

The DMCA

UPDATED
for 2017!



A Real Estate Broker's
Risk Reduction Guide to
the Digital Millennium
Copyright Act (DMCA)

*Includes how to register as an
Agent and sample language for
your website!*

**What
You
Need to
Know
And
What
You
Need to
Do**

Daytona Beach Area Association of REALTORS

Images in this guide are courtesy of freedigitalphotos.net.

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 woefully 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 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 agent.

Why Should You Care?

The bottom line is that you can be held accountable for any copyright infringement that occurs on your website. The law firms 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 web site 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 agent have a website, and brokers and agents are woefully under-informed about the issue.

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 permis-

sion 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 agent who saved that beach photo and uploaded it to his or her website has violated someone else’s copyrights. Worse is when the agent uploads the photo to the MLS, and it gets distributed via IDX to hundreds and hundreds of other broker’s and agent’s 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 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 Safe Harbor provision, however, you must comply with three administrative requirements:

- 1) You must designate an agent, usually yourself though it may be someone else who agrees to do so, to receive notices of claimed copyright infringement. Your 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 him or her. To designate an agent, a procedural requirement for protection under the DMCA safe harbor provisions, you must file with the U.S. Copyright Office and submit a \$6 filing fee.
- 2) You must publish on your site your policy for addressing repeated infringing activity, specifically a statement that you terminate users or account holders who are repeat infringers. If you have no subscribers or account holders, 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 terminate that user." Including the policy statement in the web site'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
 - the expeditious removal of the material that is claimed to be infringing;
 - notification to the user or subscriber that the material has been removed;
 - notification to the copyright holder if proper counter-notice is provided by the user or subscriber; and
 - 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, you can register an agent online at <http://dmca.copyright.gov/osp/login.html>
Agents must re-register every three years.

Fees

The Basic Fee of \$6 covers the registration for one business name.

Your Website Disclosure

Part of the requirements to establish your "Safe Harbor" is that you must publish on your site your policy for addressing repeated infringing activity, specifically a statement that you terminate users or account holders who are repeat infringers. If you have no subscribers or account holders, 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 terminate that user." Including the policy statement in the web site's terms of service or privacy agreements makes logical sense, though it may be published elsewhere on the site.

You must also publish the name and contact information of your Registered Agent so that he/she may be contacted regarding claims of infringement. Included in this guide is sample notice language you can use on your website.

What to Do If You Get a Demand Letter

In order to have an allegedly infringing web site 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(d)(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 properly formatted demand letter (and if it comes from a law firm, it will

be properly formatted to a “T”), 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, or 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 the 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 a part of your site you do not directly control, like 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, and 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 web site 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.

DMCA Designated Agent Registration Account

Login ID

Password

[Not Registered? Register here](#)
[Resend Activation Email](#)

Privacy Act Notice

Section 512 of title 17 of the United States Code authorizes the Copyright Office to collect the personally identifying information (PII) requested by this system in order to maintain a directory of designated agents under the Digital Millennium Copyright Act ("DMCA"). PII is any personal information that can be used to identify, contact, or trace an individual, such as names, addresses, and telephone numbers. By providing PII, you are agreeing to the routine use of such PII to establish and maintain a public record, including the Office's public indexes, the Office's public website, and Office search reports prepared for the public. The effect of not providing the PII requested is that it may delay processing of your designation or could affect the legal sufficiency of your filing, a determination that would be made by a court of law.

<https://dmca.copyright.gov/osp/login.html>

This is the new website set up to register Agents for the DMCA Safe Harbor provisions. Once you have set up an account, the system will email you to verify. Click on the link provided in the email, sign in and complete the online registration process. Your company (brokerage) will be the Service Provider, and whomever you have elected to serve will be the Registered Agent. Credit cards are accepted as payment. Help is available on the site under "help."

DMCA Designated Agent Directory Help

If you need help using the old paper-generated directory or the new electronically generated directory, need assistance using the new online registration system, have any questions, or encounter any technical difficulties, please contact us by telephone at (202) 707-1759 or by email at copyosp@loc.gov. You can also use the form below. Additionally, we encourage you to review answers to frequently asked questions [here](#) and watch the below video tutorials which demonstrate step-by-step how to use the new directory and registration system.

Tutorials

Searching the DMCA Designated Agent Directory

Video (1m 58s) | [Transcript](#)

Creating a DMCA Designated Agent Registration Account

Video (1m 35s) | [Transcript](#)

Managing an Account

Video (1m 37s) | [Transcript](#)

Designating an Agent for a Service Provider

Video (4m 6s) | [Transcript](#)

Managing a Designation (Amendments and Termination)

Video (5m 22s) | [Transcript](#)

Renewing a Designation

Video (3m 56s) | [Transcript](#)

You can read answers to frequently asked questions [here](#).

Contact Form

Name

Email

Question/Issue

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 the **{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, a telephone number, and an e-mail address where **{brokerage name}** can contact you and, if different, an e-mail address where the alleged infringing party, if not **{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 owner, 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 e-mail 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 DMCA Agent Registration system:

<https://dmca.copyright.gov/osp/login.html>

- ▶ 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/>

- ▶ NAR's Video:

<https://www.nar.realtor/videos/window-to-the-law-copyright-infringement-safe-harbor>



The screenshot shows the NAR website header with the logo and navigation menu. Below the header, there is a 'VIDEOS' section featuring a video player. The video title is 'Window to the Law: Copyright Infringement Safe Harbor' and it is dated 'MARCH 1, 2016'. The video player shows a woman speaking. Below the video player, there is a description: 'Learn how a provision in the Digital Millennium Copyright Act can protect MLSs, subscribers, and participants from copyright infringement liability while hosting an IDX display.' and a link to 'View the slide presentation for this video.' There is also a 'Related' link: 'Who Owns Your Property Photos?'.