

Northwestern Wisconsin Multiple Listing Service, Inc.

Copyright protection for MLS listing content

Frequently asked questions for agents

1) What is the new online subscriber agreement from NWWMLS?

NWWMLS has implemented a new subscriber agreement that each individual accessing the NWWMLS system must sign and have on file with the board office in order to continue having access. The subscriber agreement clarifies the role of agents in the NWWMLS and sets expectations about how you can use NWWMLS data, and how RANWW and other brokers can use your broker's listings.

The subscriber agreement is a binding legal agreement, and if you have questions about it, you should consult your own attorney. The views expressed in this frequently asked questions document are those of NWWMLS and its attorneys.

2) What is the language in section 16 relating to "intellectual property" about?

NWWMLS has undertaken an effort to secure the copyrights in the MLS listing data in order to prevent unauthorized persons from using brokers' listing data for their own benefit. These "data pirates" or "copyright infringers" seek to capitalize on brokers' listings without listing broker permission.

Part of that effort was a new set of participant agreements that all NWWMLS brokers had to sign. In the participant agreement, each broker had the option of (I) assigning copyrights to NWWMLS so that NWWMLS could take certain actions to protect the MLS data or (II) not assigning copyrights to NWWMLS, leaving the broker to fend for itself in protecting listing copyrights.

If your broker chose Option I, then you will be assigning any copyrights you might have in listing data to NWWMLS, which will then grant rights back to your broker and you to permit you to perform all the marketing activities you currently perform. If your broker chose Option II, you will retain any copyrights you might have in listing data, but you will give a license to NWWMLS to use it consistently with NWWMLS's policies. Your independent contractor agreement with your broker may also address copyright ownership or license issues.

3) Why is NWWMLS seeking to copyright-protect the MLS database? What are the current concerns and advantages?

Copyright law protects the authors of creative works from copyright infringers and data pirates 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. Under NWWMLS's copyright project, NWWMLS can register all the works in the MLS database for a few hundred dollars a year, and NWWMLS can take steps to sue anyone who infringes the copyrights in the MLS data. For brokers and agents to do this individually would cost a great deal more, and it would entail efforts that many brokers and agents may not want to exert.

To achieve these objectives, NWWMLS must obtain ownership of the copyrights in the materials it will register and enforce. NWWMLS has thus created an optional program where listing brokers get to decide whether to have NWWMLS register and enforce their copyrights. Brokers who chose Option I in their participant agreements with NWWMLS permit NWWMLS to acquire the copyrights in data content relating to their listings. In return, NWWMLS will (1) obtain copyrights from the brokers' agents; (2) register the copyrights; (3) take reasonable actions to prevent and pursue infringement; (4) grant back to the listing broker a license to use data relating to the broker's own listings; and (5) refrain from distributing the broker's listing data (except for core MLS purposes) unless MLS has the broker's consent.

Brokers who prefer not to take part can opt out. Those brokers choose Option II in their participation agreements with NWWMLS. They can negotiate with their own agents regarding copyright ownership; they will be responsible for their own copyright registrations and for preventing third parties from making unauthorized use of their listing

data. From these brokers and the agents in their offices, NWWMLS obtains only a license to use the copyright-protected content for core MLS purposes.

The NWWMLS board of directors has determined, that this approach is the most cost-effective way to prevent misuse of data relating to brokers' listings.

4) 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.)

5) Would granting copyrights to MLS work against my fiduciary responsibility to my seller/client?

NWWMLS will not give you legal advice about your fiduciary duties. NWWMLS believes, however, that copyright protects agents themselves and their customers from the predations of those who take listing data without permission. Sometimes, agent and seller interests may be at odds. For example, imagine an agent takes a set of particularly fine photos of her listing in June, but the house does not sell before the listing expires; imagine that the seller lists with another broker in November, but wants the 'summer' pictures from the first agent on MLS. Under copyright law, the first agent or her broker must consent before the second broker or seller can use her photos. If the seller claimed the first agent had an agency/fiduciary duty to allow the seller to reuse the pictures, NWWMLS would direct the first agent to her own attorney for counsel.

6) How can this benefit my business?

It prevents other folks taking your firm's work and profiting from it without your broker's permission.

7) What is the cost to me?

The cost is included in your MLS fees. NWWMLS does not anticipate the need to increase dues or charge any additional fees in order to pay for its copyright project.

8) Can NWWMLS release/sell our listing data without permission from the brokers?

No. The agreement between NWWMLS and the brokers ensures that brokers can opt out of any 'non-core' use of the MLS data that NWWMLS considers. Non-core uses include any distribution to persons not participating in MLS (like consumers or other businesses).

9) As an agent, will I have the ability to give third party entities the right to use my listing data? Will there be any restrictions?

The listing broker has an unrestricted right to use content relating to 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' use of their own listing content. The extent to which agents may use listing data is determined in the agreements between brokers and agents.

10) Will there need to be a separate agreement between broker and agent?

The documents NWWMLS has adopted ensure that brokers participating in NWWMLS's copyright program obtain all the rights they will need from their agents without the need for separate agreements relating to copyright between brokers and agents. Nevertheless, the brokers can choose to address copyrights in their independent contractor agreements, and NWWMLS has prepared language brokers can consider incorporating into independent contractor agreements.

Brokers not participating in NWWMLS's copyright program may wish to obtain copyright assignments from their agents, but that would be subject to negotiation between brokers and agents.

11) What if the broker agrees to have NWWMLS manage copyrights of her data but one of her agents does not want to agree to assign copyrights in the subscriber agreement to NWWMLS?

If a broker opts to have NWWMLS manage copyright registration and enforcement under the participant agreement between NWWMLS and the broker, then agents affiliated with that broker have no choice but to assign their copyrights to NWWMLS under the subscriber agreement. If the broker does not participate in NWWMLS's copyright project, the broker will have to negotiate copyright matters with each of its agents.

12) How will this impact individual agents? Will they lose all rights to their photos and text?

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

So, depending on the choice your broker made in his/her participant agreement with NWWMLS, your broker may or may not be able to restrict you from using content relating to your own listings. This is consistent with the principle underlying MLS and with Wisconsin law, which hold that a listing agreement is the property of the listing broker; as an agent of the listing broker, you are bound to follow the instructions of the broker with regard to using the materials you create in the course of your work for the broker. You may, however, negotiate specific rights to use content relating to your own listings in your independent contractor agreement with your broker.

13) If an agent moves their license to another real estate company will they have the ability to take their data, assuming that the previous broker has given them permission?

If the broker of the previous company opted into the copyright protection project in the participant agreement, the agent could use data from her listings at her previous company only as her previous broker permits. Without the previous broker's permission, the agent would not be able to use data from her listings at the previous company. If she re-listed one of the same properties, she would have to take new pictures and write new remarks text. These terms might differ depending on the independent contractor agreement between the previous broker and the agent, if any.

If the broker of the previous company opted out of the copyright protection project in the participant agreement, the agent's use of data from her listings at her previous company would be governed by state law and the independent contractor agreement between her and her previous broker, if any.

14) How is the copyright initiative handled if an agent contracts with a professional photographer who already copyrights their photos?

Unless the agent has a written agreement with the photographer that transfers the copyrights from the photographer, the photographer continues to own the copyrights. The agent has only a license to use it for the purposes the photographer permits. The NWWMLS copyright project does not change these circumstances because the agent cannot transfer to NWWMLS a copyright that the agent does not own.

15) 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. NWWMLS 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 NWWMLS. If a broker wishes to obtain copyrights from the seller, the broker should negotiate those terms with the seller. *NWWMLS 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 MLS. Thus, if MLS were sued because a broker submitted someone's copyright-protected work without permission, the proposed agreements would require the infringing broker to pay MLS's defense costs.