that are not eligible for statutory damages, in the amount of \$3,467.64, along with (a) pre-judgment interest, running with respect to each photo from the date that photo was first made available on Zillow's Digs site (as reflected in Column P of Trial Exhibit 512), through July 10, 2017 and (b) post-judgment interest on the full award (including prejudgment interest) as to all 1,221 VHT Photos, running from July 10, 2017, through the date of payment, both at the statutory rate pursuant to 28 U.S.C. § 1961. Judgment is also entered in favor of plaintiff VHT, Inc. and against defendants Zillow Inc. and Zillow Group, Inc. on VHT's direct copyright

infringement claims for the two (2) images eligible for statutory damages at the rate of \$200.00 apiece, in the total amount of \$400.00, along with post-judgment interest as to the two (2) VHT Photos, running from July 10, 2017, through the date of payment, at the statutory rate pursuant to 28 U.S.C. § 1961. VHT is not entitled to pre-judgment interest for these images. [Dkt. 321];

2. **VHT Proposal:** Judgment as a matter of law is entered in favor of defendants Zillow Inc. and Zillow Group, Inc. and against plaintiff VHT, Inc., on VHT's claims of willful infringement;

2. **Zillow Proposal Alternative No. 1:** Judgment as a matter of law is entered in favor of defendants Zillow Inc. and Zillow Group, Inc. and against plaintiff VHT, Inc., on the 2,700 searchable photos on Digs that were eligible for statutory damages and for which the Ninth Circuit vacated the jury's finding of willful infringement on the grounds that the registrations are invalid under 17 U.S.C. § 411(b)(1) based on the knowingly inaccurate statement in VHT CEO Brian Balduf's December 14, 2015 declaration that "the VHT database meets the requirements for original compilation authorship," whose inaccuracy, if known to the Registrar, would have led to refusal of registration. *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1147 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1294 (2020);

2. **Zillow Proposal Alternative No. 2:** Judgment is entered in favor of plaintiff VHT, Inc. on the 2,700 searchable photos on Digs that were eligible for statutory damages and for which the Ninth Circuit vacated the jury's finding of willful infringement. The Court finds that on these images, Zillow is entitled to a finding of innocent infringement as a matter of law and VHT is entitled to judgment at the rate of \$200.00 an image, in the total amount of \$540,000.00, along with post-judgment interest as to these photos, running from July 10, 2017, through the date of

payment, at the statutory rate pursuant to 28 U.S.C. § 1961. VHT is not entitled to pre-judgment interest for these images. [Dkt. 321];

3. Judgment as a matter of law is entered in favor of defendants Zillow Inc. and Zillow Group, Inc. and against plaintiff VHT, Inc., on VHT's direct copyright infringement claims for the remaining 24,202 VHT Photos identified in the Court's Order of June 20, 2017 [Dkt. 315];

4. Judgment is entered in favor of defendants Zillow Inc. and Zillow Group, Inc. and against plaintiff VHT, Inc., on VHT's direct copyright infringement claims regarding the 54,257 VHT Photos identified in VHT's Third Amended Complaint [Dkt. 123] as having been displayed on Zillow's Listing Site on Home Details Pages of properties not actively listed for sale;

Indirect Infringement

5. Judgment as a matter of law is entered in favor of defendants Zillow Inc. and Zillow Group, Inc. and against plaintiff VHT, Inc., on VHT's indirect copyright infringement claims for the remaining 27,994 VHT Photos identified in the Court's Order of June 20, 2017 [Dkt. 315];

Other

6. Judgment is entered dismissing without prejudice VHT's indirect copyright infringement claims for the 114 VHT Photos on which the Court had granted a new trial in its Order of June 20, 2017 [Dkt. 315] and the additional 17 VHT Photos discussed in that Order that VHT had specifically identified to Zillow prior to the first infringing act by Zillow, pursuant to the parties' agreement in their joint submission dated June 27, 2017 [Dkt. 316];

7. Judgment is entered in favor of plaintiff VHT, Inc. and against defendants Zillow Inc. and Zillow Group, Inc., on Zillow's counterclaims set forth in Zillow's Answer to VHT's Third Amended Complaint [Dkt. 156];

8. Pursuant to the parties' agreement in their joint submission dated June 27, 2017 [Dkt. 316], no party shall be awarded attorneys' fees or costs;

This case is closed, and the deadline to file any notice of appeal is 30 days after the issuance of this Judgment.

Filed this _____ day of _____, 2020.

WILLIAM M. MCCOOL
Clerk of Court