

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

timely responding to any claimed notices of copyright infringement on your website(s). You will then be prompted to pay the \$6 registration fee to finalize the process.

There are a variety of resources at www.copyright.gov including frequently asked questions and videos that walk you through the registration process.

- FAQ: <https://dmca.copyright.gov/osp/login.html>
- Videos: <https://www.copyright.gov/rulemaking/onlinesp/NPR/>

After members complete the registration process, members must update the DMCA notice on their IDX websites to identify the correct designated agent and contact information (i.e. the person that the firm designated with the Copyright Office to receive takedown notices). Currently, members' websites direct copyright holders to contact NWMLS, as NWMLS has been the designated agent for all members for the past several years.

Please note that the registration is good for three years and members will be required to periodically renew their registration. Members are also required to update their registration if any information changes (e.g. new contact information, alternate name, etc.)

3. Subscriber IDX Websites

The DMCA provides that “related or affiliated service providers that are separate legal entities . . . are considered separate services providers, and each must have its own separate designation.”

Many individual subscribers (i.e. brokers) have their own IDX websites that display NWMLS listing data. These websites, if they are properly branded with the real estate firm's information as required by the Data Use Policy, likely fall under the real estate firm's registration.

However, if an individual subscriber's website is operated under a separate legal entity (e.g. XYZ Agent, Inc.), that entity must also register with the Copyright Office and designate an agent to receive takedown notices. In other words, every separate legal entity that displays NWMLS data via an IDX website must register with the Copyright Office. Subscribers with IDX websites owned or operated by separate legal entities must follow the registration process as outlined above.

Note that if a subscriber has a separate legal entity solely for receiving commission payments (e.g. Agent Commission LLC) and that entity does not own or operate the subscriber's IDX website and is not referenced on the site, the subscriber does not have to register that separate entity with the Copyright Office. The registration requirement applies to online service providers.

4. Conclusion

The revised Data Use Policy requires each firm (and brokers with separate legal entities) to register with the United States Copyright Office, designate an agent to receive takedown notices, and update the DMCA notice with the correct contact information for the firm's designated agent on the firm's website.

You must do so by December 31, 2017. If you have any questions about this bulletin, please consult with your attorney.