

California Court of Appeal, Sixth District
DVD COPY CONTROL ASS'N v. BUNNER
10 Cal. Rptr. 3d 185 (Cal. Ct. App. 2004)

PRIMO, Judge.

Plaintiff DVD Copy Control Association, Inc. (DVD CCA) sued defendant Andrew Bunner (Bunner) and others under California's Uniform Trade Secrets Act (UTSA) (Civ. Code, § 3426 et seq.), seeking an injunction to prevent defendants from using or publishing "DeCSS," a computer program allegedly containing DVD CCA's trade secrets. * * *

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Introduction

* * * Unlike motion pictures on videocassettes, motion pictures contained on DVDs may be copied without perceptible loss of video or audio quality. This aspect of the DVD format makes it particularly susceptible to piracy. For this reason, motion pictures stored on DVDs have been protected from unauthorized use by a content scrambling system referred to as CSS. Simply put, CSS scrambles the data on the disk and then unscrambles it when the disk is played on a compliant DVD player or computer. CSS does not allow the content on the DVD to be copied.

For obvious reasons, the motion picture industry desired to keep the CSS technology a secret. But to make DVD players and computer DVD drives that can unscramble and play a CSS-protected DVD, the manufacturers had to have the CSS "master keys" and an understanding of how the technology works. In an attempt to keep CSS from becoming generally known, the industries agreed upon a restrictive licensing scheme and formed DVD CCA to be the sole licensing entity for CSS. Under the CSS licensing scheme, each licensee receives a different master key to incorporate into its equipment and sufficient technical know how to permit the manufacture of a DVD-compliant device. All licensees must agree to maintain the confidentiality of CSS.

In spite of these efforts to maintain the secrecy of CSS, DeCSS appeared on the Internet sometime in October 1999 and rapidly spread to other Web sites, including those of the defendants. According to DVD CCA, DeCSS incorporates trade secret information that was obtained by reverse engineering CSS in breach of a license agreement. DVD CCA alleges that DeCSS allows users to illegally pirate the copyrighted motion pictures contained on DVDs,

“activity which is fatal to the DVD video format and the hundreds of computer and consumer electronics companies whose businesses rely on the viability of this digital format.”

DVD CCA filed the instant complaint for injunctive relief on December 27, 1999, alleging that Bunner and the other defendants had misappropriated trade secrets by posting DeCSS or links to DeCSS on their Web sites, knowing that DeCSS had been created by improper means. The requested injunctive relief sought to prevent defendants from using DeCSS, from disclosing DeCSS or other proprietary CSS technology on their Web sites or elsewhere, and from linking their Web sites to other Web sites that disclosed DeCSS or other CSS technology. * * *

B. The Factual Record

* * * John Hoy, President of DVD CCA explained that DeCSS first appeared on the Internet on October 6, 1999. That first posting was in machine-readable form referred to as object code.⁵ The DeCSS source code was posted about three weeks later, on or around October 25, 1999. Hoy declared that both postings contain CSS technology and the master key that had been assigned to DVD CCA's licensee, Xing Technology Corporation (Xing), a manufacturer of computer DVD drives. The intended inference is that DeCSS was created, at least in part, by reverse engineering the Xing software. Since Xing licensed its software pursuant to an agreement that prohibits reverse engineering, Hoy concludes that the CSS technology contained in DeCSS was “obtained in violation of the specific provision in the Xing end-user license ‘click wrap’ agreement which prohibits reverse engineering.” Hoy stated on information and belief that Jon Johansen, a resident of Norway, was the author of the program.

Well before DeCSS was released on the Internet, a number of people had become interested in unraveling the CSS security system. Users of the Linux computer operating system had organized a forum dedicated to finding a way to override CSS. Apparently DVD CCA had not licensed CSS to anyone making DVD drives for the Linux system, so that computers using Linux were incapable of playing DVDs. CSS was widely analyzed and discussed in the academic cryptography community. Another exchange of information took place on www.slashdot.org (Slashdot), a news Web site popular with computer programmers. As early as July 1999 comments on Slashdot revealed a

⁵ To oversimplify, object code is a set of instructions comprised of strings of 1's and 0's. The same instructions written in programming language is referred to as source code. To be executable by a computer, source code must be translated into object code.

worldwide interest in cracking CSS. The gist of these communications is contained in the following excerpts of a discussion that took place on July 15, 1999:

“Yes, it is true, we have now all needed parts for software decoding of DVDs, but any software doing so will be illegal and/or non-free. [¶] . . . The information about CSS was obtained by reverse engineering some DVD software decoder.”

“This code was released before anyone checked into the legal end of things. . . . Best idea now is to download the code. Get it spread around as widely as possible. It may not be able to be used legally when all is said and done, but at least it will be out there for others to work with.”

“Well, it might not be the most ethical thing on earth, but if the appropriate algorithms were to be found just lying on the web, once the coders have seen them, they don’t have a ‘forget’ button for their brains. . . .”

Bunner first became aware of DeCSS on or about October 26, 1999 as a result of reading and participating in discussions on Slashdot. Bunner explained that he is a parttime user of Linux and supports its acceptance as a viable alternative to established computer operating systems such as Microsoft Windows. Bunner thought DeCSS would be useful to other Linux users. He claimed that at the time he posted the information on his Web site he had no information to suggest that the program contained any trade secrets or that it involved the misappropriation of trade secrets. There is no evidence as to the date Bunner first posted the program on his Web site.

Counsel representing the motion picture industry had become aware of the DeCSS posting on October 25, 1999. Beginning November 4, 1999, counsel sent letters to Web site operators and Internet service providers hosting Web pages that contained DeCSS or links to DeCSS and demanded the information be taken down. Sixty-six such letters were sent between November 4 and November 23, 1999. None of the letters listed in counsel’s declaration were addressed to Bunner or to his Web site address. About 25 of the 66 sites were taken down. DeCSS was also removed from Johansen’s Web site on or around November 8, 1999, but a link to DeCSS reappeared on the same site on or around December 11, 1999.

Meanwhile, the news that the CSS encryption system had been penetrated made headlines in Internet news magazines. Wired News ran several articles in the first days of November 1999 announcing the development of DeCSS. An

article on November 4, 1999 said: "It shouldn't be surprising that an awful lot of people are upset at this week's Wired News reports about a utility to remove DVD security. But it's out there and people are using it." An article on eMedia around the same time explained that DeCSS was "available for free download from several sites on the World Wide Web."

DVD CCA filed suit on December 27, 1999, naming as defendants the operators of every infringing Web site it could identify. A hearing for a temporary restraining order was to be held the following day. In support of that application, DVD CCA informed the court that since October 25, 1999, DeCSS had been displayed on or linked to at least 118 Web pages in 11 states and 11 countries throughout the world and that approximately 93 Web pages continued to publish infringing information.

The lawsuit outraged many people in the computer programming community. A campaign of civil disobedience arose by which its proponents tried to spread the DeCSS code as widely as possible before trial. Some of the defendants simply refused to take their postings down. Some people appeared at the courthouse on December 28, 1999 to pass out diskettes and written fliers that supposedly contained the DeCSS code. They made and distributed tee shirts with parts of the code printed on the back. There were even contests encouraging people to submit ideas about how to disseminate the information as widely as possible.

C. The Trial Court's Findings

The trial court issued the preliminary injunction based upon the following findings: First, CSS is DVD CCA's trade secret and for nearly three years prior to the posting of DeCSS on defendants' Web sites, DVD CCA had exerted reasonable efforts to maintain the secrecy of CSS. The court stated that trade secret status should not be deemed destroyed merely because the information was posted on the Internet, because, "[t]o hold otherwise would do nothing less than encourage misappropriators [sic] of trade secrets to post the fruits of their wrongdoing on the Internet as quickly as possible and as widely as possible thereby destroying a trade secret forever."

Second, the trial court found that the evidence was "fairly clear" that the trade secret had been obtained through a reverse engineering procedure that violated the terms of a license agreement and, based upon some defendants' boasting about their disrespect for the law, it could be inferred that all defendants knew that the trade secret had been obtained through improper means. * * *