

**EXHIBIT**

**B**

**NO. 22-36000**

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In The  
**United States Court of Appeals**  
For The Ninth Circuit

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**ALEXANDER BAYONNE STROSS,**

*Plaintiff-Appellant,*

v.

**ZILLOW, INC. AND TRULIA, LLC,**

*Defendants-Appellees*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON**

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**PETITION FOR PANEL REHEARING**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

In accordance with Federal Rule of Appellate Procedure 26.1, Plaintiff-  
Appellant Alexander Bayonne Stross is an individual.

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**INTRODUCTION AND SUMMARY OF THE FACTS AND LAW THE  
PANEL DECISION OVERLOOKED OR MISAPPREHENDED**

This appeal presented two related issues. The first issue presented on this appeal was whether Zillow’s failure to remove Stross’ photographs from its platform despite the fact that Zillow agreed in July of 2021 to be bound by rules, regulations and a license agreement that prohibited the display of off-market property photographs—and thus required Zillow to remove Stross’ photographs from the Zillow platform because without a license it lacked any authority for the continued display of Stross’ photographs and became an infringer—sufficiently distinguished this case from the facts of *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723 (9th Cir. 2019).

The panel held that even in the absence of a license or other authority, Zillow could not be an infringer by omitting to act to remove Stross’ photographs because infringement requires proof of volitional conduct.

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*, 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)).

(Panel Dec. at 3).

The panel decision said nothing about the second issue whatsoever. Stross submitted detailed takedowns for all the photographs at issue. The FAC alleged Zillow “fail[ed] to take down or disable the Works from the Websites despite receiving proper take-down notices from Stross. Defendants refused to take down or disable public access to the Works until multiple months after the Complaint in this matter was filed.” R. 34. In other words, Zillow displayed the Works in violation of the license it agreed to *after July 2021 when Zillow became a broker*.

It was manifest error for the panel to misapprehend Zillow’s copyright violations occurring after it became a broker and agreed to a license prohibiting the display of sold listings, and after it was notified that its display of sold listings violated Stross’ rights as copyright owner. The panel analysis of Zillow’s conduct—specifically Zillow’s omission to remove Stross’ photos from its platform—through the lens of the “volitional conduct” doctrine, was a mistake that requires correcting.

That panel failed to see Zillow's omission for what it really was: a license violation that gave rise to Stross' infringement claim. Violating a copyright license can occur without any "volitional conduct" by a licensee. The mere failure of a licensee to follow a license by omitting to act to stop using the licensed works after the license expires is infringing conduct. Zillow's failure to follow the terms of its license when it became a broker and remove Stross' photographs of off-market properties was infringement that occurred without any act at all.

An omission to act when a license compels that act in order to avoid infringement is an actionable violation of the Copyright Act in equal measure with an infringing act. The panel's application of the "volitional act" doctrine here was manifest error.

## ARGUMENT

### **a. Zillow's Failure to Remove the Unlicensed Works at Issue from its Platform was Infringement that Occurred when Zillow Violated its License as a Broker not to Display Off-Market Properties**

The FAC alleged Zillow received the photographs at issue from ABOR through ACTRIS. R. 24, 31-33. The FAC alleged that Zillow's agreements with ABOR, the rules of ACTRIS, the rules of MLS Grid, and the regulations promulgated by the National Association of Realtors (NAR), prohibited real estate brokers like Zillow from displaying more than one photograph of a home after the listing is sold. R. 31-32. The FAC alleged that Zillow agreed to comply with the



license agreement embodied in the agreements with ABOR and the rules of ACTRIS when Zillow became a broker in July of 2021. R. 31. Zillow continued to display multiple of Stross' photographs for sold listings on Zillow's platform in violation of Zillow's license. R. 32-34.

No volitional act is required to infringe by violating a license. ““Anyone who violates any of the exclusive rights of the copyright owner,’ that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, ‘is an infringer of the copyright.’ Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute . . . is not an infringer of the copyright with respect to such use.”” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (quoting 17 U.S.C. § 501(a)).

This Court has never required a licensor to allege that a licensee engaged in “volitional-conduct” in order to sue for infringement. All this Court has ever required is that the licensee’s use of the work exceeded the scope of the license. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989)(“A licensee infringes the owner's copyright if its use exceeds the scope of its license.”) Time and again, when faced with a dispute between licensees and licensors, this Court has looked to whether the licensee’s use was outside the license’s scope or not without regard to whether that use was “volitional-conduct.” See *Jarvis v. K2 Inc.*,

486 F.3d 526, 530 (9th Cir. 2007) (A party’s use of photographic images after a certain time period in violation of a limited license with time-based use constraints was infringement citing 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 3.07[B] (2005) (“[if] consent to use the underlying material is limited in time, then the owner of the derivative work may not exploit the underlying material beyond the time limit.”)); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999) (“If . . . a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.”); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 511-12 (9th Cir. 1985) (license explicitly excluded performance of songs in manner performed by licensee and gave rise to claims of infringement); .

**b. When Zillow Acquired Stross’ Photographs is not Relevant to Whether Zillow Exceeded the Scope of its Licensed Uses after Zillow Became a Broker in July 2021.**

The panel determined Stross failed to plausibly allege in the FAC that “Zillow acquired and displayed the photographs at issue *after* Zillow registered as a broker in Texas.” (Panel Decision at 3). This determination is both factually inaccurate and legally flawed.

The panel’s determination is factually inaccurate because Stross alleged in the FAC that Zillow displayed the photographs *after* Zillow registered as a broker in Texas. Stross filed his original complaint on November 3, 2021. R. 263. The

FAC alleged that Zillow “refused to take down or disable public access to the Works until multiple months after the Complaint in this matter was filed.” R. 34. Zillow became a broker subject to the license and rules of ACTRIS restricting the display of off-market listings in July of 2021. R. 31. Thus, the FAC alleged plausibly that Zillow displayed the Works in violation of the license it agreed to *after July 2021 when Zillow became a broker.*

The panel’s determination is flawed because Zillow’s acquisition of the photographs before Zillow became a broker is irrelevant. What is relevant is whether Zillow displayed Stross’ off-market listing photographs in violation of its license. The FAC alleged that is exactly what happened. R. 32-34.

The panel’s uncabined application of the “volitional-conduct requirement” appears to have been the cause of its mistaken conclusions. The volitional conduct requirement should have no application to license violations actionable as infringement where the licensee’s use rights change based on the terms of its license.

This court first characterized the “volitional-conduct requirement” as a necessary element of causation to prove copyright infringement in *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017). This court again applied the requirement to Zillow’s use of photographs in *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019). But the requirement of “volitional-conduct” makes

no sense where, as here, a licensee infringes by continuing to do something that their license prohibits them from doing past a point in time or occurrence of an event that limits the licensee's rights of use.

This court has previously allowed infringement claims to proceed against a party who did nothing more than continue using a copyrighted work after a license expired in the same way they did before the license expired with no volitional act in between. *See Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700 (9th Cir. 2004)(Defendant's continued to use images from a previously licensed film in its promotion of a line of watches after the film license expired was actionable infringement).

This case is no different. During the period of time covered by the *VHT* case, Zillow displayed the works in ways that this Court found to be non-infringing. Then, in July of 2021, Zillow's status changed to a broker and its license changed also to one that prohibited Zillow's display of ACTRIS photos of closed listings. Thereafter, Zillow's use of the works continued exactly as before in violation of Zillow's license making it an infringer with no volitional act on its part whatsoever. Simply because Zillow agreed to a new license restricting its use of Stross' photographs, Zillow became an infringer.

**c. The Panel Should Reassess this Court’s Application of the “Volitional-Conduct Requirement” in all Cases of Copyright Infringement, Especially Ones where, as here, the Infringer’s Continued Use Despite Notice Violated the Terms of a License**

It is a mistake to characterize the “volitional-conduct requirement” as either 1) an essential element of copyright infringement, or 2) necessary to demonstrate causation for copyright infringement. Neither characterization is true and neither has any foundation in Copyright law.

The “volitional-conduct requirement” demands human action to commit infringement. However, human action as an element of infringement has never been required. See *Seven Arts Filmed Entm’t Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (Direct infringement requires: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” (citation omitted)); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019, 1022 (9th Cir. 2001)(“To establish direct infringement, Blizzard must demonstrate copyright ownership and violation of one of its exclusive rights by Glider users.”)

It was established long ago that neither intent nor knowledge are necessary to infringe. See *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931) (Determining, under the 1909 Copyright Act, that “[i]ntention to infringe is not essential under the Act. And knowledge . . . is immaterial.”) (internal citations omitted). Requiring “volitional-conduct” is more akin to requiring willfulness

rather than a causal connection. Requiring a deliberate act by the defendant that directly leads to the infringement has never been necessary in the case of expiring or changing license requirements.

Causation is supposed to mean the link between an action and its effect, implying a “but for” relationship. In contrast, the “volitional-conduct requirement” focuses on the mental state behind an action, i.e. even if a machine or technology causes an infringement (a causative factor), it may not satisfy the “volitional-conduct requirement” if it lacks the element of conscious decision-making or intent. See *M. Chatterjee & J. Fromer*, *Minds, Machines, and the Law*, 119 *Columbia L. Rev.* 1887, 1889-90 (2020) (<https://ssrn.com/abstract=3392675>).

In this case, Zillow made a conscious decision after this Court decided *VHT* to become a real estate broker and assume all the responsibilities of a broker. Among those responsibilities Zillow assumed were licensing restrictions that apply to all real estate brokers in the Austin, Texas area. But the panel decision exempts Zillow from these restrictions. This court’s application of the “volitional-conduct requirement” created “automatic process immunity” for Zillow.<sup>1</sup>

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<sup>1</sup> This court has been criticized for its adoption and application of the “volitional-conduct requirement” that created this immunity. See *M. Lawless*, *Against Search Engine Volition*, 18 *Alb. L.J. Sci. & Tech.*, 205 (2008) (<https://www.albanylawscitech.org/article/19146>); *Chatterjee & Fromer*, 119 *Columbia L. Rev.* 1887; *R. May & C. Randolph*, *Volition Has No Role to Play in Determining Copyright Infringements*, 14 *Free State Found.* 1 (2019); *R. Merges*,

## CONCLUSION

The petition should be granted, the panel decision vacated, and the case restored to the calendar for reargument or resubmission. Upon reargument, the decision below should be reversed and remanded. If this court determines further amendment is necessary, leave to amend should be granted.

Dated: December 22, 2023

Respectfully submitted,

*/s/ Joel Rothman*

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Volition and Copyright Infringement, 37 Cardozo L. Rev. 1259 (2016).  
Consideration of these criticisms requires rehearing.

**CERTIFICATE OF COMPLIANCE FOR PETITIONS FOR  
REHEARING**

**9th Cir. Case Number(s)** 22-36000

I am the attorney or self-represented party.

**This brief contains 2,242 words**, including **0** words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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**Signature:** /s/ Joel B. Rothman

**Date:** December 22, 2023



## CERTIFICATE OF SERVICE

The undersigned does hereby certify that on December 22, 2023, I caused this Initial Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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UNITED STATES COURT OF APPEALS

DEC 8 2023

FOR THE NINTH CIRCUIT

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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, LLC<sup>1</sup> for direct copyright infringement, vicarious infringement, and

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\* 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).

<sup>1</sup> 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. Giganews, 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.”).<sup>2</sup>

**AFFIRMED.**

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<sup>2</sup> 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).