

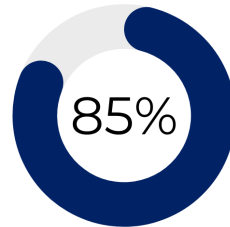


DMCA TOOLKIT

What Oregon REALTORS® need to know about the Digital Millennium Copyright Act and what actions they can take to reduce their risk of copyright infringement.

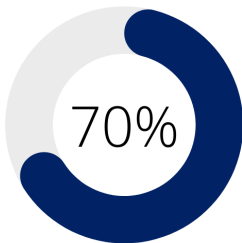
What is the Digital Millennium Copyright Act (DMCA)?

The [Digital Millennium Copyright Act](#) was passed in October, 1998. The Act heightens the penalties for copyright infringement on the internet (statutory penalties can be as high as \$150,000 per work). It also 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 a technological measure that controls access to a copyrighted work (encryption, etc.), whether or not there is actual infringement of any copyright itself. Finally, the Act creates a “safe harbor” process whereby online service providers (OSPs) who host 3rd-party content can avoid liability for copyright infringement by the 3rd party content providers if certain policies and procedures are implemented.



of the 3 billion images shared daily are copyright infringing.

Copytrack Global Infringement Report (2019)



of all brokers and broker associates have a website.

NAR Member Profile (2021)

Copyright in Real Estate

The heightened penalties for online copyright infringement are cause for concern to anyone who owns a website, which includes a majority of real estate brokers and companies.

It is not uncommon for “copyright troll” lawyers to target websites whose owners are uneducated about the DMCA and have not taken the proper steps to protect themselves

from liability. Often this forces website owners to pay large sums to avoid the risk of a full copyright infringement lawsuit.

As a website owner, you can be held accountable for any copyright infringement that occurs on your site even if the infringing material was posted without your knowledge



**Penalties up to
\$150,000
per infringing work.**

by a website vendor or 3rd party by way of an IDX. Copyright lawyers do not take into consideration how, why, or who placed copyrighted material on your website. So long as they can prove that content on your website is copyright infringing, you can be held liable.

This toolkit 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) in the future.

Nothing in this toolkit is to be construed as legal advice. If you have any questions regarding the DMCA, please consult with your legal counsel.

How Can I Avoid Copyright Infringement?

As a general rule, avoid using third party works (such as images, art, music, books, etc.) in any materials related to your business unless you are sure that either the material is not copyrighted or that you have the proper license for use, manipulation, and distribution of the material.

You know that a work is not protected by copyright and free to use if it is a part of the “public domain.” This means that the work does not qualify for copyright, its copyright has expired, or the creator intentionally published the work to be used, manipulated, and distributed freely by anyone.



Copyright
Cannot use without
proper license or
permission

VS



Public Domain
Completely free to
use (even for
commercial purposes)

You can obtain the license to use third party works if you are granted permission in writing by the creator, or pay for the ability to use their material. In either of these circumstances, there is generally a defined scope or way in

which you are allowed to use the work. For example, you may be allowed to post an image on your website, but be disallowed to edit or manipulate the image in any way. Pay careful attention to the scope of use as failure to comply with it could result in legal penalties.

It can sometimes be difficult to know what is and isn't copyrighted on the internet. By general rule, if you are unsure if a work is copyrighted or whether you have the proper permissions to use it, do not publish it on your website, social media accounts, local MLS or any other online space.

Website vendors who post graphics and materials to your website for you often can guarantee that all the works they use are not copyright infringing. However, on the chance that they do publish infringing work on your site, you are held liable. Therefore, do your own due diligence when working with a website vendor to ensure that all works published on your site are not copyright infringing.

How Can I Ensure I am Not Held Liable for Infringing Material That is Posted On My Website by a Third Party?

Many websites include an Internet Data Exchange (IDX) display. This allows users not associated with the administrator of the website the ability to publish content on the website. This is extremely common on broker websites that feature listings from one or more MLSs. The issue of copyright infringement arises if another agent posts a copyrighted image on their listing, which is posted on the MLS, and then is displayed on your website. Because the copyrighted image is on your site, you can be held liable even though you did not put it there yourself.

You can avoid this liability by taking advantage of Section 512 of the DMCA known as the Safe Harbor Provision. This provision protects online service providers (OSPs) from being held responsible for copyrighted material posted on their website by third parties so long as they meet certain administrative requirements. Courts construe the definition of "online service provider" broadly, which would likely include MLSs as well as participants and subscribers hosting an IDX display.

How Can I Protect Myself and my Website under the Safe Harbor Provision?

The Safe Harbor Provisions protects your website from copyright infringement claims so long as:

- You [register online](#) with the U.S. Copyright Office a designated agent (“DMCA Agent”) to receive takedown notices under the DMCA. This registration must be renewed every three years.
- You provide the contact information of your DMCA agent on your website in a place accessible to the public (this is often, but not required to be, contained in the website’s “Terms of Use” section). This information should include the DMCA agent’s name, physical address (street or P.O. Box), phone number, and email address.
- You comply with [the DMCA takedown procedure](#). If a copyright owner submits a takedown notice to the OSP, which alleges infringement of its copyright at a certain location, then the OSP must promptly remove allegedly infringing material. The alleged infringer may submit a counter-notice that the OSP must share with the copyright owner. The OSP must restore the content within no less than 10 and no more than 14 business days unless the person sending the takedown notice informs the OSP that a court action has been filed.

DMCA Takedown Procedure

What to do if you receive a notice that content on your site is copyright infringing



- You construct, implement, and publish a Repeat Infringer Policy on the website. Your Repeat Infringer 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.”
- You remove or disable access to posted material when you have either “actual knowledge” of infringement or “awareness of facts and circumstances from which infringing activity is apparent (known as “red flag” knowledge).

- You do not receive any direct financial benefit from the copyrighted material.
- You accommodate and do not interfere with standard technical measures that identify or protect copyrighted works that have been developed according to broad consensus between copyright owners and online service providers, to the extent any such measures exist (as of November 2021 no such measures exist).

For more information on the Safe Harbor provisions visit the [U.S. Copyright Office Safe Harbor website](#). For sample language to include on your website see the DMCA language on the [“Terms of Use” page](#) of the National Association of REALTORS® website.

What is a DMCA Agent and How Can I Register One?

A DMCA agent receives notices on behalf of the websites associated with them from creators who feel their copyrighted works are being infringed upon. The agent’s information must be shared with the Copyright Office and posted explicitly on your website so they can be easily contacted by creators to send Take-Down Notices or complaints. Below is sample wording you can use on your website to notify users of the agent’s information. Use your brokerage name wherever indicated, then place this language on your website. It can be included in your Terms of Use section, or it can be a section all on 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 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 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]*

You can register with a Designated Copyright Agent through the Copyright.gov DMCA Designated Agent Directory [here](#). You can select “Login/Register” and you will be directed to set up an account, designate an agent, and pay the filing fee of \$6.

All designations must be renewed at least once in a three year period. Renewal of a designation is accomplished either by amending the designation (i.e. updating your business information) or resubmitting your designation. Both amendment and resubmittal require a \$6 fee at time of completion.

The U.S Copyright Office provides a FAQs page with more information about agent designations [here](#).

What Do I Do if I Receive a Demand Letter Claiming I Have Infringed Copyright?

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 an 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 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.

Additional Resources

- NAR Resources on Copyright and DMCA
 - <https://www.nar.realtor/copyright>
- FAQ's about the DMCA Safe Harbour
 - <http://chillingeffects.org/dmca512/faq.cgi#QID125>
- Royalty free images and artwork that are free of charge:
 - <http://www.stockfreeimages.com>
 - <http://www.freedigitalphotos.net>
 - <http://www.clker.com>
- If you need a design space that provides non-copyrighted images, graphics, videos, and music for your business (Includes both free and paid versions):
 - [Canva Pro - An Online Graphic Design Tool: Try Canva Pro Free](#)