

C.A.R. MLS Policy Committee Legal Update

October 11, 2018
Long Beach, CA

Presenter:

Elizabeth Miller-Bougdanos, C.A.R. Senior Counsel



CALIFORNIA
ASSOCIATION
OF REALTORS®

Legal Update

- CA Real Estate Law Tune-Up
- Competition in Real Estate Brokerage
- Copyright Office Review of MLS Automated Database Copyright Applications
- CA Consumer Privacy Protection Act (CCPA)
- Photographer License Issues Update:
 - VHT Inc. v. Zillow Group, Inc.
 - New CA case of Gutenberg v Zillow Group, Inc.
 - C.A.R. Property Images Agreement (PIA)
 - Newly formed Association of RE Photographers
- Recording Devices



Legal Update

CA Real Estate Law Tune-Up

- Freshly signed by the governor (as a package deal) on September 29, 2018:
 - AB 1289 (CA Civil Code)
 - AB 2884 (CA B&P Code)
- C.A.R. Sponsored Legislation
 - Makes some technical corrections to the Real Estate Law including changing outdated terminology as well as additional changes to update the law and conform it to current practice and terminology.
- Becomes effective on January 1, 2019.



Legal Update

CA Real Estate Law Tune-Up

- Specific Impact to MLS – there has been some re-working of the statutory language pertaining to definitions, terminology and listing agreement types:
 - Various changes such as "selling agent" or "cooperating agent – to be called "buyer's agent"
 - "exclusive right to sell listing" = no change
 - "exclusive agency listing" – to be known as "seller reserved listing agreement"
 - "open listing" - retains the same basic definition as currently exists which is no exclusive rights for a listing agent and a commission due only if the listing agent procures an enforceable offer from the buyer BUT additional language in the current statutory scheme which carves out some special protection for open listings has been deleted:
 - The law will no longer state that "An open listing need specify no compensation to the selling agent, but may state that the compensation is to be negotiated between the selling agent and the owner."



Legal Update

CA Real Estate Law Tune-Up

- Timing: the newly passed RE law changes will go into effect prior to our next C.A.R. meeting.
- C.A.R. Legal Dept Recommendation: for the MLS Committee to take action now at this meeting to empower staff to make necessary revisions to the C.A.R. Model MLS Rules so that the new statutory changes in the law can be incorporated into the Model to be effective January 1, 2019.
- MOTION: That Staff make necessary revisions to the C.A.R. Model MLS Rules to incorporate pertinent statutory changes just passed in CA real estate law [AB 1289 (CA Civil Code) and AB 2884 (CA B&P Code)] in order for new legal terminology and other changes to be incorporated into the C.A.R. Model MLS Rules by the time the new laws go into effect as of January 1, 2019.



Legal Update

Competition in Real Estate Brokerage

- FTC/DOJ Joint Workshop held in Washington, DC on June 5, 2018
- Panelists from across the RE Industry spectrum discussed competition issues in the residential real estate brokerage industry:
 - Listings Data, Emerging Technology, and the Structure of the Real Estate Market
 - CRMLS, Zillow, Realtor.com, Redfin
 - Developments in Real Estate Fee and Service Models
 - ERA/Realty, Purplebricks, Glass House Real Estate, TRELORA
 - Regulatory and Industry Factors Affecting Residential Real Estate Competition
 - Cornell Prof of Economics, Consumer Federation of America, NAR GC, Industry Counsel



Legal Update

Competition in Real Estate Brokerage

- Workshop Significant Take Aways:
 - Mostly, robust competition and consumer access to listing information was shown to exist.
 - Broad access to listing data
 - MLS/IDX/VOW reduced barriers to entry and freed up listing display rights
 - Expansion of new and innovative brokerage models (with varying commission structures)
 - Growth of consumer-facing portals
 - Consumer concerns identified:
 - Lack of commission transparency (especially on buyer side)
 - Pocket listings



Legal Update

Competition in Real Estate Brokerage

Comments Submitted:

- CAR submitted on four issues:
 - Standard forms are procompetitive and the creators have a right to protect their intellectual property
 - Dual agency is lawful with the consent of all parties; buyers should not be required to go unrepresented or to find another real estate licensee to represent them after they have found a home. Consumers should choose, knowing the potential conflicts, who can represent them.
 - Competition is a good and gives rise to many innovations but “new models” that shift the burden of the services to another agent for no additional compensation may be free riding. Nevertheless full information and consumer choice and licensees should be free to market the value of their services.
 - Data and listing acquisition has cost both for the person acquiring the listing as well as for the MLS which keeps the data clean through valuable enforcement mechanism. Brokers and the MLSs alike who bear the acquisition costs should not be compelled to give their data to any portal by FTC or other regulation. It should be by the consent of both the brokers and the MLSs.



Legal Update

Competition in Real Estate Brokerage

Comments Submitted:

- Zillow
 - Specifically called out California and criticized CAR for failing to license its forms to Zillow in its letter to the FTC. It also criticized the zipForm member benefit.
 - In favor of buyer agency, and promotes buyer's agency and implicitly states dual agency is not in the buyer's interest.
 - Concerned about Upstream
 - Called for total commission amounts and splits to be made public
- Redfin
 - In favor of search optimization
 - Pro MLS
 - Listing agents should be visible



Legal Update

Copyright Office Review of MLS Automated Database Copyright Applications

- For decades, many MLSs have obtained automated database (aka compilation) copyright registrations protecting their MLS compilations.
- Much of the rote data itself is not copyrightable, but automated database copyright rests on there being sufficient creativity in the arrangement, selection, and coordination of the compilation.
- For those MLSs that own the underlying copyrightable components of the database, such as photographs and text, the scope of the copyright protection extends to those component works.
- Copyright registration helps in protecting against a third party's unauthorized use of listing content.
- As of the Fall of 2017, the US Copyright Office stopped routinely granting these compilation copyright registration requests.



Legal Update

Copyright Office Review of MLS Automated Database Copyright Applications

- NAR got involved to advocate for MLSs at large
- NAR educated the Copyright Office on what goes into an MLS's compilation and how MLS databases should meet the test
- Good news: The Copyright Office will now approve these applications again - provided they demonstrate sufficient creativity
- Bad news: MLSs previously accustomed to an easy submittal and approval of their registration application will now be asked to submit a more specific prove-up by an applicant demonstrating the requisite degree of original creativity in the arrangement, selection and coordination of MLS compilations (and Copyright Office will charge you more since it's raising application fees)



Legal Update

Copyright Office Review of MLS Automated Database Copyright Applications

- NAR worked with the Copyright Office to develop guidelines to help MLSs demonstrate that creativity.
 - <https://www.nar.realtor/legal/copyright/how-to-prepare-a-descriptive-statement-for-an-mls-database-copyright-application>
- How to show creative choices made in the arrangement, selection and coordination?
 - Changes in the “bones” of the MLS system — adding or deleting fields, changing the database display, revising data field names and descriptions, altering how photographs are displayed, and changing data sources on back-end fields
 - How participants choose to upload listing content entails making creative choices — such as which photographs to include in what order and which data fields to complete
 - All of this should be described in detail



Legal Update

CA Consumer Privacy Protection Act (CCPA)

- California Consumer Privacy Act (“CCPA”) – AB 375 [Cal. Civil Code § 1798.100 et seq]
- Makes sweeping changes and additions to California’s existing privacy legislation
- Modeled in part after EU’s General Data Protection Regulation (“GDPR”) which went into effect May 2018
- Crammed through CA Legislature
- Blunted a more onerous initiative headed for Nov 2018 ballot
- Rush Job Not Ready for Prime Time = Amendments and clarifications still anticipated
- Goes into Effect January 2020



Legal Update

CA Consumer Privacy Protection Act (CCPA)

What Is CCPA?

- Broad regulation of when and how businesses store and handle consumer personal data, and what rights a consumer has in such data.
- Among other requirements, covered businesses must:
 - disclose information to their “consumers” regarding personal information that is collected and why, including the sources of the information and the third parties with whom it is shared;
 - delete personal information on a consumer’s request;
 - allow opt-out on sale of personal information (and not discriminate against consumers who exercise their opt-out right);
 - disclose consumer rights;
 - provide additional information on the specific data, use and disclosures upon consumer requests.



Legal Update

CA Consumer Privacy Protection Act (CCPA)

Who's and what information is being regulated by the CCPA?

- “Consumer” means a natural person who is a CA resident and includes individual customers, employees, independent contractors and vendors
- “Personal information” applies to all data capable of being associated with an individual or household, and not only electronic information.
 - Includes classic identifiers (ex: name, physical address, email address, SSN)
 - Commercial information (ex: property records, purchased products/services)
 - Internet Activity (ex: browsing history, search history, cookie data)
 - Biometric information, geolocation, audio, electronic, visual, thermal or olfactory data
 - Professional and employment information
 - Inferences drawn from personal information that creates a consumer profile such as preferences, characteristics, predispositions, intellect, trends, attitudes, etc.



Legal Update

CA Consumer Privacy Protection Act (CCPA)

What businesses will be required to comply with the CCPA?

[Answer: Lots of California REALTORS® and AOR/MLSs]

- Any business doing business in California that directly or indirectly collects consumers' personal information and determines the purpose and means of processing such information, provided that one of three conditions is met:
 1. The business has \$25 million or more in annual revenues;
 2. The business derives half or more of its revenues from the sale of consumer data; or
 3. The business annually buys, receives for its commercial purposes, sells, or shares for its commercial purposes, the personal information of 50,000 or more consumers, households or devices (which breaks down to as little as 137 transactions or website visitors per day on average).



Legal Update

CA Consumer Privacy Protection Act (CCPA)

How to Get Ready:



2. Know your data: Start auditing your data and privacy policies now – how do you collect data, who’s data do you get, where is it going
3. Know your third parties: Assess their data protection practices routinely and systematically – include and categorize “perceived” low-risk as well as high-risk vendors, establish a routine, repeatable third-party assessment process that covers all third-party service providers.



Legal Update

Photographer License Issues Update

- VHT Inc. v. Zillow Group, Inc.
- New CA case of Gutenberg v Zillow Group, Inc.
- C.A.R. Property Images Agreement (PIA)
- Newly formed Association of RE Photographers



Legal Update

Photographer License Issues Update

VHT Inc. v. Zillow Group, Inc.

- Real estate photography company VHT initially filed copyright infringement case against Zillow in Federal Court in Seattle, July 2015
- The final judgment of lower court issued July 10, 2017 upheld a \$4.05 million verdict (cut down from a previous verdict of \$8.3 million) against Zillow Group
- Appealed by both parties to 9th U.S. Circuit Court of Appeals
- Oral arguments at the 9th Circuit held August 28, 2018
- After oral arguments, most cases are usually decided within three months to a year



Legal Update

Photographer License Issues Update

VHT Inc. v. Zillow Group, Inc.

- Photos at issue in the case were provided to Zillow by real estate agents, brokers and MLSs
- VHT retains copyright for all photos taken by photographers on its behalf.
- VHT licenses the photos to listing agents and brokers solely for marketing the specific pictured property or the company or agent representing the property — and only while that property is on the market
- Case arises out of use of photos on Zillow's accessory home improvement site Zillow Digs from which Zillow makes money on the array of photos used to show decorating ideas
- VHT did not name any brokers or MLSs as defendants in this case, but this case is a big one to watch for the future



Legal Update

Photographer License Issues Update

- New CA case of Gutenberg v Zillow Group, Inc.
- Copyright infringement complaint filed September 17, 2018 in U.S. District Court alleges as follows:
 - Gutenberg is a high-end professional photographer in the Coachella Valley
 - He retains the copyright to all photographs taken of each property and grants the real estate agent a limited license to use the photographs for up to one year for the purposes of marketing the property, which allows the agent to place the photos on their website, in brochures, real estate magazines, and on the MLS.
 - The license is not transferrable and prohibits 3rd party use without permission from Gutenberg
 - Zillow was using 543 of his photographs on its listing detail pages without a license or his permission
- Complaint seeks an award of actual damages and disgorgement of any profits Zillow has made from the images or, alternatively, an award for statutory damages of up to \$150,000 for each infringement for a total of \$81.45 million.



Legal Update

Photographer License Issues Update

- New CA case of Gutenberg v Zillow Group, Inc.
- Like VHT, Gutenberg did not name any brokers or MLSs as defendants in this case and makes the claim against Zillow
- Zillow asserted to Inman that it generally receives listing feeds from 3rd parties such as MLSs and franchisors, subject to agreements whereby these parties grant Zillow a license to use the photos
- A limited 1 year license that restricts any transfer to 3rd parties is totally inadequate for what is needed for use in the RE industry, including for the MLS and participants via IDX, let alone listing syndication to portals = Trouble
- MLSs should reject/pull any photo subject to this type of license



Legal Update

Photographer License Issues Update

C.A.R. Property Images Agreement (PIA)

- Assigns ALL rights to RE licensee, OR
- Grants a broad, exclusive, forever license that covers all the needs of the RE industry
 - No time limit
- Photographer engaged only for the purpose of using the Images as permitted by home sellers for use in connection with the real estate industry



Legal Update

Photographer License Issues Update

C.A.R. Property Images Agreement (PIA)

- As permitted by home sellers:
 - Per RLA seller permits for the purpose of marketing the real property and for advertising, including post sale and for brokers business in the future; and
- For use in connection with the real estate industry:
 - Advertising real property
 - RE services
 - Authorization and sublicense to 3rd party (including broker's website, the MLS and other marketing materials and third party sites)
- Expressly cannot be used for any other purpose than as permitted by home sellers in connection with the real estate industry



Legal Update

Photographer License Issues Update

C.A.R. Property Images Agreement (PIA)

- Expressly states no photographer branding of Images is required; and
- Photographer fairness and good will built in:
 - Default authorization for limited use by photographer for own portfolio/promotion on own site; and
 - Alerts that MLS will look out for misuse by prohibiting reuse of Images by unauthorized subsequent agent.
- PIA is a valuable tool to avoid key pitfalls!



Legal Update

Photographer License Issues Update

Newly formed Association of RE Photographers

- Trying to empower RE photographers to better secure their rights with online images used in perpetuity
- Attended CMLS Legal Seminar to say they “want to work with industry” but so far the “standard contract terms” they want to maintain are tone deaf to the real world needs of the industry and how listing images are used and move online
 - They want to grant a limited license that expire after a set period or upon sale of property;
 - They want to retain rights to re-use, re-sell property images outside the real estate industry (as previously discussed, that would be beyond the scope of rights their client brokers could even provide)
- We’ll see what comes of this group and any outreach to the RE industry
- Caveat Emptor: use a photographer that agrees to the necessary terms you need to operate in the industry!
 - Your MLS may even be compiling a list of those who do.



Legal Update

Recording Devices

- Remote recording/camera in seller's home
- Video-only recording in one's home without informing anyone is lawful.
- Hidden is okay as long as:
 - Used for a reasonable purpose (ex: preventing theft)
 - No placement where expectation of privacy (ex: bathroom)
 - No use for a commercial purpose



Legal Update

Recording Devices

- If the camera records audio as well as video, it's a different ballgame.
 - Under wiretapping laws, it's illegal to record oral communication in a surreptitious manner, such as with a hidden camera or other secret recording device.
 - In about 15 states, including CA, it's illegal to record audio without the consent of the party being recorded.
 - If audio is recorded, a seller would need to give prior notice/get prior consent.
 - Without consent, evidence would likely be inadmissible in court.
 - Notice in MLS?
 - Best: Provide notice onsite as one enters the property
 - The RLA provides in section 10 on Security, Audio, etc that seller is advised that those coming on the property may not be aware that they could be recorded and advises them to post notices disclosing the existence of security devices.
 - While a disclosure can be made through the MLS, that would really only be going between the agents. To be compliant with the requirements of the law, disclosure should be made directly by the seller to those entering the property.



Legal Update

The End - Thank you!

Elizabeth Miller-Bougdanos

C.A.R. Senior Counsel

elizabethm@car.org



CALIFORNIA
ASSOCIATION
OF REALTORS®