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U.S. Copyright Office
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**Re: Request for Additional Comments Regarding The Impact And Effectiveness
of The Digital Millennium Copyright Act Safe Harbor Provisions
[Docket No. 2015-7] F.R. Vol. 82, No. 17, January 27, 2017 , P. 8629**

To Whom It May Concern:

Comments of The National Association of REALTORS®

The National Association of REALTORS® (“NAR”) is pleased to provide these comments in response to the Federal Register Notice of Inquiry on the Impact and Effectiveness of the Digital Millennium Copyright Act (Docket No. 2015-07) appearing at 21 Fed. Reg. 78,636 (Nov. 8, 2016) (the “NOI”).

In sum, NAR believes that the Digital Millennium Copyright Act (“DMCA”) is a highly effective risk management tool for online service providers. This is especially so within the real estate industry for owners of brokerage websites. NAR would like to take this opportunity to stress the importance of the DMCA and also identify three areas where the DMCA could possibly be improved, specifically (1) modifying the online registration process for copyright agents to permit the naming of multiple entities within one form; (2) acknowledging a broad definition of “user” under the DMCA; and (3) standardizing copyright management information.

NAR is the United States’ largest trade association, representing over 1.2 million real estate professionals, 54 state and territorial associations and more than 1,000 local associations. NAR’s members, member firms, member boards, affiliates, institutes, societies and councils are involved in all aspects of the residential and commercial real estate industries, including sales, property management, and appraisals. The real estate industry accounts for 15 percent of the U.S. economy and 2.5 million jobs with its related professions. There are over \$1 trillion of transactions in residential and commercial real estate. In short, the real estate market is a major contributor to the national economy.

Consumers in general, including within the real estate industry, are becoming increasingly digital. They watch “how-to” videos on YouTube, they read review sites, they look up specific brands on search engines, and they research on the go with smartphones and tablets. Ninety percent of home buyers today rely on the internet as a primary research source, and 52% turn to the web as their first step.¹ In fact, real estate-related searches on Google.com have grown 22% year-over-year.² NAR’s members’ ability to effectively advertise and promote their real estate services online is paramount to remain competitive in the real estate industry today.

¹ The Digital House Hunt: Consumer and Market Trends in Real Estate, A Joint Study from The National Association of REALTORS® and Google.

² The Digital House Hunt: Consumer and Market Trends in Real Estate, A Joint Study from The National Association of REALTORS® and Google.



REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

NAR's members, who identify themselves as REALTORS®³, recognize that technology innovations are impacting the delivery of real estate information and the future of their businesses. For this reason, NAR is keenly interested in public policies and legislation that affect the digital tools its members and their consumers use during a real estate transaction.

Photographs are Crucial to the Real Estate Industry

The real estate industry is fueled by listing content. Sellers want attractive listings that highlight their properties' worth and character. As the saying goes, "A picture is worth 1000 words," and photographs provide the visual incentive to visit a particular property. Sellers use photographs to market properties, buyers rely on those images to select which properties to visit, and independent photographers sell their services to agents, brokerages, and multiple listing services ("MLS"). Brokers and agents submit listing information and photographs to MLSs for inclusion and distribution through the MLSs' proprietary databases. MLSs in turn often license their property listing databases, including all submitted listing information and photographs, to third-party portals, such as realtor.com and other websites and vendors. Displaying photos of real properties online has become a vital part of the real estate professional's marketing plan.

There are Multiple Authors and Owners of Real Property Photographs

Photographs included in property listing information are created and conveyed in a number of different ways. Property photos may be taken by homeowners, real estate agents, MLS or brokerage employees or professional photographers. Similarly, the rights to use the photographs or digital images between the parties are also conveyed in different manners. For example:

- A homeowner may convey all rights in photos he has taken to the broker representing the homeowner in the sale of the property.
- A real estate agent may assign all rights to her broker, who in turn assigns all rights to the MLS.
- A real estate agent may assign non-exclusive rights to her broker, the MLS, and third-party portals.
- A professional photographer may grant a non-exclusive license to use the photographs in connection with property listings to a broker. The broker may then grant an exclusive sublicense to an MLS or third-party portal.
- An MLS employee within the scope of her employment, photographs a property, resulting in the MLS's ownership of the photographs. The MLS may then grant a non-exclusive license to MLS participants and third-party portals.

These examples illustrate that the photographs and other digital images used in the real estate industry may be authored and owned by different entities distributed for use via different conveyances, creating a "fractured" landscape of copyright authorship and ownership.

The DMCA is Crucial to the Real Estate Industry

A property owner that wishes to sell his or her property engages a real estate professional to assist with marketing the property. The real estate professional submits the property information to the MLS, which distributes the property information via a proprietary MLS data feed to other real estate professionals participating in the MLS for display on their websites. By submitting the property information, which includes copyrightable works such as photographs, the real estate professional authorizes the MLS to make that information available to other real estate professionals for public display on brokerage websites. Consumers then have the opportunity to conveniently search hundreds and thousands of websites to learn about properties real estate professionals who can represent them.

Brokerage websites are obviously a huge benefit to consumers; however, they also present an enormous risk of copyright infringement to real estate professionals operating such websites. Brokerage website owners have no reasonable opportunity or capacity to determine whether the photographs included in the MLS data feed that is displayed on the brokerage website via

³ REALTOR® is a federally registered collective membership mark which identifies a real estate professional who is a member of the National Association of REALTORS® and subscribes to its strict Code of Ethics. NAR is the exclusive owner of the REALTOR®, REALTORS®, REALTOR ASSOCIATE®, and REALTOR® Logo trademarks.

the MLS feed infringe any third-party copyrights. The fractured landscape of copyright ownership and authorship for listing photographs, described above, further compounds this issue making it possible for a real estate professional to mistakenly submit photographs to the MLS when he or she has not obtained the rights to do so.

NAR consistently urges members to comply with the §512(c) safe harbor provision of the DMCA. Section 512(c) establishes a safe harbor for service providers of websites that display content “stored at the direction of a user”. 17 U.S.C. §512(c). Real estate professionals submit photos and other property listing information to an MLS, thereby authorizing the MLS to deliver that content to other real estate professionals for display on brokerage websites. Brokerage websites receive a data feed of third-party property information, which is automatically displayed on the brokerage website. Brokerage website owners have no control over the content that appears from the MLS data feed. Although courts have not addressed the application of the DMCA to brokerage websites, it is wholly consistent with the meaning and intent of §512(c) that the copyrighted content be stored on a service provider’s system at the behest and direction of someone using the website for its purposes, that is, a user.

MLSs also urge their participating real estate professionals to comply with the DMCA. MLSs have included educational notes on the DMCA in their policies and handbooks, with information on how to comply with the §512(c) safe harbor. Some MLSs are serve as the DMCA copyright agent for their real estate professional participants, thereby ensuring their participants’ compliance with that requirement under §512(c).

Educational Resources for the DMCA

NAR strives to educate its members, associations, and MLSs about the importance of the DMCA as a risk management tool. NAR’s DMCA resources include: videos that are distributed to members and associations (*see* <https://www.nar.realtor/topics/copyright>); webinars hosted for members, associations, and MLSs; seminars for association legal counsel and association executives; forum and committee meetings focusing on the topic during NAR’s annual meetings; and educational materials distributed to attendees during NAR’s annual meetings.

NAR supports the Copyright Office creating educational materials to improve the functioning of §512. The Copyright Office has the resources to create comprehensive educational tools for the public, including educational graphics, response plans, frequently asked questions, video tutorials, and sample language that satisfies the DMCA requirements. For example, the Copyright Office created very helpful tutorial videos in connection with the new DMCA agent registration process. Additional DMCA resources created and curated by the Copyright Office will help a wide range of people, from educators touting the benefits of the DMCA to website operators trying to comply with the legislation.

* * *

In sum, photographs in property listings are extensively used and integral to marketing and selling real estate. As shown above, the conveyance of rights in the photographs is not always straightforward, and brokerage website operators have no control over the content that appears on brokerage websites from MLS data feeds. Thus, the §512(c) safe harbor protection of the DMCA is a crucial risk management strategy for real estate professionals, MLSs and third-party portals. NAR is in a unique position to offer insight on this importance, and some issues associated with application of the DMCA, from the perspective of its members.

1. The Copyright Office should permit the electronic registration of a DMCA agent for multiple unaffiliated companies under one form.

The Copyright Office recently launched a fully-electronic system for registering DMCA copyright agents, a widely welcomed modernization to the former handwritten process. The updated registration process, however, does not permit the identification of multiple, unaffiliated companies for a single copyright agent under one form. Instead, each form may only identify one company. MLSs that provide DMCA agent services to participating real estate professionals have experienced a dramatic increase in costs associated with those services. The increase is mostly due to the time and labor needed by an MLS to complete the registration form thousands of times for each real estate professional with a brokerage website participating in the MLS. Allowing multiple entities to be covered by one registration form, however, would abate these costs.

To be clear, NAR is not requesting a change to the Copyright Office's filing fees. Instead, NAR is concerned with the soft costs associated with filling out thousands of forms under the new system, as described above. Unfortunately, this new administrative burden undermines the helpfulness of the electronic registration process.

NAR therefore urges the Copyright Office to allow the electronic DMCA copyright agent registration form to cover multiple unaffiliated entities.

2. The Copyright Office should support a broad definition of “user,” as found in BWP Media USA Inc. v. Clarity Digital Group, LLC.

NAR would like to highlight the decision in *BWP Media USA Inc. v. Clarity Digital Group, LLC*, 820 F.3d 1175 (10th Cir. Apr. 2016), which issued on April 25, 2016, after the last round of public comments closed. This case supports a broad definition of “user” under the DMCA, which is crucial to maintaining the effectiveness of the legislation.

Clarity Digital Group, LLC (“Clarity”) operated a website featuring entertainment, news and lifestyle content created by independent contractors and posted directly to the website by those independent contractors. Although Clarity provided access to and encouraged use of a library of licensed photographs, the independent contractors could select other images for articles.

BWP Media USA Inc. (“BWP”) sent a cease-and-desist letter to Clarity alleging copyright infringement of BWP's copyrighted photographs within articles posted to Clarity's website. In those articles, the independent contractor authors used photographs that were not included in Clarity's library of licensed photographs. Clarity removed BWP's photographs within fifteen days of receipt of BWP's cease-and-desist letter. BWP then sued Clarity for copyright infringement. The parties disagreed over application of §512(c) of the DMCA, specifically, whether the infringing images were posted to Clarity's website “at the direction of a user”.

The district court rejected a narrow definition of “user” under the DMCA. Instead, the court applied the plain-meaning definition of “user” and found that “‘user’ describes a person or entity who avails itself of the service provider's system or network to store material.” *BWP Media USA Inc. v. Clarity Digital Group, LLC*, 2015 WL 1538366, *7 (D. Colo. Mar. 31, 2015). Ultimately, the district court found that Clarity qualified for the safe harbor protection under §512(c).

The 10th Circuit Court of Appeals affirmed the decision on appeal. The Court wrote, “In the DMCA context, we agree with the district court that the term ‘user’ describes a person or entity who avails itself of the service provider's system or network to store material.” *BWP Media*, 820 F.3d 1175, 1179. The Court disagreed with BWP's argument that “user” should exclude the service provider's owners, employees, agents or independent contractors, stating that “a ‘user’ is anyone who uses a website – no class of individuals is inherently excluded.” *Id.* At 1180.

NAR strongly agrees with this broad interpretation of “user” under the DMCA and encourages the Copyright Office to similarly do so. Broadly defining “user” is crucial to ensuring that the DMCA safe harbors remain effective risk management tools.

NAR further encourages the Copyright Office to find, or support legislation that states, that the DMCA applies to certain groups that heavily rely on the DMCA, for example, owners of brokerage websites displaying an MLS data feed. Clearly defining such groups as “users” under §512(c) will clarify the meaning of “user” for future litigants. Court cases related to listing photographs are on the rise. NAR and the real estate industry have been carefully monitoring two particular cases: *VHT, Inc. v. Zillow Group Inc.*, No. 2-14-cv-1096 (W.D. Wash. 2015), which was recently decided; and *Alexander Stross v. Redfin Corp.*, No. 1:15-cv-00223 (W.D. Tex. 2015). The DMCA was raised as defense in both cases, and these cases illustrate just how critical §512(c) of the DMCA is to the real estate industry.

3. The Copyright Office Should Support Standardized Copyright Management Information

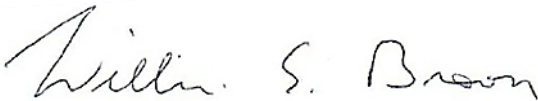
The DMCA prohibits intentional removal or alteration of copyright management information (CMI) that is conveyed in connection with a work. CMI includes the title of the work, the copyright notice, the author's name, other identifying information about the author, the copyright owner's name, other identifying information for the copyright owner, terms and conditions for use of the work, and numbers or symbols on the work referring to this information. Removing this information - or knowingly distributing a work that has been scrubbed of correct CMI - is illegal under the DMCA.

Since the properties of a digital file are not locked but rather easily modifiable using basic technology, CMI is often lost inadvertently. Photographs are often cropped, resized, and digitally modified/enhanced. Metadata can be easily stripped or revised. .

Within the real estate industry, MLSs must ensure their database of property listings is easily accessible. Brokerages must ensure their websites are easily accessible and viewable by Internet users. Agents must ensure that their clients and potential clients may easily find them online and search for property listings. In light of the amount of data these websites and portals must host, and to ensure a robust and smooth viewing experience by the end user, resizing of photographs inadvertently removes the CMI.

Digital metadata lacks adequate international standards that ensure CMI remains in place and accurate. The Copyright Office should support and assist in the creation of a standardized formatting of CMI in photographs' metadata, including field name labeling, mapping, synchronization and location. Standardizing CMI and its location within metadata can ensure that users do not inadvertently strip CMI from copyrighted photographs.

Sincerely,



William E. Brown

2017 President, National Association of REALTORS®