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(Submitted electronically)

RE: Comments Regarding Copyright Protection For Certain Visual Works [Docket No. 2015-01]
F.R. Vol. 80, No. 79, April 24, 2015, p. 23054.

To Whom It May Concern:

The National Association of REALTORS® ("NAR") is pleased to provide these comments in response to the Federal Register Notice of Inquiry on Copyright Protection for Certain Visual Works (Docket No. 2015-01) appearing at 80 Fed. Reg. 23,054 (April 24, 2015) (the "NOI").

NAR is the United States' largest trade association, representing over one 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 in general, including within the real estate industry, are becoming increasingly digital. They watch "how-to" videos on YouTube, they read review sites, they look up specific brands on search engines, and they research on the go with smartphones and tablets. 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.[1] In fact, real estate-related searches on Google.com have grown 22% year-over-year[2]. NAR's members' ability to effectively advertise and promote their real estate services online is paramount to remain competitive in the real estate industry today.

NAR's members, who identify themselves as REALTORS®[3], recognize that technology innovations are impacting the delivery of real estate information and the future of their businesses. For this reason, NAR is keenly interested in public policies that affect the digital tools its members and their consumers use during a real estate transaction.

[1] The Digital House Hunt: Consumer and Market Trends in Real Estate, A Joint Study from The National Association of REALTORS®and Google
[2] The Digital House Hunt: Consumer and Market Trends in Real Estate, A Joint Study from The National Association of REALTORS® and Google
[3] REALTOR® is a federally registered collective membership mark which identifies a real estate professional who is a member of the National Association of REALTORS® and subscribes to its strict Code of Ethics. NAR is the exclusive owner of the REALTOR®, REALTORS®, REALTOR ASSOCIATE®, and REALTOR® Logo trademarks

EQUAL HOUSING OPPORTUNITY

REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

Photographs are Crucial to the Real Estate Industry

The real estate industry is fueled by listing content. Sellers want attractive listings that highlight their properties' worth and character. As the saying goes, "A picture is worth 1000 words," and photographs provide the visual incentive to visit a particular property. Sellers use photographs to market properties, buyers rely on those images to select which properties to visit, and independent photographers sell their services to agents, brokerages, and multiple listing services ("MLS"). Brokers and agents provide photos to MLSs to enable them to distribute the property listings through their proprietary databases, which include photographs of the properties. MLSs in turn often license their property listing databases, including broker-provided or an MLS participant's property listings and photos, to third-party portals, such as REALTOR.com, and other websites and vendors. Displaying photos of real properties online has become a vital part of the real estate professional's marketing plan.

An unfortunate result to the real estate industry's extensive online presence is web scraping. Third parties "scrape" brokerage or MLS websites and display the scraped content without authorization and in violation of the owner's copyright and in some cases the website's Terms of Use. Unfortunately, current technology has made it increasingly possible for persons to scrape property photos for their own commercial sale and use, all in violation of the owner's copyright. For example, two MLSs have sought preliminary injunctions against an alleged scraper, and the courts in both granted the requested preliminary injunctions, recognizing that the MLSs were likely to succeed on the merits, likely to suffer irreparable harm in the absence of preliminary relief, and such injunctions are in the public's interest. *See Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc.*, *et al.*, 888 F.Supp.2d 691, 709-713 (D. Md. Aug. 27, 2012) (granting preliminary injunction prohibiting display of Metropolitan Regional Information Systems, Inc.'s photographs); *Regional Multiple Listing Service of Minnesota, Inc. v. American Home Realty Network, Inc.*, No. 12-cv-00965, 2012 WL 4470286, at *7-11 (D. Minn. Sept. 27, 2012) (granting preliminary injunction prohibiting display of Regional Multiple Listing Service of Minnesota, Inc.'s photographs and narrative descriptors).

There are Multiple Authors and Owners of Real Property Photographs

Photographs included in property listing information are created and conveyed in a number of different ways. Property photos may be taken by homeowners, real estate agents, MLS or brokerage employees, or professional photographers. Similarly, the rights to use the photographs or digital images between the parties are also conveyed in different manners. For example:

- A homeowner may convey all rights in photos he has taken to the broker representing the homeowner in the sale of the property.
- A real estate agent may assign all rights to her broker, who in turn assigns all rights to the MLS.
- A real estate agent may assign non-exclusive rights to her broker, the MLS, and third party portals.
- A professional photographer may grant a non-exclusive licenses to use the photographs in property listings to the broker, who grants a non-exclusive license to the MLS, who grants a non-exclusive license to MLS participants.
- A professional photographer may grant an exclusive license to use the photographs in connection with property listings to a broker. The broker may then grant an exclusive sublicense to an MLS or third-party portal.
- An MLS employee within the scope of her employment photographs a property, resulting in the MLS's ownership of the photographs, and the MLS grants a non-exclusive license to MLS participants and third-party portals.

These examples illustrate that the photographs and other digital images used in the real estate industry may be authored and owned by different entities distributed for use via different conveyances, creating a "fractured" landscape of copyright authorship and ownership.

In sum, photographs in property listings are extensively used and integral to marketing and selling real estate. Managing and protecting that listing content is crucial to real estate professionals and the MLSs in which they participate. Yet, these businesses, from the smallest brokerage to the largest MLS, face obstacles to securing copyright registrations, enforcing those registrations, and ensuring their own use of photographs and digital content is proper under the law. NAR is in a unique position to offer insight on these obstacles from the perspective of database publishers, licensees, licensors, and authors.

1. The Copyright Office should not require applicants to list the authors of all component works in applications for collective works as a prerequisite to extend protection to the component works.

A. Current Law

Applications for an automated database need not list all the authors of underlying components in order for copyright protection to extend to the underlying components (provided the owner of the database and components are the same). An electronic database, such as a property listing database, is entitled to copyright protection as a collective work. Presumably, the scope of that copyright protection extends only to the unique format or arrangement itself and not also to the underlying works; however, if the copyright claimant also owns the copyright to the underlying work, then the copyright may extend to that as well.

Requiring the names of component works' authors is unsupported by statute or regulation. Under U.S. statute, a copyright application for an automated database must include the work's author, title, and a "brief, general statement of the additional material covered by the copyright claim being registered." 17 U.S.C. §409. Registration of automated databases is further governed by 37 C.F.R. §202.3, which makes no reference to and does not require identification of the authors of component works.

Nonetheless, courts are currently split on the issue. Some courts have barred copyright infringement lawsuits pertaining to underlying component works for failure to comply with the pre-suit registration requirement when the application did not list the authors' names. *See e.g., Muench Photography, Inc. v. Houghton Mifflin Harcourt Publishing and* R.R. *Donnelley & Sons Com*, 712 F. Supp. 2d 84, 94 (S.D.N.Y. 2010); *Bean v. Houghton Mifflin Harcourt Publishing Co.*, 2010 WL 3168624, at *4 (D. Ariz. Aug. 10, 2010). Other courts have permitted such suits without identification of the authors of component works as long as the copyright owner of the collective work also owns the copyright to the component work. *See*, e.g., *Craigslist v. 3Taps*, 2013 WL 181999 (N.D. Cal. April 30, 2013); *Am. Inst. Of Physics v. Schwegman Lundberg & Woessner, P.A.*, 2012 WL 3799647 (D. Minn. July 2, 2012).

Both the 4th and 9th Circuits have agreed with the latter, finding the approach to be more "consistent with the statutory and Regulatory scheme." *See Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc.*, 722 F.3d 591 (4th Cir. 2013); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Company*, *et al.*, 747 F.3d 673 (9th Cir. 2014). Notably, the government itself has supported the positions of the 4th and 9th circuits in an *amicus* brief filed by the Department of Justice (DOJ) in the 9th Circuit. *See Metropolitan Regional Information Systems, Inc.*, 722 F.3d at 598-599, n.10. The DOJ states in its *amicus* brief, "[i]f the author of a collective work is also the author of the component works, or if the authors of the component works, transfer all rights in the works to him, the author of the collective work may claim a copyright in the component works that make up the collective work," even where the registration for the collective work fails to identify the author and title of each component work. *Id.* The DOJ's position relies on the Copyright Office's Circulars, in which "the Copyright Office has consistently taken the position that the registration of a collective work also registers any independently copyrightable works within the collective work – referred to here as 'component works' – in which the claimant owns all rights, even if the registration application does not specify the titles and authors of the component works." *Id.*

Policy considerations also support not requiring component authors' names in collective work applications. As stated by the court in *Metropolitan Regional Information Systems, Inc.*, "[a]dding impediments to automated database authors' attempts to register their own component works conflicts with the general purpose of Section 409 to encourage prompt registration … and thwarts the specific goal embodied in Section 408 of easing the burden on group registrations." *Id.* at 599.

B. The Copyright Office should not delay application review and processing when the applicant chooses not to list the authors of component works in a compilation application.

The Copyright Office historically has not required that applicants list all authors of component works covered by a compilation copyright application. MLSs have reported to NAR, however, that applications pending before the Copyright Office have been delayed since the decision in *Meunch*, despite the split amongst courts, the DOJ position, and the policy considerations articulated above.

Naming the authors of component works in order to extend copyright protection is a severe hardship for the real estate industry. Listing content, including photographs, is sourced from various authors. As previously explained, photographs are authored by home owners, agents, brokers, MLS employees or independent photographers. Photograph authors could number in the hundreds for an application for an update to an automated database. Moreover, while rights are properly conveyed to the copyright claimant, it may be difficult or impossible to ascertain the correct author for each component work.

The Copyright Office's position should align with and support the positions taken by the 4th and 9th Circuits and the DOJ in that author names for component works of compilations, including collective works, are not a prerequisite for copyright registration extending to the component works.

2. **The Copyright Office should ease restrictions on group registrations of photographs by permitting coverage of multi-authored works and longer publication ranges.**

Separate from the automated databases discussed in Section 1, the Copyright Office permits group registrations for up to 750 published photographs. While the group registration option was a definite improvement over its absence, a further easing of the strict registration requirements would increase its usefulness as a protection tool to the real estate industry.

The group registration option is available when (1) the copyright claimant in all of the photographs is the same; (2) the photographer of each photograph in the group is the same; and (3) the photographs in the group were published in the same year. If the photographs were published within three months of the date of application, then the application must state the range of publication dates. If the photographs were published longer than three months prior to application, then the publication date for each photograph must be included in the application materials.

The fractured authorship of photographs within the real estate industry, as outlined herein, makes the group registration option of limited value to the industry. A brokerage could own the copyright in every photograph used for its property listings, which may range from several thousand for small brokerages to hundreds of thousands for large, multi-state brokerages. In virtually every case, those photographs were taken by numerous authors (e.g., a different author per property listing), and the group registration option will provide little or no benefit since most real estate uses will not qualify for such registration. Instead, the Copyright Office should promote a regulation that permits a copyright claimant to include photographs taken by different authors within a single group registration.

Requiring the publication date for every photograph in a group registration if the application is not filed within three months of publication similarly undermines the value of group registrations. It is difficult to maintain the publication dates for large numbers of photographs, and the cost-benefit to maintaining those records may undermine the benefit of a copyright application. It forces applicants to potentially forego federal protection for those photographs with publication dates outside of a particular three-month range. Instead, the Copyright Office should simply require the claimant to include in the application the range of publication dates regardless of when the application is filed.

3. The Copyright Office should improve the registration process by facilitating online processing and monitoring for all applications, increasing the maximum upload file size, and developing a more comprehensive online database of copyright records.

NAR's members and Boards have also experienced logistical issues with filing copyright applications.

To remedy this problem, first, the Copyright Office should facilitate online filing and tracking of all applications. The Copyright Office's eCO system, which is available for certain types of applications, simplifies the application process greatly. The Copyright Office should improve on the process by making the online application process available to all applicants,

including those applying for automated databases and group registrations. The ability to track applications and the status thereof through eCO would benefit all copyright applicants, especially those that file numerous applications.

The Copyright Office should also increase the maximum upload file size to permit the submission of larger deposit copies online. In January 2015, the Copyright Office increased the maximum upload file size to 500MB. Photographs are often large digital files, however. The current size restriction still forces brokerages and MLSs to resize images or file paper applications, both of which are tedious and time consuming. The Copyright Office should therefore increase the maximum upload file size for copyright applications.

Finally, the Copyright Office should develop a more robust online records database. NAR supports the Copyright Office's Digitization and Public Access Project, as access to pre-1978 records online will be helpful to evidencing and confirming rights. NAR submits that access to published copyrighted works, such as the copyrighted text, copyrighted photographs, and images of copyrighted figures, or portions thereof, would also help confirm the existence of rights for particular works and the identity of owners and authors of such works.

4. The Copyright Office can support anti-scraping efforts by supporting legislation allowing a right of non-exclusive licensees to sue for copyright infringement and increased statutory penalties for scraping.

A. Non-exclusive licensees should have the right to seek remedies for copyright infringement.

NAR members, boards, and MLSs own and operate thousands of websites displaying an aggregation of real property listings. Unfortunately, those websites are currently susceptible to being easily scraped and the scraped content used without permission by the wrongdoer. However, website owners must own the copyright in scraped content in order to bring a copyright infringement claim against the alleged scraper. *See Nautical Solutions Marketing, Inc. v. Boats.com,* No. 8:02 CV 760, 2004 WL 783121 (M.D. Fla. April 1, 2004) at *2 ("NSM copied only the pictures and descriptions from Yachtworld.com's yacht listings. Individual yacht brokers, not Yachtworld.com, own the copyright to these pictures and descriptions. Accordingly, NSM's copying of the content fails to constitute an infringement of copyright against Boats.com".). Thus, in the event a broker's or MLS's website is scraped, the broker or MLS cannot sue for copyright infringement of the underlying photographs unless they own or exclusively license the photographs. The licensor of the photographs could sue for infringement but may lack the incentive to do so if it has limited funds or a small number of its photographs were scraped. In the real estate industry, the website owner – the real estate professional or MLS – is the aggrieved party and the one best suited financially to enforce the copyrights. If a non-exclusive license permits the licensee to enforce against infringement, then U.S. law should recognize that the non-exclusive licensee has proper standing to enforce the copyright. With such standing, real estate professionals and MLSs will have an easier time enforcing against web scrapers and other later developed technology that extracts and filters website content. The Copyright Office should promote adoption of legislation that would empower non-exclusive licensees to sue for copyright infringement.

B. Increased statutory penalties will deter web scrapers.

Unauthorized parties scrape websites using software that is freely available online and surprisingly easy to build with basic programming skills. When considering the low likelihood of "getting caught," or of a copyright owner actually taking action, scrapers are not sufficiently deterred. Increased penalties for scraping, however, may deter would-be scrapers. For example, increased statutory damages based on the extent of the scraper's activities, the number of copyrighted works scraped, and whether the website owner's Terms of Use explicitly prohibit scraping may assist in deterring and decreasing scraping activity. Increased penalties would fit in well within the context of the Digital Millennium Copyright Act ("DMCA"), and NAR encourages the Copyright Office to consider and promote increased penalties for web scraping.

5. The Copyright Office Should Support Standardized Copyright Management Information

The DMCA prohibits intentional removal or alteration of copyright management information (CMI) that is conveyed in connection with a work. CMI includes the title of the work, the copyright notice, the author's name, other identifying information about the author, the copyright owner's name, other identifying information for the copyright owner, terms and

conditions for use of the work, and numbers or symbols on the work referring to this information. Removing this information - or knowingly distributing a work that has been scrubbed of correct CMI - is illegal under the DMCA.

Once CMI is removed from a photograph, it is difficult and in some cases impossible to identify the appropriate person or entity to contact for permission purposes. Potential users of the work must choose between using the image and potentially

facing copyright litigation and not using the work. Owners lose potential licensing fees. The public is harmed because the work is no longer available for authorized use.

Since the properties of a digital file are not locked but rather easily modifiable using basic technology, CMI is often lost inadvertently. Photographs can be cropped, resized, and digitally modified/enhanced. Metadata can be stripped or revised. As a result, copyrighted photographs can appear to be freely available for use by anyone for any purpose. Or conscientious users may choose not to use orphaned works, and the owner, user, and public are subsequently harmed.

Within the real estate industry, MLSs must ensure their database of property listings is easily accessible. Brokerages must ensure their websites are easily accessible and viewable by Internet users. Agents must ensure that their clients and potential clients may easily find them online and search for property listings. In light of the amount of data these websites and portals must host, and to ensure a robust and smooth viewing experience by the end user, resizing of photographs inadvertently results in removal of a photograph's CMI. Such resizing may require stripping the metadata associated with the photograph, and although it is not intended to strip the CMI, it may inadvertently remove the CMI.

Digital metadata lacks adequate international standards that ensure CMI remains in place and accurate. The Copyright Office should support and assist in the creation of a standardized formatting of CMI in photographs' metadata, including field name labeling, mapping, synchronization and location. Standardizing CMI and its location within metadata can ensure that users do not inadvertently strip CMI from copyrighted photographs.

We look forward to working with the Copyright Office as this proceeding moves forward..

Sincerely,

Chris Polychron
2015 President, National Association of REALTORS®