

VHT, Inc. v. Zillow Group
Nos. 17-35587, 17-35588 (9th Cir. Mar. 15, 2019)

Year	2019
Court	United States Court of Appeals for the Ninth Circuit
Key Facts	VHT, the largest professional real estate photography studio in the U.S., licenses its photographs to real estate professionals to market properties. Zillow, an online real estate marketplace, receives real estate photos, including copyrighted photographs owned by VHT, through digital feeds from real-estate sources. VHT brought claims for direct and secondary copyright infringement relating to Zillow’s use of VHT’s photographs on its website. Zillow argued that its use of the photographs on the “Digs” section of its website, which focuses on home improvement and design was a fair use. The “Digs” section of the website consists of certain photographs selected from the listing platform section that Zillow moderators tag with various criteria (room type, style, cost, color) to make them searchable. At summary judgment, the district court rejected Zillow’s fair use defense. The jury was instructed to consider only whether “reproduction, cropping, and scaling” of those photographs by Zillow constituted fair use. The jury returned a verdict for VHT on direct infringement involving the tagged Digs images, and the court denied Zillow’s motion for judgment notwithstanding the verdict.
Issue	Whether the tagging of photographs to make them searchable on a website is transformative and supports a finding of fair use.
Holding	Among the issues on appeal, Zillow sought review of the district court’s summary judgment decision rejecting Zillow’s fair use defense. The panel affirmed the district court’s finding that Zillow’s use of the photographs to create a searchable database was not a fair use. In analyzing the first factor, purpose and character of the use, the panel distinguished this case from other “search engine” cases, in which the display of thumbnail images and snippets of works were found to be fair uses. The court concluded that “search engine” is not a “talismanic term” and that a fair use determination requires “considering the details and function of a website’s operation.” In contrast to internet-wide search engines that direct to the original source of photos or use thumbnail images, Zillow only included photographs from its own database and used full-size versions of the photographs for the same purpose as the originals, that is, “to artfully depict rooms and properties.” Overall, the panel found Zillow’s “lack of transformation” disfavored fair use. The second factor, nature of the copyrighted work, also slightly disfavored fair use because the photos were “aesthetically and creatively shot and edited,” though the court held their prior publication diminished the force of this factor. The third factor, amount and substantiality of the portion used, disfavored fair use because the full image was used and, unlike in other search engine cases, the court found nothing in Zillow’s use to justify that as necessary. The fourth factor, effect of the use upon the potential market for or value of the original, also disfavored fair use because VHT was exploring licensing opportunities. Ultimately, the court concluded the four factors cut against fair use and upheld the district court’s grant of summary judgment rejecting that defense.
Tags	Ninth Circuit; Photograph
Outcome	Fair use not found

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