CMLS VEGAS 2016
Swinging With The Stars
WHAT LIES ON THE LEGAL HORIZON
Mitchell Skinner, Esquire, Larson Skinner PLLC
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What lies on the legal horizon

Mitch Skinner, Managing Member

Larson Skinner PLLC

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Thank yous!

- **Organizing committee**
  - Mitch Skinner, Chair, Larson Skinner PLLC
  - Camille Beshara, Larson Skinner PLLC
  - Gary Berkson, Gray Robinson
  - Brad Bjelke, UtahRealEstate.com
  - Erik Feig, MRIS
  - Margy Grant, Florida Realtors
  - Justin Haag, Northwest MLS
  - Betsy Hanson, CMLS
  - Hank Lerner, Pennsylvania Association
  - Marinda Neuman, Lotus Law Center
  - Chris Osborn, Foster Pepper PLLC
- **Additional Presenters**
  - Brian Larson, Georgia Tech, Larson Skinner PLLC
  - Jerry Berditt, Xome
  - Bonnie Drinkwater, Drinkwater Law Offices
  - Rouz Tabaddor, CoreLogic
  - Merri Jo Cowen, My Florida RMLS
  - Stephen Simmons, Mombach, Boyle, Hardin & Simmons
  - Katie Johnson, NAR
  - Cristofer Leffler, Foster Pepper

New Structure

- **Revised based on previous years' feedback.**
- **Morning Session.**
  - Open to attorneys and non-attorneys.
- **Afternoon Session.**
  - Narrowed to only MLS and Association attorneys.

No legal advice.

MLS Collaborations

- **Spectrum of collaboration.**

Informal	Data share	System share/whole sale	Retail
• Antitrust	• Antitrust • Rules enforcement • Compliance	• Antitrust • Tax • IP • Pre-nup	• Antitrust • Tax • IP • Pre-nup

- **Decision making (bylaws, operating agreement, etc.).**

One association one vote

Subscriber count

ADA and the MLS

- **What's going on?**
  - Americans with Disabilities Act provides protection against discrimination on basis of disabilities.
  - "Places of public accommodation" must make "reasonable accommodations" to be accessible.
  - Are websites places of public accommodation? Circuits are split, DOJ says yes.
  - Guidance expected in 2018.
- **So, what in the meantime?**
  - Have ability for members/users to request reasonable accommodations.
  - Consider risk in contracts.
  - Have a plan for request.

CMI and the MLS

- **Digital Millennium Copyright Act (DMCA)**
  - Section 1202, not 512 (safe harbor).
  - CMI = copyright management information = “identifying information about the work, the author, the copyright owner.”
  - Shall not *knowingly* with *intent to intent to induce, enable, facilitate, or conceal infringement* intentionally remove CMI or falsify CMI.
- ***Stevens v. CoreLogic***
  - Plaintiff photographers alleged that CoreLogic removed metadata that included CMI from photos submitted via various real estate software.
  - Court held that failed plaintiffs to prove that CoreLogic “intentionally” deleted metadata
- **So, what do we do?**
  - Ownership of photos, unfettered license to photos.
  - Make sure software is not removing metadata that may be considered CMI.

Policy issues grab bag

- **Listing assignment**
  - Discussion of how various organizations handle assignment of listing to new participant.
- **Off MLS Listings**
  - Not illegal, unethical, or immoral – but problematic.
  - Erodes the value of the MLS.
  - Haven't seen a participant sued… yet.
- **What can you do?**
  - Have strong, clear rules.
  - Need ability to request documents in rules.

NAR legal update

- Katie Johnson provided an update on NAR patent efforts.
- Big win in Data Distribution Technologies (DDT) lawsuit.
- DDT was trolling as trolls do.
- NAR challenged the validity before USPTO and filed for declaratory judgment.
- Settlement that precludes DDT from enforcing its patent in the real estate industry.

Attorneys' eyes (ears) only

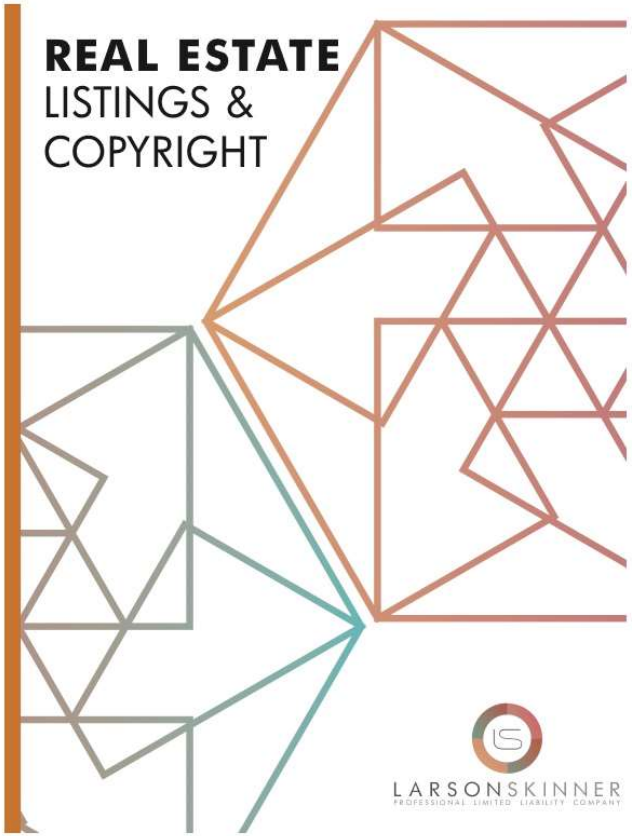
- **MLSs and EULAs**
  - Nomenclature
    - End-User License Agreement, Terms of Use, Terms of Service, Click-wrap, Browse-wrap…
  - Looking beyond copyright
    - Protection of factual content.
    - Dispute resolution choices.
    - Limit data harvesting.
    - Exclude fair use.
  - Need to actually form a contact.
    - Require separate act from user.
- **Collaborations deep dive.**
  - We were in the weeds discussing securities, antitrust, employment, deal documentation, due diligence, publicity, intellectual property, vendor contracts, biz entity.

Attorneys' eyes (ears) only

- **Upstream and open legal questions.**
  - What will happen, if anything, with license and copyright management of content?
  - Participant and subscriber agreements should control.
- **Copyright infringement risk mitigation.**
  - Discussion of *Stross v. Redfin*.
  - Discussion of content sources outside the MLSs direct contractual relationships (e.g. photographers).
  - <u>What you can do.</u>
    - Educate your participants and subscribers, local photographers.
    - NAR photographer agreements – great resource for agents and brokers.
    - Photo upload portal in the MLS system.

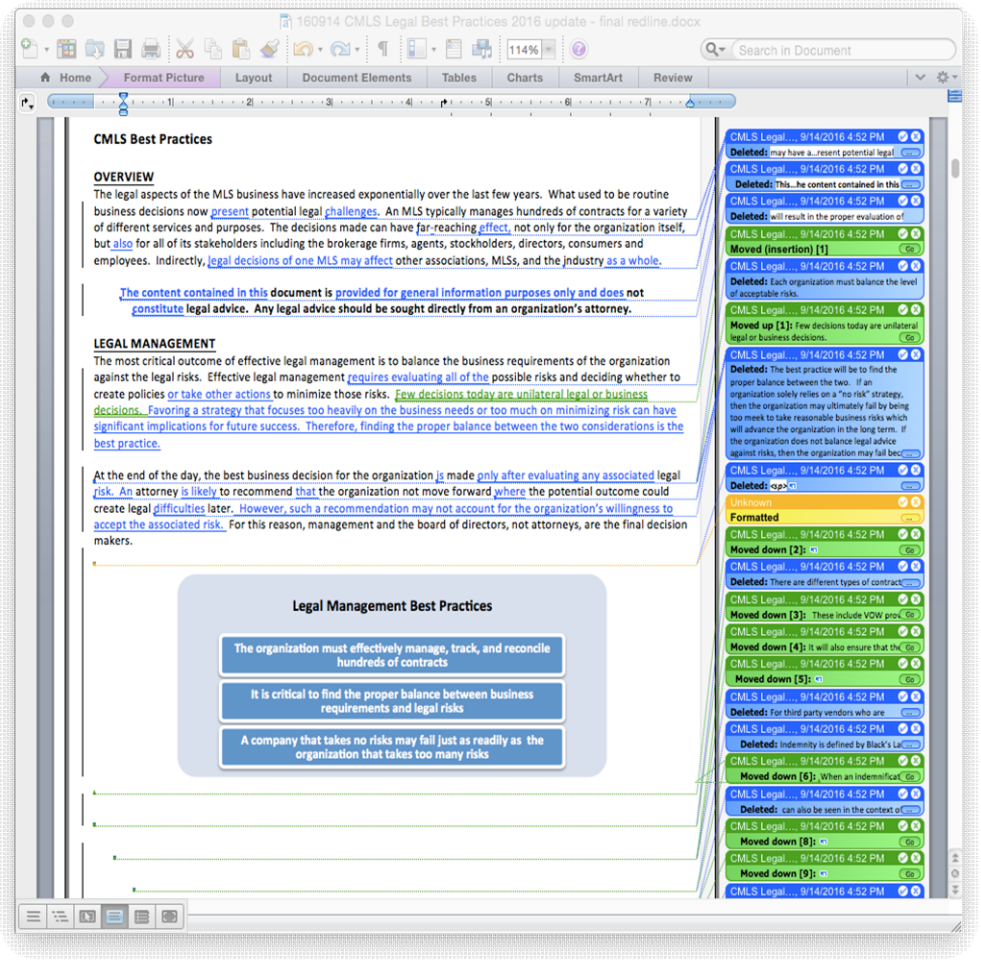
Real Estate Listings & Copyright

- Huge thank you to NAR for sponsoring!
- Two years in the making.
- Comprehensive look at listings and copyright.
- Available at: www.listingsandcopyright.com



Best Practices

- **CMLS Legal Section Council**
  - Patti Moser
  - Carrie Kendall
  - Paul Kriewall
  - Dionna Hall
  - Tom Jacobson
  - John Breault
  - Gilbert Gonzalez
  - Gary Berkson
  - Margy Grant
  - Charles Houston
  - Marinda Neumann
  - Claude Szyfer
  - Camille Beshara
  - Brad Bjelke – co-chair
  - Mitch Skinner – co-chair
  - Debbie Wey
  - Betsy Hanson
- Overhaul of Best Practices



Thank you!