

**PART 2:**  
**AN UPDATED PROGRAM TO ADMINISTER, SECURE AND ENHANCE**  
**THE VALUE OF REAL ESTATE LISTING CONTENT \***

**A. OVERVIEW OF THE PROGRAM.**

It is our experience that until recently the real estate industry generally has not devoted enough attention to recognizing, securing and realizing the value of listing content. In an industry made up of busy professionals participating in a highly competitive, fast moving, business environment, this lack of attention is perhaps not surprising. It is a fact of life that busy real estate brokers and agents on the front lines of working with the public are unlikely to add “develop a copyright program” to the already long lists of demands on their attention. Who has that kind of time?

However, as we discussed in **Part 1**, with the advent of improved technology and the Internet, the real estate industry, like other industries, must become more proactive in addressing rights in the information content it generates and relies upon for the business of real estate. Information content is no longer merely a byproduct of real estate practice; it is an important, central asset having inherent value in the marketplace. A wealth of real estate information is created, maintained and disseminated on a daily basis through agents, brokers and multiple listing services. The digitalization of this real estate information has greatly increased its value.

New challenges arise as more businesses seek to access and use this information. It appears that the evolution of today’s markets, technologies and business models has resulted in a newfound focus on information ownership and a variety of questions about the rights to use information and content originating with others.<sup>1</sup> In addition, consideration must be given to the legal and ethical obligations imposed on real estate agents and brokers under state laws and regulations – and the consequences of non-compliance when operating in an online environment.<sup>2</sup>

---

\* **Part 2** of this Guidance Paper is adapted and updated from the original co-authored by David Charron and J.T. Westermeier. Versions of the earlier paper were distributed at “MLS Topics in the Tropics”, February 3-4, 2005, at Ft. Lauderdale, Florida, and at the Realty Alliance annual meeting in Sacramento, CA on March 30, 2005. A different version of **Part 2** was presented to a group of brokers from the San Francisco Association of Realtors on June 3, 2005 and an abbreviated version of the paper appeared in the April 2005 *Real Trends*.

<sup>1</sup> The limits on rights to use of copyrighted content without consent was emphasized by the District Court in *Perfect 10 v. Google, Inc.*, 2006 WL 454354 (C.D. Cal. February 17, 2006) which found that Google was likely to have infringed Perfect 10’s copyrights when it displayed “thumbnails” of Perfect 10’s copyrighted images on a Google “image search” function.

<sup>2</sup> Various state codes of ethics and licensing regulations address a host of issues having impact on the online listing and selling of real estate. These issues include, for example, obtaining proper permission from the seller to post listings in particular venues (which speaks to the seller’s right to

All of this led us to the development of our proposed “comprehensive” program for administering, securing and enhancing the value of the content embodied in real estate property listings (for ease of reference, we will refer to the program as the “Program” in this document). As discussed in **Part 1**, since listing content is copyright protected subject matter, our proposed Program is based on and focuses on principles of federal copyright law.<sup>3</sup>

In the following sections, we first discuss the “traditional” practices for protecting real estate property listings and the copyright principles underlying the Program. Then, we will describe our recommended practices as incorporated into the Program and the legal rationale for these practices.

A primary goal of the Program is to establish a collaborative framework for real estate professionals to work with each other and with their MLSs to more clearly and efficiently administer copyright rights in listing content. This allocation and administration should cover the entire chain of contributors to real estate listing content, from the originator of the content up through to the MLS, so that the value of the listing content can be realized and maintained more effectively.<sup>4</sup> Another goal is to enhance the value of the listing content by addressing the listing content as part of a comprehensive program that includes registration and enforcement.

The Program is comprised of the following:

1. Clarifying copyright ownership in each listing broker and in the MLS, without regard to the owners of the MLS, and also clarifying ownership and rights from the seller of a property up through to the listing broker and the MLS. This is accomplished through the use of written assignments and licenses from the appropriate rights holders.

2. Making each property listing a joint work owned by the broker and the MLS for copyright purposes. This joint work is created by merging each listing broker’s and MLS’s respective copyright contributions into a merged, unitary property listing with co-ownership of the respective copyrights. Joint ownership is a key building block of the Program.<sup>5</sup>

---

control who may advertise his or her property for sale and how the property may be advertised), obtaining permission for posting another agent or broker’s listings (and the attendant possibility of claims of interference with a business relationship between another agent and a seller), what disclosures must be made by the party posting a listing (e.g., the agent’s licensure and office address), etc.

<sup>3</sup> 17 U.S.C. §§ 101 *et seq.*

<sup>4</sup> We do not in this paper discuss practices for licensing third party content incorporated into real estate listings at the MLS level.

<sup>5</sup> Clearly there are other possible ways to structure the MLS-broker relationship with respect to copyright ownership. It is our belief that joint ownership between the broker and MLS has a number of benefits over other possible structures such as sole broker ownership or sole MLS ownership. By having joint ownership, the broker as the co-copyright owner maintains its ability to use its listing content for its

3. Developing and maintaining a copyright registration program with the U.S. Copyright Office, with the MLS registering and administering the copyrights in the entire MLS database through group registration procedures for automated databases. With the MLS as a joint owner of the listing content, these registrations would cover not only the compilation and collection of content in the database, but also would extend to the jointly owned copyrighted content in each individual listing. Clearly defining appropriate boundaries on what the MLS and broker each may do with the MLS database and the listing content.<sup>6</sup>

4. Establishing and maintaining a compliance program through the MLS to monitor misuse and infringement of the MLS database and of the listing content.

5. Establishing and maintaining an enforcement program to enforce copyright rights and the rights of the listing broker in the listing content, including the following:

- (1) Appointing and enabling the MLS to serve as an enforcement agent for the benefit of all brokers, so that enforcement is more consistent and not limited to each broker's defending its own contributions to the MLS database only.
- (2) Cease and desist letters to infringers.
- (3) Settlements.
- (4) Lawsuits when necessary.

The industry participants who would be tasked with administering the Program are the real estate brokers and the MLSs. We believe that brokers, as a general rule, are best positioned to address policies and practices among their agents and third party service providers such as photographers. Likewise, in our opinion, the MLS is in the best position to implement standardized policies and practices among all broker-subscribers, so that the broker-subscribers

---

business purposes, while concurrently positioning the MLS, as the other co-copyright owner, to register, police and, as necessary, enforce rights in the listing content of all of the brokers subscribing to the MLS.

Sole ownership of listing content by the MLS, absent additional agreements licensing rights back to the brokers, does not provide brokers with the same degree of freedom as joint ownership to use the content. Sole ownership by the broker does not enable the MLS to register and enforce rights on a consistent basis across its subscribership, since the MLS would be in the position of relying upon each broker's registering its own copyrights in its respective listing content, and then appointing the MLS to enforce the copyrights in the name of each broker. Of course, another option is to continue with today's practices which, as we will discuss, generally fails to deliver consistent results that fully recognize the value of the content.

<sup>6</sup> Parties who need to use the content should be licensed to make such use pursuant to a license agreement.

are treated in a consistent manner that reflects their contributions to the MLS database and their own contributions to the listing content.

As discussed in the following Sections, the Program is simple, cost effective and relatively easy to implement and maintain. While the Program is based on a number of copyright principles that are new to the real estate industry, these same principles have long been used to guide other industries. Once the legal infrastructure has been established, we believe that the Program's benefits will be rapidly realized.

## **B. TRADITIONAL PRACTICES: COMPILATION COPYRIGHTS.**

The so-called "traditional practices" for securing and protecting rights in multiple listing databases rely primarily on a "database-as-compilation" approach focused on addressing rights in the database itself without focusing on its content. As a result, these traditional practices often do not address directly the content in each individual property listing, except to the extent the listing content is protected by policies and contracts within the industry or contributed by the multiple listing service itself.<sup>7</sup> Compilations as a general proposition are challenging to protect by copyright because compilation copyrights only extend to the original selection and arrangement of a compilation.

Our recommended practice, which we address through the Program, is to provide separate copyright protection for each listing beyond the compilation. There are two reasons for this. First, the copyright protection for automated databases as compilations is even weaker than the protection accorded more "traditional", hard-copy compilations. Second, because the listings themselves are copyrighted, protecting each listing directly would afford much stronger protection to the entirety of the database.

This point was emphasized by the U.S. Supreme Court several years ago in an important case, *N.Y. Times Co. v. Tasini*.<sup>8</sup> In the *Tasini* case, the free-lance authors who wrote articles published in the *New York Times* and other publications were found to own the copyright in their articles, not the *New York Times* or other publications that merely owned the compilation copyright for their respective publications. The Supreme Court stressed that when a user conducts a search of an electronic database of old newspaper issues, each article appears as a separate item within the search result generated using the search and retrieval software. The electronic databases in *Tasini* (such as the NEXIS database) did not perceptively reproduce articles as part of a collective work, but rather reproduced the specific individual article by itself

---

<sup>7</sup> By comparison, the Program seeks to address rights not only in the database as a compilation and collection of property listings, but also by addressing rights in the content in each individual property listing.

<sup>8</sup> 553 U.S. 483 (2001).

or along with other articles that met the search criteria.<sup>9</sup> For example, using search and retrieval software, a single article in the newspaper may be generated based on the search criteria without regard for any other article in the newspaper that day, or to the sequence and arrangement of the articles in the newspaper.

Displaying property listings on the Internet makes it essential that a legal structure be developed and maintained that directly protects the content of each individual listing.<sup>10</sup> We believe that with Internet access to an MLS database, MLSs and brokers must, by necessity, seek to protect each property listing in the MLS database on an individual basis.

The benefit of copyright protection at the level of the individual property listing also was underscored by the *Nautical Solutions Marketing, Inc. v. Boats.com* court ruling.<sup>11</sup> This case concerned two competing websites that listed yachts for sale. Boats.com did not own any copyrights in the yacht listings posted by brokers on the Boats.com website. The brokers retained the copyrights in the descriptive listings they wrote and the photos of the yachts they posted. Yachtbroker.com used an Internet spider to extract the facts from yacht listings posted on the boats.com website and indexed the extracted facts in a searchable database available to users of the Yachtbroker.com website. Boats.com did not have any protectable copyright interest in the posted listings and claims based on the “layout” of the boats.com website did not provide any legal protection for the individual yacht listings. The court found that because Yachtbroker.com’s “compilation” of yacht listings was not “virtually identical” to Yachtworld.com’s compilation, there was no compilation infringement. This court ruling reinforces the need for a protective scheme that protects each individual property listing against information piracy.

Using “traditional practices”, the real estate industry generally has not done a very good job of clarifying and solidifying copyright ownership, and relatively little effort or care has been paid to copyright ownership of the expressive copyright-protectable content in the property listings. For example, it is our understanding that many MLSs and brokers have not used copyright assignment clauses in their agreements with their agents, subscribers or third parties to vest copyright ownership in the appropriate parties. The Program uses copyright assignments as well as registration at the U.S. Copyright Office to clarify and strengthen claims of copyright ownership.

---

<sup>9</sup> This point also was more recently made in *Auscape International v. National Geographic Society*, 2004 U.S. Dist. LEXIS 15764 (S.D. N.Y. August 12, 2004), *aff'd in part, reversed in part and remanded*, 409 F. 3d 26 (2d. Cir. March 4, 2005), where electronic databases were viewed differently than other forms of reproduction because the user is allowed to view the individual article standing alone, apart from the contexts in which they appeared in the original collective works.

<sup>10</sup> One of the exclusive rights of the copyright owner is the right to display the copyrighted material publicly. See *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997).

<sup>11</sup> 2004 U.S. Dist. LEXIS 6304 (M.D. Fla. April 1, 2004).

Given the number of listings in a typical MLS database and the number of updates occurring on a daily basis, as a practical matter registering the claims of copyright ownership in each individual listing with the U.S. Copyright Office is impractical and not cost effective. What we contend is needed is a practical strategy that protects the copyrights in each individual property listing as well as the compilation and collection of property listings contained in the MLS database.

The Program takes advantage of the Copyright Office Group Registration procedures for registering copyright claims in the MLS automated database to extend the protection to the copyrightable content in each property listing. The Program uses copyrighted joint works and copyright assignments to protect the database as well as the copyrightable content in the database. As shown below, brokers benefit from solidifying copyright ownership jointly in both the broker and the MLS, irrespective of the MLS's ownership structure. Joint ownership assures that brokers remain owners while assuring that MLSs may undertake content management, distribution and copyright enforcement programs (as authorized by the brokers) for the benefit of all brokers. Joint ownership is a "win-win" strategy.

### **C. BASIC COPYRIGHT PRINCIPLES.**

The first copyright principle underlying the Program is that real estate listing content is an original written work of authorship protected by the Federal Copyright laws.

#### **1. COPYRIGHT SUBJECT MATTER.**

Copyright rights subsist in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Originality and fixation in tangible form are the two fundamental criteria for copyright protection. Copyright rights occur automatically from the moment of creation and fixation in tangible form. This automatic vesting principle is very important in connection with the Program because it accommodates copyright assignments from the agent (who creates the original property listing) and any photographer (who "snaps" the original photo or photos of the listing property) engaged by the agent or the broker.

The copyright laws cover a wide range of works, in whatever form they might be prepared, stored or recast by present or future technology. The medium in which an original work of authorship is prepared, stored or disseminated is irrelevant as long as the work meets the originality requirement and is fixed in at least one tangible form.

#### **2. ORIGINALITY.**

Originality is a constitutionally mandated prerequisite for copyright protection. For a work to be considered "original," it cannot be substantially copied from another work and it must demonstrate a modicum of creativity.

This originality requirement is relatively easy to meet. The requirement does not demand that novelty or uniqueness be present. No artistic merit or beauty is required. The creativity threshold for copyrightability is quite low. A work is original in the copyright sense if it owes its origin to the author and was not copied from some preexisting work. As discussed, we believe strongly that a real estate property listing meets the originality requirements for copyright protection.

A work can incorporate pre-existing material with permission of the author, and still be original. When a pre-existing work is included in a new work, the copyright on the new work extends only to the original material contributed by the author.

In other words, as we discussed in **Part 1**, think of a property listing as a work for copyright purposes. Some portions of the work are expressive copyright-protectable elements. Clearly, for example, the photo or photos of the property included in the property listing are protectable by copyright.<sup>12</sup> Most agent descriptions of the property are also likely to rise above the low threshold of originality needed for copyright protection.<sup>13</sup> The MLS number assigned to a listing is arbitrary and reflects the sequence of the listing in the MLS database. We also believe that the “listing price” is protectable by copyright in and of itself (we will explain this legal position respecting the list price below).

Since the property listing includes expressive copyright-protectable content, the property listing is, as a whole, a copyright-protected work even if some or even much of the content in the listing is factual information not protected by copyright. For example, let’s say you had compiled a book with many factual tables generated from government publications. The facts are not themselves protectable by copyright; however, the original text analyzing the facts is protectable by copyright such that the book as a whole is protectable by copyright.

---

<sup>12</sup> For example, in *Perry v. Sonic Graphic Systems, Inc.*, 94 F. Supp. 2d 616, 621 (E.D. Pa. 2000), the defendant’s use of plaintiff’s photographs posted on the website without permission infringed the copyright owner’s rights. In *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 1999 WL 503955 (D. Nev. July 12, 1999), the court found defendant’s scanning of a 1998 image of the Las Vegas strip to be an act of copyright infringement. In this ruling, the court notes it is basic copyright law that a photograph possesses a wide range of protectable elements, including the collective arrangement of points of interest to create pleasing configurations in the photo. In *Batesville Services, Inc. v. Funeral Depot, Inc.*, 2004 U.S. Dist. LEXIS 24336 (S.D. Nov. 10, 2004) (copyright infringement by linking to infringing photographs of caskets); *Schiffer Publishing, Ltd. v. Chronicle Books, LLC*, 2004 U.S. Dist. LEXIS 23052 (E.D. Pa. Nov. 12, 2004) (copyright infringement of photographs of fabric swatches).

<sup>13</sup> For example, in *MyWebGrocer, LLC v. HomeTown Info, Inc.*, 375 F. 3d 190 (2d Cir. July 13, 2004), MyWebGrocer claimed copyright protection in its product descriptions used on its online grocery store. It owned a copyright in its website which extended to about 18,000 product descriptions. The court noted that these product descriptions included creative choices in the wording to facilitate and promote online shopping. These descriptions of products are far less expressive than the descriptions of real estate properties.

For compilations such as MLS databases, this copyrightable originality may extend only to the selection, coordination, and arrangement of the pre-existing materials if the MLS has not contributed text, photos, graphics or other expressive content elements. Nevertheless, it is important to keep in mind that any copyright in a work applies to the work as a whole. A MLS will own a compilation copyright or collective work copyright in the MLS database. These copyright rights will extend to copyrightable material the MLS contributed to the work. Joint copyright ownership, as provided by the Program, permits the MLS to claim copyright ownership (together with the applicable listing broker) of the copyrightable content in each individual listing in the MLS database that is jointly owned.

### 3. LIST PRICE AS COPYRIGHTABLE.

We believe the “list price” included in a property listing should be treated as an expressive, copyright-protectable element rather than as a non-protectable fact. We believe the “list price” should be distinguished from the “sale price” – which is a non-protectable fact.

The “list price” is a subjective and judgmental valuation of what the property should sell for. Based on existing legal precedents, a very good argument can be made that the list price is an expressive, copyright-protectable element. In *CDN, Inc. v. Kapes*,<sup>14</sup> the Ninth Circuit Court of Appeals determined that the estimated wholesale price for coins was protectable by copyright. In *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*,<sup>15</sup> the Second Circuit Court of Appeals found that valuations of used cars in the “Red Book” were protectable by copyright in and of themselves.

Similarly, in *Marshall & Swift v. BS&A Software*,<sup>16</sup> the district court ruled that the real estate appraisals then disputed were protectable by copyright. Market predictions, valuations or appraisals have been found to be copyrightable expressive elements in a work even though they are expressed merely as a number. Numbers and symbols may be used to express ideas just like words are used. In these cases, the protectable numbers were found to be infused with the judgment and selection that are the subject matter of copyright. While situations no doubt will exist where the list price may not be infused with the judgment and selection of a real estate professional, we believe in many situations the list price will reflect the agent’s assessment of the market, comparables, quality of the property, the seller’s desires and other circumstances.

Under these circumstances, we believe the list price should be copyrightable in and of itself, although we recognize that opinions may differ on this point. The list price essentially is a short-hand way of saying the seller has valued the property at “x” dollars for purposes of selling the property. When the list price is superseded by the “sales price”, the sales price

---

<sup>14</sup> 197 F.3d 1256 (9<sup>th</sup> Cir. 1999).

<sup>15</sup> 33 U.S.P.D.2d 1183 (2d Cir. 1994), *cert. denied*, 118 S. Ct. 397 (1997).

<sup>16</sup> 871 F. Supp. 952 (W.D. Mich. 1994).

becomes a non-protectable fact.<sup>17</sup> We submit that by protecting the photographic images, the list price and marketing description, the real estate industry should be able to protect the content of real estate listings against almost every form of unauthorized reproduction, distribution, modification and display.

#### 4. COPYRIGHTS ARE INTANGIBLE RIGHTS SEPARATE FROM THE EMBODIMENT OF A WORK.

Before addressing copyright ownership, we want to address another principle that we touched upon in **Part 1**, namely that the rights under copyright law are separate and distinct from their physical embodiment. That is, the intangible copyright rights are separate and distinct from the tangible property in which the work is embodied. Mere ownership of a property listing or photo does not give the possessor the copyright unless the possessor also was the author or assignee of rights in the property listing, or the possessor was the photographer who took the photo.

The law provides that transfer of ownership of any material object that embodies a protected work (e.g., photo, property listing or other expressive content) does not in and of itself convey any rights in the copyright related to the material object. For example, you may own a copy of a book; however, the ownership of the intangible copyrights represented by the book is retained by the author or publisher of the book. The intangible copyright rights and tangible property rights may be treated separately.

#### 5. NATURE OF THE MLS DATABASE.

As noted, the Program treats the MLS database as both a “collective work” and a “compilation” under the copyright laws. This is possible because the joint owners of each listing are not the same throughout the database.

Under the copyright law, the term “collective work” is a work “in which a number of contributions, constituting separate and interdependent works in themselves, are assembled into a collective whole”.<sup>18</sup> The copyright law recognizes that each property listing in a “collective work” is a separate and independent work in and of itself. You can think of a collective work as a book of short stories with each short story being a separate and independent short story.

Applied to an MLS database, each property listing is a separate short story in the MLS database. The fact of different joint copyright owners as the result of different listing brokers

---

<sup>17</sup> This chameleon nature of copyrighted works is shown by *Veeck v. Southern Building Code Congress*, 7293 F.3d 791 (5<sup>th</sup> Cir. June 7, 2002). In that case, the Fifth Circuit acknowledged copyright rights in the author of a draft model ordinance; however, the author lost the copyrights in the draft ordinance to the extent the ordinance was adopted by a municipality because once enacted the statute became part of the public domain and lost protectability under the copyright laws.

<sup>18</sup> 17 U.S.C. § 101.

including their “short stories” in the database allows the MLS database to be viewed as a collection of “short stories”. Joint authorship by the MLS and the brokers permits this treatment. If there was only a single author, the database would be viewed as a single work and not a collection of works.

The term “compilation” is defined as a “work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship”.<sup>19</sup> The Program refers to the MLS database as both a collection and a compilation even though the term “compilation” includes collective works. A collection includes separate and independent works in themselves, that are assembled into a collective whole.

## 6. COPYRIGHT OWNERSHIP.

The author of the work is the initial owner of the copyright in that work. As discussed in **Part 1**, copyright ownership vests automatically by operation of law from the moment the work is created. If an agent “authored” the listing, then the agent owns the copyrights created in the listing. Similarly, if the agent “snapped” a photo of the property, then the agent owns the copyrights in the photo. If an independent photographer takes the photo, the photographer owns the copyrights in the photo. If the agent or photographer is an employee rather than an independent contractor, then the respective employer owns the copyrights in the works they create within the scope of their employment.

If the broker has an agreement with its agents providing that the broker owns the listings obtained by the listing agent, this agreement, without more, still may be ineffective from the perspective of vesting copyright ownership in the broker. Because copyrights vest automatically (by operation of law) and are separate and distinct from the tangible listing itself, the declaration of ownership in the listing is not likely to extend to the intangible copyrights unless they are specifically assigned in writing to the broker.<sup>20</sup>

As noted, the Program seeks to clarify copyright ownership using copyright assignments to simplify and strengthen copyright ownership. Under the Program, copyright ownership is vested first in each applicable listing broker and, for purposes of administration, registration and enforcement, then jointly between the broker and the MLS serving the broker.<sup>21</sup>

Joint ownership provides many advantages facilitating a division of labor among the MLS and its principal brokers and a stronger copyright program for the benefit of the industry.

---

<sup>19</sup> *Id.*

<sup>20</sup> Federal copyright law trumps any conflicting state law. While contracts are interpreted under state law, as to copyright matters such contracts must be construed consistent with copyright law and policy. As such, it is very important that copyright ownership be addressed in writing effectively.

<sup>21</sup> The means for accomplishing this is discussed in Section D.

We believe that joint ownership is a “win-win” situation for the broker and its serving MLS.<sup>22</sup> It is one of the key legal strategies in the design and implementation of a comprehensive copyright protection program for real estate listing content.

## 7. JOINT WORKS.

The Copyright Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or independent parts of a unitary whole.”<sup>23</sup> The Program seeks to merge the broker contribution with the MLS contribution to create an inseparable, combined unitary property listing. The copyrights are owned in the unitary property listing that includes the photo or photos, the listing information and third-party content added during the process of completing the listing.

Joint copyright ownership in each property listing permits the listing broker to exploit commercially their rights to the full extent permitted by the copyright laws. Joint ownership benefits brokers, recognizes the copyrightable contributions by the MLS, and grants the broker a non-exclusive, joint ownership interest in the entire property listing. In many cases, the scope of the broker’s copyright ownership will be expanded through joint ownership by including additional expressive elements that would otherwise not be included within the broker’s copyright.

Previously, under the industry’s traditional practices, brokers often lacked the desired legal certainty as to the ownership of the copyrights in each individual listing. Industry practices have avoided proactively protecting property listings because the real estate industry has been perplexed by the issue of who owns the content. This Program resolves and clarifies this ownership question and creates enforceable copyright rights.

Past practices in the real estate industry generally fail to recognize joint works even though joint ownership appears to be a fact of life, whether wanted or not, based on the way many brokers interact with their MLS, and based on the way property listings are created jointly. In contrast, the Program seeks to recognize – expressly – the joint ownership of the copyrights in the listings and take advantage of the joint ownership to devise copyright registration, copyright infringement monitoring and copyright enforcement programs for the benefit of both copyright owners and the industry as a whole. Accordingly, for greater certainty we recommend that joint ownership be implemented as a contractual matter through the subscriber agreement between the MLS and the listing broker. Brokers and MLSs will need to reach agreement on the division of labor and use of the content so that there are no concerns about joint ownership. It is important to note that these agreements can be reached at any time under the Program. The enforceability of the copyrights is not conditioned upon reaching these agreements.

---

<sup>22</sup> See footnote 5, above, and Section D, below for further discussion of these benefits.

<sup>23</sup> 17 U.S.C. § 101.

## 8. EFFECT OF JOINT OWNERSHIP.

Joint ownership of the copyrights in a “merged” unitary property listing means that both co-owners own non-exclusive, indivisible copyrights in the whole work. Think of the ownership as similar to the joint ownership that spouses both have in their home as a whole.

With the joint ownership of the copyrights in each property listing, the applicable listing broker and the MLS serving the broker will each own an indivisible interest in the copyrights in the applicable listing as a whole. This joint ownership has many additional benefits with respect to copyright registration and enforcement.

The Program uses the Copyright Office’s Group Registration procedures for automated databases. To take full advantage of this type of registration, the registration of the MLS’s claims of copyright ownership in the MLS database should be updated quarterly. The copyright registration covers the selection and arrangement of the property listings as well as any original copyrightable material contributed by the MLS.

The registration with the Copyright Office is broad enough to cover the MLS’s claims of copyright ownership in each property listing for which the MLS is a joint copyright owner. As such, the MLS copyright registration extends to and covers the jointly owned content of each individual property listing. As discussed previously, the copyright owner of a collective work owns the copyrights in the collection; this copyright also extends to the copyrights in the constituent parts of the collection for which the copyright owner co-owns the copyrights with other co-owners of the constituent parts.<sup>24</sup>

## 9. WRITTEN COPYRIGHT ASSIGNMENTS.

Written copyright assignments are a key part of the Program. Section 204(a) of the Copyright Act provides that “[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent”. To be effective, copyright assignments must be in writing and signed by the copyright holder.

Written copyright assignments are required to transfer the ownership of the copyrights vested in the agent to the agent’s principal broker. Similarly, written copyright assignments are necessary to transfer the ownership of copyrights in the photos from the agents to the MLS. Likewise, there may be other written assignments necessary to vest copyright ownership in the applicable listing broker and the MLS.

By including the copyright assignments, courts are more likely to recognize the copyright rights. As such, the copyright assignments both clarify and strengthen the ownership

---

<sup>24</sup> See *Morris v. Business Concepts, Inc.*, 283 F.3d 502 (2d Cir. 2002).

of copyrights. For example, to prove copyright infringement, the copyright owner must prove copyright ownership and unauthorized copying of the copyrighted work. By clarifying the “copyright” contributions owned by the applicable listing broker and the MLS, we believe the copyright ownership in each jointly-owned property listing is clarified and strengthened. Clear copyright rights add value to each listing. The Program enhances the value of the content in property listings because the copyright rights are part of a comprehensive program that includes not only registration, but also enforcement.

#### **D. THE PROGRAM.**

In developing this Program, we have borrowed ideas from a number of successful copyright enforcement models in the music, movie and software industries.<sup>25</sup> Again, it appears to us that the MLS is best situated to carry out these enforcement activities on behalf of all listing brokers since the likelihood is that any infringement will relate to many different brokers, rather than a single broker.

We believe that the Program is simple, cost effective and easy to implement and maintain. While the Program is based on a number of copyright principles that are new to the real estate industry, the Program should prove simple and cost effective once the legal infrastructure has been established. Based on blanket agreements and assignments that will be put in place among the brokers, agents, photographers, information service providers and MLSs, the desired copyright ownership will occur automatically each time a new fully-integrated property listing is created on the MLS system.

Under the Program, the MLS is tasked with the obligation of filing the quarterly application for copyright registration of the MLS automated database. The group registration covers the compilation and collection of property listings throughout the quarter, including, without limitation each of the property listings that are constituent elements of the MLS database any time during the covered period. The MLS also can implement a content monitoring and enforcement program on behalf of the MLS and all its brokers. Implementation of this program does not require the commitment of broker resources. However, the broker can use its copyright ownership and copyright remedies to prevent unauthorized use or misuse of the broker’s copyrighted listings.

##### **1. SELLER CONTRIBUTIONS.**

Sellers (e.g., homeowners) will sometimes provide agents photographs, floor plans and other copyrightable materials related to the property being listed for sale or rent. Our

---

<sup>25</sup> For example, in the music industry the Recording Industry Association of America is appointed by some record companies to bring enforcement activities on their behalf. In the software industry, groups such as the Business Software Alliance are likewise appointed by participating software companies to bring enforcement actions on their behalf. Other groups such as the Copyright Clearance Center, BMI and ASCAP act as clearinghouses for administering the granting of licenses for use of various types of content.

recommended strategy is to include a copyright license for these “Seller Materials” in the listing agreement between the Seller and the Broker’s Agent with the Seller granting the listing Broker/Agent a broad copyright license in and to the Seller Materials, including the right to create derivative works based on any Seller Materials.

We recommend this strategy for a number of reasons. First, we believe that a non-exclusive license in and to the Seller’s Materials is much more customer-friendly than asking sellers to assign and transfer the ownership of any copyrights to the Broker/Agent. We believe you can achieve your copyright objectives without requiring the seller to part with the ownership of the copyrights in the materials the Seller provides the Broker/Agent. Furthermore, in the event that the relationship between the Seller and the initial listing Broker/Agent terminates, the Seller can license the same or similar materials to the successor listing Broker/Agent without the first Broker/Agent having to transfer ownership of the copyrights back to the Seller.

We recommend that listing agreements be revised to include a contract term that provides substantially as follows:

*Seller Materials. The term “Seller Materials” collectively means any photographs, floor plans, art work, schematics and other works of original authorship related to the Property that Seller provides to Broker/Agent in connection with this Agreement. In the event Seller provides any Seller Materials to Broker/Agent, Seller hereby grants Broker/Agent a non-exclusive right and license to use, merge, incorporate with other materials, reproduce, cache, store, digitize, display publicly, perform publicly, perform electronically, modify, adapt, transmit and distribute any of the Seller Materials in any manner and media now or in the future available and to create derivative works based upon any of the Seller Materials, and to authorize real estate brokers, agents, Multiple Listing Services, advertisers and others (through multiple tiers) to do any of the foregoing in connection with this Agreement.*

*Seller represents to Broker/Agent that Seller is authorized to grant the foregoing license with respect to the Seller Materials. Following termination of this Agreement for any reason upon request from Seller, the Broker/Agent will return any Seller Materials to Seller in the form provided by Seller.*

This provision defines Seller Materials and grants a broad, non-exclusive license to the Broker/Agent in and to such Seller Materials. The Seller also provides a representation that the Seller has the right to grant the license and provides for return of the Seller Materials following termination. The key to this Seller Materials provision is the right to create derivative works. Once a derivative work is created pursuant to this authorization from the Seller, a new copyright for the derivative work springs into existence. Under Section 203(b) of the Copyright Act, the Seller cannot terminate the copyright owner’s rights in the derivative work based upon or otherwise incorporating the Seller Materials. As such, we believe the Seller Materials can remain a part of the listing to the extent the Seller Materials were included in the listing content related to the Seller’s property.

## 2. AGENTS.

It is common in many industries for independent contractors to assign the copyrights in their work product to the party for whom they are performing their services. This contract term is frequently described as a “work for hire” provision. We recommend that the agreement between the principal licensed broker and its agents include a “work for hire” copyright ownership provision assigning and transferring to the Broker the ownership of the copyrights in any property listings created by the Agent. We believe the agreements between brokers and their agents should explicitly address copyright rights. Below is a suggested contract term:

*Assignment and License Back. Agent agrees to assign to Broker and hereby does irrevocably assign to Broker, without the necessity of any additional consideration, all of Agent’s right, title and interest in any copyright rights or other intellectual property rights in any property listing (collectively, the “Content”), posted by Agent on the MLS System or otherwise provided to the MLS. Such right, title and interest shall be deemed assigned as of the moment of creation without any further action on the part of either party.*

*During and after the term of this agreement, Agent shall confirm such assignment by executing and delivering such assignments or other instruments and take any action necessary to enable Broker to secure, protect, enforce and defend its copyrights in such Content.*

*Broker hereby grants Agent a nonexclusive license to use, reproduce, adapt, modify, display, perform, store, cache, distribute any such Content, in whole or in part, in any manner or through any media, in connection with promoting or advertising the sale or rental of the Property for which the Content relates and otherwise to promote Agent to other sellers and buyers of real estate and to authorize others to do any of the foregoing.*

The contract term vests ownership of any copyrights in any copyrightable content created by the Agent in the Broker from the moment the copyrights are created. The assignment also includes any other intellectual property rights in the listing content that the Agent has. This provision could be included in a new agreement between brokers and their agents or in an amendment to any existing agreement between brokers and their agents. To be effective, the conveyance assigning and transferring the ownership of any copyrights from the agent to the broker must be in writing and signed by the copyright owner. Our program treats the Agent as the original copyright owner, thereby necessitating the written assignment to the Broker to consolidate copyright ownership of this content in the Broker.

With copyright ownership being consolidated in the Broker, we recommend that the Broker grant a copyright license back to the Agent so that the Agent can continue to use the content to promote and advertise the property for which the licensed content relates and use the content as well in connection with the Agent’s portfolio to promote the Agent to other sellers and buyers.

Another way of dealing with the copyright assignment from the Agent to the Broker is through the subscriber agreement each Agent signs with the MLS that is serving the Broker and

its Agents. If there is direct privity of contract between each Agent and the MLS, the contract between the MLS and the Agent can include a copyright assignment to the Broker even though the Broker is not a party to the agreement with the MLS or is only identified as the responsible Principal Broker for the Agent. To further reinforce the ownership of the copyrights, we recommend including a copyright assignment provision in the Agent's agreement with the MLS even if the agreement between the Broker and the Agent has a "work-for-hire" provision. For example:

*All property listing information and other content (collectively, the "Content") submitted by Agent for inclusion in the MLS System shall be owned by Agent's Broker. To confirm this ownership, Agent hereby irrevocably assigns to Agent's Broker, all right, title and interest in any and all such Content including the ownership of any copyright rights related to and in any such Content from the moment of creation and fixation in tangible media, subject to Broker's non-exclusive license back to Agent to use, reproduce, adapt, modify, display, perform, store, cache, distribute any such content, in whole or in part, in any manner or through any media, now or in the future available, in connection with promoting or advertising the sale or rental of any Property listed by Agent or to promote Agent to other sellers and buyers and to authorize others to do any of the foregoing.*

Since the Broker is not a signatory to this Agreement, the license back to the Agent is not referred to as a license grant but rather a condition of the Agent's assignment to the Broker. The intent is to clarify and strengthen the rights of both the Brokers and Agents.

### 3. PHOTOGRAPHERS.

If a Broker has an agreement with photographers to take photographs of listed properties for his or her agents, the photographer's agreement should assign the ownership of the copyrights in the photos to the Broker, as works for hire.

*[Photo Company] agrees to assign to Broker and hereby does irrevocably assign to Broker, without the necessity of any additional consideration, all of the [Photo Company's] right, title and interest in any and all Photos, including the ownership of any copyright rights related to and in any such Photos, from the moment of creation and fixation in tangible media.*

It is important to make sure that the Photo Company has a provision in its contract with its photographers assigning the rights to the Photo Company so that the Photo Company has all of the necessary rights when the assignment is made to the Broker. If there are multiple tiers of independent contractor photographers, it is important to make sure each independent contractor assigns his, her or its copyrights to the Photo Company so that the Photo Company has all of the copyrights vesting in the photographers it hired. If the Broker contracts with a photographer directly, it is essential that there be a written contract with each such photographer assigning the copyrights in the photos taken to the Broker employing the photographer. Below is a contract term with the Photo Company to deal with the risk caused by independent contractor photographers.

*Photo Company shall make it a condition of engagement of any photographer providing photographic services to or for Broker that such photographer agree in writing to irrevocably assign to Photo Company all of such photographer's right, title and interest in and to such photos including the ownership of all copyright rights in and to such photos from the moment of their creation and fixation in tangible media.*

In some cases, the MLS may employ a photographer for a listing. If the MLS employs the photographer, the Photo Company can assign its copyrights in and to the photos to the MLS using a blanket assignment. If the Agent takes the photos, the ownership of the copyrights in the photos should be covered by the "work for hire" copyright assignment in the agreement between the Agent and the Broker.

To reinforce the ownership of the copyrights in the photos taken by the Agent and downloaded directly to the MLS, the ownership can be confirmed by a click-wrap agreement at the time the Agent downloads the photos to the MLS. In many situations, the photographers are likely to work for the MLS. In such situations, it may not be practical to execute a written assignment for each photo to the applicable broker. A blanket assignment of all copyrights in the photos to the MLS may prove much more practical and easier to implement.

Another way of dealing with copyright ownership is through a "click-wrap" agreement that is conspicuously provided to Agents when they input listing content or upload digital photos to the MLS. This strategy implements the copyright assignment as an electronic agreement.

On June 30, 2000, the United States enacted the Millennium Digital Commerce Act, also known as the Digital Signatures or E-SIGN Act ("E-SIGN"). E-SIGN establishes a general rule that gives the same legal effect to electronic signatures, contracts and records that is accorded to pen and ink signatures, contracts and records. Under E-SIGN, a signature, contract or other record in electronic form will not be denied legal effect solely because it is in electronic form or an electronic signature was used in forming the agreement. Accordingly, electronic signatures on written copyright assignments should be legally valid and enforceable.

Today, many agents take photos themselves and upload them to the MLS. The written assignment of the copyrights may be handled by an electronic agreement under these circumstances. For example, agents may agree to a copyright assignment when they upload digital photos to the MLS. An example is set forth below:

## AGREEMENT

READ THE FOLLOWING CAREFULLY, AS THESE TERMS WILL BE LEGALLY BINDING ON YOU. BY SUBMITTING AN IMAGE TO THE MLS DATABASE, YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTAND AND AGREE TO BE LEGALLY BOUND BY THE FOLLOWING. IF YOU DO NOT AGREE TO THE FOLLOWING, YOU MAY NOT SUBMIT ANY IMAGES TO THE MLS DATABASE.

*All images submitted to the database become the exclusive property of [MLS COMPANY INC.] ("MLS"). By submitting an image, you hereby irrevocably assign (and agree to assign) to MLS, free and clear of any restrictions or encumbrances, all of your right, title and interest in and to the image submitted. This assignment includes, without limitation, all worldwide copyrights in and to the image from the moment of creation and fixation in tangible media, and the right to sue for past and future infringements). If and to the extent you retain any copyrights or other ownership rights in or to the image despite this assignment, you waive and agree never to assert any such rights against MLS or its successors, licensees, or customers, including without limitation, any moral rights that you may have in or to the image.*

The assignment agreement also may include a license back to the agent/photographer so that the agent/photographer may continue to use the image:

*So that you may continue to use the image in your business, MLS grants to you the perpetual right and license to use, copy, adapt, modify, display and distribute the image for your own business purposes, including by posting the image on your own broker web-site or in your own property listings, in any form or manner now or in the future available.*

You also should consider an ownership/title warranty, and a reservation of rights to reject any photo submitted. The preceding agreement could be presented as a "clickwrap" agreement during the submission process. It is advised that the "clickwrap" agreement also include a provision indicating that the specific assignment supersedes any prior agreement respecting the assignment to avoid any conflict with a prior agreement to assign the ownership of any copyrights.

### **E. REGISTRATION OF COPYRIGHTS.**

The copyright laws provide several inducements or advantages to encourage copyright registration. Registration is a prerequisite for recovering "statutory damages" and attorneys' fees for infringement. No award of statutory damages or attorneys' fees may be made for infringements commencing before registration. We believe it is critically important that statutory damages be recoverable because it would be very difficult to recover actual damages based on the unauthorized display of copyrighted real estate listing content. The recommended

quarterly Group Registration is designed to fulfill the requirements to recover statutory damages and, when appropriate, attorney's fees.

Another critical reason for registration is that registration is a prerequisite to filing a lawsuit for infringement of any copyrighted work in the United States. Registration is a precondition that must be satisfied before any claim of copyright infringement may be commenced in court. Accordingly, through our recommended registration program, we seek to permit the MLS to commence legal action against any infringer using or displaying real estate listings contained in the MLS database without authorization. In our strategy, the MLS becomes the enforcer.

In litigation, the Registration certificate constitutes *prima facie* evidence of a valid copyright in an infringement lawsuit. The *prima facie* treatment in court includes all of the facts set forth in the copyright application. As such, the Registration provides distinct litigation advantages to the MLS plaintiff and makes the defendant bear the burden of proof with respect to proving that the copyright is not valid.

Registration also is required to terminate the so-called "innocent infringer" defense. Registration also serves as a public record and notice of copyright ownership.

We recommend that the MLS register the claims of copyright ownership in the MLS database and property listing content contained in the MLS database. In particular, we recommend a quarterly filing program under the Group Registration procedures for Automated Databases under Copyright Office Circular 65, revised December 2004.

Copyright protection extends to the compilation and collection of property listings and to the contents of the database representing original authorship. Group registration is possible only if certain conditions are met which the MLS automated database meets. To make a single group registration for an MLS automated database and/or its copyrightable updates/revisions, *i.e.*, new property listings, added during a given three-month period, registration with the Copyright Office requires a \$30.00 nonrefundable filing fee payable to the Register of Copyrights, a deposit representative of the new property listings added to the MLS database during the three-month period that are being registered, and a Form TX completed in accordance with Copyright Office Circular 65. The deposit should include 50 pages or records, *i.e.*, property listings constituting the necessary visually perceptible identifying material in the copyrighted MLS database.

By virtue of granting the MLS a joint copyright interest in the content included in the MLS database, the quarterly registration of the copyright claims in the automated database will extend beyond the compilation and collection copyright to the copyright rights in the content of the MLS database itself, *i.e.*, to the expressive elements of each property listing included in the MLS database during the three-month period. This level of protection is highly desirable today. As such, the quarterly registration of the MLS database as a whole extends to each property listing in the MLS database that is in the database at any time during the three-month period irrespective of whether such property listings were in the deposit actually filed with the

Copyright Office. In many respects, the Group Registration procedures are ideally suited for automated MLS databases with a high frequency of changes.

We believe this registration strategy will provide the most comprehensive and effective registration at the very low cost related to the quarterly filing fees (*i.e.*, four quarterly payments of \$30.00 or \$120.00 annually). The key to the strategy is that by conveying a joint copyright ownership interest in the MLS, the MLS can be the copyright claimant for all brokers both for the compilation copyright as well as the copyrights in each real estate listing included in the MLS database at any time during the three month period. This broad coverage is important because the most likely threat is not to the database as a whole but to the unauthorized display of individual property listings to attract customers and potential customers to other businesses. Furthermore, since copyright ownership is a necessary prerequisite to confer legal standing to file claims for copyright infringement by conveying a joint ownership interest in the MLS database content to the MLSs, the MLS will have the legal standing to enforce the registered copyrights on behalf of the brokers served by the MLS.

#### **F. FURTHER DISCUSSION OF IMPLEMENTATION STEPS.**

##### **1. CLARIFYING COPYRIGHT OWNERSHIP IN THE LISTING BROKER AND MLS.**

By identifying and clarifying the ownership of copyrights, the parties will be in a stronger position to claim copyright ownership. The real estate industry will need to change their practices respecting copyright ownership. This includes a separate copyright notice for each property listing as well as for the MLS database as a whole. It also concerns more attention to the rights covered by copyright ownership.

There will need to be a different attitude. Since each listing is a copyrighted work, agents and brokers will need to authorize any copying by newspapers, publications and other third parties. Ads showing the photo of the property, marketing description and list price arguably are derivative works of the copyrighted listing. The listing broker is a co-owner of the copyrighted listing as a whole and should authorize the agent to use, copy, adapt, modify, distribute publicly and display publicly the copyrighted listing for the purpose of selling or renting the property or other properties.<sup>26</sup> The listing broker can also authorize the buyer's agent and broker to use and display the listing content in connection with properties for which the broker and agent represented the buyer. The new practice allows the parties to establish a "permitted" scope of use that is fair to all parties. Copying outside the "permitted" scope will in most cases constitute copyright infringement. Establishing this permitted scope of authorized use has become critical. Large scale copying and distribution of copyrighted material used to be difficult and expensive; now it has become easy and inexpensive thereby necessitating a much stronger copyright protection program.

These changes are not difficult but represent a major change in current practices.

---

<sup>26</sup> The reference to "other properties" is intended to encompass the agent's use of the listing as part of the agent's portfolio.

## 2. CLARIFYING JOINT WORKS AND THE OWNERSHIP OF THE COPYRIGHTS IN EACH PROPERTY LISTING.

The agreement between the MLS and its broker subscribers ideally should clarify the intent to create a unified property listing by combining the broker's property listing contribution with the MLS's content contributions into a single, joint copyrighted work. To further clarify the desired joint works, the broker should assign one-half of the broker's undivided copyright interest in each fully integrated property listing to the MLS and the MLS should assign one-half of its undivided copyright interest in each of the broker's fully integrated property listings to such broker such that the broker and the MLS each own an undivided one-half interest in the copyrights in each of the broker's fully unified listings. Ideally, each property listing should include the name of the listing broker and the MLS in the copyright notice for the listing.

To assure that brokers do not have to account to the MLS for any revenues they generate from the joint copyrighted works for which they are a co-owner, the agreement to create joint works also should include a disclaimer of any obligation upon the joint owners to account for and share in any net profits generated from the joint works.

As noted previously, each joint owner is a non-exclusive co-owner of all of the copyrights in the joint work and is legally obligated to account to its other co-owner and share in any net profits from the commercial exploitation of the joint work unless the parties have otherwise agreed. Accordingly, it is essential that the co-owners "otherwise agree" in writing. We also believe that the joint ownership agreement should be coupled with any restrictions the brokers need to prescribe what the MLSs can do with the copyrighted listings. For example, the agreement could preclude MLSs from using the copyrighted listings to market, promote or advertise the sale or rental of any listed property without the prior consent of the listing broker (*i.e.*, the copyright co-owner) and could also be used in connection with a permission-based content licensing program based on repurposed listing content so that the MLS only undertakes content licensing that is approved by the broker. The copyright program seeks to keep the broker in the central position of managing the use of the broker's content but empowers the MLS to take those actions authorized by the broker.

We believe content licensing is best undertaken at a high-level of aggregation. In most situations, the MLS is likely to be in a better position to conduct such content licensing and to maximize the value of repurposed copyrighted content but nothing should prevent the broker from undertaking such content licensing activities on its own as to its own copyrighted property listings or other listings for which the listing broker has given its permission. The listing broker is a copyright owner of the entire, integrated property listing. Joint ownership assures that both the MLS and the listing broker have all copyright rights including the right to create derivative works that are required to engage in content licensing of repurposed listing content. Any revenue sharing from content licensing can be agreed upon between the listing brokers and their MLSs. Our intent is to create a legal infrastructure that would support content licensing if the parties desire to pursue content licensing. Under the current system, we

believe that MLSs and the listing brokers do not have the necessary copyrights to engage in content licensing. Below is an example of a provision respecting joint works:

*Broker hereby acknowledges and confirms its intent to create joint works along with MLS by integrating the Listing Content owned by Broker that has been submitted to the MLS Service with other Content applicable to the Property which is the subject of the Broker's Listing Content to form a complete, integrated property listing with MLS and Broker (subject to the terms of this Agreement) serving as joint owners of the copyright rights in and to such joint works, i.e., the fully integrated property listing created from the expressive contributions from Broker and MLS. Except as provided otherwise in this Agreement, neither Broker nor MLS will have any obligation to the other to account for or share in the net profits from such jointly owned works. In consideration of the creation of such joint works, MLS agrees it will not use, or allow others who are not MLS subscribers or authorized users to use such joint works as to the fully integrated listings for which Broker is the principal Broker for the purpose of selling, renting, listing or appraising real estate or for advertising purposes without Broker's approval. Notwithstanding the foregoing, (i) MLS's rights in and to the Content represented by these integrated property listings are limited by the terms of this Agreement, and (ii) Broker ownership is subject to, and does not extend to, materials included in the integrated property listings that are owned by MLS's third-party licensors, and use of any such materials is limited by any restrictions that have or may be imposed by the applicable owner of such materials.*

Content licensing could be a recipe for problems unless the licensor has thoroughly assured itself that it has sufficient rights to undertake such licensing. For example, please note the reference to third-party content. Most third-party licenses prevent or restrict further sublicensing or relicensing of their content. Below is a provision restricting the MLS's content licensing activities:

*MLS shall have the right to use, copy, distribute, display and perform the Content in and as part of the MLS Database and the MLS Service, and to create derivative works based upon the Content in the MLS Database, and to license any entity to undertake any of the foregoing pursuant to terms agreed upon by the MLS Board of Directors, provided that Broker's Listing Content shall not be used for any advertising purposes without Broker's prior consent. For purposes of this Agreement, the MLS Database also includes, but is not limited to, all Content included on the MLS Service or any portion thereof, as well as all printouts of Content from the MLS Database and any publication of Content from the MLS Database.*

The important concept is to provide sufficient broker controls so that brokers feel comfortable about joint ownership and the benefits that accrue from a strong copyright program. The premise is that a stronger intellectual property program related to protecting the value of listing content will accrue to the benefit of the industry as a whole and to brokers in particular.

3. DEVELOPING AND MAINTAINING A COPYRIGHT REGISTRATION PROGRAM WITH THE MLS REGISTERING THE COPYRIGHTS IN THE MLS DATABASE UNDER THE GROUP REGISTRATION PROCEDURES FOR AUTOMATED DATABASES COVERING THE COMPILATION, COLLECTION AND COPYRIGHTED CONTENT IN AND OF EACH INDIVIDUAL PROPERTY LISTING.

The MLS generally is better situated to operate, implement and maintain an ongoing copyright registration program under the Copyright Office's group registration procedures for automated databases. Copyright registration is a jurisdictional prerequisite for bringing any lawsuits for copyright infringement. Accordingly, registration is a necessary component of a complete copyright enforcement program. One of the key elements in our program is that brokers are able to "piggy-back" on and take advantage of the MLS's quarterly filing of the copyright registration program.

As discussed, through joint ownership, the MLS's copyright registration not only covers the MLS's compilation and collection of the property listings but also the copyrightable content of each listing in the database. The registration is completed quarterly using a representative sample of fifty property listings from the MLS database each quarter. Joint ownership permits a much broader copyright coverage from the registration than would otherwise be possible.

4. IMPOSING APPROPRIATE RESTRICTIONS ON WHAT THE MLS AND BROKER CAN DO WITH THE LICENSED MLS DATABASE.

An example of possible restrictions is discussed in section 14, above, related to joint ownership. Use restrictions can be addressed as a business matter by the MLS and its broker-subscribers.

5. ESTABLISHING A MLS PROGRAM TO MONITOR MISUSE AND INFRINGEMENT OF THE MLS DATABASE.

As compared to the brokers, MLSs should be better able to implement a program for monitoring the use of the MLS database and property listings. An MLS monitoring program should not be to the exclusion of broker monitoring programs. However, MLSs can spread the cost of a monitoring program across all listings and brokers contributing listings to the MLS database.

MLSs can, for example, develop "water marking" and other digital rights management strategies to mark property listings so that Internet monitoring services may be employed using various technologies to identify unauthorized copies of property listings on the Internet and document the infringement. We believe the cost of monitoring can be borne most effectively by MLSs. Below is a sample provision:

*Broker grants MLS all rights and remedies for enforcing the copyright or copyrights in the Listing Content and other Content submitted to the MLS Service by Broker or any Broker licensed agents, licensed personal assistants and unlicensed personal assistants affiliated with*

*Broker. To effectuate the foregoing, Broker hereby irrevocably authorizes, empowers, and appoints MLS as Broker's true and lawful attorney (a) to initiate and compromise any claim or action against infringers of MLS or Broker rights in such Listing Content or other such Content in the MLS Database and (b) to do such acts and execute in Broker name any and all documents and/or instruments as desirable to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights in and to such Content, and to discontinue, compromise or refer to arbitration or litigation any such proceedings or actions, or to make any other disposition of such matters in MLS's sole discretion. MLS's responsibilities hereunder shall not preclude Broker from taking any action Broker deems appropriate or necessary to protect Broker's Listing Content from abuse, misuse or infringement.*

6. ESTABLISHING AND MAINTAINING AN ENFORCEMENT PROGRAM TO ENFORCE MLS'S COPYRIGHT RIGHTS AND THE RIGHTS OF THE LISTING BROKER IN THE MLS DATABASE AND INDIVIDUAL PROPERTY LISTINGS.

We visualize a strong enforcement program based on the evidence collected through the monitoring program. We believe that most enforcement actions will be settled without the necessity of litigation. However, litigation may be necessary to demonstrate the deterrent effect of the enforcement program. The real estate industry needs to ensure that critical enforcement procedures are available to safeguard content and the copyright rights related to that content.

We visualize that the first step simply could be a letter from the MLS to the identified infringer to cease and desist. If the infringer continues with its unlawful activities after written notice, the matter would be turned over to MLS's counsel for piracy activities.

Most cases likely would be settled prior to litigation and without the necessity of litigation. Settlement damages can be maintained in a separate fund to finance further enforcement activities. Over time, enforcement should be self-sufficient and possibly profitable. This has been the experience of the Business Software Alliance and Software Information Industry Association.

**G. DIGITAL MILLENNIUM COPYRIGHT ACT ANTI-CIRCUMVENTION PROVISIONS.**

The Digital Millennium Copyright Act<sup>27</sup> (DMCA) includes very powerful anti-circumvention provisions. Websites displaying copyrighted content should take maximum advantage of these anticircumvention provisions.

These DMCA anti-circumvention provisions provide a legal remedy against persons who (1) circumvent technological protection measures that control access to copyrighted works, (2) manufacture or distribute devices or services that circumvent access controls, or (3) manufacture or distribute devices or services that circumvent a technological measure that

---

<sup>27</sup> 17 U.S.C. §§ 1201 et seq. (enacted Oct. 28, 1998); see, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

effectively protects a right of the copyright owner. The term “circumvent protection afforded by a technological measure” means “avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure.”<sup>28</sup> The DMCA provides the legal framework to support a digital rights management program and enabling technology for the display of copyrighted real estate listing content on the Internet.

A strong copyright protection Program can be enhanced and strengthened by using technological protective access controls and use controls with respect to copyrighted content made available to the public through the Internet.

#### **H. MARKETPLACE IMPORTANCE.**

In the United States, there is contention between competition laws (such as the federal antitrust laws) and intellectual property laws (such as the federal copyright laws). The courts historically seek to strike a balance between our intellectual property laws and our competition laws. As long as intellectual property owners are exercising the rights and privileges they are entitled as an intellectual property owner to exercise, as a general principle they are not engaged in unlawful anticompetitive conduct. That is, the exercise of legitimately obtained intellectual property rights is not violate the antitrust laws. This is a fundamental principle of antitrust laws.

Intellectual property rights owners have the right to license or to license their intellectual property to anybody; provided that the licensor does not obtain its intellectual property rights improperly or exceed the scope of its intellectual property rights.<sup>29</sup> Accordingly, intellectual property rights provide a very important legal basis for refusing to license copyrighted property listing content. For example, *Data General Corp. v. Grumman Systems Support Corp.* 36 F.3d 1147, 1187 (1st Cir. 1994), the First Circuit Court of Appeals noted that a refusal to license a copyrighted work is presumptively justified conduct: “[T]he owner of the copyright, if it pleases, may refrain from vending or licensing any content [itself] ... [by] simply exercising the right to exclude others from using its property.”

Thus, a strong copyright program can provide a legal defense against antitrust claims alleging that MLSs or brokers are refusing to license their content in real estate listings to parties interested in using or displaying such content in connection with their business model. The copyright owners of property listing content are not subject to compulsory licensing. Real estate property listings are considered to be “sticky” content in the parlance of e-commerce.

---

<sup>28</sup> 17 U.S.C. § 1201(a)(3).

<sup>29</sup> The doctrine declared by the U.S. Supreme Court in *United States v. General Electric*, 272 U.S. 476 (1926), has been applied to copyright owners. The right to license copyrighted materials (and to dictate the terms of such license) is the untrammelled right of the intellectual property owner. It is not a misuse of copyright rights where the copyright owner seeks to control rights over its own copyrighted materials.

This content attracts visitors to websites and keeps them there longer.<sup>30</sup> In the *Perfect 10 v. Google, Inc.* case, the court noted that Google's use of Perfect 10's thumbnail photos resulted in increased web traffic, advertising revenue, brand awareness and market clout for Google.<sup>31</sup> The content is valuable and if properly protected will become more valuable. Listing content should be protected in the best interests of the real estate industry.

## I. WHY IS THIS PROGRAM GOOD FOR REAL ESTATE PROFESSIONALS?

Current practices do not provide the necessary clarity and legal certainty for establishing copyright ownership. As such, brokers will obtain better control over the use of their property listings because they will have the right, along with the MLS, to copy, adapt, modify, distribute publicly, perform publicly and display publicly their fully integrated property listings.

By delegating monitoring and enforcement actions respecting the copyrights to the MLS, the cost of monitoring and enforcement can be spread over all brokers with property listings in the MLS database. This should result in a more effective deterrent to infringement and a stronger, more professional enforcement program. This program should enhance the value of the content in the broker's property listings and help brokers build asset value in their intangible intellectual property assets.

---

<sup>30</sup> In *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 2003 U.S. Dist. LEXIS 14086 (D. N.J. August 7, 2003), the court described valuable content as content that increases website traffic and "stickiness", which give website owners additional time and opportunities to market their services and products.

<sup>31</sup> See *Perfect 10 v. Google, Inc.*, 2006 WL 454354 (C.D. Cal. February 17, 2006).

## J. CONCLUSION.

We believe an improved process where the copyright rights can be lawfully asserted without ambiguity is in the best interests of the real estate industry. To be successful, the program needs to be adopted industry-wide. Brokers, MLSs and interested third parties need to avoid piecemeal adoption and inconsistent copyright treatment which will have the tendency to weaken copyright protection and make enforcement more difficult.

## K. GLOSSARY.

“**Collective Work**” is a work, such as a periodic issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole. 17 U.S.C. § 101. The MLS database is treated as a “Collective Work” because there are a number of contributions.

“**Compilation**” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works. 17 U.S.C. § 101. The MLS database also qualifies as a compilation.

“**Contribution**” means a work of original authorship. Each author is sometimes referred to as a “contributor”.

“**Copyright Owner**”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

“**Creation**” refers to the first time a work is fixed in a copy. A work is “created” when it is fixed in a copy for the first time. Where the work has been prepared in different versions, each version constitutes a separate work.

“**Derivative Work**” means a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which as a whole, represent an original work of authorship, is a “derivative work”. 17 U.S.C. § 101. Different adaptations of the original, combined real estate property listing may be considered a “derivative work”.

“**Display**” means to show a copy of a work, either directly or by means of a device or process. One of the exclusive rights of copyright is the right to publicly display. The display of listings on a website or otherwise on the Internet implicates the copyright owner’s exclusive rights of display.

“**Expressive Elements**” refers to elements of a copyrighted work that constitute elements of original authorship that are copyrightable. For example, in a real estate property listing, the list price, description of the property, description of the neighborhood and community, photos and possibly other content are each “expressive” elements.

“**Fixed**” refers to a work being “fixed” in a tangible medium of expression when its embodiment in a copy is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

**“Joint Work”** means a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C. § 101. The unitary property listings are a joint work combining the contribution of the listing broker and combination of the MLS.

**“Joint Ownership”** means the ownership in and to the copyrights in a joint work that the co-owners share.

**“Registration”** refers to the process of filing an application to register claims of copyright ownership with the U.S. Copyright Office in accordance with the Copyright Office regulations. Registration usually requires completion of an application for registration form, a registration fee and a deposit of the work or representative portion of the work.

**“Work”** is a general term used throughout the Copyright Act that refers to any manifestation of original authorship, fixed in tangible media, e.g., a book, a computer program, a movie, a song, a database, a play, etc.