

**DON'T HAVE A LOOSE STICK IN THAT BUNDLE OF RIGHTS:  
INTELLECTUAL PROPERTY ISSUES IN MULTIPLE LISTING SERVICE  
DATABASE ENTRIES AND THE INTERNET USE OF LISTING  
INFORMATION**

A CLE Seminar Presented by the

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## **I. Sources of Intellectual Property Rights in a Multiple Listing Service Database Entry.**

Intellectual property rights arise from federal patent law, federal copyright law, federal and state trademark law, and state trade secret law. The materials included in a Multiple Listing Service (MLS) database will almost always implicate copyright protection and may touch upon trademark protection. Patent and trade secret issues will not usually arise. Copyright law protects the MLS database resulting from the arrangement and indexing of the individual listings. Copyright also protects portions of the individual listings.

Copyright protection attaches to any work of authorship that is (1) original and (2) fixed in any tangible medium of expression from which it can be perceived, reproduced or communicated. 17 U.S.C. § 102. Copyright does not protect the ideas contained in the work, only the specific expression of ideas in the work. 17 U.S.C. § 102(b); *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954). Copyright rights occur when the work becomes fixed in the tangible medium, no registration or other act is necessary to create the right. 17 U.S.C. § 408(a). Registration is, however, necessary to file suit or collect statutory damages and attorneys' fees in an infringement action. 17 U.S.C. § 411.

The originality requirement creates a very low threshold for a claimant to meet. The work cannot be copied from another work and must contain at least a modicum of creativity. The level of creativity required is extremely low, and a work satisfies that requirement as long as it possesses some creative spark, no matter how crude, humble or obvious it might be; originality does not signify novelty or invention—those requirements arise in patent law. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).

Federal copyright law preempts all state laws regarding the same subject matter. 17 U.S.C. § 301. Copyright rights exist separate and apart from the physical object—you can sell a copy of your novel without selling your copyright rights. 17 U.S.C. § 202. The owner of copyright rights has the exclusive authority himself or to authorize others:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

Trademark protection will not be a focus of this discussion. Most Realtors® and agents will include business trade names, service marks, and logos, all possibly protected by trademark law, in their listings. These will be reproduced according to the rules of the MLS in the database. To the extent they are reproduced, the MLS does so under an implied or express license with the consent of the mark holder and the marks are used to advertise the services of the mark holder. The one exception comes when an MLS subscriber downloads and uses MLS information in different Internet contexts. This issue will be discussed in Section IV below.

A. The Database Itself—Arrangement and Additions.

The MLS database consists of a compilation of material protected under copyright law. 17 U.S.C. § 103. A compilation of pre-existing facts receives copyright protection if the preexisting material, facts or data must be collected and assembled, materials must be selected, coordinated, or arranged, and original work of authorship must be created by virtue of particular selection, coordination or arrangement. *Sem-Torq, Inc. v. K-Mart Corp.*, 936 F.2d 851 (6<sup>th</sup> Cir. 1991). Thus the alphabetical listings in the phone book received protection in *Fiest*. MLS owners protect their intellectual property by registering the entire database as a compilation.

This protection seemed to work well in the days of bound copies of the MLS coming out periodically. The new technology of electronic databases changed the effectiveness of compilation copyrights. In *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), the Supreme Court held that when a user of an electronic database searches and retrieves individual articles rather than reproducing the compilation work, the compilation owner does NOT own the right of display, but the author of the article does have a copyright right. Thus a compilation copyright protects the MLS when the user sees the work in its compilation format, but may not if the user sees only retrieves an individual listing. The legal test will be based upon how much input the compilation “author”, the MLS, had in the information in the individual listing.

What the MLS adds to the data is the selection, format and organization of the listings. Some MLS may actually add data to a listing as well. Realizing this is the authorship contribution of the MLS, we now need to look at who owns the copyright rights in the data itself.

B. Text in the Listing.

Much of the text that could be included in MLS listings comes from pre-existing facts. Property address, legal description, tax map numbers, physical description of rooms, equipment etc. will probably not receive copyright protection. The marketing description usually includes the very modest modicum of originality and creativity needed for copyright protection. The marketing description may be authored by the agent, the owner, or BOTH.

Most members of the Realtor® community treat listing prices as if they were pre-existing facts. As Jay Westermeier points out in his white paper (attached with permission as **Attachment A**), the listing price involves originality and creativity in selecting the starting point and may well qualify for copyright protection. Agents, brokers and MLS should keep this point in mind in seeking registration and protection of listings.

C. Photographs, Drawings, Plans, Graphics.

Photographs receive copyright protection. *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4<sup>th</sup> Cir. 2001); *Perry v. Sonic Graphic Systems, Inc.*, 94 F.Supp.2d 616 (E.D. Pa. 2000); *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997). Each photograph in the MLS may come from a different source. Some agents take their own photographs. Some brokers hire professional photographers to handle the duty. Some property owners provide photographs they would like used in the listing.

Similarly, use of any drawings or plans of the home may infringe the author's copyright rights. *See, Palmetto Builders and Designers, Inc. v. UniReal, Inc.*, 342

F.Supp.2d 468 (D.S.C. 2004). Graphics regarding the home, its lay out, or marketing information likewise may create property rights in the author. *See, e.g., Ale House Management, Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137, 143-44 (4<sup>th</sup> Cir. 2000).

D. The Template—a Form for Data Entry.

The MLS arranges and selects information by how it requires the listing to be entered and then by arranging the listings. The template for entering information seems like a form—an unlikely candidate for copyright protection. Courts generally deny copyright protection to blank forms used for business. *See, e.g., Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104 (9<sup>th</sup> Cir. 1990).

E. The “Bundle of Rights,” Co or Joint Ownership.

A listing in the MLS contains a “bundle” of copyrights. Each may be held by a different author. The arrangement, selection and order of the database belong to the MLS. The marketing description and listing price probably belong to the agent. Photographs, drawings, and graphics may come from any number of sources. In order to avoid wasteful copyright litigation and to make sure the proper users of the MLS have all the rights they need, a regime of licensing or assignment must be established for the entire bundle. Leaving a loose stick in the bundle could lead to unintended, and possibly expensive, consequences.

**II. Licensing and Assignment—the Case for Protecting Listings and the MLS Database.**

J. T. Westermeier, an experienced and respected intellectual property lawyer at DLA Piper Rudnick, suggests a new model for protecting listings and MLS data in his white paper attached with permission as Attachment A. The entire model rests on assignment/joint ownership of copyrights to the most likely enforcing entities—the MLS

and brokers. Each author in the professional stream—agent, broker, photographer, sales assistant etc.—assigns rights to the enforcing entity, reserving the right to use the material for its own business.

Licensing makes more sense than assignment when dealing with the owner. The owner’s photographs, drawings or other material may have independent copyright value the owner does not intend to sell simply by listing real estate for sale. But the agent should receive a license from the owner in the form sales agreement to use any material provided by the owner, including the right to sub-license or assign to the broker or the MLS.

Copyright litigation between owners and Realtors® or MLS appears very unlikely. The owner provided the information so that the property could be effectively offered for sale. If the materials are used for other purposes, then this risk could expand. See Section III. D. and F. below. Similarly, any disagreement between Realtors®, brokers, or the MLS would likely not arise in copyright. Contract and tortious interference or unfair competition claims would seem more likely.

The real meat of possible copyright infringement litigation would arise when others reproduce listing or MLS material for their own profit, unrelated to the Realtor® community. Such uses could injure Realtors® financially, making a copyright damages suit available. The uses may harm the reputation of Realtors® with the owner community making an injunction suit a likely remedy. These realistic possibilities are the ones that the MLS and its broker members should seek to uncover for the protection of the entire Realtor® community. As Jay states in the white paper: “Again, it appears to us that the MLS is better situated to carry out these enforcement activities on behalf of all

listing brokers since the likelihood is that any infringement will relate to many different brokers, rather than a single broker.”

Whether or not your clients agree with the white paper model, you must understand the legal issues in order to give competent legal advice.

A. Agent Needs to Assign or License to Broker and Possibly MLS.

The agent generates much of the copyrighted content in a listing. The agent’s agreement with the listing broker needs to assign or at least license that content. Any assignment or license needs to be irrevocable and fully assignable or sub-licensable. With the advent of “uploading”, allowing an agent to input data directly into the MLS, a “click wrap” assignment or license prominently displayed and requiring affirmative acceptance before the upload will operate can achieve the result. The assignment must either run to the MLS directly or acknowledge the broker’s right to further assign/license.

B. Listing Homeowner Needs to Assign/License to Broker and Possibly MLS.

The listing agreement should provide that the owner licenses or assigns all material and information given to the agent to the broker and/or MLS. A non-exclusive, irrevocable, fully sub-licensable license would avoid possible unintended consequences, particularly if the content provided by the owner has copyright value not related to the offering for sale and sale of the property.

C. Broker Needs to Assign/License to MLS.

The listing broker must give copyright permission to the MLS to use the listing materials. Either a non-exclusive license or an assignment will work. Likewise, a joint authorship or ownership regime with cross assignments can work. In each case pay careful attention to the terms—if the intent of the parties as to compensation for the

assignments or licenses is not clear, unintended consequences could result. That issue requires even more careful attention in a joint authorship/ownership program as copyright law ASSUMES the joint owners intend to evenly split profits generated by the copyrighted material and one may have to account to the other unless their written agreement specifies otherwise.

The code defines a joint work as one prepared by two or more authors with the intent that the contributions become merged into a unitary whole. 17 U.S.C. § 101. Authors of joint works become co-owners of the copyright. 17 U.S.C. § 201(a). Each joint owner in a copyright acquires an undivided interest in the entire work and can exploit any of the copyright owner's exclusive rights, absent an agreement to the contrary. *Cassidy v. Lourim*, 311 F. Supp.2d 456, 459 (D. Md. 2004); 1 M. B. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 6.03 (2000). When one co-owner exploits the joint work, no violation of copyright law occurs, but the co-owner must account to the other owner either under their agreement or appropriate state law equitable standards. *Gaiman v. McFarlane*, 360 F.3d 644, 652 (7<sup>th</sup> Cir. 2004). While relief to an acknowledged co-owner rests on state law contract or equitable principles, if a claim of co-ownership must be determined, this claim falls within the exclusive federal copyright jurisdiction. *Id.*

Since the only duty between co-owners as to a joint work imposed by law is to account for profits, the agreement between the parties must be drafted carefully to make sure a co-owner does not become entitled to a share of a commission or other compensation never expected to go to that party.

### **III. Proper Use of the Multiple Listing Service Database Entry.**

- A. Established by Rules and Regulations of the Service, Requirements of State Law.

The regulatory law of each state governs the use of MLS data and listings. North Carolina law prohibits the listing of false information, misleading information, or information that the agent's principal deemed confidential. N.C. Gen. Stat. §§ 93A-1 – 93A-11; N.C. Admin. Code Tit. 21 R. 58A.0104, 0105. Equally important, the rules and regulations of the MLS govern the member and its agent's use of MLS data. Where the member fully assigns the listing information, these rules apply to the individual listing as well as the aggregate MLS data. A sample of such rules can be found in **Attachment B**, an excerpt from the Carolinas Multiple Listing Service Rules and Regulations, attached by permission.

Common sense dictates the contents of both the legal and contractual restrictions placed upon broker members and their agents. Owners expect their information to be used in ways that are related to the marketing and sale of the real estate and the maintenance of public records regarding the real estate. Owners expect confidential information to be kept in confidence. Owners expect that the material added to their listing information by an agent will be truthful and not misleading to prospective buyers.

The violation of these owner expectations can lead to litigation or complaints to the Real Estate Commission. Brokers and MLS should keep these expectations in mind in making determinations of how to use listing and MLS data. Brokers should use continuing education as well as educational and disciplinary enforcement to help agents follow the restrictions placed on the use of MLS data and listings by the law and by MLS agreements. MLS staffs need to police the activities of members and bring to their attention violations. MLS By-Laws, rules and regulations need to have provisions relating to repeat offenders which can result in internal due process and discipline where

necessary. Effective self-policing will minimize the possibility of litigation or the Real Estate Commission being used as an enforcement tool.

B. MLS Content Licensing.

One advantage to a unified copyright and registration ownership scheme, whether it is by complete assignment of the listings to the MLS or a co-ownership regime between broker members and the MLS, is the ability to license MLS content. Any licensee receiving MLS content will want to know it is receiving the complete bundle of rights, that there are no “loose sticks” which could lead to litigation or claims for additional payments. Licensing of MLS content already occurs in most MLS relationships. Certain appraisal entities, public records databases, and research databases license access to MLS data and sales records.

The new information society highly values reliable, detailed data or transactions. The MLS contains such data and has for many years. When appropriate licensing opportunities can be found, licensing of MLS content to third parties could become an additional income stream for MLS organizations, decreasing their reliance on member dues or payments for financing and, thereby, increasing member profits.

New licensing opportunities must be carefully analyzed by the MLS and its members. The licensing opportunity should not violate the expectations of the owners who provide the basic data in the listings and the MLS. Violation of owner privacy or expectations could lead to litigation or regulatory action. It is also important that any data licensing agreement not be with an entity or purpose which could compete with broker members and their agents or devalue their services or foreclose opportunities to provide service.

The value of licensing opportunities will be increased by an effective copyright registration and enforcement program. It will be very difficult to structure an effective registration and enforcement program unless the entire contents of the MLS listings and database are collectively owned by the same entity or entities and registered on a regular basis.

C. Copyright Registration and Enforcement.

In order to maximize the value of MLS data and listing information to the Realtor® community, an effective system of registering copyrights, placing copyright notice on MLS data and listings and works derived from such data, and enforcement needs to be developed in each MLS. By unifying copyright ownership in the MLS or through co-ownership in the MLS and member brokers, the MLS can pursue a systematic registration regime. It can also enforce the entire bundle of rights, i.e. if a non-authorized user reproduces just photographs, the MLS can take enforcement action.

Collective enforcement action makes much more sense. It spreads the cost of monitoring, and the MLS can hire and appropriately staff a department for the purpose of registering and enforcing copyrights. An individual brokerage might not be able to bear the burden of a compliance and registration department. The MLS can arrange to have a copyright notice placed on each individual listing and to appear every time the listing is retrieved electronically or reproduced. Likewise, the MLS can place a copyright notice on the entire database.

The MLS, in cooperation with its broker members, can prepare forms for the licensing of listing MLS information to newspapers and other preparers of print, TV or radio advertising. Being consistent about enforcing copyright rights and honoring

copyright formalities, such as licensing to advertisers, will assist in defeating any claims by persons or entities excluded from MLS listing data that copyright is being used as a shield for otherwise illegal group activity.

A recent example of an attempt to enforce copyright rights in the real estate data area can be found in *Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4<sup>th</sup> Cir. 2004). In that case, a commercial listing database service brought a copyright infringement action and related tort claims against a website operator hosting content from its database. The case garnered national attention as movie and music industry groups and composer groups intervened as *amici* to support the multiple listing service and telecommunications companies, Yahoo!, ebay and other internet companies intervened as *amici* to support the website host. A copy of that case is attached as **Attachment C** for your reading.

Costar collects data regarding commercial property and makes it available to its customers in a pay for use database. In order to license access to the database, the customer agrees not to reproduce the material or post it anywhere on the Internet.

Certain of Costar's copyrighted pictures of commercial real estate listings were posted on Loopnet's website by Loopnet's subscribers. The Court reiterated that copyright infringement need not be knowing or willful. *Id.* at 549. The Court found, however, that the defendant must engage in conduct which actually causes infringement. *Id.* at 549-51. Passively operating a website on which others post copyrighted information with no involvement or profit from the actual infringing nor any actual conduct which causes the reproduction of the copyrighted work, will not support liability. The Court compared this to the video cassette recorder decision of the United States Supreme Court which found merely manufacturing a machine which can copy movies

and, therefore, could be used for copyright infringement would not support injunctive relief under the Copyright Act. *See, Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432-35 (1984).

D. Uses a Listing Homeowner Might Find Surprising and, Therefore, be a Problem.

Attending seminars sponsored by the National Realtor® Association and listening to attorneys for various MLS and broker groups around the country have allowed me to collect a series of anecdotal examples of what listing homeowners find objectionable in use of their listing or MLS information. Internet use and display of the listing information and MLS data appears to be at the root of most owner complaints. Traditional newspaper advertising in the actual pages of the newspaper rarely leads to owner complaints. Many newspapers, however, have begun providing an “add on” service of Internet based listings. Here the advertising may appear next to advertising for related services, such as movers, septic tank cleaners, janitorial services, etc. Some owners find this highly objectionable when their listing appears as a pop up or on a web page next to some type of service the owner perceives as undesirable. An example of such a complaint can be found in the article by Ed Sumber, counsel to the Westchester County Board of Realtors®, Inc., the Westchester Multiple Listing Service, Inc., the Putnam County Association of Realtors®, Inc., the Westchester-Putnam Multiple Listing Service, Inc. and the Realtor Association and multiple listing service in Manhattan – all in New York, is attached with permission as **Attachment D**. This article will also be discussed below.

Homeowners find themselves inundated with telemarketing and Internet Spam advertising. When MLS data ends up sold or otherwise in the hands of third party service

providers, such as moving companies, mortgage lenders, or others, homeowners receive sometimes unwanted telemarketing or Spam contact regarding the ancillary services. If homeowners determine or believe that telemarketers/spammers received the contact information from their real estate listing, complaints are likely to ensue. If telephone numbers accumulated on a Do Not Call List are revealed, additional legal issues may arise with the Federal Trade Commission. *See*, 16 C.F.R. §§ 310.4(b)(2) and 310.8(e).

Even expected uses of listing information and MLS data can lead to litigation or regulatory claims.

E. The Risks of Copyright Claims.

While lawyers advising Realtor® groups certainly should advise regarding the risks of copyright infringement litigation, it seems unlikely that most holders of copyrighted information would sue a broker or MLS regarding copyright infringement. Owners provide photographs and contribute to marketing descriptions in hopes of selling their homes. Agents provide original works of authorship to the listing or the MLS in hopes of completing a sale and earning a commission. Traditional use of this information by the broker in the listing and the MLS in the database and printed manual (if one is still published) seems most unlikely to generate copyright claims from these two classes of authors.

Sale, licensing or leasing the information to third parties who may copy, publish or otherwise reproduce the material could lead to copyright litigation where the broker or MLS would be accused of being a contributory infringer. A more realistic threat of litigation would come from the use of photographs taken by professional photographers and drawings or plans made by architects or others which the owner or agent uses without permission. Copyright infringement liability does not require a knowing act by the infringer or a contributory infringer. Instead, the law assumes that a user of copyrightable material understands it likely belongs to someone and you use at your own risk if you do not have an appropriate license or assignment. It does not matter if an infringer copies knowingly or innocently – copyright infringement does not require scienter. *Lexmark Internat'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 537 (6<sup>th</sup> Cir. 2004); *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997). Special care should

be taken to analyze the rights when a professional photograph, drawing, or architectural plan becomes a part of a listing in the MLS database.

While the number of copyright claims made against brokers and MLS for listings or databases likely will be small, such claims are expensive to defend and, against a well-versed plaintiff, bear a large possible exposure. Typically, copyright infringement litigation involves the use of liability experts regarding copyrightable nature of the subject matter and copying as well as damages experts. It is difficult to fully litigate and try such a case without expending hundreds of thousands of dollars. Furthermore, if the copyright claimant registered the copyright within appropriate time frames, the claimant may seek statutory damages and attorneys' fees as part of the award. 17 U.S.C. §§ 504 and 505. Statutory damages require no quantification of actual damage. Statutory damages for non-willful infringement will be between \$750 and \$30,000 per work infringed. 17 U.S.C. § 504(c)(1). For willful infringement, statutory damages are between \$750 and \$150,000. 17 U.S.C. § 504(c)(2). Statutory damages for willful infringement are most often imposed in cases where the defendant did not have a program, policies and procedures for monitoring and attempting to identify and prevent the misuse of copyrighted work. Policies and procedures against the use of copyrighted works of others are essential to protecting the broker and the MLS.

F. Other Risks (Invasion of Privacy, Aiding/Abetting Wrongful Conduct, Negligent Enablement).

The potential exists for litigation arising out of the use of listing or MLS database information outside of intellectual property rights. In certain situations, an injured owner or agent could claim damages under various privacy torts, aiding and abetting wrongful conduct, or negligent enablement of wrongful conduct. These potential claims fall

outside the normal paradigm of real estate sales transactions. However, they are the type of claims that are likely to involve large losses.

An example of the types of claims which could arise came up at the MLS Hot Topics in the Tropics Seminar in January. An agent prepares a listing for a wealthy homeowner. Without the wealthy homeowner's permission, the agent takes multiple pictures of the decorated interior of the home containing valuable art objects and electronics. The agent notes on the listing that viewing would be by appointment with agent only, no lock box at owner's request, and the owner will be out of the country. Another agent makes the MLS database containing this listing available to a third party who allegedly specializes in moving furniture and contents of homes. The third party, however, is well-known in the community to have been involved in bidding scandals and have possible links to organized crime.

It turns out that the third party "moving company" is part of an overall criminal enterprise. The information in the listing is used to target the owner's house for a late night heist in which all of the contents are removed. The listing agent and broker may be sued for invading the homeowner's privacy by taking photographs that were not authorized and publishing them and may be sued on a negligent enablement theory. The agent who released the list to the third party "moving company" and his employing broker may be sued for aiding and abetting the conversion. The MLS could be sued for negligent enablement or aiding and abetting under these facts.

The risks described in this hypothetical may appear far-fetched. Situations such as this do occur. People suffer catastrophic losses, and if they discover that private information released in one way or another through the listing or the MLS may have

contributed to that loss, you can expect litigation. The scenario outlined above reinforces why attorneys advising Realtor® groups and organizations must always stress the need for appropriate policies and procedures to control the dissemination and use of listing information. Attorneys advising Realtors® must also assist the client in devising effective policies and procedures designed to prevent the use of intellectual property belonging to others without permission and to prevent the use of confidential information not intended for public or semi-public distribution. *See, e.g.*, N.C. Gen. Stat. §§ 93A-1 – 93A-11; N.C. Admin. Code Tit. 21 R. 58A.0104 and 0105.

#### **IV. Displaying the MLS Content on the Internet.**

Widespread access to the Internet changed the fundamental concepts of information distribution. The Internet also impacted copyright and trademark law. The display of listing MLS data on the Internet creates different issues from those faced by listing brokers and MLS organizations in the days of the paperback MLS.

Agents and brokers not affiliated with the listing broker receive legitimate and legal access to that broker's listings through the MLS. They may then take that electronic information and post it on their own websites, run by a broker or an agent, or provide it to newspapers and others who have Internet presence. The listing can be framed by advertising for others, including direct competitors of the listing broker. Placing listing or data derived from listings on websites which advertise competing services or services viewed negatively by the public at large can lead to trademark or other unfair competition litigation. While trademark infringement claims rest upon a competitive principle that one competitor should not confuse the source or origin of goods and services belonging

to another, trademark tarnishment litigation can be based upon negative impact on the image of the mark or mark holder.

Copyright cases based upon Internet display present slightly different legal issues than those based upon traditional infringement. Congress enacted the Digital Millennium Copyright Act (“DMCA”) to set up specific rules for Internet hosts and Internet service providers. 17 U.S.C. § 512. The provisions of DMCA may help protect MLS from vicarious liability for the acts of others. The DMCA provides a safe harbor against copyright infringement liability to an organization which merely hosts Internet content or a method of Internet access a safe harbor against copyright infringement liability if the organization is not responsible for reviewing or posting the content itself. Self-posted listings may fall within this category. In order for the MLS to be liable under such circumstances, it would have to receive a notice of possible infringement and not respond appropriately. 17 U.S.C. § 512.

The Internet along with providing great potential resources for those attempting to sell and buy real estate poses other potential problems. **Attachment D** to these materials is an article addressing why brokers need to have Internet policies for their salespersons.

## **V. Conclusion.**

Intellectual property law combined with Internet communications presents opportunities for increasing communication abilities and profits for the Realtor® community and MLS. To realize the potential, the traditional model for organizing, protecting, and owning intellectual property rights in listing and MLS information may need to be adjusted. A much more proactive approach to intellectual property registration

and enforcement will be required. Only the future will tell if the benefits from these activities are worth the costs, but it appears likely.

At the same time, attorneys for Realtor® organizations and MLS need to keep in mind the potential exposure for intellectual property infringement and related torts as well as other liability which could arise from the misuse or improper distribution of listing and MLS data. These areas of law likely will remain of great interest to clients far into the future.