

Court of Appeal No. H021153

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

DVD COPY CONTROL ASSOCIATION,

Plaintiff and Respondent,

v.

ANDREW BUNNER,

Defendant and Appellant.

Supreme Court No. **S 102588**

Trial Judge: Hon. William J. Elfving
Santa Clara County Superior Court
Trial Court Case No. CV 786804

**SUPREME COURT
FILED**

DEC 04 2001

Frederick K. Ohlrich Clerk

DEPUTY

**PETITION FOR REVIEW
AFTER DECISION BY
COURT OF APPEAL, SIXTH APPELLATE DISTRICT**

JARED BOBROW (Bar No. 133712)
CHRISTOPHER J. COX (Bar No. 151650)
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

JEFFREY L. KESSLER
ROBERT G. SUGARMAN
EDWARD J. BURKE
RICHARD SIMON
RACHEL H. LASKY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

**Attorneys for Petitioner
DVD COPY CONTROL ASSOCIATION, INC.**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. PETITION FOR REVIEW	1
II. ISSUES PRESENTED FOR REVIEW	2
III. STATEMENT OF THE CASE.....	2
A. The CSS Trade Secrets.....	2
B. The Theft of the CSS Trade Secrets	4
C. The Irreparable Harm Caused by the Misappropriation and Dissemination of the CSS Trade Secrets	5
D. The Decision of the Superior Court	6
E. The Decision of the Court of Appeal.....	7
IV. SUMMARY OF REASONS FOR GRANTING REVIEW	8
V. REASONS FOR GRANTING REVIEW	10
A. This Court Should Grant Review To Settle the Important Legal Questions Raised by the Court of Appeal’s Decision Rendering the California UTSA Unconstitutional in This Case.....	10
B. This Court Should Grant Review To Settle the Important Questions of First Amendment Law Raised by the Court of Appeal.....	14
1. The Court of Appeal Failed To Consider the Functional Nature of the “Speech” at Issue.....	16
2. Had the Court of Appeal Applied the Correct First Amendment Standard, The Preliminary Injunction Granted Would Have Been Found to be Justified By The Important Governmental Interests at Stake.	19

TABLE OF CONTENTS
(continued)

	Page
C. This Court Should Grant Review To Ensure Uniformity of Decision Because The Ruling Below Is Contrary To An Established Body of Case Law Recognizing The Propriety Of Injunctive Relief To Protect Against The Misappropriation Of Intellectual Property.....	24
CONCLUSION.....	29

TABLE OF AUTHORITIES

FEDERAL CASES

	Page(s)
<i>Brach Van Houten Holding, Inc. v. Save Brach's Coalition For Chicago</i> (N.D. Ill. 1994) 856 F.Supp. 472	27
<i>Computer Assocs. Int'l, Inc. v. Altai, Inc.</i> (2d Cir. 1992) 982 F.2d 693	22
<i>Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.</i> (5th Cir. 1979) 600 F.2d 1184	27, 28
<i>Dallas Cowboys v. Pussycat Cinema, Ltd.</i> (2d Cir. 1979) 604 F.2d 200	27
<i>Ford Motor Co. v Lane</i> (E.D. Mich 1999) 67 F.Supp.2d 745	26
<i>Goto.Com, Inc. v. Walt Disney, Co.</i> (9th Cir. 2000) 202 F.3d 1199	27
<i>In re Iowa Freedom Of Information Council</i> (8th Cir. 1984) 724 F.2d 658	25
<i>Junger v. Daley</i> (6th Cir. 2000) 209 F.3d 481	15, 17
<i>Kewanee Oil Co. v. Bicron Corp.</i> (1974) 416 U.S. 470	11
<i>Michaels v. Internet Entertainment Group, Inc.</i> (C.D.Cal. 1998) 5 F.Supp.2d 823	28
<i>MAI Systems Corp. v. Peak Computer, Inc.</i> (9th Cir. 1993) 991 F.2d 511, <i>cert. dismiss</i> , (1994) 510 U.S. 1033	26
<i>Near v. Minnesota</i> (1931) 283 U.S. 697	18
<i>New York Times Co. v. United States</i> (1971) 403 U.S. 713	18
<i>Playboy Enterprises, Inc. v. Calvin Designer Label</i> (N.D.Cal. 1997) 985 F.Supp. 1220	27
<i>Richmond Newspapers, Inc. v. Virginia</i> (1980) 448 U.S. 555	26

	Page(s)
<i>Religious Technology Center v. Erlich</i> , (N.D. Cal. Jan. 6, 1997) 1997 U.S. Dist. LEXIS 23572	25
<i>Standard & Poor's Corp. Inc. v. Commodity Exch., Inc.</i> (S.D.N.Y. 1982) 541 F.Supp. 1273.....	26
<i>Turner Broadcasting Sys., Inc. v. FCC</i> (1994) 512 U.S. 622	19, 20
<i>Ty, Inc. v. Publications International, Ltd.</i> . (N.D. Ill. 2000) 81 F.Supp.2d 899	25, 28
<i>Ty, Inc. v. West Highland Pub., Inc.</i> (N.D.Ill. Oct. 5, 1998) 1998 WL 698922, 19.....	27
<i>United States v. O'Brien</i> (1968) 391 U.S. 367	15, 17
<i>Universal City Studios, et al. v. Corley, et al.</i> No. 00-9185 (2d Cir. Nov. 28, 2001) 2001 U.S. App. LEXIS 25330.....	<i>passim</i>
<i>Universal City Studios, et al. v. Reimerdes, et al.</i> (S.D.N.Y. 2000) 111 F. Supp. 2d 294, <i>aff'd sub nom., Universal City Studios, Inc., et al. v. Corley, et al.</i> No. 00-9185 (2d Cir. Nov. 28, 2001) 2001 U.S. App. LEXIS 25330.	<i>passim</i>
<i>Winterland Concessions Co. v. Sileo</i> (N.D.Ill. 1981) 528 F.Supp. 1201	28

STATE CASES

<i>Aguilar v. Avis Rent A Car System</i> (1999) 21 Cal. 4th 121	23
<i>American Credit Indemnity Co. v. Sacks</i> (1989) 213 Cal.App.3d 622	26
<i>Comedy III Productions v. Gary Saderup</i> (2001) 25 Cal.4th 387	21
<i>Courtesy Temp. Serv., Inc. v. Camacho</i> (1990) 222 Cal.App.3d 1278.....	26
<i>Empire Steam Laundry v. Lozier</i> (1913) 165 Cal. 95	26
<i>Masonite Corp. v. County of Mendocino Air Quality Mgmt. Dist.</i> (1996) 42 Cal.App.4th 436	25
<i>Peabody v. Norfolk</i> (1868) 98 Mass. 452	11, 12

	Page(s)
<i>People v. Toledo</i> (2001) 26 Cal.4th 221	24
<i>Smith v. Fair Employment and Housing Commission</i> (1996) 12 Cal.4th 1143	24
<i>Thompson v. Dept. Of Corrections</i> (2001) 25 Cal.4th 117	23

OTHER CASES

<i>Morison v. Moat</i> (Ch. 1851) 9 Hare 241, 68 Eng. Rep. 492.....	12
---	----

FEDERAL STATUTES

Digital Millennium Copyright Act, 17 U.S.C. § 1201 (1998)	5
Lanham Act, 15 U.S.C.A § 1125 (1946).....	27

STATE STATUTES

Cal. Civ. Code § 3426 (West 1984)	<i>passim</i>
---	---------------

INTERNATIONAL AGREEMENTS

Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1191	14
---	----

MISCELLANEOUS

Restatement (Third) of Unfair Competition.....	11
1 Melvin F. Jager, <i>Trade Secrets Law</i>	11, 12, 22
John C. Janka, <i>Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets</i> (1987) 54 U. Chi. L. Rev. 334(1987).....	12

I. PETITION FOR REVIEW

Petitioner, DVD COPY CONTROL ASSOCIATION, INC. (“DVD CCA”), respectfully petitions the Court to review the decision of the Court of Appeal for the Sixth Appellate District, filed on November 1, 2001. The Court should review this case because the Court of Appeal has created a conflict with the decisions of this Court and with both the federal courts and courts of other states on important questions of law and public policy.

This trade secret case with national implications addresses the fundamental question of whether the owner of an acknowledged trade secret can obtain a preliminary injunction to prevent individuals from destroying the trade secret through widespread disclosure. In the face of well-established law permitting injunctions to protect intellectual property, the Court of Appeal reversed the preliminary injunction granted by the Superior Court because it held that the First Amendment’s prior restraint doctrine prohibits the use of an injunction to prohibit expression. Because any trade secret can be communicated by expression, the Court of Appeal’s decision improperly eviscerates the only effective remedy historically available to protect a trade secret that has been stolen. The result is not only inequitable, it is also inconsistent with California’s economic welfare and two centuries of precedent under which injunctions protecting misappropriated intellectual property from further dissemination have peacefully co-existed with First Amendment principles. The Court of

Appeal's decision applies the First Amendment in a blunderbuss manner wholly inconsistent with governing authority and the decisions of numerous courts.

II. ISSUES PRESENTED 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 the dissemination on the Internet of a computer program that knowingly contains stolen trade secrets violates the First Amendment.

III. STATEMENT OF THE CASE

A. The CSS Trade Secrets

The Court of Appeal adopted the findings of the Superior Court below that Petitioner had established a likelihood of succeeding on its claim that Respondent and numerous other individuals misappropriated Petitioner's trade secrets, which are embodied in an access control and copy prevention system called the Content Scramble System ("CSS") that was developed to protect copyrighted motion pictures on DVDs. (Appellant's Appendix ("AA"), pp. 1-20, 68-70).

CSS is an encryption-based system that requires the use of appropriately configured hardware, such as a DVD player or a computer DVD drive, to decrypt, unscramble and play back -- but *not* copy -- motion

pictures on DVDs. (AA, pp. 69-71). CSS is a proprietary trade secret technology that was designed to provide the protection demanded by the motion picture studios against unauthorized copying of their copyrighted motion pictures (the "CSS Trade Secrets"). (AA, pp. 68-69). Without such protection, the motion picture studios would not have allowed their copyrighted motion pictures to be available in this new digital format. And, without motion picture content, there would be no market for DVD drives and DVD players. (AA, pp. 68, 75).

Petitioner, a trade association comprised of consumer electronics, motion picture and computer companies, is the sole licensor of the technology necessary to configure DVD players and drives to play CSS-protected DVDs. (AA, p. 73). Petitioner licenses CSS to at least 73 California-based companies. (AA, p. 76). Protecting against the misappropriation of proprietary CSS technology is essential for the maintenance of businesses in the motion picture, computer and consumer electronics industries, much of which is based in California. (AA, pp. 75-76).

Using CSS, the digital sound and audio files on a DVD are protected by a proprietary encryption algorithm. Only players and drives that contain the appropriate keys and decryption algorithm -- all of which are Petitioner's trade secrets -- are able to decrypt DVD files and thereby play movies stored on DVDs. The Court of Appeal adopted the Superior Court's findings that Petitioner established a likelihood of proving that this

confidential CSS data constitutes trade secrets, qualifying for protection under the California UTSA. (AA, p. 713; Ex. A., pp. 11-12).

B. The Theft of the CSS Trade Secrets

The Court of Appeal adopted the Superior Court's finding that Petitioner also established a likelihood of proving that its CSS trade secrets were unlawfully obtained by one or more of the defendants, acting in knowing violation of a software agreement, and that other defendants were disseminating the trade secrets with actual or constructive knowledge that they had been unlawfully obtained. Indeed, the Superior Court found that the evidence was "quite compelling" both on the issue "that the trade secrets were obtained through *improper means*," and on the issue "that [Respondent and the other] Defendants *knew or should have know[n]* [sic] that the trade secret was obtained through improper means when they posted it or its derivative to the Internet." (AA, pp. 713-14) (emphasis in original). Many of the defendants openly boasted on the Internet about their intent to violate the law, by disseminating Petitioner's trade secrets. (*See, e.g.*, AA, pp. 714, 348-54).

The primary vehicle which defendants created to improperly distribute CSS trade secrets was DeCSS, a software utility, or computer program, that enables a user to circumvent CSS protection, view DVDs on unlicensed players and make unprotected and unencrypted digital copies of DVD movies on his computer hard drive. (AA, pp. 73-74). Each of these activities is prohibited by the CSS License Agreement, issued to licensees

by DVD CCA. In October 1999, DeCSS was posted on the Internet with the stolen CSS trade secrets in both “source code” and “object code” forms.¹ (AA, pp. 479-80). In order to stop the wrongful dissemination of its stolen trade secrets and prevent the wholesale unauthorized decryption and copying of DVD motion pictures, Petitioner filed a Complaint for preliminary and permanent injunctive relief against Respondent Bunner and other defendants who had posted DeCSS on the Internet.

C. The Irreparable Harm Caused by the Misappropriation and Dissemination of the CSS Trade Secrets

The Court of Appeal also adopted the Superior Court’s finding that Petitioner had established a likelihood of proving that it would suffer severe and irreparable harm if the dissemination of the stolen trade secrets embodied in DeCSS was not enjoined. (AA, pp. 714-15; Ex. A, p. 12). In a case involving a challenge to the posting of DeCSS under the Digital Millennium Copyright Act, 17 U.S.C. § 1201 (1998) *et seq.*, a federal district court in New York recently likened the irreparable harm caused by disseminating DeCSS to the irreparable damage that would be caused by publishing a stolen combination for a bank security system:

[T]he availability of DeCSS on the Internet effectively has compromised plaintiffs’ system of copyright protection for DVDs, requiring them either to tolerate increased piracy or to

¹ “Source code” consists of a set of computer instructions in a particular format used by programmers, like “C” or “FORTRAN.” Compilers in computers translate source code into “object code,” a series of ones and zeroes that can be understood and executed by a computer. (AA, pp. 479-80).

expend resources to develop and implement a replacement system unless the availability of DeCSS is terminated. *It is analogous to the publication of a bank vault combination in a national newspaper.* Even if no one uses the combination to open the vault, its mere publication has the effect of defeating the bank's security system, forcing the bank to reprogram the lock. Development and implementation of a new DVD copy protection system, however, is far more difficult and costly than reprogramming a combination lock and, may carry with it the added problem of rendering the existing installed base of compliant DVD players obsolete.

Universal City Studios, Inc., et al. v. Reimerdes, et al., 111 F. Supp.2d 294, 315 (S.D.N.Y. 2000), *aff'd sub nom., Universal City Studios, Inc. v. Corley*, No. 00-9185 (2d Cir. Nov. 28, 2001) 2001 U.S. App. LEXIS 25330.

D. The Decision of the Superior Court

Based on the substantial record before it, the Superior Court (per Elfving, J.) issued a preliminary injunction on January 21, 2000. (AA, p. 711). The Superior Court found, and the Court of Appeal adopted its findings, that Petitioner likely would prove at trial that the defendants had misappropriated the CSS trade secrets:

The circumstantial evidence, available mostly due to the various defendants' inclination to boast about their disrespect for the law, is quite compelling on both the issue of Mr. Johansen's improper means and that [sic] Defendants' knowledge of impropriety.

(AA, p. 714). The Superior Court summarized the need for preliminary injunctive relief as follow:

If the Court does not immediately enjoin the posting of this proprietary information, the Plaintiff's right to protect this information as secret will surely be lost, given the current power of the Internet to disseminate information and the Defendants' stated determination to do so. . . . In that event, the protection afforded by the encryption system licensed by the Plaintiff, whether to limit DVD hardware and software suppliers or to control unauthorized copying and distribution of DVD content will become completely meaningless. The encryption system which the Plaintiff licenses cannot simply be changed like a secret code used by a military where everyone involved simply changes to the new code because millions of people own current DVDs and DVD viewing systems.

(AA, p. 715).

To avoid any First Amendment problems, the Superior Court carefully limited the extent of the relief that it granted, enjoining only the dissemination of the stolen trade secrets at issue:

[T]he Court refuses to issue an injunction against linking to other websites which contain the protected materials as such an order is overbroad and extremely burdensome. . . . [¶] Nothing in this Order shall prohibit discussion, comment or criticism, so long as the proprietary information identified above is not disclosed or distributed.

(AA, p. 716).

E. The Decision of the Court of Appeal

The Sixth Appellate District Court adopted the findings of the Superior Court that Petitioner had met its burden for obtaining a

preliminary injunction under the UTSA “in the absence of any free-speech concerns.” (Ex. A., p. 12). Nonetheless, the appellate court reversed the order granting the preliminary injunction, holding that DeCSS, as “source code,” was “pure speech” that could not be subject to any prior restraint under the First Amendment. (*Id.*, pp. 12-19). The Court of Appeal did not consider the predominantly functional nature of DeCSS -- which, at best, rendered it mixed conduct and speech subject to intermediate First Amendment scrutiny -- and failed even to consider, let alone balance, the important interests of the State of California in protecting against the theft and dissemination of trade secrets through the injunctive relief provisions of the California UTSA.

IV. SUMMARY OF REASONS FOR GRANTING REVIEW

This Court should review the Court of Appeal’s decision (1) because it raises important questions of law and public policy about the constitutionality of the California UTSA, the extent to which trade secrets are protected in this State from unlawful dissemination and the proper standard for applying the First Amendment in the trade secret context to mixed conduct and speech in the form of a computer program, and (2) to secure uniformity of decision both in this State and among the 43 other states (and the District of Columbia) that have enacted the Uniform Trade Secrets Act (“UTSA”), as well as all of the states that have otherwise made injunctive relief available to prevent the dissemination of wrongfully acquired intellectual property.

In holding the preliminary injunctive relief provisions of the California UTSA unconstitutional as applied to the facts of this case, the Court of Appeal effectively repealed the statutory protections afforded to trade secrets under California law, leaving Petitioner and other trade secret owners with no meaningful remedy to address the misappropriation and dissemination of sensitive technology that is the lifeblood of their businesses. The destruction of trade secret protection in California will have adverse economic effects not only on the California consumer electronics, motion picture and computer industries that sell DVDs and DVD players, but also on all California businesses that rely on trade secrets for the protection of their intellectual property. The Court of Appeal's decision that the First Amendment bars any preliminary relief to prevent the dissemination of a stolen trade secret is an unthinkable departure from existing law, which cries out for review by this Court.

Review by this Court is also necessary to resolve important questions of First Amendment law and to secure uniformity of decision. The Court of Appeal erroneously concluded that DeCSS was "pure speech" that was absolutely "protected" against any prior restraint by the First Amendment. This decision is directly at odds with the well-reasoned analysis of the Second Circuit Court of Appeals, that just reached the exact opposite conclusion. *Universal City Studios, Inc., et al. v. Corley, et al.*, No. 00-9185 (2d Cir. Nov. 28, 2001) 2001 U.S. App. LEXIS 25330. The appellate court below did not consider the undisputedly functional nature of the "trade secrets/speech" at issue, which should, at the very least, have

required the Court of Appeal to balance the strong California governmental interest in protecting stolen trade secrets against dissemination, under a First Amendment standard of intermediate scrutiny. If preliminary injunctive relief cannot be granted to prevent the misappropriation of intellectual property in a case like this -- where all of the other prerequisites for preliminary relief have been met -- then all of trade secret and intellectual property law will be plunged into a state of uncertainty. It is precisely for these important policy reasons that review by this Court is warranted.

V. REASONS FOR GRANTING REVIEW

A. **This Court Should Grant Review To Settle the Important Legal Questions Raised by the Court of Appeal's Decision Rendering the California UTSA Unconstitutional in This Case.**

In its decision below, the Court of Appeal flatly held that the First Amendment bars the granting of a preliminary injunction under the California UTSA to prevent the dissemination of a stolen trade secret.² The consequence of this ruling -- if it permitted to stand -- is that the value of

² In the words of the Court of Appeal: "California's Trade Secrets Act, like the laws enacted in many other states to protect trade secrets, does not merely enhance the enforcement of contractual nondisclosure obligations but sweeps far more broadly. It is within this broad sweep that DVD CCA seeks to place Bunner. Yet the scope of protection for trade secrets does not override the protection offered by the First Amendment. The First Amendment prohibits the enactment of any law 'abridging the freedom of speech' The California Legislature is free to enact laws to protect trade secrets, but these provisions must bow to the protections offered by the First Amendment." (Ex. A., p. 16).

trade secrets in California will be virtually destroyed. The reason is that no stolen trade secret can survive if the courts are powerless to enjoin its widespread disclosure.

In holding the preliminary injunctive relief provisions of the California UTSA unconstitutional in this case, the Court of Appeal failed to consider the paramount public policies that underlie the California UTSA and the critical role which preliminary injunctive relief plays in effectuating these policies. Trade secret law is founded on the core principle that businesses will not invest money, labor or equipment in an effort to create those innovations which cannot be copyrighted or patented if trade secret law does not fill the gap to enable them to profit from their labors. Such innovation is of substantial public benefit and has been found to be deserving of legal protection not just in California, but throughout the United States. Trade secret laws also promote business morality and protect the fundamental rights of the trade secret owner by punishing those who engage in unethical or improper means to acquire another's trade secret.³

³ See, e.g., *Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 481-82 (discussing the important principles underlying trade secret law); *Peabody v. Norfolk* (1868) 98 Mass. 452, 457 (“It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise”); Restatement (Third) of Unfair Competition (1995) § 39 cmt a and § 43. Indeed, trade secret laws played a critical role in fostering the development of the computer and other high technology industries in this country. 1 Melvin F. Jager, *Trade Secrets Law* (1997) § 1.02 at 1-2 to 1-4; see also § 1.04 at 1-10 to 1-13; 1.05 at 1-14 to 1-15.

Long before the First Amendment was adopted in 1791, the English common law recognized the value of commercial secrecy and the protection of trade secrets.⁴ Early cases confirmed the power of equity courts to grant injunctive relief to prohibit trade secret disclosure in appropriate cases.⁵ These fundamental tenets of trade secret law were subsequently incorporated into the common law of the various states, and eventually in the enactment of the UTSA by 43 states, including California, and the District of Columbia.⁶

Because the Framers were aware that the common law protected trade secrets when the First Amendment was enacted, there is no reason to believe that they intended the First Amendment to prevent courts from issuing injunctions to protect against the dissemination of stolen trade secrets. The Court of Appeal, however, gave no consideration to the importance of trade secret law as a governmental interest in ruling that no

⁴ “Trade secrets were surely an accepted part of English business practice, and therefore almost certainly of its practical, unrecorded legal practice as well, long before the adoption of the fifth amendment in this country.” John C. Janka, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets* (1987) 54 U. Chi. L. Rev. 334, 353 n.89.

⁵ See 1 Jager, *supra*, § 2.01 (citing *Yovett v. Winyard*, 1 Jac. & W. 394, 37 Eng. Rep. 425 (Ch. 1820) (enjoining disclosure of secret medical formulas) and *Morison v. Moat*, 9 Hare 241, 68 Eng. Rep. 492 (Ch. 1851) (same)); *Peabody*, *supra*, 98 Mass. at 457 (noting that the power of equity courts to enjoin disclosure was “well established by authority”).

⁶ By adopting the UTSA, California acknowledged the importance of harmonizing the law of trade secrets among the various states. “This title shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this title among states enacting it.” Civ. Code § 3426.8 (West 1984).

preliminary injunction could be issued against the dissemination of stolen secrets.

California's economy is fueled by businesses that rely on their ability to protect intellectual property and consequently they must be able to obtain prompt legal relief when those assets are stolen. This lawsuit alone affects hundreds of companies that license CSS (at least 73 of which are based in California) in three industries that have a substantial and prominent presence in this State -- the entertainment industry, the computer industry and the consumer electronics industry. Scores of California companies have made enormous investments in DVDs, DVD players, and DVD software based upon the existence and enforceability of the CSS trade secrets.

This case arises at a time when all information (including stolen trade secrets) can be transmitted around the globe within seconds. The harm caused by trade secret thefts can be magnified exponentially by the dissemination of the stolen intellectual property over the Internet. The decision below, by making trade secrets more vulnerable to such widespread dissemination, has the effect of aiding those who would seek to do great damage through the theft of trade secrets, at the expense of trade secret owners and the public.

While the Court of Appeal suggested that trade secrets could be adequately protected through a claim for damages or permanent injunctive relief (Ex. A, p. 19), this view ignores the fragility of trade secrets -- which depend on secrecy for their very existence. If a

preliminary injunction cannot be granted to halt the dissemination of a trade secret, the secret will lose all of its value before permanent relief can be obtained. As for an action for damages, that is little solace to a trade secret owner who does not want his intellectual property to be destroyed.⁷

By declaring the preliminary injunctive relief provisions of the California UTSA unconstitutional, the Court of Appeal not only decimates trade secret protection for the Petitioner and those California industries that rely on CSS trade secrets, it also puts at risk every California business that depends on trade secret law. If not reversed, the decision will discourage innovation, undermine business morality and otherwise impair the vital interests of the State of California.⁸

B. This Court Should Grant Review To Settle the Important Questions of First Amendment Law Raised by the Court of Appeal.

The decision of the Court of Appeal -- which applies a *per se* rule barring any preliminary injunction against the dissemination of the stolen trade secrets at issue in this case -- is fundamentally inconsistent with

⁷ This case is a perfect example. DVD CCA could never be made whole for the loss of its trade secrets in an action for damages against Mr. Bunner or any of the other defendants in this case.

⁸ The decision of the Court of Appeal also threatens to put the United States in breach of one of its international trade agreements, the Agreement on Trade-Related Aspects of Intellectual Property Rights. That agreement requires treaty signatories to afford owners of trade secrets legal protections, including "provisional relief," to prevent the theft of such intellectual property. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 41, 33 I.L.M. 1191, 1213-14.

established First Amendment analysis and precedent. As the United States Supreme Court has long recognized: “When ‘speech’ and ‘nonspeech’ elements are combined in a single course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien* (1968) 391 U.S. 367, 376; *Junger v. Daley* (6th Cir. 2000) 209 F.3d 481, 485. This standard of First Amendment review, known as “intermediate scrutiny,” permits preliminary injunctive relief to be granted against the dissemination of stolen trade secrets, like those contained in DeCSS, which are substantially functional in character and not pure speech.

The Court of Appeal’s cardinal error is its failure to recognize the functional nature of the “speech” at issue. It also inexplicably refused to consider the important California governmental interests that support the granting of a preliminary injunction in this case, *i.e.*, the value of protecting trade secrets against misappropriation and dissemination. Had it applied the correct First Amendment standard, the Court of Appeal would have had no choice but to conclude that a preliminary injunction against the dissemination of stolen CSS trade secrets is not barred by the First Amendment.⁹

⁹ In its opinion, the Second Circuit has expressly rejected the erroneous First Amendment analysis applied by the Court of Appeal below. *Universal City Studios v. Corley*, *supra*, 2001 U.S. App. LEXIS 25330 at *65, fn. 30.

1. The Court of Appeal Failed To Consider the Functional Nature of the “Speech” at Issue.

The Court of Appeal concluded that “DeCSS is a writing composed of computer *source code* which describes an alternative method of decrypting CSS-encrypted DVDs.” (Ex. A, p.14) (emphasis added).¹⁰ To the extent that DeCSS is written in a computer language that can be used to “describe” “an alternative method” of decrypting DVDs, it does arguably contain some limited element of speech. But the critical point is that DeCSS does not simply “describe” an alternative method of DVD decryption -- DeCSS is itself the *actual instructions* that *conduct* the decryption and use the CSS trade secrets. (AA, pp. 479-80). The mere fact that DeCSS may also contain expressive elements cannot obscure the fact that DeCSS is primarily a functional software device that decrypts DVDs.

As explained by the Second Circuit:

DeCSS is computer code that can decrypt CSS. In its basic function, it is like a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store’s products. DeCSS enables anyone to gain access to a DVD movie without using a DVD player.

¹⁰ The Court of Appeal’s belief that DeCSS was only disseminated as source code was in error. As the record reflects, and as Respondent Bunner pointed out in his motion to modify the decision of the Court of Appeal, DeCSS also exists, and was widely disseminated, as “object code.” (AA, pp. 479-80). This misunderstanding by the Court of Appeal apparently affected its decision, since it found that “object code” is not “expressive speech” and thus is not subject to First Amendment protection. (Ex. A., p. 14) (“If the source code were ‘compiled’ to create object code, we would agree that the resulting composition of zeroes and ones would not convey ideas.”).

Universal City Studios v. Corley, *supra*, 2001 U.S. App. LEXIS 25330 at *58; *see also Universal City Studios v. Reimerdes*, *supra*, 111 F. Supp. 2d at 328-29 (“[DeCSS] has a distinctly functional, non-speech aspect in addition to reflecting the thoughts of the programmers”).¹¹

The conclusion that DeCSS is not pure speech, but rather a combination of functional elements and speech, whose regulation is subject, at most, to intermediate First Amendment scrutiny, was expressly adopted by the Second Circuit in *Universal City Studios v. Corley*, *supra*, 2001 U.S. App. LEXIS 25330, and is also supported by *Junger*, *supra*, 209 F.3d 481, the principal case relied on by the Court of Appeal. The plaintiff in *Junger* challenged, on First Amendment grounds, a government regulation that barred the export of computer encryption software. After finding that the source code was expressive and thus within the purview of the First Amendment, the Sixth Circuit went on to hold that the functional capabilities of the computer code dictated that the regulation should be subject to only the “intermediate standard” of First Amendment review articulated in *O’Brien*. *Junger*, *supra*, 209 F.3d at 485-86.

Because DeCSS contains both speech and functional elements, its regulation under the California UTSA through a preliminary injunction should have been subject to only intermediate First Amendment scrutiny. It certainly should not have been subject to the unprecedented *per*

¹¹ Even Respondent Bunner admitted that he made the DeCSS program available not to express an idea, but to “provid[e] others with access to the ‘deCSS’ program, and thereby enabl[e] Linux users to play ‘DVDs’.” (AA, p. 287).

se rule applied by the Court of Appeal below, which does not even apply in cases involving pure speech.¹² As the Second Circuit found in *Universal City Studios v. Corley*:

Unlike a blueprint of 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.

Univ. City Studios v. Corley, 2001 U.S. App. LEXIS 25330 at *52-53.

The Court of Appeal erroneously applied the First Amendment doctrine against prior restraints that can be found in cases involving pure, political speech, such as *New York Times Co. v. United States* (1971) 403 U.S. 713 (the Pentagon Papers case) and *Near v. Minnesota* (1931) 283 U.S. 697, without considering how dramatically different the speech in those cases was from the dissemination of stolen trade secrets here. The speech sought to be enjoined in *New York Times* and *Near* lay at the very heart of First Amendment concern -- public debate about policy issues. *Universal City Studios v. Reimerdes, supra*, 111 F.

¹² See *New York Times Co. v. United States* (1971) 403 U.S. 713 (Court must consider government's justification for restraint).

Supp.2d at 334-35. Here, by contrast, the “speech” sought to be enjoined is a computer program containing stolen trade secrets whose very purpose is to decrypt, play and enable the copying of CSS-protected DVDs.

By posting DeCSS on his website, knowing that it contained stolen trade secrets, Respondent Bunner engaged in no expressive discourse about issues of public concern, but rather exploited the technical capacity of the Internet to supply operable software to users through the process of remote downloading. There is no First Amendment prohibition against a state law, like the California UTSA, providing for the issuance of preliminary injunctive relief to prevent the knowing dissemination of such stolen trade secrets with substantial functional elements.

2. Had the Court of Appeal Applied the Correct First Amendment Standard, The Preliminary Injunction Granted Would Have Been Found to be Justified By The Important Governmental Interests at Stake.

Under the Supreme Court’s intermediate scrutiny test, as long as a law affecting speech is a content neutral law of general applicability, it will satisfy the First Amendment:

[if] it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.

Turner Broadcasting Sys., Inc. v. FCC (1994) 512 U.S. 622, 662 (quoting *O’Brien*, 391 U.S. at 377); *Universal City Studios v. Corley*, *supra*, 2001 U.S. App. LEXIS 25330 at *60-73. As applied to a preliminary injunction

restraining Resondent's posting of DeCSS on the Internet, California's UTSA clearly meets these requirements.

The UTSA is in no way designed to "stifle[] speech on account of its message." *See Turner Broadcasting, supra*, 512 U.S. at 641. Rather, the proscriptions in the UTSA are intended to regulate *conduct* -- the theft and wrongful dissemination of trade secrets.

To the extent that the preliminary injunction granted below is claimed to have burdened the First Amendment rights of those who would illegally disseminate CSS trade secrets, such impact is incidental to the primary governmental purpose of the injunction, which is to prevent the theft and wrongful dissemination of the functional trade secrets at issue. As explained by the Second Circuit in *Universal City Studios v. Corley*:

In considering the scope of First Amendment protection for a decryption program like DeCSS, we must recognize that the essential purpose of encryption code is to prevent unauthorized access. *Owners of all property rights are entitled to prohibit access to their property by unauthorized persons. . . .*

But just as the realities of what any computer code can accomplish must inform the scope of its constitutional protection, so the capacity of a decryption program like DeCSS to accomplish unauthorized -- indeed, unlawful -- access to materials in which the Plaintiffs have intellectual property rights must inform and limit the scope of the First Amendment protection. [citation omitted]

Universal City Studios v. Corley, *supra*, 2001 U.S. App. LEXIS 25330 at *57, 60) (emphasis added).

The preliminary injunction granted below did not prevent any defendant from exercising his or her First Amendment rights. Instead, as the Superior Court found, the injunction had a *de minimus* effect on Defendants' ability to engage in speech:

At this point in the proceeding, the harm to the Defendants is truly minimal. They will simply have to remove the trade secret information from their web sites. *They may still continue to discuss and debate the subject as they have in the past in both an educational, scientific, philosophical and political context.*

(AA, p. 714) (emphasis added).¹³

Because it incorrectly applied a *per se* rule against any prior restraint of DeCSS, the Court of Appeal failed to balance, at all, the important governmental interests underlying trade secret laws in general, and California's UTSA in particular.¹⁴ As discussed above (pp. 12-13 *supra*), the UTSA is designed to further the public interest by, among other

¹³ In this connection, it is important to note that the preliminary injunction expressly did not enjoin any pure speech by defendants: "Nothing in this Order shall prohibit discussion, comment or criticism, so long as the proprietary information identified above is not disclosed or distributed." (AA, p. 716).

¹⁴ This Court recently reaffirmed the importance of conducting this type of balancing in the context of a First Amendment challenge to a claim for violation of the right of publicity. *See Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 (Court formulated what is essentially a balancing test between the First Amendment and the right of publicity).

things, encouraging people and companies to invest time, labor and money to innovate. This public policy greatly benefits the economy, particularly in high technology industries, such as those involving computer code and software:

Throughout this uncertainty as to whether patents and copyrights granted any protection to the computer field, the common law of trade secrets stood, by comparison, as a solid legal fortress. Any confidential computer technology, be it hardware or software, copyrightable or not, patentable or unpatentable, could be protected by the trade secret law. . . . The common law of trade secrets plays a major part in affording timely legal protection for our rapidly expanding technology.

1 Jager, § 1.02, at 1-3 to 1-4; *see also Computer Assocs. Int'l, Inc. v. Altai, Inc.* (2d Cir. 1992) 982 F.2d 693, 717 (“Precisely because trade secret doctrine protects the discovery of ideas, processes, and systems which are explicitly precluded from coverage under copyright law, courts and commentators alike consider it a necessary and integral part of the intellectual property protection extended to computer programs.”).

This case, in particular, strongly underscores California’s important governmental interest in applying the injunctive provisions of the UTSA to protect against the dissemination of stolen trade secrets. The injunction granted below prohibits the dissemination of a computer program that puts at risk three California industries that have invested heavily in DVD technology and CSS encryption -- movie studios, the computer industry, and the consumer electronics industry. Without secure

CSS encryption protecting DVDs, copyright owners would never have agreed to place and distribute their motion pictures on DVDs. (AA, pp. 68-69). The compelling California governmental interest in protecting these industries against the theft and dissemination of trade secrets in DeCSS outweighs any incidental harm to First Amendment concerns raised by defendants.

Indeed, the reasoning of the decision of the Court of Appeal, barring preliminary injunctive relief without any consideration of the important state governmental interests at stake, conflicts sharply with recent decisions of this Court, which make it clear that the mere fact that some form of speech is being constrained does not automatically bar the operation of a state statute that furthers an important government interest. In *Aguilar v. Avis Rent A Car System* (1999) 21 Cal. 4th 121, for example, this Court held that an injunction against the use of derogatory racial or ethnic epithets in the workplace was not an invalid prior restraint, since the trial court had made a determination that the use of such epithets would contribute to the continuation of a hostile or abusive work environment, in violation of California's Fair Employment and Housing Code (FEHA). The First Amendment concerns raised by the defendant in *Aguilar* -- which involved an injunction against something much closer to pure speech (racial epithets) than the DeCSS computer program at issue here -- were found to be outweighed by the state governmental interests underlying the FEHA.¹⁵

¹⁵ See also, *Thompson v. Dept. Of Corrections* (2001) 25 Cal.4th 117 (prison regulation is not violation of inmate's First Amendment rights

In its decision below, the Court of Appeal gave no weight at all to the State's strong interest expressed in the California UTSA and summarily overturned the preliminary injunction granted as an unlawful prior restraint. This Court should grant review to resolve these important questions of law and make it clear that the First Amendment does not operate in such an overbroad and mechanical manner.

C. This Court Should Grant Review To Ensure Uniformity of Decision Because The Ruling Below Is Contrary To An Established Body of Case Law Recognizing The Propriety Of Injunctive Relief To Protect Against The Misappropriation Of Intellectual Property.

In addition to raising the important legal questions and policy issues discussed above, the decision of the Court of Appeal threatens to create substantial confusion, since it departs from mainstream law upholding the propriety of injunctions to protect against the misappropriation of intellectual property. The Court of Appeal's divergence from this body of law is particularly troubling, given the fact that a "uniform" state law is at issue in 43 states and the District of Columbia and the high profile nature of this case.

Courts in California and other states have repeatedly recognized the importance of protecting intellectual property -- often

where regulation is reasonably related to penological interests); *People v. Toledo* (2001) 26 Cal.4th 221 (California's criminal threat statute is not violative of defendant's First Amendment rights); *Smith v. Fair Employment and Housing Commission* (1996) 12 Cal.4th 1143 (FEHA's prohibition of discrimination based on marital status is not violative of landlord's First Amendment rights).

through the issuance of preliminary injunctions -- notwithstanding First Amendment objections. Indeed, judicial recognition of the fact that the First Amendment does not bar injunctive relief to protect against the dissemination of misappropriated intellectual property is so well established that “there are not many reported cases in which challenges to copyright or trademark injunctions are made upon First Amendment grounds. Those challenges that are made have been summarily rejected.” *Ty, Inc. v. Publications International, Ltd.* (N.D. Ill. 2000) 81 F.Supp.2d 899, 902. The Court of Appeal has squarely departed from this body of case law, which holds that a First Amendment challenge does not automatically trump a state’s legitimate interests in affording injunctive protection to intellectual property rights.

For example, in *Religious Technology Center v. Erlich* (N.D. Cal. Jan. 6, 1997) No. C-95-20091 RMW, 1997 U.S. Dist. LEXIS 23572, the Northern District of California enjoined the dissemination of plaintiff’s trade secrets by prohibiting defendant from *posting* them on the Internet, pending trial. The court found that the balance weighed in favor of the plaintiff because “[i]f publication is not prohibited pending trial, RTC may lose any secrets it has. On the other hand, the injunction will not preclude defendant from engaging in criticism of the Church pending trial....” *Id.* at *42.¹⁶ In a different context, in *In re Iowa Freedom Of Information*

¹⁶ Numerous other California cases have granted injunctive relief to protect against the dissemination of trade secrets. *See, e.g., Masonite Corp. v. Co. of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436 (affirming injunction prohibiting the defendant from disclosing

Council (8th Cir. 1984) 724 F.2d 658, 662, the Court found that an attorney's representation that trade secrets were involved in a lawsuit was a sufficient basis to justify closing a court hearing for a review of the issue, despite the First Amendment rights of access of the public and the press. As the court noted: "Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed." *Id.* at 662; *see also, Standard & Poor's Corp. Inc. v. Commodity Exch., Inc.* (S.D.N.Y. 1982) 541 F.Supp. 1273, 1276-77 ("right to attend judicial proceeding should, in appropriate circumstances, give way to right to protect one's trade secrets"); *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 600 n.5 (J. Stewart, concurring) ("[t]he preservation of trade secrets . . . might justify the exclusion of the public from at least some segments of a civil trial").¹⁷

emission records); *MAI Systems Corp. v. Peak Computer, Inc.* (9th Cir. 1993) 991 F.2d 511, 519, *cert. dismissed*, (1994) 510 U.S. 1033 (enjoining defendant computer servicing company from infringing computer systems manufacturer's copyrights and misappropriating certain trade secrets); *Courtesy Temp. Serv., Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1291 (enjoining former employees from misappropriating temporary help agency's trade secrets); *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal.App.3d 622, 638 (enjoining former employee of credit insurance underwriter from misappropriating trade secrets); *Empire Steam Laundry v. Lozier* (1913) 165 Cal. 95 (affirming injunction prohibiting the defendant from using plaintiffs' customer lists).

¹⁷ Respondent will likely rely on one other divergent case, *Ford Motor Co. v. Lane* (E.D. Mich. 1999) 67 F.Supp.2d 745, to support the Court of Appeal's decision. That case, however, is not only wrong in its First Amendment analysis (as shown above), it is completely distinguishable from the facts presented here. In this case, the CSS trade secrets are predominantly functional in character and thus clearly subject to intermediate First Amendment scrutiny. In *Ford Motor Co.*, by contrast,

In an analogous vein, injunctions to prevent the copying of trademarks under the Lanham Act, 15 U.S.C.A § 1125 (1946), have successfully withstood First Amendment challenge. In *Ty, Inc. v. West Highland Pub., Inc.* (N.D.Ill. Oct. 5, 1998) 1998 WL 698922, *19, for example, the court found defendant's First Amendment challenge to an injunction seeking to prevent both trademark and copyright infringement to be unpersuasive. Similarly, in *Brach Van Houten Holding, Inc. v. Save Brach's Coalition For Chicago* (N.D. Ill. 1994) 856 F.Supp. 472, the court granted a preliminary injunction to prevent the defendant from using plaintiff's logo. "Trademarks are property rights and as such, need not 'yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.'" *Id.* at 476 (quoting *Dallas Cowboys v. Pussycat Cinema, Ltd.* (2d Cir. 1979) 604 F.2d 200, 206.¹⁸

Another area of intellectual property law where injunctive relief has been repeatedly recognized as appropriate despite First

the trade secrets were internal company business plans that came much closer to being pure speech.

¹⁸ See also, *Goto.Com, Inc. v. Walt Disney, Co.* (9th Cir. 2000) 202 F.3d 1199 (affirming preliminary injunction in trademark infringement suit); *Playboy Enterprises, Inc. v. Calvin Designer Label* (N.D.Cal. 1997) 985 F.Supp. 1220 (granting preliminary injunction to prevent alleged trademark infringement); *Hasbro v. Internet Entertainment Group, Ltd.* (W.D.Wash. Feb. 9, 1996) 1996 WL 84853 (granting preliminary injunction in trademark infringement case); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.* (5th Cir. 1979) 600 F.2d 1184 (affirming preliminary injunction and rejecting prior restraint argument in a case of alleged copyright and service mark infringement).

Amendment challenges is the right of publicity. In *Winterland Concessions Co. v. Sileo* (N.D.Ill. 1981) 528 F.Supp. 1201, for example, the court issued a preliminary injunction to prevent the defendant from producing shirts bearing the names of musical entertainers because “[t]he First Amendment is ‘not a license to trammel on legally recognized rights in intellectual property.’” *Id.* at 1214 (quoting *Dallas Cowboys Cheerleaders*, 600 F.2d at 1188). Similarly, in *Michaels v. Internet Entertainment Group, Inc.* (C.D.Cal. 1998) 5 F.Supp.2d 823, the court granted a preliminary injunction against the dissemination of a videotape of the plaintiff based on a right of publicity claim.

Requests for preliminary injunctions against copyright infringement have also regularly survived First Amendment challenge. In *Ty, Inc. v. Publications International, Ltd.* (N.D.Ill. 2000) 81 F.Supp.2d 899, the court granted a preliminary injunction to prevent defendant’s copyright and trademark infringement. Similarly, in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.* (D.Utah 1999) 75 F.Supp.2d 1290, the court granted plaintiff’s motion for a preliminary injunction over the defendant’s First Amendment defense where defendant was posting plaintiff’s copyrighted materials on the Internet, noting that “[t]he First Amendment does not give defendants the right to infringe on legally recognized rights under the copyright law.” *Id.* at 1295. Likewise, in *Dallas Cowboy Cheerleaders, supra*, 600 F.2d at 1184, a preliminary injunction was affirmed to prevent copyright infringement. “If the record demonstrated a substantial likelihood that the Cowboys Cheerleaders could

have a valid copyright infringement claim against the defendants the district court was well within its discretion in granting the preliminary injunction.”
Id. at 1188.¹⁹

There is no principled reason to treat trade secret law any more stringently under the First Amendment than other forms of intellectual property. To the contrary, there is a greater public interest in granting preliminary relief against the dissemination of stolen trade secrets because -- unlike copyrights, trademarks and rights of publicity -- the entire value of a trade secret can be destroyed if preliminary relief is not afforded to protect its secrecy. Review should be granted by this Court to ensure that California trade secrets are provided uniform protections as exists in other states and in other areas of intellectual property jurisprudence.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that its Petition for Review be granted so that this Court may settle the important questions of law and public policy that it raises and so that a uniformity of decisions can be ensured in First Amendment and intellectual

¹⁹ The Court of Appeal sought to distinguish the copyright cases cited by Petitioner on the ground that the uniform UTSA, unlike copyright law, “lacks any constitutional foundation.” (Ex. A, pp. 16-17). However, as shown above, First Amendment jurisprudence establishes a balancing of interests that takes into consideration the strong public policy underlying intellectual property protection, regardless of whether that policy emanates from the Constitution, the common law or statute, or some combination thereof.

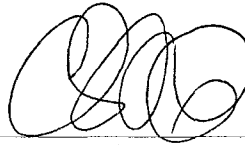
property law. Unless the decision below is overturned by this Court, the value of all trade secrets in California will be placed in serious jeopardy.

DATED: November 30, 2001

Jared Bobrow
Christopher J. Cox
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3000

Jeffrey L. Kessler
Robert G. Sugarman
Edward J. Burke
Richard Simon
Rachel H. Lasky
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000

By: _____



Christopher J. Cox
Attorneys for Petitioner
DVD Copy Control Association, Inc.