

Copyright protection for MLS listing content – Agent/Subscriber Agreement FAQ

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1) What is the new online Subscriber agreement from IRMLS?

IRMLS has implemented a new Subscriber agreement that addresses copyright to intellectual property. The agreement will be placed in the MLS system sometime after August 1st and will require agents to accept the terms before access to the MLS will be available. After IRMLS adds the agreement to the MLS, it will display the first time you attempt to log into IRMLS's system. You will need to click on the "I Agree" button/link in order to access to the MLS system. The subscriber agreement clarifies the role of agent in IRMLS and sets expectations about how the MLS data can be used based on the copyright option chosen by the Participant (Managing Broker).

The subscriber agreement is a binding legal agreement, so agents should consult an attorney with any questions. The views expressed in this FAQ are those of IRMLS and its attorneys.

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

IRMLS 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' listing without the listing broker's permission.

MLS participant's (Managing Brokers) received a Participant Agreement that offered Brokers two options related to copyright. (I) assigning copyrights to IRMLS so IRMLS could take certain actions to protect the MLS data or (II) licensing the rights to IRMLS which allows IRMLS to use the data but requires the broker to protect their listing copyrights.

If your broker chose Option I, then you will be assigning any copyrights to the listing data to IRMLS. In turn, IRMLS grants rights back to the Managing Broker which allows the agents to use the data in all the marketing activities currently performed. If your broker chose Option II, you will retain any copyrights you might have in listing data, but you are giving a license to IRMLS to use the data within IRMLS's policies. Please note, copyright ownership or licensing may also be addressed in your independent contractor agreement.

3) Why is IRMLS copyright-protecting the MLS database? What are the current concerns and advantages?

Copyright law protects the author of creative works from copyright infringers and data pirates who seek to use those works without the author's permission. Prompt copyright registration with the United States Copyright Office is a prerequisite to suing an infringer and is required in order to sue for attorney fees and special damages against infringers. When the copyright is assigned to IRMLS by the Broker, IRMLS can register all the works in the MLS database for a few hundred dollars a year, and take steps to sue anyone who infringes the copyrights. This would cost a great deal more if brokers and agents had to register their works individually and it would entail efforts that many brokers and agents may not want to exert.

To achieve these objectives, IRMLS must obtain copyright ownership in the materials it will register and enforce. This is why IRMLS created this optional program that gives Managing brokers the opportunity to provide IRMLS with ownership of the works so it can be registered and the copyright enforced. Brokers who chose Option I will provide IRMLS with ownership of the data. In turn, IRMLS will (1) obtain copyrights from brokers' agents; (2) register the copyrights; (3) take reasonable action 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 brokers consent.

Managing Brokers who choose Option II provide IRMLS with a data use license for core MLS purposes and are basically "opting out" of any protections offered by IRMLS. It will be the responsibility of the Broker to negotiate copyright ownership with their agents; register copyright ownership; take actions to prevent data piracy; and enforce against third parties who use the data without authorization.

The IRMLS board of directors approved the copyright protection project because this approach was the most efficient and cost effective way to protect the MLS listing data.

4) Which portion of the listing is copyright-protected?

Copyrights protect anything that is the result of a creative process, including original text (like remarks) and perhaps even listing price; photographs, whether taken with digital or traditional equipment; virtual tours (though the creators of the tours often retain their copyrights); and any other creative text and graphic materials.

Facts cannot be copyright-protected. For example: a house for sale on 123 Elm Street has three bedrooms and encompasses approximately 2,100 square feet is not subject to copyright protection. (Note; Copyright does not cover product or service names; designations of the origins of products/ services, including product names and logos, which are the subject of trademark laws)

5) Does granting copyright to MLS work against my fiduciary responsibility to my seller/client?

IRMLS will not give any legal advice about your fiduciary duties, however, IRMLS believes that copyright protects agents and their customers from the predations of those who take listing data without permission. Sometimes, the agent and seller interests may be at odds. For example, an agent takes a several photos of her listing in June but the house expires before it is sold. The seller lists with another broker in November and asks the new agent to use the photos taken in June in the MLS. Under copyright law, the first agent/Broker must give consent before the second broker or seller can use the photos. If the seller claimed the first agent had an agency/fiduciary duty to allow the seller to reuse the pictures, IRMLS would direct the first agent to her own attorney for counsel.

6) What will this cost the agent or broker?

The cost is included in your MLS fees. IRMLS and your local association do not anticipate the need to increase dues or charge any additional fees in order to pay for the copyright project.

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

No. The agreement between IRMLS and the brokers ensures that brokers can “opt out” of any ‘non-core’ use of the MLS data. Non-core uses including distribution to persons not participating in MLS (like consumers or other businesses).

9) Will agents have the ability to give third party entities the right to use their listing data without restrictions?

The Listing Broker has the right to use their listing content without restriction, including licensing to a third party. In the agreement, MLS commits to supporting the brokers’ use of their own listing content. The extent to which agents may use the listing data is determined in the agreement between brokers and agents.

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

The documents IRMLS adopted ensures the brokers participating in IRMLS’s copyright program obtain all the rights they need from their agents without a separate agreement relating to copyright between broker and agent. Nevertheless, the brokers can choose to address copyrights in their independent contractor agreements. Brokers who choose Option II may wish to obtain copyright assignments from their agents, but that would be subject to negotiation between brokers and agents.

11) What if an agent disagrees with the Managing Broker’s choice for copyright assignment?

If the broker chooses Option I, the agent affiliated with the office will be covered when IRMLS registers and enforces the copyright. If the Broker chooses Option II, the agents affiliated with that Broker will have to negotiate copyright matters individually with their Broker. Agents cannot choose a different option.

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

When a broker chooses Option I in the Participant Agreement, IRMLS receives copyright ownership to the listing content submitted to the MLS. In turn, IRMLS gives the listing broker a license to use that listing content any way the listing broker wishes. Individual agents can negotiate their rights to use listing content in their independent contractor agreement. When a broker chooses

Option II, IRMLS receives a “license” to use the data but the Broker’s works is not included in IRMLS’s copyright registration and protection. In that case, the Brokers agents continue to hold copyrights in works they created unless their independent contractor agreement with their broker provides otherwise.

Your Broker may or may not be able to restrict you from using your own listing content. It depends on the choice the Broker made in the Participant Agreement. This is consistent with the principle underlying the MLS and Indiana 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 listing in your independent contractor agreement with your broker.

13) If an agent moves to another office, will they take their data if they have the Brokers permission?

If the agent has permission from the Broker from office #1, the agent can use data from her listings in any way Broker #1 permits. However, without Broker #1’s permission, the agent would not be able to use the listing data from the Office #1. The agent would need to take new photos and write new text if the property was re-listed at Office #2.