

The Copyright Conundrum

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A “conundrum” is an intricate and difficult problem. A “copyright” is an intangible intellectual property right. It is a creature of Federal Law under the Copyright Act (17 U.S.C. §101, et seq.). In the Spring of 2012, our Hudson Gateway Multiple Listing Service became aware that a website operator under the name of “NeighborCity.com” was publishing information taken from the HGMLS database and also providing agent scores and performance metrics based upon the individual transaction histories for each salesperson. HGMLS sent a cease and desist letter to NeighborCity. Two other MLSs similarly affected brought suit against NeighborCity and its parent company, American Home Realty Network, Inc., a licensed real estate broker located in California. These two MLSs were the St. Paul, Minnesota based regional Multiple Listing Service of Minnesota, Inc. (NorthStar MLS) and Metropolitan Regional Information Systems, Inc. (MRIS), the largest multiple listing service in the U.S. which services over 40,000 real estate licensees in the Mid-Atlantic region including Maryland, Virginia, Washington DC and parts of Pennsylvania, Delaware and West Virginia. The litigation commenced by the two MLSs against American Home Realty Network, Inc. were in part, funded by the National Association of Realtors.

MLS Granted Injunction

On August 27, 2012, MRIS was granted a preliminary injunction against American Home Realty Network, Inc. and NeighborCity enjoining NeighborCity “from unauthorized copying, reproduction, public display or public distribution of copyrighted content from the MRIS database, and from preparing derivative works based upon the copyrighted content from the MRIS database.” In the same decision by the Court, Jonathan Cardella, NeighborCity’s Chief Executive Officer, was removed as a co-defendant in the suit. NeighborCity is also engaged in a lawsuit with Travelers Casualty and Surety Company of America which was brought by the insurance company in May of 2012. Travelers is denying any duty to pay for NeighborCity’s defense against the MLS copyright suits. That matter is pending, as is a final determination regarding the preliminary injunction granted to MRIS. A full hearing on the MRIS injunction matter against NeighborCity.com will not be heard until sometime in 2013.

What Should a Realtor Know About Copyrights?

There are no state laws governing copyrights. Copyrights are a creature of Federal Law and are intended to cover literary works, pictorial and graphical works, motion pictures and audio visual works (such as virtual tours and animated listing data), sound recordings and musical works.

Generally speaking, compilations, websites and computer programs are considered to be literary works.

How are Copyrights Created?

Whenever an individual goes to his or her keyboard to enter text or uses a pen to write something down, a copyright is created in the work product. Copyrights need not be registered in order to have validity. Under current law, even without a copyright notice, copyrights exist. What creates the copyright is its original authorship plus fixation. Once an item is copyrighted by virtue of its creation, it cannot be copied as anyone else's property. Ideas cannot be copyrighted and data cannot generally be copyrighted.

What Makes MLS Data Copyrightable?

In order to copyright data, a "modicum of creativity is required." MLS data contains many items of factual information and can still be copyrightable because MLS data includes factual data plus creative data in a creative format. Photographs, house tours, the listing agent's narratives, maps, public record information, neighborhood information, the price of the property, floor plans and other data included in a listing are fully copyrightable creative information. The MLS then collects, organizes and arranges the data in a useful format which we call a real estate listing. Some listings add virtual tours or links. As such, our industry has begun to refer to our MLS data as "listing content" because it is a more accurate description of the elements of a listing.

Who Owns the Copyrights?

A copyright vests automatically at the moment of creation and fixation in some tangible media. When an agent takes a photograph of a residence, the agent owns the copyright to the photo. When the agent creates listing information and comments and places them into the MLS system for the first time, the agent is the owner of the copyrights. When an outside firm that creates virtual tours provides the virtual tour and it is downloaded as a link to the listing, the virtual tour company owns the copyrights unless they "assign" the copyright to the agent.

In our HGMLS system, the MLS owns the copyrights. This occurs because the agents enter into independent contractor agreements with their principal broker in which they agree to assign all copyrights to the principal broker. The principal broker in turn executes an agreement with the MLS that gives the MLS ownership of the copyrights. In this way, the MLS has some control over where the listings ultimately land. Articles in this column have previously addressed how MLS data is submitted to real estate syndicators who in turn, distribute the data to various publishers including Trulia, Zillow, Realtor.com, etc., as well as printed media sites.

If all this is true, what was NeighborCity thinking?

NeighborCity, like many others who believe that MLS content should not be copyrightable, perceive there to be well-established laws which state that one cannot copyright facts and that any copyright claim by an MLS is limited to creative works. MLSs uniformly take the position that their entire database, because of its “creative” elements, is fully copyrightable. Our MLS has filed copyright registrations for the MLS database with the United States Copyright Office for decades. Those opposed to copyright protection for MLSs perceive the MLS data to be in the “public domain”. In copyright parlance, something which is in the public domain can be used freely and without restriction. The industry, supported by the National Association of Realtors, perceives MLS content to be original new works and compilations, therefore, not in the public domain and subject to copyright protection. Digitizing a creative work or making it available on the internet does not make the creative work part of the public domain. Works created by U.S. government employees are not copyrightable and are considered in the public domain. Works that have been copyrighted through registration with the U.S. Copyright Office and which then expire, are considered in the public domain. Real estate listing content is generally not considered by the industry or the courts to be in the public domain.

What Does this Mean to You as a Realtor?

It is imperative that every Realtor be conscious of the copyright laws and not misuse the copyrighted data of others. That includes photographs, listing content from a prior listing agent or the republication of another broker’s listings without consent. Fortunately, our MLS has an extensive system to authorize re-publication and cooperation within our MLS participation base. IDX is at the root of this system and generally, unless a broker refuses to permit her listings to be fed through the MLS IDX system, members are given a sub-license to re-publish MLS data for the specific purpose of marketing the real property. That is why a cooperating broker cannot provide listing data from another broker to a moving company. The actual use is limited to the marketing for sale or rent of the specific property.

Any time that a Realtor wants to use the copyrighted data of another person, the Realtor must request authorization and obtain the permission of the person who owns the copyright. It is imperative that a determination is made that the copyright is owned by the person from whom permission is sought. If you use the data of another Realtor without permission, it is no different than walking into your neighbor’s home and using his washing machine. The fact that the door is open is irrelevant. Apologizing after the fact does not take away your exposure to being sued for copyright infringement.

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