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HOW TO PROTECT THE VALUE OF  
REAL ESTATE PROPERTY LISTING CONTENT  
FOR CONTENT-RELATED TRANSACTIONS

OFFERED BY

DAVID CHARRON



AND COUNSEL

J.T. WESTERMEIER



# How To Protect the Value of Real Estate Property Listing Content for Content-Related Transactions

By

J. T. Westermeier\*

The purpose of this paper is to propose a legal program for protecting and enhancing the value of the content contained in real estate property listings. The proposed legal infrastructure and procedures, relying on Federal Copyright rights and common law general property rights, seek to take advantage of the relationship between principal brokers and the Multiple Listing Service serving such brokers.

We will first discuss the traditional practices for protecting real estate property listings and some of the shortcomings of these traditional practices. Then, we will describe the proposed practices, including the steps to implement our proposed practices and the legal rationale for the proposed practices.

## I. Traditional Practices.

The traditional practices for protecting multiple listing databases treat the automated database of property listings as a copyright-protected compilation. The traditional practices do

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\* Partner in the Reston, Virginia office of DLA Piper Rudnick Gray Cary US LLP. Past President, Computer Law Association; Fellow, American Bar Foundation; winner of the 2001 Burton Award for Legal Achievement; and member of the advisory boards for *E-Commerce and Law Strategist*, *Computer Law Reporter*, BNA's *Computer Technology Law*, BNA's *Electronic Commerce & Law*, *The Commercial Advisor*, *Intellectual Property Counselor*, *Internet and Business Law*, and *Information Strategies: The Executives Journal*. He is the author of Chapter 13 on Software Licensing, *DRAFTING LICENSING AGREEMENTS* (4<sup>th</sup> Ed.) (Aspen Law 2002, 2004) and co-author of Chapter 8 on "Civil Litigation: Security" in the *DATA SECURITY AND PRIVACY LAW: COMBATING CYBER THREATS TREATISE* (West Group 2002, 2003, 2004) and Chapter 1 on E-Commerce Legal Survival Kit in *DOCUMENTING E-COMMERCE TRANSACTIONS* (Business Laws, 2002, 2004). He is listed in Best Lawyers in America (2003-2004; 2005-2006). Erik Feig, a senior associate in our firm's Reston office, assisted me with this paper and the development of the strategies described in the paper and my partner, Kate Spelman, in our San Francisco CA office, helped me with revisions to the paper.

not attempt to protect the content in each individual property listing, except to the extent the listing content is protected by policies and contracts within the industry. The traditional practice treats the property listing as factual data that either is not protectable by copyright or does not contain sufficient expressive content of an original nature to be protectable by copyright.

By comparison, the proposed practice seeks to protect the content in each individual property listing as well as the compilation and collection of property listings in the aggregate. Our proposed strategy protects both the individual listing content as well as the arrangement of the listings.

Compilations are difficult to protect by copyright because copyright protects only the original selection and arrangement of a compilation. Compilation copyright protection does not extend to each individual property listing in the compilation. As such, compilation copyright protection is inadequate, by itself, to protect the value of the content in each property listing.

We are urging separate copyright protection for each listing because the copyright protection for automated databases as compilations is even weaker than the protection accorded more “traditional”, hard-copy compilations. Protecting each listing would afford much stronger protection. This point was emphasized by the U.S. Supreme Court several years ago in an important case, *N.Y. Times Co. v. Tasini*.<sup>1</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

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<sup>1</sup> 553 U.S. 483 (2001).

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 or along with other articles that met the search criteria.<sup>2</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 protects the content of each individual listing. 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 protectable elements of a compilation copyright are not likely to provide the level of protection needed to effectively protect real estate content in an Internet environment or under many types of third-party licensing arrangements for the content.

The need for copyright protection at the level of the individual property listing was underscored by the *Nautical Solutions Marketing, Inc. v. Boats.com* court ruling.<sup>3</sup> The case concerns two competing websites that listed yachts that were 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

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<sup>2</sup> This point was recently made in *Auscape International v. National Geographic Society*, 2004 U.S. Dist. LEXIS 15764 (S.D. N.Y. August 12, 2004), 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>3</sup> 2004 U.S. Dist. LEXIS 6304 (M.D. Fla. April 1, 2004).

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 protectible 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 piracy.

Under the traditional practice, the real estate industry does not do a very good job of clarifying and solidifying copyright ownership and little effort or care is being paid to copyright ownership of the expressive copyright-protectable content in the property listings. Most MLSs and brokers have not used copyright assignment clauses in their agreements with their REALTOR® agents, subscribers or third parties to vest copyright ownership in the broker or MLS, as the case may be. The proposed practice discussed later in this paper uses copyright assignments as well as registration at the U.S. Copyright Office to clarify and strengthen claims of copyright ownership.

Given the number of listings in a typical MLS database and the number of updates occurring on a daily basis, registering the claims of copyright ownership in each individual listing with the U.S. Copyright Office is impractical and not cost effective. What 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 proposed practice takes advantage of the Copyright Office Group Registration procedures for registering copyright claims

copyright claims in the MLS automated database. The proposed practice 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.

## II. Basic Copyright Principles.

The proposed practice is premised on a number of basic copyright principles. The first principle is that real estate property listing content is a 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 this proposed practice because it accommodates copyright assignments from the agent (who creates the original property listing) and the photographer (who "snaps" the original photo or photos of the listing property).

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 below, we believe 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. For compilations such as MLS databases, this 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. An MLS will own a compilation copyright or collective work copyright in the MLS database as a whole, and the MLS’s copyright will extend to copyrightable material contributed by the MLS. Through joint copyright ownership, the proposed practice permits the MLS to claim copyright ownership with the applicable listing broker of the copyrightable content in each individual listing in the MLS database. The joint ownership is based on the MLS being a separate legal entity which may or may not be owned by brokers, associations or other parties.

In other words, think of a property listing as a separate work for copyright purposes. Some portions of the work are expressive copyright-protectable elements. Clearly, the photo or photos of the property included in the property listing are protectable by copyright.<sup>4</sup> Most marketing descriptions of the property are also likely to rise above the low threshold of originality needed for copyright protection. In addition, we take the position 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. Much of the content in the listing may be factual. Facts are 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. Copyright infringement only occurs if someone makes an unauthorized copy of the protectable copyright elements in the book. If someone only makes an unauthorized copy of the non-protectable factual material, the copying does not constitute copyright infringement. Only where the unauthorized copying is of the protectable expressive elements does a claim for copyright infringement arise.

3. List Price. 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

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<sup>4</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.

fact. The “list price” is a subjective and judgmental valuation of what price the property should be listed. 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>5</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>6</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>7</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 professional REALTOR, we believe in many situations the list price will reflect the REALTOR® 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. The list price 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

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<sup>5</sup> 197 F.3d 1256 (9<sup>th</sup> Cir. 1999).

<sup>6</sup> 33 U.S.P.D.2d 1183 (2d Cir. 1994), *cert. denied*, 118 S.Ct. 397 (1997).

<sup>7</sup> 871 F.Supp. 952 (W.D. Mich. 1994).

selling the property. When the list price is superseded by the “sales price”, the sales price becomes a non-protectable fact.<sup>8</sup>

4. Copyrights Are Separate. Before addressing copyright ownership, we want to address another principle. Another important copyright principle is 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 of the property listing, or 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 are retained by the author or publisher of the book. The intangible and tangible rights may be treated separately.

5. Nature of MLS Database. The proposed practice treats the MLS database as both a “collective work” and a “compilation” under the copyright laws. 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>9</sup> The term “collective work” recognizes that

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<sup>8</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 protectibility under the copyright laws.

<sup>9</sup> *Id.*

each property listing in the collection is a separate and independent work in and of itself. This is possible because the joint owners of each listing are not the same throughout the database. If they were, the database would be a single work instead of a collection of single works. You can think of a collective work as a book of short stories with each short story being a separate and independent short story. As such, 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 including their “short stories” in the database allows the MLS database to be viewed as a collection of “short stories”.

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>10</sup> The new practice refers to the MLS database as both a collection and a compilation even though the term “compilation” includes collective works.

6. Copyright Ownership. The author of the work is the initial owner of the copyright in that work. Copyright ownership vests automatically by operation of law from the moment the work is created. If the REALTOR® agent “authored” the listing, then the REALTOR® agent owns the copyrights created in the listing. Similarly, if the REALTOR® agent “snapped” the photo of the property, then the REALTOR® agent owns the copyrights in the photo. If an independent photographer takes the photo, the photographer owns the copyrights in the photo. If

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<sup>10</sup> *Id.*

copyrights in the photo. If the REALTOR® agent or photographer are employees, then their 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, is still likely to 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. 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.

The proposed practice seeks to clarify copyright ownership using copyright assignments to simplify and strengthen copyright ownership. The proposed practice seeks to vest copyright ownership in each listing jointly in the applicable listing broker and in the MLS serving such listing broker. Joint ownership of copyrights is one of the key legal bases for the proposed practice. 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. Joint ownership is a “win-win” situation for the broker and its serving MLS.

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>11</sup> The proposed practice 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. Previously, brokers 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 proposed practice resolves and clarifies this ownership question.

Practices in the real estate industry do not appear 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.

The proposed practice seeks to recognize the joint ownership of the copyrights in the listings and take advantage of the joint ownership to devise a copyright registration, copyright infringement monitoring and copyright enforcement programs for the benefit of both copyright owners and the industry as a whole. Joint ownership is one of the key legal building blocks for the proposed practice.

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<sup>11</sup> 17 U.S.C. § 101.

Our proposed practice implements the joint ownership through the subscriber agreement between the MLS and the listing broker. Since joint copyright owners have an obligation to account to their joint copyright owners and to share net profits from the commercial exploitation of the content, we propose expressly disclaiming any obligation to account for and share in any net profits except as the broker and MLS have agreed. 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.

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. The ownership is similar to the joint ownership 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 proposed practice relies on the Group Registration procedures for automated databases. 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. Accordingly, 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 each individual property listing. 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>12</sup>

### III. Written Copyright Assignments.

Written copyright assignments are a key part of the proposed new practice. 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 of copyrights. 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 proposed practice enhances the value of the content in property listings.

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<sup>12</sup> See *Morris v. Business Concepts, Inc.*, 283 F.3d 502 (2d Cir. 2002).

Below, we will discuss possible structures for the necessary written copyright assignments.

1. REALTOR® Agents.

The agreement between the broker and its agents should 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 need to explicitly address copyright rights. For example,

*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.*

Another approach is for the MLS to include an assignment in the Subscription Agreement (or Access License Agreement) between the REALTOR® agent and the MLS. If there is direct privity of contract between the agent and the MLS, the contract between the agent can include a copyright assignment to the broker (or MLS) even though the broker is not a party to the agreement with the MLS.

*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.*

2. Photographers.

The consulting agreement between the MLS and the photographers for photographic services should include a copyright assignment assigning to the MLS the ownership in the photos taken and digitized for the MLS. Copyright ownership is not affected by who pays for the photograph. If the photographer is an independent contractor, then the photographer owns the copyrights in the photos he or she takes. If the photographers are under agreement with a broker, the photographer's agreement should assign the ownership of the copyrights to the broker. The two strategies are as outlined previously.

*[Photo Company] agrees to assign to MLS and hereby does irrevocably assign to MLS, 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.*

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 MLS or Broker. If there are multiple tiers of independent contractors, it is important to make sure each independent contractor assigns his, her or its copyrights. The strategy should be to consolidate the ownership of all copyrights in the photos in the MLS. With respect to copyright assignments, our proposed strategy seeks to vest copyrightable content in both the MLS and the listing broker so that these respective broker and MLS copyright contributions can be merged into an integrated work. This allows the parties to take advantage of joint ownership. In other words, we seek to make sure that both the MLS and listing broker have copyrighted content so that the intentional merger of their respective contributions will result in a joint work.

Another strategy respecting written copyright assignments is to implement them as electronic agreements. 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 of the agents take the 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 on the next page.

#### 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, 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 photographer so that the 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.

Another assignment could be obtained in the contract between the MLS and its photographer.

*Photo Company shall make it a condition of assignment of any photographer providing photographic services to or for MLS 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.*

### 3. Sellers.

Home sellers may provide their agents with photos of the property, floor plans or other copyrightable materials. The listing agreement with the seller needs to contemplate this eventuality by including a copyright license in the listing agreement.

*In the event Seller provides agent any photos, floor plans or other copyrightable material related to the listed Property (collectively, the “Content”), Seller hereby grants to Agent’s Broker an irrevocable, non-exclusive and fully*

*and fully sub-licensable right (through multiple tiers) to use, reproduce, modify, adapt, publish, create derivative works from, distribute, perform and display any such Content (in whole or in part) worldwide and/or to incorporate any such Content (in whole or in part) in other works in any form, media, or technology now known or later developed.*

We could have included a copyright assignment in the listing agreement; however, we believe a broad copyright license makes more sense and is likely to be better received by the sellers. With the license, the seller can license the same Content to a succeeding broker's agent without affecting any prior MLS property listings. In other words, one of the problems with the seller's provision of copyrightable materials is that new agents may get retained in the future if the first agent does not work out. By making the license non-exclusive, the seller may license the same copyrightable material to successor agents and their respective brokers.

#### IV. The Proposed Practice.

Putting all the parts discussed above together, the proposed legal practice for protecting the value of the content embodied in property listings includes the following steps:

1. Clarifying copyright ownership in the listing broker and MLS, without regard to the owners of the MLS.
2. Making each property listing a joint work created by merging the listing broker's and MLS's respective copyright contributions into a merged, unitary property listing with co-ownership of the respective copyrights.
3. Developing and maintaining a copyright registration program with the U.S. Copyright Office 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 each individual listing.

4. Imposing appropriate restrictions on what the MLS and broker can do with the licensed MLS database. Restricting what the MLS can do with the copyrighted MLS database.

5. Establishing and maintaining a MLS program to monitor misuse and infringement of the MLS database.

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 incorporated in the MLS database, including the following:

(1) Appointing and enabling the MLS to serve as an enforcement agent for the benefit of all brokers.

(2) Cease and desist letters.

(3) Settlements.

(4) Lawsuits when necessary.

V. 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>13</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.

2. Clarifying Joint Works and the Ownership of the Copyrights in Each Property Listing.

The agreement between the MLS and its broker subscribers 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

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<sup>13</sup> The reference to "other properties" is intended to encompass the agent's use of the listing as part of the agent's portfolio.

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 should also include a disclaimer of any obligation upon the joint owners to account for and share in any net profits generated from the joint works. This provision is essential whenever joint works are created. 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**.

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. 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.

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 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 2, above, related to joint ownership.

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 develop “water marking” and other 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. MLSs can develop other monitoring systems and procedures. 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’s 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.*

In developing this program, we have borrowed from a number of successful copyright enforcement models in the music, movie and software industries. For example, in the music industry, the Records Recording Industry Association is appointed by some record companies to

bring enforcement activities on their behalf. Again, it appears to us that the MLS is better 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.

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 would 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 will 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.

VI. Simplicity of Procedures.

The proposed copyright program is simple, cost effective and easy to implement and maintain. While the proposal is based on a number of copyright principles that are new to the real estate industry, the proposed practices 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 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 proposal, 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.

## VII. Marketplace Importance.

In the United States, there is strong tension between competition laws and intellectual property laws. The intellectual property owner has the right to license or refuse to license its intellectual property to anybody the licensor determines not to license; provided that the licensor does not obtain its intellectual property rights improperly or exceed the scope of its intellectual property rights. Accordingly, intellectual property rights provide a very important legal defense 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.”

A strong copyright program should provide a legal defense against any 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. Real estate property listings are considered to be “sticky” content in the parlance of e-commerce. This content attracts visitors to websites and keeps them there longer.<sup>14</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.

#### VIII. Why Is This Program Good For Brokers.

Through this process, brokers will obtain clear ownership of the copyrights in each of their fully integrated property listings. 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.

Through joint ownership with the MLS, the broker is protected against the MLS licensing content without the broker’s consent because the MLS must share with the broker any net profits realized from licensing the content. This legal obligation restrains MLSs from engaging in content licensing arrangements because of the legal obligation joint copyright owners have to share profits with their co-

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<sup>14</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.

their co-owners. We believe this legal framework will make it necessary for brokers and MLSs to mutually agree upon content relicensing and redistribution arrangements because both the MLS and listing broker are entitled to compensation from such arrangements. In our view, this makes content licensing agreements between the MLSs and their brokers prior to entering into content provider arrangements highly desirable, if not necessary.

IX. 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.

## 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.