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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 8 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ALEXANDER BAYONNE STROSS,

No. 22-36000

Plaintiff-Appellant,

D.C. No.

v.

2:21-cv-01489-RAJ-BAT

ZILLOW, INC.; TRULIA, LLC,

MEMORANDUM*

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Submitted December 6, 2023**
Seattle, Washington

Before: McKEOWN, N.R. SMITH, and SANCHEZ, Circuit Judges.

Alexander Stross appeals the dismissal of his claims against Zillow, Inc. and Trulia, LLC¹ for direct copyright infringement, vicarious infringement, and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

¹ Because Trulia is a subsidiary of Zillow and the differences between the two entities are not at issue in this appeal, Defendants/Appellees are collectively referred to as “Zillow.”

contributory infringement. We review de novo a dismissal for failure to state a claim. *See Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). We affirm.

Stross, an Austin-based real estate photographer, alleges that Zillow allowed his photographs of homes in the Austin area to remain on display after the homes were sold, violating the rules of the Austin/Central Texas Realty Information Service (“ACTRIS”), the Austin Board of Realtors (“ABOR”), Texas Realtors, and the National Association of Realtors. Stross alleges that Zillow either “accessed the [photographs] through . . . a third party license with ACTRIS MLS (prior to becoming a Texas broker), or as a participant/subscriber to ACTRIS MLS” after becoming a broker. Then Zillow, “on [its] own initiative, instigated the long-term reproduction and display of the Photographs on the Websites for purposes other than marketing the properties depicted in the Photograph, and solely for [its] own benefit.”

To prevail on a claim of direct copyright infringement, Stross must demonstrate that Zillow “violate[d] at least one exclusive right granted to [Stross] under 17 U.S.C. § 106.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). Stross must also establish causation, known as the “volitional-conduct requirement.” *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019); *see also Perfect 10, Inc. v. Giganeews, Inc.*, 847 F.3d 657, 666 (9th Cir.

2017) (“*Direct* liability must be premised on conduct that can reasonably be described as the *direct cause* of the infringement.” (cleaned up)).

Stross fails to plausibly plead volitional conduct here. He does not plausibly allege that Zillow acquired and displayed the photographs at issue *after* Zillow registered as a broker in Texas. According to his own allegations, Zillow did not register as a broker in Texas until July 2021, but Stross took the photographs in question and registered them between 2008 and 2014, and sent the takedown notices to Zillow in April 2021 (and thus, presumably, found that the photos were still displayed on Zillow prior to that date). To the extent Stross instead pleads that Zillow acquired and displayed the photos through a third-party license *before* registering as a broker, and is therefore liable, in Stross’s words, for “fail[ing] to control the photographs on its system in conformance with the licensing restrictions on those photographs imposed by the ABOR/ACTRIS rules,” that argument is squarely foreclosed by *VHT, Inc. v. Zillow*. *VHT*, 918 F.3d at 733–34 (holding that Zillow did not “exercise[] control” over the photos at issue “beyond the ‘general operation of [its website]’” (quoting *Perfect 10*, 847 F.3d at 670)).

Stross also brings claims for both vicarious infringement and contributory infringement, which were dismissed by the district court for failure to plead an underlying direct infringement by a third party, a requirement of any claim of secondary infringement. *See Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d

1060, 1068 (9th Cir. 2014). But Stross failed to argue in his briefing before us that underlying direct infringement was plausibly pleaded here, thus waiving that issue. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (“The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant’s opening brief.”).²

AFFIRMED.

² Though Stross briefly argues that the district court erred in dismissing without granting leave to amend, Stross has failed to proffer, either before this court or the district court, any additional facts he would plead if given the opportunity to amend. Accordingly, amendment would be futile. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051–52 (9th Cir. 2008).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

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The Clerk is requested to award costs to *(party name(s))*:

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