The What and the Why of It: 3taps' Dispute with Craigslist

Three important questions for the open web and more generally the kind of world we live in have been raised by 3taps' dispute with Craigslist:

- Who owns user generated data?
- Is it allowable to criminalize discriminatory access to public data?
- Do unjustified attempts to deny access to public data (including through the use of discriminatory terms of use) violate the antitrust laws?

It is worth noting that 3taps has full respect for copyright, anti-hacking, and contract law. Our issue is when there is misuse of copyright, anti-hacking, and contract law to impermissibly harm innovation, users, and the open web that has brought so many benefits to our society.

When there is a lack of clarity about how the law can be used to chill innovation that directly benefits users and the open web, it's worth gaining clarity – even at the risk that some bad outcomes and precedents may be set along the way. A bad outcome with clarity is at least something that can be fixed.

For the last few years, the founders of Craigslist have used the lack of clarity around copyright as a pretext to bully scores of innovators trying to create a better world for users via the open web. Because of the hundreds of millions of dollars at the disposal of Craigslist, the victims of this bullying never had the resources to even challenge the underlying assertions on which the threats were made. In the case of the first question above, there is now clarity that the Craigslist copyright claims regarding user postings were bogus and sham. And while it is now too late to resuscitate those who have already perished, we can put a stop to this abusive practice of sham copyright assertions going forward.

Two more questions are still to be resolved, and it is the need for clarity here that drives the why behind 3taps' dispute with Craigslist. Significantly, at the time Craigslist initially filed suit against 3taps, the gathering of publicly available data performed by 3taps was done through Google, without the need to access Craigslist. What was not known at the time by anyone on the internet was that days prior to the filing, Craigslist had slipped in clickwrap affirmations claiming that users' postings to the site were exclusively owned by Craigslist (including the right to operate as a copyright troll and sue others), all without announcing the change to anyone.

Importantly, this claim was NOT added to the TOU where this momentous change would have easily been seen by the public at large as an outrageous overreach. The surreptitious change was only noticed and exposed weeks later by an astute blogger, and after widespread public condemnation led by the EFF, the abusive terms were banished. But for that three-week period, any posting submitted by a user to both Craigslist and Backpage (the #2 player in local classifieds) made both the user and Backpage liable for

breaches of copyright law. But more importantly to Craigslist, the three-week clause created a window of pretext for Craigslist to sue 3taps which, like everyone else, had no knowledge of the wording change inserted into the clickthrough posting process as a downstream trap upon which to litigate upon.

Though Craigslist removed the "exclusivity" language from its agreements with users, it continued to press that very claim in court, claiming that "exclusivity" was implied without the need for the presence of actual "magic words" to exercise enforcement of copyright claims. Had newspapers employed such ham fisted tactics in the early days of Craigslist – there never would have been a Craigslist in the first place as they would have been sued out of existence for trying to compete with an existent and dominant medium.

Around the time it was forced to abandon what the EFF called a "terrible precedent," Craigslist began to block Google (and thus 3taps downstream) from indexing publicly viewable posting data. Craigslist apparently has relented, but the form of data now flowing through Google is no longer available to others on the same basis as enjoyed by Google itself. Thus Google (and a few others) has full access to the publicly available content, but everyone else now has only inferior access to snippets of the fuller data set. A regime of discriminatory access has thus been carved out of the open web.

Tragically, Aaron Swartz felt strongly enough about this level of differential access to take matters into his own hands to make a point over the public policy implications of restricting access to academic journal articles hosted by JSTOR. The difference here is that Craigslist does not even own the copyright (besides arguably during their three week surreptitious self-granting) AND the content in question is publicly available on the open web i.e. without the need for access credentials. Furthermore, with the exception of a brief period when Craigslist even blocked Google, the data is accessible – but on a discriminatory basis despite being in plain public view both on Craigslist itself and on Google.

3taps affirmatively chose, in mid-August 2012, to go directly to the source on the same basis as Google to assert equal access to the same content as the search giant. 3taps gathers the data in question using the same methods as any search engine, yet does so from multiple IP addresses and crowd sourcing, thus reducing the amount of requested data from any single source. Because 3taps began sourcing publicly viewable data directly from the source, rather than as derivative action from an existing search engine, Craigslist chose to treat this as a newly-litigable criminal offense – and not just as a breach of civil contract terms.

Specifically, Craigslist has chosen to pursue a Computer Fraud and Abuse Act (CFAA) claim – the same criminalization statute used to ensnare Aaron Swartz over downloading too many academic articles. Ironically, at the outset of the controversy, 3taps didn't even access Craigslist to operate its business. But after Craigslist began restricting access to Google's cache data, the need for 3taps to directly access Craigslist to operate created a new opportunity for Craigslist to litigate.

But for Craigslist to succeed with the CFAA claims where it failed with its overreach on copyright, it must achieve two things: i) extend the reach of the CFAA to criminalize access to even publicly available information; and ii) allow the CFAA to be used be used to create discriminatory access regimes that criminally punish competitors in a marketplace seeking equal access to that public data.

One of the most interesting aspects of the outcome of the April 30, 2013 ruling by Judge Breyer of the United States District Court for the Northern District of California is stated in the footnotes of his decision. Here, he well lays out the scope of the reach that is at stake if the CFAA is extended to include the scenarios above:

> Applying the CFAA to publicly available website information presents uncomfortable possibilities. Any corporation could subject its competitors to civil and criminal liability for visiting its otherwise publicly available home page; in theory, a major news outlet could seek criminal charges against competing journalists for reading articles on its website.
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> In Nosal, the Ninth Circuit rejected an "interpretation [that] would transform the CFAA from an anti-hacking statute into an expansive misappropriation statute." 676 F.3d at 857. At the same time, Nosal discussed at some length potential problems with an overly expansive interpretation of the CFAA, but did not seize on that opportunity to highlight a possible distinction between public and non-public information. Accordingly, until the Ninth Circuit holds otherwise–and in the absence of any argument on this issue from Defendants at this time– this Court assumes that the expansive language of the statute covers owner-imposed restrictions on access to otherwise public information on public websites. Page 8 No. CV 12-03816 CRB

The court here duly notes the huge consequences that come when one can subject competitors and/or even journalists to onerous penalties just for accessing publicly viewable data. The court goes on to recognize that the implications of conflating anti-hacking imperatives to protect non-public data with a net to ensnare those who only seek access to public data.

What the court (and this author) recognizes is an open question to a higher authority in the form of the Ninth Circuit: will clarity be brought forth regarding the "expansive language" covering access to "public information on public websites"? ." It is thought by many that the Ninth Circuit in *Nosal* already forbids restrictions on access to or use of publicly available web-based information – and forbids it wherever and whenever private terms of use are used to impose the restriction. Judge Breyer, however, is taking a more cautious approach by awaiting explicit, specific guidance from the Ninth Circuit.

Why this matters in the eyes of 3taps is completely clear. We believe that access to public information on public websites should be openly and accessible to all. Craigslist

must absolutely be called out for attempting to turn the CFAA from an anti-hacking statute into bullying vehicle to intimidate potential innovative competitors, abuse users, and gut the open web by selectively criminalizing this access. (*Nosal* specifically condemned the notion that private drafters of terms of use should be able to criminalize whatever they want via edits to their TOUs.)

Whatever Craigslist's rights may be in the management of its site, these rights must not include the right to abuse the actual letter and intent of copyright, hacking, and competition law and constitutional imperatives.

The first battle is now won, but that leaves two other defenses of public access to public data to be fought for. That task remains before us, and we hope that the Craigslist founders see the harm to the open web of pushing the CFAA as a means of litigating against, rather than participating with, innovations in the marketplace that benefit all users.

And it's worth noting that even if Craigslist wins out on this terrible precedent of punishing competitors by creating a discriminatory access regime to public viewable data – such a victory will be Pyrrhic[1] anyways. Using the CFAA as a brutal club to thwart innovation just goes to prove the further downstream point that the real intent and outcome here is to protect a dominant market position at the expense of innovation, users, and the open web. 3taps may or may not get crushed along the way, but at some point, it will become apparent to a critical mass of new innovators and even existing Craigslist users, that the emperor has no clothes.

The why of it is that open access is worth fighting for.

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[1] The armies separated; and, it is said, Pyrrhus replied to one that gave him joy of his victory that *one more such victory would utterly undo him*. For he had lost a great part of the forces he brought with him, and almost all his particular friends and principal commanders; there were no others there to make recruits, and he found the confederates in Italy backward. On the other hand, as from a fountain continually flowing out of the city, the Roman camp was quickly and plentifully filled up with fresh men, not at all abating in courage for the loss they sustained, but even from their very anger gaining new force and resolution to go on with the war.
—By Plutarch, as spoken in a report by Dionysius re: the Greek King Pyrrhus of Epirus, whose army suffered irreplaceable casualties in defeating the Romans at Heraclea in 280 BC and Asculum in 279 BC during the Pyrric War