

Copyright Considerations for Real Estate Licensees

Much of today's real estate practice starts with marketing. Licensees creatively use the internet, social media and other technology to advertise their services and share information about the real estate market. Although these tools make it easier to distribute information, licensees should be cautious before using images or text found online. Copyrighted materials, such as images and text, require permission to be used. Licensees who reproduce materials without the permission of the creator of the work may find themselves accused of copyright infringement. The following discusses how licensees can avoid copyright infringement and protect their own copyrighted works.

COPYRIGHT LAW

Copyright protects original works of authorship. In the United States, the Copyright Act of 1976 (Copyright Act) is the exclusive source of copyright protection. Works of authorship protected by the Copyright Act include the following:

- Literary works, such as books, newspapers, magazine articles, manuscripts, poetry, textbooks, advertising copy and catalogs, among other textual works.
- Musical works, including any accompanying words.
- Dramatic works, including any accompanying music.
- Pictorial, graphic and sculptural works, such as photographs, maps, models, diagrams, technical drawings, paintings and graphic art.
- Motion pictures and other audiovisual works, such as movies, television shows and videos.
- Sound recordings.
- Architectural works.

The Copyright Act generally gives the copyright owner the exclusive right to do, and authorize others to do, the following:

- Reproduce the work.

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EDITORIAL STAFF

Author: Wendy Hoang

Production: Lauren Hubbard

ASSOCIATION MANAGEMENT

Chairman: Joe Horning

President & CEO: Michael Theo

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WISCONSIN REALTORS' ASSOCIATION

4801 Forest Run Road, Suite 201

Madison, WI 53704

608-241-2047

800-279-1972

- Modify the work.
- Distribute copies of the work to the public by sale or other transfer of ownership, or by rental or lease.
- Display the copyrighted work publicly.



Copyright protection exists from the time a work is created. There is no requirement to publish or register the work with the U.S. Copyright Office. The copyright of the work immediately becomes the property of the creator. For example, if a listing agent takes a photograph of a property for a listing, that photograph immediately becomes the copyrighted property of the listing agent.

Anyone who infringes upon the exclusive rights of the copyright owner may be liable for damages. Additionally, courts have the power to issue an injunction to prevent or restrain copyright infringement. If an agent copies a photograph from an expired listing and posts it on their firm's website without first obtaining permission from the photographer, then that agent would be infringing upon the photographer's copyright by reproducing and displaying the photograph. If this happens, the photographer, as the copyright owner, may be able to recover damages from the agent and have a court order the agent to take the photograph down.

Some think that citing the source of a work is sufficient to avoid liability for copyright infringement. Attribution alone, however, is not enough to comply with copyright regulations. Permission from the creator of the copyrighted work is required to use the work. It is prudent to get this permission in writing from the creator.



passwords or circumventing encryption. Under the DMCA, it is also unlawful to provide false copyright management information or to remove or modify the copyright management information. Moreover, the penalties for copyright infringement on the internet are severe, including imprisonment and monetary fines for criminal violations.

As such, owners of websites and other online platforms, such as blogs, should be cognizant of the materials that are posted on their websites. Unless the website owner meets certain requirements, the owner can be held responsible for any copyright infringement on their website or account. This is true even if the owner was not aware of how the copyrighted work was posted to their website.

REALTOR® PRACTICE TIP

The Copyright Act of 1976 can be viewed on the U.S. Copyright Office's website at www.copyright.gov/title17.

Digital Millenium Copyright Act

In 1998, Congress passed the Digital Millenium Copyright Act (DMCA) to extend the reach of copyright on the internet and regulate liability for copyright infringement online. The DMCA criminalizes the circumvention of digital protections for copyrighted materials, such as hacking



DMCA Safe Harbor

The DMCA safe harbor provisions, found in section 512 of the Copyright Act, shields online service providers (OSPs) from monetary liability and limits other forms of liability for copyright infringement if the OSPs meet certain conditions. To be protected under the safe harbor, an OSP must do the following:

1. Designate an agent to receive takedown requests. This agent must also be registered with the Copyright Office. The agent's contact information must be available on the website. The agent may be the owner of the website, an operator of the website, or another individual or entity.
2. Develop, implement and post a DMCA-compliant policy that addresses repeat infringers, including terminating the accounts or subscriptions of repeat infringers.
3. Comply with the DMCA takedown procedure by expeditiously removing the infringing material when notified of a violation. The OSP must notify the user who uploaded the material that it has been removed. The alleged infringer may submit a counter-notice that the OSP must share with the copyright owner. If the copyright owner fails to initiate a copyright lawsuit within 10 days, then the OSP may restore the removed material.
4. Have no actual knowledge of the infringement.
5. Not be aware of facts or circumstances that would make the infringement apparent.
6. Not receive a financial benefit attributable to the infringing activity.

Copyright Alternative in Small-Claims Enforcement Act of 2020

In 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement (CASE) Act, which established the Copyright Claims Board (CCB) within the U.S. Copyright Office. The CCB provides an alternative to federal court for copyright claims. The CCB is voluntary and allows all types of creators and users of copyrighted materials to resolve disputes involving claims up to \$30,000. Eligible claims include copyright infringement, declarations of noninfringement and matters related to notices and counter-notices under the DMCA's safe harbor provisions.

REALTOR® PRACTICE TIP

To learn more about the CCB's dispute procedures, see the CCB's website at www.ccb.gov.

TECHNOLOGY AND COPYRIGHT

The technology today makes obtaining information easier. However, this technology also makes it easier to copy and paste information and materials with a click of a button. Although access to these materials is easy, it does not give someone the right to reproduce or use that material. Using someone else's information or materials may be copyright infringement.

Multiple Listing Service

There are many ways listing content, such as a photograph, is put in the multiple listing service (MLS). Just because these materials are in the MLS, however, does not give other MLS participants the right to freely use that listing content. The terms of use of the MLS allow limited use of listing content by other MLS participants and subscribers. For example, the MLS terms do not allow using MLS content for future listings or automatically allow for use in advertising sold property.

REALTOR® PRACTICE TIP

To learn more about the DMCA's safe harbor provisions, see the U.S. Copyright Office's webpage on Section 512 of the Digital Copyright Act at www.copyright.gov/512.



REALTOR® PRACTICE TIP

The REALTOR® Code of Ethics in Standard of Practice 12-7 previously limited the use of the word “sold” in advertising to the listing broker, but now Standard of Practice 12-7 provides that “REALTORS® who participated in the transaction as the listing broker or cooperating broker (selling broker) may claim to have ‘sold’ the property.”

If the cooperating broker wishes to use the listing broker’s photographs of the property to advertise the sold property, the cooperating broker will need to obtain permission from the listing broker or take new photographs for the advertisement.

Anytime a licensee has questions about using MLS content, the licensee should reach out to the local MLS. Each MLS sets its own rules and policies, including rules about potential use of MLS content. The local MLS will guide licensees about authorized use and what, if any, identifying information must be included when listing content is shared.

REALTOR® PRACTICE TIP

MLS Policy statement 7.86 defines “listing content” as follows: “‘Listing content’ as used in the National Association’s multiple listing policies, including the model MLS rules and regulations, includes, but is not limited to, photographs, images, graphics, audio and video recordings, virtual tours, drawings, descriptions, remarks, narratives, pricing information, and other details or information related to listed property. (Adopted 5/06).”

Social Media

Social media is not an exception to copyright law. Before reposting another listing’s photographs on Facebook or

Instagram, licensees should be sure to obtain permission from the owner of the photographs. Permissions are also required to use music or audio recordings in videos or social media stories. It is prudent to get the permission in writing from the creator or owner.

REALTOR® PRACTICE TIP

The National Association of REALTORS® has sample photo agreements at www.nar.realtor/copyright/listing-photo-sample-agreements.

Artificial Intelligence

With the use of artificial intelligence (AI) on the rise, licensees should be aware of potential copyright concerns when using AI to create any materials. Licensees using AI should always check AI-generated materials for accuracy and possible copyright infringement.

Although many believe AI-generated works are original, it is possible the AI-generated work utilized a copyrighted work as a foundation. If this happens, licensees should confirm they have the appropriate permission or license before using any AI-generated materials, such as images or text.

MORE INFORMATION

For more information about the use of AI and potential copyright concerns, see the August 2023 *Wisconsin Real Estate Magazine* article, “The Best of the Legal Hotline: I, Robot; I, REALTOR®” at www.wra.org/WREM/Aug23/Hotline and the *REALTOR® Magazine* article, “AI Use in Real Estate Comes With Copyright Concerns,” at nar.realtor/magazine/real-estate-news/law-and-ethics/ai-use-in-real-estate-comes-with-copyright-concerns.



CONCLUSION

Understanding the basics of copyright use and potential infringement concerns will elevate a licensee's business practices. If a photograph or map is not an original work of the licensee, the licensee should obtain permission to use the work. Doing so will protect the licensee from claims of copyright infringement and allow the property to be advertised in the best and most legitimate way.

RESOURCES

- The U.S. Copyright Office's website at www.copyright.gov/#.
- The U.S. Copyright Office's webpage on Section 512 of the Digital Copyright Act at www.copyright.gov/512.
- The April 2014 *Legal Update*, "Avoiding Liability for Copyright and Patent Infringements," at www.wra.org/LU1404.
- The May 2017 *Wisconsin Real Estate Magazine* article, "The Best of the Legal Hotline: The Other Guy," at www.wra.org/WREM/May17/Hotline.
- The June 2022 *REALTOR® Magazine* article, "Protect Your Website From Copyright Claims," at www.nar.realtor/magazine/real-estate-news/law-and-ethics/protect-your-website-from-copyright-claims.
- The January 2023 *REALTOR® Magazine* article, "3 Rules to Avoid a Copyright Claim on the Photos You Use," at www.nar.realtor/magazine/real-estate-news/law-and-ethics/3-rules-to-avoid-a-copyright-claim-on-the-photos-you-use.

