



OREGON
ASSOCIATION
OF REALTORS®

THE DMCA

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!



Executive Summary

You just received a very official-looking packet in the mail from a law firm in Chicago, claiming there is a copyrighted image on your website. And the law firm is demanding that you pay for the use of the image on behalf of their client who owns the copyrighted image.

What?

While that may be your initial reaction, this scenario is playing out all over the United States, as “copyright troll” lawyers have discovered that the real estate industry is a lucrative revenue stream.

Unfortunately, most real estate brokers are under-informed about the dangers of using other people’s images on their websites and in the Multiple Listing Service.

This guide was developed to help educate brokers about the issue, and inform them of the steps they can take today to protect themselves within the provisions of the Digital Millennium Copyright Act (DMCA).

Included in this guide are the exact steps you need to take to protect yourself, including the official form from the U.S. Copyright Office, and sample language you can copy and use on your website as part of the “Safe Harbor” provisions of the Act.

Nothing in this guide is to be construed as legal advice – if you have any questions about this subject, please consult with your legal counsel.

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 company.

Why Should You Care?

The bottom line is that you can be held accountable for any copyright infringement that occurs on your website. The lawyers 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, or trying to blame a website 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. 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 company has a website.

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

- Don't steal somebody else's photos.
- Don't 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 the Act 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 the Safe Harbor provision, however, you must comply with three administrative requirements:

1. You must designate an agent to receive notices of claimed copyright infringement. The designated 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 the agent. 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 who are repeat infringers. 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 prevent that user from accessing our website.” Including the policy statement in the website’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:
 - a. The expeditious removal of the material that is claimed to be infringing;
 - b. Notification to the user that the material has been removed;

- c. Notification to the copyright holder if proper counter-notice is provided by the user; and
- d. 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, visit the DMCA Designated Agent Directory page here: <https://www.copyright.gov/dmca-directory/>.

NOTE: On December 1, 2016, the DMCA Designated Agent Directory switched to a new, all-digital format. If you were previously registered and wish to maintain an active designation with the Copyright Office, you must submit a new designation electronically by December 31, 2017.

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.

What to Do if You Get a Demand Letter

In order to have an allegedly infringing website 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(c)(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 demand letter, 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, and 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 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 part of your site you do not directly control, like the 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, which 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 website 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.

[Interim Designation of Agent to Receive Notification of Claimed Infringement]

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 [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, telephone number, and an email address where the alleged infringing party, if not the [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 owners, 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 intellectually 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 email 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 copyright 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" from the U.S. Copyright Office:
 - <https://dmca.copyright.gov/osp/>
- If you need to amend or change your registered agent:
 - <http://www.copyright.gov/onlineasp>
- 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>

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