

2015 LEGAL SEMINAR



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Copyrights and Listing Photographs



By Chloe Hecht



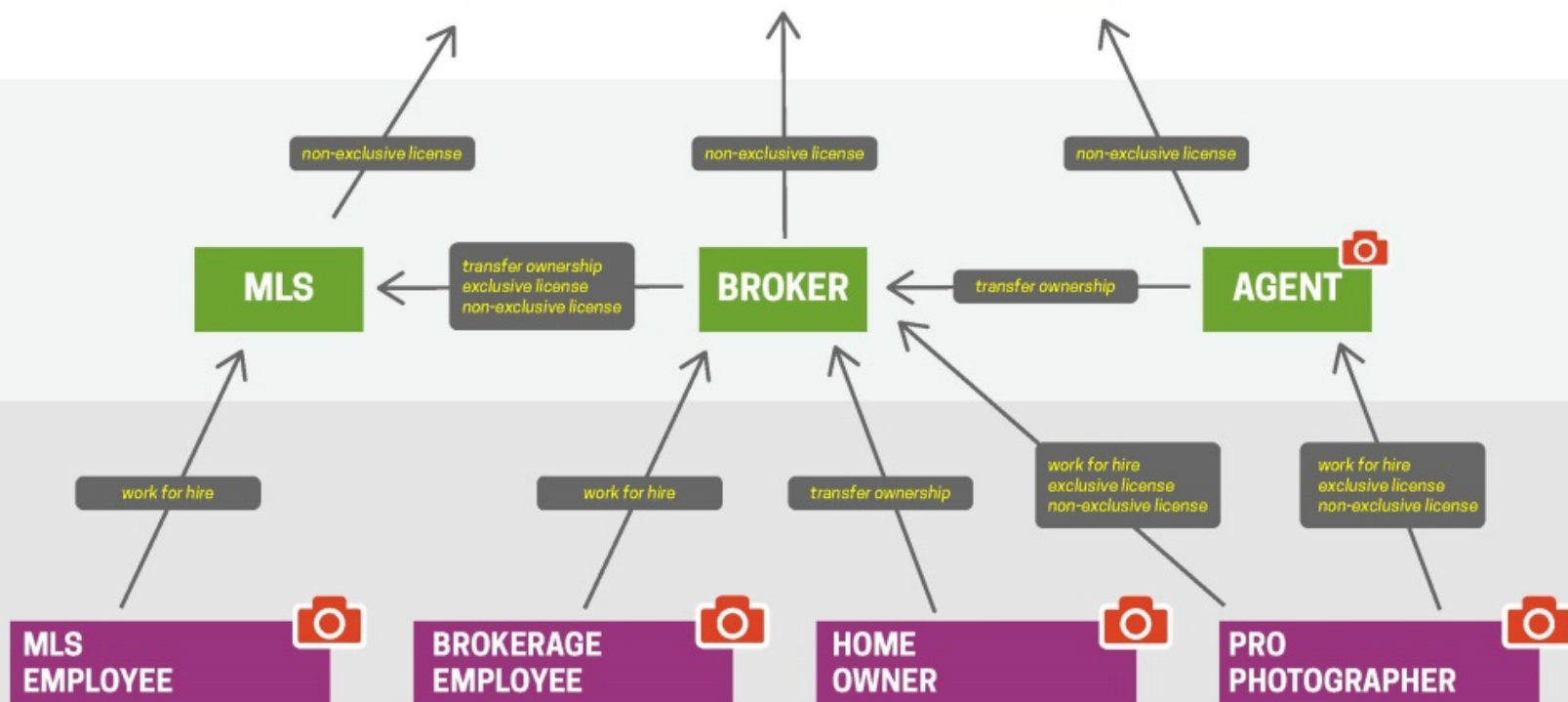
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Fractured Landscape

- The authors of listing photographs vary.
 - Professional photographer; real estate agent; MLS employee; homeowner
- Photographs may be owned or licensed in a variety of ways.

PORTALS / VENDORS

have non-exclusive licenses for photos



Fractured Landscape

- The fractured landscape...
 - Creates confusion over what rights were conveyed.
 - Increases difficulty enforcing against misuses.
- Ultimately, a misunderstanding of the rights conveyed or granted increases the risk of a copyright lawsuit.

Recent Cases

- *VHT, Inc. v. Zillow Group, Inc.*, No. 2-15-cv-1096 (W.D. Wash. 2015)
- *Alexander Stross v. Redfin Corp.*, No. 1:15-cv-00223 (W.D. Tex. 2015)



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VHT, Inc. v. Zillow

- VHT grants a non-exclusive license to brokers to use photos solely in connection with marketing active property listings.
- VHT alleges that the limited scope of the license does not permit use Zillow's use of VHT's photos on "Digs" and in connection with "sold" properties.

VHT v. Zillow: Umbrella Limited License

- Purpose limited to “the sales and marketing of the subject property or the company/agent representing the property”.
- The term of the license is by definition limited to the time the property is on the market and the agent/company is trying to sell it.

VHT v. Zillow: One-off License

- Governed by the Terms of Use on VHT's website.
- “Content made available to clients for property specific marketing purposes only. Any publication of content for non-specific property marketing purposes is strictly prohibited.”

VHT v. Zillow: Fair Use?

- Fair Use Factors:
 - Purpose and character of use
 - Nature of the copyrighted work
 - Amount and substantiality of the portion taken
 - Effect on the potential market

Stross v. Redfin

- Copyright infringement between two Participants in the ACTRIS MLS:
 - Alexander Stross, photographer and real estate broker
 - Redfin, real estate brokerage

Stross v. Redfin: Four Key Issues

- Exceeding scope of granted license versus violating ACTRIS Rules
- “Share” button and contributory infringement
- False CMI
- Application of the DMCA



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Stross v. Redfin: License

“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...thereby does grant, ACTRIS (and its service providers and licensees) an irrevocable, worldwide, paid-up, royalty-free, right and license to...authorize its use...for any purpose consistent with the facilitation of the sale, lease and valuation of real property or such other use...”



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Stross v. Redfin: License

- Did Stross grant a broad license to ACTRIS, who in turn granted a more limited license to Redfin?
- Did Stross grant a broad license to both ACTRIS and Redfin?
- Does Redfin's violation of the ACTRIS Rules violate the scope of the granted license?

Stross v. Redfin: Contributory Copyright Infringement

- Users of Redfin's website can “share” property listing photos to their social media sites.
- Does the “Share” button create liability for contributory copyright infringement?

Stross v. Redfin: False CMI

- DMCA: Illegal to remove, alter or provide false CMI or distribute a work containing removed, altered or false CMI if you have reasonable grounds it will induce, facilitate or conceal copyright infringement
- The listing photos are stamped with the wording “Courtesy of Alexander Stross”.
- False CMI or identification of listing agent?

Stross v. Redfin: DMCA

- Does compliance with the DMCA protect an MLS participant?
- Are the photos on Redfin's website stored "at the direction of a user"?
- Did Redfin identify a copyright agent with the U.S. Copyright Office?



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Strategies to Reduce the Risk of Copyright Infringement

- Review agreements to assess what rights were granted or conveyed.
- Audit use of listing photos to ensure compliance with the relevant agreements.

Strategies to Reduce the Risk of Copyright Infringement

- Determine how the photographs will be used and ensure future agreements permit those uses.
- Maintain records of all assignments and licenses.
- Include indemnity clauses in agreements.



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Strategies to Reduce the Risk of Copyright Infringement

- NAR created sample agreements:
 - Work Made for Hire Agreement
 - Assignment Agreement
 - Exclusive License Agreement
- Available online at [http://www.realtor.org/law-and-ethics/who-owns-your-property-photos.](http://www.realtor.org/law-and-ethics/who-owns-your-property-photos)



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Strategies to Reduce the Risk of Copyright Infringement

- Ensure compliance with the DMCA.
 - Designate a copyright agent and register with USCO.
 - Comply with takedown requests.
 - Develop and post a copyright policy.

Thank you!

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