

South Texas MLS Copyright Protection For MLS Listing Content Participant Agreement

STXMLS will be implementing new Participant and Subscriber Agreements with its MLS participant and subscribers. These agreements, along with the MLS rules and policies, govern the relationship between the MLS and its participants and subscribers.

The following FAQs are not legal advice, and if you do not understand the Participant Agreement you should seek the advice of your legal counsel.

Frequently Asked Questions

1) What is the Participant Agreement?

The Participant Agreement is the agreement under which you receive services from the MLS, including access to the MLS database. The agreement is subject to the MLS rules and regulations, but includes terms that complement the MLS rules. For example, details about the MLS service, warranties, and copyright terms. Specifically, the Participant Agreement provides brokers with the option to assign its copyrights to the MLS.

2) Why do I need to copyright my listing content?

Copyright law protects the authors of creative works from others (called “copyright infringers” or just “infringers”) who would use those works without the authors’ permission. Prompt registration of copyright with the United States Copyright Office is required in order to get attorney fees and a special kind of damages against infringers. Registration is also a prerequisite to suing an infringer.

3) Who currently retains ownership of listing copyrights?

In the absence of written agreements to the contrary, the owner of the copyright in a photo or in original text is the author – the human being who created it, in most cases, the agent or assistant who wrote the text or snapped the photo. If an employee (not an independent contractor) creates a work within the scope of their employment, then the employer is the author. (This is not as common in the real estate industry as other industries, because most real estate agents and many assistants, etc., are independent contractors.)

If someone owns a copyright and allows someone else to use it, the owner is said to be “licensing” the copyright. Just because an agent submits the photo to their broker does not mean she transfers ownership to their broker. Just because a photographer takes a photo for an agent and permits the agent to put it on MLS does not mean that the photographer has given up his or her copyrights. Instead, they are licensing their rights to be used for particular purposes.

4) Which portion of the listing is copyright-protected?

Copyright protects anything that is the result of a creative process, including original text (like remarks) and perhaps even the listing price; photographs, whether taken with digital or traditional equipment; virtual tours (though the creators of tours often retain their copyrights); and any other creative text and graphic materials.

Facts cannot be copyright-protected; the facts that the home on 123 Elm Street is for sale and that it has three bedrooms and encompasses approximately 2,100 square feet are not subject to copyright protection. (Copyright also does not relate to product or service names; designations of the origins of products and services, including product names and logos, are the subject of trademark law, something completely different.)

5) What are the two intellectual property options under Section 21 of the Participant Agreement?

Option I is assignment of your copyrights to MLS. MLS can register all the works in the MLS database, and MLS can take steps to sue anyone who infringes the copyrights in the MLS data. For brokers and agents to do this individually would likely cost a great deal more, and it would entail efforts that many brokers and agents may not want to exert.

To achieve these objectives, MLS must obtain ownership of the copyrights in the materials it will register and enforce, which is the Option I selection. If a broker selects Option I, they permit MLS to acquire the copyrights in data content relating to their listings and agents in their offices. In return, MLS promises in its agreement with the broker (the Participant Agreement) to (1) obtain copyrights from the brokers’ agents; (2) register the copyrights; (3) take reasonable actions to prevent and pursue infringement; (4) grant back to the listing broker rights to use data relating to the broker’s own listings; and (5) refrain from distributing the broker’s listing data (except for core MLS purposes) unless MLS has the broker’s consent.

For brokers that do not want to assign ownership of its copyright to MLS, brokers can select Option II. From these brokers and the agents in their offices, MLS obtains only a license to use the copyright-protected content for MLS purposes. If a broker selects Option II, then that broker will be responsible for negotiating with their own agents regarding copyright ownership; they also will be responsible for their own copyright registrations and for preventing third parties from making unauthorized use of the brokers’ listing data.

STXMLS has determined, that using Options I and II in the Participant Agreement and allowing brokers to decide whether to have MLS register and enforce their copyrights is the most cost-effective way to prevent misuse of data relating to brokers’ listings.

Additionally, regardless of what option you choose (Option I or II) your selection, coordination, and arrangement of listing information that is input in the MLS database is part of the compilation copyright and owned by MLS. For more details about this aspect, see here: <https://larsonskinner.com/2018/03/23/mls-terms-use-changes-copyright-faq/>.

6) Would granting copyrights to MLS work against my fiduciary responsibility to my seller/client?

MLS cannot give you legal advice about your fiduciary duties. MLS’s attorneys believe, however, that copyright protects agents themselves and their customers from the predations of those who take listing data without permission. Sometimes, agent and seller interests may be at odds. For example, imagine an agent takes a set of particularly fine photos of their listing in June, but the house does not sell before the listing expires; imagine that the seller lists with another broker in November, but wants the ‘summer’ pictures from the first agent on MLS. Under copyright law, the first agent must consent before the second broker or seller can use their photos. If the seller claimed the first agent had an agency/fiduciary duty to allow the seller to reuse the pictures, MLS would direct the first agent to their own attorney for counsel.

7) Would copyrighting restrict activity in the market and violate federal anti-trust laws?

Generally, copyrights do not pose antitrust problems. In fact, a copyright is a sort of state-sponsored monopoly; an exception to the antitrust laws’ view that monopolies are generally bad. Copyrights can be misused so as to bring about an antitrust violation, but such misuses are unlikely in the MLS/brokerage context.

8) If I pick Option II, will I still be able to use the MLS service?

Yes, regardless of your selection of Option I or Option II, you are granted a license to use the MLS service.

9) What would the cost be to me?

Regardless of your selection of Option I or Option II, the cost is included in your MLS fees.

10) Do NAR and Texas REALTORS® have a position on copyrighting? Do we need their approval for this agreement?

NAR has encouraged the registration of copyrights in MLS databases. Under NAR policy, MLS cannot require brokers to transfer any intellectual property rights to MLS. Consequently, MLS’s copyright project is optional for brokers. Texas REALTORS® does not maintain MLS policies that are binding on MLS with regard to the handling of the compilation copyright.

11) Can MLS release/sell our data without permission from the Participants?

No. The proposed Participant Agreement between MLS and the Participants ensures that Participants can opt out of any ‘non-core’ use of the MLS data that MLS considers, in accordance with NAR Policy Statement 7.85.

12) As a broker, will I retain my right to give third-party entities the right to use my listing data? Will there be any restrictions?

The proposed Participant Agreement ensures that the listing broker has an unrestricted right to use content relating to their own listings, including licensing them for use by third parties (and even including the right to allow the third parties to license to other third parties). MLS commits in the proposed Participant Agreements to support the brokers’ use of their own listing content.

13) Will there need to be a separate agreement between broker and agent? Can the broker incorporate the language into their Independent Contractor Agreement or will it need to be a separate document?

The proposed Participant and Subscriber Agreements endeavor to ensure that brokers participating in MLS’s copyright program obtain all the rights they will need from their agents without the need for separate agreements relating to copyright between brokers and agents. Nevertheless, the brokers can choose to address copyrights in their independent contractor agreements.

Brokers not participating in MLS’s copyright program may wish to obtain copyright assignments from their agents, but that would be subject to negotiation between brokers and agents.

14) What if the broker opts to copyright their listing data and one of their agents does not want to agree to copyright?

MLS takes care of this issue with regard to brokers who participate in MLS’s copyright project. It obtains assignments from the agents and grants the appropriate rights to the broker. If the broker does not participate in MLS’s copyright project, the broker will have to negotiate copyright matters with each of its agents.

15) How will this impact an individual agent? Will they lose all rights to their photos and text?

If a broker takes part in MLS’s copyright project, MLS takes copyright ownership in the listing content each of the broker’s agents submits to the service. The listing broker, though not the owner of the copyrights, has a license from MLS to use that content any way the listing broker wishes. Individual agents can negotiate in their independent contractor agreements with brokers the right to continue using listing content they supply under particular circumstances. As for brokers that do not participate in MLS’s copyright project, their agents continue to hold copyrights in works they create unless their independent contractor agreements with their brokers provide otherwise.

16) If an agent moves their license to another real estate company will they have the ability to take their data, assuming that the previous broker has given them permission?

The agent can use data from their listings at their previous company in any way their previous broker permits. Without the previous broker’s permission, the agent would not be able to use data from their listings at the previous company. If she re-listed one of the same properties, she would have to take new pictures and write new remarks text.

17) How is the copyright initiative handled if an agent contracts with a professional photographer who already copyrights their photos?

Unless the agent has a written agreement with the photographer that transfers the copyrights from the photographer, the photographer continues to own the copyrights. The agent has only a license to use it for the purposes the photographer permits. The MLS copyright project does not change these circumstances because the agent cannot transfer to MLS a copyright that the agent does not own.

18) What if the seller does not agree to the copyright terms?

Sellers generally do not contribute copyright-protected material for inclusion in MLS. To the extent that the seller has taken a picture or drafted remarks for MLS, the seller would be treated like the photographer in the previous question. MLS does not require brokers or sellers to enter listing agreements or other agreements where the seller must transfer ownership of copyrights to the listing broker or to MLS. If a broker wishes to obtain copyrights from the seller, the broker should negotiate those terms with the seller. *MLS does require* that the listing broker (and the seller and any photographers from whom the listing broker obtains copyright-protected work) have the rights necessary to provide the materials to MLS. Thus, if MLS were sued because a broker submitted someone’s copyright-protected work without permission, the proposed Participant Agreement would require the infringing broker to pay MLS’s defense costs.

19) What are my obligations with regard to listing content I or my agents provide to the MLS?

You must use reasonable care to ensure that you have the appropriate permissions to provide any content to the MLS, and that all information you provide is in compliance with all laws. You also warrant that the information you or your agents provide is accurate and does not infringe any third party intellectual property or other proprietary rights.