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Using Photographs in Real Estate and MLS Listings: What Every Agent Needs to Know Before Activating a Listing

MARIA Marquis, a movie star, wanted to sell her multi-million dollar Beverly Hills home. Her assistant contacted William Johnson, a listing agent, and gave him a memory stick containing some photos, telling him he could use them for the listing. The photos on the memory stick were taken by Jessica Starzimize for an article in *Starz Weekly* regarding Ms. Marquis' rise to fame and her at-the-time new home. Mr. Johnson did not ask the assistant who took the photos whether he was specifically authorized to use them for the listing by the photographer.¹ Mr. Johnson then created an MLS listing using six photos he personally took, four photos from the memory stick, and two photos he found on the internet² by searching for pictures of the neighborhood surrounding Ms. Marquis' home. Mr. Johnson assumed that the photos found on the internet were "free" and he did not need to seek permission to use them. He also cropped the photos³ from the internet (thus removing the copyright symbol) to fit the size requirements for the MLS listing. Mr. Johnson's agency, Ritz Homes Realty, placed the listing (including photos) on its website, Facebook page, and other social media sites.

About a month later, Ms. Starzimize learned from a friend that the photos that she had taken for the *Starz Weekly* article were being used to sell Ms. Marquis' home. Ms. Starzimize had provided a copy of the photos to Ms. Marquis as a courtesy, but she never authorized the use of the photos for any other purpose. Ms. Starzimize sued Ritz Homes and Mr. Johnson for copyright infringement and removing the copyright symbol on one photo (turns out that one of the two found on the internet was also taken by Ms. Starzimize).

During the lawsuit, it was discovered that Ritz Homes also used photos from old MLS listings and the internet on its website and social media pages⁴ for other listings, some of which were also taken by Ms. Starzimize. Even though Mr. Johnson and Ritz Homes did not intentionally infringe on Ms. Starzimize's copyrights, she sought to maximize her damages and attempted to find out whether

Four Important Risk Factors

Risk Factor #1—The agent did not ask who took the photos on the memory stick. When the assistant turned over the memory stick, the photos were of unknown origin and the agent did nothing to find out where they came from. While it is possible that Ms. Marquis or her assistant obtained permission for the photos to be used for the listing, the agent should not have assumed this.

Risk Factor #2—The agent used photos from the internet, assuming that the photos were "free" and did not need to ask for permission for their use. Many people assume that if photos (or videos) appear on the internet anyone can use them for any purpose without permission. They sometimes assume that if it is on the internet and there is no copyright symbol or watermark that means there is no copyright protection. The opposite is true: all of these works have some form of copyright protection that is not lost just because they are on the internet.

Risk Factor #3—The agent cropped the photos to make the size smaller to fit the MLS listing. In addition to using the photo without permission, the agent made another mistake. Federal law prohibits the altering of a work such as a photo to remove the copyright symbol or a watermark. Even though the agent did not intentionally remove this "copyright management information," the agent/agency could still be liable.

Risk Factor #4—The agency used photos from old MLS listings and the internet without seeking permission. Again, just because the photos were previously used in an old MLS listing, the agency should not have assumed that they could be used again, especially if the listing did not belong to the agency previously. Also, the MLS has very strict rules and procedures regarding copyright infringement that the agency and its agents should be fully aware of.

Ritz Homes had used any other works she authored and the identity of the authors of other photos used by Ritz Homes and its agents in listings, on its website, and social media sites. This put Ritz Homes at risk of other lawsuits being filed.

The Result

The case was settled for in excess of \$200,000. One key consideration was that claims under federal law for infringement of registered works and for removing the copyright symbol could result in significant damages and recovery of attorneys' fees and costs. Additionally, there was the possibility that additional infringement could be discovered and other photographers could sue Ritz Homes.

What Is a Copyright?

Copyrights are a form of protection provided to authors of "original works of authorship." This extends to literary, musical, dramatic, pictorial, audio/visual, and architectural works such as novels, movies, songs, computer software, photos, and designs. Copyright protection covers both published and unpublished works. The author of a work has the right to control the distribution, use, and reproduction of that work.

What Should Agents Do and Not Do When Dealing with Photos for Listings?

The most important thing an agent must know is whether the agent is authorized to use the photo in conjunction with a listing. The agent should ask who took the photos. The agent should find out if the photographer specifically gave permission for the photos to be used to sell the property and that the photos will appear on MLS, websites, and social media sites for that purpose. If an agent is working with a co-listing agent, the agent should not assume that the co-listing agent has permission to use photos; the agent should specifically confirm this with the co-listing agent.

Just because a photo appears on the internet does not mean it does not have copyright protection. And just because a photo does not have a copyright symbol © or a watermark does not mean it can be used without permission. Agents should not copy photos used in a prior MLS listing unless the agent has asked for permission to do so.

The copyright symbol and watermarks are considered to be "copyright management information." If an agent uses a photograph without permission and crops out or deletes the copyright symbol or watermark, that agent can also be liable for "circumvention," which carries additional penalties under federal law.

What Happens If an Agent Uses a Photo Without Permission or Deletes the Copyright Symbol?

The author can seek damages if a photo is used improperly or without permission. The author can recover actual damages suffered or damages set out in the federal Copyright Act. The Copyright Act allows a range of damages for works that are registered with the U.S. Copyright Office, from \$750 per work up to \$150,000 per work; the author also has the ability to recover attorneys' fees and costs associated with a copyright infringement lawsuit.

Federal statutes also prohibit the altering or removal of "copyright management information" such as a © symbol or other watermark on a work that shows the author's identity. Each violation can carry penalties of at least \$2,500 and as high as \$25,000.

The most important takeaway is that federal copyright laws can be very unforgiving. If an agent uses a photo registered with the Copyright office without the author's permission, it is very likely that the agent (and its agency) will be held accountable for damages and attorneys' fees and costs.

Risk Management Tips for Agencies

- Agencies can be held liable for the acts of its agents, even if they are unintentional. Agencies should implement policies and procedures to make sure that agents are not using photos without confirming permission, and train its agents to understand how to handle using photos in listings. This information should be included in employee manuals and shared during orientation with new agents, who should acknowledge the policies and procedures in writing.
- Agencies should be especially vigilant regarding who uploads photos for MLS listings and that there are safeguards in place before allowing a listing to become active.
- Agencies can also consider designating "approved" photographers that agents must use as a tool to significantly decrease the risk that photos of unknown origins are being used.

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