

Who Owns Your Property Photos?

Listing content fuels the real estate industry, and displaying photographs of real properties online is now a vital part of the real estate professional's marketing plan. Sellers use photographs to market properties, and buyers rely on those images to select which properties to visit. MLSs distribute property listings through proprietary databases that include the listing photographs. Moreover, MLSs in turn often license their property listing databases, including broker-provided photographs, to third-party portals, such as REALTOR.com, and other websites and vendors.

Improper use of listing photographs, however, can create legal problems for agents, brokerages and MLSs. Authorship and ownership of photographs within the real estate industry is "fractured". Who authored the photograph and who can use what photograph and in what way varies across the industry. Listing photographs may be taken by homeowners, real estate agents, MLS or brokerage employees, or professional photographers. Photographs may be owned or licensed to different parties in a variety of ways. A misunderstanding of how you may use the photographs for property listings could make you vulnerable to a copyright lawsuit.

For example, copyright infringement of listing photographs is central to the recent lawsuit *VHT, Inc. v. Zillow Group, Inc.*, No. 2:15-cv-1096 (W.D. Wash. 2015). VHT purportedly retains ownership in the listing photographs and only grants non-exclusive licenses to brokers to use the photographs solely in connection with marketing active property listings. In the complaint, VHT alleges that Zillow uses VHT's photographs without authorization in connection with "sold" properties and on Zillow's home design website, "Digs." VHT argues that these uses exceed the scope of VHT's limited license to use the photographs in connection with active property listings. The case is still pending.

It is crucial to know what rights you own in photographs and how those rights permit you to use the photographs. To reduce your risk of copyright infringement, you should:

- Review photography agreements to assess what rights were granted or conveyed;
- Audit your use of listing photographs to ensure compliance with the relevant agreements;
- Determine how you will use photographs and ensure future agreements permit those uses; and
- Maintain records of all assignments and licenses.

In order to assist members and member firms, NAR Legal Affairs created sample license agreements, which should be modified as necessary to fit your particular needs.

These documents are provided as a sample, and are not intended to be and do not constitute legal advice, or a substitute for specific legal advice or opinions. The user of this sample document should not use this document without consulting legal counsel. The use of this document should be modified to address the specific legal needs of the user.

Work for Hire Agreement: This sample agreement provides that the commissioned photographs are a "Work for Hire", which means the commissioning party is the automatic owner of the photographs from their creation.

Assignment Agreement: In this sample agreement, the photographer assigns all right, title and interest in the photographs to the broker.

Exclusive License Agreement: A photographer may want to retain its ownership of the photographs. In this sample agreement, the photographer grants to the broker an exclusive license to display and distribute the photographs in connection with the real estate industry.

WORK MADE FOR HIRE AGREEMENT

This Agreement ("Agreement") is made and entered into as of < date > by and between _____ ("Brokerage") and _____ ("Photographer"). Brokerage has commissioned Photographer to photograph, visually record or otherwise create graphics or other images (collectively, "Images") of the properties identified in the attached Appendix A. The parties hereby agree, for good and valuable consideration received, the receipt and sufficiency of which is hereby acknowledged, as follows:

1. Brokerage agrees to pay Photographer in consideration of all services rendered by Photographer and the creation of the Images as set forth below the total amount of _____.
2. Photographer acknowledges and agrees that all Images are proprietary works of Brokerage. To the extent permitted under applicable law, all Images shall be considered a Work Made for Hire (as such term is defined under the Copyright Act, 17 U.S.C. §101 and following, as amended) by Photographer for Brokerage, and as such, shall be exclusively developed for the benefit of and owned by Brokerage. Brokerage shall exclusively own all worldwide right, title and interest in and to the Images, including without limitation copyrights.
3. To the extent that it should be determined that any of the Images do not qualify as a Work Made for Hire under U.S. law, Photographer hereby irrevocably assigns and transfers to Brokerage all of Photographer's worldwide right, title and interest, including without limitation all copyrights, whether now existing or hereafter acquired, in and to all Images. Photographer agrees to cooperate and take all action reasonably requested by Brokerage, including executing and delivering to Brokerage all documents, or providing information pertaining to the Images, in connection with the assignment of Photographer's rights to Brokerage under this Agreement. Specifically, but without limitation, Photographer agrees to assist in filing copyright applications in the United States or elsewhere if necessary.
4. Photographer hereby represents and warrants that no third party has any rights in, to, or arising out of the Images, and Photographer has full right and power to enter into this Agreement.
5. Photographer acknowledges and understands that it is in no way permitted to use the Images in any manner whatsoever, and no other royalty or other consideration will be due to Photographer. Photographer agrees and warrants that Brokerage is under no obligation to credit Photographer or any other third party as author of the Images.
6. Photographer understands and agrees that it is an independent contractor of Brokerage and nothing in this Agreement shall be construed to create a partnership, or joint venture, between Photographer and Brokerage.
7. The validity, construction and enforceability of this Agreement shall be governed in all respects by the laws of the State of _____. The terms and conditions set forth herein constitute the entire agreement between the parties and shall supersede all prior agreements. This Agreement may not be amended except in writing signed by the respective parties. The failure of either party to enforce its rights under this Agreement at any time for any period shall not be construed as a waiver of such rights.

IN WITNESS WHERE, the Parties have executed this Agreement as of the date first above written:

<Insert Photographer name >

<insert Brokerage name >

Signature: _____

Signature _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Address: _____

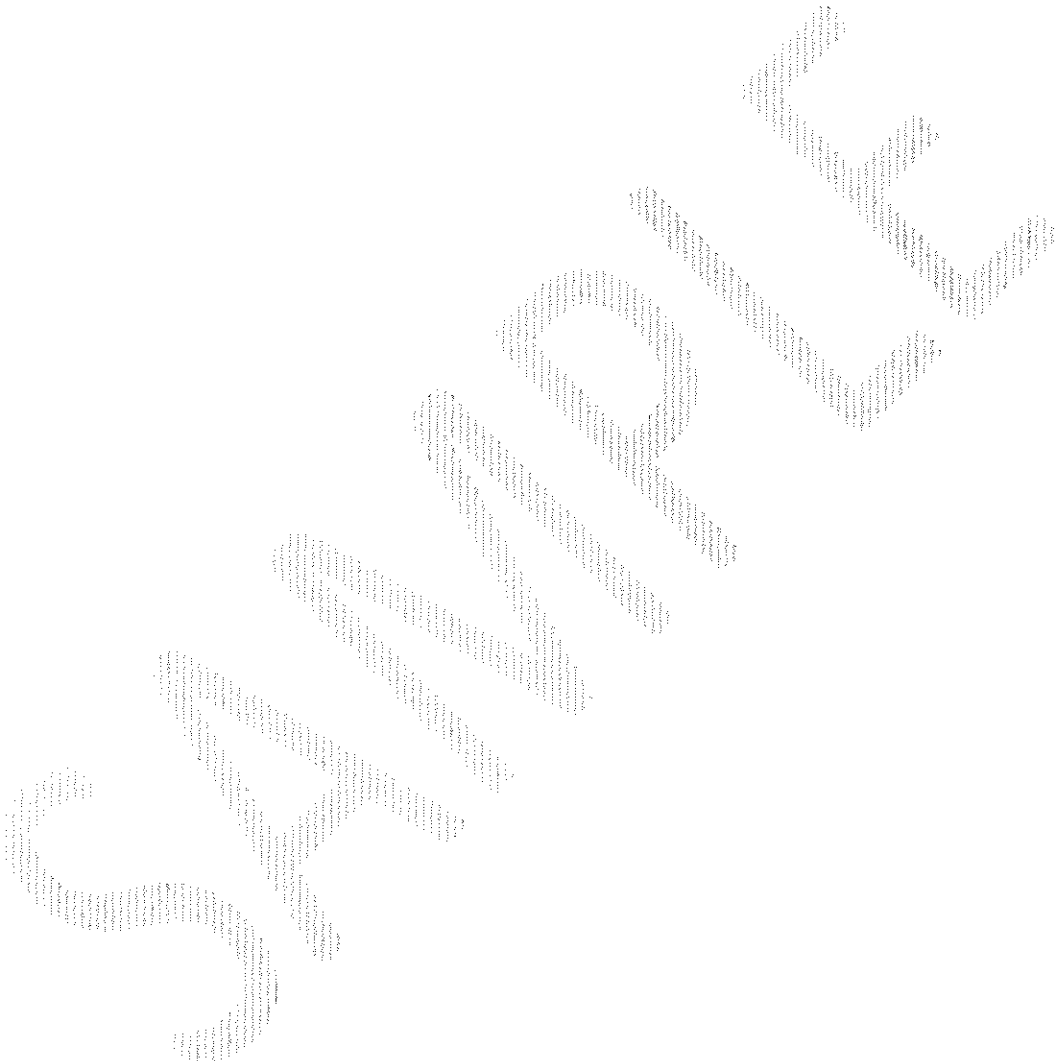
Address: _____

Email: _____

Email: _____

APPENDIX A

[List applicable properties]



ASSIGNMENT AGREEMENT

This Assignment Agreement ("Agreement") is made and entered into as of < date > by and between _____ ("Brokerage") and _____ ("Photographer"). Brokerage has engaged Photographer to photograph, visually record or otherwise create graphics or other images (collectively, "Images") of the properties identified in the attached Appendix A. The parties hereby agree, for good and valuable consideration received, the receipt and sufficiency of which is hereby acknowledged, as follows:

1. Brokerage agrees to pay Photographer in consideration of all services rendered by Photographer and the assignment of the Images as set forth below the total amount of _____.
2. Photographer hereby irrevocably assigns and transfers to Brokerage all of Photographer's worldwide right, title and interest, including without limitation all copyrights, whether now existing or hereafter acquired, in and to all Images. Photographer agrees to cooperate and take all action reasonably requested by Brokerage, including executing and delivering to Brokerage all documents, or providing information pertaining to the Images, in connection with the assignment of Photographer's rights to Brokerage under this Agreement. Specifically, but without limitation, Photographer agrees to assist in filing copyright applications in the United States or elsewhere if necessary.
3. Photographer represents and warrants to Brokerage that it owns all right, title and interest in and to the Images, including copyright, is capable of assigning said rights in the Images as set forth in this Agreement, and has full right and power to enter into this Agreement.
4. Photographer acknowledges and understands that it is in no way permitted to use the Images in any manner whatsoever, and no other royalty or other consideration will be due to Photographer. Photographer agrees and warrants that Brokerage is under no obligation to credit Photographer or any other third party as the author of the Images.
5. Photographer understands and agrees that it is an independent contractor of Brokerage and nothing in this Agreement shall be construed to create a partnership, or joint venture, between Photographer and Brokerage.
6. The validity, construction and enforceability of this Agreement shall be governed in all respects by the laws of the State of _____. The terms and conditions set forth herein constitute the entire agreement between the parties and shall supersede all prior agreements. This Agreement may not be amended except in writing signed by the respective parties. The failure of either party to enforce its rights under this Agreement at any time for any period shall not be construed as a waiver of such rights.

IN WITNESS WHERE, the Parties have executed this Agreement as of the date first above written:

<Insert Photographer name >

<insert Brokerage name >

Signature: _____

Signature _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Address: _____

Address: _____

Email: _____

Email: _____

APPENDIX A

[List applicable properties]



EXCLUSIVE LICENSE AGREEMENT

This Exclusive License Agreement ("Agreement") is made and entered into as of < date > by and between _____ ("Brokerage") and _____ ("Photographer"). Brokerage has engaged Photographer to photograph, visually record or otherwise create graphics or other images (collectively, "Images") of the properties identified in the attached Appendix A. The parties hereby agree, for good and valuable consideration received, the receipt and sufficiency of which is hereby acknowledged, as follows:

1. Brokerage agrees to pay Photographer in consideration of the services rendered and exclusive license granted below the one-time total amount of _____.
2. License Grant.
 - a. Photographer hereby grants to Brokerage an exclusive worldwide royalty-free license in perpetuity to reproduce, distribute, display, prepare derivative works of, and publicly perform the Images in connection with the real estate industry, including without limitation such uses of the Images in connection with advertising real property and to authorize and sublicense such rights to third parties at Brokerage's discretion.
 - b. This exclusive license grant shall include the right to sue for copyright infringement, including without limitation past infringement. To that end, Photographers agrees to assist Brokerage in preparing and filing any copyright applications that cover the Images, including providing any information necessary to prepare such applications.
3. Brokerage acknowledges that Photographer retains title and ownership of the Images.
4. Photographer hereby represents and warrants that it owns all right, title and interest in and to the Images, no third party has any rights in, to, or arising out of the Images, and Photographer has full right and power to enter into this Agreement and grant the license set forth in Section 2. The parties agree that Brokerage is under no obligation to credit Photographer or any other third party as the author or owner of the Images.
5. Photographer understands and agrees that it is an independent contractor of Brokerage and nothing in this Agreement shall be construed to create a partnership, or joint venture, between Photographer and Brokerage.
6. The validity, construction and enforceability of this Agreement shall be governed in all respects by the laws of the State of _____. The terms and conditions set forth herein constitute the entire agreement between the parties and shall supersede all prior agreements. This Agreement may not be amended except in writing signed by the respective parties. The failure of either party to enforce its rights under this Agreement at any time for any period shall not be construed as a waiver of such rights.

IN WITNESS WHERE, the Parties have executed this Agreement as of the date first above written:

<Insert Photographer name >

<insert Brokerage name >

Signature: _____

Signature _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Address: _____

Address: _____

Email: _____

Email: _____

APPENDIX A

[List applicable properties]

