ALLEN RUBY (Bar No. 47109)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
525 University Avenue
Palo Alto, California 94301-1908
Telephone: (650) 470-4500
Facsimile: (650) 470-4570
Email: allen.ruby@skadden.com

Attorneys for Defendant 3TAPS, INC.

Additional Counsel Listed on Next Page

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CRAIGSLIST, INC., a Delaware corporation,

Plaintiff,

v.

3TAPS, INC., a Delaware corporation; PADMAPPER, INC., a Delaware corporation; and DOES 1 through 25, inclusive.

Defendants.

3TAPS, INC., a Delaware corporation,

Counter-claimant,

v.

CRAIGSLIST, INC., a Delaware corporation

Counter-defendant.

Case No. CV-12-03816 CRB

3TAPS, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS CAUSES OF ACTION 4, 5, 6, 13 AND 14

Date: March 29, 2013
Time: 10:00 a.m.
Courtroom: 6
Judge: Hon. Charles R. Breyer

JAMES A. KEYTE (admitted *pro hac vice*)
MICHAEL H. MENITOVE (admitted *pro hac vice*)
MARISSA E. TROIANO (admitted *pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (917) 777-3000
James.Keyte@skadden.com
Michael.Menitove@skadden.com
Marissa.Troiano@skadden.com

CHRISTOPHER J. BAKES (SBN 99266)
M. TAYLOR FLORENCE (SBN 159695)
LOCKE LORD LLP
500 Capitol Mall, Suite 1800
Sacramento, California 95814
Telephone: (916) 930-2500
Facsimile: (916) 930-2501
cbakes@lockelord.com
tflorence@lockelord.com

BRANDON J. WITKOW (SBN 210443)
LOCKE LORD LLP
300 S. Grand Avenue, Suite 2600
Los Angeles, California 90071
Telephone: (213) 485-1500
Facsimile: (213) 485-1200
bwitkow@lockelord.com

JASON MUELLER (Texas Bar No. 24047571) (admitted *pro hac vice*)
LOCKE LORD LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
Telephone: (214) 740-8844
Facsimile: (214) 740-8800
jmueller@lockelord.com

Attorneys for Defendant 3TAPS, INC. and
DISCOVER HOME NETWORK, INC. d/b/a
LOVELY

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I. INTRODUCTION

Computer Fraud and Abuse Act, and related California statute.[1]

craigslist argues that it is completely free to legislate criminal wrongs through its terms of use, the Ninth Circuit notwithstanding. Threading both its First Amended Complaint and now its brief with allegations that its terms of use have been violated, craigslist chooses not to hear *Nosal*'s plainspoken command that terms of use – privately drafted, subject to change without notice, largely unread, and inconsistently applied – cannot be transformed into penal statutes. *Nosal* even singled out craigslist's own terms of use as one of a group of popular websites whose use is supposedly governed by "private agreement and policies that most people are only dimly aware of and virtually no one reads or understands." *United States v. Nosal*, 676 F.3d 854, 862 (9th Cir. 2012).

Copyright.

craigslist also alleges that, despite the fact that it failed to extricate an exclusive license from its users using clear conveyance language, it nevertheless owns all copyright rights in all content created by users for use in their classified ads. It not only fails to extract such an exclusive license, but its status as a non-exclusive licensee is fatal to its claims because a non-exclusive licensee lacks standing to claim infringement. In addition, its claim for infringement of a compilation must fail because craigslist never created an original work of authorship, let alone one that was fixed in a tangible medium for more than a transitory period. craigslist's attempt to claim all content in any classified ad posted to its site is a merely an attempted power-grab, aimed at suppressing competition, innovation, and unwittingly exercising dominion over other author's works.

[1] 3taps and Lovely assume that the Court's construction of the California Comprehensive Computer Access and Fraud Act, California Penal Code section 502, will track the Court's construction and application of the federal Computer Fraud and Abuse Act. *See, e.g., Kahn v. Kahn*, 68 Cal.App.3d 372, 387 (Cal.App. 1977) ("The interpretation placed on a federal statute by federal courts is followed in construing state statutes modeled after the federal statute, and it is presumed that the Legislature had that interpretation in mind."), citing *Scripps etc. Hospital v. Cal. Emp. Com.*, 24 Cal.2d 669, 677, 151 P.2d 109 (1944).

II. CRAIGSLIST'S ATTEMPT TO CRIMINALIZE ALLEGED VIOLATIONS OF ITS TERMS OF USE FAILS UNDER *NOSAL*.

Nosal is not mysterious and it is not a puzzle. It seeks to avoid criminal law and punishment being put in the hands of authors of private terms of use. *United States v. Nosal*, 676 F.3d at 863 (". . . website owners retain the right to change the terms at any time and without notice…. Accordingly, behavior that wasn't criminal yesterday can become criminal today without an act of Congress, and without any notice whatsoever.")

A. NARROW CONSTRUCTION OF THE CFAA DOES NOT PERMIT CRIMINALIZATION OF PRIVATE TERMS OF USE.

Nosal holds, plainly, that the Computer Fraud and Abuse Act ("CFAA"), as penal legislation, cannot be deployed to criminalize private terms of use:

> We remain unpersuaded by the decisions of our sister circuits that interpret the CFAA broadly to cover violations of corporation computer use restrictions or violations of a duty of loyalty.... These courts looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of 'exceeds authorized access.' They therefore failed to apply the long-standing principal that we must construe ambiguous criminal statutes narrowly so as to avoid 'making criminal law in Congress's stead.'

Nosal, 676 F.3d at 863-864, citing *United States v. Santos*, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008).

The CFAA is, according to *Nosal*, an anti-hacking hacking statute, aimed at preventing the types of destruction hacking leads to: non-functional computers; missing data; corrupted data; exposed information; fraud; and cyber-vandalism. *Nosal*, 676 F.3d at 859-860 ("This is a perfectly plausible construction of the statutory language that maintains the CFAA's focus on hacking rather than turning it into a sweeping Internet-policing mandate."[2])

Nosal applied the rule of lenity, which provides that statutes with dual criminal and civil applications must be construed "strictly," since determinations on the civil side are no less

[2] In a footnote, the *Nosal* court went on to respond to a government argument that cited legislative history to show that the statute was originally intended to apply to access, which even if properly obtained, could later be abused by exceeding an access restriction. The court noted that this language had been removed in committee. *United States v. Nosal*, 676 F.3d 854, 859 (9th Cir. 2012), footnote 5.

precedential on the criminal side. From this root, *Nosal* went on to describe why laws such as the CFAA must be limited in scope and narrowly construed.

B. CRAIGSLIST HAS REVERSED THE RULES OF JUDICIAL REVIEW AND STATUTORY INTERPRETATION: IT ADVOCATES BROAD CONSTRUCTION OF A VAGUE PENAL STATUTE AND NARROW APPLICATION OF THE LEADING CIRCUIT CASE THAT LIMITS IT.

craigslist construes *Nosal* into irrelevance while broadly construing the vague penal statute that *Nosal* explicitly narrowed. This reverses basic axioms of judicial review and statutory interpretation, particularly in face of explicit precedent. craigslist begins by attempting to confine *Nosal* to the "employer-employee" setting and book-ends this error with its most colossal error: that *Nosal* allows violations of private terms of use to be criminalized.

There is nothing in *Nosal* to support these extreme limitations, and everything to suggest to the contrary.

First, *Nosal* cited *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988), and its warning that "the broader statutory interpretation would 'delegate to prosecutors and juries the inherently legislative task of determining what type of … activities are so morally reprehensible that they should be punished as crimes' and would 'subject individuals to the risk of arbitrary or discriminatory prosecution and conviction.'" *Id.* at 949. *Nosal* quoted this as the far-reaching policy language that it is. This is hardly language that limits *Nosal* to the employment context.

Second, contrary to craigslist's notion that *Nosal* somehow permits terms of use to criminalize behavior (*Opposition Memorandum*, Part I.A, p. 12, l. 6), *Nosal* actually stated that that would be strictly up to Congress, not the courts and certainly not to drafters of private terms of use: "We need not decide today whether Congress could base criminal liability on violations of a company or website's computer use restrictions." *Nosal*, 676 F.3d at 864.

In the next sentence came the court's exact holding: "*Instead, we hold that the phrase 'exceeds authorized access' in the CFAA does not extend to violations of use restrictions.*" *Id.* (italics added).

C. CRAIGSLIST UNWITTINGLY DEMONSTRATES THE DANGER THAT *NOSAL* CONDEMNS: VAGUE PENAL STATUTES USED TO CRIMINALIZE VIOLATIONS OF PRIVATE TERMS OF USE.

Nosal emphasized that ambiguous penal statutes are dangerous. craigslist's brief unwittingly demonstrates why.

In its opening brief, 3taps described that what Google and other search engines do is what 3taps and co-defendant Lovely do—they all access the user-created ads posted on craigslist for relay and re-presentation elsewhere; according to craigslist, they're all "scrapers." *Compare Memorandum of Points and Authorities in Support of Motion to Dismiss*, Part II.B, to *Opposition Memorandum*, Part B. But Google, according to craigslist, is permitted to do so since it—according to craigslist—adheres to craigslist's demands on use of the data extracted. 3taps, apparently, has not achieved preferred status, so it is barred and sued. (Oppos., Part B.)

This selective outcome is precisely what *Nosal* condemned. According to craigslist, Google's activity is perfectly fine and non-criminal, but 3taps' identical activity is not – a distinction craigslist alone considers itself entitled to make by applying its own terms of use, with penal consequences. In other words, craigslist gets to pick who the criminal is.

This type of power is anathema enough in government hands. *Nosal*, 676 F.3d at 863 ("The government assures us that, whatever the scope of the CFAA, it won't prosecute minor violations. But we shouldn't have to live at the mercy of our local prosecutor."), citing *United States v. Stevens*, ____ U.S. ____, 130 S.Ct. 1577, 1591, 176 L.Ed.2d 435 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.") *Nosal* emphasized that the power to criminalize can not be placed in unaccountable private hands.

III. CRAIGSLIST'S COPYRIGHT CLAIMS SHOULD BE DISMISSED.

craigslist admits in its response that the registrations issued in 2008, and named in its First Amended Complaint ("FAC"), do not claim or cover any rights to user-generated content (classified ads posted by users of the site). (Oppos. at 23, n.11). Accordingly, the only copyright registrations possibly at issue are those filed on July 19 and 20, 2012 (the "2012 registrations). (Oppos. at 23, n.11; FAC ¶ 52). 3taps' motion to dismiss craigslist's copyright claims is limited to the content of these user postings, and must be granted because A) craigslist lacks standing to claim infringement

as a non-exclusive licensee, B) craigslist does not claim ownership in any compilation of such users' posts and cannot claim ownership because it did not select or arrange them in an original work of authorship, and C) no compilation of user posts can ever be "fixed in a tangible medium" because the universe of posts uploaded and expiring from the craigslist site is ever-changing**.** These reasons are dispositive.

A. CRAIGSLIST LACKS STANDING AS AN EXCLUSIVE LICENSEE OF THE CONTENT OF ITS USERS' POSTS.

craigslist concedes in its Opposition that its infringement claims are contingent upon its status as an *exclusive licensee* of the content of the user-posted ads. (Oppos., at 19:26-22:17). craigslist also concedes that its website contains no reference to an exclusive license agreement between it and its users. (Oppos., at 19:26-22:17). Rather, craigslist argues that even though it never actually used the term "exclusive" in its website terms of use ("TOU"), the Court should nonetheless infer that craigslist and its users intended to enter into an exclusive license. (*See* Oppos., at 20:25-21:9 (citing *Nafal v. Carter*, 540 F. Supp. 2d 1128, 1141-42 (C.D. Cal. 2007)). What craigslist ignores, however, is that in order for the Court to make this inference and find the existence of a valid exclusive license, "the intention of the copyright owner to transfer an ownership interest must be clear and unequivocal." *See Weinstein Co. v. Smokewood Entm't Group, LLC*, 664 F. Supp. 2d 332, 341 (S.D.N.Y. 2009) ("[if] a copyright owner's intention in writing is unclear – even deliberately so – there is no legally valid transfer"). There was no such "clear and unequivocal" intent expressed here because 1) craigslist's actions demonstrate its intent not to claim an exclusive license to its users' posts by, *inter alia*, removing an exclusivity "confirmation box," 2) it represented to the Copyright Office that it claimed no exclusive copyrights in its users' posts, and 3) the scope of craigslist's TOU is entirely ambiguous, precluding any "clear and unequivocal" intention to create an exclusive license. craigslist cannot be an exclusive licensee of its users' posts as a matter of law, and its claim for infringement of the posts must be dismissed.

1. CRAIGSLIST'S OWN CONDUCT DEMONSTRATES THAT NO EXCLUSIVE LICENSE EXISTS WITH RESPECT TO THE CONTENT OF ITS USERS' POSTS.

While craigslist argues that it has acquired an exclusive license to its users' posts, its own recent public actions demonstrate quite the opposite. On July 16, 2012, craigslist implemented a "confirmation box," requiring its users to "confirm" that craigslist had an "exclusive license" to their "content." (Motion, at 15:3-18). If it was clear that the TOU conveyed an exclusive license, this "confirmation box" would be unnecessary. Later, the box was quickly removed in response to considerable backlash against craigslist's attempt to claim ownership over user content.[3] By removing the box, craigslist made clear its disavowal of any claim of ownership or exclusive license to user content. Because craigslist cannot escape these events, it now argues that the confirmation box is not relevant to its claim as an exclusive licensee (Oppos., at 19:26-21:9) and, six months after deletion of the confirmation box, flip-flops again claiming that it *does* in fact have an exclusive license to its users' posts. Namely, craigslist makes the untenable argument that, notwithstanding its clear communication to its users that it would not claim ownership over their content by removing the box, its TOU (in force since February 2012) has always created an exclusive license between craigslist and its users.

craigslist is either misleading its users or misleading the Court. If craigslist genuinely believed that its TOU as written in February 2012 granted it an exclusive license to its users' posts, then it never would have implemented the exclusive license "confirmation box." The two positions are irreconcilable. At a minimum, adding—then deleting—the "confirmation box" creates ambiguity as to the existence of an exclusive license; and, absent "clear and unequivocal" intent of an exclusive license, craigslist must be found to be a non-exclusive licensee without standing to assert the instant copyright claims. *See Nafal v. Carter*, 540 F.Supp.2d 1128, 1135 n. 8 (C.D. Cal. 2007) ("There is no question that a non-exclusive license . . . would be insufficient to confer

[3] For example, the Electronic Frontier Foundation ("EFF") noted that the exclusivity provision was damaging, met with craigslist to discuss the provision, and then reported that it was pleased that craigslist removed the provision. The EFF's report that craigslist's TOU, while more expansive than pre-2012 versions, still amounted to a non-exclusive license is significant as it evidences the public's understanding that the February 2012 TOU is intended only to convey a non-exclusive license. *See* https://www.eff.org/deeplinks/2012/08/good-news-craigslist-drops-exclusive-license-your-posts.

standing on plaintiff."); *see also* 1 *Melville B. Nimmer & David Nimmer, Nimmer on Copyright*, § 12.02[B].

2. CRAIGSLIST'S REPRESENTATIONS TO THE COPYRIGHT OFFICE CLEARLY DISCLAIM ANY EXCLUSIVE LICENSE TO THE CONTENT OF ITS USERS' POSTS.

The FAC lists five copyright registrations on which craigslist initially based its claims for infringement (collectively, "the 2008 Registrations"); craigslist admits these do not cover user posts or compilations of them. (Oppos. at 23, n.11; FAC, ¶ 51). Thus, craigslist's 2008 registrations are irrelevant to any claim to infringement in the user posts, and cannot serve as a basis for any such claims. Any infringement claims related to these Registrations should be dismissed.

Specifically, the 2008 Registrations relate only to facets of the craigslist website (i.e. "new computer program code, new and revised text, new and revised compilation"). (*See* Application and Registration Information, attached as Exhibit C, items (2)-(6), to the Declaration of Christopher J. Bakes.) The 2008 Registrations go on to explicitly *disclaim* any copyright ownership over its users' postings by expressly excluding "third-party text" from the copyright as "pre-existing material." *Id.*

craigslist identifies additional applications filed July 19 and 20, 2012, just days before initiating this lawsuit (FAC ¶ 52), but only one of these applications has been registered. That registration (TX0007547907 (the "2012 Registration")) pertains only to "text, compilation, computer program." (*See* Application and Registration Information, attached as Exhibit C, item (1), to the Declaration of Christopher J. Bakes.) craigslist did not claim, and the Copyright Office did not issue, the 2012 Registration for "third-party text." (*See* Oppos., at 23, n.11). craigslist's specific exclusion of "third-party text" from its 2008 Registrations and its deliberate omission of "third-party text" from its 2012 Registration make clear that craigslist has never considered itself an exclusive licensee of its users' posts—a status seemingly manufactured for purposes of the current litigation.[4] craigslist's longstanding conduct with the Copyright Office confirms that it has never sought, nor obtained, a valid copyright over its users' postings (i.e., "third-party text"). Without a registration

[4] Further evidencing its lack of intent to claim exclusive rights to its users posts, craigslist does not display a copyright symbol within each post (*i.e.* "© craigslist"), a fact determined notable by the court in *Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc.*, No. 12-cv-00954-AW, 2012 WL 3711513, at *14 (D. Md. Aug. 24, 2012) (hereafter, "MRIS").

over its users' postings or compilations of them, craigslist fails to satisfy a necessary precondition to suit pursuant to section 411 of the Copyright Act, and its claims for infringement of its users' posts must be dismissed. *See Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 1241, 1247 (2010) (holding that section 411 imposes a precondition to filing a claim of copyright infringement).

3. CRAIGSLIST'S OWN TERMS OF USE ARE DEVOID OF ANY "CLEAR AND UNEQUIVOCAL" INTENT TO CREATE AN EXCLUSIVE LICENSE.

craigslist claims that its February 2012 TOU provides for an exclusive license from its users (Oppos., at 19:26-21:9); yet, as discussed above, this claim is disingenuous given its short-lived use of an "exclusive license" confirmation box, and subsequent decision to disable the box in the face of objections from its users. But, it is obvious that this is just one of the circumstances which demonstrate that there was no "clear and unequivocal" intent to grant craigslist an exclusive license.

As craigslist has argued, the Court must look to the totality of the circumstances behind a relevant agreement to determine the parties' intent as to whether the agreement transferred exclusive or non-exclusive rights. (*See* Oppos., at 20-21 (citing *Nafal v. Carter*, 540 F. Supp. 2d 1128, 1141-42 (C.D. Cal. 2007)). When analyzing a purported transfer of exclusive rights, a court must consider both parties' mutual *intent*, not one party's unilateral desire. *See, e.g.*, *Nafal*, 540 F. Supp. 2d at1141-42; *see also Bucciarelli-Tieger v. Victory Records, Inc.*, 488 F. Supp. 2d 702, 708 n.2 (N.D. Ill. 2007) (where a recording contract lacked exclusivity provision, rights transferred were non-exclusive).

As craigslist pleads and admits, its TOU, just like the TOU in place prior to February 2012, do not contain an explicit exclusive license provision. In its February 2012 revision, craigslist rewrote the license provision and, rather than claiming "exclusive" rights, it used the ambiguous and incomplete provision that it now claims provides for an *implied* exclusive license to the user posts.[5] While this provision describes an intent by craigslist to obtain some type of license to its users posts, there is absolutely no mention that it is an "exclusive," as opposed to "non-exclusive," license, nor

[5] Stating that users "grant and assign" to craigslist a "license to copy, perform, display, distribute, prepare derivative works….and otherwise use any content that you post," on a "fully sub-licensable basis," as well as all "rights and causes of action to prohibit and enforce against any unauthorized copying, performance, display, distribution, use or exploitation of…any content that you post…."

any right to create or claim any compilation. craigslist, of course, takes the position that it does not matter that these critical terms were omitted, and that users would fully understand and intend such rights because the various rights enumerated in § 106 of the Copyright Act (17 U.S.C. § 106) were conveyed by virtue of the above phrases.

This position would require users to construe ambiguous phrases from the craigslist TOU, apply complex copyright law, and make an unguided inference that the user is giving away to craigslist all content exclusively and without further rights to use the content for any other purpose. This is untenable, at least because any inference that a user's intent to convey an exclusive content produces an absurd result. For example, any user who posted his or her resume in the craigslist job category would—if posted subject to this "exclusive" license—be unable to thereafter post the resume to any other jobsite or even make copies of the resume to present to prospective employers. Certainly, this ridiculous outcome cannot represent the intent of users posting their content on craigslist's website. Rather, craigslist's insistence that its ambiguous TOU, despite omitting the term "exclusive," created an exclusive license suggests that craigslist was attempting to avoid consumer backlash (*see, e.g.*, *supra*, note 1) while at the same time trying to unilaterally position itself to claim an exclusive license to its users' posts.

The circumstances, as craigslist pleads and admits, also reveal that craigslist tried, but failed, to correct this ambiguity by creating the later-abandoned "confirmation box" as described above. The fact that craigslist created the confirmation box as a post-hoc attempt to include the critical term of exclusivity, but then abandoned that practice, further supports that craigslist's ambiguous TOU does not grant exclusive rights in the content posted on its website. It is a reasonable inference, based on what craigslist has pled and argued, that craigslist certainly had the capability and sophistication to include the term "exclusive license" if it intended to clearly convey to its users that they were granting such broad rights. This leads inescapably to the further inference that its omission was knowing, and reflected an intent *not* to obtain an exclusive license.

craigslist's Opposition does not upset this conclusion. Its reliance on *MRIS* is inapposite. The relevant TOU provision in *MRIS* unambiguously provided that any images submitted to the MRIS Service "become the *exclusive* property of Metropolitan Regional Information Systems, Inc.,"

and that by submitting an image, a user "irrevocably assign[s] (and agree[s] to assign) to MRIS free and clear of any restrictions or encumbrances, *all* of [the user's] *rights, title, and interest* in and to the image submitted." *See MRIS*, 2012 WL 3711513, at *12 (italics added). In other words, the agreement in *MRIS* provided an unambiguous and exclusive assignment and transfer all rights in copyright. By contrast, craigslist's TOU vaguely (perhaps purposefully) provides no clear language, resulting in nothing more than a non-exclusive license to user posts. This is a clear distinction. The TOU here do not "clearly and unequivocally" grant craigslist an exclusive license.

craigslist's reliance on *Radio Television Espanola S.A. v. New World Entertainment, Ltd.*, 183 F.3d 922, 926-28 (9th Cir. 1999), fares no better. *Radio Television* did not even address whether a license was exclusive or non-exclusive. Instead, it was concerned with whether there was any kind of copyright license agreement *at all*. *See id.* The *Radio Television* court was faced with documents suggesting that the parties had not reached agreement on any license, not on whether a license was exclusive or non-exclusive. *See id.* Similarly, the court in *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 556-58 (9th Cir. 1990), only had to decide whether, under section 204 of the Copyright Act, section 204, a copyright license lacking any writing whatsoever could at most only be a non-exclusive license. The court did not analyze the clarity of any claimed ambiguous writing, which 3taps has shown exists here, to determine whether it amounted to an exclusive copyright license. Given craigslist's copyright registrations, its ambiguous TOU, and the implementation then abandonment of the "confirmation box," the "totality of the circumstances" as they have been pled and admitted by craigslist leads to the conclusion that craigslist holds, at most, a non-exclusive license to its users' posts.

B. CRAIGSLIST LACKS STANDING BECAUSE IT NEITHER AUTHORED THE USER POSTS NOR SELECTED OR ARRANGED SUCH POSTS.

Section 101 of the Copyright Act (17 U.S.C. § 101) defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." As an initial, and dispositive, matter—craigslist does not allege any infringement of a compilation. In paragraph 50 its FAC, craigslist defines "Copyrighted Works" as

"in its website and all portions thereof, including, but not limited to, the database underlying the website and the user-generated postings on its website." However, even if this definition is construed to include a compilation, it is indisputable that copyright protection for factual compilations is "thin." *Feist Publications, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 349 (1991). "As applied to a factual compilation, copyright law protects an author's original selection and arrangement of facts, but the facts and ideas within the compilation are free for the taking." *Id.*

Here, as pled, craigslist's "compilation" does not contain the necessary original "selection" or "coordination" or "arrangement" to warrant copyright protection as a matter of law. craigslist admits that its users author their respective posts, and craigslist's website functionality simply allows the posts to be displayed in the order in which they were submitted by their users, and in the classified ad category and location selected by the user. The "selection" of content is purely governed by the users who choose to post their classified ad content on craigslist.

Likewise, craigslist pleads that the "arrangement" into one of the standard classified categories is also controlled by users, who by identifying the relevant category, determine where their ad is depicted on the site. Nevertheless, craigslist claims that this ad presentation somehow qualifies as ***its*** original selection and arrangement because (1) it undertakes voluntary efforts to restrict the posting of offensive material, (2) it chooses the duration that postings appear on its website depending on the type of posting, and (3) it arranges the ads into different geographical communities and then into dozens of categories and sub-categories. (Oppos., at 17:13-18:19). These "efforts" do not entitle craigslist to compilation copyright protection, and do not represent an original work of authorship.

For example, craigslist's act of monitoring postings for offensive material (*i.e.* defamatory, threatening, hateful or pornographic content) does not constitute an act of "selection" sufficient to warrant copyright protection. craigslist's motivation in halting the publication of offensive material is not, as it contends, an act of original selection, but rather, a task dictated by moral convention and compelled by potential legal liability. *See Mid Am. Title Co. v. Kirk*, 867 F. Supp. 673, 678-79 (N.D. Ill. 1994) (granting summary judgment for defendant on plaintiff's copyright infringement claim on

the ground that a real property title insurance report was not "original" for copyright purposes because it was guided by "strong external forces"), *affirmed* 59 F. 3d 719, 722 (7th Cir. 1995).

craigslist's related claim that its act of "selecting" the duration of each posting is not an exercise in "originality" but proscribed by practical considerations. In other words, craigslist's determination to limit the posting lifespan of, as its states, a "For Sale" posting, or a "Resumes" posting, is based on the fact that such a post has an inherent expiration after which it is more often than not stale or moot—*e.g.*, the item is sold, or the poster obtains a job. Simply put, it is not an exercise in "originality" to remove posts that are more than "7" days old (in the case of "For Sale" postings), or "30 days" old (in the case of "Resumes" postings). Just as the Supreme Court in *Feist* gave no weight to the functional act of using fictitious listings to detect copying, craigslist's expiration limitations are spurred by practical and functional considerations that do not warrant copyright protection as a compilation of its users' works. *See* 499 U.S. at 344, 361-64.

craigslist's contention that its "coordination" or "arrangement" of the postings on its website—by "geographical community" and then into "dozens of different categories and sub-categories"—constitutes the necessary "creative" elements to warrant copyright protection also falls flat. (Oppos., at 17:25-19:8). This position is incorrect in two separate, yet related, respects.

First, there is no "coordination" or "arrangement" conducted by craigslist. As discussed below, and as pled by craigslist, the author of the post, not craigslist, selects the category in which to post the ad. craigslist simply processes the user's category selection by placing the ad into a list format based on the time of the posting (*i.e.*, the most recent first). Such a basic arrangement is not protectable as a matter of law. *See Assessment Tech. of WI, LLC v. WIREdata, Inc.*, 350 F. 3d 640, 643 (7th Cir. 2003) ("obvious orderings, the lexical and the numeric, have long been in the public domain, and ... cannot be appropriated by claiming copyright"); *Arica Inst., Inc. v. Palmer*, 970 F. 2d 1067, 1076 (2d Cir. 1992) (a finding that a sequence of posts in chronological order is not copyrightable because the sequence itself is "an unalterable fact, the product of discovery and not creativity.")

Second, craigslist improperly collapses the selection of the *names* of the categories and sub-category titles (which is created by craigslist, *i.e.* "SF Bay Area"), into the *selection* of which

category to publish the ad (which is determined by the user). These are two distinct concepts. craigslist cannot be credited with the user's selection of the category to publish the ad—as, necessarily, that is a decision by the user undertaken for whatever personal reasons the user has chosen. Further, the naming of the categories is purely functional; the geographic locations relate to the inherent locality of classified advertising and result from the location selected by the user, and the names of various categories of goods and services have been used for decades in every classified newspaper section. Certainly neither represents an *original* work of *authorship* created by craigslist. *See Georgia v. Harrison,* 548 F. Supp. 110, 115 (N.D. Ga. 1982) ("brief, descriptive language used merely to designate something may not be copyrighted."); *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 419 (S.D.N.Y. 1986) ("Copyright applies only to original creations and not to ordinary or unoriginal combinations of words."), *rev'd on other grounds,* 811 F.2d 90, 98 (2d Cir. 1987)("a cliched or an 'ordinary' word combination by itself will frequently fail to demonstrate even the minimal level of creativity necessary for copyright protection... "). Accordingly, craigslist's "selection" of the category names cannot form the basis of compilation copyright protection.

Finally, craigslist's reliance on *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509 (2nd Cir. 1991) and *MRIS* to support its claim of compilation copyright protection is misplaced. In *Key Publications*, a telephone directory was held copyrightable because the author had used her subjective judgment in selecting which businesses she felt would be of interest to, and would remain located for some time in the future within, the Chinese community. 945 F. 2d at 513. In contrast to *Key*, craigslist does not use any selective judgment in organizing the ads on its website, as it is the *users* who create the ads, using language they choose to attract the relevant audience, and then self-select which category and sub-category to post the ad.

In *MRIS*, the court specifically found that the MRIS Database "exhibits the requisite originality for copyright protection" because "MRIS *oversees and controls the quality and accuracy of the content* in the MRIS database." *MRIS*, 2012 WL 3711513, at *15 (emphasis added). In contrast, craigslist makes it unambiguously clear that it does not control or edit the ads, or confirm the accuracy or quality of any of the products or services offered in the ads. (*See* craigslist Terms of Use, § 3(a) & (b), attached as Exhibit B-2 to the Declaration of Christopher J. Bakes). craigslist's

limited involvement in its users' postings and maintenance of its website does not add the requisite level of "original expression" to warrant compilation copyright protection as a matter of law, and as a result any claim related to a compilation of user posts must, if even alleged, be dismissed.

C. THE CLASSIFIED ADS POSTED ON CRAIGSLIST ARE NEVER "FIXED."

Copyright law only protects original works of authorship that are "fixed in any tangible medium of expression . . . ." 17 U.S.C. § 102(a). In order to be "fixed" under the Copyright Act, a work must be embodied in a copy or record in a manner that is "sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Under the Copyright Act, the definition of "fixation" excludes "purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer." H.R. No. 2237, 89th. Cong., 2d Sess. p. 45 (1966) (reporting on H.R. 4347, an earlier version of the current Copyright Act).

Here, craigslist ignores the "fixation" requirement, and seeks to assert copyright protection over the user content of its website, despite the fact that the content is constantly changing. New postings are added, postings are updated or changed, and old postings are removed on a continual basis. craigslist states that over 100 million ads are posted each month[6] resulting in more than 37 ads being posted each second, let alone expirations, deletions and modifications—all generated by users. This constant state of flux belies craigslist's claim that it selected and arranged any compilation of its users' posts for more than a "transitory duration" or that any such selection and arrangement even *existed* for more than a "transitory duration." Thus, any alleged compilation is not fixed for more than a transitory duration due to its ever-changing and variable nature and is not copyrightable. *See Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304, 305 (7th Cir. 2011) (rejecting copyright protection for a garden because its "elements are alive and inherently changeable" and "its appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement"); *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) ("Given that the data reside in no buffer for more than 1.2 seconds before being automatically

[6] *See* Fact Sheet, http://www.craigslist.org/about/factsheet.

overwritten, and in the absence of compelling arguments to the contrary, we believe that the copyrighted works here are not 'embodied' in the buffers for a period of more than transitory duration, and are therefore not 'fixed' in the buffers.").

In sum, because craigslist does not own an exclusive license to user posts, it cannot sustain a claim for infringement of such posts and such claims should be dismissed. And, because it has neither selected, arranged, nor fixed any compilation in a tangible medium for more than a transitory duration, any claim for infringement of a compilation should similarly be dismissed.

IV. CONCLUSION

craigslist repeatedly promotes – in its briefing, in its complaints – its modest origins as a public bulletin board, a form of public square available for free. Now craigslist wants to cordon off parts of the public square. They'll remain public and free for some, while others are barred. Into this stew, craigslist tries to insert statutes and laws to make sense of what it's trying to do: prevent access. But it's a bad fit – neither the Computer Fraud and Abuse Act nor the Copyright Act apply to these facts, as craigslist has pled them.

Dated: February 13, 2013

LOCKE LORD LLP

/s/ Christopher J. Bakes
CHRISTOPHER J. BAKES (SBN 99266)
Attorneys for Defendant 3TAPS, INC. and DISCOVER HOME NETWORK, INC. d/b/a LOVELY