

**STRENGTHENING THE FOUNDATION:
THE REAL ESTATE LISTING CONTENT COPYRIGHT FAQ
AND
AN UPDATED PROGRAM TO ADMINISTER, SECURE AND ENHANCE
THE VALUE OF REAL ESTATE LISTING CONTENT**

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◆ **INTRODUCTION: WHY ARE WE PUBLISHING THESE FREQUENTLY ASKED QUESTIONS AND UPDATING OUR GUIDANCE PAPER?**

This is an exciting time for the real estate industry. Since publishing our guidance paper last year entitled “*How To Protect The Value Of Real Estate Property Listing Content For Content-Related Transactions*” (available online at <http://www.mris.com/news/papers/index.cfm>), this past year we have seen the emergence of several high profile initiatives proclaiming “new” and “improved” alternative business models that they propose will dramatically change the real estate industry. Additionally, there have been a variety of new offerings from existing industry participants that may also impact the way the industry thinks about -- and practices -- real estate.

Together with these new developments, we also have seen increasing focus on and discussion of issues related to real estate “data” ownership, usage, and copyrights, with a particular emphasis on real estate listings. This focus has created robust (and at times contentious) discussions not only about the present state of real estate practice, but also about the future of the industry in general. Complicating this discussion, copyrights and copyright law are subjects that are often misunderstood, and consequently misapplied.

The real estate practitioners (who arguably have the most pressing need to understand the evolving landscape) are bombarded with messages that too often obscure rather than clarify how the real estate industry should address copyrights and ownership issues. The following are typical of what we have seen during the past year (please note that these are characterizations, not direct quotes):

- ◆ Copyrights and all of the legal “mumbo jumbo” are merely evasions thrown out by the industry to distract and confuse. Real estate listings are *different* and should be treated differently than information in other industries.
- ◆ Real estate listings merely are collections of unprotectable data – free for all to use. They don’t belong to anybody. It’s in the public interest for it to be that way.
- ◆ Real estate listings belong to sellers – real estate professionals and multiple listing services merely transcribe materials that originate from the sellers. If they belong to anybody, it is the sellers.
- ◆ Copyrights and copyright infringement are merely “speed bumps” used to prevent progress and to keep new business models from competing. How can anyone claim that using real estate information is illegal or infringing when a use is intended to benefit the public?

. . . and the list goes on.

The result all too often is confusion, information overload and an understandable urge to throw up one's hands in exasperation. But, before this happens, we urge you to read the balance of this FAQ.

Our primary intention with the original discussion paper was to heighten the level of discourse on this most important topic. Based on the input we have received, new case law, and practical experience, we offer this updated version, including several of the more commonly asked questions. Our goal yet again is to help real estate professionals and other interested parties alike navigate through this torrent of information, and to arm them so that they may understand and reach their own conclusions about how to treat real estate information properly in today's networked world. Our proposition is straightforward: these conclusions should be based on – and be consistent with – the law.

By applying basic legal principles as they have been applied in other industries adapting to the Internet, we should be able to come to a better understanding of the issues, challenges, and most importantly, solutions. We believe these solutions will facilitate win-win results that accrue to the benefit of all parties. Candidly, the tenor and substance of the dialogues the authors have experienced this past year (coming from all fronts) has taught us that there is tremendous opportunity available to those willing to work cooperatively towards raising standards and practices for the entire industry.

To that end, we have transformed and updated last year's Guidance Paper into this document so that these complex issues can be understood and discussed more readily. We also hope that this paper can be a tool to dispel some of the misconceptions about copyrights and the law that currently are circulating throughout the industry.

◆ HOW DO I USE THIS DOCUMENT?

This document is divided into two primary parts.

Part 1 is this set of Frequently Asked Questions based on issues/questions that have been raised to us during the past year. **Part 1** explains in layman's terms why copyrights are important to our industry and underscores the value of the real estate professional and the work each professional creates. It also discusses what can be done to foster collaboration and information exchange in a manner that lawfully recognizes the value and contributions made by real estate professionals, and multiple listing services (MLS).

Part 2 is a more detailed explanation of the copyright laws and our updated program for real estate professionals and MLSs to create a comprehensive copyright program so that each contributor to a real estate listing may properly recognize the value of, and appropriately administer his or her rights in, real estate listing content. Also in **Part 2** we provide our recommendations about how to clarify the copyright rights of each contributor to a listing in a manner that (1) allows brokers to retain their copyrights in their listings, and (2) concurrently positions the MLS to register and enforce copyrights in the listing content, so that the content's value may be realized and maintained more effectively.

1. **FROM LISTING BOOKS TO E-LISTINGS: HOW HAS THE INTERNET CHANGED THE WAY REAL ESTATE INFORMATION IS PRESENTED AND DISSEMINATED?**

It wasn't too long ago that real estate listings primarily were paper products. They were created, organized and published on paper, and shared in paper format. Sharing was often among agents in the same office or among relatively small groups of professionals who had relationships with each other.

Multiple listing services originally grew out of the industry's desire to facilitate collaboration and sharing of information among real estate professionals (in different locations and of different affiliations) wishing to serve their clients more effectively. In today's parlance, MLSs grew up as B2B services provided to and for real estate industry professionals, to aid them in providing B2C services for the buyers and sellers of real estate.

From the early days of real estate, multiple listing services offered an opportunity for real estate professionals to move beyond traditional "hit-or-miss" advertising to the public. Using a multiple listing service, real estate professionals could exchange more detailed listing information with other professionals to help identify and pursue bona fide opportunities for their buyer and seller clients. In general, listings on the multiple listing services were more extensive than public advertisements, and contained additional information for use solely by other professionals (e.g., information that would not be appropriate for general public consumption, such as agent comments, showing instructions, and seller information intended for the agents-eyes-only). By using multiple listing services, real estate professionals were able to offer their clients the efficiency of using targeted information to respond to their clients' specific needs and requirements.

From collections of listing cards, to compilations printed by the multiple listing services in listing books, to the use of dumb terminals, through to the early stages of the Internet, the real estate listing has evolved to an even more expansive set of data elements, facts, and expressive content. By today's standards, yesterday's listings would appear unexciting and flat to the user.

The dazzling capacity of the Internet and today's computer technology to assemble, organize, store, access, display, and disseminate real estate listing information has permanently changed the ways that consumers and real estate professionals alike seek out and capitalize on the ever-growing number of resources available literally at their fingertips.

Now we can easily communicate and copy information in digital form. To be certain, the way we access, seek and use information in all areas of work and leisure is forever changed. Today, technology and the Internet have emerged as mainstream tools to facilitate real estate business transactions. As the public has embraced this technology, so too have the real estate industry and the online providers of real estate information. Real estate brokers and agents routinely maintain web sites that serve as "extranets" for clients to enable them to more effectively interact on a host of issues and services.

With the adoption of IDX, the information available on broker and agents web sites routinely goes beyond available properties in the marketplace. Publishing a practitioner's own listings and other listings (which he or she has permission to publish) continues to be essential. Additionally, these sites now regularly provide community information, calendars, seminar information, public school/increment weather updates, and a variety of other information intended to benefit the public. Agents and brokers have expanded their online communication suite to include other complementary communication forums such as print media, cable channel broadcasting, and direct mailings.

No longer limited to static, paper media or to expensive broadcast productions, today's electronic real estate listings offer users a variety of information in multiple formats, including text, photos, animations, and movies. Because the information is in digital form, it is easily updated, maintained and transmitted to a wide audience.

2. DOES THE INTERNET CHANGE THINGS SO FUNDAMENTALLY THAT "OLD" RULES DO NOT – AND CANNOT – APPLY?

No.

During and after the "dot com" boom and bust, industries continue to struggle with the question of whether, and how, to apply the old rules of law to the online world. Many have argued that the old rules should not apply to the Internet. In the early days of the Internet, some described the online world as akin to the wild, wild, west – a new frontier where the rule of law was yet to be established.

However, with the maturation of the Internet as a channel for business, it has become clear that the "old" rules do, and should, continue to apply, albeit now in a more contemporary form. Importantly, where the law is concerned, there is recognition that the fundamental legal principles underlying these rules can and should be applied in a "technology independent" fashion – in much the same way that they were applied to previous advances in technology during the twentieth century.

Consider recent developments affecting the music industry. During the past five years there have been prominent and well publicized legal battles fought over the practice known as peer-to-peer "file sharing". A number of businesses and online forums offered users the means to store, share and distribute music and software over the Internet.

Arguments justifying these practices abounded. With respect to music, some argued that file sharing was the natural response to the alleged high price of music CDs. Others decried the "monopoly" of the music industry, or claimed that no one should own music – music was "art" that should be free flowing without restriction. Some even argued that once music content was made available in digital form or on the Internet, the materials were made part of the "public domain" and consequently belonged to the world. Similar arguments often were made with respect to software – with a particular emphasis on gaming.

The high profile court battles recently fought by and against companies such as Napster and various peer-to-peer file sharing services, the various actions commenced by the Recording Industry Association of America (you can find information about several of these actions at the RIAA web site, via <http://www.riaa.com/news/filings/default.asp>), actions to curtail software piracy by groups such as the Business Software Alliance and various other organizations, as well as a host of other controversies, demonstrated that existing law, specifically copyright and other intellectual property laws, do apply to the Internet. Software and music content are and remain property, whether distributed online over the Internet, sold or copied on floppy disks, CDs or DVDs, or distributed in any other form or format.

Again consider the music industry. While these controversies progressed through the courts and the court of public opinion, new and updated business models addressing the online availability and distribution of music emerged and flourished. These models were based on working within the general rules established by the copyright laws, although with appropriate adjustments for particular practices.

We understand that opinions vary about specific tactics and strategies applied by the music and software industry; we are not advocating in this paper for or against any of these approaches. However, we do believe that the learning resulting from these controversies is highly relevant and important to the conduct of business online today. We believe that the lesson here is that there is similar opportunity for success in the real estate industry today for those having the vision to work cooperatively and non-contentiously with each other.

All of this debate has contributed to a growing awareness about property rights in the online world, with specific attention given to copyrights and other intellectual property rights.

3. WHAT ARE COPYRIGHTS AND WHY SHOULD THE REAL ESTATE INDUSTRY CARE ABOUT THEM?

Copyright rights are intangible intellectual property rights. They are created as a matter of federal law under the Copyright Act, 17 U.S.C. §§ 101 *et seq.* There are no state laws governing copyrights in the United States. The real estate industry should care about copyrights because the industry uses and relies upon many types of copyrighted materials, and the copyright laws establish the rules for using copyrightable subject matter.

What is copyrightable subject matter? Some examples are:

- ◆ Literary works, such as marketing materials and property descriptions;
- ◆ Pictorial and graphical works, such as photos and illustrations;
- ◆ Motion pictures and other audiovisual works, such as virtual tours and animated listing information;
- ◆ Sound recordings, such as voice recordings played on a website or in an advertisement; and

- ◆ Musical works, including any accompanying lyrics.

These categories are viewed broadly. For example, web sites, computer programs and most compilations are considered literary works protected by copyrights. Copyright protection extends to every representation, embodiment and manifestation of copyrighted materials.

Copyright rights are created automatically by operation of law the first time an “original” work of authorship is “fixed” in tangible media -- in essence, from the moment pen is put to paper, or your finger hits the keyboard to create new text, a copyright is created in the work product. Copyrights exist whether or not they are formally “registered”, although registration carries important benefits such as statutory damages for infringement and access to the courts to enforce the registered copyrights. In addition, under modern copyright law, copyrights exist whether or not a work includes a copyright notice, although including a copyright notice avoids confusion as to whether an author considers a work to be copyrighted.

“Original authorship” plus “fixation” are what create copyright rights. What this means is that you cannot, for example, copyright an idea. You can, however, have a copyright in the expression of an idea. Copying materials originally authored by another does not grant you a copyright since doing so does not meet the originality requirement. The exceptions to this general rule relate to specific circumstances where you obtain rights by operation of law (e.g., works created as “works made for hire”) or where copyrights are assigned to you by the rights holder.

Copyright rights also do not attach to purely factual materials; a “modicum of creativity” is required to meet the standard of copyrightability and the requirements of authorship. However, works may contain factual materials and still be copyrightable. Copyrights exist in the entirety of a work, even if elements of the work are not copyrightable (e.g., including a statistical table in an article does not make the article uncopyrightable).

Copyright law vests each copyright owner with five exclusive rights, which sometimes are referred to as the “bundle of rights” granted to the copyright owner:

- (1) to make reproductions of the work;
- (2) to adapt, modify and otherwise make “derivative works” based on the work;
- (3) to distribute the work publicly;
- (4) to display the work publicly; and
- (5) to perform the work publicly.

These exclusive copyright rights give the copyright owner the right to stop anyone from “copying” the copyright owner’s work without the copyright owner’s permission. The term “copying” is a shorthand term that applies to any violation of the copyright owner’s exclusive rights. The term “display,” in the copyright sense, refers to displaying static content such as a

single photograph or text. “Perform,” on the other hand, refers to displaying something dynamic in nature, such as a movie, a series of photographic “frames” or a video tour of a home.

In other words, as a general rule, you must have permission from the copyright owner to use or to commercially exploit copyrighted materials. While there are some exceptions to this rule (such as where a work is in the public domain or where a use qualifies as a “fair use” under the law), as a working premise it generally is safer to assume that if a work is copyrighted, permission is needed before the work may be used for a commercial purpose. This is discussed further in Section 11 of this FAQ.

It is important to understand that copyright rights are separate and distinct from the tangible property listing itself. That is, *possession* of a copy of a work is not the same as *ownership* of the copyrights in the work.

This is not always an obvious distinction. For example, you may think of a property listing as analogous to a book or a short story. You may read the book or give your copy of the book to someone else without implicating copyright. The book is the tangible property. You can use the ideas you obtain from reading the book. However, you cannot make additional copies of the book, adapt, modify or translate the book, distribute or sell the book, publicly display the book on the Internet or elsewhere, or publicly perform the book on the Internet or elsewhere without the copyright owner giving you permission.

Copyright rights also may be transferred or licensed. Under the Copyright Act, transferring copyrights requires a writing signed by the rights holder. Licensing copyrights essentially means granting permission to exercise one or more of the exclusive rights of the bundle of rights granted to the copyright owner. The exclusive copyright rights are severable – that is, the law allows copyright owners to transfer or license any or all of the rights in the bundle. The law also, except in certain limited circumstances, provides a copyright owner with the absolute right to choose whether – and to whom – any rights will be transferred or licensed.

4. HOW DOES ALL OF THIS APPLY TO REAL ESTATE LISTINGS?

As noted, with the advent this past year of new high profile businesses advancing varying business models for the industry, and the increased discussion about ownership and use of listings, copyrights and copyright questions are now center stage.

Some of the basic questions we have heard about the connection between copyrights and real estate listings include:

- ◆ Are listings copyrighted?
- ◆ Should they be?

- ◆ If they are copyrighted, what are the “rules of the road” for using listing content?

Perhaps the best place to start the discussion is with the terms we in the industry use to describe listing information.

5. IS “DATA” THE RIGHT TERM TO DESCRIBE THE INFORMATION CONTAINED IN REAL ESTATE LISTINGS?

This is an important question. Within the real estate industry, we often see terms such as “listing data,” “MLS data,” and “broker data” used to describe the information that comprises a real estate listing. Assertions that listing information is merely “data” underpin many of the arguments of those espousing the “MLS-is-a-public-utility” view, and the proponents of relegating listings to the realm of the “public domain” where use is free and unfettered.

But is the term “data” a misnomer? Is “content” a better descriptor?

We would argue yes on both counts. The term “data” implies non-protectable factual information. Who owns a fact? Thus the arguments that: (1) listing “data,” MLS “data” and broker data are merely data not worthy of being designated protectable “property,” and (2) because they are publicly available on the Internet, they are in the public domain.

But does this argument reflect the reality of what constitutes a real estate listing? For example, today’s real estate listings on MRIS include a combination of information such as photographs, house tours, floor plans, the agent’s original narrative commentary, maps, public record information, neighborhood information, list price, and more. This information is derived from a variety of sources, including sellers, agents, photographers, third party vendors, public agencies, as well as information provided by and through MRIS itself.

In addition, the information is collected, processed, selected, organized and arranged so that it presents the information in a useful format that we call the real estate listing. Online, some of these listings also engage the viewer in multimedia experiences (e.g., virtual tours). While some elements of the listings may not have the degree of creativity represented by, for instance, a song, when the totality of the listing is considered it becomes difficult to argue that the listing is comprised merely of unprotectable “data.”

For this reason, it seems that “content” is a better term to describe the information contained in real estate listings. The word “content” not only more accurately describes the information that is provided (when was the last time you saw a song or even a song lyric described as data?), it also implicitly recognizes the value inherent in the listing itself, and recognizes that the real estate listing is itself an item of property.

6. IS LISTING CONTENT PROTECTED BY COPYRIGHT?

Yes. Real estate listings are works of original authorship comprised of more than just a compilation of facts such as names, addresses, dimensions and public record information. As we discussed previously, copyright rights subsist in works as a whole. While listing content may not, on the surface, have the degree of creativity we associate with a song or a story or other types of so called “creative” works, there should be little question that listing content is protectable by copyrights. Protection does not depend upon (and is not a function of) the agent’s or broker’s “sweat equity” expended in obtaining or writing the listing. Rather, it is derived from the original creative composition of the listing itself.

Consider some of the elements of the typical listing. The original marketing description in the listing will usually meet the threshold of originality for copyright protection. Although there is debate on this matter, the list price for the property arguably is also protectable by copyright, since the list price can reflect the judgment of the real estate professional and/or the seller. As such, it arguably is a protectable valuation, not an unprotectable fact (at least until a sale is made and the list price becomes a factual sale price).

The typical listing also will include other expressive elements that qualify for copyright protection. For example, there appears to be a trend toward increasing the number and types of photographic images included in each listing, further expanding and underscoring the copyright-protected content in the listings. The same holds true for illustrations, floor plans and virtual tours.

Moreover, all of this content is created, selected from a variety of sources, arranged, organized and structured in an original manner.

Conceptually, it may be easier to think of digital listing content as analogous to the older printed hard-copy MLS listing books. While over the years many people have struggled with the question of how to treat digital information, focusing only on the media speaks to the *form* of the work, and not the *substance* of the work (which determines its copyrightability). The digital feed of an MLS database essentially represents the same “input” that traditionally was used to print MLS listing books. However, by digitizing this MLS database input, now it may be processed, organized, stored, accessed, used, transmitted, reproduced and displayed in virtually unlimited ways as the result of advances in technology. This does not change the answer to the substantive question: is the subject matter copyrighted.

7. WHEN AND HOW DOES A LISTING BECOME PROTECTABLE BY COPYRIGHT?

By law, copyright rights vest automatically from the moment of creation and fixation in tangible media. This means that a copyright is created at the same time the work is created and memorialized. When a photographer “snaps” a photograph, the photographer automatically obtains the copyright rights in the photo. Likewise, when an agent creates a new property listing by inputting the listing into an MLS system for the first time, a copyright is created in the listing.

By combining a photographer's photographic content with an agent's listing content to form a unitary listing, a single, integrated copyright protectable work is created. If the contributor of the photographic content and the contributor of the listing content are the same entity, then that entity owns the copyrights in the integrated work. If the contributors are different parties, then the integrated listing may be a joint work with co-owners of the copyright.

This last result, which may be surprising to some, underscores the need for the industry to maintain a program that clarifies, identifies, and allocates copyright rights clearly – since not doing so runs the risk that multiple contributors to a work may claim ownership rights as a result of their contributions. We discuss our recommendations for a copyright program that clarifies copyright for each contributor to a listing (up through the MLS) in the second part of this document.

8. WHO, IF ANYONE, OWNS THE COPYRIGHTS?

Copyright rights vest automatically in the author by operation of law from the moment of creation and fixation in tangible media. The starting point, then, for determining ownership is the creator, who, in the case of a typical real estate listing, is the agent.

If the agent is an *independent contractor*, then the agent owns the copyrights in the listing content he or she creates, *unless* the agent's rights are assigned (via a written assignment) to another party, such as the broker. However, if the agent is an *employee* of the broker or if the broker creates the listing content, then the broker owns the copyrights in the listing content. If an independent photographer (*i.e.*, non-employee) takes a photograph of the property, the photographer owns the copyrights in the photo, *unless* the photographer's rights are assigned to the party engaging the photographer. If an MLS or service provider creates the content, then the MLS or service provider owns the copyrights in the content it created.

If the initial copyright owner assigns (using a signed writing) the ownership of any copyrights in the content he or she creates to a broker or MLS, then the assignee (*i.e.*, the broker or MLS, as the case may be) owns the copyrights in the content for which the assignor was the copyright owner.

9. BUT AREN'T REAL ESTATE LISTINGS ON THE INTERNET IN THE PUBLIC DOMAIN?

No. Real estate listings displayed publicly on the Internet are not public domain materials. They are copyrighted content.

The term "public domain" in copyright-parlance is a term of art that essentially means that no copyright rights are attached to a work, and that the work may be used freely and without restriction. It does not mean that the work is publicly available. Real estate listings are copyright protected works.

There are several ways that a work may enter the public domain for purposes of copyright law. Despite common myths to the contrary, the act of digitizing a work or making it available on the Internet *does not* result in the work becoming part of the public domain.

Perhaps the most common ways that works enter the public domain are due to a copyright expiring through the passage of time, or by the copyright owner's abandoning its copyright rights (e.g., by affirmatively dedicating the work to the public domain, by waiving copyright rights to the work in writing, etc.). Works created by U.S. government employees working within the scope of their government employment also are considered to be in the public domain. Real estate listing content does not fall into these categories of public domain materials.

In fact, most of the content displayed on the Internet is not in the public domain for copyright purposes, even if the authors of such materials are unaware of this fact. Since copyright ownership vests automatically by operation of law, copyrights exist whether the author wants to acquire them or not. Copyright rights vest automatically without regard to intent. Remember as well that copyright ownership does not depend upon the presence of a copyright notice or upon registration with the U.S. Copyright Office.

10. WHAT DO COPYRIGHTS MEAN TO ME AS A REAL ESTATE PROFESSIONAL?

In short, it means that you have to pay attention to and take into account copyright rights whenever you consider using materials that are not your own, and whenever you make available your own – or someone else's – materials.

With respect to real estate listing content, this means that since the content is protected by copyright, it may only be "reproduced", "displayed", "distributed", "performed", or "adapted" (e.g., modified or translated) with the permission of the copyright owner. As a real estate professional, you need to assume that all listing content is protected by copyright and therefore owned by someone who has an interest in those rights.

If you are the copyright owner of the copyrights in the listing content, this means that you need to make sure you include your copyrights in a comprehensive program with provisions for registration and enforcement. You also should adopt policies that grant users of your copyrighted content the right to use the content for legitimate, enumerated purposes, but that also define the scope of use that is permitted. (We have provided several sample legal provisions in **Part 2** of this document that may help guide you in your decision. We also of course strongly encourage you to seek counsel specifically as it relates to your circumstance and your position in the value chain.)

Copyright licenses can be granted for any or all of the exclusive rights, separately or in combination. For example, you can authorize another broker or a third party web site to publicly display your copyrighted listings on their web site. If the licensed broker or other third party site exceeds the permitted scope by publicly displaying your copyrighted listings at

another web site or in another venue that you did not authorize, the scope of the license would be exceeded and the licensee would be engaging in copyright infringement.

11. DO I NEED PERMISSION TO USE SOMEONE ELSE'S LISTINGS, OR TO ALLOW SOMEONE ELSE TO USE MY RETS FEED OR OTHER INFORMATION FROM THE MULTIPLE LISTING SERVICE?

In almost all cases, the answer is "yes". It is important to understand that under copyright law, you do not have the right to use another's copyrighted works without the copyright owner's permission.

With Internet technology, the word "use" in legal parlance almost always means to "copy". The term "access" means to "make use of" or copy. Likewise, the words "display," "transmit," "distribute," "store," "adapt," "modify," and "reproduce" refer to other ways of "copying" the listing content. None of the exclusive copyright rights of the copyright owner may be engaged in with respect to their copyrighted listings without the copyright owner's permission. While it is possible that "use" may qualify as "fair use," most commercial uses of a listing will not so qualify ("fair use" under the copyright law is a term of art; we discuss fair use in Section 14).

This applies to RETS, IDX and other real estate listing content you may receive from or through an MLS. Unless your agreement with the provider of the feed authorizes you to sublicense or re-license the feeds for use by others, your doing so would constitute copyright infringement. Most MLSs have been empowered to protect the MLS database and the copyrighted content in the MLS database for the benefit of all brokers and agent subscribers who contribute and have access to the MLS database. The typical RETS/IDX license from a MLS limits the licensee's right to use content from the MLS database to specific enumerated uses. If you use the MLS database or parts of the database in excess of the authorized scope of your license, you are violating the copyrights in the MLS database and in all listing content not belonging to you.

Other considerations are that much of the third-party data and information that the MLS licenses from third parties are subject to their own use restrictions. In addition, there are regulatory restrictions imposed by the various states on advertising and other use of listing content that apply to the content contained in the feeds. These all limit the MLS's authority to grant its users rights in the database or its contents. These limitations flow-down to the licensees of the MLS, since the MLS cannot grant rights that it does not, itself, have. Thus, it is very important for RETS/IDX database licensees to be aware of and to comply with the licensing restrictions in their licenses.

12. FROM WHOM SHOULD I GET PERMISSION?

The short answer is: the copyright owner or the authorized licensee of the copyright owner. The term "authorized" is very important in this context. It means licensees who have the right to grant the permission sought from them. The easy way to think of this is to

remember the general rule that: “you cannot grant rights to someone else that you never had yourself.”

For example, if Agent A has permission to display Broker B’s listings on Agent A’s site, but not to display the listings on any other web site, then Agent A’s authorization is limited to displaying the listings on that one site.

- ◆ If Agent A enables or grants permission to another agent or web site to display Broker B’s listings or to redistribute or repurpose the listings, Agent A has exceeded the scope of his authorization and has infringed upon Broker B’s copyrights. Under this scenario, if the third agent or web site desires to use Broker B’s listings, Broker B’s – not Agent A’s – permission would be necessary.
- ◆ This is not to say that Agent A cannot allow the other agent or site to display Agent A’s own listings. Agent A simply cannot grant that authorization on behalf of Broker B.

The answer changes if Broker B has authorized Agent A to sublicense the right to display Broker B’s listings, provided that Agent A’s rights aren’t limited to a single site.

13. WHEN SHOULD I GET PERMISSION?

To answer that question, consider the following scenario. Because the copyright owner has the exclusive right to control the use of its copyrighted work, asking permission after the fact becomes analogous to borrowing your neighbor’s lawnmower without first asking permission. It doesn’t matter if the garage door was open or if the greater good is served by everyone’s having a neatly landscaped lawn. Apologizing after the fact doesn’t transform the original wrongful act into a proper one.

Several new industry participants declare that they only use content for which they have obtained permission. The key question, however, is whether they are obtaining permission from the party that has the right to grant permission to them. As a general rule, the permission should be from the copyright owner (or from a licensee that the copyright owner has given the necessary authority to grant permission for the intended use of the content). Consideration also must be given to whether the right person within the right organization is granting permission, since not all members of an organization will have the authority necessary to legally bind the organization (e.g., an agent may not have the authority to bind his or her broker).

This applies to MLS content as well. Continuing the scenario of Agent A and Broker B, from the previous section, if Agent A or Broker B is receiving MLS content through an IDX or RETS feed, then even if Agent A or Broker B has the right to license his or her own content to third parties, he or she would not have the right re-license or redistribute anyone else’s content in the feed unless the MLS providing the feed has granted permission to do so. Again, re-distributing or using such content without permission from the proper rights holder would be a copyright infringement.

Similarly, if the broker is the owner of the copyrights in a listing, then an agent (who typically is a third party contractor) seeking to advertise the listing in another venue must obtain permission from the broker to do so, even if the agent obtained the listing on behalf of the broker.

Seeking permission in advance of engaging in these types of activities would help to avoid these copyright infringement issues and the attendant liabilities. Remember that copyright ownership provides a legal remedy for preventing unauthorized users from displaying, distributing or otherwise copying listing content.

14. BUT WHAT ABOUT FAIR USE?

As mentioned, one instance where permission from a copyright owner is not necessary is when a use qualifies as a “fair use”. As mentioned earlier, the term “fair use” is a term of art in copyright practice, although “fair use” is not defined by the Copyright Act.

Fair use is an affirmative defense to a claim of infringement. That is, it is a shield which, in appropriate circumstances, may enable one to avoid liability for using another’s copyrighted materials. As a procedural matter, the alleged copyrighted infringer bears the burden of proving that a use qualifies as a fair use.

There is no “slam dunk” fair use analysis that can be applied across the board to all situations. The bottom line is that determining fair use is heavily dependent upon the specific facts and circumstances surrounding the use. The “traditional” fair use test requires a balancing of four factors:

- ◆ the purpose and character of the use (e.g., commercial vs. non-commercial; is the use for a fair and reasonable purpose such that permission should not be necessary);
- ◆ the nature of the copyrighted work;
- ◆ the amount and substantiality of the portion used; and
- ◆ the effect of the use upon the potential market for or value of the copyrighted works used.

In balancing these four factors, each must be explored and the results weighed together against the backdrop of the purposes underlying the copyright laws. In other words, each of these factors is weighed based on the circumstances surrounding the use and the intent of the use.

Generally speaking, it is much more difficult to claim that a commercial or for-profit use of another’s copyrighted materials is a fair use, compared to use for an educational purpose.

Similarly, it can be very difficult to claim that using key materials from a work (sometimes referred to as the “heart” or “core” of the work) is fair use. Quoting the paragraph identifying the murderer in a whodunit story in a book review is an oft cited example of what is *not* a fair use.

Accordingly, one must give careful consideration to each of these four factors before relying on a fair use as a defense to a claim of copyright infringement. For example, allowing a third party to use another’s listing content for a commercial purpose is less likely to be considered a fair use than a non-commercial purpose. Likewise, there is a difference between allowing a third party to use one’s entire RETS feed for the third party’s business purposes, and allowing one’s own service providers limited access for reasons related solely to one’s own business purposes.

15. SO WHERE DO WE GO FROM HERE? HOW DOES ALL OF THIS BENEFIT THE CONSUMERS, THE REAL ESTATE COMMUNITY, AND ENCOURAGE NEW BUSINESSES?

Real estate listing content has already proven to be very valuable on web sites. It attracts visitors to web sites and has the “stickiness” to keep visitors on the site they visit. Furthermore, experience has shown the listing content may be repurposed and used for purposes other than selling or renting real estate properties. This does not make the practice itself wrong if the owner or proper licensee of the copyrights has granted permission.

Copyright rights are essential not only to protect and secure the value of listing content, but also to ensure that the proper safeguards and quality control procedures are maintained so that those who use and rely upon real estate information can have confidence in the information they receive. If copyright owners could not police and control the use of their own works, it is more likely that real estate information will be misused and abused – and not always as a result of bad intention or bad faith.

One solution to address these concerns is to establish a copyright program administered through the brokers and the MLSs. We discuss our proposed structure for such a program in the second part of this paper. In short, we recommend that each MLS should implement, if it has not already done so, a copyright registration program, and for the brokers to piggy-back on this MLS registration program as it would not be cost-effective for brokers to register the copyrights in each listing.

If brokers implement their own copyright programs independently without regard to the MLSs, there is likely to be a wide variance in practices among brokers working with the same MLS. These differences could undercut the strength of the copyright program, and prevent the MLS from administering the program in a consistent manner across its constituency. Consistency will strengthen the copyright rights of all concerned.

In closing, we understand that there are a great deal of emotions, dollars, market perceptions, and more that surround this issue. Indeed, several have stated that “the horse is out of the barn and you are proposing where to build the fences!” In fairness, there is some truth to this statement as it is ultimately up to the owner of the copyright to make the decision “on where to build the fences, if at all.”

Our intention with this discussion paper is to remind those that can lawfully assert copyright rights that they have legitimate recourse at their disposal if they feel their rights are violated. Likewise, we wish to remind those seeking to use copyrighted materials that there is an appropriate procedure to follow if they desire to use those materials rightfully.

Yes, it will require work by all involved parties. But we strongly believe that use of copyrighted information should be done lawfully and with the complete permission of the copyright owner.