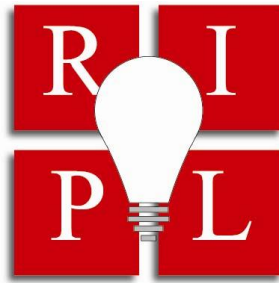


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## PROVIDING COPYRIGHT PROTECTION TO REAL ESTATE LISTINGS: PROTECTING BROKERS, SELLERS, AND CONSUMERS

KATHRYN S. ROBINSON

### ABSTRACT

In a technology-driven age, the Internet has changed how prospective homebuyers search for their new home. For many, a search on Google is the first step before hiring a broker or getting prequalified for a mortgage. Although the Internet is a powerful tool widely utilized by many, there has been a growing concern for managing and protecting the integrity of real estate listings. Data scraping of listing data has become problematic for the real estate industry; as a result, this has caused irreparable harm to everyone. This comment highlights the benefits of awarding copyright protection to all contents of the original broker's listing.

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KATHRYN S. ROBINSON

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KATHRYN S. ROBINSON\*

I. INTRODUCTION

Suppose you are interested in selling your home. You hire an independent, professional appraiser to evaluate the value of your home.<sup>1</sup> Satisfied with the evaluation, you decide to enter into a listing agreement with a broker.<sup>2</sup> You proudly place the for-sale sign outside your front yard after your broker has listed your home on the local multiple-listing service.<sup>3</sup> Shortly after, your broker starts to receive contacts from potential buyers; buyers who found your home through a third-party website. Your broker is confused because she did not advertise or consent to having the listing published on these websites. More importantly, your broker is upset that the listings on these websites contain inaccurate information. Your broker attempts to rectify the situation by contacting the third-party websites to correct the errors but her request is either ignored or denied. What now?

Are there options for our poor broker and homeowner? Are there protectable rights in the original listing? Is there any legal recourse available? Recently, there has been a growing concern for managing and protecting the integrity of real estate listing contents.<sup>4</sup> The Internet is a powerful tool widely utilized by many brokers and brokerage companies.<sup>5</sup> Although online advertising produces a wide distribution to many consumers, there are some glaring unwanted results.<sup>6</sup> It is very common for

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<sup>1</sup> See generally Amy Hoak, *Five Tips for Getting Your Home Appraised Before Selling*, THE WALL STREET JOURNAL (July 28, 2006) available at <http://www.wsj.com/articles/SB126270402016216503> (describing how homeowners should use professional appraisers before listing their home).

<sup>2</sup> See generally 2015 Home Buyer and Seller Generational Trends, NATIONAL ASSOCIATION OF REALTORS® (stating that buyers of all ages gain many benefits from working with a real estate agent and many buyers were referred to an agent by a friend or family member).

<sup>3</sup> Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04 (explaining that multiple listing services are local databases which brokers exchange information regarding properties); see also NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/topics/nar-doj-settlement/multiple-listing-service-mls-what-is-it> (last visited Oct. 8, 2015).

<sup>4</sup> NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/law-and-ethics/managing-listing-content> (last visited Oct. 7, 2015) (“Managing and protecting listing content is a paramount concern to real estate professionals and the multiple listing services in which they participate.”).

<sup>5</sup> See Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 10.05 (stating that brokers have “incorporated the World Wide Web into their company business strategies”).

<sup>6</sup> Steve Bochenek, *Syndication of Listing Information*, ILLINOIS ASSOCIATION OF REALTORS, <http://www.illinoisrealtor.org/drlegalnews/Mar2012/syndication> (last updated March 2012).

websites to publish listings with inaccurate information.<sup>7</sup> It is no question that the original listing contains some copyrighted material: digital media and creative listing descriptions.<sup>8</sup> However, such safeguards are not effective; data aggregators and syndicators take listing information, including photographs, and post it without the broker's consent. This harms not only the broker, but also the seller and consumer because the information posted is often inaccurate and out-of-date. The question becomes: how far does copyright protection extend to protect the contents of the broker's original listing? This comment will examine the history of real estate listings with respect to intellectual property rights. The comment will then analyze whether brokers should be entitled to copyright protection for all contents of their listings. Finally, this comment will propose solutions to protect all interested parties: brokers, sellers, and consumers.

## II. BACKGROUND

Copyright law exists for both social and economic reasons. Authors can be confident in the protection that copyright affords to their works.<sup>9</sup> But the protection afforded is far from conclusive. This section will discuss copyright protection for real estate listings. It is pertinent to explain how copyright law has evolved over time. Moreover, it is also pertinent to understand the emergence of exclusive listings and the rise of publishing real estate listings over the Internet.

### A. Copyright Law 101

Article I, § 8, cl. 8, of the United States Constitution grants Congress the authority to enact statutory copyright protection.<sup>10</sup> The first copyright act was enacted in 1790, which provided authors protection for their “maps, charts, and books.”<sup>11</sup> Since then, copyright protection has expanded in scope and now encompasses “original works of authorship fixed in any tangible medium of expression.”<sup>12</sup> Commonly known as The Copyright Act of 1976, the Act provides

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<sup>7</sup> *See id.* (describing how “sites that advertise or distribute this listing information are not subject to rules regarding the accuracy of the information, the identification of the listing firm, updating of information and confidentiality of certain information”).

<sup>8</sup> *See* NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/law-and-ethics/managing-listing-content/what-liting-content-can-be-protected> (last visited Oct 01, 2015) (outlining that the following is entitled to copyright protection: photographs, virtual tours, artistic renderings, floor plans, list price, architectural drawings, listing descriptions that include creativity).

<sup>9</sup> *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (“The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.”).

<sup>10</sup> U.S. CONST. art. I, § 8, cl. 8. Article I, § 8, cl. 8 of the Constitution provides: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.*

<sup>11</sup> MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW, FIFTH EDITION 6 (2010); *see* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act).

<sup>12</sup> 17 U.S.C. § 102(a) (2012).

fundamental rights and protection against infringement.<sup>13</sup> These protective rights vest from the time of creation.<sup>14</sup> Copyright does not require publication.<sup>15</sup> As a matter of public policy, courts have viewed the Copyright Act to provide motivation and reward for authors.<sup>16</sup> The Act is also viewed as a promotion to “induce release to the public of the products of [an author’s] creative genius.”<sup>17</sup>

In order to qualify for protection, the author’s work must be original.<sup>18</sup> The “originality” debate has continued to evolve over time.<sup>19</sup> Congress purposefully left the term “original” undefined<sup>20</sup> because it recognized the impossibility of defining mediums.<sup>21</sup> Likewise, the term original is not equivalent to novelty; “a work may be original even though it closely resembles other works so long as the similarity is fortuitous and not the result of copying.”<sup>22</sup> The threshold requirement of originality “is extremely low; even a slight amount will suffice.”<sup>23</sup> The author’s work will qualify if he can show his work was created independently.<sup>24</sup>

Although the threshold requirement of originality is low, not all mediums are entitled to protection.<sup>25</sup> Regardless of the medium of expression, “any idea, procedure, process, system, method of operation, concept, principle, or discovery” is exempt from copyright protection.<sup>26</sup> Additionally, it is well established that facts<sup>27</sup> are not entitled to copyright protection.<sup>28</sup> Regardless of the medium, “facts, whether

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<sup>13</sup> 17 U.S.C. § 106 (2012).

<sup>14</sup> See *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 546-47 (1985) (“Under the Copyright Act, these rights—to publish, copy, and distribute the author’s work—vest in the author of an original work from the time of its creation.”).

<sup>15</sup> 17 U.S.C. § 104(a)-(b) (2012); see also *Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc.*, 948 F. Supp. 2d 538, 559 (D. Md. 2013) (explaining that “‘published’ and ‘unpublished’ works may obtain copyright protection”).

<sup>16</sup> See *Sony Corp. of Am.*, 464 U.S. at 432 (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor.”).

<sup>17</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); see also *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (Chief Justice Hughes commented on how “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

<sup>18</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

<sup>19</sup> S. Rep. No. 94-1476, at 51 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5659, 5664 (noting that the “history of copyright law has been one of gradual expansion”).

<sup>20</sup> See *id.* (noting that the “phrase ‘original works of authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute”).

<sup>21</sup> See *id.* (“Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.”).

<sup>22</sup> *Feist Publ’ns, Inc.*, 499 U.S. at 345.

<sup>23</sup> *Id.*

<sup>24</sup> 1-2 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (stating that “the work owes its origin to the author”).

<sup>25</sup> 17 U.S.C. § 107-18; See also *Harper & Row, Publrs.*, 471 U.S. at 547 (describing how “copyright owner’s rights are subject to certain statutory exceptions”).

<sup>26</sup> 17 U.S.C. § 102(b) (2012).

<sup>27</sup> Nonfiction literary works are an exception. See *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. Ill. 1977) (The court permitted copyright protection to a gardening directory, and found that “[c]reation of a nonfiction work, even a compilation of pure fact, entails originality.”).

<sup>28</sup> *Harper & Row, Publrs.*, 471 U.S. at 556 (outlining that “no author may copyright his ideas or the facts he narrates”).

alone or as part of a compilation,<sup>29</sup> are not original and therefore cannot be copyrighted.”<sup>30</sup> If the “factual compilation” is an “original selection or arrangement of facts,” then the arrangement is entitled to copyright protection.<sup>31</sup> Another exception to the copyright act is the doctrine of fair use.<sup>32</sup>

### *B. The Emergence of Exclusivity*

Copyright infringement with respect to real estate listings has not always been a concern. Specifically, real estate brokerage has evolved over time. In the early days of America, brokers would meet in central location and exchange information regarding “what listings they were offering for sale.”<sup>33</sup> There was a general mutual agreement to compensate those brokers who assisted in the sale.<sup>34</sup> In 1907, this “exchange function was reduced to a system of distributing the written listing information from a central office.”<sup>35</sup> This new and improved system was termed “Multiple Listing.”<sup>36</sup> This system was founded on a basic fundamental principle: “Help me sell my inventory and I’ll help you sell yours.”<sup>37</sup>

As time progressed, the use and frequency of “Multiple Listing” increased;<sup>38</sup> if organized successfully, this organized system “proved to be very profitable to both the member and the local Board of Realtors.”<sup>39</sup> Likewise, this system was an “efficient

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<sup>29</sup> A “compilation” is defined as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101 (2012).

<sup>30</sup> *Feist Publ’ns, Inc.*, 499 U.S. at 350-51. *See id.* at 341 (noting that “the statute envisions that some ways of selecting, coordinating, and arranging data are not sufficiently original to trigger copyright protection”).

<sup>31</sup> *See id.* (“A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.”).

<sup>32</sup> 17 U.S.C. § 107 (2012) (providing that “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”).

<sup>33</sup> Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04 (explaining the history behind multiple listing services).

<sup>34</sup> NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/topics/nar-doj-settlement/multiple-listing-service-mls-what-is-it> (last visited Oct. 8, 2015).

<sup>35</sup> Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04 (explaining the history behind multiple listing services).

<sup>36</sup> *Id.*

<sup>37</sup> NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/topics/nar-doj-settlement/multiple-listing-service-mls-what-is-it> (last visited Oct. 8, 2015).

<sup>38</sup> *See generally* Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04 (noting how “ninety-two percent of surveyed sellers who used brokers indicating that their properties were listed on the MLS”).

<sup>39</sup> Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04 (explaining that the MLS had a number of advantages, “including efficiency and the elimination of much competition. Where successfully organized, it proved to be very profitable to both the member and the local Board of Realtors®”).

method for marketing exclusive listings.”<sup>40</sup> Brokers embraced the rights and protections associated with exclusive listings.<sup>41</sup> Sellers also embraced the “Multiple Listing” but for different reasons: advertising and exposure.<sup>42</sup> As a result, there was competition between sellers, the original listing broker, and other brokers.<sup>43</sup> Consequently, both sellers and brokers suffered from this general practice of “open listings.”<sup>44</sup>

As time progressed, the development of the “Multiple Listing” helped curtail the issues associated with “open listings.” The combined use of “Multiple Listing” and exclusive listing agreements reduced the problems arising from “unfettered competition.”<sup>45</sup> Unlike before, “Multiple Listing” listings now contained exclusive right-listing agreements.<sup>46</sup> This provided numerous benefits for sellers and brokers.<sup>47</sup> Before the use of Internet, “brokers would search the [Multiple Listing] and provide copies of relevant listings to potential buyers by hand delivery, mail or fax.”<sup>48</sup>

Today, the “Multiple Listing” is commonly referred to as the MLS and is composed of multiple private databases maintained by real estate professionals.<sup>49</sup> Brokers and brokerage companies have continued to embrace the benefits these private databases provide: efficiency, cooperation, and compensation.<sup>50</sup> To become a member of these private databases, one must meet the requirements<sup>51</sup> set forth by

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<sup>40</sup> *See id.* (describing that “the concept of multiple listing was based upon the need to devise an efficient method for marketing exclusive listings. With an exclusive listing only one broker had direct rights and incentives to sell the house.”).

<sup>41</sup> *See id.* (“With an exclusive listing only one broker had direct rights and incentives to sell the house.”).

<sup>42</sup> *See id.* (commenting on historical aspects of sellers’ views: “By the 1920’s, however, sellers had become aware of the advantages of obtaining exposure through many brokers.”).

<sup>43</sup> *See id.* (“From the broker’s point of view, open listings were associated with a number of problems. These problems related to competition among listing brokers, competition with sellers, and duplication of effort by brokers.”).

<sup>44</sup> *See id.* (“Substantial numbers of sellers at that time were making direct sales to buyers even after listing their homes with a broker who spent time and effort to sell it.”).

<sup>45</sup> *See* Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04 (describing how “[t]he MLSs and exclusive listing agreements, when used together, reduced the problems presented by unfettered competition. With an exclusive listing, only one broker could claim the commission. Other brokers could not work directly with the seller.”).

<sup>46</sup> *See id.* (concluding that “MLSs would accept only exclusive-right listings, and the exclusive-right listings most brokers came to insist upon in most transactions guaranteed the broker a commission even if the seller procured the buyer”).

<sup>47</sup> *See id.* (noting how exclusive agreements created a fiduciary relationship between both parties).

<sup>48</sup> Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04.

<sup>49</sup> NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/topics/nar-doj-settlement/multiple-listing-service-mls-what-is-it> (last visited Oct. 8, 2015).

<sup>50</sup> *See id.* (noting how the MLS is a “private offer of cooperation and compensation by listing brokers to other real estate brokers”).

<sup>51</sup> *See id.* (explaining how MLSs are “private associations which have the right to discipline members for violations of standards of professional conduct as set out by the constitution, bylaws, rules and regulations of the MLS. However, an MLS cannot behave in an arbitrary manner in disciplining its members.”).

the individual private database.<sup>52</sup> The majority of MLS databases are governed and controlled by the National Association of Realtors.<sup>53</sup> Although there is no requirement for a broker to belong to an MLS, the majority are members.<sup>54</sup>

### C. *The Rise of the Internet*

Due to the rise and popularity of the Internet, many brokers and brokerage companies have expanded beyond the use of the MLS. Many consumers utilize websites before contacting a broker.<sup>55</sup> Recognizing this, many brokers will try and reach out<sup>56</sup> to as many potential clients as possible by “syndicating” their current listings.<sup>57</sup> “Listing syndication is the distribution in bulk of active real estate listings (listings currently available for sale), by or on behalf of the listing agent or listing broker, to sites that will advertise them on the web to consumers, excluding IDX [Internet data exchange] sites and VOWs [virtual office websites] operated by MLS participants/subscribers.”<sup>58</sup> Typically, “syndication occurs through the auspices of the multiple listing service.”<sup>59</sup> Since the MLS is a central location of all exclusive listings within a geographical boundary, syndication frequently occurs.<sup>60</sup> Often, some MLSs will enter into a license agreement with a syndicator. This agreement “allows the syndicator to display listing information for consumers to see.”<sup>61</sup> As a result, the provided information is accurate because the MLS is providing the information.<sup>62</sup>

Counterintuitively, multiple exposure through online syndication has actually hurt real estate brokers.<sup>63</sup> Not all syndication agreements are created equal: many MLSs forego entering into an agreement because of the rights lost. Many syndicators sell data information to other third-party publishers; however, the most common practice is for websites to “pull information without permission from syndicators or

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<sup>52</sup> Patrick J. Rohan, Vol. 10 Real Estate Brokerage Law and Practice, § 2.04 (describing how “[m]ultiples are structured as formal organizations with requirements for membership and participation”).

<sup>53</sup> *Id.* The National Association of Realtors® “promulgates rules governing MLSs and requires that its member boards adopt the MLS rules governing conduct of the MLS”. *Id.*

<sup>54</sup> *See id.* (noting that “majority of brokers believe that participation in their local or regional MLS is required in order to adequately serve their clients and compete with other brokers”).

<sup>55</sup> *Id.*

<sup>56</sup> *See* 2015 Home Buyer and Seller Generational Trends, NATIONAL ASSOCIATION OF REALTORS® (stating that “younger buyers are not only more likely to use the internet during their search, but they also use the internet more frequently during their home search process”).

<sup>57</sup> *See* Patrick J. Rohan, Vol. 4 Real Estate Financing, § 1.03 (noting how brokers “usually ‘syndicate listings’ by using a third party service that automatically lists or publishes that broker or agent’s listing on various real estate websites”).

<sup>58</sup> Brian Larson, *A Listing Syndication Discussion*, COUNCIL OF MULTIPLE LISTING SERVICES (last visited Oct. 9, 2015).

<sup>59</sup> Steve Bochenek, *Syndication of Listing Information*, ILLINOIS ASSOCIATION OF REALTORS, <http://www.illinoisrealtor.org/drlegalnews/Mar2012/syndication> (last updated March 2012).

<sup>60</sup> *See id.* (describing how “syndication and distribution to other sites can more easily occur”).

<sup>61</sup> Cori Lamont, *Do You Know Where Your Listings Are?*, WISCONSIN ASSOCIATION OF REALTORS, <https://www.wra.org/WREM/Dec11/Syndication/> (last updated Dec. 7, 2011).

<sup>62</sup> *See id.* (noting that since the MLS is the provider of the information, any updates, including, modifications, terminations, or expirations would be provided by the MLS).

<sup>63</sup> *See id.* (describing how “the results of this wide distribution of listing information has not been all positive”).



the MLS.”<sup>64</sup> This practice is commonly known as data scraping.<sup>65</sup> The information “scraped” is published on third-party websites without permission.<sup>66</sup> Unlike the MLS or any authorized website, many of these third-party websites are not bound by the same rules and regulations.<sup>67</sup> Moreover, these unauthorized third-party websites often list inaccurate contact information, or in worst cases, list another broker as an agent.<sup>68</sup> These websites have also been noted for the “failure to update information on a timely basis.”<sup>69</sup> As a result, it is common for consumers to be confused as to who is the representing broker for a particular listing.<sup>70</sup> This unauthorized practice has also caused brokers to experience little to no increase in leads or sales.<sup>71</sup>

### III. ANALYSIS

Before the rise of the Internet, states have long regulated the real estate profession.<sup>72</sup> The crux of such regulation is consumer protection.<sup>73</sup> Although these regulations are in place, the protection is not absolute. The need to protect all parties—brokers, buyers, sellers, and third-party websites—became more apparent with the rise of data scraping.<sup>74</sup> The benefits of awarding copyright protection to all contents of the original broker’s listing would foster unity and efficiency among all parties involved in the real estate transaction. Part A of this section will look at the problems associated with data scraping, and how the courts have dealt with these

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<sup>64</sup> *Id.*

<sup>65</sup> See *Scraping*, PC MAG, <http://www.pcmag.com/encyclopedia/term/57344/scraping> (last visited Oct. 30, 2015).

<sup>66</sup> See Jeffrey Kenneth Hirschey, *Symbiotic Relationships: Pragmatic Acceptance of Data Scraping*, 29 BERKELEY TECH. L.J. 897, 899 (2014) (explaining how “scrapers may derive their own ad revenues, viewers, and customers by taking content directly from another data host”).

<sup>67</sup> See *id.* (arguing that this is not a benefit to the listing broker nor are they a benefit to the consumer).

<sup>68</sup> See Alex Zoghlin, *Friend or Foe? The Battle with Third Party Aggregators*, (Spring 2012), [http://www.vht.com/news/PDF/FriendorFoe\\_Battlewith3rdPartyAggs.pdf](http://www.vht.com/news/PDF/FriendorFoe_Battlewith3rdPartyAggs.pdf) (noting how “[i]f the listing is on Trulia, Realtor.com, or Zillow, and the agent or broker did not opt to “buy” their listing or zip code, often the aggregator will place contact information of a competing agent or sales person next to the listing”).

<sup>69</sup> See *id.* (noting that “the information that is reflected on some of these sites may not be accurate as regards the current list price or even as to whether the property is still for sale”).

<sup>70</sup> See *id.* (describing how listings “become lost in a sea of aggregated data and their brands are further diminished when home buyers on the third party sites are confused in terms of who is representing the listings”).

<sup>71</sup> See *id.* (noting how “real estate aggregators such as Trulia and Zillow are masters of SEO, giving them a huge advantage over brokers”).

<sup>72</sup> See Darryl W. Anderson, *Minimum Service Requirements in Real Estate Brokerage: A Response to Maureen K. Ohlhausen*, THE ANTITRUST TRUST SOURCE, at 2 (Jan. 2010) (noting how Texas Real Estate Commission has a mission statement embodying the goal to “assist and protect consumers of real estate services”).

<sup>73</sup> *Id.*

<sup>74</sup> As technology progresses, the importance of copyright protection becomes a desideratum. “Even since the 1976 Copyright Law, the incessant need for information has warranted a revisiting of the existing law to incorporate advances in technology and to offer greater protection against copyright infringement.” ANDREA TWISS-BROOKS, ACS SYMPOSIUM SERIES 1055: SPECIAL TOPICS IN INTELLECTUAL PROPERTY, at 10 (American Chemical Society 2010).

issues. Part B will discuss the justifications for awarding copyright protection to all contents of the broker's original listing. Part C will discuss the positive implications copyright protection will have on consumers. Part D will discuss the rationale for providing copyright protection to third-party websites.

### A. Why Data Scraping is Problematic

Data scraping is problematic for many industries: airlines, banks, financial brokerage houses, and social media websites are just a few of many who have been subjected to data scrapers.<sup>75</sup> As a result, several aggregators have been subject to legal action.<sup>76</sup> Websites have also cracked down on data scrapers; for example, the website Realtor.com<sup>77</sup> states that it blocks data scrapers from trying “to scrape listing data from more than 1 million pages per day.”<sup>78</sup> Online databases, like the MLS, are a prime target for data scrapers because of their wealth of information.<sup>79</sup>

Although U.S. copyright law protects original works, databases—like the MLS—should also have protection against infringement. Even prior to the digital age,<sup>80</sup> databases have served as an important social utility.<sup>81</sup> The contents of a listing hold a wealth of information. Likewise, there has been a long debate over how much legal protection the law should afford. After the U.S. Supreme Court's decision in *Feist Publications v. Rural Telephone Service Co.*, there were legislative discussions and proposals for awarding copyright protection to databases.<sup>82</sup> In 1996, the European Union adopted legislation granting legal protection to “original” databases.<sup>83</sup>

<sup>75</sup> Jeffrey Kenneth Hirschey, *Symbiotic Relationships: Pragmatic Acceptance of Data Scraping*, 29 BERKELEY TECH. L.J. 897, 899 (2014) (noting how “[t]here are countless examples of recent cases where data hosts sought legal remedies for the collection and dissemination of their data”).

<sup>76</sup> See *id.* at 900 (describing how airline price aggregators—websites (such as Kayak, Orbitz, and Expedia) that aggregate and display price and flight information from multiple airline carriers—have been subject to legal action); see also *Sw. Airlines v. Orbitz LLC*, No. 2:01-cv-04068(C.D. Cal. filed May 3, 2001).

<sup>77</sup> Realtor.com is a website that is controlled and operated by National Association of Realtors®; the listings displayed represent over 800 MLSs. See generally <http://www.realtor.com>.

<sup>78</sup> *Industry Cracks Down On Listing Scraping*, REALTOR MAGAZINE, <http://realtormag.realtor.org/daily-news/2013/08/02/industry-cracks-down-listing-scraping> (last visited Oct. 29, 2015).

<sup>79</sup> Gerard J. Lewis, Jr., *Copyright Protection for Purely Factual Compilations Under Feist Publications, Inc. v. Rural Telephone Service Co.: How Does Feist Protect Electronic Data Bases of Facts?*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169, 171 (1992) (noting how online “data bases of facts pose unique problems for the compilation theories because of their inherent flexibility and the ease with which they can be accessed”).

<sup>80</sup> U.S. Copyright Office, REPORT ON LEGAL PROTECTION FOR DATABASES 1 (1997) (comparing today's electronic databases to “eighteenth century directories, which were compiled by walking door to door”).

<sup>81</sup> See *id.* (noting how databases “have always been commodities of both commercial value and social utility”).

<sup>82</sup> *Id.* Legislative proposals and discussions were conducted in both the U.S. and in Europe.

<sup>83</sup> EUROPEAN COMMISSION, [http://ec.europa.eu/internal\\_market/copyright/prot-databases/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm) (last visited Oct. 29, 2015); see also Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197(1994).

Historically, databases were not protected under the Copyright Act; recently, however, courts have started to take a different approach. In the context of real estate listings, local MLSs have taken action against data scrapers that republished listing data without permission. In *Key West Association of Realtors, Inc. v. Allen et al.*, the district court awarded the “maximum amount of statutory damages, permanent injunctive relief, and entitlement to fees and costs”<sup>84</sup> to the plaintiff, a local multiple listing service database. Plaintiff alleged that the defendant “infringed on its copyrights by intentionally publishing its listing data.”<sup>85</sup> The district court agreed and found that the defendant’s actions were “willful and intentional infringement of plaintiff’s Copyrights pursuant to 17 U.S.C. § 101 *et seq.*”<sup>86</sup> As a result, the district court awarded attorney’s fees pursuant to the Act.<sup>87</sup> The district court concluded that as a matter of public policy, deterrence was necessary to prevent further infringement of MLS copyrights.<sup>88</sup>

Shortly after the *Key West Association of Realtors* decision, the Fourth Circuit ruled in favor of a local MLS. In *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, the Fourth Circuit affirmed the district court’s preliminary injunction order prohibiting the defendant’s “display of plaintiff’s photographs on its website . . . NeighborCity.com.”<sup>89</sup> In that case, plaintiff, MRIS, ran and operated a local MLS, which serviced brokers in “Maryland, Virginia, the District of Columbia, and parts of Delaware, West Virginia, and Pennsylvania.”<sup>90</sup> According to the plaintiff, its quarterly registrations of the MLS database with the Copyright Office extended to all elements of the compilation: photographs and written text.<sup>91</sup> The Fourth Circuit affirmed the district court’s findings that the copyright protection only extended to the photographs, not the textual elements.<sup>92</sup>

Oddly enough, this was not the first copyright infringement case for the defendant, American Home Realty Network, Inc. In 2012, another local MLS filed suit against the defendant for copyright infringement of its copyrighted photographs and content.<sup>93</sup> The district court enjoined the defendant from “engaging in any unauthorized copying, display, use, and/or public distribution of Plaintiff’s

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<sup>84</sup> *Key West Association of Realtors®, Inc. v. Robert Allen, et. al.*, No.11-cv-10084-JLK at 2 (S.D.Fla. May 22, 2013).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 15-16 (describing how “Awarding a lesser amount of damages would not serve the purpose of the Copyright Act in deterrence of further wrongful conduct by Defendant and others.” The Court also emphasized that “future potential infringers of Plaintiff’s MLS copyrights will only see the potential benefit of high commissions from ill-gotten leads.”).

<sup>89</sup> *See Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 592-93 (4th Cir. 2013) (specifically stating that “district court entered a preliminary injunction order prohibiting AHRN’s display of MRIS’s photographs on AHRN’s referral website”).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 594. Plaintiffs alleged that the copyright protection extended “to the collection and compilation of the real estate listings in the MRIS Database and to expressive contributions created by MRIS or acquired by MRIS, including the photographs included in the listings”. *Id.*

<sup>92</sup> *See id.* (specifically, the district court stated “the court enjoins only AHRN’s use of MRIS’s *photographs*—not the compilation itself or any textual elements that might be considered part of the compilation”).

<sup>93</sup> *Reg’l Multiple Listing Serv. of Minnesota, Inc. v. Am. Home Realty Network, Inc.*, 960 F. Supp. 2d 958, 968 (D. Minn.) *modified*, 960 F. Supp. 2d 988 (D. Minn. 2013).

copyrighted photographic works, including, without limitation, the works covered by U.S. Copyright Reg. Nos. TX VA 1-432-912; VA 1-432-913; VA 1-432-914; and VA 1-432-917.”<sup>94</sup>

### *B. Justifications for Awarding Protection: Brokers*

Although there have been only a few cases involving this matter, the rulings thus far are encouraging to brokers who wish to protect the contents of their listing data. The courts are beginning to recognize the importance of having safeguards for real estate listings. A broker’s listings are some of his or her most “valuable assets.”<sup>95</sup> Currently, a broker is entitled to copyright protection for the following contents: “photographs, virtual tours, artistic renderings, floor plans, list price, architectural drawings, listing descriptions that include creativity.”<sup>96</sup> Even though copyright protection exists for these contents, this protection is not enough. The factual compilations within a listing should also be protected against infringement. It is evident that data scraping is not going away anytime soon.<sup>97</sup> The moment a broker’s listing data has been scraped, he or she loses control over “the presentation of the property, the quality of the data, and the ads and agents that are displayed adjacent to the listing.”<sup>98</sup> This loss of control is costly for everyone.<sup>99</sup> Providing copyright protection for all contents within a listing affords protection and security to brokers and local multiple listing services. For brokers, there can be serious repercussions for publishing false information. Brokers are bound by statutory regulations,<sup>100</sup> and state agencies have taken action against brokers who list inaccurate information on their listings.<sup>101</sup> Thus, a broker could face disciplinary

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<sup>94</sup> *Id.*

<sup>95</sup> Alex Zoghlin, *Friend or Foe? The Battle with Third Party Aggregators*, (Spring 2012), [http://www.vht.com/news/PDF/FriendorFoe\\_Battlewith3rdPartyAggs.pdf](http://www.vht.com/news/PDF/FriendorFoe_Battlewith3rdPartyAggs.pdf).

<sup>96</sup> NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/law-and-ethics/managing-listing-content/what-liting-content-can-be-protected> (last visited Oct 01, 2015).

<sup>97</sup> See generally Rami Essaid, *Is Web Scraping Illegal? Depends on What the Meaning of the Word Is Is*, DISTIL NETWORKS (Jul. 18, 2013) available at <http://resources.distilnetworks.com/h/i/53822104-is-web-scraping-illegal-depends-on-what-the-meaning-of-the-word-is-is/181642> (stating that web scraping is popular among many because “it’s a cheap and powerful way to gather data without the need for partnerships”).

<sup>98</sup> *Why Web Scraping Can Be Costly for Real Estate Agents, Brokers and Portals*, PROPERTY PORTAL WATCH, <http://www.propertyportalwatch.com/2015/03/why-web-scraping-can-be-costly-for-real-estate-agents-brokers-and-portals/> (last visited Oct. 29, 2015).

<sup>99</sup> Besides societal implications, data scraping often results in a lower search engine rating for the broker. See Alex Zoghlin, *Friend or Foe? The Battle with Third Party Aggregators*, (Spring 2012), [http://www.vht.com/news/PDF/FriendorFoe\\_Battlewith3rdPartyAggs.pdf](http://www.vht.com/news/PDF/FriendorFoe_Battlewith3rdPartyAggs.pdf). (citing that this is “problematic if the sites do not prominently display information concerning the listing broker in connection with the listing or display information concerning other brokers more prominently in connection with their listing”).

<sup>100</sup> Anupam Nanda & Katherine A. Pancak, 12 *Real Estate Brokers’ Duties to Their Clients: Why Some States Mandate Minimum Service Requirements*, CITYSCAPE, no.2, 2010, at 109 (stating that many jurisdictions have codified “minimum service requirements” for licensed brokers. Illinois was the first state to enact minimum service requirements).

<sup>101</sup> Ronda Kaysen, *When Apartment Listings Are Misleading*, N.Y. TIMES (Feb. 7, 2015) available at [http://www.nytimes.com/2015/02/08/realestate/inaccurate-listing-information-fire-hazards-combined-apartments.html?\\_r=1](http://www.nytimes.com/2015/02/08/realestate/inaccurate-listing-information-fire-hazards-combined-apartments.html?_r=1) (noting how National Association of Realtors® and state

actions for a listing that was published without his or her permission from a data scraper.

More importantly, providing copyright protection would not digress from the court's interpretation of the Copyright Act.<sup>102</sup> The display and configuration of a broker's listing is unique and original.<sup>103</sup> Although the listing contains a significant amount of factual information, the social implication from inaccurate listing data is costly. There is a lot of work that goes into publishing a listing on the MLS: a broker must carefully craft the listing to appeal to his or her target audience. Gathering factual information, including everything from prior tax history to the square footage of each room, can be a challenging task. If there were an error on the original listing, it would be impossible for the broker to correct the error on every listing published online. It is common for a broker to be unaware of every website that displays its listing.<sup>104</sup> Inaccurate listing data may also harm the broker's reputation among the community.<sup>105</sup> It is no debate that a broker thrives on referrals and recommendations in their community.

### *C. Justifications for Awarding Protection: Consumers*

Consumers would also benefit from this protection. In a digital age, we are forced to deal with the challenges of an "information-rich business environment."<sup>106</sup> It is no question that today's buyers rely on the Internet when searching for a home.<sup>107</sup> For many, a search on Google is the first step before hiring a broker or getting prequalified for a mortgage.<sup>108</sup> Likewise, the information published on third-

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agency boards have ethical guidelines requiring brokers to give "honest and accurate descriptions of the properties they list." If necessary, the state regulatory board has the power to revoke or suspend a broker's real estate license).

<sup>102</sup> Gerard J. Lewis, Jr., *Copyright Protection for Purely Factual Compilations Under Feist Publications, Inc. v. Rural Telephone Service Co.: How Does Feist Protect Electronic Data Bases of Facts?*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169, 171 (1992).

<sup>103</sup> Facebook, Inc. v. Power Ventures, Inc., No. C 08-5780 JF (RS), 2009 WL 1299698, at 4 n.2 (N.D. Cal. May 11, 2009) (explaining how factual information "was not by itself copyrightable," but the arrangement of that information was).

<sup>104</sup> See generally Robert Freedman, *MLSs See Gains in Efforts to Protect Data*, NATIONAL ASSOCIATION OF REALTORS, (Jun. 13, 2013) available at <http://speakingofrealestate.blogs.realtor.org/2013/06/19/mlss-see-gains-in-efforts-to-protect-data/>.

<sup>105</sup> See generally 2015 Home Buyer and Seller Generational Trends, NATIONAL ASSOCIATION OF REALTORS® (stating that "When choosing an agent, younger buyers were more likely to place the agent's honesty and trustworthiness of more importance than older buyers, while older buyers rate the agent's reputation as a higher factor").

<sup>106</sup> See generally Nelson Granados et al., *Information Transparency in Business-to-Consumer Markets: Concepts, Framework, and Research Agenda 207* (noting how information available online challenges us to confront the "open, dynamic, and information-rich business environment").

<sup>107</sup> Teresa Mears, *The Best Online Tools for your Housing Search*, U.S. NEWS & WORLD REPORT (Jan. 3, 2014) <http://money.usnews.com/money/personal-finance/articles/2014/01/03/the-best-online-tools-for-your-housing-search> (noting how the internet "has drastically changed the way Americans look for homes").

<sup>108</sup> See generally *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1140 (9th Cir. 2003) (the court recognized that "Long gone are the days when agents trawled the neighborhood on horseback in search of telltale 'For Sale' signs").

party websites must be accurate and up-to-date.<sup>109</sup> Inaccurate information published on third-party websites harms all parties.<sup>110</sup> There is no benefit for providing false information. Regarding sellers, inaccurate listings appearing on third-party websites may deter buyers. Several third-party websites “compute branded estimates of home values that conflict with those carefully chosen by the seller and agent.”<sup>111</sup> Thus, if a seller is trying to sell his or her home for a price that is above the branded estimate, buyers might be reluctant to purchase the home at the asking price.<sup>112</sup> Research has shown that false information on listings have a negative impact on consumers’ “perception of the site with the expired listing, the broker offering the listing and especially the listing agent.”<sup>113</sup>

A broker has a crucial role of informing both buyers and sellers of the characteristics of the real estate business.<sup>114</sup> By receiving copyright protection, sellers will have confidence that their broker has total control of their listing. Buyers will also have confidence that a broker’s listing is accurate and up-to-date.

#### *D. Justifications for Awarding Protection: Third-Party Websites*

Lastly, protection should be awarded for third-party websites. While it appears that these websites are the crux of this problem, brokers and MLSs are not opposed to online exposure. Primarily, they are concerned with the unauthorized use of their data.<sup>115</sup> Brokers and MLSs want to “maintain control of where their listing data is displayed.”<sup>116</sup> This is reasonable considering the importance of managing and

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<sup>109</sup> See *id.* (the court stressed that “Real estate agents make a living matching buyers and sellers. Up-to-date information about properties on the market is a must.”).

<sup>110</sup> See generally Teresa Mears, *The Best Online Tools for your Housing Search*, U.S. NEWS & WORLD REPORT (Jan. 3, 2014) <http://money.usnews.com/money/personal-finance/articles/2014/01/03/the-best-online-tools-for-your-housing-search>. (noting how in addition to computer searches, there are mobile apps that allow consumers the opportunity to search for real estate).

<sup>111</sup> Alex Zoghlin, *Friend or Foe? The Battle with Third Party Aggregators*, (Spring 2012), [http://www.vht.com/news/PDF/FriendorFoe\\_Battlewith3rdPartyAggs.pdf](http://www.vht.com/news/PDF/FriendorFoe_Battlewith3rdPartyAggs.pdf)

<sup>112</sup> See *id.* (describing how Zillow’s estimates lack reliability because the site cannot take into account any form of property renovations, condition of properties and upgrades such as landscaping, roofing, new appliances”).

<sup>113</sup> See 2011 CMLS Listing Syndication Challenges and Opportunities, COUNCIL OF MLS, available at <http://www.councilofmls.com/wp-content/uploads/2011/09/CMLS-Listing-Syndication-Challenges-and-Opportunities.pdf>, at 7 (describing how some websites are more concerned with the number of listings available, not about the quality of those listings. Many of those listings are outdated or expired.).

<sup>114</sup> See Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUMBIA L. REV. 1325, 1327 (describing how “a lack of knowledge by both buyers and sellers of home values and market trends, an absence of access to sources of financing, and a lack of financing expertise, all of which are characteristic of the real estate business, illuminate the crucial role of the broker”).

<sup>115</sup> Robert Freedman, *MLSs See Gains in Efforts to Protect Data*, NATIONAL ASSOCIATION OF REALTORS, (Jun. 13, 2013) available at <http://speakingofrealestate.blogs.realtor.org/2013/06/19/mlss-see-gains-in-efforts-to-protect-data/>.

<sup>116</sup> See *id.* (describing how the recent outcomes of the *Key West Association of Realtor®s, Inc.; Reg’l Multiple Listing Serv. of Minnesota, Inc. v. Am. Home Realty Network, Inc.*; and *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.* have had a positive outcome and “is an

protecting listing content.<sup>117</sup> Brokers have a fiduciary relationship with their clients<sup>118</sup>; this duty includes protecting the privacy of their client.<sup>119</sup> Unauthorized use of MLS listings could damage or “threaten the viability of the MLS.”<sup>120</sup> By granting copyright protection to all contents of the original listing, local MLSs would have the opportunity to pursue legal action against data scrapers. Thus, data scrapers would be deterred from scraping data from real estate listings because of liability for copyright infringement. Courts have observed and recognized the necessity of deterring data scrapers.<sup>121</sup> This deterrence would also benefit consumers. Now, consumers will have confidence when searching online for a new home because the contents displayed online is accurate and authorized by the listing broker. Thus, awarding protection is beneficial to all parties.

#### IV. PROPOSAL

In a technology-driven economy, it is important for brokers to protect their listings.<sup>122</sup> Data scrapers are thriving on a broker’s most important asset: their listing contents. MLS databases are a valuable asset to all licensed brokers. It is also a valuable asset to data scrapers. Misappropriation of real estate listings not only hinders broker’s ability to sell, but it also discredits the local MLS database.

Data scraping is problematic and, as a result, it is causing irreparable harm to brokers. Likewise, data scrapers are diminishing the value that MLS databases provide and the integrity of brokers and real estate professionals.<sup>123</sup>

It is unequivocal that there is a special relationship between consumers and brokers. Brokers are “the gatekeepers of the American dream of home ownership.”<sup>124</sup> Brokers hold a vast array of knowledge; as a result, a relationship built on trust is

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encouraging development for MLSs as they try to maintain control of where their listing data is displayed on the Internet”).

<sup>117</sup> NATIONAL ASSOCIATION OF REALTORS®, [http:// www.realtor.org/topics/mls/managing-listing-content/why-manage-and-protect-listing-content](http://www.realtor.org/topics/mls/managing-listing-content/why-manage-and-protect-listing-content)(last visited Oct. 30, 2015).

<sup>118</sup> See generally Anupam Nanda & Katherine A. Pancak, 12 *Real Estate Brokers’ Duties to Their Clients: Why Some States Mandate Minimum Service Requirements*, CITYSCAPE, no.2, 2010, at 107 (noting how minimum service laws have deterred brokers from utilizing the Internet as a market tool).

<sup>119</sup> See NATIONAL ASSOCIATION OF REALTORS®, [http:// www.realtor.org/topics/mls/managing-listing-content/why-manage-and-protect-listing-content](http://www.realtor.org/topics/mls/managing-listing-content/why-manage-and-protect-listing-content)(last visited Oct. 30, 2015) (noting how sellers have “an interest in being protected from undesired harassment, solicitation, and communication while having their property marketed in an efficient, effective manner”).

<sup>120</sup> *Id.*

<sup>121</sup> *Key West Association of Realtors®, Inc. v. Robert Allen, et. al.*, No.11-cv-10084-JLK at 15-6 (S.D.Fla. May 22, 2013).

<sup>122</sup> See Jack Vidovich, *I Want to Be A Non-Producer: Copyright Non-Practicing Entities and the Group Registration Process for Photographs*, 66 ADMIN. L. REV. 679, 686 (2014) (noting how “the Internet has become an omnipresent creature in American lives”).

<sup>123</sup> The implications from copyright infringement “can potentially be devastating to a client’s business.” See Douglas L. Lineberry, *Copyright the Often-Overlooked Form of Ip Protection*, S.C. LAWYER at 20 (March 2014).

<sup>124</sup> DEBORAH H. LONG, ETHICS FOR THE REAL ESTATE PROFESSIONAL at 56 (2007).

born between brokers and consumers.<sup>125</sup> Therefore, because both buyers and sellers hold a strong reliance on trust, it is time for brokers to “take control” of their listing data.<sup>126</sup>

The best way to preserve this trust is to provide copyright protection to all contents of a broker’s listing. Although a listing contains factual components, this doesn’t diminish the importance of maintaining and preserving the trust between brokers and consumers.<sup>127</sup> This section will propose a new approach that respects legislative policy while protecting the rights of all parties.

### A. Abandoning Fair Use

There is a widespread tension between copyright law and protection for factual compilations.<sup>128</sup> Currently, the law provides brokers with limited protection against infringement.<sup>129</sup> Due to the lack of a licensing agreement, local MLSs have no ability to enforce or control the content posted on unauthorized websites. More importantly, the practice of data scraping is diverting consumers away from licensees: brokers, websites, subscribers and participants who pay subscription fees to receive and view content.

To combat this, the National Association of Realtors® encourages registration of a MLS database with the United States Copyright Office.<sup>130</sup> However, this safeguard

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<sup>125</sup> See Mark Greene, *Realtors Drive The Mortgage Bus*, FORBES, (Sept. 27, 2013) <http://www.forbes.com/sites/moneybuilder/2013/09/27/realtors-drive-the-mortgage-bus/> (noting how “the most influential people in the mortgage industry do not work on Wall Street or at the Federal Reserve Bank, they are not lawmakers or regulators, they are not even mortgage people. The most influential people in the mortgage business are Realtors.”).

<sup>126</sup> Meg White, *Do You Know Where Your Listings Are?* NATIONAL ASSOCIATION OF REALTORS, (Jan. 2014) available at <http://realtormag.realtor.org/news-and-commentary/feature/article/2014/01/do-you-know-where-your-listings-are>.

<sup>127</sup> See Mark Greene, *Realtors Drive The Mortgage Bus*, FORBES, (Sept. 27, 2013) <http://www.forbes.com/sites/moneybuilder/2013/09/27/realtors-drive-the-mortgage-bus/> (noting how “Realtor/buyer relationship where trust and expertise are established and nurtured. Out of this trusted relationship, advice and information flows in the interest of moving the home buying process toward a successful outcome. Questions are asked, experience is mined, caution is given, trust is established.”).

<sup>128</sup> Don Lawby, Century 21 Canada CEO, once said “I am opposed to anybody taking, just independently, scraping data or removing data without permission. We have spent millions of dollars and an exorbitant amount of effort to get that data on to our sites.” See Matt Cohen, *Screen-Scraping—Finally, the Real Estate Industry Solution*, CLAREITY, (Mar. 23, 2013) <http://clareity.com/screen-scraping-finally-the-real-estate-industry-solution/>.

<sup>129</sup> Patent Law Basics § 4:2 (noting how “only parts of a database of information relating to real estate listings that evidenced sufficient originality to merit copyright protection was held to be photographs of the properties for sale together with ‘uniquely-phrased descriptions’ of those properties”).

<sup>130</sup> See generally NATIONAL ASSOCIATION OF REALTORS®, <http://www.realtor.org/law-and-ethics/mls-copyright-compilation-registration> (last visited Nov. 15, 2015).



only provides limited protection.<sup>131</sup> Registration may help prove the source of the listing information,<sup>132</sup> but it does not deter or prevent data scraping.

Due to the low originality standard, adopted by the Supreme Court, providing copyright protection to the MLS database would not be a stretch. Even though society may arguably benefit from multiple exposure of the broker's original listing, the broker's incentive is undermined due to the lack of copyright protection.<sup>133</sup> Providing copyright protection would help foster and preserve the trust between brokers and consumers. Brokers would have the incentive to publish their listings on other websites while consumers would have reassurance that the online listing contains truthful information. Moreover, this would provide a harmony between an author's incentives to produce works while serving public interest by providing widespread access to the original listing.<sup>134</sup>

In addition, providing copyright protection would not violate the Fair Use Doctrine. Data scrapers are not using real estate listings for educational purposes; rather, their use of the listings is commercial in nature. Thus, the Fair Use Doctrine does not and should not award protection to data scrapers trying to escape liability for copyright infringement.

### *B. Deterring Data Scraping*

In addition to preserving the trust between brokers and consumers, providing copyright protection would also deter the practice of data scraping. The practice of data scraping "is nothing new."<sup>135</sup> Websites "like elance.com and freelancer.com continue to advertise for freelancers to create new real estate screen-scrapers."<sup>136</sup> Data scraping has been problematic for many industries, including real estate professionals, and has consequently catalyzed copyright infringement lawsuits. As a result, there has been an industry push to deter and prevent data scrapers from stealing data. For example, this industry push has led to the formation of REDPLAN: an organization dedicated to intellectual property rights in real estate

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<sup>131</sup> 1 Information Law § 3:16. Copyright protection for factual works is very limited: "In some cases, this requires proof of either virtual identity between two works or, at least, of comprehensive taking of the original in order to sustain a finding of infringement." *Id.*

<sup>132</sup> See generally *Steps for Deterring Data Scraping*, MLSLISTINGS, (March 6, 2016) <http://portal.mlslistings.com/blog/newsletters/brokerconnection/steps-for-deterring-data-scraping/>.

<sup>133</sup> See Gerard J. Lewis, Jr., *Copyright Protection for Purely Factual Compilations Under Feist Publications, Inc. v. Rural Telephone Service Co.: How Does Feist Protect Electronic Data Bases of Facts?*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169, 170 (1992) (noting how "[a]lthough society may benefit from the larger number of compilations at its disposal, original compilers argue that their incentive to produce factual works is undermined if later compilers can freely copy facts from original compilations").

<sup>134</sup> See *id.* (specifically referencing how "telephone directories, restaurant guides, rental property lists, and data bases of stock quotations are immensely useful and society benefits from their creation by various compilers").

<sup>135</sup> Jeffrey Kenneth Hirschey, *Symbiotic Relationships: Pragmatic Acceptance of Data Scraping*, 29 BERKELEY TECH. L.J. 897, 897 (2014) (stating how "scrapers continually access and repost data for other websites").

<sup>136</sup> Matt Cohen, *Screen-Scraping – Finally, the Real Estate Industry Solution*, (Mar. 23, 2013) available at <http://clarity.com/screen-scraping-finally-the-real-estate-industry-solution/>.

brokerage.<sup>137</sup> This nonprofit organization is “focused on advocating for real estate intellectual property rights by providing a central office for alerts and advisories concerning data theft and misuse.”<sup>138</sup>

Without doubt, maintaining any online database or website takes a tremendous amount of time and effort.<sup>139</sup> For example, the website REALTOR.com® monitors its website countless to prevent and “detect patterns that signal illicit behavior.”<sup>140</sup> Although somewhat successful,<sup>141</sup> this strategy for deterring data scraping is highly costly.<sup>142</sup> If copyright protection were awarded, local MLSs would not have to spend limited resources deterring data scrapers.<sup>143</sup> Copyright protection would also save time and money litigating infringement cases because data scrapers would be on notice.<sup>144</sup> Awarding protection would also help define what is protected under the Copyright Act.

Policy reasons also support providing copyright protection to the entire contents of a real estate listing. Providing protection would also service sellers. Data scrapers can hinder a seller from selling his home by reposting a listing with inaccurate information. Sellers should have the freedom to advertise their property without the fear of data scrapers.<sup>145</sup> This freedom should also apply to brokers. Data scraping can be harmful to not only the broker’s business, but also his or her reputation.<sup>146</sup> Lastly, this freedom should also apply to buyers. Data scraping can mislead and confuse buyers of all ages. Data scraping harms everyone; the “far-reaching

<sup>137</sup> REDPLAN stands for the Real Estate Data Protection Legal Association Nonprofit. REDPLAN, <http://www.red-plan.org>. REDPLAN is an organization dedicated to the protection and promotion of MLS and real estate brokerage intellectual property rights. *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Marianne M. Jennings, *Multiple Listing Services-Antitrust and Policy*, 32 REAL EST. L.J. 140 (2003) (stating that “the creation and maintenance of the MLS national and international network of the residential home market does not come without cost”).

<sup>140</sup> Amit Kulkarni, *How Realtor.com® Protects Your Listing Data from Scrapers, Scammers and Spammers* (Apr. 19, 2012) available at <http://www.realtor.com/advice/for-pros/how-realtor-com-protects-your-listing-data-from-scrapers-scammers-and-spammers/> (noting how the website logs, tracks, and monitors for “patterns that indicate data is being stolen for these illegitimate purposes. Once an offender is identified, their IP address is blocked from accessing the site.”).

<sup>141</sup> The website has “been successful in keeping 1.5 million pages of data daily from being scraped.” *Steps for Deterring Data Scraping*, MLSLISTINGS, (March 6, 2016) <http://portal.mlslistings.com/blog/newsletters/brokerconnection/steps-for-deterring-data-scraping/>.

<sup>142</sup> See *id.* (emphasizing that Realtor.com® “puts personnel, resources and MILLIONS of dollars into protecting our data from scrapers”).

<sup>143</sup> See generally Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1571 (1963) (noting how “labor, effort, and expense that is sought to be protected”).

<sup>144</sup> Jack Vidovich, *I Want to Be A Non-Producer: Copyright Non-Practicing Entities and the Group Registration Process for Photographs*, 66 ADMIN. L. REV. 679, 691 (2014). In addition to proving ownership, a claimant registering with the Copyright Office is also providing “notice to others that the registered work is protected and not in the public domain.” *Id.*

<sup>145</sup> See generally Meg White, *Do You Know Where Your Listings Are?* National Association of Realtors®, (Jan. 2014) available at <http://realtormag.realtor.org/news-and-commentary/feature/article/2014/01/do-you-know-where-your-listings-are> (emphasizing that it is common knowledge that “the listing agent’s duty is to get property sold under the best conditions for the seller”).

<sup>146</sup> See generally Douglas L. Lineberry, *Copyright the Often-Overlooked Form of Ip Protection*, S.C. LAW. at 20 (March 2014).

protections provided by the Copyright Act” afford and promote this freedom and protection against data scrapers.<sup>147</sup>

## V. CONCLUSION

Providing copyright protection is central to preventing unfair misappropriation of real estate listings. The current law is inadequate in protecting a broker’s listing content.<sup>148</sup> Although a listing contains factual information, the listing as a whole contains originality and creativity. No two listings are alike—each client has different needs. Likewise, for every real estate listing, a broker carefully arranges and organizes the listing content. This originality and creativity includes factual information, like the listing price of the home.

By providing copyright protection, all interested parties: brokers, sellers, and consumers, are better served. The integrity of the real estate professionals is preserved, and the relationship between consumers and brokers is protected. Public policy also supports and warrants awarding copyright protection to real estate listings. The public does not benefit from inaccurate real estate listings; by awarding copyright protection, the public’s interest is protected and integrity of the real estate profession is upheld. In conclusion, the Copyright Act can—and does—afford protection for all contents of a real estate listing.

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<sup>147</sup> See *id.* at 20, 23 (advocating how “the far-reaching protections provided by the Copyright Act, clients need to be aware of their rights as well as the rights of others regarding copyright protected materials”).

<sup>148</sup> See STEFAN SWANEPOEL, REAL ESTATE CONFRONTS THE E-CONSUMER, 222 (2000) (noting how “existing copyright law do not adequately protect the integrity of listings on the Internet”).