

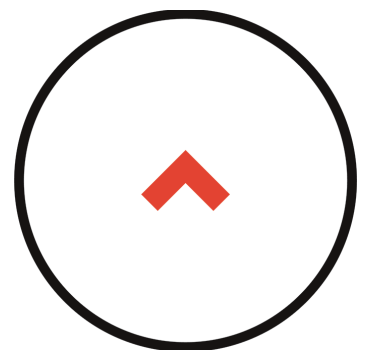


THE RED DOT

Vol 1, Issue 1: May 2018

Photography and Copyright
Impact of *Stross v. Redfin*

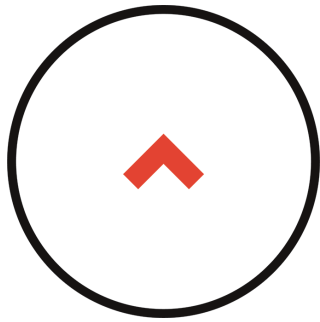
MLS & Association Edition



Observe. Orient. Decide. Act.

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Observe.

INTRODUCTION

Back in 2015, I was writing and speaking about the issue of copyrights, licenses, and photographs. The reason was a case out of Texas called *Stross v. Redfin*. I served as an expert witness for the plaintiff in that case and learned quite a bit about copyright, photography, and how they affect the MLS and brokerages.

The trial court granted summary judgment in the case, finding for Redfin. That, was that—or so we thought.

Then in April of 2018, the United States Court of Appeals for the Fifth Circuit reversed the lower court and remanded the case, with directions to the trial judge. This is a huge decision with major repercussions for MLS, for franchises, for brokerages, for agents, and for property portals like Zillow as well as for technology companies that work with photographs for any reason.

There are parts of the laws of copyright that are quite unsettled. So much of copyright law was written in the last century, and much of it pretty early in the last century when technologies like the computer were unknown, never mind the Internet and digital photography.

One result is that consumer behavior and therefore business needs change at the speed of technology, but the law does not. It takes years and years for the legal and regulatory environment to catch up to what's happening on the ground, and often requires expensive and time-consuming litigation before they do change. And of course, sometimes, the laws never change.

The issue of real estate photography and copyright is one example of this lag between legal doctrine and business reality. The industry has been busy trying to catch up with the changes of recent years, and some of the innovations that technology companies, brokerages, and the MLS have implemented are good for consumers and good for the industry. In some cases, those innovations are necessary.

But the law is not something one can ignore because of business demands. Rather, business must navigate around the law, or face consequences that could be severe.

Despite many important developments that happened in April, including the launch of Zillow's new Instant Offers program in which Zillow will become an investor, and the announcement of NAR's S.M.A.R.T. Budget Initiative, the Fifth Circuit decision in *Stross v. Redfin* is the single most important. It will have the most significant impact on the industry.

In this issue of *The Red Dot*, we dive deep into photographs, copyright, and the real estate industry.

Robert Hahn
April, 2018

PS: I apologize in advance for some of the sections that are really quite heavy on legalese. I have tried to simplify as much as I could, but given the topic, engaging with heavy-duty legal concepts and legal language was unavoidable.

The upside is that some sections may serve as a wonderful sleep aid. You're welcome.

this report, you need to contact your attorney. I am an attorney by training, but I am not your attorney. 7DS Associates is not a law firm; it is a management consultancy. *The Red Dot Report* is not legal advice, but analysis for the industry from a business strategy standpoint.

Any opinions expressed herein about a legal issue, about the disposition of a case, or validity or invalidity of legal arguments are merely our opinions as management consultants not as attorneys. Once again, if you have any questions about any legal issues, **please contact your attorney for a qualified legal opinion.**

EXECUTIVE SUMMARY:

MLS & ASSOCIATIONS

On April 9, 2018, the United States Court of Appeals issued an unpublished decision in *Stross v. Redfin* overturning the lower court's summary judgment for Redfin and ordered that the trial continue with specific directions.

The lower court had essentially ruled that Redfin's usage of photos of sold properties was as a Participant to the MLS. So if Stross has a copyright problem, he should go tell the MLS, not a judge.

Enter the Fifth Circuit

The Fifth Circuit reversed that, ruling that copyright infringement is a federal issue that stems from federal copyright law. But the Fifth Circuit went beyond that.

The court said two other critical things:

1. Stross granted a broad right to the MLS, but not *all* the rights—specifically, he granted a non-exclusive license, bestowing the right to “use, copy, and create derivative works,” but only “for any purpose consistent with the facilitation of the sale, lease and valuation of real property or such other uses.”
2. The MLS granted a narrower set of rights to Redfin, with the MLS Rules forming the limits on usage of Stross photographs.

The only remaining question at trial will be whether Redfin's usage did in fact exceed the scope of its narrower license from the MLS. That will turn on whether Redfin's usage did or did not violate the MLS Rules.

The Industry Lacks Basic Knowledge of Photograph Copyright

With a few exceptions, the real estate industry simply does not understand copyright of photographs well at all.

Brokers and agents pay very little attention to copyright and licenses. They call up a photographer, order a package of listing photographs, then upload them into the MLS, blithely assuming that they somehow own those photos or have exclusive rights to them to do whatever they wish.

- **Work for hire:** If an employee takes a photograph, the employer owns the copyright to that photo. Otherwise, there must be a written work for hire agreement assigning ownership from the photographer to the customer. Many photographers will either refuse outright, or charge a large amount of money for a work for hire contract.
- **Exclusive License:** The photographer may not resell the rights licensed to anybody else for the duration of the license agreement. Exclusive licenses must be in writing, and may still contain terms such as duration, number of uses, and most importantly, *usage rights*. They also cost more than the standard license, which is...
- **Non-exclusive License:** This is the kind of license that most photographers provide to their real estate broker or agent clients and any kind of verbal license is non-exclusive.

In most of the licenses I have seen during research for this paper, the photographer grants non-exclusive licenses with the usage rights limited to two things:

1. sale and marketing of the specific property photographed; and
2. promotion of the broker or agent or both who ordered the photographs.

Missing from most of these licenses is usage rights to the photos *once the property is sold*. Sometimes, usage in property valuation is also granted, but that is **not** the standard default license.

The most important thing to understand is that **you cannot grant rights you do not have**. Which means that if an agent received non-exclusive license with usage rights limited to marketing the property or herself and her brokerage, then she cannot give her broker the right to use those photos after the property is sold. That in turn means her brokerage cannot grant the MLS rights to sold property photos, which then affects everybody who receives their

license from the MLS: other Participants, as well as licensees, such as Zillow, Realtor.com, or technology companies.

We have a “source” problem in the industry as it comes to photography licenses.

We also have issues with deep misunderstandings of how the MLS grants licenses to Participants and Licensees.

*Missing from most of these licenses is usage rights to the photos once the property is sold. Sometimes, usage in property valuation is also granted. But that is **not** the standard default license.*

Copyright and MLS Rules

Many people in the industry seem to believe that if the MLS has given them permission to use data/photos, they're in the clear. The MLS has broad rights, and if it says that you can do X, Y, and Z, then you can do X, Y, and Z.

This is no longer true, if it ever was.

It is now clear, after the Fifth Circuit decision, that the MLS Rules are “baked into” the sub-license from the MLS to a Participant or subscriber for how a photo may or may not be used.

MLS Rules exist because the MLS itself is a model of cooperation in which competitors choose to cooperate. The main balance that has to be struck is between serving the client and acquiring the client in the first place. As Geoffrey Lewis, then General Counsel of Re/Max, said in 2006:

The concept [of the MLS] is simple: you earn a customer, you get to use the MLS with the customer. The concept is not: you get free access to the MLS and then you use it to advertise the properties of your competitors in order to attract customers.

As a result, most MLS Rules tend to disfavor and place limits on uses that are more “get a customer” oriented versus “serve an existing customer” oriented.

For example, Rule 7.3 of the Austin MLS in the *Stross v. Redfin* case limits the usage of sold data to “support an estimate of value on a particular property for a particular client.”

The MLS Rules are incorporated into the sub-license from the MLS to a Participant (such as Redfin) by way of the Participant Content Access Agreement¹ which every brokerage must sign upon joining an MLS. Therefore, the takeaway from all this is that *violating the MLS Rule on data/photo usage equals exceeding the scope of copyright license*.

Sold Data Over IDX is a Big Problem

The single biggest problem for most of the industry as a result of *Stross v. Redfin* is Sold Over IDX.

In 2014, NAR’s MLS Policy Committee changed the rules to make it **mandatory** for the MLS to provide brokerages and agents sold data in the IDX feed. In 2017, NAR expanded the scope of Sold Over IDX to require providing all sold data back to 2012.

Those decisions, while celebrated at the time, were made without regard to or clear understanding of the photography license problem.

After the Fifth Circuit decision, Sold Over IDX is **extraordinarily risky** for the MLS and for the brokers and agents. We now have brokerages and even individual agent websites that have been displaying photos of sold properties to the general public for *years*.

There is a very good chance that each and every one of those brokers and agents are liable for copyright infringement.

Slightly Different Problems for Licensees

For licensees, such as Zillow, Realtor.com, and technology companies, the problem is slightly different.

Because they are not Participants, the MLS Rules do not get “baked into” their licenses from the MLS. All of their rights come from a



¹ Different MLSs use different names for this document, but it is a valid contract and normally has language that specifically says something like, “pursuant to the Rules of the MLS.”

license agreement with the source, whether that source be the MLS, a national franchise or a brokerage.

The root problem remains the same: the MLS/franchise/brokerage cannot grant usage rights it does not have.

The case to watch here is *VHT v. Zillow*. After a jury trial, Zillow was found liable to VHT for copyright infringement and ordered to pay damages of \$8.3 million, later reduced to \$4.1 million.

Zillow dodged the most dangerous bullet in that case at trial, however, by having the court issue a summary judgment in their favor on the issue of using sold photographs on the main Zillow website. (The damages stemmed from how photos were used on Zillow Digs, not the main Zillow website and apps.)

The root problem remains the same: the MLS/franchise/brokerage cannot grant usage rights it does not have.

VHT is now appealing that summary judgment to the Ninth Circuit Court of Appeals. If the Ninth follows the lead of the Fifth Circuit, then the possible liability explodes.

There are three issues here for non-Participant licensees.

1. The law is highly unstable in this area. Because the law is not fully settled, there's a great deal of risk and uncertainty. As a result, details matter, especially for technology companies. Zillow lost at trial in part because they used human moderators on Zillow Digs. Zillow won parts of the trial because its automated software system was well-designed to avoid infringement. But the excruciating details of what, when, where, who, and how *all matter* to courts.
2. How a company responds to accusations of infringement matters a great deal. Basically, you want to take every allegation seriously, and show that you took steps to investigate, to alleviate, and to minimize. It can be very expensive to be found to have "willfully" infringed a copyright.
3. License agreements usually contain indemnification clauses as well as warranties, in which the data provider (i.e., the MLS, the franchise, the brokerage, etc.) certifies that it has the

rights it is granting to the licensee, and promises to indemnify the licensee if anything goes wrong.

The first two are real issues for technology companies working in real estate and use photographs.

The third is a real issue for the data providers, such as the MLS and franchises and brokerages. While I do not believe that big companies like Zillow and Move with deep pockets would sue their real estate partners for indemnification, smaller technology companies without deep pockets might not have a choice.

The problem is that as the rights flow down, indemnification flows back up. After the dust settles, it may be the brokerage who ends up holding the bag for damages...

Implications for Brokerages & Brands

All of the problems with photo copyright flow down from the brokerage, which has not been sufficiently attentive to or knowledgeable about what rights they need to obtain from the photographer.

The problem is that as the rights flow down, indemnification flows back up. After the dust settles, it may be the brokerage who ends up holding the bag for damages, as the agent who hired the photographer without paying attention to photo rights may not have any money.

Furthermore, brokerages can no longer afford to be disengaged from the MLS Rules and the often tedious and contentious process of making them and changing them. Those Rules make up part of the data license from the MLS, which directly affects the brokerage and its potential liability.

Brokerages must also pay far closer attention to the details of how its vendors and technology partners have implemented a system that uses photographs in some way. The smallest detail matters in whether you end up writing a check for \$200 million or a check for \$2,000.

Summary of Recommendations for MLS and Associations

Please turn to the Recommendations section at the end, for a much more detailed discussion of each of these.

- **Suspend Solds Over IDX**

Immediately suspend Solds over IDX. Do not wait. Do not pass Go. Do not collect \$200. Just suspend it right now.

- **Conduct an Image Audit, Like Yesterday**

For all of the photos in your MLS system, you need to know what rights you do and do not have. That means finding out what rights the broker or agent who uploaded the photograph did and did not have.

- **Review Your Syndication Agreements**

Immediately review your various syndication and data agreements with portals and technology vendors.

- **Take A Deep Look at Your MLS Rules**

Take another look at your MLS Rules; they may no longer work for what you and your Participants need.

- **Review Your Participant Agreements**

Similarly, review your Participant Content Access Agreements in light of these new developments.

- **Consult an Antitrust Attorney about Third Party Photographer Agreements**

The Third Party Photographer Agreements from NAR make me nervous; consult an antitrust attorney before you implement.

- **Explore Retroactive Licensing**

The long-term solution is to figure out a way to license the rights you and your brokers and agents need, in an efficient way.

- **Partner Up and Find Allies**

Whether fighting the issue, or trying to find a solution, you need friends, allies and honest adversaries who might negotiate a solution with you. Partner up.

NAR and Political Action

NAR should be looking into lobbying for changes to the copyright laws.

Technology Alliance

Form a technology alliance across the industry.

Local MLS: Pool Resources

Smaller MLSs need to think about pooling resources with other MLSs.

- **Invite Real Estate Photographers to Join the MLS/Association**

Appraisers, mortgage professionals, and title people can already join as affiliate members. Why not photographers?

Conclusion

For MLS and Associations, this issue of photography and copyright is absolutely the most important one that arose in April. It may in fact be one of the most critical issues in recent years, as it goes to the very heart of how an MLS operates.

That MLS Rules are incorporated into the license to Participants is something we all should have known and thought about as we built the overall system. Thanks to the Fifth Circuit, we now know that.

That we have a major source problem with real estate photography is regrettable, and the effort to solve that problem will not be a small one.

Solds-Over-IDX needs to be suspended immediately until the whole copyright of sold photographs is sorted out.

MLSs need to start figuring out what rights they actually have vs. what rights they think they have. That is both an urgent and a critical need.

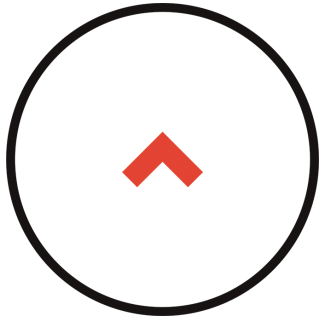
Yet, problems also introduce opportunities.

This crisis gives us the opportunity to go and reexamine the MLS Rules and that balancing act between “serve a client” and “get a client” that is at the heart of the fundamental understanding of the MLS as an institution in real estate.

It gives the industry the opportunity to get far better informed and educated on important intellectual property concepts.

It gives the opportunity for new alliances and new partnerships and innovation to deal with the problems.

Now, we just have to seize the opportunities.



Orient.

MAIN SECTION

This is where we go deep into details.

I actually recommend reading the Executive Summary, which you have presumably already done, skimming this section, and then reading the Recommendations. Then come back and read this section to really understand the analysis that led to the Recommendations.

It may prove helpful in framing the discussions in this part once you know the rough outline and the ultimate action items.

Of course, you can just power through. The Recommendations will become much clearer if you put in the work now.

The flow of the Main Section is organized as follows:

- Discussion of *Stross v Redfin*
- Photography and Copyrights
- MLS Rules and Copyright
- Implications for MLS, Brokerages, Tech Companies

Here we go.

Background: *Stross v. Redfin*

As I was the expert witness for the plaintiff, Alex Stross, I am going to limit my discussion of the case to publicly available information.²

[The case summary is drawn from the Fifth Circuit opinion (Stross v. Redfin, No. 17-50046 (USDC No. 1:15-CV-223)).³ Note that this is an unpublished opinion and is not precedent, according to 5TH CIR. R. 47.5.4.]

Alex Stross is a real estate broker in Austin, TX. Accordingly, he was a full Participant in ACTRIS, the MLS in Austin, and a member of Austin Board of REALTORS.

Stross also happens to be an architectural photographer of some note. His work has appeared in print magazines and books and he is a professional member of the American Society of Media Photographers, among other qualifications.

This is an example of the kind of work he does:



² The case summary is drawn from the Fifth Circuit opinion (Stross v. Redfin, No. 17-50046 (USDC No. 1:15-CV-223)). Note that this is an unpublished opinion and is not precedent, according to 5TH CIR. RULES.

³ Because the lower court's opinion is also *Stross v. Redfin*, I'm going to refer to these as *Stross v. Redfin, Fifth Circuit Opinion* and *Stross v. Redfin, District Court Opinion* in this document for reference purposes.

Image: Alex Stross

In May of 2013, Stross noticed that some of his photos were appearing on Redfin.com. The problem was that those photos were from his listings that had already been sold. He started investigating and ultimately found that more than 1,800 of his photos from sold listings were showing up on Redfin.

As a professional photographer, Stross knew quite a bit about copyright and about licensing. He did not believe that he had licensed his photographs to be used as Redfin was using them. As a real estate broker, and a very intelligent guy with a degree in CompSci from UT Austin, he knew the rules of ACTRIS and believed that Redfin was violating both the rules and his copyrights.

He brought a lawsuit alleging:

- (1) direct copyright infringement—for copying, displaying, and distributing Stross’s photographs on its website;
- (2) contributory copyright infringement—for knowingly encouraging third parties to “share” Stross’s photographs to social media; and
- (3) false copyright management information—for violating the Digital Millennium Copyright Act (DMCA) by attributing false “courtesy credits” to Stross. (*Ibid.* p. 4.)

Redfin’s defense was that it received Stross’s photographs as a Participant in ACTRIS. Stross granted a license to ACTRIS when he uploaded his photographs, and Redfin argued that the license was broad enough to cover Redfin’s uses as well. If Redfin did not infringe Stross’s copyrights due to a license, then it could not be held liable for secondary or contributory copyright infringement. And the DMCA safe harbor provisions shielded Redfin from any liability.

After discovery and back and forth motions at trial, the trial court ultimately granted summary judgment in favor of Redfin.

The Trial Court’s Summary Judgment Ruling

In granting Redfin’s motion for summary judgment, the trial court actually ruled that Stross lacked standing (that is, he did not have the right to bring a lawsuit in the first place) to sue Redfin.

The court’s reasoning went like this:

- Stross signed a Participant Content Access Agreement (“PCAA”) which incorporates the ACTRIS Rules.
- Under ACTRIS Rule 7.10, all Participants grant a broad license when they submit any Listing Content, which includes photographs.⁴
- Redfin also signed a PCAA, which gave them the right to use the Stross photographs “subject to [Redfin’s] compliance with the terms of this Agreement and ACTRIS Policies.”
- So, Stross granted broad rights to ACTRIS, and ACTRIS granted narrow rights to Redfin.
- However, Stross was not a party to the ACTRIS-Redfin PCAA, so he doesn’t have legal standing to bring a lawsuit. The court basically tells Stross to take his problem to ACTRIS:

Thus, a participant may seek to have the ACTRIS Rules enforced, just not in federal court. That Stross chose not to avail himself of established ACTRIS

⁴ ACTRIS Rule is not special or unique in the world of the MLS. 7.10 reads as follows:

7.10. Warranty and License To ACTRIS. By the act of submission of any Listing Content to ACTRIS or into the MLS Compilation, the Participant and/or Subscriber represents and warrants that he or she owns all right, title and interest in the Listing Content, has obtained necessary consents to comply with these Rules, if any, from any third party to any materials included in such Listing Content, and to grant, and thereby does grant, ACTRIS (and its service providers and licensees) an irrevocable, worldwide, paid-up, royalty-free, right and license to include the Listing Content in the MLS Compilation, any statistical report or comparables, and to use, copy and create derivative works of it and authorize its use, copying and creation of derivative works for any purpose consistent with the facilitation of the sale, lease and valuation of real property or such other use; provided that with respect to such other use, the Participant has not opted-out of such other use after notice of the same.

Please note that I am using the March 2014 version of ACTRIS Rules in this Report, because those were the ones at issue in the *Stross v. Redfin* case. The Rules have since been modified in some important ways.

remedies does not make the proper interpretation absurd. (Summary Judgment Opinion, p.10)

- Additionally, the trial court writes some dicta (explanation that isn't central to the disposition of the case) about Redfin's broad license. It is dicta because Stross has maintained that Redfin is not a "licensee" of ACTRIS under Rule 7.10.
- The court then writes:

Nevertheless, even assuming Redfin is a licensee under Section 7.10, Stross has failed to create a fact issue as to whether Redfin exceeded the broad license grant by using Stross' s photographs for purposes other than to facilitate "the sale, lease and valuation of real property or such other use." ACTRIS Rule § 7.10.

By signing the Stross PCAA, Stross granted ACTRIS a broad license to use his photographs in conjunction with the "sale, lease and valuation of real estate or such other use." Stross retains his copyright for purposes other than those contemplated in Section 7.10. Were ACTRIS or its licensees to exceed this broad license, Stross could file a lawsuit alleging copyright infringement. For everything else, Stross is advised to tell it to ACTRIS, not the judge.

This was almost as total a defeat for Stross as anyone could imagine. It was such a bad beating that Redfin countersued Stross for legal fees.

The National Association of REALTORS, who filed an amicus brief in the case, noted the summary judgment. Its top takeaway was this:⁵

A Texas federal court directed an MLS subscriber to raise his complaint about another subscriber's allegedly unauthorized use of his photos to the MLS, rather than raise the issue in Federal court. The court held that the subscriber lacked standing to sue to enforce the MLS rules for the alleged improper use of photos. But the court also acknowledged that the purported improper use of the photos may have been

⁵ MLS Copyright Lawsuit Dismissed, September 14, 2016.

(<https://www.nar.realtor/legal-case-summaries/mls-copyright-lawsuit-dismissed>)

protected from copyright infringement claims under the Digital Millennium Copyright Act.

It appeared as if the question of copyright and photographs was settled: **tell it to the MLS, not the judge.**

Except that Stross appealed the decision to the Court of Appeals for the Fifth Circuit, which covers Texas. There is no higher legal authority, save one: the Supreme Court of the United States.

The Fifth Circuit reversed the trial court's summary judgment decision, and remanded the case to continue forward.

The Fifth Circuit's Decision

Once again, as an unpublished opinion, the decision here is not precedent. Other federal district courts even in the Fifth Circuit are not bound by it, never mind the other appellate courts. But *Stross v. Redfin* is still an opinion by a Court of Appeals, who reversed the lower court's ruling. There is persuasive value to the opinion.

Furthermore, the Fifth Circuit goes through the legal reasoning and explains copyright law and how it works. That reasoning is likely to be followed by a number of judges who would look at substantially similar cases — that is, any other photographer bringing an identical copyright violation lawsuit against a brokerage or website relying on the license from the MLS.

So it is a very important opinion for us, even if it is an unpublished opinion. (So far, at any rate.)

The Key Issue

The Court of Appeals starts by clearly isolating the key issue:

The parties here do not dispute that Stross owns a valid copyright for these photos. Nor do they dispute that Redfin copied the photos. At issue is whether a license authorized Redfin to use the photos the way it did. *Stross v. Redfin*, Fifth Circuit Opinion, p 6.

This is, of course, exactly right. This is the key issue. Everything boils down to this: Did Redfin have a license to use the photos the way it did?

...the court rules that the grant of license from ACTRIS to Redfin is undoubtedly narrower than the grant of license from Stross to ACTRIS because the PCAA contains language subjecting the uses to the rules of the MLS

Standing for Copyright Lawsuit is Statutory

The court then tells the lower court that he “took a wrong turn, mistakenly focusing on whether Stross had *contractual* standing to bring his copyright claims.”

The Fifth Circuit then engages in “de novo” review, which simply means that it disregards any legal conclusion of the lower court and substitutes its own (higher) understanding of the law. That’s why they’re the Court of Appeals, because they’re better lawyers and better judges.

So the court disposes of the “legal standing” issue, which is what decided it for the lower court, quite simply:

First things first: This is a copyright case, not a contracts case. **The right to bring a copyright infringement claim comes from federal copyright law**, specifically the Copyright Act of 1976, 17 U.S.C. § 501(b). This right does not depend on state contract law. Whether Stross may sue (under federal law) for copyright infringement is a separate question from whether Redfin can prove (under state law) that it has a meritorious license defense. The district court conflated these inquiries, holding that Stross lacked “standing” to sue Redfin because he was neither a party to, nor a third-party beneficiary of, the ACTRIS–Redfin PCAA. Had Stross sued Redfin for *contractual* violations of the PCAA, this analysis would have been sound. But **Stross did not bring contractual claims and did not seek contractual remedies—he sued solely for copyright infringement.** [Emphasis added.]

For our purposes, what this means is quite simple: the whole PCAA angle is entirely irrelevant when it comes to copyright infringement. That means the lower court’s take — tell it to the MLS, not to a

judge — is *entirely and completely wrong*. That also means that NAR's take on what the case means is now entirely and completely wrong.

The plaintiff does not have to tell it to the MLS, because his legal claim is not based upon the PCAA or any other contractual agreement. It's based on federal copyright law, specifically the Copyright Act of 1976.

Stross's agreement with ACTRIS (granting a broad license), and ACTRIS's agreement with Redfin (granting a narrower license), create a defense of license: that there was no copyright infringement because the use was under a valid grant of license. But that's a defense; Stross still has standing to bring the lawsuit:

Simply put, because Stross fulfills the statutory requirements of the Copyright Act, he has a valid claim. He does not lose his right to bring this claim just because Redfin raises a downstream sublicense in its defense. *Id.*, p.8.

So naturally, the court turns to the merits of Redfin's defense of license.

The License Defense

The court begins by noting that a license “acts as a shield”:

As long as Redfin acts within the scope of its license, it remains safe from Stross's claims. But if Redfin acts outside the permitted scope of its license, it may be held liable for copyright infringement. *Id.*

There were two claims — one about timing and the other about whether Redfin exceeded the scope of its license. We'll ignore the first one, since that one was just a fact question as to when Redfin joined ACTRIS as a Participant.

Once again, the court cuts through to the heart of the matter:

The parties also dispute whether Redfin exceeded the scope of its license to use Stross's photographs. Much of this disagreement stems from their opposing views as to which license Redfin may raise in its defense. Stross argues that Redfin may raise only the PCAA—the license to which it is a party. But Redfin argues that it may raise the Stross–ACTRIS license under Rule 7.10, because **when Stross gave ACTRIS a license to use his photographs, he simultaneously gave Redfin the same license.** [Emphasis added.]

Then the court proceeds to demolish Redfin's license defense in detail. It is as bad a beating as Stross took from the trial court below.

First, applying Texas law, the court holds that Stross's grant of license via PCAA did not intend to benefit Redfin, only ACTRIS. If Redfin wants to use Rule 7.10 as implying a grant of a broad license, they must show a "clear and unequivocal expression of the contracting parties' intent to directly benefit a third party." *Id.* at 11, quoting *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011).

The court ends that by saying, "any implied intent is insufficient." *Id.*

Second, the court dismisses Redfin's legal theory, conflating the grant of broad license to ACTRIS with the license that Redfin got from ACTRIS. The court points out that if Redfin, as a Participant, could avail itself to the license to ACTRIS, then the PCAA between ACTRIS and Redfin is meaningless.

Furthermore, (and I think this is absolutely the critical piece here for us) the court rules that the grant of license from ACTRIS to Redfin is undoubtedly narrower than the grant of license from Stross to ACTRIS because the PCAA contains language subjecting the uses to the *rules of the MLS*:

Although ACTRIS could have sublicensed Redfin up to as much as it received from Stross, the PCAA from ACTRIS to Redfin is undoubtedly narrower than the license from Stross to ACTRIS. As Redfin's own affiant confirms, Redfin and other ACTRIS Participants gain access to MLS listings via the PCAA, which expressly provides that Participants "may display the Licensed Content on a website available to the public *only to the extent permitted by the ACTRIS Policies*." [Emphasis in original opinion.]

It goes further still.

In discussing another of Redfin's defenses, the court explains that Stross never gave up all of his copyrights to ACTRIS:

Only the legal or beneficial owner of an "exclusive right" under a copyright may sue for a violation of that right. Section 101 of the Copyright Act "expressly excludes nonexclusive licenses." A non-exclusive license is one "that gives the licensee a right to use [copyrighted materials] . . . on a shared basis with the licensor and possibly other licensees."

That is the case here—Stross did not transfer to ACTRIS an exclusive right under the Copyright Act. Instead, he provided a non-exclusive license,

bestowing the right to “use, copy, and create derivative works,” but only “for any purpose consistent with the facilitation of the sale, lease and valuation of real property or such other uses.” Because of this, Stross is the only party able to sue for copyright infringement. [Emphasis added.]

This analysis will play an important role for us as well.

So, in summary, the Court of Appeals held that:

- ACTRIS received certain rights from Stross via Rule 7.10
- ACTRIS then granted some portion of those rights to Redfin via PCAA;
- The sublicense from ACTRIS to Redfin was narrower than the license ACTRIS got from Stross;
- The rules of the MLS *are* those limitations on usage;
- Without evidence that Redfin specifically is an intended third-party beneficiary of Rule 7.10, then Redfin’s license defense is limited to the rights it received from ACTRIS via PCAA.

The court remanded the case because there are open questions of fact as to whether Redfin did in fact exceed the scope of the sublicense from ACTRIS, which would make them liable for copyright infringement.

The vast majority of agents, of brokerages, and even of MLS executives and Association leadership are completely unaware of the ticking time bomb of photography copyright under their feet.

As mentioned above, Redfin took as bad a beating from the Court of Appeals as Stross did from the lower District Court. All of its arguments have been eviscerated, legally speaking. The only question that remains is whether its uses were or were not within the scope of the narrower sublicense from ACTRIS or not.

Photography and Copyrights

Let me repeat that I am a lawyer by training, but I am not your lawyer, and I am not licensed to practice law in any jurisdiction. So consult your attorney for legal advice.

I have researched opinions from real copyright attorneys, as well as from resources for photographers from organizations such as American Society of Media Photographers (ASMP) and PLUS (Picture Licensing Universal System). A good resource for the neophyte (I am barely past that stage myself) is this blogpost by a former lawyer turned professional photographer at DIYPhotography.net: [Photo Licensing: A Look at the Basics \(+ Sample License\)](https://www.diyphotography.net/photo-licensing-look-basics/) located at <https://www.diyphotography.net/photo-licensing-look-basics/>.

Since my interest is only in presenting the basics, then applying them to real estate, I will limit this section to very basic concepts only.

Since real estate photography is almost never stock imagery (what exactly would be the point of that for the homeowner?), almost all of it is Assignment Photography. That is, a broker or an agent or a homeowner hires someone to take photos of the home. In some cases, the agent takes the photos herself.

Work for Hire vs. Licensed

The most important first difference is between work for hire and typical licensed photography. When an employee takes a photograph, that photograph belongs to the employer as work for hire. The actual copyright belongs to the employer.

When the photo is taken by an independent contractor, however, whether that be the professional photographer or the real estate agent, the copyright belongs to the person who took the photograph, *unless it is assigned*.

It goes without saying that professional photographers, especially the high end photographers who aren't desperate for work, usually know the value of "work for hire" and will charge accordingly, if they entertain it at all.

Exclusive vs Non-Exclusive License

Exclusive license means that the photographer cannot resell the rights licensed to anybody else.

Non-exclusive license means the photographer can sell to anybody he pleases.

There are three things to note here.

First, under copyright law, exclusive licenses **must be in writing** and signed by the photographer as it represents a transfer of economic interests in the intellectual property.⁶ What this means for practical purposes is that unless you have a piece of paper, signed by the photographer, that says you have an exclusive license, what you have is a non-exclusive license.

Usually, a real estate agent will call up her favorite photographer and ask him to go do a photo shoot of a new listing. The photographer agrees, and schedules the photo shoot for Saturday. That is a non-exclusive license, no matter what you might think, unless there is some sort of a written master agreement that says otherwise.

Second, exclusive license does not mean you can do anything you want. There may be conditions to that exclusive license. The most common are number of uses, duration, and **usage rights**.

Third, and not obvious to non-photographers, exclusive licenses cost more. And they cost more based on what kinds of rights you get as an exclusive. The same analysis goes for the work for hire vs. licensed. The photographer may grant you a broad, perpetual, and exclusive license — but it will cost you, and it must be in writing.

The Typical Grant of License

I hesitate to write this, as each photographer is a business and is free to operate as he sees fit, but most of the real estate photography licenses I have seen as part of the research for the *Stross v. Redfin* case and for this paper, grant the following:

- non-exclusive (or, exclusive only to real estate agents/brokers);

⁶ See, Copyright Licensing, Justia.com at <https://www.justia.com/intellectual-property/copyright/copyright-ownership/licensing/>

- time-limited to the duration of the listing agreement;
- restricted to **two uses**:
 1. sale and marketing of the specific property photographed; and
 2. promotion of the client and/or the client's brokerage company

So the broker or agent can use the photos to market the listing, and for things such as Just Sold postcards. She could use them on her website showcasing "Here are the homes I've sold over the years!"

This is an example posted online in a discussion of photo licensing for real estate agents:⁷

Rights and Usage: All images produced by Scott Hargis Photo [Photographer] for _____ Real Estate Brokerage [Client] may be used by the Client and Client's parent company for the sole purpose of marketing the specific property photographed. Please note, however, that the images will be copyrighted by the Photographer, and license is granted only to the Client and Client's parent company, and not to any third party. Any usage of the images by any third party, including but not limited to, architects, builders, stagers, designers, sellers or buyers, is strictly prohibited unless approved in writing by the Scott Hargis Photo.

As the Hargis language specifically points out, professional photographers often look to resell the listing photographs to other people, such as architects or interior designers. In some cases, high-end architecture magazines might license the photos from them for a high profile story of some luxury mansion, as it would be less expensive and less time consuming than hiring a photographer for a whole new photo shoot.

The Industry's Understanding

In contrast, the real estate industry's understanding of copyright of photographs is lacking, to say the least. In fact, it is safe to say that

⁷ Comment by Scott Hargis at <https://photographyforrealestate.net/2015/12/29/explanation-of-real-estate-photo-licensing-for-agents/>

most real estate agents go years in the business without once giving any thought to photography usage rights.

Many brokerages have never given any thought to copyright of photographs. They just simply assume that they own them, the way they assume that they own the listing data.⁸

Of the 700-plus MLSs in the United States, many are simply too small to have either the resources or even the awareness on photo copyright issues. When the MLS only has 200 members, and the CEO of the REALTOR Association is the sole employee, it is quite unlikely that he has spent much time on perfecting the MLS compilation copyright, never mind the complicated issues of photo copyrights.

There is no question that there is a minority of people in the industry — and I hope that most of them are reading this *Red Dot Report* right now — who understand the issues, and are working on addressing them, but they are just that: a minority.

The vast majority of agents, of brokerages, and even of MLS executives and Association leadership are completely unaware of the ticking time bomb of photography copyright under their feet. Thanks to *Stross v. Redfin*, that bomb is about to blow up.

The Interaction Between MLS Rules and Copyright

My take on how copyright of photographs interact with MLS Rules was fairly straightforward (or so I thought). I believed then, and still believe, that the copyright owner (usually the photographer, but possibly the broker or agent) grants the license to the MLS with the understanding that the **MLS Rules constitute limits on usage by other Participants**.

⁸ Note that Mitch Skinner of Skinner Larson, one of the top intellectual property attorneys in the industry, has repeatedly said that ownership of listing data is "complicated."

Seeing as how the Fifth Circuit agreed with that reasoning, it is critical to understand why the MLS rules exist and how they function as a limitation on the copyright license.

“The concept is simple: you earn a customer, you get to use the MLS with the customer. The concept is not: you get free access to the MLS and then you use it to advertise the properties of your competitors in order to attract customers.”

— Geoffrey Lewis, RE/MAX, in 2006

Think About MLS Rules for a Moment

Far too often, we in the industry hear brokers and agents complain about MLS Rules. The rules are stupid, they say, or arbitrary, or they just don't like them.

Often, they behave as if the MLS Rules are created by some force of nature and they merely have to obey them (or circumvent them in some way, or just pay the fines as a “cost of doing business”). But those rules are created by human beings, to serve a purpose.

It pays to spend a few minutes talking about why MLS rules exist and in particular, why they have to impact copyright and license rules.

The MLS is a Marvel of Coopetition

First, the MLS is not a governmental entity. It is not the regulatory body that oversees real estate licensees. It is a unique creature of history and circumstance and business needs.

The uniqueness of the American real estate industry is that you have competitors cooperating every single day to sell a home. Two brokerages who are competing like crazy against each other in recruiting, retention, and getting every listing on the market nonetheless agree to cooperate on the transaction, to share the commissions from the sale, and to share information so that the other broker can make money.

It is a remarkable example of coopetition. Because we have become so used to having the MLS as a fact of life, far too many brokers and agents simply do not think about this dynamic of cooperation amongst and between fierce competitors.

One of the requirements of coopetition is that competitors realize that they have more to gain by cooperating in some areas, while they try to beat each other in *every other area*.

The Core Understanding of the MLS

As a result, the MLS has to strike a very delicate balance between competition and cooperation. Go too far in one direction or the other, and the entire structure is endangered.

The best formulation of this balance can actually be found in the 2006 congressional testimony⁹ of Patricia Vredevoogd-Combs, President-Elect of NAR, and Geoffrey Lewis, General Counsel for RE/Max.

At the time, they were arguing against suggestions that the MLS be made into a public data utility because of their monopoly characteristics.

Vredevoogd-Combs testified at the hearing about the role of the MLS that:

the MLS is a cooperative that not only operates for the use and benefit of its members **in serving their clients and customers**, but it is created and operated, and its inventory provided by, the very members it serves.

Geoffrey Lewis was even more direct on point:

The MLS was designed as a B2B vehicle, not a business-to-consumer vehicle. It was designed as a mutual sharing of information by industry peers to facilitate the sale of and search for properties. The idea was that cooperating brokers and agents would work to earn their own customers using their own assets and then share listings via the MLS. **The concept is simple: you earn a customer, you get to use the MLS with the customer. The concept is not: you get free access to the MLS and then you use it to advertise the properties of your competitors in order to attract customers.** {Emphasis added}

Historically, the balance that was struck was between client service and client acquisition. Brokerages have chosen to cooperate in

⁹ The 2006 hearing by the Subcommittee on Housing and Community Opportunity of the House Committee on Financial Services was titled "The Changing Real Estate Market".

serving an already-existing client, but generally frowned on “cooperation” to acquire a client.

The MLS Rules were and are written to reflect this delicate balance. The most contentious areas of MLS Rules almost always have to do with that balance between client service (“Let’s cooperate!”) and client acquisition (“Let’s compete!”). For example, IDX rules are a hotbed of dispute, at least compared to something like conditional offer of compensation.

The Internet Changed Things; MLS Has Been Slow to Evolve

As long as client acquisition was more or less limited to the offline “real world,” that balance between cooperation and competition held just fine. When buyers had no choice but to stop by a brokerage office to look through the MLS book, no one was particularly concerned about Participants advertising “the properties of your competitors in order to attract customers” as Lewis said.

When the internet came of age, and became an increasingly important client acquisition channel, that balance was upset. The MLS, however, has been slow to adapt.

IDX was the first innovation to deal squarely with the changed environment. Allowing brokers and agents to put listings of their competitors on a website accessible to the whole world went completely counter to the “get a client, use the MLS to serve the client” philosophy.

Nonetheless, business realities forced a reset of the balance, and the general compromise was that brokerages would allow competitors to use their listings to acquire clients, but only if they reciprocated that right. Hence, IDX as of this writing is an all-or-nothing proposition. There is no such thing as “partial IDX.” At least not yet.

But that balancing needed to be tested time and again. For example, I imagine that most of us remember the search engine indexing controversy from 2009.¹⁰ It ultimately resulted in MLS Policy being

¹⁰ If you’re interested, see Brian Larson’s series on Search Engines Indexing IDX Sites, which is a fantastic recount, albeit with a firm point of view.
<http://www.larsonskinner.com/2009/06/search-engines-indexing-idx-sites-part-i-whats-the-beef.html>

changed to exclude Google and other “legitimate search engines” from the ranks of “scrapers” who had to be stopped.

The Franchise IDX controversy from 2011 was also related to this balance between cooperation and competition. Those opposed to allowing franchises access to IDX believed that a franchise never acquires a client; one of its franchisee brokers does. Those arguing for Franchise IDX thought that was ancient outdated thinking, since franchises exist to market for their franchisees who ultimately acquire the client, thus putting it squarely within the exception for IDX.

The MLS is **not** to be faulted in those controversies. The MLS has been slow to evolve because it takes time to adjust fundamental understandings that lay beneath the entire social contract of the MLS.

One could argue that is a positive. Before you go changing that fundamental balance between cooperation and compensation, you had best make sure that everyone understands the tradeoffs involved in setting a new equilibrium point and has thoroughly debated the pros and cons and has come to a new fundamental understanding.

The current issue of copyright and MLS Rules is another balancing point challenge. We illustrate this by looking at the ACTRIS rules in question in the *Stross v. Redfin* case, then generalize from them.

The MLS Rules in *Stross v. Redfin*

There were a number of ACTRIS Rules that were implicated in *Stross v. Redfin*. The most important were:

- 7.10: Grant of broad license to the MLS by the Participant; and
- 7.12: Grant of narrower license to the Participant and Subscriber.

We have already provided the language of 7.10 above. ACTRIS 7.12 reads as follows:

7.12. License from ACTRIS. ACTRIS shall grant Participant and Subscriber a limited, non-exclusive, personal, revocable license solely to use and copy the Compilation, **subject to all of the limitations and restrictions set forth herein**. Participants and Subscribers shall at all times maintain control over and responsibility for each copy of any

Compilation licensed to them by ACTRIS, and shall not distribute any such copies to persons other than persons who are affiliated with such Participant as a Subscriber of the MLS. [Emphasis added]

But other ACTRIS Rules were important as well, because they are incorporated into the grant of license in 7.12 by that emphasized phrase.

For example, 7.3 Permitted Use of Sold Data, 7.4 Permitted Disclosure, and 9.24 Limited Number of Listings were all relevant as limitations and restrictions on usage rights.

ACTRIS Rule 7.3 reads as follows:

7.3. Permitted Use of Sold Data. A Participant or Subscriber may utilize current listing information, “sold” information, “comparables,” or statistical information **to support an estimate of value on a particular property for a particular client**. However with respect to “sold” information, only such information ACTRIS has deemed to be nonconfidential and necessary to support the estimate of value may be reproduced and attached to the report as supporting documentation. In addition, the listing or selling Participant of a property may use the “sold” information for that property in advertising Participant’s services. **Any other use of “sold” information, including, without limitation, importation of such information into a separate database or compilation, is unauthorized and prohibited by these Rules.** [All emphasis added.]

That phrase “to support an estimate of value on a particular property for a particular client” is truly problematic for Redfin, who was displaying sold data (including all of the photos) in a search engine that users can browse.

That Redfin was making sold data, including photos of sold properties, available via VOW does not matter, because 7.3 applies to ***all uses of sold data***, not just via the Internet. Rule 7.3 applies to a face to face meeting with a client in the broker’s physical office. And VOW does not *expand* usage rights under ACTRIS Rules (or any rules of any MLS I am aware of).

In fact, ACTRIS Rules impose additional limitations on VOW usage of sold data. That’s what Rule 9.24 does:

9.24. Limited Number of Listings. A Participant may allow a Registrant to view, retrieve, or download an unlimited

number of currently active listings, however, Participant must limit the number of sold listings that a Registrant may view to not more than 100 sold listings in response to any inquiry.

Now add in Rule 7.4 which limits the number of property records that may be provided to a particular client to a “reasonable” number. And “reasonable” is defined in the rule by a number of factors, such as:

- the total number of listings in the MLS Compilation;
- how closely the types of properties contained in such listings conform with the prospective Purchaser’s expressed desires and ability to purchase;
- whether the reproductions were made on a selective basis;
- and whether the types of properties contained in the Listing Content is consistent with a normal itinerary of properties which would be shown to the prospective purchaser.

What should become obvious is that all of these rules — 7.3, 7.4, and 9.24 — reflect the fundamental understanding of the MLS as something you use **once you get a client in order to serve that client.**

The language of 7.3 in particular really contemplates an old fashioned printed CMA:

A Participant or Subscriber may utilize current listing information, “sold” information, “comparables,” or statistical information to support an estimate of value on a particular property for a particular client. However with respect to “sold” information, only such information ACTRIS has deemed to be nonconfidential and necessary to support the estimate of value may be reproduced and **attached to the report as supporting documentation.** [Emphasis added]

It is actually unclear whether Cloud CMA on the iPad is in compliance with Rule 7.3. Is a display on an iPad a “report”? Is a list of properties with photos and all of the information “supporting documentation” within the meaning of 7.3?

One assumes that it is, but it isn’t clear.

The point is that ACTRIS did not adjust the rules around Sold Data as the internet changed the balance between cooperation and



compensation because the attention and the energy was on IDX and the content that mattered was **active listings** (for obvious reasons).¹¹

This is a completely reasonable oversight. Why would buyers care about homes that are not on the market? Agents might care, in order to advise their clients (or even potential clients), but a legitimate buyer is only interested in properties he might actually be able to buy.

Reasonable oversight or not, fact is that the existence of these MLS rules place limits on what the Participant can do with listing information. After the Fifth Circuit ruling, it is clear that they also form the limits and restrictions on photography licenses.

Which means that the trial court's admonishment to "go tell it to the MLS, not to a judge" does in fact apply... to Redfin, not to Stross.

The Limit on MLS Grant of License

We must address one critical point here, which limits the MLS's ability to grant permission to Participants on usage of photographs.

As the Fifth Circuit notes, the MLS can grant broad rights to the Participant. In fact, it can sub-license *all* of the rights it received. However, and this is important, the **MLS can only grant the rights it received**. That in turn implicates whoever granted the MLS the "broad rights" in fact has them to grant in the first place.

As we saw above, the industry's understanding of copyright is woefully lacking. As a result, most brokerages have not paid any attention to what sorts of rights they were receiving on photographs, whether from photographers or from their own independent contractor agents.¹²

¹¹ There is some evidence of changes to 7.3 over time, but ACTRIS has always maintained the "estimate of value on a particular property for a particular client" language. Also note that the latest December 2016 ACTRIS Rules contains the exact same language as the March 2014 version that was at issue in *Stross v. Redfin*.

¹² Some of the larger, more sophisticated brokerages may have addressed this lackadaisical approach to photography copyrights, but given that the vast majority of brokerages are small "mom-n-pop" companies with a couple of working broker-agents, I believe that most have not, not even in 2018, not even after legal advisories from NAR, from local MLS and Associations, and others.

In many cases, the failing will be at the original source: the photographer did not grant appropriate rights to the broker, who in turn cannot grant them to the MLS, who in turn cannot grant them to the Participants.

This is a Big Problem, with capital B and capital P.

What it implies is that even if the MLS were to change its rules and policies to grant Participants the broad rights it received, if the brokerage that uploaded the photos did not have the broad rights from the photographer, the entire chain fails.

So for example, suppose that ACTRIS revises Rule 7.3 to allow Participants to display sold data on a website for purposes other than “to support an estimate of value on a particular property for a particular client.”

But ACTRIS itself does not have the right to allow display of photographs to sold properties that it can sub-license to Participants. The reason is that the original listing broker only received the right to use the photographs for the sale and marketing of the listed property and to promote itself.

Once the property was sold, those photos cannot be displayed or used, except to promote the listing broker or agent.

No amount of MLS Rule changes fixes this flaw. What is required is a *retroactive license* from the copyright owner, the photographer.

The Ticking Bomb: Sold Data Over IDX



If this were just a problem for Redfin, I would not have written this report. Redfin has competent lawyers, millions of dollars, and ways to cope with whatever court decisions and MLS changes come down the pike.

I am writing this because of **Sold Data over IDX**.

In 2014, NAR approved a change to its MLS Policy not only allowing the display of sold data over IDX, but mandating it.¹³ In 2017, further changes were made expanding the scope of sold data that must be provided via IDX feed.

Specifically, NAR changed Policy Statement 7.58 which now reads in relevant part:

To comply with this requirement MLSs must, if requested by a participant, promptly provide **basic downloading of all active listings, sold* listing data starting from January 1, 2012, non-confidential pending sale listing data, and other listings authorized under applicable MLS rules. MLSs may not exclude any listings from the information which can be downloaded or displayed under IDX except those listings for which a seller has affirmatively directed that their listing or their property address not appear on the Internet or other electronic forms of display or distribution.** Associations and MLSs can also offer alternative display options including framing of board, MLS, or other publicly-accessible sites displaying participants' listings (with permission of the framed site). [Highlight in original]

That the industry did not realize the dangers of what it was doing is highlighted in a 2014 blogpost from the WAV Group, a leading

¹³ MLSs located in "non-disclosure" states are exempt from the MLS Policy mandate. The text of the changes can be found here:

<https://www.nar.realtor/handbook-on-multiple-listing-policy/advertising-print-and-electronic-section-1-internet-data-exchange-idx-policy-policy-statement-758>

consultancy to the real estate industry, which is actually titled “IDX Policies Proposed to Go More Broker-Friendly.”¹⁴

Lest you think I’m picking on a competing consultancy (which I am not as I have unbelievable respect for WAV Group and its work), here’s a celebratory post from Boomtown, a software provider to real estate brokers and agents, whom I like a great deal, written by Jeff Corbett, a former partner in 7DS and one of my favorite people in the industry. It is entitled, “2015 IDX MLS Policy Changes. Alright, alright, alright!”¹⁵

Corbett writes:

We’re still finding many Association-owned Multiple Listing Services out there that haven’t received the memo that it is now mandatory to publish sold data in an IDX feed as well as allow for the commingling of data between multiple MLS IDX feeds. We can debate the warrants of these policy changes in the comments... this post’s main purpose is to explicitly point out what and where the changes are, and that they are currently mandatory.

Because I knew about the photography and copyright issue, I was sounding alarm bells back in 2015.

Here’s a post I wrote called “Copyright and Solds-Over-IDX,” from April of 2015.¹⁶ Allow me an extended quote, as it is directly on-point to what we’re discussing here:

But last year, NAR approved a change to its MLS Policy allowing the display of sold data over IDX. Indeed, if “solds” are available publicly in that MLS’s market (i.e., it is not a non-disclosure state like Texas), then the MLS cannot prohibit the display of sold information over IDX.

This then gives rise to potential liability for both the MLS and the brokerage when photographs are used in these solds-

¹⁴ <http://waves.wavgroup.com/2014/10/29/idx-policies-proposed-to-go-more-broker-friendly/>

¹⁵ <https://boomtownroi.com/blog/2015-idx-policy-changes/>

¹⁶ <http://www.notorious-rob.com/2015/04/copyright-and-solds-over-idx/>

over-IDX. This is a property I found on Redfin, which is a brokerage and a participant in the MLS:



Redfin did not sell this house. According to the [record](#), this home was listed by Laura Syme of Bauhaus Properties, and the buyer agent on the deal was Fay Liu of Re/Max Premier Realty.

The source of this information is CRMLS, the local MLS. I have no idea whether Redfin is using solds-over-idx or some other methodology for this display. But I think it's illustrative of the issue at hand.

The 14 photographs for the house above are fantastic. They appear to be taken by a professional, so let's assume that they were.

If the photographer here was using the standard terms (as above), then Redfin as the brokerage is liable for display of these photographs without a license, and the MLS is likely liable for providing these photographs to Redfin. In addition, Bauhaus Properties, the listing broker, may be on the hook for providing the photographs to the MLS to be put into the Sold Data compilation which Redfin used to display these images.

Because the property has been sold, there is no marketing/promotion of the property here. The argument that perhaps the sold data on

Redfin is used to promote Laura Syme the agent or Bauhaus Properties the broker is really, really thin. I don't think that holds.

The usage here is outside of the photographer's grant of license, and everyone involved has violated the photographer's copyright.

It's just a matter of time before nasty letters, demands for payment, and possibly a class action lawsuit by companies that have sprung up to "protect the photographer's interests" start coming down the pike.

The summary judgment motion by the trial court in 2016 put a damper on nasty letters, demands for payment, and so on. And it made my concerns absolutely pointless.

The Fifth Circuit validates my concerns, but also has now put a target squarely on the back of the real estate industry.

Display of sold data over IDX has now been going on for three years. In 2017, NAR updated Policy Statement 7.58 requiring that MLSs provide sold data from 2012 onward. I sounded the alarm again, in a post called "Brief Thoughts on the 2017 MLS Policy Changes."¹⁷

In that post, despite the lower court's summary judgment ruling in *Stross v. Redfin*, I wrote:

Photographers typically grant a limited license to their clients, the real estate agent and/or broker, which allows usage of the listing photos to market that property or to market the agent/broker.

Any usage outside of promoting/marketing that property or promoting/marketing the broker is a violation of the copyright.

Solds-over-IDX has a big problem if the listing photographs are made available, since there is no marketing of the property (it's already sold, remember) and no marketing of the listing agent/broker.

That was true in 2015; it remains true in 2017. Unless the listing agent/broker got a different license (perhaps a work-

¹⁷ <http://www.notorious-rob.com/2017/10/brief-thoughts-on-the-2017-mls-policy-changes/>

for-hire agreement, or an expanded license to use of the photographs), that broker cannot assign rights it does not have to the MLS. In turn, that MLS cannot grant rights to Participants that it does not have. So, making photos of sold properties available via IDX or VOW or whatever is skating on extremely thin ice.

Well, consider this edition of *The Red Dot* the third and final warning. But this time, my analysis is backed up by the United States Court of Appeals for the Fifth Circuit.

How many photographs of sold listings are we talking about here? Thousands? Tens of thousands? Millions?

How many MLSs and brokerages are potentially on the hook for massive copyright violation claims?

Impact on Portals and Tech Companies

While Sold Data over IDX is my top concern for the industry, it is not the only one. The web portals, such as Zillow, Realtor.com, Homes.com, Movoto, etc. are also at risk. (I put Redfin under the Brokerage side of things, since it is a full Participant in each MLS.) Technology companies may also be at risk, depending on if they use sold photographs and how they use them.

Web Portals: Zillow, Realtor.com, etc.

The problem for web portals is obvious: if they're using sold photos anywhere on their websites or mobile apps, they have a potential problem.

It's a slightly different problem than the ones that brokerages and MLSs face, since all licenses to portals are going to be explicit on some kind of a syndication agreement. That would make Zillow et. al. a "licensee" of the MLS.

You still have the same root problem, however: the MLS cannot grant what it does not have. If the photographer never granted a license to use photographs of sold properties, then the entire chain of title is flawed and any usage of such photos by a portal likely violates copyrights.

Zillow in particular needs to be concerned, since it has already been a target of a lawsuit. In 2015, VHT, a large network of real estate photographers, sued Zillow for copyright violation over the Zillow Digs feature on its website.¹⁸ In 2017, after a full trial, a federal jury held for VHT and ordered \$8.3 million in damages.¹⁹ There have been appeals, post-trial motions, and so on. But all of that was around Zillow Digs.

For our purposes, what is critical and not all that well covered in the media is that VHT's original lawsuit sued Zillow for using photographs of sold properties *outside* of Zillow Digs — that is, on the Zillow website itself (“Listing Site”) on the Home Details Pages (“HDPs”).

The potential problem here is not the perpetuity or non-perpetuity of the license, but the initial scope of the license from the photographer to the client, and then to the MLS and down the chain to Zillow.

That issue was not covered because in 2016, the trial court in *VHT v. Zillow* granted summary judgment to Zillow as it came to the issue of displaying sold property photos on the main Listing Site with its millions of HDPs.

Let us take a brief detour into *VHT v. Zillow*, as there are a couple of important concepts to know.

VHT v. Zillow

VHT's argument is more or less identical to Stross's argument in *Stross v. Redfin*:

52. Zillow well knows that VHT owns the copyright in all of its photographs and that **VHT licenses listing agents and brokers to use the photographs solely for marketing of the homes**. These facts are not only widely known in the real estate industry, but VHT has expressly informed Zillow of those facts. VHT's ownership of the copyrights was central

¹⁸ A copy of the complaint can be found here:

<https://www.scribd.com/document/271148194/Zillow-Suit-Vht>

¹⁹ <http://realtormag.realtor.org/daily-news/2017/02/13/zillow-ordered-pay-83m-in-copyright-case>

in the discussions between VHT and Zillow back in the spring of 2013 about potentially licensing VHT images for use on the Digs Site, and VHT reiterated that point and highlighted the limitations on the licenses it grants to listing agents and brokers in a July 2014 letter to Zillow.

53. Nonetheless, Zillow continues to use photographs owned by VHT in listings for properties that were sold weeks, months, or even years ago. **These uses of the photographs cannot serve to market or advertise the properties that are pictured because the properties have already been sold.** [Emphasis added]

As mentioned, the trial court granted Zillow summary judgment on this as it comes to the Listing Site and its HDPs.

Volitional Acts

The reason has to do with something called the “volitional acts doctrine.” This is a fairly hotly contested item in copyright law,²⁰ but the judge in *VHT v. Zillow* did adopt it.

In brief, the volitional acts doctrine says that the defendant in a copyright infringement case can only be held liable if he did something to infringe. There is a difference between active and passive participation.

What the trial court decided is that Zillow lacked “volitional conduct” as it came to the main Listing Site and the HDPs to trigger infringement because of the way its software was setup:

However, Zillow’s mechanisms—including its evergreen and deciduous classifications—are designed to avoid infringing behavior, not facilitate it. Zillow requires its users to certify the extent to which they possess rights to utilize the photographs that they upload. Zillow classifies every photograph that a customer uploads as either evergreen or deciduous, and Zillow designed its automated system to treat photographs accordingly.... This system is no more designed to facilitate infringement than a copy machine.²¹

²⁰ For a fairly thorough discussion of the issue, see, Robert C. Denicola, *Volition and Copyright Law*, 37 Cardozo Law Review 1259 (2016).

²¹ *VHT v. Zillow* Summary Judgment Order, December 23, 2016 at p. 28

The Zillow Digs claims were left in because of “volitional conduct” in the form of human moderators.

Evergreen vs. Deciduous

One of the things that the trial judge found important was the difference between what Zillow terms “evergreen” agreements and “deciduous” agreements:

Zillow obtains the photographs that it uses on HDPs and Digs from two main sources: public records and real estate listings received from agents, brokers, and Multiple Listing Services (“MLSs”). Zillow contracts with each agent, broker, and MLS to clarify the terms under which Zillow may use the contents of each listing. Some of those contracts restrict the manner in which Zillow may use photos after a property is sold; Zillow calls these contracts “deciduous.” However, the majority of the contracts are “evergreen,” meaning they do not restrict Zillow’s ability to use data or images after a property sells.



The court notes that Zillow has an automated system for categorizing each of the as many as five million new images it receives per day as “evergreen” or as “deciduous,” depending on the agreement it has with the data provider (MLS, brokers, agents, others).

In what may turn out to be important in the Ninth Circuit (we shall see), Zillow has a policy of classifying a photograph as “evergreen” if one of its data providers has signed an “evergreen” agreement, even if the others have signed a “deciduous” agreement:

When a client informs Zillow that a property has sold, Zillow’s “automated teardown algorithms” determine whether or not the information on the HDP page, including photographs, can continue to be displayed. If Zillow has received a photo from any evergreen source, Zillow continues to display the photo after the property sells. **In other words, even if a dozen sources, including the listing agent, have conferred only deciduous rights to Zillow, so long as one source confers evergreen rights to the photograph, Zillow classifies its rights as evergreen and its algorithm leaves the photograph up after the property sells.** Zillow classifies its rights as deciduous only if Zillow possesses exclusively deciduous rights to the photograph. [Emphasis added]

The court notes that as of November 15, 2016, Zillow had over 429 million evergreen images in its database. That's a lot of photos.

Potential Issue at Appeal

VHT is appealing this summary judgment on the Listing Site and the HDPs to the Ninth Circuit Court of Appeals.

The issue I see as being potentially relevant in the Ninth Circuit is that the trial judge differentiated between “evergreen” and “deciduous” on the basis of *time*. That is, he interpreted evergreen as meaning without a time limit, while deciduous was a valid license only until the property sold.

The potential problem here is not the perpetuity or non-perpetuity of the license, but the **initial scope of the license** from the photographer to the client, and then to the MLS and down the chain to Zillow.

That's a problem because one cannot grant rights that one does not have. Zillow may be able to argue good faith reliance on its license agreements, and the system it has that “requires its users to certify the extent to which they possess rights.” But it isn't clear whether that will be enough to escape liability.

And that is because the “volitional acts doctrine” is not widely accepted and settled law. We just don't know.

In fact, I'm tempted to wonder whether the trial judge intentionally invoked the volitional acts doctrine to force the Ninth Circuit to make a ruling.²²

In any event, the fact that Zillow chooses to classify a photograph as “evergreen” if one data provider signs an “evergreen” agreement could be relevant at appeal. A lot depends on the facts. But there is something fishy about having ten sources sign “deciduous” agreements, and one signing an “evergreen” agreement, and having the photograph become “evergreen”—even if one or more of the other “deciduous” providers alert Zillow that it needs to take a photograph down because the property has been sold.

²² In a footnote in his law review article cited above, Denicola notes that “a few federal district court decisions in California have declined to adopt a volition requirement in the absence of clear instructions from the Ninth Circuit.” The judge here might want that clear instruction for himself and his peers.

Practically speaking, that means that even if the MLS has prohibited sold photos from being used on Zillow, if a franchise or a broker (or even the individual agent) signed an “evergreen” agreement, then Zillow continues to use and display that photograph.

But again, the issue isn’t *how long* Zillow can use a photograph. The issue is whether *it has valid license to display that photograph if the property was sold*, because the license from the MLS, the broker, the franchise, or whomever may not allow usage other than “sale or marketing” of the property. It’s not about time; it’s about usage rights.

If the Ninth Circuit reinstates VHT’s claim against Zillow for usage of sold photographs, as the Fifth Circuit did in *Stross v. Redfin*, then things get all kinds of expensive.

Given what we have already covered — that one cannot give rights that one does not have, and that the real estate industry has been... ah... *inattentive* to terms of the license from photographers — it appears likely that Zillow is going to be on the hook for a pretty serious amount of damages.

Since Zillow is not a Participant to any MLS, and received its data via a syndication agreement of some sort (whether via ListHub, or through a direct syndication agreement), everything will turn on the provisions of that specific agreement.

Which brings up....

Representations and Warranties & Indemnification

For obvious reasons, I am not privy to any of the syndication agreements between any technology company and the relevant data provider, whether MLS, brokerage, franchise, or somebody else. Even if I were, I wouldn’t use such information without permission.

However, it is difficult to imagine that Zillow would have executed many agreements without getting some form of “reps and warranties” and indemnification from the data provider.

In its standard “Zillow Listings Feed - Terms”,²³ we find this language:

²³ <https://www.zillow.com/feeds/FeedsTerms.htm>

Warranty. You represent that (a) **you have all rights necessary to grant Zillow the rights** in paragraph 1 on behalf of yourself, the brokerage or property management company you represent, or if you are a listing data aggregator, the third parties whose data you aggregate; (b) to the best of your knowledge, the Data is accurate and complete and is consistent with like records you provide to listing or other services; (c) the Data complies with all applicable laws, ordinances, regulations, and licenses; (d) **Zillow's exercise of such license rights will not violate any proprietary or personal right of any third party**, including the property owner(s); (e) the Data will not cause injury to another person or entity; and (f) the information provided below is accurate and complete. **You further promise to indemnify and defend Zillow and its affiliates against all claims related to your Data, including breach of any warranty set forth above.** If you discover any violation of the warranties above, you will immediately notify Zillow at feeds@zillow.com. [Emphasis added]

We also know that in at least one case, negotiations broke down between an MLS and Zillow over this specific issue of indemnification:²⁴

According to Sandicor President and CEO Ray Ewing, some of the sticking points in the negotiations included these items:

- Zillow Group wanted the MLS to indemnify Zillow Group against claims related to Sandicor's listing data (a term included in its generic listing feed terms.) Ewing said that was not something that was typically included in its agreements with other vendors. "They were pushing the liability back to us," he said.

If you are a MLS, a brokerage, a franchise company, or even an individual agent, you should not be celebrating if VHT wins its appeal in the Ninth Circuit no matter how much you hate on Zillow. Because any damages Zillow pays out could ultimately end up being *your problem*.

²⁴ <https://www.inman.com/2015/04/07/deal-or-no-deal-mlss-talk-terms-with-zillow-group/>

Assuming that there is some form of this reps & warranties and indemnification language in your syndication agreement with Zillow, Realtor.com, Homes.com, or any other portal, **they have the right to come after you for anything they paid out to a photographer for copyright infringement.**

That amount could be staggering. We already know that the jury awarded \$1,500 per photo in statutory damages to VHT for willful infringement (a legally significant term, which we'll touch on below) by Zillow, and that amount was on the low end of possible damages, *which could have been as high as \$150,000 per photograph.*²⁵

Zillow can easily handle a \$4 million judgment. Doesn't mean Zillow won't seek indemnification. Also doesn't mean that companies not named Zillow, who aren't making \$1 billion in annual revenues, could handle copyright infringement damages.

A Word or Two About Willful Infringement

Before we leave this section, I have to mention some of the language from the trial court on "willful infringement."

"Willfulness does not exist . . . where infringing works were produced under color of title, such as a [sic] under a reasonable belief that the infringer possesses a license or implied license." *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228 (9th Cir. 2012). Indeed, even after one is notified of alleged infringement, "[c]ontinued use of a work . . . does not constitute willfulness so long as one believes reasonably, and in good faith, that he or she is not infringing."

....

The court concludes that substantial evidence supports a finding of recklessness or willful blindness. Multiple witnesses testified that Zillow relies on representations from its users without performing further investigation into the rights each user possesses. Furthermore, although the evidence suggests that the letters VHT sent to Zillow did not adequately identify allegedly infringing images, **there is no evidence Zillow took responsive measures to obtain further**

²⁵ Do note that statutory damages are available only for works that have been registered with the Copyright Office, or within three months of "publication."

information. Zillow’s witnesses indicated several good-faith reasons for its inaction, but the record also suggests an economic incentive not to remove photographs (admitting that Zillow misclassified approximately 40 feeds as evergreen and did not retroactively fix those classifications). Based on this circumstantial evidence, a reasonable juror could have concluded that Zillow was reckless or willfully blind toward the 2,700 VHT Photos for which the direct infringement verdict remains intact. Accordingly, the court denies Zillow’s motion as to those images. [Emphasis added]

So, a few things to note from here. (Again, consult your attorney for actual legal advice.)

1. If you have a reasonable good faith belief of a valid license, you are not willfully infringing, even if someone told you that you’re infringing.
2. Good faith, however, seems to require some effort to check to make sure.
3. That effort is especially required if you have some economic incentive not to check or get more information.

What I conclude is that you should take seriously any notice from any photographer that you or one of your licensees is infringing copyright. Do not ignore it. Show some evidence of investigating the alleged infringement.

In fact, on such small details rides the difference between giant judgments that bankrupt your company and getting off scot-free.

Non-Portal Technology Companies

This whole issue has implications on technology companies who aren’t in the portal business—CRM systems, transaction management platforms, IDX providers, predictive analytics companies, etc.

Just because you do not operate a consumer portal does not mean you are out of the woods vis-a-vis copyright issues. Once again, so much depends on your specific fact situation. How do you use photographs? Who is the audience? Who is the customer? How does your automated system work? Do you have an automated system?

And so on and so forth.

Note that there are legal theories such as contributory copyright infringement by inducement and vicarious copyright infringement which could implicate a technology vendor.

For example, in *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. ____ (2014), the Supreme Court held that Aereo was infringing on copyrights despite the fact that its technology was merely retransmitting over-the-air broadcast TV over the Internet at the request of individual Aereo subscribers.²⁶

After that decision put Aereo out of business, a startup named Mohu began selling a product called the AirWave. It also lets users watch live broadcast TV. The critical difference? Mohu uses an indoor antenna that users install in their own homes, vs. Aereo who required users to lease an antenna offsite.²⁷

That one small change might make all the difference with copyright law.

The point here is that as a non-portal technology company, if you use listing photographs, you need to look at various aspects of your system to make sure you're not at risk.

Consider all of the factors we have already covered:

- The MLS may not have the rights it purports to grant to you, as a licensee;
- Think about usage rights of photographs—in general, marketing the property for sale and promoting the listing agent/broker are within the scope of license; anything else is not;

²⁶ Note that the dissent in the *Aereo* case is where J. Scalia fully articulated the “volitional act doctrine.”

²⁷ See the Mashable article: “This cord-cutting company picks up where Aereo left off” <https://mashable.com/2017/01/03/mohu-airwave/#yM68BZBRkOqn>

- MLS Rules are baked into any Participant's usage rights;
- The MLS may have indemnified you, or it may not have, because you're not a \$10 billion company;
- Volitional acts?
- Willful infringement?

We have already touched on CloudCMA, the popular CMA product from W+R Studios. While it may appear that CloudCMA is 100% within the usage rights of any photos, since doing comparables is wholly within MLS Rules, it would not hurt to double check.

In fact, on such small details rides the difference between giant judgments that bankrupt your company and getting off scot-free.

Implications for Brokerages

I saved the implications for brokerages (and franchises, brands, and agent teams) to the last because most of them flow from the implications for MLS and Technology Companies.

If you think, "This is absolutely insane!" well, all I can tell you is, that's copyright law in the 21st century.

It All Starts With YOU

As discussed above, the real estate industry generally, and brokers and agents more particularly, lack a clear working understanding of photography licensing. Most brokers and agents have gone years and years in the business without once having encountered a problem with or having thought about usage rights of a listing photo.

Unless you deal with luxury properties on a regular basis, and therefore with high-end luxury and architectural photographers, you may never had to learn about these issues.

Far too many brokers believe that the agent or broker who hires the photographer owns the photographs, or at the very least, has the appropriate rights to use those photographs in all of the normal real

estate ways in which a listing photo would be used. In the minds of the average agent or broker, of course using photos of sold listings is okay; it's been used for decades to run comps and to do Just Sold postcards and whatever else. Why wouldn't it be?

Accordingly, when the broker or agent uploads the photo into the MLS, they figure that the MLS has all of the rights to those photos as it needs.

As we have seen, nothing could be further from the truth.

One cannot grant what one does not have. The agent cannot grant you, the brokerage, rights that she never had. That means that in turn, you cannot grant rights you never had to the MLS, or to Zillow, or to anybody you think you have.

The entire chain of title begins with **you**. What that means, of course is...

Indemnification Flows Up to YOU

Just as licenses cascade down the chain of title—from the photographer to the agent to the broker to the MLS to the Participant or licensee—indemnification cascades back up the chain of title.

Take the scenario in which Zillow gets sued by photographers and ends up paying out damages or settles.

If Zillow has indemnification rights—and we saw that their standard data feed agreement definitely does—then it can seek repayment from the MLS.

The MLS, in turn, can seek indemnification from the broker or agent who uploaded those photographs, if it has those rights. And once again, many MLS Participant Agreements do give indemnification rights to the MLS.

As the brokerage, you might or might not have indemnification rights against the individual agent who may have hired the photographer and uploaded the photographs to the MLS. We do know that most agents are independent contractors, and operate under some kind of an independent contractor agreement.

If you have indemnification rights in your agent independent contractor agreement, you can go after the agent. Of course, that will be an uncomfortable conversation—I imagine retention will suffer.

Plus, who's to say that the agent has the money to pay you for what you've been forced to pay out?

All of that is to say that ultimately, the brokerage may be the one who ends up holding the bag for damages resulting from copyright infringement.

Putting Sold Data On Your Website Is A Major Risk



If Redfin is exposed to potential liability because of how it used sold data on its website, then guess what? Your sleek new IDX website featuring sold information for visitors exposes you to the same liability.

If Redfin is found to have willfully infringed on Alex Stross's copyrights, and his photos are registered with the Copyright office (which they are), Redfin is potentially on the hook for **\$225 million** (\$150K in statutory damages x 1,800 images). I'd call that catastrophic, if it were to come to pass.

And that's one photographer suing Redfin. Now imagine a thousand photographers suing Redfin... or **YOU**.

Keep in mind that you don't have Redfin's market cap, Redfin's revenues, and Redfin's high-priced lawyers.

As we saw in the *VHT v. Zillow* case, so much depends on the details, but honestly, could a brokerage even afford the legal bills to find out?

Putting sold data on the web is a very risky business today.

Brokerages and the MLS Rules

Another major implication that brokerages need to think about is the balance between client service and client acquisition in this digital age of ours.

The MLS Rules as they exist are not the Word of God handed on down on stone tablets. They are created by brokers to setup a system in which they can balance the two oft-conflicting goals: client service

on the one hand, which means cooperation, and client acquisition on the other hand, which means competition.



Oftentimes, brokerages are disengaged from the process of rulemaking: it does seem like drudgery, and can be painful or at least argumentative. They leave the task up to the various volunteers who make up the local MLS Board, or to the Association leadership, or maybe to NAR's MLS Policy Committee.

Then the brokerages sometimes complain about the resulting rules. Or they are caught by surprise, as the rules require things that they never thought about or believe is a waste of time.

For example, suppose your MLS has the exact same language as did Austin on rules for sold data.

It's actually not clear whether you can use sold data for one of those automated Home Value Estimator tools. We've all seen them: "Find out what your home is worth!" It's a listing lead generation tool.

Is that supporting "an estimate of value on a particular property for a particular client?" Maybe, maybe not. Is a random visitor to your website, who hasn't registered, a client? Is a HVE an estimate of value on a particular property, especially no human being is involved in spitting out an answer?

To put the question differently, "How much would you like to spend on legal bills to find out?"

The brokerage in the digital age has got to be engaged with the MLS Rules. It can no longer afford not to.

Brokerages and Technology Vendors

Another implication is that depending on how a brokerage's technology vendor implemented systems handling photographs, there may be problems. Or not.

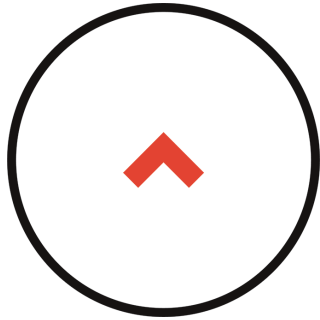
Curiously enough, when it comes to the big portals like Zillow and Realtor.com, the brokerage's only risk is from potential indemnification. Those big portals have very sophisticated technology people, in-house legal departments, and very expensive law firms on speed-dial.

But as we saw with *VHT v. Zillow*, minor details make a huge difference. Things like “volitional act doctrine” might turn on whether your IDX/VOW vendor implemented fully automated filtering software, or if some human being has to go in and check boxes at some point.

Keep in mind that Zillow got sued, and was ultimately held liable, for something called Contributory Copyright Infringement by Inducement. Without getting into too much detail, Zillow allowed website visitors to “dig” a listing photo onto Zillow Digs, thereby “enabling” ***other people*** to infringe. Get that? Zillow itself didn’t infringe; it just enabled and induced other people to infringe.

What this means is that there is a chance that a brokerage could be held liable for some sort of indirect copyright infringement because of the way that its social media marketing vendor implemented some Instagram marketing technology.

If you think, “This is absolutely insane!” well, all I can tell you is, that’s copyright law in the 21st century. Consult your attorney.



Decide. Act.

RECOMMENDATIONS: MLS & ASSOCIATIONS

Let me repeat, once again, that you should consult your attorney for actual legal advice. That's the first recommendation.

Suspend Solds Over IDX

I recommend **immediately** suspending Solds over IDX. Do not wait. Do not pass Go. Do not collect \$200. Just suspend it right now.

Clearly notify your Participants why you're doing this: to protect yourself and to protect **them**. After all, they're the ones with photographs of sold properties on their websites. Every single day that passes exposes you and your Participants to potential additional liability.

Since providing sold data is mandatory under NAR MLS Policy 7.58, I would notify NAR and NAR Legal as to why you are doing this. I cannot imagine that NAR would not grant a waiver, or temporarily suspend that requirement in light of recent developments, but notify them anyway.

Push comes to shove, your MLS may be in violation of NAR rules. I think the penalties for that is less severe for you and your Participants and licensees than facing (and losing) dozens of potential copyright infringement lawsuits.

Conduct an Image Audit, Like Yesterday

For all of the photos in your MLS system, you need to know what rights you do and do not have.

That means finding out what rights the broker or agent who uploaded the photograph did and did not have.

Yes, that's a major pain in the ass. Yes, it's going to be a ton of work. Yes, there are going to be thousands upon thousands of photographs you know nothing about, since the agent who uploaded them has

been retired for years and the you don't even know the name of the photographer who took them. Yes, this will definitely be an unplanned drain on your financial resources.

I'm afraid you're just going to have to do it anyhow.

Even if you end up with a giant pile of photos with "Rights Unknown" all over them, at least you'll know the scope of the problem you have to deal with at some point.

Review Your Syndication Agreements

Immediately review your various syndication and data agreements with various portals and technology vendors.

There are two issues to look for specifically.

First, you need to know whether your agreements are "deciduous" or "evergreen".

If "evergreen" then I would suggest notifying your licensees that there may be a problem with some of the photographs on sold properties. (Remember the Image Audit recommendation above? This is one reason why.) Your licensee may ignore that, but at least you have warned them and done the right thing—which could only help if somebody somewhere drags you into court. No recklessness or willful blindness on our part, your honor, is what you want to be able to say with a straight face.

Second, look for any Representations and Warranties as well as any Indemnification language. Have your attorney review those to see (a) what you have promised, if anything; and (b) what's your potential exposure, should a problem arise.

Assuming that you have made reps and warranties, and have agreed to indemnify your licensees, I recommend immediate renegotiation.

At a minimum, I'd want to remove indemnification for willful infringement by your licensee. That just makes sense, and is fair to all parties besides. You should not be liable if your licensee acts with recklessness or willful blindness to copyrights.

Besides, it's the statutory damages for willful infringement where the time bomb is. Actual damages are usually pretty insignificant. Even statutory damages for non-willful infringement is \$200 per work, as opposed to as high as \$150,000 per work.

In my opinion, it isn't Zillow and Realtor.com that you have to be concerned with here. They have very deep pockets. \$8 million judgments (original damages in *VHT v. Zillow*) won't faze them. I don't see those big guys coming after the MLS on an indemnification claim, if they want to maintain a good relationship with you.

I would worry more about smaller players who don't have that kind of cash and if they're faced with bankruptcy on the one hand, or suing you for indemnification on the other hand... well... all bets are off.

Take A Deep Look at Your MLS Rules

In the medium to long term, you need to take another look at your MLS Rules. The Fifth Circuit decision makes clear that those rules are a critical part of the license from you to your Participant.

I would pay close attention to all of the MLS Rules having to do with usage of sold data. (The equivalent to ACTRIS Rule 7.3.)

But rather than changing just those few rules, I actually recommend having a larger conversation about the fundamental understanding of the MLS, its role in the real estate industry, and the balancing point between client service and client acquisition.

For a larger MLS, it might make sense to convene a special Workgroup of some kind to bring as many stakeholders—particularly your brokerage community—together to have a series of conversations about that tension between “use the MLS once you get a client” and “use the MLS to get yourself a client.”

Then think about rewriting the MLS Rules to fit the updated consensus on the part of your Participants and Subscribers. This is the 21st century, after all.

Review Your Participant Agreements

Similarly, you should review your Participant Content Access Agreements to see if they are meeting the needs of the 21st century Participant and Subscriber.

Because changing the Participant Agreements affect the legal rights and responsibilities of your current members, I urge that this effort be as broad-based as possible. This is not something you want your Board of Directors to change after a closed-door session.

You want town hall meetings, membership meetings, one-on-one conversations with your brokers who love you and brokers who hate

you. Hell, you might want to talk to some real estate photographers while you're at it; never hurts to find out what the people who may be suing you think about an issue.

Pay particularly close attention to the Warranties and the Indemnification language, if any, in the Participant Agreement. If the Agreement is lacking that language, *really* figure out why that is.

I spoke with an experienced anti-trust litigator on these third party forms, and his exact words were, "I'd have to look at more details, but that smells bad."

Consult an Antitrust Attorney about Third Party Photographer Agreements

A few MLSs have already begun to implement agreements with photographers that must be signed and filed before they accept photographs from that photographer.

NAR has already made available a form Third Party Independent Contractor Agreement at <https://www.nar.realtor/legal/managing-listing-content/third-party-independent-contractor-agreement>.

However, I would consult an antitrust attorney to make sure how you're going about this is going to pass muster with the antitrust people.

I spoke with an experienced anti-trust litigator on these third party forms, and his exact words were, "I'd have to look at more details, but that smells bad."

I have some ideas, but now I'm getting into areas better reserved for antitrust specialists. Call me if you're interested.

Explore Retroactive Licensing

Finally, the real solution to all of these problems is to have the proper licenses in place.

If you look at *VHT v. Zillow* in particular, the actual damages from infringement were minuscule: \$2.84 per infringement. But that's for infringement.

The actual market value of a typical listing photograph outside of some litigation context rapidly approaches zero. I mean, who actually wants to use mediocre photographs of empty rooms? What's the market like for those?

Sure, high-end architectural photographers might think that their photograph has enormous economic value to some magazine, architects, or whomever wants gorgeous photos of gorgeous luxury homes. The average real estate photographer who produced 20-30 shots of some single family house in a subdivision could think that, if they want, but their hopes and dreams are likely to meet the rock of reality.

The difficulty is in the *logistics* of doing a retroactive license. Thousands upon thousands of photographs, across thousands upon

Finally, the real solution to all of these problems is to have the proper licenses in place.

thousands of listings and properties, over years and years of records... yes, it is a nightmare.

Once again, see the Image Audit recommendation above.

One recommendation: look into Picture Licensing Universal System (PLUS: <http://www.useplus.com/>). PLUS is an international non-profit organization that seeks to “simplify and facilitate the communication and management of image rights.”

From PLUS website:

The Picture Licensing Universal System—a cooperative, multi-industry initiative — provides a system that clearly defines and categorizes image usage around the world, from granting and acquiring licenses to tracking and managing them well into the future.

Through standardized language, a machine-readable coding architecture and a global Registry, image licenses become more transparent, more fair, and much simpler for everyone.

Technology alone cannot solve all of the problems. For one thing, PLUS isn't going to set license fees or terms. But it will go a long way towards helping the MLS manage the licenses for various images.

PLUS is just one system; the truth is that what is really necessary is some kind of standard for creating, reading, and using real estate

image metadata. RESO could be a source for that kind of “real estate photo data standard.”

Furthermore, implementing some kind of a PLUS or PLUS-like system across the entire MLS would go a long way towards avoiding a finding of willful infringement should someone sue you for infringement.

Partner Up and Find Allies

If you think about it, this whole situation is very similar to the “patent troll” situation that everybody was concerned about for the past few years.

It was such a concern, in fact, that NAR made fighting patent trolls a big part of its 2016 agenda. NAR filed a petition with the U.S. Patent Office in one case,²⁸ and even sent out a national Realtor Party Call for Action asking REALTORS to urge Congress to stop patent trolls.²⁹

Similar to a patent troll’s patent, the typical real estate photograph has very little residual value other than in a lawsuit for copyright infringement.

NAR and Political Action

The fundamental problem, perhaps, is our nation’s antiquated copyright laws that were written in the industrial age. That isn’t something the courts can do much about, nor the real estate industry. Congress could, and perhaps should. The technology industry is certainly interested—why not seek out partners to go after the fundamental issue together?

That is certainly something that NAR could be looking into.

Technology Alliance

More immediately, part of the solution to this problem has to be technological. Managing photography licenses from 1.3 million REALTORS and who knows how many photographers across the

²⁸ <http://realtormag.realtor.org/daily-news/2016/05/24/nar-pushes-back-against-patent-troll>

²⁹ <http://my.sfrealtors.com/news-members-home-menu/443-nar-call-to-action.html>

country involving millions of images every day is logistically impossible without the use of technology.

There are giant companies with extraordinary technology expertise in the industry who are fierce competitors, but may find cooperation to be in everyone's best interests. Sound familiar to you, MLS?

It will take leadership to bring folks like Zillow, Redfin, Move, Corelogic, Black Knight, Opendoor, Offerpad, and others into the same room with MLSs and brokerages and national franchises (even Keller Williams would join such an effort, I would think) and get everybody working on a common solution to the photography copyright problem. So show some leadership and get that alliance formed sooner rather than later.

Local MLS: Pool Resources

More locally, smaller MLSs need to think about pooling resources with other MLSs for things like the Image Audit. Maybe a necessary project like that is impossible for a 500-member MLS, but very possible for ten such MLSs together pooling their resources.

Many of these Recommendations may be possible only by pooling resources. Hiring attorneys to review all of your data licensing agreements is not all that cheap, after all.

Frankly, larger MLSs need to think about pooling resources too. It isn't as if this sort of thing was a value-add that they had planned on doing. This is something that has to get done, so why not share the workload and share the costs?

Come together. Maybe working on a common problem like this could lead to deeper partnerships and relationships.

Possibly Crazy, But Possibly Brilliant Idea

Consider allowing photographers to join the Association and/or the MLS in some fashion as affiliate members.

Appraisers can already join NAR as Appraiser Members.³⁰ Quite a few MLSs not only allow appraisers to join as members, but even set aside a Board seat specifically for appraisers. I know of at least two



³⁰ <https://www.nar.realtor/appraisal-valuation/benefits-of-joining-nar-for-appraisers>

local MLSs who have mortgage professionals as not only members, but Directors.

Why not real estate photographers?

Here's what NAR itself says to promote appraiser membership on its website:

The National Association of REALTORS® (NAR) is the world's largest professional association with one million members. NAR is composed of REALTORS® who are involved in residential and commercial real estate as appraisers, brokers, salespeople, property managers, counselors and others engaged in all aspects of the real estate industry. The benefits of membership provide appraisers with a wide array of tools to navigate the current real estate market.

Well, real estate photographers are certainly engaged in a very important aspect of the real estate industry. They do not currently have a trade organization.

There are a number of organizations for professional photographers, such as American Society of Media Photographers, Professional Photographers of America, National Press Photographers Association, American Photographic Artists, etc.

But there is no organization for real estate photographers. I spoke with a couple of individuals who have been trying to get such a thing going, but well, let's just say that photographers make the real estate industry look amazingly organized and unified.

One of the gentlemen I spoke with is Joel Rothman, a copyright attorney who may not be the real estate industry's favorite, given that he sues real estate companies on behalf of photographers. But it's worth setting aside your hostility and think about how some of what he says serve the interests of the real estate industry *as a whole*.

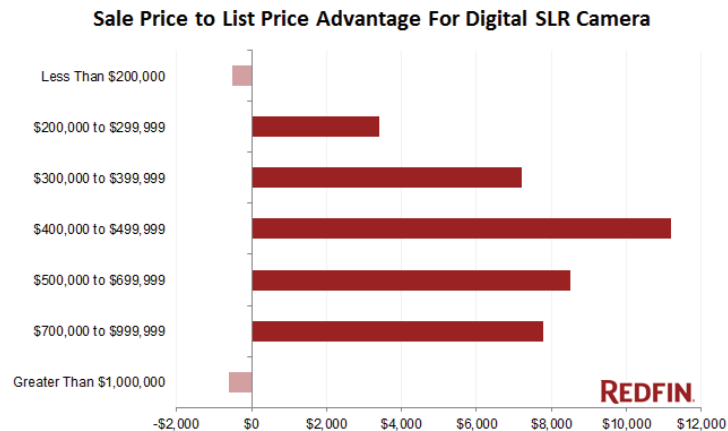
Rothman lists three reasons in a blogpost titled "Do Real Estate and Architectural Photographers Need Their Own Association?"³¹

- To promote the value of great images

³¹ <https://photographyforrealestate.net/2016/06/12/do-real-estate-and-architectural-photographers-need-their-own-association/>

- To protect great images from infringement and free riding
- To educate photographers, their clients, and the real estate industry

He points out that listings with professional photography sell faster and for more money. In 2013, Redfin published the results of a study showing just that:



For homes listed between \$200,000 and \$1 million, Redfin found that homes with listing photos taken with DSLR cameras sell for \$3,400 to \$11,200 more relative to their list prices.

...

Across all price tiers, homes with DSLR photography were more likely to sell within six months than homes with point-and-shoot photos. In the \$400,000 to \$500,000 price range, 64 percent of homes with DSLR photos sold within six months, compared to 46 percent of homes with point-and-shoot photos. For those difficult-to-sell million dollar homes, 35 percent of professionally photographed homes sold in six months, compared to 30 percent of homes with point-and-shoot photos.³²

A real estate photographer could be an integral part of the home selling and home buying experience. One could argue that they *should be*, as a real estate agent taking listing photos with her iPhone is hardly top-notch client service, and if not using professional

³² <https://www.redfin.com/blog/2013/12/professional-photos-2013.html>

photography results in lower prices and longer days on market, one could actually argue that it is (a) potential breach of fiduciary duty, and (b) against the spirit, if not the letter, of the Code of Ethics if the agent is a REALTOR.

For the MLS and Associations, having photographers join as affiliate members yields a few benefits:

- Far better mutual understanding of rights needed by the industry;
- Cross-education of real estate agents and brokers on photography, including copyrights and licenses, and of photographers on real estate practices;
- The ability to codify data standards for real estate photography, which helps immensely in dealing with all of the licensing issues we have raised above;
- The possibility of standardized terms for real estate photography across the entire MLS, without as much potential for antitrust issues;³³
- The real possibility of resolving licensing and copyright disputes in-house, between Members, rather than at the courthouse.

Let's not forget that inviting photographers to join the MLS and the Association brings more membership dollars to the table.

For the photographers, becoming an affiliate member could really help drive business. NAR's pitch to appraisers literally begins with "Open New doors to Appraisal Opportunities" in giant blue letters. The same applies to photographers.

Last, but by no means least, joining the REALTOR Association means that photographers could have the most politically powerful

³³ I mentioned above that I find the NAR Third Party License approach to be troubling. There's a whiff of the ye olde group boycott with that approach. But inviting photographers to join the MLS/Association *voluntarily*, then letting brokers and agents know which photographers are Members, who have *voluntarily* embraced a standard set of terms and licenses along with standards of professionalism, strikes me as far less problematic. Maybe there is no legal difference, but there certainly is a difference in optics.

trade organization advocate on legislative and regulatory issues affecting real estate photographers—in exactly the same way that NAR, state and local Associations do advocacy for appraisers.

Given that a lawsuit by a photographer against a broker is the origin of this report, this recommendation may be surprising. It may be crazy. But I think it may also be brilliant, and you should explore it.

As Abraham Lincoln said, “Do I not destroy my enemies when I make them my friends?”



CONCLUSION

We have reached the end, at last.

For MLS and Associations, this issue of photography and copyright is absolutely the most important one that arose in April. It may in fact be one of the most critical issues in recent years, as it goes to the very heart of how an MLS operates.

That MLS Rules are incorporated into the license to Participants is something we all should have known and thought about as we built the overall system. Thanks to the Fifth Circuit, we now know that.

That we have a major source problem with real estate photography is regrettable, and the effort to solve that problem will not be a small one. But it's better late than never, and better to be proactive than to have to do it under court order, or after your Participants have gotten sued for hundreds of millions of dollars.

Yet, problems also introduce opportunities.

This crisis gives us the opportunity to go and reexamine the MLS Rules and that balancing act between “serve a client” and “get a client” that is at the heart of the fundamental understanding of the MLS as an institution in real estate.

It gives the industry the opportunity to get far better informed and educated on important intellectual property concepts, and to improve its technology, its business practices, and its professionalism.

It gives the opportunity for new alliances and new partnerships.

Finally, since this was the inaugural issue of *The Red Dot*, I consider it a bit fortunate that this issue came up in April. A premium service should deliver premium value in order to justify the time and money spent. I have tried very hard to do just that, and I hope that you have gotten your money's worth, and then some from this issue.

Thank you for reading, and for your patronage.

-rsh