



Brokers Are Creators, Too

Using Copyright to Leverage Real Estate Listings

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ABELEV



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USING COPYRIGHT LAW proactively equips creative real estate professionals with the tools to protect their created content. Among the most important assets a real estate professional creates and relies on are the photographs and data that comprise his/her property listings. Copyrights, especially registered copyrights, are one of the most cost-effective strategies for protecting such content from misuse by third parties. Proactive registration provides the opportunity for statutory damages and attorneys' fees.

The Pitfalls of Failing to Protect Listings Data

Most consumers now rely on third-party aggregator sites when searching for a new home. Third parties may collect information from real estate agents' listings for use on their own websites, diverting web-based traffic and misinforming consumers about who is behind the listings. A real estate professional who does not monitor and enforce his/her ownership against third parties runs the risk of an eroding market position.

The National Association of Realtors (NAR) has become increasingly aware of this problem and has sought to raise awareness of proactive U.S. copyright registration as a solution. NAR has posted several articles with tips on how to effectively manage property listings, including obtaining copyright registrations of photographs, virtual tours, artistic renderings, drawings, floor plans, list prices and creative descriptions of a property.

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The Benefits of Copyright Registration

The Copyright Act of 1976 provides protection for all content creators. A work may qualify for a copyright if the work is original and fixed in a tangible medium of expression. A copyright attaches to a work immediately upon its creation, but taking the extra step of registration has two major benefits. First, copyright registration makes the work eligible for statutory damages under the Copyright Act, which is essentially a set damages amount for each infringed work that is awarded, independent of actual harm from infringement. Second, registration promotes good corporate hygiene by creating a record or archive of content.

The economic significance of obtaining copyright registrations for property listings recently came to the fore in *VHT Inc. v. Zillow Group Inc.* VHT, a provider of professional real estate photography, brought the case against Zillow, accusing the online real estate marketplace of copyright infringement for misusing VHT's property photographs by "scraping" in wholesale numbers of VHT's photographs and repurposing those

identical photographs without authorization or attribution.

VHT claimed that Zillow displayed or saved images produced by VHT for marketing purposes to the Zillow Digs website. According to the VHT website terms of use, the photos may be used only for marketing an active listing. In the suit, VHT alleged that Zillow also failed to remove photos from its listing website once a property was sold and used VHT photography on the Zillow Digs website without permission and as derivative works. The resulting Zillow Digs site features residential design, home improvement and remodeling ideas in a radical new format that allows for shopping of the individual objects depicted in the photograph.

In February, a jury awarded VHT \$8.24 million against Zillow, finding that Zillow engaged in copyright infringement and contract violation of the VHT website terms of use. Because VHT had obtained copyright registrations for certain photographs, it was eligible for statutory damages. The jury found that VHT had only suffered \$79,875 in actual damages, but \$8.24 million in statutory damages — more than a 100 times difference. VHT's victory was a direct result of its proactive corporate habit of filing for U.S. registered copyrights for its photographs. Only proactive copyright registrations are eligible for the more elevated statutory damages rather than actual damages.

VHT anticipated this litigation in a 2012 white paper detailing its concerns about third parties misusing its property data, noting that third-party aggregators rely on its property information. The white paper, titled "Friend or Foe? The Battle With Third Party Aggregators," poses the inquiry: "Ever wonder how a [then] six-year-old company like Trulia ... and Zillow, with a small marketing budget, are able to attract more unique visitors than all major brokerages/brands combined?" The white paper goes on to connect the economic success of these companies to their unauthorized monetization of other professionals' property listing content.

By adding copyright registrations to their listings management plans, real estate professionals increase their own market leverage with third-party aggregators and potentially increase their enforcement outcomes. As VHT proved in its case against Zillow, a proactive copyright strategy can make all the difference.

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