



MITCHELL A. SKINNER, Managing Member/Attorney
By electronic mail from Broker Public Portal

AUGUST 10, 2015

Broker Public Portal MLS Data License – Comment period 2 call for comments

Dear Sir or Madam:

The Broker Public Portal (BPP) released the first draft of a multiple listing service (MLS) data license agreement for comment on July 8, 2015. BPP provided the first version of the agreement to the MLSs that are participating in the project. Thank you to those of you that provided feedback during Comment Period 1!

With this letter BPP is starting Comment Period 2 and releasing the current draft agreement more broadly. Included with this document is the second draft of the BPP MLS Data License Agreement (the “Agreement”). This draft includes some changes made based on the feedback and comments received in Comment Period 1, which concluded July 22, 2015. *This is a draft agreement; it is not a final version. The Agreement is still subject to change.*

BPP seeks feedback on this second draft to continue to help BPP create a data license that is fair and favorable to multiple listing services (MLSs) and the brokers they serve. What follows is (I) a description of BPP’s data license philosophy, (II) a summary of comments from Comment Period 1 and the BPP’s responses, (III) the revisions to the draft Agreement based on the comments, and (IV) instructions for providing feedback.

I. BPP data license philosophy

BPP wants an agreement that is favorable to brokers and MLSs for three reasons. (For those of you that commented during the first comment period, the following is repetitious, but worthy of repeating.)

- 1) BPP was created out of a desire for brokers and MLSs to have a national consumer-facing portal to display property listings on terms brokers and MLSs have been requesting for years. Correspondingly, the license agreement provides favorable terms to those parties.
- 2) BPP does not desire to negotiate each data license with every MLS or broker because of the transaction costs involved. BPP believes that an agreement favorable to brokers and MLSs will result in lower transaction costs for agreement review.
- 3) BPP is comprised of brokers and MLSs. In a sense, BPP is also “on the other side” of the agreement and wants its broker and MLS constituents to have an agreement with which they are comfortable.

Following on the last point above, BPP does not seek to create unnecessary exposure for itself. BPP is comprised of the very parties it seeks to serve. Exposing BPP to unnecessary risk does not serve any party in the transaction favorably. After all, suing yourself is typically a poor business decision.

The attached Agreement is drafted in the MLS’s favor, as the other party to the Agreement, with many display and business terms that are very beneficial to brokers, who are beneficiaries of the Agreement and the owners of the listings agreements. Additionally, the liability-limiting terms are fair to both the MLS and BPP.



II. Comment Period 1 summary and BPP responses

1. Fees

The comments reflected that MLSs are sensitive to fees.

BPP leadership is still considering fees and the Agreement leaves a placeholder for the fees. There are several variables that have yet to be determined before a specific fee schedule is released. *BPP does not expect MLSs to enter into an agreement where MLSs does not first know the fees and payment terms.* At this time, BPP leadership does not anticipate that any fees will be charged during the Development Term of the Agreement.

2. Estimates of value

The consensus was that MLSs are comfortable with the display of estimates of value on active listings in order for BPP to be competitive. Commenters recognized that a good valuation model, based on local data, could be a competitive advantage for BPP.

The Agreement is revised accordingly; there is no restriction on the display of estimates of value.

3. For sale by owner

Commenters noted that BPP is supposed to be an industry-friendly portal and that displaying FSBOs is not industry-friendly.

At this point, BPP has determined that FSBOs will not be displayed on the site in order to further its goal of providing terms that brokers seek.

4. License to off-market listings

Comments on this topic varied. Some commenters felt that is very important for BPP to have real time sold data on the site, while another noted that its organization does not provide Off-Market data to public facing sites.

BPP has revised the Agreement so that MLSs license *sold* listings (not all off-market listings) only if (a) the MLS chooses to provide sold listings or (b) the MLS provides sold listings to any other public facing website or app. BPP leadership feels this is a fair middle ground for BPP, MLSs, and brokers. If the MLS has a policy of not providing sold listings, it won't need too, but if the MLS provides listings to another public facing website or app, it should also provide them to the portal that seeks to be the most industry friendly portal.

5. Opt-out

A few commenters noted that they only provide listings to third party portals on an "opt-in" basis.

BPP views the opt-out model to be critical to the success of BPP because an opt-out model enables BPP to more efficiently serve its stakeholder MLSs and brokers. However, if an MLS only provides data on an opt-in model to all other consumer facing portals, then BPP may allow for the MLS to provide data on an opt-in basis.

6. Non-compete

A few commenters noted that the non-compete should be longer than one year.



BPP leadership decided to leave the non-compete term to one year. Many jurisdictions will not enforce a non-compete term longer than one year, so it is in the MLSs’ interests to leave the non-compete to one year. Additionally, BPP is comprised of brokers and MLSs, it would not in BPP’s interests to compete with its stakeholders’ businesses. The non-compete was included simply to provide additional peace of mind to MLSs.

7. Development term

Some commenters believe that three years is too long for a development term and preferred a one-year term.

At this time, BPP leadership has decided to leave the development term at three years and highlights that the development term will end as soon as the portal website is released, which will likely occur before the three year period expires.

III. Changes to license draft after Comment Period 1

The following chart reflects the changes that were made to the Agreement after reviewing comments and feedback received during Comment Period 1. You’ll notice that in some instances we’ve split sections into subsections to preserve the original numbering; we’ll revise the section numbering prior to a final draft.

AGREEMENT SECTION	REVISION	RATIONALE
1. Definitions (f)(iii) Fields	New language added: <i>“BPP acknowledges that MLS shall not be required to provide data fields that are no longer available in IDX display due to changes in MLS Policies or MLS’s rights to provide certain data to third parties.”</i>	Created out for MLS in case MLS rules or data policies change and certain fields are no longer available.
1. Definitions (f)(i1)	Revised Agreement to allow “opt-in” if an MLS only provides data to other consumer facing portals or apps on an “opt-in” basis.	Revised to recognize MLSs that have a policy of only providing data on an opt-in basis.
1. Definitions (f)(i2), (l), and (m2).	Revised Agreement to specify instances when BPP may use sold listings and to distinguish sold listings from off-market listings. Also revised to split apart opt-in vs. opt-out.	Clarify the statuses of listings to which BPP receives a license and when it receives such a license.
1. Definitions (f)(v) Roster Information	New language added: <i>“Roster Information shall be used by BPP only for the display purposes specified in this Agreement and for no other purpose.”</i>	Clarifies use of Roster Information.
2. MLS License	Language revised to avoid a conflict with expected data use and license scope.	Clarifies that Licensed Materials may be used on BPP Properties.
9. BPP Obligations	New language added: <i>“If a third party gains unauthorized access to Licensed Materials, BPP will promptly notify MLS of such unauthorized access.”</i>	Creates obligation on the part of BPP to notify MLS of any third party unauthorized access to MLS data.
14. MLS Obligations	Deleted language: <i>“Fees paid to BPP by</i>	BPP has concluded that it is too early



	<i>MLS are nonrefundable.</i>	to contemplate specifically how fees will work.
Exhibit A. Display of Licensed Data (c) Prohibition on advertising on detailed displays by third parties.	Language revised to read: i. “Prohibition on advertising on detailed displays by third parties: <i>BPP shall not display advertising for any third party or non-listing Participant or Subscriber on a Detailed Listing Display.</i> ii. BPP must clearly distinguish advertisements on non-detailed displays: <i>Where advertisements for brokers other than the listing Participant or Subscriber are present, BPP must clearly distinguish between listing content and advertisement.”</i> Section (k) deleted and incorporated into section (c) (ii).	Revisions to (c) and (k) reduce inconsistency regarding advertising in the portal.
Exhibit A. Display of Licensed Data (e) BPP will not display estimates on Active Listings	Section (e) language deleted: Estimates of Active Listings’ values may not display on any page where Licensed Data is displayed.	Commenters did not object to BPP being able to display AVMs, so the restriction was removed from the Agreement.
Exhibit A Display of Licensed Data (f) Subscriber Reviews.	Revised to permit review for those Subscribers or Participants that opt-in.	Revised to allow reviews for Subscribers who want them, in the event BPP provides reviews.
Exhibit A. Data Use Rights (v) No charge to end users	Revised language to state: <i>“BPP shall not charge third parties any fee to access the Licensed Data via the BPP Properties.”</i>	BPP does not intend to charge consumers to view the Licensed Data on the portal site.

IV. Commenting process; instructions for providing feedback

Comment Period 2. With this letter, BPP is starting Comment Period 2. The comment period for this version of the Agreement will **close at the end of the day on Monday, August 24, 2015.**

Form of feedback. Comments, questions, and suggested edits can be submitted in the form of a redline markup or a separate list. In the case of a redline, please provide explanatory comments for proposed revisions. If you provide a separate list instead, please make sure to identify specific sections about which you ask questions and for which you suggest revisions; offer explanations for any proposed changes.

Submission. Please submit your feedback to bppcomments@larsonskinner.com.

We look forward to hearing from you!

LARSON SKINNER PLLC

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