TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

RULES

TREATISES

I. INTRODUCTION

Rumors of the death of trade secret law have been greatly exaggerated. Petitioner, the DVD Copy Control Association (DVD-CCA), has publicly distributed around the world millions of copies of a computer program called "CSS." In this action, DVD-CCA applied for and received a preliminary injunction against named and unnamed "defendants" who allegedly stole its trade secrets by illegally reverse engineering the CSS computer program and publishing on the Internet the results in the form of a different computer program, DeCSS. None of the "defendants" who allegedly accomplished the reverse engineering, however, appeared to contest the preliminary injunction.

The only defendant who appeared was respondent herein, a young man named Andrew Bunner whom DVD-CCA concedes was not involved in the reverse engineering and who instead found DeCSS on a publicly available news web site and merely republished it on his own web site. It was Mr. Bunner who appealed the preliminary injunction, and, in reversing the preliminary injunction, the Court of Appeal (unlike the trial court) properly focused its attention on him and on the effect of the injunction on *his* First Amendment rights.

No grounds for review exist here. Neither of the two issues on which DVD-CCA seeks review is presented in this case. Contrary to DVD-

CCA's contentions, the Court of Appeal did not hold that California's Uniform Trade Secrets Act ("UTSA," Civ. Code § 3426 et seq.) was unconstitutional in this case. Nor did the Court of Appeal hold that every preliminary injunction in a trade secret case violates the First Amendment. The Court of Appeal merely held that the trial court's preliminary injunction against Mr. Bunner, who had no contractual or other special duty under trade secret law to DVD-CCA, violated the First Amendment. Opinion, p. 18-20. DVD-CCA's misrepresentation of the Court of Appeal's decision, and the absence from this case of the issues on which it seeks review, is by itself sufficient reason to deny review.

Ample additional reasons for denying review exist as well. Most significantly, the DVD-CCA has premised its Petition to this Court on the single contention that the DVD-CCA could have, but did not, raise in either the trial court or the Court of Appeal: that the computer code known as DeCSS has both expressive and functional aspects and that its functional aspects render it worthy of only "intermediate" First Amendment protection, even in the context of a preliminary injunction that creates a prior restraint.

In the trial court and the Court of Appeal, the DVD-CCA acknowledged that "computer code is speech." As a factual matter, the record before the trial court did not develop the expressive versus functional aspects of DeCSS as it pertained to Mr. Bunner. As a legal

matter, DVD-CCA's briefs did not (until now) address intermediate First Amendment scrutiny, much less argue the novel contention that intermediate scrutiny can apply to hobble the well-settled principles of prior restraint analysis. Instead, DVD CCA argued that the First Amendment is irrelevant.

The Court of Appeal correctly decided the case by applying ordinary and well-settled principles of both trade secret and First Amendment law. Contrary to the DVD-CCA's representations, the Court of Appeal did not hold the USTA unconstitutional nor did it hold that the First Amendment forbids every trade secret injunction. In reversing the preliminary injunction, the Court of Appeal found simply that when someone like Mr. Bunner republishes an alleged trade secret, a preliminary injunction against republication is a prior restraint under the First Amendment, and that on the facts of this case the trial court had failed to accord sufficient weight to Mr. Bunner's First Amendment right to speak.

Nor is this a case of general application, for Mr. Bunner is in no way typical of defendants in trade secrets cases. As the Court of Appeal found, the DVD-CCA sued Mr. Bunner for republishing on his web site information that he had found on another publicly available news web site, information DVD-CCA claimed contained or reflected its trade secret. Mr. Bunner had no employment, fiduciary, contractual or other relationship with DVD-CCA and DVD-CCA made no showing that Mr. Bunner himself

used improper means to obtain the trade secret. The DVD-CCA's sole rationale for injunctive relief against Mr. Bunner was that he had republished the trade secret with actual or constructive knowledge that someone else had somehow obtained the trade secret improperly. Trade secrets plaintiffs whose "lifeblood" is their secrets rarely attempt to silence a republisher who found the secret in public. For all of the foregoing reasons, this case is unworthy of review under Rule of Court 29, and as a matter of the policy of this Court.

II. STATEMENT OF THE CASE

The decision of the Court of Appeal fully and fairly characterized the facts that the record presented. A DVD is a thin disk that can store a large amount of digital data. The digital data can include the video and audio images of entire motion pictures. Motion pictures stored on DVDs are encrypted (scrambled) by a uniform process called the "content scramble system" ("CSS"). The plaintiff and petitioner, the DVD-CCA, is a trade association that licenses the rights to the CSS. Opinion p. 1-2. Millions of copies of CSS have been distributed worldwide contained within DVD players and computer programs designed to play DVD disks.

In October 1999, a 15-year-old Norwegian boy allegedly posted a computer program entitled "DeCSS" onto the Internet. The trial court later found that the evidence was "fairly clear" that DeCSS was created by

reverse engineering CSS[1]. DeCSS was created so that CSS-encrypted DVD's could be played on computers that utilize an unsupported operating system known as Linux. Opinion p. 5. Soon after its initial publication, DeCSS spread across numerous websites worldwide. Opinion p. 2.

In a declaration filed with the trial court, Mr. Bunner stated that he had become aware of the existence of DeCSS through a popular news web site called slashdot.org. He explained that he had republished the DeCSS source code on his own web site to encourage its development for use with the Linux operating system for computers. At the time that he republished DeCSS, he had no information suggesting that DeCSS contained trade secrets or involved the misappropriation of trade secrets. Opinion p. 6.[2]

On December 29, 1999, the trial court denied the DVD-CCA's application for a temporary restraining order but issued an order to show cause regarding a preliminary injunction. Opinion p. 3. In opposition to the preliminary injunction, Mr. Bunner submitted the uncontradicted

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[1] The question of whether the reverse engineering done to create DeCSS was legal or illegal remains disputed. Opinion pp. 7-8.

[2] In one of its many attempts to blur the distinctions between Mr. Bunner and the other defendants (many of whom have not yet been served to this day), as well as non-defendants who have commented about CSS and DeCSS on the Internet, DVD CCA points out that on several web sites, including a news web site entitled slashdot.org, various persons boasted of their disrespect for the law in connection with their dissemination of DeCSS. (Opinion p. 8). It is undisputed that Mr. Bunner was *not* one of the persons who contributed to any discussion indicating a disrespect for the law. (Opinion p. 8, n. 5).

declarations of encryption experts attesting to the significance of DeCSS to scientific and academic research.

Almost three months after the first Internet publication of DeCSS, DVD-CCA brought this action and moved for a preliminary injunction.[3] In opposing the preliminary injunction, Mr. Bunner asserted that on the facts of this case an injunction against him would be a prior restraint and would violate his First Amendment rights. Bunner's Memo in Opposition to Preliminary Injunction, filed January 7, 2000, at pp. 14-15.

On January 21, 2000, the trial court issued a preliminary injunction, enjoining "defendants," including Mr. Bunner, from "[p]osting or otherwise distributing, on their web site or elsewhere, the DeCSS program, the master keys or algorithms of the Content Scrambling System ('CSS'), or any other information derived from this proprietary information." Opinion p. 7.

On November 1, 2001, the Court of Appeal issued its unanimous decision reversing the preliminary injunction. In so holding, the Court of Appeal first acknowledged its responsibility to determine whether the restraint on Mr. Bunner's First Amendment right to free expression was implicated. If First Amendment rights were implicated, then as a reviewing court it was obligated to make an independent examination of the whole

[3] In its Petition before this Court, the DVD-CCA pointed out that, "This case arises at a time when all information (including trade secrets) can be transmitted around the globe within seconds." Petition, p. 13. Yet, the first posting of DeCSS was in October 1999, and the DVD-CCA did not file suit until almost three months later, December 27, 1999. Opinion p. 2.

record. Opinion p. 10. Bose v. Consumer's Union 466 U.S. 485, 104 S.Ct. 1949 (1984).

The Court of Appeal then carefully distinguished between the DVD-CCA's rhetoric and what it had actually alleged of Mr. Bunner:

> DVD-CCA argues that 'this case is (and always has been) about theft of intellectual property.' Yet DVD-CCA's complaint did not allege that Bunner was involved in any 'theft' or other improper acquisition of intellectual property. Instead, DVD-CCA alleged that Bunner's republication of DeCSS violated the [Uniform Trade Secrets] Act because (1) DeCSS disclosed one of DVD-CCA's trade secret 'master keys,' (2) the master key had been obtained by improper means, and (3) Bunner had reason to know both that DeCSS contained the master key and that the master key had been obtained by improper means. Thus, while Bunner did not use improper means to *acquire* DVD-CCA's proprietary information, he *disclosed* DeCSS when he knew or should have known that DeCSS had been "created through the unauthorized use of proprietary information, which was illegally 'hacked.'

Opinion p. 11. The Court of Appeal further noted that Bunner's alleged knowledge was premised on the postings on the Internet in which various persons boasted that DeCSS was illicit. Nevertheless, the Court of Appeal assumed for the purposes of its discussion that the DVD-CCA had

established a reasonable probability that it could prove those allegations. Contrary to DVD-CCA, the Court of Appeal nowhere "adopted" the factual findings of the trial court, *see* Petition at pp. 2, 3, 4, 5, 7, nor could it under Bose. Instead it held that even assuming the facts to be as the trial court had found them, the injunction still violated Mr. Bunner's First Amendment rights.

The Court of Appeal then turned to the applicability of the First Amendment in this case. The Court of Appeal found that DeCSS was speech:

> Like CSS decryption software, DeCSS is a writing composed of computer source code that describes an alternative method of decrypting CSS-encrypted DVDs. Regardless of who authored the program, DeCSS is a written expression of the author's ideas and information about decryption of DVDs without CSS.

Opinion p. 14.

The Court of Appeal also noted that First Amendment was not without its limits and examined whether speech containing trade secret information fell within any of those limits. The Court of Appeal held that such speech, at least when spoken by a republisher without any contractual or fiduciary duty to the trade secret holder, did not. In so holding, the Court of Appeal distinguished cases that enjoined the use of a trade secret for profit or the breach of a contractual or employment obligation.

Finally, the Court of Appeal recognized that the preliminary injunction at issue acted as a prior restraint on speech. Prior restraints are highly disfavored and presumptively unconstitutional, and on the facts of Mr. Bunner's case, in which he was merely a republisher of publicly distributed information, the governmental interests expressed in the Uniform Trade Secrets Act were insufficient to overcome the presumption of unconstitutionality. The preliminary injunction in this case was therefore unconstitutional.[4]

III. LEGAL DISCUSSION

A. The Petition Must Be Denied Because Petitioner Failed to Raise Below Its Principal Ground for Review

The DVD-CCA premises its entire Petition on the argument that the "cardinal error" of the Court of Appeal was its failure to appreciate the functional aspect of the DeCSS computer code and therefore its failure to apply intermediate First Amendment scrutiny. Petition p. 15. If there was error here, it would be the DVD-CCA's tactical decision not to raise the intermediate scrutiny issue in either the trial court or the Court of Appeal. Under and settled appellate law, the DVD-CCA cannot raise this argument

[4] Mr. Bunner has now moved for summary judgment in the trial court on the grounds that DeCSS is no longer a secret capable of trade secret protection. The motion is set for hearing on January 29, 2002.

for the first time before this Court. The present Petition must be denied for this reason alone.

Rule 29 sets forth the various grounds that this Court will consider in determining whether to grant a petition for review. That Rule also sets forth the limitations on those grounds. Specifically, Rule 29 (b)(1) states that it is the policy of this Court not to consider: "Any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal."

This Court's policy expressed in Rule 29 restates well-settled law regarding the scope of appellate review:

> A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.

Richmond v. Dart Industries, Inc., 196 Cal. App. 3d 869, 874, 242 Cal. Rptr. 184 (1987) (*quoting* Ernst v. Searle, 218 Cal. 233, 240-1, 22 P.2d 715 (1933)).[5]

[5] There is an exception: A pure question of law on undisputed facts may be raised for the first time on appeal, especially when the issue involves important questions of public policy. Fisher v. City of Berkeley, 37 Cal. 3d 644, 654 n.3, 209 Cal. Rptr. 682, 693 P.2d 261 (1984). However, if the new theory contemplates a factual situation that is open to controversy and was not presented at the trial court level, then the exception cannot be applied. Richmond, 196 Cal. App. 3d at 879; MacDonald's Corp. v. Board of Supervisors, 63 Cal. App. 4th 612, 618, 74 Cal. Rptr. 2d 101 (1998).

The DVD-CCA did not raise the issue of intermediate First Amendment scrutiny on which it now relies in the lower courts. In the trial court, the DVD-CCA "conceded that 'computer code is speech,'" (Opinion p. 5) but argued that a preliminary injunction could be issued without First Amendment scrutiny. (DVD-CCA's Reply Mem. in Support of Preliminary Injunction, filed January 14, 2000 at pp.7-9. "DVD-CCA does not seek to enjoin any speech or expression protected by the First Amendment").[6]

In the Court of Appeal, the DVD-CCA again argued that the First Amendment had no application. It stated: "Bunner takes great pains to show that source code is speech. Plaintiff agrees, but the point is irrelevant." Respondent's Brief, filed June 14, 2000, p. 18 n. 5. The DVD-CCA again did not raise intermediate First Amendment scrutiny. Thus, throughout this litigation, the DVD-CCA has argued that the First Amendment does not apply to injunctions issued under the UTSA. Accordingly, the Court of Appeal noted only the DVD-CCA's "suggestion" that DeCSS is insufficiently expressive because it is composed of source code and has a functional aspect. Opinion at 13. In short, the Court of Appeal did not analyze the issue of intermediate First Amendment scrutiny because DVD-CCA did not argue it.

[6] Mr. Bunner did raise and rely upon his First Amendment rights in opposing the preliminary injunction. Bunner's Memo in Opposition to Preliminary Injunction, filed January 7, 2000 at pp. 14-15.

The Court of Appeal could not properly have addressed the issue of intermediate scrutiny in any event. As noted above, an issue first raised on appeal may be addressed only if the facts are not open to controversy. In the trial court, the distinction between expressive elements and functional elements of the DeCSS computer code was disputed as a factual issue. Mr. Bunner submitted declarations before the trial court reflecting the significance of DeCSS as expression on the topic of cryptographic research. Opinion p. 6. Against this record, the DVD-CCA cannot now assert that DeCSS is insufficiently expressive.

The DVD-CCA cannot raise a new issue before this Court that was not previously briefed. DVD-CCA cannot raise a new issue before any appellate court when that new issue involves factual issues that are open to controversy. For these reasons, review should be denied.

B. The Petition Must Be Denied Because the Issues of Which the Petitioner Seeks Review Are Absent in This Case.

Rule 28(e) requires a Petition to specify the issues presented for review. "Only those issues set forth in the petition or answer or fairly included in them need be considered by the court." Cal. Rule of Ct. 28(e). In its Petition to this Court, the DVD-CCA identified the following two issues for review:

1. Whether the injunctive relief provisions of the California Uniform Trade Secrets Act (Civ. Code § 3426, *et seq*. (1984)) (the "California UTSA"), are unconstitutional as applied to the facts of this case.

2. Whether the issuance of a preliminary injunction to stop dissemination on the Internet of a computer program that knowingly contains stolen trade secrets violates the First Amendment.

Petition p. 2. While these issues might be of interest on a hypothetical level, neither is reflected in the opinion of the Court of Appeal. This Court need not consider them.

This is most apparent with respect to the second issue. The DVD-CCA falsely states that the Court of Appeal held that the First Amendment forbids all trade secret injunctions. Petition p. 10. But the Court did not hold that the knowing disclosure of trade secret information could never be enjoined. The Court of Appeal did not even draw within the sweep of its decision all Internet disclosures of trade secret information. For example, the Court of Appeal expressly noted that: "The enforcement of a contractual nondisclosure obligation does not offend the First Amendment." Opinion p. 15. It found that this circumstance, and many others which might otherwise warrant injunctive relief, simply did not apply to Mr. Bunner.

The first issue also mischaracterizes the decision below. The Court of Appeal clearly held that it was the trial court's issuance of a preliminary injunction against Mr. Bunner that violated the First Amendment (Opinion, pp. 18-20); it nowhere held that the statute, Section 3426.2, was "unconstitutional as applied." Section 3426.2 simply affords a court the discretion to enjoin the misappropriation of trade secrets: "Actual or threatened misappropriation *may* be enjoined." That discretion may not be exercised so as to violate the federal and state constitutions. *See* San Diego Unified Port District v. U.S. Citizens Patrol, 63 Cal. App. 4th 964, 970, 74 Cal. Rptr. 2d 364 (1998). When it does, it is the judicial conduct of enforcement and not the statute itself that is found unconstitutional. *See* United States. v. Grace 461 U.S. 171 (1983); In re Marriage of Siller, 187 Cal. App. 3d 36, 51, 231 Cal. Rptr. 757 (1986). Thus, it was the trial court's exercise of discretion to enforce the statute, and not the statute itself, which was found constitutionally invalid.

In a similar vein, the DVD-CCA proclaims that the Court of Appeal "adopted the findings of the Superior Court below that Petitioner had established a likelihood of succeeding on its claim that [Mr. Bunner] and numerous other individuals misappropriated Petitioner's trade secrets." Petition p. 2. This mischaracterizes the Opinion further. In fact, the Court of Appeal expressly stated that Bunner was *not* "involved in any 'theft' or other improper acquisition of intellectual property." Opinion p. 11. The

Court of Appeal assumed for purposes of discussion, that Mr. Bunner had the requisite knowledge of the allegedly improper origin of DeCSS when he republished DeCSS on his web site. Opinion p. 12.

C. This is Not a Case of General Application with Respect to Trade Secret Law, Is Unremarkable as a Matter or First Amendment Law and Does Not Contravene Decisions Issued by the District Courts of Appeal or the Second Circuit Court of Appeals.

The decision of the Court of Appeal is unremarkable and unworthy of further review. Rule 29 of the California Rules of Court states that review will be granted, "where it appears necessary to secure uniformity of decision or the settlement of important questions of law." The Court of Appeal's decision in this case simply does not qualify. The decision is not one of general application with respect to trade secret law, the decision is unremarkable as a matter of First Amendment law, and there is no split among the Courts of Appeal of the various Districts that would warrant this Court's attention.

Because the circumstances surrounding Mr. Bunner's acquisition and disclosure of DeCSS are atypical, the opinion of the Court of Appeal is not one of general application in the law of trade secrets. Mr. Bunner was not an employee or a fiduciary of the DVD-CCA or of any of its licensees.

He did not enter into any contractual obligation to preserve the secrecy of CSS or to refrain from reverse-engineering CSS. He did not reverse engineer CSS and he did not create DeCSS. He learned about DeCSS from a publicly available web site, but had no knowledge of the source of DeCSS prior to the filing of this action. Mr. Bunner did not engage in any bribery or other form of skullduggery. He did not use DeCSS or profit from its use. He was not the first person to post DeCSS on the Internet, did not boast of his disdain for the law, and he removed DeCSS from his web site immediately when the DVD-CCA lawyers first notified him of the action, before being enjoined.

The holding of the Court of Appeal's Opinion in this case is simply that if a trade secret becomes so public that it reaches someone innocent like Mr. Bunner, publication cannot be enjoined. Because trade secrets holders already know that protection of trade secrets requires vigilance, the holding of the Court of Appeal adds little to the state of the law. And, contrary to the DVD-CCA's assertions, the vigilant are not without remedy.

Because the Court of Appeal's decision distinguishes cases with relationships involving duties of confidentiality (as opposed to mere republication) that decision leaves intact the prior California case law upholding injunctive relief. *See e.g.* Morlife, Inc. v. Perry, 56 Cal. App.4th 1514, 66 Cal. Rptr. 2d 731 (1997) (former employees using a confidential customer list enjoined); Courtesy Temporary Service, Inc. v. Camacho, 222

Cal. App. 3d 1278, 272 Cal. Rptr. 352 (1990) (same); Religious Technology Center v. Netcom On-Line Communication Services, Inc., 923 F. Supp. 1231 (1995) (enjoining former Scientology minister who had entered into a confidentiality agreement). That is, in part, why the DVD-CCA would be hard-pressed to find any case anywhere with a defendant analogous to Mr. Bunner and has cited none. The DVD-CCA would further be hard-pressed to find any case where the result would be materially different under the reasoning applied by the Court of Appeal.

The Court of Appeals decision is unremarkable as a First Amendment case. Computer code is speech. Junger v. Daley, 209 F.3d 481, 484-485 (6th Cir. 2000); Bernstein v. U. S. Dept. of State, 922 F. Supp. 1426, 1434-35 (1996). That proposition was sufficiently unremarkable as applied to DeCSS for the DVD-CCA to concede the point prior to filing its Petition with this Court. Because the trial court acted to prevent disclosure of that speech before a trial on the merits, its preliminary injunction acted as a prior restraint. *See* Wilson v. Superior Court, 13 Cal. 3d 652, 658, 119 Cal. Rptr. 468 (1975); *see also*, New York Times Co. v. United States, 403 U.S. 713 (1969); Bernstein, 922 F. Supp. at 1438.[7] Prior

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[7] "The term "prior restraint" is used "to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4-14 (1984) (emphasis added). Temporary restraining orders and permanent injunctions -- *i. e.,* court orders that

restraints are highly disfavored and presumptively unconstitutional. Hervitz v. Hoefflin, 84 Cal. App. 4th 1232, 1241 (2000).

A prior restraint analysis applies equally to content-neutral or content-based enactments. *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 223 (1990)(plurality opinion of O'Connor, J); Bernstein v. U.S. Dept. of Justice, 176 F.3d 1132, 1143 n.17, *reh'g in banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999)(prior restraint analysis proper for computer program). The Sixth Circuit Court of Appeals applied prior restraint doctrine to overturn an injunction against the publication of trade secrets and other confidential material in Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996). In that case, a *Business Week* reporter obtained documents exchanged between two parties to a confidentiality agreement. The district court enjoined their publication. The Sixth Circuit reversed, finding that the commercial interest in the confidential documents was insufficient to justify an injunction.

Similarly, in Ford Motor Co. v. Lane, 67 F. Supp. 2d 745 (E.D. Mich. 1999), the district court dissolved a temporary restraining order. The Court held that the First Amendment provides an affirmative defense to trade secret misappropriation when the moving party seeks a prior restraint

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actually forbid speech activities -- are classic examples of prior restraints. *See id.,* § 4.03, at 4-16." *Alexander v. United States,* 509 U.S. 544, 550 (1993).

on speech. It noted that, "[i]n the absence of a confidentiality agreement or fiduciary duty between the parties, Ford's commercial interest in its trade secrets and Lane's alleged improper conduct in obtaining the trade secrets are not grounds for issuing a prior restraint." Ford Motor Co., 67 F. Supp. 2d at 753. *See also* Chicago Lock Co. v. Fanberg 676 F.2d 400, 216 U.S.P.Q. 289 (9th Cir. 1982) (mere use of trade secret does not create basis for liability; absent showing of confidential relationship, no duty can be imposed to enjoin distribution of secret lock codes under California trade secret law.)

As in Proctor & Gamble, Ford Motor Co. and Chicago Lock Co., no confidentiality agreements or fiduciary duties exist between the DVD-CCA and Mr. Bunner. Moreover, the circumstances surrounding Mr. Bunner and his publication of DeCSS do not suggest any countervailing vital governmental interest that might justify a prior restraint against that disclosure. These conclusions also are not very remarkable.

Nor is review necessary to secure uniformity of decision. The context of Rule 29 makes clear that the uniformity of decision to which Rule 29 refers is uniformity between and among the various District Courts of Appeal. The Rule does not compel review so that California law might conform to the decisional law of other states, even under a uniform act, or to decisional law of the federal courts. In this case, the DVD-CCA has not

identified any conflict between the District Courts of Appeal. Review is not necessary on this ground.

In its Petition, the DVD-CCA cites the recent Second Circuit Court of Appeals' opinion in Universal City Studios v. Corley, 2001 U.S. App. LEXIS 25330 (2d Cir. Nov. 28, 2001), to support its position that a preliminary injunction against the publication of DeCSS warrants only intermediate First Amendment scrutiny. However the applicable law, procedural posture and the facts of Corley are all different from the present case.

First, in Corley, the basis for the lawsuit was not state trade secret law, but a violation of the anti-circumvention "tools" provisions of the federal Digital Millennium Copyright Act (17 U.S.C. §§ 1201 et seq.) ("DMCA"). The DMCA is grounded in the desire to protect copyright. Second, Corley concerned a permanent injunction issued after trial. The Court of Appeals here correctly limited its analysis to the law of preliminary injunctions. Corley. Opinion at 19.

Third, the Corley decision was based upon factual findings developed during a trial focusing on the implications of the publication of DeCSS for the movie studios who hold the copyrights on DVD movies. Neither Mr. Bunner nor DVD CCA was a party to the Corley case so those factual findings can have no application here. *See* Knowles v. Tehachapi Valley Hospital District, 49 Cal. App. 4th 1083, 1091, 57 Cal. Rptr. 2d 192

(1996) (as a matter of due process, preclusive effect of a judgment only binds the parties to an action). The DVD-CCA cannot borrow a different factual record from Corley -- a case brought under a different law and in a substantively different procedural posture -- to create a new issue supporting review before this Court.

In short the present case has different parties at a different procedural point with a different factual record and a different underlying substantive law. It is neither necessary nor appropriate for this court to, as DVD CCA suggests, "reconcile," the First Amendment's application to a preliminary injunction under California state trade secret law with the First Amendment's application to a permanent injunction under federal copyright law.

Even if this Court were to find the Second Circuit's reasoning to be persuasive, this Court could not follow the Second Circuit without imposing a different factual record on Mr. Bunner. This Court would also have to bountifully excuse the DVD-CCA's concessions and its failure to raise the point below. In short, this Court may not reconcile this case to the analysis of Corley without itself violating the very rules of proper appellate procedure that are the foundation of the law of this Court.

IV. CONCLUSION

For the foregoing reasons, Mr. Bunner respectfully requests that this Court deny Petitioner's Request for Review.

Dated: December 24, 2001

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