

THE NATIONAL LAW REVIEW

Picture This: No Direct Infringement but no Fair Use Either

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Addressing the use of third-party photographs on a real estate listing website, the US Court of Appeals for the Ninth Circuit found no direct copyright infringement, notwithstanding the display of thousands of copyrighted photographs. *VHT, Inc. v. Zillow Group, Inc.*, Case No. 17-35587, -35588 (9th Circ. Mar. 15, 2019) (McKeown, J). The Court also concluded that making photographs searchable was not transformative and thus did not support a fair use defense.

Real estate brokers, agents and listing services hire VHT to take professional photos of new real estate listings for marketing purposes. VHT takes the photos, touches them up, saves them in the studio's database and then delivers them to its clients for use under a license. The license authorizes use of the photos in relation to the sale of the property. Zillow used VHT's photos to display images of current and expired home listings on its real estate website, known as the listing platform. Zillow also used the photos on its Digs website, which focuses on home renovation and interior design.

In 2015, VHT sued Zillow for copyright infringement, alleging that Zillow's use of the photos on its listing platform and Digs sites exceeded the scope of licenses that VHT provided to its licensees who in turn provided the photos to Zillow. VHT alleged that Zillow directly infringed its copyrights by displaying photos after the property sold. Zillow argued that it received the photos via feed providers that represented that they had all the necessary authority to grant rights to Zillow that would allow it to use the photos without violating any third-party intellectual property rights. VHT alleged that Zillow designed its software to cause the reproduction of the photos post-sale on the listing platform.

The district court concluded that Zillow had not engaged in volitional conduct and therefore did not directly infringe VHT's copyrights by displaying more than 54,000 photos on its listing platform. It also granted Zillow partial summary judgment of non-infringement. On the remaining claims of direct, indirect and willful infringement for Zillow's use of the photos on Digs, a jury found in favor of VHT and awarded \$8.27 million in damages. The district court, however, reversed part of the jury verdict on the majority of photos and reduced total damages to approximately \$4 million. VHT appealed the non-infringement finding relating to the listing platform, and Zillow appealed the infringement finding relating to Digs.

On appeal, the Ninth Circuit agreed with the district court, concluding that Zillow did not directly infringe VHT's copyrights by using the photos on its listing platform. The Court pointed out that direct copyright infringement requires active involvement in the infringement. Since VHT failed to demonstrate that Zillow exercised any control over the material, selected any material for transmission, or instigated any copying or distribution of the photos, it could not be held liable for direct infringement.

Zillow asserted that the fair use defense insulated it from liability on the remaining photos for which it had been found liable on its Digs site, arguing that Digs' searchable functionality constitutes fair use. At issue was whether Zillow's tagging of 3,921 VHT photos for searchable functionality on Digs was transformative and thus supported a finding of fair use. The Ninth Circuit rejected Zillow's argument, noting that making the images searchable did not fundamentally change their original purpose when produced by VHT, which was to artfully depict rooms and properties. Finding limited transformation, the Court affirmed the district court's grant of summary judgment.

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Addressing damages, the Court found there remained an issue as to whether the photos were a compilation or whether each individual photo was entitled to a separate damages award. Since there were thousands of photos, and there was no explicit determination on compilation, the Court remanded the issue to the lower court to make the determination.

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