

Syndicating Real Estate Listing Data:

Fully Examining Benefits, Costs, and Risks when Entering Licensing Agreements for MLS Data

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Key points

1. This whitepaper is a tool for brokers, for MLS executives and volunteer leaders, and for local counsel in structuring listing distribution and syndication relationships and agreements targeted at consumer advertising of real estate listings for sale.
2. Listing distribution and syndication may provide significant benefits to brokers and therefore to MLSs.
3. Any distribution or syndication effort has associated operational and technical costs.
4. Distribution and syndication efforts have legal risks that brokers and MLSs must examine.
5. Brokers and MLSs can fairly address most costs and risks in agreements with syndicators and commercial distributors.

Introduction

Many brokers and MLSs are rushing to distribute listing data to national aggregators like Googlebase, Zillow, and others. Some brokers believe they gain a competitive advantage over brokers who do not send their data to those sites or lose out on important marketing opportunities by not having listings on those sites. The current depressed housing market appears to have accentuated this drive.

Recently, we have reviewed numerous agreements proposed to MLSs and brokers by companies that (1) want to distribute MLS data commercially, to post on marketing or advertising sites on a local level (e.g., Classified Ventures seeking data for newspaper web sites) or to put on national aggregation sites (e.g., direct deals to transmit to organizations like Google), a process we call 'commercial distribution'; and (2) function as listings 'syndicators,' who get the data from the MLS or broker and then transmit it to multiple sites (e.g., ThreeWide and Cyberhomes), a process we call 'syndication.'

We have learned that some MLSs and brokers sign agreements to syndicate and distribute listings without negotiating key terms or taking the time for legal review. We understand that brokers are anxious to get their listings marketed, that MLS leaders want to deliver value to brokers, and that these factors encourage haste. In light of the risks involved, however, we think excessive haste is unreasonably risky. Instead, we recommend that MLSs and brokers engage in sound business decision-making, which includes balancing the costs and risks with the benefits.

We do not intend to discourage listings syndication. On the contrary, if brokers believe it is in their best business interests, MLSs probably should support it. We propose only that MLSs and brokers consider all the risks and costs before agreeing to any particular deal.

This whitepaper proposes the following process for entering listing distribution and syndication relationships: (1) Understand the nature of the proposed business relationship, including who will receive the listing data and to what end uses they may put it. (2) Understand the expected benefits of the business relationship to broker or MLS or both. (3) Consider operational and technical costs, as well as legal risks, associated with the relationship. (4) Negotiate an agreement that mitigates risks to MLS and brokers while preserving the value of the relationship to all parties.

Note: We have mentioned several syndicators and commercial distributors of listing data by name here only to ensure the reader perceives the relevance of this article. We do not suggest that any syndicator or distributor (whether named here or not) is misbehaving or attempting to harm brokers or MLSs. The examples we use come from many different syndicators and distributors. While we assert that some of their contract provisions impose risk of liability on MLSs and brokers, we do not intend to suggest that the syndicators and distributors shift the risks unreasonably; rather, we believe that MLSs and brokers should accept those risks only after full consideration, and, if necessary, negotiating modifications to them.

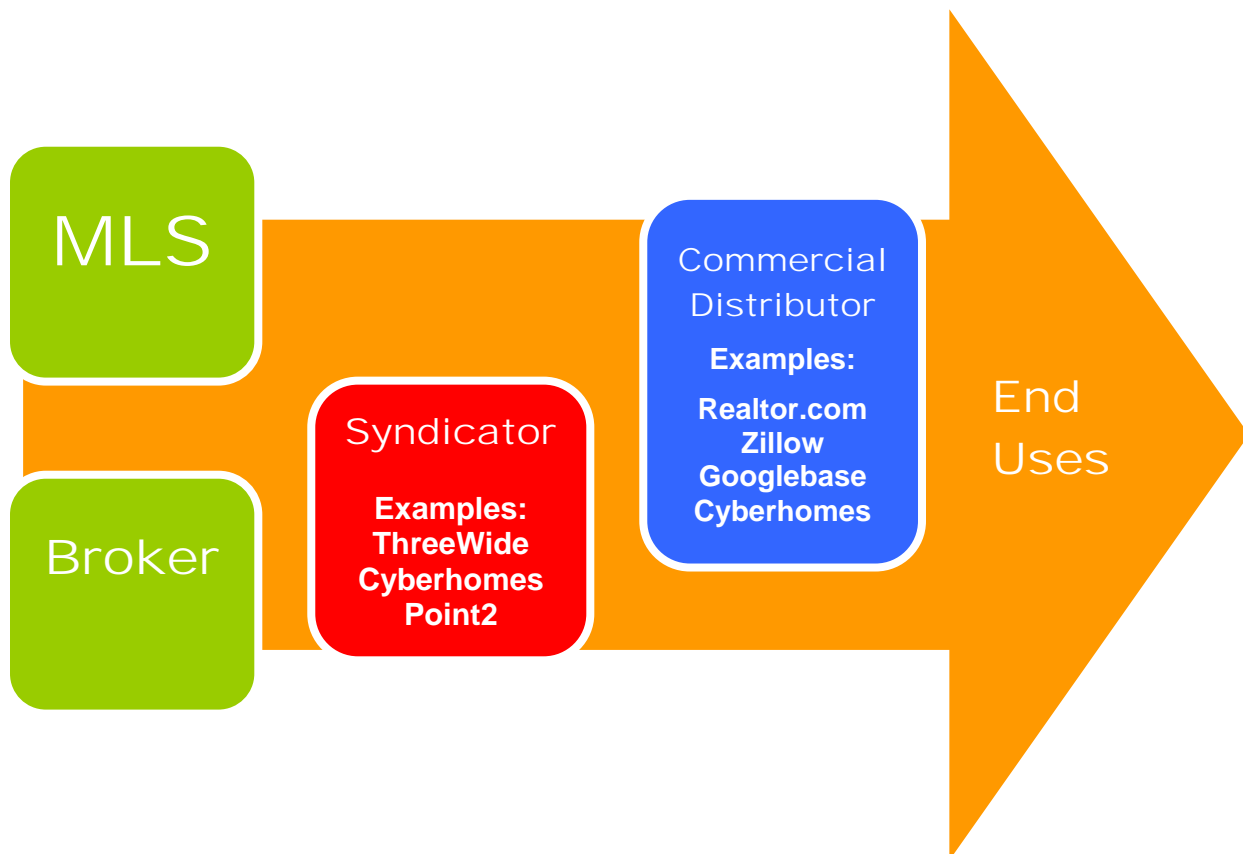
Defining business relationships

The flow chart on the following page shows listing syndication and distribution in rudimentary terms. There are no lines of connection between the boxes in the chart, because one can draw the lines differently depending on the deal. In general, this whitepaper refers an entity that provides data as a **'data source'** and an entity that receives data as a **'data recipient.'** A **'syndicator'** is a data recipient that receives data and then distributes it to multiple data recipients who then put the listing data to commercial use. A **'commercial distributor'** is an entity that creates the end use for the data; in other words, it prepares the listing data for use by the ultimate consumer. The ultimate data source is the listing broker. The route of the listing data from ultimate source to ultimate consumer can vary greatly. Here are some examples:

Core purpose of MLS. The listing broker puts her listings into MLS with the intent that MLS will distribute them to other MLS participants. In this case, the broker is the listing source, the MLS is the commercial distributor, and the sale and valuation of real estate by MLS participants is the end use. MLS's rules and other governing documents establish the procedures for this distribution, including rights of, and limitations on, those involved.

MLS as syndicator. As the next section explains, the MLS is a natural syndicator of listings. The broker puts her listings into the MLS and then expects the MLS to distribute them to third parties, perhaps

including Realtor.com, the local newspaper, Homes & Land magazine, Google, etc. In this case, these third parties are commercial distributors, MLS is the syndicator, and the end use is display and distribution of the listing to consumers via web sites or print publications. MLS's policies govern when it can syndicate a broker's listings; the contract between MLS and the commercial distributor governs the commercial distributor's use.



MLS working with syndicator. The MLS has all the brokers' data aggregated into one database, but MLS may not be prepared to take on the role of managing relationships with a large number of commercial distributors. MLS may choose instead to contract with an entity focusing on the syndication role, such as ThreeWide. The syndicator then distributes the listing data to commercial distributors such as Googlebase, Yahoo Real Estate, etc., and the end use is display and distribution of the listing to consumers, usually via web sites. MLS's policies govern whether it can transmit listings to the syndicator; the contract between MLS and the syndicator determines to which commercial distributors and under what terms the syndicator will syndicate data; the contracts between syndicators and commercial distributors determine how the commercial distributors will use the data; and there may even be agreements between the listing broker and the syndicator or commercial distributor permitting or limiting certain uses of the listing data. (Note that we have identified Cyberhomes both as a syndicator and a commercial distributor, as its business model includes both components.)

Broker working with syndicator. If the broker wants her listings sent to commercial distributors but her MLS is unwilling or unable to transmit them on her behalf, she may choose to work with a syndicator, such as Point2, which will syndicate her listings to commercial distributors such as Craigslist, eBay, and Trulia. In this case, it is the agreement between broker and syndicator that governs their relationship, and the syndicator's agreements with commercial distributors govern their use of the listing data.

Broker as syndicator. Brokerage firms, especially larger ones and those working in multiple MLS markets, may want to syndicate their own listings. The broker may be concerned that the "MLS Working with syndicator" model puts the broker at too great a distance from the end use of the data, leaving the broker with insufficient control over the details of data use. If the brokerage has a comprehensive database of its own listings, it may be able to negotiate terms with commercial distributors that it would not obtain by working through MLS or other syndicators. In this case, the agreement between the broker and the commercial distributor governs the end use.

Many other models available. There are many other ways brokers can distribute and syndicate their listings. The models above are just examples. Hybrids of these options are common. This whitepaper also generally covers only syndication and distribution agreements with consumer advertising as their intended end uses. Licensing relationships of the following types pose different and special problems, and this whitepaper does not make any effort to address them.

- MLS licensing data to a third party to permit the third party to deliver a product back to the MLS's own participants (e.g., ListingBook).
- IDX.
- Broker or MLS licensing data to third party that will incorporate it into an automated valuation or other commercial tool for sale to entities not participating in MLS.
- MLS operating a consumer-facing web site with listing data on it.

Benefits of listing distribution and syndication

For purposes of this whitepaper, we assume that some brokers rightly believe that distributing and syndicating their listings to data recipients is in the brokers' best interests. We are not in a position to judge the full extent of the benefits brokers are likely to derive from distribution and syndication. There is a wide variety of opinion on the subject, with some brokers, agents, and commentators questioning the quantity and quality of leads these forms of distribution generate, and others standing by them as critical means of attracting interest in their listings and their firms' services. Brokers should measure the traffic they receive on their web sites and the calls and other inquiries they receive in their offices, and use available tools to understand what drives the consumer to contact them, recognizing that the first phone call may be the result of a prior web site visit, or vice versa. This is the only way to know what marketing methods are truly effective.

Role of the MLS. If brokers want to distribute and syndicate their listings, the MLS can play a role in doing so efficiently. First, the MLS already has a database of the broker's listings. Thanks to the existence of RETS and use by MLSs of industry-standard technologies, a broker's listing data content is often more easily and inexpensively available from the MLS than from any other source. Second, data recipients

working with MLSs can avoid the common problem of stale listing data on web sites. Many web sites that receive uploads of data from brokers (and sometimes from MLSs) continue to show listings as active for months and even years after they expire. MLS can ensure that the data recipients refresh active listing data based on up-to-date data the MLS provides.

The MLS also derives value from syndication, as syndication permits the MLS to deliver the value the brokers crave but with diminished technology, monitoring, and operational costs by the MLSs.

Brokers and MLSs often do not receive money to compensate them in these types of relationships. Whether the MLS/broker receives money or not, one of the questions MLS/broker must answer with regard to distribution and syndication is what the costs of distribution and syndication are to the MLS/broker, and how it will recover those costs. Both the broker and MLS also must assess what risks they assume, as this is a form of 'hidden cost' that they must evaluate when making a business decision.

Costs

MLSs and brokers incur costs when engaging in listings distribution and syndication. To the extent possible, brokers and MLSs should ascertain the costs before entering into any agreement. Costs to MLSs and brokers for data distribution and syndication come in various forms. Some syndicators and commercial distributors charge MLSs and brokers for their services directly; some MLSs charge brokers; the act of distributing the data imposes technical costs on the MLS or broker or both; and the conduct of agents, brokers, and data recipients may impose operational costs on brokers and MLSs.

Cash costs from syndicators and commercial distributors. The majority of current syndicators and distributors tend not to charge any fee to the MLS for distributing or syndicating the brokers' listings. Some charge the broker, however, either for their basic services or for certain premium or add-on services (like monitoring, enhanced listing placement, etc.). Brokers have to decide whether they wish to pay such costs. MLSs have to decide whether they will attempt to negotiate on behalf of all their brokers for discounts on those costs. Larger MLSs may have the clout to require syndicators and distributors to reduce their fees to brokers in return for the MLSs' cooperation in the syndication or distribution.¹

Cash costs from MLS for data feeds. A broker hoping to use MLS to facilitate transmission of the broker's data to a data recipient must consider any charge MLS may assess for its efforts. Some MLSs charge the broker, some charge the data recipient, and some impose no charge at all. Some MLSs vary the charge depending on the end use involved.

Operational and technical costs to MLS. MLSs affiliated with NAR (and most are) must have listing broker permission before distributing the broker's listings to data recipients. Under NAR policy, MLS can presume the permission, provided MLS notifies the listing broker of the intended end use(s) and gives the

¹ Negotiations of this kind can raise anti-trust concerns, and MLSs involved in them should consult antitrust counsel. At a minimum, the MLS should understand that it should not coordinate or claim to be able to coordinate a 'boycott' of a syndicator or distributor by the MLS's brokers. The only consequence of the syndicator or distributor not reaching agreement with the MLS is that the MLS will not contract with the data recipient to facilitate data transfer. Brokers would remain free on their own to work with the distributor or syndicator.

broker an opportunity to opt out. Even MLSs not affiliated with NAR (those typically owned by groups of real estate brokers) should consider adopting a similar stance to ensure that brokers participating in MLS do not perceive the MLS as making unexpected or unauthorized use of the brokers' listings. Consequently, MLSs must factor into the costs of distribution and syndication the need to communicate to brokers that a new data recipient or syndication option exists and the need to process and maintain information about brokers who have opted out.

Some MLSs take an 'all-or-nothing' perspective on listings distribution and syndication. These MLSs create a list of data recipients, including perhaps Realtor.com and other national sites, and tell brokers to mark their listings 'Internet Advertising Yes/No.' Listings of a broker who marks 'yes' go to all the data recipients on the list; listings of a broker who marks 'no' go to none. Other MLSs allow brokers to select the data recipients to which MLS will transmit their listings, on a recipient-by-recipient basis or on an end-use-by-end-use basis. The selective approach clearly offers greater value to brokers, who can choose which data recipients they trust with their listings and which end uses they believe deliver the greatest value. The all-or-nothing approach, however, is much more cost effective for the MLS, which can track brokers' choices with a single field on the listings or on the broker database that MLS maintains. If the MLS offers a selective approach, then it must factor in the costs of maintaining technology to achieve it and of communicating to brokers how to use it.

Some listing data syndicators themselves provide a selective approach. Thus, the MLS transmits the listings to the listings syndicator, and the syndicator in turn provides the mechanism for the listing broker to indicate which commercial distributors and end uses may have the broker's listings.

Data support may require ongoing operational costs. For example, some data recipients will expect the MLS to provide technical support for downloading and distribution efforts. In any case, an MLS will have to deal with the inevitable call from a broker complaining that her listing is not appearing on Site X. The MLS may be compelled to verify that the listing is indeed in the MLS and in the data feed to the data recipient, even though it is not appearing the data recipient's site(s). In that instance, the broker may resent the MLS 'passing the buck' to the data recipient when the MLS asks her to contact the data recipient or Site X to resolve the problem.

Legal Risks

Data recipients' standard contracts often place legal risks squarely on MLSs. Data recipients are not being naughty; rather, they are naturally attempting to structure the relationship in the fashion most appealing to them, addressing risks by placing liability on other parties. They anticipate that MLSs will negotiate certain terms, and they generally are agreeable when MLSs make that effort. The risks that contracts for syndication address include problems with the MLS data, how misuse of the data by the data recipients is handled; and other matters.

Problems with the listing data

Listing data can be flawed in numerous ways. For example, agents sometimes do not have the legal right to submit photos to the MLS. This can arise when the agent uses the photo from another listing, perhaps taken by a professional photographer who has not licensed the photo's use. An agent's unauthorized

submission of photos and MLS's reproduction of them are technically copyright infringement, as is reproduction of the photos by data recipients and on web sites. The data recipients therefore often include in their contracts a 'warranty of non-infringement' from the MLS or broker.

Listing data can be inaccurate because of inadvertent mistakes by the broker/agent or seller, data entry mistakes by brokerage staff, data processing problems at the MLS or between the MLS and the data recipient, or even intentional misrepresentations by seller or broker/agent. The data recipients therefore sometimes include in their agreements a warranty from MLS or broker of the data's accuracy.

Listing data can contain comments that violate fair housing laws, RESPA, truth-in-lending regulations, and other laws. Data recipients sometimes include in their agreements a warranty by MLS broker that the data violates no laws or regulations. They attempt to shift liability for these problems to the MLS or broker.

Flaws in the listing data are a matter of concern for everyone involved in listing distribution and syndication. The fact that commercial distributors display the data on the Internet or via other means exposes them to liability. Third parties, such as consumers, fair housing groups, and others, with grievances about listing data may well seek to sue the commercial distributor, perceiving it as a big player with deep pockets. In most cases, the commercial distributors should be able to escape liability because the plaintiffs will not be able to demonstrate wrongdoing on the part of the commercial distributors, but the costs of defending such a suit, even if it is quickly dismissed, can mount to tens or hundreds of thousands of dollars. Data recipients thus take steps to protect themselves, and here are examples of actual contract provisions intended to do just that.

One agreement provides that MLS

represents and warrants that it has obtained all rights, licenses, and permissions necessary to grant the rights under this Agreement and that the Content does not and will not contain any information or materials that (i) are obscene, defamatory, libelous, or inaccurate; (ii) infringe or misappropriate any copyright, right of publicity, trademark or other intellectual property right or violate any other right of a third party, or (iii) violate any applicable law, rule, or regulation.

This same agreement requires the MLS to indemnify the data recipient for defense costs arising from any claim that these assertions are not true. In most cases, it will be difficult for MLS to say whether these assertions are true with regard to all the MLS data, but by representing and warranting them, the MLS is promising that (1) the assertions are true at the time the agreement is executed and (2) MLS will ensure that the assertions remain true during the term of the agreement.

Another agreement provides that

MLS represents that MLS owns all right, title and interest in and to the [MLS data].

Elsewhere, it says

MLS represents and warrants that . . . MLS owns all rights in and to the [listing data] free of any claims, liens or encumbrances.

The agreement states this representation in multiple places, so MLS needs to edit or remove it multiple times to effect the change.

The most breath-taking example is an agreement that provides

[MLS will indemnify the data recipient and its third-party, downstream recipients, and their affiliates] from any third party lawsuit or proceeding (including without limitation any liability, loss, claim, penalty or damage, attorneys' fees and related services) based upon or otherwise arising out of [data recipient's use or its third-party downstream recipient's use of the MLS data].

This provision essentially says MLS is responsible even where the claim does not allege that MLS did anything wrong!

One agreement also provides that

[MLS] represent[s] and warrant[s] that... [listing data files] do not contain any viruses, worms, Trojan horses or other similar harmful components.

Many MLSs may not be in a position to make this warranty, especially where they rely on their vendors to deliver the data on their behalf. Problems with the MLS data are not the only issues that raise legal concerns.

Recipient and third party misuses of listing data

Establishing the data recipient's use rights. MLSs have traditionally been concerned about how data they license to data recipients may resurface. MLSs and brokers are often concerned that the data recipient may misuse the data. This can happen relatively innocently—a key staff person, the one who understands the MLS's and broker's expectations, leaves the data recipient's team, a new executive at the data recipient hatches a brilliant idea, and suddenly listing data shows up where it should not be.

Syndication poses especially difficult problems, because there the broker or MLS is granting a data license to one data recipient – the syndicator – who will be granting licenses to other data recipients – the commercial distributors – perhaps for a wide variety of end uses. The broker's or MLS's agreement with the syndicator either needs to address the commercial distributors permitted to have the data and the end uses in which they may employ the data, or the agreement needs to provide a means for the broker or MLS to give consent for particular commercial distributors and end uses as they become available.

A related problem is that brokers may authorize their listing data to appear on a web site or in a publication, but they do not read the fine print in the agreement, which permits the data recipient to forward the data to other sites and publications. For example, in one agreement between a data recipient and an MLS or broker, the MLS or broker grants the data recipient a license to

access, download, host, store, copy, reproduce, publish, enhance, distribute, transmit, adapt, modify, publicly display, publicly perform, create derivative works from, and otherwise use [the listing data]... with a right to sublicense the foregoing rights through multiple tiers and in connection with any... derivative site, or syndication or distribution arrangement.

The license further states that the data recipient may

use [listing data] in connection with any websites and web pages owned or operated by or on behalf of [data recipient], including, without limitation, any mobile, co-branded and/or private labeled versions of such sites and pages, all

applications and functionality related to such sites and pages, and all successors and replacements of any of the foregoing.

This language gives the data recipient almost complete control of the listing data. It could, for example, roll the listing data up into some other kind of product, of which neither the MLS nor the listing brokers were previously aware. One example with which our firm has assisted brokerage clients involved a brokerage firm whose agents were placing ads for their listings in a print magazine. The brokerage firm has a policy against advertising listings on a particular web site, but the agents did not notice when signing agreements for the print magazine that there was a provision in them permitting the magazine's publisher to forward the listing data to its web site and those of its affiliated companies. Consequently, the brokerage found its listings on the objectionable site and was distressed to learn that its own agents had arguably given permission for that misuse!

Contributing to the problem is that the agreements proposed by data recipients are often light on details about how a broker authorizes distribution of listing data. One provides, for example that a data recipient

may distribute [broker listing data] to any channel authorized by [the broker].

Without further clarification, such an authorization could be oral; or in a written agreement or letter, deeply embedded in small print; or it could be passed off as some kind of "blanket" authorization. In any event, in such a scenario the MLS might have no knowledge as to uses permitted by the broker and under what circumstances a broker has extended that permission: for instance the listing broker might authorize listing data to appear on sites that will embarrass the broker and MLS alike. MLSs frequently handle complaints from a broker or agent that listings of the firm are appearing on a web site, only to discover that the broker or agent him- or herself authorized the display inadvertently.

Keeping data current. Many brokers and MLSs are concerned and agitated when listings appear on national websites weeks, months, and even years after they become inactive in MLS. Most brokers and MLSs would like their listing distribution and syndication partners to assure that listings are removed from sites advertising to the public when the listings become inactive. Unfortunately, most listings distribution and syndication data agreements that data recipients draft are silent on the recipient's obligation to remove inactive listings.

Confidentiality. Agreements offered by data recipients frequently are silent regarding any duty to protect confidentiality of data, user IDs, and passwords. Some agreements protect only the confidential information of the data recipient:

If [MLS or broker] receives any [data recipient] confidential information, such information shall be kept securely.

Generally, promises like this one should be mutual, with each side protecting the confidential information of the other. In a listings syndication agreement, the MLS is typically sharing listing data, user IDs, and passwords that the data recipient should keep confidential except to the extent the agreement permits their disclosure. The data recipients are usually sharing little if any of their confidential information with the broker or MLS.

Some data recipient agreements address this issue in a way that that is good for broker and MLS. For example, one provides that data recipient

maintains the sole responsibility for protecting the licensed access to the [listing data and]... shall protect such access and shall safeguard and maintain its confidentiality.

Other concerns

Copyright and other intellectual property rights. Many agreements are silent on the question of who owns the intellectual property rights (copyrights, etc.) in the data content the MLS or broker is providing. An exceptionally good provision in one agreement reads that, as between the MLS and the data recipient, the MLS data is the “sole and exclusive property of” the MLS and its brokers.

“Perma-links” to listings on broker web sites. Syndicators often promise as part of their sales pitch that listing brokers will have “perma-links” on their listings through syndication. This means that when MLS sends a listing record to the syndicator, it includes a link back to the broker’s own web site and the page on it for that particular listing; any commercial distributor displaying that listing would include the link back to the broker’s site. (There are other ways of achieving perma-links; this is just one option.) Some brokers do not care about the perma-link concept, as they do not have web sites hosting their own listings. For other brokers, the perma-link concept is a critical part of distribution and syndication. Unfortunately, the issue often does not find its way into the agreement with the data recipient.

Exclusivity. One syndicator provides in its agreement that for the first year of its relationship with MLS, MLS “agrees not to provide any marketing or distribution assistance to any competing solution.” This amounts to an exclusive relationship. The syndicator may be justified in seeking a short-term exclusive if that is the only way it can rationalize the investment it will make in technology. MLSs generally view exclusive relationships with skepticism, however. This particular provision is distressing because the terms are not clear: What would constitute marketing or distribution assistance, and what criteria should one use to assess whether a solution ‘competes’ with this provider? (After all, there are meaningful ways in which the MLS is itself a syndicator.)

Future charges for the data recipient’s services. Many agreements do not address whether the data recipient may charge brokers for forwarding their data to the commercial distributors and whether the commercial distributors can charge brokers for displaying the brokers’ listings in the end uses. Charging is fine, but MLS should factor charges into its cost/benefit analysis of the deal and allocation of risks. One agreement provides, for example, that data recipient

may, but is not obligated to, publish all or any portion of the [listing content] and may reject or remove any portion of the [listing content from its sites] in its sole discretion.

This suggests that the data recipient could condition display of a particular broker’s listing data on payment of some fee or other consideration by the listing broker.

How and where disputes are resolved. The MLS or broker is wise to be concerned about how effective its efforts to enforce the agreement can be. Typical is an agreement that provides (where State X is the data recipient’s home state)

This Agreement is governed in all respects by the laws of the State of [X]... [and] all claims arising under this Agreement shall be brought exclusively in a... court in [State X].

The choice of law may be reasonable. After all, it would be difficult for the agreement to be governed by both State X's and the MLS's or broker's home state's laws. There is no reason, however, that a dispute must be held in the courts of State X. The MLS's or broker's home state courts and the federal courts there are well-accustomed to judging the rights of parties under the contract law of other states. The MLS or broker should be able to obtain a concession permitting either party to sue in its own home state.

Limitations on liability and remedies. The license agreements typically provide for significant limits on the liability the data recipient will incur. Sometimes these provisions are superficially mutual, meaning they apply to both the data recipient and the MLS or broker. Their practical effect may be to limit the MLS's and broker's remedies more significantly than they limit the data recipient's. For example, one agreement provides

[neither party shall be liable for] indirect, incidental, consequential, special or exemplary [punitive] damages.

It then goes on to limit direct damages, *except MLS's or broker's duty to indemnify the commercial distributor*, to \$5,000. The damages broker or MLS would sustain if a commercial distributor or syndicator misused the listing data would likely include substantial indirect and consequential damages, and if the data recipient violates broker's or MLS's copyrights in the data, broker or MLS might be entitled to punitive damages under the Copyright Act. This provision strips those remedies away from the broker and MLS. The limit of \$5,000 on direct damages effectively means that the commercial distributor can walk away from any wrong-doing by offering a \$5,000 check. The broker or MLS is putting one of its most precious business assets in the hands of the data recipient; it may have reason to be concerned if it cannot make itself whole in the event of misuse by the data recipient.

Similarly, one agreement provides that neither party shall be liable for

direct damages other than reimbursement of third party claims, however caused and on any theory of liability.

In short, one party cannot obtain damages for the other's wrong-doing. Again, most brokers and MLSs would think twice about such a provision once they recognized its impact.

Term of the agreement and termination. Many agreements provide that either party may terminate on 60 days' prior notice to the other. Some have longer terms, for example:

the initial term . . . of this Agreement shall be one (1) year . . . [and] shall automatically renew for successive one (1) year terms . . . unless a party notifies the other parties in writing not less than ninety (90) days prior to the end [of the current term] of its intention to allow the Agreement to terminate.

If the relationship sours, this provision prevents the MLS or broker from immediately terminating it.²

² We have been successful in negotiating hybrid approaches, where the MLS signs an agreement with a data recipient that has a longer term (a year or more) but any listing broker can withdraw authorization for display of its listings with little or no notice. In practice, it may be difficult for an individual broker to stand up to a commercial distributor if the broker's competitors can use the broker's opt-out against it.

Many agreements are silent on what happens to the broker's listing data in the event the agreement terminates. In most cases, the MLS or broker will want to require that the syndicators and commercial distributors subject to the agreement stop using the data if the agreement terminates.

Third-party beneficiaries. One syndicator provides that the commercial distributor to which it transmits data downstream is "designated a third party beneficiary of [this agreement] regarding [the listing data]." This means that the commercial distributor can actually sue MLS under the agreement if it believes MLS has offended *its* rights under the agreement; but MLS has no rights against the commercial distributor, which is not even a party to the agreement. A better provision is

The Agreement is not intended to benefit, nor will it be deemed to give rise to, any rights in any third party.

It is not unreasonable for data recipients to raise these issues and even to seek resolutions to them that are favorable to the data recipients. If MLSs do not review and negotiate these terms, however, they may be signing on to more risks than they anticipate.

Mitigating risks and costs

In most cases, the MLS's or broker's local counsel can review and revise the agreement proposed by the data recipient. Counsel's revisions will depend on a legal review and on input from the broker/MLS management regarding issues. Here is a checklist of items broker/MLS management and counsel should consider while negotiating with syndicators and commercial distributors. It is not a comprehensive list of items that a contract should contain, but instead as a list of items particular to this type of agreement.

MLS and brokerage management input

The MLS's management and leadership should consider the following issues before finalizing an agreement to distribute or syndicate listings:

- An MLS and broker should consider adopting a data use policy. This permits the data source to classify requests for data and impose appropriate conditions on them. For MLSs, it may also reduce antitrust risks by reducing the risk of actions that appear to be collective boycotts without rational bases.
- Understand the interests of the parties before entering the deal. Learn how the syndicator(s) or commercial distributor(s) involved in the deal expect to make their money. A good relationship should be reasonably profitable for all the parties, with no party suffering unacceptable losses or obtaining excessive windfalls on account of the others.
- MLS should assess brokers' support for distribution or syndication to balance it against the costs and risks for MLS.
- Will the data recipient pay MLS to offset its costs and risks?
- If the data recipient does not pay (or does not pay the full cost), how will MLS recover the costs of distribution or syndication? Will it charge brokers who use the service, or will it charge all brokers by absorbing the costs?
- How will broker/MLS deliver data to the data recipient? Will there be a cost associated with this solution?
- Does broker/MLS wish to be able to change the data delivery method at its discretion?

With what kind of notice to the data recipient?

- To what extent does MLS expect to receive support calls from brokers about the data uses contemplated in the agreement? To what extent does the broker expect to receive support calls from agents regarding the same subject?
- What responsibility should the syndicator and commercial distributors have for broker and agent support calls?
- Does broker/MLS expect data recipient to take any particular steps to protect security and confidentiality of MLS data?
- Does the syndicator or commercial distributor want an exclusive agreement with broker/MLS? What does the broker/MLS get in return? Do other data recipients offer similar services without exclusivity? Exactly what actions by broker/MLS are exclusive to this data recipient? How is the data recipient's competition defined?
- MLS must determine: Will brokers opt in to data distribution or opt out?
- If MLS is syndicating, will opting for distribution to one end use affect all other end uses, or will broker be able to make selections based upon each end use? Will MLS track brokers' selections or will a syndicator?

- Is the data recipient or commercial distributor promising 'perma-links' to brokers' web sites? If so, does broker/MLS technology provide the means for brokers to indicate the perma-link for each listing? Is this an important consideration in the agreement with the data recipient?
- The broker should consider: Must the broker pay the data recipient for syndication or commercial distribution services? Is a base-line of services offered for free, with premium or add-on services offered for a fee?
- The MLS may ask: Does the data recipient plan to charge brokers, now or in the future, for its services? Does MLS wish to be informed of charges, to have a say in establishing them, or to be able to terminate agreement if it does not agree with them?
- Acts on termination. Determine what happens to listing data on termination. Some MLSs figure the issue is between the listing broker and the data recipient, so the procedure for broker authorizations stays in place. Others figure the data recipient must destroy or return everything – if data recipient wants to use broker data from that point forward, it would have to get it from the brokers.

Legal issues checklist

The broker's and MLS's management and leadership should consider the following issues before finalizing an agreement to syndicate listings:

- Address the issues identified in "MLS and Brokerage Management Input" (above).
- If the broker or MLS has a data use policy, is this agreement consistent with it?
- Identify any sources of data in broker's or MLS's possession that may impose restrictions on distribution or syndication. A common possibility is a tax data provider that permits 'auto-population' of property tax data into MLS at the time a listing is put into

- MLS. Agreements of these providers often prohibit any 'down-stream' distribution.
- Define data recipient's permitted use in the very narrowest terms and expressly prohibit all other uses.
 - MLS can give listing broker power to authorize data recipient to make other uses. In that case, consider requiring that additional broker authorizations be in writing, that each authorization relates to one use, and that MLS can get a copy of the authorization (which will aid in MLS's efforts to enforce MLS copyrights, etc.)
 - Copyrights and intellectual property rights. Get acknowledgement from data recipient that as between broker/MLS and recipient, MLS, broker, or both own all right, title and interest in IP rights in data.
 - Confidentiality. Consider a provision making the MLS data confidential except to the extent the agreement permits its disclosure.
 - Assurances about updates. Consider requiring the data recipient to promise that status changes reflected in the data broker/MLS provides will be reflected within x hours on any sites and in any products to which data recipient supplies data.
 - Representations and warranties. Ideally, represent and warrant nothing about the data that broker/MLS cannot verify. An option is to represent that broker/MLS will not transmit content if it has actual knowledge that the content infringes, is inaccurate, or violates any law.
 - Disclaimer of warranties by broker/MLS. Disclaim all warranties about the listing data, including accuracy, compliance with law, non-infringement, timeliness, etc., except to the extent broker/MLS has expressly warranted any of these things.
 - "As is" and "as available." Ideally, get data recipient to acknowledge that broker/MLS provides data on an "as is" and "as available" basis.
 - Disclaimer of warranties by the data recipient. Read carefully to see whether these disclaimers too greatly limit broker/MLS's remedies.
 - Indemnifications. Check to make sure broker/MLS does not indemnify for anything outside its control. Identify permissible indemnitees. Check to see whether liability for indemnification is limited elsewhere; such limitations often gut the effectiveness of the indemnification.
 - Liability limitations. Check to see whether a limit of liability is imposed. The broker/MLS may want to seek incidental, special, consequential, and exemplary damages and may want no cap on direct damages. If data recipient balks, broker/MLS may be able to get the limitations removed at least with regard to unauthorized disclosure of listing data by data recipient.
 - Exclusivity. Consider whether any exclusivity provisions are unreasonable restraints on trade. Consider term and rationale of exclusivity carefully.
 - Choice of law. Generally one U.S. state or another. Most states do not provide special problems, though broker/MLS may wish to think twice about using law of states (like Virginia) that have adopted part or all of the UCITA, unless broker/MLS's counsel is familiar with the implications.
 - Venue for disputes. Consider whether a 'file at home' or 'file and fly' provision makes most sense. Is it reasonable for data recipient to expect disputes to be handled in data recipient's home town?

- Term of the agreement. A 'short fuse' – say, termination for convenience on 60 days' notice – goes a long way to ensure that broker/MLS is not 'trapped' into an unexpected use. Note that political forces within an MLS may make it very difficult to exercise the option to terminate; for example, brokers may become reliant on the data syndication and may strongly object.
- Third-party beneficiaries. Ideally, avoid inclusion of any third-party beneficiaries. Consider carefully the kinds of claims that third-party beneficiaries could bring if the data recipient insists on third-party beneficiary inclusion.

Conclusion

Brokers and MLSs considering listing distribution and syndication deals should review the issues this whitepaper identifies and make sound business decisions based upon them and upon other broker and MLS business considerations. In many cases, brokers and MLSs will be able to address their concerns through contract negotiations with the syndicators and commercial distributors with whom they will work. Ultimately, some listing brokers may decide that the demands of data recipients are too great. MLSs may also conclude that certain agreements are just not reasonable for the MLS. Even there, MLSs that are unprepared to provide active assistance to brokers in distributing and syndicating listings can still offer passive assistance. For example, some MLSs have created 'drop-box' data feeds, allowing the broker to control parties with access to them.³

It is critical to remember that one size does not fit all. Brokers and MLSs should examine costs and benefits of distribution deals and negotiate terms for them that fit their needs.

Disclosures and more information

This whitepaper is not intended as professional advice; seek competent legal, accounting, and other professional counsel with regard to your business needs. If you have any questions or suggestions regarding this whitepaper, or if you are interested in professional services relating to listing distribution and syndication, please contact Brian Larson at BLarson@LarsonLegal.com or 612.424.8661.

This whitepaper may constitute advertising by a law firm under the laws of some jurisdictions. Brian N. Larson is admitted before the bar in Minnesota, and Elizabeth Sobotka is admitted before the bar in California and Minnesota. They do not purport to be licensed in any other jurisdictions. The Law Office of Brian N. Larson may be able to provide legal advice regarding the matters presented in this whitepaper to clients in jurisdictions other than Minnesota and California, but it may not be able to handle matters that would require personal presence in other jurisdictions or that would require an appearance before the courts in other jurisdictions.

³ In a drop box arrangement, the MLS feeds data to an FTP directory or creates a limited RETS access with the listings of a single broker and then tells the broker, "You can provide access to this feed/directory to anyone you want, but you agree not to hold the MLS responsible for any of the results." Usually, the MLS will ask the broker in this situation to sign a 'data release agreement' or the like.

The Larson law firm provides professional consulting services that do not require the practice of law through its consulting subsidiary, Larson/Sobotka Business Advisors, LLC.

Other resources

National Association of REALTORS®, *2008 Handbook on Multiple Listing Policy*. Available on NAR's [password-protected member site](#). Addresses the policy issues surrounding use of broker listings.

Linda Rohrbaugh, *Data Distribution on the Web* (Real Estate Industry Solutions, LLC 2007). The document, which is an excellent and detailed analysis of the agreements of numerous data recipients, is available from REIS at www.reisinnovations.com. REIS is a subsidiary of the Florida Association of REALTORS®. For more information, contact REIS at (888) 784-5404 or info@reisinnovations.com. Note that the data recipient mentioned in Ms. Rohrbaugh's paper may have changed the specific provisions she analyzed in it.

Syndicator web sites:⁴

- [Cyberhomes](#)
- [Point2](#)
- [SubmitYourListings](#)
- [ThreeWide Corporation](#)

⁴ This is by no means a complete listing of syndicators. If you are aware of a syndicator not appearing on this list, please bring it to our attention so that future revisions of this whitepaper can include it.