# ISSUES BRIEFING PAPER



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# The Elusive Quest to Control Data: Listing Syndication and Other Conundrums

The proliferation of real estate data available online seems endless. The quality and reliability of it may vary from site to site, but one thing that remains constant is that a whole lot of stakeholders want to get their hands on it and use it to their advantage. With so many wanting to use it and technology ever advancing the movement and portability of it, REALTORS® quest to "control" their listing and other data often seems futile. While the forces are greater than any one person, with a little more information, there may be more you can do to better manage this process.

## First Stop: How Does Listing Data Go Where It Goes? [And What Should I Be Aware Of?]

Key to developing a strategy for better data control is first understanding how listing data moves online. There are several ways it makes its way onto the Internet.

## 1st Party Display

The foundation underlying most listing display is the Multiple Listing Service ("MLS"). Participants in the MLS submit their listing information to the MLS where all of the other real estate licensees participating in the MLS can access the information. Through the course of submitting the listing to the MLS, most listing brokers also designate that they want the listing information displayed on the Internet and allow their fellow MLS participants to display the listing on their own sites via Internet Data Exchange ("IDX"). IDX is the means by which brokers authorize the other participants in their MLS, subject to the IDX rules, to display their listings on sites that their fellow MLS participants directly control. Through IDX, MLS participants must abide by a series of display rules, including providing attribution to the listing firm and agent. Essentially, these broker sites are 1<sup>st</sup> party displays showing listing information by way of one's MLS's IDX data feed.

## 3<sup>rd</sup> Party Display

Listings are also available on any number of 3<sup>rd</sup> party (i.e. non-licensee/MLS participant) real estate data aggregation sites. The big ones are Zillow.com, Trulia.com and Realtor.com, although there are hundreds more. How do listings get there?

## a) Listing Syndication

Brokers direct their listings to appear on 3<sup>rd</sup> party sites through "syndication." Syndication is the process of supplying content for integration with other materials a 3<sup>rd</sup> party publisher or other outlet disseminates across the Web. There are a variety of ways this is being done.

The most common is for brokers to syndicate their listings out to 3<sup>rd</sup> party sites through their MLS via tools like ListHub or Point2 (or possibly an MLS's in-house developed tool) where brokers can select the desired place(s) for their listing to be displayed. While a syndication tool might be enabled through the MLS, MLSs usually will not have a direct contractual relationship with the actual 3<sup>rd</sup> party sites where the listing will be displayed – the exception being Realtor.com with whom virtually all MLSs have longstanding contractual relationships. That makes it especially important that brokers understand their syndication elections, including whether one's MLS defaults to an opt-in (in order to syndicate you must affirmatively opt in) or opt-out (you are automatically in unless you affirmatively opt out) option. It is also vital for brokers and agents to review their syndication settings to ensure they know and approve of the 3<sup>rd</sup> party sites designated. Through inattention or inadvertence, some have been surprised to discover they were automatically designating "all" sites on a syndication panel.

Some brokers do not syndicate through the MLS but instead provide their listings directly to 3rd party sites. And, unbeknownst to the broker, it's possible broker's agents – or even the sellers - could be entering listings directly onto 3rd party sites.

#### b) Am I Seeing Double...or Triple...or Outdated Information?

As a result of all these different entry points, strategies and players, 3rd party sites receiving syndicated data will often contain a degree of duplication or outdated/inaccurate information which differs from that on the MLS. Keep in mind, in most instances, when brokers elect to syndicate their listings to 3<sup>rd</sup> party sites, the data either leaves the MLS or was never vetted through it in the first place. The data is thereafter disconnected from the MLS and thus outside of the MLS's control with no real time MLS "automated" process for correcting, revising or updating the listing on the various sites. Changes made to the data on the MLS might not be reflected on the 3<sup>rd</sup> party sites unless and until a party "manually" updates it or the 3<sup>rd</sup> party site updates it data feed or employs some kind of a data reconciliation process, to the extent that exists.

## c) I Permitted My Listing to Go Where?

Again, with multiple entry point options, brokers don't always know where their listings are going or which sites they or their agents have designated. This disconnect is further compounded by the fact that some sites to which listings have been "knowingly" syndicated will then turn around and redistribute their data to additional 3<sup>rd</sup> party sites beyond the locations brokers or their agents originally thought they enabled. Brokers' listings may be appearing in conjunction with site features they don't like. And whether broker or agent realized it or not, chances are they authorized the display!

This wide open, unrestricted grant of authorization results from the extremely broad terms of use ("TOUs") and end-user license agreements ("EULAs") so many 3<sup>rd</sup> party sites employ. The EULAs and TOUs of prominent data aggregators compel those submitting data to grant them "forever" rights to unlimited use, distribution, copying, repurposing of data, creation of derivative works, etc. An amalgam of the kind of language commonly found in these TOUs requires one to grant "an irrevocable, perpetual, royalty-free, and fully sub-licensable worldwide license to use, copy, distribute, transmit, publicly display, publicly perform, reproduce, edit, modify, prepare derivative works of or incorporate into other works, and translate your submission, in connection with this service or in any other media. You understand and agree that any user content that you post or submit may be redistributed through the Internet and other media channels…"

Thus, once brokers or agents have syndicated their listings to 3<sup>rd</sup> party aggregators with TOUs containing the above types of language, they have agreed to relinquish control of their listings. Many have been unpleasantly surprised to discover what they gave up after-the-fact. While some may conclude this is a worthy trade-off in exchange for the enhanced marketing opportunities these sites provide, it is essential to be fully informed up front so you go into your syndication decisions with your eyes open.

### d) <u>Misappropriation – Scraping or Other Unauthorized Display</u>

While there is a wide array of methods underlying the authorized display of listing data online, sometimes listing data also makes its way online in totally unauthorized manners. A wayward vendor could be repurposing an MLS data feed without authorization from an MLS. An MLS participant could be using MLS data in unsanctioned ways or funneling the data to unauthorized 3<sup>rd</sup> parties. An Internet portal could be employing scraping technology to populate its website. Misappropriation

of data is yet another threat to brokers and/or MLSs' control of their data.

Determining the appropriate remedy depends on the underlying circumstances. But brokers and MLSs are not alone in suffering from misappropriation of data. Many 3<sup>rd</sup> party data aggregators spend millions of dollars contending with this problem, only to be one step behind the next scraper.

## Step Two: What Can I Do to Better Control My Data?

You have now achieved the first step which is getting educated about the online data landscape. Only after a base understanding of how listing data moves online can brokers begin to proactively develop a strategy for better management.

#### Make Prudent Syndication Decisions

Some brokers have decided to limit online listing exposure to IDX only and not engage in syndication to 3<sup>rd</sup> parties. This is certainly a way for a broker to gain greater control of listings. However, while this may work for some, others may find that the benefits of syndication outweigh the costs. Whether and to what extent, if any, to crawl it back is a decision a brokerage can make after assessing their individual business needs.

For those many brokers who conclude that listing syndication is an enhancement to their business, there are steps they can and should take to assert greater control over their data. Steps include creating a unified syndication policy so one's office syndicates in the same way. Either have all syndication go through the MLS or through a unified direct arrangement with a 3<sup>rd</sup> party aggregator, but haphazardly doing both causes problems. So too with agents and brokers making contradictory or duplicate syndication decisions. Maybe it makes sense to select only a few choice locations...or perhaps your business finds value in casting a broad net - whether the verdict is to authorize syndication widely or narrowly, the decision should be the result of a syndication policy created by design and not default.

#### Work with Your MLS

Brokerages who have established a unified syndication policy can work with their MLS in the process to facilitate it. If an office makes a global decision about which 3<sup>rd</sup> party aggregators it will authorize for syndication, there may be controls that the MLS can put in place to help execute the plan. Further, it's quite possible that syndicating through the MLS (as opposed to a direct pipeline from the brokerage) can offer a

broker some additional leverage or data integrity protection. Some MLSs may have negotiated more favorable TOUs or employed corrective data reconciliation arrangements with 3<sup>rd</sup> party sites.

### MLS and Copyright Protection

Brokers often look to their MLS to confront misappropriation of listing data by scrapers or other unauthorized users. On this front, some MLSs may attempt to strengthen their legal positions in the event they are called upon to initiate copyright infringement actions.

First, a quick copyright legal primer: for an original work to be copyrightable, it must contain a "spark" of creativity. In terms of listing data, the "spark" of creativity which is potentially copyrightable is generally going to be the portion consisting of photos and remarks (but not the rote factual information such as the address, number of bedrooms, etc.). To enforce a copyright, one must be the owner or exclusive licensee of a copyrighted work.

Normally, those submitting listings to an MLS grant the MLS a license to include the listing data in the MLS compilation but do not transfer actual copyright ownership. The National Association of REALTORS® ("NAR") policy prohibits requiring the transfer of copyright ownership as a condition of submitting the listing to the MLS. While brokers will often look to their MLS to protect their copyrighted data when it is infringed, depending on the nature of the infringement, the MLS might not be in a strong position to do so without ownership in the underlying work.

So that they can assert greater rights on behalf of the brokers, some MLSs might be asking their participants and subscribers whether they wish to transfer copyright ownership to the MLS – with the MLS in turn granting participants and subscribers back a very broad license to use, display, reproduce, sublicense, prepare derivative works, etc. The thinking behind this arrangement is that ownership of the copyright with the right to register it with the U.S. Copyright Office and sue on it would rest with the MLS, with all other uses of it licensed back to the broker. If your MLS offers such a proposal, it will be important to carefully review the language of the license back to verify it's as broad as needed, and assuming it is, broker will likely not notice any practical impairment. Keep in mind, brokers would not be required to transfer copyright ownership – this would be a purely voluntary election. Brokers can continue to maintain copyright ownership but broker's ability to look to the MLS to be its enforcer on infringement actions would be limited.

#### Conclusion

REALTORS® work hard for their listings, and their listing data is a valuable commodity. That is why it is imperative for REALTORS® to develop a greater understanding of how and where this data is used on the Internet. Better controlling listing data online is important not only on an individual business level for REALTORS® but also for the REALTOR® industry as a whole. Once you click that mouse and send it on its way, it's out there. So make sure the pathway you put it on was selected by deliberation and not default.

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