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26 SUPERIOR COURT OF THE STATE OF CALIFORNIA
27 COUNTY OF SANTA CLARA

28 DVD COPY CONTROL ASSOCIATION,
INC.,

Plaintiff,

v.

ANDREW THOMAS MCLAUGHLIN;
ANDREW BUNNER; et al.,
Defendants.

Case No. CV - 786804

DATE: January 29, 2002

TIME: 9:00 a.m.

DEPT.: 2

HONORABLE WILLIAM J. ELFVING

**DEFENDANT ANDREW BUNNER'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT**

1 **I. INTRODUCTION AND SUMMARY**

2 Plaintiff DVD Copy Control Association, Inc. (DVD CCA) has brought a single trade
3 secret cause of action against defendant Andrew Bunner, seeking only injunctive relief. DVD
4 CCA alleges that it possesses trade secrets in the Content Scramble System (CSS) encryption
5 system used in conjunction with DVD digital movie discs and alleges that Mr. Bunner disclosed
6 those alleged trade secrets by posting a copy of the DeCSS DVD descrambling program on his
7 web site. In January 2000, only a few weeks after this action was filed and after a hectic rush of
8 briefing, the Court granted a preliminary injunction prohibiting Mr. Bunner from “[p]osting or
9 otherwise disclosing or distributing, on [his] websites or elsewhere, the DeCSS program, the
10 master keys or algorithms of the Content Scrambling System (“CSS”), or any other information
11 derived from this proprietary information.” 1/21/00 Order Granting Prelim. Inj. at 2. Mr.
12 Bunner has observed the terms of the injunction since it was issued. In issuing the preliminary
13 injunction, however, the Court noted: “As Plaintiff conceded at the hearing on the TRO, once
14 this information gets into the hands of an innocent party, the Plaintiff loses their ability to enjoin
15 the use of their trade secret.” *Ibid.*

16 The passage of time since the Court enjoined Mr. Bunner has dramatically altered,
17 clarified, and simplified the legal and factual landscape of this case. Legally, the Court of
18 Appeal recently reversed the preliminary injunction, finding that the injunction infringed Mr.
19 Bunner’s First Amendment right to free speech.

20 Factually, the Court now faces a vastly different record than that hurriedly presented at
21 the time of the preliminary injunction. The undisputed evidence now shows that, as the Court
22 foreshadowed, there is nothing secret about the CSS algorithms and keys:

- 23 • The DeCSS computer program is available throughout the world without
24 restriction. DeCSS continues to be published at numerous sites on the Internet,
25 and may be freely examined, copied, or downloaded by anyone wishing to do so.
- 26 • The CSS algorithms and keys have been the subject of worldwide academic
27 study, research, teaching, and communication.

- 1 • Other DVD descrambling programs have now been created embodying and
2 disclosing the same CSS encryption algorithms and keys disclosed by DeCSS and
3 alleged by DVD CCA to be trade secrets.
- 4 • DVD descrambling programs has been published in the Massachusetts Institute of
5 Technology's journal *Technology Review* and *Wired Magazine*. One of the CSS
6 encryption keys has been published in the *Wall Street Journal*.
- 7 • In the face of the ubiquity of DeCSS and other DVD descrambling programs,
8 DVD CCA have ceased policing its alleged CSS trade secrets, claiming it would
9 be too burdensome for it to examine every web site now posting a DVD
10 descrambling program.

11 This evidence shows conclusively that the CSS algorithms and keys are no longer
12 confidential information known only to DVD CCA but are now publicly available information
13 free to all who wish to learn them.

14 This undisputable evidence of the general public availability of the CSS algorithms and
15 keys is fatal to DVD CCA's trade secret cause of action against Mr. Bunner, which seeks only
16 injunctive relief. California's trade secret statute prohibits any injunctive relief once a trade
17 secret becomes generally known to the public. Civil Code § 3426.2(a). Because the essential
18 element of continuing secrecy is absent here and the CSS algorithms and keys are generally
19 available, DVD CCA's cause of action fails. Judgment must be granted for Mr. Bunner and this
20 action dismissed.

21 This simple and straightforward ground for summary judgment removes the necessity for
22 the Court to decide the many challenging statutory and constitutional issues this case otherwise
23 presents. These include the questions of whether the republication of information widely
24 available on the Internet is a "misappropriation" under California's Uniform Trade Secrets Act
25 and whether the free speech and equal protection provisions of the California and federal
26 Constitutions and the Intellectual Property Clause of the federal Constitution permit an
27 injunction suppressing speech whose content is already a matter of widespread public
28 knowledge.

1 **II. FACTUAL BACKGROUND**

2 **A. DVD Movie Discs and the CSS Encryption System**

3 DVDs are a digital information storage medium. Like the more familiar audio CDs, a
4 DVD consist of a plastic disc beneath whose transparent surface lies a metal-coated layer in
5 which is etched a spiral track of microscopic indentations. When a DVD hardware drive plays
6 the DVD disc by spinning it, a laser beam tracks along the spiral path within the disc and the
7 resulting pattern of reflectance and darkness caused by the presence or absence of these
8 indentations is translated into the binary code—the ones and zeros—of digital data.

9 DVDs have a much greater data storage capacity than CDs, and for this reason may be
10 used to store entire movies in digital form, as well as any other type of information that can be
11 converted to a digital format. A DVD movie disc may be played on a standalone DVD player
12 attached to a TV in the same manner as a VCR, or may be played on a personal computer by
13 means of a DVD hardware drive and a DVD hardware or software decoder/player in the
14 computer.

15 Audio CDs are not encrypted. By contrast, the manufacturers of DVD movie discs, DVD
16 hardware drives, and DVD movie decoder/players have chosen to encrypt, or scramble, the
17 digitized audiovisual information stored in DVD movie discs. A consumer cannot view the
18 DVD movie disc he or she has purchased unless the audiovisual information is first descrambled.

19 The encryption system used by manufacturers of DVD movie discs, DVD hardware
20 drives, and DVD hardware or software movie decoder/players is known as the Content Scramble
21 System, or CSS. CSS was originally developed by Matsushita Electrical Industrial Co., Ltd. and
22 Toshiba Corporation and licensed to others by a Japanese entity, the CSS Interim Licensing
23 Organization. 8/10/00 Plaintiff's Ans. & Objs. to Def. Bunner's First Set of Special Interrogos.,
24 Ans. to Interrogos. 25, 39. DVD CCA then took over licensing of CSS in December 1999, shortly
25 before filing this lawsuit.

26 The many steps by which CSS descrambles the scrambled audiovideo data on a DVD
27 movie disc can be divided into two basic functions: 1) a *mutual authentication function* by
28 which the DVD decoder/player on the one hand and the DVD drive on the other hand mutually

1 authenticate each other to verify that each is a device authorized by DVD CCA; and 2) a
2 *descrambler function* by which the decoder/player descrambles the scrambled audiovisual data
3 of the encrypted movie stored on the disc. Both of these functions involve various encryption
4 algorithms (each of which may be represented as a mathematical equation or series of equations)
5 and encryption keys (numeric values used in conjunction with different encryption algorithms).
6 Many of these keys are themselves encrypted as an additional security measure. In general
7 outline, these two functions operate in the following manner. (This summary is based on Dr.
8 Touretzky's Decl. ¶¶ 3-12 and the 12/20/00 Amended Submission of Plaintiff DVD Copy
9 Control Assoc., Inc., Pursuant to § 2019(d), at Ex. A (DVD CCA's complete technical
10 specifications for CSS, as set forth by DVD CCA's predecessor Matsushita).)

11 In the authentication function, the DVD drive and the DVD decoder/player authenticate
12 each other by exchanging random numbers, performing identical computations on the exchanged
13 numbers using encryption algorithms, and comparing the results. If the results match, then each
14 device considers the other to be authentic.

15 Descrambling of the movie audiovisual data on the disc uses a number of different
16 encryption keys and algorithms. The scrambled audiovisual data on the DVD disc is divided into
17 numerous files. The data in each file has been scrambled using a *title key* in conjunction with a
18 scrambling algorithm. Different files use different title keys, and each file is associated with an
19 encrypted version of the title key used to scramble the audiovisual data in that file. The different
20 title keys used for the different files on the disc are all encrypted and stored on the DVD disc
21 using a single *disc key* in conjunction with an encryption algorithm.

22 The disc key in turn is itself stored on the DVD disc in encrypted form. It is encrypted in
23 408 different versions using a single encryption algorithm with each of the 408 possible *master*
24 *key* (also sometimes called *player key*) pairs DVD CCA has established. DVD CCA has
25 assigned to each decoder/player manufacturer a single unique master key pair from this universe
26 of 408 possible master key pairs. This unique master key pair is stored in every decoder/player
27 made by that manufacturer. To insure that every disc will work with every decoder/player, the
28

1 disc key on each disc is encrypted into 408 different versions by using one of the two master
2 keys from each of the 408 master key pairs.

3 In order to play a scrambled DVD disc, CSS uses the master key in the DVD
4 decoder/player to decrypt the disc key. It then uses the decrypted disc key to decrypt the title
5 key for each file, and uses the decrypted title key to descramble the scrambled audiovisual data
6 in that file. Once the audiovisual data is descrambled, it may be used to display the images and
7 sounds of the movie to the consumer.

8 **B. Andrew Bunner's Republication of the DeCSS DVD Descrambling Program**

9 The DeCSS DVD descrambling program was published on the Internet in October 1999.
10 It is undisputed that Mr. Bunner had nothing to do with the creation or programming of DeCSS
11 or any other DVD descrambling program, and nothing to do with the reverse engineering or
12 technical analysis of CSS that preceded the creation of DeCSS. Bunner Decl. ¶¶ 2-3. Nor was
13 Mr. Bunner involved in the original publication of DeCSS on the Internet. *Id.* at ¶ 4. He first
14 learned of DeCSS after CSS had been reverse engineered and after DeCSS had been created and
15 published on the Internet in October 1999. *Id.* at ¶ 5. Mr. Bunner then downloaded a copy of
16 DeCSS from a publicly-available web site on the Internet and placed it on his personal web site.
17 *Id.* at ¶ 6. In December 1999, before being served with the summons and complaint in this
18 action, Mr. Bunner spoke by telephone with an attorney for DVD CCA. *Id.* at ¶ 7. Mr. Bunner
19 immediately removed DeCSS from his web site server during his telephone conversation with
20 DVD CCA's attorney, has not disclosed or distributed DeCSS since that time, and has observed
21 the terms of the preliminary injunction. *Ibid.*

22 **C. The CSS Algorithms And Keys Remain Public Information Available To All Who Wish** 23 **To Know**

24 Pursuant to Code of Civil Procedure section 2019(d), DVD CCA has identified its alleged
25 trade secrets as "the master keys, secured [i.e., encrypted] disc keys, disc keys and title keys
26 themselves, the computational method for creating these keys, and the algorithms for using these
27 keys in the encryption and decryption operations." 12/20/00 Amended Submission of Plaintiff
28

1 DVD Copy Control Assoc., Inc., Pursuant to § 2019(d), at 3. None of this information is
2 currently secret, as is made abundantly clear by the accompanying declarations from:

- 3 • Princeton Computer Science Professor Edward Felten (on sabbatical this year at
4 Stanford Law School's Center for the Internet and Society; chief technical adviser
5 to the U.S. Department of Justice in *United States v. Microsoft*)
- 6 • University of California-Berkeley Computer Science Professor David Wagner
- 7 • Carnegie Mellon University Principal Computer Scientist Dr. David Touretzky
- 8 • Carnegie Mellon University Computer Scientist Gregory Kesden
- 9 • Computer Scientist Roland Parviainen of Sweden's Luleå University of
10 Technology

11 As the evidence in these declarations demonstrates, *persons other than the 22 defendants*
12 *named and served in this action* have made unlimited public disclosure of the CSS algorithms
13 and keys through the publication and repeated republication of DeCSS, other DVD descrambling
14 programs, and other information about CSS continuously from before this action was filed to the
15 present time, a period now exceeding two years. Such information has been taught and
16 discussed at universities and within the computer science community worldwide, is available at
17 numerous Internet web sites, and has been published in print in the *Wall Street Journal*, *Wired*
18 *Magazine* and MIT's *Technology Review* as well as in course materials, widely distributed
19 technical papers, and even on publicly posted adhesive stickers. It is available not only in the
20 form of the original DeCSS computer program posted by Mr. Bunner on his web site, but also in
21 other forms as well: other versions of DeCSS, other DVD software player computer programs
22 that have subsequently been developed and published, as well as in narrative, mathematical,
23 graphical, animated, and musical representations. There is nothing secret about CSS and its
24 algorithms and keys, all of which are widely and readily available to the public. Prof. Felten
25 Decl. ¶ 12; Prof. Wagner Decl. ¶ 27; Dr. Touretzky Decl. ¶¶ 31-32, Kesden Decl. ¶ 8; Parviainen
26 Decl. ¶ 4.

1 1. *DeCSS And Other DVD Descrambling Computer Programs Disclosing CSS*
2 *Algorithms And Keys Remain Widely And Easily Available To All Who Wish Them.*

3 The DeCSS computer program remains available, at the very least, at hundreds of
4 locations on the Internet, in both source code and object code versions. Prof. Wagner Decl. ¶¶ 6-
5 21; Dr. Touretzky Decl. ¶¶ 13-15, 18-23; Prof. Felten Decl. ¶¶ 14-15. Other DVD software
6 players have been created since the creation of DeCSS that also disclose the CSS algorithms and
7 keys: these include Videolan, developed at the École de Paris; Ogle, developed at Chalmers
8 University in Sweden; and Xine. Prof. Wagner Decl. ¶¶ 22-25; Dr. Touretzky Decl. ¶¶ 11, 24-
9 25, 30. These other DVD software players are available on the Internet. Dr. Touretzky Decl. ¶¶
10 11, 24-25, 30; Prof. Wagner Decl. ¶¶ 22-25. Numerous additional programs performing the
11 CSS descrambling function have been created in a variety of programming languages. Dr.
12 Touretzky Decl. ¶¶ 14-15, 29. MIT's journal *Technology Review* and *Wired Magazine* both
13 recently published DVD descrambling programs, and the *Wall Street Journal* published one of
14 the CSS master keys. Dr. Touretzky Decl. ¶¶ 10, 29 & Exs. A, B, C. Descrambling programs
15 have even been publicly posted on adhesive stickers. Kesden Decl. ¶ 8 & Ex. C.

16 2. *There Is Widespread Knowledge Of The CSS Algorithms And Keys In The Computer*
17 *Science Community*

18 CSS and its algorithms and keys have been the subject of research, discussion, and
19 teaching worldwide within the computer science community, both academic and non-academic.
20 Prof. Felten Decl. ¶¶ 12-13, 16-21; Prof. Wagner Decl. ¶¶ 28-33; Dr. Touretzky Decl. ¶¶ 26-32;
21 Kesden Decl. ¶ 4-8; Parviainen Decl. ¶¶ 1-5. Professor Felten has taught a seminar on CSS at
22 Princeton and has taught CSS and DeCSS in his Information Security course. Prof. Felten Decl.
23 ¶ 19. Professor Wagner has taught CSS in his Security in Computer Systems course. Prof.
24 Wagner Decl. ¶ 28. Dr. Touretzky of Carnegie Mellon University maintains a "Gallery of CSS
25 Descramblers" web site (<http://www.cs.cmu.edu/~dst/DeCSS/Gallery>) on the Internet as an
26 academic resource. Dr. Touretzky Decl. ¶ 14.

27 Computer Scientist Kesden teaches CSS as part of his course on operating systems at
28 Carnegie Mellon University, and his course materials describing the operation of CSS are posted

1 in the Gallery of CSS Descramblers. Kesden Decl. ¶¶ 1-5 & Ex. A. He has also lectured on CSS
2 at the University of California, San Diego. Kesden Decl. ¶ 7. MIT has held a seminar on CSS
3 and DeCSS. Dr. Touretzky Decl. ¶ 29. CSS algorithms and keys are available from Harvard
4 University and Case Western Reserve University web sites. Prof. Wagner Decl. ¶ 26. Computer
5 Scientist Parviainen of Sweden’s Luleå University of Technology teaches CSS in his Computer
6 Security course as an example of how not to design an encryption system, as do Kesden of
7 Carnegie Mellon University and Professor Wagner of Berkeley. Parviainen Decl. ¶ 5; Kesden
8 Decl. ¶ 5; Prof. Wagner Decl. ¶¶ 28-29.

9 *3. In Addition, There are Many Other Publicly Available Descriptions of The CSS*
10 *Algorithms And Keys*

11 Other descriptions and representations of the CSS algorithms and keys have been created
12 in a vast variety of formats. Cryptographer Frank Stevenson’s technical paper describing the
13 CSS algorithms and keys is widely known in cryptographic circles and is available on the
14 Internet. Prof. Felten Decl. ¶¶ 17-20; Dr. Touretzky Decl. ¶¶ 11-12; Kesden Decl. ¶ 8 & Ex. B;
15 see also 1/7/00 Stevenson Decl. ¶¶ 15-18. In it, he presents a method for deriving every possible
16 master key. Dr. Touretzky Decl. ¶ 12. Stevenson also presents methods for deriving title keys
17 without the use of a master key. Dr. Touretzky Decl. ¶ 12. Others have created narrative
18 descriptions, mathematical descriptions, and graphical, animated, and musical renderings of the
19 CSS algorithms and keys. Dr. Touretzky Decl. ¶¶ 14-18, 28.

20 *4. DVD CCA Has Given Up Trying To Identify The “Thousands” Of Sources Publishing*
21 *CSS Algorithms And Keys, Or To Name And Serve Them In This Litigation*

22 Perhaps most telling, when requested in interrogatories to identify all sources currently
23 disclosing the CSS algorithms or keys, DVD CCA frankly confessed it had given up any serious
24 attempt to police its trade secrets. After identifying 72 of the “thousands of web sites and file
25 transfer sites apparently claim[ing] to be posting materials containing Plaintiff’s trade secrets,”
26 DVD CCA explained it was making no attempt to locate and identify, much less suppress, all of
27 these thousands of sources publishing information about the CSS algorithms and keys, stating
28 “Plaintiff cannot reasonably be expected to perform this process to verify the contents of

1 thousands of web sites claiming to be posting Plaintiff's trade secrets." 10/3/00 Plaintiff's
2 Highly Confidential Supplemental Ans. & Objs. To Def. Andrew Bunner's First Set of
3 Interrogs., at 3-5; 8/10/00 Plaintiff's Highly Confidential Ans. & Objs. To Def. Andrew
4 Bunner's First Set of Interrogs., at 3. This admission merely confirms the indisputable: There is
5 nothing secret about the CSS algorithms and keys.¹

6 DVD CCA also has never sought to bring before this Court all those "thousands" who are
7 still publishing its alleged CSS trade secrets. DVD CCA to date has named only 24 defendants
8 in this action and has served 22 of them. 10/9/01 Case Management Conference Questionnaire
9 of DVD CCA. It has not sought to name and serve the publishers of the 72 web sites identified
10 in its interrogatory answers. Nor has it sought to name and serve the publishers of the hundreds,
11 if not thousands, of other web sites publishing CSS algorithms and secrets or the many other
12 sources of information about CSS algorithms and keys we have described in our evidentiary
13 submissions.

14 It is, of course, only by naming and serving as parties to this action all those who were
15 allegedly violating its trade secrets that DVD CCA could have made the preliminary injunction,
16 or any future permanent injunction, enforceable against them. As a matter of fundamental due
17 process, the Court's injunction is only effective against those defendants over whom the Court
18 has acquired personal jurisdiction by the plaintiff's service of a summons and the complaint.
19 Judge Learned Hand long ago explained this point with his customary clarity and wisdom:
20 "[N]o court can make a decree which will bind any one but a party; a court of equity is as much
21 so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it
22 words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons

23
24 ¹ It is nothing less than bizarre that DVD CCA has designated as "highly confidential" under the
25 protective order its list of 72 web sites republishing DeCSS or other DVD descrambling
26 programs, for there is nothing confidential, much less highly confidential, about either the
27 content or identity of these web sites on the Internet. The Internet "constitutes a vast platform
28 from which to address and hear from a world-wide audience of millions," *Reno v. A.C.L.U.*, 521
U.S. 844, 853 (1996), and these sites make no secret of the fact that they contain DeCSS, other
DVD descrambling programs, or other information about CSS. For DVD CCA to pretend that
these sites, a number of which it publicly named in its complaint, are "highly confidential" is
simply delusional.

1 enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful;
2 its jurisdiction is limited to those over whom it gets personal service, and who therefore can have
3 their day in court.” *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930). Whatever
4 the explanation for DVD CCA’s failure to diligently enforce the injunction this Court granted it,
5 that failure is further evidence of the unrestricted public availability of the CSS algorithms and
6 keys.

7 *5. DVD CCA’s Decision To Distribute CSS Worldwide In Software Form Made Its*
8 *Disclosure Almost Certain, As DVD CCA And Its Licensees Recognized In The CSS License*

9 DVD CCA and its predecessors in interest Matsushita, Toshiba, and the CSS Interim
10 Licensing Organization made a considered business decision to permit the licensed distribution
11 of CSS not only in the form of hardware DVD players for televisions and hardware DVD players
12 for computers but also in the form of software DVD players for computers. These software
13 DVD players necessarily contain in software form the CSS algorithms and keys. The decision of
14 DVD CCA and its predecessors to distribute CSS in software form, however, made it almost
15 certain that within no more than a few years of its initial release the CSS algorithms and keys
16 would become public knowledge. Prof. Felten Decl. ¶¶ 22-29; Prof. Wagner Decl. ¶¶ 29, 34-40.
17 The faulty encryption design decisions made by CSS’s designers likewise made it unreasonable
18 to expect that CSS’s details would not become public knowledge. Prof. Felten Decl. ¶¶ 27-28;
19 Prof. Wagner Decl. ¶ 29; Dr. Touretzky Decl. ¶¶ 11-12, 26; Kesden Decl. ¶ 5; Parviainen Decl.
20 ¶ 5. These flaws, for example, make it possible to decrypt the title keys contained on each DVD
21 movie disc without using a master key and to use the decrypted title keys to descramble the
22 movie. Dr. Touretzky Decl. ¶¶ 11-12; 1/7/00 Stevenson Decl. ¶¶ 15-18. They also make it
23 possible to derive all of the possible master keys using a purchased DVD movie disc.
24 Dr. Touretzky Decl. ¶¶ 11-12; 1/7/00 Stevenson Decl. ¶¶ 15-18.

25 Thus, it is not surprising that the licenses used by DVD CCA and its predecessors in
26 interest, as well as their licensees, expressly recognize the likelihood that the worldwide
27 distribution of CSS would result in its public disclosure. Section 5.2 of the CSS Interim License
28 Agreement, which imposes a confidentiality obligation upon licensees, explicitly acknowledges

1 this eventuality. It excuses CSS licensees from their duty of confidentiality once CSS is publicly
2 disclosed for more than 90 days:

3 (h) Confidentiality Exceptions. The confidentiality restrictions contained in Sections
4 5.2(a), (b) and (c) herein shall not apply to information that Licensee can demonstrate: (i)
5 is either Confidential or Highly Confidential Information which is or becomes generally
6 known to the public through no breach of Licensee's obligations owed to [Blank]
7 hereunder and which [Blank] failed to remove from public availability or to enjoin such
8 public disclosure within ninety (90) days after the date such information is or becomes
9 generally known as set forth above; . . .

10 CSS Interim License Agreement, ¶ 5.2(h), reproduced at 1/13/00 Hoy Reply Decl., Ex. C. The
11 CSS algorithms and secrets have been generally known to the public not just for 90 days but for
12 more than two years from sources not subject to this Court's injunction, thus excusing DVD
13 CCA's licensees from any further duty of confidentiality. Clearly, it would be unjust and
14 irrational to hold that Andrew Bunner, a stranger to DVD CCA with no contractual or fiduciary
15 relationship with it, has an obligation to keep secret publicly available information which DVD
16 CCA's own licensees are no longer obligated to keep secret.

17 **III. ARGUMENT**

18 **SUMMARY JUDGMENT MUST BE GRANTED BECAUSE THE WIDESPREAD 19 PUBLIC AVAILABILITY OF THE ALLEGED CSS TRADE SECRETS PRECLUDES 20 DVD CCA'S CAUSE OF ACTION FOR INJUNCTIVE RELIEF**

21 **A. The Summary Judgment Standard**

22 The familiar standard for summary judgment of Code of Civil Procedure section 437c
23 provides that "summary judgment shall be granted if all the papers submitted show that there is
24 no triable issue as to any material fact and that the moving party is entitled to a judgment as a
25 matter of law." Code Civ. Pro. § 437c(c). "A defendant or cross-defendant has met his or her
26 burden of showing that a cause of action has no merit if that party has shown that one or more
27 elements of the cause of action, even if not separately pleaded, cannot be established, or that
28 there is a complete defense to that cause of action." Code Civ. Pro. § 437c(o)(2); see generally
Aguilar v. Atlantic Richfield Co., 25 Cal.4th 826 (2001).

Here, to prevail on its sole cause of action for injunctive relief for trade secret
misappropriation, DVD CCA as plaintiff has the burden of proving, among other things, that the

1 CSS algorithms and keys still remain secret. The factual record in this case shows that DVD
2 CCA cannot meet its burden of proof on the essential element of secrecy, for it is indisputable
3 that its alleged trade secrets are widely known and have been continuously published for a period
4 now exceeding two years.

5 **B. California’s Uniform Trade Secrets Act Prohibits Injunctive Relief When The Alleged**
6 **Trade Secret Is Publicly Known, As Is The Case Here**

7 State trade secret law, as the Court of Appeal emphasized in its opinion, lacks the federal
8 constitutional status that patent and copyright law possess. Slip op. at 16-17. The holder of a
9 federal copyright or a patent is granted a constitutionally-sanctioned exclusive property right
10 enforceable against the world at large. State trade secret law does not, and cannot, provide the
11 holder of a trade secret with an exclusive property right in an idea, enforceable against the world;
12 instead, it provides additional remedies only against certain parties who in obtaining or using the
13 trade secret have violated some independent legal duty—a duty that has either been voluntarily
14 assumed (e.g., by contract or as the consequence of a fiduciary relationship) or that is imposed as
15 a generally applicable legal obligation (e.g., laws against theft, bribery, or trespass). See *Bonito*
16 *Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 156, 158 (1989) (Supreme Court struck
17 down a “Florida statute endow[ing] the original boat hull manufacturer with rights against the
18 world, similar in scope and operation to the rights accorded a federal patentee” because federal
19 Constitution preempts states from creating intellectual property rights against the world for an
20 idea embodied in “an item in general circulation”); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S.
21 470, 490 (1974) (patent rights operate “ ‘against the world’ ” while trade secret rights do not).
22 Both the Intellectual Property Clause and the First Amendment of the federal Constitution limit
23 the permissible scope of state law protection for trade secrets, for both protect and guard the
24 public domain of free discourse in ideas. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489
25 U.S. at 150-165; Court of Appeal’s slip op. at 16, 19.

26 An essential part of the framework of these constitutional limitations on state trade secret
27 law is the fundamental requirement that “The subject of a trade secret must be secret, and must
28 not be of public knowledge or of a general knowledge in the trade or business.” *Kewanee Oil*

1 *Co. v. Bicron Corp.*, 416 U.S. at 475. It is only because of this requirement of secrecy that, for
2 example, “ ‘the [patent law] policy that matter once in the public domain must remain in the
3 public domain is not incompatible with the existence of trade secret protection.’ ” *Bonito Boats,*
4 *Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. at 155.

5 California law is in accord with this constitutional requirement. For information to
6 qualify as a protectable trade secret under California law, it is an essential requirement that the
7 information be secret, something not generally known. The definition of “trade secret” under
8 California’s Uniform Trade Secrets Act (Civil Code § 3426 et seq.) includes the requirement that
9 it be “information . . . not . . . generally known to the public or to other persons who can obtain
10 economic value from its disclosure or use.” Civil Code § 3426.1(d)(1).

11 Accordingly, under California’s Uniform Trade Secrets Act general public disclosure
12 destroys the secrecy essential to a trade secret. *Vacco Industries, Inc. v. Van Den Berg*, 5
13 Cal.App.4th 34, 50 (1992) (“a trade secret is protectible only so long as it is kept secret”);
14 *Religious Tech. Center v. Netcom On-line Commun. Servs.*, 923 F.Supp. 1231, 1254 (N.D. Cal.
15 1995) (“Once trade secrets have been exposed to the public, they cannot later be recalled.”);
16 *Enterprise Leasing Co. v. Ehrnke*, 3 P.3d 1064, 1069 (Ariz. Ct. App 1999) (applying Uniform
17 Trade Secrets Act: “the hallmark of a trade secret obviously is its secrecy . . . matters that are
18 public knowledge are not safeguarded as trade secrets”) see also *Murray v. Bank One*, 649
19 N.E.2d 1307, 1313 (Ohio App. 1994) (applying Restatement (First) of Torts trade secret law; “If
20 information is generally known in the industry, it is not ‘secret’ and ‘cannot qualify as a trade
21 secret.’ ”); 1 Milgrim on Trade Secrets § 1.05[1], at 1-197 (2000) (“Since secrecy is a requisite
22 element of a trade secret, . . . unprotected disclosure of the secret will terminate that element
23 and, at least prospectively, forfeit the trade secret status”).

24 In particular, widespread and sustained publication destroys the secrecy essential to a
25 trade secret. *Enterprise Leasing Co. v. Ehrnke*, 3 P.3d at 1069 (applying Uniform Trade Secrets
26 Act: “[i]nformation is considered public knowledge if it is available in trade journals, reference
27 books or published materials”). The legislative history of California’s Uniform Trade Secrets
28 Act confirms this fact; it notes that “[o]btaining the trade secret from published literature” is a

1 proper means of acquiring knowledge of the information alleged to be a trade secret. Sen. Com.
2 on Jud., Rep. on Assem. Bill 501, 8 Sen. Jour. (1983-1984 Reg. Sess.) p. 13883; see also
3 1 Milgrim on Trade Secrets § 1.03, at 1-163 (2000) (“[W]hether secrecy is lost through seepage
4 in conduct of business, sale or exposition of a product embodying the secret, disclosure of the
5 idea through a trade or technical publication, or by way of patent . . . the principle remains: a
6 secret on the wing cannot be recalled.”).

7 This is equally true of publication on the Internet as it is of publication in more traditional
8 media. As the United States Supreme Court has noted: “From the publishers’ point of view, [the
9 Internet] constitutes a vast platform from which to address and hear from a world-wide audience
10 of millions of readers, viewers, researchers, and buyers. Any person or organization with a
11 computer connected to the Internet can ‘publish’ information. Publishers include government
12 agencies, educational institutions, commercial entities, advocacy groups, and individuals.” *Reno*
13 *v. A.C.L.U.*, 521 U.S. 844, 853 (1996). Applying California’s Uniform Trade Secrets Act to
14 publication on the Internet, the court in *Religious Tech. Center v. Netcom On-line Commun.*
15 *Servs.*, 923 F.Supp. 1231, 1256, addressed whether information can be considered secret if it has
16 been posted to an Internet newsgroup, a much more limited form of distribution than publication
17 on a web site. (“Newsgroups . . . serve groups of regular participants, but these postings may be
18 read by others as well. There are thousands of such groups, each serving to foster an exchange
19 of information or opinion on a particular topic running the gamut from, say, the music of Wagner
20 to Balkan politics to AIDS prevention to the Chicago Bulls. . . . In most newsgroups, postings
21 are automatically purged at regular intervals.” *Reno v. A.C.L.U.*, 521 U.S. at 851.) The *Netcom*
22 court held: “Although a work posted to an Internet newsgroup remains accessible to the public
23 for only a limited amount of time, once that trade secret has been released into the public domain
24 there is no retrieving it.” 923 F.Supp. at 1256.

25 Significantly, the *Netcom* court held that the fact that those who originally posted the
26 information to the Internet may have obtained the information by improper means cannot defeat
27 the loss of secrecy that occurs upon general publication on the Internet. “While . . . those who
28

1 made the original postings likely gained the information through improper means . . . this does
2 not negate the finding that, once posted, the works lost their secrecy.” 923 F.Supp. at 1256.

3 Other courts have reached the same conclusion. In *Religious Tech. Center v. Lerma*, 908
4 F.Supp. 1362, 1368 (E.D. Va. 1995), the court held that the plaintiff’s alleged trade secrets had
5 become “ ‘generally known’ ” when despite the plaintiff’s extraordinary efforts at suppression
6 the information was published on an Internet newsgroup for ten days: “Once a trade secret is
7 posted on the Internet, it is effectively part of the public domain, impossible to retrieve.” *Ibid.*
8 Again, the court held that trade secret protection was lost notwithstanding the plaintiff’s
9 allegations that those who originally posted the information on the Internet obtained it by
10 improper means. *Id.* at 1364. In *Hoechst Daifol Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411,
11 419 (4th Cir. 1999), the United States Court of Appeals for the Fourth Circuit approved *Lerma*’s
12 holding, stating that “the court correctly found that information which had been both disclosed in
13 public court files and made ‘generally known’ by Internet publication had lost its trade secret
14 status.” In *Religious Tech. Center v. F.A.C.T.NET, Inc.*, 901 F.Supp. 1519, 1526-27 (D. Colo.
15 1995), the court likewise found that the alleged trade secrets at issue in that case were not secret
16 because they were “widely known” “through multiple sources,” including the Internet.

17 Given the requirement that information must be secret in order to be protected as a trade
18 secret, it is no surprise that California’s Uniform Trade Secrets Act prohibits injunctive relief
19 once a trade secret ceases to be a secret: “Upon application to the court, an injunction shall be
20 terminated when the trade secret has ceased to exist” Civil Code § 3426.2(a). As the
21 legislative history to California’s Uniform Trade Secrets Act explains, “an injunction
22 accordingly should terminate when a former trade secret . . . becomes generally known.” Unif.
23 Trade Secrets Act § 2 cmt., *reprinted in* 14 Unif. Laws Annot. 450 (West 1990); Sen. Com. on
24 Jud., Rep. on Assem. Bill 501, 8 Sen. Jour. (1983-1984 Reg. Sess.) p. 13883 (“the comments of
25 the national conference with respect to the act reflect the intent of the Senate Committee on
26 Judiciary in approving Assembly Bill 501”). The statute’s prohibition of injunctive relief for
27 information no longer secret is absolute and mandatory, and is not conditioned on the manner in
28 which the information has become public.

1 This unequivocal command from the Legislature must be obeyed. As the evidence laid
2 out above makes clear, information disclosing the CSS algorithms and keys has been repeatedly
3 and continuously published and republished throughout the world for a period now exceeding
4 two years. It has been published not only at literally hundreds of web sites on the Internet (at one
5 of which Mr. Bunner first encountered it) but in more tangible media as well, including MIT's
6 journal *Technology Review*, the *Wall Street Journal*, printed university course materials and
7 handouts, adhesive stickers, and even a music CD. It has been the subject of academic research,
8 teaching, and discussion by computer scientists at the University of California at Berkeley,
9 Princeton, Carnegie Mellon University, MIT, Sweden's Luleå University, and elsewhere, as well
10 as disclosure in the larger computer science community.

11 Because the CSS algorithms and keys, DVD CCA's alleged trade secrets in this action,
12 lack the essential element of secrecy, DVD CCA's cause of action seeking injunctive relief for
13 trade secret misappropriation fails. The plain and unequivocal language of section 3426.2
14 forbids any injunctive relief in this case; accordingly, Mr. Bunner is entitled to summary
15 judgment, and the action should be dismissed.²

16 In so holding, this Court need not go nearly as far as *Religious Tech. Center v. Lerma*,
17 908 F.Supp. 1362, which held that secrecy is lost by publication on the Internet even for ten days
18 and even when publication occurs in a newsgroup rather than on a web site. The Court need not
19 hold that any disclosure on the Internet, however obscure, evanescent, or brief, results in the loss
20 of secrecy. Here there has been widespread and sustained publication of CSS algorithms and
21 keys for more than two years not only at hundreds of Internet web sites but also in print media,
22 as well as public disclosure and discussion in the academic community, the larger computer
23 science community, and elsewhere. Thus, the Court need merely apply the well-settled rule,
24 developed long before the Internet era, that widespread and sustained publication destroys

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27 ² Early in this litigation, DVD CCA acknowledged that continuing widespread public
28 availability of DeCSS would be fatal to its trade secrets cause of action against Mr. Bunner. It
noted that the effect of continuous publication would be that "eventually the trade secret will lose
its protection." 1/13/00 DVD CCA's Reply Mem. in Support of Prelim. Inj. at 9. Indeed, that
has now come to pass.

1 secrecy and precludes an injunction against a third-party republisher who had no involvement in
2 the initial public disclosure.³

3 **C. The First Amendment And Other Federal And State Constitutional Provisions Prohibit**
4 **Using State Trade Secret Law To Enjoin The Publication Of Publicly-Available**
5 **Information**

6 It is no accident that section 3426.2 prohibits the Court from enjoining the publication of
7 information that is no longer secret. Most obviously, it would contradict section 3426.1(d)'s
8 definition of a trade secret as "information . . . not generally known" to enjoin under section
9 3426.2(a) information that is generally known.

10
11 ³ We expect that, as it did at the preliminary injunction stage, DVD CCA may seek to rely
12 on *Underwater Storage, Inc. v. U. S. Rubber Co.*, 371 F.2d 950, 955 (D.C. Cir. 1966), to argue
13 that Mr. Bunner should continue to be enjoined notwithstanding the general public knowledge of
14 the CSS algorithms and keys. That case, however, does not reflect California law and has no
15 application here. *Underwater Storage* was a statute of limitations case holding that, for purposes
16 of damages liability, trade secret misappropriation was a continuing wrong persisting even after
17 the secret became public knowledge. It was decided under District of Columbia local law
18 thirteen years before the National Conference of Commissioners on Uniform State Laws
19 promulgated the Uniform Trade Secrets Act. The national Uniform Trade Secrets Act rejected
20 the "continuing wrong" theory of trade secret misappropriation that *Underwater Storage* used to
21 justify continuing damages liability even after a secret has become public, observing that it was
22 contrary to pre-UTSA California law. Unif. Trade Secrets Act § 6 cmt., reprinted in 14 Unif.
23 Laws Annot. 462 (West 1990) (noting "[t]here presently is a conflict of authority as to whether
24 trade secret misappropriation is a continuing wrong," that under pre-UTSA California law
25 misappropriation was not a continuing wrong but that *Underwater Storage* took the contrary
26 view, and that "[t]his Act [the UTSA] rejects a continuing wrong approach"); Sen. Com. on Jud.,
27 Rep. on Assem. Bill 501, 8 Sen. Jour. (1983-1984 Reg. Sess.) p. 13883 ("the comments of the
28 national conference with respect to the act reflect the intent of the Senate Committee on
Judiciary in approving Assembly Bill 501").

23 Instead, as explained above, California's Uniform Trade Secrets Act in section 3426.2(a)
24 explicitly prohibits injunctive relief once a secret has become public knowledge. In cases in
25 which a commercial misappropriator has gotten a jump on the market by reason of the
26 misappropriation California's Uniform Trade Secrets Act contains a limited exception that
27 permits a court to continue to enjoin publicly known information for an additional finite period:
28 "the injunction may be continued for an additional period of time in order to eliminate
commercial advantage that otherwise would be derived from the misappropriation." Civil Code
§ 3426.2(a). That limited exception has no relevance in this case where it is undisputed that Mr.
Bunner had no commercial purpose and obtained no commercial advantage from his
 republication of DeCSS. Accordingly, section 3426.2(a) bars any injunctive relief against Mr.
 Bunner, and thereby mandates summary judgment for him.

1 There are more fundamental constitutional concerns as well. Reimposing the injunction
2 would not only flout the statute’s command but would raise serious constitutional questions
3 under the free speech provisions of both the state and federal Constitutions. As the Court of
4 Appeal concluded, Mr. “Bunner’s republication of DeCSS was ‘pure speech’ within the ambit of
5 the First Amendment.” Slip op. at 18. Any permanent injunction against him would be a
6 content-based restriction on speech, even if it did not run afoul of the constitutional prohibition
7 against prior restraints on which the Court of Appeal relied to vacate the preliminary injunction.
8 Content-based regulations of speech are presumptively invalid. *R. A. V. v. St. Paul*, 505 U.S.
9 377, 382 (1992). To pass muster under the First Amendment and the liberty of speech clause of
10 the California Constitution, a content-based speech restriction must serve a compelling
11 governmental interest and must be narrowly tailored to advance that interest while infringing on
12 as little speech as possible. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*,
13 502 U.S. 105, 118 (1991); *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45
14 (1983); *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 365 (2000)
15 (state Constitution). Clearly, there is no compelling governmental interest in prohibiting the
16 further disclosure of information about CSS already in the public domain, information that DVD
17 CCA’s own licensees are now permitted to disclose.

18 Nor is that the only constitutional hurdle an injunction of Mr. Bunner would have to
19 surmount. To once again selectively gag Mr. Bunner while leaving all the rest of the world,
20 including DVD CCA’s own licensees, free to speak and publish widely-available information
21 about the CSS algorithms and keys offends both the First Amendment to the federal Constitution
22 and the even “more protective” (*Griset v. Fair Political Practices Com.*, 8 Cal.4th 851, 866, fn. 5
23 (1994)) liberty of speech clause of California’s Constitution, which guarantees “[e]very person”
24 the right to “freely speak write and publish his or her sentiments on all subjects” (Cal. Const., art.
25 I, § 2, italics added). Selective censorship, permitting some speakers to voice a message while
26 forbidding others to voice the same message, is at the core of what our constitutional free speech
27 provisions forbid: “In the realm of private speech or expression, government regulation may not
28 favor one speaker over another.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S.

1 819, 828 (1995). Selective censorship is equally repugnant to the state and federal guarantees of
2 equal protection, which “condemn[] such discrimination among different users of the same
3 medium for expression.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

4 Any attempt to create state trade secret rights in publicly available information would
5 also run afoul of the preemptive force of federal patent and copyright law and the Intellectual
6 Property Clause of the federal Constitution (art. I, § 8). “[I]deas once placed before the public
7 without the protection of a valid patent are subject to appropriation without significant restraint. .
8 . . . [¶] . . . States may not offer patent-like protection to intellectual creations which would
9 otherwise remain unprotected as a matter of federal law. . . . [C]oncepts within the public grasp,
10 or those so obvious that they readily could be, are the tools of creation available to all.” *Bonito*
11 *Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. at 156. “[A]ll ideas in general circulation
12 [are] dedicated to the common good unless they are protected by a valid patent.” *Id.* at 159-60.

13 Nor will granting summary judgment for Mr. Bunner sound the death knell of trade secret
14 law, as DVD CCA will no doubt also argue. Trade secret law continues with full force against
15 those who breach contractual obligations or fiduciary or other legal duties in revealing trade
16 secrets on the Internet or elsewhere. It will continue to apply to those who steal trade secrets.
17 Even in the instance of DeCSS, DVD CCA may yet have claims against those directly involved
18 in its initial public disclosure. But they do not have a claim for injunctive relief against Andrew
19 Bunner, who merely found the program in the public domain and republished it. They certainly
20 do not have a claim after the program has been freely and continuously available for several
21 years all around the world and effectively the *only* persons restrained from publishing it are Mr.
22 Bunner and a handful of co-defendants.

23 IV. CONCLUSION

24 “Trade secret law provides far weaker protection in many respects than the patent law.
25 While trade secret law does not forbid the discovery of the trade secret by fair and honest means,
26 e. g., independent creation or reverse engineering, patent law operates ‘against the world,’
27 forbidding any use of the invention for whatever purpose for a significant length of time. The
28 holder of a trade secret also takes a substantial risk that the secret will be passed on to his

1 competitors, by theft or by breach of a confidential relationship, in a manner not easily
2 susceptible of discovery or proof. Where patent law acts as a barrier, trade secret law functions
3 relatively as a sieve.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. at 489-90 (citation and
4 footnote omitted).

5 DVD CCA and its predecessors had a choice once they had created CSS and decided they
6 were going to permit the public distribution of its algorithms and keys in software DVD players
7 and DVD discs. They could have sought patent protection for CSS, which would have assured
8 them the exclusive right to use it for the term of the patent. Instead, they gambled and chose to
9 attempt to protect it under the much weaker and more fragile law of trade secrecy. In doing so
10 they assumed the risk that through independent invention, reverse engineering, or general public
11 disclosure secrecy would be lost (a risk that was a virtual certainty given their decision to permit
12 distribution of CSS in software form and the weak encryption design of CSS), and assumed as
13 well as the risk that CSS would prove to be so readily discoverable that it would not qualify as a
14 trade secret in the first place. That CSS is now publicly known is due not to a shortcoming in
15 trade secret law but to DVD CCA’s own business decisions.

16 Now that the CSS algorithms and keys are public knowledge, DVD CCA seeks to place
17 the Court in the impossible position of trying to put the genie back in the bottle. Wisely,
18 California’s Uniform Trade Secrets Act and the federal and state Constitutions bar DVD CCA,
19 for the reasons we have explained above, from imposing that Sisyphean labor upon the Court.

20 Accordingly, summary judgment should be granted for defendant Andrew Bunner and
21 the action dismissed.

22 Dated: November 28, 2001

Respectfully submitted,

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26 Richard R. Wiebe
27 Attorney for Defendant Andrew Bunner
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1 **TABLE OF CONTENTS**

2 **I. INTRODUCTION AND SUMMARY** 1

3

4 **II. FACTUAL BACKGROUND** 3

5 **A. DVD MOVIE DISCS AND THE CSS ENCRYPTION SYSTEM**..... 3

6 **B. ANDREW BUNNER’S REPLICATION OF THE DeCSS DVD DESCRAMBLING PROGRAM**..... 5

7 **C. THE CSS ALGORITHMS AND KEYS REMAIN PUBLIC INFORMATION AVAILABLE TO ALL WHO**

8 **WISH TO KNOW**..... 5

9 *1. DeCSS And Other DVD Descrambling Computer Programs Disclosing CSS Algorithms*

10 *And Keys Remain Widely And Easily Available To All Who Wish Them* 7

11 *2. There Is Widespread Knowledge Of The CSS Algorithms And Keys In The Computer*

12 *Science Community*..... 7

13 *3. In Addition, There are Many Other Publicly Available Descriptions of The CSS*

14 *Algorithms And Keys*..... 8

15 *4. DVD CCA Has Given Up Trying To Identify The “Thousands” Of Sources Publishing*

16 *CSS Algorithms And Keys, Or To Name And Serve Them In This Litigation*..... 8

17 *5. DVD CCA’s Decision To Distribute CSS Worldwide In Software Form Made Its*

18 *Disclosure Almost Certain, As DVD CCA And Its Licensees Recognized In The CSS License*

19 *..... 10*

20 **III. ARGUMENT**..... 11

21 **SUMMARY JUDGMENT MUST BE GRANTED BECAUSE THE WIDESPREAD**

22 **PUBLIC AVAILABILITY OF THE ALLEGED CSS TRADE SECRETS PRECLUDES**

23 **DVD CCA’S CAUSE OF ACTION FOR INJUNCTIVE RELIEF** 11

24 **A. THE SUMMARY JUDGMENT STANDARD**..... 11

25 **B. CALIFORNIA’S UNIFORM TRADE SECRETS ACT PROHIBITS INJUNCTIVE RELIEF WHEN THE**

26 **ALLEGED TRADE SECRET IS PUBLICLY KNOWN, AS IS THE CASE HERE** 12

27

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2
3
4
5
6
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8
9
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11
12
13
14
15
16
17
18
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23
24
25
26
27
28

C. THE FIRST AMENDMENT AND OTHER FEDERAL AND STATE CONSTITUTIONAL PROVISIONS PROHIBIT USING STATE TRADE SECRET LAW TO ENJOIN THE PUBLICATION OF PUBLICLY-AVAILABLE INFORMATION..... 17

IV. CONCLUSION..... 19

TABLE OF AUTHORITIES

CASES

Aguilar v. Atlantic Richfield Co., 25 Cal.4th 826 (2001) 11

Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930)..... 10

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)..... 12, 13, 19

Enterprise Leasing Co. v. Ehrnke, 3 P.3d 1064 (Ariz. Ct. App 1999) 13

Griset v. Fair Political Practices Com., 8 Cal.4th 851, 866 (1994)..... 18

Hoechst Daifoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411 (4th Cir. 1999)..... 15

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) 12, 20

Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352 (2000) 18

Murray v. Bank One, 649 N.E.2d 1307 (Ohio App. 1994)..... 13

Perry Ed. Assn. v. Perry Local Educators’ Assn., 460 U.S. 37 (1983) 18

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)..... 19

R. A. V. v. St. Paul, 505 U.S. 377 (1992) 18

Religious Tech. Center v. F.A.C.T.NET, Inc., 901 F.Supp. 1519 (D. Colo. 1995)..... 15

Religious Tech. Center v. Lerma, 908 F.Supp. 1362 (E.D. Va. 1995) 15, 16

Religious Tech. Center v. Netcom On-line Commun. Servs., 923 F.Supp. 1231 (N.D. Cal. 1995)
 13, 14, 15

Reno v. A.C.L.U., 521 U.S. 844 (1996)..... 14

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995)..... 19

Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U.S. 105 (1991)..... 18

Underwater Storage, Inc. v. U. S. Rubber Co., 371 F.2d 950 (D.C. Cir. 1966)..... 17

Vacco Industries, Inc. v. Van Den Berg, 5 Cal.App.4th 34 (1992)..... 13

STATUTES

Civil Code § 3426 13

Civil Code § 3426.1 13

Civil Code § 3426.2 2, 15, 17

1 Code Civ. Pro. § 437c..... 11

2
3 **OTHER AUTHORITIES**

4 Sen. Com. on Jud., Rep. on Assem. Bill 501, 8 Sen. Jour. (1983-1984 Reg. Sess.) p. 1388314,
5 15, 17

6 Unif. Trade Secrets Act § 2 cmt., *reprinted in* 14 Unif. Laws Annot. 450 (West 1990)..... 15

7 Unif. Trade Secrets Act § 6 cmt., *reprinted in* 14 Unif. Laws Annot. 462 (West 1990)..... 17

8 **TREATISES**

9
10 1 Milgrim on **Trade Secrets** § 1.03 (2000) 14

11 1 Milgrim on **Trade Secrets** § 1.05[1] (2000) 13

12 **CONSTITUTIONAL PROVISIONS**

13 Cal. Const., art. I, § 2 18

14 U. S. Const., amd. 1 1, 12, 18

15 U. S. Const., art. I, § 8..... 19

16

17

18

19

20

21

22

23

24

25

26

27

28