

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VHT, INC., a Delaware company,)	
)	
Plaintiff,)	
)	CASE NO. C15-01096JLR
v.)	
)	SEATTLE, WASHINGTON
ZILLOW GROUP, INC., a)	February 7, 2017
Washington corporation; and)	
ZILLOW, INC., a Washington)	JURY TRIAL, VOL. 6
corporation,)	
)	
Defendants.)	
)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES L. ROBERT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

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1 that information. And, crucially, the individual who appears
2 to be including these charts in the email string is not a
3 witness who will be testifying at trial.

4 So I don't believe that Zillow can lay a foundation to get
5 in this document and that will fit within the hearsay
6 exception.

7 THE COURT: Counsel, I don't need to hear from the
8 other side on this one.

9 I'm going to overrule the objection. Both of you have
10 consistently introduced, as business records, strings of
11 emails in which people have not testified. I don't happen to
12 think that's proper under the evidence rules, but you've both
13 engaged in it and it's been without objection; I'm not going
14 to change for this particular document.

15 MR. LLOYD: Thank you, Your Honor.

16 THE COURT: Anything else?

17 MS. PAUL: No, Your Honor.

18 THE COURT: All right.

19 You all have asked about statutory damages, and we have
20 delayed as long as we can, because it is not a question that
21 can really be answered in the abstract; however, since I'm
22 asking you to take exceptions to the jury instructions at
23 4:30 today, it seems to me I need to give you an answer so
24 that you can be prepared to discuss this issue and object, if
25 you want to, particularly in regards to the verdict form.

1 So the following will constitute the opinion of the court
2 or the order of the court on your dispute:

3 The parties dispute the appropriate manner of calculating
4 statutory damages for which Zillow is potentially liable,
5 17 U.S.C. Section 504(c), as you well know.

6 The disputed provision of the Copyright Act reads, as the
7 language says in the Copyright Act, in particular, 17 U.S.C.
8 Section 504(c)(1).

9 VHT contends that it can prove at trial that each image
10 has an independent economic value, each image constitutes a
11 separate, quote, work, unquote, for purposes of calculating
12 statutory damages.

13 Zillow responds that VHT's photo database is a compilation
14 and, therefore, only one work for purposes of assessing
15 statutory damages.

16 That's Zillow's motion for summary judgment response,
17 Docket 168 at pages 24 through 27.

18 As you all well know, the court has previously declined to
19 rule on this. However, in order to present a proper verdict
20 form to the jury, I need to decide the issue before reading
21 the final instructions, and it seems to me, since I'm asking
22 you to take exceptions today, that the time is ripe for
23 adjudication.

24 The majority of the cases that VHT relies on in support of
25 its arguments address registration of copyrights, not

1 statutory damages. For instance, as recently as last week,
2 VHT was relying on Alaska Stock, 747 F.3d 376.

3 In Alaska Stock, the Ninth Circuit concluded that
4 registering a compilation of photographs protects the
5 compilation as well as the individual photographs. That's at
6 685.

7 It also relies on Metropolitan Regional Information
8 Systems, Inc. v. American Home Realty, 722 F.3d 591, Fourth
9 Circuit 2013. However, the efficacy of registration is not
10 the issue here; rather, the parties dispute the proper way to
11 determine what constitutes one work for purposes of
12 calculating statutory damages.

13 504(c)(1) constructs a different definition of, quote,
14 work, unquote, and other subsections of the Copyright Act.
15 So the court finds Alaska Stock and MRIS, as the Metropolitan
16 case is known, minimally applicable.

17 I'll note that, for purposes of this subsection, all of
18 the compilation or derivative work constitutes one work. It
19 does not really answer the question that I'm asked to
20 address.

21 In Monge, 68 F.3d 1164, the Ninth Circuit, in 2012, noted,
22 "Although the Copyright Act does not define the term 'work,'
23 courts approach the definition depending on the specific
24 issue; for example, deciding proper registration, determining
25 whether a work is sufficiently original in calculating

1 damages."

2 Language out of Alaska Stock at 680-81, concluding that
3 different uses of work within the Copyright Act arguably
4 shows that the term "work" is ambiguous but does not tell us
5 which sense of the word "work" must be applied in the context
6 of registering collective works.

7 Zillow asks the court to defer to the Copyright Office's
8 interpretation of Section 504(c)(1), that's in the motion for
9 summary judgment at 25 through 26, and cites to the U.S.
10 Copyright Office Compendium of U.S. Copyright Office
11 Practices, Sections 1104.5, 1116 through 17, Third Edition
12 2014.

13 Copyright Office interpretations are entitled to
14 deference, quote, only to the extent those interpretations
15 have the, quote, power to persuade, closed quote, Christensen
16 v. Harris City, 529 U.S. 576, 2000 quoting Skidmore v. Swift,
17 323 U.S. 134.

18 Also, if you look at the Compendium Third at page 2, it
19 explains the standard of deference the courts afford to the
20 compendium.

21 Contrary to Zillow's argument, however, the Copyright
22 Office's interpretation do not give definitive guidance on
23 the question before the court.

24 In its December 1, 2016, proposed rule, the Copyright
25 Office indicates that a copyright owner that registers a

1 number of photographs as a collective work, quote, may,
2 unquote, be entitled only to seek statutory damages for the
3 database as a whole, and not for each individual photograph.

4 It can be found at 81 Federal Register 866 43, 865 54
5 through 55, December 1st, 2016.

6 The compendium similarly indicates that when a copyright
7 owner, quote, registers a number of works using unpublished
8 collection option, the copyright owner may be entitled -- and
9 I would stress "may be entitled" -- to claim only one award
10 of statutory damages in an infringement action, even if the
11 defendant infringed all of the works covered by the
12 registration. It's in the Compendium Third, Section 1104.5.

13 By using, quote, may, unquote, the copyright office
14 implicitly acknowledges that, in some instance, the group
15 registration does not preclude recovering statutory damages
16 for each component that has an independent economic value.

17 Indeed, the compendium expressly indicates that, quote,
18 copyright owners who use a group registration option may be
19 entitled to claim a separate award of statutory damages for
20 each work that is covered by the registration, because the
21 group registration covers each work that is submitted for
22 registration, parens, rather than the group as a whole,
23 closed parens, closed quote.

24 The Copyright Office's interpretation can be reconciled
25 with Ninth Circuit law on this matter. The Ninth Circuit has

1 adopted and uniformly applied independent economic value
2 tests for purposes of Section 504(c)(1).

3 The court notes that other circuits have various law. The
4 Fifth Circuit employs the independent economic value test;
5 the Eleventh Circuit employees independent economic value
6 analysis, but it is only one consideration and not
7 dispositive; the Second Circuit has rejected the test in the
8 Bryant v. Media Right case, 603 F.3d. See also Grant Heilman
9 Photography v. McGraw-Hill, which there is a Westlaw cite to,
10 which rejects the independent economic value test as contrary
11 to the plain language of the Copyright Act.

12 Turning to the Ninth Circuit, controlling law seems to be
13 Columbia Pictures TV v. Krypton Broadcast of Birmingham, 106
14 F.3d 284, 295 Fed. Circuit 1997 reversed on other grounds,
15 523 U.S. 340, commonly referred to as Columbia Pictures I,
16 concluding that the proper test to apply in analyzing whether
17 each component is a separate work for purposes of statutory
18 damages is whether each component has an independent economic
19 value.

20 That's followed by Columbia Pictures II at 259 F.3d 186,
21 1193, Ninth Circuit 2001, and Monge, 688 F.3d at 1180, which
22 quotes Columbia Pictures II at 259 F.3d at 1193. Quote, each
23 of the individual wedding photographs is a separate work
24 because each photo, quote, can live its own copyright life
25 and has economic value in itself as long as the photograph

1 itself is viable.

2 In other words, consistent with the Copyright Office's
3 message that a group registration may, in some circumstances,
4 obtain statutory damages for all components of the group, the
5 Ninth Circuit has concluded that a copyright owner may
6 recover for separate components, where those components have
7 independent economic value.

8 The Ninth Circuit's test fills the gap that the Copyright
9 Office's several interpretations expressly leave open.

10 Zillow argues that, quote, none of the cases that VHT
11 cites involved a copyright holder that expressly sought and
12 obtained registration for a compilation, and then obtained
13 separate awards for statutory damages for constituent work,
14 period, end quote. That's in the motion for summary judgment
15 response at 26, Note 23.

16 However, the court is not persuaded that it should veer
17 from established and unqualified precedent based on an
18 insignificant difference in registration format and an
19 equivocal Copyright Office interpretation that can be
20 reconciled with that precedent.

21 Accordingly, the court concludes that VHT is entitled to
22 statutory damages for each unit image that it proves has an
23 independent economic value.

24 That's the ruling of the court. I'll say for the second
25 time in a number of days, the court's job is to apply the law

1 as it is given to it. It's an interesting question, and,
2 obviously, the circuits are divided.

3 Counsel, anything else before we bring the jury in?

4 MS. PAUL: No, Your Honor.

5 MS. WALLACE: No, Your Honor.

6 THE COURT: All right. Do we have the full jury?

7 THE CLERK: Yes.

8 THE COURT: All right. Please bring them out.

9 Counsel, for your information, as of the close of
10 business, the plaintiffs have five hours and four minutes,
11 and the defendant has six hours and 43 minutes remaining. It
12 is my intention that between today and tomorrow, you will
13 have completed everything, including my reading of the
14 instructions and your closing arguments.

15 Please rise for the jury.

16 THE FOLLOWING PROCEEDINGS WERE HELD
17 IN THE PRESENCE OF THE JURY:

18 THE COURT: Good morning, ladies and gentlemen,
19 please be seated. Since you were here last, we've had an
20 action-filled Friday and weekend. I thought we would get
21 back to copyright on Monday, and I'm sure it was not a
22 reaction to my ruling on Friday, but it snowed and we had to
23 cancel court on Monday.

24 It remains my belief that we are going to finish this case
25 by close of business tomorrow. And remember, "close of

1 business" means it goes to you for deliberations. So you
2 stop being passive bystanders, and you become the main show
3 as of the close of business tomorrow. We'll get you the case
4 at that time.

5 I appreciate you. It is a challenge for some of you to
6 make it in today, and I appreciate the fact that this case
7 has been broken up, largely due to my schedule, some of which
8 I can't control. So thank you for your attention.

9 Counsel, are we ready to proceed?

10 MR. SARGENT: We are, Your Honor.

11 Zillow calls John Vogel.

12 THE COURT: Thank you.

13 JOHN VOGEL, HAVING BEEN FIRST DULY SWORN,
14 TESTIFIED AS FOLLOWS:

15 THE CLERK: Please state your name for the record,
16 and spell your last name for the court reporter.

17 THE WITNESS: My name is John H. Vogel, V-o-g-e-l,
18 Jr.

19 THE COURT: You may inquire.

20 DIRECT EXAMINATION

21 BY MR. SARGENT:

22 Q Sir, where do you work?

23 A I work at Dartmouth College.

24 Q Do you prefer go by "Mister" or "Professor"? What title
25 do you prefer?