

Legal Bulletin 212 Digital Millennium Copyright Act

*By Northwest Multiple Listing Service
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The NWMLS Data Use Policy, which governs the display of listing data on member internet data exchange (“IDX”) websites, has been revised to address recent changes to the Digital Millennium Copyright Act (“DMCA”). If you have any questions about this bulletin, please consult with your attorney.

1. DMCA

Over the past several years, there has been a dramatic increase in copyright infringement claims in the real estate industry related to the use of listing photos. Real estate firms and brokers can greatly reduce the risk of a copyright infringement claim by taking advantage of the “safe harbor” provision of the DMCA.

Under the DMCA, online services providers (which includes NWMLS members and subscribers with IDX websites) can be shielded from copyright liability for posting infringing third party content (i.e. other member’s listings), if the service provider:

- a. Registers with the United States Copyright Office and designates an agent to receive notifications of claimed infringement (known as “takedown” notices);
- b. Posts the required DMCA notice and the designated agent’s contact information on the service provider’s website; and
- c. Promptly removes infringing material at the request of the lawful copyright holder.

In 2012, NWMLS registered all of its members with the Copyright Office and became its members’ designated agent for receiving takedown notices. NWMLS updated its registration annually to add new members and account for firm name changes. NWMLS drafted the required DMCA notice and provided it to members and their IDX vendors to post on their websites. These efforts have been effective in shielding NWMLS members from copyright infringement claims over the past several years.

The Copyright Office has recently changed its process for registration and NWMLS will no longer be able to efficiently register its members with the Copyright Office. The change to electronic registration has made it much cheaper (\$6 for a three year registration) and easier for members to register themselves. Accordingly, the Data Use Policy has been revised to require that members operating IDX websites register with the Copyright Office and designate an agent to receive takedown notices.

The revised Data Use Policy provides as follows:

As a condition to displaying the Listing Data on the Internet, each Member and Subscriber (who operates under a separate legal entity) shall designate an agent to

receive notifications of claimed copyright infringement with the United States Copyright Office under the Digital Millennium Copyright Act (“DMCA”) (17 U.S.C. § 512). Members must also post the required DMCA notice (see, e.g., Exhibit B to this Policy) on all websites that display the Listing Data and otherwise comply with the requirements of the applicable sections of 17 U.S.C. § 512(c). The failure to comply with this section shall result in the immediate suspension of the subject Member’s license to use and display the Listing Data, without prior notice to the Member.

NWMLS’s current registration for members’ sites is effective until December 31, 2017. This means that member firms must register with the Copyright Office and designate an agent to receive takedown notices before the end of the year. Note that, as explained below, subscribers (i.e. individual brokers) with IDX websites operated under a separate legal entity (e.g. a limited liability company or corporation) must register that entity with the Copyright Office.

Here is a practical example of how the DMCA operates with regarding to listing information. Assume Member A inadvertently submits a photograph to NWMLS without the proper license from the copyright holder (i.e. the photographer). Member B unknowingly publishes that photograph on its IDX website and the photo is discovered by the copyright holder. The copyright holder will be required to provide Member B with a takedown notice through the DMCA process – instead of seeking monetary damages for copyright infringement. Member B can inform the listing member or NWMLS of the issue to facilitate the removal of the photograph from the listing. This process significantly minimizes the risk of potential liability for copyright infringement for all members.

2. Registration Process

To register your firm with the Copyright Office, either the designated broker or an authorized representative of the firm must visit <https://dmca.copyright.gov/osp/login.html> and click on “register here.” You will be prompted to create an account with the Copyright Office. Fill out the required information to set-up your account. The person who registers will be sent an activation e-mail to complete set-up process.

After you have created an account, you must log-in to your account and fill out the necessary information to register the firm as a service provider. Required information includes the name of the firm (e.g. ABC Realty, Inc.), the firm’s physical address, phone number, and e-mail address. You will also be asked to enter any “alternate” names that the public would be likely to use to search for your firm with the Copyright Office, any DBAs, website names and addresses (URLs), and other commonly used names. The idea is that if a consumer finds an infringing photo on your website, the consumer would be able to easily search the Copyright Office’s directory to find your firm. Examples of alternate names for ABC Realty, Inc. may include ABC Realty, www.abcrealty.com, ABC Real Estate, ABC, etc.

Next, you must fill out the required contact information for the designated agent who will receive takedown notices on behalf of your firm. This is the person who will be responsible for

Exhibit B

Digital Millennium Copyright Act Notice

Claims of Copyright Infringement & Related Issues (17 USC § 512 et seq.)

We respect the intellectual property rights of others. Anyone who believes their work has been reproduced in a way that constitutes copyright infringement may notify our agent by providing the following information:

- a. Identification of the copyrighted work that you claim has been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at the site;
- b. Identification of the material that you claim is infringing and needs to be removed, including a description of where it is located so that the copyright agent can locate it;
- c. Your address, telephone number, and, if available, e-mail address, so that the copyright agent may contact you about your complaint; and
- d. A signed statement that the above information is accurate; that you have a good faith belief that the identified use of the material is not authorized by the copyright owner, its agent, or the law; and, under penalty of perjury, that you are the copyright owner or are authorized to act on the copyright owner's behalf in this situation.

Upon obtaining such knowledge we will act expeditiously to remove, or disable access to, the material. Please be aware that there are substantial penalties for false claims.

If a notice of copyright infringement has been wrongly filed against you, you may submit a counter notification to our agent. A valid counter notification is a written communication that incorporates the following elements:

- a. A physical or electronic signature of the poster;
- b. Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled;
- c. A statement under penalty of perjury that you have a good faith belief that the material was removed or disabled as a result of mistake or misidentification;
- d. Your name, address, and telephone number; a statement that you consent to the jurisdiction of federal district court for the judicial district in which your address is located, or if your address is outside of the U.S., for any judicial district in which the service provider may be found; and that you will accept service of process from the complainant.

Notices of the foregoing copyright issues should be sent as follows:

Note - members and subscribers must insert their own applicable contact information below.

By mail:

ABC Real Estate Firm
123 Main Street
Any Town, WA 99999
United States
Attention: DMCA Designated Agent

By e-mail:

copyright@ABCcrealestatefirm.com

If you give notice of copyright infringement by e-mail, an agent may begin investigating the alleged copyright infringement; however, we must receive your signed statement by mail or as an attachment to your e-mail before we are required to take any action.

This information should not be construed as legal advice. We recommend you seek independent legal counsel before filing a notification or counter-notification. For further information about the DMCA, please visit the website of the United States Copyright Office at: <http://www.copyright.gov/>.