

COPYRIGHT LAW – PHOTOGRAPHS AND OTHER CREATIVE LISTING COMPONENTS

As a general rule, copyright law protects the creative portion of a listing, such as a photograph or a virtual tour of the home. (Copyright law does not protect “facts,” but may, such as in the case of an MLS, protect the creativity involved in selecting, coordinating and arranging the facts.) In the case of creative works, the copyright belongs to the person who did the creating, for example, the person who took the photograph. The copyright protection is automatic from the moment the work is created. Copyright registration is not necessary for copyright protection.¹

A photographer can give someone a license to use a photograph for a particular purpose for a particular period of time. Alternatively, a photographer can assign all of his rights in the photograph to the person who hired him. If the person who paid for the photograph receives only a license, then she must take great care to make certain that her use of the photograph does not exceed the rights granted in the license. For example, if the photographer grants a Realtor® a non-exclusive license to use photographs in connection with marketing active listings, it would be a copyright violation if the photographs were used in connection with a home design website.

The Handbook on Multiple Listing Policy provides that by submitting listing content to the MLS, the broker is granting the MLS a license to use the listing content in its MLS compilation and also in any statistical reports on comparables. MLS Policy provides further that prior to submitting to the MLS, the listing broker should own or have authority to license all listing content (e.g., photographs, virtual tours, descriptive narratives, etc.).

¹ Copyright registration, however, does have some benefits. First, it allows the copyright owner to sue in federal court for infringement. Second, the registration is reliable evidence of copyright validity and creates a public record of the copyright. Third, registration, if done prior to when the infringement begins, renders a copyright owner eligible for statutory damages (\$30,000) and attorney fees. If there is no registration, then the copyright owner is only entitled to actual damages – typically lost profits.

In 2019, changes to the MLS Model Rules added language whereby by submitting a listing, an MLS participant is deemed to have warranted to the MLS that it has the legal right to authorize the MLS to use the photograph and other listing content. The rule changes also added language whereby the MLS participant who submits the listing to the MLS is deemed to have agreed to indemnify both the MLS and any other participant of the MLS against any liability as a result of “any inadequacy of ownership” of the submitted listing content.

Obviously, the MLS is relying on the broker to obtain all necessary rights to use the photograph and other copyrightable listing content. Brokers, in turn, rely on the party who obtained the photograph, typically the listing agent, both for authorization to use the photograph and for assurance that the listing agent has the authority to grant the broker the right to use the photograph. This is typically done through the independent contractor agreement between the broker and the salesperson.

Many, if not most, independent contractor agreements provide that all photos, virtual tours, written descriptions and other copyrightable elements of a listing submitted by the agent are “works for hire” and the property of the broker. A “work for hire” is a contractual exception to the general rule that the person who creates the work holds all rights to the work produced. Under this doctrine, even if the agent took the photograph and created the written description, the terms of the independent contractor agreement assign all rights in that creative work to the agent’s broker. If the independent contractor agreement states that the photograph provided by the salesperson is a “work for hire,” then the photograph belongs to the broker even if the salesperson terminates his relationship with the broker.

But, what if, as is often the case, the agent does not take the photo or create the video tour himself, but instead hires a professional photographer or videographer? Many Realtors® are under

the assumption that if they hire a professional photographer to take a photograph, then the photograph belongs to them. Technically, this is not the case. Other than in an employer/employee situation, in order for the “work for hire” doctrine to apply, the parties must agree via a written contract that the work shall be considered a “work for hire.” If the agent hires a professional photographer then the agent needs the photographer to agree in writing that the photograph that the agent paid for is a “work for hire” and belongs to the agent. Alternatively, the photographer could license the agent to use the photograph for marketing purposes. In the absence of a written agreement, legally all rights in the photograph belongs to the photographer. (If an employee of a listing agent takes the photograph, then under the “work for hire doctrine,” the photograph belongs to the employer-listing agent. The “work for hire” doctrine applies automatically in an employer/employee relationship, and there is no need to assign those rights pursuant to a written agreement.)

Most brokers’ independent contractor agreements provide that it is the responsibility of the agent to make sure that he/she not only obtains the right to use the photograph, but also the right to assign those rights to his/her broker. Many independent contractor agreements also include a provision whereby if the agent fails to obtain all necessary authorization to use any photographs or other copyrightable listing content, the agent will indemnify the broker for the costs involved defending any copyright infringement claim.

If the seller relists the property with a new broker, that new listing broker cannot use the prior broker’s photographs. In 2019, the MLS Rules and Regulations were amended to include procedures to be followed in the event any MLS participant believes that another participant has engaged in the unauthorized use of his or her photographs or other listing content. Under the new MLS Rules and Regulations, a participant may not file a lawsuit or pursue any action against

another MLS participant based on the unauthorized use of his or her photographs until he/she first follows these new procedures:

1. Claimant must send notice of alleged unauthorized use to the MLS not more than 60 days after the alleged misuse is first identified.
2. MLS then sends notice to the participant who is accused of unauthorized use.
3. Within ten days, the respondent must either 1) remove the alleged unauthorized content or 2) provide proof that the use is authorized.
4. If the respondent submits evidence that the use is authorized, MLS must make a decision as to whether the use was in fact unauthorized within 30 days.
5. If MLS determines that use is unauthorized, MLS may issue sanctions including a request that the respondent stop the unauthorized use within ten days. (MLS itself may remove the content only “where a clear violation exists” – if the question is debatable, the MLS should leave the parties to work this out in the courts.)
6. If the respondent does not remove the content within ten days, then the complainant may pursue legal remedies.

Finally, agents and brokers should also keep in mind that photographs they find online of a local landmark, park, school or tourist attraction may also be subject to copyright protection. Realtors® should not rely on the presence or absence of a copyright notice (“©”) because such a notice is not required for works published after March 1, 1989. If the copyright for these photographs is registered, then an agent who uses these photographs without the permission of the copyright owner may be liable for statutory damages as high as \$30,000 (\$150,000 if the infringement is “willful”).