

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

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff MICHAEL BOATMAN, by and through undersigned counsel, and pursuant to both the applicable Federal Rules of Civil Procedure including Rule 15(a)(1)(B), and the Local Rules of this Court, demands a trial by jury of all claims and issues so triable, and, for his First Amended Complaint against Defendant PEORIA AREA ASSOCIATION OF REALTORS, hereby asserts and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Michael Boatman (“Boatman”) is an individual residing in Peoria, Illinois.
2. Defendant Peoria Area Association of Realtors (“PAAR”) is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business at 7307 N. Willowlake Court, Peoria, Illinois, 61614. PAAR may be served through its registered agent, John Lehman, at 301 SW Adams Street, Suite 1000, Peoria, Illinois, 61602.
3. PAAR operates a multiple listing service (“MLS”).
4. This action arises under the Federal Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.* This Court is vested with subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1338(a) (copyright jurisdiction).

5. This Court has personal jurisdiction over Defendant PAAR by virtue of its presence in this District and its transacting, doing, and soliciting business in this District.

6. Venue is proper in this Court under 28 U.S.C. § 1400(a).

BACKGROUND ON BOATMAN

7. Boatman is a full-time professional photographer who, among other areas, specializes in interior architectural photography.

8. Boatman has forty years of experience in architectural, fashion, food, industrial, corporate, editorial, advertising, and event photography. Formally educated at the Art Institute of Ft. Lauderdale, Boatman's photography has been given numerous awards, including awards by Omni International, the Boston Academy of Fine Arts, the Advertising Photographers of America, and he has received multiple wins for the "Communication Arts in Advertising" award. Additionally, many of Boatman's clients, for work featuring his photography, have received the American Association of Advertising Agencies' "Addies" award.

9. Attached hereto as Exhibit 1 is a list of 1,216 photographs (each a "Photograph," collectively the "Photographs") at issue in this case.

10. All the Photographs at issue in this case were taken during the years 2012, 2013, 2014, or 2015.

11. Boatman is the author and copyright owner of the Photographs pursuant to 17 U.S.C. § 201.

12. The Photographs in perspective, orientation, positioning, lighting, and other details are entirely original to Boatman.

13. The Photographs are protectable subject matter under the Copyright Act.

14. Boatman has fully complied with the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, as amended, and all other laws and regulations governing copyrights and has secured the exclusive rights and privileges in and to the copyrights for the Photographs.

15. The Register of Copyrights for the U.S. Copyright Office issued to Boatman Certificates of Registrations for the copyrights to the Photographs and other images, numbered as follows:

- VA 1-980-161, effective December 30, 2013,
- VA 2-007-605, effective January 8, 2014,
- VA 1-964-540, effective June 26, 2015,
- VA 1-964-118, effective July 2, 2015,
- VA 1-965-006, effective July 2, 2015,
- VA 1-965-013, effective July 6, 2015,
- VA 1-976-962, effective October 3, 2015,

True and correct copies of the registration certificates referenced above are attached collectively as Exhibit 2.

16. Boatman never transferred ownership of copyright to his Photographs to anyone.

BOATMAN'S REAL ESTATE PHOTOGRAPHY LICENSE

17. At all relevant times, Boatman provided residential real estate photography services for multiple real estate agents in the Peoria and East Peoria, Illinois areas.

18. The real estate agents who commissioned Boatman did so with the intent to use Boatman's photographs to market and sell the property depicted in the photographs because those real estate agents had obtained listing agreements from the owners of the property to represent those owners in the marketing and sale of their real estate.

19. Boatman photographed the exterior and interior of houses, edited the resulting images, and then licensed the photographs to the real estate agents who engaged him.

20. Boatman provided multiple relevant photographs from each property to the real estate agents who engaged him, but never dictated how many of that group would be used for the listing, or in what order they needed to be displayed.

21. Boatman retained all the copyright rights to his Photographs and only issued limited licenses to his real estate agent clients.

22. Each of Boatman's real estate photographs have individual value beyond their intended use by his real estate agent clients and therefore it was important to Boatman that he retain all ownership rights in his photographs, including rights to control the use of those photographs in the future.

23. Boatman's licenses to his real estate agent clients granted them the rights to use Boatman's Photographs to advertise and market the properties depicted in the Photographs to prospective buyers during the term of the real estate agents' listing agreements for those properties.

24. Boatman's license granted to his real estate agent clients for each of the Photographs was limited to the rights to copy, distribute, display, and make derivative works of any number of that property's Photographs for the purpose of listing, marketing and displaying the properties depicted for sale during the term of the real estate agents' listing agreement.

25. Boatman's license to his real estate agent clients did not permit those clients to sublicense the use of Boatman's Photographs for any purposes unrelated to the sale of the real estate agent's listing.

26. Boatman's license granted to his real estate agent clients for each of the Photographs terminated when the listing sold or the listing agreement otherwise terminated or

expired. In other words, upon the closing of the sale of the property depicted in a Photograph, the license granted to Boatman's real estate agent clients for that Photograph terminated along with all other usage rights.

PEORIA AREA ASSOCIATION OF REALTORS AND THE PAAR MLS

27. Boatman's real estate agent clients for the Photographs are members of PAAR and are participants in the PAAR multiple listing service.

28. A multiple listing service "compile[s] active real estate listings into a database for use by area realtors and brokers in connection with the sale, lease, and valuation of real property. The database allows realtors both to find properties for their clients and to share those properties via their own sites, ensuring real estate listings get the broadest possible exposure to online viewers." *Stross v. Redfin Corp.*, 730 F. App'x 198, 200 (5th Cir. 2018).

29. MLS's are usually formed by a single area real estate association, or a combined group of area real estate associations.

30. The PAAR MLS was formed by the Greater Davenport Board of Realtors® and the Illinois Quad City Area Realtor® Association.

31. There are typically two types of copyrightable authorship embodied in an MLS database.

32. One type of authorship is the MLS data "'compilation,' which is 'formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.'" *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 596 (4th Cir. 2013) quoting 17 U.S.C. § 101 (definition of compilation).

33. “The protection afforded to a compilation is independent of any protection that might be afforded to its individual components. Thus, ownership of the copyright in a compilation, standing alone, ‘extends only to the material contributed by the [compilation's author] ... and does not imply any exclusive right in the preexisting material.’” *Am. Home Realty*, 722 F.3d at 596, quoting 17 U.S.C. § 103(b).

34. MLS’s, or their underlying association sponsors, typically claim compilation copyright to their listing databases. PAAR is no exception. The PAAR MLS Rules and Regulations, a copy of which is attached hereto as Exhibit 3, state that “[a]ll 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®.” (Exhibit 3, Section 13.1).

35. Compilation copyright in an MLS database is different and distinct from copyright claimed in any of the material contributed to the MLS database, such as photographs.

36. Photographs contributed to and contained within an MLS database are preexisting copyrightable component works protectible separately from the compilation copyright in the MLS database.

The copyright in individual component works need not be owned by the author of the collective work. See *id.* § 201(c) (“Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution.”). Indeed, the Copyright Act establishes a default presumption that the author of a collective work does not own the copyright in any component part:

In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Id. at § 201(c).

Am. Home Realty, 722 F.3d at 596.

37. Boatman is not a member of PAAR or a participant in the PAAR MLS.

38. Each Photograph at issue is a separate preexisting copyrightable component work.

39. As noted above, all the Photographs at issue were taken in the years 2012, 2013, 2014, or 2015.

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.

41. Boatman's real estate agent clients were licensed to permit the PAAR MLS to combine the selected Photographs into an MLS compilation, then distribute that compilation to other MLS participants to market and promote the real estate listings.

42. After PAAR received the Photographs from Boatman's real estate agent clients, PAAR combined the Photographs with other information about the listings, then distributed the Photographs to other MLS members to market and promote the real estate listings as part of the MLS compilation for the subject property.

43. Included within the scope of the license granted by Boatman to his real estate agent clients was the distribution of Boatman's Photographs to websites to promote the sale of the real estate agents' listings online.

44. PAAR sold access to the Photographs via internet data exchange¹ ("IDX") feeds to websites that display "live" MLS listings (i.e., unexpired, not withdrawn and unsold listings) on the internet.

¹ An IDX feed is a data feed that participants in an MLS can display on "websites of member brokers and which assembles selected MLS listing data from all brokers who have requested that their listings be distributed."

45. PAAR, the IDX feed provider, distributed the MLS database compilations including the preexisting component works protectible by copyright, which preexisting component works included Boatman's Photographs.

46. PAAR's distribution of the MLS database compilations including the preexisting component works including Boatman's Photographs was not an automatic process devoid of volitional acts by PAAR.

47. PAAR acted with volition to create each multiple listing compilation with that property's Photographs, property descriptions, and additional property data.

48. PAAR acted with volition to create the IDX feed capability for its MLS database.

49. PAAR acted with volition to choose what participants and non-participants could obtain access to its IDX feeds.

50. PAAR acted with volition to adopt and enforce its rules and regulations governing IDX feed use by MLS participants.

51. PAAR acted with volition to adopt, negotiate and police licensing agreements for IDX feed use by non-participants in the PAAR MLS.

52. PAAR acted with volition when it chose to grant access to IDX fees to some non-participants but not others.

53. PAAR acted with volition when it chose to overlook violations of IDX feed licensing agreements by some non-participants.

54. PAAR acted with volition concerning every aspect of its creation and distribution of its MLS compilations including the preexisting component works protectible by copyright that included Boatman's Photographs.

Realcomp II, Ltd. v. F.T.C., 635 F.3d 815, 820 (6th Cir. 2011). See also, Exhibit 3, Section 20 ("IDX Defined. IDX affords MLS participants the ability to authorize limited electronic display of their listings by other participants.")

55. The IDX feed access to “live” MLS listings (i.e., unexpired, not withdrawn and unsold listings) sold by PAAR was consistent with Boatman’s license to his real estate agent clients.

56. When 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.

57. The license to the Photographs granted by Boatman to his real estate agent clients excluded rights to copy, display or distribute Boatman’s Photographs after the applicable real estate listing was expired, withdrawn or sold.

58. The rules and regulations adopted by PAAR applicable to IDX feeds at the time Boatman’s Photographs were uploaded to the PAAR MLS prohibited the display by participants of expired, withdrawn or sold listings. See Exhibit 3, Section 20.3.12 (“Display of expired, withdrawn, and sold listings is prohibited.”)

59. Prior to 2016, PAAR did not distribute Boatman’s Photographs by IDX feed where the applicable real estate listing was expired, withdrawn or sold.

60. At all times, including through and including the present, the rules and regulations applicable to participants in the PAAR MLS and users of PAAR MLS IDX feeds required participants to refresh all MLS downloads and IDX displays automatically fed by those downloads at least once every 12 hours.

61. At all relevant times, including through and including the present, the automatic refreshment of IDX displays by PAAR distributed to participants resulted in the removal of IDX

displays of listings and associated photographs after those listings were expired, withdrawn or sold.

PAAR'S INFRINGEMENT BY DISTRIBUTION

62. Realtor.com is a website that displays MLS listings on the internet.

63. Realtor.com is operated by non-party Move, Inc. under license from the National Association of Realtors which owns the trademark REALTOR.

64. Realtor.com, like other websites that display MLS listings, displays listings by IDX feed received from an MLS.

65. The owner and operator of Realtor.com is not a real estate broker.

66. Only real estate brokers can be participants in an MLS.

67. Non-participants in an MLS, such as the owner and operator of Realtor.com, are required to obtain a license from an MLS to display an IDX feed.

68. The licenses granted by an MLS to a non-participant are generally subject to written terms and conditions.

69. The written terms and conditions of licenses between an MLS and a non-participant generally require the non-participant refresh all MLS downloads and IDX displays automatically fed by those downloads at least once every 12 hours.

70. The written terms and conditions of licenses between an MLS and a non-participant generally do not permit the non-participant to copy, display or distribute real estate listing information and associated photographs for real estate listings that have expired, been withdrawn or been sold.

71. The written terms and conditions of licenses between an MLS and a non-participant are generally consistent with the rules and regulations for MLS and IDX use applicable to participants.

72. PAAR entered into an Agreement with non-party REALTORS Information Network, at that time the owner and operator of the Realtor.com website, on June 3, 1996, relating to the display of PAAR's MLS database on the Realtor.com website (the "RIN Agreement").

73. At some point after the RIN Agreement was executed, The RIN Agreement with PAAR transferred from non-party REALTORS Information Network to non-party Move, Inc., and has not been terminated or materially changed by any of the parties to date.

74. The RIN Agreement did not require the owner or operator of the Realtor.com website to refresh all MLS downloads and IDX displays automatically fed by those downloads over any time frames.

75. 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.

76. PAAR distributed the MLS database compilations including the preexisting component works protectible by copyright, which preexisting component works included Boatman's Photographs, to Realtor.com pursuant to the RIN Agreement.

77. PAAR failed to police the display of Boatman's Photographs on Realtor.com after the properties depicted in the Photographs sold and after the listings closed.

78. PAAR never made any effort to ensure that the licenses granted to IDX feed recipients were supported by licenses granted to it by the respective copyright owners.

79. Boatman never granted a license to Move, Inc. to use Boatman's Photographs after the listings closed and the properties sold.

80. Boatman never granted a license to his real estate agent clients to use Boatman's Photographs after the listings closed and the properties sold.

81. Boatman never granted a license to PAAR to distribute Boatman's Photographs after the listings closed and the properties sold.

82. PAAR unilaterally granted rights to third parties that exceeded the scope of Boatman's licenses.

83. PAAR's volitional distribution of Boatman's Photographs under the circumstances alleged herein was the proximate cause of Boatman's loss.

84. On February 21, 2020, Boatman, through counsel, sent a letter by mail and email to PAAR notifying PAAR of its infringement and advising PAAR that it lacked a license to use or sublicense the use of Boatman's Photographs after the listings closed and the properties sold.

85. Despite notice, PAAR's infringement has continued.

FIRST CAUSE OF ACTION

(Copyright Infringement - 17 U.S.C. § 101 *et seq.*)

86. Boatman re-alleges and incorporates by reference paragraphs 1 through 85 above.

87. Boatman owns valid copyrights in the Photographs at issue in this case.

88. The Photographs at issue in this case were registered with the Register of Copyrights pursuant to 17 U.S.C. § 411(a).

89. PAAR distributed the Photographs at issue in this case to the owners and operators of Realtor.com without Boatman's authorization in violation of 17 U.S.C. § 501.

90. PAAR's acts were willful.

91. Boatman has been damaged.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Michael Boatman prays that this Honorable Court:

- A. Order that PAAR's unauthorized conduct violates Boatman's rights under the Federal Copyright Act at 17 U.S.C. §101 *et seq.*;
- B. Order PAAR to account to Boatman for all gains, profits, and advantages derived from the unauthorized distribution of the Photographs;
- C. Award Boatman all profits and damages from PAAR in such amount as may be found pursuant to 17 U.S.C. § 504(b) (with interest thereon at the highest legal rate) for the infringements of Boatman's copyrights in the Photographs; alternatively, maximum statutory damages in the amount of \$30,000 for each of the PAAR Infringements pursuant to 17 U.S.C. § 504(c)(1); or such other amount as may be proper pursuant to 17 U.S.C. § 504;
- D. Alternatively, award Boatman maximum statutory damages from PAAR in the amount of \$150,000 for each willful violation of 17 U.S.C. § 106 pursuant to 17 U.S.C. § 504(c)(2), or such other amount as may be proper pursuant to 17 U.S.C. § 504;
- E. Award Boatman his costs of litigation, reasonable attorneys' fees, and disbursements in this action pursuant to 17 U.S.C. § 505;
- F. Order PAAR to deliver to Boatman all copies of the Photographs and all other materials containing such infringing copies of the Photographs in their possession, custody, or control;
- G. Order PAAR, its agents, and servants to be enjoined during the pendency of this action and permanently from infringing the copyrights of Boatman in any manner

and from reproducing, distributing, displaying, or creating derivative works of the Photographs; and

H. For such other and further relief as this Honorable Court deems just and proper.

JURY DEMAND

Boatman demands a trial by jury on all issues so triable.

Respectfully submitted, this 28th day of September, 2020.

/s/ Evan A. Andersen

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on September 28, 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

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