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Magna Charta
re "Magic Words" for Intellectual Property Rights

Recent court filings by Craigslist and Multiple Listing Services (MLS) lay clear their respective bids for a massive transfer of copyright powers to publishers. In both cases, the website publishers are claiming exclusive copyright power over data that has bypassed traditional procedures and safeguards for the recognition and assignment of authorship, and fair use rights.

First, Craigslist (CL) claims to be the exclusive licensee of all user-generated postings, citing Section 3 of its own Terms of Use (TOU)—a TOU that happens not to even mention the words "exclusive" or "copyright." Craigslist's current TOU claims are audacious; especially in light of the fact that last summer when Craigslist briefly employed a clickwrap agreement requiring users to acknowledge Craigslist as the purported "exclusive licensee" of any posted content,[1] widespread and immediate public criticism led CL to abandon this stance after little more than three weeks. In contrast to prior, long-standing CL TOU language that specifically recognized that Craigslist did <u>not</u> claim ownership of user-generated content and held a non-exclusive use license, the expansive implications of CL's newly minted TOU claims to the contrary were quickly tagged by the user community and singled out by the Electronic Frontiers Foundations (EFF) on August 9, 2012 as a "terrible precedent":

> "For many years, Craigslist has been a good digital citizen … Nevertheless, it was important for Craigslist to remove the provision because claiming an exclusive license to the user's posts--to the exclusion of everyone, including the original poster--would have harmed both innovation and users' rights, and would have set a terrible precedent. We met with Craigslist to discuss this recently and are pleased about their prompt action." August 9, 2012 EFF[2]

[1] This clickwrap agreement read: "Clicking "Continue" confirms that Craigslist is the exclusive licensee of this content, with the exclusive right to enforce copyrights against anyone copying, republishing, distributing or preparing derivative works without its consent.

[2] Under copyright law, an exclusive license is a "transfer of copyright ownership" (17 U.S.C. § 101). If upheld, it would have meant that Craigslist owned every post that you made (assuming a court would find clicking "Continue" was equivalent to an "instrument of conveyance … in writing and signed by the owner" (17 U.S.C. § 204)). The change appeared to fit in with the lawsuit, which sued, in part, over alleged infringement of these newly-minted exclusive rights.

But while the clickwrap agreement words disappeared, Craigslist has subsequently advanced an aggressive legal concept regarding the non-necessity of using "**magic words**" to achieve the same sought outcome of exclusive ownership through assumed transfer of copyright to themselves from authors of user-generated content, and therefore the standing to litigate. The argument proceeds as follows:

> "The absence of the term "exclusive" in the TOU is not determinative … there is no magic language sufficient to evince an intent to grant an exclusive license to a copyrighted work." Page 20 Line 16, Craigslist Opposition to 3taps Motion to Dismiss

And further:

> "No magic words must be included in a document to satisfy 204(a).[3] Rather the parties' intent as evidenced by the writing must demonstrate a transfer of the copyright." Page 20 Line 19, Craigslist Opposition to 3taps Motion to Dismiss

Craigslist's legal team goes on to back-up its "magic words" legal concepts by reference to the *Magna Carta*—which in 1215 A.D. enshrined, among other things, that no freeman could be punished except through the law of the land.

Unfortunately, the reference is based on what Craigslist is calling the "Magna Charta" in the form of its assertion that Craigslist's TOU "doesn't have to be the Magna Charta; a one line pro forma statement will do." [The "Charta" spelling is anachronistic and rarely used; perhaps as rarely as citations to the actual Magna Carta in a legal brief aimed at *limiting* an author's rights.] Thus despite never

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This new language was a marked difference from prior Terms of Use (2008/2011), which clearly stated "Craigslist does not claim ownership of content that its users post." While this clear language has not returned to the TOU, the same result comes from the non-exclusive license currently in the TOU. https://www.eff.org/deeplinks/2012/08/good-news-Craigslist-drops-exclusive-license-your-posts.

[3] **§ 204 . Execution of transfers of copyright ownership**

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. From Copy Law of the United States of America and Related Laws Contained in Title 17 of the United States Code Circular 92

putting in writing the words "exclusive rights" or "copyright," the argument proceeds that:

> Since Craigslist's users have granted to Craigslist *all* the exclusive rights a copyright owner is entitled to under 17 U.S.C. § 106 .... the only proper interpretation is that Craigslist has an exclusive license to the postings and can enforce the copyrights protecting the postings against third parties like Defendants.

If this assertion stands true, that no "magic words" describing actual claims of exclusive ownership or explicit transfer of copyright are needed by any website to capture the full ownership of any and all user-generated content (UGC), a new reality for Internet content and intellectual property has truly been brought to life!

If ever a time to use concise language (i.e. magic words) existed in our society, one would think a point of legal conveyance of copyrights—or any rights—would be the exact time to "say what one means, and mean what one says." **Replacing a "terrible precedent" with an invisible one, Craigslist now omits magic words—critical words like "exclusive" and "copyright"—at the very moment when those values are about to be conjured up and transferred between authors and publishers.** (This is all the more glaringly obvious when exactly the opposite words were concisely and clearly stated between the parties in question as recently as February 2012.)

We are asked to accept a descent from clarity to fog, where the logic of language is undercut by "spin"—i.e., how best to minimize actual understanding. The "spin" here, though, is to effect that **Craigslist users are lulled into a sense that nothing is being transferred because nothing is said in print about a transfer** (of copyright) … later, Craigslist spins all of this into a knowing waiver of rights on the part of its users.

Craigslist has company. There is a separate but parallel evolution of expansive copyright assumption; re: the real estate sales Multiple Listing Service (MLS) website, an aggregator of homes-for-sale listings. Usurpation of a User's rights are almost the same, but without the spin. Unlike Craigslist, which has asserted exclusive ownership of its users' content without using actual words of transfer, Minnesota-based MLS earnestly did pursue its exclusive claims the old- fashioned way—by following the procedures and fees specified in section 204(a) of U.S. copyright law. Its novel contribution was to claim copyright to all pictures of homes for sale—rather than just those with registered copyrights—on its MLS-owned websites. Under MLS's construct, it claimed copyright to all published images on their websites; the creators of the photographs and/or the authors of ads were to forfeit their copyright if their works were to appear in MLS's listing service.

For the mere cost and effort of those fifty $35 filings, the MLS then constructed an ownership claim over the entire universe of posted filings that it did not initially own or create—and proceeded to litigate as if it did own exclusive copyrights to the lot. (This might be termed a "Brooklyn Bridge" stratagem of charging private tolls on public roads.) Based on these ownership claims, the MLS even obtained an injunction against entities making use of postings bearing the bold application of MLS's watermark of ownership, even though no actual registered copyright existed.[4]

Alas, where Craigslist may have erred in its reference to the Magna Charta, MLS of Minnesota did made its own tactical error by accidentally sending a copy of a solicitation to other MLS agencies to join its efforts in "throwing a world of hurt" on parties challenging their ownership claims, including—most unwittingly—the legal representatives of the very opponent that they sought to destroy. The author of this MLS solicitation bemoaned the fact that unless strong action was taken, their

[4] The case is Metropolitan Regional Information Systems, Inc. (MRIS) v. American Home Realty Network, Inc., et al. (D. Md. Civil Action No. AW-12-cv-00954) by Judge Alexander Williams, Jr. on Aug. 24, 2012

organization and others that had watermarked unregistered photos as their own might/would be viewed as "unconnected, unserious and more noise than threat."

Whereas Craigslist reaches back to 1215 to buttress its arguments, the Minnesota MLS attorneys reached even further back to the exertions of King Arthur and his robust defense of the British against the Saxon invaders in the early 6th century. The MLS's e-mail read like a battle-cry:

> "… I'd be thinking that we (the offended MLSs) are unconnected, unserious and more noise than threat. Ask Brian about the French guards in Monty Python and The Holy Grail as they rain insults down on Arthur[5] … If we don't have the standing to enforce the copyright as anticipated in the Access and License Agreements of those of our Participants who assigned us an interest … what is the point of them … How do we connect the dots between all the MLSs that have been abused so that we can act collectively, either in cost sharing and/or strategically by taking action?" By RMLS president, John Morsey, to RMLS's attorneys, Mitchell Skinner and Brian Larson, and apparently, inadvertently, copied to in-house lawyers for the Defendant fighting off RMLS claims of copyright infringement.

Fighting words from an industry already operating under a consent order from the Department of Justice against the National Association of Realtors, based on past anticompetitive abuses.[6]

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[5] Favored French ranked insults referred to by RMLS president John Morsey: I don't wanna talk to you no more, you empty headed animal food trough wiper! I fart in your general direction! Your mother was a hamster and your father smelt of elderberries! (73%); I'm French. Why do you think I have this outrageous accent, you silly king? (3%); You don't frighten us, English pig-dogs! Go and boil your bottom, sons of a silly person. I blow my nose at you, so-called Arthur King, you and all your silly English k-nnnnniggets. Thpppppt! Thppt! (7%); No chance, English bed-wetting types. I burst my pimples at you and call your door-opening request a silly thing, you tiny-brained wipers of other people's bottoms! (10%); Yes, depart at this time and don't be approaching any more, or we fire arrows at the tops of your heads and make castanets out of your testicles already! (7%).%).

[6] On November 18, 2008 the Court entered a Final Judgment approving a settlement against NAR….NAR repealed policies challenged by the United States and replaced those policies with rules that do not discriminate against innovative brokers who use the Internet to provide high-quality, low-priced brokerage services to consumers. From the United States Department of Justice Enforcing: Public Documents: Antitrust Laws in the Real Estate Industry.

In their arguments regarding vast transfers of copyright, Craigslist and the MLS agencies, respectively, never pause to question whether the content in question—**advertisement for exchanges—actually qualifies as creative expression under Supreme Court precedent.**[7] **An alternative and plausible understanding is that exchange postings are factually descriptive expressions authored for an instrumental purpose (to effect an exchange) rather than as an end in themselves.**

Users do not usually create a posting to promote their fine prose or lovely photographs. They are promoting something else: a sale of the advertised item to another party. As such, these authors need none of the incentives available to literary authors or inventors, since the consummation of the exchange as an end in itself is incentive enough to foster the creation of ads. One might need copyright and patents to motivate Michael Jackson to create Thriller or a scientist to solve the riddle of cold fusion, but the Craigslist or MLS ad performs a just and simple utilitarian function—to promote a sale. Absent anything beyond this utilitarian purpose, there is, at a minimum, a de facto right of fair use. Indeed, the User who creates a posting seeking to find a buyer for something the user wants to sell seeks further dissemination of the posting since wide publicity makes a sale more likely.

Though meant in no way as disrespect to King Arthur or the Magna Carta, the relatively junior Founding Fathers and U.S. Constitution made clear their target objective in encouraging the creation of art and culture through assignation of natural law of copyright:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Article 1. Section 8 , Clause 8 (the Copyright Clause) from the 1787 Continental Convention courtesy James Madison of Virginia and Charles C. Pinckney of South Carolina.

[7] *See Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991).

It is bad enough that Craigslist and the MLS agencies think that they have earned authorship status by mere virtue of compiling postings into obvious categories and geographical groupings. But to go beyond pompous claims regarding "creativity" and "originality" to actual **assertion of ownership of words and pictures that they had no hand in authoring, and for which no act of formal conveyance has been performed, is bold beyond belief.**

Why This Matters for Consumers

Why would anyone conduct such a flight of fancy, especially when twelve months earlier Craigslist claimed exactly the opposite (i.e. "Craigslist does not claim ownership of the content")? Very simply because there is no better way to thwart innovation and competition from new entrants that make head-to-head comparisons of postings from other sources, along with the addition of new services that are not offered by existing dominant players. If successful, Craigslist and MLS will set a damaging precedent for all publishers that utilize exchange data and/or UGC (user generated content)—shifting the historical ascription of copyrights between authors, distributors, and the public domain. And, in this process, the consuming public shall be seriously harmed.

Historically, users granted UGC-based websites a limited, non-exclusive license to their authored works (aka postings) with no mention of a formal transfer of copyright. But now, under the Craigslist "Magna Charta" doctrine of

> Quod meum est, meum est. Quod uestum est mei Translation: What's mine is mine. What's yours is mine.

conveyance of ownership, copyright transfer occurs not only without willing consent, but can transpire without the use of common

language (i.e., the *magic words*: "exclusive ownership" and "copyright") to acknowledge what has just been taken from one party and assigned to the other.

Acknowledgement of such transfer of ownership is not of record, and has been used as an after-the-fact weapon in litigation against those who believe (apparently mistakenly) that postings of exchange offers in the public domain are openly and equally available to all.

In hedging bets that there may be no copyright in exchange offers, an even more aggressive interpretation of permission for access to data is now being brought to the fore by Craigslist. Relying on the Computer Fraud and Abuse Act (CFAA), and ignoring the Ninth Circuit's restrictions on application of the CFAA, Craigslist claims, now, that its Terms of Use (TOU) prohibits certain types of access to its website. Further, because the CFAA has a criminal component, the Ninth Circuit has interpreted it narrowly, unambiguously holding that **TOU cannot be the basis for criminal action—because they're privately generated, they change often, and few read them.** Based on these observations, the Ninth Circuit held in 2012 that TOU cannot be the basis of a criminal action and, for that reason, cannot be the basis for a private lawsuit either (at least under the CFAA).[8]

The Ninth Circuit has it right. It has placed limits on TOU being used to criminalize site access that is unauthorized only because someone's TOU may say so. In the Ninth Circuit, the CFAA does not apply to TOU.

The Computer Fraud and Abuse Act (CFAA) deserves to be limited. Passed in 1984, almost a decade before the appearance of the World Wide

[8] *See United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012).

Web, the statute has relied on out-of-context notions about "protected computers" and "exceeding access"–terms which, back then, would only have been pertinent to a small population segment possessive of the technical skills to truly "attack" a computer and cause grievous mischief or harm. **But the slippery slope of characterizing criminal activity to include alleged breaches of any stipulation of a website's TOU opens the floodgates to minting expansive and creative new felonious behaviors in which we all are apt to take part**. The Ninth Circuit's *United States v. Nosal* dead-ended this process, at least within the ten-state region over which the Ninth Circuit has jurisdiction.

Massachusetts, however, sits in the First Circuit, not the Ninth, and has produced an enormously different interpretation of CFAA, with alarming results. It was there that the Massachusetts U.S. Attorney's office applied the CFAA to threaten renowned Internet "open Web" activist Aaron Swartz with thirteen felony counts and thirty-five years in prison for "exceeding access" when he downloaded files from a MIT archive website via the MIT network. Under these pressures, Aaron Swartz committed suicide on January 11, 2013.

The tragic consequences of prosecutorial overreach have finally resulted in proposals to pass "Aaron's law" to put an end to the conflation of mere TOU violations, on the one hand, and criminalization statutes aimed at genuinely malicious hacking. But while these efforts to narrow what may be criminalized advance through Congress, **Craigslist is still trying to make use of pre-passage window tactics to bully users, innovators and competitors via declared TOU provisions.**

In the case of Craigslist data, there is no assertion that any password or other access barriers have been transgressed. Instead the access and

actions are exactly the same as what Google currently does to scrape and index websites to support search of web pages. The noted difference is that when crowdsourced data from multiple proxies on the Internet occurs, the act of gathering search data is transformed from "good enough for Google" to "good enough for jail and liquidated damages" for other users. Based on the adhesive TOU currently proffered by Craigslist, a rough calculation of sums owed to them for the conduct of scraping to index CL content, as Google does, can be tallied as follows:

$25K per unauthorized copy
x
1.5M posting a day
x
365 days a year

= $13.7 Trillion dollars in damages for 2012 (and counting for 2013)

Craigslist minces no words in summing up its legal argument that targets "web crawlers often operated from multiple IP addresses simultaneously." This constitutes the core of alleged CFAA violation claims against innovators that don't get the same 'hall pass' that is granted to Google. In short, **the operating notion of "good enough for Google is good enough for the rest of us," gets short shrift from the Craigslist legal team** and is a sure-fire ticket to joining the long list of individuals and entities that Craigslist has threatened and/or sued.

No mention is made that the data in question is entirely available to the public and collectible without need to access Craigslist at all. Google scrapes, indexes and shows both CL posting headers (in full text format) and posting details in full (text and images are displayed as a detuned image). Clearly, Google archives the full text body of each CL user-generated posting, as a keyword search on Google will reveal any incidence of the searched-for

keyword(s) in question with the immediately preceding and following phrases clipped out of the body of the whole. Google used to share the full cache, but after a period of being blocked by Craigslist over posting details, Google (at Craigslist's behest?) downgraded its cache access, blurring images to the current truncated levels of display. One can still view the contents in full, but it is now damned hard to copy verbatim without also scraping Craigslist directly lest critical facts be left absent. Clever users could continue to try to source via Google's degraded access, but you need to watch the movie *Argo* or study up on e-Puzzler[9] to see how painful reconstructing data is when it has been purposely shredded, or detuned, to make computational copying difficult to perform. The point is that **the data in question is there in the public domain**—though in a much more difficult-to-index form—but there, nevertheless.

Thus the information in question is clearly archived by Google (despite Craigslist declaring that it has requested this not be done). But that archive is recently viewable in full only by Google (since the filing of the lawsuits against the author of this paper and subsequent failure of the clickwrap clause for assignment of an exclusive license and copyright) and a few other preferred providers. Just try and get the same information from privacy-centric search engine duckduckgo.com, and you'll have no joy at all. Yet, at least DuckDuckGo is simply shut out. Had it persisted in gathering and indexing the data in question, it too would potentially face being sued for copyright violations and criminal CFAA hacking charges.

Lest readers believe that this type of aggressive projection of criminality is just an obscure edge case of our legal system misfiring, a further read of other "traps" in

9 Reconstructing shredded documents re: American hostage identities in Iran was done manually by Iranian children as documented in *Argo*. A much more computationally intense effort was embarked upon in the use of e-Puzzler software to reconstruct East German Stasi shredded surveillance files on enemies of the state. See http://www.time.com/time/business/article/0,8599,1983287,00.html The same types of resources could be spent on OCR efforts to read data that was intentionally detuned to deter otherwise legitimate copying, but such efforts are non-trivial when clean sources made available to Google and Bing are also accessible to the public at large.

TOU provisions is worth considering. In the case of Craigslist, the tripwires for exceeding authorization do not just deal with "scraping" to build search indexes. There are also catch-all prohibitions that can ensnare any user who "interoperates" with Craigslist:

> "Any access to or use of Craigslist to design, develop, test, update, operate, modify, maintain, support, market, advertise, distribute or otherwise make available any program, application or service (including, without limitation, any device, technology, product, computer program, mobile device application, website, or mechanical or personal service) that enables or provides access to, use of, operation of or ***interoperation with Craigslist*** (including, without limitation, to access content, post content, cross-post content, re-post content, respond or reply to content, verify content, transmit content, create accounts, verify accounts, use accounts, circumvent and/or automate technological security measures or restrictions, or flag content) is prohibited. This ***prohibition specifically applies but is not limited to software, programs, applications and services for use or operation on or by any computer and/or any electronic, wireless and/or mobile device, technology or product that exists now or in the future.***
>
> If you access Craigslist or copy, display, distribute, perform or create derivative works from Craigslist webpages or other CL intellectual property in violation of the TOU or for purposes inconsistent with the TOU, your access, copying, display, distribution, performance or derivative work is unauthorized. Circumvention of any technological restriction or security measure on Craigslist or any provision of the TOU that restricts content, conduct, accounts or access is expressly prohibited. ***For purposes of this paragraph, you agree that cached copies of Craigslist webpages on your computer or computer server constitute "copies" under the Copyright Act, 17 U.S.C. § 101."***
> (Emphasis added.)

Or **to put it simply, if you are accessing Craigslist with a browser (i.e., a piece of software that caches server content on your local computer so that you can view it), you are already exceeding authorization and vulnerable to being rung up for criminal CFAA charges –** particularly if you reside in Circuits like the First, and not the Ninth. **Everyone starts out as guilty** and is allowed to continue using the service without being sued by the grace and goodwill of the site owners who reserve their right to exclude or punish at a time and with a means of their choosing. In a fitting tribute to the spirit of *Minority Report*, the TOU as stated even reserves the right to punish you for the future use of technology that doesn't even exist now but

may exist in the future. Now that's lawyering up!

The point here is not to harp on any particular point or argument about the scope of copyright incentives and the value of the public domain. There clearly are some valid arguments regarding copyright on which thoughtful people can agree to disagree and to which Congress and the courts can speak, with or without reference to the wisdom of our Founding Fathers. The problem here is that the lawyering up tactic of expansive claims of exclusive copyrighted ownership via misleading watermarks and shoddy avoidance of "magic words" creates a black hole that distracts everyone from the real issue at hand – that we as a society have lost our way regarding the notions of intellectual property and the public domain.

An indication of a society that has lost its way is the dubious revelation that in the last year, the expenditures by Google and Apple on patent lawsuits sadly exceeded their expenditures on R&D.[10] If the most creative **companies are already spending more on blocking rather than beating the competition**, our country's innovation culture is clearly at a crossroads. Certainly a portion of IP protection pertains to legitimate defense of the fruits of true creativity and innovation. But extending this realm to restrictions that fundamentally undermine the best execution of exchange markets is a complete degradation of the original and rightful intent of intellectual property doctrines. Such bogus notions both devalue truly original and creative works of authors and inventors, while at the same time fundamentally inhibiting the transparency of price, supply, and demand essential to the efficient and fair operation of exchange marketplaces.

[10] From *The Patent Used as a Sword* From the New York Times, The iEconomy | Part 7: A System in Disarray http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html?pagewanted=all

The Founding Fathers did not wing it when they carefully considered the mechanism to promote "arts" and "sciences" in the best interests of citizens through the means of innovation and competition. One needs to compare that original spirit against the mix of priorities and expenditures as illustrated by the ratio of R&D to litigation outlays by mere distributors rather than creators of works of authorship. A hint in understanding the difference in situations here is to realize that one class of publishers pays authors for the right to distribute their original and creative content; while another type of publisher gets paid to distribute mere descriptive ads. **The fact that any and all expression must take some expression has been played to such linguistic absurdity as to turn as much of the public domain of "descriptive expression" into private intellectual property rights. The banality of reducing even rote commercial speech of exchange offers in the public domain space into silos of private data fiefdoms is a looting that wreaks havoc on free markets and free speech alike**. Say it ain't so!

The application of copyright law should clearly recognize the difference between publishers that pay for the right to distribute creative content from the realm of publishing activity pertaining to mere ads for which authors have not only failed to be paid, *but in fact have often already paid* in expectation of a duty to promote best execution. Instead, tactics chronicled in this paper suggest that **publishers of exchange data believe they have the right and a means to covertly filch ownership of their users' content to the exclusion of other innovative or competitive uses**.

No quibble is intended about the valid role in our society for copyright, patent, and trademark law. But fast and loose takings of user content (UGC) coupled with efforts to subsume exchange data into an

intellectual property framework that bashes the public domain of market information on open access to prices, supply, and demand data is truly a "terrible precedent" for innovation, competition, and all consumers of exchange information. No magic word euphemisms are required here as the conduct can clearly be identified for its correctly descriptive name: sham.

The law locks up the man or woman
Who steals the goose from off the common
But leaves the greater villain loose
Who steals the common from off the goose.

The law demands that we atone
When we take things we do not own
But leaves the lords and ladies fine
Who take things that are yours and mine.

The poor and wretched don't escape
If they conspire the law to break;
This must be so but they endure
Those who conspire to make the law.

The law locks up the man or woman
Who steals the goose from off the common
And geese will still a common lack
Till they go and steal it back.

Anonymous, first quoted by Edwin Birch, Tickler Mag., Fe. 1821 at 45

The law is the true embodiment
Of everything that's excellent,
It has no kind of fault or flaw,
And I, my Lords, embody the Law.

From the comic Gilbert and Sullivan opera Iolanthe circa 1882, cited by Justice Rehnquist in his dissent to Richmond Newspapers, Inc. v. Virginia over a majority decision against restrictions on media access to criminal court proceedings July 2, 1980 -- six years prior to his elevation by Ronald Reagan to a nineteen year tenure as Chief Justice of the United States