No. 17-16783

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HIQ LABS, INC.

Plaintiff-Appellant

v.

LINKEDIN CORP.

Defendant-Appellant

On Appeal from the United States District Court

For the Northern District of California

The Honorable Edward M. Chen

BRIEF OF *AMICUS CURIAE* 3TAPS, INC. IN SUPPORT OF PLAINTIFF-APPELLEE HIQ LABS, INC. SUPPORTING AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* 3taps, Inc. states that it is a privately-owned company, it has no publicly-traded corporate parent or subsidiary, and no publicly-traded corporation owns 10% or more of its stock.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

3taps, Inc. ("3taps") is compelled to file this brief to respond to the grossly misleading and inaccurate account of the dispute between Craigslist, Inc. ("Craigslist") and 3taps that Craigslist purports to describe in its *amicus curiae* brief to this Court. Craigslist's *amicus curiae* filing attempts to persuade this Court that its dispute with 3taps, and its customer Padmapper, Inc. ("Padmapper"), demonstrates the importance of a broad and expansive interpretation of the Computer Fraud & Abuse Act (18. U.S.C. Section 1030, *et. seq.*), including the right to restrict, under threat of criminal prosecution, the public's access to facts and information that Craigslist voluntarily makes publicly-available on a non-password protected, public internet webpage.

In attempting to persuade this Court to adopt its expansive interpretation of the CFAA, Craigslist has filed with this Court a work of fiction about an innocent company that was maliciously attacked by offshore villains living on the high seas to avoid US law enforcement. If Craigslist is to be believed, it was only able to protect itself from these nationless cyber-pirates because a judge broadly interpreted the CFAA as giving Craigslist the right to "revoke access" to facts and information that Craigslist placed on a publicly-available webpage for all to see.

Craigslist's account of its dispute with 3taps and Padmapper is materially inaccurate, and conceals from the Court critical matters that, when disclosed, paint a very different picture than the one Craigslist has painted. Freed from the normal requirement that a party cite to an appellate record, Craigslist is effectively trying to relitigate its dispute with 3taps and Padmapper here, without the normal burden of providing this Court with any actual evidence supporting the factual assertions it makes in its *amicus* filing. An accurate account of the facts of the 3taps-Craigslist dispute demonstrates that adopting the broad and expansive interpretation of the CFAA proffered by Craigslist, which neither this Court nor the Supreme Court has ever endorsed, would create real and present threats to competition and innovation.

The only thing that Craigslist gets right in its *amicus* brief is its general premise that the dispute between Craigslist, 3taps and Padmapper should serve as a cautionary tale. That much is true. However, the caution one should take is that allowing private internet companies to selectively "revoke access" to facts and information that they make publicly available on the internet, and in the process, *criminalize by way of a federal felony any further viewing of a public webpage*, permits large companies with nearly unlimited resources to use the CFAA to terrorize and destroy small, innovative start-up companies that threaten them with competition and innovation.

If the Court intends to in any way rely upon the dispute between Craigslist, 3taps and Padmapper in resolving this appeal then it is essential that 3taps be permitted to present the Court with a fuller and fairer account of that dispute. 3taps also believes that there are at least two significant Constitutional issues supporting an affirmance of Judge Chen's order below that have not been fully addressed by the parties' briefing. 3taps respectfully files this *amicus* brief with the consent of all parties to provide the Court with an accurate account of Craigslist's dispute with 3taps and Padmapper and to address these two Constitutional issues to the Court.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), 3taps states that no one, except for 3taps and its counsel, authored this brief in whole or in part, or contributed money towards the preparation of this brief.

I. INTRODUCTION

The central issue on this appeal is whether private internet companies, such as Craigslist, should be permitted to weaponize the CFAA to selectively criminalize the accessing or viewing of facts and information that those companies voluntarily make publicly available to all on the internet. After initially expressing great hesitation regarding the potentially deleterious effects on competition and innovation that could result from handing that kind of power over to private internet operators,[2] Judge Breyer reluctantly did so in 2013, and in the process gave Craigslist the legal sledgehammer that it needed to bludgeon Padmapper and countless other innovative startups into discontinuing their use of publicly-available data in innovative ways that could foster competition with Craigslist.

[2] Judge Breyer initially stated: "The parties have not addressed a threshold question of whether the CFAA applies where the owner of an otherwise publicly available website takes steps to restrict access by specific entities, such as the owner's competitors. 'Some commentators have noted that suits under anti-hacking laws have gone beyond the intended scope of such laws and are increasingly being used as a tactical tool to gain business or litigation advantages.'" Joseph Oat Holdings, Inc. v. RCM Digesters, Inc., 409 Fed.Appx. 498, 506 (3d Cir.2010); see also Nosal, 676 F.3d at 857 (describing the CFAA as "an anti-hacking statute"); *Mark A Lemley, Place and Cyberspace*, 91 Cal. L.Rev. 521, 528 (2003) ("An even more serious problem is the judicial application of the [CFAA], which was designed to punish malicious hackers, to make it illegal—indeed, criminal—to seek information from a publicly available website if doing so would violate the terms of a 'browsewrap' license.")." Craigslist, Inc. v. 3Taps Inc., 942 F. Supp. 2d 962, 970 n. 8 (N.D. Cal. 2013).

Judge Breyer's ruling, which he acknowledged at the time might cause Congress to weigh amending the CFAA, effectively allowed Craigslist to assert *property rights* over uncopyrightable facts and information that Craigslist's users chose to make publicly available on Craigslist's webpage. With the greatest of respect for Judge Breyer, 3taps submits that his ruling was wrong as a matter of law and should not be made the law of this Circuit for numerous reasons, two of which 3taps highlights in this *amicus* brief. It was wrong as a matter of law because the ruling undermined a series of decisions from the United States Supreme Court carefully delineating a boundary between the categories of speech that one can claim property rights over because such speech is copyrightable under the Copyright Clause, and the categories of speech that the government can never grant property rights over without running afoul of the First Amendment's free speech guarantee. As explained in more detail below, the Supreme Court has held that property rights can never be granted over publicly-available facts and information because restrictions on the public's right to use publicly-available facts and information violate the free speech guarantee of the First Amendment and hinder innovation and progress that redounds to the benefit of humankind generally.

Judge Breyer's ruling in the 3taps-Craigslist matter also failed to take account of critical Constitutional concerns that arise from interpreting the CFAA in

a manner that would permit private internet operators to decide who among us cannot, under federal felony sanction, view political and governmental speech being made publicly available on the internet by our public officials. The Supreme Court has confirmed that First Amendment protections for speech and to political participation include ***the right to hear political speech***, and that when new technologies create new mediums for speech, First Amendment guarantees regarding the right to hear speech must be analyzed in light of these new mediums and their potential effect on First Amendment freedoms. 3taps submits that an analysis of these Supreme Court precedents confirms that interpreting the CFAA to permit private internet companies to criminalize the viewing of their publicly-available websites would necessarily result in unconstitutional restrictions on First Amendment rights to hear political speech and to political participation. This concern is discussed extensively below.

II. BACKGROUND ON THE 3TAPS-CRAIGSLIST DISPUTE

A. Craigslist's Initial Openness To Innovation and Competition

Prior to 2012, Craigslist consistently informed persons posting on Craigslist that the poster, not Craigslist, owned and was responsible for the contents of their posts. Indeed, going back to as far as 1999, the "Our Policies" page of Craigslist's website stated: "[u]ltimately, the information you provide to craigslist belongs to

you"; "you own your own words"; and "craigslist does not claim ownership of our users' content that users provide to craigslist and/or place on the craigslist website." Similarly, Craigslist's Terms of Use stated that "craigslist does not claim ownership of content that its users post."

Prior to 2012, Craigslist also expressly invited startups and potential innovators, like 3taps and Padmapper, to create their own new products and services by making use of the content that users posted to Craigslist. This attitude of open and unrestricted access was exemplified by statements made in July 2010 by Craig Newmark, Craigslist's founder, when he publicly discussed Craigslist's policy on Quora, a well-known online technology forum. A Quora user asked: "Why hasn't anyone built any products on top of craigslist data? Is it a matter of craigslist policy not letting people use the data?" Mr. Newmark responded "actually, we take issue with only services which consume a lot of bandwidth, it's that simple." https://www.quora.com/Why-hasnt-anyone-built-any-products-on-top-of-Craigslist-data-Does-Craigslist-not-let-people-use-their-data. These and other statements by Craigslist made it clear to potential innovators, such as 3taps and Padmapper, that they were welcome to access and use Craigslist users' content, as long as they did not use too much bandwidth in the process.

B. Craigslist Reverses Course And Launches An Anti-competitive Scheme

After initially welcoming and encouraging the use of its data by innovators, Craigslist dramatically reversed course when it realized that some companies, such as 3taps, PadMapper, Radpad and AirBnB, were using data publicly available on Craigslist in innovative ways that created user experiences that were superior to those Craigslist could provide.

This didn't sit well with Craigslist, which began to fear that these companies might potentially threaten the near monopoly that Craigslist had until that time enjoyed in the marketplace for online classified advertisements. Rather than compete with innovators on the merits with its own research, development and innovation, Craigslist responded to these potential threats by launching an anticompetitive scheme designed to destroy these innovators by ensnaring them into protracted, expensive and distracting litigations that these startups simply could not afford.

Although its methods, described below, were underhanded and abusive, Craigslist's fear of competition from these start-up enterprises was entirely justified. As of 2012, Craigslist was (as it is today) a notoriously uninnovative company with a 1990's looking webpage. 3taps, by contrast, had by 2012 succeeded in building a data exchange website that aggregated raw data from

various websites, including Craigslist, eBay and others, and re-indexed the data into a creative and robust categorization system. 3taps then made the re-indexed data available through an application programming interface ("API") to developers of search-engine products, including Padmapper. Other innovators had also done interesting, potentially game-changing things by building on Craigslist's data exactly as Mr. Newmark had encouraged them to do, and the trend showed no signs of abating.

The commercial success of these enterprises meant the once welcome innovators might actually expand Craigslist's network effect, but shrink its share of the pie in the process. That concern was justified, as Padmapper, for example, would very soon thereafter surpass the "one million page hits per month" milestone. https://www.theverge.com/2012/10/19/3521020/craigslist-innovation-map-view-padmapper.

What 3taps built using Craigslist user data had never been done before and required substantial technical and creative innovations by 3taps. These useful innovations did not go unnoticed by the technical press, which published glowing reviews and noted the significant efficiency gains 3taps had fostered for consumers.

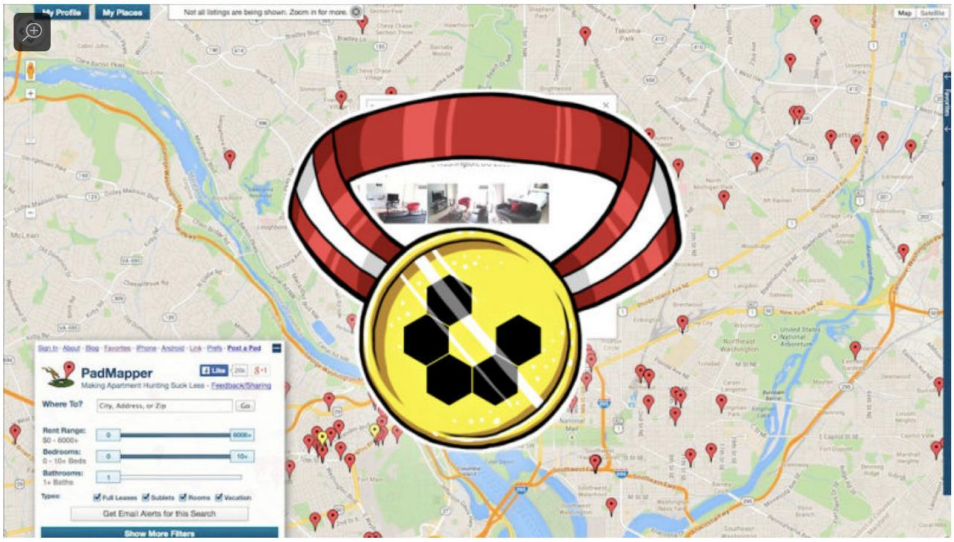
3taps was not the only innovative startup that was grabbing headlines for its innovative use of Craigslist user data. One of the most beloved websites to spring up in the past several years, AirBnB, also, according to several sources, reportedly used Craigslist data to solicit Craigslist users. https://growthhackers.com/growth-studies/airbnb. AirBnB, which provides a user experience immeasurably superior to that offered by Craigslist, is now the go to place on the internet for short term rentals, and, if press accounts are to be believed, it exists today partially as a result of its ability to access publicly-available classified ads found on Craigslist to create a more robust and consumer-friendly website for those offering and seeking short-term housing and vacation rentals than Craigslist was able to provide.

In addition, one of 3taps' customers, Padmapper, had developed a feature that permitted apartment hunters to see on a map where rental vacancies existed, and search for them by mapped areas encompassing neighborhoods where the searcher might want to live. This feature was highly popular with consumers. As a result of this innovation, Padmapper received many accolades in the technical press for its ability to transform raw publicly-available data from postings found on Craigslist into a form and search platform that was far more useful than Craigslist's platform. As the below article makes clear, Padmapper successfully leveraged Craigslist's data to become "one of the first - - and still one of the best - - sources that properly presents [Craigslist's] data in a meaningful, customizable way":

Most Popular Apartment Search Tool: Padmapper/Craigslist

Alan Henry
5/07/14 5:15pm • Filed to: HIVE FIVE FOLLOWUP

6.5K 3



There are plenty of tools available to make searching for a new apartment easy, or at least easier than running around looking for "for rent" signs. Last week we asked for your favorites, then took a look at the five best apartment search tools. Now we're back to highlight the crowd favorite.

What's the Best Apartment Search Tool?

Whether you're looking for a better place to live, or you're just curious what rent...

Read more

What's The Best Apartment Search Tool? (Poll Closed)

Padmapper / Craigslist 44.45% (569 votes)

Hotpads 7.27% (93 votes)

Lovely 7.66% (98 votes)

Trulia 27.97% (358 votes)

WalkScore 13% (162 votes)

Total Votes: 1,280

The tag team combo of **Padmapper and Craigslist** took the top spot, to no one's real surprise, by a wide margin—over 44% of the overall vote. Craigslist is generally the number one source for apartment listings, sublets, and other rentals, and Padmapper was one of the first—and still one of the best—sources that properly presents that data in a meaningful, customizable way.

As a result of these innovations, 3taps believes that as of 2012 Craigslist's founders were in a state of panic. The technical press was gushing with praise for the innovative ways in which companies like 3taps and Padmapper were able to improve upon the usefulness of publicly-available postings found on Craigslist, and, as demonstrated in the previous screen shot, the usefulness of these new platforms was often expressed by *contrasting* the user experience with the experience on Craigslist.

The other problem confronting Craigslist as of 2012 was that its *initial* dominance in the market for online classified ads meant that it would benefit economically when innovators built on the network effect of its publicly-available data. However, Craigslist soon realized that these innovators were so successful in servicing customer needs with the publicly-available data that consumers were opting to *bypass* Craigslist for more trusted and powerful options from AirBnB, Padmapper, Radpad and others.

During this time, 3taps was obtaining Craigslist's users' publicly-available postings from Google caches (because, at the time, Google was scraping Craigslist). 3taps would then index the postings it obtained from Google's cache and provide consumer-friendly functions like map search and geographical search *across* rather than *within* geographies. Craigslist couldn't do that. Thus, relying on 3taps' indexing and sorting of the postings found on Craigslist, the customers of

these innovators like Padmapper could enjoy more trusted experiences based on Craigslist's (and other publicly-available data sources) without ever having to visit Craigslist. Just as travel sites like Kayak offer their customers competing hotel, flight, and car rental offers, 3taps did the same for goods being sold online such as cars, apartment rentals, concert tickets, etc., from Craigslist, ebay and other websites. Craigslist was simply not capable of competing with the vertical search options 3taps and these new platforms offered.

When it became apparent that these innovators might actually compete with Craigslist and take some of its market share, Craigslist set out to destroy these companies through expensive litigation that Craigslist knew they could ill-afford in order to ensure its continued dominance in the marketplace for online classified advertisements. There was only one problem with this strategy. As of early 2012, Craigslist had no valid legal basis to stop the innovators (which it had invited onto its site) from using publicly-available facts and information that users placed on its public webpage. Craigslist was therefore forced to engage in a series of actions designed to manufacture legal claims against those innovators.

Craigslist took the first step toward manufacturing these claims in 2012 when Craigslist, which had always gone to great lengths to disavow any ownership or responsibility for its users' posts, suddenly changed its Terms of Use to give itself *ownership rights* over its users' posts - - posts that were being made publicly

available by those users. In addition, on February 14, 2012, Craigslist amended its Terms of Use and removed the language "craigslist does not claim ownership of content that its users post," which 3taps believes had always been present in prior versions of the Terms of Use. Finally, Craigslist amended its Terms of Use to substantially increase a provision for liquidated damages (running in favor of Craigslist, not its users) in the event of what Craigslist considered to be an unauthorized use of its user's postings

C. Craigslist Demands That 3taps and Others Stop Using Its Users' Content.

After manufacturing this litigation trap for 3taps and others, on March 7, 2012, Craigslist tried to manufacturer CFAA liability by sending 3taps a cease and desist letter that falsely accused 3taps of accessing data from Craigslist's website and purporting to revoke authorized access. On March 13, 2012, 3taps responded that it was not scraping Craigslist's website. Rather, mindful of Craig Newmark's public statement permitting the use of user-generated posts, provided that doing so does not consume a lot of bandwidth, 3taps was obtaining the posts from caches maintained by search engines (like Google and Yahoo) that already had scraped and indexed Craigslist's website. Accordingly, 3taps did not consume any of Craigslist's bandwidth because 3taps was not accessing Craigslist's website to obtain user posts.

Craigslist, however, remained determined to ensnare 3taps into some type of litigation, and launched a new scheme to manufacturer copyright claims against 3taps. On July 16, 2012, just a few months after being jilted by 3taps' response to its first cease and desist letter, Craigslist inserted into its Terms of Use, without notice to any of its users, language under which Craigslist posters purported to grant to Craigslist an exclusive license in their posts. Armed with a completely manufactured copyright claim against 3taps, Craigslist then filed suit against 3taps in federal court claiming 3taps had violated its exclusive license in these posts. After filing its complaint, Craigslist then immediately revised its Terms of Use again so that it no longer claimed an exclusive license over its users' posts. Craigslist apparently had no further need for such licenses now that it had the litigation hook it was seeking.

Not content with its ginned-up copyright claims, Craigslist also began intentionally manipulating 3taps' business model in an effort to trap 3taps into a CFAA violation, which carried not just civil but the specter of potential criminal liability. This required Craigslist to alter the manner in which 3taps was obtaining the publicly-available posts found on Craigslist. As noted above, 3taps was not, as of March 2012, actually accessing any content directly from Craigslist. Rather, 3taps was obtaining its content from Google's cached search results, which included ads on Craigslist.

Craigslist, knowing that it could not under any stretch of the imagination assert claims against 3taps under the CFAA for obtaining content from third party search engines such as Google, then took steps to ensure that Google and other search engines stopped caching the posts. This action by Craigslist effectively coerced 3taps into accessing Craigslist's servers directly (or through third parties) to obtain the user-generated content that 3taps had previously sourced through search-engine caches. [3]

Having successfully manipulated 3taps' business model, Craigslist then amended its complaint in the federal litigation to assert claims against 3taps under the CFAA and a similar California statute and sought billions of dollars in damages against 3taps and its founder.[4]

D. Craigslist Succeeds in Driving Innovators Out of Business

Craigslist's scheme worked exactly as intended. Small, innovative startup companies such as 3taps, Padmapper and Radpad simply cannot afford the cost of litigating to judgment against large industry players such as Craigslist, even where, as in the case of 3taps, those companies have good and valid antitrust claims

[3] This also conveniently permitted Craigslist to sue 3taps, Padmapper and others without involving deep pocketed players like Google or LinkedIn's current parent company, Microsoft (which owns the search engine Bing) in the dispute.
[4] Ironically, while driving these once-welcome innovators out of business, Craigslist essentially copied Padmapper's mapping feature for its own platform.

against the large industry players (claims that Judge Chen's opinion below suggest are meritorious). Although 3taps fought hard for as long as it could, deposing Craig Newmark, Jim Buckmaster, and other Craigslist executives and employees, 3taps simply ran out of money and couldn't continue to either defend against Craigslist's claims or prosecute its antitrust claims against Craigslist.

Lacking the necessary financial resources to continue the fight, 3taps settled with Craigslist in June of 2015 and *voluntarily* agreed to the issuance of an injunction against further accessing Craigslist's webpage. In what can only be characterized as a Pyrric victory for Craigslist, the settlement required 3taps to donate $1,000,000 to a fund for the Electronic Frontier Foundation - - an organization that supported 3taps' position against Craigslist via an *amicus* brief in the 3taps-Craigslist litigation and is supporting hiQ's position in this matter.

To this day 3taps does not believe that it did anything unlawful or improper, but the reality of litigating even meritless claims is that doing so is simply beyond the financial ability of small start-up enterprises. 3taps also does not believe that it ever caused any harm to Craigslist. To the contrary, far from being damaged by 3taps' conduct, Craigslist actually benefitted from the API 3taps built because it meant that the potential innovators seeking publicly-available posts found on Craigslist could obtain them *from* 3taps, as opposed to directly from Craigslist (which would have increased the load on Craigslist's servers), as protecting its

servers was Craigslist's stated concern with scrapers. This not only shows that Craigslist benefitted from 3taps' efforts, but also further confirms that Craigslist's concern was never about 3taps or anyone else getting *access* to its data by scraping its servers. Craigslist's concern was always with preventing *use* of the data in a manner that might foster competition with Craigslist, and Craigslist was more than happy to coerce 3taps into accessing its data in order to generate litigation claims that Craigslist used to try and destroy 3taps.[5]

E. Craigslist Files An Inaccurate And Misleading *Amicus Curiae* Brief In This Court.

Having strictly complied with Judge Breyer's order and having no further engagement with Craigslist, 3taps was stunned when Craigslist filed in this Court an *amicus* brief attacking 3taps as a "bad actor." 3taps is compelled to respond to Craigslist's work of fiction, which reads more like an adventure novel, complete with tales of cyber villains stationed on boats in international waters to escape US law enforcement.

[5] Indeed, if Craigslist were truly interested in *access* restrictions, it could have instituted technical controls restricting excessive access or malicious attacks, or better yet built its own API and let innovators take data from that source. 3taps believes that the reason Craigslist did not do so is because *use* of the data, not access, is what creates competition for Craigslist, and squashing out competition was always Craigslist's real goal.

Craigslist has misstated too many facts to list here, but some do bear mention::

- 3taps always was, and remains to this day, *a San Francisco based company* with offices at 717 Market Street;
- 3taps' principal officers and executives *all* live and work in the San Francisco Bay Area and are citizens of the United States- - they do not live on boats in international waters to evade U.S. law enforcement;
- Craigslist's claims against 3taps were almost certainly manufactured by Craigslist when it (i) sought to obtain an exclusive copyright in its users posts for only a short period of time immediately before filing a copyright action against 3taps, and then abandoned that practice just after getting its complaint on file; and (ii) took action to ensure that 3taps would access Craigslist's servers to obtain user content even though 3taps had previously been accessing those materials from search engines in order to comply with Craigslist's request to respect its bandwidth limitations;
- 3taps alleged antitrust claims against Craigslist asserting anti-competitive theories not dissimilar to those approved of by Judge Chen, but those claims never saw the light of day because Craigslist insisted that they be

tried only after a trial of its CFAA claims, which Craigslist knew 3taps could not afford;

- Judge Breyer simply held Craigslist's claims were sufficient to get past a motion to dismiss, and did so after stating that he had great concerns on the effect his ruling might have on innovation, competition and the "openness" of the internet, but decided to punt that issue to Congress and let Craigslist's claims go forward;
- Judge Breyer never held that Craigslist was legally entitled to an injunction against 3taps; rather, 3taps submitted ***voluntarily*** to an injunction after Craigslist grinded 3taps into submission using its vastly superior financial resources;
- Out of hundreds of millions of scraped posts, Craigslist has identified only a scattering of complaints from its users, likely because people selling things *prefer* that their advertisements reach as broad of an audience as possible (there is a reason sellers of goods pay far more to advertise during the Superbowl than any other time);
- Craigslist has never presented any evidence that a significant portion of its users ever wanted to give Craigslist the power to determine the extent to which their posts should be restricted to only other Craigslist users;

- Craigslist conceded in the 3taps litigation that 3taps' behavior actually resulted in no harm to Craigslist's servers. (No. CV 12-03816 CRB, Order Following Discovery Hr'g, Dkt. No. 223, at 1 ("craigslist stipulated that there was no actual, physical harm to its servers or hardware as a result of Defendants' scraping.")

This brief is submitted to ensure the Court has a fuller and fairer account of the 3taps-Craigslist dispute than the one proffered by Craigslist.

3taps also submits this *amicus* brief to address two critical Constitutional issues that bear on the decision this Court is being asked to make regarding the scope and applicability of the CFAA to include publicly-available facts and information. These two issues are discussed below.

III. ARGUMENT.

In light of the exhaustive briefing on the scope of the CFAA in hiQ's responsive brief, 3taps will not repeat all of the reasons why the expansive interpretation of the CFAA urged by Craigslist and LinkedIn is erroneous under the text of the statute and this Court's prior decisions interpreting the CFAA.

There are however two additional reasons that 3taps would like to emphasize demonstrating why this Court should not be the first Court of Appeal to authorize private internet companies to selectively criminalize the use of facts that those

companies have chosen to make publicly available on the internet. The first is that allowing private internet operators to effectively assert property rights over facts and information they make publicly available would run afoul of Supreme Court precedents delineating boundaries between the specific types of speech that can give rise to property rights because they are copyrightable under the Copyright Clause, and the types of speech that cannot give rise to such rights without infringing on the First Amendment guarantee of free speech. The second is that an order by this Court sanctioning such a result would cause unconstitutional restraints on First Amendment guarantees regarding the right to hear political speech and to informed political participation.

A. Permitting Private Internet Operators To Claim Property Rights Over Facts And Information That They Make Publicly Available On The Internet Would Undermine Supreme Court Jurisprudence Restricting Property Rights In Speech.

Each of Craigslist and LinkedIn couch their CFAA arguments in terms of property right violations allegedly occurring when someone "without authorization" accesses facts and information that others have made publicly available over the internet. However, neither address the fact that the Supreme Court has limited the extent to which the government can authorize property rights over speech to materials that are copyrightable under the Copyright Clause.

In placing restrictions on what materials can be subject to copyright, the Supreme Court has carefully balanced a private actor's ability to claim property rights in materials against First Amendment concerns that restrict property rights over speech and expression. One of the boundaries the Supreme Court has enacted to balance the tension between property rights under copyright, and that which cannot be copyrighted because of First Amendment concerns, is the fundamental notion that *no one can claim property rights over facts and information available in the public sphere*. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

In Eldridge, the Supreme Court noted the inherent tension between the Copyright Clause, which permits the government to grant property rights over speech, with the First Amendment's free speech guarantee. Id. The Court concluded that given the fact that the Copyright Clause and the First Amendment were enacted at about the same time, the Framers must have believed that this tension could be reconciled:

> The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies [over speech] are compatible with free speech principals.

Id see also; Suntrust Bank v. Houghton Miffin Co., 268 F.3d 1257, 1263 n.11 (11th Cir. 2001) ("[w]hile the First Amendment disallows laws that abridge freedom of speech, the Copyright Clause specifically calls for such a law.") In order to

resolve this tension and reconcile these apparently conflicting Constitutional provisions, the Court observed that property rights granted under copyright law "contain[] built-in First Amendment protections." Eldred v. Ashcroft, 537 U.S. at 219. Chief among these protections under copyright law is the notion that copyrights cannot be granted over ideas or facts. Id. According to the Court, this limitation was essential to avoid creating a conflict between the First Amendment guarantee of free speech and the property rights in speech available under copyright law:

> As we stated in *Harper & Row, this* 'idea/expression dichotomy ***strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting the author's expression.***

Id (emphasis added). The Court held that this Constitutional protection for "free communication of facts" meant that no one could Constitutionally claim property rights over facts and that factual material must remain in the public sphere for "public exploitation" without any limitation: "[d]ue to this distinction, ***every . . . fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication***." Id. (emphasis added). Supreme Court precedent therefore requires that publicly-available factual information, on the internet or anywhere else, be protected as a category of speech that cannot be considered the property of anyone without violating the First Amendment's guarantee of free speech.

Despite these Supreme Court pronouncements on the issue, both Craigslist and LinkedIn seek an order from this Court effectively allowing private companies to put an artificial cease and desist letter fence around factual information regardless of whether that information is copyrightable, or in the public sphere (*i.e.*, a publicly-available website). If Craigslist and LinkedIn have their way, facts that they make publicly available on the internet (*e.g.*, there is an apartment for rent in Millennium Tower with 2 bedrooms, 2 bathrooms, 1600 square feet, and located on the 34th floor) would effectively be subject to property rights through the CFAA, even though such information could unquestionably not be copyrighted without running afoul of the First Amendment's free speech guarantee. This Court should not sanction the creation of property rights over speech under the CFAA given that the Supreme Court has indicated that "free communication" and "public exploitation of" facts is firmly ensconced within the First Amendment guarantee of free speech.

Treating facts as outside the realm of property law is also essential in light of the Supreme Court's holding in Feist Publications, Inc., v. Rural Telephone Service Co., Inc., that "there can be no valid copyright in facts is universally understood" because all facts, be they "scientific, historical, biographical . . .. [m]ay not be copyrighted and *are part of the public domain available to every person*." 499 U.S. 340, 348 (1991) (emphasis added.). The stated reason for

keeping "facts" outside of the realm of copyright law is to foster technical progress. As the Court noted in explaining why it was that facts were not copyrightable:

> "[T]his is not 'some unforeseen byproduct of a statutory scheme' . . ..[citation]. It is, rather, 'the essence of copyright,' *ibid*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and useful Arts.'

Feist, 499 U.S. at 349. The Constitutional purpose of treating publicly-available facts as the property of no one and available to all (*i.e.*, to promote scientific progress), is completely inconsistent with any interpretation of the CFAA that permits Craigslist, LinkedIn or anyone else to claim ownership over and legally restrict access to publicly-available facts on their public, non-password protected webpages. As demonstrated above in Section II, Craigslist used the CFAA to block access to publicly-available facts precisely because it feared the innovative manner in which others were using those facts to foster competition with Craigslist. 3taps, Padmapper and others had used facts publicly available on Craigslist's webpage to create products that were superior in the minds of the public. Their platforms permitted cross-geographical searching and the use of mapping features that were highly popular with consumers, but threatened Craigslist's dominant market position.

The destruction of these platforms resulted from an interpretation of the CFAA that permitted Craigslist to assert ownership rights over publicly-available facts, demonstrating that the Supreme Court's mandate that facts be kept outside the realm of property law, and protected as speech, is indeed essential to protect innovation and competition. 3taps and Padmapper had made, and were likely to continue to make, great progress that redounded to the benefit of the consuming public, and they did so by having free access to facts viewable to all with an internet connection. See also Sorell v. IMS Health, Inc., 564 U.S. 552, 570 (2011) ("[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge . . ."). The harm these companies endured epitomizes the critical necessity of not allowing anyone to use the law to claim ownership (and the concomitant right of exclusion) over publicly-available factual information. No one can know what technical innovations, and the extent to which the public might have benefitted from those technical innovations, would have been in the hands of consumers right now if Craigslist had not been authorized to unleash a now 5-year-old campaign of terror against anyone daring to use content found on its website in a manner that might have aided consumers at the expense of Craigslist. Indeed, the New York Times has lamented that as a result of this campaign, "the internet is littered with digital carcasses that once built on top of [Craigslist.]" https://bits.blogs.nytimes.com/2012/07/29/when-craigslist-blocks-

innovations-disruptions/?_r=0. The only thing we know for sure is that Judge Breyer's expressed concern that his acceptance of Craigslist's interpretation of the CFAA could have detrimental effects on innovation was prescient.

B. Allowing Private Internet Operators To Selectively Revoke Access to Publicly-Available Facts and Information On The Internet Would Undermine Constitutional Protections Regarding The Right to Hear Political Speech

There is no questioning that the growth and popularity of the internet has transformed our lives in ways that Congress could not possibly have foreseen when it enacted the CFAA decades ago. Although nothing in the CFAA permits a private company to engage in the tortured fiction of "revoking access" to non-password protected facts and information that it has chosen to make publicly available on the internet, Craigslist and LinkedIn assert here that the CFAA grants them the power to do so.

In seeking these powers (which have never been authorized by this or the United States Supreme Court), these companies turn a willfully blind eye toward the significant consequences that giving such broad powers to private internet companies would entail given their role in contemporary American political life. Private internet operators with publicly-available webpages and hundreds of millions of users have become so intertwined with American political life that permitting them to selectively determine who is banned from viewing their content

would almost certainly encroach upon First Amendment rights to hear political speech and to informed political participation.

Privately-operated, but publicly-available, websites, such as Twitter and Facebook, have now become the primary medium through which the President of the United States communicates policies and viewpoints to the American people. https://www.usatoday.com/story/news/politics/onpolitics/2017/11/07/trump-has-tweeted-2-461-times-since-election-heres-breakdown-his-twitter-use/822312001/. Moreover, the government has confirmed that statements made to the American people by the President on social media platforms constitute official communications by the Executive. See www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.[6]

These Executive communications, which deal with issues such as travel bans, immigration policy, LGBT rights, foreign relations, and domestic policies, set off robust debates between the President and members of the Legislative branch of government, many of whom have also selected privately-operated, but publicly-available internet platforms as their preferred medium for both supporting or criticizing the President and/or their fellow legislators. In addition, publicly-

[6] This Court has cited the President's proclamations on Twitter in interpreting Presidential intent regarding issues such as travel bans on selected groups of individuals. Hawaii v. Trump, 859 F.3d 741, 773, n.14 (9th Cir. 2017) (vacated November 2, 2017)

available websites are also now used extensively by political campaigns - - a trend that is unlikely to abate given their proven effectiveness in communicating political messages to voters.

The central role that non-governmental internet platforms like Twitter play in contemporary American political life is significant because the Supreme Court has recognized on several occasions that the right to ***hear*** political speech is a fundamental right secured by the First Amendment. As the Supreme Court has stated, the guarantee of "free speech" encompasses the right to "receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[t]he right to receive information and ideas, regardless of their social worth, [citation], is fundamental to our free society.") The right to listen to political speech is therefore firmly ensconced in the Constitution. Lamont v. Postmaster General, 381 U.S. 301 (1965).

The right to hear political speech is protected because it cannot be separated from the First Amendment's protections for free speech and political participation. Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 867 (1982) ("the right to receive ideas is a necessary predicate to the *recepient's* meaningful exercise of his own rights of speech, press and political freedom.") (emphasis in original); see also Griswald v. Connecticut, 381 U.S. 479, 480 (1965) ("[t]he state may not, consistently with the First Amendment, contract

the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read . . ..").

Most significantly for this case, the Supreme Court has also admonished that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Braodcasting v. FCC, 395 U.S. 367, 386 (1969). The unique nature of websites such as Twitter, which now serve as the gatekeepers through which much of American political life is filtered, should caution against giving private internet companies the power to decide who can and cannot have access to Presidential communications and other political speech. Yet, this is exactly the kind of power that LinkedIn and Craigslist ask this Court to declare as being authorized by the CFAA. If the position that Craigslist and Linkedin argue for here were adopted, then Twitter could effectively bar anyone they wanted from having use or access to the most critical pronouncements from our Executive and Legislative branches of government, including pronouncements that the government has confirmed constitute official communications by the President.

3taps recognizes that requiring website operators such as Twitter to allow all to access facts and information that Twitter is making publicly-available would in some theoretical sense curtail Twitter's control over its website. However, the

Supreme Court has made it clear that when it comes to the right to hear speech "it is the right of the viewers and listeners, not the right of the broadcaster, which is paramount." Red Lion Broadcasting, 395 U.S. at 390. As the Court explained:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences that is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC

Id. at 390. 3taps respectfully submits that the right of citizens to have access to new media forums hosting, sometimes exclusively, the most consequential political debates between our highest ranking government officials strongly cautions against granting the broad powers under the CFAA sought here by Craigslist and LinkedIn.[7]

3taps also submits that granting private internet operators the right to selectively revoke access to publicly-available information would have disastrous, if unintended, consequences for a society built on the openness of the press and informed political participation. The Trump Organization could "revoke access" to its webpage for all media outlets and their employees publishing critical

[7] 3taps notes that some Courts of Appeal have read Supreme Court precedents as including a right to hear purely commercial speech. See Cramer v. Skinner, 931 F.2d 1020, 1025-27 (5th Cir. 1991). In light of the harmful effects on competition and innovation documented in Section III.A that resulted from the squelching of purely commercial speech under the CFAA, the need to protect the right to hear commercial speech is critical to protecting innovation.

commentary about the President, thus making felons out of all journalists that viewed the Trump Organization webpages for research or commentary. Competing media giants such as CNN and Fox could "revoke access" to their websites for all employees of the other organization. Political candidates could "revoke access" to their campaign website from their opponents and their employees, thus thwarting their opponent's ability to research and criticize their policy positions. While there can be no guarantee that any of this would occur, Courts should not trust representations that a statute like the CFAA will not be abused so long as the power to abuse exists. See U.S. v. Nosal, 676 F.3d 854, 862 (9th Cir. 2012) (en banc) (summarizing a parade of horribles that could occur, were this Court to adopt the Government's broad interpretation of the CFAA.)

CONCLUSION

For the reasons stated above, the Court should affirm the order of the District Court.

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,989 words. This certification is made in reliance on the word count feature of Microsoft Word.

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