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The Voice - 2022 Q2



from **The Voice - 2022 Q2**
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LEGAL UPDATE

Copyright Infringement Claims on the Rise



Ashley Strauss-Martin New Mexico Association of REALTORS® General Counsel

Most letters that begin with the phrase “This law firm represents...” do not end well. A common copyright troll tactic is sending a cease and

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desist letter demanding that you stop using “their” intellectual property, and demanding that you pay them a substantial amount of money to avoid a lawsuit. These letters are ostensibly supposed to put you on notice about a copyright violation, but they are often abused by individuals and companies who are simply looking to make a quick buck.

Think it won't happen to you? Think again! Several New Mexico business owners, including Realtors ® , have received just this type of letter in the last year, demanding as much as \$30,000.00. One photographer alone sent copyright infringement letters to at least four New Mexico business owners including our own a CCIM Institute, threatening to bring suit for upwards of \$100,000 if the demand for payment was not met. To make matters worse, you may NOT have insurance coverage to assist you with these type claims. Typical Errors and Omissions policies do not cover copyright infringement claims. (1)

What is Copyright?

Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression. In copyright law, there are a lot of different types of works, including paintings, photographs, illustrations, musical compositions, sound recordings, computer programs, books, poems, blog posts, movies, architectural works, plays, and more. Copyright exists automatically in an original work of authorship once it is fixed, but a copyright owner can take steps to enhance the protections. The most important step is registering the work. Registering a work is not mandatory, but for works in the United States, registration (or refusal) is necessary to enforce the exclusive rights of copyright through litigation. Registration also allows copyright owners to seek certain types of monetary damages and attorney fees if there is a lawsuit and serves the public by providing notice that someone is claiming copyright protection.

What is Copyright Infringement?

Copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner. Under the copyright law, the creator of the original expression in a work is its author. The author is also the owner of copyright unless there is a written agreement by which the author assigns the copyright to another person or entity, such as a publisher. In cases of works made for hire, the employer or commissioning party is considered to be the author. Publication has a technical meaning in copyright law, but generally, publication occurs when copies of the work are first made available to the public.

What is the Public Domain?

The “public domain” is not a place. Work enters the public domain when a copyright expires, when the copyright holder fails to renew it, when it was unprotected in the first place, and when dedicated to the public domain by the owner. Copyright does not protect work in the public domain, and works in the public domain may be used freely without the permission of the former copyright owner. Certain works will always be in the public domain. (2) But remember, just because something is found on the Internet, does not mean that it’s in the public domain. Even memes have copyright protection belonging to their creator – you’re just getting a license to use them freely. Click [HERE](#) for more information on searching the copyright database.

Could you be infringing someone’s copyright?

Do you have an online platform – a website, a Facebook page, your Realtor.com profile page? (3) Is ALL the content on those pages original works of authorship, meaning you produced it? If not, do you have a license to use it?

Do you have an IDX feed? The MLS requires all participants to be the author of or have permission to use all the content they upload, but the MLS does not review everything uploaded by its participants to confirm this is the case, so is it possible that somewhere in that IDX feed is an image, a diagram, a floor plan, etc. that violates someone’s copyright?

How do you protect yourself?

First confirm that you either produced or have the right to use all content that is being uploaded onto your platform. You can access a number of copyright release forms [HERE](#).

As for that content on your website that contains material that you did not upload, the Digital Millennium Copyright Act (“DMCA”) provides protections. The DMCA was signed into law on in 1998. It significantly changed copyright law, including the addition of “safe harbor” provisions. The DMCA established protections – “a safe harbor”- for online service providers (4) in certain situations if their users engage in copyright infringement. To take advantage of the safe harbor protections, certain steps must be followed. (5)

Step #1: Adopt and implement a policy for terminating the accounts or subscriptions of repeat infringers and publish it on your website.

Step #2: Accommodate and do not interfere with standard technical measures used by copyright owners to identify and protect their works.

Step # 3: Register an agent under the DMCA to receive notices of infringement claims for material posted on the website or platform and publish your agent’s information on your website. Click [HERE](#) to learn how to register an agent.

Step #4: When your agent receives a Take-Down Notice, comply with the DMCA takedown and counter notice process. Click [HERE](#) for steps to take if your agent receives a Take-Down Notice Request.

If an agent is designated, and other necessary steps under the DMCA are followed, then if you should receive a claim of copyright infringement, you will not be liable for copyright infringement, even if the user material posted by the user on your website was in fact infringing material.

Visit the U.S. Copyright Office's Website and NAR's Website for more information and resources.

1. Review your policy and/or check with your carrier for information regarding your specific policy and/or to determine if a rider is available for such coverage.
2. These include: works created prior to 1923, works that are not copyrightable in the first place, such as facts, ideas and government and judicial works, works that have a clear message of disclaiming copyright; and works with a copyright term that has lapsed, either due to time or a failure to renew or register
3. Last year a photographer claimed a photograph on the REALTORS[®] profile page of Realtor.com infringed his copyright and demanded money from the Realtor. Realtor.com had registered an agent under the DMCA and immediately took the photograph down and the photographer had no further recourse against Realtor.com; however, the Realtor who allegedly uploaded the photograph had no protection. She settled the claim to avoid a lawsuit.
4. An online service provider is an "entity offering the transmission, routing, or providing of connection for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." This means that if an entity allows users to post things the user chooses to post, and the entity transmits, routes, or provides that material without alteration, then the entity is considered an online service provider. Prior to receiving a takedown notice, the service provider must not be aware of the infringement or of facts or circumstances that would make the infringement apparent.

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obtained. NMAR members are cautioned against engaging in the unauthorized practice of law by advising a consumer of legal rights and obligations or by applying the law to particular facts and circumstances.

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