

**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**WASHINGTON, D.C.**

**COMMENTS REGARDING NOTICE OF PROPOSED RULEMAKING [Docket No. 2018-4]  
F.R. Vol. 83, No. 101, May 24, 2018, p. 24054**

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF REALTORS®**

**Introduction**

The National Association of REALTORS® (“NAR”) is pleased to provide these comments in response to the Federal Register Notice of Proposed Rulemaking (Docket No. 2018-4) published on May 24, 2018 (the “NPRM”). NAR respectfully objects to the proposed 488% increase of the fee for filing Group Registrations for Updates and Revisions to Non-Photographic Databases, and NAR urges the Copyright Office to implement the recommendations of its consultant, Booze Hamilton, to increase that fee by 38% instead.

NAR is the United States’ largest trade association, representing over 1.3 million real estate professionals, 54 state and territorial associations and more than 1,200 local associations. NAR’s members, member firms, member boards, affiliates, institutes, societies and councils are involved in all aspects of the residential and commercial real estate industries, including sales, property management, and appraisals. The real estate industry accounts for 15 percent of the U.S. economy and 2.5 million jobs with its related professions. There are over \$1 trillion of transactions in residential and commercial real estate. In short, the real estate market is a major contributor to the national economy.

Consumers are becoming increasingly digital. Ninety percent of home buyers today rely on the internet as a primary research source, and 52% turn to the web as their first step in their real estate search.<sup>1</sup> In fact, real estate-related searches on Google.com have grown 22% year-over-year<sup>2</sup>. The industry’s ability to effectively advertise, promote, and provide real estate services online is paramount to remain competitive in the real estate industry today.

**MLSs and MLS Databases are Crucial to the Real Estate Industry**

Multiple Listing Services (“MLS”) are the cornerstone of an orderly real estate marketplace. The industry is fueled by listing content, and MLSs are responsible for receiving and disseminating that content. MLSs safeguard market information and enforce rules that govern market participation, thereby allowing real estate professionals to do their jobs with a confidence that would not otherwise exist. MLSs vary in size, from small entities to large, complex technology companies. All MLSs, regardless of size or level of sophistication, provide:

- The facility for the orderly correlation and dissemination of listing information among real estate professional participants so that they may better serve their clients, customers, and the public.

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<sup>1</sup> The Digital House Hunt: Consumer and Market Trends in Real Estate, A Joint Study from The National Association of REALTORS® and Google (2013).

<sup>2</sup> *Id.*

- A method for real estate professional participants make blanket unilateral offers of compensation to other participants.
- A manner of accumulating and disseminating real estate property information from which appraisals and other valuations of real property are prepared.
- A channel for participants to contribute real estate appraisal information to common databases.

A property owner that wishes to sell his or her property engages a real estate professional to assist with marketing the property. The real estate professional submits the property information to the MLS, which distributes the property information to other real estate professionals participating in the MLS through its proprietary database. By submitting the property information, which includes copyrightable works such as photographs and text descriptions, the real estate professional authorizes the MLS to make that information available to other real estate professionals for public display on brokerage websites. MLSs also license their property listing databases to third-party portals, such as realtor.com® and other websites and vendors. Displaying listing information online is now a vital part of the real estate professional's marketing plan, and MLSs allow real estate professionals to do just that. Consumers benefit from the ability to conveniently search and learn about available properties and also identify a real estate professional to facilitate the process. A substantial number of real estate professionals participate in MLSs, and there are hundreds of thousands of real estate brokerage websites featuring property listing information and photographs.

In order to facilitate the sharing of listing information among real estate professionals, portals, vendors and consumers, MLSs maintain complex databases that are constantly evolving. MLSs invest funds, time, and manpower to operate and improve these proprietary databases. Changes that frequently occur to MLS databases include, but are not limited to, renaming data fields, adding data fields, removing data fields, rearranging output formats, and increasing or decreasing the arbitrary geographic coverage. The creative selection, coordination, and arrangement embodied in the respective databases are the result of the MLSs' careful considerations. In order to protect copyrightable authorship in the MLS database, many MLSs choose to file quarterly applications for the group registration of updates or revisions to a non-photographic database. These registrations also protect the copyrightable works within the database provided the MLS owns those works. Given the high number of changes that occur to an MLS database, older registrations decrease in value over time.

### **Protection of the MLS Database**

An unfortunate result of the real estate industry's extensive online presence is unauthorized downloading of the MLS database, web scraping of the MLS database, and other unauthorized use of the MLS database. Some third parties reportedly scrape an MLS database by downloading the database in its entirety in violation of the MLS's copyright and in some cases the website's Terms of Use. Unfortunately, current technology has made it increasingly possible for persons to improperly obtain copies of the MLS database.

Copyright protection in the selection, coordination and arrangement of the MLS database is therefore of great importance to the real estate industry. Such registrations were relied upon in the following cases:

- *San Fernando Valley Board of REALTORS® , Inc. v. Mayflower Transit, Inc. et al.*, No. CV 91-5872-WJR (C.D. Cal. Aug. 30, 1993). The San Fernando Valley Board of REALTORS® brought copyright infringement claims against a number of defendants that reproduced or distributed without authorization the association's MLS materials, the electronic MLS database. The court found in

favor of the association stating, “[t]he Board has valid and enforceable copyrights in all MLS materials issued by it on or after January 1, 1991. The listings published in the Board’s MLS are a copyrightable original embodiment of legal acts and relationships. The Board’s selection of listings for inclusion in its MLS entails a level of creativity sufficient to support copyrights in the selection process.” *San Fernando Valley Board of REALTORS®, Inc.*, No. CV 91-5872-WJR at \*24.

- *Montgomery County Association of REALTORS®, Inc. v. Realty Photo Master Corporation, et al.*, 878 F. Supp. 604 (D. Md. Feb. 10, 1995). Montgomery County Association of REALTORS® brought a copyright infringement claim against a photographic service that used the association’s MLS database without authorization to provide its services. The defendant argued that the Association’s database was not entitled to copyright protection based on *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The court found in favor of the Association, stating, “[u]nlike a telephone directory, however, the arrangement of the information in MCAR’s MLS database, ‘possesses at least some minimal degree of creativity.’” *Montgomery County Association of REALTORS®, Inc.*, 878 F. Supp. at 810.
- *Real Data, Inc. v. Houston Association of REALTORS®, Inc.*, No. H-94-0947 (S.D. Tex. Apr. 28, 1995). The Houston Association of REALTORS® claimed Real Data was infringing its copyright in the MLS database by downloading the database without authorization. Real Data argued that the Association’s MLS database did not embody sufficient creative authorship to warrant copyright protection based on *Feist, supra*. The court found in favor of the Association, stating: “Unlike a telephone book, however, the arrangement of the information in HAR’s MLS database possesses at least some minimal degree of creativity... HAR has employed a complex system of abbreviations in organizing and presenting its information. HAR’s selection and organization of the MLS compilation is sufficiently creativity to warrant protection as an original work of authorship.” *Real Data, Inc.*, No. H-94-0947 at \*4-5 (S.D. Tex. Apr. 28, 1995).
- *Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc., et al.*, 888 F.Supp.2d 691 (D. Md. Aug. 27, 2012). Metropolitan Regional Information Systems, Inc. (“MRIS”) sought a preliminary injunction against an alleged scraper. The court granted the preliminary injunction finding that MRIS’s database exhibited the requisite originality for copyright protection; MRIS had a likelihood of success for purposes of a motion for preliminary injunctive relief; and MRIS established irreparable harm. *Metropolitan Regional Information Systems, Inc.*, 888 F. Supp. at 709-713.
- *Regional Multiple Listing Service of Minnesota, Inc. v. American Home Realty Network, Inc.*, No. 12-cv-00965, 2012 WL 4470286 (D. Minn. Sept. 27, 2012). The court granted a preliminary injunction prohibiting display of Regional Multiple Listing Service of Minnesota, Inc.’s photographs and narrative descriptors based on RMLS’s copyright registration for the compilation content and photographs in its MLS database. *Regional Multiple Listing Service of Minnesota, Inc.*, No. 12-cv-00965, 2012 WL 4470286 at \*7-11.

**Copyright Office’s Proposed Fee Increase for Applications for the Group Registration of Updates and Revisions to a Non-Photographic Database will Drastically Hinder MLSs’ Protection of MLS Databases**

NAR respectfully objects to the Copyright Office’s proposed fee increase for applications for the group registration of updates and revisions to a non-photographic database. The proposal raises the fee from \$85 per application to \$500 per application, resulting in an increase of approximately 488%, which is well beyond Booz Allen Hamilton’s recommended increase of 38%<sup>3</sup>. The consequences of this increase are distressing to the real estate industry. For many MLSs, copyright registration is an effective means to protect an MLS’s most valuable asset within budgetary constraints. A cease-and-desist letter supported with a copyright registration, and the statutory damages afforded by such a registration, are persuasive to infringers and would-be infringers. The proposed fee increase, however, will likely force many MLSs to skip registration. Others may sacrifice a clean, continuous and consistent copyright registration record and instead file for registration only when required by potential litigation. These results directly undermine the Copyright Office’s goal of ensuring that most copyright owners may register their works.

The proposed increase for applications for the group registration of updates and revisions to a non-photographic database is disproportionately high compared to other proposed increases for other types of group registrations, as shown by the below chart.

<b>Application Type</b>	<b>Current Fee</b>	<b>Proposed Fee</b>	<b>Percentage Increase</b>
<i>Group Registration of Updates and Revisions to Non-photographic Databases</i>	\$85	\$500	488%
Electronic Filing for Group Registration of Updates and Revisions to Photographic Databases	\$55	\$250	355%
Paper filing for Group Registration of Updates and Revisions to Photographic Databases	\$65	\$250	285%
Paper filing for Group Registration of Published Photographs (up to 750)	\$65	\$100	54%
Electronic filing for Group Registration of Published Photographs (up to 750)	\$55	\$100	82%
Paper filing for Group Registration of Newsletters	\$80	\$125	56%
Electronic filing for Group Registration of Newspapers	\$80	\$95	19%
Group Registration of Contributions to Periodicals	\$85	\$85	0%

<sup>3</sup> Copyright Office Fees, 83 Fed. Reg. 24056 (May 24, 2018).

The Copyright Office justifies the steep fee increase based on the \$694 calculated cost of service for the group registration of updates and revisions to a non-photographic database. First, that cost per application was determined to be only \$53 in 2008. It is difficult to believe without additional information that the cost associated with processing such an application increased over 1209% over the last decade. NAR therefore urges the Copyright Office to disclose the information used to calculate this estimate. NAR also urges the Copyright Office to consider other changes it could implement, such as electronic filing, to lower the calculated cost of service before passing that cost on to database owners. Second, the percentage increase of proposed fees for other types of services with higher or similar calculated costs of service are not nearly as dramatic. For example:

<b>Service Type</b>	<b>Current Fee</b>	<b>Proposed Fee</b>	<b>Percentage Increase</b>	<b>Calculated Cost of Service</b>
Registration of Vessel Designs/Correction of an Existing Registration for a Vessel Design (Form D-VH)	\$400	\$500	25%	\$6,528
Request for Reconsideration – Second Appeal	\$500	\$700	40%	\$4,470
Registration of Mask Work	\$120	\$150	25%	\$2,176
<i>Group Registration of Updates and Revisions to Non-Photographic Databases</i>	<i>\$85</i>	<i>\$500</i>	<i>488%</i>	<i>\$694</i>
Search Report Prepared from Official Records, including Licensing Division Records (per hour, 2 hour minimum)	\$200	\$200	0%	\$661
Recordation of Notice of Termination – Base Fee	\$105	\$125	19%	\$552
Paper Filing of Supplementary Registrations	\$130	\$150	15%	\$413

These comparisons indicate that a high calculated cost of service is not a consistent reason for such a high increase in application fees. NAR therefore encourages the Copyright Office to reconsider whether a 488% increase in the application filing fee is truly necessary for the group registration of updates and revisions to a non-photographic database.

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The proposed increase in the fee for an application for the group registration of updates and revisions to non-photographic databases will ultimately hinder MLSs' protection of their proprietary databases and negatively impact the real estate industry. NAR therefore urges the Copyright Office to reconsider and ultimately lower the proposed fee increase for the group registration of updates or revisions to a non-photographic database.

Thank you for the opportunity to submit these comments.