



Image Tool Kit

- Is There Really an Issue?
- What is the DMCA?
- How Can the DMCA Benefit Me and My Brokerage?
- Are Your Images Licensed?
- How do the MLS Rules help?
- Appendix:
 - Reference links
 - Helpful terminology
 - More on Copyright and Licensing of Images
 - Sample forms (NAR)
 - Responding to a Take-Down Notice without DMCA

Note: This Guide has been created to assist members in managing proper use and ownership of listing content and to understand their obligations when challenged about image copyright and licensing. Brokers and Agents are encouraged to consult their Legal Counsel for guidance. With special recognition and appreciation for the excellent resources on these subjects provided by the National Association of Realtors, www.realtor.org.

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Introduction

The licensure and proper use of photos, videos and other images has quickly become an area that requires the attention of MLS Broker Participants and their agents. It's common knowledge that you, as a broker are responsible for the actions of the licensees affiliated with your company/firm. Have you considered that the liability for misuse of copyrighted materials could present itself as a challenge to your brokerage? Not from Stellar, but from the other sources that you and your agents use for photos, images and virtual tours? And, surprisingly enough, even from the loading of photos taken by your agents or provided by the sellers.

This Toolkit has been put together as a resource for Stellar MLS Broker Participants and their agents. You will find information and resources on the proper licensure of images, suggestions for the internal licensing of images from your agents to your firm and information on a safe harbor under federal law to assist in providing protection from potential liability for copyright infringement claims against your company and agent websites. Since this Toolkit does address some complex legal issues and "one size" does not fit all, we urge you to review and consult with your own legal counsel if you have specific questions or issues.

While the MLS Rules offer some protection, and there is also limited protection in the Participant and Subscriber Agreements that each Stellar customer has agreed to, there is no guarantee that you won't be challenged legally.

There have been lawsuits filed against MLS vendors as well as individual brokerages for the alleged violation of a photographer's copyright. The proper licensing of images loaded into the MLS system has become quite a serious issue and a focus of Stellar to provide tools for your protection.

Brokers and agents from time to time receive demand letters from companies or persons who claim ownership of digital images including those found on their IDX feed – photos that were likely added to the system by another brokerage. Stellar MLS continuously monitors and updates its processes and procedures in an effort to police and prevent unauthorized use of the listing contents and the MLS database. That alone is not sufficient to protect your brokerage from liability. Do you have written permission or a license to authorize the use of the images loaded with your listings? From your agents? From the Seller? From the Photographer? Are there limitations on those uses?

In addition to the rules and policies of Stellar, federal law provides a "Safe Harbor" for broker and agent websites for images that were not loaded through your brokerage. The Digital Millennium Copyright Act (DMCA) and the potential protection offered is described in detail in Section One of this document. While this toolkit provides valuable information on how the Safe Harbor works, it will fall on you to follow the necessary steps to register and add the required language to your website to take advantage of that Safe Harbor. We encourage you and your agents to jump on this right away to protect your company and agent websites that display MLS listings and photos. If you choose not to follow those procedures, the Safe Harbor will not apply and you will have potential monetary liability for infringement claims.

Section Two of this toolkit will provide a roadmap to understanding the role and responsibility of brokers and agents in regards to the proper licensure and use of images, with links to draft documents created by the National Association of Realtors that will give you a head start on licensing and protecting the chain of ownership of images used by your brokerage.

You will find detailed information on the current Stellar Rules and Regulations as they relate to photos, virtual tours and other images included in Section Three. Of course, these are subject to change so a link to the full MLS Rules and Regulations will also be included.

In the Appendix you will find a resource list of helpful documents, including those referenced in this Tool Kit, videos that you can review and share with your agents and articles of interest relating to the DMCA and the need for diligence.

One highlight from "*Managing Listing Content*" by the National Association of Realtors notes that protecting listing content (including images) is more difficult than ever due to the ease of copying and re-using images found online. It further notes, "Brokers may also face legal liability from the copyright owner (such as the seller or a third-party photographer) if the broker uses the listing content without obtaining the proper rights."

<https://www.nar.realtor/law-and-ethics/managing-listing-content>

Section One: DMCA Compliance Tool Kit

Let's start first with an explanation of what the Digital Millennium Copyright Act (DMCA) entails and how it can provide a safe harbor to protect you from the possible infringement by third parties including other brokerages and their agents. It's critical to understand that use of this safe harbor will not protect you or your agents for misuse of images that were loaded through your brokerage. Please see Section Two for suggestions on how to properly license images that are loaded by your company/firm.

For the purposes of this section, we will focus on how the DMCA can offer protection to your brokerage and agents with websites that include images from property listings that come from Stellar MLS Matrix system and other images that you may be displaying on your site that come from other sources.

This section of the toolkit is intended to explain how Participants and Subscribers can take advantage of the "Safe Harbor" provisions of the Digital Millennium Copyright Act ("DMCA"), as set forth in 17 U.S.C. § 512. The Safe Harbor is designed to protect Participants and Subscribers from monetary liability for the inadvertent posting of copyright infringing materials that may be contained in MLS Listing Content. What does that mean to you? It's a potential shield from litigation against you and your brokerage for copyright infringement caused by another party. Protection for Participants and Subscribers is subject to compliance with all the steps and requirements.

The Safe Harbor

The DMCA created the Safe Harbor to limit the liability of online service providers for claims of copyright infringement relating to posting of infringing materials. The term "online service provider" is defined very broadly by the DMCA and includes Stellar MLS, its Participants and Subscribers, and their websites that allow consumers to search real property listings and other listing content over the Internet. The Safe Harbor provides protection against infringing content posted by others provided that the on-line service provider did not have actual or "constructive" knowledge of the infringing material. Protection under the Safe Harbor is only provided for parties that strictly comply with the safe harbor requirements of 17 U.S.C. § 512(c), including:

- Registration with the U.S. Copyright Office of a designated agent to receive notifications of claimed infringements.
- Adoption and implementation of a policy that addresses repeat offenders.
- Posting of the required DMCA notice instructions and information, including the designated agent's contact information, in an accessible location on the Participant or Subscriber website.
- Prompt compliance with a takedown notice by removing any infringing materials and confirming such removal in writing, as well as prompt compliance with the requirements for action upon receipt of a counter-notification, as provided for in 17 U.S.C. §§ 512(g)(2)(B), 512(g)(2)(C), and 512(g)(3).

Required Actions to Comply with Safe Harbor

In December 2016, the U. S. Copyright Office introduced a new online registration system and electronically generated directory to replace the Copyright Office's paper based system and directory. This online system has streamlined the process and allows for simple and efficient registration. Detailed information, video tutorials and FAQ's about the online registration system, are available through the following links:

<https://www.copyright.gov/dmca-directory/help.html>

<https://www.copyright.gov/dmca-directory/faq.html>

STEP 1: Registration with the Copyright Office.

In order to designate an agent, a Participant or Subscriber must first register with the U.S. Copyright Office through the online registration system described above. The process is very simple and is described in details in the video tutorials. In summary, a Participant or Subscriber must first either create a Registration Account or work with someone that already has an account (this could be their Broker Participant or attorney). There is no fee to create an account. Upon logging in to a registration account, it is a simple process of following the steps to identify a designated agent by providing all the required information including, (i) the name, street address and other contact information of the service provider; (ii) all “alternate names” (this would include all d/b/a names, website names, etc.) and (iii) the name and street address and other contact information for the designated agent. An agent will need to be designated for each service provider. The fee for each designated agent application is \$6.00 and covers all alternate names for a period of 3 years.

A couple of important points are worth noting. First, the designated agent is the agent who will receive notifications of claimed infringements on behalf of the service provider. The designated agent has specific obligations in the event an infringement claim is received and failure to fulfill these obligations will result in loss of the Safe Harbor and potential monetary liability. Also, although a service provider should register all of its “alternate names”, separate legal entities (such as parents and subsidiaries) are not considered alternate names and must file separate designations. For this reason, agents that have separately owned websites will have to file a separate designated agent application.

STEP2: Posting of DMCA Notice.

In order to comply with the Safe Harbor, each Participant and Subscriber must post a DMCA Notice on each website filed with the Copyright Office. The DMCA Notice can be placed in a separate section of your website or incorporated into the website’s Terms of Use. The DMCA notice should be added to the website immediately upon filing with the Copyright Office.

The verbiage for the DMCA Notice is inserted below and should be provided to your website and IDX vendors to facilitate the process.

DMCA Notice Verbiage

“Digital Millennium Copyright Act Take-Down Notice. The Digital Millennium Copyright Act of 1998 (the “DMCA”) provides recourse for copyright owners who believe that material appearing on the Internet infringes their rights under U.S. copyright law. If you believe in good faith that materials hosted on the website infringe your copyright, you (or your agent) may send us a DMCA Take-Down Notice (“Takedown Notice”) requesting that the material be removed, or access to it blocked. The Notice should be sent to the following Designated Copyright Agent:

[INSERT DESIGNATED AGENT INFORMATION]

The Takedown Notice must include the following information: (a) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (b) identification of the copyrighted work claimed to have been infringed (or if multiple copyrighted works are covered by a single Notice, a representative list of such works); (c) identification of the material that is claimed to be infringing or the subject of infringing activity and that is to be removed or access to which is to be disabled, and information

reasonably sufficient to allow us to locate the material on the website; (d) information reasonably sufficient to permit us to contact you, including without limitation, your name, address, telephone number, and email address; (e) a statement that you have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (f) a statement that the information in the Notice is accurate and, under penalty of perjury, that you are authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.”

STEP3: Responding to a Takedown Notice.

Upon compliance with all of the above steps, any copyright owner who believes that content on a Participant’s or Subscriber’s website infringes its copyright will be required to provide a takedown notice to the designated agent. Depending on whether the alleged infringing materials relates to MLS Listing Content or other third party sources impacts how Stellar MLS can assist you in the process and your obligations.

Upon receipt of a Takedown Notice, you should review the notice to make sure that it complies with all of the notice requirements listed above. If the Takedown Notice alleges that any MLS Listing Content is infringing, you should send a copy of the Takedown Notice to Stellar MLS immediately. Also, if you have an attorney, you should send them a copy of the Notice for their review.

If the Takedown Notice includes the required information, the online service provider must locate the alleged infringing materials and “expeditiously” remove it. The DMCA does not provide a specific time frame as to when the materials must be removed, but it should be removed as soon as the accuracy and completeness of the Takedown Notice is confirmed and the materials located. If Stellar MLS receives a copy of the Takedown Notice, it will promptly investigate and remove the alleged infringing material if included in the MLS Listing Content. If the alleged infringing content is not part of the MLS Listing Content, the Participant or Subscriber will be obligated to expeditiously remove the alleged infringing material. If the Participant or Subscriber does not expeditiously remove the alleged infringing material, they will be subject to potential liability to the copyright owner. You should be aware that failure to remove infringing material may subject you to additional liability to Stellar MLS pursuant to the terms of the Stellar MLS Enrollment and Participant / Subscriber Agreement and any applicable Stellar MLS Rules and Regulations.

Once the materials have been removed from the website, written notice must be given to the third party who provided the alleged infringing content (“Third Party Notice”). If the alleged infringing materials is part of the MLS Listing Content, Stellar MLS may assist you in providing the Third Party Notice, but otherwise you will be responsible for providing such notice. In any case, the Third Party Notice should advise the third party of the receipt of the Takedown Notice; identify the content that is the subject of the Takedown Notice; and that the alleged infringing content has been removed or access disabled. That third party will then have a right to submit a counter-notification (“Counter Notification”). See Appendix 5 for the requirements of what must be included in a Counter Notification.

STEP 4: Receipt of a Counter Notice

If a Counter Notification is received, you should review the notice to make sure that it complies with all of the Counter Notice requirements listed above. Again, if you have an attorney, you should send them a copy of the Counter Notice for their review. If a Counter Notice complies with all requirements, a copy must be provided promptly to the copyright holder and inform them that the alleged infringing material that was removed will be reposted within 10 business days. The removed materials must then be replaced not less than 10 nor more than 14 days following receipt of the Counter Notice unless the copyright holder has filed a legal action seeking court order to restrain the third party from infringing its copyrighted works that were the subject of the original Takedown Notice.

Conclusion

The DMCA Safe Harbor can be a very effective tool to help mitigate risk of liability for copyright infringement. However, it does require technical compliance with all requirements of the Safe Harbor. Participants and Subscribers are urged to seek the advice of their own counsel to assure compliance with the Safe Harbor and to respond to any Takedown Notices or Counter Notices.

Note: Please see Appendix 6 for suggestions on how to handle a copyright infringement claim if you choose not to take advantage of the DMCA Safe Harbor.

Section Two: Licensing of Images

Who Owns the Copyright?

Why is it important for brokers and agents to be aware of the need to manage listing content and to avoid possible copyright infringement? On the surface, we all tend to believe that “if it’s on the Internet, it’s free and I can use it”. That is definitely not true – it’s fair to say that the majority of the images on the Internet require licensing for use. Use of another agent’s photos from the MLS system? Also, not allowed. Altering images (even those that you may have license to use) or using them for unlicensed purposes can also cause problems down the line. See Appendix 4 for a detailed definition of what a copyright is and how it applies directly to your brokerage. The chart included in that section is complex and demonstrates clearly how easily “who owns what” can be confused.

Adding the DMCA protection explained in Section One is a measure to protect you from the images loaded by other Stellar customers. It does not necessarily protect you from possible infringement resulting from actions within your own brokerage. We recommend that you also take a close look at the licensure and permissions you do (or don’t) have for loading images into Matrix. See Section 3 for details on the related Stellar MLS Rules and Regulations.

There is an excellent section on www.nar.realtor titled *How to Build a Chain of Ownership*. The article acknowledges that it is not a simple task to protect yourself and your brokerage. And their suggestions, while not guaranteed to prevent litigation in the future, can further pave the way to reducing risk.

Building a “chain of ownership” of images includes having an understanding of who owns what (see Appendix 4 and 4.a for more information on copyright and ownership) and also an acceptance of the needs for both MLSs and brokerages to take necessary steps to make certain that the Intellectual Property (aka IP) that is added to the MLS system is not infringing on another’s. Stellar takes these steps through the MLS Rules and Regulations, policies and the Participant and Subscriber Agreement (click through with first login to Matrix); brokers must adopt internal policies and procedures that apply to their brokerage and their agents.

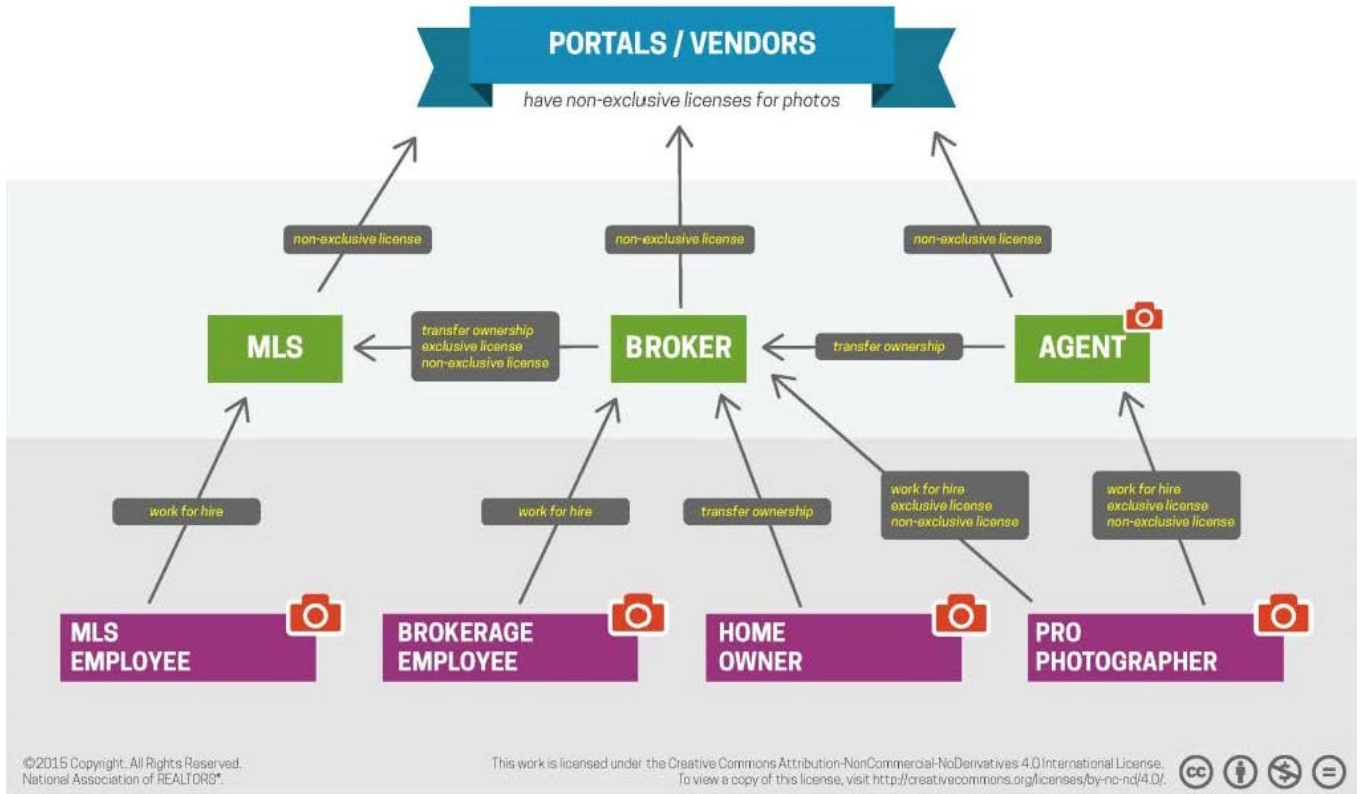
Brokers will want to consider some type of release from their agents for photographs/images they take; for assistants who may take photos on behalf of your brokerage or agents; from the seller(s); and from 3rd party photographers or services that provide photos/images to you. See Appendix 3 for sample draft documents provided by NAR as a starting point. They strongly recommend that you have any documents you intend to use reviewed by your own legal counsel – the templates are merely starting points and will need to be customized to your market and your specific needs. If the Listing Agreement you use does not include a release from the property owner(s), there is also sample language that you may want to consider using.

It is particularly important to carefully review agreements when working with 3rd party photographers. Some try to limit your use to “active” status within the MLS only which can restrict your ability to send photos out to the Internet or use them for on-line display on pending and sold properties (now allowed for IDX sites).

More on how to protect your brokerage: It’s important to understand the basic concepts of ownership and management rights for images. Educating your agents and creating office policies is critical to the process. A few key points to consider:

- Brokers and agents must avoid uploading of photos found on the internet and posting of images to their listings without proper licensing and written approval to use those images.
- Brokers must continuously monitor listings to avoid the use of improper images or unlicensed images.
- Improper or unlicensed images should be removed immediately.
- Participants and subscribers are responsible for verifying that all images and listings are in compliance with all Stellar MLS Rules and Regulations and applicable copyright laws.

Building a Chain of Ownership Illustration



To access the complete “How to Build a Chain of Ownership” document and recommendations go to:
<https://www.nar.realtor/law-and-ethics/managing-listing-content/how-to-build-a-chain-of-ownership>

Stellar MLS Tip – Are the Images Yours?

- Yes, if you personally took the original photos
- Yes, if you paid a professional photographer and have “ownership” vs. a license to use the photos(s) (in writing?)
- No, if the seller provided you with the images for loading and is re-listing with another agent
- No, if you or another party (example: virtual tour company) insert images from the Internet without permission/proper licensing
- Not Sure? Talk with your Broker!

Section Three: Stellar MLS Rules and Regulations on Photos

Not only are there laws to discourage the misuse of images, Stellar MLS has long had rules that affirm that images loaded into the MLS system must be properly licensed. It is important not to confuse the protection that is offered by the DMCA for images on websites with the responsibilities that MLS Participant/Brokers and Subscriber/Agents have as part of the MLS Rules and Regulations. Having the protection of the DMCA if you follow the steps in Section One does not relieve you or your agents from the requirement that you have permission to use the images you load in Matrix. Here are the applicable rules today – of course, subject to change. You can review the MLS Rules and Regulations on www.StellarMLS.com at any time to see the latest version.

Article 4.5: Listing Photos and Virtual Tours (applicable sections only)

A. At least one front exterior photo or rendering, aerial photo, or water view from the property (unit) must be loaded before a listing will be active. The front exterior photo or rendering must be entered in the 1st photo slot of the listing on all property types unless the 1st slot is an aerial photo or an exterior photo of a water view from the property (unit), in which case the front exterior photo must be in the 2nd slot.

B. The only exception is vacant land listings which must have a photo or an aerial photo, rendering, site plot or plat map in the listing's 1st photo slot. Photographs, images, virtual tours and/or renderings submitted by a Participant or Subscriber shall not be copied by other Participants or Subscribers for use in a subsequent listing of the same property without first obtaining a proper license the owner of such photographs, virtual tour or renderings. Images not licensed or purchased by the listing broker/agent will result in a fine as outlined in the General Fine Schedule (See Article 11/Section 4B).

D. Photos, images or virtual tours may not contain company or agent logos, agent photos, commissions, bonuses, any contact information, voice, text, or graphics of any kind (with the exception of copyright ©) in the virtual tour or photo sections. Only photographs, site plot, property sketch, property line art or survey of the property can be entered in the virtual tour and all photo fields. All images including virtual tour photos and images must be owned, purchased or licensed by the listing broker/agent, from the owner of the image(s). The penalty for non-compliance is outlined in the General Fines Schedule (See Article 11/Section 4B).

**note: as of this time, the MLS Rules and Regulations do not include penalties for failure to comply with MFRs request to "take down" a photo and there is a grace period for removal of photos used by another agent without permission of the former listing agent. These rules are subject to change as the adoption of the DMCA program dictates the need for higher fines/penalties.*

Reporting a Violation

To report a potential violation of Article 4.5, please use one of the following methods to report the circumstance to Stellar MLS:

1. Click on the link at the bottom of each report in Matrix that says "If you believe there is a violation on this listing, click here to report the problem."
 - A. Please be specific on the violation (your photo or someone else's, from outside source) and which photo(s) you are questioning.
2. If the images belong to you and are being used without your permission, please send an email with the specifics (MLS# and potential violation) to: admin@StellarMLS.com

Note: MFR staff reviews all reported violations and will issue the appropriate penalty in accordance with the Stellar MLS Rules and Regulations once confirmed.

Stellar MLS Practices

- When a report is received that an agent/broker is using photos not owned by them we reach out to offending agent requesting they provide the original photos without the watermarks or a license that grants them permission to use the images for upload into the MLS.
 - If there is a dispute that a photographer provided the images to a seller who in turn gave them to a new listing agent, we refer them back to the photographer to settle the licensure dispute.
 - If the listing agent is not able to produce originals or a license, they are provided a warning timeframe pursuant to MLS policy to remove the copyrighted photos and obtain originals. The property may have to be TOM until this occurs.
- IMAPP has provided permission for use of their aerial photos to be uploaded in Stellar MLS listings.
- Realist has photos that are obtained from each county. An agent must first contact the individual county to seek permission to use property images. Some counties allow them while others state they are copyrighted and are not available for public use.

ARTICLE 14 - OWNERSHIP of the Stellar MLS COMPILATIONS and COPYRIGHTS

Section 1: Submittal of Listing. By submitting any property listing to MLS, the Participant represents that:

- A. They have been authorized to grant and also thereby grant authority for MLS to include the property listing content in its copyrighted MLS compilation and also in any statistical report or "comparable".
- B. They have the authorization to grant and do grant the MLS the authority to include the property listing (data) in approved VOW and IDX displays for advertising on other Participant's IDX and/or VOW compliant websites. (Revised 6/11)

Unless the property owner(s) has/have instructed the Participant otherwise. See Article 5.11.

Note: Listing content 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.

Appendix 1: Resources and Research

Resources from NAR (Realtor.org) referenced or quoted in this Tool Kit and additional links are noted here. Login to realtor.org may be required to access this information.

<https://www.nar.realtor/law-and-ethics/managing-listing-content/how-to-manage-and-protect-listing-content>

<https://www.nar.realtor/ae/manage-your-association/association-policy/copyright-considerations-for-mls-photographs>

<https://www.nar.realtor/policy/mls-policy/use-of-photographs-in-a-multiple-listing-service>

<http://realtormag.realtor.org/daily-news/2015/11/13/when-it-comes-photos-know-you-publish>

<https://www.nar.realtor/law-and-ethics/managing-listing-content/how-to-build-a-chain-of-ownership>

<http://realtormag.realtor.org/daily-news/2015/11/13/when-it-comes-photos-know-you-publish>

<https://www.nar.realtor/videos/window-to-the-law-listing-video-copyright-issues>

[https://www.nar.realtor/law-and-ethics/who-owns-your-property-photos_\(with links to documents\)](https://www.nar.realtor/law-and-ethics/who-owns-your-property-photos_(with%20links%20to%20documents))

[https://www.nar.realtor/videos/window-to-the-law-copyright-infringement-safe-harbor_\(video\)](https://www.nar.realtor/videos/window-to-the-law-copyright-infringement-safe-harbor_(video))

[https://www.nar.realtor/law-and-ethics/slides-from-window-to-the-law-copyright-infringement-safe-harbor \(slides\)](https://www.nar.realtor/law-and-ethics/slides-from-window-to-the-law-copyright-infringement-safe-harbor(slides))

<https://www.nar.realtor/handbook-on-multiple-listing-policy/policies/policies-participants-rights/section-16-digital-millennium-copyright-act-safe-harbor>

<https://www.nar.realtor/articles/law-policy-do-you-understand-online-copyright-law>

<https://www.nar.realtor/law-and-ethics/managing-listing-content/sample-documents-and-implementation-guides-for-mls-listing-content-module>

Appendix 2: Sample Documents for Chain of Ownership (photos/images)

Sample Agreements available on Realtor.org (login required)

<https://www.nar.realtor/law-and-ethics/who-owns-your-property-photos>

In order to assist members and member firms, NAR Legal Affairs created sample agreements, which should be modified as necessary to fit your particular needs.

These documents are provided as a sample, and are not intended to be and do not constitute legal advice, or a substitute for specific legal advice or opinions. The user of this sample document should not use this document without consulting legal counsel. The use of this document should be modified to address the specific legal needs of the user.

Work for Hire Agreement: This sample agreement provides that the commissioned photographs are a “Work for Hire”, which means the commissioning party is the automatic owner of the photographs from their creation.

Assignment Agreement: In this sample agreement, the photographer assigns all right, title and interest in the photographs to the broker.

Exclusive License Agreement: A photographer may want to retain its ownership of the photographs. In this sample agreement, the photographer grants to the broker an exclusive license to display and distribute the photographs in connection with the real estate industry.

Stellar MLS Note: Samples are below, for a full sized-editable version, please follow the link above each document to download in either PDF or editable version.

Appendix 2.A Sample Work for Hire Agreement from NAR

(customize to your brokerage needs)

<https://www.nar.realtor/sites/default/files/applications-and-forms/2015/photographs-work-made-for-hire-agreement.pdf>

WORK MADE FORE HIRE AGREEMENT

This Agreement ("Agreement") is made and entered into as of < date > by and between _____ ("Brokerage") and _____ ("Photographer"). Brokerage has commissioned Photographer to photograph, visually record or otherwise create graphics or other images (collectively, "Images") of the properties identified in the attached Appendix A. The parties hereby agree, for good and valuable consideration received, the receipt and sufficiency of which is hereby acknowledged, as follows:

1. Brokerage agrees to pay Photographer in consideration of all services rendered by Photographer and the creation of the Images as set forth below the total amount of _____.
2. Photographer acknowledges and agrees that all Images are proprietary works of Brokerage. To the extent permitted under applicable law, all Images shall be considered a Work Made for Hire (as such term is defined under the Copyright Act, 17 U.S.C. §101 and following, as amended) by Photographer for Brokerage, and as such, shall be exclusively developed for the benefit of and owned by Brokerage. Brokerage shall exclusively own all worldwide right, title and interest in and to the Images, including without limitation copyrights.
3. To the extent that it should be determined that any of the Images do not qualify as a Work Made for Hire under U.S. law, Photographer hereby irrevocably assigns and transfers to Brokerage all of Photographer's worldwide right, title and interest, including without limitation all copyrights, whether now existing or hereafter acquired, in and to all Images. Photographer agrees to cooperate and take all action reasonably requested by Brokerage, including executing and delivering to Brokerage all documents, or providing information pertaining to the Images, in connection with the assignment of Photographer's rights to Brokerage under this Agreement. Specifically, but without limitation, Photographer agrees to assist in filing copyright applications in the United States or elsewhere if necessary.
4. Photographer hereby represents and warrants that no third party has any rights in, to, or arising out of the Images, and Photographer has full right and power to enter into this Agreement.
5. Photographer acknowledges and understands that it is in no way permitted to use the Images in any manner whatsoever, and no other royalty or other consideration will be due to Photographer. Photographer agrees and warrants that Brokerage is under no obligation to credit Photographer or any other third party as author of the Images.
6. Photographer understands and agrees that it is an independent contractor of Brokerage and nothing in this Agreement shall be construed to create a partnership, or joint venture, between Photographer and Brokerage.
7. The validity, construction and enforceability of this Agreement shall be governed in all respects by the laws of the State of _____. The terms and conditions set forth herein constitute the entire agreement between the parties and shall supersede all prior agreements. This Agreement may not be amended except in writing signed by the respective parties. The failure of either party to enforce its rights under this Agreement at any time for any period shall not be construed as a waiver of such rights.

IN WITNESS WHERE, the Parties have executed this Agreement as of the date first above written:

<Insert Photographer name >

<insert Brokerage name >

Signature: _____ Signature _____

Name: _____ Name: _____

Title: _____ Title: _____

Date: _____ Date: _____

Address: _____ Address: _____

Email: _____ Email: _____

APPENDIX A

[List applicable properties]

Appendix 2.B: Sample Photograph Assignment Agreement – by NAR

<https://www.nar.realtor/sites/default/files/applications-and-forms/2015/photographs-assignment-agreement.pdf>

ASSIGNMENT AGREEMENT

This Assignment Agreement (“Agreement”) is made and entered into as of < date > by and between _____ (“Brokerage”) and _____ (“Photographer”). Brokerage has engaged Photographer to photograph, visually record or otherwise create graphics or other images (collectively, “Images”) of the properties identified in the attached Appendix A. The parties hereby agree, for good and valuable consideration received, the receipt and sufficiency of which is hereby acknowledged, as follows:

1. Brokerage agrees to pay Photographer in consideration of all services rendered by Photographer and the assignment of the Images as set forth below the total amount of _____.
2. Photographer hereby irrevocably assigns and transfers to Brokerage all of Photographer’s worldwide right, title and interest, including without limitation all copyrights, whether now existing or hereafter acquired, in and to all Images. Photographer agrees to cooperate and take all action reasonably requested by Brokerage, including executing and delivering to Brokerage all documents, or providing information pertaining to the Images, in connection with the assignment of Photographer’s rights to Brokerage under this Agreement. Specifically, but without limitation, Photographer agrees to assist in filing copyright applications in the United States or elsewhere if necessary.
3. Photographer represents and warrants to Brokerage that it owns all right, title and interest in and to the Images, including copyright, is capable of assigning said rights in the Images as set forth in this Agreement, and has full right and power to enter into this Agreement.
4. Photographer acknowledges and understands that it is in no way permitted to use the Images in any manner whatsoever, and no other royalty or other consideration will be due to Photographer. Photographer agrees and warrants that Brokerage is under no obligation to credit Photographer or any other third party as the author of the Images.
5. Photographer understands and agrees that it is an independent contractor of Brokerage and nothing in this Agreement shall be construed to create a partnership, or joint venture, between Photographer and Brokerage.
6. The validity, construction and enforceability of this Agreement shall be governed in all respects by the laws of the State of _____. The terms and conditions set forth herein constitute the entire agreement between the parties and shall supersede all prior agreements. This Agreement may not be amended except in writing signed by the respective parties. The failure of either party to enforce its rights under this Agreement at any time for any period shall not be construed as a waiver of such rights.

IN WITNESS WHERE, the Parties have executed this Agreement as of the date first above written:

<Insert Photographer name >

<insert Brokerage name >

Signature: _____ Signature _____

Name: _____ Name: _____

Title: _____ Title: _____

Date: _____ Date: _____

Address: _____ Address: _____

Email: _____ Email: _____

APPENDIX A

[List applicable properties]

Appendix 2.C Sample Exclusive License Agreement – provided by NAR

<https://www.nar.realtor/sites/default/files/applications-and-forms/2015/photographs-exclusive-license-agreement.pdf>

EXCLUSIVE LICENSE AGREEMENT

This Exclusive License Agreement (“Agreement”) is made and entered into as of < date > by and between _____ (“Brokerage”) and _____ (“Photographer”). Brokerage has engaged Photographer to photograph, visually record or otherwise create graphics or other images (collectively, “Images”) of the properties identified in the attached Appendix A. The parties hereby agree, for good and valuable consideration received, the receipt and sufficiency of which is hereby acknowledged, as follows:

1. Brokerage agrees to pay Photographer in consideration of the services rendered and exclusive license granted below the one-time total amount of _____.
2. License Grant.
 - a. Photographer hereby grants to Brokerage an exclusive worldwide royalty-free license in perpetuity to reproduce, distribute, display, prepare derivative works of, and publicly perform the Images in connection with the real estate industry, including without limitation such uses of the Images in connection with advertising real property and to authorize and sublicense such rights to third parties at Brokerage’s discretion.
 - b. This exclusive license grant shall include the right to sue for copyright infringement, including without limitation past infringement. To that end, Photographers agrees to assist Brokerage in preparing and filing any copyright applications that cover the Images, including providing any information necessary to prepare such applications.
3. Brokerage acknowledges that Photographer retains title and ownership of the Images.
4. Photographer hereby represents and warrants that it owns all right, title and interest in and to the Images, no third party has any rights in, to, or arising out of the Images, and Photographer has full right and power to enter into this Agreement and grant the license set forth in Section 2. The parties agree that Brokerage is under no obligation to credit Photographer or any other third party as the author or owner of the Images.
5. Photographer understands and agrees that it is an independent contractor of Brokerage and nothing in this Agreement shall be construed to create a partnership, or joint venture, between Photographer and Brokerage.
6. The validity, construction and enforceability of this Agreement shall be governed in all respects by the laws of the State of _____. The terms and conditions set forth herein constitute the entire agreement between the parties and shall supersede all prior agreements. This Agreement may not be amended except in writing signed by the respective parties. The failure of either party to enforce its rights under this Agreement at any time for any period shall not be construed as a waiver of such rights.

IN WITNESS WHERE, the Parties have executed this Agreement as of the date first above written:

<Insert Photographer name >

<insert Brokerage name >

Signature: _____

Signature _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Address: _____

Address: _____

Email: _____

Email: _____

APPENDIX A

[List applicable properties]

Appendix 2.D Sample

provided by NAR

<https://www.nar.realtor/law-and-ethics/managing-listing-content/listing-agreement-language>

From NAR Implementation Guide

Name of Agreement: Listing Agreement Language - Parties: Seller and Listing Broker

Purpose: The purpose of the Listing Agreement License Language is to have the seller grant to the broker the rights necessary for the broker to use the listing content, which includes but is not limited to the following elements: photographs, images, graphics, video recordings, virtual tours, drawings, written descriptions, remarks, narratives and pricing information, and any other copyrightable elements relating to the Property (“Listing Content”). The Listing Agreement Language also authorizes the broker to list the property in the MLS and allow the MLS to make IDX listings available to other brokers. Without a license, the broker’s use of any Listing Content of which the seller exercises ownership or control may constitute infringement, and the broker’s grant of rights to an MLS will be invalid.

Instructions: This document includes language, but is not a standalone agreement. It needs to be attached or incorporated into the listing agreement signed by the seller. If attached, the listing agreement should make reference to the attachment and state that the attachment is “incorporated by reference.” If the listing agreement does not define the listing broker as “Broker” and the property owner/seller as the “Seller,” the references in the language to Broker and Seller should be modified accordingly.

THIS DOCUMENT IS PROVIDED AS A SAMPLE AND IS NOT INTENDED TO BE AND DOES NOT CONSTITUTE LEGAL ADVICE, OR A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS. THE USER OF THIS SAMPLE DOCUMENT SHOULD NOT ACT OR REFRAIN FROM ACTING, OR USE THIS DOCUMENT WITHOUT CONSULTING LEGAL COUNSEL. THE USE OF THIS DOCUMENT SHOULD BE MODIFIED TO ADDRESS THE SPECIFIC LEGAL NEEDS OF THE USER.

Listing Agreement Language

1
2

3 Use of Listing Content: Intellectual Property License. Unless Seller delivers to Broker a
4 written certification, in a form acceptable to Broker, that Seller does not desire the Listing
5 Content to be disseminated by a multiple listing service, Seller acknowledges and agrees that all
6 photographs, images, graphics, video recordings, virtual tours, drawings, written descriptions,
7 remarks, narratives, pricing information, and other copyrightable elements relating to the
8 Property provided by Seller to Broker or Broker’s agent (the “Seller Listing Content”), or
9 otherwise obtained or produced by Broker or Broker’s agent in connection with this Agreement
10 (the “Broker Listing Content”), and any changes to the Seller Listing Content or the Broker
11 Listing Content, may be filed with one or more multiple listing services, included in
12 compilations of listings, and otherwise distributed, publicly displayed and reproduced. Seller
13 hereby grants to Broker a non-exclusive, irrevocable, worldwide, royalty free license to use,
14 sublicense through multiple tiers, publish, display, and reproduce the Seller Listing Content, to
15 prepare derivative works of the Seller Listing Content, and to distribute the Seller Listing
16 Content or any derivative works thereof. This non-exclusive licence shall survive the termination
17 of this Agreement for any reason whatever. Seller represents and warrants to Broker that the
18 Seller Listing Content, and the license granted to Broker for the Seller Listing Content, do not
19 violate or infringe upon the rights, including any copyright rights, or any person or entity. Seller
20 acknowledges and agrees that as between Seller and Broker, all Broker Listing Content is owned
21 exclusively by Broker, and Seller has no right, title or interest in or to any Broker Listing
22 Content.

Appendix 3 - Terminology

(NAR) Managing Listing Content Terminology

<https://www.nar.realtor/law-and-ethics/managing-listing-content/managing-listing-content-terminology>

Assignment: When a copyright owner transfers some or all of his or her rights unconditionally and without restrictions, it is generally considered to be an “assignment” of the copyright. A copyright gives the owner numerous rights in the work, such as: the right to reproduce and the right to prepare derivative to name a few. Accordingly, the copyright owner has the option of assigning each of these rights to different individuals or the owner may assign all of the rights to only one individual.

Compilation: The MLS holds a copyright to the compilation of the listings. A “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. Therefore, the copyright is truly in the “selection” and “arrangement” of the material, not in the individual listing, and not in the individual components of the listing, such as photographs and remarks.

Indemnification: Is a clause used in contracts to guarantee against any loss which another might suffer.

Intellectual Property (“IP”): Any intangible asset that consists of human knowledge and ideas. Examples of intellectual property include patents, copyrights, trademarks and software

License: When a copyright owner only transfers some of his or her rights for a limited period of time or a limited purpose, it is generally known as a “license” of the copyright. With a license, you temporarily transfer your rights in the copyright to another person, but you retain actual ownership of the copyright. Generally, there are two types of license agreements, exclusive and non-exclusive.

Exclusive License: An exclusive license exists when the transferred rights can only be used by the owner of the license (the licensee). Accordingly, no one but the licensee can exercise the rights contained in the license, not even the person who granted the license (the licensor).

Non-exclusive License: A non-exclusive license permits others, including the licensor to exercise the same right being transferred in the license.

Work Made for Hire: 17 U.S.C. Section 101 of the Copyright Act defines “works made for hire” as either:

- a work prepared by an employee within the scope of his or her employment; OR
- a work specially ordered or commissioned for use as:
 - a contribution to a collective work,
 - a part of a motion picture or other audiovisual work,
 - a translation,
 - a supplementary work,
 - a compilation,
 - an instructions text,
 - a test,
 - answer material for a test, or
 - an atlas

and the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. The written “work for hire” instrument must be executed prior to the work being created; “work made for hire” does not apply to works already created

Appendix 4 – Managing Listing Content

(NAR) How to Manage and Protect Listing Content

<https://www.nar.realtor/law-and-ethics/managing-listing-content/how-to-manage-and-protect-listing-content>

The most popular legal regime used to protect creative works from unauthorized use is copyright law. In addition to copyright law, contract law also plays a significant role in transferring and controlling these rights.

What is a copyright?

Copyright is a form of protection provided under federal statutes to original works of authorship fixed in a tangible medium of expression. It is a means whereby the creator of a valuable work can legally protect his rights in that work and realize the benefits of it. A copyright is secured immediately at the time the work is created. A work is created when it is fixed in a tangible medium of expression for the first time. For example, a copyright in a photograph is created the moment the photograph is developed.

What can you copyright?

A work that is creative, original, and fixed in a tangible medium.

Examples:

- photographs
- virtual tours
- architectural drawings
- creative listing remarks
- Data and raw facts are NOT copyrightable because they are not original.

What rights does the copyright owner have?

A copyright owner has the following exclusive rights to the work:

- Reproduction (copying)
- Derivative works (using original work to create something else)
- Distribution
- Performance
- Public display

Who owns the copyright?

The creator (author) of the copyrightable work owns the copyright. However, there are some limited exceptions:

- Works created by an employee in his scope of employment are owned by the employer.
- Works prepared by a person who has entered into a written agreement prior to commencement of creation are known as a “Work Made for Hire” and are owned by the party commissioning the work.

So who owns the listing content?

Many different people could own parts of the listing content. The creator of the work would own the copyright to that work, unless there was an agreement to the contrary.

- Work Owner
- Photograph Photographer
- Listing Remarks Agent and/or Seller
- List Price Seller—NAR instructs that the seller must always establish the list price; agents can aid in this decision, but should never set the list price.
- Architectural Drawings Architect
- Virtual Tours Creator of the virtual tour

Are copyrights transferable?

Copyrights are transferable. The owner may transfer all or part of the rights to a copyright in a work to another person.

How are copyright rights transferred?

A copyright is most commonly transferred through contract law. There are two popular contractual mechanisms that allow for transfer of these rights, assignments, or licenses. An assignment and a license are entirely different tools. An assignment is similar to the sale of a home, while a license is similar to a lease. Both tools permit another person access and rights in the copyright; however, the extent of those rights differ.

Assignment: Copyright owner retains no rights to the copyright rights assigned because he has permanently transferred those rights.

License: Copyright owner retains the rights, but gives others permission to use some or all of the copyright rights. The copyright owner can limit the use through the license; examples of limitations include duration, and even where or how the copyright work can be used. Additionally, there are two types of licenses available:

Exclusive License: An exclusive license means that only the licensee can use the rights transferred. Not even the licensor can use the rights transferred under this type of license.

Non-Exclusive License: A non-exclusive license permits others, including the licensor, to exercise the same rights being transferred in the license.

Appendix 4.A: Quick Reference: Realtor.org/Who Owns the Copyright

Copyright Owner	Copyrightable Content	Document that Transfers the Content	Type of Transfer	New Owner of Copyright (Assignment) OR Person/Entity Permitted to Use Copyright (License)	Rights Transferred
Seller	Photographs, listing price, listing remarks...	Listing Agreement	License	Broker	Broker may use the copyrightable material and may license the content to other parties for use. Seller still owns the copyrightable content.
Agent	Photographs, listing remarks...	Agent Independent Contractor Agreement	Assignment	Broker	Broker owns the content. Agent no longer has rights to the content. However, Broker may license the content back to the Agent for the Agent to use.
Third-Party Independent Contractor	Photographs, Virtual Tours, Architectural Drawings	Third-Party Independent Contractor Agreement	Assignment	Broker	Broker owns the content. Third-Party no longer has rights to the content.
Broker	Listing Content (photographs, list price, listing remarks...)	Participation Agreement	License	MLS	MLS may use the content and may sublicense the content to vendors, cooperating participants. Broker still owns and may use the content.

Appendix 5: Submitting a Counter-Notice to a Demand Letter

DMCA Take-Down Counter-Notice

If you believe in good faith that a DMCA Take-Down Notice of copyright infringement has been wrongly filed against you, the DMCA permits you to send us a counter-notice (“Counter-Notice”). The Counter-Notice should be sent to the following Designated Copyright Agent:

The Counter-Notice must include the following information:

- (a) Your physical or electronic signature;
- (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 of the material to be removed or disabled;
- (d) your name, address, and telephone number, and a statement that you consent to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if your address is outside of the United States, for any judicial district in which we may be found, and that you will accept service of process from the person who provided the Notice, or an agent of such person.

Appendix 6: If You Receive a Demand Letter

The following information may be helpful if you receive a take-down notice regarding an image and you have chosen not to add the DMCA Safe Harbor disclosures appointing MFR as your Agent. It is an important reminder to give serious consideration to following the instructions for DMCA compliance to protect your brokerage and your agents. MFR will be unable to assist with these types of notices if you have not complied with the notification requirements.

Suggested Steps:

Step 1: Investigate and Notify

In the event of a receipt of a demand letter from a third party company who claims that a broker or agent is infringing or improperly using its images requires immediate investigation which should include, at a minimum, the following:

- Attempt to determine if the allegations properly identify images that you are currently using or have used in listing contents in the past.
- If alleged images have been used, investigate whether you have obtained proper ownership or license of the images.
- If alleged violation is included in a listing from another participant/subscriber, you should immediately advise both Stellar MLS and the listing broker or agent so that they can remove the alleged infringing image.

STEP 2: Prepare Appropriate Response

Depending on the results of the investigation and the demands made in the letter, a response to the letter may be required. The content of the response will depend on the results of the investigation, but may include the following:

- If the demand letter threatens legal action or demands payment and relates to an image in a listing from a separate listing broker or agent, consider responding to the letter advising that you have been properly licensed to utilize the image pursuant to the applicable Subscriber/Participation Agreement. **[A sample response is attached]**
- If the demand requires immediate action and payment and relates to one of your own listings, the response will depend upon the results of your investigation, but could include the following:
 - Demand specific identification of the image and proof of copyright registration and/or evidence of ownership.
 - If Demand is for compensation, response could include one or more of the following:
 - Request identification of the formula for calculating damages;
 - Demand evidence of proof of pricing or the fair market value of the alleged infringing image;
 - Demand evidence of the date in which the alleged infringement began.
 - Demand that they cease and desist in contacting you regarding the alleged infringement until they have provided a response with all the requested information.

Appendix 6.A – Sample Demand Letter Response

(be sure to consult your legal counsel)

[Sample RESPONSE LETTER on Your Letterhead]

[Date]

Re: **[Provide appropriate reference designating claim of violation]**

To Whom It May Concern:

We are in receipt of your letter dated _____ claiming that our use of certain images may infringe your company's copyrights by utilizing these images without proper license.

Contrary to your claim, we do not believe we are in violation of your copyrights in that we have a valid license to use all photographs displayed on our website. In that regard, enclosed is a copy of our Stellar MLS Enrollment and Participant/Subscriber Agreement which we have entered into with our MLS Service, Stellar MLS ("Stellar"). You will see from reviewing this Agreement that it grants us the right to utilize all of the Content including photographs in accordance with the terms of the Agreement and applicable MLS rules and policies. We have complied with all of the obligations under the Agreement and are therefore operating under a valid and proper license.

We believe that this letter and attached Agreement should resolve all outstanding issues regarding this matter.

Sincerely,