# 06-16-16 Computer Law and Technology Hot List

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Craigslist, Inc. v. RadPad, Inc., No. 16-1856 (N.D. Cal. filed Apr. 8,

**2016)** – Craiglist suit against unauthorized parties from scraping, linking to or accessing user postings for their own commercial purposes.

Follow up to *Craigslist, Inc. v. 3Taps, Inc.*, 2013 WL 1819999 (N.D. Cal. Apr. 30, 2013) in which defendant was allegedly scraping content from the craigslist site (despite having received a cease and desist letter informing it that it was no long permitted to access the site) and offering the data to outside developers through an API. Craigslist subsequently settled the 3Taps lawsuit, with relief against various defendants that included monetary payments and a permanent injunction barring the defendants from accessing any craigslist content, circumventing any technological measures that prohibit spidering activity or otherwise representing that they were affiliated with craigslist.

## Allegation:

Real estate listing site RadPad, an entity that had allegedly received, for a limited time period, scraped craigslist data from 3Taps that it used on its own website. In its complaint, craigslist claims that after the 3Taps litigation was settled in June 2015, RadPad or its agents began their own independent efforts to scrape craigslist site. Craigslist alleges that RadPad used sophisticated techniques to evade detection and scrape thousands of user postings and thereafter harvested users' contact information to send spam over the site's messaging system in an effort to entice users to switch to RadPad's services.

#### **Causes of Action:**

- Breach of Contract. The complaint alleges that as a user of the site, RadPad was
  presented with and agreed to the site's Terms of Use, which prohibits scraping and
  spidering activity, collection of user contact information, as well as unsolicited spam.
- CAN-SPAM (and California state spam law): RadPad allegedly initiated the
  transmission of commercial email messages with misleading subject headings and a
  non-functioning opt-out mechanism, among other violations, and also had allegedly
  collected email addresses using email harvesting software. Craigslist asserts that it
  was adversely affected and incurred expenses to combat the spam messages and is
  entitled to statutory damages.
- Computer Fraud and Abuse Act (CFAA) (and California state law equivalent): The
  complaint alleges that RadPad accessed craigslist's site in contravention of the
  Terms of Use and thereby gained unauthorized access to craigslist's servers and
  obtained valuable user data. Websites seeking to deter unauthorized screen
  scraping frequently advance this federal cause of action, with mixed results.
- Copyright Infringement: Craigslist claims that RadPad is liable for secondary copyright infringement for inducing 3Taps' prior copyright infringement, by allegedly

assisting 3Taps in shaping the "data feed" and advising on how to circumvent the site's technological blocks.

### Defense:

Radpad is not directly denying that it is scraping the information from Craigslist and using for its own commercial purposes, but rather it is public domain material. Radpad argues in its answer that craigslist is attempting to exclude RadPad from accessing publicly-available information that would allow it to compete in the classified-ad market for real estate rentals. In its counterclaim, RadPad claims that, in its efforts to block RadPad, craigslist has prevented email messages containing the word "RadPad" from being delivered to landlords in response to craigslist listings, an act that, it alleges, constitutes unfair competition. RadPad is also seeking a declaration that craigslist is wrongfully asserting copyright claims over rental listings that are not copyrightable subject matter.

## Legal Analysis:

Digital rights advocates have argued that content on publicly-available websites is implicitly free to disseminate across the web, while web services hosting valuable user-generated content or other data typically wish to exercise control over which parties can access and use it for commercial purposes. While the law surrounding scraping remains unsettled, craigslist has notched some notable litigation successes in recent years, including, in the prior 3Taps case. In that case, a California district court ruled, among other things, that an owner of a publicly-accessible website may, through a cease-and-desist letter and use of IP address blocking technology, revoke a specific user's authorization to access that website. Such lack of "authorization" could form the basis of a viable claim under the federal Computer Fraud and Abuse Act and state law counterpart.

Blog <a href="http://newmedialaw.proskauer.com/">http://newmedialaw.proskauer.com/</a> contributed to above recap

BWP Media USA, Inc. v. Clarity Digital Group, LLC, 2016 WL 1622399 (10th Cir. Apr. 25, 2016) - Tenth Circuit Affirms Lower Court Ruling on Meaning of "User" in DMCA §512(c) Safe Harbor

#### Overview:

Title II of the Digital Millennium Copyright Act (DMCA) offers safe harbors for qualifying service providers to limit their liability for claims of copyright infringement. To benefit from the Section 512(c) safe harbor, a storage provider must establish that the infringing content was stored "at the direction of the user." 17 U.S.C. § 512(c)(1). The statute does not define "user" and until recently, no court had interpreted the term.

## **Dispute:**

The dispute before the lower court centered on whether Examiner.com was entitled to protection under the § 512(c) safe harbor. The business model of Examiner.com, a "content farm" style site is to posts articles written by independent contractors on popular

topics of the day. More specifically, the question became whether the contributors to the Examiner (who had to sign an "Examiners Independent Contractor Agreement and License" before receiving permission to post to the site) were "users" under § 512(c), that is, were the plaintiffs' photographs stored on defendant's system at the direction of the site's contributors or stored at the direction of the defendant.

## **Appellate Ruling:**

The appeals court affirmed the lower court's holding that the infringing photographs were not uploaded at the direction of the defendant and Examiner.com was protected under the DMCA safe harbor. The Tenth Circuit found that, in the absence of evidence that the defendant directed the contributors to upload the plaintiffs' photographs to the site, the defendant's policies (e.g., prohibiting use of infringing content in the user agreement, having a repeat infringer policy and offering contributors free access to a licensed photo library) showed that the photographs were stored at the direction of the "user."

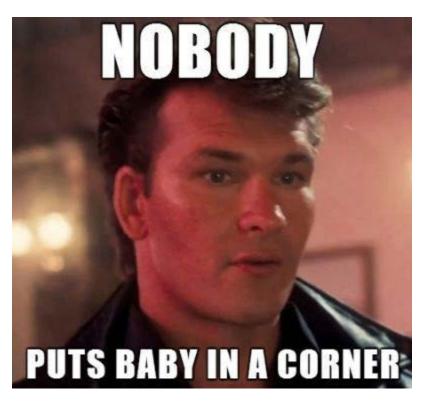
According to the court, the word "user" in the DMCA should be interpreted according to its plain meaning, to describe "a person or entity who avails itself of the service provider's system or network to store material." Notably, the court flatly rejected the plaintiff's argument that the term "user" should exclude an ISP's or provider's employees and agents, or any individual who enters into a contract and receives compensation from a provider. Refusing to place its own limitations on the meaning of "user," the Tenth Circuit stated that a "user" is simply "anyone who uses a website — no class of individuals is inherently excluded," even commenting that "simply because someone is an employee does not automatically disqualify him as a 'user' under § 512."

To quell any fears that such a natural reading would create a "lawless no-man's-land," the court noted that the term "user" must be read in conjunction with the remainder of the safe harbor provision. As such, a storage provider will only qualify for safe harbor protection when it can show, among other things, that the content was stored at the direction of a "user," that the provider had no actual knowledge of the infringement, that there were no surrounding facts or circumstances making the infringement apparent, or that upon learning of the infringement, the provider acted expeditiously to take down the infringing material. See 17 U.S.C. § 512(c)(1)(A). Thus, the relevant question isn't who is the "user," but rather, who directed the storage of the infringing content — as the court stressed, there is no protection under § 512 when the infringing material is on the system or network as a result of the provider's "own acts or decisions":

In the court's interpretation, the term "user" is not limited by any relationship with the provider, essentially removing the concept of the user from the safe harbor analysis and placing the emphasis on the remaining requirements of the statute (which, regardless, are frequently the subject of contention in litigation involving the DMCA safe harbor).

Blog http://newmedialaw.proskauer.com/ contributed to above recap

Lions Gate Entertainment, Inc. v. TD Ameritrade Services Company, Inc., 15-05024 (C.D. Cal. 2016) - Trademark Claims Preempted by Copyright Act



#### Overview:

Lions Gate Entertainment, Inc. ("Lions Gate") owns the intellectual property rights in the movie "Dirty Dancing" which used the catch phrase "Nobody Puts Baby in a Corner." Defendant TD Ameritrade Services Company, Inc. ("TD Ameritrade") used the phrase "Nobody puts your old 401(k) in a corner" with a man lifting a piggy bank over his head along to the song "I've Had the Time of My Life." Lion's Gate alleged trademark infringement based on the scene from Dirty Dancing where the actor says "Nobody puts Baby in a Corner," which included the music "I've Had the Time of My Life" and a dance scene where the actor lifts another dancer over his head. Lions Gate sued TD Ameritrade for copyright infringement, trademark infringement under the Lanham Act and state law, unfair competition and false association. TD Ameritrade moved to dismiss on the grounds that the Copyright Act preempted the federal and state law trademark claims, among other jurisdictional grounds.

## **Court Holding:**

A federal district court dismissed plaintiff's trademark infringement claims over an ad campaign using the phrase "Nobody Puts Baby in a Corner" because the Copyright Act

preempted all aspects (under the Lanham Act and state law ) of the trademark claim Act and state law were preempted by the Copyright Act

The Court relied upon the Supreme Court's ruling extending the principle of copyright preemption to the Lanham Act and federal trademark protection. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-38 (2003). The Ninth Circuit has adopted a two-part test for copyright preemption. First, the court "determine[s] whether the 'subject matter' of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103." Laws v. Sony Music Entm 't, Inc., 448 F.3d 1134, 1137 (9th Cir. 2006). Second, if the court determines the subject matter is within copyright, then the court "determine[s] whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders." Id. at 1137-38.

The Court found that the Copyright Act specifically covers "motion pictures and other audiovisual works," such as the film Dirty Dancing, as well as literary works, musical works, and choreographic works – all of which may be at issue here with the song, the screenplay "Corner" quote, and the dance lift. Thus, copyright subject matter covers all factual aspects of the trademark claims. The Court found that it appears that Lion's Gate seeks to use copyright aspects either to bolster its trademark and unfair competition claims, or as the real basis of the claims- the latter of which is certainly not permissible.

# **Further Analysis:**

The causes of action were based on TD Ameritrade's essentially copying Lion's Gate's intellectual property and slightly changing the words – thereby creating a derivative work, perhaps – and using the changed sentence in advertising its own products. Under standard state and common-law preemption analysis from the Ninth Circuit, the state and common-law claims alleged here are preempted by copyright law because the same rights are asserted in these causes of action as are asserted in the copyright infringement cause of action, namely reproduction and distribution of the copyrighted work and preparation of a derivative work.

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