

CONTENT MANAGEMENT BEST PRACTICES



CMLS BEST PRACTICES GUIDE FOR THE MLS

CMLS Best Practices bring together emerging and proven practices from across real estate to align and advance professional standards within the MLS industry.

Published By:
Council of Multiple Listing Services
1000 N. Green Valley Parkway #440-583
Henderson, Nevada 89074
cmls.org / 877.505.8805



“Content isn’t king.
It’s the kingdom.”

— Lee Odden

CMLS

BACKGROUND

CMLS Best Practices began as a work group initiative that grew out of an idea submitted in 2013. From that initial work group spark, the group curated the best ideas submitted by attendees, added policies and procedures gathered from CMLS members, and recruited Ann Bailey of Pranix Inc. to refine, organize, and add further insights. The result was the publication of seven documents capable of guiding any MLS organization to meet industry standards and recognized benchmarks.

The objective of these documents is to help MLSs of all sizes make the market work by encouraging them to adopt the best practices of a community that consists of leading MLSs and business partners. In sum, best practices help MLSs and customers succeed.

In an effort to assist MLSs to meet the growing complexities of content management, CMLS began work on a new comprehensive document designed to help MLSs understand the types of content, sources of content, and legal considerations of acquisition, protection, and distribution. The idea originated with an organization that advocated for real estate intellectual property rights and copyright best practices.

The result was the creation and publication of the Content Management document, a guide to information included in a real estate listing, provided to an MLS, or otherwise provided to participants and subscribers through an MLS-facilitated relationship. Its development was spearheaded by Mitchell Skinner, an attorney and managing member of Larson Skinner, members of the CMLS executive team, and CMLS staff.

DEVELOPMENT

More than a dozen attorneys, content management experts, and MLS professionals are responsible for the development of the Content Management Best Practices Guide. For a partial list of contributors providing research, insight, and authorship, please see the references. Thank you.

CONTENTS

OVERVIEW	5
CONTENT ORIGINS	6
Content Sources	6
Content Types	7
CONTENT ACCEPTANCE	9
Driving Considerations	9
Legal Considerations	10
Agreements	14
Assignments/Licenses	15
Participant/Subscriber Agreements	15
Direct-To-MLS Third-Party Content	16
Professional Media	17
Input Methods/Strategic Considerations	19
Default MLS Input	19
Alternative Input	19
Direct-To-MLS Third-Party Auto-Input	19
CONTENT DISTRIBUTION	21
Key NAR MLS Considerations	21
General Contracts And Licenses	22
MLS Content Distribution For Participants	26
NAR MLS Policy Terms	26
Defining Participants	26
IDX	27
VOW	28
Valuation Use	29
Back Office Data Licenses	31
Participant-Directed Use	31
MLS Content Distribution To Third Parties	32
CONCLUSION	35
APPENDIX A - Aggregated Best Practices	36
APPENDIX B - Sample Content Flowchart	38
APPENDIX C - Sample Licensing Grid	39
APPENDIX D - References	43



OVERVIEW

Content management is a critical foundational element for multiple listing services (MLS) to provide services. It is incumbent upon each MLS to have a strong understanding and think critically about its content management practices. This document was developed to help MLS leadership achieve that objective.

This document uses the word “content” to describe information that is included in a real estate listing, provided to an MLS, or otherwise provided to participants and subscribers through an MLS-facilitated relationship (e.g., MLS licensing public records that it provides to participants and subscribers).

Legal issues will be addressed from a high-level perspective as they pertain to certain aspects of content management. **However, this document is not intended to be, nor should it be, regarded as legal advice.**

This document reviews the sources and types of content. From that foundation, it addresses MLS content acceptance, which includes a review of the legal considerations and mechanics of content acquisition. It further reviews general, overriding considerations for MLS content distribution, content distribution on behalf of participants, and content distribution to third parties.¹

This document also provides an aggregated list of the suggested best practices; a sample MLS content distribution flow chart; and a sample grid for content distribution considerations.

1. Cf. National Association of REALTORS®, Handbook on Multiple Listing Policy 6 (31st ed. 2019) [hereinafter NAR MLS Handbook] (Listing data content “includes, but is not limited to, photographs, images, graphics, audio and video recordings, virtual tours, drawings, descriptions, remarks, narratives, pricing information, and other details or information related to listed property.”)

CONTENT ORIGINS

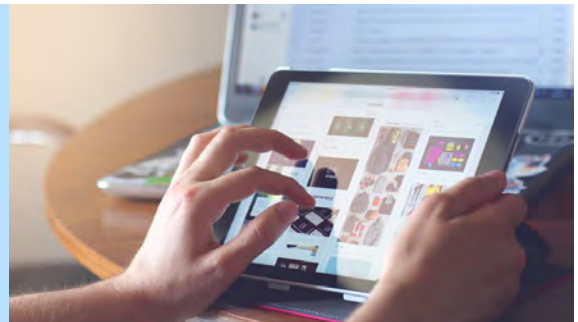
It is essential for MLS leadership to consider content sources and types. By better understanding where content originates (if not the source), leadership can better understand risk allocation regarding the content.

MLSs receive various types of content from many different sources — some sources with which MLSs have a direct relationship and others with which they do not. Each MLS should have a clear understanding of its content sources and types. Doing so better ensures proper downstream decisions, such as how the MLS, participants, subscribers, and third parties may use the content.

Content Sources

Best Practice

- **Understand content sources.**



Each MLS should determine where the content it receives may have originated. Likely sources include participants, subscribers, homeowners, professional media sources, governmental organizations, direct-to-MLS third-party content providers, and past listing information.

“Participants” in this document are defined as the individual broker, which is sometimes referred to as the designated broker or broker-in-charge, and the actual brokerage office or firm for which the broker works. Office or firm is also included in “participant” to consider content that the business entity itself may own. Depending on the structure of the given brokerage and individual MLS policy, such participants may be defined as the office (in the case of some franchises) or a top-level business entity (such as national brands).²

“Subscribers” are defined as the salespeople that work for the participant. They are likely independent contractors but may also be employees. Any other non-salesperson employees or independent contractors that have access to the MLS are included as subscribers. (After all, those non-salesperson employees may also provide content to the MLS.)³

². *But see* NAR MLS Handbook 3 (defining “participant” for NAR-policy purposes).

³. *But see id.* 4 (defining “subscriber” as including only licensees and appraisers for NAR policy purposes).

“Homeowners” are those individuals who own the home. In particular, it focuses on the home-seller as potentially providing content that makes its way to the MLS.

“Professional media sources” include photographers, videographers, virtual tour companies, and companies that otherwise produce media for a real estate listing.

“Third-party content providers” includes those companies with which the MLS enters into an agreement under which the MLS receives or otherwise facilitates distribution of content provided by the third party. Examples include third parties that provide tax, statistical, neighborhood, commute, and homeowner information. While content may originate one or more steps removed from this source, it can be treated as its own source unless otherwise specified.



“Governmental organizations” includes those entities such as county assessors and recorders from which the MLS may directly or indirectly procure content. Governmental organizations are sometimes the ultimate sources of content, like property tax records, that the MLS or brokerages may obtain from third-party content providers.

“Past listing information” includes any information in the MLS’s systems that is part of an off-market listing and may be included in a new instance of a listing for the same property. While it’s not a direct source, and likely populated from the other sources, it provides some unique considerations and should therefore be treated as a separate source. Again, while content might originate a step away from the source, it can still be treated as the source for the purposes of this document.



The preceding sources may also originate or otherwise provide various types of content to the MLS, described in the next section.

Content Types

Best Practices

- Understand content sources.
- Understand what content is subject to copyright.
- Understand that content, regardless of copyrightability, might have contractual limitations.



MLSs handle, distribute, or otherwise facilitate access to various types of content. One way to categorize content is to view it as media, property facts, public records, and written narratives.

“**Media**” includes photos, videos, virtual tours, and other similar content. Such content is almost always subject to copyright protection.⁴ While outside the scope of this document, manipulated media (such as virtually staged images that add furnishings or design accents) is a growing concern for many MLSs and warrants thoughtful consideration.



“**Property facts**” include factual information about a property, such as the number of bedrooms, number of bathrooms, square footage, and other factual information. Factual information is not subject to copyright.⁵

“**Public records**” are a subset of property facts in that they are factual, but they also likely include information the government uses to identify property owners, liens, and taxes. Sometimes this includes the legal description of a property, title information, tax information, and other similar content. This information is likely not subject to copyright.⁶

“**Narrative**” content refers to any free-form writings about a property. Examples include any property description and agent remarks fields. It may also include any script used to narrate media such as video tours. This content is almost always subject to copyright.

There may be other content that an MLS handles, distributes, or facilitates access for.



While the focus of this document is on listing content, “other” content may include, among others, participant information, subscriber information, participant and subscriber directly generated content (such as saved searches), user (participant, subscriber, client, or public) behavioral information, various types of maps, GIS information, neighborhood information, school information, and other community related information. While outside the scope of this document, personally identifiable information also warrants thoughtful consideration.

Content subject to copyright, such as photos and videos, warrants some special considerations, given the rights copyright law confers on owners of copyrighted works. All content may also have limitations on its use, especially if the content is provided under a contract that includes such limitations. This document addresses such special considerations in detail.

4. Copyright Act of 1976, 17 U.S.C. § 102(a); Brian N. Larson & Mitchell A. Skinner, *Real Estate Listings & Copyright* 18 (2016) [hereinafter Larson & Skinner].

5. 17 U.S.C. § 102(b).

6. LARSON & SKINNER, *supra* note 4, at 18.



CONTENT ACCEPTANCE

After an analysis of the content sources and types, an MLS needs to consider how it receives content. Specifically, an MLS should understand the relationships it has with content sources. It must ensure that it can use the content it receives. The MLS must seek, at minimum, assurances from any content providers that it has a license to use such content for MLS-provided services.⁷ This is a minimum standard. Most organizations seek broader licenses or assignments.

The next section focuses on general, driving, and legal considerations for content inputs as well as the means by which such content may be provided to the MLS. It also details any strategic considerations related to the content.

Driving Considerations

Best Practice

- **Have a clear understanding and categorization of MLS content uses.**



Every MLS must consider how it uses content, plans to use content, and ensure it has adequate rights to such content. Ideally, the desired use of the content drives which content rights an MLS receives.

⁷. See Larson & Skinner, *supra* note 4, ch. II.

Sometimes this ideal scenario is flipped on its head: The content provided to the MLS falls under a restrictive license or the license restricts use of the content (because the desired use did not drive the terms of the license). One example includes public records that are provided under a limited license. Such public records might be subject to downstream uses limitations thus limiting how an MLS can use the public records.

In the Legal Considerations section, let's make two assumptions: First, an MLS is seeking broad licenses for content it receives. (Many MLSs will seek a very broad license for content that is contributed to its database, with an understanding that MLS rules limit MLS content use.) Second, use of content follows NAR policies.

For an in-depth conversation of NAR MLS policies, see Key NAR MLS considerations, page 21.

Legal Considerations

Best Practices | Agreements

- **Protect the MLS from claims that the MLS cannot use content.**
- **Protect participants and subscribers from claims that they cannot use content**



An MLS should consider typical contract terms when establishing content use agreements. Terms are available in the *CMLS Legal Best Practices*⁸. However, keep the following in mind when accepting content:



- MLSs must ensure they have sufficient rights to use content in their operations.
- MLSs should mitigate their risk and also the risk of their participants and subscribers. This can be done through warranties regarding the content provided and through indemnifications in the event a warranty is breached.

Certain agreements may warrant some special considerations. (Certain aspects of agreements with participants, third parties, and media will be provided for in more detail following an overview of basic assignment and licensing considerations.)

⁸. Council of Multiple Listing Services, “CMLS Best Practices: Legal Best Practices” (March 2018) [hereinafter CMLS Legal Best Practices].



Best Practices | Assignment/License

- **Protect the MLS from claims that the MLS cannot use content.**
- **Protect participants and subscribers from claims that they cannot use content.**

If there is copyrightable subject matter⁹ in the content (i.e., photos, videos, narrative text), the MLS must determine whether to seek a copyright assignment or a license to the content. The bottom line: The MLS needs agreements that allow it to use content in the services the MLS provides. An MLS may get those permissions by either getting an assignment of content or a content license.

An **“assignment”** is a transfer of all copyright ownership and rights. A **“license”** leaves copyright ownership with the licensor but grants permission for the licensee to use the content, usually subject to some limitations. (Some agreements also license rights back to the assignor). What truly matters is not whether the agreement is made with an assignment or license, but rather exactly how any terms or limitations are defined.

While this document will not delve into situations where an MLS seeks an assignment to create copyright portfolios¹⁰ (to limit unauthorized use of content), it should be understood that if an MLS acquires ownership of any content, then ownership should be sufficient for the MLS to use the content for providing all services.

Regardless of whether or not the content is subject to copyright, any MLS seeking a license should receive terms that clearly permit use of the content. Specifically, the license should specify what content is licensed and how the content may be used.

⁹. According to the Copyright Act of 1976, 17 U.S.C. § 102(a), copyright subsists “in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a **machine** or **device**.” See Larson & Skinner, *supra* note 4, at 16–20 (discussing copyrights in works related to real estate listings).

¹⁰. See, *generally*, CMLS Legal Best Practices, *supra* note 8.



When negotiating a license, keep the following license provisions in mind.

Provisions for Licenses

Licensed Content	What content is being licensed to the MLS?	e.g., photos, videos, text, factual information, user information, etc.
Exclusive Rights Licensed	If the content is subject to copyright, which of the exclusive rights of the copyright owner ¹¹ are being licensed?	e.g., reproduce,” “create derivative works,” “distribute,” “perform,” etc.
Description of Use	What kinds of things may the MLS do with the content?	e.g., “marketing listings for sale,” or “for any commercial or personal use”
Duration	May the MLS use the content only during the term of some agreement, or is the permitted use forever?	e.g., “during the term of this agreement” or “perpetual”
Exclusivity	Is the licensee the only entity that can use the material within the scope of the license, preventing even the owner from using it, or is the license non-exclusive?	e.g., “non-exclusive” or “exclusive”
Geographic Limitations	Can the licensee use the content everywhere in the world or just in some limited geography? (This can be a complicated issue where the Internet is concerned as most websites have a global reach.)	e.g., “worldwide” or limited to a geographic jurisdiction
Assignability	Can the licensee assign its rights in the license to someone else?	e.g., “transferable” or “non-transferable”
Sublicensable	Can the licensee share its rights with others?	e.g., “right to sublicense through multiple tiers”
Revocability	Can the licensor revoke the license, and if so, under what circumstances?	e.g., “revocable” or “irrevocable”

A reading of those license terms, particularly in conjunction with the MLS uses of content as provided for in *MLS content distribution to and on behalf of participants* and *MLS content distribution to third parties*, underscores why MLSs need broad licenses to operate.

¹¹ 17 U.S.C. § 106. These include the right to make copies (including computer copies), to distribute, and to display copyright-protected works, among others.

Now review the license terms again, with additional annotations and detailed considerations for “inbound” MLS licenses.

Provisions for Inbound MLS Licenses

Licensed Content	What content is being licensed to the MLS?	e.g., photos, videos, text, factual information, user information, etc.
-------------------------	--	---

INBOUND: The MLS will likely want a broad description of content provided to the MLS, which might describe the licensed content as *any* content provided to the MLS by or on behalf of the licensor.

Exclusive Rights Licensed	If the content is subject to copyright, which of the exclusive rights of the copyright owner are being licensed?	e.g., reproduce,” “create derivative works,” “distribute,” “perform,” etc.
----------------------------------	--	--

INBOUND: The MLS will likely exercise many applicable copyright rights – reproduction, creation of derivative works, distribution, and public display – in provision of MLS.

Description of Use	What kinds of things may the MLS do with the content?	e.g., “marketing listings for sale” or “for any commercial or personal use”
---------------------------	---	---

INBOUND: The MLS should consider a license to use content for any services the MLS provides in tandem with any MLS rules as they exist or are modified from time to time. This would permit the MLS to use content in any service it provides to participants and subscribers. If the MLS plans to distribute content outside that group, the license should have a broader description of use.

Duration	May the MLS use the content only during the term of some agreement, or is the permitted use forever?	e.g., “during the term of this agreement” or “perpetual”
-----------------	--	--

INBOUND: The MLS will likely want to use content in some way, shape, or form without any time restrictions. This is true even where the license might be limited in time. For example: The MLS may license access to public records through a third-party content provider. When the agreement ends, access to the records will also end. If participants and subscribers have “auto-populated” content from those records into listing records, the MLS would likely need the license to that content to include a time extension for as long as it keeps the listing records.

Exclusivity	Is the licensee the only entity that can use the material within the scope of the license, preventing even the owner from using it, or is the license non-exclusive?	e.g., “non-exclusive” or “exclusive”
--------------------	--	--------------------------------------

INBOUND: While it is possible for an MLS to take an exclusive license, it is not necessary and can create complications. For example: Most MLSs take the position that a participant may use listing content that it contributes as it sees fit. This includes marketing properties. If the MLS had an exclusive license, then the participant’s future use would require MLS permission, even if the participant contributed the content.

Geographic Limitations	Can the licensee use the content everywhere in the world or just in some limited geography? (This can be a complicated issue where the Internet is concerned as most websites have a global reach.)	e.g., “worldwide” or limited to a geographic jurisdiction
-------------------------------	---	---

INBOUND: Most MLSs will not want geographic limitations given their systems may be accessible from any state or country.

Assignability	Can the licensee assign its rights in the license to someone else?	e.g., “transferable” or “non-transferable”
----------------------	--	--

INBOUND: Most MLSs will want the ability to assign license rights in the event of a merger or another consolidation. However, it is not uncommon for some licensors to require written agreement before assigning a license.

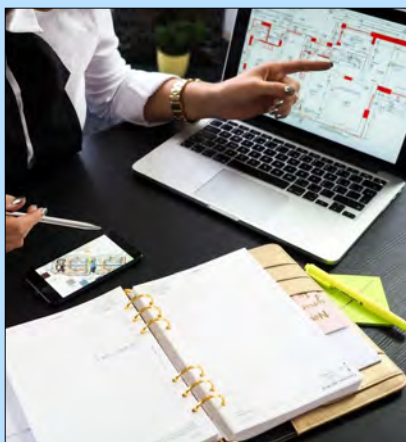
Sublicensable	Can the licensee share its rights with others?	e.g., “right to sublicense through multiple tiers”
----------------------	--	--

INBOUND: Some of the most common uses of MLS content require sublicensing such as to an MLS system provider, and to participants’ and subscribers’ IDX and VOW vendors. ¹²

Revocability	Can the licensor revoke the license, and if so, under what circumstances?	e.g., “revocable” or “irrevocable”
---------------------	---	------------------------------------

INBOUND: MLSs require certainty that they may continue to use listing content. A revocable license could create major issues for an MLS.

Be mindful of licensing considerations while reviewing content acceptance.



Best Practices | Participant/Subscriber Agreements

- **MLSs should determine whether they are seeking assignment of content or not.**
- **If an MLS is seeking assignment of content, review NAR policies regarding participant rights.**
- **MLSs should have clear, broad licenses to use content.**
- **MLSs should establish risk allocation provisions for the protection of the MLS and its participants and subscribers.**

¹². See the further discussion of these uses in *MLS content distribution to and on behalf of participants*, on page 26.

An MLS needs agreements with its participants and subscribers to ensure the MLS is aggregating all necessary rights to use content. Such agreements clarify the rights and obligations between the parties. They also establish risk-allocation provisions among the MLS and its participants and subscribers.

Structurally, agreements with participants, subscribers, or both may be handled in various ways. Some MLSs have separate agreements for participants and subscribers. Others have a blanket agreement. Additionally, each agreement may be implemented through several methods: a traditional signature, e-signature, EULA,¹³ or otherwise.

In participant and subscriber agreements, the MLS should consider whether it is seeking assignment of content, a license to content, or either in conformance with MLS rules. The MLS should also consider how it will communicate with its participant and subscriber base about the agreements and potential options within those agreements.

If the MLS is seeking assignment, note that NAR Policy requires the MLS to give a participant a choice whether to assign content to the MLS. It cannot be a condition of participation.^{14,15}

If the MLS is seeking a license, most MLSs will seek a broad license that is then tailored to conform to MLS rules. This allows the MLS to adjust the MLS rules at its discretion without needing to continually update licenses.

To ensure proper risk allocation, MLSs should ensure that participants and subscribers are providing content to which they have appropriate rights to provide to the MLS. Such promises usually occur through representations and warranties to the MLS. Additionally, MLSs need participants and subscribers to protect the MLS *and* other participants and subscribers in the event they provide content that causes a third-party claim such as a copyright infringement claim. Such promises to protect are delineated in indemnifications.¹⁶

13. MLSs should seek legal counsel if they're contemplating an agreement via "click-through" to ensure there is clear "assent" of the parties to enter into a contract.

14. See NAR MLS Handbook, supra note 2, at 31 (Policy Statement 7.85: "Participants cannot be required to transfer ownership rights (including intellectual property rights) in their listings or listing content to MLS to obtain or maintain participatory rights except that MLSs may require participants to grant the licenses necessary for storage, reproduction, compiling, and distribution of listings and listing information to the extent necessary to fulfill the defined purposes of MLS.")

15. Additionally, MLSs seeking registration of the compilation copyright in the MLS database should consider assignment of participant and subscriber changes to the *compilation* (the selection, coordination, and arrangement of content), which is distinct from the content itself the participants and subscribers provide.

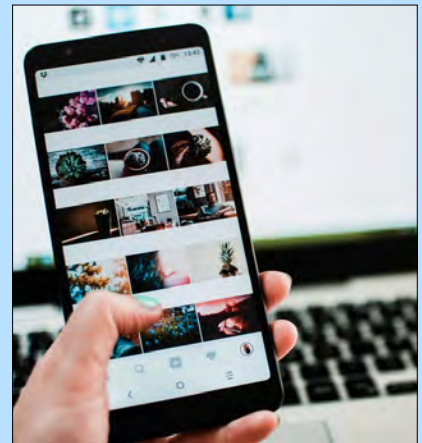
16. See *id.* ("MLSs may also require participants to warrant that they have the rights in submitted information necessary to grant these rights to MLS.")

Participants and subscribers may provide media, property facts, and narrative content created by the participants or professional media sources. Some content is likely subject to copyright, which carries certain risk if proper permission is not secured from the content owner.¹⁷ It's important for participants and subscribers to understand the rights they're promising to grant to the MLS so they can have adequate agreements with any third-party sources.

Communication is key for the smooth implementation of participant and subscriber agreements. The MLS should consider circulating draft agreements to its leadership (and leading brokerage firms) prior to finalizing an agreement for implementation. Similarly, MLSs should make sure they educate participants and subscribers as to why the MLS is implementing the agreements.

Best Practices | Direct-To-MLS Third-Party Content

- **Ensure the ability to use content for the defined purposes of MLS.**
- **Understand all limitations on use of some content.**
- **Consider the ability to remove content if it does not have a broad license.**
- **Consider complications with software agreements, such as end-user license agreements.**



The third-party provision of content to MLSs creates some unique issues to address in agreements with third parties. Third parties often provide property facts, factual information (such as community statistics), and public records content. MLSs should consider whether third-party content is incorporated into its listings, its reliance on the third-party content, unique types of third-party content to which the third party is just an intermediary, and the potential impact of third-party end-user license agreements (EULAs).

There are unique considerations for MLSs using systems that insert third-party content into the listings.

One common example: An MLS works with a third party to “auto-populate” public records information into listings. When the content is co-mingled with a listing, the MLS must carefully consider its license to the “auto-popped” content. Depending on the scope of the license, it has to consider its ability to remove the content from the listing.

¹⁷. *Who Owns Your Property Photos?*, National Association of REALTORS® (Nov. 9, 2016), <https://www.nar.realtor/legal/copyright/who-owns-your-property-photos>. and See Larson & Skinner, *supra* note 7, at 23.

MLSs that do not have the capability (or desire) to remove content will need a very broad license. After all, an MLS needs to distribute listings as permitted by its rules, and participants will market their listings according to their business discretion. Another consideration is what happens to auto-popped content used in listings that have been shared (such as valuations or consumer-client reports) by participants and subscribers. The MLS needs to know how those off-market listings will be used even if the relationship between the third-party content provider and the MLS has ended.

MLSs should also consider their reliance on third-party content providers to understand what steps they must take if they lose rights or a relationship ends. If the MLS does not receive a broad (i.e., perpetual) license to co-mingled third-party content, it will need to remove that third-party content from listings. If the content is to be removed, the MLS will need to determine what happens to the affected listings and how it might repopulate lost information. The takeaway here is to consider all options when relying on third-party content to power mission-critical components of business.

In fact, third parties may provide unique types of content to the MLS for which the third party does not have broad rights. For example, MLSs are often twice removed from the originators of geocodes (a third-party contract to get geocodes from another party). These twice-removed content sources may come with restrictions that are passed through to the MLS. MLSs should request the ability to review any such agreements to understand how those restrictions might apply to the MLS.

MLSs should be mindful of any end-user license agreements (EULAs) introduced or required by third parties, and this applies to more than content use. All EULAs that participants and subscribers agree to may include additional obligations or requirements.

An MLS should verify that third-party EULAs do not circumvent the terms for which the MLS negotiated. Likewise, the MLS should verify there are no unexpected obligations placed on participants or subscribers in a EULA. An MLS does not want to create risk for participants and subscribers using products the MLS provides.



Best Practices | Professional Media

- **Consider the role of participant/subscriber agreements when participants and subscribers are providing professional media.**
- **Educate participants and subscribers regarding the use of professional media.**
- **Consider a direct license or assignment from all media companies.**
- **Ensure the MLS is receiving necessary rights (and that the MLS does not exceed rights in outbound licensing).**

Many participants and subscribers will use companies and professionals to create media content — photos, videos, and similar creative works — for participant and subscriber listings. Because participants and subscribers use content created by these professionals, MLSs should consider any impact created by participant and subscriber agreements and MLS educational efforts whether or not the MLS seeks direct licenses from professionals. It should also assess its content uses as it applies to these agreements.

MLSs should ensure that participant and subscriber agreements include appropriate warranties and indemnification that survive termination or expiration (for content the participant and subscriber provide to the MLS). This protects the MLS and its participants and subscribers. This is especially important when the MLS is one step removed from the content source. Even if the MLS is second or third in a chain of licenses or assignments, it should ask the party providing the content to consider the original source because that party is in the best position to know any license terms.

MLSs are responsible for educating participants and subscribers on which rights they need to secure from professional media sources when using content in their businesses or passing the content along to the MLS. For example, participants and subscribers need content licenses that allow the MLS to use the content. If the participants or subscribers are securing assignments of content from professional media sources, then participants and subscribers need to



be assured that they have adequate rights to use content. NAR created further information on this topic ¹⁸ and promulgates sample agreements ¹⁹ among participants/subscribers and professional media companies.

Another consideration adopted by some MLSs, is to create programs under which media professionals (photographers in particular) provide content direct to the MLS. The potential benefit to the MLS is that this would create a direct relationship with the photographers, ensuring sufficient licenses or assignments. Not only does this reduce potential risk, it also encourages the use of technology systems for the streamlined provision of content to the MLS.

The photographer also benefits from such a system because it could create marketing opportunities for the photographer while improving the efficiency of the content being provided. Whether an MLS decides to set up such a system will likely depend on participant and subscriber goals, the amount of content provided, and the marketing opportunities an MLS would provide for media professionals in a given market.

¹⁸. *Who Owns Your Property Photos?*, NATIONAL ASSOCIATION OF REALTORS® (Nov. 9, 2016), <https://www.nar.realtor/legal/copyright/who-owns-your-property-photos>.

¹⁹. *Listing Photo Sample Agreements*, NATIONAL ASSOCIATION OF REALTORS®, <https://www.nar.realtor/legal/copyright-trademark/listing-photo-sample-agreements> (last visited Feb. 25, 2019).

Input Methods And Strategic Considerations

Best Practices | Default MLS Input

- **Require participants and subscribers to agree to a participant or subscriber agreement or an end-user agreement (EULA) before accepting content.**
- **Request documentation of acceptance.**



Most content entered into the MLS is submitted through a primary input module (sometimes referred to as “add/edit”). Many MLS systems also enable an MLS to add a EULA, which must be accepted before using the input module or the MLS system itself. The key is that the participant, subscriber, or end user must approve the agreement before adding any content to the MLS system.

An add/edit module can be a strategic place for an MLS to include a subscriber agreement. If the MLS has specific content acquisition goals and the technological capability, the MLS can even display a participant-specific agreement for participants and subscriber-specific agreement for subscribers.²⁰

When requesting a user to accept a EULA, the MLS should include a mechanism that tracks what a particular participant or subscriber has agreed to the EULA and when they have agreed to it. The MLS should also consult with legal counsel to determine what information should be collected related to the EULA acceptance in order to ensure it’s an effective, binding agreement between the participant or subscriber and MLS.



Best Practices | Alternative Input

- **If an MLS is going to offer an alternative input system, consider the implications for content management.**
- **If MLS is going to offer an alternative input system, consider adopting standard terms offered for integration to MLS system.**

As MLS technology and standards progress, there are more discussions about developments that could enable content-input methods to occur outside of the default MLS input module.

²⁰. A little further explanation here – under NAR policy participants are given the choice to assign content or not. See *supra* notes 14–16.

Such systems have advantages to participants who participate in multiple MLSs that implement the same alternative input system. These secondary input systems may provide more functionality or control options for participants. They may also increase competition among MLS vendors. Conversely, such systems can also create strategic challenges for the MLS, specifically as it relates to content.

If the MLS is going to implement an alternative-input system, consider the following.²¹

Business rules license scope. An MLS may consider the business rules and logic that underlie its input module as proprietary content. If it does, the MLS can then secure a clear license with the third-party vendor that includes how it must and may use the business-rules information that the MLS provides.

Listing content license to vendor. The MLS should consider the scope of the listing-content license it provides to the vendor including what services the vendor may provide under the license.

Vendor-facilitated implementation of MLS EULA/participant/subscriber agreements. If the alternative add/edit system can bypass the point in the MLS system where the MLS requires participants and subscribers to agree to license agreements,²² then the MLS should work with the vendor to facilitate the participant and subscriber execution of that document before adding content through a vendor's system.

Vendor EULA. If the vendor has its own EULA, then the MLS should review any contractual limitations with the vendor, including what it can require from participants and subscribers. This is important to ensure a vendor-delivered EULA doesn't circumvent MLSs expectations and rules.



If the MLS implements alternative input systems, it should also consider what baseline terms are required to integrate with the MLS system and offer those terms to all alternative input systems. Doing so could lead to increased third-party vendor competition, creating value for the MLS ecosystem along with participants, subscribers, and their clients. Benefits include increased options, quality of products, and innovation.

Direct-To-MLS Third-Party Content Auto-Input

As noted, if content entering the MLS database is integrated with other content, such as listings, it is imperative that the MLS secure a very broad license to that content or the technological means to filter that content out.

²¹. Of course, the MLS should consider other aspects outside the scope of this document, such as non-disclosure terms, a tight description of the vendor product, vendor compliance with MLS rules, requirements regarding the contractors the vendor employs, and other typical contract terms.

²². For example, if an MLS implemented an alternative add/edit system and enables participant back office systems, it is possible that participants and subscribers would not enter into MLS provided systems that facilitate agreement to a participant or subscriber agreement.



CONTENT DISTRIBUTION

Many MLSs are owned by REALTOR® associations, which means they are affiliated with the National Association of REALTORS®. As such, they are subject to MLS policy provided in the *NAR Handbook on Multiple Listing Policy*.²³ NAR-affiliated MLSs receive NAR-provided insurance coverage provided the MLS's policies are compliant with NAR MLS policy. (MLSs have the opportunity to purchase extended coverage.)

Key NAR MLS Considerations



Best Practices | Distribution

- Follow NAR policy, if MLS is NAR affiliated.
- If MLS is not NAR affiliated, use the NAR-like policy as a default and only deviate from it after legal review.
- Understand the two key questions under NAR policy for content use.

NAR MLS policy is vetted by NAR member experience, engagement, and legal staff. The policies generally reduce some risk inherent in the operation of an MLS business. This is one reason why MLSs that are not required to follow NAR MLS policy should consider adhering to policies that are similar to it. Following NAR MLS policy allows MLSs to leverage an MLS policy that has undergone significant legal review. Of course, non-NAR-affiliated MLSs can depart from NAR policy, but such MLSs should seek attorney review for any legal risk incurred by an MLS following such a departure.

²³. See, generally, NAR MLS HANDBOOK, *supra* note 2.

NAR MLS policy sets parameters around how an MLS may use listing content. There are two questions that determine how an MLS should handle listing content use and distribution:

- (1) Is the use for a defined purpose of an MLS? This will dictate the content set that is provided for a given use.
- (2) Is the use requested by a participant (or its affiliated subscriber)? This will determine whether a given content use is even permitted (e.g., is it for a participant?), and specify certain content sets and rule provisions that apply to the content use (i.e., IDX).

Both questions are covered in the next two sections, Appendix B and Appendix C.

General Contract And License Considerations For Content Distribution

MLSs should review **CMLS Legal Best Practices** for general contract considerations when drafting outbound data licenses.²⁴

MLSs should also consider how outbound licenses must be not greater than inbound licenses. Specifically, they should compare the inbound license considerations against outgoing license parameters.

²⁴ See, generally, CMLS Legal Best Practices.



The following license terms include further annotation regarding outbound licenses.

Provisions for Outbound MLS Licenses

Licensed Content	What content is being licensed to the MLS?	e.g., photos, videos, text, factual information, user information, etc.
-------------------------	--	---

INBOUND: The MLS will likely want a broad description of content provided to the MLS, which might describe the licensed content as *any* content provided to the MLS by or on behalf of the licensor.

OUTBOUND: An MLS will want to describe any content the MLS is licensing to third parties with precision, ensuring it is easily understood as to what content may be used and for how long, especially if the licensee has access to more content than is being licensed.

Exclusive Rights Licensed	If the content is subject to copyright, which of the exclusive rights of the copyright owner are being licensed?	e.g., reproduce,” “create derivative works,” “distribute,” “perform,” etc.
----------------------------------	--	--

INBOUND: The MLS will likely exercise many applicable copyright rights – reproduction, creation of derivative works, distribution, and public display – in provision of MLS.

OUTBOUND: An MLS will likely limit the rights licensed to conform to their rules.

Description of Use	What kinds of things may the MLS do with the content?	e.g., “marketing listings for sale” or “for any commercial or personal use”
---------------------------	---	---

INBOUND: The MLS should consider a license to use content for any services the MLS provides in tandem with any MLS rules as they exist or are modified from time to time. This would permit the MLS to use content in any service it provides to participants and subscribers. If the MLS plans to distribute content outside that group, the license should have a broader description of use.

OUTBOUND: An MLS will likely need to limit the permitted uses to a specific use to ensure compliance with MLS rules. For example, content licensed for IDX use should only be for IDX use.

Duration	May the MLS use the content only during the term of some agreement, or is the permitted use forever?	e.g., “during the term of this agreement” or “perpetual”
-----------------	--	--

INBOUND: The MLS will likely want to use content in some way, shape, or form without any time restrictions. This is true even where the license might be limited in time. For example: The MLS may license access to public records through a third-party content provider. When the agreement ends, access to the records will also end. If participants and subscribers have “auto-populated” content from those records into listing records, the MLS would likely need the license to that content to include a time extension for as long as it keeps the listing records.

OUTBOUND: In contrast to the license that the MLS receives (which requires future use of content by participants), outbound licenses likely require limits. For example: Participant use is granted to participants. If the status of a company/individual shifts to not being a participant, then the license should terminate.

Exclusivity	Is the licensee the only entity that can use the material within the scope of the license, preventing even the owner from using it, or is the license non-exclusive?	e.g., “non-exclusive” or “exclusive”
--------------------	--	--------------------------------------

INBOUND: While it is possible for an MLS to take an exclusive license, it is not necessary and can create complications. For example: Most MLSs take the position that a participant may use listing content that it contributes as it sees fit. This includes marketing properties. If the MLS had an exclusive license, then the participant’s future use would require MLS permission, even if the participant contributed the content.

OUTBOUND: MLSs grant the same license to many licensors (e.g., IDX use), which makes it hard to imagine situations where an MLS would grant an exclusive license. MLSs should seek legal counsel if they are considering any exclusive licenses.

Geographic Limitations	Can the licensee use the content everywhere in the world or just in some limited geography? (This can be a complicated issue where the Internet is concerned as most websites have a global reach.)	e.g., “worldwide” or limited to a geographic jurisdiction
-------------------------------	---	---

INBOUND: Most MLSs will not want geographic limitations given their systems may be accessible from any state or country.

OUTBOUND: A broad geographic license may be necessary (e.g., “North America”), but such limitations need to consider licensed uses. Some MLSs might want to limit European Union country access to their systems to avoid EU General Data Protection Regulation requirements.

Assignability	Can the licensee assign its rights in the license to someone else?	e.g., “transferable” or “non-transferable”
----------------------	--	--

INBOUND: Most MLSs will want the ability to assign license rights in the event of a merger or another consolidation. However, it is not uncommon for some licensors to require written agreement before assigning a license.²⁵

OUTBOUND: Most MLSs will not want a licensor to assign their license without permission. Similar to MLSs, licensors may want the right to assign a company restructure.

²⁵ MLSs should closely consider the specific language of these terms. For example, assignment clauses often include language that permission for assignment “will not be unreasonably withheld,” which some MLSs find too ambiguous.

Sublicensable	Can the licensee share its rights with others?	e.g., “right to sublicense through multiple tiers”
----------------------	--	--

INBOUND: Some of the most common uses of MLS content require sublicensing such as to an MLS system provider, and to participants’ and subscribers’ IDX and VOW vendors.²⁶

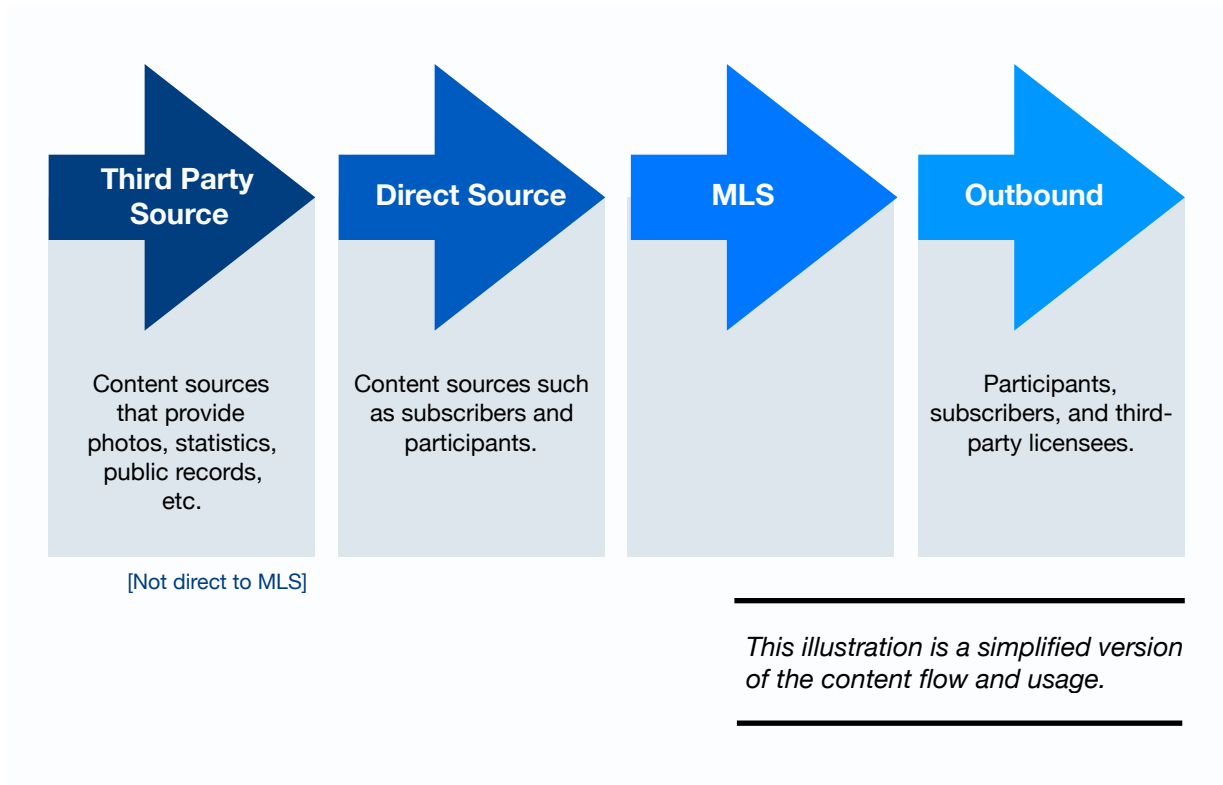
OUTBOUND: While sublicensing is likely necessary in many instances, MLSs should tailor those license provisions with precision to not inadvertently step outside the MLS rules. One example of sublicensing is a participant who wants to sublicense to a vendor for IDX use.

Revocability	Can the licensor revoke the license, and if so, under what circumstances?	e.g., “revocable” or “irrevocable”
---------------------	---	------------------------------------

INBOUND: MLSs require certainty that they may continue to use listing content. A revocable license could create major issues for an MLS.

OUTBOUND: Many MLSs will want to ensure that they can “turn off the data spigot” in the event a licensee misuses content or causes other types of harm for the MLS.

MLSs need to understand and ensure that the rights they are granting to downstream content uses are equal to or narrower than any rights granted to the MLS (or through the MLS rules).



²⁶ See the further discussion of these uses in *MLS content distribution to and on behalf of participants* on page 26.

MLS Content Distribution To And On Behalf Of Participants

Best Practice | NAR MLS Policy Terms

- **Understand when a participant is seeking content use for purposes only granted to participants.**



The primary reason for an MLS to distribute listing content is to serve its participants and subscribers better. There are many content uses to which only participants and their affiliated subscribers are entitled. A non-participant third party cannot have an IDX website, for example. Regardless, most issues can be avoided if the MLS confirms whether a participant (or affiliated subscriber) is seeking the content and for what purpose.

Defining Participants

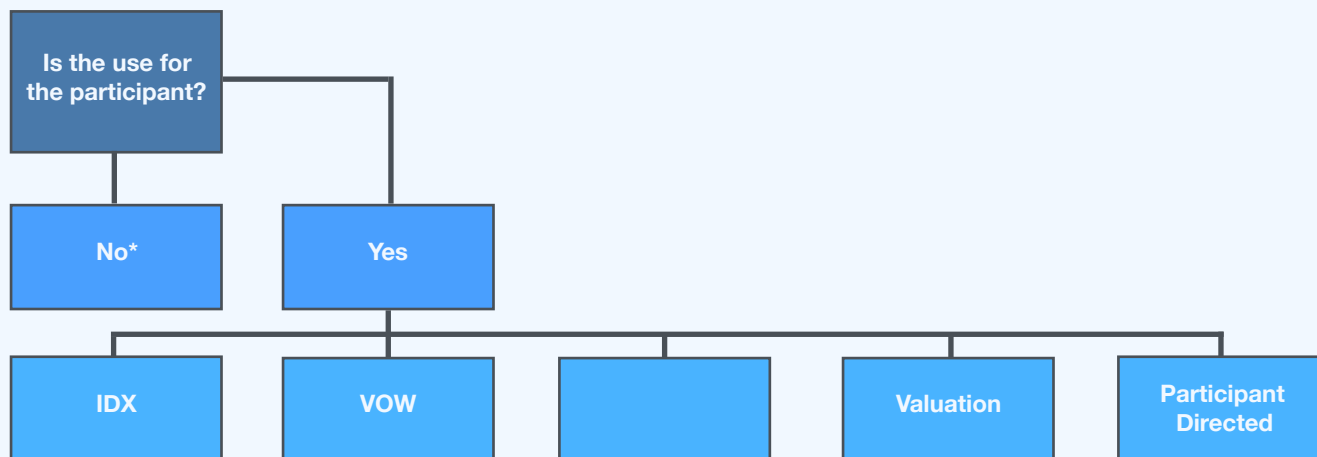
For MLSs that follow NAR MLS policy, Policy Statement 7.9 provides guidance in determining whether a given party is a participant. The most important part of this statement is that “[p]articipatory rights shall be held by an individual principal broker unless determined by the association or MLS to be held by a firm” and that “[m]ere possession of a broker’s license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm offers or accepts cooperation and compensation means that the participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS.”²⁷

MLSs should have clear and accurate records as to who (or what firm) is the “participant” in the MLS. Sometimes there is confusion in determining to which party an MLS must provide the participant-entitled data use. One way to minimize potential confusion is to review the party from which a data use request originated. The MLS can then clarify what party plans to execute the MLS data license to enable the participant data use. There are various ways to structure data licensing to participants and subscribers, but under the MLS rules, the participant is responsible for its subscriber’s content use. It seems relatively clear when stated this way, but it is often lost in the weeds of MLS data licensing when requests are incoming from third parties purportedly on behalf of participants. MLSs should have clear communication to participants about their licensing options. ²⁸

²⁷. NAR MLS Handbook, *supra* note 2, at 3–5.

²⁸. See, “App 5B – Best Practices for MLS Data Feeds,” National Association of REALTORS®

Under NAR MLS policy, MLSs must provide content for certain uses to participants, specifically: IDX, VOW, and valuation content use.²⁹ Most MLSs will also provide MLS content to participants for “back office” data uses and content related to that participant’s own listings. An examination of those uses provides additional clarity.



*If no, see MLS Content Distribution to Third Parties.



Best Practices | IDX

- Understand that IDX is not only a content set, but also the related rules for use of the content set.
- If a requested data use is clearly IDX, MLS should authorize within five days.

Internet Data Exchange (IDX) is a means for participants and subscribers to advertise their services and the listings of other participants and subscribers. IDX is a program under which a participant or subscriber, if permitted, may display the listings of other participants via the participant’s website, mobile application, and audio device.

Since the focus of IDX is on advertising, it does not further the defined purpose of an MLS.³⁰ Therefore, participants and subscribers have the option whether to include their listings in the IDX program. ³¹

²⁹. *Id.* at 23–27 (IDX, Policy Statement 7.58), 40–46 (VOWs), 20–21 (valuations, including automated valuations, Policy Statement 7.79).

³⁰. See NAR MLS Handbook, *supra* note 2, at 3; see also MLS content distribution to third parties, below, for further discussion on the definition of MLS.

³¹. See *id.* at 24; see also MLS content distribution to third parties. below. for further discussion.

IDX is a sort of quid pro quo in that — if a participant opts out³²(or does not opt in³³ such as in the case of MLSs working under opt-in regimes) — the same participant cannot display IDX content.³⁴

IDX is not only a content set, it is also a program with specific policies and rules. MLSs should confirm that participants and subscribers seeking IDX content use are entitled to the IDX content set and that it is properly used, and only used for IDX under the IDX policies. MLSs confused by incoming requests do not have to use “an IDX feed” for some other purpose. It is a best practice to not provide an IDX feed for a non-IDX use because it runs counter to the MLS rules and complicates MLS content licenses.

Instead, MLSs should promptly determine whether a participant request for IDX content use is made by a valid participant and for use within that MLS’s IDX rules. If it is, an MLS should act on the request within five days of receipt.³⁵ If, however, the MLS determines there are open questions as to whether the conditions for participation are met or the use complies with the IDX policies, then the MLS should provide an estimated time for a final decision or a denial for non-compliance.

NAR-affiliated MLSs must provide IDX content use to participants. MLSs may, but are not required to, enable subscribers’ IDX content uses. In practice, most MLSs allow subscribers to have IDX websites and apps.

Best Practices | VOW

- **MLSs must offer VOW content use.**
- **MLSs may only exclude content as permitted by VOW policy.**
- **If MLSs exclude content from VOW as permitted by policy, MLSs must not allow distribution via other means (including face-to-face interactions or onsite.)**



³². “Unless state law requires prior written consent from listing brokers, listing brokers’ consent for IDX display may be presumed unless a listing broker affirmatively notifies the MLS that the listing broker refuses to permit display (either on a blanket or on a listing-by-listing basis.)” *Id.*

³³. Alternatively, MLSs may require that participants’ consent for IDX display of their listings by other participants be affirmatively established in writing. *Id.*

³⁴. *Id.* “If a participant refuses on a blanket basis to permit IDX display of that participant’s listings, then that participant may not display the aggregated MLS data of other participants on an IDX site.”

³⁵. “Requests for IDX feeds/downloads must be acted on by the MLS within five (5) business days from receipt, barring extenuating circumstances related to an individual’s qualification for MLS Participation, and review of the participant’s and vendor’s use of the IDX information consistent with the MLS rules, in which case an estimated time of approval or denial must be issued.” *Id.* at 23.

In contrast to IDX content uses, VOW content use furthers the defined purpose of an MLS. It enables participants to provide “real estate brokerage services to consumers with whom the participant has first established a broker-consumer relationship.”³⁶ Therefore, participants may not opt out of permitting distribution of their listings via VOW. (Note: If a home seller prohibits the listing for the sale of their property from the Internet display completely, then it should not be included in VOW data uses.³⁷)

The VOW policy is a result of litigation between NAR and the Department of Justice (DOJ) between 2005 and 2008.³⁸ The litigation concluded in a consent decree that set forth NAR’s VOW policy for MLSs. Each NAR-affiliated MLS must adopt the VOW policy verbatim and follow it closely. While the consent decree between NAR and the DOJ only required the VOW policy to remain unchanged through 2018,³⁹ until NAR revises the VOW policy, it is a best practice for MLSs to continue to follow NAR policy. For non-NAR-affiliated MLSs, it is likely a best practice to follow NAR policy unless legal counsel is consulted prior to any deviation.

The NAR VOW policy details types of content and information that must be included and may be excluded in a VOW data license. MLS leadership should keep in mind it may only restrict content provided for VOW as permitted in the policy, and any restriction must have an analogous restriction on participants’ provision of the content via all other delivery mechanisms.⁴⁰ If a participant or subscriber can provide certain information to individuals in a brick-and-mortar office, then the same information must be available via VOW. The VOW policy specifies the categories of information that may be limited to participant and subscriber use only (e.g., not disseminated to participants’ and subscribers’ clients.⁴¹). Consult legal counsel as to whether any restriction of the content via VOW could create risk for your MLS.



Best Practices | Valuation Use

- Have an agreement that creates boundaries on valuation content use.
- Consider VOW-like requirements in valuation content use agreement.
- Consider NAR FAQ for such licenses.

³⁶. NAR MLS Handbook, *supra* note 2, at 40.

³⁷. *Id.* at 42.

³⁸. See Press release, United States Department of Justice, [Justice Department Sues National Association of REALTORS for Limiting Competition Among Real Estate Brokers](https://www.justice.gov/archive/atr/public/press_releases/2005/211008.htm) (Sept. 8, 2005), https://www.justice.gov/archive/atr/public/press_releases/2005/211008.htm; U.S. Department of Justice, *U.S. v. National Association of REALTORS*, <https://www.justice.gov/atr/case/us-v-national-association-realtors> (last visited Feb. 26, 2019); *Breaking Down the 2008 DOJ-NAR Settlement Agreement*, NATIONAL ASSOCIATION OF REALTORS® (Feb. 14, 2018) <https://www.nar.realtor/breaking-down-the-2008-doj-nar-settlement-agreement>.

³⁹. “*The Future of VOW Policy After the DOJ-NAR Agreement Expiration*,” NATIONAL ASSOCIATION OF REALTORS® (Nov. 27, 2018), <https://www.nar.realtor/the-future-of-vow-policy-after-the-doj-nar-agreement-expiration>.

⁴⁰. NAR MLS HANDBOOK, *supra* note 2, at 46.

⁴¹. *Id.* at 42–44.

A recent development in NAR policy occurred in May 2014 when a requirement was added for MLSs to provide MLS content to participants and subscribers to create valuations. ⁴²

It reads: “MLSs must either permit use of existing data feeds, or create a separate data feed, to satisfy this requirement.”⁴³ The NAR policy speaks to valuations but specifically identifies automated valuation (or “AVM” or “automated valuation model”) as a permitted participant use of content.

The basic rationale for the NAR policy was that participants have always been able to use MLS content to create valuations — it is part of the defined purpose of an MLS.⁴⁴ The amendments to the policy clarified that MLSs must permit use of existing data feeds (presumably referring to IDX and VOW feeds) or provide a separate data feed.

“Valuations” generally include comparative/comparable market analysis (CMA), broker price opinions (BPO), and other valuation types that do or do not integrate information from human manipulation.⁴⁵ NAR policy is silent as to the specifics of “valuations.”

However, because participants have historically used MLS content to create CMAs and BPOs, it follows that these types of analyses are valuations. Again, the rules permit participants and subscribers with the help of their third-party vendors to be able to provide valuations with a full MLS dataset, including listings of other participants and subscribers (e.g., no opt outs). This does not include non-participant third parties acting alone.



In contrast to VOWs, there are no detailed policies regarding the use of MLS content to provide valuation. MLSs should consider what is permitted in creating a valuation to avoid inadvertently creating a loophole in an MLS data-licensing regime.

When creating parameters for an MLS valuation data license, the MLS could consider the VOW policies and whether there are analogous requirements that should be imposed in the valuation context. After all, the DOJ approved the VOW policies as part of the NAR-DOJ consent decree, and the policies clarify how and what the MLS will provide to participants and subscribers; the relationship between participants and subscribers and their affiliated third-party vendors; and the role of the participant and subscriber as central in the broker-client relationship.

⁴². NAR MLS HANDBOOK, *supra* note 2, at 21–21 (Policy Statement 7.79: “Any MLS content in data feeds available to participants for real estate brokerage purposes must also be available to participants for valuation purposes, including automated valuations.”); see also *Frequently Asked Questions About the AVM Sample Data License Agreement*, NATIONAL ASSOCIATION OF REALTORS®, <https://www.nar.realtor/about-nar/policies/frequently-asked-questions-about-the-avm-sample-data-license-agreement> (last updated Feb. 2017).

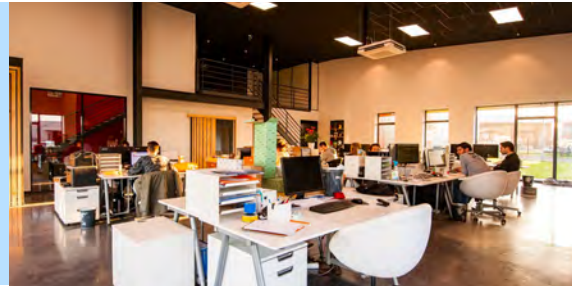
⁴³. NAR MLS HANDBOOK, *supra* note 2, at 21–21.

⁴⁴. *Id.* at 3.

⁴⁵. *Id.* at 20. NAR’s clarification that valuations include non-human intervened AVM’s makes this clear.

Best Practice | Back Office Data Licenses

- Provide participants a back-office data feed.



Most MLSs will provide a “back-office” data license to participants, which allows them to use MLS content within their firm. Back-office content use examples may include a customer relationship management (CRM) system, a transaction management system, or some other kind of program that enables use of MLS content within a firm. Explicitly defined use may vary from MLS to MLS. Whether the use falls within the defined purpose of MLS and does not require an opt out must be determined on a case-by-case basis.

However, CMLS considers it a best practice for MLSs to provide a back-office feed to its participants, which better enables a participant to serve its bona fide customers and clients. When the back-office license is drafted in such a way to only expose the full MLS database to a single participant and its affiliated subscribers in conformance with MLS policies, it is arguably within the defined purpose of MLS. Under these terms, it would not require the MLS to provide participants the option to opt out.



Best Practices | Participant-Directed Use

- Provide participant listings back to participant.
- Allocate risk accordingly.

Many MLSs enable a participant to access a feed of that participant’s listings. Since the participant is considered the owner of the listing agreement,⁴⁶ and under many state laws is responsible for the marketing of a listing,⁴⁷ it follows that MLSs will provide the participant access to their own listings. MLSs may also facilitate the providing the participant's listings to destinations or parties that the participant chooses. MLSs may also facilitate participant access to their own listings, but the MLS’s role with regard to content protection is less clear.

As a minimum standard, the MLS should suggest that the participant have a clear, written agreement with any third party that the participant has directed the MLS to provide the participant’s own listings. The participant should then have its legal counsel review the agreement. Given that the MLS is following the direction of the participant with regard to the participant’s listings, the MLS should not take on liability for the participant’s directions. Providing a waiver form or some other legal document clarifying the risk allocation is a best practice for the MLS and will ensure the participant understands this point.

⁴⁶. NAR MLS HANDBOOK, *supra* note 2, at 31.

⁴⁷. See, e.g., WASH. REV. CODE 18.85.

MLS Content Distribution To Third Parties

Best Practice | Participant/Subscriber Use

- License content to a participant requested vendor, providing the vendor can show it conforms to MLS policies.



In order to enable participants and subscribers to use content for IDX, VOW, and valuation services, the MLS licenses content to participants and subscribers and their authorized technology vendor(s) or allows the participants and subscribers to sublicense content. NAR policy states that MLSs should work with a participant’s vendor. It is considered a best practice to work with the participant’s vendor, providing that vendor can show it conforms to MLS policies.

There is a different relationship between the MLS and the vendor than there is between the MLS and the participant. For instance, the vendor is not automatically bound to the MLS rules because the vendor is (likely ⁴⁸) not a participant. Therefore, MLSs should ensure that the participant’s vendors are contractually bound by license agreements. Within those agreements, the MLS should follow best practices for drafting license terms (see checklist in CMLS Legal Best Practices); for ensuring the license to the vendor is narrowly scoped (e.g., only specifies the permitted use); and for requiring the vendor to follow MLS policies now and as they may be amended from time to time.

Content Distribution To Non-Participant Third Parties

As noted earlier, an MLS must consider when it is licensing content for use within the defined purpose of MLS. The “defined purpose of MLS” refers to the NAR definition of MLS provided in the *NAR MLS Handbook*.⁴⁹ NAR’s definition details some specifics related to the purpose of an MLS. However, there is gray area as to how MLSs deliver products and services as technology continues to evolve.

48. It’s entirely possible the vendor could be a participant, too; but in this context, where the vendor is working on behalf of a participant, an MLS can assume it is not acting as a participant.

49. The handbook provides:

A multiple listing service is:

- a facility for the orderly correlation and dissemination of listing information so participants may better serve their clients and customers and the public
- a means by which authorized participants make blanket unilateral offers of compensation to other participants (acting as subagents, buyer agents, or in other agency or non-agency capacities defined by law)
- a means of enhancing cooperation among participants
- a means by which information is accumulated and disseminated to enable authorized participants to prepare appraisals, analyses, and other valuations of real property for bona fide clients and customers
- a means by which participants engaging in real estate appraisal contribute to common databases (*Revised 11/04*)

Entitlement to compensation is determined by the cooperating broker’s performance as procuring cause of the sale (or lease).

NAR MLS HANDBOOK, *supra* note 2, at 3.

Knowing whether a given use is within the definition is important. It helps determine what content an MLS may license without seeking a participant's permission or allowing them to opt out of or opt in to a particular use. NAR Policy Statement 7.85 provides that “[u]se of listings and listing information by MLSs for purposes other than the defined purposes of MLS requires participants’ consent.”⁵⁰

Distribution for Services Within The Defined Purpose of an MLS



Best Practices | Defined Purpose

- **Understand what services the MLS provides within the defined purpose of MLS.**
- **Identify uses where it is less clear if the use is within the defined purpose of MLS. Clarify use with leadership, NAR, and legal counsel as necessary.**

Ask: What are common content uses intended to further the defined purpose of MLS?

The most obvious answer is the provision of the MLS system. Directly related MLS tools such as mobile MLS, listing data-checker, and security services are also within the defined purpose of MLS. Other MLS services that incorporate all content and deliver participant- and subscriber-facing services that enable cooperation and compensation (and creation of valuations) are also within the defined purpose of MLS. In these instances, the MLS system and its directly related services may incorporate all listing content without seeking participant permission.

There may be some nuance for additional content uses that might not be clearly within the defined purpose of MLS. MLS may provide property sale information to governmental entities, third-party entities for academic research and statistical analysis, and to participants and subscribers in the form of services.⁵¹ Please refer to NAR policy for specifics on these uses.

While NAR's definition of the defined purpose of MLS provides an excellent guideline, it also allows for some interpretation. It is not readily apparent what is or is not permitted under an effort to provide “a facility for the orderly correlation and dissemination of listing information so participants may better serve their clients and customers and the public.”⁵² The historical practices of the MLS, NAR rule interpretation, and the MLS industry at large, may also influence a determination of what is considered within the defined purpose of MLS. MLSs should identify those gray area content uses and assess whether those uses further the defined purpose of MLS.

^{50.} *Id.* at 31.

^{51.} *Id.* at 22 (“The MLS may provide sale price information to governmental bodies only to be used for statistical purposes (including use of aggregated data for purposes of valuing property) and to confirm the accuracy of information submitted by property owners or their representatives in connection with property valuation challenges; and to third-party entities only to be used for academic research, statistical analysis, or for providing services to participants and subscribers.”).

^{52.} *Id.* at 3.

Distribution for Services Outside the Defined Purpose of an MLS

Best Practices | Outside Of Purpose

- **Notify participants and subscribers of any content uses outside the defined purpose of MLS.**
- **Enable participants to opt out or in for such uses.**
- **Consider under what circumstances the MLS might provide an opt out rather than an opt-in license to third parties.**
- **Apply all rationales consistently.**



MLSs facilitate content distribution outside the defined purpose of MLS because the role of the MLS in helping participants distribute listings has grown over the years. Distribution of content to third-party publishers⁵³ is a content use outside the defined purpose of MLS. MLS distribution of content to third parties to create valuations, analytics, and related products to sell to the real estate vertical (e.g., lending institutions, etc.) is also outside the defined purpose of MLS.

For any MLS content uses outside the defined purpose of MLS, the MLS should provide participants the option to exclude their listings from the use.⁵⁴ There are two ways MLSs may provide participants with an option related to their listings.

There is an “opt-in” basis, which requires an affirmative action on the part of the participant to include their listings.

There is an “opt-out” basis, which notifies participants that the content use will be used for a specific purpose unless the participant takes affirmative action to exclude their content from the use.⁵⁵

Each MLS should consider why and when it licenses content on an “opt-in” or “opt-out” basis, and consistently apply its internal policy.

Allowing participants to opt in or out of content uses requires communication and transparency. MLSs should clearly communicate content uses to participants, empowering them to make opt-in or out determination. MLSs should also consider on what basis they remind participants of such uses and how participants might change their decision.

⁵³. Such as Zillow, Realtor.com, and Homes.com.

⁵⁴. NAR MLS HANDBOOK, *supra* note 2, at 31 (Policy Statement 7.85).

⁵⁵. *Id.* “MLSs may presume such consent provided that listing brokers are given adequate prior notice of any intended use unrelated to the defined purpose of MLS, and given the opportunity to affirmatively withhold consent for that use.”



CONCLUSION

Content management is a critical foundational element for MLSs in providing services. It is incumbent upon each MLS to have a strong understanding and think critically about their content management practices. Understanding the parameters set forth in this document will enable an MLS to be more strategic in its business practices in furtherance of MAKING THE MARKET WORK.®



APPENDIX A

Aggregated Best Practices

CONTENT MANAGEMENT BEST PRACTICES	YES	NO	COMMENTS
Content Sources			
Understand content sources.			
Content Types			
Understand content sources.			
Understand content is subject to copyright.			
Understand that content, regardless of copyrightability, might have contractual limitations.			
Content Acceptance			
Have a clear understanding and categorization of MLS content uses.			
Legal Considerations - Agreements			
Protect the MLS from claims that the MLS cannot use content.			
Protect participants and subscribers from claims that they cannot use content.			
Legal Considerations - Assignment/License			
Protect the MLS from claims that the MLS cannot use content.			
Protect participants and subscribers from claims that they cannot use content			

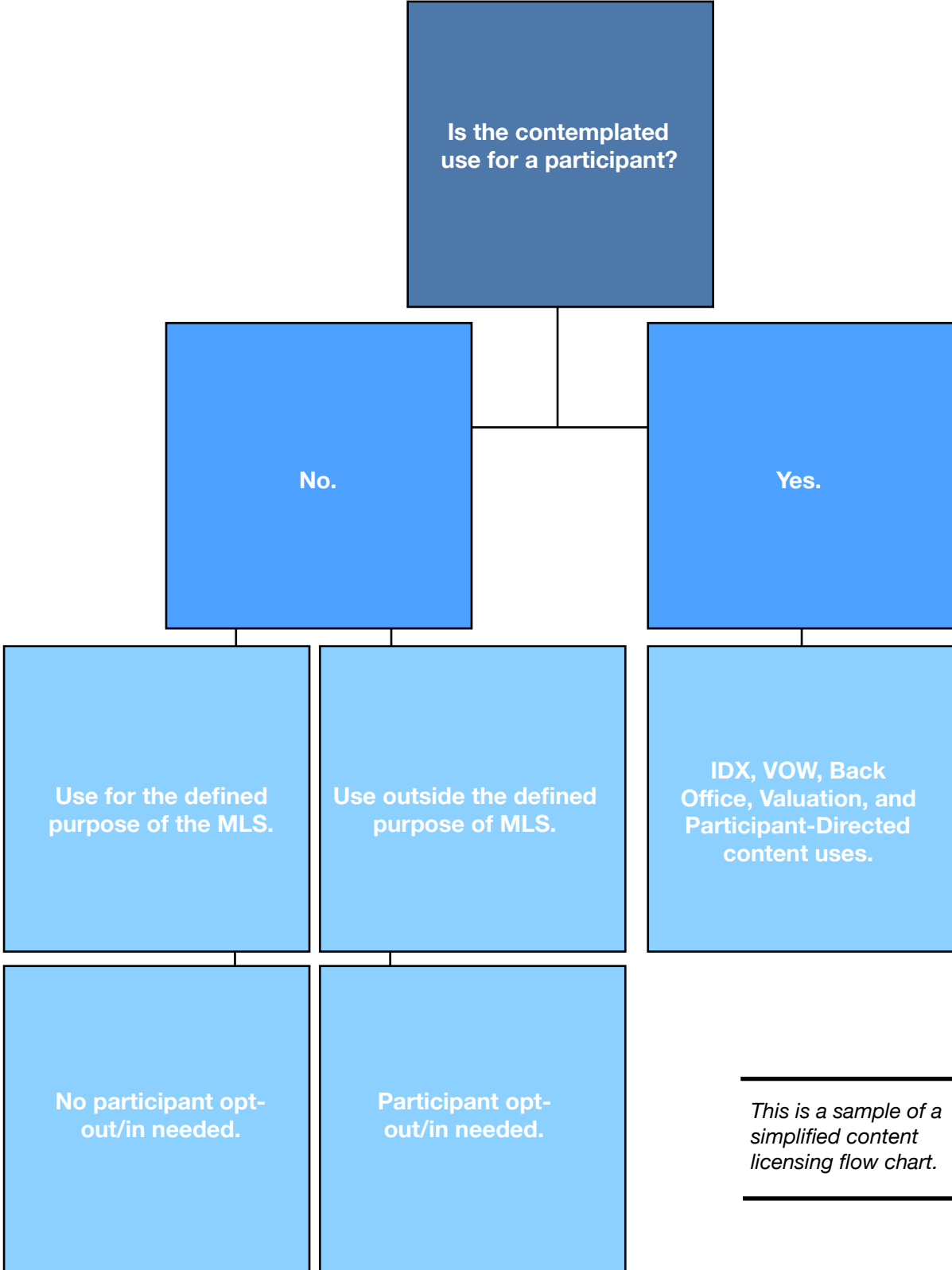
CONTENT MANAGEMENT BEST PRACTICES	YES	NO	COMMENTS
Participant/Subscriber Agreements			
MLSs should determine whether they are seeking assignment of content or not.			
If an MLS is seeking assignment of content, review NAR policies regarding participant rights.			
MLSs should have clear, broad licenses to use content.			
MLSs should establish risk allocation provisions for the protection of the MLS and its participants and subscribers.			
Direct-To-MLS Third-Party Content			
Ensure the ability to use content for the defined purposes of MLS.			
Understand all limitations on use of some content.			
Consider the ability to remove content if it does not have a broad license.			
Consider complications with software agreements, such as end-user license agreements.			
Professional Media			
Consider the role of participant/subscriber agreements when participants and subscribers are providing professional media.			
Educate participants and subscribers regarding the use of professional media.			
Consider a direct license or assignment from all media companies.			
Ensure the MLS is receiving necessary rights (and that the MLS does not exceed rights in outbound licensing).			
MLS Default Input			
Require participants and subscribers to agree to a participant or subscriber agreement or an end-user agreement (EULA) before accepting content.			
Request documentation of acceptance.			
Alternative Input			
If an MLS is going to offer alternative input systems, consider the implications for content management.			
If MLS is going to offer alternative input systems, consider adopting standard terms offered for integration to MLS system.			

CONTENT MANAGEMENT BEST PRACTICES	YES	NO	COMMENTS
Distribution			
Follow NAR policy, if MLS is NAR affiliated.			
If MLS is not NAR affiliated, use the NAR-like policy as a default and only deviate from it after legal review.			
Understand the two key questions under NAR policy for content use.			
NAR MLS Policy Terms			
Understand when a participant is seeking content use for purposes only granted to participants.			
IDX			
Understand that IDX is not only a content set, but also the related rules for use of the content set.			
If a requested data use is clearly IDX, MLS should authorize within five days.			
VOW			
MLSs must offer VOW content use.			
MLSs may only exclude content as permitted by VOW policy.			
If MLSs exclude content from VOW as permitted by policy, MLSs must not allow distribution via other means (including face-to-face interactions or onsite.)			
Valuation Use			
Have an agreement that creates boundaries on valuation content use.			
Consider VOW-like requirements in valuation content use agreement.			
Consider NAR FAQ for such licenses.			
Participant-Directed Use			
Provide participant listings back to participant.			
Allocate risk accordingly.			

CONTENT MANAGEMENT BEST PRACTICES	YES	NO	COMMENTS
Participant/Subscriber Use			
License content to a participant requested vendor, providing the vendor can show it conforms to MLS policies.			
Defined Purpose			
Understand what services the MLS provides within the defined purpose of MLS.			
Identify uses where it is less clear if the use is within the defined purpose of MLS. Clarify use with leadership, NAR, and legal counsel as necessary.			
Outside of Purpose			
Notify participants and subscribers of any content uses outside the defined purpose of MLS.			
Enable participants to opt out or in for such uses.			
Consider under what circumstances the MLS might provide an opt out rather than an opt-in license to third parties.			
Apply all rationales consistently.			
Additional Practices			

APPENDIX B

CONTENT FLOWCHART



This is a sample of a simplified content licensing flow chart.

APPENDIX C

LICENSING GRID

	Purpose	Explanation, examples, and samples	Data recipient e.g., party to the agreement	Data included	Broker option to exclude listings e.g., opt in or opt out	Authorization granted by	MLS provides content use?	Agreement?
P a r t i c i p a n t c o n t e n t u s e s	IDX	Advertising; use on participant IDX website, mobile app, or audio device subject to IDX policies	Participant	IDX data set	Yes	MLS may specify who and/or how the MLS grants authorization	Yes	MLS may specify a reasonable agreement or terms
	VOW	Provision of brokerage service; use on participant virtual brokerage website subject to VOW policies	Participant	All, less confidential as permitted by policy	No, except seller option for no Internet display (then no IDX, too)	MLS may specify who and/or how the MLS grants authorization	Yes	MLS may specify a reasonable agreement or terms
	Back Office	Sample definition: Any use of firm's own listings; and any use of those portions of the MLS Data relating to listings of participants other than firm that exposes listings only internally	Participant	Depends on definition. MLS reasonable business determination in light of policy and legal considerations	Depends on definition	MLS may specify who and/or how the MLS grants authorization	Suggested	MLS may specify a reasonable agreement or terms
	Participant Valuation	Use by participants to create valuations of real property for customers and clients	Participant	All, less confidential	No broker option to exclude	MLS may specify who and/or how the MLS grants authorization	Yes	MLS may specify a reasonable agreement or terms

	Purpose	Explanation, examples, and samples	Data recipient e.g., party to the agreement	Data included	Broker option to exclude listings e.g., opt in or opt out	Authorization granted by	MLS provides content use?	Agreement?
M L S c o n t e n t u s e s	MLS products within the definition of MLS	Example: mobile MLS app accessible only to participants and subscribers	Non-participant (only to provide MLS products to participants)	MLS reasonable business determination in light of policy and legal consideration	No; presumed as result of participation	MLS may specify staff, department, board, etc.	MLS reasonable business determination in light of policy and legal consideration	MLS may specify a reasonable agreement or terms; or agree to use the third party's agreement
	MLS products outside the definition of MLS	Example: display of listings on a public facing publisher.	Non-participant	MLS reasonable business determination in light of policy and legal consideration	Varies (see NAR 7.85); consider opt in, but there may be practical reasons to go opt out	MLS may specify staff, department, board, etc.	MLS reasonable business determination in light of policy and legal consideration	MLS may specify a reasonable agreement or terms; or agree to use the third party's agreement



APPENDIX D

REFERENCES

Contributing Organizations

Arizona Regional MLS
Carolina Multiple Listing Service, Inc.
CoreLogic /Clareity
FBS
Greater El Paso Association of REALTORS MLS, Inc.
Heartland Multiple Listing Service
HHIMLS
Houston REALTORS® Information Service, Inc.
Intermountain MLS
Knoxville Area Association of REALTORS®
MLS Technology
National Association of REALTORS®
New England Real Estate Network
Northwest MLS
Regional Multiple Listing Service
State-Wide Multiple Listing Service
Stellar MLS
Utahrealestate.com



published by

CMLS

Council of Multiple Listing Services
1000 N. Green Valley Parkway #440-583
Henderson, Nevada 89074

[cmls.org](https://www.cmls.org)

[cmls.org](https://www.cmls.org) | 877.505.8805