

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS**

MICHAEL BOATMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 1:20-cv-01248-JES-JEH
	)	
PEORIA AREA ASSOCIATION OF	)	Honorable Judge James E. Shadid
REALTORS,	)	
	)	
Defendant.	)	

**DEFENDANT PEORIA AREA ASSOCIATION OF REALTORS’ MOTION AND  
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

Defendant Peoria Area Association of Realtors (“PAAR”), by and through its attorneys, respectfully moves pursuant to Fed. R. Civ. P. 12(b)(6) and 19(a) for dismissal of Plaintiff’s Complaint, or, in the alternative, the joinder of third party Move, Inc., and in support, states as follows:

**INTRODUCTION**

The Court should dismiss Boatman’s complaint for three reasons.

First, to state a claim for copyright infringement, the owner of copyright-protected photographs must demonstrate that the operator of an automated website was actively involved in the display of the photos. Here, Boatman does not allege that PAAR infringed by displaying his copyrighted photographs, only that the website that did display them, Realtor.com, operated by Move, Inc., “obtained” them from PAAR. Boatman has failed to properly allege copyright infringement against PAAR.

Second, Rule 19 allows the joinder of all materially interested parties “so as to protect interested parties and avoid waste of judicial resources.” If a party is necessary, it must be joined, if feasible. If it is not feasible, and the claim cannot proceed without them, then the complaint must

be dismissed. Boatman's claim against PAAR depends on an alleged contractual relationship between PAAR and Move, Inc., and in turn, Move, Inc.'s wrongful display of the photographs in violation of Boatman's copyrights. But Boatman failed to name Move, Inc. as a defendant party, despite the fact that Move, Inc. is necessary to completely adjudicate his claims regarding the construction and interpretation of the alleged contract between PAAR and Move, Inc. Boatman must either add Move, Inc. as a defendant, or his claim must be dismissed.

Finally, a party may not bring a claim against another if that claim had previously reached finality on the merits and was litigated under an identity of cause of action and parties or their privies. In such cases, the party's claim is barred by *res judicata*. Further, even if the prior litigation of those claims did not reach finality, they must be brought in one action against all culpable parties to avoid dismissal for improper claim splitting. Here, the allegations against PAAR have been alleged and adjudicated by Boatman in at least one prior action (and possibly more) which was dismissed with prejudice pursuant to a settlement in 2018. Boatman's complaint against PAAR is barred by *res judicata* and for improper claim splitting.

### **SUMMARY OF ALLEGED FACTS**

According to his Complaint, Boatman is a professional photographer who contracts with real estate agents to photograph the interior and exterior of homes to market their sale. (Compl., ¶¶ 7, 9). PAAR is a professional association of Peoria-area real estate agents that maintains a multiple listing service ("MLS") database for its members. (*Id.* at ¶¶ 3, 25.) At issue in this action are 1,216 of Boatman's photographs that he took and copyrighted from December 2013 to October 2015 and that he licensed to real estate agents in the Peoria area. (*Id.* at ¶¶ 12, 17, Exs. 1, 2.)

Boatman delivered his photographs to his real estate agent customers, who in turn uploaded the photos to the MLS operated by PAAR. (*Id.* at ¶ 26.) The photographs on the PAAR MLS would

be fed to real estate websites, like Realtor.com, that display MLS listings on the internet. (*Id.* at ¶ 29.) Boatman concedes such feeds to Realtor.com, which is the general practice in the industry, are permitted by Boatman’s licenses to his customers. (*Id.* at ¶¶ 28, 29, and 30.) The real estate websites would display photographs from the MLS to market homes until they were sold or the listing was removed. (*Id.* at ¶ 28.)

Move, Inc. owns and operates Realtor.com. (*Id.* at ¶ 32.) At some unstated point in time, Realtor.com changed its practice and continued to display photographs even after the properties sold. (*Id.* at ¶¶ 34-37.) Boatman alleges that Move, Inc.’s redisplay of his photographs in this manner violated the licenses Boatman granted to his real estate agent customers and thereby infringed his copyrights. (*Id.* at ¶ 39.)

Move, Inc. is the only entity that Boatman accuses of improperly displaying or redisplaying his photographs in this manner. (*Id.*, and Compl. Generally.) But Boatman did not name Move, Inc. as a defendant in this action. Instead, Boatman alleges that PAAR is responsible for the alleged infringement by Move, Inc. because “PAAR granted rights to third parties [i.e., Move, Inc.] that exceeded the scope of Boatman’s licenses [to his real estate agent customers].” (*Id.* at ¶ 43.)

On February 21, 2020, Boatman’s counsel sent a letter to PAAR notifying PAAR of its alleged infringement. (*Id.* at ¶ 44.) Although the letter is incorporated into Boatman’s complaint by reference, the letter is not attached to the complaint. The content of the letter is central to Boatman’s claims against PAAR because it provides the detail of the alleged relationship between PAAR and Move, Inc. that Boatman contends makes PAAR liable for the conduct of Move, Inc., which is not otherwise set forth in the complaint with any specificity, and is the only way to connect PAAR to Move, Inc.’s alleged infringement of Boatman’s copyrights. The crux of Boatman’s claim against PAAR is that “PAAR granted rights to third parties that exceeded the

scope of Boatman’s licenses.” (*Id.* at ¶ 43.) There are no other allegations in the complaint to support a claim for copyright infringement against PAAR. A copy of the referenced February 21, 2020 letter from Boatman’s counsel to PAAR is attached to this motion as Exhibit A.

In his February 21, 2020 letter, Boatman’s counsel identifies a June 3, 1996 written agreement between PAAR and Realtors Information Network (“RIN”) as the agreement by which PAAR allegedly granted Move, Inc. rights to Boatman’s photographs that exceed the scope of the licenses Boatman grants to his customers. *See* Ex. A at 2. Boatman contends that this 1996 agreement between PAAR and RIN “now controls the relationship between PAAR and Move, Inc. for the distribution of photographs to realtor.com.” *Id.* Boatman’s counsel claims in this letter that Move, Inc. relied upon the 1996 agreement between PAAR and RIN to justify its continued use of Boatman’s photographs after his customers listings had expired, and that, “[b]ut for PAAR’s grant of an overbroad license . . . , Mr. Boatman’s Photographs would not be extensively infringed online.” (*Id.* at 3.)

This is not the first time that Boatman has claimed that someone other than Move, Inc. is liable for Move, Inc.’s display of his photographs beyond the time permitted by the licenses he granted to his real estate agent customers. In *Boatman v. Honig Realty, Inc.*, Civil Action No. 16-cv-08397 (N.D. Ill. August 26, 2016) (the “*Honig* Action”), an action he filed in the Northern District of Illinois more than four years ago, Boatman made the exact same claim he makes in the present action, but against Defendant Honig, which was a real estate agency that employed some of Boatman’s real estate agent customers. In the *Honig* Action, Boatman claimed that it was the real estate agency, Defendant Honig, rather than PAAR, that “uploaded the Registered Photographs to Realtor.com knowing that it unlawfully granted rights in the Registered Photographs to Realtor.com under the Move Terms of Use that far exceeded the scope of Limited

License” that Boatman granted to his real estate agent customers. *See* Boatman Second Amended Complaint in the *Honig* Action at ¶ 38. A copy of Boatman’s Second Amended Complaint in the *Honig* Action is attached to this motion as Exhibit B (the “*Boatman v Honig* SAC”).

Boatman understood in the *Honig* Action that in order to publish a photograph on Realtor.com, a [Peoria-area real estate agent] must first agree to the terms and conditions of the Peoria Area Association of Realtors’ (“PAAR”) Multiple Listing Service (“MLS”) Rules and Regulations (the “PAAR MLS Rules and Regulations”) before uploading the photographs to PAAR’s online “portal,” which photographs are then published on Realtor.com.” Boatman attached the PAAR MLS Rules and Regulations as an exhibit to his *Boatman v. Honig* SAC, and further alleged that:

Defendant Honig-Bell agreed to the PAAR MLS Rules and Regulations, which PAAR MLS Rules and Regulations provide:

By the act of submitting any property listing content to the MLS, **the participant represents that he has been authorized to grant and also thereby does grant authority for the MLS to include the property listing content in its copyrighted MLS compilation and also in any statistical report on comparables.** Listing content includes, but is not limited to, photographs, images, graphics, audio and video recordings, virtual tours, drawings, descriptions, remarks, narratives, pricing information, and other details or information related to the listed property. (PAAR MLS Rules and Regulations, Section 13 (emphasis added); see also *id.* at Section 13.1 (“All right, title, and interest in each copy of every multiple listing compilation created and copyrighted by the Peoria Area Association of REALTORS® (PAAR) and in the copyrights therein, shall at all times remain vested in the Peoria Area Association of REALTORS®.”).) A copy of the PAAR MLS Rules and Regulations is attached as Exhibit H hereto.

Ex. B, *Boatman v. Honig* SAC ¶ 40 (emphasis in original).

Thus, Boatman recognized in the *Honig* Action that PAAR was acting in the same middle-man role he alleges that PAAR occupies in the present action. Boatman alleges in both actions that Boatman’s real estate agent customers upload his copyrighted photographs from to the PAAR

MLS, and from their they get uploaded to Realtor.com. Indeed, the photographs that Boatman incorporated into the *Boatman v. Honig* SAC contained the PAAR watermark. *See, e.g.*, Ex. B, *Boatman v. Honig* SAC ¶ 25. The *Honig* Action also involved some of the same properties and copyright registrations. Both actions encompass the photographs Boatman copyrighted for the properties at 1010 Glen Oaks, 614 Ravenwoods Rd and 218 Surrey Lane and Copyright Registration Nos. VA 1-964-540, VA 1-964-052. Compare Ex. B, *Boatman v. Honig* SAC ¶ 6 to Ex. A, Boatman Demand Letter to PAAR at attached Exhibit A. Despite this knowledge, Boatman did not name either PAAR or Move, Inc. as defendants in the *Honig* Action. Instead, he elected to settle and dismiss his claims in the *Honig* Action with prejudice. A copy of the November 18, 2018 Stipulation of Dismissal with Prejudice in the *Honig* Action is attached as Exhibit C.

## ARGUMENT

### 1. Legal standard for a motion to dismiss.

Under Rule 12(b)(6), a court should dismiss a plaintiff's complaint when the factual allegations fail to state a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560-61 (2007). A complaint that contains no more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," or that fails to allege "more than the mere possibility of misconduct," fails to meet the liberal pleading standard of Rule 8. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "The complaint must actually suggest that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the speculative level." *Frazier v. U.S. Bank Nat. Assn.*, 2013 WL 1337263, at \*2 (N.D. Ill. Mar. 9, 2013) (quotations and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Martin v. Direct Wines, Inc.*, 2015 WL 4148704, at \*1 (N.D. Ill. Jul. 9, 2015) (quoting *Twombly*,

550 U.S. at 556). “In reviewing the sufficiency of a complaint under the plausibility standard...[courts] need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Martin*, 2015 WL 4148704, at \*1 (quotations omitted). Conclusions of fact and law may be disregarded because “they are...not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679.

**2. Boatman’s complaint fails to state a claim for copyright infringement because he does not allege that PAAR was the cause of any infringement and alleged no facts to infer that necessary proposition.**

To establish copyright infringement, a plaintiff must prove two elements: (1) the ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017) (citations omitted). A plaintiff must also establish causation, which is commonly referred to as the “volitional-conduct requirement.” *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 731 (9th Cir. 2019) (signaling *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017)). Direct liability must be premised on conduct that can reasonably be described as the direct cause of the infringement. *Id.* This issue comes to the fore when a plaintiff accuses a defendant who does nothing more than operate an automated, user-controlled system. *Id.* (citing *Am. Broad Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 453 (2014) (Scalia, J., dissenting)). The question becomes: who selected the copyrighted content, the defendant or its customers? *Id.* (citing *Aereo, Inc.*, 573 U.S. at 454-55)).

As stated by the Ninth Circuit in *Giganews*,<sup>1</sup> direct copyright liability for website owners arises when they are actively involved in the infringement, and the distinction between active and

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<sup>1</sup> The Seventh Circuit and the Northern District of Illinois have relied on the Ninth Circuit’s analysis in several copyright infringement cases that involved plaintiff Perfect 10, Inc. and its claims against defendants related to the display of Perfect 10’s copyrightable material on various websites. See e.g. *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012); *Bell v. Chi. Cubs Baseball Club, LLC*, 2020 WL 550605 (N.D. Ill. Feb. 4, 2020); *GC2 Inc. v. Intl. Game Tech. PLC*, 255 F. Supp. 3d 812 (N.D. Ill. 2017).

passive involvement in the alleged infringement is central to the legal analysis. *Giganews*, 847 F.3d at 667; *see also*, *CoStar Grp, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004). Indirect activities, such as automatic copying, storage, and transmission of copyrighted materials, when instigated by others, do not render a website service strictly liable for copyright infringement. *Giganews*, 847 F.3d at 670. To demonstrate volitional conduct, a plaintiff must provide some evidence showing the defendant exercised control (other than by general operation of its website); selected material for upload, download, transmission, or storage; or instigated any copying, storage or distribution of its photos. *VHT, Inc.*, 918 F.3d at 732 (citing *Giganews*, 847 F.3d at 666, 670).

Here, Boatman does not allege that PAAR improperly copied, displayed, or distributed any of Boatman's copyrighted photographs. Nor does he allege that PAAR exercised any control over the selection of any photographs for display by Realtor.com, or that PAAR instigated the allegedly infringing redisplay of the photographs by Realtor.com. The PAAR MLS is populated with photographs that real estate agents upload to the MLS, and thus the photographs are not even "selected" by PAAR in the first instance. There is no allegation that PAAR exercised control over the photographs beyond the general operation of the MLS platform. The only action Boatman alleges PAAR took was acting as a middleman for the automatic "feed" of photographs from the PAAR MLS to the website. (Compl., ¶ 29). Boatman never alleges that he had any relationship with PAAR, or that PAAR violated Boatman's copyrights by possessing Boatman's photos, or by maintaining the Boatman photos on the PAAR MLS, or by feeding the Boatman photos to Realtor.com. On the contrary, Boatman concedes in his complaint that PAAR feeding access to Boatman's photos to Realtor.com to display the listings on the internet "was consistent with Boatman's license to his real estate agent clients." (*Id.*) The complaint does not allege that PAAR in any way instigated any redisplay by Realtor.com that infringed on Boatman's copyrighted



photographs. The only allegations that Boatman makes against PAAR with respect to Move, Inc.'s infringing redisplay of the photographs are that "Realtor.com obtained Boatman's Photographs from PAAR" and that PAAR "granted rights to third parties that exceeded the scope of Boatman's licenses." (Compl., ¶¶ 38 and 43.) This falls far short of a valid claim for direct copyright infringement against PAAR.

Indeed, based on Boatman's own allegations, PAAR could not have committed a direct infringement of Boatman's copyright because PAAR did nothing more than operate a largely automated, user-controlled MLS. There can no direct copyright infringement when PAAR was simply acting as a passive resource through which photographs were uploaded onto a third-party's website. Boatman's complaint fails to allege that PAAR had any active involvement in any infringing redisplay of his photos by Realtor.com.

**3. Move, Inc. is a necessary party to this action, and Boatman must name Move, Inc. as a defendant or the Court should dismiss Boatman's complaint.**

The defendant bears the burden in a Rule 19 motion of showing that the missing party must be joined for just adjudication. *Florian v. Sequa Corp.*, 2002 WL 31844985, at \*3 (N.D. Ill. Dec. 18, 2002). Rule 19 sets up a two-step inquiry. First, the court must determine whether a party's joinder is feasible. *Thomas v. U.S.* 189 F.3d 662, 667 (7th Cir. 1999). To answer that question, the court examines whether: (1) complete relief can be accorded among the present parties to the lawsuit; (2) the absent party's ability to protect its interest will be impaired; and (3) any existing parties might be subjected to a substantial risk of multiple or inconsistent obligations unless the absent party is joined. *Id.*; Fed R. Civ. P. 19(a).

Only if the court concludes, based on those factors, that the party should be included in the action, but it cannot be, must it go on to decide whether the litigation can proceed in the party's absence. *Id.* If there is no way to structure a judgment in the absence of the party that will protect

both the unavailable party's rights and the rights of the existing litigants, the unavailable party is regarded as "indispensable" and the action is subject to dismissal on a proper motion. *Id.* When ruling on a dismissal for lack of joinder or an indispensable party, a court may go outside the pleadings and look to extrinsic evidence. *Davis Companies v. Emerald Casino, Inc.*, 268 F.3d 477, 481 (7th Cir. 2001). Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim. Fed. R. Civ. Pro. 12(b)(6); *Ochs v. Hamilton*, 984 F. Supp. 2d 903, 907 (N.D. Ill. 2013).

Plaintiff's claim against PAAR in this lawsuit is rooted in: (1) Move, Inc.'s alleged redisplay of Boatman's copyrighted photographs on its website in a manner that exceeded the scope of the licenses that Boatman granted to his real estate agent customers, and (2) Boatman's contention that PAAR is liable as a direct infringer for Move, Inc.'s alleged copyright violations because PAAR entered into a contract (way back in 1996) that purportedly granted Realtor.com a license to use Mr. Boatman's photographs in a manner that exceeded the scope of the license that Mr. Boatman granted to the real estate agents that uploaded the photos to the PAAR MLS. In short, Boatman accuses Move, Inc. of copyright infringement, and seeks to hold PAAR liable for Move, Inc.'s infringing conduct based on the contention that a 1996 contract between PAAR and Move, Inc.'s predecessor purports to grant Move, Inc. a right to engage in that infringing conduct.

The adjudication of Boatman's claims in this action requires this Court to find: (1) that Move, Inc. engaged in conduct that violated Boatman's copyrights, (2) that Move, Inc. engaged in this infringing conduct in reliance upon a 1996 agreement between PAAR and RIN, (3) that Move, Inc. actually is a successor or otherwise has standing to assert rights under the 1996 agreement between PAAR and RIN, and (4) that the 1996 agreement between PAAR and RIN actually grants rights to Move, Inc. to continue to use photographs obtained from PAAR's feed to the Realtor.com

website after the sale of the subject properties and/or termination of the listings. All of these determinations could dramatically impact Move, Inc.'s interests in the subject matter of this action – including, without limitation, Move, Inc.'s substantial interest in (1) ensuring that its practice of redisplaying photographs after the sale of the property or termination of a listing is not found to infringe on third party copyrights, and (2) protecting whatever rights and other interests Move, Inc. may have (if any) in the 1996 agreement between PAAR and RIN. Yet Boatman did not name Move, Inc. as a defendant.

Under Rule 19, a necessary party includes any person who “claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may ... as a practical matter impair or impede the person’s ability to protect that interest....” Fed. R. Civ. P. 19(a). Move, Inc. satisfies these criteria. A finding that Move, Inc.’s business practices constitute copyright infringement meets this standard. Likewise, a “judicial declaration as to the validity and the enforceability and construction of a contract necessarily affects, “as a practical matter,” the interests of both parties to the contract. *U.S. ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996). As the purported successor in interest to the 1996 contract at issue here, Move, Inc. has a commercial stake in the outcome of this litigation. It therefore would appear beyond dispute that Move, Inc. is a necessary party under Rule 19(a). Furthermore, PAAR’s interests and Move, Inc.’s are not identical and do not align, and PAAR could not and would not adequately represent Move, Inc.’s interest. *See Lufkin v. Ill. Dept. of Employment Sec.*, 1997 159546, at \*2 (N.D. Ill. March 28, 1997) (unreported in F.Supp.); *but cf. N. Shore Gas Co.*, 896 F. Supp. at 790 (an identity of interests between a named defendant and a third party does not favor adding the third party as a necessary one).

Second, a court must determine if the absent party is “indispensable,” and Rule 19(b) provides for factors to consider in that analysis. *Hall*, 100 F.3d at 479. These factors include whether: (1) a judgment entered in the absence of the missing party will be prejudicial to the absent or existing party; (2) any such prejudice can be lessened or avoided by reshaping the judgment; (3) the judgment will be adequate; and (4) the plaintiff will have an adequate remedy if the action is dismissed. *Moore v. Ashland Oil. Inc.*, 901 F.2d 1445, 1447 (7th Cir. 1990). But the Court need not reach the question of whether a party is indispensable under Rule 19(b) if joinder of that party would not destroy federal jurisdiction. *Promatek Indus., Ltd. v. Equitrac Corp.*, 185 F.R.D. 520, 523 (N.D. Ill. 1999). Because Boatman’s copyright claim arises under federal law, the court’s jurisdiction does not depend on the diversity of the parties, and therefore, the Court need only analyze joinder under Rule 19(a). Move, Inc. is a necessary party and must be added as an additional defendant as in this action, but if it is not feasible, then Boatman’s complaint must be dismissed.

**4. Boatman’s claim is barred by *res judicata* because there was a final decision on the facts, transactions, and litigants that are at issue in this case. Also, Boatman has and continues to engage in improper claim splitting by naming the parties to these events in separate successive lawsuits.**

The doctrine of claim preclusion or *res judicata* precludes parties from relitigating issues that were or could have been raised in a previous action. *Johnson v. Cypress Hill*, 641 F.3d 867, 874 (7th Cir. 2011). Claim preclusion under federal law has three elements: (1) a final decision in the first suit; (2) a dispute arising from the same transaction (identified by its operative facts); and the same litigants (directly or through privity of interest). *US ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 851 (7th Cir. 2009). *Res judicata* bars not only those issues which were decided in a prior suit, but also all issues that could have been raised in that action. *Highway J Citizens Group v. U.S. Dept. of Transp.*, 456 F.3d 734, 741 (7th Cir. 2006) (citations omitted). Once a transaction

has caused injury, all claims arising from that transaction must be brought in one suit or lost. *Roboserve*, 121 F. 3d 1027, 1035 (7th Cir. 1997). The doctrine of *res judicata* may properly be raised as a basis to dismiss a complaint pursuant to Rule 12(b)(6). *Anderson v. Guaranteed Rate, Inc.*, 2013 WL 2319138, at \*3 (N.D. Ill. May 28, 2013).

In *Bell v. Taylor*, the Seventh Circuit found that there was an identity of the causes of action in two copyright infringement cases of the holder of a copyright for photographs depicting a city skyline, as required for *res judicata* to bar the second action. 827 F.3d 699, 706-07 (7th Cir. 2016). The court found that the plaintiff's two lawsuits arose out of a common core of operative facts—the defendant's use of the same photograph. *Id.*

Boatman has been litigating his copyright claims with respect to the photographs at issue in this action since at least August 2016 when he filed the *Honig* Action. Civil Action No. 16-cv-08397. Honig is a real estate sales agency located in Joliet, Illinois that commissioned Boatman to photograph certain homes for sale in 2015. *Id.* at Dkt. #45, ¶¶ 3, 6. Boatman alleged that the Honig agents distributed Boatman's photos to PAAR for publication on Realtor.com. *Id.* at Dkt. #45, ¶ 39. Some of the photos in the *Honig* Action are part of the 1,216 photos at issue in this case. Despite his knowledge throughout the *Honig* Action of PAAR's role in feeding Boatman's photographs to Realtor.com, Boatman did not name PAAR as a defendant in the *Honig* Action. Boatman elected instead to settle the *Honig* Action, and that action was dismissed with prejudice on November 7, 2018. Boatman's claim against PAAR arising out of the same operative facts therefore is barred. Boatman is not permitted to continue seeking repeated pay-days for the same infringing conduct in successive actions against the various different parties involved in that operative conduct.

Even if Boatman's claim against PAAR is not strictly barred by *res judicata*, this action cannot proceed because Boatman has engaged in improper claim-splitting. Unlike traditional claim preclusion, the bar against claim splitting can be applied before either action reaches a final judgment on the merits. *Anderson*, 2013 WL 2319138, at \*4. The doctrine prohibits a party from maintaining a suit that arises from the transaction or events underlying a previous suit simply by changing his legal theory. *Id.* The federal definition of a cause of action, when combined with the rule against claim splitting, requires that a plaintiff allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future. *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1365 (7th Cir. 1988). Claim splitting is a litigation tactic that the *res judicata* doctrine is meant to prevent. *Palka v. City of Chi.*, 662 F.3d 428, 437 (7th Cir. 2011).

Courts take a pragmatic approach when determining whether a set of facts constitutes a series of connected transactions and consider the relation of the facts in time, space, origin, and motivation. *Huon v. Johnson & Bell, Ltd.*, 757 F.3d 556, 558 (7th Cir. 2014) (citation omitted). They look to whether the facts form a convenient trial unit that conforms to the parties' expectations or business usage. *Id.* The fact that some events occurred at different times did not matter when the facts in the two complaints described a series of connected transactions that formed a convenient trial unit. *Id.* at 559.

Boatman is seeking to recover for the same alleged infringement from multiple parties in multiple actions under multiple theories. The doctrine of claim splitting prevents Boatman from testing out new legal theories against more innocent parties. With his latest suit against PAAR, Boatman seeks to relitigate the same events and claims that already were decided or could have been litigated in his prior *Honig* Action, which involved the same operative facts. If Boatman had

a good faith basis for suing PAAR for copyright infringement, he should have brought those claims in the *Honig* Action, which involved the same operative facts. Because he failed to bring the instant claim in the Honig Action, Boatman is barred from seeking relief against PAAR in the present action, and this Court should dismiss Boatman's claims against PAAR with prejudice.

### CONCLUSION

PAAR respectfully requests that this Court address the *res judicata* and claim splitting arguments first. Boatman's claim should be barred and dismissed with prejudice. His claim should be barred because he knew of PAAR and its alleged role in the redisplay of Boatman's photographs since at least 2016, yet never named it as a defendant in the *Honig* Action. He is not permitted to do so now because the doctrines of *res judicata* and claim splitting bar the claims. Should the claims not be barred and dismissed with prejudice on those grounds, the Court should dismiss the Complaint for failure to state a claim. A party that maintains an automated database of photographs is not the direct cause of their display and is innocent of copyright infringement. *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 731 (9th Cir. 2019). Nor should Boatman be allowed to proceed with his claims against PAAR without naming Move, Inc. as the party that actually displayed the photographs on its website in alleged violation of Boatman's copyrights, and whose purported contract with PAAR would need to be construed and enforced in order for Boatman to obtain any judgment against PAAR. Under Rule 19, Move, Inc. must be named as a party or the case dismissed.

Dated: September 14, 2020

Respectfully submitted,

Peoria Area Association of Realtors,  
Defendant,

By: /s/ Thomas G. Griffin  
One of Its Attorneys

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**Attorneys for Peoria Area Association of Realtors**



**EXHIBIT A**



*For Settlement Purposes Only, Subject to F.R.E. 408*

February 21, 2020

**VIA Priority Mail with Delivery Confirmation  
and E-Mail (rtuttle@paarealtors.com)**

Regina Tuttle, CEO  
Peoria Area Association of Realtors  
7307 North Willowlake Court  
Peoria, IL 61614

Re: Michael Boatman's Copyright Infringement Claims

Dear Ms. Tuttle,

Michael Boatman has retained this firm for representation in the matter of Peoria Area Association of Realtors ("PAAR," "you," or "your") infringement of copyrights as you previously have distributed 1,630 of my clients' timely registered photographs (as identified in Exhibits A and B, collectively the "Photographs") in a manner that severely exceeds the authority given to you.

Specifically, you have knowingly distributed Mr. Boatman's Photographs to third parties, including but not limited to Move, Inc. who owns and operates the website <https://www.realtor.com>, while granting usage rights that far exceed those rights granted by Mr. Boatman for the commercial display of his Photographs. This unauthorized granting of broad rights to Mr. Boatman's Photographs without his permission has resulted in those third parties not only using the Photographs beyond the sale term of the properties pictured, but has also allowed Move, Inc. to defend their own unauthorized use by referencing the rights you granted to them. An examples of continued use after the sale of the property is shown in part below:

A screenshot of a real estate listing page for 10419 Churchill Dr, Peoria, IL 61615. The page displays property details: 4 beds, 2 full, 1 half baths, 2,446 sq ft, with an estimated value of \$211,600. Below the details is a "Property History" section showing a timeline of events: "Listed for \$239,900" on Apr 12, 2013; "Sold for \$233,000" on May 29, 2013; and "Estimated at \$211,600" today. A gallery of eight photos shows the interior and exterior of the property. The listing is presented by Scott Rodgers with Re/Max Traders Unlimited.

[https://www.realtor.com/realestateandhomes-detail/10419-Churchill-Dr\\_Peoria\\_IL\\_61615\\_M88549-87070](https://www.realtor.com/realestateandhomes-detail/10419-Churchill-Dr_Peoria_IL_61615_M88549-87070)

Mr. Boatman never granted rights to any agent, brokerage, or you for use beyond the period that the properties were listed for sale. However, in paragraph 4 of the June 3, 1996 written agreement between PAAR and Realtors Information Network (which now controls the relationship between PAAR and Move, Inc. for the distribution of photographs to realtor.com), there is no such limitation on the use of the Photographs after the sale of the property:

**4. License Grant.** During the term of this Agreement, Data Provider hereby grants to RIN, its affiliates and authorized subcontractors a worldwide license to market, license, display, perform and promote the Licensed Data solely through the RPA. It is understood that all national account revenue derived from advertising through corporate national sponsorships whether the ads are displayed nationally or locally, shall be RIN's. RIN may also participate in the development and revenue sharing of locally identified and sold customers if so requested by the Data Provider. Subject to the foregoing license, as between RIN, its affiliates and authorized subcontractors and Data Provider, Data Provider shall retain all right, title, and interest in the Licensed Data.

This unauthorized and expansive grant of rights became known to Mr. Boatman in July 2017 while litigating claims against Peoria-based real estate agents, a case in which PAAR was deposed by Mr. Boatman. Through subsequent investigation into the issues and discussions with Move, Inc. regarding the unauthorized use of his images after the sale of the properties and for Move, Inc.'s own commercial advertisements, Mr. Boatman learned that it was PAAR's grant of rights combined with its warrant and representation of those rights that provided Move, Inc. with the foundational belief that it had authority to do so.

While this certainly could be chalked up to mere misunderstanding, PAAR's course of dealing suggests that at best, PAAR has been willfully disregarding the rights of the real estate photographers like Mr. Boatman for years. Specifically, Mr. Boatman first raised his concerns with PAAR in July 2015, when he spoke with Beth Reusch and Dallas Hancock about his concerns about Zillow using images beyond the sale of the property. At this point, PAAR had actual notice that Mr. Boatman specifically limited the scope of his licenses, and had concerns about downstream rights-granting issues.

Subsequent to these discussions, in July 2017, Mr. Boatman discovered the newly redesigned format of the realtor.com website where Move, Inc. used Mr. Boatman's Photographs as site content and commercial advertisements beyond the terms of the sale of the house. Then, in February 2018, Dallas Hancock confirmed that PAAR had never taken any action to compare or confirm that the licenses it granted to third parties were supported by the licenses granted by the copyright owners:

14	Q. Has there an ever -- has there ever been,
15	to your understanding, any effort to -- to understand
16	the -- the co-play of the licenses granted and
17	obtained by the Realtors with those third-party
18	websites to which PAAR distributes the photographs?
19	A. No.
20	Q. Why not?
21	A. I -- I guess I don't understand where that
22	responsibility would be the Association's.
23	Q. Whose responsibility would it be?
24	A. I don't know. I don't know.

Rule 30(b)(6) deposition of PAAR, 1:17-cv-01009-MMM-JEH, Feb. 5, 2018, 69:14-24.

Finally, last year Mr. Boatman engaged in discussions directly with Move, Inc. regarding the unauthorized use of his Photographs after the listings expired. Rather than acknowledge the misuse, Move, Inc. relied heavily on the 1996 license granted to it by PAAR as rationale for why they felt as though they had authorization to use the Photographs however they wanted. But for PAAR's grant of an overbroad license and refusal to amend that grant despite actual knowledge of the issue, Mr. Boatman's Photographs would not be extensively infringed online. As he discovered the continued uses of the Photographs in July 2017, the statute of limitations has not yet passed.

Accordingly, your distribution and granting of expansive rights to the Photographs without authorization of Mr. Boatman or the law constitute copyright infringements. These infringements are clear; the only question is the extent of damages to be paid.

#### **MY CLIENT'S RIGHTS PURSUANT TO U.S. COPYRIGHT LAW**

United States Copyright Law grants exclusive rights to the copyright owner of an image for use of that image, including the rights to:

- reproduce the copyrighted work;
- prepare derivative works based on the copyrighted work;
- distribute copies of the copyrighted work to the public; and/or
- display the image.

See 17 USC §§ 106 and 501. When those rights are infringed, the copyright owner is entitled to recover damages suffered as a result of the infringement, regardless of whether the infringer acted knowingly or intentionally. See 17 USC §504. Your company, its officers, and third parties performing work for you remain liable for this infringement until it is resolved.

Since Mr. Boatman timely registered the copyrights to the Photographs with the U.S. Copyright Office, he may elect either to receive the actual damages caused by and the profits earned from the infringement or statutory damages for each copyrighted work. 17 USC §504(b) and (c). The registration certificate for each of the Photographs is included in Exhibit A. 17 U.S.C. 504(c)(2) expressly provides that for an infringement of his timely registered Photographs, Mr. Boatman is entitled to recover somewhere between \$750 and \$30,000 per work infringed. He is also entitled to receive any legal fees and costs necessary to recover those damages through successful litigation. 17 USC §505.

#### **SUMMARY OF MY CLIENT'S CLAIMS AND DEMANDS**

Accordingly, Mr. Boatman demands that you:

1. Cease any further use of the Photographs; and
2. Provide an accounting of all of your uses of the Photographs.

Copyright infringement is a strict liability offense: you are responsible for any infringing act regardless of your intent. While you may stop using the Photographs, you remain liable for your past infringements.

**NOTICE TO PRESERVE DOCUMENTS AND DATA**

You are on notice that litigation is likely regarding your actions concerning the Photographs. Other than stopping any further use of the Photographs, you are now obligated and have a duty to preserve all evidence that may be relevant to the dispute discussed above and that may be the subject of pending litigation. This duty of preservation extends to, but is not limited to, data files, e-mails, calendars, telephone logs, access lists, and logs that are located on your computer networks, e-mail servers, mainframes, individual computer workstations, and external drives, or are located on any of those devices within your control but not owned by you, such as your web host. Specifically, but not exclusively, you are on notice that you must preserve all evidence of all of your uses of the Photographs. This duty extends to your employees and agents. We request that you notify your employees and agents of this retention request immediately.

Sanctions for violating any of the foregoing duties can be severe and include substantial monetary sanctions, adverse inferences in evidentiary rulings, and the entry of judgments by default. We remain hopeful that we can resolve this dispute short of litigation. The above duties, however, must be satisfied during any settlement or other discussions that we may have.

**OFFER TO SETTLE MY CLIENT'S CLAIMS**

Mr. Boatman is willing to provide you an opportunity to settle these claims against you and end this matter immediately and confidentially if you send certified funds in the amount of \$1,222,500 (\$750 minimum statutory damages per Photograph) payable to the following:

Evan Andersen Law, LLC, Trust Account  
3495 Buckhead Loop NE, #260147  
Atlanta, GA 30326

within ten (10) business days of your receipt of this letter. Please note that this amount represents an offer of settlement but does not reflect the damages that my client can and will seek in a court proceeding, including attorneys' fees pursuant to 17 USC 505. Rather, this settlement offer reflects what Mr. Boatman will accept if no further actions against you are necessary. If you do not accept this offer, Mr. Boatman reserves the right to seek the maximum available damages under the law, which far exceed this amount.

Be advised that if you are unwilling to resolve this matter as noted above, Mr. Boatman may initiate formal litigation at any time without further notice to you. If you carry business insurance, now may be an appropriate time to contact your carrier to determine whether my client's claims are covered under your policy. This letter is without prejudice to Mr. Boatman's rights and claims, which are expressly reserved.

We look forward to receiving your timely response.

/s/ *Evan A. Andersen*

Evan A. Andersen, Esq.  
Phone: 404.496.6606  
Email: [evan@pixeliplaw.com](mailto:evan@pixeliplaw.com)

# Exhibit A

Address	City, State	Unique Images	Copyright VA
	Re/Max_ Scott Rogers		
10406 W Riekena Rd	Mapleton IL 61547	13	VA 2-007-605
10419 N Churchill Dr	Peoria IL	19	VA 2-007-605
138 Heatherview	Peoria IL	24	VA 2-007-605
1428 W Margaret Ave	Peoria IL	16	VA 2-007-605
2723 W Wendarm Ct	Peoria IL	14	VA 2-007-605
5916 W Sioux Trail	Peoria IL	23	VA 2-007-605
5930 W Ridgecrest	Peoria IL	15	VA 2-007-605
1388 Exeter Ct	Tremont IL	29	VA 2-007-605
1405 Wood Rd	Peoria IL	15	VA 2-007-605
1917 Hampton	Peoria IL	6	VA 2-007-605
1921 Hampton	Peoria IL	16	VA 2-007-605
2018 W Geneva	Peoria IL	21	VA 2-007-605
2427 W Cabana Ct	Peoria IL	11	VA 2-007-605
2707 S St. Agnes Ct	Bartonville IL	12	VA 2-007-605
2816 w James Rd	Peoria IL	10	VA 2-007-605
303 Circuit Ct	East Peoria IL	14	VA 2-007-605
4504 W Russell Ave	Peoria IL	6	VA 2-007-605
4707 W Red Bud Dr	Peoria IL	11	VA 2-007-605
608 W Maywood Ave	Peoria IL	16	VA 2-007-605
10111 W Lake Shore Dr	Princeville IL 61559	21	VA 2-007-605
1013 W Kensington	Peoria IL	20	VA 2-007-605
1028 E Forrest Hill	Peoria IL	13	VA 2-007-605
11217 N Oakwood Dr Unit 71	Peoria IL	12	VA 2-007-605
1220 W Progress St	Metamora IL 61548	11	VA 2-007-605
1318 N University St	Peoria IL	18	VA 2-007-605
136 Glenview Ave	East Peoria IL	16	VA 2-007-605
1817 Memorial Dr	Pekin IL	20	VA 2-007-605
215 N Holly	Elmwood IL	11	VA 2-007-605
5307 N Rothmere DR	Peoria IL	23	VA 2-007-605
5810 W Colt Dr	Bartonville IL	13	VA 2-007-605
7655 Chestnut Dr	Edwards IL	23	VA 2-007-605
9504 Excalibur Ct	Mapleton IL	12	VA 2-007-605
1313 W Kingsway Dr	Peoria IL	17	VA 2-007-605
1429 8Th St	Pekin IL	18	VA 2-007-605
190 Gunion	Pekin IL	16	VA 2-007-605
200 Theodore	Washington IL	14	VA 2-007-605
2028 W Clarke Ave	West Peoria IL	15	VA 2-007-605
2116 W Sunnyview Dr	Peoria IL	21	VA 2-007-605
2227 W Kensington Dr	Peoria IL	19	VA 2-007-605
308 N Nebraska Ave	Morton IL	12	VA 2-007-605
4004 W Carrousel Lane	Peoria IL	17	VA 2-007-605
405 Illini Dr	East Peoria IL	16	VA 2-007-605
5215 N Sherbrook Ln	Peoria IL	19	VA 2-007-605
5218 N Montclair	Peoria Heights IL	9	VA 2-007-605
7102 N White Fir Dr	Edwards IL	24	VA 2-007-605

5406 N Stephen Dr	Peoria IL	23	VA 2-007-605
10514 W Sir Ector	Mapleton IL	22	VA 2-007-605
1401 Shellbark Ct	Washington IL	18	VA 2-007-605
2104 W Overbrook Dr	Peoria IL	4	VA 2-007-605
249 Oakwood Rd	East Peoria	16	VA 2-007-605
2521 S High Meadow	Bartonville IL	10	VA 2-007-605
3 Oxford Court	Washington IL	16	VA 2-007-605
3907 W Creighton Ter	Peoria IL	11	VA 2-007-605
5129 W Arrowood # 132	Peoria IL	16	VA 2-007-605

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 Re/max\_AI Legg
 

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13 Lavender Ln	Bloomington IL	20	VA 1-855-851
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 Re/Max\_Amy Vonachen
 

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1811 Kern Road	Washington IL	36	VA 2-007-605
201 W Aspen Way	Peoria IL	31	VA 1-976-962
218 Surrey Lane	East Peoria	33	VA 1-964-118
220 Ravinwoods	Peoria IL	36	VA 1-964-540
2600 Sunset Ct	Peoria IL	36	VA 2-007-605
318 W Stratford Dr	Peoria IL	36	VA 1-965-006
5728 W Forestwood Dr	Peoria IL	36	VA 1-964-540
5404 N Prospect	Peoria Heights IL	36	VA 1-980-161
1 Brockway Ave	Peoria Heights IL	15	VA 1-980-161

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 Keller Williams\_Renee Faletti
 

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2812 Addison Ct	Pekin IL	29	VA 1-964-116
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 Keller Williams\_Linda Kepple
 

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11944 N Hickory Grove Rd	Dunlap IL	6	VA 1-965-013
12323 W Downing Pl	Brimfield IL	36	VA 1-965-006
12802 Georgetowne	Dunlap IL	36	VA 2-007-605
12909 Georgetowne	Dunlap IL	11	VA 2-007-605
135 E Southgate Rd	Peoria IL	29	VA 2-007-605
4421 W Deermeadow Dr	Peoria IL	39	VA 1-965-006
519 E High Point Rd	Peoria IL	35	VA 1-965-006
5404 Prospect	Peoria IL	35	VA 2-007-605
5906 W Ivyleaf Ct	Peoria IL	36	VA 1-964-116
711 Highview	East Peoria	35	VA 1-965-006
709 W Bridgetowne Ct	Dunlap IL 61525	6	VA 1-965-006
614 W Ravenwood Rd	Peoria IL	36	VA 1-964-052

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 Keller Williams\_Laurie Cain /Elizabeth Stone
 

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142 Detweiller	Peoria IL	25	VA 1-965-013
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 Knell Group
 

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1010 Glen Oaks	Peoria IL	29	VA 1-964-540
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Steve Horan

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13425 N Lakewood Dr	Dunlap	35	VA 1-964-118
	TOTAL:	1630	

**EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

MICHAEL BOATMAN, an individual,

Plaintiff,

v.

HONIG REALTY, INC. d/b/a  
COLDWELL BANKER HONIG-BELL,

Defendant.

Civil Action No. 16-cv-8397

Judge John J. Tharp, Jr.  
Magistrate Judge Maria Valdez

**JURY TRIAL DEMANDED**

**SECOND AMENDED COMPLAINT FOR COPYRIGHT INFRINGEMENT**

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiff, Michael Boatman (“Plaintiff”), by and through his undersigned attorneys, for his second amended complaint against Defendant, Honig Realty, Inc. d/b/a Coldwell Banker Honig-Bell (“Honig-Bell”), states as follows:

**NATURE OF THE ACTION**

1. This is an action arising under the copyright laws of the United States, 17 U.S.C. § 101 *et seq.*, and is brought by Plaintiff against Defendant Honig-Bell for Honig-Bell’s infringement of 356 registered copyrighted photographs owned by Plaintiff in violation of 17 U.S.C. § 501 *et seq.*, and for Honig-Bell’s intentional removal or alteration of “copyright management information” originally contained in such registered copyrighted photographs, as well as 168 additional copyrighted photographs, in violation of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1202(b).

## **THE PARTIES**

2. Plaintiff Michael Boatman is an individual who resides at 124 Kaskaskia Ct., East Peoria, Illinois 61611. Mr. Boatman is a professional photographer.

3. On information and belief, Defendant Honig-Bell is a corporation organized under the laws of the State of Illinois having a place of business at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431. On further information and belief, Honig-Bell is in the business of residential and commercial real estate sales and related services.

## **JURISDICTION AND VENUE**

4. This Court has exclusive jurisdiction over the subject matter of this case under 28 U.S.C. § 1331 because this action arises under the copyright laws of the United States.

5. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (d) and 1400(a) because, as described more fully below, a substantial part of the events or omissions giving rise to the claims herein occurred in this judicial district. Further, Defendant Honig-Bell has contacts in this judicial district sufficient to subject it to the personal jurisdiction of this district if this district were a separate state.

## **FACTS**

### **I. Plaintiff's Registered Copyrighted Photographs**

6. From early through mid-2015, Plaintiff took numerous photographs of each of nine real estate properties for agents of Defendant Honig-Bell (the "Photographed Properties"). Plaintiff group-registered each such photograph with the U.S. Register of Copyrights (the "Registered Photographs"). The table on the following page includes the address of each of the Photographed Properties, the date on which Plaintiff photographed each of the Photographed Properties, the number of Registered Photographs Plaintiff took of each of the Photographed Properties, the Certificate of Registration number for each set of Registered Photographs Plaintiff

took of the Photographed Properties, and the effective date of registration for each set of Registered Photographs Plaintiff took of the Photographed Properties. Copies of the Certificate of Registration for each set of Registered Photographs are attached as Exhibit A hereto. Further, a complete list of all the Registered Photographs at issue in this action is attached as Exhibit B hereto.

<b>Date Created by Plaintiff</b>	<b>Photographed Property Address</b>	<b>Number of Registered Works</b>	<b>Registration Date</b>	<b>Registration #</b>
5/29/15	207 Country Club Dr., Pekin, IL	52	6/26/15	VA0001964540
3/31/15	2219 Knollaire Dr., Washington, IL	22	6/26/15	VA0001964540
4/6/15	1008 W. Kensington Dr., Peoria, IL	26	6/26/15	VA0001964540
3/30/15	614 W. Ravinwoods Rd., Peoria, IL	12	6/26/15	VA0001964540
7/15/15	614 W. Ravinwoods Rd., Peoria, IL	38	7/28/15	VA0001964052
4/6/15	9712 Cherrybark Ct., Peoria, IL	60	6/26/15	VA0001964540
5/11/15	218 E. Surrey Lane, East Peoria, IL	50	6/26/15	VA0001964540
5/1, 5/4/2015	1010 NE Glen Oak Ave., Peoria, IL	33	6/26/15	VA0001964540
4/30/15	179 State Rte. 116, East Peoria, IL	32	6/26/15	VA0001964540
7/15/15	1604 School St., Washington, IL	31	7/28/15	VA0001964052

7. The following is a reproduction of one of the 26 Registered Photographs Plaintiff took of the Photographed Property located at 1008 West Kensington Drive, Peoria, Illinois 61614, on April 6, 2015 (the “Registered Kensington Dining Room Photograph”):



8. Because Plaintiff registered each of the Registered Photographs within three months of the date he created each such photograph, at his election, Plaintiff will be entitled to an award of statutory damages and/or attorney's fees pursuant to 17 U.S.C. § 412(2) upon a determination that Defendant Honig-Bell is liable for infringement of the Registered Photographs.

## **II. Plaintiff's Grant of a Limited License to the Registered Photographs to Defendant Honig-Bell**

9. In connection with taking each set of Registered Photographs of the Photographed Properties and providing digital copies of the same to Defendant Honig-Bell, Plaintiff granted Defendant Honig-Bell a limited copyright license (the "Limited License"), which Limited License provides:

Photography for locale [sic] Realestate [sic]. Photography for listing and marketing of [Photographed Property address], a house. Usage lease expires with the listing agreement termination. No usage rights are granted until full payment is made. ***Nontransferable to any 3rd party for any reason without prior written consent from the author and copyright owner Mike Boatman.*** Mike Boatman maintains full and complete ownership of images.

(Emphasis added.)

10. Plaintiff submitted invoices for the Registered Photographs to realtors Trish Yocum and Kendra Sipes, who at all relevant times were employed as real estate agents of Defendant Honig-Bell. Each such invoice included the Limited License set forth in paragraph 9 above. Copies of those invoices are attached as Exhibit C hereto.

11. In addition to invoicing his real estate clients after taking and delivering photographs of real estate properties, it was Plaintiff's custom and practice to send his clients copies of (i) Plaintiff's written "Real estate photography usage fees proposal" (the "Usage Terms") and (ii) the express language of Plaintiff's Limited License before taking and delivering photographs. Plaintiff's Usage Terms set forth Plaintiff's fee structure and include the following express "Restricted Lease Usage" provision:

**Restricted Lease Usage:**

Photography usage rights are restricted to the marketing of the listed property. Usage lease is nontransferable to 3rd parties. Lease expires upon sale of the house or cancellation of the listing agent or broker.

(Emphasis in original.) Plaintiff provided copies of his Usage Terms and the language of his Limited License to Defendant Honig-Bell’s real estate agents, Ms. Yocum and Ms. Sipes, when negotiating his services relative to the Photographed Properties. By way of example and not limitation, on April 17, 2015, Plaintiff emailed Ms. Sipes copies of his Usage Terms and the language of his Limited License. (Exhibit D hereto.) In the body of that email, Plaintiff advised Ms. Sipes that “I’m also attaching my real estate usage agreement which limits the use of the photographs to the listing and marketing of this particular property so long as you have the listing contract. Once your listing contract expires or the house is sold the images can no longer be used.”

(*Id.*)

**III. Plaintiff’s Inclusion of Copyright Management Information Within the Registered Photographs**

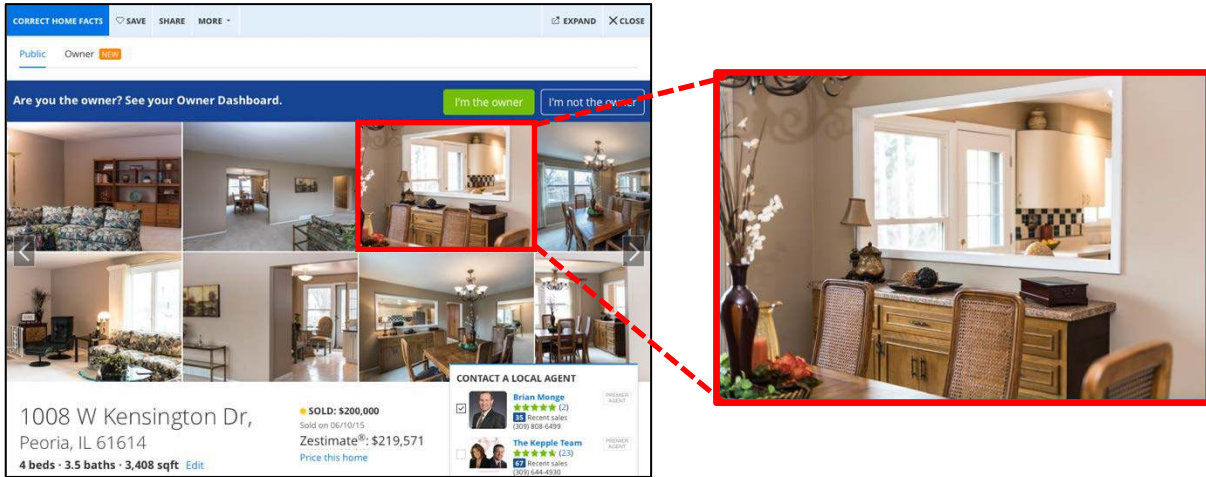
12. As delivered to Defendant Honig-Bell, Plaintiff included the following embedded “copyright management information” as that term is defined under 17 U.S.C. § 1202(c):

Artist:	<b>Mike Boatman</b> (Plaintiff’s personal information redacted.)
Copyright:	© Mike Boatman 2015
Terms of Use:	Restricced

**IV. Defendant Honig-Bell’s Unauthorized Transfer of the Registered Photographs to Third-Party Zillow, Inc.**

13. Without seeking the written consent of Plaintiff, Defendant Honig-Bell distributed the Registered Photographs to third-party Zillow, Inc. (“Zillow”) in order to advertise the Photographed Properties for sale. By way of example and not limitation, the Registered

Kensington Dining Room Photograph, and the other Registered Photographs Plaintiff took of the Kensington Photographed Property on April 6, 2015, are currently displayed on Zillow.com as shown in part below:



(See, e.g., [http://www.zillow.com/homes/for\\_sale/5120691\\_zpid/40.762156,-89.605294,40.759194,-89.610551\\_rect/17\\_zm/1\\_fr/?view=map](http://www.zillow.com/homes/for_sale/5120691_zpid/40.762156,-89.605294,40.759194,-89.610551_rect/17_zm/1_fr/?view=map) (callout of the Registered Kensington Dining Room Photograph added for clarity).)

14. On September 5, 2017, this Court granted-in-part Defendant Honig-Bell’s motion to dismiss Plaintiff’s initial complaint in this action. (Order on Motion to Dismiss, Dkt. #33.) In dismissing Plaintiff’s claim for direct infringement of his copyrights, the Court ruled that Defendant Honig-Bell’s distribution and transfer of the Registered Photographs to third parties Zillow and Realtor.com was “for the stated purposes of listing and marketing the [Photographed Properties]” and, therefore, fell “within the scope of [the Limited License].” (*Id.* at 5.) Without waiver of any arguments Plaintiff may raise on appeal concerning the Court’s dismissal of Plaintiff’s originally-pled direct copyright infringement claim, as discussed more fully in the paragraphs below, for the purpose of this Second Amended Complaint, Plaintiff does *not* allege that Defendant Honig-Bell’s mere act of distributing, transferring, and uploading the Registered



Photographs to third parties such as Zillow and Realtor.com, without more, constituted direct copyright infringement.

15. In direct contravention of the express terms of the Limited License, and by way of example and not limitation, the Registered Kensington Dining Room Photograph, and the other Registered Photographs of the Kensington Photographed Property Defendant Honig-Bell distributed to third-party Zillow, have remained published on Zillow.com long after the June 10, 2015 sale date of the Kensington Photographed Property (as indicated on the Zillow.com web page shown in paragraph 13 above). On information and belief, such publication has continued despite the termination of Defendant Honig-Bell's listing agreement with respect to the Kensington Photographed Property. Like those of the Kensington Photographed Property, numerous other of the Registered Photographs remain improperly published on Zillow.com despite the sale of the subject Photographed Property. As discussed more fully in the paragraphs below, the improper publication of the Registered Photographs of the Kensington Photographed Property and numerous other of the Registered Photographs after the termination of Defendant Honig-Bell's listing agreements for the underlying properties, and for other purposes unrelated to "the stated purposes of listing and marketing the [properties]" (Order on Motion to Dismiss at 5, Dkt. #33), was the direct result of acts Defendant Honig-Bell committed in addition to merely distributing, transferring, and uploading the Registered Photographs to third parties such as Zillow and Realtor.com.

16. On July 23, 2015, in separate conversations, Plaintiff spoke by telephone with two employees of Defendant Honig-Bell who were present at, or work out of, Defendant Honig Bell's headquarters at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431, or were otherwise located in this judicial district. In the first such discussion, Defendant Honig-Bell's employee, Ms. Kim

Jesen, who Plaintiff called at phone number (815) 553-2400, and who Plaintiff understood to have been associated with Defendant Honig-Bell's marketing department, advised Plaintiff that Defendant Honig-Bell's IT department had created and maintained an online "portal" that Defendant Honig-Bell uses to upload photographs for publication on Zillow. In the second such discussion, Defendant Honig-Bell's employee, Mr. Dennis Dunn, who Plaintiff called at (773) 484-6311 and who identified himself as Defendant Honig-Bell's IT director, advised Plaintiff that Defendant Honig-Bell has a contract with Zillow that governs the terms of Defendant Honig-Bell's publication and advertisement of real estate properties (the "Zillow Listing Agreement").

17. On information and belief, the officers, representatives, employees, or agents of Defendant Honig-Bell responsible for negotiating and executing the Zillow Listing Agreement work out of Defendant Honig-Bell's headquarters at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431, in this judicial district.

18. On further information and belief, the online "portal" that Defendant Honig-Bell uses to upload photographs for publication on Zillow, including Defendant Honig-Bell's upload of Plaintiff's Registered Photographs, resides, and/or is maintained and serviced, at Defendant Honig-Bell's headquarters at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431, in this judicial district.

19. On further information and belief, the officers, representatives, employees, or agents of Defendant Honig-Bell responsible for causing, authorizing, or allowing Defendant Honig-Bell's unauthorized and infringing transfer of Plaintiff's Registered Photographs to Zillow work out of Defendant Honig-Bell's headquarters at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431, in this judicial district, and committed acts resulting in infringement of Plaintiff's Registered Photographs in this judicial district.

20. In order to upload photographs for publication on Zillow, a party must agree to be bound by Zillow's terms of use (the "Zillow Terms of Use"), which Zillow Terms of Use provide:

For materials you post or otherwise provide to Zillow Group in connection with the Services (your "Submission"), you ***grant Zillow Group an irrevocable, perpetual, royalty-free worldwide license to (a) use, copy, distribute, transmit, publicly display, publicly perform, reproduce, edit, modify, prepare derivative works of or incorporate into other works, and translate your Submission, in connection with the Services or in any other media, and (b) sublicense these rights, to the maximum extent permitted by applicable law.*** Zillow Group will not pay you for your Submission or to exercise any rights related to your Submission set forth in the preceding sentence. Zillow Group may remove or modify your Submission at any time. ***For each Submission, you agree to provide accurate and complete information and represent that you have all rights necessary to grant Zillow Group the rights in this paragraph, that Zillow Group's use of the Submission will not infringe any third party rights and that the Submission complies with Section 2(a) above.*** You are solely responsible for all Submissions made through your user account(s) on the Services or that you otherwise make available through the Services.

(Zillow Terms of Use, ¶ 3 (emphasis added); *see also id.* at ¶ 2(a) (agreeing not to use Zillow's services in any way that, *inter alia*, is "unlawful").) A copy of the Zillow Terms of Use is attached as Exhibit E hereto.

21. On information and belief, Defendant Honig-Bell agreed to be bound by the Zillow Terms of Use.

22. The rights Defendant Honig-Bell unlawfully granted to Zillow pursuant to the Zillow Terms of Use exceed the scope of the Limited License, which permitted Defendant Honig-Bell to use the Registered Photographs only for the purposes of listing and marketing the properties, and then, only until the sale of the subject Photographed Properties. (*See* Limited License, ¶ 9 above; Usage Terms, ¶ 11 above.)

23. Accordingly, without seeking Plaintiff's written consent, as required by the express terms of the Limited License, Defendant Honig-Bell uploaded the Registered Photographs to Zillow knowing that it unlawfully granted rights in the Registered Photographs to Zillow under

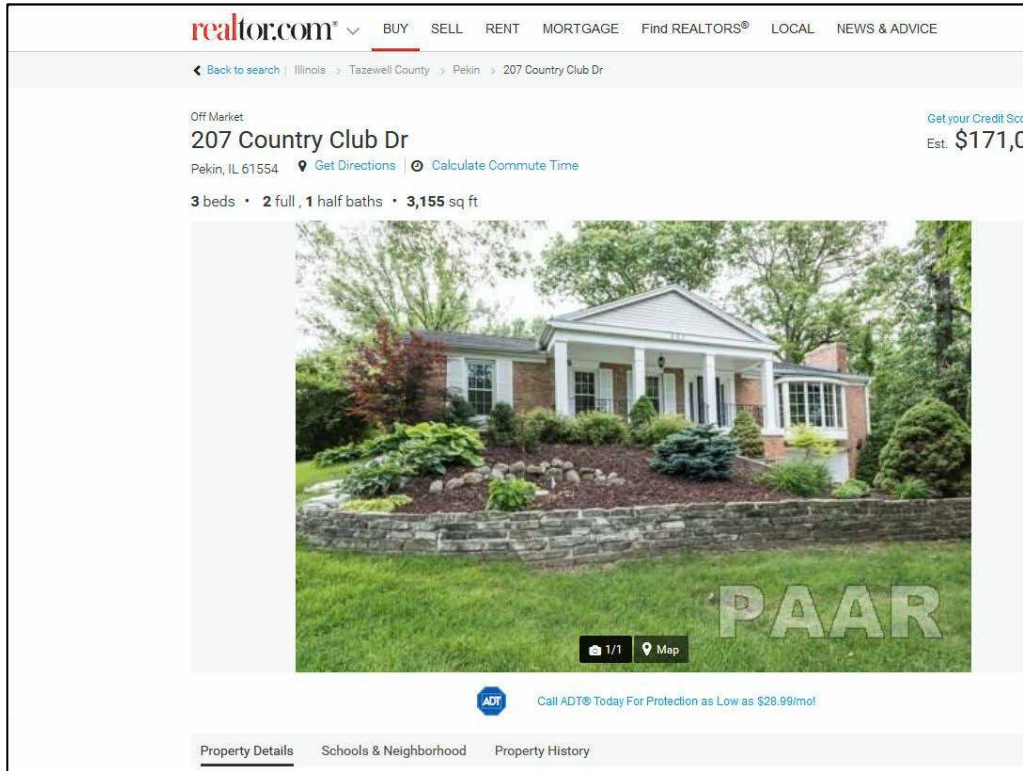
the Zillow Terms of Use that far exceeded the scope of the Limited License – namely, as pertains to Plaintiff’s claim for direct infringement of his copyrights and as discussed more fully in the paragraphs below, (i) the right to publish the Registered Photographs even after termination of the listing agreements for the subject properties (which Zillow did), (ii) the right to publish the Registered Photographs for purposes other than the listing and marketing of the subject properties, such as, for example, for use in third party advertising totally unrelated to the listing and marketing of the subject properties (which use Zillow made of Registered Photographs on its “Zillow Digs” advertising pages), and (iii) the unfettered right to an “irrevocable, perpetual, royalty-free worldwide license to (a) use, copy, distribute, transmit, publicly display, publicly perform, reproduce, edit, modify, prepare derivative works of or incorporate into other works, and translate [the Registered Photographs], in connection with the Services or in any other media, and (b) sublicense these rights, to the maximum extent permitted by applicable law.” (Ex. E, Zillow Terms of Use, ¶ 3.)

**V. Defendant Honig-Bell’s Unauthorized Transfer of Registered Photographs to Other Third-Parties**

24. The following is a reproduction of one of the 52 Registered Photographs Plaintiff took of the Photographed Property located at 207 Country Club Drive, Pekin, Illinois 61554, on May 29, 2015 (the “Registered Country Club Exterior Photograph”):



25. Without seeking Plaintiff's written consent, Defendant Honig-Bell distributed Registered Photographs, or caused Registered Photographs to be distributed, to third-parties other than Zillow, including, for example, Realtor.com, in order to advertise Photographed Properties for sale as well as for other improper purposes in violation of the Limited License. By way of example and not limitation, the Registered Country Club Exterior Photograph Plaintiff took of the Country Club Photographed Property on May 29, 2015, is currently displayed on Realtor.com as shown in part on the following page:



(See, e.g., [http://www.realtor.com/realestateandhomes-detail/207-Country-Club-Dr Pekin IL 61554 M80405-77163](http://www.realtor.com/realestateandhomes-detail/207-Country-Club-Dr-Pekin-IL-61554-M80405-77163).)

26. As stated in paragraphs 14, 15, and 23 above, Plaintiff does not allege that Defendant Honig-Bell's mere act of distributing, transferring, and uploading the Registered Photographs to third parties such as Zillow and Realtor.com, without more, constituted direct copyright infringement.

27. In direct contravention of the express terms of the Limited License, and by way of example and not limitation, the Registered Country Club Exterior Photograph has remained published on Realtor.com long after the sale date of the Country Club Photographed Property (as indicated on the Realtor.com web page shown in paragraph 25 above (see "Off Market" notice above property address)). On information and belief, such publication has continued despite the termination of Defendant Honig-Bell's listing agreement with respect to the Country Club



Photographed Property. On information and belief, like the Registered Country Club Exterior Photograph, numerous other of the Registered Photographs remain improperly published on third-party websites such as Realtor.com despite the sale of the subject Photographed Property. As discussed more fully in the paragraphs above and below, the improper publication of the Registered Country Club Exterior Photograph and numerous other of the Registered Photographs after the termination of Defendant Honig-Bell's listing agreements for the underlying properties, and for other purposes unrelated to "the stated purposes of listing and marketing the [properties]" (Order on Motion to Dismiss at 5, Dkt. #33), was the direct result of acts Defendant Honig-Bell committed in addition to merely distributing, transferring, and uploading the Registered Photographs to third parties such as Zillow and Realtor.com.

28. Indeed, on information and belief, 231 of the Registered Photographs were improperly republished on Realtor.com. Screenshots of these Registered Photographs are attached as Exhibit F hereto.

29. On further information and belief, Defendant Honig-Bell is a party to one or more contracts with third-parties such as, for example, Realtor.com, which one or more contracts governs the terms of Defendant Honig-Bell's publication and advertisement of real estate properties on such third-parties' websites ("Third-Party Listing Agreements").

30. On further information and belief, Defendant Honig-Bell uses an online "portal" – similar to, or the same as, the portal used to upload photographs for publication on Zillow – to upload photographs for publication on third-party websites such as, for example, Realtor.com.

31. On information and belief, the officers, representatives, employees, or agents of Defendant Honig-Bell responsible for negotiating and executing the Third-Party Listing

Agreements work out of Defendant Honig-Bell's headquarters at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431, in this judicial district.

32. On further information and belief, the online "portal" that Defendant Honig-Bell uses to upload photographs for publication on third-party websites such as, for example, Realtor.com, including Defendant Honig-Bell's upload of Plaintiff's Registered Photographs, resides, and/or is maintained and serviced, at Defendant Honig-Bell's headquarters at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431, in this judicial district.

33. On further information and belief, the officers, representatives, employees, or agents of Defendant Honig-Bell responsible for causing, authorizing, or allowing Defendant Honig-Bell's unauthorized and infringing transfer of Plaintiff's Registered Photographs to third-parties such as, for example, Realtor.com, work out of Defendant Honig-Bell's headquarters at 320 Waterstone Way, Suite 100, Joliet, Illinois 60431, in this judicial district, and committed acts resulting in infringement of Plaintiff's Registered Photographs in this judicial district.

34. In order to upload photographs for publication on third-party websites such as, for example, Realtor.com, a party must agree to accept and comply with the terms, conditions, and notices stated in Move, Inc.'s (which operates Realtor.com) terms of use (the "Move Terms of Use"), which Move Terms of Use provide:

To the extent that you post, upload, input, submit or otherwise transmit (collectively, "Transmit" or "Transmitting" as appropriate) Content on or through the Move Network, you agree to provide true, accurate and complete information and to refrain from impersonating or falsely representing your affiliation with any person or entity. You are entirely responsible for all Content that you provide or otherwise make available via the Move Network. ***You also warrant and represent that you own or otherwise control all of the rights to such Content including, without limitation, all the rights necessary for you to Transmit such Content, and to transfer your or others' interests in such Content to Move as provided below.***

\*\*\*

***By Transmitting Content to the Move Network, you grant, and you represent and warrant that you have the right to grant, to Move an irrevocable, perpetual, non-***



***exclusive, fully paid, worldwide license to use, copy, perform, display, and distribute the Content and to prepare derivative works of, or incorporate into other works, the Content, and to grant and authorize sublicenses (through multiple tiers) of the foregoing.*** Furthermore, by posting Content to any public area of the Move Network, you grant Move all rights necessary to prohibit any subsequent aggregation, display, copying, duplication, reproduction, or exploitation of the Content on the Move Network by any party for any purpose.

(Move Terms of Use, “Content You Provide” (emphasis added); *see also id.* (promising not to use the “Move Network” to transmit any Content “that you do not have a right to post and transmit under any law or under contractual relationships” or “such that such posting, uploading, or transmission constitutes the infringement of any . . . copyright or other proprietary rights of any party”).) A copy of the Move Terms of Use is attached as Exhibit G hereto.

35. The Move Network homepages include, but are not limited to, pages currently located at <http://www.move.com/>, <https://www.realtor.com/>, <http://newhomes.move.com/>, <http://www.moving.com/>, <http://www.relocation.com/>, <http://www.doorsteps.com/>, <http://www.topproducer.com/>, <http://www.tigerlead.com/>, <http://www.fivestreet.com/>, <http://www.listhub.com> and <http://www.homefair.com/>. (*See id.*)

36. On information and belief, Defendant Honig-Bell agreed to be bound by the Move Terms of Use.

37. The rights Defendant Honig-Bell unlawfully granted to third-party websites such as Realtor.com pursuant to the Move Terms of Use exceed the Limited License, which permitted Defendant Honig-Bell to use the Registered Photographs only for the purposes of listing and marketing the properties, and then, only until the sale of the subject Photographed Properties. (*See* Limited License, ¶ 9 above; Usage Terms, ¶ 11 above.)

38. Accordingly, without seeking Plaintiff’s written consent, as required by the express terms of the Limited License, Defendant Honig-Bell uploaded the Registered Photographs to

Realtor.com knowing that it unlawfully granted rights in the Registered Photographs to Realtor.com under the Move Terms of Use that far exceeded the scope of the Limited License – namely, as pertains to Plaintiff’s claim for direct infringement of his copyrights and as discussed more fully in the paragraphs below, (i) the right to publish the Registered Photographs even after termination of the listing agreements for the subject properties (which Realtor.com did with, by way of one example but not limitation, the Registered Country Club Exterior Photograph), (ii) the right to publish the Registered Photographs for purposes other than the listing and marketing of the subject properties, such as, for example, for use in third party advertising totally unrelated to the listing and marketing of the subject properties, and (iii) the unfettered right to “an irrevocable, perpetual, non-exclusive, fully paid, worldwide license to use, copy, perform, display, and distribute the Content and to prepare derivative works of, or incorporate into other works, the Content, and to grant and authorize sublicenses (through multiple tiers) of the foregoing.” (Ex. G, Move Terms of Use, “Content You Provide”.)

39. On information and belief, in order to publish a photograph on Realtor.com, a party must first agree to the terms and conditions of the Peoria Area Association of Realtors’ (“PAAR”) Multiple Listing Service (“MLS”) Rules and Regulations (the “PAAR MLS Rules and Regulations”) before uploading the photographs to PAAR’s online “portal,” which photographs are then published on Realtor.com.

40. On further information and belief, Defendant Honig-Bell agreed to the PAAR MLS Rules and Regulations, which PAAR MLS Rules and Regulations provide:

By the act of submitting any property listing content to the MLS, *the participant represents that he has been authorized to grant and also thereby does grant authority for the MLS to include the property listing content in its copyrighted MLS compilation and also in any statistical report on comparables.* Listing content includes, but is not limited to, photographs, images, graphics, audio and

video recordings, virtual tours, drawings, descriptions, remarks, narratives, pricing information, and other details or information related to the listed property.

(PAAR MLS Rules and Regulations, Section 13 (emphasis added); *see also id.* at Section 13.1 (“All right, title, and interest in each copy of every multiple listing compilation created and copyrighted by the Peoria Area Association of REALTORS® (PAAR) and in the copyrights therein, shall at all times remain vested in the Peoria Area Association of REALTORS®.”).) A copy of the PAAR MLS Rules and Regulations is attached as Exhibit H hereto.

41. The rights Defendant Honig-Bell unlawfully granted to PAAR pursuant to the PAAR MLS Rules and Regulations exceed the scope of the Limited License, which permitted Defendant Honig-Bell to use the Registered Photographs only for the purposes of listing and marketing the properties, and then, only until the sale of the subject Photographed Properties. (*See* Limited License, ¶ 9 above; Usage Terms, ¶ 11 above.)

42. Accordingly, without seeking Plaintiff’s written consent, as required by the express terms of the Limited License, Defendant Honig-Bell uploaded the Registered Photographs to PAAR knowing that it unlawfully granted rights in the Registered Photographs to PAAR under the PAAR MLS Rules and Regulations that exceeded the scope of the Limited License.

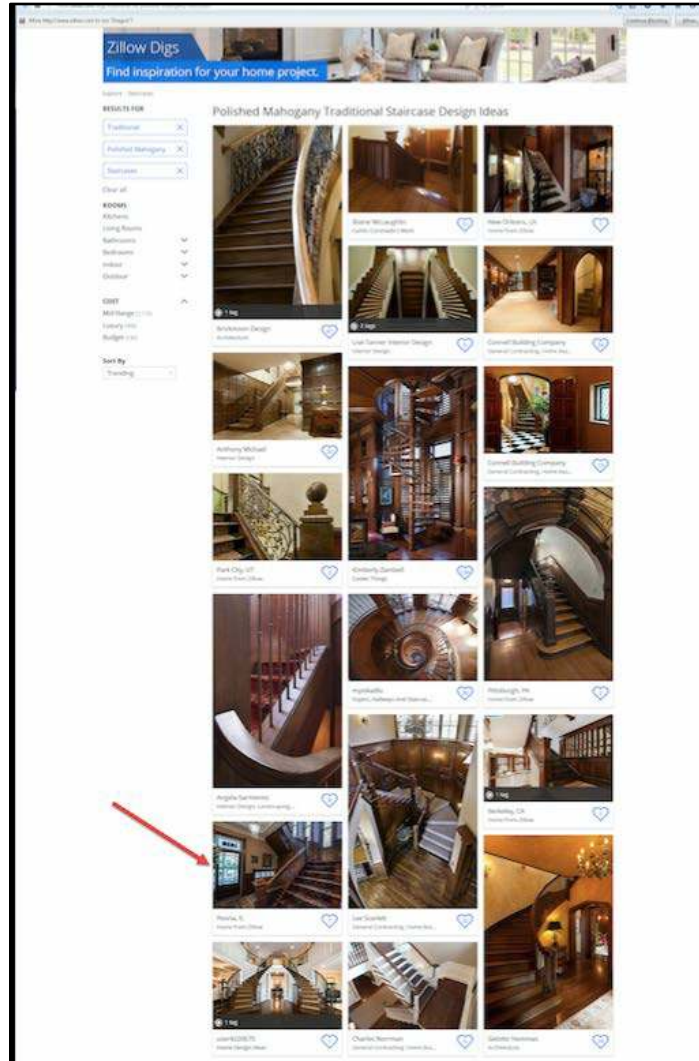
#### **VI. The Unauthorized Use of Registered Photographs Beyond the Scope of the Limited License**

43. As Defendant Honig-Bell has been aware at all relevant times by virtue of Plaintiff’s Limited License and Usage Terms, and, more recently, by virtue of Plaintiff’s First Amended Complaint as well, Plaintiff licensed the Registered Photographs to Honig-Bell only for the purposes of listing and marketing the properties, and then, only until the sale of the subject Photographed Property. (*See* Limited License, ¶ 9 above; Usage Terms, ¶ 11 above.) Notwithstanding Honig-Bell’s knowledge of the limited scope of its license to the Registered Photographs, and without seeking Plaintiff’s written consent, as required by the express terms of

the Limited License, Honig-Bell has distributed Registered Photographs to third-parties for uses other than the pre-sale listing and marketing of Photographed Properties. By way of example and not limitation, as shown below, the Registered Country Club Exterior Photograph Plaintiff took of the Country Club Photographed Property on May 29, 2015, was previously displayed on Realtor.com as the backdrop to a “Rocket Mortgage” pop-up advertisement, despite the fact that the property was “Off Market” and, therefore, no longer being marketed:



44. Similarly, by way of further example and not limitation, as shown on the following page, at least one of Plaintiff’s Registered Photographs of the Photographed Property located at 1010 NE Glen Oak Ave., Peoria, Illinois 61603, which property has been sold, is currently being displayed on “Zillow Digs,” an independent section of the Zillow website, which showcases groups of photographs of particular elements of home design and pairs them with advertising from vendors who sell goods depicted in the photographs or offer related services. In the example on the following page, the relevant elements of home design are “Polished Mahogany Traditional Staircase Design Ideas.”



**VII. Defendant Honig-Bell’s Removal of Plaintiff’s Copyright Management Information from the Registered Photographs**

45. As stated in paragraph 12 above, Plaintiff included “copyright management information,” as that term is defined under 17 U.S.C. § 1202(c), as embedded data within each of the Registered Photographs (“CMI”).

46. In the process of improperly distributing the Registered Photographs to third-party Zillow, Defendant Honig-Bell removed Plaintiff’s CMI from such photographs in violation of 17 U.S.C. § 1202(b).

**VIII. Defendant Honig-Bell's Improper Distribution of False and Altered Copyright Management Information from the Registered Photographs**

47. The examples of the Registered Country Club Exterior Photograph improperly published on Realtor.com as shown in paragraphs 25 and 43 above include the watermark "PAAR," which, on information and belief, is an acronym for the Peoria Area Association of Realtors. The PAAR watermark, which purports to constitute CMI of the Registered Country Club Exterior Photograph, was placed on the photograph without Plaintiff's knowledge, permission, or written consent. As such, the PAAR watermark constitutes CMI that has been altered "without authority of the copyright owner or the law" under 17 U.S.C. § 1202(b)(2).

48. On information and belief, Defendant Honig-Bell distributed CMI of several Registered Photographs to third-party Zillow, knowing that such CMI had been altered without authority of Plaintiff or the law in violation of 17 U.S.C. § 1202(b)(2).

49. On information and belief, based upon Defendant Honig-Bell's agreement to be bound by the terms and conditions of the PAAR MLS Rules and Regulations set forth in paragraphs 39 and 40 above, Defendant Honig-Bell knew, or had reasonable grounds to know, that prior to publication on third-party Realtor.com, Plaintiff's CMI of the Registered Country Club Exterior Photograph and other Registered Photographs would be intentionally removed from such photographs and altered without authority of Plaintiff or the law in violation of 17 U.S.C. § 1202(b)(2).

**IX. Defendant Honig-Bell's Willful Violation of Plaintiff's Copyright Rights**

50. In or about late July or early August 2015, Plaintiff advised Ms. Yocum, the real estate agent of Defendant Honig-Bell referred to in paragraph 10 above, of the improper publication of certain of the Registered Photographs in violation of the Limited License. At the time, Ms. Yocum acknowledged that the continued publication of Plaintiff's Registered



Photographs after a Photographed Property had been sold violated the terms of the Limited License as well as Plaintiff's copyrights. Notwithstanding Plaintiff's discussion with Ms. Yocum, Defendant Honig-Bell took no action to remedy the problem or mitigate harm to Plaintiff.

51. Because Defendant Honig-Bell refused to take remedial action based on Plaintiff's discussions with Ms. Yocum, on August 28, 2015, Plaintiff's intellectual property attorney sent a letter to Michael Prodehl, then president and chief executive officer of Defendant Honig-Bell, outlining in detail the infringement and CMI violations described above (the "Notice Letter"). Despite having received the Notice Letter, Defendant Honig-Bell took no action to correct the problem or mitigate harm to Plaintiff. As discussed above, the infringement and CMI violations attributable to Defendant Honig-Bell continue to this day.

**X. Plaintiff's Additional Photographed Properties**

52. In addition to the Registered Photographs, Plaintiff took numerous photographs in early 2015 of each of six real estate properties for agents of Defendant Honig-Bell (the "Additional Photographed Properties"). The table below includes the address of each of the Additional Photographed Properties, the date on which Plaintiff photographed each of the Additional Photographed Properties, and the number of photographs Plaintiff took of each of the Additional Photographed Properties (collectively, the "Additional Photographs"). Screenshots of the 168 Additional Photographs at issue in this action are attached as Exhibit I hereto.

<b>Date Created by Plaintiff</b>	<b>Photographed Property Address</b>	<b>Number of Works</b>
3/5/2015	130 W. Lyndale Rd., Peoria, IL	33
3/20/2015	10843 N. Glenfield Dr., Dunlap, IL	32
3/20/2015	1008 W. Kensington Dr., Peoria, IL	19
1/23/2015	2101 W. Leyna Dr., Dunlap, IL	31
2/3/2015	20 Emerald Ct., Morton, IL	31
3/20/2015	5110 N. Sunnyside Ct., Peoria, IL	22

53. In connection with taking each set of Additional Photographs of the Additional Photographed Properties and providing digital copies of the same to Defendant Honig-Bell, Plaintiff granted Defendant Honig-Bell the Limited License set forth in paragraph 9 above. Plaintiff submitted invoices for the Additional Photographs to realtor Trish Yocum, who at all relevant times was employed as a real estate agent of Defendant Honig-Bell. Each such invoice included the Limited License. Plaintiff also provided copies of his Usage Terms and the language of his Limited License to Defendant Honig-Bell's real estate agent, Ms. Yocum, when negotiating his services relative to the Additional Photographed Properties, as set forth in paragraph 11 above.

54. As stated in paragraph 12 above, Plaintiff included CMI, as that term is defined under 17 U.S.C. § 1202(c), as embedded data within each of the Additional Photographs.

55. In early 2015, without seeking the written consent of Plaintiff, as required by the express terms of the Limited License, Defendant Honig-Bell distributed the Additional Photographs to several third-party websites, including, for example, Zillow, Realtor.com, <https://www.trulia.com/>, <https://www.309realestatevalue.com/>, <http://www.homefinder.com/>, and <http://hotpad.com/>, in order to advertise the Additional Photographed Properties for sale.

56. On information and belief, in early 2015, Defendant Honig-Bell agreed to the terms and conditions of the PAAR MLS Rules and Regulations set forth in paragraphs 39 and 40 above. Accordingly, in the process of improperly distributing the Additional Photographs to PAAR, Defendant Honig-Bell knew, or had reasonable grounds to know, that Plaintiff's CMI would be intentionally removed from such photographs and altered in violation of 17 U.S.C. § 1202(b). Indeed, the PAAR watermark, which purports to constitute CMI of the Additional Photographs, was placed on the Additional Photographs and published on Realtor.com without Plaintiff's knowledge, permission, or written consent.



57. On information and belief, *after* Plaintiff filed his First Amended Complaint for Copyright Infringement on October 14, 2016 (Dkt. #22), the Additional Photographs embedded with the PAAR watermark were improperly republished on Realtor.com. (*See* Exhibit I.)

58. On further information and belief, numerous of the Additional Photographs remain improperly published on Realtor.com despite the sale of the subject Additional Photographed Property.

### **COUNT I – Copyright Infringement**

59. Plaintiff hereby incorporates and realleges paragraphs 1-58 above as though fully stated herein.

60. Defendant Honig-Bell did not have permission or rights granted from Plaintiff to distribute the Registered Photographs to third-parties Zillow, Realtor.com, and/or other third-parties for any purpose that exceeded the scope of the Limited License.

61. Defendant Honig-Bell and/or its agents reproduced, distributed, and/or displayed the Registered Photographs, or caused the Registered Photographs to be reproduced, distributed, and/or displayed in a manner that exceeded the scope of the Limited License, without the written permission of Plaintiff, as required by the Limited License and in violation of the Copyright Act, 17 U.S.C. § 101, *et seq.* By way of example but not limitation, Defendant Honig-Bell exceeded the scope of the Limited License with respect to the Registered Photographs by, at least, (i) “grant[ing] Zillow Group an irrevocable, perpetual, royalty-free worldwide license to (a) use, copy, distribute, transmit, publicly display, publicly perform, reproduce, edit, modify, prepare derivative works of or incorporate into other works, and translate [Defendant Honig-Bell’s] Submission, in connection with the Services or in any other media, and (b) sublicense these rights, to the maximum extent permitted by applicable law” (Zillow Terms of Use, ¶ 3, Ex. E); (ii)

“grant[ing], and . . . represent[ing] and warrant[ing] that [Defendant Honig-Bell] ha[s/had] the right to grant, to Move an irrevocable, perpetual, non-exclusive, fully paid, worldwide license to use, copy, perform, display, and distribute the Content and to prepare derivative works of, or incorporate into other works, the Content, and to grant and authorize sublicenses (through multiple tiers) of the foregoing” (Move Terms of Use, “Content You Provide,” Ex. G); and (iii) pursuant to the improper rights granted to third-parties such as Zillow and Move as described above, distributing Registered Photographs to third-parties for uses other than the pre-sale listing and marketing of Photographed Properties, including by way of example and not limitation, distributing Registered Photographs that have been used by third-parties in pop-up advertisements, despite the fact that the subject property is “Off Market” and, therefore, no longer being marketed by Defendant Honig-Bell and/or a third-party, and distributing Registered Photographs that have been published by third-parties after the listing agreement for the subject property has been terminated. Each of the aforementioned acts, which exceed the scope of the Limited License, constitutes direct copyright infringement. *See, e.g., Boatman v. Honig Realty, Inc.*, No. 16-cv-08397, 2017 WL 3872479, at \*2 (N.D. Ill. Sept. 5, 2017) (“An entity that holds a copyright license, such as Honig, can only commit copyright infringement (rather than breach of contract) if it exceeds the scope of the license.”) (parenthetical in original).

62. Defendant Honig-Bell’s acts constitute willful and deliberate infringement of Plaintiff’s copyrighted Registered Photographs, which infringement has caused and is causing irreparable harm and damage to Plaintiff.

63. Plaintiff has suffered and continues to suffer financial loss as a result of Defendant Honig-Bell’s conduct.

64. Plaintiff is entitled to recover from Defendant Honig-Bell the damages, including attorney's fees and costs, that Plaintiff has sustained and will sustain, and any gains, profits, and advantages obtained by Defendant Honig-Bell as a result of its acts of violation alleged above or, at Plaintiff's election, to recover statutory damages, if applicable. At present, the amount of such damages, gains, profits, and advantages cannot be fully ascertained, but will be established according to proof at trial.

### **COUNT II – Contributory Copyright Infringement**

65. Plaintiff hereby incorporates and realleges paragraphs 1-64 above as though fully stated herein.

66. Defendant Honig-Bell intentionally induced or encouraged third-party Zillow and/or other third-parties, including but not limited to, for example, on the Zillow.com and Realtor.com websites, to reproduce, distribute, or display the Registered Photographs beyond the scope of the Limited License, even though Defendant Honig-Bell did not have any right to do so.

67. Defendant Honig-Bell knowingly took steps that were substantially certain to result in direct infringement, including distributing the Registered Photographs to at least third-parties Zillow and Realtor.com, which did not have permission or a license to reproduce or display the Registered Photographs, knowing that at least third-parties Zillow and Realtor.com would reproduce or display the Registered Photographs beyond the scope of the Limited License and in violation of Plaintiff's copyrights.

68. Defendant Honig-Bell made a material contribution to the direct infringement of Plaintiff's copyrighted Registered Photographs by at least third-parties Zillow and Realtor.com.

69. Defendant Honig-Bell's acts constitute contributory copyright infringement in violation of the Copyright Act, 17 U.S.C. § 101, *et seq.*

70. Plaintiff has suffered and continues to suffer financial loss as a result of Defendant Honig-Bell's conduct.

71. Plaintiff is entitled to recover from Defendant Honig-Bell the damages, including attorney's fees and costs, that Plaintiff has sustained and will sustain, and any gains, profits, and advantages obtained by Defendant Honig-Bell as a result of its acts of violation alleged above or, at Plaintiff's election, to recover statutory damages, if applicable. At present, the amount of such damages, gains, profits, and advantages cannot be fully ascertained, but will be established according to proof at trial.

**COUNT III – Violation of the Digital Millennium Copyright Act  
as to Plaintiff's Registered Photographs and Additional Photographs**

72. Plaintiff hereby incorporates and realleges paragraphs 1-71 above as though fully stated herein.

73. The Registered Photographs and Additional Photographs Plaintiff delivered to Defendant Honig-Bell in digital format contained embedded metadata identifying the copyright owner as Mike Boatman.

74. This embedded metadata constitutes "copyright management information," as defined in 17 U.S.C. § 1202(c).

75. Upon information and belief, Defendant Honig-Bell, without the authority of Plaintiff or the law, intentionally removed and/or altered, or caused to be removed and/or altered, the copyright management information from the Registered Photographs in the process of improperly distributing them to third-party Zillow and/or other third-parties, and/or distributed the Registered Photographs to third-party Zillow and/or other third-parties knowing that the copyright management information had been, or would be, removed and/or altered.

76. Upon information and belief, based upon Defendant Honig-Bell's agreement to be bound by the terms and conditions of the PAAR MLS Rules and Regulations set forth in paragraphs 39 and 40 above, and without the authority of Plaintiff or the law, Defendant Honig-Bell intentionally removed and/or altered, or caused to be removed and/or altered, the copyright management information from the Additional Photographs and several Registered Photographs in the process of improperly distributing them to third-party Realtor.com and/or other third-parties, and/or distributed the Additional Photographs and several Registered Photographs to third-party Realtor.com and/or other third-parties knowing that the copyright management information had been, or would be, removed and/or altered prior to publication on third-party Realtor.com and/or other third-parties.

77. Defendant Honig-Bell's acts violate the DMCA, 17 U.S.C. § 1202.

78. Plaintiff has suffered and continues to suffer financial loss as a result of Defendant Honig-Bell's conduct.

79. Plaintiff is entitled to recover from Defendant Honig-Bell the damages, including attorney's fees and costs, that Plaintiff has sustained and will sustain, and any gains, profits, and advantages obtained by Defendant Honig-Bell as a result of its acts of violation alleged above or, at Plaintiff's election, to recover statutory damages, if applicable. At present, the amount of such damages, gains, profits, and advantages cannot be fully ascertained, but will be established according to proof at trial.

#### **COUNT IV – Breach of Contract**

80. Plaintiff hereby incorporates and realleges paragraphs 1-79 above as though fully stated herein.

81. There existed a valid and enforceable contract between Plaintiff and Defendant Honig-Bell as embodied in the Limited License included in the invoices attached as Exhibit C hereto.

82. The Limited License allowed for limited use of the Registered Photographs and the Additional Photographs by Defendant Honig-Bell. Defendant Honig-Bell used the Registered Photographs and the Additional Photographs outside the scope of the use granted by the Limited License. In doing so, Defendant Honig-Bell breached the Limited License.

83. Further, the Limited License precluded Defendant Honig-Bell from transferring or assigning its rights to the Registered Photographs and the Additional Photographs under the Limited License without the prior written consent of Plaintiff. Plaintiff did not grant Defendant Honig-Bell prior written consent to transfer, or assign its rights to, the Registered Photographs and/or the Additional Photographs, beyond the scope of the Limited License. Notwithstanding, Defendant Honig-Bell distributed the Registered Photographs and the Additional Photographs to third-parties Zillow, Realtor.com, and/or other third-parties for their unauthorized publication, display, and dissemination of the Registered Photographs and the Additional Photographs beyond the scope of the Limited License. In so doing, Defendant Honig-Bell breached the Limited License.

84. As a result of Defendant Honig-Bell's breach of the Limited License, Plaintiff has suffered and continues to suffer financial loss.

85. Plaintiff is entitled to compensatory damages in an amount equal to financial losses suffered by Plaintiff as a result of Defendant Honig-Bell's breach of the Limited License.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Michael Boatman respectfully asks this Court to enter judgment in Plaintiff's favor and against Defendant Honig-Bell, and against its subsidiaries, successors, parents, affiliates, officers, directors, agents, servants, employees, and all persons in active concert or participation with Defendant Honig-Bell, granting the following relief:

A. Permanently enjoining and restraining Defendant Honig-Bell, its officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with Defendant Honig-Bell from:

- (1) reproducing, distributing, or displaying the Registered Photographs and the Additional Photographs;
- (2) contributing to or inducing any third-party to reproduce, distribute, or display the Registered Photographs and the Additional Photographs; and
- (3) removing or altering copyright management information, or distributing copyright management information that falsely identifies ownership of the copyright;

B. Directing Defendant Honig-Bell to:

- (1) Turn over or destroy all copies, including all electronic copies, of the Registered Photographs and the Additional Photographs;
- (2) Pay to Plaintiff all the actual damages he has suffered as a result of the acts of Defendant Honig-Bell complained of herein, together with prejudgment interest;

- (3) Account for and pay to Plaintiff all profits derived by Defendant Honig-Bell from its acts complained of herein, together with prejudgment interest;
  - (4) At Plaintiff's election, pay statutory damages based upon Defendant Honig-Bell's acts of infringement and violation of the DMCA complained of herein;
  - (5) At Plaintiff's election, pay an increased award for Plaintiff's statutory damages as a result of Defendant Honig-Bell's willfully infringing acts in an amount the court deems appropriate;
  - (6) Pay Plaintiff's reasonable attorney's fees and costs in this action;
- and

C. Awarding Plaintiff such further relief as this Court deems just and appropriate.

### **Jury Demand**

Plaintiff demands a trial by jury on all issues presented in this second amended complaint.

Respectfully submitted,

Dated: December 14, 2017

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*Attorneys for Plaintiff,*  
Michael Boatman



**EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

MICHAEL BOATMAN, an individual,

Plaintiff,

v.

HONIG REALTY, INC. d/b/a COLDWELL  
BANKER HONIG-BELL,

Defendant.

Case No. 1:16-cv-08397

Judge John J. Tharp, Jr.  
Magistrate Judge Maria Valdez

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, Plaintiff, Michael Boatman (“Plaintiff”), and Defendant, Honig Realty, Inc. d/b/a Coldwell Banker Honig-Bell (“Defendant”), having entered into a mutually agreeable resolution of all claims asserted in the above-referenced action, hereby stipulate to the dismissal of Plaintiff’s claims against Defendant with prejudice. Each party agrees to bear its own costs and attorney fees.

Respectfully submitted,

/s/ Matthew G. McAndrews

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### **Certificate of Service**

I hereby certify that on September 14, 2020, a copy of the foregoing document was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Thomas G. Griffin