

IN THE  
SUPREME COURT OF THE STATE OF CALIFORNIA

DVD COPY CONTROL ASSOCIATION,  
INC.,

Plaintiff/Respondent,

v.

ANDREW BUNNER,

Defendant/Appellant.

Case No. S102588

Court of Appeal No. H021153

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BRIEF FOR *AMICUS CURIAE*  
THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION

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## I. INTRODUCTION

The Intellectual Property Owners Association (“IPO”) urges this Court to confirm that pretrial injunctions against disclosure of trade secrets are not barred by the First Amendment.<sup>1</sup> Although IPO appears as amicus nominally in support of Respondent DVD CCA, it takes no position on the factual merits of the underlying litigation. Its interest is in challenging a proposition that threatens to eviscerate trade secret law. In this respect, IPO intends that this brief function appropriately to provide perspective that is missing from the parties’ briefs. For example, while DVD CCA focuses attention on the “functional” aspects of its code as justifying special protection, IPO argues that *all* trade secrets are equally entitled to preliminary injunctive relief. And while Bunner argues in many ways that DeCSS cannot be a trade secret because it was already published, IPO submits that these arguments are irrelevant to the core issue, which transcends the factual thicket of the dispute between these parties.

As will be argued more fully below, the issue before this Court is of profound importance to California and to the development of intellectual property and constitutional jurisprudence. Trade secret law, based on twin policies of preserving business ethics and promoting innovation, broadly protects all sorts of private information of value to business, ranging from technical formulas and designs to strategic plans and customer lists. Unless preliminary injunctions are available to restrain disclosure by unauthorized persons, the rights protected by trade secret law will fade and in many cases disappear. While the First Amendment generally prohibits prior restraints, it was not designed to shield acts

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<sup>1</sup> While the decision of the Court of Appeal can be read to apply only to cases where the defendant was not in contractual privity with the plaintiff, *DVD Copy Control Ass’n v. Bunner*, 113 Cal. Rptr. 2d 338 (2001), it can also be interpreted to broadly prohibit preliminary injunctions in trade secret cases. See *infra* Parts IV.B, V.D.

of misappropriation, acts which can be crimes under California as well as federal law. Traditional measures of scrutiny should not apply to trade secret actions; but even if they do, the state's strong interest in enforcing this right is sufficient justification for any collateral effect on speech.

## II. TRADE SECRET LAW IS CRITICALLY IMPORTANT TO CALIFORNIA

If intangible assets form the body of the information economy, trade secrets are its backbone. All patents start their life as confidential applications protected by trade secret law until their publication. Much software copyrighted in machine-readable form finds protection for its basic architecture in secret source code. Perhaps most importantly, when it comes to deciding how to protect innovation, business chooses trade secret law first, far ahead of patents.<sup>2</sup>

California's modern history is inextricably tied to the exploitation of technology, backed by intellectual property rights. Technology-based companies have helped build California into the seventh largest economy in the world.<sup>3</sup> For this state, protection of information assets is an extremely high priority.

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<sup>2</sup> Wesley M. Cohen, et al., "Protecting their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)," (Nat'l Bureau of Econ. Research, Working Paper No. 7552, 2000), <http://papers.nber.org/papers/w7552> (finding that trade secrecy tied with "lead time advantage" and was significantly ahead of patenting as a chosen mechanism for protecting innovation).

<sup>3</sup> According to the 1997 census, the "information sector" of the California economy encompassed over 16,000 companies employing more than 450,000 people, with revenues exceeding 108 billion dollars. 1997 Economic Census, Information Services in California, available at [http://www.dof.ca.gov/HTML/FS\\_DATA/stat-abs/TABLES/Q10.xls](http://www.dof.ca.gov/HTML/FS_DATA/stat-abs/TABLES/Q10.xls).

### III. TRADE SECRET LAW PROHIBITS MISAPPROPRIATION OF BUSINESS INFORMATION AS WELL AS “FUNCTIONAL” TECHNOLOGY

Trade secrets cover a huge universe of information. There is no subject matter limitation; anything that is useful and not generally known can qualify.<sup>4</sup> “Functional” or “technical” secrets, such as chemical formulas, mechanical designs and source code, are protectable, but so are customer lists and financial information.<sup>5</sup> Even so-called “negative information,” the detritus of research that records what did not work or what worked less well, qualifies.<sup>6</sup>

The modern law of trade secrets emphasizes this breadth of coverage. Under the 1939 Restatement of Torts definition, trade secrets were limited to processes and other data “in use” in a business; other information of “ephemeral” value, such as bids, investment plans or unannounced products, was protected only against espionage.<sup>7</sup> Trade secrecy was not covered at all in the Second Restatement, and it appears in its present incarnation in the Restatement (Third) of Unfair Competition, where the old distinctions were dropped and a broad definition supplied: “A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”<sup>8</sup> California’s version of the Uniform Trade Secrets Act uses similar language: “‘Trade secret’ means information . . . that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the

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<sup>4</sup> See *Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.*, 923 F. Supp. 1231, 1251 (N.D. Cal. 1995) (“[T]here is ‘no category of information [that] is excluded from protection as a trade secret because of its inherent qualities.’”).

<sup>5</sup> See CEB, *Trade Secrets Practice in California* § 1.14 (2d ed. 2001).

<sup>6</sup> See *Id.* § 1.5.

<sup>7</sup> Compare Restatement (First) of Torts § 757 cmt. b (1939), with § 759 cmt. b.

<sup>8</sup> Restatement (Third) of Unfair Competition § 39 (1995).



subject of efforts that are reasonable under the circumstance to maintain its secrecy.”<sup>9</sup>

The importance of non-technical trade secrets or “business information” has been emphasized recently at both the state and federal levels. In 1996, the California legislature amended Penal Code Section 499c(a)(9) to remove language that had restricted its coverage to “scientific or technical” information and substitute the Uniform Act definition.<sup>10</sup> California therefore treats as a criminal offense the misappropriation of information defined just as broadly as in the civil statute. In the same year that California amended its criminal law, Congress passed the Economic Espionage Act, which also criminalizes the improper use or communication of trade secrets, similarly defined.<sup>11</sup> Significantly, the federal statute also provides for civil injunction proceedings by the Attorney General.<sup>12</sup>

#### IV. TRADE SECRET RIGHTS ARE ILLUSORY IN THE ABSENCE OF PRETRIAL INJUNCTIVE REMEDIES

Trade secrets are not only extremely valuable, they are uniquely fragile. Unlike any other form of intellectual property, trade secrets are destroyed by uncontrolled disclosure.<sup>13</sup> Therefore, pretrial injunctions are the *only* effective

<sup>9</sup> Cal. Civ. Code § 3426.1(d).

<sup>10</sup> Act of July 3, 1996, ch. 121, sec. 1, 1996 Cal. Legis. Serv. 406 (West) (codified as amended at Cal. Penal Code § 499c).

<sup>11</sup> See 18 U.S.C. §§ 1832(a), 1839(3) (2000); H.R. Rep. No. 104-788 (1996) (the statute was directed at every type of trade secret theft, “from the foreign government that uses its classic espionage apparatus to spy on a company, to the two American companies that are attempting to uncover each other’s bid proposals, or to the disgruntled former employee who walks out of his former company with a computer diskette full of engineering schematics.”); see also *United States v. Hsu*, 155 F.3d 189, 194 (3d Cir. 1998) (legislation motivated in part by studies showing corporate information loss exceeding \$24 billion per year).

<sup>12</sup> See 18 U.S.C. § 1836.

<sup>13</sup> See *Wearly v. FTC*, 462 F. Supp. 589, 603 (D. N.J. 1978), *vacated on other grounds* 616 F.2d 662 (3d Cir. 1980): the trade secret right “involves a peculiar form of property that can vanish by evanescence, sublimation or osmosis. It is in that class of personalty, like the heirloom, the original manuscript of ‘Look Homeward, Angel’, the Mona Lisa, the Venus de Milo, and other like items for which equity historically provided the suitable remedy of specific reparation.”

way to preserve the right, which otherwise lays exposed to the whims and schemes of the unscrupulous.

The vulnerability of trade secrets has grown more acute since the arrival of the internet. Disgruntled employees and competitors can wreak havoc with a single posting, sometimes achieved anonymously.<sup>14</sup> Bunner tries to trivialize this sort of harm with a dismissive suggestion that because business participates in the enabling technology it is up to business to solve the problem.<sup>15</sup> But Bunner's argument is not just unreasonably cynical; if accepted it would have dramatically negative economic effects, causing business to engage in expensive self-help measures and actually impeding the flow of useful information through hoarding.<sup>16</sup>

Trade secrets would in practical terms be no less threatened by a system that provided injunctive relief only against those who have signed confidentiality agreements with the trade secret holder. Gaming such a system would be simple, as illustrated by the facts in *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999), a case on which Bunner primarily relies. There the individual defendant, who was not contractually related to Ford, put up a web site with information about the company's products. Trying to resolve a dispute over use

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<sup>14</sup> See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Communications Serv., Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995) (holding trade secret status is lost through anonymous posting.) IPO does not necessarily agree that all postings to the internet, without regard to the duration or other circumstances, irretrievably destroy trade secret rights. But the case is illustrative of the extreme risk of harm posed by this otherwise useful tool.

<sup>15</sup> "That a single consumer can violate a click-licensing agreement, distribute her findings and terminate a trade secret is a fact of life for informational businesses. The same technologies that create the wealth of opportunity carry corresponding threats. The solution is for businesses to find ways to minimize the risks." (Answer Br. at 42 n. 36.)

<sup>16</sup> See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 486 (1974) (Without trade secret law, "[s]ecurity precautions necessarily would be increased, and salaries and fringe benefits of those few officers or employees who had to know the whole of the secret invention would be fixed in an amount thought sufficient to assure their loyalty. Smaller companies would be placed at a distinct disadvantage, since the costs of this kind of self-help could be great . . . . [O]rganized scientific and technological research could become fragmented, and society, as a whole, would suffer.").

of Ford's trademarks, he threatened to post trade secret information anonymously provided by Ford employees (presumably in violation of their secrecy agreements). He even followed through on the threats with actual disclosure of information found to constitute trade secrets, and threatened to do it again. Yet the court denied injunctive relief solely because it felt disabled to act due to the First Amendment.<sup>17</sup> If the rule of the *Ford* case is accepted, the legal system for protecting trade secrets will be no more effective than a barn with only one of its doors open.

## **V. ENFORCEMENT OF TRADE SECRETS DOES NOT DIMINISH ANY RIGHTS THAT THE FIRST AMENDMENT WAS DESIGNED TO PROTECT**

### **A. Wrongful Disclosure Is Conduct That Violates Privacy, Not Protectable Speech**

The First Amendment protects democratic freedom by guaranteeing the unrestricted exchange of information and ideas. See *Bartnicki v. Vopper*, 532 U.S. 514, 533-34 (2000) (observing that the "core" interest protected by the First Amendment is discourse on matters of "public concern"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964) (The constitutional protections for speech and press were "'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (internal citation omitted). This noble and public purpose must be compared to the privacy interest that is served by trade secret law and to the behavior that invades it. Cf. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) ("A most fundamental human

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<sup>17</sup> The *Ford* court said it was compelled to this conclusion by *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996). 67 F. Supp. 2d at 753. However, that case did not deal with judicially-assessed trade secrets, but merely embarrassing information privately designated by the parties for sealing under a protective order. The *Procter & Gamble* case does not even address the economic harm that would occur if pretrial injunctions were unavailable; but the *Ford* case illustrates it well.

right, that of privacy, is threatened when industrial espionage is condoned or is made profitable . . .”).

Unauthorized disclosure of private data *necessarily* is accomplished through a communicative act. In its brief DVD CCA emphasizes the “functional” nature of DeCSS in arguing that it is more conduct than speech. But this fact-based argument misses the larger point. Whether misappropriation can be prevented should not be determined by the functional or technical nature of the matter being communicated. Rather, it is the *private* nature of the matter, measured only by the objective standards of trade secret law, that makes legal restraints on the communication acceptable.<sup>18</sup> Where unlawful disclosure is concerned, conduct and speech merge, since the communication is merely a tool for destroying secrecy.<sup>19</sup>

Thus, the written or oral communication involved in unauthorized disclosure of protected secrets is not speech of the sort that the First Amendment was designed to protect. The U.S. Supreme Court has cautioned that broadly interpreting “speech” would make it “practically impossible ever to enforce laws . . . deemed injurious to society.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct

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<sup>18</sup> This essential aspect of a private interest is what most clearly distinguishes commercial trade secret disputes from the Pentagon Papers case. See *New York Times v. United States*, 403 U.S. 713 (1971); see also *Bartnicki v. Vopper*, 532 U.S. at 528, 533 (*New York Times* dealt with “information of great public concern” and “we need not decide whether [the state wiretap statute could be applied] to disclosures of trade secrets . . . or other matters of purely private concern.”).

<sup>19</sup> See Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash between Intellectual Property and the First Amendment from an Economic Perspective*, 12 *Fordham Intell.Prop. Media & Ent. L.J.* 1, 62-63: “[I]f trade secret law is viewed from the perspective that it makes certain conduct unlawful, any attempt by a trade secret owner to prohibit third-party disclosure of a trade secret is merely an attempt to prohibit conduct, not speech. A trade secret owner must limit disclosure of the trade secret if he or she wants to prevent destruction of any property interest. Therefore, any limitations on speech rights are simply unavoidable consequences of the necessity of preserving a trade secret.”

was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”). Unauthorized disclosure of secrets involves speech only in a technical sense; such speech is not part of public discourse, but merely the enabling vessel for the wrongful appropriation of private information.

**B. The Trade Secret Right Is Destroyed By Publication, Not Merely Interfered With**

Communicating trade secrets is not an expression of one’s ideas, but a transfer or destruction of private property. The disseminator seizes the information and distributes it to others, either diminishing or destroying it in the process. This behavior cannot be within the ambit of First Amendment protection. Bunner’s brief holds up as comparable the clash of interests between shopping center owners and public protesters. (Answer Brief at 37.) But this is misleading; the trade secret owner’s right is in the *information itself*, as contrasted with rights that proliferate from holding title to land. When a trade secret is publicly disclosed, there is no remaining right to balance against freedom of speech: it has been vaporized.

**C. Improper Disclosure of a Trade Secret, Like Obscenity and Fighting Words, Has No Social Value**

The Court of Appeal held that trade secret disclosure constituted “pure speech” which the First Amendment protects against restraints. It explained that cases limiting constitutional protection were inapplicable because *DeCSS* “is not lewd, profane, obscene, or libelous, nor did it involve any fighting words.” 113 Cal. Rptr. 2d at 349. In making this distinction the court was referring to “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem [because they] are no essential part of any exposition of ideas, and are of such

slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>20</sup> The logical fallacy of the court’s distinction with trade secret misappropriation is apparent: what matters is not whether the secret information *itself* lacks social value, but whether *its communication* does. As has been noted above, both the California legislature and the U.S. Congress have criminalized the unauthorized disclosure of a trade secret. Such behavior has no social value, and it deserves no more constitutional protection than other specific forms of speech long presumed to be outside the scope of the First Amendment.<sup>21</sup>

**D. First Amendment Protection Does Not Depend On Contractual Privity With the Defendant**

The Court of Appeal also grounded its decision on an observation that pretrial trade secret injunctions have only been entered when the right is based on a confidentiality agreement, which *impliedly* “waives any First Amendment protection for an ensuing disclosure.” 113 Cal. Rptr. 2d at 349. In the first place, the observation is incorrect, since preliminary injunctions are routinely granted against disclosure of secrets obtained through espionage or through intermediaries who had violated a confidence.<sup>22</sup> Secondly, it is an odd argument that on the one hand exalts the First Amendment sufficiently to trump important property rights and on the other admits that this constitutional protection is waived by legal implication. This notion of implied waiver is a fiction designed to provide

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<sup>20</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

<sup>21</sup> The law recognizes a public interest exception for disclosure of secret information to a government agency in matters affecting health or safety. See, e.g., *KLM Royal Dutch Airlines v. deWit*, 415 N.Y.S. 2d 190, 191 (N.Y. Sup. Ct. 1979), *aff’d* 418 N.Y.S. 2d 63 (N.Y. App. Div. 1979) (noting, however, that only reporting to the government is justified, not disclosure to the public at large).

<sup>22</sup> See, e.g., *Imi-Tech Corp. v. Gagliani*, 691 F. Supp. 214 (S.D. Cal. 1986) (enjoining company’s disclosure to potential licensee of secrets taken by company’s employee from his former employer).

intellectual comfort that most trade secrets are protectable. But it is both illogical and unwise. It would permit restraints against an employee transferring to a new job but deny relief against a spy whose despicable behavior would be shielded by First Amendment protection. Constitutional doctrine cannot be subject to such irrational, fictional variance.

**VI. IF FIRST AMENDMENT LIMITATIONS APPLY TO WRONGFUL DISCLOSURE, THEN PRESERVING TRADE SECRECY IS A SUFFICIENT JUSTIFICATION FOR ANY RESULTING RESTRAINT ON SPEECH**

**A. Intermediate Scrutiny Should be Applied to the UTSA**

The parties have adequately briefed the different standards of review that might be applied to the UTSA. Since misappropriation of a trade secret is not expressive conduct intended to convey a message to the public, it does not warrant application of a strict scrutiny test. Instead, any concerns regarding collateral effect on speech should be resolved through intermediate scrutiny.

The strict scrutiny standard advocated by Bunner is reserved for cases where state regulation is not content-neutral. Acknowledging this, Bunner argues that the *injunction* entered by the trial court is not content-neutral because it restrains the content of his speech. (Answer Br. at 15.) This circular argument misleads because the test for content-neutrality examines the UTSA, not the injunction, which necessarily addresses precisely what is not to be disclosed.

The injunctive relief provision of the UTSA is not directed at the content of speech, but rather at whether a trade secret needs protection. See Cal. Civ. Code § 3426.2(a) (“Actual or threatened misappropriation may be enjoined.”). Content-neutral restrictions are permitted on otherwise lawful speech, because

they do not discriminate against particular types of speech.<sup>23</sup> Since the UTSA addresses misappropriation of trade secrets without regard to any expressive content, the statute should be recognized as content-neutral.

#### **B. The UTSA Satisfies Both Intermediate and Strict Scrutiny Tests**

The UTSA meets both the intermediate and strict scrutiny standards of review, justifying pretrial restriction on speech. The intermediate scrutiny test is met where a government regulation is within its constitutional power and the regulation furthers an important or substantial governmental interest unrelated to the suppression of free speech by means of a restriction no greater than is essential to further that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Clearly, trade secret injunctions meet the intermediate scrutiny standard. However, the UTSA injunction provisions also satisfy the strict scrutiny test, where a content-based restriction of protected speech is narrowly tailored to serve a compelling state interest. The UTSA serves just such an interest. The trade secret holder has a *right that survives only in complete privacy*, and can be lost without the protection of pretrial injunctions. The state has a compelling interest in protecting that privacy right, as the U.S. Supreme Court explained in *Kewanee*, in order to serve the twin policy goals of encouraging investment in innovation and upholding standards of business ethics:

In addition to the increased costs for protection from burglary, wiretapping, bribery, and the other means used to misappropriate trade secrets, there is the inevitable cost to the basic decency of society when one firm steals from another. A most fundamental human right, that of privacy, is threatened when industrial

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<sup>23</sup> See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 384 (1992) (“[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).



espionage is condoned or is made profitable; *the state interest* in denying profit to such illegal ventures *is unchallengeable*.<sup>24</sup>

Further, the UTSA meets the strict scrutiny test because it is narrowly tailored. Bunner does not contend otherwise, but instead argues that the injunction entered against him does not meet established standards. (Answer Br. at 35.) This fact-based argument — as to which IPO takes no position on the merits — is beside the point. The constitutional standard is applied to the law regulating speech. Whether a court in a particular case properly applies that law to the facts is a question that can have constitutional dimensions in that case, but it does not affect the broader question of whether the law itself meets the constitutional standard. In California, a preliminary injunction against disclosure of private commercial data is available only upon a showing of irreparable injury, a requirement that ensures the restriction is narrowly tailored to avoid that extraordinary sort of harm.<sup>25</sup>

## VII. CONCLUSION

When someone knowingly discloses a trade secret, he expresses not his own idea but someone else's. The words used are merely a tool for the destruction of a property right. To suggest that this behavior can be shielded by the First Amendment trivializes that pillar of our Constitution. This Court should confirm

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<sup>24</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) (internal citations omitted) (emphasis added).

<sup>25</sup> See Cal. Civ. Code § 526; see also *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.*, 281 Cal. Rptr. 216, 223 (1991) (“In ruling on a preliminary injunction, the court considers whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it . . . considers probability of the plaintiff’s ultimately prevailing in a trial on the merits, and . . . [considers whether] there is a reasonable probability that plaintiff will successfully assert his rights.”).

that trade secrets are protectable against improper disclosure through pretrial injunctions.

Dated: July 11, 2002

Respectfully submitted,

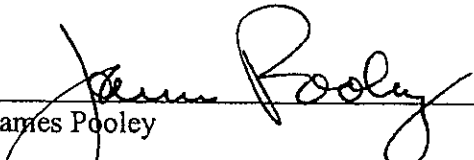
  
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#### **CERTIFICATION OF COMPLIANCE**

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

Exclusive of the exempted portions in California Rules of Court Rule 14(c)(3), the brief contains 4,140 words.

  
James Pooley

## PROOF OF SERVICE

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action; my business address is 630 Hansen Way, Second Floor, California 94304.

On July 11, 2002, I served the foregoing document:

### **BRIEF FOR *AMICUS CURIAE* THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION**

on the interested parties in this action:

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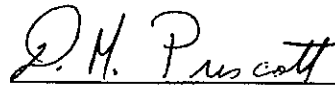
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Executed on July 11, 2002 at Palo Alto, California.

  
\_\_\_\_\_  
Donna M. Prescott

**SERVICE LIST**

**DVD Copy Control Association, Inc. v. Andrew Bunner**

California State Supreme Court No. S102588

Court of Appeal No. H021153

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APPLICATION FOR PERMISSION TO FILE  
AMICUS CURIAE BRIEF

IN THE  
SUPREME COURT OF THE STATE OF CALIFORNIA

DVD COPY CONTROL ASSOCIATION,  
INC.,

Plaintiff/Respondent,

v.

ANDREW BUNNER,

Defendant/Appellant.

Case No. S102588

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF ON BEHALF  
OF THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION

---

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## INTRODUCTION

Pursuant to California Rules of Court, rule 29.3(c), the undersigned requests leave to file the attached brief of amicus curiae in support of Respondent DVD Copy Control Association, Inc. This application is timely made within 30 days after the filing of the reply brief on the merits.

## THE AMICUS CURIAE

The Intellectual Property Owners Association (“IPO”) is the only major association focused on representing the interests of owners of all types of intellectual property, including patents, trademarks, copyrights, and trade secrets. Current IPO members include over 100 large and mid-sized companies and over 250 small businesses. IPO’s advocacy activities on behalf of intellectual property owners include the drafting of position papers, the filing of *amicus* briefs, and an ongoing government relations program. IPO’s public awareness activities include daily publication of updated information on intellectual property in the *IPO Daily News*, the maintenance of a web site at <http://www.ipso.org>, and the presentation of its annual National Inventor of the Year award.

## INTEREST OF AMICUS CURIAE

The rationale of the Court of Appeal's decision in this case, if confirmed by this Court, would seriously undermine a critical intellectual property right. Trade secret law, which has been an accepted part of California's jurisprudence for a century, is the touchstone for protection of most commercial innovation. Because it depends on secrecy, the trade secret right requires prompt and robust judicial intervention to prevent dissemination of protected information by those who threaten unauthorized publication. IPO has a strong interest in advocating



that trade secret remedies be preserved, in support of our increasingly information-based economy.

#### **NEED FOR FURTHER BRIEFING**

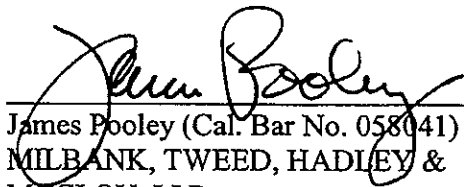
IPO is familiar with the issues before this Court and the scope of their presentation in the briefs on the merits. IPO believes that further briefing is necessary to address matters not fully covered by the parties' briefs. Inter alia, IPO argues that all trade secrets, and not just those deemed "functional", should have the benefit of pretrial injunctions against their disclosure, and that constitutional protections for speech should not interfere with such remedies.

#### **CONCLUSION**

For the foregoing reasons, the amicus curiae respectfully requests that the Court accept the accompanying brief for filing in this case.

Dated: July 11, 2002

Respectfully submitted,



---

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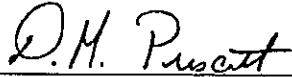
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