

(ENDORSED)
FILED
JAN 21 2000

STEPHEN V. LOVE
Chief Executive Officer
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

DVD COPY CONTROL ASSOCIATION,
INC.,

Plaintiff,

vs.

ANDREW THOMAS MCLAUGHLIN,
et al.

Defendants,

Case No. CV 786804

ORDER GRANTING PRELIMINARY
INJUNCTION

The above-entitled matter came on for hearing before the Honorable William J. Elfving on January 18, 2000 at 1:30 p.m. in Department 2. The matter having been taken under submission, the Court orders as follows:

The Plaintiff's Motion for Preliminary Injunction is GRANTED in part as follows:

The named Defendants, their officers, directors, principals, agents, servants, employees, attorneys, successors and assigns, representatives and all persons acting in concert with them, are

1 hereby enjoined from: Posting or otherwise disclosing or distributing, on their websites or
2 elsewhere, the DeCSS program, the master keys or algorithms of the Content Scrambling system
3 ("CSS"), or any other information derived from this proprietary information.
4

5 Plaintiff, DVD Copy Control Association, is the sole licencing entity which grants licenses
6 to the CSS technology in the DVD format. CSS, "Content Scrambling System," is an encryption
7 system developed by Plaintiff's predecessor in interest in order to protect the copyrighted materials
8 stored on DVDs. The alleged misappropriation of the CSS algorithm and master keys is the subject
9 of this action and the instant Motion for Preliminary Injunction.
10

11 The evidence is fairly clear and undisputed that the original postings of DeCSS, a program
12 which allegedly embodies, uses and/or is a substantial derivation of CSS, to the Internet occurred
13 on October 6 and then on October 25, 1999. Plaintiff's evidence shows that the Motion Picture
14 Association immediately began an investigation and sent cease and desist letters on November 18,
15 1999. Some individuals and entities such as CNET's download.com removed the alleged trade
16 secret materials; other did not. Thereafter, on December 27, 1999 Plaintiff filed this lawsuit seeking
17 the limited remedy of injunctive relief for misappropriation of its trade secret. The Court denied
18 Plaintiff's very broad request for a Temporary Restraining Order, and the parties proceeded to
19 submit extensive argument and evidence for the Court's consideration. In the course of these
20 proceedings, Plaintiff narrowed the scope of the injunction which they seek to only prohibit
21 Defendants from posting and/or knowingly linking to any websites which post the trade secret and/or
22 its derivatives.
23

24 In order to prevail on their Motion for Preliminary Injunction in a misappropriation of trade
25 secret case, the Plaintiff must show that they are likely to prevail on the merits, and that the burden
26 of harm weighs in their favor. (See Generally Witkin, Cal. Procedure, 4th ed., Provisional Remedies,
27 IV Injunctions, §296) "A preliminary injunction may be properly issued whenever the questions of
28 law or fact are grave and difficult, and injury to the moving party will be immediate, certain, and

1 great if it is denied, while the loss to the opposing party will be trivial if it is granted. Wilms v. Hand
2 (1951) 101 Cal.App.2d 811, 815

3
4 In order to prevail on the merits, Plaintiff must establish that they had a trade secret which
5 was misappropriated. The Plaintiff has shown that the CSS is a piece of proprietary information
6 which derived its independent economic value from not being generally known to the public and that
7 Plaintiff made reasonable efforts under the circumstances to maintain its secrecy. Although
8 Defendants argue extensively that a 40 bit encryption system is weak at best, it is undisputed that
9 the encryption remained a secret for close to three years and was limited in its strength by certain
10 international export regulations. Under the law, a system to protect secrecy does not become
11 unreasonable simply because a clever thief finds a way to penetrate the security. (E.I. du Pont de
12 Nemours & Co., inc. v. Christopher, (CA5, 1970) 431 F.2d 1012) Under these circumstances, the
13 Court is satisfied that Plaintiff has shown a likelihood of prevailing on the issue of trade secret.

14
15 Plaintiff must also show that the trade secret was misappropriated, or that the trade secret was
16 obtained through *improper means* and that the Defendants *knew or should have know* that the trade
17 secret was obtained through improper means when they posted it or its derivative to the Internet.
18 (Civil Code § 3426.1(b)) Although the parties dispute the who and how, the evidence is fairly clear
19 that the trade secret was obtained through reverse engineering. The Legislative comment to the
20 Uniform Trade Secret Act states, "Discovery by "reverse engineering," that is, by starting with the
21 known product and working backward to find the method by which it was developed," is considered
22 proper means. The only way in which the reverse engineering could be considered "improper
23 means" herein would be if whoever did the reverse engineering was subject to the click licence
24 agreement which preconditioned installation of DVD software or hardware, and prohibited reverse
25 engineering. Plaintiff's case is problematic at this pre-discovery stage. Clearly they have no direct
26 evidence at this point that Mr. Jon Johansen did the reverse engineering, and that he did so after
27 clicking on any licence agreement. However, in trade secret cases, it is a rare occasion when the
28 Plaintiff has a video of an employee walking out with trade secrets, or an admission of a competitor

1 that they used improper means to obtain Plaintiff's intellectual property. In most situations,
2 Defendants try to cover their tracks with considerably more effort than the Defendants did herein.
3 The circumstantial evidence, available mostly due to the various defendants' inclination to boast
4 about their disrespect for the law, is quite compelling on both the issue of Mr. Johansen's improper
5 means and that Defendants' knowledge of impropriety.

6
7 Defendants make the additional argument that even if Johansen clicked on the license
8 agreement, such an agreement contravenes Norwegian law. This Court is not well positioned to
9 interpret Norwegian Law, and Defendant's own expert, even if this Court could consider expert
10 testimony on a question of legal interpretation,¹ states that the issue has not been conclusively
11 decided in Norway. Defendants have not sufficiently supported their argument that the licence
12 agreement, like the one at issue here, would be disallowed by Norwegian Law, although they may
13 at some point be able to do so.

14
15 Most compelling in this matter is the relative harm to the parties. At this point in the
16 proceeding, the harm to the Defendants is truly minimal. They will simply have to remove the trade
17 secret information from their web sites. They may still continue to discuss and debate the subject
18 as they have in the past in both an educational, scientific, philosophical and political context.
19 Defendants have not provided evidence of any economic harm which an injunction could currently
20 cause, although if such an injunction were not granted it is quite possible that this could change
21 which could potentially shift the burden of harm in Defendants' favor.

22
23 On the other hand, the current and prospective harm to the Plaintiff, if the Court does not
24 enjoin the display of their trade secret, will be irreparable. It is undisputed that the Plaintiff's
25 predecessor-in-interest expended considerable time, effort and money in creating the intellectual

26
27 ¹ Defendant stated in passing at the hearing on Preliminary Injunction that issues of
28 foreign law are questions of fact, however neither side has provided this Court with argument or
authority on this point.

1 property at issue in order to protect the copyrighted information contained on DVDs. As Plaintiff
2 conceded at the hearing on the TRO, once this information gets into the hands of an innocent party,
3 the Plaintiff loses their ability to enjoin the use of their trade secret. If the Court does not
4 immediately enjoin the posting of this proprietary information, the Plaintiff's right to protect this
5 information as secret will surely be lost, given the current power of the Internet to disseminate
6 information and the Defendants' stated determination to do so. Religious Technology Center v.
7 Netcom on-Line.com (N.D. Cal 1995) 923 F.Supp. 1231 In that event, the protection afforded by
8 the encryption system licenced by the Plaintiff, whether to limit DVD hardware and software
9 suppliers or to control unauthorized copying and distribution of DVD content will become
10 completely meaningless. The encryption system which the Plaintiff licences cannot simply be
11 changed like a secret code used by a military where everyone involved simply changes to the new
12 code because millions of people own current DVDs and DVD viewing systems. .

13
14 The Court is not persuaded that trade secret status should be deemed destroyed at this stage
15 merely by the posting of the trade secret to the Internet. Religious Technology Center v. Netcom
16 on-Line.com supra. To hold otherwise would do nothing less than encourage misappropriators of
17 trade secrets to post the fruits of their wrongdoing on the Internet as quickly as possible and as
18 widely as possible thereby destroying a trade secret forever. Such a holding would not be prudent
19 in this age of the Internet. Plaintiffs moved expeditiously, reasonably and responsibly to protect
20 their proprietary information as soon as they discovered it had been disclosed by investigating,
21 sending cease and desist letters all over the world and then filing suit against those who refused
22 within two months of the disclosure. The Court is satisfied that trade secret status has not been
23 destroyed.

24
25 Whether or not the Defendants agree that such information as at issue here should be
26 protected or secret is irrelevant to the determination herein. Our system currently places high
27 importance on protecting such intellectual property, and this Court must enforce such protections
28 with all appropriate and available means.

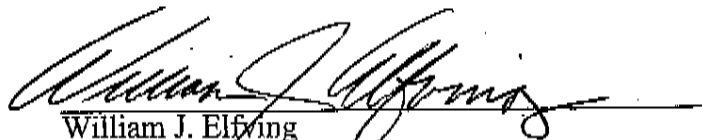
1 In granting this injunction this Court is mindful of the many potential enforcement problems.
2 However, a possibility or even a likelihood that an order may be disobeyed or not enforced in other
3 jurisdictions is not a reason to deny the relief sought. For the reasons Plaintiff has clearly articulated
4 in their complaint and moving papers, it has chosen this jurisdiction to seek an injunction. If this
5 Court determines that Plaintiff has met its burden then they are entitled to the relief sought, and
6 seeking enforcement of the order, whether in this or other jurisdictions becomes Plaintiff's
7 responsibility.

8
9 However, the Court refuses to issue an injunction against linking to other websites which
10 contain the protected materials as such an order is overbroad and extremely burdensome. Links to
11 other websites are the mainstay of the Internet and indispensable to its convenient access to the vast
12 world of information. A website owner simply cannot be held responsible for all of the content
13 of the sites to which it provides links. Further, an order prohibiting linking to websites with
14 prohibited information is not necessary since the Court has enjoined the posting of the information
15 in the first instance.

16
17 Nothing in this Order shall prohibit discussion, comment or criticism, so long as the
18 proprietary information identified above ^{is} ~~is~~ not disclosed or distributed.

19
20 IT IS FURTHER ORDERED that Plaintiff DVD-CCA shall post a bond in the amount of
21 \$10,000 pursuant to CCP § 529..

22
23 Dated: January 21, 2000,

24 
25 William J. Elfving
26 Judge of the Superior Court
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