

1 Venkat Balasubramani (SBN 189192)
2 **Focal PLLC**
3 800 Fifth Ave, Suite 4100
4 Seattle, WA 98104
5 Phone: (206) 529-4827
6 Fax: (206) 260-3966
7 *venkat@focallaw.com*

8 Attorneys for Defendant and
9 Counterclaim Plaintiff
10 PADMAPPER, INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 CRAIGSLIST, INC., a Delaware corporation,

15 Plaintiff

16 v.

17 3TAPS, INC., a Delaware corporation;
18 PADMAPPER, INC., a Delaware corporation;
19 DISCOVERY HOME NETWORK, INC., a
20 Delaware corporation d/b/a LOVELY, BRIAN
21 R. NIESSEN, an individual, and DOES 1
22 THROUGH 25, inclusive,

23 Defendants.

24 PADMAPPER, INC., a Delaware corporation,

25 Counterclaim Plaintiff,

26 v.

27 CRAIGSLIST, INC., a Delaware corporation,

28 Counterclaim Defendant.

Case No. CV-12-03816 CRB

**MOTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT
PADMAPPER, INC.'S LIMITED MOTION
TO DISMISS**

Judge: Hon. Charles R. Breyer
Date: February 15, 2013
Time: 10:00 a.m.
Courtroom: 6

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on February 15, 2013, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom Six of this Court, located on the 17th Floor of 450 Golden Gate Avenue, San Francisco, California, 94102, the Honorable Charles R. Breyer presiding, Defendant PadMapper, Inc. will and hereby does move this Court for an order dismissing craigslist’s claims for (1) trespass; (2) federal trademark infringement, federal false designation of origin, California trademark infringement, common law trademark infringement; and (3) breach of contract (to the extent the claim is based upon alleged copying, displaying, distributing or making derivative use of craigslist user content in violation of the craigslist website’s Terms of Use). PadMapper also seeks dismissal of the civil conspiracy claims brought in relation to craigslist’s trespass, breach of contract, and misappropriation claims.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all of the records on file in this action, and upon any further argument that the Court may permit at the hearing in this matter.

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1 **SUMMARY OF ARGUMENT**

2 Pursuant to the Court’s Standing Order dated July 6, 2012, PadMapper provides the
3 following summary of argument:

4 Allegations of a conspiracy: craigslist’s allegations of a civil conspiracy are deficient
5 because there is no allegation that PadMapper concurred in any conspiracy with knowledge of
6 an underlying improper purpose or that PadMapper intended, agreed to, or did aid any third
7 party regarding the use of craigslist data. Kidron v. Movie Acquisition Corp., 40 Cal. App. 4th
8 1571, 1582 (1995).

9 Trespass claims: craigslist’s trespass claims are deficient because craigslist does not
10 allege that PadMapper’s allegedly improper access of its sites or servers caused “significant
11 impairment,” as required under Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1347 (Cal. 2003).

12 Breach of contract claims: craigslist’s breach of contract claims are preempted by the
13 Copyright Act, to the extent the claims seek to vindicate rights that are reserved exclusively for
14 the copyright owner. Del Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973, 977 (9th
15 Cir. 1987) and Mortg. Mkt. Guide, LLC v. Freedman Report, LLC, No. 06CV140-FLW, 2008
16 U.S. Dist. LEXIS 56871, at *117-119 (D.N.J. July 28, 2008).

17 Trademark claims: the trademark claims are precluded by Dastar. Dastar Corporation v.
18 Twentieth Century Fox Film Corporation, 539 U.S. 23, 28 (2003) and Sybersound Records, Inc.
19 v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008).

I. INTRODUCTION

1
2 This is a lawsuit brought by craigslist to maintain control over listings that end users
3 post to the craigslist site. While craigslist attempts to utilize a variety of different causes of
4 action to control exclusive access to user submitted listings, the Court should ultimately reject
5 these efforts. To the extent the listings in question are copyrightable at all, craigslist does not
6 own all rights in the individual listings, and should not be permitted to control their display or
7 access. Even assuming craigslist does have rights in the individual listings, it should not be able
8 to prevent a third party such as PadMapper from making those listings available on a limited
9 basis, and in a way that enhances their usability and searchability for consumers. PadMapper
10 brings this limited motion to dismiss directed at craigslist's claims for trespass; federal
11 trademark infringement, federal false designation of origin, California trademark infringement,
12 and common law trademark infringement; and breach of contract, to the extent the claim is
13 based upon alleged copying, displaying, distributing or making derivative use of craigslist user
14 content in violation of the craigslist website's Terms of Use.

II. BACKGROUND

15
16 craigslist is a well known provider of classified advertising services that cover an array
17 of product and service categories and geographic areas. In this lawsuit it sued (1) 3Taps, an
18 entity that craigslist alleges improperly provides third parties with access to craigslist listings;
19 (2) Brian Niessen, whom craigslist alleges improperly accessed craigslist's website and
20 extracted data from the site; and (3) Discovery Home Network, Inc. (d/b/a Lovely) and
21 PadMapper, who both make available housing rental listings graphically depicted and overlaid
22 on a map, for ease of searching by end users. craigslist filed its complaint on July 20, 2012
23 (Dkt. 1), and filed the First Amended Complaint (the "FAC") on November 20, 2011 (Dkt. 35).
24 With respect to PadMapper, the FAC asserts the following claims: (1) trespass, based on
25 PadMapper's allegedly improper access of craigslist's website; (2) breach of contract, based on
26 PadMapper's alleged violation of craigslist's terms of use, including PadMapper's "display,"
27 "distribution," "copying," and "aggregation" of craigslist listings; (3) misappropriation;
28 (4) copyright infringement; (5) various state and federal trademark claims; and (6) unfair

1 competition, that piggybacks on craigslist’s remaining claims. craigslist brings these claims
 2 against 3Taps as well, but in addition brings a variety of other claims, including Computer
 3 Fraud and Abuse Act claims, and claims for contributory copyright infringement,
 4 cybersquatting, and trademark dilution.

5 The core of craigslist’s claims against PadMapper seek to prevent PadMapper from
 6 using indexed factual information submitted by craigslist users, which PadMapper does not
 7 obtain directly from craigslist and which PadMapper uses to provide its search and map
 8 features. craigslist’s copyright claim, and part of its breach of contract claim, are both squarely
 9 premised on this conduct. craigslist’s trademark claims are also premised on this conduct, and
 10 not on allegations that PadMapper used craigslist’s trademarks or any confusing variations of
 11 craigslist’s marks to brand any products or services offered by PadMapper. craigslist’s unfair
 12 competition claim under California Civil Code § 17200 is a catch-all claim derivative of its
 13 misappropriation and trademark claims.

14 III. DISCUSSION

15 A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.”
 16 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can either be based on the lack
 17 of a “cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
 18 theory.” Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988). While the Court
 19 is required to accept well pleaded allegations as true, it need not accept mere legal allegations—
 20 “threadbare recitals of the elements of a cause of action, supported by mere conclusory
 21 statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (citing Bell Atl. Corp.
 22 v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a complaint must be both
 23 “sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that
 24 the party may effectively defend against it” and “sufficiently plausible” such that “it is not
 25 unfair to require the opposing party to be subjected to the expense of discovery.” Starr v. Baca,
 26 633 F.3d 1191, 1204 (9th Cir. 2011).

27 A. craigslist’s Vague Allegations Regarding a Conspiracy are Insufficient

28 While conspiracy is not a standalone civil claim, and must be supported by an

1 underlying tort or wrongful act, derivative liability under a conspiracy theory requires three
 2 elements: (1) an agreement to commit wrongful acts; (2) commission of the wrongful acts; and
 3 (3) damage resulting from operation of a conspiracy. Davenport v. Litton Loan Servicing, LP,
 4 725 F. Supp. 2d 862, 881 (N.D. Cal. 2010). Moreover, mere knowledge of tortious activity is
 5 not sufficient: the conspiring defendants must “have actual knowledge that a tort is planned *and*
 6 *concur in the tortious scheme with knowledge of its unlawful purpose.*” Kidron v. Movie
 7 Acquisition Corp., 40 Cal. App. 4th 1571, 1582 (Cal. App. 2d Dist. 1995) (emphasis added);
 8 People v. Austin, 23 Cal.App.4th 1596, 1607, 28 Cal.Rptr.2d 885 (1994) (“without knowledge
 9 of the illegal purpose there is no basis for inferring an agreement”). As the court articulated in
 10 Kidron:

11 Actual knowledge of the planned tort, without more, is insufficient to
 12 serve as the basis for a conspiracy claim. Knowledge of the planned tort
 13 must be combined with intent to aid in its commission. The sine qua non
 14 of a conspiratorial agreement is the knowledge on the part of the alleged
 conspirators of its unlawful objective *and their intent to aid in achieving*
 that objective.

15 Kidron, 40 Cal. App. 4th at 1582 (emphasis added).

16 The FAC does not allege any sort of factual basis of an alleged conspiracy in which
 17 PadMapper is involved. craigslist’s trespass, breach of contract, and misappropriation claims
 18 include conclusory allegations that defendants “engaged in a civil conspiracy” to commit acts
 19 underlying those claims. *See, e.g.*, FAC, ¶ 123; ¶ 140; ¶ 147. Nothing in the FAC even
 20 approaches an allegation that PadMapper knew of an allegedly improper objective, or entered
 21 into an agreement with intent to specifically *aid* such an objective. Separately, craigslist alleges
 22 that PadMapper obtained data from 3Taps. *See* FAC, ¶ 99. However, nowhere does craigslist
 23 allege that PadMapper intended, agreed to, or actually *aided* 3Taps, or any other third party, in
 24 obtaining such data.

25 craigslist’s allegations of a conspiracy lack “enough fact to raise a reasonable
 26 expectation that discovery will reveal evidence of illegal agreement.” Twombly, 550 U.S. at
 27 556. These are the type of “bare allegations that a conspiracy existed” that the Court rejected in
 28 Twombly. Id. Consequently, the Court should strike craigslist’s conspiracy claims against

1 PadMapper.

2 **B. craigslist Fails to State a Trespass Claim Against PadMapper**

3 Courts have grappled with applying the old doctrine of trespass to chattels in the context
4 of alleged unauthorized access to websites and computer servers. To prevail on a claim for
5 trespass based on unauthorized access to a computer system, a plaintiff must establish that:
6 “(1) defendant intentionally and without authorization interfered with plaintiff’s possessory
7 interest in the computer system; and (2) defendant’s unauthorized use proximately resulted in
8 damage to the plaintiff.” eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d 1058, 1069-70
9 (N.D. Cal. 2000). The tort of trespass is an intentional tort: “intention is present when an act is
10 done for the purpose of using or otherwise intermeddling with a chattel or with knowledge that
11 such an intermeddling will, to a substantial certainty, result from the act.” Level 3 Communs.,
12 Inc. v. Lidco Imperial Valley, Inc., No. 11CV01258-BTM, 2012 U.S. Dist. LEXIS 146887
13 (S.D. Cal. Oct. 11, 2012) (quoting Restatement (Second) of Torts § 217 cmt. c (2012)). In
14 addition, a plaintiff must allege and prove a significant impairment of the functioning of the
15 computer. *See* Ticketmaster Corp. v. Tickets.com, Inc., No. 99CV7654-HLH, 2003 U.S. Dist.
16 LEXIS 6483, at *11 (C.D. Cal. Mar. 7, 2003) (unless there is some “tangible interference with
17 the use or operation of the computer . . . [or] actual dispossession of the chattel for a substantial
18 time, the elements of the tort have not been made out”). California law is clear that the trespass
19 tort “does not encompass . . . an electronic communication that neither damages the recipient
20 computer system nor impairs its functioning.” Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1347, 1
21 Cal. Rptr. 3d 32, 71 P.3d 296 (Cal. 2003). Following Hamidi, courts have required a plaintiff to
22 allege that any unauthorized access caused “significant” impairment. *See* Hernandez v. Path,
23 Inc., No. 12CV01515-YGR, 2012 U.S. Dist. LEXIS 151035 (N.D. Cal. Oct. 17, 2012) (granting
24 motion to dismiss trespass claim on the basis of failure to allege significant impairment); *see*
25 *also* In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1069 (N.D. Cal. 2012) (“trespass
26 without harm, ‘by reason of the impairment of the property or the loss of use,’ is not
27 actionable”) (quoting Hamidi, 30 Cal. 4th at 1351). craigslist’s allegations fall well short of
28 alleging the elements necessary to support a trespass claim.

1 First, apart from the time-period prior to receipt of a cease and desist letter during which
2 PadMapper allegedly accessed craigslist's site directly, craigslist does not allege that
3 PadMapper even accessed craigslist's sites or servers. Nor does craigslist allege that
4 PadMapper currently accesses craigslist's websites or servers. (*See, e.g.*, FAC, ¶ 104.) With
5 respect to PadMapper's alleged access of craigslist's sites or servers prior to receipt of the cease
6 and desist letter, craigslist does not allege that such access damaged craigslist's computer
7 systems or deprived craigslist of use of its computer system. craigslist has alleged that
8 "Defendants' unauthorized interference, intermeddling, and access with craigslist, its website,
9 computer systems, and its servers . . . reduces craigslist's capacity to service its users because it
10 occupies and uses craigslist's resources." (FAC ¶ 121.) However, these allegations do not rise
11 to the level of "significant" impairment that the case law requires.

12 The allegations made by plaintiffs in In re iPhone Application Litig. are analogous to
13 those made by craigslist here. There, plaintiffs alleged that defendant Apple's creation of
14 location history files and app software components on plaintiffs' mobile devices "consumed
15 portions of the cache and/or gigabytes of memory on their devices," had "taken up valuable
16 bandwidth and storage space on their iDevices," and "shortened the battery life of the
17 iDevices." In re iPhone Application Litig., 844 F. Supp. 2d at 1069. In dismissing plaintiffs'
18 trespass claims, the court held that "[w]hile these allegations conceivably constitute a harm,
19 they do not plausibly establish a significant reduction in service constituting an interference
20 with the intended functioning of the system, which is necessary to establish a cause of action for
21 trespass." Id. As the court noted, "'intermeddling is actionable only if the chattel is impaired as
22 to its condition, quality, or value or . . . the possessor is deprived of the use of the chattel for a
23 substantial time.'" Id. Applying the same reasoning, the Court should dismiss craigslist's
24 trespass claim in this case.

25 **C. The Copyright Act Preempts craigslist's Breach of Contract Claim to the Extent it**
26 **Seeks to Vindicate Rights Vested Under Section 106**

27 A cause of action is preempted under 17 U.S.C. § 301(a) if: (1) the work involved falls
28 within the general subject matter of the Copyright Act as specified by sections 102 and 103; and

1 (2) the rights that the plaintiff asserts under state law are equivalent to those exclusively vested
2 in the copyright owner under section 106 of the Copyright Act. *See* 17 U.S.C. 301(a); Downing
3 v. Abecrombie & Fitch, 265 F.3d 994, 1003 (9th Cir. 2001). “Copyright preemption is both
4 explicit and broad.” G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc., 958 F.2d
5 896, 904 (9th Cir. 1992). Federal copyright law preempts any state law claim which “depends
6 on the same conduct which underpins [the] copyright claims.” Idema v. Dreamworks, Inc., 162
7 F. Supp. 2d 1129, 1191 (C.D. Cal. 2001). State law causes of action are generally preempted
8 when they seek damages that are identical to those sought for copyright infringement, *see, e.g.*,
9 Bucklew v. Hawkins, Ash, Baptie & Co., 329 F. 3d 923, 934 (7th Cir. 2003), or where they seek
10 to vindicate the same rights as plaintiff’s copyright claims. *See* Morris v. Buffalo Chips
11 Bootery, Inc., 160 F. Supp. 2d 718, 721 (S.D.N.Y. 2001).

12 In the Ninth Circuit, breach of contract claims premised on the mere unauthorized use of
13 copyrighted material are preempted by the Copyright Act. *See* Del Madera Properties v.
14 Rhodes & Gardner, Inc., 820 F.2d 973, 977 (9th Cir. 1987), *overruled on other grounds* by
15 Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994); *see also* Warner Bros. v. American Broadcasting
16 Cos., 720 F.2d 231, 247 (2d Cir. 1983) (“State law claims that rely on the misappropriation
17 branch of unfair competition are pre-empted.”). The key question in a case raising a breach of
18 contract claim is the nature of the promise sought to be enforced by the plaintiff. Montz v.
19 Pilgrim Films & TV, Inc., 649 F.3d 975, 980 (9th Cir. 2011). As the Ninth Circuit stated in
20 Montz, “[t]o survive preemption, a state cause of action must assert rights that are qualitatively
21 different from the rights protected by copyright” *Id.* Mortgage Mkt. Guide, LLC v.
22 Freedman Report, LLC is instructive and canvasses the law on preemption and terms of service
23 agreements. *See* Mortg. Mkt. Guide, LLC v. Freedman Report, LLC, No. 06CV140-FLW, 2008
24 U.S. Dist. LEXIS 56871, at *117-119 (D.N.J. July 28, 2008). There, the court stated that where
25 “the promise amounts only to a promise to refrain from reproducing, performing, distributing or
26 displaying the work, then the contract claim is preempted.” *Id.* (citing Wrench LLC v. Taco
27 Bell Corp., 256 F.3d 446, 457 (6th Cir. 2001), *cert. denied*, 534 U.S. 1114 (2002)); *see also* 1
28 NIMMER ON COPYRIGHT § 1.01[B][1][a][iii] (“[A] breach of contract cause of action can serve

1 as a subterfuge to control nothing other than the reproduction, adaptation, public distribution,
2 etc. of works within the subject matter of copyright. Those instances are . . . pre-empted.”).

3 Here, craigslist’s breach of contract claim is premised in part on PadMapper’s alleged
4 dissemination of craigslist’s copyrighted material in violation of the craigslist Terms of Use.
5 craigslist alleges that PadMapper “regularly accessed the craigslist website to . . . copy,
6 aggregate, display, distribute, and/or make derivative use of the craigslist website and the
7 content posted therein.” (FAC, ¶ 135.) Indeed, in describing the crux of the lawsuit, craiglist
8 says that it “has every right to limit the copying and distribution of craigslist content.” (FAC, ¶
9 9.) craigslist’s breach of contract allegations based on the copying, aggregation, display, or
10 distribution of its data are premised on rights that are vested exclusively in the copyright owner
11 under the Copyright Act—*i.e.*, craigslist’s breach of contract claim seeks to vindicate rights
12 identical to those it seeks to protect under its copyright claim. *See* 17 U.S.C. § 106.

13 Accordingly, to the extent craigslist’s breach of contract claim is premised on PadMapper’s
14 alleged copying, aggregation, display, or distribution of craigslist listings, it is preempted.

15 **D. craigslist’s Trademark Claims are Precluded by Dastar**

16 craigslist asserts various federal, state, and common law trademark claims against
17 PadMapper, but its claims are based on the inclusion of craigslist’s copyright notice in craigslist
18 listings which PadMapper provides access to through its site, or use of content or material that is
19 allegedly owned by craigslist and that identifies craigslist. These claims are merely copyright
20 claims disguised as trademark claims, and are precluded by Dastar Corporation v. Twentieth
21 Century Fox Film Corporation, 539 U.S. 23, 28 (2003); *see also* Shaw v. Lindheim, 919 F.2d
22 1353, 1364-65 (9th Cir. 1990) (declining to “expand the scope of the Lanham Act to cover cases
23 in which the Federal Copyright Act provides an adequate remedy”).

24 In Dastar Corporation v. Twentieth Century Film Fox Corp., the Supreme Court
25 narrowed the scope of available Lanham Act claims that can be brought against sellers or
26 distributors of communicative products. Dastar, 539 U.S. at 48. Dastar distributed a video
27 (ownership of which was in the public domain) without proper attribution. Mindful of a
28 contrary rule that would create “a species of mutant copyright law that limits the public’s . . .

1 right to copy and use expired copyrights,” the Supreme Court held that “origin,” in the context
2 of a false designation of origin claim under the Lanham Act refers only to the manufacturer or
3 producer of a physical good and not to the creator or owner of the underlying intellectual
4 property. Dastar, 539 U.S. at 48. As a result, Dastar was not liable for “any false designation of
5 origin” because Dastar was the “origin” of the modified video series. Dastar, 539 U.S. at 50.

6 Courts have applied Dastar to bar trademark claims where the core allegation against the
7 defendant is the improper reproduction of the plaintiff’s copyrighted material. *See, e.g., Bach v.*
8 Forever Living Prods. U.S., Inc., 473 F. Supp. 2d 1110, 1116 (W.D. Wash. 2007) (citing Dastar
9 and noting that the Supreme Court has cautioned “against misuse or over-extension of
10 trademark and related protections into areas traditionally occupied by patent or copyright”);
11 Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1116-1117 (W.D. Wash. 2004)
12 (declining to recognize false designation of origin claim based on allegation that defendant
13 displayed plaintiff’s images without crediting plaintiff or its photographers); Martin v. Walt
14 Disney Internet Group, No. 09CV1601-MMA, 2010 U.S. Dist LEXIS 65036, at *25 (S.D. Cal.
15 2010) (Lanham Act claim based on incorrect attribution of photograph through misspelling
16 precluded by Dastar); Fractional Villas, Inc. v. Tahoe Clubhouse, No. 08CV1396, 2009 U.S.
17 Dist. LEXIS 4191, at *10-11 (S.D. Cal. Jan. 22, 2009) (claim based on inclusion of plaintiff’s
18 material on defendant’s website barred by Dastar); Perfect 10, Inc. v. Megaupload Ltd., No.
19 11CV0191-IEG, 2011 U.S. Dist. LEXIS 81931 (S.D. Cal. July 26, 2011) (claims that “appear to
20 arise largely from the potential for confusion as to the source of [plaintiff’s] creative works . . .
21 are precluded under Dastar”). For example, in Fractional Villas, Inc. v. Tahoe Clubhouse, the
22 plaintiff asserted a trademark and a copyright claim based on defendant’s use of plaintiff’s
23 copyrighted material. Id. The court rejected the trademark claims:

24 Plaintiff has not accused defendants of taking tangible objects or services,
25 repackaging them, and selling them under defendants’ name. Rather,
26 *plaintiff has accused defendants of incorporating copyrighted materials*
27 *into defendants’ website.* Therefore, the Court finds plaintiff has failed to
plead a cause of action under the Lanham Act.

28 Id. (emphasis added). Other cases have taken a similar approach, concluding that even

1 misattribution of copyrighted material is not actionable under the Lanham Act. *See Martin v.*
2 *Walt Disney Internet Group*, No. 09CV1601-MMA, 2010 U.S. Dist LEXIS 65036, at *25 (S.D.
3 Cal. 2010).

4 1. Dastar precludes a false designation of origin claim based on PadMapper's display
5 of craigslist listings.

6 Here, craigslist's false designation of origin claim is premised entirely on PadMapper's
7 alleged display of craigslist listings. (*See* FAC, ¶¶ 99-110, alleging, for example, that the
8 "craigslist postings displayed by PadMapper are identical to the craigslist postings as they
9 appear on craigslist's website."). craigslist does not allege that PadMapper branded its products
10 or services with a name that is confusingly similar to "craigslist." To the contrary, craigslist
11 claims that the alleged display of craigslist listings on the PadMapper website will confuse
12 consumers as to whether PadMapper's site "[is] associated or connected with craigslist, or [has]
13 the sponsorship, endorsement, or approval of craigslist." (FAC, ¶ 178.) As in *Martin v. Walt*
14 *Disney* and *Fractional Villas*, craigslist's false designation of origin claim based on the display
15 of craigslist listings on PadMapper's website is precluded by *Dastar*. Indeed, craigslist should
16 be required to allege that "its marks are used in a manner beyond their appearance in
17 copyrighted works." *See Perfect 10*, 2011 U.S. Dist. LEXIS 81931 at *5. The only allegation
18 in the FAC regarding the alleged use of a craigslist trademark by PadMapper is that craigslist's
19 copyright notice is displayed when PadMapper allegedly displays craigslist postings, because
20 the copyright notice appears within the postings. (FAC, ¶ 106.) Such "use" of a trademark is
21 not sufficient to withstand preclusion under *Dastar*.

22 2. Dastar applies equally to craigslist's trademark infringement claims.

23 There is scant case law expressly deciding whether *Dastar* applies to trademark
24 infringement claims, but *Dastar* should apply equally to these types of claims: trademark
25 infringement under 15 U.S.C. § 1114 and unfair competition under 15 U.S.C. § 1125 "are
26 measured by identical standards." *World Wrestling Fed'n Entm't, Inc. v. Big Dog Holdings,*
27 *Inc.*, 280 F. Supp. 2d 413, 445 (W.D. Penn. 2003); *Brookfield Communs. v. W. Coast Entm't*
28 *Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999) (noting that 15 U.S.C. § 1114(1) and 15 U.S.C. §

1 1125(a)(1) embody the “same standard”). Dastar dealt with claims under section 43(a)(1)(A),
2 the prong dealing with origin, sponsorship, or approval, but the Ninth Circuit has extended
3 Dastar’s rationale to section 43(a)(1)(B), the section dealing with the “nature, characteristics,
4 [or] qualities” of a product. *See Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1305
5 (Fed. Cir. 2009) (citing and discussing Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137,
6 1144 (9th Cir. 2008)).

7 Sybersound is instructive as to why craigslist’s trademark infringement claims should be
8 barred. There, plaintiff brought copyright claims and Lanham Act claims; its Lanham Act
9 claims were premised on defendant’s misrepresentation regarding the licensing status of
10 copyright material in question. The Ninth Circuit rejected Sybersound’s argument, and held
11 that:

12 [c]onstruing the Lanham Act to cover misrepresentations about copyright
13 licensing status . . . would allow competitors engaged in the distribution of
14 copyrightable materials to litigate the underlying copyright infringement
15 when they have standing to do so because they are nonexclusive licensees
or third party strangers under copyright law.

16 Sybersound, 517 F.3d at 1144. Sybersound is on point. To allow craigslist to assert any species
17 of trademark claim based on attribution or non-attribution of the source of craigslist listings—
18 whether in the form of infringement or false designation of origin—would allow craigslist to
19 radically expand the scope of any copyright protection it may have in the listings at issue.
20 Given the tenuous copyright claims that craigslist has on these listings to begin with, the Ninth
21 Circuit’s admonition from Sybersound is particularly relevant in this case. The state and
22 common law trademark infringement claims are subject to the same standards. *See Jada Toys,*
23 Inc. v. Mattel, Inc., 518 F.3d 628, 632 (9th Cir. 2008). Accordingly, they should also be
24 dismissed.

25 IV. CONCLUSION

26 For the reasons set forth above, PadMapper respectfully requests that the Court grant its
27 motion and dismiss craigslist’s trespass and trademark claims, as well as its breach of contract
28 claim, to the extent the claim is based upon PadMapper’s alleged exploitation of rights that are

1 reserved exclusively for the copyright owner under the Copyright Act.

2 Dated: December 21, 2012

Respectfully submitted,

3 **Focal PLLC**

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5 By: /s/Venkat Balasubramani
Venkat Balasubramani (SBN 189192)

6 Attorneys for Defendant and
7 Counterclaim Plaintiff
8 PADMAPPER, INC.

9
10 **CERTIFICATE OF SERVICE**

11 The undersigned hereby certifies under penalty of perjury of the laws of the United States
12 and the State of California that he filed the foregoing MOTION AND MEMORANDUM OF
13 POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT PADMAPPER, INC.'S
14 LIMITED MOTION TO DISMISS using the Court's CM/ECF system which will provide ECF
15 notice to counsel for all parties.

16 Dated: December 21, 2012

17 /s/ Venkat Balasubramani
18 Venkat Balasubramani
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