



When posting an advert to Craigslist, most users do not care who owns the advert – they just want the free exposure for their posting. But with a reported 955m active Craigslist users on 700 local Craigslist sites in 70 countries¹, a substantial body of content is created and important questions arise regarding ownership and lawful use of that content.

On 20 July 2012, Craigslist, (“Craigslist”) issued a complaint at the Northern District Court of California against 3Taps, (“3Taps”) and PadMapper, (“PadMapper²”). Craigslist alleged that the defendants were “unlawfully and unabashedly mass harvesting and redistributing postings entrusted by Craigslist users to their local Craigslist sites³”. The defendants were accused of using automated software to trawl through the user-generated adverts on Craigslist and then copying the collected content for their own competitive and unauthorised use.

3Taps was also alleged to have operated “Craiggers.com”, which offered “re-packaged” Craigslist content to the public under the slogan, “Craigslist data, better than Craigslist”, and PadMapper was alleged to have used the 3Taps-supplied data that was scraped from Craigslist for a service that was competitive with Craigslist itself⁴.

Craigslist was understandably concerned that all of its user-generated content was allegedly being taken without its permission and being commercially used by competitors. Aside from what would appear to be a compelling argument for trademark infringement and trademark dilution over the use of the domain name “Craiggers.com” by 3Taps, Craigslist asserted that “each user-generated posting on the Craigslist website is itself an original work of creative expression” and was thereby subject to copyright protection⁵.

But since the content at issue consisted of mainly user-generated adverts, and *not* original content actually created by Craigslist itself, a question exists as to whether Craigslist has “copyright” in these postings. In somewhat similar circumstances, the court in the case of *Facebook, Inc v Power Ventures, Inc et al*, held that Facebook *did not* have copyright in the user-generated Facebook content itself⁶. This finding also seems to

find support in the recent case of *The People of The State of New York v Malcolm Harris*, wherein a New York Judge ruled that users ‘own their own tweets’ subject only to providing Twitter with a licence to use them⁷.

Craigslist potentially could have relied upon Terms of Use (“TOU”) for its website that could have purported to actually convey user copyright from users to Craigslist. Unfortunately for Craigslist however, its then current version of its TOU, which were reportedly in place prior to the issuance of the complaint, expressly *disclaimed* ownership of user-generated content, which was in keeping with Craigslist’s history of supporting freedom of expression online⁸. Had the TOU instead purported to grant an exclusive licence or transfer of copyright to Craigslist by each user, then ostensibly Craigslist could have argued that it held copyright in each user post by virtue of its TOU.

Instead, Craigslist was forced to rely on other grounds for asserting a right to protect its user-generated content from unauthorised third-party use. Craigslist asserted that it had copyright over the ‘entirety or compilation’ of the user-generated content, rather than merely the individual posts. This principle of copyright over a compilation is well-established; it has been held that “a collection of non-copyrighted material arranged in an original way is subject to copyright protection⁹”. In fact, it was this principle that was ultimately upheld in the *Facebook* case, *supra*. It seems therefore, that websites may have a claim to a “proprietary interest” over user-generated content by asserting copyright over the entire website as a compilation rather than merely a copyright over particular user posts.

Craigslist also relied upon a provision in its TOU which prohibited “any copying, aggregation, display, distribution or derivative use of Craigslist or any content posted on Craigslist whether done directly or through...spiders, robots, crawlers, scrapers [etc]”¹⁰. Craigslist further relied upon the fact that according to its posted TOU, anyone who accessed or used the website was bound by the TOU. This ostensibly included the defendants, who must have accessed the Craigslist websites in some way in order to scrape content. In this manner, the

TOU attempted to prohibit exactly what the defendants were alleged to have done.

In the case of *Ticketmaster, LLC v RMG Technologies, Inc*¹¹, the defendant was found to have made a copy of the plaintiff's website when it used an automated program to access and scrape data from the plaintiff's website. Ticketmaster's allegations were similar to Craigslist's in that Ticketmaster's TOU provided that 'mere use of the website constituted assent to its provisions', and that expressly prohibited the use of automated programs to access and copy content. It was ultimately held that Ticketmaster's TOU were enforceable, and that any user who accessed Ticketmaster's website was contractually bound by them. Similarly, in *Facebook, supra*, it was held that, "access for purposes that are explicitly prohibited by the terms of use is clearly unauthorised"¹². Accordingly, there is ample support for Craigslist's claim that the defendants breached Craigslist's TOU when they entered the website and copied data.

Notwithstanding that a defence has not yet been filed in the Craigslist case, some insight into the defendants' positions are nevertheless discernible. In an open letter on the 3Taps and Craiggers.com websites, 3Taps claimed that Craigslist user-postings were not copyright-protectable because they were not "creative expressions"¹³. Furthermore, 3Taps claimed that since Craigslist "provided" the data for indexing (aka "scraping"), an "implied licence" was created¹⁴. Nevertheless, since the case law appears to establish that Craigslist may have copyright over the compilation of user-generated posts, and that furthermore, Craigslist's TOU may lawfully prohibit unauthorised use of its website as aforesaid, these defences may be without merit.

3Taps however, also asserted a purported "public policy" reason to justify its conduct. 3Taps argued that, "passing along the data is clearly fair use, and clearly was intended by – and in the best interest of – the author"¹⁵. Apparently, 3Taps is of the mind that "information wants to be free on the internet"¹⁶, and that there is a "public policy" reason which ought to allow it to "re-package" and "re-distribute" data. 3Taps ostensibly feels that the public should have unfettered access to user-generated adverts since the posters themselves are the authors and they have an interest in gaining exposure for their own postings. On the other hand however, Craigslist has an equalling compelling argument, that a business that invests in creating a particularly innovative system for disseminating data should be entitled to protection, as it is that protection which encourages innovation in the first place. In any event, 3Taps' 'fair use of copyrighted material in the public interest' argument, although interesting, does not seem likely to result in a favourable outcome for the defendants, given the aforementioned established case law.

Some of the most popular websites on the internet are comprised of user-generated content, such as Facebook, eBay, Craigslist, and arguably even Google that constantly aggregates and reproduces third party content to some degree¹⁷. As internet businesses continue to rely on user-generated content, clear lines between 'what belongs to the website' and 'what belongs to the user' are becoming increasingly important. Internet businesses and their counsel must therefore carefully consider these issues.

"Terms of Use" documents have been shown to play a crucial role in protecting online businesses and may be relied upon to protect against unauthorised access and copying. Accordingly, rather than being considered a mere afterthought or "boilerplate", "Terms of Use" should be drafted with care and precision, particularly at the initial stages of developing a website's functionality and business model. Furthermore, "Terms of Use" should be adapted and re-considered with regularity, in order to reflect ongoing concerns and new issues as they arise. Care should be taken to prominently place "Terms of Use" throughout a website, and they should be brought to users' attention, preferably through an unequivocal an express assent, such as a "checkbox", where

users are required to agree if they wish to access the website. For example, the "Terms of Use" in *Ticketmaster, supra*, were held to be enforceable because a link to them appeared on almost every page of the website, users had to affirmatively agree to their provisions, and they were written clearly in an easy-to-understand fashion¹⁸.

If a website includes copyrighted information that its owner does not want scraped, technological measures may also be considered, such as log-in mechanisms that restrict access to only human registered-users and also hinder or prevent unauthorised robots from trawling a website for data. However, in most cases, such measures are considered ultimately counterproductive as they impede user access, and prevent *useful* robots from crawling a website, such as those employed by search engines, like Google. Accordingly, well-crafted and enforced "Terms Of Use" can be the key to enforcing user-generated content on the internet.

Footnotes

1. See <http://www.craigslist.org/about/factsheet>, accessed 29 August 2012.
2. *Craigslist, Inc v 3Taps, Inc; PadMapper, Inc*, CV 12 3816 LB.
3. *Ibid*, at Paragraph 2.
4. See <http://craiggers.com>, accessed 29 August 2012.
5. *Craigslist, Inc v 3Taps, Inc; PadMapper, Inc*, at Paragraph 43.
6. *Facebook, Inc v Power Ventures, Inc*, 91 USPQ2d 1430 (ND Cal 11 May 2009).
7. *The People of The State of New York v Malcolm Harris*, NYS2d, 2012 NY Slip Op 22109 (NY Crim Ct 20 April 2012). This decision is currently being appealed.
8. "Good News: Craigslist drops exclusive licence to your posts". See <https://www.eff.org/deeplinks/2012/08/good-news-craigslist-drops-exclusive-license-your-posts>, accessed 29 August 2012. In late July or early August 2012, Craigslist reportedly attempted to amend its Terms of Use in a manner that granted it an exclusive licence over users' posts but subsequently retracted the amendment due to apparent concern among users regarding their desired ownership of the content posted on Craigslist.
9. *Facebook, Inc v Power Ventures, Inc, supra*.
10. See <http://www.craigslist.org/about/terms.of.use>, accessed 29 August 2012.
11. *Ticketmaster LLC v RMG Techs, Inc*, 507 F Supp 2d 1096 (CD 2007).
12. *Facebook, Inc v Power Ventures, Inc, supra*.
13. *id*.
14. *id*.
15. *id*.
16. This slogan, reportedly attributed to Stewart Brand, has been the rallying cry of activists who believe that the internet should be a public domain of information and largely free of intellectual property rights. See http://en.wikipedia.org/wiki/Information_wants_to_be_free, accessed 29 August 2012.
17. In the May 2011 judgment of *Google, Inc v Copiepresses et al*, RG 2007/AR/1730, the Court of Appeal in Brussels, Belgium, upheld a decision finding Google in breach of copyright by unilaterally publishing links and parts of articles belonging to local newspapers using its Google News aggregation service. See <http://www.bloomberg.com/news/2011-05-06/google-loses-copyright-appeal-over-links-to-belgian-newspapers.html>, accessed on 30 August 2012.
18. *Ticketmaster LLC v RMG Techs, Inc, supra*, at Paragraphs 11-16.

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