



## **Copyright Protection for MLS Listing Content Frequently Asked Questions (FAQs) for Brokerages**

### **1) Why do I need to copyright my listing content? What are the current concerns and advantages?**

Copyright law protects the authors of creative works from others (called “copyright infringers” or just “infringers”) who would use those works without the authors’ permission. Prompt registration of copyright with the United States Copyright Office is required in order to get attorney fees and a special kind of damages against infringers. Registration is also a prerequisite to suing an infringer.

For brokerages and broker associates to do this individually would cost a great deal, and it would entail efforts that many brokerages and broker associates may not want to exert. Under MRED’s Copyright Program, MRED can register all the works in the MLS database at no cost to you, and MRED can take steps to sue anyone who infringes the copyrights in the MLS data.

To achieve these objectives, MRED must obtain ownership of the copyrights in the materials it will register and may need to enforce. MRED has thus created an optional program where brokerages get to decide whether to have MRED register and enforce their copyrights. If they do, they permit MRED to acquire the copyrights in data content relating to their listings. In return, MRED promises in its agreement with the brokerages to (1) obtain copyrights from the brokerages’ broker associates; (2) register the copyrights; (3) employ reasonable efforts to hinder unpermitted use of data content when made aware of same; (4) grant back to the brokerage unfettered rights to use data relating to the brokerage’s own listings; and (5) refrain from distributing the brokerage’s listing data except for MLS related purposes unless MLS has the brokerage’s consent.

Brokerages that prefer not to take part do not have to opt-in. They can negotiate with their own broker associates regarding copyright ownership; they will be responsible for their own copyright registrations and for preventing third parties from making unauthorized use of the brokerages’ listing data. From these brokerages and the broker associates in their offices, MRED obtains only a license to use the copyright-protected content for MLS purposes.

The MRED Board of Managers has determined that this approach is the most cost-effective way to prevent misuse of data relating to brokerage’s listings.

### **2) Who currently retains ownership of listing copyrights?**

In the absence of written agreements to the contrary, the owner of the copyright in a photo or in original text is the author. That would be the human being who created it - in most cases, the broker associate or assistant who wrote the text or snapped the photo. If an employee (not an independent contractor)

creates a work within the scope of her employment, then the employer is the author (this is not as common in the real estate industry as other industries, because most real estate brokers and many assistants, etc., are independent contractors).

If someone owns a copyright and allows someone else to use it, the owner is said to be “licensing” the copyright. Just because a broker associate submits the photo to her brokerage does not mean she transfers ownership to her brokerage. Just because a photographer takes a photo for a broker associate and permits he or she to put it on MLS does not mean that the photographer has given up his or her copyrights. Instead, they are licensing their rights to be used for particular purposes.

### **3) Which portion of the listing is copyright-protected?**

Copyright protects anything that is the result of a creative process, including original text (like remarks) and perhaps even the listing price; photographs, whether taken with digital or traditional equipment; virtual tours (though the creators of tours often retain their copyrights); and any other creative text and graphic materials. Facts cannot be copyright-protected; the facts that the home on 123 Elm Street is for sale and that it has three bedrooms and encompasses approximately 2,100 square feet are not subject to copyright protection. Copyright also does not relate to product or service names; designations of the origins of products and services, including product names and logos, are the subject of trademark law, something completely different.

### **4) Would granting copyrights to the MLS work against my fiduciary responsibility to my seller/client?**

MRED cannot give you legal advice about your fiduciary duties. MRED’s attorneys believe, however, that copyright protects brokers themselves and their customers from those who take listing data without permission.

### **5) Would copyrighting restrict activity in the market and violate Federal anti-trust laws?**

Generally, copyrights do not pose antitrust problems. In fact, a copyright is a sort of state-sponsored monopoly; an exception to the antitrust laws’ view that monopolies are generally bad. Copyrights can be misused so as to bring about an antitrust violation, but such misuses are unlikely in the MLS/brokerage context.

### **6) How can this benefit my business?**

It prevents others from taking your work and profiting from it without your permission.

### **7) What would the cost be to me?**

There is no additional cost; it is already covered in your MLS fees.

### **8) Do NAR and the Illinois Association of REALTORS® (IAR) have a position on copyrighting? Do we need their approval for any new documents we are utilizing?**

NAR has encouraged the registration of copyrights in MLS databases. MRED is not bound to follow NAR policy, but has chosen to make the copyright program optional for MRED brokerages as is required under NAR policy. Otherwise, no approval from NAR for the documentation is required. IAR does not maintain MLS policies that are binding on MRED.

**9) Can MRED release/sell our data without permission from the Participants?**

No. The proposed agreement between MRED and the Participants ensures that Participants can opt out of any 'non-core' use of the MLS data that MRED considers. Non-core uses include any distribution to non-Participants (like consumers or other businesses). This is the same as existing MRED policy.

**10) As a Broker, will I retain my right to give third-party entities the right to use my listing data? Will there be any restrictions?**

The proposed agreements ensure that the listing broker has an unrestricted right to use content relating to his or her own listings, including licensing them for use by third parties (and even including the right to allow the third parties to license to other third parties). MLS commits in the proposed agreements to support the brokers' unfettered use of their own listing content.

**11) Will there need to be a separate agreement between brokerages and their broker associates? Can the brokerage incorporate the language into their Independent Contractor Agreement or will it need to be a separate document?**

The documents ensure that brokerages participating in MRED's copyright program obtain all the rights they will need from their broker associates without the need for separate agreements relating to copyright between brokerages and their broker associates. Nevertheless, brokerages can choose to address copyrights in their independent contractor agreements.

Brokerages not participating in MRED's copyright program may wish to obtain copyright assignments from their broker associates, but that would be subject to negotiation between them.

**12) What if the brokerage agrees to have MRED manage copyright of their listing data and one of their broker associates does not want to agree to copyright?**

If a brokerage opts to have MRED manage copyright registration and enforcement under the Participant Agreement between MRED and the brokerage, then brokers affiliated with that brokerage have no choice but to assign their copyrights to MRED under the Subscriber Agreement. If the brokerage does not participate in MRED's copyright program, the brokerage will have to negotiate copyright matters with each of its broker associates.

**13) How will this impact an individual broker? Will they lose all rights to their photos and text?**

If a brokerage takes part in MRED's copyright program, choosing Option I in its Participant Agreement with MRED, MRED takes copyright ownership of the listing content each of its broker associates submit to the service. The listing broker, though not the owner of the copyrights, has a license from MRED to use that content any way the listing broker wishes. Individual brokers can negotiate in their independent contractor agreements with brokerages the right to continue using listing content they supply under particular circumstances. As for brokerages that chose Option II in their Participant Agreements with MRED and do not participate in MRED's copyright program, their broker associates continue to hold copyrights in works they create unless their independent contractor agreements with their brokerages provide otherwise.

**14) If a broker associate moves his or her license to another real estate company will they have the ability to take their data, assuming that the previous brokerage has given them permission?**

The broker associate can use data from his or her listings at the previous company in any way the previous brokerage permits. Without the previous brokerage's permission, the broker associate would not be able to use data from the listings at the previous company. If he or she re-listed one of the same properties, new pictures would have to be taken and new remarks text written.

**15) How is the copyright initiative handled if a broker associate contracts with a professional photographer who already copyrights their photos?**

Unless the broker associate has a written agreement with the photographer that transfers the copyrights from the photographer, the photographer continues to own the copyrights. The broker associate has only a license to use it for the purposes the photographer permits. The MRED copyright program does not change these circumstances because the broker associate cannot transfer to MRED a copyright that the he or she does not own.

**16) What if the seller does not agree to the copyright terms?**

Sellers generally do not contribute copyright-protected material for inclusion in MLS. To the extent that the seller has taken a picture or drafted remarks for MLS, the seller would be treated like the photographer in the previous question. MRED does not require brokers or sellers to enter listing agreements or other agreements where the seller must transfer ownership of copyrights to the listing broker or to MRED. If a broker wishes to obtain copyrights from the seller, the broker should negotiate those terms with the seller. *MRED does require* that the listing broker (and the seller and any photographers from whom the listing broker obtains copyright-protected work) have the rights necessary to provide the materials to the MLS. Thus, if the MLS were sued because a broker submitted someone's copyright-protected work without permission, the proposed agreements would require the infringing broker to pay MRED's defense costs.