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Rants and Raves: Craigslist's Attempt to Stop Innovating Third-Party Web Developers with Copyright Law

Stephanie Marie Davies

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RANTS AND RAVES: CRAIGSLIST’S ATTEMPT TO
STOP INNOVATING THIRD-PARTY WEB
DEVELOPERS WITH COPYRIGHT LAW

Stephanie Marie Davies*

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I. INTRODUCTION

The age-old war between progress and stasis has wiggled its way into the world of online classified ads with a battle between craigslist, the Internet's classifieds giant, and 3taps, Inc., a data exchange website looking to establish an open exchange for public information. Craigslist filed a lawsuit against 3taps to enjoin the site from using any of craigslist's user-generated content, crushing its dream of facilitating the free exchange of information. 1 3taps responded with claims that its appropriation of the classified ads had not created any kind of liability in its pursuit for equal, open access to information for all. 2

Craigslist, which publishes online classified ads, is the third most visited American internet company, 3 with over fifty billion page views per month. 4 It also ranks in the top ten most visited internationally. 5 Despite its popularity, this well-known website has not made any significant changes to its user interface 6 since the turn of the century. 7 Even in the face of criticism and vibrant discourse on the subject from online commentators regarding its resistance to innovation, 8 craigslist trudges along with its same tried-and-true methods (though there is some suggestion that it may finally give in to pressure). 9 Over the past ten years craigslist has repeatedly stifled other web developers' efforts to build on top of its data. 10 In 2005, craigslist blocked

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3 Complaint, supra note 1, at 3.
5 Complaint, supra note 1, at 3.
6 See What is a user interface?, IBM, https://www-01.ibm.com/software/ucd/designconcepts/whatisUI.html ("User interface refers to the parts of a computer [or website] and its software that you (the computer user) see, hear, touch, or talk to...if you are reading this on a computer screen, then you're looking at part of a user interface right now.").
9 Newman, supra note 7.
Oodle, an online marketplace, from using its listings. Oodle copied listings from craigslist using a method called “screen-scraping” and used those listings to create a search engine, allowing users to sift through ads more easily.

Another service called Listpic also used this screen-scraping method to enhance the craigslist experience by adding associated photos to users’ ads. In 2007, craigslist similarly disallowed that service access to its data as well. Even when developers did not use the screen-scraping technique, craigslist persisted in shutting them down. A website called Flippity tried to plot craigslist postings on a map, but craigslist blocked it from doing so in 2009. Craigslist maintains that its mission is public service, but these actions do not seem to serve the public at all—they benefit craigslist by keeping online ads available only on its website, directing all web traffic looking to browse classified.

3taps arrived on the scene with the idea that all online data should be available for anyone who desires to access it. Craigslist was the best source for information about “local exchange activity between seekers and providers of goods and services in the United States.” 3taps viewed craigslist as driven solely by profit, despite craigslist’s claims to the contrary. It wanted to provide a way for developers to access and use craigslist’s listing information to offer users some of the basic services craigslist refused to provide such as a saving feature for searches, “setting up match results notifications,” or allowing users to see thumbnails of images in the list view. PadMapper, the co-defendant with 3taps in the instant case, against craigslist was one of these developers. It placed housing listings on a map to make the search easier for

12 SCREEN SCRAPING, http://www.techopedia.com/definition/16597/screen-scraping (last visited Mar. 7, 2013) (“Screen scraping is the process of collecting screen display data from one application and translating it so another application can display it.”).
13 Id.
15 Id.
17 Id.
18 CRAIGSLIST FACTSHEET, supra note 4.
21 Id.
22 Id.
those in need of a place to rent. True to form, craigslist attempted to shut down these developers by asserting copyright infringement claims over the ads posted on its website.

This Note examines whether craigslist should be able to assert copyright claims over user-generated classified ads on its website, or whether 3taps should be allowed to continue its practice of providing access to the ads because they are not subject to copyright protection. Part II of this Note provides an overview of the relevant law governing proper copyright subject matter, eligible copyright authors, and the fair use exception to copyright protection. It then discusses the basic details of craigslist and 3taps, as well as the services they provide. It finally describes the specific claims craigslist brought against 3taps, Inc. Part III applies those legal principles to craigslist's classified ads to conclude that, while they are copyrightable subject matter, craigslist should not be able to assert copyright infringement claims because it is not the author of those ads. Next, Part III shows that, even if craigslist successfully brought suit as a copyright owner, 3taps' asserted fair use defense would preclude it from liability for infringement.

II. BACKGROUND

A. COPYRIGHT LAW

1. Origin and Goals of Copyright Law. A copyright is “the right to copy; specifically, a property right in an original work of authorship... fixed in any tangible medium of expression.” The federal government derives its right to pass copyright legislation from the Constitution, which states in Article I, Section 8, that “Congress shall have Power...[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors...the exclusive Right to their respective Writings.” Accordingly, Congress passed the federal Copyright Act not long after the ratification of the Constitution. It has been updated several times since; the most recent update is the Copyright Act of 1976.

24 Complaint, supra note 1, at 7.
26 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1.02 (Matthew Bender, Rev. Ed.).
27 U.S. CONST. art. I, § 8, cl. 8.
28 1 Nimmer & Nimmer, supra note 26, § 1-OV.
29 Id.
The goal of copyright law is to combat the risk of underproduction of “useful Arts” by encouraging creativity. Society wants to encourage creation; by giving creators a right to exclude others from using their work creators are incentivized to innovate. Without these rights, others could copy authors’ works and reap the benefits without expending the same efforts to create the works as did the author. Because the copier would have a higher profit margin, the author would be discouraged from creating anything in the first place, and society would suffer. The right to exclude others from reproducing, distributing, displaying, or performing a work is what makes a copyright valuable.

2. Copyrightable Subject Matter. Copyrights cover a broad range of categories, from books to video games. The Copyright Act defines exactly what subject matter it protects in section 102, which states that “[c]opyright protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” The statute then goes on to list several categories subject to copyright, including literary and musical works, as well as pantomime and motion pictures. This section has been interpreted as requiring two elements in order for a work to be copyrightable: fixation and originality. If both elements are present, the Copyright Act grants protection to the work, even if it is not formally registered and no copies have been distributed.

a. Fixation. According to section 101 of the Copyright Act, a work is fixed when “its embodiment in a copy ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” The Act’s definition of a fixed work has
been divided into two separate sub-requirements: the "embodiment requirement" and the "duration requirement." Both must be present for a work to be considered properly fixed.

In MAI Sys. Corp. v. Peak Computer, Inc., the Ninth Circuit held that a copyrighted computer software program contained in a computer’s random access memory (RAM) was adequately fixed for purposes of the statute. It reasoned that the embodiment requirement was met because the computer program, once copied into the RAM, could be viewed through the system error log. This representation was permanent enough to be "perceived, reproduced, or otherwise communicated" as the as required by the statute, therefore satisfying the embodiment requirement. Another court found the embodiment requirement fulfilled when the entire work at once, rather than merely a piece of it, was stable enough to be perceived.

Fulfillment of the duration requirement was less clear because "RAM...[is] a computer component in which...computer programs can be temporarily recorded...It is a property of RAM that when the computer is turned off, the copy...is lost." While the court there did not specifically qualify "a period of more than transitory duration," because it ultimately held that the software program in a computer’s RAM was fixed, it necessarily found that a temporary copy of a program endured long enough to satisfy the statute.

In Cartoon Network, the Second Circuit conducted a more thorough discussion of the duration requirement. That case involved the streaming of television programs into the data buffers contained within a digital video recorder (DVR). New data flowing into one buffer overwrote the data already on it, and the buffer held at most 0.1 seconds of television programming at any given time. Another buffer could only hold 1.2 seconds of programming at a

42 Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d. Cir. 2008).
43 Id.
44 MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).
45 Id.
47 MAI Sys., 991 F.2d at 518.
48 Cartoon Network, 536 F.3d at 129.
51 MAI Sys., 991 F.2d at 519.
52 Cartoon Network, 536 F.3d at 127-30.
53 Id. at 121.
54 Id. at 124.
time. In deciding whether or not these instances of holding for mere seconds or less were enough to qualify the work as fixed, the court looked to the district court's opinion MAI Systems. It noted that the program was in the computer's RAM "for minutes or longer," but that if the program's embodiment had lasted only seconds it might be "too ephemeral to be fixed.... Since the data in the buffer lasted only seconds, the Cartoon Network court found that the television programs were embodied for only a "transitory period," which did not meet the statutory requirement. Judging whether a work meets the duration requirement is a fact-specific inquiry, but typically it is only those works that are "so fleeting [that they] cannot be copied, perceived or communicated" that will fail to count as fixed.

b. Originality. Originality is the second requirement for a work to qualify as copyrightable subject matter. It is a constitutionally mandated condition, but unlike fixation, it is not specifically defined within the statute. Instead, it is typically defined by common law as a work that the author created independently (without copying), and that contains some modicum of creativity.

Traditionally, the originality standard has been quite low. It "means little more than a prohibition of actual copying." An author merely needs to add something, even if it is trivial, to a work to call it his own. For instance, in Burrow-Giles Lithographic Co. v. Sarony, the Supreme Court upheld copyright protection for a photograph of Oscar Wilde, despite the defendant's protests

55 Id. at 125.
57 Id.
58 Id. at 130 (internal quotation marks omitted).
59 Id. at 129–30.
60 Id. at 129 (internal quotations omitted).
61 Id.
62 17 U.S.C. § 102 (2012); see LOREN & MILLER, supra note 31, at 343 (discussing the requirements for a work to qualify for copyright protection under the Copyright Act).
64 LOREN & MILLER, supra note 31, at 343.
65 Id.
66 1-2 NIMMER & NIMMER, supra note 26, § 2.01[A].
67 Id. § 2.01[B]; see also Luck's Music Library, Inc. v. Ashcroft, 321 F. Supp. 2d 107, 118 (D.D.C. 2004) ("Originality merely requires... a scintilla of creativity.").
68 Feist, 499 U.S. at 345 ("[R]equisite level of creativity is extremely low; even a slight amount will suffice.").
70 Id. at 103.
that it did not meet originality standards because no creation went into making a reproduction of some tangible object in the form of a picture.\(^71\) However, because the photographer posed Wilde, chose his wardrobe, arranged the lighting, and selected the background, the Court found that the photograph was "entirely from his own mental conception," therefore meeting the originality threshold.\(^72\) Twenty years later, the Supreme Court considered the originality standard again in *Bleistein v. Donaldson Lithographing Co.*, where the defendant argued that a circus poster was not subject to copyright because it was merely an advertisement.\(^73\) The Court found that because artistic ability was required to make a successful advertisement, the work was original and would "promote the progress . . . of useful arts."\(^74\)

Despite the low bar for satisfying the originality standard, there are limits on the types of creation will satisfy it, as "no author may copyright his ideas or the facts he narrates."\(^75\) The statute protects works that are "original works of authorship,"\(^76\) which the courts have defined as requiring some minimal level of creativity.\(^77\) Facts are not created, they are discovered.\(^78\) The court in *Burrow-Giles* opined that an author is a work's "maker"\(^79\) or "originator,"\(^80\) but neither of those terms applies to a fact.\(^81\) Therefore, no author may lay copyright claims to any fact, be it scientific, historic, a piece of news, or biographical,\(^82\) because it is a part of the public domain available to everyone.\(^83\) While facts do not meet the requisite originality standard, courts have found that compilations of facts do.\(^84\) Both the Copyright Act of 1909\(^85\) and the 1976 Act\(^86\) specifically

\(^71\) Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1883) ("[T]he photograph is the mere mechanical reproduction of the physical features . . . of some object . . . , and involves no originality of thought.").

\(^72\) Id. at 60.

\(^73\) Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 243 (1903).

\(^74\) Id. at 243–44 (quoting U.S. CONST. art. 1, § 8, cl. 8).


\(^78\) *Feist*, 499 U.S. at 347; see also 17 U.S.C. § 102(b) (2012) (expressly excluding discoveries from copyright protection).

\(^79\) Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 58, 60 (1883).

\(^80\) Id. at 60.

\(^81\) *Feist*, 499 U.S. at 347.

\(^82\) Id. at 348.

\(^83\) Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1369 (5th Cir. 1981).

\(^84\) *Feist*, 499 U.S. at 348.

\(^85\) Copyright Act of 1909, ch. 320, § 5, 35 Stat. 1075, 1077 (repealed 1978).

mention compilations; it is beyond dispute that they can be the subject matter of copyright. A compilation author chooses which facts to include and in what order they should appear. He also decides which display creates the greatest efficiency and impact for his readers. So long as these selections are made independently—without copying others—and with some small iota of creativity, then the compilation satisfies the originality requirement for copyright protection.

Section 101 of the Copyright Act 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.” The court in Feist interpreted this as defining three elements, each of which must be present in order for the work to constitute a compilation: (1) collection of “preexisting material”; (2) arrangement of that information; and (3) creation of an original work, due to the author’s unique choices in how the data is displayed. Because the statute requires more than just an assembly of data, it implies that not every compilation will be protected; something more is required. For example, the court in Feist refused to extend protection to a telephone directory, that the law required the defendant to create, and that was organized simply in alphabetical order. The Court held that “the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist,” and is required in order to be protected. However, this does not mean that compilations consisting solely of unprotectable facts will never qualify for copyright. The constitutional minimum of originality can be met even without any written expression outside the bare facts. In such an instance, the creativity arises from the author’s arrangement of the facts. The expressive element that would constitute creation of an original work in these cases is more elusive, to be sure, because it

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87 Feist, 499 U.S. at 345.
88 Id. at 348.
89 Id.
90 Id.
91 17 U.S.C. § 101 (2012); see also Feist, 499 U.S. at 357.
93 Feist, 499 U.S. at 357.
94 Id. at 357–58.
95 Id. at 362.
96 Id. at 357, 362.
97 Id. at 345.
98 Id. at 348.
99 Id.
rests entirely on the arrangement of the work, but it still may qualify. However, the underlying facts will be freely available for the public to copy, because copyright may only extend to the author's original content (his expression and/or arrangement of the facts), but the public would not be able to copy his compilation without infringing.

3. Idea-Expression Distinction. The Feist Court also discussed an important limitation on copyrightable subject matter: protection extends only to an author's expression of ideas or facts, not the ideas themselves. "No matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking." The creation of this doctrine is typically ascribed to the decision in Baker v. Selden. In that case, the defendant created an accounting system and owned the copyright for the book explaining it. The Court held that the copyright did not grant him the exclusive right to substance of what he described in his book, only to his expression of it. The legislature codified this principle in section 102 of the 1976 Copyright Act, which states that "[i]n no case does copyright protection for an original work of authorship extend . . . to any idea." The U.S. Copyright Office regulations also explain that "[i]deas . . . [are] [distinct] from the particular manner in which they are expressed or described in a writing." While neither of these sources expressly mentions facts, only ideas, the Court has opined that it is applicable to them as it is well established that facts may not be copyrighted. The preclusion of facts furthers the goal set forth in the Constitution of "[p]romot[ing] the Progress of Science and useful Arts" giving copyright owners protection of their original work. But since the ideas and facts expressed in those original works can be freely used without fear of infringement, others are encouraged to utilize

100 Id.
101 Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981) (quoting Hoebling v. Universal City Studios, 618 F.2d 972, 974 (2d Cir. 1980)).
102 Feist, 499 U.S. at 349.
103 Id. (internal quotations omitted).
104 LOREN & MILLER, supra note 31, at 358.
106 Id. at 10.
107 LOREN & MILLER, supra note 31, at 362.
110 Feist Publ'ns, Inc. v. Rural Tel. Serv., Inc., 499 U.S. 340, 350 (1991) ("This principle, known as the . . . fact/expression dichotomy, applies to all works of authorship . . . only the compiler's selection and arrangement may be protected; the raw facts may be copied at will.").
111 Id. at 349 (quoting U.S. CONST. art. I, § 8, cl. 8).
112 Id.
them when creating new works. This promotes the progress of the useful arts.

4. Copyright Owners and Authors. Ownership of copyright is governed by section 201 of the Copyright Act, which states in part that "[c]opyright in a work protected under this title vests initially in the author or authors of the work." While "author" is not included in the list of definitions found in section 101, the Court held in Burrow-Giles that an author "is he to whom anything owes its origin; originator; maker, one who completes a work of science or literature." There, a photographer was an author for purposes of the statute because he "superintended the arrangement." He chose where the subject should sit, what the background should be, and which lighting to use. An author is a work's mastermind; he caused it to exist.

Generally, a copyright owner has certain exclusive rights to his copyrighted works, including the right to reproduce the work in copies, to prepare derivative works, and to distribute copies to the public. The owner also has the sole right to sue for copyright infringement if any of these exclusive rights are violated by another party.

5. Copyright of Classified Ads. In general, advertisements can receive copyright protection so long as the material meets the originality threshold. Controversy has arisen, however, in the context of the copyright of individual classified ads, and whether the advertiser or the publisher owns the copyright. In Jacobs v. Robitaille one district court found that, while it is possible for a publisher to hold the copyright for a classified ad found in a periodical, the advertiser must intend to assign his copyright to the publisher when she submits the ad to be published. In the absence of a written agreement, courts have generally found that advertisers, who have "little or no knowledge of

113 Id. at 349–50; see also LOREN & MILLER, supra note 31, at 362 (The "Court in Baker was concerned with achieving the ultimate goal of copyright: progress in knowledge and learning. Leaving certain aspects of a work free for others to use is important to that underlying goal. . . .").
114 Feist, 499 U.S. at 349–50.
116 Id. § 101.
118 Id. at 61.
119 Id.
121 Id. § 501 ("Anyone who violates any of the exclusive rights of the copyright owner as provided by section 106 . . . is an infringer of the copyright. . . .").
123 Id.
copyright laws and [their] ramifications, do not intend to assign their rights to the publisher.\textsuperscript{125} \textit{Want Ad Digest, Inc v. Display Advertising, Inc.} raised a similar issue, but that court did not decide it.\textsuperscript{126} That opinion suggested that if the publisher chose what information to include in the classified ad, then it might have a copyright on that ad, but that it was not a definitive statement.\textsuperscript{127} The courts in both cases, however, found that even when a copyright exists for an advertisement compilation, there is no resulting copyright in the individual ads within that compilation.\textsuperscript{128}

6. \textit{Fair Use}. The exclusive rights enjoyed by a copyright owner under section 106 of the Copyright Act are subject to limitations found elsewhere in the Act,\textsuperscript{129} including the fair use exception found in section 107.\textsuperscript{130} Fair use is an affirmative defense, the purpose of which is to "permit courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster."\textsuperscript{131} The statute, which merely codified prior jurisprudence,\textsuperscript{132} does not explicitly define fair use.\textsuperscript{133} Instead, the statute enumerates a list of factors that a court should consider in deciding whether or not the fair use defense should apply.\textsuperscript{134} The four factors that a court must consider under the statute are:

\begin{enumerate}
\item the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
\item the nature of the copyrighted work;
\item the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
\item the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{135}
\end{enumerate}

\begin{itemize}
\item \textsuperscript{125} Id.
\item \textsuperscript{126} 653 F. Supp. 2d 171, 177 (2009).
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. at 179; Jacobs, 406 F. Supp. 2d at 1151.
\item \textsuperscript{129} 17 U.S.C. § 106 (2012).
\item \textsuperscript{130} Id. § 107.
\item \textsuperscript{131} 4 NIMMER & NIMMER, supra note 26, § 13.05 (quoting Iowa State Univ. Research Fund, Inc. v. Am. Broad Cos., 621 F.2d 57 (2d Cir. 1980)).
\item \textsuperscript{133} 17 U.S.C. § 107 (2012).
\item \textsuperscript{134} 4 NIMMER & NIMMER, supra note 26, § 13.05[A].
\item \textsuperscript{135} 17 U.S.C. § 107 (2012).
\end{itemize}
These factors are used in a case-by-case analysis and are considered collectively.\footnote{Campbell, 510 U.S. at 569.}

\textit{a. Purpose of Use.} The preamble of no single factor in dispositive has a list of several accepted fair uses that courts have used in interpreting the "purpose and character of the use"\footnote{Id.} factor, including: "criticism, comment, news reporting, teaching . . . scholarship, or research."\footnote{17 U.S.C. § 107 (2012).} However, this list is merely illustrative, not exhaustive, and courts must consider purposes beyond those found in the statute.\footnote{Id. § 107(1).} In \textit{Campbell v. Acuff-Rose Music}, the Supreme Court found that the primary purpose of the first factor analysis was to determine if the defendant had transformed the copyrighted work by adding something new or making changes.\footnote{4 NIMMER & NIMMER, supra note 26, § 13.05[A]; see also Pac. & S. Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984) (holding that the trial court erred by not considering the four factors because the use did not fall within those uses found in the preamble).} While the transformation of a work will not always result in a finding of fair use, its existence will lend support for such a finding.\footnote{Campbell, 510 U.S. at 569.} This is because altering a copyrighted work in such a way as to add new expression furthers the constitutional copyright goal of promoting the progress of art and science.\footnote{Id.} This is also the very purpose of the fair use exception, which is to give "breathing space within the confines of copyright."\footnote{Id.} Therefore, the more transformative a defendant's use of a copyrighted work, the more aligned the work is with underlying copyright goals, and the less significant the other factors become.\footnote{4 NIMMER & NIMMER, supra note 26, § 13.05[A][1][c] (quoting Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980)).}

Commercial use, however, will cut against a finding of fair use under the first factor.\footnote{Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).} At one point, the Supreme Court considered the presence of any commercial use to be presumptively unfair.\footnote{Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 921 (2d Cir. 1994).} However, because this would have the effect of eradicating fair use in every instance except for nonprofit purposes,\footnote{Id. (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994)).} the Court softened its approach so that commercial use merely weighs against the finding of fair use.\footnote{Id.} But even with this gentler approach,
commercial use is still often the death knell for a fair use argument because courts have found a broad range of activities to be commercial and because such a finding weighs heavily against a fair use exception.\textsuperscript{150}

\textit{b. Nature of Copyrighted Work.} When examining the nature of a copyrighted work in the fair use context, the courts beyond mere originality, placing importance instead on the work’s creativity.\textsuperscript{151} Generally, greater protection will likely be afforded to a work that is more creative, while one that is merely informational is more likely to be subject to a fair use defense.\textsuperscript{152} For instance, if a work is categorized as an entertainment piece, it is less likely that fair use will apply.\textsuperscript{153} On the other hand, a compilation composed mainly of facts might fall under the defense, even though the arrangement of those facts was original enough to qualify as copyrightable subject matter.\textsuperscript{154} The Second Circuit, however, refused to allow a fair use defense even in a case where a factual work was copied by another factual.\textsuperscript{155}

Despite these general rules, this factor tends to be insignificant in comparison to the other three.\textsuperscript{156} Fair use applied in one case despite the fact that the copyrighted work in question was a highly creative rock ballad, in light of the other factors.\textsuperscript{157} In contrast, another court did not accept the fair use defense in a case where the copyrighted work was a nonfiction, historical book, a genre which is typically more vulnerable to the defense, because of extensive market harm (the fourth factor), and because the entire copyrighted book had been duplicated verbatim.\textsuperscript{158} These cases demonstrate the relative insignificant of this factor when compared to the others.

\textsuperscript{150} See Roy Export Co. Establishment v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137 (S.D.N.Y. 1980) (finding that copyrighted work in an unsponsored television broadcast was commercial because the program could boost ratings, therefore generating profit); see also Texaco, 802 F. Supp. at 16 (holding that making photocopies of scholarly journals for scientific research within a petroleum company was commercial use).

\textsuperscript{151} 4 NIMMER & NIMMER, supra note 26, § 13.05[A][2][a].

\textsuperscript{152} Id.

\textsuperscript{153} See New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 226 (D.N.J. 1977) (finding that the work in question, the New York Times Index, was “a work more of diligence and fact than of creativity and imagination,” and ultimately deciding the defendant’s activity constituted fair use).

\textsuperscript{154} Id. at 220.

\textsuperscript{155} See Fin. Info. Inc. v. Moody’s Investor Serv., Inc., 751 F.2d 501 (2d Cir. 1984) (denying a fair use defense despite the work’s factual nature because the defendant was the plaintiff’s competitor and used the copyrighted material for commercial gain. The first factor outweighed the second).

\textsuperscript{156} 4 NIMMER & NIMMER, supra note 26, § 13.05[A][2][a].


c. Amount of Copyrighted Work Used. The third fair use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." Here, courts examine the substantial similarity between the allegedly infringing work and the original copyrighted work. A proper analysis includes both a quantitative and qualitative review. Under a quantitative review, courts look to the exact amount of the copyrighted work that was used—usually how many words or pages used compared to the total. However, fair use has been found to apply when one hundred percent of a work was used. The qualitative substantiality of the amount used is more determinative—if what is copied is "what was essentially the heart of the book," then even if only a small portion of a work is copied, it can still be substantial enough to find against fair use.

d. Effect on Market and Value. The fourth factor, the "effect of use on potential market for or value of [the] copyrighted work," is likely the most important. The Second Circuit described this element as striking a balance between benefits the public could receive if the fair use exception were allowed and what the copyright holder might gain if it were rejected. A more adverse effect on the copyright holder must correspond with a greater public benefit stemming from the fair use. The question primarily focuses on whether widespread conduct of the type the defendant committed would impact either the potential market for or the value of the plaintiff's work. This impact can be on the value of any of the copyright holder's rights, even if it is one that has not yet been exercised.

160 4 Nimmer & Nimmer, supra note 26, § 13.05[A][3].
161 Robinson, 877 F. Supp. at 841.
162 4 Nimmer & Nimmer, supra note 26, § 13.05[A][3].
163 Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984). But see Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2005) ("Neither our court nor any of our sister circuits has ever ruled that the copying of an entire work favors fair use.").
165 Id.; see also Meerepol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977) ("A key issue in fair use cases is whether the defendant's work tends to diminish or prejudice the potential sale of plaintiff's work.").
169 Id.
7. Licenses. There are two categories of licenses that a copyright holder can use to share his rights with others: exclusive and non-exclusive.\textsuperscript{172} An exclusive license agreement is considered a transfer of ownership\textsuperscript{173} that must be in writing and signed\textsuperscript{174} by the copyright owner in order to be valid.\textsuperscript{175} The rights of the exclusive licensee granted to her by the terms of the license are superior to the rights of others, including even those of the copyright owner.\textsuperscript{176} If the exclusive licensee’s rights are infringed upon, she has the power to sue.\textsuperscript{177} Non-exclusive licenses, on the other hand, convey no ownership interests under the Copyright Act.\textsuperscript{178} The non-exclusive licensee, therefore, cannot sue for infringement as the exclusive licensee can.\textsuperscript{179} This type of license is also more easily granted, as it is not subject to the same writing and signature requirements as an exclusive license.\textsuperscript{180}

B. PARTIES TO THE PERTINENT LAWSUIT

1. Craigslist, Inc. Craigslist is a website that provides a place for members of a community to post and read classified ads from their locale.\textsuperscript{181} This service is free in most instances, and the website is free from third-party advertising.\textsuperscript{182} It is organized first by geography, so users see only postings from their area, and second, broken down by categories of posting.\textsuperscript{183} These categories consist of ads for jobs, housing (including houses for sale, apartments for rent, and subleases), items for sale, romantic encounters, and a wide variety of other things.\textsuperscript{184} To create an ad, users submit a form containing the information they have written and would like to publish on the website for others to see.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{172} Davis v. Blige, 505 F.3d 90, 99 (2d Cir. 2007).
\item \textsuperscript{173} 17 U.S.C. § 101 (2012).
\item \textsuperscript{174} It is possible under contract law that such a signature can be electronic; see generally Unif. Elec. Transactions Act § 9 cmt. 5 (1999) (“A ‘click-through’ transaction involves a process which, if executed with an intent to ‘sign,’ will be an electronic signature.”).
\item \textsuperscript{175} 17 U.S.C. § 204(a).
\item \textsuperscript{176} Davis, 505 F.3d at 99.
\item \textsuperscript{177} Id. at 99 n.10.
\item \textsuperscript{178} Id. at 100.
\item \textsuperscript{179} Id. at 101.
\item \textsuperscript{180} Foad Consulting Grp. v. Musil Govan Azzalino, 270 F.3d 821, 826 (9th Cir. 2001).
\item CRAIGSLIST FACTSHEET, supra note 4.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Complaint, supra note 1, at 4.
\item CRAIGSLIST FACTSHEET, supra note 4.
\end{itemize}
These ads remain active for a period ranging from seven to forty-five days, depending on the type of listing and its location, and they expire thereafter.86 Ads are listed on the site in chronological order, so that the newest posts are featured at the top of the webpage.87 Free ads can be renewed before they expire; renewal puts an ad back at the top of the list, thereby attracting more views.88 This renewal does not extend the ad’s lifespan, and after thirty days, the user can no longer renew.89 Once a post expires or is deleted, the user can choose to repost it for the same amount of time as the original post as many times as desired.90 A paid listing91 can be reposted regardless of whether it is active or expired.92 A repost is similar to creating a new post altogether—it is the same price, it will be active for the same amount of time, and it will appear at the top of the list along with other new ads.93

Anyone who uses or accesses the craigslist website is subject to its terms of use through a contractual agreement.194 This type of agreement is typically referred to as a “browse-wrap agreement,” which “is part of the web site and the user assents to the contract when the user visits the web site.”195 Any user wishing to post an ad must also affirmatively agree to the terms of use (which includes craigslist’s rights to the content the user posts) with a “click-wrap agreement.”196 In contrast to the browse-wrap agreement, a click-wrap agreement requires the user to click a box signifying that he or she has read and agrees to the terms of service before continuing to use the website.197 By agreeing to the craigslist terms of use, the user agrees to give craigslist a “perpetual, irrevocable, unlimited... license to copy, perform, display, distribute, prepare derivative works from... and otherwise use any content [the user] posts. The user also expressly grants and assigns to [craigslist] all

186 Id.
189 Id.
190 Id.
192 CRAIGSLIST REPOST, supra note 188.
193 Id.
196 Complaint, supra note 1, at 4.
rights ... to prohibit ... any unauthorized ... exploitation of ... any content that [the user] posts." 198

2. 3taps, Inc. 3taps, Inc. provides web developers with the tools necessary to build on top of craigslist's data. 199 The main page of the 3taps website included the phrase, "Your one-stop Craigslist API." 200 An application programming interface (API) is a "well-defined interface that allows one software component to access, programmatically, another component." 201 3taps uses this software to allow others to access craigslist content, 202 based on a concept of open, equal access to public facts about goods and services, such as price, availability, and demand. 203 The company premises its services on supporting the equal exchange of ideas for a wide community for the purpose of "lowering costs, increasing efficiency and democratizing opportunities." 204 In furtherance of this goal, it has many online postings, with nearly 10 million real-time postings from craigslist as of September 2012. 205

3. PadMapper. PadMapper, 3taps' co-defendant in this suit, used craigslist listings to plot apartment listings on a map, with various search filters to facilitate easier searching (such as number of bedrooms number of bathrooms, rent payment, etc.). 206 At its inception, PadMapper used data pulled directly from craigslist to populate its maps with apartment listings 207 across North America and even in the United Kingdom. 208 However, craigslist sent PadMapper a cease and desist letter upon discovering that the company was using craigslist's content. 209 PadMapper compiled and stopped using craigslist data taken directly from the website. 210 Craigslist offered a license to the site—

198 CRAIGSLIST TERMS OF USE, supra note 196.
199 Stephanie Mlot, Craigslist Sues PadMapper, 3Taps Over Listings, PC MAG (July 24, 2012, 4:53 PM), http://www.pcmag.com/article2/0,2817,2407591,00.asp.
200 Id.
202 Complaint, supra note 1, at 15.
204 3TAPS GENERAL DESCRIPTION, supra note 19.
206 PADMAPPER, supra note 23.
207 Complaint, supra note 1, at 12.
208 PADMAPPER, supra note 23 (zoom out on the map to see worldwide postings).
209 Complaint, supra note 1, at 12.
210 Id.
the kind that other third parties can use to put craigslist content on applications for mobile devices—but PadMapper refused the offer.\textsuperscript{211} However, when PadMapper saw its traffic decline severely after removing craigslist postings, it turned to the services 3taps offered to get craigslist content without going through the craigslist website.\textsuperscript{212} The PadMapper blog asserted that this was "legally kosher, since it doesn't touch their servers at all . . . and [therefore isn't] subject to CL's Terms of Use."\textsuperscript{213} The same blog also expressed concern that by using craigslist content on its website again, the PadMapper owner could be called into court.\textsuperscript{214} However, the CEO of PadMapper decided that the extra time and expense it would cost apartment-hunters who could no longer view craigslist content on the PadMapper website was too great.\textsuperscript{215} PadMapper.com features craigslist content courtesy of 3taps' API for craigslist data for apartment-searching as of January 2012.\textsuperscript{216}

C. THE SUIT: CRAIGSLIST'S CLAIMS AGAINST 3TAPS, INC. AND PADMAPPER

1. Craigslist's Claims. Craigslist filed a complaint against 3taps, Inc. and PadMapper on July 20, 2012, claiming that they used its listings unlawfully on a massive scale, harming both craigslist and its users.\textsuperscript{217} Craigslist included several claims,\textsuperscript{218} including infringement of the copyrights craigslist had over its content.\textsuperscript{219} This included several registered copyrights covering advertising, information distribution, and "online interactive bulletin boards."\textsuperscript{220} However, craigslist also claimed that each user-generated posting on its website was "an original work of creative expression"\textsuperscript{221} to which craigslist had all rights.\textsuperscript{222} While these postings were only ads, the basis for the copyright claims arose because craigslist claimed each ad was a "unique written description[ ] of the goods or services offered for sale."\textsuperscript{223} The company also stated in its complaint that it filed for additional copyrights in July of 2012, which may reflect an

\textsuperscript{211} Id. at 5.
\textsuperscript{212} Id. at 13.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Complaint, supra note 1, at 1.
\textsuperscript{218} Id. at 15.
\textsuperscript{219} Id. at 1.
\textsuperscript{220} Mlot, supra note 199.
\textsuperscript{221} Complaint, supra note 1, at 7.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
attempt to register copyrights over user-generated data (although it is not clear from the complaint that this is the case).\textsuperscript{224}

Because craigslist claimed a copyright in each individual ad, it also argued that it had a claim for relief under section 106 of the Copyright Act of 1976, which defines the exclusive rights of copyright owners,\textsuperscript{225} and section 501, which defines what particular acts constitute infringement.\textsuperscript{226} Craigslist alleged that 3taps made copies of user-posted ads and distributed those copies to the public in violation of these statutes when it accessed craigslist data and made it available to 3taps users.\textsuperscript{227} Craigslist also said that 3taps contributorily infringed\textsuperscript{228} on its copyrights, as the company "systematically induc[ed], caus[ed] and/or materially contribut[ed] to unauthorized copying, reproduction, [and] preparation of derivative works from . . . the Copyrighted Works by 3taps users and thus to direct infringement . . . ."\textsuperscript{229} Craigslist argued 3taps facilitated unlawful access to at least nine websites, to applications on mobile devices, and by allowing its users to utilize its API to then access craigslist content.\textsuperscript{230}

2. 3taps' Answer. 3taps answered craigslist's complaint by asserting several arguments against the copyright infringement claims. The primary arguments were that craigslist's ads were not copyrightable,\textsuperscript{231} and that if they were, that craigslist could not act on behalf of its users (each of whom would own the copyright, if any existed for his particular ad) in an infringement action.\textsuperscript{232}

3taps' main argument against copyright infringement was that craigslist's ads were not copyrightable.\textsuperscript{233} It claimed that there was nothing "unique"\textsuperscript{234} that would make each ad an "original work of creative expression"\textsuperscript{235} sufficient to incur copyright protection because the ads were thrust into the public domain,

\textsuperscript{224} Id.
\textsuperscript{225} 17 U.S.C. § 106 (2012) ("[T]he owner of the copyright under this title has exclusive rights to do and to authorize any of the following: to reproduce the copyrighted works . . . ; to prepare derivative works . . . ; to distribute copies . . . to the public by sale or other transfer of ownership. . . . ").
\textsuperscript{226} Id. § 501.
\textsuperscript{227} Id. at 16.
\textsuperscript{228} Id. at 15.
\textsuperscript{229} See Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (1996) (quoting Gershwin Publ’g Corp. v. Columbia Artists Mgmt., 443 F.2d 1159, 1162 (1971) (describing contributory infringer as "[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . . ").
\textsuperscript{230} Id. at 2.
\textsuperscript{231} Id. at 13.
\textsuperscript{232} Id. at 1.
\textsuperscript{233} Id. at 12.
and because the information was intended to be public.\textsuperscript{236} 3taps's answer states that "facts . . . regarding goods or services . . . owned by others who . . . write their own descriptions for purposes of . . . sale by them to the public . . . via a public website"\textsuperscript{237} may not be copyrighted.\textsuperscript{238}

Furthermore, 3taps argued that even if the classified ads were copyrightable, craigslist would not be the owner of those copyrights and therefore could not assert a cause of action.\textsuperscript{239} According to this theory, the users generated the ads and owned or controlled the saleable items or services; thus the users owned all rights to the ads.\textsuperscript{240} Accordingly, 3taps reasoned that craigslist had no authority to sue on behalf of its users, regardless of anything stated in the terms of use attempting to transfer rights from the user to craigslist (3taps also asserted that craigslist used its Terms of Use illegally to "protect a dominant market position," rendering them unable to effectively transfer rights).\textsuperscript{241}

Finally, 3taps maintained that "any alleged use of craigslist's allegedly copyrighted materials constitute[d] fair use."\textsuperscript{242} If successful, this affirmative defense would exculpate 3taps from liability for copyright infringement, and craigslist's complaint would fail.\textsuperscript{243}

III. ANALYSIS

A. ARE CRAIGSLIST ADS COPYRIGHTABLE?

3taps' first answer to craigslist's complaint is that it merely provided access to publicly available data that had no intellectual property rights attached to it, so it could not be liable for copyright infringement.\textsuperscript{244} Is 3taps right? Is there no copyright protection for these classified ads? To answer these questions one must address the requirements for a copyrightable work: fixation and originality.

Craigslist ads remain active and viewable on the website from seven to forty-five days, depending on the type and location of the listing.\textsuperscript{245} Although the ads expire after that time, users can repost them for the same time period as many

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{236} Id. at 11.
    \item \textsuperscript{237} Id. at 13.
    \item \textsuperscript{238} Id.
    \item \textsuperscript{239} Id. at 4.
    \item \textsuperscript{240} Id. at 12.
    \item \textsuperscript{241} Id. at 10.
    \item \textsuperscript{242} Id. at 23.
    \item \textsuperscript{243} Id.
    \item \textsuperscript{244} 3taps Answer, supra note 2, at 1.
    \item \textsuperscript{245} CRAIGSLIST POSTING LIFESPAN, http://www.craigslist.org/about/help/posting_lifespans (last visited Mar. 9, 2013).
\end{itemize}
\end{footnotesize}
times as desired. Even though these ads are not permanent, they can still be “fixed” enough to satisfy the statute. The embodiment requirement is fulfilled if a work is stable enough to be perceived by others. The Cartoon Network court stated that if an entire work was able to be communicated, rather than just a miniscule piece of the whole, the work would be embodied. These ads typically exist for at least seven days. During that time, the ads are available in their entirety, not just in pieces—it would do the advertiser no good whatsoever if only a part of their ads were viewable by others. They could easily be “copied, perceived or communicated” without difficulty while posted online, so they satisfy the first requirement.

The duration requirement, on the other hand, might be more problematic than the embodiment requirement because for a work to satisfy this requirement, it must exist for “a period of more than transitory duration.” As the craigslist ads are only temporarily available, it might seem to exist for only a transitory duration that would be insufficient for fixation. However, courts have dealt with this issue before; the Second Circuit in Cartoon Network found that a television program embodied for only a matter of seconds existed for only a transitory duration, so it was not fixed. The Ninth Circuit, on the other hand, found that a temporary copy of a computer program (temporary because the copy is lost when the computer is turned off) was fixed for copyright protection. The district court opinion in that case noted that the copy of the program existed for a span of at least a few minutes, or even longer. It is clear from these cases that while a matter of seconds is not sufficient for the duration requirement, several minutes is long enough. The craigslist ads can be posted for days and weeks at a time. If a span of a few minutes is long enough to be “a period of more than transitory duration,”

246 CRAIGSLIST REPOST, supra note 188.
248 Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 129 (2d Cir. 2008).
251 Id.
252 Cartoon Network, 536 F.3d at 129–30.
253 MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993).
254 Id.
256 CRAIGSLIST REPOST, supra note 188.
then, a fortiori, classified ads posted online for weeks at a time would be sufficient as well.

Since both the embodiment and duration requirements are met by the craigslist ads, the fixation portion of the Copyright Act is satisfied. But the inquiry does not stop there—the ads must also be original to get copyright protection.258

Originality is a fairly low standard.259 All that is required is "a scintilla of creativity," defined as any small thing that the author added independently and without copying that makes it unique.260 It does not matter what the work's nature or purpose is. In Bleistein v. Donaldson Lithographing Co., the Supreme Court held that advertisements are as equally subject to copyright protection as a novel or a masterful painting.262 Therefore, the fact that the material(s) posted on craigslist are advertisements does not defeat their copyrightable status. They are sufficiently original under the statute and can be protected.

Despite satisfying the threshold for originality, classified ads are still problematic because they are comprised mostly of facts, such as the price of a secondhand couch or that a two-bedroom apartment is available for $900 a month. Facts and ideas are not "original works of authorship" because they are discovered, not created. As such, they are not subject to copyright protection.264 It is the author's expression of facts or ideas that is protected, as opposed to the underlying facts themselves, and those facts may be freely copied and used by other authors.265 Therefore, the facts in the craigslist ads cannot be protected by copyright law. 3taps, PadMapper, and any other party that wishes to use the facts contained within craigslist ads should be able to do so freely, without fear of liability. What cannot be copied is the author's expression of those facts, which might exemplify what has been so problematic for them. As in this case. Their websites do not merely restate the facts found within the ads (such as the fact that a three-bedroom, two-bath townhome is available for rent); instead, they repost the entire content of the classified advertisement, which includes the author's rendition of the facts. If the ad

258 Id. § 102; see LOREN & MILLER, supra note 31, at 343 (discussing the requirements for a work to qualify for copyright protection under the Copyright Act).
261 1 NIMMER & NIMMER, supra note 26, § 2.01[A].
262 188 U.S. 239, 244 (1903).
264 Feist, 499 U.S. at 345.
265 Id. at 349.
contains the author's opinion on the office management at an apartment complex, an anecdote about her elderly neighbor, or even just that she is looking for a quiet, clean roommate, those things would be copied by 3taps and PadMapper as well. If all that is needed is a mere "modicum of creativity" for a work to be original, then these ads, which explain or narrate facts, would meet that minimum standard. This is especially true if the ad contains something that elaborates on the facts or that is unrelated to them. If the defendants or other similar parties copy those ads that are both fixed and original, then they have committed copyright infringement.

But even ads that merely list a set of facts, without any further expression, could still be protected as originals. The facts themselves, of course, would still be free for anyone to use. But historically, courts have afforded compilations of facts copyright protection, if not the facts themselves, and they continue to do so today. The author of a compilation chooses what facts to include and in what order they should appear, which satisfies the originality standard even if there is nothing else present in the work the author created. If the defendants or other similar parties copy those ads that are both fixed and original, then they have committed copyright infringement.

Of course, not every compilation gets protection. In Feist, the Supreme Court ruled that a telephone directory organized alphabetically would not be protected. Rather, the author's choices of how the data is arranged must be unique to that author, not "mechanical or routine." Listing the facts relevant to an advertisement for an apartment, the sale of used goods, or a job opening, though, nearly always involves more creativity than an alphabetical phonebook. Most telephone books are arranged in such a way. It is common. In contrast, there is no commonly accepted way for a classified ad to list details about whatever it is advertising. Most apartment rental listings, for instance, might include information about the number of bedrooms and bathrooms or the rental price, but they can also state what amenities are available in the building or whether pets are allowed. There is no standard. The author includes what information he feels is necessary and organizes it accordingly. Even if there are just bare facts, the writer crafted a unique advertisement conveying those facts. An expressive element was present in that ad, which would satisfy the originality requirement for purposes of the statute.

If the defendants had taken just the facts found within craigslist classifieds and made them available on their respective websites without copying the entire

266 Id. at 346.
267 Id. at 348; see Copyright Act of 1909, ch. 320, § 5, Stat. 1075, 1077 (repealed 1978) (stating that compilations of facts are the subject matter of copyright).
268 Feist, 499 U.S. at 348.
269 Id. at 362–63.
270 Id. at 362.
text of the ads, there would have been no infringement. But these ads are both fixed and original. They are subject to copyright protection, and the defendants can be held liable for infringement.

B. WHO CAN SUE?

In general, the author of a copyrighted work is the owner of that copyright. Craigslist did not write any of the craigslist ads posted on its site; its users did. The users were entirely responsible for how the ads appeared; they “superintended the arrangement” of the content. Craigslist’s only involvement was to provide a place for its users to post their classified ads. Courts have suggested that it might be possible for a publisher to be the author of a classified ad, but only in instances where the publisher chose what information to include in the ad. Yet craigslist did not do that. What appeared in any ad is only what the user chose to include in it. Craigslist would not be able to claim authorship over any of its ads based on that limited principle.

There has also been some suggestion from the court that, in the absence of a written agreement, the publisher has rights over an ad if its creator intended to assign her rights to the publisher at the time she submitted the ad. The court in Jacobs v. Robitaille recognized that most advertisers in a periodical would not have this intention, so it would be rare that the publisher would be the copyright owner. No exception was further contemplated here. But most craigslist users are average people who likely have limited knowledge of United States copyright law. When they submit their ads to be published, it is doubtful that most would understand the consequences of assigning their rights to craigslist or even have the presence of mind to intend such an assignment at all. Without that intent, the publisher receives no rights.

Unfortunately for the authors of craigslist posts, there is a written agreement (craigslist’s terms of use), so their intent matters little. Any user who posts an ad on craigslist must affirmatively accept the craigslist terms of use before his ad will be posted. In such an instance, the advertiser does not need to have

217 17 U.S.C. § 201(a) (2012) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”).

272 CRAIGSLIST FACTSHEET, supra note 4.

273 Burr-Giles, 111 U.S. at 60.


276 Id. at 1150.

277 CRAIGSLIST HELP, supra note 185.
the intent to assign his rights, because the agreement between them will govern. In this case, the agreement specifically noted that the user gave craigslist a "perpetual, irrevocable . . . license to copy, perform, display, distribute [and] prepare derivative works" 278 or any content he posted to the website. The contractual language did not specify whether this created an exclusive license or a nonexclusive license.

From craigslist's perspective, an exclusive license would be preferable because it would be considered a transfer of ownership that would give the licensee rights superior even to that of the copyright owner. 279 To be granted an exclusive license, there must be a written agreement signed by the copyright owner. 280 However, that might not be an issue: because of the "click-wrap agreement," 281 the user must accept all terms before posting his ad. 282 The click-wrap agreement constitutes the written agreement, and the user's accepting that agreement can act as an electronic signature, depending on the state's contract law. 283 With these formalities satisfied, the license would be exclusive, giving craigslist the right to sue these defendants for copyright infringement.

If, however, the click-wrap agreement was insufficient to act as both a signed, written agreement between copyright owner and licensee, then all craigslist would have is a non-exclusive license to the users' content. This type of license is not a transfer of ownership, 284 and therefore does not allow the licensee to instigate litigation for infringement. 285 If the click-wrap agreement is a non-exclusive license, craigslist would lack sufficient standing to sue, and it would effectively eliminate the basis for this suit. In its complaint, craigslist claims to have exclusive rights to the user-generated data on its website. 286 However, the specific type of license craigslist was granted for use of its users' content is dependent upon whether the click-wrap agreement fulfills the requisite formalities required of an exclusive license under relevant contract law.

278 CRAIGSLIST TERMS OF USE, supra note 194.
279 Davis v. Blige, 505 F.3d 90, 100 (2d Cir. 2007).
281 United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009) ("Clickwrap agreements require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website.").
282 Complaint, supra note 1, at 4.
283 See UNIFORM ELECTRONIC TRANSACTIONS ACT § 9 cmt. 5 (1999) (a click-wrap transaction will be an electronic signature if there is an intent to sign).
284 Davis, 505 F.3d at 100.
285 Id. at 101.
286 Complaint, supra note 1, at 7.
If it does not, craigslist had no standing to sue for copyright infringement because it had an insufficient ownership interest, regardless of what the complaint alleges. If this were true, the defendants would be able to walk away from the suit without liability.

C. FAIR USE DEFENSE

Finally, 3taps claimed that its use of the craigslist content constituted fair use rather than illegal infringement. 287 This claim is predicated on the notion that even if a court were to find that craigslist had the right to sue as an author or licensee for copyright infringement of sufficiently original material, 3taps would nonetheless be protected by the four-factor test 288 for fair use.

Under the first factor, “purpose of use,” 289 courts look at how, if at all, the defendant transformed the copyrighted work by either adding something new or making changes to the existing material. 290 However, the defendants here did not change the craigslist ads, 291 because to do so would have defeated their purpose. 3taps aims to provide open, equal access to public facts found within craigslist ads. 292 PadMapper’s service links users directly to craigslist ads, just as they appeared on the craigslist website. 293 For each defendant, the purpose of its service is to provide information to their users just as it appears on craigslist; thus specifically do not make changes to the information. PadMapper can argue that it added something to the craigslist ads by showing them on a map. Showing the ad featured on a map is new presentation, adding a visual element to the work that was absent from its original form. Although the ad itself was not changed, PadMapper could argue that this additional element was transformative of the work overall, although this is only a minor transformation.

Courts also look at commercial use under the first factor, which cuts against a finding of fair use. 294 In Roy Export Co. Establishment v. Columbia Broadcasting Systems a district found that use of a copyrighted work in an unsponsored television broadcast was commercial use because it could attract a wider

287 3taps Answer, supra note 2, at 23.
289 Id.
291 3TAPS’ MANIFESTO, supra note 203.
292 Id.
293 PADMAPPER, supra note 23.
294 Campbell, 510 U.S. at 579.
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audience and boost ratings.\textsuperscript{295} The co-defendants in this case are similar in that both based their respective websites on using craigslist data for commercial purposes to benefit their respective businesses. The presence of craigslist ads could increase traffic to their websites and make those sites more desirable to users, just as the copyrighted material in a television show could boost ratings and therefore generate advertising profit. Because of the commercial use and the lack of transformation to the craigslist ads, the first factor would be in craigslist's favor.

The second factor, the nature of the copyrighted work, works more in the defendants' favor. The more creative a work in nature, the greater protection it is typically afforded, causing the fair use doctrine to not apply.\textsuperscript{296} Craigslist ads were not meant to be creative or entertaining; they were meant to provide information to the public, like an announcement that an apartment was available for lease or that an item was available for sale. While the ads were sufficiently original to qualify for copyright protection, most of them were probably not creative enough to merit protection from the fair use defense. These ads were structured to convey facts, and a work that is more informational in character is less likely to be protected from the defense.\textsuperscript{297} Use of the ads, then, was more likely to qualify as a fair use. This is not definitive, though—courts have, in the past, disallowed the fair use defense even where the nature was informational, in light of the other factors.\textsuperscript{298} Further, this second factor is the least significant of the four,\textsuperscript{299} and it alone is not enough to establish the defense.

Like the first factor, the third factor works more in craigslist's favor. Here, a court will look at the amount of the work that the defendant copied in relation to the work as a whole.\textsuperscript{300} While a quantitative analysis is useful\textsuperscript{301} (like rather than finding the defendant copied 75% of a work or only 10%), what is more important is whether the defendant copied "what was essentially the heart of the" work.\textsuperscript{302} The "heart" of the craigslist ads was that they were advertising an item for sale or an apartment for rent. Both 3taps and PadMapper copied each ad in its entirety, including every word and photograph. This eliminates the

\textsuperscript{296} 4 NIMMER & NIMMER, supra note 26, § 13.05[A][2][a].
\textsuperscript{297} Id.
\textsuperscript{299} Id.
\textsuperscript{300} 17 U.S.C. § 107(3) (2012).
\textsuperscript{301} Robinson, 871 F. Supp. at 841.
need to examine the amount copied to determine whether the 'heart' of the ad was copied, because it not only captures the 'heart,' but also, the details that go along with it. While it is true that even where 100% of a work is copied, the court can still find that fair use applies. 303

With the first and third factors in craigslist's favor, and only the second (arguably least important) factor in the defendants' favor, it would seem unlikely that fair use would apply here. However, the fourth factor—the use's effect on market for and value of the work 304—is the most important and can significantly outweigh the others. 305 This factor is analyzed by weighing the public benefits of the application of the fair use exception against what the copyright holder would gain if it were rejected.306 If the defendants here were allowed to continue their activity, the public would be given greater access to craigslist data. PadMapper's sole purpose was to make searching for an apartment faster and easier, which would benefit the public. In general, wider dissemination of information is a service that benefits everyone. If a person were looking to lease an apartment or buy secondhand furniture, the information that person needs would be available from a number of different sources, rather than just on craigslist. This would also facilitate the exchange of goods and could improve local markets, as people could buy and sell items, find jobs, or locate a place to live much more quickly and efficiently.

Also, by allowing these defendants to use craigslist data, craigslist would actually benefit from the allegedly infringing activity. PadMapper reproduces craigslist ads just as they appear on the craigslist website itself. 307 The name "craigslist" appears on them, which could actually promote the website instead of harming it because craigslist makes money by charging for certain types of listings in specific geographical areas. 308 Users who want to post paid listings would be more likely to spend the money to do so if they knew their ad would be seen in multiple places, instead of just one website. It is true that there are people who will respond to an ad not because they saw it on craigslist, but because they saw it on PadMapper or another similar website. However, those users who have posted their ads have still successfully rented their apartments or sold their used cars through a craigslist ad, which has been craigslist's goal all
along. Applying the fair use exception would not only serve the public, but could even result in benefits to craigslist.

If the court instead found against fair use, craigslist would gain exclusivity of the material posted on its site. The ads would still be available for anyone to see and use, but would only be accessible on its website. Craigslist could potentially see an increase in its web traffic and could become a more valuable company (assuming that 3taps and PadMapper detracted from traffic in the first place).

It is hard to imagine that the defendants’ use of craigslist data would harm the potential market for or value of a plaintiff’s ads. An advertisement is typically more valuable if more people can see it, which is what these defendants’ services accomplished. The plaintiff would therefore not be greatly injured by allowing the defense to stand. Users cannot circumvent craigslist by posting original ads on PadMapper or 3taps’ websites, so craigslist would not lose any potential revenue because of users posting elsewhere. The public would benefit from the defense because ads would be easier to access. This last factor favors a finding for the fair use defense.

It seems that the fair use score is tied here, with two factors in favor of each party. The purpose of the use was not very transformative, and the defendants copied the entirety of each individual advertisement. However, the nature of the work was mostly informational, instead of highly creative or entertaining, and the benefit to the public of greater dissemination of information would outweigh the harm to craigslist. But courts have traditionally put the most weight on this last factor, which makes it likely that a court would find that the defendants’ actions were protected by the fair use defense, thereby defeating craigslist’s claims of copyright infringement.

D. WHAT NOW?

Craigslist has a history of shutting down any web developer’s attempt to use its listings in an effort to maintain control over the online classifieds market. Ever-resistant to change and innovation, it remains static in comparison to the mercurial world wide web. As its own entity, craigslist can do what it pleases. But this time, it has attempted to enlist the help of copyright law, which it simply cannot do.

Craigslist has no standing to even bring this litigation because it is not the author of the ads on its website. Simply put, it is trying to use other people’s

309 Harper & Row, 471 U.S. at 566.
310 Bilton, supra note 10.
property to protect is own position as the Internet's classifieds giant. But each post is written and owned by a craigslist user, and it is that user who holds the rights to it and who can sue for infringement of that ad. Craigslist will try to argue that it holds an exclusive license to the content in an attempt to get around that fact. However, the click-through agreement will likely be insufficient and contract law to serve as the written agreement required by the Copyright Act to create an exclusive license, leaving craigslist with only a non-exclusive license that will not grant it the authority to sue for infringement.

Really, though, it would not matter if craigslist had an air-tight exclusive license. It would not even matter if the CEO of craigslist had personally written every single advertisement appearing on its website. 3taps' and PadMapper's actions constitute a fair use, and craigslist cannot do anything to hold them liable for infringement, no matter how hard it might try. Presenting the ads in a map is a new form of presentation that is transformative of the original work. The ads are informational in nature, rather than creative or entertaining. Most importantly, there would be very little negative market effect (if any at all). 3taps and PadMapper are reposting craigslist ads. In order to do so, those ads must exist—on craigslist—in the first place, or the defendants would have nothing to copy. They are not trying to pull people away from posting on craigslist; they are merely trying to disseminate information. Doing so helps everyone involved—those posting the ads might have more responses, and those looking for ads can view them in more places. Craigslist should have no complaints because its users will have a greater chance of successfully subleasing their apartments or selling their old couches. However, craigslist does not like to share. Like an only child, it is used to being the only one around and always getting its way. Under the guise of copyright law, it is attempting to hold its content and information hostage rather than allow others to build something new and useful on top of it. This cannot be allowed. The defendants' fair use of this information will force the Internet dinosaur to step aside and watch progress happen.

IV. CONCLUSION

Craigslist has been the biggest player in the online classifieds market since its inception. It has tried to protect that position by stopping other developers from using its data to create new services. Most recently, it filed a lawsuit against two Internet companies, 3taps and PadMapper, to stop them from

311 CRAIGSLIST FACTSHEET, supra note 4.
312 Mot, supra note 199.
plotting craigslist ads on a map (among other things) by claiming copyright infringement.

3taps and PadMapper stridently opposed this approach by arguing that copyright protection does not apply to anything on craigslist’s site because it is all information in the public domain. While several of the defendants’ other arguments against craigslist have merit, this one does not. A work is subject to copyright protection if it is fixed and original. The ads easily meet the fixation requirement, as they are posted for at least several days, and they have sufficient creativity to meet the traditionally law originality standard because each ad constitutes an author’s expression of facts. With both requirements met, the craigslist ads are copyrightable.

Craigslist faces one of its greatest hurdles in the area of copyright ownership. In most circumstances, the author of the work—the one who caused it to come into being—is the owner of the copyright, but craigslist only provides a place for its users to post ads. Rather the users are the authors. For craigslist to get around this obstacle, it must have an exclusive right to the content under a license giving it standing to sue for infringement. While the craigslist terms of use mandate that all users grant it a license, they do not specify what type of license. An exclusive license requires the copyright holder to sign a written agreement. Here, contract law will determine whether the website’s click-wrap agreement (where users must affirmatively accept the terms of use by clicking “I accept” before posting) can act as a signature.

Even if contract law grants craigslist an exclusive license, which would give it standing to sue, the defendants’ use of its content would probably qualify as fair use, giving them an escape from liability. Fair use is evaluated under four factors: the purpose of the use, the nature of the work, the amount of the work copied, and the effect on the market for and the value of the work. Under this analysis, the defendants’ copying of each ad entirely and for a commercial use work in craiglist’s favor. However, because this case involve some transformation of a work that is informational in nature, and because there is little to no negative effect on craigslist, 3taps and PadMapper’s activities are a fair use that exculpates them from liability.

Even though 3taps and PadMapper are wrong in stating that online classified ads had no intellectual property rights attached to them, the rest of their assertions concerning copyright are, for the most part, accurate. Craigslist was not a copyright owner and had to rely on a shaky claim to an exclusive license to bring an infringement suit at all. But even disregarding that fair use, the defendants would still have permitted to act as they did. Based on copyright claims, craigslist will have little choice but to step aside and allow innovation to occur.