E-FILED
Tuesday, 27 October, 2020 10:15:48 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

MICHAEL BOATMAN,

Plaintiff,

v.

PEORIA AREA ASSOCIATION OF REALTORS,

Defendant.

Civil Action No.

1:20-cv-01248-JES-JEH

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Other

I. Introduction

Plaintiff Michael Boatman ("Boatman") opposes Defendant Peoria Area Association of Realtors' ("PAAR") Motion to Dismiss Plaintiff's First Amended Complaint Under Federal Rules of Civil Procedure 12(b)(6) and 19(a) (DE 15, the "Motion").

Boatman, a real estate photographer, claims that PAAR distributed 1,216 of Boatman's real estate photographs (DE 12-1 and 12-2, collectively the "Photographs") to non-party Move, Inc. ("Move"), which currently owns the website at Realtor.com, for Move's use including displaying the Photographs after listings of the real properties depicted in the Photographs had closed.

These claims arise from interactions between the parties between 2012 and 2016, when Boatman worked for real estate agents in the Peoria and East Peoria, Illinois areas. For each of the properties he photographed for the real estate agents, he granted to them a license allowing distribution and display of the photographs for the limited purpose of marketing and advertising the properties for the term that the listings were active. These licenses included the right to distribute to PAAR, and subsequently to third-party aggregator websites that displayed the property listings provided that the displays ended with the listings. Through 2016, Boatman understood that PAAR and most third-party websites were only displaying the property listings while the property was actively for sale.

In 2017, however, Boatman discovered that Move redesigned the Realtor.com website to not only show active listings for properties, but also a history of sales information and prior listing photographs for properties while they were no longer for sale, including his Photographs. Then, by investigating the agreements between the entities that distributed his photographs, Boatman discovered that Move did not unilaterally determine that it had the rights to continue displaying

the Photographs. In fact, in fall 2017, Boatman discovered that throughout his time working with Peoria-area realtors, PAAR had been distributing his Photographs to Realtor.com with significantly broader rights than those he granted to any party for the display and distribution of his real estate photographs. The rights PAAR granted to Move, for example, included the right to display his Photographs after the listing ended.

The FAC in this matter alleges a discrete violation of Boatman's exclusive rights: the right to distribute Boatman's copyrighted works. Boatman asserts PAAR sold access to the Photographs to Move knowing that Move could and would display those Photographs after real estate listings closed and the properties sold.

In response, PAAR argues that Boatman's claims are barred by the three-year statute of limitations in 17 U.S.C. § 507. PAAR is wrong because Boatman's copyright claim accrued when Boatman actually discovered that PAAR distributed his Photographs to Move with greater usage rights than he granted to PAAR. PAAR also argues the First Amended Complaint (DE 12, the "FAC") fails to state a claim against PAAR alleging volitional conduct. PAAR is wrong again because the FAC alleges in great detail that PAAR acted volitionally throughout the process of collecting, organizing, and distributing Boatman's Photographs.

PAAR next tries to rely on its agreement with the owners and operators of Realtor.com (collectively "Realtor.com") as a defense. However, this is not a breach of contract case. Boatman alleges violation of a property right: copyright infringement by PAAR. PAAR's agreement with Realtor.com, and the language of that agreement, does not control; Boatman is not a party to that agreement. Further, the details of PAAR's license defense is for PAAR to prove by facts, and cannot be determined on a motion to dismiss. PAAR also relies on its agreement with Realtor.com to claim Move is a necessary party under Rule 19. But again, because this is not a breach of contract

case and because Boatman alleges copyright infringement only by PAAR, there is no missing party here. Finally, PAAR's *res judicata* argument fails. Boatman's claims here are different from ones asserted previously.

Accordingly, for the reasons explained herein, the Court should deny PAAR's Motion in its entirety and allow Boatman's well pled claims to proceed.

II. Argument

A. The three-year statute of limitations accrues upon discovery of the infringement; Boatman's FAC alleges discovery within three years and therefore is not time barred.

The Copyright Act's three-year statute of limitations runs from the date the plaintiff's claim accrued. 17 U.S.C. § 507 ("No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.") The Seventh Circuit follows the discovery rule for claim accrual in copyright cases. See *Chicago Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 618 (7th Cir. 2014) (reversing dismissal on pleadings based on statute of limitations, recognizing the application of the discovery rule in copyright cases, and explaining that the Supreme Court in *Petrella v. Metro-Goldwyn-Mayer, Inc.,* 572 U.S. 663 (2014) did not change that rule[1]). "Under the discovery rule, a copyright claim accrues (and the limitations clock starts ticking) when the plaintiff learns or reasonably should have learned that the defendant was infringing a protected work." *Richardson v. Kharbouch*, No. 19 C 02321, 2020 WL 1445629, at *7 (N.D. Ill. Mar. 25, 2020).

[1] Not only did *Petrella* leave the accrual rule intact, the Supreme Court acknowledged that the rule is followed by the majority of the Courts of Appeal. *Petrella,* 572 U.S. at 670 fn. 4 (2014)("Although we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a 'discovery rule,' which starts the limitations period when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.").

The infringement alleged in the FAC concerns the distribution of Boatman's works by PAAR to Move including the right to display in connection with **real estate listings that are expired, withdrawn or sold**. PAAR claims that Boatman's limitations period began at "the last IDX feed of Boatman's photos [which] occurred by no later than 2016." (DE 15 at 13). PAAR also claims Boatman admitted he knew about PAAR's infringement in paragraph 40 of the FAC which states:

> 40. After Boatman delivered the Photographs to his real estate agent clients, those real estate agent clients selected and organized the Photographs, then uploaded the Photographs to the MLS operated by PAAR in 2012, 2013, 2014, 2015, or 2016.

Id. PAAR also argues that Boatman's two prior lawsuits[2] show he was aware of PAAR's infringing activity in this case more than three years ago. *Id*. at 8-11, 13.

PAAR is wrong on all counts. *First*, paragraph 40 admits nothing about Boatman's discovery of PAAR's infringement by distribution of his Photographs to Realtor.com including the right to display expired, withdrawn, or sold listings. In fact, the FAC asserts that Boatman understood that PAAR itself removed the Photographs from the IDX feed once the listing ended,

---

[2] *Boatman v. Honig Realty, Inc.*, Civil Action No. 16-cv-08397 (N.D. Ill. August 26, 2016) ("*Honig*") and *Boatman v. Kepple Premier Real Estate, LLC, et al.,* Civil Action No. 17-cv-01009-MMM-JEH (C.D. Ill., Jan. 9, 2017) ("*Kepple*").

Both *Hoenig* and *Kepple* asserted copyright infringement claims against real estate agents and brokers. The defendants in *Kepple* had no license to use Boatman's photographs that Boatman took for a prior agent who had the listing on the property. The *Kepple* defendants asked for a license, Boatman declined, and then the *Kepple* defendants used the photographs to promote the sale of the property anyway.

The *Honig* defendant was a real estate brokerage. Boatman alleged that the brokerage used his photographs in ways that departed from the rights granted in his license, including uploading the photographs directly to the Zillow.com and Realtor.com websites.

Neither case had anything to do with PAAR's distribution of Boatman's Photographs at issue in this case to include display of expired, withdrawn or sold listings on Realtor.com.

and that any such expired listings were not included on the IDX feed prior to 2016. (DE 12 at ¶¶ 56, 59). In other words, for the time that Boatman actively licensed the Photographs to be distributed through PAAR, his understanding was that PAAR and the third-party aggregators were displaying them in accordance with his limited license. *Second*, Boatman's awareness of PAAR's policy that "real estate agent members [] assign to PAAR copyrights in the photos they uploaded to the PAAR MLS even if the agents did not have the power to do so" (DE 15 at 13) more than three years ago does not equate to Boatman's awareness of PAAR's infringing conduct in this case that was discovered by Boatman within three years of the filing of this action. The transactions are separate and different, and any knowledge of the former does not support actual knowledge of the latter.

Third, Boatman's claims in *Honig* and *Kepple* were different than the claim asserted here against PAAR. PAAR selectively pulled a quote from the Complaint in *Honig* to show that Boatman alleged the same conduct by PAAR in that case that Boatman alleges here. *Id*. at 8-9. But the language quoted by PAAR concerned the allegation that the *Honig* defendants "uploaded the Registered Photographs to Realtor.com knowing that [the *Honig* defendants] unlawfully granted rights in the Registered Photographs to Realtor.com." *Id*. The infringement committed by the *Honig* defendants in that case when they uploaded Boatman's photographs directly to Realtor.com has nothing to do with Boatman's complaint against PAAR in this case.[3] Nor is PAAR's reference to the Rules and Regulations helpful to its argument, as that document does not detail the specific rights PAAR granted to third parties such as Move.

[3] Similarly, PAAR quotes from Boatman's complaint in *Kepple* in an attempt to show Boatman's knowledge of MLS activities in that case more than three years ago. But Boatman's knowledge how MLSs like PAAR generally distribute photographs does not constitute knowledge that PAAR, contrary to its rules and regulations, was distributing photographs for use in displaying expired, withdrawn or sold listings.

Before the summer of 2017, the 1,216 Photographs at issue were displayed on Realtor.com only for **active** listings. That changed in the summer of 2017 when Realtor.com re-displayed listing photographs after listings expired, were withdrawn, or were sold. Until Realtor.com began to display Boatman's images on those dead listings, Boatman had no knowledge that PAAR had ever distributed the Boatman's images to Move for Move's use outside the terms of Boatman's licenses. In fact, Boatman affirmatively alleges the opposite in the FAC, that "[w]hen an MLS listing in the PAAR MLS database expired, was withdrawn, or was sold, PAAR removed that MLS listing and the listing photographs, including Boatman's Photographs, from the IDX feed access to "live" MLS listings that PAAR sold for display on the Internet." (DE 12 at ¶ 56).

After Realtor.com began re-displaying the Photographs after the subject properties sold in the summer of 2017, Boatman had no knowledge nor any reason to believe that PAAR had granted any rights to the owners and operators of Realtor.com to allow that to happen. While Boatman might have previously been on alert that something about the distributions seemed off, he was not actually aware of the terms of the RIN Agreement and PAAR's infringement until September 12, 2017, when PAAR's attorney provided the RIN Agreement to Boatman in response to a subpoena served on PAAR in *Kepple*.[4] Boatman's first knowledge of PAAR's infringing distribution did not accrue until he received the RIN Agreement, which required a subpoena through *Kepple* to obtain.

Boatman discovered the facts of PAAR's unauthorized distribution of his Photographs to the owners and operators of Realtor.com on September 12, 2017. He obtained this information as quickly as could be reasonably expected after learning about the re-displays by Realtor.com in the

[4] As discussed in *Chi. Bldg. Design*, the "inquiry notice" Boatman was initially under prior to receipt of the RIN Agreement ("the point at which a plaintiff possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry") was not sufficient to start the clock for the statute of limitations period. *Chi. Bldg. Design*, 770 F.3d at 615-16.

summer of 2017. Accordingly, the three-year window for claims regarding PAAR's unauthorized distribution of the Photographs began on September 12, 2017, and ran until September 12, 2020, approximately two and a half months after the initiation of this matter. Boatman's claims are not barred by the statute of limitations and should proceed.[5]

B. Boatman's First Amended Complaint states a claim for copyright infringement against PAAR.

To establish a valid claim of copyright infringement, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying[6] of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). "An individual 'copies' another's work for purposes of copyright law if he plays it publicly or distributes copies without the copyright owner's authorization." *Janky v. Lake County Convention & Visitors Bureau,* 576 F.3d 356, 361 (7th Cir. 2009). "[A] plaintiff is *not* required to prove that the defendant's copying was unauthorized in order to state a *prima facie* case of copyright infringement." *Muhammad-Ali v. Final Call, Inc.*, 832 F.3d 755, 760 (7th Cir. 2016).

Boatman's FAC satisfies both elements. PAAR does not dispute Boatman's copyright ownership of his Photographs or the registration of copyright in those works. (DE 12, ¶¶ 11, 16, Ex. 2). Importantly, PAAR does not dispute that the FAC alleges that PAAR distributed Boatman's copyrighted Photographs. In fact, PAAR does not deny that it distributed the Photographs at all. Rather, PAAR instead claims that the FAC fails to allege volitional conduct by PAAR that violated

[5] Should the Court find that the FAC does not sufficiently state information regarding Boatman's discovery of his claim, Boatman asks for leave to amend the FAC to include the September 12, 2017 date he received the RIN Agreement from PAAR during discovery in *Kepple*.

[6] "Copying is a shorthand reference to the act of infringing any of the copyright owner's five exclusive rights set forth at 17 U.S.C. § 106, including the rights to distribute and reproduce copyrighted material." *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F. 2d 277, 291 (3rd Cir. 1991) (citation omitted).

Boatman's exclusive distribution right under 17 U.S.C. § 106(3). (DE 15 at 14). In other words, PAAR admits it distributed the Photographs for display on Realtor.com, but PAAR asserts it either did not commit the act of distribution volitionally or cannot be held liable for doing so.

PAAR's volitional conduct arguments fail. *First*, assuming *arguendo* that volitional conduct must be shown, the FAC alleges sufficient conduct by PAAR to withstand a motion to dismiss, with Boatman's factual assertions taken as true and with reasonable inferences drawn in his favor. (DE 12 at ¶¶ 46-54). Yet even beyond the scope of the FAC, PAAR admits its role as a distributor of multiple listing photos including the Photographs. *See, e.g.,* DE 15 at 3 ("The purpose of the RIN Agreement is clearly articulated and confined to the display of information obtained from the PAAR MLS to advertise the photographed properties for sale"); and DE 15 at 4 ("The listing information on the PAAR MLS is 'fed' by internet data exchange feeds ("IDX") to real estate websites, like Realtor.com, that display MLS listings on the internet").

Specifically, the FAC asserts PAAR acted volitionally in combining the Photographs with other information to create the MLS compositions, then choosing how and where to distribute them and under what terms. (DE 12, ¶¶ 46-54, 83). Specifically, the section of the FAC entitled "PAAR's Infringement By Distribution," *Id.* at ¶¶ 62-85, details PAAR's volitional actions involved in negotiating and setting the terms of the RIN Agreement that permitted the display of photographs of expired, withdrawn or sold listings. *Id.* at ¶¶ 72-75. Finally, the FAC describes how PAAR actively chose how and where to distribute the MLS database compilations to third parties. *Id.* at ¶¶ 76-78. These are all volitional acts of PAAR.

Second, PAAR's argument is not really a volitional conduct argument at all.[7] Rather, PAAR argues license, i.e., it has every right to do what it did with Boatman's Photographs as a passive conduit. However, license is a defense, and does not undermine Boatman's *prima facie* case in the FAC. "Under Seventh Circuit copyright law, a plaintiff only needs to show that the defendant has used her property; the burden of proving that the use was authorized falls squarely on the defendant." *Ali*, 832 F.3d at 760-761 citing *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1193 (Fed. Cir. 2004).

Ultimately, the FAC alleges enough to show that PAAR copied the Photographs by distributing them to third parties, which meets the *prima facie* standard of pleading copyright infringement in the Seventh Circuit. Boatman's FAC exceeds these requirements, and the Motion should be denied in its entirety.

[7] Indeed, PAAR cannot simultaneously claim, as it does, to own a copyright in its MLS compilation while at the same time arguing that its distribution of the compilation (including the photographs in that compilation) was non-volitional.

Compilation copyright covers the organization and arrangement of preexisting material, like real estate listing information and photographs. A collection of facts is copyrightable, but the underlying facts themselves are not protected. A compilation copyright protects the creativity and the expression inherent in the organization and selection of the material. *See, Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*, 893 F.3d 1176, 1181–82 (9th Cir. 2018) citing *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991), and 17 U.S.C. § 103(b).

To claim copyright in its MLS compilation, as PAAR does, PAAR has to be affirmatively involved in the organization and arrangement of its compilation. It cannot be totally "hands off." The argument that PAAR lacked volitional conduct when it distributed the compilation over which it claims copyright contradicts its claim to be entitled to copyright on the compilation in the first place.

C. The RIN Agreement does not control Boatman's copyright infringement claims.

In the FAC, Boatman alleged PAAR infringed Boatman's copyrights by distributing Boatman's Photographs to Move to include display of sold, expired, or withdrawn listings, and pointed to the RIN Agreement as evidence of that distribution.

PAAR responded with a non-sequitur:

> Move, Inc. is not a party to the 1996 RIN Agreement. The RIN Agreement specifically prohibited assignment of any rights without PAAR's prior written consent, and no assignment or consent is alleged by Boatman in the FAC. Boatman accordingly fails to allege sufficient facts to show that Move, Inc. is a successor to RIN's rights under the RIN Agreement.

(DE 15 at 16). As best as Boatman can discern, PAAR's point is that assuming Boatman's claims are true (as the Court must on this motion), and that PAAR distributed Boatman's Photographs to Move to include Move's display of sold, expired, or withdrawn listings on Realtor.com, then Move is not entitled to rely on the RIN Agreement as justification for its display.

Boatman's response is "so what?" Whatever Move's justification, it is not the "why" that matters; it is what PAAR did to violate Boatman's copyrights that matters here. All Move did was receive Boatman's Photographs distributed by PAAR under circumstances, as alleged by Boatman, where PAAR knew that Move could and would display them for sold, expired, or withdrawn listings, a use that Boatman never authorized.[8]

PAAR next argues that the language of the RIN Agreement unambiguously limits the usage rights granted to Move, and therefore PAAR's distribution of Boatman's Photographs was

[8] Even assuming that Move's interest in the RIN Agreement substantively affected Boatman's claims in the FAC, Boatman did assert a succession of rights from REALTORS Information Network to Move, Inc. (DE 12, ¶¶ 63, 72-73).

properly within the scope of Boatman's licenses, and not unauthorized.[9] As stated above, Boatman's burden in the FAC is only to assert ownership and copying, and any rationale for that copying is left for PAAR's affirmative defenses. In addition, PAAR's argument misses the point. PAAR appears to believe that Boatman sued PAAR because PAAR signed the RIN Agreement. Not true. Boatman sued PAAR because, among other likely distributions, PAAR distributed the Photographs to Move to include its display of sold, expired, or withdrawn listings.

Even if the RIN Agreement is relevant to Boatman's claims, the parties' disagreement over how to interpret the agreement prevents dismissal in reliance on the agreement. As this Court previously held, it is improper on a motion to interpret a contract where the parties dispute the underlying facts. *Christie Clinic, P.C. v. Multiplan, Inc.*, No. 08-CV-2065, 2008 WL 4615435, at *8 (C.D. Ill. Oct. 15, 2008) ("if the court does consider a contract, it should not interpret any language that is ambiguous regarding the parties' intent; interpretation of contract language is a question of fact that a court cannot properly determine on a motion to dismiss"), citing *Dawson v. Gen. Motors Corp.*, 977 F.2d 369, 373 (7th Cir. 1992).

Finally, PAAR devotes substantial argument to whether the RIN Agreement required PAAR to refresh the data it sent to the owner and operator of Realtor.com on a weekly basis. But whether PAAR required Move to refresh webpages goes to PAAR's license defense. None of PAAR's arguments regarding the parties, scope, or terms of the RIN Agreement rebut or undercut Boatman's *prima facie* claims of copyright infringement, and the Motion should be dismissed.

[9] The FAC alleges that "The RIN Agreement permitted the owner or operator of the Realtor.com website to copy, display or distribute real estate listing information and associated photographs for real estate listings that had expired, been withdrawn or been sold." (DE 12, ¶ 75).

D. Move, Inc. is not a necessary party under Rule 19.

Under Rule 19(a)(1), a so-called "required party" is "subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). If the absentee party is found to be a required party under Rule 19(a)(1), but cannot feasibly be joined in suit, then the court must proceed to Rule 19(b) to determine whether to proceed without the party or dismiss the lawsuit. *Askew v. Sheriff of Cook Cnty., Ill.*, 568 F.3d 632, 634 (7th Cir. 2009). If an action cannot proceed without the required party, then the party is deemed "indispensable" and the proceeding must be dismissed. *Sullivan v. Flora, Inc.,* No. 15-CV-298-WMC, 2016 WL 4275864, at *2 (W.D. Wis. Aug. 12, 2016).

PAAR argues "Boatman's claim against PAAR in this lawsuit is rooted in an alleged contractual relationship between PAAR and Move, and in turn, Move's purported rights under the contract to re-display the photographs on the Realtor.com website in a manner that infringes on Boatman's copyrights." (DE 15 at 18). **PAAR is wrong.** Boatman's claim is not contractual. Boatman's claim is for copyright infringement. Boatman alleges PAAR violated his exclusive distribution rights in his copyrighted Photographs under 17 U.S.C. § 106(3), and PAAR is therefore liable for infringement in violation 17 U.S.C. § 501.

PAAR argues "[t]he adjudication of Boatman's claims in this action requires this Court to

find that: (1) Move, Inc. is a successor or otherwise has standing to assert rights under the 1996 RIN Agreement between PAAR and RIN, and (2) that the 1996 RIN Agreement 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." (DE 15 at 18). **PAAR is wrong.** No such determinations are necessary for the adjudication of Boatman's claims.

If a jury determines that Boatman owns valid copyrights in his Photographs and that PAAR distributed those Photographs in violation of Boatman's exclusive rights, then Boatman proved his case of infringement. All of the arguments PAAR makes here are license defenses to infringement. Those defenses are PAAR's burden to assert and prove, not Boatman's, and not in the FAC.

Move is not a necessary party to this action. It may very well be the case, as Boatman has alleged, that PAAR distributed Boatman's Photographs pursuant to the RIN Agreement. But discovery might also reveal that is not the reason. Either way, PAAR's distribution occurred. Why it occurred is not central to this dispute. Boatman's claims are only against PAAR. No other parties or joint tortfeasors are needed for complete relief. Move's liability is not in issue.

Complete relief of Boatman's distribution infringement claims can be accorded without Move. Copyright infringement claims do not require joinder of all infringers, even if the defendant is joint and severally liable with absent parties. See *Malibu Media, LLC v. John Doe 1*, No. CIV.A. 12-2078, 2013 WL 30648, at *10 (E.D. Pa. Jan. 3, 2013) ("To prevail against each Doe, Malibu needs to prove that each Doe downloaded its copyrighted material without authorization. The court will be able to adjudicate these matters and to 'accord complete relief' whether or not the other members of the swarms, who allegedly also infringed Malibu's works, are present"); *Coach, Inc. v. Celco Customs Servs. Co.*, No. CV1110787MMMFMOX, 2013 WL 12122691, at *12 (C.D. Cal. Jan. 28, 2013) ("Courts have long held that in patent, trademark, literary property, and

copyright infringement cases, any member of the distribution chain can be sued as an alleged joint tortfeasor. Since joint tortfeasors are jointly and severally liable, the victim of trademark infringement may sue as many or as few of the alleged wrongdoers as he chooses; those left out of the lawsuit ... are not indispensable parties"). Boatman asserts full liability and can gain complete relief for his infringements claims against PAAR alone.

Furthermore, Move is not a party to Boatman's licenses. "[W]hen a person is not a party to the contract in litigation and has no rights or obligations under that contract, even though the absent party may be obligated to abide by the result of the pending action by another contract that is not at issue, the absentee will not be regarded as an indispensable party in a suit to determine obligations under the disputed contract." *Davis Companies v. Emerald Casino, Inc.*, 268 F.3d 477, 484 (7th Cir. 2001), citing 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure Civil 3d, § 1613 at 197 (2001) (quotations omitted).

The "contracts in litigation" are Boatman's licenses. Could the outcome of this litigation impact what photographs Move obtains by distribution from PAAR in the future? Yes. Does that make Move an indispensable party? No. *Id*. ("[B]ecause we conclude that [the third party] has no interest in the subject matter of this particular lawsuit, his ability to bring his own future lawsuit to protect any individual claims will not be impaired"). Finally, it is possible for Move to participate in this matter and protect its interest in the RIN Agreement in other ways than being named a defendant to Boatman's claims, such as non-party subpoenas and depositions, cross claims by PAAR pursuant to Rule 13, or Move, Inc.'s own intervention pursuant to Fed. R. Civ. P. 24. *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 483 (7th Cir. 2001) ("[U]nder Rule 19(a) it is the absent party that typically must claim such an interest"). Indeed, "the Seventh Circuit

prefers for the absent party to claim the interest in compulsory joinder cases." *Sullivan,* No. 15-CV-298-WMC at *2. Move, has not yet done so, or indicated an interest in doing so.

Finally, the separation between Boatman's licenses and the RIN Agreement eliminates a substantial risk of multiple or inconsistent obligations for PAAR unless Move is joined. In *Davis Companies,* the Seventh Circuit explained that "[t]he fact that [the defendant] might be liable to [the third party] in a future action does not create the substantial risk of multiple or inconsistent obligations. This is not a case where a judgment imposing liability on [defendant] to [plaintiff] necessarily implies that [defendant] is also liable to [third party]" *Davis Companies*, 268 F.3d at 484–85.[10] The same is true here. If there is any risk of PAAR and Move engaging in litigation at a later time to determine the interpretation, boundaries, or breaches of the RIN Agreement, that action will not be affected by or influenced by a final judgment for or against PAAR in this action. No substantial risk of multiple or inconsistent obligations exists if Move is not joined, and so it is not a necessary party under Rule 19.

The claims in this matter are simple – Boatman granted PAAR limited and specific rights, and PAAR exceeded those rights by distributing to third parties with greater terms than what it had been granted. No third-party recipient is necessary to fully adjudicate those claims, whether Move or otherwise. The Motion should be denied in its entirety.

[10] Of note, the Seventh Circuit criticized the defendant in *Davis Companies* for wanting to "have their cake and eat it too," because there the defendants argued that no contract existed, but that the third party should be joined as a contractual party so as to support their motion to dismiss. *Id.* at 485. PAAR uses the same legal gymnastics in subsequent pages of its Motion, claiming on one hand that "Move, Inc. has no rights under the RIN Agreement," and then on the other that "Move, Inc. is a necessary party to this action" because they are a contractual party (DE 15, 16-17). The Seventh Circuit noted that "[t]he advantage of such a cross-current flows only to [defendant], and it does not persuade us that [third party] must be joined as a necessary party to this litigation." *Id*. Nor should such tricks persuade this court that Move, Inc. be considered a necessary party here.

E. Boatman's claims are not barred by *res judicata*.

The defense of *res judicata* requires that the defendant establish three elements, "(1) an identity of the parties or their privies; (2) an identity of the cause of action; and (3) a final judgment on the merits [in the earlier action]. *Johnson v. Cypress Hill*, 641 F.3d 867, 874 (7th Cir. 2011). Here, PAAR fails to establish any of the three elements.

PAAR points to *Honig*. Boatman's copyright infringement claims there were against a real estate brokerage. PAAR was not a party. The claims against the *Honig* defendants were for the *Honig* defendants' distribution of some of Boatman's photographs directly to third parties including Move. But the causes of action in *Honig* did not claim distributions by PAAR to Move, as Boatman alleges here. The parties were different, the actions at issue were different, and the claims were different.

But even assuming *arguendo* that the *Honig* defendants and PAAR were in privity, PAAR failed to establish the identity of causes of action. PAAR argues that "[s]ome of the photos in the *Honig* Action are part of the 1,216 photos at issue in this case." (DE 15 at 20). In fact, none of the photographs at issue in *Honig* are claimed here. There are no overlapping images between the two matters. Moreover, the case cited by PAAR to support its argument relied specifically on facts missing here: the same copyrighted works at issue in both actions.[11]

Finally, PAAR failed to establish that a final judgment on the merits in *Honig* precludes Boatman's assertion of claims in this action. Specifically, PAAR claims that the district court in *Honig* ruled "as a matter of law that that the licenses Boatman granted to his Peoria area real estate agent clients permitted the copyrighted photographs to be uploaded to the Realtor.com website."

[11] PAAR cites *Bell v. Taylor*, 827 F.3d 699, 706 (7th Cir. 2016), where two successive matters involved the same photograph, and the court noted "Bell's two lawsuits against Taylor arise out of a common core of operative facts—namely, Taylor's use of the nighttime photo".

(DE 15, at 20-21). This characterization misrepresents what the *Honig* court held in its September 5, 2017 Memorandum Opinion and Order. In that motion, Judge Tharp considered the specific question of whether the "nontransferable" language in Boatman's license should have restricted Honig Realty, Inc. from distributing the subject photographs to third parties for any purpose. Judge Tharp found that "[t]he only reasonable interpretation of the license is that Honig could not transfer the license itself to a third party. It does not prevent Honig from distributing the photographs for the stated purposes of listing and marketing the homes." (DE 15, Exhibit E, p. 5). No final judgment was ever made as to whether distribution with terms that exceeded the license granted by Boatman amounted to copyright infringement. The FAC, in comparison, specifies that while PAAR had authority to distribute the Photographs for the purposes of listing and advertising properties for sale, that license was limited to the term that the listings were active. Boatman's claims in this action focus on PAAR's distribution beyond the terms of his licenses, a question which was never adjudicated in *Honig*.

Ultimately, the parties, the photographs at issue, the contracts granting usage rights, and the claims are different here than they were in *Honig*. No final judgment was made regarding whether any of the Photographs were distributed beyond the terms of Boatman's licenses. None of the elements of a *res judicata* defense are present, and so PAAR's Motion should be denied in its entirety.

III. Conclusion

As Boatman pled the elements of a timely *prima facie* case of copyright infringement, PAAR relies on a series of arguments that are based on contractual arguments or its affirmative defenses, and the elements of *res judicata* are not met, the Motion does not provide a rationale for dismissing the FAC, and it should be dismissed in its entirety.

Dated: October 27, 2020

Respectfully submitted,

/s/ Evan A. Andersen

EVAN A. ANDERSEN
evan@pixeliplaw.com

EVAN ANDERSEN LAW, LLC
3495 Buckhead Loop NE, #260147
Atlanta, GA 30326
404.496.6606 – Telephone

and

JOEL B. ROTHMAN
joel.rothman@sriplaw.com

SRIPLAW
21301 Powerline Road
Suite 100
Boca Raton, FL 33433
561.404.4350 – Telephone
561.404.4353 – Facsimile

Counsel for Plaintiff Michael Boatman

CERTIFICATE OF COMPLIANCE

1. This Response complies with the type volume limitations of C.D. Ill. Local R. 7.1(B)(4) because it does not exceed 7,000 words in length, pursuant to Local Rule 7.1(B)(4)(b)(1). This brief contains 5,248 words, excluding the signature block and certificates.

2. This brief complies with the typeface and type-style requirements of C.D. Ill. Local Civ. R. 5.1(C) because it has been prepared in proportionally spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman 12-point font.

This 27th day of October, 2020.

/s/ Evan A. Andersen
Evan A. Andersen
EVAN ANDERSEN LAW, LLC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on October 27, 2020, a true and correct copy of the foregoing document was served by electronic mail by the Court's CM/ECF System to all parties listed below on the Service List.

/s/ Evan A. Andersen
EVAN A. ANDERSEN

SERVICE LIST

Mr. Thomas G. Griffin
Mr. Matthew C. Casey
Walker Wilcox Matousek LLP
One North Franklin Street
Suite 3200
Chicago, IL 60606
tgriffin@wwmlawyers.com
mcasey@wwmlawyers.com

Attorneys for Peoria Area Association Of Realtors