## Are Public Facts Public Property? Craigslist vs. 3taps / Padmapper

Putting all distractions aside, a central issue in Craigslist vs. 3taps/Padmapper is whether a company can put data into the public domain and at the same time complain when it doesn't like the consequences. Craigslist chose to make its user data available for indexing by search engines, which it does to drive traffic to its website. But making this data available to search engines makes it available to those who use the search engines, which, it turns out, Craigslist does not like. But can it have its cake and eat it too?

Here is what is happening: 3taps sources exchange data from the public internet which has already been voluntarily made available by Craigslist to search engines. 3taps does not need to scrape or even visit Craigslist because the data is already available throughout the public internet via search. 3taps indexes that data and makes it possible for transformative innovators like PadMapper to display the same facts in new and novel ways that benefit the market.

Despite having put this data out to the public by offering it wholesale for indexing by search engines and other internet users, Craigslist attempts at the same time to protect its market position by asserting the protection of an unlikely — and ultimately inapplicable — legal doctrine, namely, the copyright laws. But what worked for the record labels will not work for Craigslist. The fact that someone is selling a 2004 Honda w/AC for \$2300 OBO is just that — a fact, not a symphony, and CL's terms of use notwithstanding, the seller never intended any different; all the seller wanted was a buyer. CL's TOU does not create a copyrighted work where none otherwise existed, and even if it had, the provision of the data for indexing created an implied license. Passing along that data is clearly fair use, and clearly was intended by — and in the best interest of — the author.

This is especially clear when one looks at what Padmapper actually does. What is PadMapper doing that oversteps the portrayal of facts and strays into the dangerous territory of copying, without permission, someone's creative expression? Price? Location? Or maybe the count of bathrooms is the trigger for crossing the line from factual description to truly creative expression in the minds of the plaintiff?

These are *not* creative expressions any more than phone numbers in a phone book are a creative expression. The Supreme Court has spoken on this point. What part of a phone number can you leave out to protect its creative expression before what remains becomes a non-fact — i.e. a wrong number? We ask the same question of exchange postings as regards price, quantity, location, etc.

No Terms of Use can ride roughshod over the fact that there is no copyright in facts. PadMapper's use of exchange posting is *not* infringing use. It is fair use or free (as in freedom) use of public facts.

## A poem

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

Courtesy James Boyle, Author of "The Second Enclosure Movement and the Construction of the Public Domain"