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What You Need to Know and What You Need to Do

A Real Estate Broker's Risk Reduction Guide to the Digital Millennium Copyright Act

Includes the form you need and sample language for your website!

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What is the Digital Millennium Copyright Act (DMCA)?

The DMCA is not new. It is a United States copyright law that was passed in October, 1998. Essentially, it criminalizes production and dissemination of technology, devices, or services intended to circumvent measures for digital rights management (DRM). It also makes it illegal to circumvent an access control, whether or not there is actual infringement of any copyright itself. And it heightens the penalties for copyright infringement on the Internet.

It's this last part that is of concern to anyone who owns a website, which includes nearly every real estate broker and agent.

Why Should You Care?

The bottom line is that you can be held accountable for any copyright infringement that occurs on your website. The law firms who have been hired to enforce copyrights of images owned by their clients do not care how, why or who put an image on your site. Because you own the site, it's your problem and your responsibility. Claiming ignorance is no defense. Trying to blame a web site vendor is also irrelevant. The lawyers can prove the image exists, or did exist at one time, on your website, and so you are left holding the proverbial bag.

Is This For Real?

Unequivocally, yes! Brokers and associations have already gotten demand letters and most have ended up paying hard-earned dollars to make the threat of a copyright infringement lawsuit go away. As search engines like Google have become increasingly adept at locating images on the web, it's exceedingly easier to find these copyrighted images. Leading the charge is a company called Getty Images, which owns the copyrights of thousands of images. Another company is Masterfile Corporation, which is based in Canada and has the largest collection of stock photography images in North America (with rights enforceable in the United States). Just as the music companies BMI and ASCAP were able to successfully crack down on the unauthorized use and piracy of songs, these companies are going after targeted industries. Real estate seems to be an easy target because nearly every real estate broker and agent has a website, and brokers and agents are woefully under-informed about the issue.

So what Do You Need to Do?

Two things are necessary. The first is Education, and the second is Protection.

Education

The bottom line is that no one is permitted to use someone else's images without permission. A photographer who takes a photo and retains the rights to that photo is protected from other people stealing the photo and using it on a website without permission and/or compensation.

Most people know how easy it is to search for a generic beach photo on Google, right click to "Save As" and download the photo to a computer. Even though Google clearly states the image may be subject to copyright, people have been doing it for so long, nobody seems to pay attention. We've been conditioned to think that everything on the internet is free, and we can do whatever we want with it.

So the agent who saved that beach photo and uploaded it to his or her website has violated someone else's copyrights. Worse is when the agent uploads the photo to the MLS, and it gets distributed via IDX to hundreds and hundreds of other broker's and agent's websites.

Even something as seemingly innocent as including a piece of clip art on a site could be a violation of a copyright.

So the rules are pretty simple.

- Do not steal somebody else's photos.
- Do not use somebody else's maps – including maps contained in Paragon
- Do not post somebody else's pictures or artwork to Facebook, Instagram, the MLS, or any other website.
- If you don't know where an image came from, don't display it on your website, period.

Don't rely on a web vendor, unless that vendor can prove that it owns the rights to every image it is placing on your site, and is willing to indemnify you in writing. And most importantly, follow the provisions in this Guide to establish a "Safe Harbor" under the DMCA.

The "Safe Harbor"

When the DMCA was passed, web site operators had serious concerns about the potential liabilities of this law. So Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act ("OCILLA") creates a safe harbor for online service providers against copyright infringement liability, provided they meet specific requirements. This is what protects Facebook, for example, from copyright infringement claims when its users post copyrighted images.

Section 512 of Title 17 of the U.S. Code spells out the "Safe Harbor" provisions, and what has to be done to limit liability under the act. These provisions may shield you from liability for copyright infringements as long as you have effective notice-and-takedown procedures, promptly remove content when a copyright owner notifies you that it is infringing and have no actual or effective knowledge that the posted material is infringing.

Under § 512(c), you are not liable for money damages for user-generated content that infringes another copyright provided that:

- 1) You are not aware of any infringing content on your site nor know of any "red flags" that would make an infringement apparent;
- 2) You do not receive a financial benefit directly attributable to the infringing activity if you have the right and ability to control that activity; and
- 3) You act expeditiously to remove the infringing content from your site once you have received proper notice of the infringement.

In order to take advantage of Safe Harbor provision, however, you must comply with three administrative requirements:

- 1) You must designate an agent, usually yourself though it may be someone else who agrees to do so, to receive notices of claimed copyright infringement. Your agent must provide up-to-date contact information so that copyright owners who believe their work is being infringed on your site can send complaints or take-down notices to him or her. To designate an agent, a procedural requirement for protection under the DMCA safe harbor provisions, you must file an interim designation with the U.S. Copyright Office and submit a \$105 filing fee.
- 2) You must publish on your site your policy for addressing repeated infringing activity, specifically a statement that you terminate users or account holders who are repeat infringers. If you have no subscribers or account holders, your policy may state, "If we become aware that one of our users is a repeat copyright infringer, it is our policy to take reasonable steps within our power to terminate that user." Including the policy statement in the web site's terms of service or privacy agreements makes logical sense, though it may be published elsewhere on the site.

3) You must properly comply with a notice of claimed infringement when received, including:

- the expeditious removal of the material that is claimed to be infringing;
- notification to the user or subscriber that the material has been removed;
- notification to the copyright holder if proper counter-notice is provided by the user or subscriber; and
- restoration of the removed material if proper counter-notice is provided, and the copyright holder does not file suit within 10 days.

Designating and Registering an Agent

You do not need an attorney to do this job. To designate and register an agent, you can download the U.S. Copyright Office's official form at:

<http://www.copyright.gov/onlinesp/agent.pdf>

Or simply use the blank form included in this Guide.

**Mail the form to: Copyright I&R/Recordation
P.O. Box 71537
Washington, D.C. 20024**

Make your check payable to the Register of Copyrights.

Please be aware that all mail (U.S. Postal Service and private carrier) sent to the U.S. Copyright Office is being screened off-site prior to arrival on Capitol Hill. This process can add 3 to 5 days to the delivery time for all mail sent to the Copyright Office.

Fees

The Basic Fee of \$105 covers the registration for one business name. If you have other dba's or operate multiple websites, you can add an additional \$30 to cover up to 10 additional alternate names or websites.

Your Website Disclosure

One requirement of establishing your "Safe Harbor" is that you must publish on your site your policy for addressing repeated infringing activity, specifically a statement that you terminate users or account holders who are repeat infringers.

If you have no subscribers or account holders, your policy may state, "If we become aware that one of our users is a repeat copyright infringer, it is our policy to take reasonable steps within our power to terminate that user." Including the policy statement in the web site's terms of service or privacy agreements makes logical sense, though it may be published elsewhere on the site.

You must also publish the name and contact information of your Registered Agent so that he/she may be contacted regarding claims of infringement. Included in this Guide is sample notice language you can use on your website.

What to Do If You Get a Demand Letter

In order to have an allegedly infringing web site removed from a service provider's network, or to have access to an allegedly infringing website disabled, the copyright owner must provide notice to the service provider with the following information:

- The name, address, and electronic signature of the complaining party [512(c)(3)(A)(i)]

- The infringing materials and their Internet location [512(c)(3)(A)(ii-iii)], or if the service provider is an "information location tool" such as a search engine, the reference or link to the infringing materials [512(d)(3)].
- Sufficient information to identify the copyrighted works [512(c)(3)(A)(iv)].
- A statement by the owner that it has a good faith belief that there is no legal basis for the use of the materials complained of [512(c)(3)(A)(v)].
- A statement of the accuracy of the notice and, under penalty of perjury, that the complaining party is authorized to act on the behalf of the owner [512(c)(3)(A)(vi)].

Once notice is given to the service provider, or in circumstances where the service provider discovers the infringing material itself, it is required to expeditiously remove, or disable access to, the material. The safe harbor provisions do not require the service provider to notify the individual responsible for the allegedly infringing material before it has been removed, but they do require notification after the material is removed.

So if you get a properly formatted demand letter (and if it comes from a law firm or one of the major players like Getty or Masterfile, it will be properly formatted to a "T"), first, determine if the image in question appears on a part of your website that you directly control, like informational pages about you or your company, or any other pages you control the content. If so, you are required to remove the potentially infringing image expeditiously, and notify the claimant that the infringing image has been removed.

More than likely, the letter will also demand that you pay a fee for the use of the allegedly infringing image. If monetary compensation is demanded, seek the advice of your attorney. You may still be liable for copyright infringement if the infringing image appeared on pages for which you produced the content. The provisions of the "Safe Harbor" may not protect you in this case.

There have been documented cases where brokers and associations were successful in negotiating the amount of money demanded to a more reasonable amount, and the resulting payment makes the issue go away. It will be a business decision you have to make whether to negotiate and pay off the claim, or pay your attorney to dispute the claim.

If the Image is in IDX

If the image in question appears on a part of your site you do not directly control, like IDX search results, then you must notify the MLS providing the data immediately. The MLS will research the claim, and follow the provisions of the "Safe Harbor" as outlined in this Guide, and may include removal of the image in question from the MLS. This would remove the image from all IDX feeds, effectively removing it from your web site as soon as your IDX vendor refreshes the IDX photos.

While you should still seek advice from your legal counsel, the provisions of the "Safe Harbor" should protect you in this case—if you have taken the steps described above.

Wisconsin's Right of Privacy Statute

The DMCA is a federal law. It therefore applies in each of the 50 states and all US territories—and the protections described in this brochure should apply to copyright claims made against you or your business in Wisconsin. Wisconsin does not have its own copyright law. However, it does have a "Right to Privacy" statute that can apply to images on your website. Section 995.50 of the Wisconsin Statutes prohibits "the use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian." Under the statute, a person whose image has been used can be entitled to damages and attorney fees.

How can you avoid problems with the Right to Privacy statute? It's simple:

Don't use anyone's image on your website unless you have their consent in writing (or their guardian's consent if they are a minor).

Keep the consent on file so there are no disputes later.

Other states have differing privacy laws—for example, while Wisconsin's law is limited to using images of someone who is alive, other states also prohibit use of a dead person's image (such as a celebrity, for example). Although you should consult your legal advisor in the event of any claim, if you do not transact business in other states, your use of personal images will likely be governed by the Wisconsin statute. However, the best way to limit potential liability is to make sure that any images you have, whether of persons or anything else, is an image that you own or have express permission to use.

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**Interim Designation of Agent to Receive Notification
of Claimed Infringement**

Basic fee of \$106
covers indexing
of this one name.

Full Legal Name of Service Provider: _____

Additional \$30
per group of 10
or fewer.

**Alternative Name(s) of Service Provider (including all names under which the service
provider is doing business):** _____

Address of Service Provider: _____

**Name of Agent Designated to Receive
Notification of Claimed Infringement:** _____

Full Address of Designated Agent to which Notification Should be Sent (a P.O. Box
or similar designation is not acceptable except where it is the only address that can be used in the geographic
location):

Telephone Number of Designated Agent: _____

Facsimile Number of Designated Agent: _____

Email Address of Designated Agent: _____

Signature of Officer or Representative of the Designating Service Provider:
_____ **Date:** _____

Typed or Printed Name and Title: _____

**Note: This Interim Designation Must be Accompanied by a Filing Fee*
Made Payable to the Register of Copyrights.
*Note: Current and adjusted fees are available on the Copyright website at
www.copyright.gov/docs/fees.html**

Mail the form to:
Copyright I&R/Recordation
P.O. Box 71537
Washington, DC 20024

Sample Notification Language for Your Website

Use your brokerage name where noted, then place this language on your website. It can be included in your Terms of Use or Privacy Policy sections, or it can be a section all its own.

If you believe that your intellectual property rights have been violated by **{brokerage name}** or by a third party who has uploaded Content on our Site, please provide the following information to the **{brokerage name}** -designated copyright agent listed below:

- a. A description of the copyrighted work or other intellectual property that you claim has been infringed;
- b. A description of where the material that you claim is infringing is located on the Site;
- c. An address, a telephone number, and an e-mail address where **{brokerage name}** can contact you and, if different, an e-mail address where the alleged infringing party, if not **{brokerage name}**, can contact you;
- d. A statement that you have a good-faith belief that the use is not authorized by the copyright or other intellectual property rights owner, by its agent, or by law;
- e. A statement by you under penalty of perjury that the information in your notice is accurate and that you are the copyright or intellectual property owner or are authorized to act on the owner's behalf;
- f. Your electronic or physical signature.

{brokerage name} may request additional information before removing any infringing material. **{brokerage name}** may provide the alleged infringing party with your e-mail address so that that person can respond to your allegations.

{brokerage name} has registered a designated agent with the Copyright Office pursuant to 17 U.S.C. 512(c). If you believe your copyrighted material is being used on this Site without permission, please notify the designated agent at:

{registered agent name}
{registered agent contact information}

Additional Resources

- FAQ's about the DMCA, including everything you always wanted to know:
<http://chillingeffects.org/dmca512/faq.cgi#QID125>
- Link to the online "Interim Designation of Agent to Receive Notification of Claimed Infringement" form from the U.S. Copyright Office
<http://www.copyright.gov/onlinesp/agent.pdf>
- If you need to amend or change your registered agent:
<http://www.copyright.gov/onlinesp/>
- The U.S. Copyright Office's summary of the DMCA:
<http://www.copyright.gov/legislation/dmca.pdf>
- If you need royalty free images that are free of charge:
<http://www.stockfreeimages.com/>
<http://www.freedigitalphotos.net>
- If you need royalty free artwork that is free of charge:
<http://www.clker.com/>