



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

June 29, 2017

Brad Owens
Zillow Group, Inc.
1301 Second Ave, Floor 31
Seattle, WA 98101

BY EMAIL

Dear Mr. Owens:

I write in response to Zillow's letter of June 26, 2017 regarding the website mcmansionhell.com ("McMansion Hell"). The Electronic Frontier Foundation represents Kate Wagner, who created this site to comment on contemporary residential architecture. In the letter, Zillow demands that all images sourced from Zillow be removed from the site, alluding to various purported claims under contract, copyright, and the Computer Fraud and Abuse Act. Our client has no obligation to, and thus will not, comply with Zillow's demands. Zillow's legal threats are not supported and plainly seek to interfere with protected speech.

McMansion Hell educates the public about architectural concepts, urban planning, environmentalism, and history. The site alternates comedy-oriented discussions of individual houses with weekly informative essays about urbanism, architecture, sociology, and interior design. The site comments on the houses themselves, as well as how they are presented and discussed in real estate listings. For example, a recent post discusses how houses of various styles are all labeled as "Colonial" in real estate listings.¹ Wagner's posts about individual houses include heavily annotated photographs that, though humor and parody, illustrate the ugly, absurd, and misguided features of some contemporary homes and their descriptions. Wagner hopes that her posts, though amusing and comic, open readers' eyes to the contemporary suburban environment and inspire them to build better homes and towns.

McMansion Hell has a wide following and has been featured in national media. The Washington Post recently featured McMansion Hell and published a video interview with Wagner.² Even before the attention generated by your letter, the website had been discussed in The Huffington Post, Business Insider, Slate, Realtor.com News, CityLab, Houstonian Magazine and many others. McMansion Hell has become part of the national dialogue about contemporary design.

¹ See <http://mcmansionhell.tumblr.com/post/162212185966/looking-around-the-curious-case-of-minimal>

² See <https://www.washingtonpost.com/news/wonk/wp/2017/06/26/the-ultimate-symbol-of-the-pre-recession-boom-is-back/>

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We provide this background so that you can understand the purpose behind McMansion Hell, which will, in turn, help you understand that Zillow's legal complaints against it are baseless. We address below Zillow's contentions in its letter of June 26 (sent by in-house counsel Christopher Poole), Zillow's email to Wagner of June 27 (sent by Vice President, Communications and Public Affairs Katie Curnutte), and your phone call with me on June 27—and we explain why Zillow's allegations are unfounded and unsupportable.

In our phone call yesterday, you suggested that Zillow's primary complaint against Wagner is based on Zillow's Terms of Use, which purports to prohibit any reproduction or modification of images found on Zillow's website. You stated that Zillow's agreements with third parties requires it to include such provisions in its Terms of Use and to enforce them. But Wagner is not bound by your Terms of Use and, even if she were, the relevant provisions are unenforceable.

Courts routinely decline to enforce “browsewrap” agreements like Zillow's Terms of Use, which fail to present terms except via a hyperlink and without a checkbox to signal assent. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014); *Meyer v. Kalanick*, 199 F. Supp. 3d 752 (S.D. N.Y. 2016); *Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *9 (N.D. Cal. Oct. 9, 2013); *Kwan v. Clearwire Corp.*, No. C09-1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012).

Even if an agreement were formed, paragraph 14 of the Terms of Use, asserting Zillow's right to alter the contract without notice or justification, would render the agreement illusory and void for lack of consideration. *See, e.g., Cheek v. United Healthcare of Mid-Atl., Inc.*, 378 Md. 139, 144, 835 A.2d 656, 659 (2003); *Interchange Assocs. v. Interchange, Inc.*, 16 Wash. App. 359, 362, 557 P.2d 357, 359 (1976).

Further, to the extent that Zillow's Terms of Use purport to undermine Wagner's freedom to operate the McMansion Hell website, such terms would be unenforceable under contract law doctrines that restrict surprising, unfair, or speech-restrictive terms, particularly in contracts of adhesion like the Terms of Use. For instance, Wagner would be protected by doctrines of reasonable expectations (*see, e.g., Philadelphia Indem. Ins. Co. v. Barerra*, 200 Ariz. 9, 21 P.3d 395 (2001)), unconscionability (*see, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003)), and public policy (*see, e.g., Perricone v. Perricone*, 292 Conn. 187, 210-11, 972 A.2d 666, 682-83 (2009)).

The relevant provision of your Terms of Use is also unenforceable under the recently enacted Consumer Review Fairness Act of 2016 (“CRFA”), codified at 15 U.S.C. § 45b. Zillow's letter to Wagner cited §1 of Zillow's Terms of Use, which prohibits “reproducing, modifying, distributing, or otherwise creating derivative works from any portion of the Zillow Site,” and §2(a), which broadly prohibits “any use of the Zillow Site that could harm Zillow or its suppliers.” Even if Wagner can be said to have agreed to Zillow's form contract, which Wagner does not concede, these provisions are

unenforceable against her under the CRFA.

The CRFA makes void from inception any form contract provision that “prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication.” 15 U.S.C. § 45b(b). A “covered communication” is defined as:

[A] written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party.

Id. at (a)(2).

Given Zillow’s business model, its goods and services include its listings, real estate photographs, and the underlying properties, all of which are covered by McMansion Hell’s reviews. Wagner’s work and blog therefore constitutes, among other things, an assessment of the goods offered via the Zillow website and thus falls squarely within the protections of the CRFA. This protection includes prohibiting any provision of Zillow’s Terms of Use that would purport to waive Wagner’s fair use rights in this circumstance, given the restriction that would place on Wagner’s ability to engage in a covered communication (which expressly includes a “pictorial review”). Zillow’s attempt to enforce its Terms of Use to prohibit Wagner’s activities is unlawful. *See id.* at (c).

Should Zillow seek to enforce its Terms of Use against Wagner in violation of the CRFA, Wagner will consider all possible remedies available to her including, without limitation, a counterclaim against Zillow for violation of Washington’s Consumer Protection Act, RCW 19.86.020 *et seq.*, and a request for an award of attorneys’ fees and costs.

In our telephone conversation, you suggested that Zillow’s agreements with third parties require it to demand that our client remove images from her blog. Of course, our client is not a party to any of those agreements and is not bound by them. Further, Zillow does not have any viable state law claims, such as interference with contract or business expectancies. Any such claim would be founded on Wagner’s commentary and criticism and would be barred by the First Amendment. *See, e.g., Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 857 (10th Cir. 1999) (state law claim for interference with contract cannot be based on protected speech); *SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1290 (D. Utah 2010); *Search King Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003); *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 224 (D. Kan. 1996); *cf., Aitken v. Reed*, 89 Wn. App. 474, 491, 949 P.2d 441, 449 (1998) (“Where defamation and tortious interference with contract claims arise out of the same conduct, both claims are subject to the defense of privilege.”). Zillow’s agreements with third parties do not trump Wagner’s right to free expression.

In Zillow's original cease and desist letter, your counsel suggested that Wagner is infringing the copyrights in photographs sourced from Zillow's website. Zillow claimed that Wagner's use of these images was not fair use. This contention fails for at least three reasons.

First, Zillow does not purport to own the copyright to any of the images that form the basis of your allegation. Thus, Zillow has no copyright interest to assert against our client. *See Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1169 (9th Cir. 2013) ("only the 'legal or beneficial owner of an exclusive right under a copyright' has standing to sue for infringement of that right").

Second, even if Zillow somehow had standing to assert a copyright interest, Wagner's use of images from real estate listings, whether sourced from Zillow or elsewhere, is fair use. Wagner transforms the photographs with her critical annotations and uses the photographs for a radically different purpose than Zillow or the original photographers. *See Katz v. Google Inc.*, 802 F.3d 1178, 1182 (11th Cir. 2015) (blogger's use of photograph for criticism was transformative); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800-803 (9th Cir. 2003); *Dhillon v. Does 1-10*, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014). Wagner generates a modest income from her website through a Patreon, but this limited commercial purpose does not weigh against fair use. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998). Similarly, Wagner's use of entire photographs is necessary to illustrate her criticism and does not weigh against fair use. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006). Finally, there is no market harm. Wagner is not a competitor of Zillow or any other listings service. To the extent Wagner's commentary harms the market for real estate photography by making people realize that certain homes are poorly designed, that is not a cognizable copyright injury. *See Campbell*, 510 U.S. at 593 (the "fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary" has no relevance under copyright). In sum, the four statutory fair use factors strongly support a finding of fair use.

Third, Zillow cannot leverage its agreements with third parties to assert some kind of 'super copyright' that overrides fair use. The original copyright owners could not deny Wagner permission to make fair use of the photographs. *See Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016) (a fair use is not an infringement of copyright). Zillow, which does not even own the relevant copyrights, cannot then assert rights that the original copyright owners could not assert. Further, as discussed above, Wagner is not bound by Zillow's Terms of Use and, even if she were, the relevant provisions are unenforceable.

Finally, Zillow has pointed to no support for its assertion that Wagner's activities

“may violate” the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. The CFAA is the federal anti-hacking statute intended to criminalize unauthorized intrusions into computer networks. Wagner has engaged in no such behavior. To the extent Zillow’s claim is premised on an alleged violation of its Terms of Use or other contractual obligations, federal courts have rejected such theories as a premise for liability under the CFAA. See *United States v. Nosal*, 676 F.3d 854, 859-862 (9th Cir. 2012); *WEC Carolina Energy v. Miller*, 687 F.3d 199, 207 (4th Cir. 2012); *United States v. Valle*, 807 F.3d 508, 526 (2d Cir. 2015).³

Our client intends to relaunch McMansionHell.com shortly and will not be deleting any posts. In the interests of compromise, and because Wagner no longer wishes to use Zillow’s website, she will no longer source photographs from Zillow for her blog. Given this, we sincerely hope Zillow will have the good sense not to trouble a court of law with this matter. However, if Zillow does intend to file suit, please be assured that our client is prepared to defend herself against your spurious claims.

Very truly yours,



Daniel K. Nazer
Staff Attorney

Cc (by email): Christopher Poole

³ See also *Cloudpath Networks, Inc. v. SecureW2 B.V.*, ___ F. Supp. 3d ___, 2016 WL 153127, at *17 (D. Colo. Jan. 13, 2016); *Lane v. Brocq*, 2016 WL 1271051, at *10 (N.D. Ill., March 28, 2016); *Experian Marketing Solutions, Inc. v. Lehman*, 2015 WL 5714541, at *5 (W.D. Mich. Sept. 29, 2015); *Giles Const., LLC v. Tooele Inventory Solution, Inc.*, 2015 WL 3755863, at *3 (D. Utah Jun. 16, 2015); *Enhanced Recovery Co., LLC v. Frady*, 2015 WL 1470852, at *6-*7 (M.D. Fla. Mar. 31, 2015); *Cranell Inc. v. Pro Image Consultants Group, LLC*, 57 F. Supp. 3d 838, 845-46 (S.D. Ohio 2014); *Advanced Fluid Systems, Inc. v. Huber*, 28 F. Supp. 3d 306, 329 (M.D. Pa. 2014); *Dresser-Rand Co. v. Jones*, 957 F. Supp. 2d 610, 619 (E.D. Pa. 2013); *Power Equipment Maintenance, Inc. v. AIRCO Power Services, Inc.*, 953 F. Supp. 2d 1290, 1295 (S.D. Ga. 2013); *Lewis-Burke Associates, LLC v. Widder*, 725 F. Supp. 2d 187, 194 (D.D.C. 2010); *Bell Aerospace Servs., Inc. v. U.S. Aero Servs., Inc.*, 690 F. Supp. 2d 1267, 1272 (M.D. Ala. 2010); *Clarity Servs., Inc. v. Barney*, 698 F. Supp. 2d 1309, 1315 (M.D. Fla. 2010); *ReMedPar, Inc. v. AllParts Med., LLC*, 683 F. Supp. 2d 605, 615 (M.D. Tenn. 2010); *Nat’l City Bank, N.A. v. Republic Mortgage Home Loans*, 2010 WL 959925, at *3 (W.D. Wash. Mar. 12, 2010); *Black & Decker, Inc. v. Smith*, 568 F. Supp. 2d 929, 934 (W.D. Tenn. 2008); *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 967 (D. Ariz. 2008); *Diamond Power Int’l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1343 (N.D. Ga. 2007); *Int’l Ass’n of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 499 (D. Md. 2005).