

NOS. 22-35147, 22-35200

In the United States Court of Appeals  
for the Ninth Circuit



VHT, INC.,

*Plaintiff-Appellants,*

v.

ZILLOW GROUP, INC., AND ZILLOW, INC.,

*Defendant-Appellee.*

On Appeal from the United States District Court  
for the Western District of Washington

No. 2:15-cv-01096-JLR

Hon. James L. Robart

**BRIEF OF THE NATIONAL PRESS PHOTOGRAPHER'S  
ASSOCIATION, AMERICAN PHOTOGRAPHIC ARTISTS, THE  
GRAPHIC ARTIST GUILD, PROFESSIONAL PHOTOGRAPHERS OF  
AMERICA, NORTH AMERICAN NATURE PHOTOGRAPHERS,  
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, AND DIGITAL  
MEDIA LICENSING ASSOCIATION AS *AMICI CURAE* IN SUPPORT OF  
APPELLANTS**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and local rules 29(4)(A) and 26.1, American Photographic Artists, National Press Photographer's Association, Professional Photographers of America, North American Nature Photography Association, Graphic Artist Guild, Digital Media Licensing Association, and American Society of Media Photographers are non-profit organizations. None of these amici have a parent corporation and that no publicly held corporation owns 10% or more of any stock.

s/ Stephen M. Doniger

Stephen M. Doniger, Esq.

*For Amici Curiae*

Dated: August 8, 2022

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## I. INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* the American Photographic Artists, National Press Photographer’s Association, Professional Photographers of America, North American Nature Photography Association, Graphic Artist Guild, Digital Media Licensing Association, and American Society of Media Photographers, respectfully submit this brief in support of plaintiff-appellee/cross-appellant VHT, Inc. (“VHT”). This brief is submitted with consent by the parties.<sup>1</sup>

American Photographic Artists (“APA”) is 501(c)(6) not-for-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

The American Society of Media Photographers (“ASMP”) is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers and all visual creators who earn their living by making works intended for publication, display, and every avenue of art and commerce.

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<sup>1</sup> The parties have consented to the filing of this *amicus* brief pursuant to Fed. R. App. P. 29(a) and Fed. Cir. R. 29(c). Pursuant to Fed. R. App. P. 29(4)(E), *Amici* state that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *Amici*, their members, if any, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

With thousands of members across 38 chapters and in 22 countries, working in every genre of photography, videography, content creation, and media, ASMP is a leading trade organization representing professional creators' interests.

Digital Media Licensing Association, Inc. (“DMLA”) (formerly known as the Picture Archive Council of America, Inc.) is a not-for-profit trade association that represents the interests of entities who license still and motion images to editorial and commercial users. Founded in 1951, DMLA’s membership currently includes over 100 image libraries worldwide that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual creators. Members include large general libraries, as well as smaller specialty libraries, all of which support and provide livelihoods to individual visual artists. Over the years, DMLA has developed licensing standards, promoted ethical business practices, and actively advocated for copyright protection on behalf of its members. In addition, DMLA educates and informs its members on issues including technology, tools, and changes in the marketplace.

Graphic Artists Guild, Inc. (“GAG”), a 501(c)(6) not-for-profit corporation, has advocated on behalf of illustrators, designers, animators, cartoonists, comic artists, fine artists, web designers, production artists, and educators since it was founded in 1967. GAG educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The Graphic Artists Guild Handbook:



Pricing & Ethical Guidelines has raised industry standards and provides graphic artists and their clients guidance on best practices and pricing standards. We also advocate for graphic artists on Capitol Hill on a wide range of legislative initiatives, as well as internationally through active membership in global umbrella organizations.

National Press Photographers Association, Inc. (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community all of whom rely on a robust copyright system to protect their livelihoods. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional and intellectual property rights of visual journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. As part of its mission, the NPPA advocates for a robust copyright law, works with the Copyright Office and Congress in support of strong copyright law, and educates its members on their rights and responsibilities with regard to copyright.

The North American Nature Photography Association (“NANPA”) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography (both stills and video) as an artistic medium for the

documentation, celebration, and protection of the natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

Professional Photographers of America (PPA), the world's largest photographic trade association, represents over 34,000 photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years and have shared their creative works with the public secure in the knowledge that their rights in those works would be protected.

## **II. SUMMARY OF THE ARGUMENT**

Photographs are a unique kind of copyrightable work. They are frequently stored and/or displayed as part of a compilation, yet each constituent photograph generally has independent value unrelated to the compilation as a whole. In its prior consideration of this case, this Court explained that neither the label of a registration nor the independent economic value test was determinative of whether constituent photographs in a compilation should be treated as separate works or a single work and remanded for the district court to make a finding on that question by applying the statutory definition.

On remand the district court found that each photograph was properly treated as a separate work—a finding that should be affirmed because Zillow infringed the individual pictorial works, not the characteristics of VHT’s database that made it eligible for registration as a compilation, i.e., “the authorship ... involved in selecting and assembling the collection.” *Alaska Stock*, 747 F.3d at 682 (internal quotation marks and citation omitted). Nothing in § 504(c) or *VHT* bars recovery of multiple statutory damages awards simply because the “works infringed” happen to be individual images registered within a compilation.

Zillow’s challenge to the district court’s findings in this appeal raise questions that are of particular importance to *amici*, although they should also be of significant interest to all who value the work of professional creatives and want to see the goals of the Copyright Act achieved. Far too often when multiple discreet works on a compilation or group registration are infringed the same questions arise—questions that could greatly benefit from further guidance by this Court.

The undersigned coalition of visual artists associations<sup>2</sup> files this brief to ensure that this Court understand the challenges facing professional photographers in registering their work, how Congress and the Copyright Office have sought to

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<sup>2</sup> For purposes of this brief, the terms, “visual artists,” “photographers,” and “the photography industry” are used to refer to graphic artists, photographers, and their licensing representatives; and the terms, “photography” and “images” are used to refer to the works they create.

address those challenges, and the importance of recognizing the independent value of discreet works of visual art that may create a source of potential income, notwithstanding the way they are registered.

Zillow would have this Court hold that the cost of utilizing a “group” or “compilation” registration—a necessity for many visual artists to register their work—is the loss of the copyright protections that would be accorded to the individual images had they been registered separately. But such a holding would be inconsistent with precedent, fairness, and the policies and goals of the Act. Indeed, this Court previously acknowledged that “VHT registered thousands of photos as compilations” yet remanded this case back to the district court to make explicit what “we might infer... was an implicit determination” per the jury instructions given that “[e]ach VHT Photo... constitutes a separate work.” *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 747 (9<sup>th</sup> Cir. 2019). Zillow is wrong in arguing that those photographs must be considered a single work if the VHT photo database was properly deemed a compilation at the time of its registration. The Act is clear that the copyright in a compilation is independent of the copyright in the preexisting work within the compilation and should only affect the protection of the preexisting work when it was the compilation as a new work that was copied. 17 U.S.C. § 103.

*Amici* thus ask this Court to clarify that, under the plain language of the Act, infringement of discreet photographs in a compilation should only be treated as

infringement of a single work where the discreet photographs were copied in the manner that they were collected and assembled in the compilation, i.e., what was copied was the arrangement that makes the compilation a separate and independently protectable work. Otherwise, the infringement of discreet photographs contained in a compilation is properly found to be the infringement of separate works regardless of the registration form used.

### **III. ARGUMENT:**

**The VHT Photos were properly treated as separate works because they were selected and copied without regard to “the collection [that]... as a whole constitutes an original work of authorship” and each has independent economic value.**

This Court remanded this case to the district court in 2019 “for further proceedings as to whether the VHT photos remaining at issue were a compilation,” with instructions that “the registration label is not controlling” but rather what was controlling was the statutory definition of “compilation” set forth in 17 U.S.C. § 101, i.e., “a work 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.” 918.F.3d at 747-748. Because the district court’s findings are consistent with—if not compelled by—that definition, they should be affirmed.

The district court was tasked with determining whether the 2,700 photographs Zillow infringed in this case should be treated as 2,700 works or a single work (i.e., compilation). In setting up that question for the district court, this Court explained that whether each photograph has “‘independent economic value’ informs our analysis of whether [it] is a work, though it is not a dispositive factor.” *Id.* at 747 (citing *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1193 (9th Cir. 2001)). And in the next sentence it explained that because is not dispositive “the independent economic value factor does not answer the question whether something is a compilation.” *Id.* (emphasis added).

Given this Court’s holding that the independent economic value test informs whether multiple works should be treated as a compilation but does not answer that question, Zillow is plainly wrong in arguing “that the question of independent economic value is *distinct* from the question of compilation” and should not have been considered by the district court when determining whether the VHT Photos were a compilation.

In this case, Zillow did not copy a compilation—rather it selected and copied certain of the VHT Photos based on their individual content and merit without regard to how those photographs fit into the “compilation” that was registered. Thus, the Act’s plain language, the independent economic value factor, and all relevant policy considerations compelled the clear finding that Zillow infringed 2,700 works.

In undertaking this analysis, *amici* believe it is critical for this Court to understand the problems photographers face in registering their work and the solutions offered by Congress and the Copyright Office. Unlike creators of other types of copyrightable works, photographers can create thousands of images per day with each having economic value. Recognizing these challenges, the Copyright Office has worked with visual artists and their associations to offer registration practices that permit group registration that still protect the constituent works, including registration options specific to photographers. Without these group registrations, the task of registering large quantities of photographs would be financially and administratively impossible for many visual artists, and potentially overwhelming for the Copyright Office. Most photographs would not get registered, enforcement of copyrights would not be practical, and many photographers would give up their craft.

**A. The Act is clear that discreet photographs are considered independent works except as part of a particular selection, coordination, or arrangement that qualifies as a new work.**

17 U.S.C. § 101 defines “pictorial, graphic, and sculptural works” to include photographs, and nothing in that definition excludes works that are later incorporated into a compilation, database or group of images registered together. The Act also defines a “compilation” as “a work 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.” 17 U.S.C. § 101 (emphasis added). Importantly, those preexisting materials may or may not be individually entitled to copyright protection and may or may not individually have independent economic value.

A copyright in a collective work or compilation is *in addition to* the copyright in the contributions to the collective work or the preexisting material employed in the compilation. Section 201(c) of the Act states that “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.*” 17 U.S.C. § 201(c) (emphasis added). Likewise, Section 103 states that a compilation’s copyright is separate and distinct from the copyright in the preexisting material employed in the work. *See* 17 U.S.C. § 103. Following that clear directive, the United States Supreme Court held that when there is a collective work “the statute recognizes two distinct copyrighted works,” the copyright in the separate contributions, and the copyright in the collective work as a whole, which does not extend to the preexisting material. *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 493–94 (2001) (finding clear and protectable copyright in “each separate contribution to a collective work”). Thus, the copyright in a compilation itself does not affect the copyright in the preexisting material that serves as the parts to the



compilation and, importantly, “does not affect... the *copyright protection* in the preexisting material.” 17 U.S.C. 103(b).

As the *Tasini* Court recognized, the clear purpose of the 1976 revision of the Copyright Act was to ensure that while the selection and placement of images and articles in a collective work such as a magazine, newspaper, or in this case, database, is a copyrightable collection, the images in the collective work have independent protectable value. *See Tasini* at 494, (noting that the changes under the 1976 Copyright Act were intended by Congress to “clarify and improve [this] confused and frequently unfair legal situation with respect to rights in contributions.”) (citing H.R. Rep. No. 94-1476, p. 122). Put differently, the inclusion of a work in a collection, group registration, or database does not rob the work of any of its independent protections, including statutory damages.

The Copyright Office has created a group registration option for databases to solve the administrative challenge of registering large numbers of photographs and other works (discussed below) but cannot, of course, re-write of the definition “work” or “compilation” as it doesn’t have the authority to establish regulations that are inconsistent with the Copyright Act. 17 U.S.C. § 702. *See also*, U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1105.2.<sup>3</sup> (3d ed. 2021) (the “Compendium”). Indeed, the Copyright Office has made clear that the

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<sup>3</sup> Available at <https://www.copyright.gov/comp3/docs/compendium.pdf>

information and definitions it provides as guidelines for registration are “for purposes of copyright registration” only. Compendium § 1112.1.

Given that the Act determines what qualifies as a work while the Copyright Office determines what qualifies as a proper registration, “courts approach the definition [of ‘work’] depending on the specific issue, for example, deciding proper registration . . . [or] calculating statutory damages.” *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1180 n.10 (9th Cir. 2012) (citation omitted). What is considered one “work” for purposes of registration may constitute multiple “works” for purposes of awarding statutory damages. *See, e.g., Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117-18 & n. 8 (1st Cir. 1993) (holding four episodes constituted four separate “works” and therefore warranted four awards of statutory damages, even though all four episodes were under the same group registration); *TVB Holdings (USA), Inc. v. Enom Inc.*, No. 13-CV-624 (JLS) (DFM), 2014 WL 12588473, at \*1 (C.D. Cal. Apr. 11, 2014) (holding that individual episodes constitute separate “works” for purposes of computing statutory damages, even though the episodes are subject to group registrations covering an entire series of episodes).

Despite the clear authority holding that the registration label is not controlling, including this Court’s prior holding in this case, Zillow appears to be arguing that *if* the VHT Photos were properly registered together as a group *then* VHT should only be entitled to a single statutory damage award regardless of the circumstances of the

infringement. That is certainly wrong since such registrations cover “both the collection as a whole and the individual images” in it, *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 682 (9th Cir. 2014).

Rather, under a plain-language interpretation of the Act, it is the nature of the infringement **and not** the nature of the registration that will carry the most weight in determining the number of available statutory damages where multiple discreet works included in a compilation are infringed. If the infringement claim relates to the unauthorized copying of the compilation (i.e., of the “resulting work” of the selection, coordination, or arrangement of pre-existing works of materials) then only one statutory damages award may be permissible. But if the claim relates to the infringement of constituent pre-existing works without any significant regard to how or whether they were ever part of a compilation then multiple statutory damages should generally be available to the same extent they would have been had the works been separately registered.

Put differently, nothing in the Act precludes a copyright holder from seeking separate statutory damages where the gravamen of the claim is the infringement of individual images within the work and not infringement of the compilation as new work. Infringement of discreet works in a compilation should be treated as infringement of a single work only where the compilation, i.e., the particular selection, coordination, or arrangement of pre-existing works, is copied in whole or

in part. But where the infringer merely pulls select material for use without regard to that selection, coordination, or arrangement of pre-existing works—i.e., what makes the compilation a separate work—separate statutory damages should generally be permitted.

In this case, Zillow’s Digs platform copied “photos of artfully-designed rooms in some of those properties and is geared toward home improvement and remodeling. Zillow tags photos on the Listing Platform so that Digs users can search the database by various criteria, like room type, style, cost, and color.” 918 F.3d 723, 730. Zillow thus infringed select VHT Photos because they showed kitchens, or bathrooms, or the artistic use of red, or for any number of other reasons related to the content and merits of the individual photographs—reasons unrelated to the selection, coordination, and arrangement of those photographs in VHT’s database. Thus, the district court correctly found that VHT was entitled to separate statutory damages for each infringed photograph in this case.

**B. The “Independent Economic Value” factor compels affirmance of the district court’s findings in this case.**

The district court’s finding that each photograph commanded a separate statutory damage award was also correct based on considerations of the “independent economic value” test adopted by the Ninth Circuit, i.e., that where a work has “independent economic value and is, in itself, viable” then it should constitute a separate “work” for purposes of calculating statutory damages.

*Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1193. *Accord Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1180.

As noted above, Zillow copied select VHT Photos as a result of their individual merits and what those photographs showed, not because they were part of a compilation. That fact alone demonstrates what Zillow does not meaningfully dispute—that each photograph has independent economic value. Potential licensees interested in using VHT’s photographs to show well-executed contemporary bathroom designs (like Zillow) will not care how those photographs were arranged in the original database, and the economic value of the photograph is untethered to either that original arrangement or the licensing value of the entire database.

Even if the district court’s finding were not compelled by the plain language of the Act, permitting the value of a work with an independent economic life to be obliterated simply by its inclusion in a database would be an absurd interpretation of that language. *See Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004) (“[S]tatutory interpretations which would produce absurd results are to be avoided.”) (citing *United States v. Wilson*, 503 U.S. 329, 334 (1992)).

*New York Times v. Tasini* illustrates this perfectly. In *Tasini*, freelance authors of articles that were published in newspapers and magazines brought an infringement action against the publishers who relicensed their articles to electronic databases, and against the owners of electronic databases that sold copies of their

articles. *See Tasini*, 533 U.S. at 483-84. The Supreme Court held that the periodical’s copyright in a collective work—in that case newspapers and magazines—was separate from the preexisting material employed in the work. *Id.* at 493-94. The defendants in *Tasini* did not duplicate the preexisting collective work. Rather, they took the underlying works—each of which had their own copyright life—and presented them in a new context which did not lessen the copyright protection of the underlying works. *Id.* at 485-7.

Zillow emphasizes that certain photographs at issue are related, but that fact does not detract from their independent economic value. In *Agence France Presse v. Morel*, photojournalist Daniel Morel created some of the first journalistic images of the devastating 2010 earthquake in Haiti. *Agence Fr. Presse v. Morel*, 934 F. Supp. 2d 547, 551 (S.D.N.Y. 2013). While Mr. Morel took the photos of the same event within moments of each other and distributed them together via an online service called “Twitpics,” the images—which were widely infringed and the subject of a copyright infringement lawsuit—were each considered a separate work. 2015 WL 13021413 (S.D.N.Y. Mar. 23, 2015), *aff’d sub nom. Presse v. Morel*, 645 Fed. Appx. 86 (2d Cir. 2016) And appropriately, Morel was awarded separate statutory damages for each image that was infringed. *Id.*

Each infringed work with independent economic value, properly registered before the infringement, should generally entitle the copyright owner to seek

statutory damages regardless of the form of registration unless their copying was incidental to the copying of the separate compilation. Thus, the trial court's determination should be affirmed.

**C. The position advocated by Zillow would work a gross injustice on copyright holders and significantly frustrate the goals of the Act.**

To limit its liability in this case, Zillow wants all images within a registered database to be considered a single work. Not only is that inconsistent with the Act and this Court's precedent, as discussed above, but it ignores both the reality of how images are managed and licensed in the modern world and would stand to work a gross injustice on copyright holders who for years have relied on Copyright Office guidance to register and protect their works. Changing the rules now would unfairly deprive many copyright holders of their rights and effectively make it impossible for them to register and protect their work.

As this Circuit has recognized, it is "not performing a mere verbal, abstract task when we construe the Copyright Act. [It is] affecting the fortunes of people, many of whose fortunes are small." *Alaska Stock, LLC.*, 747 F.3d at 686. Those people plainly include photographers who have faced intense economic disruption over the past two decades as staff jobs for major publishers have dried up and the internet has made infringement far too easy. Independent business owners whose livelihoods depend on the licensing of images operate on narrow profit margins and depend on a healthy copyright law to protect the value of their work.

Almost all freelance photographers maintain their work in some kind of database as photographs are almost entirely captured using digital cameras or analog images scanned for distribution. Some databases are massive archives of images that are public facing from which clients license the work. But many are smaller individually maintained databases, some invisible to the public but shared with clients for licensing purposes. Many cloud-based services allow photographers to maintain and organize their images in a back-end database, some of which may be public and some private, depending on the goal of the photographer.

Organizations that license photographs, such as Plaintiff-Appellee maintain similar databases internally to manage the volume of work. Still other photographers contribute their work to a specific photo agency which, once again, maintains databases of images for the purposes of management, licensing and delivery of images. A stylized portrait of a celebrity by a photographer in Los Angeles and a war photograph by a photojournalist in Ukraine live side by side in these databases.

Without databases as asset management systems, the millions of images visual creators produce would be so unorganized as to render them useless beyond their first publication.

Recognizing both the need of photographers to utilize databases for the large number of works they create and license, and that it is prohibitively time consuming and expensive to register every photograph individually, the Copyright Office has



established means to register multiple works with one application and one filing fee, including the registration option at issue in this case. *See* Group Registration of Photographs, 81 Fed. Reg. 86643, 86644-46, 2016 WL 6995985 (Dec. 1, 2016); *see also* 37 C.F.R. § 202.3(b)(5); *Id.* § 202.4.; COMPENDIUM § 1105.2.<sup>4</sup>

Those group registration options are critically important to photographers and their licensing representatives. Unlike creators of other copyrightable works, photographers can create hundreds, and sometimes thousands, of photographs per day. Our Coalition of Visual Artists conducted a survey that revealed that over 62% of photographers take more than 3000 photographs in a month when busy, and 41.3% take more than 5001 per month. *See* Response Submitted on Behalf of The Coalition of Visual Artists Comments in Response to U.S. Copyright Office NPRM re Copyright Office Fees, 37 CFR 201, FR DOCKET NO. 2018-4, FED. REG.: 2018-24054, VOL. 83, NO. 101 (MAY 24, 2018) at pp. 27.<sup>5</sup> Thus, group registrations alleviate the impossible burden of having to file hundreds if not thousands of applications for each photo shoot in order to protect each image.

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<sup>4</sup> Congress recognized that requiring separate applications “where related works or parts of works are published separately” may impose “unnecessary burdens and expenses on authors and other copyright owners” and may even cause copyright owners to forego registration altogether. H.R. Rep. No. 94-1976, at 154 (1976). Thus, the Register is permitted to create regulations that allow “a single registration for a group of related works.” 17 U.S.C. § 408 (c)(1).

<sup>5</sup> Available at [https://downloads.regulations.gov/COLC-2018-0005-0160/attachment\\_1.pdf](https://downloads.regulations.gov/COLC-2018-0005-0160/attachment_1.pdf)

Notably, the Copyright Office specifically recommended the database registration form of registration to *amici* DMLA<sup>6</sup> and its members who represent the works of thousands of individual creators for commercial licensing. *See Alaska Stock*, 747 F.3d 673, 676. The Copyright Office worked closely with *amici* DMLA, to develop a procedure to accommodate the inherent difficulties in registering catalogs containing thousands of photographs by hundreds of individual photographers; and later, to adapt that procedure to accommodate the shift in industry practice from delivery of physical images for licensing to delivery of digital images through sophisticated online platforms. *Id.* at 675. The Copyright Office eventually revised its registration procedures to extend the group database option, which was initially created for non-photographic works,<sup>7</sup> to databases that consist predominantly of photographs.<sup>8</sup> Using this form of registration, the copyright owner may file a single application for all of the photographs contained in its database at a given time, and thereafter need only file updates of newly added images at regular intervals (usually every three months to remain compliant with 17 U.S.C. § 412). *See* 37 C.F.R. § 202.3(b)(5)(ii).

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<sup>6</sup> At the time, DMLA was called the Picture Archive Counsel of America.

<sup>7</sup> *See* Registration of Claims to Copyright Registration and Deposit of Databases, 54 Fed. Reg. 13177, 1989 WL 275930 (Mar. 31, 1989).

<sup>8</sup> “Individual photographers . . . cannot use the group registration option for photographic databases, even if their images have been included in a database that consists predominantly of photographs.” Compendium, § 1112.

The goal of these types of group registration of photographs has always been to find an efficient and effective way to protect large numbers of individual photographs just as if each photograph had been separately registered—not to obtain protection only in the database as a compilation *per se*. This is because the value of the *collection* of images included in a particular registration (*i.e.*, the selection and arrangement of the thousands of images) it is not substantial. Rather, the value lies in the *individual* images since specific individual images, not the entire collection, database, or group of images are typically licensed to third parties. It is also select individual images that are generally infringed and require the protection and benefits conferred by registration, including the entitlement to statutory damages, not the “compilation.”

In this case, VHT did exactly what it was supposed to in registering the VHT Photos. Zillow’s efforts to put unwarranted consequences on those actions must be rejected just as it was by this Circuit in *Alaska Stock*:

The stock agencies through their trade association worked out what they should do to register images with the Register of Copyrights, the Copyright Office established a clear procedure and the stock agencies followed it. The Copyright Office has maintained its procedure for three decades, spanning multiple administrations. The livelihoods of photographers and stock agencies have long been founded on their compliance with the Register's reasonable interpretation of the statute. Their reliance upon a reasonable and longstanding administrative interpretation should be honored. Denying the fruits of

reliance by citizens on a longstanding administrative practice reasonably construing a statute is unjust.

747 F.3d 673, 686.

Zillow's arguments in support of limiting VHT to a single statutory damage award ignores both the intent of group registration allowances and the plain language and fundamental principles of the Copyright Act. If accepted, the law would either force photographers to inundate the Copyright Office with more registration applications than it can process or, more likely, have them give up trying to register their work altogether since the creation and registration of a compilation would largely obliterate the copyright protections in the preexisting copyrighted works included therein. It would thus also encourage greater infringement.

Infringement actions to enforce and protect copyrights are only economically viable when statutory damages are commensurate with the burden of taking a claim to federal court, given that the actual damages associated with the infringement of images are often relatively small. Thus, the various forms of group registration – and the ability to obtain statutory damages for each work within a group registration – serve an important function in protecting licensable images and protect the licensing model crucial to the livelihood of photographers. Neither of these should be diminished to ease the comfort level of companies that engage in mass infringement, who gain the economic benefit of photography without having to burden themselves with the cost of creating the work.

#### IV. CONCLUSION

*Amici curiae* respectfully request that this Court affirm the decision below on the availability of separate statutory damages and take this opportunity clarify that the district court's finding was the only appropriate one because the 2,700 infringed photographs each had independent economic value and were selected and copied based on their individual merits and not because of how they were arrangement or composed as part of the compilation with which they were registered.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,386 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word, Times New Roman, 14 point.

s/ Stephen Doniger  
Stephen Doniger  
*For Amici Curiae*  
Dated: August 8, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 8, 2022, a true and correct copy of the foregoing Brief of *Amici Curiae* was timely filed in accordance with Fed. R. App. P. 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

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