Court of Appeal No. H021153

In the Supreme Court of California

DVD COPY CONTROL ASSOCIATION, INC., *Plaintiff/Respondent,* V. ANDREW BUNNER, *Defendant/Appellant.*	Supreme Court No. S102588 Trial Judge: Hon. William J. Elfving Santa Clara County Superior Court Trial Court Case No. CV 786804

DVD CCA'S REPLY BRIEF

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Petitioner DVD CCA asks the Court to reinstate the superior court's injunction preventing Bunner's illegal posting of stolen trade secrets. Bunner's position turns on the argument that the injunction is not content neutral. Because the injunction *is* content neutral—it was issued to further the state's interest in protecting against the theft of trade secrets, not because the government disliked the ideas contained in DeCSS—it should be reinstated on that basis alone. Beyond this, Bunner cannot overcome the argument that limitations on distributing programmable code are subject to, at most, intermediate scrutiny. Every court other than the court of appeal to look at the issue has recognized that the functional nature of computer code renders the distribution and use of code an act of mixed speech and conduct under *O'Brien*. Because the injunction can easily withstand intermediate scrutiny, application of the *O'Brien* standard mandates reversal of the court of appeal. Bunner also asks this Court to review the superior court's fact findings in support of the injunction. These findings are not properly before this Court and are not a basis for sustaining the decision of the court of appeal. For all of these reasons, the court of appeal's decision should be reversed.

I. THE SUPERIOR COURT'S INJUNCTION IS SUBJECT TO INTERMEDIATE SCRUTINY BECAUSE IT IS CONTENT NEUTRAL AND BECAUSE IT REGULATES MIXED SPEECH AND CONDUCT.

A. The Injunction Is Content Neutral.

The superior court's injunction is content neutral. It was not imposed because the government disfavored the ideas contained in DeCSS but rather to further other governmental interests: to foster innovation and business opportunity by protecting trade secrets. *See* Opening Br. 12-19.

In his attempt to portray the injunction as content based, Bunner makes an argument that the Supreme Court has specifically rejected. Bunner argues that any government action restricting specific speech identified by content is *per se* content based. Bunner Br. 15 ("By its plain language, the preliminary injunction bans the publication of specified information identified solely by its content" and is "a prototypical content-based restriction."). Under that theory, every injunction restricting speech is content based and therefore subject to strict scrutiny. As the Supreme Court has explained, however:

> An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 762. This Court has adopted the same proposition, rejecting the "content-identifying" argument that Bunner proposes:

> Contrary to plaintiffs' view, [United States Supreme Court] decisions do *not* require literal or absolute content neutrality, but instead require only that the regulation be "justified" by legitimate concerns that are unrelated to any "disagreement with the message" conveyed by the speech.

Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal.4th 352, 368 (internal citations omitted). The same content-neutrality analysis is also used under the California Constitution's Liberty of Speech clause. *See id.* at 376-79.

Los Angeles Alliance is consistent with the many cases emphasizing that it is the *justification* for the government action that is examined—*i.e.*, whether the justification serves a legitimate government interest other than

disagreement with the ideas contained in the restricted expression.[1] "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *See Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791 (quoting *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293). This is because "the kind of content-based distinctions that are suspect are those that involve government censorship of subject matter or governmental favoritism among different viewpoints." *See Los Angeles Alliance*, 22 Cal.4th at 377. But when a restriction is not imposed because the government opposes a particular point of view, that concern is not present.

The superior court did not issue the injunction because it disagreed with ideas contained in DeCSS. Instead, the injunction issued because DeCSS contained misappropriated trade secrets. In short, it is theft, and not dissemination of ideas, that the injunction seeks to prevent. In this sense, the injunction is no more content based than a law preventing the distribution and sale of stolen books. To make the point another way, it is only a fact external to the content of DeCSS—the fact that the content consisted of trade secrets which belonged to DVD CCA, and not Bunner—that justified the injunction. If Bunner had developed and published CSS and DeCSS without using stolen trade secrets, then the government would not restrict its transmission. In terms of its content neutrality, the superior court's order is just like any other enjoining use of another's intellectual

[1] Bunner argues that the government action that is the proper subject of the content-neutrality analysis is the injunction, and not the Trade Secrets Act. Because it is the justification that is the focus of the content-neutrality analysis, however, this point is irrelevant. The justification is the same for both the injunction and the statute: to foster innovation and business ethics. There may be instances where the justification for judicial and legislative action diverge—in "selective enforcement" cases, for instance—but Bunner has not alleged, and there is no evidence, that this divergence exists here.

property,[2] and courts do not consider those injunctions content based. *See, e.g., Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.* (2d Cir. 1979) 604 F.2d 200, 206.

Indeed, in his neutrality analysis, Bunner conspicuously ignores the recent Second Circuit case upholding an injunction, based on intellectual property law, of the posting of DeCSS: *Universal City Studios, Inc. v. Corley* (2d Cir. 2001) 273 F.3d 429. If an injunction issued under the Digital Millennium Copyright Act is content neutral, *see id.* at 454, then the same injunction is content neutral when issued under the Trade Secrets Act. The Court should follow *Corley* in holding that an injunction against disseminating DeCSS is content neutral and permissible under the First Amendment.[3]

B. Bunner's Posting of DeCSS Is Mixed Speech and Conduct Subject, at Most, to Intermediate Scrutiny.

Despite Bunner's argument, DVD CCA has never conceded that the posting of DeCSS is an act of pure speech and instead argued that Bunner's posting was not entitled to First Amendment protection. *See* Bunner Br. 23, AA 609. Moreover, Bunner himself never argued below that DeCSS was pure speech whose regulation was subject to strict scrutiny. Instead, he cited to cases applying *O'Brien* scrutiny to limitations on the distribution of

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[2] Bunner has argued that laws passed pursuant to the constitutional Copyright Clause are subjected to a lower level of First Amendment scrutiny than those, like the Trade Secrets Act, passed under the states' police power. But he has not, and reasonably could not have, distinguished between copyright laws and trade secret laws for purposes of content-neutrality analysis.

[3] Bunner also argues that the injunction should be analyzed under the slightly stricter standard laid out in *Madsen*. See 512 U.S. at 765. It is far from clear, however, that the *Madsen* standard applies to injunctions that are not time place and manner restrictions, and to those that govern mixed speech and conduct. *See id.* (describing *Madsen* as a modification of the

computer code. *See* AA 189 (citing *Bernstein v. United States Dep't of State* (N.D. Cal. 1996) 922 F.Supp. 1426, 1436-37). Since Bunner never argued for a pure speech standard in the superior court, there was no need for DVD CCA to respond to this claim until it was raised by the court of appeal's erroneous analysis.[4]

Bunner urges this Court to take a position accepted by no court other than the court of appeal: that the distribution of computer code is an act of pure speech. Bunner's argument relies on a false analogy; he contends that computer code is like a set of instructions or a recipe. But unlike a recipe, computer code is executable without human comprehension—a set of instructions directed from one computer to another. When communication is from machine to machine, the basic concerns underlying the First Amendment are not implicated. Thus courts have commented that when code is directed to a computer, it is "never protected." *Corley*, 273 F.3d at 449. And there is no doubt that DeCSS was posted, by Bunner and others, with the intent that it be used to illegally decrypt DVDs. *See* AA 287 (Bunner posted DeCSS so that CSS could be broken and DVDs played on Linux systems). "The presence of some expressive content in [DeCSS] should not obscure the fact of its predominant functional character—it is first and foremost a means of causing a machine with which it is used to perform particular tasks." *Universal City Studios, Inc. v. Reimerdes*

"standard time place and manner analysis"). In any case, the injunction withstands *Madsen* scrutiny.

[4] In any event, "it is settled that a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record.'" *See Ward v. Taggart* (1959) 51 Cal.2d 736, 742 (citing *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341). Additionally, constitutional issues may be raised for the first time on appeal. *See Bonner v. City of Santa Ana* (1996) 53 Cal.Rptr.2d 671 (citing numerous California cases in which courts accepted constitutional arguments raised for the first time on appeal).

(S.D.N.Y. 2000) 111 F.Supp.2d 294, 335 (*Reimerdes II*). "[T]he chief focus of those promoting the dissemination of DeCSS is to permit widespread copying and dissemination of unauthorized copies of copyrighted works." *Universal City Studios, Inc. v. Reimerdes* (S.D. N.Y. 2000) 82 F.Supp.2d 211, 223 (*Reimerdes I*).

Bunner also seeks to avoid the application of intermediate scrutiny by relying on the Supreme Court's recent decision in *Ashcroft v. Free Speech Coalition* (April 16, 2002) __ U.S. __, 122 S.Ct. 1389. In *Ashcroft*, the Court held unconstitutional a federal law punishing possession and distribution of sexually explicit images that appear to depict minors but were produced without using real children. *See id.* at __, 122 S.Ct at 1405. The Court rejected the government's argument that distribution of virtual child pornography is unprotected speech because it promotes a market for pornography that uses actual children, reasoning that "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *See id.* at __, 122 S.Ct at 1403. But the Court also recognized that speech can be restricted where there is a "stronger, more direct connection" between the speech and the harm it facilitates. *See id.* Unlike the tenuous connection between the speech and harm described in *Ashcroft*, in this case, there is no distance between the enjoined conduct and the harm: the posting of DeCSS *is* the harm. It is the very communication of a stolen trade secret that destroys its value. *See In re Shalala* (8th Cir. 1993) 996 F.2d 962, 965. In addition, DeCSS is a tool specifically designed to make possible a further harm—the copying of protected material. DeCSS directly facilitates, and is intended to facilitate, unlawful acts, and its distribution is separately enjoinable on that basis. *See Reimerdes I*, 82 F.Supp.2d at 223.

II. THE INJUNCTION WITHSTANDS INTERMEDIATE SCRUTINY.

A. The Injunction Serves a More than Substantial Government Interest.

Bunner has gone to great lengths to characterize the injunction as being something other than what it is: a well established court order protecting intellectual property rights. Bunner argues that the government has no substantial interest in enjoining the distribution of DeCSS because, contrary to the superior court's findings, the trade secrets contained in DeCSS are no longer secret. As DVD CCA argues in section III.B.2, *infra*, there is ample evidence to support the superior court's finding that "trade secret status has not been destroyed." AA 715. Indeed, the "evidence" Bunner points to in support of his claim was not before the superior court and is not in the record on this appeal.

Bunner also argues that California has no compelling state interest in protecting DVD CCA's trade secrets because Bunner did not have a pre-existing relationship with DVD CCA when he posted DeCSS to his website. Trade secret law, however, is more than a species of contract law; it is a form of protected intellectual property. "Trade secret law is the oldest type of intellectual property protection." Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash between Intellectual Property and the First Amendment from an Economic Perspective* (2001) 12 FORDHAM INTEL. PROP., MED. & ENTERT. L.J. 1, 57; *see also* 3 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS (2d ed. 2000) §2.01 at 2-4 (noting that property rights underlie trade secret actions). "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." *Computer Assocs. Int'l, Inc. v. Altai, Inc.* (2d Cir. 1992) 982 F.2d 693, 717.

California has a strong interest in protecting against the theft of trade secrets, regardless of the existence of a pre-existing contractual relationship. When California passed its Trade Secrets Act it created a cause of action against people who, like Bunner, disclose a trade secret while knowing, or having reason to know, that the knowledge of the trade secret was derived from a person who had utilized improper means to acquire it. *See* CAL. CIV. CODE §3426.1. The statute does not contain the requirement that Bunner now tries to read into the law: that the defendant have a contractual or employment relationship with the owner of the trade secret.[5]

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[5] In support of its theory that third party distribution of trade secrets is protected under the First Amendment, Bunner has assembled an array of irrelevant cases. *Sports Mgmt. News v. Nachtigal*, for instance, does not concern the First Amendment, but rather the Oregon Constitution's free speech clause. (Or. 1996) 921 P.2d 1304, 1308. Furthermore, it applies the same overly literal "content identifying" content-based analysis that the Court rejected in *Los Angeles Alliance. See id. Procter and Gamble Co. v. Bankers Trust Co.* (6th Cir. 1996) 78 F.3d 219, has little, if anything, to do with trade secrets, and involves an injunction on the publication of documents that were not found to contain trade secrets and were, in fact, "standard litigation filings." 78 F.3d at 225. *CBS, Inc. v. Davis* (1994) 510 U.S. 1315, is the decision of a single justice to stay enforcement of a lower court's judgment, and turns on the fact that the evidence of harm was too "speculative" and based on "factors unknown and unknowable." 510 U.S. at 1318. Curiously, Bunner also cites *Garth v. Staktek Corp.*, in which a lower court's injunction against a misappropriator of trade secrets was *affirmed*, despite the fact that the trade secrets were public knowledge when the injunction was entered. (Tex. App.—Austin 1994, writ dism'd w.o.j) 876 S.W.2d 545, 548-49. With a single exception, the rest of the cases Bunner cites in support of his third party publication theory do not address injunctions protecting trade secrets. *See* Bunner Br. 12-13. The single exception is *Ford Motor Co. v. Lane* (E.D. Mich. 1999) 67 F.Supp.2d 245. As DVD CCA argued in its opening brief, *Ford* is wrongly decided, and has already drawn significant negative critical commentary. *See* 3

Bunner's position would lead to manifestly absurd results. If trade secrets are enforceable only against contracting parties and those in privity with them, hackers could obtain trade secrets through willful misappropriation and distribute or use them for profit, safe in the knowledge that the First Amendment protected them. The government's interest in providing incentives to innovation are not diminished by the fact that, because of the internet, someone abetting piracy may have no relationship with the owner of the trade secret. Bunner should not be allowed to frustrate this interest by posting DeCSS when he knew or had reason to know that it was misappropriated.

B. The Injunction Does Not Burden Substantially More Speech Than Is Necessary To Further the Government's Interest.

Bunner argues that the injunction burdens more speech than is necessary, asserting that it is overbroad because the injunction forbids dissemination of the trade secret in text form, as well as in downloadable code. Bunner's argument misses the fact that the government interest in fostering innovation is furthered by protecting the secrecy of DVD CCA's technology; any order protecting trade secrets will have to prevent dissemination in every possible medium, or else it will be a nullity. In preventing dissemination of DVD CCA's trade secrets, the injunction, like any other order protecting trade secrets, guards against any means of transferring the protected information. *See, e.g., PepsiCo, Inc., v. Redmond* (7th Cir. 1995) 54 F.3d 1262, 1272 (preventing defendant from "forever . . . disclosing" trade secrets and confidential information).

The injunction does not in any way limit Bunner's capacity to discuss the issues surrounding DeCSS, or cryptography, or prevent him

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MILGRIM, *supra*, §14.01[2][a], at 14-26 n.15. The Court should not follow *Ford*'s overbroad application of the First Amendment.

from developing his own encryption programs—it only keeps him from disclosing trade secrets.

III. THE SUPERIOR COURT'S FINDINGS IN SUPPORT OF THE INJUNCTION ARE NOT PROPERLY BEFORE THIS COURT AND ARE SUPPORTED BY THE RECORD EVIDENCE.

A. The Superior Court's Findings in Support of the Injunction Are Not Properly Before This Court.

Bunner asks this court to consider the sufficiency of the evidence supporting entry of the injunction, despite the fact that the court of appeal accepted the trial court's findings and therefore did not treat this issue. Such issues are not properly before this Court, since the court of appeal has never reached them.[6] *See Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 40; *People v. Cahill* (1993) 5 Cal.4th 478, 510.

B. The Superior Court's Findings Are Supported by the Record Evidence.

In any case, the record amply supports the superior court's findings. Bunner argues that the superior court's fact findings are subject to *de novo* review. Although those findings can easily withstand *de novo* review, fact findings in first Amendment cases are reviewed *de novo* only when they are necessarily intermingled with application of the constitutional standard, which these findings are not. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 567. Accordingly, like other findings in support of injunctions, the findings here should only be reviewed for substantial evidence. *See Shoemaker v. County of Los Angeles* (Cal. Ct. App. 1995) 43 Cal.Rptr.2d 774, 779 (findings in support

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[6] If the Court disagrees with the court of appeal's First Amendment holding it should reinstate the injunction and remand the case to the court of appeal for its further consideration.

of preliminary injunctions should be affirmed if there is "substantial evidence" to support them).

1. There Is Substantial Evidence to Support the Superior Court's Finding that DVD CCA Will Likely Prove that the Balance of the Harm Supported Entry of the Injunction.

Bunner argues that the superior court erred in finding that the balance of the harm supported the injunction, despite the fact that the court found that if it did not enjoin the posting of DeCSS, "the Plaintiff's right to protect this information as secret will surely be lost." AA 715. There is a wealth of record evidence supporting the conclusion that the failure to issue the injunction would cause severe harm to the interest of DVD CCA, including testimony that the movie industry decided that protecting DVDs from piracy was so important that without encryption the industry would not have agreed to sell DVDs. *See* AA 66-68.

The injury to Bunner, on the other hand, is "truly minimal." AA 714. The injunction does not prevent Bunner from discussing DeCSS, arguing that it is not a trade secret, or developing or discussing cryptography techniques. In fact, the record shows that Bunner was not interested in doing any of these things when he posted DeCSS; instead, he was interested in disseminating the program so Linux users could illegally play DVDs. *See* AA 287. Bunner and those he hoped to aid by posting DeCSS do not have a First Amendment right to illegally copy and view DVDs on an operating system that at the time had failed to obtain a DVD CCA license, and the loss of this opportunity is not a constitutional injury.

2. There Is Substantial Evidence to Support the Superior Court's Finding that DVD CCA Will Likely Prove DeCSS Is a Protected Trade Secret.

Bunner's brief repeatedly argues that illegal posting of DeCSS has made DVD CCA's trade secrets so widely available that they are no longer

trade secrets. Although DeCSS is still a secret, its current status is irrelevant to this appeal; in reviewing an injunction, courts look only at the evidence before the court when it entered the injunction. *See Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136.

In rejecting Bunner's argument that DeCSS had lost its secret status, the superior court reasoned that "trade secret status should not be deemed destroyed at this stage merely by the posting of the trade secret to the Internet," or else those who misappropriate trade secrets would be encouraged to "post the fruits of their wrongdoing on the Internet as quickly as possible thereby destroying a trade secret forever." AA 715. This accords with the traditional view that those who misappropriate trade secrets cannot avoid judicial sanction by making the secret widely available. "We do not believe that a misappropriator or his privies can 'baptize their wrongful actions by general publication of the secret." *Underwater Storage, Inc. v. United States Rubber Co.* (D.C. Cir. 1966) 371 F.2d 950, 955.

Moreover, CSS's trade secrets are still secret. The testimony of various witnesses established that CSS contained a proprietary encryption algorithm that was carefully guarded. *See* AA 71, 263. Bunner does not dispute this fact, but asserts that posting of DeCSS on the web has destroyed the secret.[7] There is no evidence, however, that the actual trade

[7] Bunner notes that a Google search of "DeCSS" returns over a 100,000 websites, Bunner Brief at 3 n.4. This reference is not only an improper attempt to introduce evidence outside the record, but is also highly misleading. A search for "DeCSS" looks for the letters "DeCSS" in the text of a web page, not the actual code of DeCSS. It is unclear how many of these websites retrieved in Bunner's search actually contain a textual copy of the DeCSS code or a downloadable version of the program. Ironically, the fact that references to DeCSS are widely available online proves DVD CCA's point that injunctions imposed on posting of DeCSS

secrets—the algorithm and master keys—contained in DeCSS are widely known. Because DeCSS is, by nature, more a tool than a means of communication, it can be used to violate copyright law by those who have no comprehension of its contents. Indeed, Bunner himself did not attest to understanding DeCSS or having an ability to create a decryption program of his own. AA 286-88. Even if some hackers do now have DeCSS, the evidence shows that they would have reason to know that the knowledge of the trade secret in it was derived from a person who had utilized improper means to acquire it and would therefore themselves be properly bound to an injunction under the Trade Secrets Act. *See* AA 348-51 (reflecting widespread knowledge among posters to a hacker's discussion group that DeCSS was obtained improperly). Indeed, information about the superior court's injunction has been made widespread through major media and the internet. Finally, as one who wrongfully disseminated DeCSS, Bunner is estopped from relying on that dissemination. *See Underwater Storage,* 371 F.2d at 955; *Religious Technology Center v. Netcom On-Line Communication Serv., Inc.* (N.D. Cal. 1995) 923 F.Supp. 1231, 1241.

3. There Is Substantial Evidence to Support the Superior Court's Finding that DVD CCA Will Likely Prove that DeCSS Was Created Through Misappropriation.

DVD CCA has introduced ample evidence to support the superior court's finding on misappropriation. The testimony of DVD CCA's expert, a partner in an Oslo law firm, establishes that Johansen's hack of CSS is a violation of both Norwegian copyright law and Norwegian penal law. *See* AA 306-09.

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by the superior court and the federal district court in New York do not restrict speech about DeCSS.

4. There Is Substantial Evidence to Support the Superior Court's Finding that DVD CCA Will Likely Prove that Bunner Knew or Had Reason to Know that DeCSS Was Created Through Improper Means.

Bunner's protest that he did not have reason to know that DeCSS was created through improper means is belied by the evidence. The record shows that the hacker community knew, or had reason to know, that DVD CCA's trade secrets were obtained improperly. *See* AA 349-65 (documenting posts on websites showing knowledge that DeCSS was improperly reversed engineered). Bunner himself testified that he became aware of the CSS trade secrets on the website "slashdot.org" and that he read and participated in the discussions about CSS trade secrets on this site. *See* AA 287. One need only look at the numerous comments about Xing in various slashdot.org discussion groups, including those posted at approximately the time Bunner became aware of DeCSS, to conclude that he knew that Xing's DVD software was illegally hacked in order to create the DeCSS program. *See* AA 349-65.

Even if Bunner did not have reason to know that DeCSS was improperly obtained when he posted it, he can still be enjoined under the Trade Secrets Act. Under the plain language of the UTSA, if a person acquires a trade secret without knowing that it was misappropriated, that person is liable for misappropriation if he or she continues to disclose or use the trade secret after being notified that it was misappropriated by a third party.[8]

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[8] The Act defines misappropriation as "[d]isclosure or use of a trade secret of another without express or implied consent by a person who...[a]t the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was...[d]erived from or through a person who had utilized improper means to acquire it." CAL. CIV. CODE

IV. THE INJUNCTION DOES NOT VIOLATE THE PATENT AND COPYRIGHT CLAUSES OF THE CONSTITUTION.

Finally, Bunner's assertion that the intellectual property clause of the Constitution render the injunction unconstitutional is without merit. The Supreme Court has made it clear that "state protection of trade secrets d[oes] not operate to frustrate the achievement of the congressional objectives served by the patent laws." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (1989) 489 U.S. 141, 155; *see also Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 487-90. Bunner argues that the injunction violates the intellectual property clauses because the CSS trade secrets are no longer secrets. However, as DVD CCA demonstrated in section III.B.2, *supra*, their claim is both premature and false. Bunner's arguments concerning the intellectual property clauses are not a basis for denying DVD CCA relief for clear infringement of its intellectual property.

CONCLUSION

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

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§3426.1(b)(2)(B)(i). Because Bunner had knowledge that DVD CCA's trade secrets were misappropriated (at a minimum since getting notice of this action in late December), but continued to "disclose or use" DeCSS, he was in violation of the statute. *See Imed Corp.* v. *Systems Eng'g Assocs. Corp.* (Ala. 1992) 602 So.2d 344 ("The purpose underlying the Act would surely be thwarted if a person, although innocently acquiring a trade secret from a third person, could nonetheless disclose or use that trade secret with impunity after being placed on notice that the trade secret had been misappropriated by the third person.").

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CERTIFICATE 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 3,754 words.

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