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What Does Pruneyard Have To Do With California Internet Trade Secret Law?

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I. INTRODUCTION

When the average young man gets on his computer, he probably does not consider that his actions could draw attention from the Motion Picture Association of America, the American Civil Liberties Union, or the National Football League. However, these organizations and about twenty other major corporations and industry organizations have been quite attentive to the actions of a young California man named Andrew Bunner (Bunner).[1] Bunner put a link on his Web page allowing visitors to access a Digital Video Disc (DVD) descrambler program, which, when used properly, allows a computer user to decrypt DVDs.[2] All those previously mentioned interested parties jumped into a lawsuit in support of the DVD Copy Control Association (DVD Copy Control) after DVD Copy Control brought suit against Bunner.[3]

The *Bunner* case gives the California appellate courts their first good look at free speech in relation to computer code, and, additionally, of how trade secret protection conflicts with such code protection.[4] The California Sixth District Court of Appeal (Sixth District, *Bunner* court) ruled on whether computer code involves free speech, and to what extent.[5] The Sixth District ultimately decided that computer code should be given enormous protection, holding that the code deserves "pure speech" protection, potentially trumping any state trade secret protection the information may have.[6]

Recently, however, the California Supreme Court (supreme court), in a lengthy opinion, reversed the Sixth District, saying that the case did

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1. *See* Mike McKee, *"Friends" in High Places: In a Sign of What's at Stake, State Justices Deluged with 42 Amicus Briefs in Trade-Secrets Dispute*, SAN FRAN. RECORDER, Aug. 22, 2002, at 1. Over thirty major corporations and industry groups, including all four major sports leagues, filed amicus curiae briefs in a lawsuit against Bunner. *Id.*

2. DVD Copy Control Ass'n v. Bunner, 113 Cal. Rptr. 2d 338, 341-42, 60 U.S.P.Q.2d (BNA) 1803, 1804 (Cal. Ct. App. 2001) [hereinafter *Bunner*].

3. McKee, *supra* note 1, at 1-2.

4. A California trial court decided another case on the issue of DeCSS distribution, but the *Bunner* case was the first to make it to a California appellate court. *See* DVD Copy Control Ass'n v. McLaughlin, 2000 WL 48512 (Cal. Super. Ct. Jan. 21, 2000).

5. *See Bunner*, 113 Cal. Rptr. 2d at 347-48, 60 U.S.P.Q.2d at 1808-09.

6. *See id.* at 349, 60 U.S.P.Q.2d at 1811.

not "implicate[] the core purpose of the First Amendment."[7]

This Comment will discuss the facts of the *Bunner* case and the decisions of the Sixth District and the supreme court. It will then analyze the historical protection given free speech and trade secrets under California law. Ultimately, the Comment will conclude that the Sixth District likely decided the case soundly, as California's historical heightened protection of free speech allowed the Sixth District to give computer code pure speech protection.

II. THE FACTS OF *BUNNER* AND *DVD COPY CONTROL*[8]

The *Bunner* case involves the computer decryption program called DeCSS.[9] DeCSS is a derivation of the original Content Scramble System (CSS) program[10] and it allows users to descramble encrypted DVDs and play them in non-CSS drives.[11] The original CSS program contains 400 keys and various algorithms, which combine to read a DVD inserted into the player and descramble the encryption.[12] The DeCSS program appeared on the Internet in 1999.[13] Once on the

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7. DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 15 (Cal. 2003) [hereinafter *DVD Copy Control*].

8. The decision in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 60 U.S.P.Q.2d (BNA) 1953 (2d Cir. 2001) was based on facts almost identical to those in these California cases (*i.e.*, DeCSS Web-posting) and will be discussed occasionally in this Comment. For another author's overview of these DeCSS cases, see Brian R. Chase, *Legal Update: The First Amendment and DeCSS*, 8 B.U. J. SCI. & TECH. L. 729 (2002) (published shortly after this Comment was completed).

9. *Corley*, 273 F.3d at 435, 60 U.S.P.Q.2d at 1955-56; *Bunner*, 113 Cal. Rptr. 2d at 342, 60 U.S.P.Q.2d at 1804.

10. The movie industry created CSS encryption to prevent piracy of DVDs and promote DVD sales. DVD Copy Association controls the rights to CSS and licenses the CSS code to DVD player manufacturers. *Corley*, 273 F.3d at 436-37, 60 U.S.P.Q.2d at 1956; *Bunner*, 113 Cal. Rptr. 2d at 341, 60 U.S.P.Q.2d at 1804.

11. *Corley*, 273 F.3d at 437-38, 60 U.S.P.Q.2d at 1957. DeCSS also has the potential to allow a computer user to copy an entire DVD to his or her hard drive and then recopy the DVD to another disc (known as "burning" DVDs), although this has not occurred yet with the DeCSS program. *See id.* at 438, 60 U.S.P.Q.2d at 1957. A few other programs are on the market to burn DVDs. A recent example is the 321 Studios program, a program designed by a retired computer consultant that allows users to burn DVDs cheaply and quickly by manipulating the CSS program. The motion picture industry is watching these programs closely, and more lawsuits over the CSS program are imminent. *See Renegade Offers 'Legal' DVD Copying*, CNN.com, *at* http://www.cnn.com/2002/TECH/ptech/11/12/new.dvd.copy.ap/index.html (Nov. 12, 2002) (no longer available; copy on file with author).

12. *Bunner*, 113 Cal. Rptr. 2d at 341, 60 U.S.P.Q.2d at 1804.

13. A young Norwegian named Johansen reverse-engineered a licensed DVD player manufactured by Xing Technology Corporation and from that process derived the necessary

Internet, computer users around the world could access the DeCSS program; many DeCSS users and supporters either hyperlinked to the program on their Web pages or directly copied the program and made it available on their Web pages.[14]   Bunner directly copied the program onto his Web site.[15]   After DVD Copy Control discovered Bunner's actions, it sought an injunction under the California Uniform Trade Secrets Act (UTSA).[16]   Bunner put forth a defense of freedom of speech under the First Amendment of the United States Constitution to protect his actions.[17]

III. THE DECISIONS IN *BUNNER* AND *DVD COPY CONTROL*

A. Corley

Although not a California case, and not directly the topic of this Comment, the United States Court of Appeals for the Second Circuit's (Second Circuit) decision in *Corley* has influenced courts across the country, including the Sixth District and California Supreme Court, in how they address computer code as "speech" under the First Amendment. Thus, a brief synopsis of *Corley* is necessary.

The Second Circuit had three issues to sort out when it decided how much First Amendment protection to accord computer code: (1) whether computer code is speech; (2) whether computer programs are speech; and (3) whether the functionality of the code minimized the

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computer "keys" and "algorithm" to create DeCSS. Johansen created DeCSS to allow him to play CSS encrypted DVDs on his Linux computer system, as all other DVD players use Microsoft systems. *See Corley*, 273 F.3d at 437, 60 U.S.P.Q.2d at 1957; *Bunner*, 113 Cal. Rptr. 2d at 341, 60 U.S.P.Q.2d at 1804. Whether Johansen's reverse engineering was legal under Norwegian law was not an issue addressed in either case.

14. *Bunner*, 113 Cal. Rptr. 2d at 341, 60 U.S.P.Q.2d at 1804; *Corley*, 273 F.3d at 439, 60 U.S.P.Q.2d at 1958.

15. *Bunner*, 113 Cal. Rptr. 2d at 341, 60 U.S.P.Q.2d at 1804.

16. *Id.* at 340, 60 U.S.P.Q.2d at 1804. After seeing Universal win an injunction against Corley in New York on the copyright infringement issue, perhaps DVD Copy Control should have filed a similar federal copyright claim against Bunner, rather than just a state trade secret claim. In fact, the *Bunner* court explicitly stated that DVD Copy Control might have won an injunction if it had brought a copyright claim against Bunner. *Id.* at 351-52, 60 U.S.P.Q.2d at 1811. Perhaps DVD Copy Control believed it could win on the trade secret as it did in *McLaughlin*, a case in which a California court issued an injunction to prevent a man from distributing a reverse-engineered copy of DVD Copy Control's CSS encryption code. *See McLaughlin*, 2000 WL 48512.

17. *Bunner*, 113 Cal. Rptr. 2d at 343, 60 U.S.P.Q.2d at 1805. *See generally* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

code's protection as free speech.[18]

The court relied on previous federal decisions and stated that an individual computer code is undisputedly "speech," as it can be read and understood by a large group of people (*i.e.*, computer programmers).[19] The court noted that ease of comprehension is irrelevant to whether code constitutes pure speech—even though code in its most basic form is an extremely long series of numbers, it is still pure speech.[20]

The Second Circuit had a tougher time deciding whether a computer program (a combination of many codes working together) and the codes contained therein may be protected as pure speech. Since programs are ultimately constructed from code, the court reasoned that there is some free speech protection for computer programs and program code, but "the scope of such protection remains to be determined."[21]

The scope of protection for computer code is the biggest decision the Second Circuit had to make in the *Corley* case. The court based the scope of protection analysis on the assumption that "functionality" is equivalent to "conduct,"[22] bringing the analysis within the scope of closer scrutiny under the appropriate freedom of speech test.[23] Since

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18. *Corley*, 273 F.3d at 445-54, 60 U.S.P.Q.2d at 1961-69. For a further discussion of the *Corley* court's analysis, see *Second Circuit Classifies the Posting and Linking of Computer Code as Expressive Conduct Rather than Pure Speech*, 115 HARV. L. REV. 2042 (2002).

19. *Corley*, 273 F.3d at 446, 60 U.S.P.Q.2d at 1963 (citing Junger v. Daley, 209 F.3d 481, 484 (6th Cir. 2000)).

20. *Id.*

21. *Id.* at 449, 60 U.S.P.Q.2d at 1966.

22. *See id.* at 451, 60 U.S.P.Q.2d at 1967. The court decided that "conduct" should be defined as any speech or expression that "has immediate effects on the environment." *Id.* (citing Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 331-32 (S.D.N.Y. 2000)). For an argument that the court incorrectly approached this "effect on environment" definition, see *Second Circuit Classifies the Posting and Linking of Computer Code as Expressive Conduct Rather than Pure Speech, supra* note 18, at 2044-45 (claiming that although "intuitively appealing," the Second Circuit's conduct distinction is "unstable").

23. *See Corley*, 273 F.3d at 451, 60 U.S.P.Q.2d at 1967 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969)). The historical federal test for free speech protection when both speech and conduct are present is the "O'Brien test," established by the United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968). The O'Brien test gives speech with conduct elements less First Amendment protection than "pure speech" with no conduct elements; in other words, speech with conduct elements is more closely scrutinized under First Amendment analysis to determine whether it should be given protection. *See O'Brien*, 391 U.S. at 376. The *Corley* court's content-based approach has little precedent, as most copyright cases involving reproduction are decided under the fair use doctrine. *See* Deborah F. Buckman, Annotation, *Copyright Protection of Computer Programs*, 180 A.L.R. FED. 1 (2002). Future decisions will determine whether the *Corley* decision indicates a new trend of displacing the fair use doctrine under the DMCA or whether the decision is just an anomaly.

computer code cannot be executed without the "functionality" of computers, the code is not as highly protected as pure speech without any functionality element.[24] The court also relied on a balance of harms test in determining the appropriate free speech protection to accord computer code.[25]

Ultimately, the Second Circuit decided that federal copyright law did not infringe upon this lower level of free speech protection for computer code, upholding the District Court's injunction against Corley.[26]

B. Bunner

The Sixth District could have easily followed the lead of the *Corley* court in making its decision in the *Bunner* case. The California court, however, went the opposite way, rejecting the harm-based approach and concluding that computer code and the DeCSS program are "pure speech," relying heavily on statements set forth in *Junger v. Daley.*[27]

The Sixth District recognized that not all forms of speech are fully

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24. *See Corley*, 273 F.3d at 451, 60 U.S.P.Q.2d at 1967. The DeCSS cases involve two types of code. "Source code" is code in a more readable form, made possible by programs such as BASIC, C, and Java; "object code" is the basic 1's and 0's of the code. The computer must translate the source code back to object code before it can read what the programmer is trying to say; this is where the "functionality" of the computer comes into play. *See id.* at 439, 60 U.S.P.Q.2d at 1958. *See also* notes 102-09, *infra*, and accompanying text.

25. *See Corley*, 273 F.3d at 451, 60 U.S.P.Q.2d at 1968. The court reasoned that since computer code can be mass disseminated with the click of a mouse, the code's potential harm to others necessitates that it be afforded less free speech protection. In the opinion, the court seemed to long for the good old days where "copyright infringement could be dealt with quite adequately" because books and other materials were more tangible. *See id.* at 451-452, 60 U.S.P.Q.2d at 1968. For criticism of this new harm-based approach, see *Second Circuit Classifies the Posting and Linking of Computer Code as Expressive Conduct Rather than Pure Speech, supra* note 18, at 2046-49 and Geoffrey Gordon, Note, *Breaking the Code: What Encryption Means for the First Amendment and Human Rights*, 32 COLUM. HUM. RTS. L. REV. 477, 500-01 (2001) (arguing that a harm-based balancing test as applied to computer code is incongruent with the First Amendment's historical inclusion of protection of various kinds of speech). *But see* David Greene, *Trade Secrets, the First Amendment and the Challenges of the Internet Age*, 23 HASTINGS COMM. & ENT. L.J. 537, 555-60 (2001) (suggesting that concessions to trade secret holders must be made because of the Internet's communication power, and a balance of harms test should be applied to make it easier for trade secret holders to obtain injunctions against third-party disseminators); Adam W. Johnson, Note, *Injunctive Relief in the Internet Age: The Battle Between Free Speech and Trade Secrets*, 54 FED. COMM. L.J. 517, 534-35 (2002) (arguing that such a harm-based test used by a Texas court in *Garth v. Staktek Corporation*, 876 S.W.2d 545 (Tex. App. 1994), is the "proper balance of free speech and trade secret concerns").

26. *Corley*, 273 F.3d at 459-60, 60 U.S.P.Q.2d at 1974.

27. *See Bunner*, 113 Cal. Rptr. 2d at 348, 60 U.S.P.Q.2d at 1809 (citing Junger v. Daley, 209 F.3d 481 (6th Cir. 2000)).

protected under all circumstances.[28] However, since the computer code at issue in the *Bunner* case did not fall into one of the "well-defined and narrowly limited" categories of speech that are subject to prohibition, the court refused to limit protection of the code as pure speech.[29] The court also rejected the argument that the policy set forth in the UTSA required protection of the trade secret despite any free speech ramifications that such an order would produce.[30] The Sixth District continued by stating that the trial court's injunction was a prior restraint on pure speech.[31]

As courts often do, the *Bunner* court appeared to structure its opinion as if the court knew what result it wanted from the start (*i.e.*, overturn the injunction), and filled in law to reach that conclusion. As this Comment discusses below, however, the court may have been following precedent without even knowing it.[32]

C. DVD Copy Control

The California Supreme Court did not directly contradict the reasoning of the Sixth District in its *DVD Copy Control* decision. However, the supreme court decision skirted the issue of whether computer code is protected as pure speech. Instead, the court mentioned that the computer code deserved some level of free speech protection[33] but then quickly shifted its focus to the issue of what type of burden the trial court's injunction placed on Bunner's speech.[34] Reasoning that the injunction here was "content neutral," the court used a lower level of scrutiny, concluding that the injunction should be upheld.[35] In essence, the supreme court was more interested in balancing the burden on speech against the protection of a property right,[36] whereas the Sixth District focused more on protecting speech.

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28. *Id.*, 60 U.S.P.Q.2d at 1808-09.

29. *Id.* at 348-49, 60 U.S.P.Q.2d at 1810.

30. *Id.* at 349-50, 60 U.S.P.Q.2d at 1810 ("The UTSA ... lacks any constitutional foundation. Consequently, a clash between the trade secrets law and the First Amendment does not involve a balancing between two constitutional interests.").

31. *Id.* at 350-51, 60 U.S.P.Q.2d at 1811-12.

32. Of course, the court may have well known that it was following in the footsteps of previous cases, but because none of the cases discussed later in this note were cited by the court, one could reasonably assume that the court overlooked those cases.

33. *DVD Copy Control*, 75 P.3d at 10.

34. *See id.* at 11.

35. *Id.* (relying on the test set forth in Madsen v. Women's Health Center, 512 U.S. 753 (1994)).

36. *See id.* at 13.

Moving on to the prior restraint doctrine, the California Supreme Court again turned to the classification of the injunction as a content-neutral restriction relative to DVD Copy Control's interest in protecting its property right in deeming the prior restraint doctrine inapplicable.[37]

The supreme court's decision did not appear to provide much substance. The decision was founded on many assumptions[38] backed with minimal discussion. Perhaps most disappointing is the fact that the court did not directly address many issues in the Sixth District's earlier opinion, leaving substantial uncertainty as to where the California courts stand on many aspects of the trade secret-free speech issue.

D. Which California Court Was Right?

Although the supreme court did not directly confront most of the Sixth District's analysis, it still reversed the Sixth District, implying that there was a problem with that lower court's decision. The Sixth District opinion, though, contained holes of its own. In short, neither decision was perfect under the circumstances.

Even though the Sixth District opinion was not perfect, it was a reasonable reflection of previous free speech law in California and did not necessarily warrant reversal. The discussion that follows attempts to highlight California case law that supports the Sixth District opinion and then applies the facts of *Bunner* to those cases.

IV. CALIFORNIA LAW AND THE *BUNNER* DECISION

A. Historic Cases Outlining the Extent of California's Heightened Free Speech and Public Access Law

A look at a few recent cases that exemplify free speech protection in California helps give an understanding of the underlying free speech convictions of the California courts. From these opinions one gets the sense that California courts have somewhat of a tradition of providing heightened free speech protection. Although the cases discussed below do not all deal specifically with trade secrets, and although the Sixth

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37. *See id.* at 17-18.

38. *See, e.g., DVD Copy Control,* 75 P.3d at 18 ("[W]e assume . . . that Bunner knew . . . that DVD [Copy Control]'s trade secrets were acquired by improper means."); 75 P.3d at 19 ("We [make our holding] *assuming* the trial court properly issued the injunction . . . .") (emphasis in original); 75 P.3d at 10 ("We also assume that DVD [Copy Control] will suffer irreparable harm without injunctive relief and that the injunction will cause minimal harm to Bunner.").

District does not specifically address these cases in its decision, these previous holdings show a marked trend toward expanding free speech protection by the California courts and may demonstrate why the Sixth District decided this case the way it did.

1. *Pruneyard*

The initial inquiry in this area of heightened free speech protection comes from *Pruneyard Shopping Center v. Robins.*[39]

In *Pruneyard*, a group of Zionists set up a table in a privately owned shopping mall, soliciting signatures for a petition the group was sending to the President of the United States in protest of a United Nations resolution that opposed Zionism as a religion.[40] The California Supreme Court held that Article I of the California Constitution[41] protected petitioning as political speech, even though the petitioning was held on private property. The court reasoned that the state framers "could have adopted the words of the federal Bill of Rights[,]" but they chose not to, signifying an expansion of free speech protection under the state constitution.[42] Based on the public nature of the shopping center[43] and the "strength of 'liberty of speech' in [California,]"[44] Robins, the shopping center owner, had no ability to remove the petitioners without imposing proper "time, place, and manner rules."[45] The court held that "the rights of society" could limit individual property rights.[46] The *Robins* court decided that no previous United States Supreme Court

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39. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979) [hereinafter *Robins*], *aff'd*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) [hereinafter *Pruneyard*].

40. *Robins*, 592 P.2d at 342. Zionism is defined as "[a] Jewish movement that arose in the late 19th century in response to growing anti-Semitism and sought to reestablish a Jewish homeland in Palestine. Modern Zionism is concerned with the support and development of the state of Israel." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

41. CAL. CONST. art. I, § 2. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." *Id.* § 2(a).

42. *Robins*, 592 P.2d at 346.

43. *See id.* at 344-45. The court listed among the factors of a "public place" whether the place was one where the population was "likely to spend the most significant amount of its time." *Id.* at 345. For in-depth commentary on the public place doctrine and its applicability to the Internet, see generally Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998). For a broad overview of free speech rights on the Internet in general, see generally MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE (Random House 1998).

44. *Robins*, 592 P.2d at 346.

45. *Id.* at 347.

46. *Id.* at 344.

decisions, nor federal preemption, took away the "states' power to regulate uses of property[,]" including the states' power to expand protected individual liberties like free speech to private property.[47]

The United States Supreme Court affirmed the decision of the California Supreme Court, but added an extra relevant element to the analysis of the issue: since the public forum (the shopping center) is large and many groups are present in the shopping center, the statements made by the petitioners will likely not be mistakenly attributed to the mall's owner.[48]

2. *Providian*

On the flip side of free speech, is the right to access "public information." Inherent in the right to freely speak is the right to receive the information being spoken.[49] In the *Providian Credit Card Cases*,[50] the California Court of Appeal dealt with potential trade secrets that had been sealed pending a civil lawsuit. In the motion for unsealing the documents, the plaintiffs argued that the records were not trade secrets because they had previously been disclosed to the public.[51] The court stated that a trial court had no "mandatory independent duty . . . to protect trade secrets" when making court orders[52] and that the defendant had the burden to first prove that a trade secret existed before the court would even consider protecting the information.[53] In

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47. *Id.* at 345-46. The court's decision in *Pruneyard* has had a dramatic effect on recent state free speech law. *See generally* Brady C. Williamson & James A. Friedman, *State Constitutions: The Shopping Mall Cases*, 1998 WIS. L. REV. 883 (1998) (providing examples of how the *Pruneyard* free speech doctrine has been received in other states); Maurice F. Kirchofer III, Note, *New Jersey State Constitution Requires Privately Owned Shopping Malls to Allow Access for Expressional Leafletting, Subject to the Owner's Reasonable Time, Place, and Manner Restrictions*, 27 SETON HALL L. REV. 289 (1996) (reporting on a case in which the New Jersey Supreme Court followed the *Pruneyard* decision to broaden free speech rights under the New Jersey state constitution).

48. *See Pruneyard*, 447 U.S. at 87.

49. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976).

50. *In re* Providian Credit Card Cases, 116 Cal. Rptr. 2d 833 (Cal. Ct. App. 2002).

51. *Id.* at 836. For a practical overview of trade secrets, including the public disclosure doctrine, see generally KINNEY & LANGE, P.A., INTELLECTUAL PROPERTY LAW FOR BUSINESS LAWYERS, §§ 12.1-12.10 (West 1996).

52. *Providian*, 116 Cal. Rptr. 2d at 838 n.5.

53. *Id.* at 840 (citing CAL. EVID. CODE § 500 (2001)). The court must look at the California version of the UTSA when determining whether the defendant met his burden of proof on the trade secret issue. *See id.* at 839. California statute provides the factors for determining whether a trade secret exists:

(d) "Trade secret" means information, including a formula, pattern, compilation,

deciding preliminary motions involving potential trade secrets (impliedly including preliminary injunctions such as that in the *Bunner* case), the court must decide whether there is an "overriding interest that overcomes the right of public access to the [information]."[54] If no overriding interest exists, the court should not prohibit the public from retaining rights to already-public trade secret information.[55]

The *Providian* court also laid the groundwork for determining (1) whether information is "public" and unprotectable under trade secret law or (2) whether the trade secret holder protected the information by using "reasonable" efforts to protect secrecy and thereby allowing the information judicial protection as a trade secret.[56] The court seemingly raised the bar in regard to burdens of proof for trade secret protection, strictly applying a rule that could be liberally read to suggest that when perhaps even one individual holder of the proprietary information discloses the trade secret to at least one person who has no obligation to protect the confidentiality of the information, the information could be in the public forum and thereby unprotectable under trade secret law.[57] The court went on to find that any memoranda that was not stamped "confidential" by the defendant was not a trade secret because the defendant did not take reasonable measures to protect the documents' secrecy.[58] More obviously, the court found that the scripts used by telemarketers were sufficiently disclosed to the public to deprive them of trade secrecy because "all who have had . . . their evening meal disturbed by a call from a telemarketer" have heard the information in the scripts.[59]

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program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

CAL. CIV. CODE § 3426.1(d) (West 1997).

54. *Providian*, 116 Cal. Rptr. 2d at 841.

55. *Id.*

56. *Id.* at 842-46.

57. *See id.* at 842 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); CAL. CIV. CODE § 3426.1 (West 1997)).

58. *Id.* at 845. The court stated that "actions speak louder than words[,]" and when a defendant does not take the time to stamp every document, it shows that the defendant did not really try hard enough to protect the documents. *Id.*

59. *Providian*, 116 Cal. Rptr. 2d at 842.

3. *Saline*

One recent California case further illustrates the state courts' distaste for trade secret protection when freedom of speech issues are involved. *Saline v. Superior Court*[60] involved a corporate director who allegedly posted in-house computer system costs on the Internet to spite opposing directors.[61]   The corporation, an energy services provider, claimed that the system costs were trade secrets because the information went to the heart of the business' strategy. The court refused to protect the information as trade secrets because the information posted "was not the apocryphal 'secret formula,' the disclosure of which damaged the company beyond all repair."[62]   The court went on to state that prohibiting the director from speaking (*i.e.*, posting the information) was a prior restraint on speech, and prior restraints are rejected by California courts unless there is a "competing constitutional right" that deserves protection equal to that of free speech.[63]

B. *California Free Speech and Trade Secret Law as it Applies to* Bunner

The above-mentioned cases give some insight into the types of heightened free speech and lessened trade secret protection that California courts give to information. When *Pruneyard, Providian,* and *Saline* are examined in an overall context, one sees both a high level of protection of free speech and a high barrier for trade secret protection in preliminary California state court proceedings applying California law.   Together, these two elements may underscore why the *Bunner* court allowed Andrew Bunner free speech protection and denied DVD Copy Control a preliminary injunction on the trade secret issue. Applying the facts of the case to these ideals of free speech and trade secret protection in California will illustrate the possible explicit and implicit motivations behind the Sixth District's decision.

1. *Bunner* in Light of *Pruneyard*

Trade secrets are inherently treated as private property under the California UTSA, as they have an "owner" and that owner can protect

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60. Saline v. Superior Court, 122 Cal. Rptr. 2d 813 (Cal. Ct. App. 2002).

61. *See id.* at 815.

62. *Id.* at 817.

63. *Id.* A prior restraint is "[a]n order that prevents one from exercising his or her free speech rights, rather than addressing the harm caused by an utterance after the fact . . . ." Greene, *supra* note 25, at 543-44 (emphasis omitted).

the information against misappropriation.[64] California courts, as outlined in the *Pruneyard* decision, must weigh the social good of a constitutionally recognized action (*e.g.*, speech) in relation to the individual property right being infringed upon when determining whether an action is acceptable under the state constitution.[65] The *Bunner* court applied this balancing test to the facts of the case and determined that the constitutional right to free speech outweighs the trade secret protection under the UTSA: "[T]he scope of protection for trade secrets does not override the protection offered by the First Amendment . . . . The California Legislature is free to enact laws to protect trade secrets, but these provisions must bow to the protections offered by the First Amendment."[66] The court went one step further and noted that trade secret protection is not constitutionally protected.[67] This distinction further enhanced Bunner's right to speak; a balancing between a constitutional interest (speech) and a statutory interest (trade secrets) is not comparable to a balancing between two purely constitutional interests.[68]

As mentioned above, the United States Supreme Court added another element to California's free speech analysis under *Pruneyard*—the "lack of source confusion" factor.[69] Under this standard, a court considers whether the statement being made will be mistakenly attributed to a different speaker; if it cannot be, the speech is protected.[70] Had the Sixth District spent some time on the mistaken source issue, the result in *Bunner* may have been drastically different. Andrew Bunner likely could not have satisfied this source mistake

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64. *See* CAL. CIV. CODE § 3426.1 (West 1997). DVD Copy Control claims that the keys and algorithm contained in its CSS program are the pieces of code that deserve trade secret protection. The key and the algorithm are especially important because they are the pieces of code that together allow all licensed players to descramble encrypted DVDs. *Bunner*, 113 Cal. Rptr. 2d at 341-42, 60 U.S.P.Q.2d at 1804. Likewise, when this Comment mentions Bunner's "speech" via the DeCSS program, it refers to the program's inherent publication of the keys and algorithms contained therein.

65. *Robins*, 592 P.2d at 344. The Sixth District did not expressly cite *Robins* in its *Bunner* decision, but the court's analysis follows the procedure set forth in *Robins* in almost all respects.

66. *Bunner*, 113 Cal. Rptr. 2d at 349, 60 U.S.P.Q.2d at 1810.

67. *Id.* The court indirectly contrasted DVD Copy Control's trade secret claim with the copyright claim in *Corley*, stating that the United States Constitution provides for copyright protection. *See id. See generally Corley*, 273 F.3d 429, 60 U.S.P.Q.2d 1953 (involving a copyright claim against a DeCSS user).

68. *See Bunner*, 113 Cal. Rptr. 2d at 349-50, 60 U.S.P.Q.2d at 1811.

69. *See Pruneyard*, 447 U.S. at 87.

70. *See id.*

element, because it was almost certain that a random Internet user could not have determined where the DeCSS program originated and who was responsible for the speech.[71] In fact, Bunner himself had every reason to believe that a legitimate license or copyright holder originally distributed the program.[72] The simple fact that the court did not look at this issue may further strengthen the conclusion that the *Bunner* court had free speech in mind and did not want to include in its analysis any tests or elements that would hinder its furtherance of free speech protection.

2. *Bunner* in Light of *Providian*

The California Court of Appeal's holding in the *Providian* cases shed some more light on the "publicness" of information contained in trade secrets. As mentioned above, the *Providian* court held that a disclosure of proprietary information to a party not obligated to protect the information is considered a disclosure to the public and prevents the information from receiving trade secret protection.[73] Alternatively, the party claiming trade secrecy has the burden to show that it took the proper steps to maintain secrecy of the information, and the court construes these steps strictly.[74]

These are high standards to meet, and DVD Copy Control likely does not meet either standard. There are numerous DVD player manufacturers,[75] all of which receive the CSS codes from DVD Copy

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71. Although the Norwegian Johansen is often credited with developing DeCSS, the program is "widely available on the Internet" and many users acquire the program from people who have copied, sent, and distributed the program so many times that the original source is unrecognizable. *Corley*, 273 F.3d at 439, 60 U.S.P.Q.2d at 1958.

72. *See Bunner*, 113 Cal. Rptr. 2d at 343-44, 60 U.S.P.Q.2d at 1806. Bunner stated that he "'had no information suggesting' that DeCSS 'contained any trade secrets' or 'involved any misappropriation of the trade secrets ....'" *Id.* In addition, the average Internet user has the opportunity to download numerous legitimate programs at no cost to the user from a third-party Web page, so a user could have easily attributed the DeCSS program to a legitimate user. For an example of a legitimate licensed program that is also available at a third-party Web site, see http://ie6.yahoo.com/ie6/ (last visited Jan. 26, 2004), which allows a user to obtain the Microsoft Internet Explorer program originally available directly from Microsoft, *at* http://www.microsoft.com/windows/ie/default.asp (last visited Jan. 26, 2004).

73. *See Providian*, 116 Cal. Rptr. 2d at 842.

74. *See id.* at 845.

75. *See* Press Release, Microsoft Corporation, Leading DVD Player Manufacturers Announce Support For Windows Media at 2002 International CES, *at* http://www.microsoft.com/presspass/Press/2002/Jan02/01-07DVDPlayerPR.asp (stating that the Windows platform alone supports over 100 types of DVD players by various manufacturers) (last visited Jan. 26, 2004).

Control in order to produce the players.[76] Some of these manufacturers sub-licensed the CSS code to third parties.[77] Under *Providian*'s heightened standard of secrecy, if some of these numerous licensors failed to obtain a confidentiality agreement or some other form of secrecy assurance regarding the code in their dealings with third party licensees, the code may have been disclosed to the public and would be no longer a trade secret.[78] Then, regardless of whether someone else improperly obtained or reverse-engineered the code, DVD Copy Control could not claim trade secret protection, as the code was in the public arena and unprotectable under the UTSA.[79] The likelihood that this open disclosure occurred is high, considering the number of manufacturers and the differences in confidentiality laws in lesser-developed manufacturing nations.[80]

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76. *See Corley*, 273 F.3d at 437, 60 U.S.P.Q.2d at 1956-57.

77. *See Bunner*, 113 Cal. Rptr. 2d at 341, 60 U.S.P.Q.2d at 1805 (describing the procedure by which Xing, a DVD player manufacturer, licensed the code to third parties, possibly including Johansen).

78. *See id.* at 342, 60 U.S.P.Q.2d at 1805. DVD Copy Control's president asserted that "to [his] knowledge" all end user sub-licenses from the manufacturing licensees to third parties contained some type of confidentiality agreement, but he did not state certainly whether all licensees actually did use such agreements. *Id.* Futhermore, Xing Products had a "click wrap" confidentiality agreement (one that a computer user must "click" "yes" or "no" to the agreement in order to download the program) on the product that Johansen supposedly downloaded. The *Bunner* court showed some hesitation as to the legitimacy of such confidentiality agreement. *See id.* ("the user's assent . . . was obtained only through . . . a 'click wrap' . . . ."). The click wrap agreement is likely "reasonable" under the *Providian* test, though, so long as it was applied every time the program was downloaded; it is arguably similar to stamping a document as confidential. *See* note 58, *supra*, and accompanying text (discussing the *Providian* plaintiff's failure to take the time to stamp every document). For a Note discussing the role of mass dissemination in recent trade secret cases, see Matthew R. Millikin, *www.misappropriation.com: Protecting Trade Secrets After Mass Dissemination on the Internet*, 78 WASH. U. L.Q. 931 (2000).

79. *See* CAL. CIV. CODE § 3426.1 (West 1997). Bunner "asserted that the disclosure of the alleged trade secret throughout the world over the Internet had caused it to 'become a matter of public knowledge' which had lost any trade secret status." *Bunner*, 113 Cal. Rptr. 2d at 344, 60 U.S.P.Q.2d at 1806. Bunner's proposition fails to take into account whether the first instance of publication was proper or improper, however, since *Providian* deals with the initial disclosure and whether the information was reasonably protected. *See Providian*, 116 Cal. Rptr. 2d at 842.

80. For authority stating that other nations have lesser protections of confidentiality than the United States, see John R. Bauer & Joseph F. Savage, *Criminalization of Trade Secret Theft: On the Second Anniversary of the Economic Espionage Act*, 8 CURRENTS: INT'L TRADE L.J. 59 (1999) (stating that the Economic Espionage Act is necessary to protect companies operating in the United States because state and foreign trade secret law is insufficient to protect valuable trade secrets). The Internet is a worldwide phenomenon, so a disclosure over the Internet, even if received in a foreign country, puts the code in the "public forum" of the United States. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme Et

The *Providian* court also calls upon a court to apply a balancing test to determine whether there exists an "overriding interest" that requires protection of information even if the information may have already been disclosed to the public; if no such interest exists, the public should not be deprived of access to the information.[81] Assuming that the CSS information was already in the public forum,[82] there was no overriding interest that would have prompted the *Bunner* court to restrict the current public access to the information. First, there was no overriding *public* interest to deny public access to the code because the DeCSS program benefited the public. Providing an alternative platform for watching and copying DVDs would help drive down manufactured DVD player and disc prices and would provide more consumer choices.[83] Second, there was likely no overriding *private* interest to DVD Copy Control to deny public access to the code. DVD Copy Control may have received the immediate gratification of pulling the pirated code from the public sector and receiving a preliminary injunction, but in the long run, DVD Copy Control may actually suffer from this quick fix. Pulling the code from public knowledge and pretending that there was no problem would deter DVD Copy Control from the real issue—it should be working on a better way to encrypt future DVDs in order to offer itself more protection against illegal copying.[84] The only immediate recourse that DVD Copy Control could receive from the *Bunner* suit would be an injunction keeping one person from posting the code on his Web site. As an alternative, DVD Copy

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L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (holding that the French court cannot prohibit Internet speech by American company, since the speech was in the Internet public forum and the First Amendment trumps France's inferior free speech protection).

81. *Providian*, 116 Cal. Rptr. 2d at 841-42. This test should apply to *Bunner* because the *Bunner* decision involved only a preliminary injunction. *See Bunner*, 113 Cal. Rptr. 2d at 338, 60 U.S.P.Q.2d at 1804.

82. *See Corley*, 273 F.3d at 439, 60 U.S.P.Q.2d at 1958 (stating that the code was "widely available on the Internet").

83. For authority in support of the proposition that consumers benefit from lower prices and more choices, see generally Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001).

84. *See Corley*, 273 F.3d at 438 n.5, 60 U.S.P.Q.2d at 1957 n.5. As of 2000, DVD sales accounted for thirty-five percent of movie studio revenues. *Id.* at 437 n.3; 60 U.S.P.Q.2d at 1957 n.3. Thus, if DVD Copy Control were to ignore this encryption breach caused by DeCSS, it would be in danger of losing large revenues. At his original preliminary injunction hearing, Bunner submitted a declaration by a cryptography researcher in which the researcher stated that "the publication of information about 'flaws in supposedly secure systems serves a vital public interest' by notifying the public" and DVD Copy Control about possible breaches in the encryption security. *Bunner*, 113 Cal. Rptr. 2d at 343, 60 U.S.P.Q.2d at 1806.

Control may be better served by coming up with a new code to prevent all illegal copying.[85] Neither public nor private interests in depriving the public of the DeCSS code were "overriding" enough to warrant the court's denial of public access to the information.

3. *Bunner* in Light of *Saline*

The *Saline* case, discussed above, brings two other relevant considerations into a California court's analysis of the relationship between free speech and trade secrets: (1) whether the information is the "secret formula"[86] and (2) whether the prohibition would constitute a prior restraint on free speech.[87] Both of these considerations indicate that a preliminary injunction was rightly denied by the Sixth District. First, the CSS code is not the secret formula for DVD Copy Control. The code is merely a key for descrambling encrypted DVDs in order to protect the manufacturers from illegal copying. The encryption has nothing to do with the underlying commercial value of the DVDs themselves.[88] Second, the *Bunner* court expressly stated that prohibiting Bunner's disclosure of the code is "a prior restraint on Bunner's First Amendment right to publish the DeCSS program."[89] The *Bunner* court resounded the tone of the *Saline* court in proclaiming:

> Prior restraints on pure speech are highly disfavored and presumptively unconstitutional.... [T]he [United States] Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial....
>
> ... Our respect for the Legislature and its enactment of the UTSA cannot displace our duty to safeguard the rights guaranteed by the First Amendment.[90]

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85. Granted, there may be valid business, logistical, and/or deterrence reasons for DVD Copy Control to (1) bring lawsuits against people like *Bunner* and (2) hold off on implementing a new code. However, no such reasoning can minimize the fact that the DeCSS program will still be widely available to the public from numerous alternative sources despite an injunction against Bunner; DVD Copy Control therefore receives essentially no private benefit from this single injunction.

86. *Saline*, 122 Cal. Rptr. 2d at 816-17.

87. *Id.* at 817.

88. *See Corley*, 273 F.3d at 453, 60 U.S.P.Q.2d at 1968-69. The *Corley* court likened the CSS program to a "skeleton key" for unlocking DVD movies. That court also conceded that "[t]he initial use of DeCSS to gain access to a DVD movie *creates no loss to movie producers because the initial user must purchase the DVD.*" *Id.* (emphasis added).

89. *Bunner*, 113 Cal. Rptr. 2d at 350, 60 U.S.P.Q.2d at 1811.

90. *Id.* at 351, 60 U.S.P.Q.2d at 1811-12.

This strong view on prior restraints gives the court its most powerful argument for its ultimate decision, denying an injunction against Bunner as an unconstitutional prohibition of protected speech.

When the facts of *Bunner* are examined in light of *Pruneyard*, *Providian*, and *Saline*, one sees that the decision of the *Bunner* court either expressly or implicitly incorporates many of the underlying philosophies of free speech protection found in these cases. Although the California Supreme Court reversed the Sixth District, the above discussion demonstrates that the Sixth District's decision may not necessarily be unsound. In fact, judging by these historic California cases, the Sixth District's decision is likely a mere continuation of California's proud history of protecting free speech.

C. Prior Restraint as Applied to Computer Code

As mentioned above, the *Bunner* court's application of the prior restraint doctrine gives it the strongest argument for protecting Bunner's publication of the DeCSS program. The Sixth District viewed an injunction as a potential prior restraint on "pure speech."[91] The California Supreme Court failed to adequately discuss whether it considered computer code pure speech. As prior restraint is an interesting aspect of these types of cases, this section will briefly discuss prior restraint by contrasting the Sixth District's *Bunner* opinion with the United States Court of Appeals for the Second Circuit's *Corley* opinion.

The *Bunner* court held that the DeCSS program was pure speech,[92] but the *Corley* court held that the program was not pure speech.[93] This distinction was likely the most significant difference between the two cases, as finding pure speech put the *Bunner* court in a perfect position to apply the prior restraint doctrine to the trial court's injunction. Why did the Sixth District so readily allow computer code pure free speech protection while the Second Circuit refused to do so? Two possible reasons include the *Bunner* court's liberal interpretation of the definition of "pure speech" and the distinction between "object code" and "source code"—a distinction discussed by the *Corley* court[94] but not by the *Bunner* court.

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91. *See id.* at 350-351, 60 U.S.P.Q.2d at 1811-12.

92. *Id.*

93. *Corley*, 273 F.3d at 451, 60 U.S.P.Q.2d at 1967.

94. *See id.* at 445-49, 60 U.S.P.Q.2d at 1963-66.

1. Definition of "Pure Speech"

The *Bunner* court relied on a very liberal approach as to what types of speech are "pure speech" protected by the First Amendment, allowing only a few narrow exceptions to full free speech protection. The court stated as much in its opinion:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words .... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[95]

The court went on to say that the DeCSS program does not fit any of these narrow exceptions to free speech since "it is not lewd, profane, obscene, or libelous, nor did it involve any fighting words."[96] One can, based on the quoted definition of free speech exceptions above, infer that the *Bunner* court believed that the DeCSS program had at least enough social value to overcome the weighing against the "social interest in order and morality."[97]

One can also infer that the *Corley* court saw the balancing process differently, believing that the social value of DeCSS did *not* outweigh the social interest in order. The *Corley* court stated "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."[98] The program's potential for such breach of social order was enough to persuade the Second Circuit to limit the free speech protection given to DeCSS, with that court stating that "[t]hese realities of what code is and what its normal functions are require a First Amendment analysis that treats code as combining nonspeech and speech elements ...."[99]

This is an appropriate time to note that although the *Corley* court disagrees with the *Bunner* court on the issue of whether computer code is pure speech, even the Second Circuit has agreed that trade secrets in general may be subject to free speech protection if the underlying

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95. *Bunner*, 113 Cal. Rptr. 2d at 348-49, 60 U.S.P.Q.2d at 1810 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

96. *Id.* at 349, 60 U.S.P.Q.2d at 1810.

97. *See id.*

98. *Corley*, 273 F.3d at 451, 60 U.S.P.Q.2d at 1967.

99. *Id.*

communication is protected under the pure speech-prior restraint doctrine.[100]

2. Object and Source Code

The distinction between "object" code and "source" code[101] is important when determining whether free speech protection should be applied to computer code. Unfortunately, judges are not computer code experts, so they often vary on their understanding of how computer code operates. Such a different view of the operation of code was another cause of divisiveness between the *Bunner* and *Corley* courts.

A brief discussion of the types of computer code may help point out the differences in the two courts' decisions. [102] Source code is the "language" of most average computer programmers and was used to write the DeCSS program.[103] A source code is comprised of statements that are fairly easily learned and assembled by humans, allowing a person to write a program.[104] Many different types of source code languages are used in different industries and among different groups.[105]

Object code, on the other hand, is the code that the computer reads and is expressed by long strings of numbers.[106] Object code is designed only for the computer to read and is unintelligible to all but the most advanced computer-literate human programmers.[107] A human programmer could theoretically "write" a program in object code, but the task would be extremely time consuming.[108] Different computers may be able to read the same source code language, but object code is computer specific; one computer likely reads a different object code

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100. *See* Greene, *supra* note 25, at 542-43. Greene cites the Second Circuit decision in *Bridge C.A.T. Scan Ass'n v. Technicare Corp.*, 710 F.2d 940, 943 (2d Cir. 1983), in which the court held that trade secrets may be subject to the prior restraint doctrine. *Id.* Of course, the *Corley* court was dealing with copyright infringement and not a trade secret; however, the *Bridge* decision helps show how narrow the difference between the *Bunner* and *Corley* decisions actually was. Had the Second Circuit decided in *Corley* that the DeCSS program *was* pure speech, any future computer program trade secret cases in the Second Circuit may have likely turned out as the *Bunner* decision in the California Sixth District.

101. *See generally Corley*, 273 F.3d at 439, 60 U.S.P.Q.2d at 1958 discussed in note 24, *supra*.

102. *See generally* Ryan Christopher Fox, Comment, *Old Law and New Technology: The Problem of Computer Code and the First Amendment*, 49 UCLA L. REV. 871 (2002).

103. *Id.* at 877-79; *Bunner*, 113 Cal. Rptr. 2d at 348, 60 U.S.P.Q.2d at 1809.

104. Fox, *supra* note 102, at 877-79.

105. *Id.*

106. *Id.* at 880.

107. *Id.*

108. *Id.*

than another computer.[109]

An encryption program, such as the CSS program licensed by DVD Copy Control, makes the computer object code even harder for a human to read.[110] Encryption programming uses algorithms to "build up" the object code into numbers too large and complex for any human to break down and decode without the proper key.[111] When a computer has the proper key in its system, it can break down the algorithm and read the encrypted message.[112]

The *Corley* court likened source code to a "recipe" or "musical score," since humans can write source code, but the code requires a computer to complete the process of conveying the idea (similar to an oven required for a recipe or an instrument for music).[113] Both recipes and computer source code convey information; however, the means of *processing* the information is the biggest obstacle preventing the Second Circuit from granting computer code full free speech protection. The Second Circuit states that instructions (such as computer code) "that communicate information comprehensible to a human" qualify as "speech" under the First Amendment.[114] However, such speech cannot be strictly protected unless *human* comprehension is required to create the "functional result" of the instructions.[115] Since the computer itself converts the source code to object code and runs the program, no human comprehension is required and the code therefore has a "nonspeech" element.[116]

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109. Fox, *supra* note 102, at 877.

110. *See generally* Gordon, *supra* note 25, at 490.

111. *Id.* Many mathematicians and cryptographers have used advanced programs that spot series of equations to manipulate the large sets of numbers and "crack the code" without use of a key. As more codes are cracked, companies create even more advanced encryption, setting off a "race" between encryptors and code breakers. *See id.* at 492-93. A recent California federal case involving First Amendment free speech rights of code-breakers to use and market their programs gives a good summary of the computer code-breaking process, including keys and algorithms. *See* Bernstein v. United States Dep't of State, 922 F. Supp. 1426 (N.D. Cal. 1996).

112. Gordon, *supra* note 25, at 477. *See also* note 13, *supra*, which states that the DeCSS program is merely a reverse-engineered copy of the CSS algorithms and key.

113. *Corley*, 273 F.3d at 447, 60 U.S.P.Q.2d at 1964-65.

114. *Id.* at 448, 60 U.S.P.Q.2d at 1965.

115. *Id.* at 451, 60 U.S.P.Q.2d at 1967.

116. *Id.* The court's decision raises an interesting question: When is there "enough" human intuition to allow free speech protection? The court recognized that a human must put the disk into the computer and turn the computer on, but it said that this was insufficient human comprehension to make the code pure speech. *See id.* For arguments in support of both source and object code being protected as pure speech, see generally Fox, *supra* note 102; Gordon, *supra* note 25.

In contrast to the *Corley* court, the *Bunner* court decided that computer source code is pure speech with no nonspeech elements whatsoever. The *Bunner* court took a more superficial approach—where the *Corley* court looked into the inner workings of the computer processing the information, the *Bunner* court looked only at the language of source code and its use as a vehicle to communicate ideas:

> [F]or individuals fluent in a computer programming language, source code is the most efficient and precise means by which to communicate ideas about cryptography.
>
> ... The fact that a medium of expression has a functional capacity should not preclude constitutional protection.
>
> . . . .
>
> ... Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.[117]

Since DeCSS is a written expression of decryption ideas in source code form, the court held that it was pure speech.[118] However, the court gave a fair warning to future programmers when it stated that source code compiled into object code likely would *not* be protected as free speech, since it would be only a string of ones and zeroes, not actual ideas.[119]

Both the *Corley* and *Bunner* courts recognized that source code and object code are different forms of communication. The *Corley* court took a more limiting approach and decided that the mere capability of computer source code being compiled into nonspeech object code is sufficient to give the source code lesser free speech protection. The *Bunner* court, on the other hand, took a "wait and see" approach, providing maximum free speech protection to source code, limiting free speech protection only when the source code is actually converted to object code.

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117. *Bunner*, 113 Cal. Rptr. 2d at 348, 60 U.S.P.Q.2d at 1809 (citing Junger v. Daley, 209 F.3d 481, 484-85 (6th Cir. 2000)).

118. *Id.*

119. *Id.* The court stated "[t]hat the source code is capable of such compilation, however, does not destroy the expressive nature of the source code itself." *Id.*

V. THE FUTURE OF CALIFORNIA TRADE SECRET-FREE SPEECH LAW

In California, the most recent decisions giving a glimpse into future treatment of these cases are *Bunner* and *DVD Copy Control*. However, in a previous DVD Copy Control trade secret lawsuit in California, a trial court *did* grant an injunction against a DeCSS user by applying a harm-based test[120] instead of a "pure speech" test.[121] Cases like *McLaughlin* demonstrate how unpredictable cases in this area can be; two courts in the same state with very similar facts applied different tests and ended up with different outcomes.

What does the California Supreme Court's decision in *DVD Copy Control* hold in store for California trade secret-free speech law? The supreme court did not really show its hand regarding the pure speech issue in the *DVD Copy Control* opinion. This hesitancy may have stemmed from a variety of potential reasons, including the possibility that the court did not feel it needed to decide the issue in order to reverse the Sixth District,[122] the possibility that the court was not ready to make a determinative decision on the matter in this case, or the possibility that the court would rather wait and see what the Sixth District does on remand before making a decisive ruling.

Whatever the California courts ultimately decide on any of the various issues contained in these trade secret-free speech cases, there is a good chance that others will be watching. Just as the *Corley* decision got courts around the country thinking about these technological free speech issues, these California decisions will have courts closely considering the underlying free speech issues stemming from computer code.

VI. CONCLUSION

As exemplified by the discussion above, the Sixth District was on its way to allowing more freedom for technological manipulation and computer code discussion, based on its tradition of providing heightened constitutional protection to all forms of speech. California's long-

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120. For a discussion of the harm-based approach to free speech, see note 25, *supra*, and accompanying text.

121. Johnson, *supra* note 25, at 535 (citing *McLaughlin*, 2000 WL 48512).

122. "The role of the court is not to reexamine previous decisions made by experienced judges, but rather, to exercise judicial restraint." Sarah K. Delaney, *High Court Study: Stare Decisis v. The "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1998-2002*, 66 ALB. L. REV. 871, 902 (2003) (paraphrasing Justice Kelly of the Michigan Supreme Court).

standing tradition of protecting the free speech of its citizens is continued by the Sixth District's opinion in *Bunner*. For the time being, though, the Sixth District has been stopped in its tracks by the California Supreme Court, which failed to address the issue of pure speech for computer code in its *DVD Copy Control* opinion, leaving the question open for the time being.

As demonstrated in these DeCSS cases, legislators cannot make laws quickly enough to keep up with rapidly expanding technologies; hence, courts have an opportunity to develop the law in these new technological frontiers, based loosely on the framework of existing law. In the future, more lawsuits involving technological developments, like those in the *Bunner* case, will emerge as firms battle to protect trade technology from keen computer programmers. The way in which courts decide such cases will profoundly influence the constitutional protections such technologies and their inherent communication capacities will receive.

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