Supreme Court No. S102588

IN THE
SUPREME COURT OF CALIFORNIA

DVD COPY CONTROL ASSOCIATION, INC.,	)	Court of Appeal No. H021153
Plaintiff/Respondent,	)	Superior Court No. CV 786804
v.	)	
ANDREW BUNNER,	)	
Defendant/Appellant.	)	

After a Decision of the Court of Appeal, Sixth District,
Reversing a Judgment of the Superior Court,
Santa Clara County, Hon. William J. Elfving

BRIEF OF MICROSOFT CORPORATION, FORD MOTOR COMPANY, THE BOEING COMPANY, SEARS, ROEBUCK & CO., THE PROCTER & GAMBLE COMPANY, AOL TIME WARNER INC., BELLSOUTH CORPORATION, THE COCA-COLA COMPANY, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PLAINTIFF/RESPONDENT

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INTEREST OF *AMICI*

This case presents questions of profound importance concerning the proper reconciliation between trade secret law, as it has developed over the centuries, and the guarantees of free speech contained in the First Amendment to the U.S. Constitution and the Liberty of Speech Clause of the California Constitution. These issues are brought to the fore by the Court of Appeal's unprecedented holding that an injunction prohibiting an Internet web site operator from disclosing trade secrets violates his right to free speech.

The *amici* – Microsoft Corporation, Ford Motor Company, The Boeing Company, Sears, Roebuck & Co., The Procter & Gamble Company, AOL Time Warner Inc., BellSouth Corporation, The Coca-Cola Company, and the National Association of Manufacturers ("NAM")[1] – represent a wide range of large American corporations and businesses spanning the software, automotive, aerospace, retail, consumer-products, internet access, entertainment, telecommunications, food-and-beverage, and manufacturing industries, all of which rely on trade secret law to protect valuable and sensitive information. During the past year alone, *amici*'s combined sales, not even counting those of NAM's membership, totaled more than $410 billion. *Amici* are alarmed that if the lower court's decision is upheld, its consequences will extend well beyond the unlawful publication of trade secrets in this case to include a much broader array of

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1 NAM is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and medium-sized companies) and 350 member associations serving the manufacturers and employees in every industrial sector and all 50 states. Its members employ 18 million people in manufacturing enterprises throughout the United States.

situations in which the intellectual property of American business is embedded in trade secrets.[2] If the decision is affirmed, businesses will no longer be able to rely on California courts to preserve a wide range of trade secrets, from customer lists to blueprints to industrial know-how – even the secret formula for Coca-Cola. The loss to California will be that valuable trade secrets will not be protected against unlawful misappropriation and disclosure, and the State could become a haven for intellectual property thieves.

The sweep of the issues before this Court is profound. Eliminating trade secret protection whenever the First Amendment is invoked will reduce the productivity of businesses, which will have negative effects on the overall rate of innovation. In today's digital age, as this case demonstrates, the loss of effective judicial protection for trade secrets means that processes developed and employed by U.S. companies could easily be disseminated worldwide, destroying a principal advantage of U.S. companies in the global marketplace.

For this reason, *amici* believe it is imperative that courts issue injunctions – as they have always done – to protect the value of intellectual property, including patents, copyrights, trademarks, *and* trade secrets. Contrary to Defendant Bunner's arguments, the First Amendment is

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[2] Although employees of *amici* Microsoft and AOL Time Warner (through its subsidiary, Warner Bros.) currently serve on the board of plaintiff DVDCCA, those employees serve only in their personal capacities. In any event, Microsoft and AOL Time Warner write here to address their much broader and independent interest in the scope of protection for their trade secrets. The ramifications of the Court of Appeal's decision extend far beyond the specific trade secret of DVDCCA to the trade secret rights of all companies who might find their valuable intellectual property misappropriated by someone in the State of California.

entirely compatible with intellectual property owners' rights to seek injunctive relief, and the Constitution does not require an unwise disruption of settled commercial expectations. Indeed, the decision below is squarely at odds with *Universal City Studios, Inc. v. Corley* (2d Cir. 2001) 273 F.3d 429, in which the court gave persuasive reasons for sustaining, against a First Amendment challenge, an injunction issued under the Digital Millennium Copyright Act, 17 U.S.C. § 1201 et seq. (Supp. V 1999).

SUMMARY OF FACTS

Plaintiff offers a technology known as the Content Scramble System ("CSS") that protects commercial movies released in DVD format from unlawful copying. To achieve this end, CSS uses secret encryption keys in combination with certain algorithms to protect DVD titles from unauthorized access and copying. Norwegian Jon Johansen obtained access to CSS and one of its keys through a process the lower courts assumed at this stage of the proceedings to be improper.[3] He used that information to create a computer program known as "DeCSS" that decrypts DVD titles without authorization. Andrew Bunner, the defendant in this case, obtained DeCSS and posted it on his website.

Plaintiff is not in a position to alter its CSS system in response to DeCSS because its members have already sold hundreds of millions of CSS-encoded DVDs and consumers have spent billions of dollars to purchase CSS-compatible DVD equipment. The lower courts assumed at this stage of the proceedings that when Bunner posted DeCSS on his web

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[3] Hence, the issue of how Johansen acquired the trade secret, including the propriety of reverse engineering, is not implicated at this stage of the proceedings, and this brief takes no position on the issue.

site he knew, or had reason to know, that it had been illegally obtained. The only secure and effective relief for this misappropriation of a trade secret is an injunction, which, as issued by the trial judge, prohibited

> [p]osting or otherwise disclosing or distributing, on their websites or elsewhere, the DeCSS program, the master keys or algorithms of the Content Scrambling System ("CSS"), or any other information derived from this propriety information.

In view of the potential free speech issues presented, the trial judge narrowed the injunction's scope to accommodate the defendant's legitimate First Amendment interest in discussing aspects of CSS:

> Nothing in this Order shall prohibit discussion, comment or criticism, so long as the proprietary information identified above is not disclosed or distributed.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

1. Trade secrets are recognized as private property under the laws of every State, *see* Restatement First of Torts § 757 (1939), and the U.S. Supreme Court has held that trade secrets are a form of private property protected under the Fifth Amendment of the U.S. Constitution. Trade secret protection applies in circumstances in which other forms of intellectual property rights are inadequate or unavailable, and thus trade secrets are indispensable in any regime of intellectual property rights. The Supreme Court has emphatically held that nothing in the federal law of copyrights and patents preempts the state law of trade secrets. *See Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 473-74 [94 S. Ct. 1879, 1882-84, 40 L. Ed. 2d 315, 320-22].

2. In most cases the misappropriator of trade secrets is a competitor of the trade secret owner, and thus has no incentive to publicize his wrongdoing; accordingly, the First Amendment and trade secret law typically do not overlap. In a limited but growing number of cases, however, a party who obtains a trade secret is intent not upon its illegal commercial use, but upon its destruction, which it seeks to achieve by placing the trade secret into the public domain. In such cases, an injunction against publication is often the only way a court can prevent destruction of the trade secret. With rare exceptions, such injunctions, which are issued on viewpoint neutral grounds, do not violate the First Amendment.

In some First Amendment contexts, courts typically refuse to issue injunctions and require the plaintiff to be content with a damages remedy. In defamation cases, for example, the risks of censorship are manifest. It is often difficult to determine whether a given statement is true or false, or even whether it is a protected statement of opinion. An injunction therefore runs the risk of denying the public information about matters of political, social, or intellectual importance.

In contrast, the issuance of injunctions against the unauthorized republication of copyrighted material is entirely consistent with the First Amendment. Injunctions against copyright infringement serve to promote interests in creating expression, while a "fair use" privilege ensures that copyrighted speech is not insulated from comment. In contrast to defamation, the equities involved in a copyright infringement generally are not difficult for a court to determine, so the risk of censoring speech that is important to the public debate is minimized. Vigorous counterspeech offers some protection against defamation, but is useless when intellectual property infringement is concerned.

In determining whether injunctions may issue consistent with the First Amendment, trade secrets are more like copyrighted materials than defamatory statements. As with copyrights, there are no public gains from the publication of encryption technologies, customer lists, blueprints, or industrial know-how. Moreover, damages frequently are wholly ineffective when it comes to protecting the value of a trade secret to its owner. Finally, in sharp contrast with defamation, counterspeech does nothing to diminish the impact of the loss. Violations of trade secrets frustrate the private communication of others. No citizen has a right to demand that a stranger release his trade secrets to the public. Nor should any person who knowingly receives a trade secret from a thief be able to disclose that information with impunity.

Trade secret cases are not about preserving the right to criticize government officials, public figures, or public policy, nor in the typical case do they aid the search for truth in the marketplace of ideas. Save in the most exceptional case (and certainly not this one), the vindication of trade secrets through injunctive relief does nothing to frustrate a compelling interest in public disclosure or to impair any legitimate First Amendment value. Indeed, in a parallel context, the matter was so clear to the Second Circuit in *Corley* that it upheld an injunction against publication of DeCSS without so much as mentioning Supreme Court decisions, such as *New York Times Co. v. United States* (1971) 403 U.S. 713 [91 S. Ct. 2140, 29 L. Ed. 2d 822], that rejected prior restraints of publications on matters of vital public concern.

The Court of Appeal's suggestion that injunctions are appropriate in copyright cases but not in trade secret cases is unpersuasive. It hardly matters that copyrights are created under federal law, while trade secret protection primarily arises under state law. Both are valuable property interests. Likewise, the copyright privilege of fair use makes no sense in the context of trade secrets, given that *any* disclosure may result in the immediate and permanent loss of a trade secret. For First Amendment purposes, moreover, it cannot matter that copyrights are protected for only "limited times," when that limited period is several decades and the dangers of prior restraint, when applicable, increase with each *day* of postponed publication.

3. Nor in the unusual but increasingly common circumstances where the trade secret has been improperly disseminated by others (as has happened in this case) should injunctive relief be denied solely on that basis. If the plaintiff's interest is diminished by contemporaneous publication of the trade secret, then the same is necessarily true of the defendant's interest, for he only seeks to disseminate the identical material already in the public domain, and thus adds nothing to the common discourse. Where dissemination is widespread, although it is true that an injunction against defendants in a single action may not prevent *all* wrongful disclosures, injunctive relief may still prevent substantial unauthorized redistribution, help preserve the economic value of the trade secret, and serve as a deterrent to other misappropriators.

ARGUMENT

I. TRADE SECRETS ARE AN ESSENTIAL FEATURE OF MODERN SOCIAL AND ECONOMIC LIFE THAT DESERVE FULL AND EFFECTIVE LEGAL PROTECTION.

Trade secrets occupy a central place in the modern economic life of the Nation. Large amounts of industrial know-how and other types of business information are held in the form of trade secrets, and courts have been uniformly steadfast in protecting these trade secrets from misappropriation by competitors and other individuals who seek to compromise their value. As the Seventh Circuit has recognized, "trade secret protection is an important part of intellectual property, a form of property that is of growing importance to the competitiveness of American industry. Patent protection is at once costly and temporary, and therefore cannot be regarded as a perfect substitute." *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.* (7th Cir. 1991) 925 F.2d 174, 180.

The strong legal protection afforded to trade secrets advances multiple interests. Most obviously, the protection eliminates "the unfairness inherent in obtaining a competitive advantage through a breach of confidence." Restatement Third of Unfair Competition § 39, comment *a* (1995). Legal protection of trade secrets is also "justified as a means to encourage investment in research by providing an opportunity capture the returns from successful innovations." *Id*. These gains are themselves increased when the holder of a trade secret is able to enter into confidentiality agreements with others for whom the trade secret is of value. Thus, trade secrets are useful in "facilitating disclosure to employees, agents, licensees, and others who can assist in their use." *Id*.

Consistent with this objective, the trend for both federal and state law has been to strengthen the protection accorded to trade secrets. Most notably, the U.S. Supreme Court in *Ruckelshaus v. Monsanto Co*. (1984) 467 U.S. 986, 1003-04 [104 S. Ct. 2862, 2872-74, 81 L. Ed. 2d 815, 832-34], held that trade secrets are a form of private property protected by the Constitution. As the *Ruckelshaus* Court observed, *id.* at 1001-1002 [104 S. Ct. at 2871-73, 81 L. Ed. 2d at 831-33], trade secrets have the key characteristics of property rights: they are assignable, may serve as the res for a trust, and pass to a trustee in bankruptcy.

Though trade secrets are a form of property created by state law, Congress itself has recognized the significant value of trade secrets to the American economy and enacted legislation to protect them by criminalizing their misappropriation under federal law. *See* Economic Espionage Act of 1996, 18 U.S.C. § 1832. Congress has also taken steps to ensure that trade secrets shared with the U.S. Government remain confidential. *See generally* Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4) (trade secret exemption against disclosure). Further, Congress has built specific protections for trade secrets into many federal statutes. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136h; 10 U.S.C. §§ 2320-21 (protection of trade secrets by Department of Defense).

It is widely understood that damages, although surely useful, are insufficient by themselves to protect trade secrets. Defendants may be insolvent or incapable of compensating plaintiffs for destruction of trade secrets of immense value. Moreover, it is often difficult to quantify the precise harm to the plaintiff, or benefit to the wrongdoer, that results from misappropriation of a trade secret. Injunctions protect the often immense value of trade secrets without having to quantify that value, or the extent to which it has been diminished. Owing to the inadequacy of damage remedies, "a defendant's continuing or threatened use or disclosure of a trade secret normally justifies an award of injunctive relief." Restatement Third of Unfair Competition § 44, comment *b* (1995); *see also* 18 U.S.C. § 1836 (availability of injunctive relief under Economic Espionage Act).

Significantly, trade secrets are protected not merely as contract rights, but as a form of private property. Section 1 of the Uniform Trade

Secrets Act ("UTSA") broadly defines misappropriation to include acquisition of trade secrets from individuals who themselves used improper means to acquire the information, as well as by inducing a breach of a confidentiality agreement. This provision is critical to American business – it ensures that trade secrets are not lost simply because they are transferred by someone who is in privity of contract with the holder of the trade secret to a third party who is not. This result is consistent with the general principle, applicable to other forms of property, that any person who takes property with notice that it belongs to another holds it in trust for the owner and can be made to disgorge the property. In the context of trade secrets, it is of course both futile and unnecessary to order the "return" of a trade secret, since the trade secret holder never lost the information in the first place. But by the same token it is critical to prevent the person in wrongful possession of the trade secret from making any use of it, which is why injunctive relief lies at the very heart of trade secret protection.

The need for injunctive relief is even more pressing in the digital age, when the time between unlawful conversion of a trade secret and its transmission to a third party can be measured in nanoseconds. Whatever may be the type or form of the trade secret, once converted into digital form it can be disseminated quickly all over the world. Every recipient is capable of retransmitting it, as this case demonstrates so clearly, and those subsequent recipients are themselves capable of retransmitting it, and so on, and so on. Given the Internet, the ramifications of a trade secret violation increase "exponential[ly] rather than linear[ly]." *Corley*, *supra*, 273 F.3d at 452.

In the digital world, therefore, the equities often tilt more sharply toward the grant of an injunction given both the immediacy and the potentially unlimited extent of unlawful disclosure, and the significant injury to the commercial interests of trade secret owners that can result.

II. THE USE OF INJUNCTIVE RELIEF TO PROHIBIT THE PUBLICATION OF TRADE SECRETS DOES NOT VIOLATE THE FIRST AMENDMENT.

A. Conduct Involving Mixed Speech and Non-Speech Receives Only Limited First Amendment Protection.

Without doubt, the constitutional protection of free speech plays a vital role in the development and preservation of a free society and a free people. Freedom of speech contributes to "the pursuit of truth, the accommodation among interests, the achievement of social stability, the exposure and deterrence of abuses of authority, personal autonomy and personality development, or the functioning of a democracy." *Commodity Futures Trading Commission v. Vartuli* (2d Cir. 2000) 228 F.3d 94, 111, citing Kent Greenawalt (1989) *Free Speech Justifications*, 89 Colum. L. Rev. 119. As companies representing a diverse cross-section of the American economy, *amici* firmly embrace these principles.

The right to speak is not unlimited, however. Each free speech claim must be weighed against legitimate or compelling interests of the government. Our Nation's laws permit criminalization of, or injunctive relief against, speech that is threatening, fraudulent, or furthers criminal action. In such cases, the courts apply the intermediate standard of review, as set forth in *United States v. O'Brien* (1968) 391 U.S. 367 [88 S. Ct. 1673, 20 L. Ed. 2d 672], and *Turner Broadcasting System, Inc. v.* FCC (1994) 512 U.S. 622 [114 S. Ct. 2445, 129 L. Ed. 2d 497]. This test only "requires … that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"

Turner Broadcasting, 512 U.S. at 662 [114 S. Ct. at 2469, 129 L. Ed. 2d at 530].

Similarly, merely invoking the First Amendment against a suit to enjoin a trade secret misappropriation does not end the case. Whether trade secret law in general or the issuance of an injunction in a particular case satisfies the First Amendment standard should be assessed under the *O'Brien* standard.

The State of California has a long standing and legitimate interest in safeguarding trade secrets, in order to foster the innovation and competition that they further. Corporations have engaged in substantial amounts of business activity in California in the expectation that California courts would recognize significant investments made in the development and use of trade secrets. By contrast, the misappropriation of trade secrets generally raises no compelling interest in favor of disclosure that would trample the interests and expectations in enforcing well-established property rights.[4] Typically, as here, no one challenges the importance of political debate or artistic and literary expression, or the importance of "a marketplace of ideas" in which citizens and consumers can make informed decisions about their public and personal choices.

The specific facts here, involving the use of computer code, also present very different issues, because they involve the intimate admixture of speech and non-speech conduct. For a trade secret plaintiff to prevail in

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[4] Indeed, in this case the relevant balance is sharply in the opposite direction, since any state-authorized destruction of a trade secret counts as a presumptive taking of private property in violation of the Fifth Amendment to the United States Constitution under the Supreme Court's decision in *Ruckelshaus*, *supra*, 467 U.S. 986 [104 S. Ct. 2862, 81 L. Ed. 2d 815].

a case, it need not show that the underlying trade secret, such as the source and object codes here, does not contain *any* speech component. No one can doubt that both source and object code have the capacity to transmit information and so count as a form of speech. *See Corley, supra*, 273 F.3d at 446-48. Yet the fact that source code and object code are within the zone of constitutional protection does not eliminate the need for a more focused inquiry that distinguishes, as the court failed to do here, the transmission of *someone else's* code for *functional* purposes from the use or transmission of *one's own* code for the lawful *exposition of ideas*.[5]

The central fallacy in the defendant's brief is that it fails to address the question whether the government's legitimate interests should be outweighed by the disclosure in this (or any other) case. Instead, it collects snippets about the importance of protecting "speech" under the First Amendment in contexts that are far removed from the present reality of the

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[5] On this point, the Second Circuit rightly drew the necessary contextual distinctions by emphasizing the functional capabilities of DeCSS in overriding the legitimate CSS protection afforded to copyrighted materials:

> Unlike a blueprint or a recipe, which cannot yield any functional result without human comprehension of its content, human decision-making, and human action, computer code can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet. The only human action required to achieve these results can be as limited and instantaneous as a single click of a mouse. These realities of what code is and what its normal functions are require a First Amendment analysis that treats code as combining nonspeech and speech elements, i.e., functional and expressive elements.

Corley, *supra*, 273 F.3d at 451.

development and use of trade secrets in American business. In some cases, Bunner ignores important differences in the nature of the protected form of speech. Thus, at the very outset he writes that "[t]hese constitutional protections encompass information and ideas about 'all subjects'," Resp. Brief. at 11, as if trade secrets (including the source and object code at issue in this case) are necessarily covered in full. But the principal case he cites for this sweeping conclusion, *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th, 468, 493 [101 Cal. Rptr. 2d 470, 487-89, 12 P.3d 720, 736], stands only for the much narrower proposition that California affords commercial speech greater protection than it receives under the First Amendment. It is a vast leap from the *Gerawan Farming* court's general pronouncements about free speech rights to the specific trade secret and computer code issues raised in this case.

Likewise, general statements that the Constitution "shields painting of Jackson Pollock, music of Arnold Schoenberg, [and] Jabberwocky verse of Lewis Carroll," *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* (1995) 515 U.S. 557, 569 [115 S. Ct. 2338, 2345, 132 L. Ed. 2d 487, 501], have little bearing on the types of judicial relief available to a party whose trade secrets are compromised when they are posted on the web. Any First Amendment analysis must take into account the applicable constitutional tests and the fundamental interests in preserving trade secrets, as well as the dual nature – speech and nonspeech – of the defendant's activities here.

B. An Injunction Against the Dissemination and Distribution of the Trade Secret at Issue Does Not Constitute an Impermissible Prior Restraint.

Bunner's argument that an injunction would constitute an unlawful prior restraint is unavailing. The core application of the prior restraint doctrine, "as historically conceived and guaranteed," concerns matters of public criticism and debate: "The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to impose previous restraints upon publications *relating to the malfeasance of public officers* is significant of the deep-seated conviction that such restraints would violate constitutional rights." *Near v. Minnesota* (1931) 283 U.S. 697, 718 [51 S. Ct. 625, 632, 75 L. Ed. 2d 1357, 1369] (emphasis supplied). Indeed, in one sense even this articulation of the protection is too narrow, in that it makes no explicit reference to criticisms, however scurrilous, of public figures, or even comments about matters of public interest and concern. But there is not the slightest sense that anything the Court said in *Near* on matters of defamatory speech would apply to the wholly different question whether the First Amendment renders injunctive relief unavailable to protect intellectual property rights. As shown below, an injunction frequently is the *only* remedy effective for curbing trade secret violations.

That an injunction issued against the unauthorized disclosure of a trade secret is even less likely to run afoul of *Near* is demonstrated by the fact that the act of misappropriating a trade secret is usually committed for purposes of using it or, more recently, for the purposes of harming the interests of the trade secret owner, and not for any expressive value that the trade secret communicates. The value to most misappropriators is in the commercial value of utilizing the information that constitutes the trade secret, not in the speech that it communicates. Where an injunction, as here, is directed narrowly to the use and disclosure of the trade secret – rather than speech about the trade secret – the relief does not burden more speech than is necessary to further the government interest.

An injunction is appropriate in this case, and many trade secret cases, because damages are difficult to calculate and virtually impossible to collect. Counterspeech is of no benefit in cases of commercial appropriation, unlike those in which it is possible to have spirited disagreement in the marketplace of ideas. Finally, as is the case with Bunner, a trade secret defendant may retain the right to articulate his views where a limited injunction is granted.

If this were a nuisance, patent (35 U.S.C. § 283), or copyright (17 U.S.C. § 502) case, an injunction would routinely issue upon the proper showing having been made to the court. Injunctive relief is routinely accorded in trade secret cases to prevent any "actual or threatened" misappropriation of a trade secret. *See* UTSA § 2; *see also* 18 U.S.C. § 1836. The tiny free-speech tail in this case should not be allowed to wag the trade-secret dog. The injunction in this case is narrowly tailored to target the instrumental use of code in the operation of computer programs, where it functions no differently from a bag of burglar's tools that allow illegal entry into forbidden places.

In passing on a similar request for injunctive relief against the dissemination of the same computer code, the Second Circuit in *Corley* applied *Turner Broadcasting* and treated the restraint on publication as a content-neutral restriction governed by the intermediate standard of review. The Second Circuit found that the test had been met because (a) there was no way to narrow the injunction further, and (b) the government has legitimate and highly important interests in preventing the systematic violation of copyright law. No different approach is warranted with respect to injunctions against violations of trade secrets. They, too, are needed to preserve investments in developing valuable intellectual property.

Bunner insists that the injunction is content-based because it is directed only to what the code says and is not limited to "time, place and manner" regulations. There is no question that time, place and manner regulations fall into the content-neutral category. *See, e.g.*, *Kovacs v. Cooper* (1949) 336 U.S. 77 [69 S. Ct. 448, 93 L. Ed. 2d 513]; *Ward v. Rock Against Racism* (1989) 491 U.S. 781 [109 S. Ct. 2746, 105 L. Ed. 2d 661]. But the test for content-neutral restrictions also applies in other contexts – including, in particular, to cases like this one in which speech and conduct are inextricably linked. Thus, in *United States v. O'Brien* (1968) 391 U.S. 367 [88 S. Ct. 1673, 20 L. Ed. 2d 672], the U.S. Supreme Court upheld criminal sanctions against war protestors who had burned their draft cards on the steps of the South Boston Courthouse. That passionate symbolic protest contained far more dramatic communicative elements than the republication of plaintiff's trade secret on Bunner's website. But the *O'Brien* Court rebuffed it in these terms: "This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech can justify incidental limitations on First Amendment freedoms." *Ibid*. at 376 [88 S. Ct. at 1678-79, 20 L. Ed. 2d at 679-80]. The Court then held that the Government had carried its burden by showing that the draft certificate established proof of registration and facilitated communication between the registrant and the selective service. *Ibid*. at 378 [88 S. Ct. at 1680, 20 L. Ed. 2d at 680-681].

In contrast, the action of Bunner – like that of most trade secret defendants – had no appreciable symbolic speech component. The injunction here, as is true of most injunctions issued in trade secret cases, serves not to skew or distort the debate on any public issue, but to provide the only effective remedy against misappropriation of a trade secret. Indeed both here and in *Corley,* the case for enforcing the law is even stronger than in *O'Brien*, for in this case the government did not act on its own initiative, but only in response to a request for an injunction by a private party. *Corley*, *supra*, 273 F.3d at 450-51. Any and all speech about the role and desirability of CSS as a trade secret, or the role and purpose of DeCSS, lies outside the scope of the injunction, and may be pursued vigorously in any forum by Bunner.

Indeed, it appears that even if laws granting protection against the unauthorized misappropriation of trade secrets (including DeCSS) were classified as content-based regulations, this injunction would satisfy the more exacting conditions of strict scrutiny, which allows restrictions "only if they serve compelling state interests and do so by the least restrictive means available." *Corley*, *supra*, 273 F.3d at 450. No narrower form of relief is available: damages do not begin to remedy the wrong; porous injunctions are useless; and counterspeech is wholly ineffective. The tailoring here is virtually perfect. And even with this injunction, vast arenas of alternative speech are left, by design, completely open. The state's interest in the protection of intellectual property counts as compelling under the First Amendment, especially given that trade secrets are protected as property under both state and federal law.

Bunner also makes much of language in some Supreme Court cases to urge that the actual and threatened harm to plaintiff is too contingent and uncertain to justify prompt interference. Thus, Bunner's brief cites precedents holding that speech is protected even though it may have the "potential" to lead to the commission of an unlawful act. For example, *Brandenburg v. Ohio* (1969) 395 U.S. 444 [89 S. Ct. 1827, 23 L. Ed. 2d 430], struck down the Ohio Syndicalism Act on the ground that "the statute's bald definition of the crime [of syndicalism] in terms of mere advocacy is not distinguished from incitement to imminent lawless action." *Ibid.* at 448-49 [89 S. Ct. at 1830, 23 L. Ed. 2d at 434]. Similarly, *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. ___, 122 S. Ct. 1389 [152 L. Ed. 2d 403], invalidated the Child Pornography Prevention Act of 1996 ("CPPA"), 18 U.S.C. § 2256(8), insofar as the CPPA prohibited the creation of "virtual" child pornography. The Court rejected the position that the government could halt speech on the ground that "virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct" and noted that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ibid.* at 1403 [152 L. Ed. 2d at 403].

To be sure, these decisions are pillars of First Amendment law in the areas they govern. But they do not govern this case or any other ordinary trade secret case. In *Brandenburg* and *Ashcroft*, the key element in the Court's reasoning was its ability to identify the clear gap in time between the dissemination of the information to some third party and the potential performance of some subsequent independent lawless action that it might induce. In light of the substantive speech interests involved, the state therefore can be asked to wait until the illegal act is being committed, or until some unambiguous conspiracy or attempt has crystallized. Accordingly, these statutory provisions were invalidated in their entirety because other remedies could protect the state's legitimate interests, so that the narrower question of injunctive relief and prior restraints never arose cleanly at all.

In the case of the misappropriation of a trade secret (including this case), by contrast, where the trade secret can be (and was) disseminated rapidly on the Internet, the judgment on immediacy runs in the opposite direction. Dissemination of the trade secret itself is the act that has caused and will continue to cause harm. It is utterly impracticable to think that a trade secret owner facing such destruction of the value of its property could track down the countless individuals who aided in its destruction. Either disseminations of trade secrets are enjoined in such cases or the immediate harm arising from such disseminations will be realized. "Watchful waiting" is an option for political or artistic speech, but not trade secrets. Every element of a trade secrets case such as this calls for the issuance of an injunction.

C. Injunctions to Protect Trade Secrets Should Routinely Issue So Long as the Material Protected Does Not Contain Information of Significant Public Interest and Concern.

The dominance of the nonspeech over the speech elements present in the instant case removes all principled objections to plaintiff's request for injunctive relief. But trade secrets arise in many forms apart from secret computer code, including recipes, formulas, customer lists, industrial know-how and the like. In some of those cases, it may not be possible – as it is here – to justify injunctive relief on the ground that the primary object of the injunction is the suppression of illegal nonspeech conduct.

Accordingly, it is useful to address whether injunctions may be entered to protect against the misappropriation by publication of trade secrets that (unlike DeCSS) do not function predominantly as tools.

Any discussion of this issue begins with the decision of the U.S. Supreme Court in the Pentagon Papers case, *New York Times Co. v. United States* (1971) 403 U.S. 713 [91 S. Ct. 2140, 29 L. Ed. 2d 822], which strongly affirmed the indispensable role that private criticism of public action has not only in peacetime but also in times of war or other national crisis. If permitted to conceal its own misdeeds under a veil of secrecy, government can arrogate to itself powers that are not committed to it under our constitutional form of government. But even when First Amendment values are highest, the prohibition against prior restraint is not applied reflexively. When the nation is "at war," the Court has acknowledged, "no one would question but that [the] government might prevent … publication of the sailing dates of transports or the number and location of troops." *New York Times*, 403 U.S. at 726 (Brennan, J. concurring), quoting *Near, supra,* 283 U.S. at 716 [51 S. Ct. at 631, 75 L. Ed. at 1357]. Such information could be considered a type of "governmental trade secret" necessary to give it a comparative advantage in its military operations.

This essential feature of *New York Times* does not disappear when the trade secrets in question belong to a private organization; if anything, the First Amendment concerns are considerably less weighty here. A firm's customer list or unannounced product designs are not grist for public debate. Indeed, in many contexts, such as medical records, which themselves may be analogized to "personal" trade secrets, extensive efforts have been made to ensure their privacy and protection from unauthorized publication, so that it is inconceivable that a medical center would be helpless if one of its employees decided to disclose all its medical records on the web – or sent the medical records to a friend who was prepared to do so. *See* 42 U.S.C. § 702(a) & 45 C.F.R. § 160.103 (2002) (broad definition of "health information").

At present, the U.S. Supreme Court has not yet passed definitively on the question whether it is permissible to enjoin publication of some or all trade secrets. Nonetheless, its latest pronouncements strongly suggest that it would approve the use of injunctions in most trade secret cases. The most recent opinion of importance on the matter is *Bartnicki v. Vopper* (2001) 532 U.S. 514 [121 S. Ct. 1753, 149 L. Ed. 2d 787]. The defendant, Vopper, played on his radio show a tape of an electronic cell-phone conversation that a third party had intercepted between the plaintiffs, leaders of the local teachers union, during its contentious negotiations with the local school board. These conversations hinted at possible criminal conduct relating to a matter of substantial public concern: "If they're not gonna move for three percent, we're gonna have to go to their, homes … to blow off their front porches." The defendant received a recording of the conversation from a third-party and broadcast it even though he knew that the recording had been illegal under federal and state law. Notwithstanding that Vopper's conduct fell squarely within the statutory prohibition, a four-member plurality held that this disclosure was, on the authority of the Pentagon Papers case, protected against criminal prosecution. Notably, the plurality then stated: "We need not decide whether that interest is strong enough to justify the application of § 2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern." *Id.* at 533 [121 S. Ct. at 1764, 149 L. Ed. 2d at 787].

Although the plurality in *Bartnicki* postponed consideration of the trade secret question, Justice Breyer's concurrence (for himself and Justice O'Connor) made clear that his willingness to supply First Amendment protection rested on the more particularized inquiry that Vopper's publication related to the potential commission of a wrongful act, for which there is a general privilege of disclosure and which, of course, represents a matter of public concern. *Bartnicki*, 532 U.S. at 539, citing Restatement Third of Unfair Competition § 40, comment *c* (1995). Chief Justice Rehnquist's dissent (for himself and Justices Scalia and Thomas) argued that the statutory prohibition should have remained in place on the ground that it protects and thus promotes the speech of ordinary users. *Bartnicki*, 532 U.S. at 533-34. There is every reason to expect that these Justices would extend the same protection to the dissemination, in a non-news setting, as is the case here, of a trade secret where there is no matter of public interest and concern justifying the publication of the trade secret and the destruction of a protected property interest.

A similar analysis applies to many of the cases on which Bunner relies. In *CBS, Inc. v. Davis* (1994) 510 U.S. 1315 [114 S. Ct. 912, 127 L. Ed. 2d 358], Justice Blackmun, speaking only for himself on circuit, refused to enjoin the publication of a TV show that purported to make "public dissemination of [plaintiff's] confidential and proprietary practices and processes [that] would likely cause irreparable injury to plaintiff." Exactly what trade secrets, if any, were involved in the disclosure was never stated. But even if some trade secret claim could have been made out, CBS's investigation into allegedly unsanitary practices at a meat-packing plant implicated far more powerful public interests than are involved here. And, further, the harm to the plaintiff there was minimal, given that the story did not identify the plaintiff's plants by name.

In *CBS*, Justice Blackmun observed that prior restraint was an extraordinary remedy, but he also recognized that it would be allowed "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures." *Id*. at 1318 [114 S. Ct. at 914, 127 L. Ed. 2d at 358]. The danger of prior restraint in investigative reporting cases is that it lacks the panoply of protections that a criminal trial affords. Trade secret cases seldom involve "reportage" of any sort, and the real necessity lies with the need for prompt preliminary injunctions, for otherwise the value contained in the trade secret will be lost. It would be anomalous to allow any wrongdoer to nullify the elaborate set of protections afforded under trade secrets law simply by transferring the information to a third party who, with actual or constructive knowledge of the theft, is then able to disclose it, no matter what its content. These are indeed extraordinary situations, and the disclosure should be allowed only where what is posted is a matter of substantial public concern, as most trade secrets, like those here, are not.

The decisions of lower courts do little to advance Bunner's arguments. The odd fact-pattern in *The Procter & Gamble Co. v. Bankers Trust* (6th Cir. 1996) 78 F.3d 219, stemmed from an injunction that prohibited *Business Week* magazine from publishing routine legal pleadings and papers arising from the high-profile litigation arising out of Bankers Trust's alleged fraud in the sale of derivatives to P&G. The documents in question had been leaked to the magazine by mistake after the district court judge had improperly subjected them to an "unusual" protective order, which had in fact been lifted before the appeal was decided. No trade secrets were involved, and the story was without question "on a matter of public concern." *Id.* at 225. This prior restraint of "pure speech" was lifted, *id.* at 221, precisely because no compelling interest could be found to justify the restraint. The balance of interests is precisely the opposite of what is found here and the vast majority of trade secret cases that courts are called upon to decide.

Only one decision, from a federal district court in Michigan, even remotely could be said to truly support Bunner's argument: the ill-considered opinion in *Ford Motor Co. v. Lane* (E.D. Mich. 1999) 67 F. Supp. 2d 745, which involved the publication on the web of a variety of Ford Motor Company trade secrets. The court acknowledged that only some of the information disclosed (namely information about issues with certain engines and approaches to emission standards) could be regarded as directed to matters of public concern. Information regarding unannounced product designs, and other like information, was identified as of primary interest to Ford's competitors, and not as a subject of public concern. The release of such confidential information put Ford at a substantial disadvantage against its competitors. It is agreed that Ford could discipline or dismiss any of its employees who release this information and could also obtain injunctive relief if Ford learned of the violation before it occurred. It simply cannot be the case that the First Amendment should require Ford or any other party in possession of trade secrets to play games of "cat and mouse" with any person who acts in deliberate violation of Ford's rights. The decision in *Lane* that the doctrine of prior restraint prevents injunctions of any publication of a trade secret, whether or not it is a matter of public concern, has been rightly questioned, *see* 3 Roger M. Milgrim (2d ed. 2000) *Milgrim on Trade Secrets* § 14.01[2][a], at 14-26, and its overbroad interpretation of the First Amendment should not be followed in this case. Rather, this Court should follow the lead of all other courts that have recognized that the First Amendment does not authorize what amounts to the effective destruction of intellectual property.

Nor are Bunner's attempted distinctions between trade secrets, which largely arise under state law, and copyrights, which are based upon federal law, availing. In other contexts, property rights receive the same constitutional protection whether they are created under state or federal law. Thus, in *Ruckelshaus,* the Supreme Court explicitly recognized "the basic axiom that '[property] interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law,'" 467 U.S. at 1000 [104 S. Ct. at 2872, 81 L. Ed. 2d at 831], which included trade secrets under Missouri law, as defined under § 757, Comment *b*, of the Restatement of Torts. The obvious implication is that the question of prior restraint depends on the nature of the right asserted, not the law of its creation.

Bunner also argues that trade secrets differ from copyrights in that the former are of indefinite duration while the latter only exist for a limited term. Only copyrights, therefore, are certain to fall within the public domain at some future time. But the point bears no relevance to the propriety of granting injunctive relief. In those cases where the First Amendment values are highest, even a delay of a matter of *days* is heavily suspect. The copyright term of several decades is for these purposes an eternity and does not provide a reasoned basis to distinguish injunctions for copyright violations from injunctions for trade secret violations.

Finally, it makes no difference that trade secrets are not formally subject to a privilege of fair use. A privilege to quote protected materials makes sense in the world of copyright, for criticism of literary works requires the ability to reproduce material from the work under review. It is only the rare instance in which disclosure of the specific content of a trade secret is necessary to further public debate regarding the social consequences of its existence. But the fair use privilege does not allow the critic to quote so extensively as to enter into competition with the holder of the copyright work. *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, (1985) 471 U.S. 539, 560-69 [105 S. Ct. 2218, 2230-35, 85 L. Ed. 2d 588]. There is no justification for a privilege permitting the disclosure of trade secrets in instances, as here, in which the disclosure serves no purpose other than to destroy the trade secret.

The First Amendment "is not a license to trammel on legally recognized rights in intellectual property" of any kind. *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, (5th Cir. 1979) 600 F.2d 1184, 1186. Copyrights and trade secrets function in different ways because they fill different niches in the landscape of intellectual property. But, for all their differences, each requires the extensive use of injunctive relief to afford full protection for the underlying right.

D. Injunctive Relief Is Available Against Third Parties Who Acquire A Trade Secret With Knowledge That It Has Been Misappropriated.

In cases involving tangible property, no one stands lower in the legal hierarchy than the bad faith purchaser or bad faith donee. Although the bona fide purchaser for value often receives protection even against the true owner, the bad faith purchaser is universally required to return the property to its original owner. *See* Saul Levmore (1987) *Variety and Uniformity in the Treatment of the Good-Faith Purchaser* 16 J. Legal Stud. 43. In cases of intellectual property, the "return" of stolen information cannot be achieved by any transfer of any tangible document or thing. The essential feature of information allows it to be retained by a thief even as it is returned (*e.g.*, in the form of a specific document) to its owner. Only an injunction against the use of the information ensures that the bad faith taker surrenders his illicit interest, and allows the lawful owner to regain the exclusive right to use the trade secret.

That outcome makes eminently good sense here. High speed transmissions enable wrongdoers to violate confidentiality agreements instantaneously – and often anonymously – by transmitting trade secrets to other wrongdoers who are well aware of the illicit source of the information. If the law fails to protect against this obvious subterfuge, then ultimately it strips trade secret owners of effective legal protection in the digital age. Bad faith takers must stand in the shoes of the original wrongdoer, and be subject to the same set of legal sanctions, including injunctive relief. It hardly makes sense to allow the entire structure of intellectual property law, including that of trade secrets, to be subverted by the simple expedient of having one wrongdoer enlist a second into the service of the same illicit cause. If the initial wrongdoer is entitled to disclose information because it contains matters of public interest and concern, then the third party can inherit that privilege. But that exception does not apply in ordinary trade secret cases, and certainly not in this case. The third party who takes in bad faith, as the lower courts assumed Bunner did here, is bound by the same rules that govern the original thief.

In order to escape this logic, Bunner insists that "publication of a trade secret by a party who isn't bound by the contract … certainly ought to be protected against a preliminary injunction." Mark A. Lemley & Eugene Volokh (1998) *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 230), cited in Resp. Brief at 23. For the opposite position, see Richard A. Epstein (2000) *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 Stan. L. Rev. 1003, 1035-1046.

Lemley and Volokh's argument might have some plausibility if trade secrets were mere creations of contract, which do not normally bind strangers. But in this context their argument is subject to two fatal objections. First, it proves too much. If trade secrets were only creatures of contract, then they could never bind third parties as a matter of state law. Second, trade secrets are not created by contract. Rather, they are property rights created by invention, labor, and discovery which thereafter can be transferred and licensed by contract, just like real estate, copyrights, and patents. A single person can create and possess a trade secret, and surely does not do so by contract. The protection afforded trade secrets against confiscation offers yet further evidence, if any is needed, that trade secrets are property rights. The entire structure of the misappropriation provisions presupposes that trade secrets are protected even after they are illicitly transferred to third hands. One might as well say that "fences" are entitled to protection of their stolen property under the Takings Clause. Nothing in the First Amendment requires such a radical restructuring of fundamental property law concepts.

III. THE CONTEMPORANEOUS PUBLICATION OF A TRADE SECRET DOES NOT RENDER INJUNCTIVE RELIEF INAPPROPRIATE.

In many traditional trade secret cases, the plaintiff secures an injunction against publication before the trade secret is released to the public. In the run of trade secret cases, moreover, the trade secret is of value to a competitor, and, therefore, a court will not issue an injunction once the competitor has learned the secret. In this case, however, a potential harbinger of future fact patterns, the dynamics of the marketplace are quite different. The deliberate publication of DeCSS is not designed to neutralize a competitive advantage of one firm relative to others. Rather, as the court held in *Corley*, it is intended to allow vast numbers of consumers to obtain copyrighted material without paying the copyright owner to obtain a lawful copy. In this case, the rate of illegal copying (the ability to limit such copying being the source of economic value of CSS) will vary according to the ease with which potential copiers are able to gain access to plaintiff's trade secrets. Thus, the removal of the program after it has been posted on the web still has enormous economic value to the owners of copyrighted material that is protected by CSS. Since these parties cannot change CSS to counteract the code, injunctive relief remains critical in this case.

The usual test of whether injunctive relief should be granted asks the court to balance the equities. In trade secret cases such as this one, the equities surely favor the innocent plaintiffs who suffer further injury with every posting of their trade secret. The point is made by considering two scenarios. In the first, the distribution of a trade secret such as DeCSS is quite limited. In this case, the injunctive relief is effective so there is no reason to displace the usual rule on injunctive relief. The major gains to the plaintiff overwhelm any scintilla of speech interest of the defendant. Alternatively, if distribution of a trade secret is broader, the injunction is less effective than before, so that the plaintiffs' interest in its trade secret is somewhat reduced. But by the same token, the defendant's speech interest reduces to zero. What interest does a defendant have in disclosing a trade secret that is identical to that which is, by hypothesis, already widely available in the marketplace? Either way the balance between the two interests remains the same. Widespread publication of a trade secret does not reverse the balance of equities; it only reduces the effectiveness of the injunction. Yet even that can be improved if similar injunctions issue against the posting of trade secrets on other web sites. For that reason, it is all the more important that injunctions be granted in timely fashion whenever a party – be it a confidentiality agreement violator or a bad faith acquirer – intends to disseminate a misappropriated trade secret. In *Underwater Storage, Inc. v. United States Rubber Co.* (D.C. Cir. 1966), 371 F.2d 950, 955, the court said: "[W]e do not believe that a misappropriator or his privies can 'baptize their wrongful actions by general publication of the secret.'" Just so. No one, the defendant here included, should be permitted to profit from his or her own wrong.

CONCLUSION

For these reasons, the judgment of the Court of Appeal should be reversed and the injunction of the trial court reinstated.

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I, Linda Jesus, certify and declare as follows:

I am over the age of 18 years, and not a party to this cause and employed in the county where the mailing took place. My business address is 601 California Street, 19th Floor, San Francisco, California 94108. On July 11, 2002, I served the foregoing **Brief of Microsoft Corporation, Ford Motor Company, The Boeing Company, Sears, Roebuck & Co., The Procter & Gamble Company, AOL Time Warner Inc., BellSouth Corporation, The Coca-Cola Company, and the National Association of Manufacturers as *Amici Curiae* Supporting Plaintiff/Respondent** by placing a true copy in a sealed envelope and served to each party herein by overnight delivery via **Federal Express** to:

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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct that this declaration was executed at San Francisco, on July 11, 2002.

____

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of the California Rules of Court Rule 14(c)(1).

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