Are DeCSS T-Shirts Dirty Laundry? Wearable, Non-Executable Computer Code as Protected Speech

Sara Crasson
JD Candidate, 2005, Fordham University School of Law

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NOTES

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Sara Crasson[*]

INTRODUCTION

Copyleft is a company that sells computer-related T-shirts, hats, and paraphernalia.[1] In July 2000, Copyleft discovered it was being sued by the Digital Versatile Discs Copy Control Association ("DVD CCA") over one of its t-shirts.[2] Copyleft's alleged offense was selling T-shirts printed with the text of a computer code called DeCSS.[3] DeCSS is software that breaks the encryption on commercial Digital Versatile (or Video) Discs

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[1]   *See generally* Copyleft, *at* http://www.copyleft.net (last visited Oct. 19, 2004) (listing goods available for purchase and general company information).

[2]   Robert Lemos, *DVD Group: Stop Wearing Our Code!*, ZDNET, *at* http://zdnet.com.com/2100-11-522652.html (July 31, 2000); *see also* DVD Copy Control Ass'n, *at* http://www.dvdcca.org (last visited Oct. 19, 2004) (presenting general information on DVD CCA). The DVD CCA is the organization that licenses the DVD decryption software to the manufacturers of DVDs and DVD players. DVD Copy Control Ass'n Frequently Asked Questions, *at* http://www.dvdcca.org/faq.html (last visited Nov. 14, 2004).

[3]   Complaint, DVD Copy Control Ass'n v. McLaughlin, 2000 WL 48512 (Cal. Super. 2000) (No. CV 786804) *available at* http://www.eff.org/IP/Video-/DVDCCA_case/19991228-complaint.html (last visited Oct. 19, 2004).

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(DVDs).[4]   Since a Norwegian teenager, Jon Johansen, wrote the
first version of DeCSS, the DVD industry has battled to suppress
the DeCSS code, suing the author and those who distribute the
software.[5]   The DVD industry has experienced great success in
various suits,[6] but DeCSS continues to proliferate on the Internet.[7]

    The difference between the prior suits and the claim against
Copyleft is that the prior suits were against entities that distributed
the software, usually over the Internet, in digital, executable
forms.[8]   This Note will discuss the special case of the Copyleft
litigation, where the code was distributed in a wearable, rather than
an executable, format.

    Part I of this Note will discuss the relevant law, including the
Digital Millennium Copyright Act (DMCA) and trade secret law,
and the First Amendment issues implicated in prior DeCSS cases.
It will also introduce the basics of DVD technology, various types
of computer code, and the encryption used by the industry.

    Part II will present examples of each cause of action used by
the DVD industry to suppress DeCSS. *Universal City Studios v.
Corley* was based on the Digital Millennium Copyright Act
(DMCA).[9] In *DVD Copy Control Association v. Bunner,* the DVD
CCA sought to stop distribution of DeCSS by protecting CSS as a

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[4]   *See* Lemos *supra* note 2. For examples of the type of shirts at issue, see Copyleft,
Shirts: DVD Decryption 3 Pack, *at* http://www.copyleft.net/category.phtml?page-
=category_apparel.phtml (last visited Oct. 14, 2004).

[5]   David Streitfeld & Aniana Eunjung Cha, *Chasing Hollywood 'Pirates'; Suits a Test
for Digital Copyright, Free Speech*, WASH. POST, Aug. 9, 2000, at A01; s*ee also*
Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Universal City
Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 346 (S.D.N.Y. 2000). Versions have since
appeared in different computer languages. *See* Copyleft, *Shirts: DVD Decryption 3 Pack*,
supra note 4.

[6]   *See, e.g.*, *Corley,* 273 F.3d 429.

[7]   The California Court of Appeals found that DeCSS had been published on "hundreds
of websites, enabling untold numbers of persons to download it and to use it." DVD
Copy Control Ass'n Inc. v. Bunner, 10 Cal. Rptr. 3d 185, 196 (Cal. Ct. App. 2004)
[hereinafter *Bunner III*].

[8]   *See, e.g.*, Lemos, *supra* note 2. Executable software or code is code the computer
can read and use to perform tasks. Non-executable code or software would be a version
of the code the computer could not read, for example, if the commands were written out
on a piece of paper, or saved in a text file.

[9]   273 F.3d 429.

trade secret.[10] This section will identify all the relevant arguments, and discuss the courts' analyses of the issues.

Part III will describe the peculiar position of Copyleft and the legal status of distributing DeCSS code in alternative formats, including T-shirts. It will also compare Copyleft's situation to the prior DeCSS litigation. This section concludes that the courts should distinguish the Copyleft suit from past DeCSS cases because text, even source code, printed on shirts should get a higher level of First Amendment protection than object code distributed on the Internet. The shirts themselves do not break the law; they merely convey information that an individual could use to break a law.

I.   WHAT'S ALL THE ARGUING ABOUT?

This section of the Note will provide all of the background material needed to understand the issues. First, it will describe the legal protections that have been invoked by the DVD industry in their various suits, i.e. the Digital Millennium Copyright Act and trade secret laws. Then, this section will discuss the free speech defense commonly claimed by the defendants in those suits. Finally, this section will provide an introduction to DVD encryption, DeCSS, and the history of the controversy.

A. Intellectual Property Protection

1. Copyright and the DMCA

In general, federal copyright law gives authors the exclusive rights to: reproduce their work, create derivative works, distribute copies of their work, and perform or display their works publicly.[11] These restrictions on the use of copyrighted works are counter-

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[10]   113 Cal. Rptr. 2d 338 (Cal. Ct. App. 2001) [hereinafter *Bunner I*]; 75 P.3d 1 (Cal. 2003) [hereinafter *Bunner II*]; 10 Cal. Rptr. 3d 185 (Cal. Ct. App. 2004) [hereinafter *Bunner III*].

[11]   *See* 17 U.S.C. § 106 (2000).

balanced by fair use exceptions.[12]   The exceptions allow purchasers to make unauthorized copies under certain limited circumstances.[13]   In deciding whether a particular use of copyrighted material is a fair use, the courts consider, but are not restricted to considering: (1) whether the junior use is commercial, (2) whether the use is transformative, (3) the type of protected work in question (whether the work is creative or factual), and (4) the effect of the use on the market for the original work.[14] Fair use exceptions allow users to make unauthorized excerpts for purposes including, but not limited to, "criticism, comment, news reporting, teaching . . . scholarship, or research."[15]

New technologies may lead to new fair uses. For example, after the invention of the VCR, time-shifting, recording a television program for later private viewing, became recognized as a fair use.[16] Some argue that fair use should also allow copying of legitimately acquired copyrighted material for personal back-up copies and for format-shifting (for example, transferring content from an audio CD to MP3 files which can be stored and played on a dedicated, portable, device).[17] Fair use does not permit people to duplicate and sell copies of movies. Many owners of copyrighted material responded to these new technologies by adding technological measures that prevent purchasers from making copies.[18]   However, "[d]igital files cannot be made uncopyable [sic] any more than water can be made not wet."[19] And while

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[12] 17 U.S.C. § 107 (2000); s*ee also* David V. Lampman, *"A Prologue to a Farce or a Tragedy?" A Paradox, a Potential Clash: Digital Pirates, the Digital Millennium Copyright Act, the First Amendment & Fair Use*, 38 GONZ. L. REV. 367, 375 (2003).

[13] ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 450 (3d ed. 2003) [hereinafter MERGES ET AL.].

[14] Lampman, *supra* note 12, at 376–81.

[15] MERGES ET AL., *supra* note 13, at 450.

[16] Lampman, *supra* note 12, at 380–81; s*ee also* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).

[17] Elec. Frontier Found., *Fair Use FAQ*, *at* http://www.eff.org/IP/eff_fair_use_faq.php (citing RIAA v. Diamond Multimedia, 180 F.3d 1072, 1079 (9th Cir. 1999)) (last updated Mar. 21, 2002).

[18] *See generally* Lampman, *supra* note 12.

[19] *Id*. at 383 (quoting Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1636–37 (2002) (quoting Bruce Schneier, *The Futility of Digital Copy Prevention*, Crypto-Gram, *at* http://www.counterpane.com/crypto-gram-0105.html#3 (May 15, 2001))).

"[almost] any protection system will work against the average user . . . no protection system will work against the power user, hacker, or professional pirate."[20]   No technology can provide perfect protection.

In response to lobbying by content-creating industries, including the music and DVD industries,[21] Congress increased the protection of copyrighted works by legislating criminal and civil penalties.[22]   The DMCA,[23] arguably Congress's most aggressive effort to stop digital violations of copyrights, states "[n]o person shall circumvent a technological measure that effectively controls access to a [copyright-protected] work."[24]   It also provides that "[no] person shall manufacture, import, offer to the public, provide, or otherwise traffic in" a circumvention technology.[25]   This prohibition of circumvention was an unprecedented development in U.S. copyright protection.[26]   While the DMCA states it is not intended to eliminate fair use of copyrighted material,[27] or to restrict free speech or the free press,[28] groups such as Internet Service Providers (ISPs), electronics manufacturers, and library associations expressed serious concerns about this

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[20]   *Id*. at 383 (citing Samuelson & Scotchmer, *supra* note 19, at 1636–37 (citations omitted)).

[21]   Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1103 (2003).

[22]   Lampman, *supra* note 12, at 391.

[23]   17 U.S.C. §§ 1201–05 (2002).

[24]   § 1201(a)(1)(A).

[25]   § 1201(a)(2). The statute restricts any technology that:
   (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
   (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
   (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.
Id.

[26]   Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 546 (1999).

[27]   17 U.S.C. § 1201(c)(1) (2000).

[28]   § 1201(c)(4).

legislation.[29] The fair use permitted by the DMCA is quite narrow; access for copying purposes is permitted,[30] while distribution of the tools required to make copies is prohibited.[31] This effectively limits fair use to the small segment of the population capable of creating their own decryption tools.[32] Some claim the DMCA "unduly restricts fair use of encrypted copyrighted works,"[33] and protects copyright holders at the expense of the public seeking to make legitimate use of copyrighted materials.[34] The United States Court of Appeals for the Second Circuit, in *Universal City Studios, Inc. v. Corley* ("*Corley*"), disagreed, holding that fair use does not guarantee "copying by the optimum method or in the identical format of the original."[35] It concluded that fair users could still access the copyrighted materials by "pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie."[36] This decision sorely disappointed fair users who did not wish to be "relegated to a 'horse and buggy' technique in making fair use of DVD movies."[37] In protest against the court's decision in *Corley*, a community of people have produced non-functional versions of the DeCSS code, using the code to make a picture, or lyrics to a song.[38] Others have published descriptions of DeCSS written in code, or using mathematical expressions.[39]

2. Trade Secret

The DVD industry has also sought to prohibit people from spreading DeCSS by suing them under trade secret laws.[40] To qualify for protection as a trade secret, information must be

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[29]   MERGES ET AL., *supra* note 13, at 500.

[30]   17 U.S.C. § 1201(c)(1) (2000).

[31]   § 1201(e)(2).

[32]   MERGES ET AL., *supra* note 13, at 501.

[33]   Albert Sieber, *The Constitutionality of the DMCA Explored: Universal City Studios, Inc. v. Corley & United States v. Elcom Ltd.*, 18 BERKELEY TECH. L.J. 7, 23–24 (2003).

[34]   *See generally* Samuelson, *supra* note 19.

[35]   273 F.3d at 459.

[36]   *Id.*

[37]   *Id.*

[38]   *See* David S. Touretzky, *Gallery of CSS Descramblers*, *at* http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery (last modified July 10, 2004).

[39]   *See id.*

[40]   *See infra* Part II.B.

valuable and not generally known, and the owner must have taken "reasonable precautions" to keep the information secret.[41] Information is misappropriated when the secret is obtained through improper means or through a breach of confidence.[42] Frequently, courts find misappropriation occurred because the defendant used or benefited from another's "deception, skulduggery, or outright theft," in violation of an explicit contract or an implied obligation, such as an employee/employer relationship.[43] A trade secret may be obtained legitimately though independent invention, observation of public use of an item embodying the trade secret, and reverse engineering.[44] Reverse engineering is using the legally acquired product to figure out the secret. Examples include opening up the housing of a device to see how it works, or looking at software code to see how it accomplishes a particular function.[45] Trade secret laws vary from state to state, but forty states have enacted the Uniform Trade Secrets Act (UTSA), or some close variation.[46] The DVD CCA sued Copyleft for trade secret misappropriation in California,[47] which has enacted the UTSA without major changes.[48]

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[41] MERGES ET AL., *supra* note 13, at 31.

[42] UNIF. TRADE SECRETS ACT § 1 (1985), *available at* http://nsi.org/Library-/Espionage/usta.htm (last visited Oct. 19, 2004).

[43] MERGES ET AL., *supra* note 13, at 31.

[44] *Id.* at 67.

[45] *See id.*

[46] *Id*. at 30. The UTSA defines "misappropriation" as:

   (i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
   (ii) disclosure or use of a trade secret of another without express or implied consent by a person who
      (A) used improper means to acquire knowledge of the trade secret; or
      (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was
         (I) derived from or through a person who had utilized improper means to acquire it;
         (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
         (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

UNIF. TRADE SECRETS ACT § 1 (1985), *available at* http://nsi.org-/Library/Espionage/usta.htm (last visited Oct. 19, 2004).

[47] *See* Lemos *supra* note 2.

[48] *Bunner II*, 75 P.3d 1, 9 (Cal. 2003).

B. First Amendment Protections for Free Speech

Defendants in cases involving the distribution of DeCSS often claim a First Amendment defense.[49] However, the First Amendment's guarantee of free speech[50] is limited.[51] Some speech is not entitled to First Amendment protection, such as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[52] Also, free speech rights are balanced against the rights and interests of others.[53]

In the balancing process, courts first look at whether the restricted activity is expressive enough to qualify as protected speech.[54] This can be a complex analysis, as activities can have some components that are protected expressive speech, and other components that are considered unprotected non-speech.[55] Once a court decides an activity falls under the province of the First Amendment, it will determine whether the law prohibiting the activity is "content-based" or "content-neutral."[56] A "content-based" law regulates an activity because of a disagreement with its message.[57] In contrast, a "content-neutral" law regulates speech to advance a goal unrelated to the content of the speech.[58]

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[49] *See, e.g.*, MERGES ET AL., *supra* note 13, at 67; Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 346 (S.D.N.Y. 2000).

[50] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). This amendment is applied to the states by the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

[51] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569–71 (1942) (affirming Chaplinsky's conviction for violating a statute prohibiting him from calling another person an "offensive or derisive name" in a public place).

[52] *Id.* at 572.

[53] Bonnie Schriefer, "*Yelling Fire" and Hacking: Why the First Amendment Does Not Permit Distributing DVD Decryption Technology,* 71 FORDHAM L. REV. 2283, 2305 (2003).

[54] *Id.*; *see* Spence v. Washington, 418 U.S. 405, 409–10 (1974) (holding that the action of hanging an American flag upside-down with a peace sign attached was a type of expressive communication, and therefore protected under the First Amendment).

[55] Schriefer, *supra* note 53.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 2305–06.

   Content-based laws face a higher level of scrutiny than content-neutral laws, and are more likely to be struck down.[59] Content-based restrictions are considered presumptively unconstitutional, and are only permissible if the government is restricting speech in the least restrictive manner possible to "promote a compelling interest."[60] For example, the Supreme Court struck down a statute intended to protect children from offensive material, which prohibited indecent and obscene interstate telephone messages.[61] The Court held the statute was unconstitutional because, while the government's interest was compelling and the obscene material did not benefit from First Amendment protection, the merely indecent material which would have been prohibited was, in fact, protected as free speech, and the government could have pursued other means to protect children from that material.[62]

   Courts distinguish punishment for speech already delivered from "prior restraints," or punishment in advance of speech.[63] They find prior restraints to be particularly detrimental to the guarantee of free speech.[64] Rather than holding someone responsible for their words, prior restraints act as a legal muzzle, forbidding speakers from expressing their thoughts. The Supreme Court noted that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[65] One district court noted that when the prior restraint affects pure speech, "the Court is directed to consider whether publication 'threaten[s] an interest more fundamental than the First Amendment itself.'"[66] While courts have, on occasion, granted prior restraints to protect trade secrets,[67] the Supreme Court has never permitted a prior restraint on protected pure speech.[68]

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[59]   *Id.* at 2306.

[60]   Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

[61]   *See generally id.*

[62]   *Id.* at 131.

[63]   *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

[64]   *Id.* at 714.

[65]   *Id.*

[66]   Ford Motor Co. v. Lane, 67 F. Supp. 2d 745, 749 (E.D. Mich. 1999) (quoting Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996)).

[67]   *See, e.g.*, Garth v. Staktek Corp., 876 S.W.2d 545, 550 (Tex. App. 1994) (allowing the prior restraint in order to preserve trade secret protection); Religious Tech. Ctr. v.

Supreme Court decisions in cases involving prior restraints on free speech illustrate the Court's strong preference for allowing pure speech to occur, even in the face of significant countervailing interests. In *New York Times v. United States*, the "Pentagon Papers" case, the Court protected the newspaper's right to publish a classified document about the United States' involvement in Vietnam, despite the government's interest in keeping the information secret.[69] In *Near v. Minnesota*,[70] the Supreme Court noted that prior restraints should only be available in "rare and extraordinary circumstances, such as when necessary to prevent the publication of troop movements during time of war, to prevent the publication of obscene material, and to prevent the overthrow of the government."[71]

Prior restraints, in the form of preliminary injunctions, are sometimes permitted in intellectual property cases.[72] They are issued to preserve the rights of the trade secret owner, because publication would eliminate the secrecy required for protection[73] and abolish intellectual property rights in the information, causing irreparable injury to the holder of the secret.[74] A preliminary injunction in a trade secret action is usually given "if there is a reasonable certainty that plaintiff will prevail in the ultimate

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Lerma, 897 F. Supp. 260, 262–63 (E.D. Va. 1995) (denying the injunction as prior restraint in a trade secret action).

[68]   *See N.Y. Times*, 403 U.S. at 714; Near v. Minnesota, 283 U.S. 697 (1931); CBS v. Davis, 510 U.S. 1315 (1994) (Blackmun, J.) (staying the preliminary injunction); *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979). "Protected pure speech" refers to types of speech which are covered by the First Amendment. It excludes, for example, "threats to kidnap or injure," and fighting words. U.S. v. Maxton, 940 F.2d 103, 105–06 (4th Cir. 1991). Protected pure speech has also been distinguished from "expressive pure conduct" such as showing the nude female body. Ranch House, Inc. v. Amerson, 22 F. Supp. 2d 1296, 1304–05 (N.D. Ala. 1998).

[69]   403 U.S. at 713.

[70]   283 U.S. 697 (1931).

[71]   *Id*. at 716.

[72]   *See, e.g.*, SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1263–64 (3d Cir. 1985); Merck & Co. v. Lyon, 941 F. Supp. 1443, 1455–62 (M.D.N.C. 1996); KLM Royal Dutch Airlines, N.V. v. DeWit, 415 N.Y.S.2d 190, 191 (Sup. Ct. 1979).

[73]   *See, e.g.*, Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1362, 1368 (E.D. Va. 1995) (holding trade secret status is lost when information is posted on the Internet).

[74]   Loveall v. American Honda Motor Co., 694 S.W.2d 937, 939–40 (Tenn. 1985).

disposition of the controversy, and that in the absence of the preliminary injunction plaintiff risks irreparable injury."[75]   An injunction changes the penalty for making the prohibited speech from a civil suit into a criminal action.[76]

Ford Motor Co. v. Lane[77] addressed the intersection of trade secret law and First Amendment rights to publish secret information.[78] Ford wanted the court to prohibit Lane, a student who published a website about Ford, from publishing advance photographs of upcoming Ford products and internal memoranda detailing Ford's strategies, plans, and concerns about product quality.[79] The court found that Lane knew the documents were confidential and that the sources who gave him the documents were violating their duty to their employer.[80] The court held that regardless of the trade secret status of the documents, Lane's First Amendment rights to publish them on his website could not be enjoined as long as he had not personally breached an employment contract or fiduciary duty to Ford, the owner of the intellectual property.[81]

Advocating illegal conduct is another area where free speech is not a perfect protection against liability. In *Brandenburg v. Ohio*,[82] the Supreme Court overturned a Ku Klux Klan leader's conviction for advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[83] The Court held that the First Amendment protects speech that advocates lawlessness in the abstract.[84]

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[75]   3 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 14.01[1]1, at 14.2–14.17 (1996).

[76]   Carolyn Gorse, *Put Your Body on the Line: Civil Disobedience and Injunctions*, 59 BROOK. L. REV. 1497, 1504 (1994).

[77]   67 F. Supp. 2d 745 (E.D. Mich. 1999).

[78]   *See generally id.*

[79]   *Id.* at 747.

[80]   *Id.* at 750.

[81]   *Id.* at 750 (citing Cherne Indus. v. Grounds & Assoc., 278 N.W.2d 81, 94 (Minn. 1979)).

[82]   395 U.S. 444, 444–45 (1969).

[83]   *See generally id.*

[84]   *Id.* at 448.

When speech becomes more specific, however, and promotes the lawless behavior, the speaker may not be protected. For example, Paladin Enterprises published *Hit Man: A Technical Manual for Independent Contractors*.[85] The book instructed and encouraged James Perry, who planned and committed a brutal triple murder, which he was hired to perform by one victim's ex-husband.[86] Paladin, relying on its First Amendment rights to publish the book, stipulated for the purpose of a summary judgment motion that "it not only knew that its instructions might be used by murderers, but that it actually *intended* to provide assistance to murderers and would-be-murderers."[87] The Fourth Circuit held that the First Amendment did not provide an absolute defense, and Paladin could be held liable for assisting in the murders.[88] It did, however, make a clear effort to restrict the holding to the facts of the particular case.[89] The Fourth Circuit also noted that "*Hit Man* is not political manifesto, not revolutionary diatribe, not propaganda, advocacy, or protest, not an outpouring of conscience or credo," indicating that speech motivated by political activism or other advocacy might get protection where *Hit Man* did not.[90] The book "methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct."[91] Similarly, there is a string of cases holding that speech and instruction on evading taxes are not protected by the First

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[85]   Rice v. Paladin Enterprises, 128 F.3d 233, 239–41 (4th Cir. 1997).

[86]   *Id.* at 239.

[87]   *Id.* at 242 (emphasis in original).

[88]   *Id.* at 266.

[89]   *Id.* ("A decision that Paladin may be liable under the circumstances of this case is not even tantamount to a holding that all publishers of instructional manuals may be liable for the misconduct that ensues when one follows the instructions which appear in those manuals." But the court notes that the holding "may not bode well for those publishers, if any, of factually detailed instructional books, similar to *Hit Man,* which are devoted exclusively to teaching the techniques of violent activities that are criminal *per se*.").

[90]   *Id.* at 262.

[91]   *Id.* at 256.

Amendment when they tell listeners "what to do and how to prepare the [false] forms."[92]

C. DeCSS Technology Primer

An understanding of the technologies involved in the DeCSS controversy is vital to a debate over the code and the Copyleft T-shirts. First, computers read binary code, which appears as a series of on/off signals, or "strings of 1's and 0's."[93] When software is in this format, called object code, the computer can read and execute it.[94] People rarely read or write object code.[95] Instead, programmers generally create software by writing code in a variety of computer languages. That code, which cannot be directly executed by a computer, is called source code.[96] Source code must be translated, or compiled, into object code before it can be executed by the computer.[97]

A DVD is a metallic disk with a five-inch diameter and a hole in the center, commonly used commercially to hold "full-length motion pictures in digital form."[98] They are currently the cutting-edge medium for viewing movies at home.[99] The DVD industry has taken measures to protect copyrighted material on DVDs by creating the Content Scramble System (CSS) which encrypts and safeguards the contents of a DVD.[100] The movie may then be viewed on a DVD player or on a computer which has the required hardware and is "appropriately configured . . . [with the licensed technology] to decrypt, unscramble and play back, but not copy, motion pictures on DVDs."[101]

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[92]   United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985); *see also* United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990), *cert. denied,* 498 U.S. 828 (1990); United States v. Moss, 604 F.2d 569 (8th Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978), *cert. denied,* 437 U.S. 906 (1978).

[93]   Universal City Studios, Inc. v. Corley, 273 F.3d 429, 439 (2d Cir. 2001).

[94]   *Id.*

[95]   *Id.*

[96]   *Id.* There are many programming languages, such as C++, HTML, and Java.

[97]   *Id.*

[98]   Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 307 (S.D.N.Y. 2000).

[99]   *Id.*

[100]   *Id.* at 308.

[101]   *Id.*

With DVD technology, content creators face a serious threat of piracy because DVDs can be copied with little or no degradation in picture or sound quality between generations.[102] The ability to make perfect copies is a feature of digital technology unavailable with the older analog technology.[103] While each analog copy is of lower quality than the preceding version,[104] digital technology copies perfectly, generation after generation.[105] Perfect copies are possible because information about the sound or image is recorded in a binary system, as 1's and 0's.[106] Furthermore, digital media do not degrade from use, regardless of how many times the original is played.[107] Thus, a copied videocassette will be of lower quality than the original, but a copied DVD can be identical to its parent.[108]

Additionally, many computer users connect their computers to the Internet.[109] Because the Internet makes the illicit distribution of digital media "easy and inexpensive," it poses a potentially significant threat to the DVD industry.[110] The DVD industry is,

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[102] *See* Lampman, *supra* note 12, at 375.

[103] Videocassettes, an analog technology, have video and audio tracks recorded on a Mylar tape which the videocassette recorder (VCR) reads as the tape rolls by. Marshall Brain, *How VCRs Work - The Tape*, HowStuffWorks, *at* http://electronics.howstuffworks.com/vcr1.htm (last visited Oct. 20, 2004). Analog technologies, like videocassettes or phonograph records, store data in a format which can include unintended signals, like scratches or static, and degrade over time and between copy generations. Marshall Brain, *How Analog and Digital Recording Works - Analog Wave*, HowStuffWorks, *at* http://electronics.howstuffworks.com/analog-digital2.htm (last visited Oct. 20, 2004). For more information on how analog technologies work, see Marshall Brain, *How Analog and Digital Recording Works*, HowStuffWorks, *at* http://electronics.howstuffworks.com/analog-digital.htm (last visited Oct. 20, 2004) [hereinafter Brain, *How Analog and Digital Recording Works*], and subsequent pages.

[104] *See* Brain, *How Analog and Digital Recording Works*, *supra* note 103.

[105] *See id.*

[106] Using ones and zeroes, or an on/off switch instead of a wave form.

[107] *Id.*

[108] *See* Lampman, *supra* note 12, at 383.

[109] The internet is "a global electronic network, consisting of smaller, interconnected networks, which allows millions of computers to exchange information over telephone wires, dedicated data cables, and wireless links." *See* Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 306 (S.D.N.Y. 2000) (quoting United States v. Microsoft Corp., 84 F. Supp. 2d 9, 13 (D.D.C. 1999)).

[110] Schriefer, *supra* note 53 at 2287 (citing Comm. on Intellectual Prop. Rights and the Emerging Info. Infrastructure and Computer Sci. and Telecomm. Bd. Comm'n on

understandably, vehemently committed to protecting its rights to their copyrighted works.

The DVD industry developed CSS encryption to counter the threat of digital piracy.[111] CSS "is a type of mathematical formula for transforming the contents of [a] movie file into gibberish" which can only be deciphered by a player with the proper key.[112] The DVD CCA was created to administer licenses to the CSS technology.[113] It licenses the "player keys," the code that allows a device to access the contents of an encrypted DVD, to manufacturers of DVD players so that the devices can show the movie on a monitor, but the users cannot copy or edit the movie.[114] The DVD industry also uses this technology to regionally restrict where users can play their DVDs.[115] There are different keys licensed for players sold in different geographic areas, so that, for example, a DVD issued in China could not be played on a North American DVD player.[116] The security measures ensure that the DVD industry retains a great deal of control over where and when DVDs are released, and how they are priced.[117] The DVD CCA tried to ensure that CSS would qualify for trade secret protection by including confidentiality agreements in their licensing contracts and requiring licensees to waive their ability to reverse engineer the CSS technology.[118]

In 1999, Jon Johansen, a Norwegian teenager, collaborated with two unidentified individuals (he knew them only by their Internet pseudonyms) to write the software called "DeCSS."[119] DeCSS stands for "Decrypt CSS."[120] They discovered the CSS decryption algorithm by reverse engineering a commercial DVD

Physical Scis., Mathematics, and Applications, Nat'l Research Council, *The Digital Dilemma: Intellectual Property in the Information Age,* 172 (2000)).

[111]   *Id.*

[112]   Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436 (2d Cir. 2001).

[113]   *Bunner II,* 75 P.3d 1, 6–7 (Cal. 2003).

[114]   *Corley,* 273 F.3d at 436–37.

[115]   Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).

[116]   *See id.*

[117]   *Id.*

[118]   *Bunner II,* 75 P.3d at 7.

[119]   *Reimerdes,* 111 F. Supp. 2d at 311.

[120]   *Id.* n.72 (citing transcript of Johansen).

player.[121] Mr. Johansen published a copy of the executable code on his website and released it onto the Internet.[122] The DVD CCA never granted a license for DeCSS.[123] It is unclear what Johansen intended the software to do; he claimed he wanted to enable DVD users to play their movies on computers without the Microsoft Windows operating system ("Windows").[124] The DVD industry retorted that DeCSS was written to run only on computers using Windows.[125] The Windows version may have been written as a precursor to a version for Linux, another operating system.[126] Johansen claimed the DVDs had to be decrypted on a Windows machine before the files could be transferred to a Linux computer.[127] Running DeCSS with an encrypted DVD in the computer's DVD drive will decrypt the movie and place a large video file on the user's hard drive.[128] The file can then be copied, edited, or played on a player without a CSS license.[129]

Since Johansen released the code, it has spread like wildfire on the Internet, and other applications intended to decrypt DVDs have sprung up as well.[130]

1. Different Parties Have Different Interests in Using or Distributing DeCSS

Piracy is not the only use for DeCSS. Courts have acknowledged a number of possible fair uses that explain why people would want to break the encryption on DVDs:

> A movie reviewer might wish to quote a portion of the verbal script in an article or broadcast review. A television

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[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 437 (2d Cir. 2001). An operating system is the software that works with the computer to run other software programs. Windows is the most common operating system. *Id.*

[125] *Id.*

[126] *Id.* At that time, a license was not available to play CSS-protected DVDs on a computer running Linux. *Reimerdes,* 111 F. Supp. 2d at 311.

[127] *Reimerdes,* 111 F. Supp. 2d at 311.

[128] *Corley,* 273 F.3d at 437.

[129] *Id.*

[130] *Reimerdes,* 111 F. Supp. 2d at 311.

station might want to broadcast part of a particular scene to illustrate a review, a news story about a performer, or a story about particular trends in motion pictures. A musicologist perhaps would wish to play a portion of a musical sound track. A film scholar might desire to create and exhibit to students small segments of several different films to make some comparative point about the cinematography or some other characteristic. Numerous other examples doubtless could be imagined.[131]

Copying copyrighted materials for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" can be permissible.[132] Also, the Supreme Court held that people may duplicate protected intellectual property for the purpose of time-shifting.[133] By extension, some believe fair use permits copying for the purpose of format-shifting, thus allowing a user to move content between mediums (e.g. from compact discs to digital MP3 files).[134] Some experts assert that copying materials to create private back-up copies is a fair use.[135] As mentioned above, consumers who purchase DVDs in one region will find themselves unable to play their legitimately purchased DVDs on a player purchased in another region;[136] an extension of fair use doctrine could prevent this. Each of these proposed fair uses allows a consumer to enjoy legitimately-obtained media in the time and place, and on a device, of his or her own choosing.

The public has also demonstrated an interest in discussing encryption, and a technical discussion of encryption requires using code.[137] Not all encryption work is done within the DVD industry,

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[131]   *Id.* at 337.

[132]   MERGES ET AL., *supra* note 13 at 450.

[133]   Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984) (this case involved private citizens taping television shows for later home viewing).

[134]   Elec. Frontier Found., *supra* note 17 (basing their belief on *Sony*, and *RIAA v. Diamond Multimedia*, 180 F.3d 1072, 1079 (9th Cir. 1999) (concerning MP3 players)); *see also* Amy Harmon, *Group Says It Beat Music Security but Can't Reveal How*, N.Y. TIMES, Jan. 15, 2001, at C2.

[135]   *See* Elec. Frontier Found., *Fair Use FAQ*, *supra* note 17.

[136]   *See id.*

[137]   *See infra* notes 141–48 and accompanying text.

or other content-producing industries.[138] Encryption research and development also occurs at universities and private organizations.[139] Industry and university scientists need to discuss these topics with each other, and use the language of computer code to communicate their ideas.[140]

In one case, Dr. Edward Felten, a Princeton professor, took up a challenge issued by the Secure Digital Music Initiative (SDMI), an organization sponsored by the music industry to improve protection of the industry's copyrighted materials.[141] SDMI issued a general challenge to the public on their website, www.hacksdmi.org, for anyone who could disable their copyright protection system.[142] SDMI offered a reward to anyone who successfully broke the encryption on the digital music files that it provided for download on its website.[143] Dr. Felten and his team of professors, students, and a non-profit association of "engineers, system administrators, scientists, and technicians working on the cutting edge of the computing world," succeeded in their efforts in less than three months.[144] Dr. Felten and his group decided to present the results of their efforts at the Fourth International Information Hiding Workshop in April of 2001.[145] Before the conference, SDMI sent Felten a letter threatening legal action under the DMCA if his group presented their work at the conference.[146] Felten and his team sued, seeking declaratory judgment and an injunction permitting them to present their research.[147] The court dismissed the suit after the recording

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[138]   Harmon, *supra* note 134.
[139]   *Id.*
[140]   *See generally* Elec. Frontier Found., *supra* note 17.
[141]   John Markoff, *Technology; Record Panel Threatens Researcher with Lawsuit*, N.Y. TIMES, Apr. 24, 2001, at C4.
[142]   Complaint, Felten v. RIAA, http://www.eff.org/IP/DMCA/Felten_v_RIAA-/20010606_eff_felten_complaint.html (June 6, 2001) [hereinafter *Felton Complaint*].
[143]   *Id.*
[144]   *Id.* at 2.
[145]   Markoff, *supra* note 141.
[146]   *Felton Complaint*, *supra* note 142.
[147]   *Id.*

industry backed down from their position and allowed Felten to present his group's work.[148]

While SDMI retreated from their position and permitted the presentation on music encryption, the DVD industry continues to aggressively use and protect CSS. The DVD CCA claims that without strong protections, piracy would run rampant, and the DVD industry might cease to release movies on DVD.[149] They argue that piracy "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."[150]

II. EXISTING CASE LAW ON DeCSS

The DVD industry has used two causes of action to stop purveyors of DeCSS: violation of the DMCA, and trade secret misappropriation. Part II will describe and discuss previous suits, and how the courts responded to the First Amendment arguments raised by the defendants.

A. *Universal City Studios, Inc. v. Corley*

In *Universal City Studios, Inc. v. Corley*,[151] seven movie studios sued a magazine publisher for publishing DeCSS on his website, claiming Corley violated the DMCA prohibition against providing a circumvention device.[152] The target audience of Eric Corley's magazine included "serious computer science scholars . . . computer buffs . . . mischief-makers . . . and thieves"[153] who were interested in "techniques for circumventing protections of computers and computer data from unauthorized access."[154] Corley made copies of both the DeCSS source code and the object

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[148] John Schwartz, *Technology: Two Copyright Cases Decided in Favor of Entertainment Industry*, N.Y. TIMES, Nov. 29, 2001, at C4.

[149] DVD Copy Control Ass'n, *Frequently Asked Questions*, http://www.dvdcca.org-/faq.html (last visited Oct. 20, 2004).

[150] *Bunner III,* 10 Cal. Rptr. 3d 185, 188 (Cal. Ct. App. 2004).

[151] 273 F.3d 429 (2d Cir. 2001).

[152] Reimerdes, 111 F. Supp. 2d at 303 (*Reimerdes* became *Corley* on appeal); s*ee also* 17 U.S.C. § 1201(a)(2) (2000).

[153] *Corley*, 273 F.3d at 435.

[154] *Id*.

code available for download on his magazine's website.[155] After a bench trial, the court issued a permanent injunction prohibiting Corley from posting DeCSS on his site, or knowingly linking to a site that does, despite Corley's claims that the DMCA and the injunction infringed his rights to free speech under the First Amendment.[156]

Corley appealed to the United States Court of Appeals for the Second Circuit, claiming that the DMCA violated his First Amendment rights "because computer code is 'speech' entitled to full First Amendment protection, and the DMCA fails to survive the exacting scrutiny accorded statutes that regulate 'speech.'"[157] Generally, instructions qualify as protected speech.[158] The Second Circuit acknowledged that code, whether object code or source code, is a language for the purpose of a First Amendment analysis.[159] Either one can be read directly and comprehended by programmers of sufficient expertise.[160] The Second Circuit agreed that computer code and programs could get that protection.[161] That court held, however, that the code here was more than a set of instructions—it had a functional aspect due to its ability to "instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet."[162] Therefore, the court viewed publishing the code as an activity combining speech and non-speech components.[163] It

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[155] *Id.* at 439.

[156] *Reimerdes*, 111 F. Supp. 2d at 346–47.

[157] *Corley*, 273 F.3d at 435.

[158] *Id.* at 447. The exception is instructions for illegal acts, which are not always protected. *See* Rice v. Paladin Enterprises, 128 F.3d 233, 239–41 (4th Cir. 1997) (denying First Amendment protection for instructions for being a contract murdered), United States v. Raymond, 228 F.3d 804, 815 (7th Cir. 2000) (eliminating protection for instructions on violating tax laws); United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (same); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1020–25 (5th Cir. 1987) (protecting instructions for a dangerous sex act); United States v. Featherston, 461 F.2d 1119, 1122–23 (5th Cir. 1972) (foregoing protection for instructions on building a bomb).

[159] *Corley,* 273 F.3d at 445–46; *see* Schriefer, *supra* note 53, at 2316 (noting that the Second Circuit affirmed the District Court's holding that computer code is speech).

[160] *Corley,* 273 F.3d at 446.

[161] *Id.* at 449.

[162] *Id.*

[163] *Id.* at 451.

found the DMCA to be content-neutral since it was not aimed at the communicative aspects of DeCSS, but only at the software's function of breaking CSS.[164] Under this lighter burden, both the DMCA and the specific injunction against the defendant survived the balancing test and the constitutional challenge.[165] Thus, the code in software form did not receive the full protection of the First Amendment because it was distributed in a functional form.

B. *DVD Copy Control Ass'n v. Bunner*

In 1999, Andrew Bunner made the DeCSS software available for download on his website.[166] In *DVD Copy Control Ass'n v. Bunner*,[167] the DVD CCA claimed that this was a violation of California trade secret law.[168] They sought an injunction to force him to remove the program from his website.[169] The DVD CCA won a preliminary injunction and Bunner appealed, claiming the injunction violated his First Amendment rights.[170] The California Court of Appeals was concerned that the preliminary injunction might be a prior restraint.[171] That court noted that "[p]rior restraints on pure speech are highly disfavored and presumptively unconstitutional."[172] It also observed that the United States Supreme Court has never upheld a prior restraint on pure speech, even when First Amendment rights were balanced against the government's interest in national security.[173] The court's decision hinged on whether Bunner's posting of DeCSS qualified as pure speech.[174] Since DeCSS was "a writing composed of computer source code which describes an alternative method of decrypting CSS-encrypted DVDs,"[175] and not already-compiled object code,

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[164] *Id.* at 454.

[165] *Id.* at 454–55.

[166] *Bunner I,* 113 Cal. Rptr. 2d 338, 341 (Cal. Ct. App. 2001).

[167] *See generally id.*

[168] *Id.* at 338, 341–43.

[169] *Bunner II,* 75 P.3d 1, 9 (Cal. 2003).

[170] *Bunner I,* 113 Cal. Rptr. 2d 338, 340–41 (Cal. Ct. App. 2001).

[171] *Id.* at 350–51 (quoting Alexander v. United States, 509 U.S. 544 (1993)).

[172] *Id.* at 351 (quoting Hurvitz v. Hoefflin, 84 Cal. App. 4th 1232, 1241 (2000)).

[173] *Id.* at 351 (quoting Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226–27 (6th Cir. 1996)).

[174] *Id.* at 348, 352.

[175] *Id.*

the appeals court found the posting was pure speech, and therefore the preliminary injunction issued by the lower court was held improper.[176]

The DVD CCA appealed the loss of their preliminary injunction to the Supreme Court of California, which reinstated the injunction.[177] That court agreed with the lower court that computer code can be protected as speech under the First Amendment.[178] It also held that the trade secret laws, which would prohibit the posting of illicitly gained trade secrets on the web, were content-neutral, rather than aimed at eliminating Bunner's "message or viewpoint."[179] The court recognized that the following issues remained undecided: (1) If CSS is a trade secret, would distributing DeCSS expose the trade secret?; (2) Has the publication of CSS and DeCSS on the web ruined CSS's trade secret status?; (3) Did the author of DeCSS misappropriate trade secrets?; and if so, (4) Did Bunner "kn[ow] or ha[ve] reason to know" that the code exposed misappropriated trade secrets?[180]

The California Supreme Court then followed the *Madsen* test, which required it to "ask . . . whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[181] The court weighed the government interest in protecting trade secrets against Bunner's First Amendment right to "appropriat[e] to [himself] the harvest of those who have sown."[182] The court noted that Bunner's speech regarded "matters of purely private concern and not matters of public performance:"[183]

> [He] posted these secrets in the form of DeCSS on the Internet so Linux users could enjoy and use DVDs and so others could improve the functional capabilities of DeCSS. He did not post them to comment on any public issue or to

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[176]   *Id.*

[177]   *Bunner II,* 75 P.3d 1, 6 (Cal. 2003).

[178]   *Id.* at 10–11.

[179]   *Id.* at 11.

[180]   *Id.* at 9–10.

[181]   *Id.* at 13 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)).

[182]   *Id.* (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 541 (1987) (internal citation omitted) (emphasis in original)).

[183]   *Id.* at 16

participate in any public debate. Indeed, only computer encryption enthusiasts are likely to have an interest in the *expressive* content—rather than the uses—of DVD CCA's trade secrets.[184]

After balancing these interests, the court held that the injunction was permissible.[185]

The California Supreme Court then considered the court of appeals' concerns regarding prior restraints.[186] It found (in *Bunner II*) that the injunction against Bunner was not a prior restraint because the injunction was content-neutral and the result of Bunner's previous unlawful action.[187] The California Supreme Court then remanded the case back to the California Court of Appeals for their evaluation of the record to determine if the DVD CCA had met its burden for obtaining the injunction.[188]

The DVD CCA attempted to dismiss the case before the Court of Appeals ruled.[189] It filed a voluntary dismissal and asked the court hearing the remanded issues to dismiss the appeal as moot.[190] Bunner fought dismissal, and the court decided to hear the appeal, since it believed important issues had been raised.[191]

The California Court of Appeals for the Sixth District ruled, in February 2004, that the plaintiff DVD CCA had failed to show either that they would suffer irreparable harm if the preliminary injunction was not granted or that they were likely to succeed on the merits of the case at trial.[192] The court reversed the order granting the preliminary injunction because the record showed the allegedly secret information would likely be widely available on the Internet when Bunner put it on his website, and trade secret law

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[184] *Id.* at 15–16. Linux is a free computer operating system whose source code is available to all. *See generally* Linux, *What is Linux?*, *at* http://www.linux.org (last visited Oct. 20, 2004).

[185] *See generally Bunner II*, 75 P.3d 1.

[186] *Id.* at 17.

[187] *Id.* (referring to the misappropriation of the trade secret, assuming there was misappropriation).

[188] *Id.* at 19; s*ee supra* notes 166–76 and accompanying text.

[189] *Bunner III,* 10 Cal. Rptr. 3d 185, 187 n.2. (Cal. Ct. App. 2004).

[190] *Id.*

[191] *Id.*

[192] *Id.* at 196.

is not intended to make the general public "liable for misappropriation simply by disclosing [publicly available information] to someone else."[193] Its decision was also based on the finding that "by the time this lawsuit was filed hundreds of Web sites had posted the program, enabling untold numbers of persons to download it and to use it."[194] Therefore, the DVD CCA had not shown that irreparable harm would occur without an injunction against this particular publisher, Bunner.[195] The court finally remarked that "[t]he preliminary injunction . . . burden[ed] more speech than necessary to protect DVD CCA's property interest and was an unlawful prior restraint upon Bunner's right to free speech."[196]

Some believe that this holding will have little effect on this issue as a whole: since *Corley* held it is illegal to distribute the code under the DMCA, trade secret protection for CSS becomes irrelevant.[197] The DVD CCA grumbled that it was "disappointed by and disagree[d] with today's decision . . . . We are reviewing the ruling in its entirety to determine our next steps in the case."[198] As of this writing, it is unclear whether CSS is a trade secret. It is possible that the DVD CCA could continue with this course of action, and pursue purveyors of DeCSS under trade secret laws. However, since the DVD CCA was unable to meet its burden and win a preliminary injunction, and since DeCSS continues to proliferate on the web, it seems exceedingly unlikely that a future court would grant trade secret protection for CSS.

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[193]   *Id.* at 194, 196.

[194]   *Id.* at 195–96

[195]   *Id.*

[196]   *Id*. at 196.

[197]   John Borland, *Hollywood Group Drops DVD-Copying Case*, ZDNET, *at* http://zdnet.com.com/2100-1104-5145809.html (Jan. 22, 2004).

[198]   Evan Hansen, *Court: DeCSS Ban Violated Free Speech*, ZDNET, *at* http://zdnet.com.com/2100-1105-5166887.html (Feb. 27, 2004).

III. THE COPYLEFT T-SHIRTS

A. History of the T-shirts

In January 2000, Copyleft, a small, New Jersey-based company,[199] started marketing T-shirts printed with DeCSS source code.[200]   The company sells shirts, caps, and accessories to computer aficionados, and donates a portion of its profits to organizations dedicated to the creation of free software.[201] Copyleft donated four dollars from the sale of each DeCSS shirt to the Electronic Frontier Foundation ("EFF"), to help the EFF defend other individuals and organizations against DeCSS-related suits initiated by the DVD industry.[202]   Copyleft advertises its shirts as a way for their customers to "[s]how [their] disapproval of the DVD CCA"[203] and make a statement against the DMCA.[204] Even the company's name shows their advocacy of the free software movement. "Copyleft" denotes the movement's preferred method of ensuring that software it creates remains free, and that future versions will also be free. The movement's philosophy is that "[p]roprietary software developers use copyright to take away the users' freedom; we use copyright to guarantee their freedom. That's why we reverse the name, changing 'copyright' into 'copyleft.'"[205]

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[199] Copyleft, *Information*, *at* http://www.copyleft.net/info/info_staff.phtml (last visited Oct. 20, 2004). The Copyleft website only lists one employee—the founder Steve Blood.
[200] Lemos, *supra* note 2. The shirts have enough information on them to allow a programmer to make a functioning copy of DeCSS software, with varying degrees of effort. E-mail from Brian Rudy, computer expert, to Sara Crasson (Feb. 18, 2004) (on file with the author).
[201] Copyleft, *Information: A Brief History of Copyleft*, *at* http://www.copyleft.net/info/info_about.phtml (last visited Oct. 20, 2004); s*ee generally* Copyleft, http://www.copyleft.net (last visited Oct. 20, 2004).
[202] Press Release, Copyleft, *Copyleft Donates $10,000 to EFF*, *at* http://www.copyleft.net/info/info_press.phtml (Feb. 23, 2000).
[203] *E.g.*, Copyleft, *Shirts: DVD Decryption 3 Pack*, *supra* note 4.
[204] *Id.*
[205] Free Software Found., GNU Project, *What is Copyleft?*, *at* http://www.gnu.org/copyleft/copyleft.html (last updated June 15, 2004).

B. *The Suit against Copyleft*

The shirts made their courtroom debut in July 2000, during the *Corley* trial.[206] David Touretzky, a computer science professor at Carnegie Mellon University,[207] testified that DeCSS code should qualify as free speech.[208] During the course of his testimony, he brought up the T-shirts, claiming that "if you can put it on a T-shirt, it's speech."[209] Within weeks, Copyleft had been added to the list of defendants in a pending action by the DVD CCA.[210]

The other defendants included several individuals and organizations that have allegedly made the executable software available on the Internet.[211]   The DVD CCA claimed that distributing T-shirts with DeCSS printed on them "is every bit as much of a theft of the trade secrets as was the posting on websites which was [initially] enjoined by the courts."[212] No decisions have been written yet which address the peculiar issues raised by the Copyleft T-shirts.[213]

C. *Resolving the Copyleft Quandary*

It is currently unlikely that the DVD industry could win a suit against Copyleft with either a trade secret action or under the DMCA, because CSS appears to have lost trade secret protection,

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[206] Farhad Manjoo, *Court to Address DeCSS T-Shirt*, WIRED NEWS, *at* http://www.wired.com/news/technology/0,1282,37941,00.html (Aug. 2, 2000).

[207] Dave Touretzky, *Home Page*, *at* http://www-2.cs.cmu.edu/~dst (last visited Oct. 21, 2004).

[208] *Id.*

[209] Manjoo, *supra* note 206.

[210] *Id.*; *see* DVD Copy Control Ass'n v. McLaughlin, No. 1-99-CV-786804 (Cal. Super. Ct. Dec. 27, 1999), *available at* http://www.sccaseinfo.org. Copyleft is included in the preliminary injunction granted in DVD Copy Control Assoc. v. McLaughlin, No. CV 786804, 2000 WL 48512 (Cal. Super. Ct. 2000). Bunner is also a defendant in *McLaughlin*, and the only defendant to appeal the injunction. No further action has yet been taken in *McLaughlin*.

[211] Chris Marlowe, *T-shirt Designers Call Film Group's Suit 'Absurd,'* MILWAUKEE JOURNAL SENTINEL, Aug. 6, 2000, at E5.

[212] Manjoo, *supra* note 206 (quoting Robert Sugarman, attorney for the DVD CCA).

[213] A preliminary injunction was issued, which was appealed by their co-defendant Bunner, and eventually lifted. *See Bunner I*, 113 Cal. Rptr. 2d 338 (Cal. Ct. App. 2001); *Bunner II*, 75 P.3d 1 (Cal. 2003); and *Bunner III*, 10 Cal. Rptr. 3d 185 (Cal. Ct. App. 2004).

and because the shirts qualify as pure speech. Therefore, the shirts receive more protection under the First Amendment than the executable software banned from distribution by the DMCA.

1. Trade Secret Law

The February 2004 decision of the California Court of Appeals in *Bunner II* indicates that CSS may no longer merit protection as a trade secret.[214]   The court held that the DVD CCA had failed to show CSS was still a protected secret, given the wide proliferation of DeCSS on the Internet.[215]   While a court has not yet ruled on the final issue of whether CSS retains trade secret status,[216] the DVD CCA's failure to meet their burden and get a preliminary injunction indicates that CSS is no longer a trade secret.

2. Digital Millennium Copyright Act

It is unclear whether the DMCA applies to the Copyleft T-shirts, or any other non-executable representations of the prohibited software. The answer depends on whether selling the shirts can be interpreted as "offer[ing] to the public . . . any technology . . . or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the DMCA]."[217]   Selling the shirts through the Copyleft website would be an "offer to the public,"[218] and DeCSS has been found to be "primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the DMCA]."[219]   However, it is unclear whether a court will deem the Copyleft shirts to be "a technology . . . or part thereof."[220]

Professor Felten's aborted action against the Recording Industry Association of America (RIAA) best approximates the

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[214]   See *supra* notes 179–82 and accompanying text.
[215]   *See Bunner III,* 10 Cal. Rptr. 3d 185, 196 (Cal. Ct. App. 2004).
[216]   *Id.*
[217]   17 U.S.C. § 1201(a)(2) (2000).
[218]   *See id.*
[219]   *See generally* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).
[220]   § 1201(a)(2).

issue of whether the DMCA applies to items other than executable code.[221]   The RIAA had objected to the Felten team's planned presentation and publication "describing their research and their attacks" on the SDMI technological security system.[222]   The case was dismissed for mootness when the RIAA withdrew their objections to Felten's presentation.[223]   While no firm conclusions can be drawn from that resolution, SDMI's failure to win their case against Felten bodes ill for the DVD industry's efforts to prohibit the sale of the Copyleft shirts.   Copyleft, like Felten's team, is disseminating information about encryption and decryption outside the context of copying and piracy, and would be a similarly sympathetic defendant.   Copyleft's alleged offense is quite different from spreading executable software, which can be painted as aiding widespread piracy.   The T-shirts themselves cannot decrypt DVDs.   No matter how much you rub the shirts against a DVD, the shirt cannot break the CSS encryption.   Nor can a computer automatically follow instructions printed on a shirt.   The *Corley* court found it compelling that the code could be easily installed in a computer and used to break the encryption on DVDs with just the click of a mouse.[224]   In contrast, the code on the shirt is a set of instructions a person would have to interpret[225] and expand on; his or her own intent and expertise would be necessary before this technology could be implemented.   It is closer to instructions on making a technology than the technology itself.   Instructions can be protected even where the act described is not.[226]   However, a court could conceivably consider the shirts to be a medium of distribution for the prohibited technology, if the information printed on the shirt qualifies as a technology.

3.   The First Amendment Defense

In response to either cause of action, Copyleft could raise the First Amendment defense that prohibiting the sale of the shirts

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[221]   *See Felton Complaint, supra* note 142.

[222]   *Id.* ¶ 37.

[223]   Robert Lemos, *Court Dismisses Free-Speech Lawsuit,* CNET NEWS.COM, *at* http://news.com.com/The+thin+gray+line/2100-1023-276352.html (Nov. 28, 2001).

[224]   *Corley,* 273 F.3d at 451.

[225]   Or, at least, type up and compile into useable software.

[226]   *See supra* notes 82–84 and accompanying text.

violates free speech rights. The First Amendment defense has seen limited success in the DeCSS line of cases,[227] but a court might reconsider it here, since the code is printed on a shirt rather than being distributed in executable form. The United States Court of Appeals for the Seventh Circuit once commented that "T-shirts are a medium of expression prima facie protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away."[228] Judge Posner stated in his opinion that the "T-shirts . . . are to [the seller] what the *New York Times* is to the Sulzbergers and the Ochs—the vehicle of her ideas and opinions."[229] However, not everything printed on a T-shirt can be protected as free speech. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,[230] the owners of rights to the Three Stooges comedy act won their suit to prevent Saderup, an artist, from selling shirts with unauthorized representations of the Three Stooges characters.[231]

Since printing information on a shirt does not provide a perfect First Amendment defense, whether Copyleft can be liable for spreading the software when it provides instructions for making the software will be an issue in the litigation. People can be punished for disseminating instructions for committing illegal acts.[232] *Rice v. Paladin Enterprises* demonstrates that First Amendment protections are limited for instructions for illegal actions.[233] The Copyleft shirts, however, are easily distinguished from the handbook for hit men in *Paladin*. The acts described by the instructions in the handbook are much more damaging to society than the result of following the instructions on the Copyleft shirts. Also, in *Paladin*, the Fourth Circuit gave special weight to

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[227]   *See supra* notes 157–65, 181–85 and accompanying text.

[228]   Ayers v. Chicago, 125 F.3d 1010, 1014 (7th Cir. 1997) (evaluating the constitutionality of an ordinance prohibiting peddling T-shirts in designated areas).

[229]   *Id.* at 1017.

[230]   21 P.3d 797, 801 (Cal. 2001).

[231]   *Id.*

[232]   *See, e.g.*, United States v. Raymond, 228 F.3d 804, 815–16 (7th Cir. 2000) (holding that the First Amendment does not protect instructions for violating the tax laws); United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (same); United States v. Featherston, 461 F.2d 1119, 1122–23 (5th Cir. 1972) (holding that the First Amendment does not protect instructions for building an explosive device).

[233]   *See supra* notes 85–91 and accompanying text.

how detailed the instructions were, enabling someone with no base knowledge to follow them and become a murderer for hire.[234] In contrast, significant knowledge of computers and programming is needed to create functional software from the information on the shirts. The shirts do not provide the level of instruction that courts require in order to eliminate First Amendment protections.[235] The hit man manual was also not intended to make any political statement, unlike the Copyleft shirts.[236]

The First Amendment analyses performed by the *Corley* and *Bunner II* courts could each be applied to the Copyleft example. In *Corley*, the court reduced the amount of First Amendment protection available to the publishers of the code because the code has a functional aspect.[237] The court held that:

> Unlike a blueprint or a recipe, which cannot yield any functional result without human comprehension of its content, human decision-making, and human action, computer code can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet. The only human action required to achieve these results can be as limited and instantaneous as a single click of a mouse.[238]

This distinction does not apply to the Copyleft T-shirts. As mentioned above, the instructions printed on them must be interpreted by a human to yield a functional result. The Copyleft shirts are missing the functional, non-speech component. And since, as the *Corley* court noted, the DMCA only targets the non-speech component,[239] the DMCA may not be applicable to the speech on the shirts. Furthermore, the speech on the shirts may be interpreted as instructions on how to make DeCSS software, and, notably, making the software is not prohibited under the DMCA.[240] Using the software to circumvent technological protections on

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[234] *See id.*

[235] *See supra* note 91 and accompanying text.

[236] *See supra* note 90 and accompanying text.

[237] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451–52 (2d Cir. 2001).

[238] *Id.* at 451.

[239] *Id.* at 456.

[240] *See* 17 U.S.C. § 1201(a)(2) (2002).

copyrighted material and distributing the software are prohibited, but creating the software itself is legal.[241] Therefore, unlike *Paladin*, using the instructions would be legal. Although instructions on committing illegal acts can be prohibited,[242] these shirts provide instructions for the legal act of creating DeCSS. Following the *Corley* analysis, for a DMCA action, the courts should allow Copyleft to continue to print and sell their shirts.

Allowing people to spread the instructions for creating DeCSS is only one step toward addressing the concerns of fair use advocates. The DMCA allows users to follow instructions and create their own copies of DeCSS, but prohibits them from using the software to decrypt copyrighted materials. Currently, fair use is not a defense to a DMCA violation, but once instructions for users to make their own decryption tools become commonly and legitimately available, fair use advocates could try to attack the DMCA for failing to provide a fair use exception. Although that argument failed to provide a basis for legalizing the distribution of executable DeCSS software in *Corley*,[243] these advocates may have more success when fair use is the only issue before the court.

Assuming that the DVD industry continues the current suit against Copyleft[244] and meets its burden of showing that CSS retains trade secret status, Copyleft likely will raise a free speech defense. Under the *Bunner II* analysis, it is less important if the code is functional, since the trade secret protection would apply at least as strongly to the non-functional code. In that case, the major tension was between protecting Bunner's speech and protecting the property rights of the DVD CCA.[245]

A court looking at the Copyleft shirts will likely hinge a trade secret decision on the misappropriation issue.[246] The *Bunner II* court also limited Bunner's free speech protection because it found

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[241] *See id.*

[242] *See supra* note 232.

[243] 273 F.3d at 458–59.

[244] DVD Copy Control Ass'n v. McLaughlin, No. 1-99-CV-786804 (Cal. Super. Ct. Dec. 27, 1999), *available at* http://www.sccaseinfo.org.

[245] *Bunner II,* 75 P.3d 1, 14 (Cal. 2003) (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 541 (1987) (citing Int'l News Serv. v. Associated Press, 248 U.S. 215, 239–40 (1918)) (alterations in original)).

[246] *See generally Bunner II,* 75 P.3d 1.

he posted DeCSS on the Internet for functional purposes rather than for participation in a public debate.[247] This distinction may be a winning argument for Copyleft. Copyleft intended the speech on the shirt specifically to serve as a political commentary, as a statement of the wearer's distaste for the DMCA and of the DVD industry's actions in suppressing DeCSS.[248]   This argument, however, does not resolve whether it is necessary, important, or even helpful to the public debate to express one's views through the exposure of the DVD CCA's trade secret. There are any number of statements, slogans, or expletives which could express disdain for the DMCA and the DVD industry without revealing a protected trade secret. Moreover, *Bunner II* noted and disregarded that "computer encryption enthusiasts *are* likely to have an interest in the expressive content—rather than the uses—of [CSS]."[249] Copyleft might pursue this argument by bringing evidence that a sufficient segment of the population is interested in the expressive content of their shirts, and that the shirts should be counted as participation in a public debate.

Copyleft is more likely to win a free speech argument in an action like the one in *Corley* than that in *Bunner II*, and it is more likely that it will face a DMCA action than a trade secret action, following the *Bunner III* decision not to grant the injunction against publication of DeCSS.[250] The impact of a decision in the Copyleft T-shirts case would be limited, given that most DeCSS-related suits are against defendants who distributed the executable code over the Internet, but it would affect some people. A finding for Copyleft would ensure that First Amendment rights would protect the pure speech of the DeCSS songs, pieces of music using the DeCSS code as lyrics,[251] and the DeCSS Haiku, which includes instructions for writing software to decrypt a DVD in the poetic form.[252] It is also possible that digital representations of the code

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[247]   *Id.* at 15–16.

[248]   *E.g.* Copyleft, *Shirts: DVD Decryption 3 Pack*, *supra* note 4; *see also supra* notes 199–204 and accompanying text.

[249]   *Bunner II,* 75 P.3d at 16 (emphasis added and original emphasis removed).

[250]   See *supra* notes 192–96.

[251]   Two examples of songs can be found at Touretzky, *supra* note 38. The author's favorite is the "Square Dance Version."

[252]   For Seth Schoen's *DeCSS Haiku*, see Touretzky, *supra* note 38.

that are not in the form of software, but which could be digitally copied and then compiled into functioning software, would qualify for protection as pure speech. The above analysis reveals that a major distinction lies in whether the speech has a functional aspect. Accordingly, the "screen dump of the CSS descrambling code"[253] file would be protected pure speech, since it is an image, like a photograph, of the text, and it is not possible to directly compile those files into software, or execute the files to decrypt a DVD.[254] As a result, distributing the code for DeCSS in any form other than executable software, including the Copyleft T-shirts, would most likely protect the dissemination of the code as pure speech under either the DMCA or trade secret law. A court addressing the specifics of the Copyleft litigation will likely find in Copyleft's favor and allow the company to continue selling the T-shirts.

CONCLUSION

The courts should permit Copyleft to continue to sell the DeCSS T-shirts, unimpeded by the DMCA and trade secret laws. This situation is distinguishable from similar cases because here the code is disseminated in a very different medium. Instead of downloadable software ready to be executed by a computer and decrypt DVDs, Copyleft sells uncompiled, human-readable source code printed on a T-shirt, a traditional American medium for all kinds of expression. Printing source code on a shirt to express distaste for the DVD CCA's policies and actions is pure speech, and this country places a premium on permitting pure speech.

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[253] *See* David S. Touretzky, *Screen Dump of CSS Descrambling Code*, *at* http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/page1.gif; http://www-2.cs.cmu.edu/~dst/DeCSS-/Gallery/page2.gif; http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/page3.gif (last modified July 10, 2004).

[254] *See id.*