

# [US] Prevention of Posting Encryption Software is Not an Infringement of Free Speech

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The California Supreme Court recently held that the free speech rights of a web-site operator, Andrew Bunner, were not violated by a preliminary injunction barring posting of DeCSS software used to decrypt the content scrambling systems on movie DVDs. The court, however, did not decide on whether the code posted by Mr. Bunner was still a trade secret and remanded that issue for a lower court to decide.

The suit was brought by DVD Copy Control Association, a movie industry trade group that controls the rights to the "content-scramble system" used to encrypt movie DVDs (see IRIS Plus 2002-4). The trade secret at issue in the Association's lawsuit is a piece of code known as a "master key" that is used by properly-licensed DVD players to decrypt movie DVDs. The DeCSS software posted on Bunner's web-site revealed the "master key."

The trial court granted the Association's request for a preliminary injunction barring Bunner from continuing to distribute DeCSS. Although the California Court of Appeals assumed that Bunner had violated California's trade secrets law, it went on to hold, however, that the injunction violated Bunner's First Amendment free speech rights.

The California Supreme Court reversed the Court of Appeals. Justice Janice Brown wrote the opinion and agreed with the defendant's argument that "restrictions on the dissemination of computer codes in the form of DeCSS are subject to scrutiny under the First Amendment." On the other hand, the Justice held that the preliminary injunction was content neutral, because the purpose of the injunction was "to protect the Association's statutorily created property interest in information-and not to suppress the content of Bunner's communications."

The standard of review of a content-neutral injunction is that such a regulation is permissible, so long as it burdens no more speech than necessary in order to serve a significant government interest. Justice Brown ruled that California's trade secret law does serve the significant interest of "encouraging innovation and development."

Justice Brown concluded that the court's decision was "limited" and that the Court of Appeal should determine whether the trial court properly issued the injunction

under California's trade secret law.

In a similar suit, Paramount Pictures Corp. and Twentieth Century Fox Film Corp. recently sued Tritton Technologies in Manhattan federal court, seeking a court order to stop Irvine-based Tritton from distributing the software called "DVD CopyWare."

***Copy Control Association v. Bunner, Calif. Supreme Ct. No. 102588, 25 August 2003***

