Trade Secret Posted to Internet

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Trade Secrets Posted To Internet

Religious Technology Center v. Lerma[1] dealt with the effect of postings on the Internet. Two postings had been made by a disgruntled former church member ten days before the Church of Scientology obtained a TRO. The Virginia district court found that the Internet posting made the information generally known at least to the relevant people in the new group. The court reasoned that although the person originally posting the information on the Internet may be liable for trade secret misappropriation, a party who merely downloads the information is not liable because there is no misconduct in interacting with the Internet.[2]

The dispute over trade secret protection for the religious scriptures of the Church of Scientology continued in *Religious Technology Center v. Netcom On-Line Communication Services, Inc. ("Netcom I").*[3] As in the *Lerma* case, the defendant Erlich in the *Netcom I* case had posted portions of the religious scriptures of the Church on the Internet. A preliminary injunction based upon violation of trade secrets was denied initially on the ground that there was no showing of a likelihood of succeeding on the trade secret claim. The court noted that while the Internet "has not reached the status where a temporary posting on a newsgroup is akin to publication in a major newspaper or on a television network, those with an interest in using the Church's trade secrets to compete with the Church are likely to look to the newsgroup. Thus,

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[1] *Religious Technology Ctr. v. Lerma*, 908 F. Supp. 1362, 37 U.S.P.Q.2d 1258, 1262 (E.D. Va. 1995) (appeal pending)

[2] 37 U.S.P.Q.2d at 1263.

[3] *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

posting works to the Internet makes them "generally known' to the relevant people--the potential "competitors' of the Church."[4]

The defendant Erlich in *Netcom I* argued that no trade secret misappropriation had occurred because he did not charge anyone for the materials and thus had not profited from the use of the trade secrets. The court rejected this argument. Nothing in the USTA or the California Act required that the defendant gain an advantage from the disclosure. It was a sufficient "use" by disclosure of a trade secret with actual or constructive knowledge that the secret was acquired under circumstances giving rise to the duty to maintain secrecy under Section 3426.1(2) of the California Trade Secrets Act. In conclusion, the court noted: "Thus Erlich's admitted posting of the information, regardless of any alleged fair use defense or lack of financial motive, may constitute misappropriation of the Church's trade secrets."[5]

The court in *Religious Technology Center v. Netcom On-Line Communication Services, Inc. ("Netcom II")* [6] reconsidered and revised its decision with respect to Internet postings in response to a later request for expanded preliminary injunction. During these weak reconsideration proceedings, the Church of Scientology was able to raise serious questions as to whether specific processes and instructions contained in the documents taken by the defendant Erlich qualified as trade secrets. After reviewing its prior decision, the court in *Netcom II* noted:

> Nevertheless, the Court believes that its statement in its September 22, 1995 order that "posting works on the Internet makes them "generally known' to the relevant people" is an overly broad generalization and needs to be revised. The question of when a posting causes the loss of trade secret status requires a review of the circumstances surrounding the postings and consideration of the interest of the trade secret owner, the policies favoring competition and the interest, including First Amendment Rights, of innocent third parties who acquire information off the Internet.
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> The relevant inquiry is whether the documents for which trade secret protection is sought are "generally known" to the relevant people--the potential competitors of the Church. . . . Nevertheless, defendant has not established the extent to which the specific practices and instructions contained in the works are known generally or to potential competitors.[7]

The court weighed the balance of hardships, and entered a limited preliminary injunction enjoining the disclosure of the alleged trade secrets.

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[4] *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995).

[5] *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1257 n.31 (N.D. Cal. 1995).

[6] *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 1997 U.S. Dist. LEXIS 23572 (N.D. Cal. January 3, 1997).

[7] *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 1997 U.S. Dist. LEXIS 23572 (N.D. Cal. January 3, 1997).

Other courts have had difficulty in accepting the concept that trade secrets cannot be maintained in this digital age, and that one click of a computer button to post information on the Internet destroys all trade secret rights. In *DVD Copy Control Ass'n v. McLaughlin*,[8] the court entered an injunction prohibiting the defendant from posting or otherwise disclosing or distributing on their web sites or elsewhere an encryption program developed by the plaintiff to protect copyrighted materials stored on DVDs. The encryption algorithm and master keys were shown to be the type of proprietary information that would qualify as trade secrets under the California Trade Secrets Act. The alleged defense that the information was obtained by reverse engineering was dismissed, because the defendant was subject to a "click license," which preconditioned installation of the DVD software on an agreement not to reverse engineer. In explaining the grant of a preliminary injunction, the court held:

> The Court is not persuaded that trade secret status should be deemed destroyed at this stage merely by the posting of the trade secret to the Internet. *Religious Technology Center vs. Netcom on-Line.com*. To hold otherwise would do nothing less than encourage misappropriators of trade secrets to post the fruits of their wrongdoing on the Internet as quickly as possible and as widely as possible thereby destroying a trade secret forever. Such a holding would not be prudent in this age of the Internet.[9]

The posting of trade secrets on the Internet was also involved in *Ford Motor Co. v. Lane*.[10] The District Court found that the defendant Lane had posted strategic marketing and product development plans of Ford on his web site. It also found that Ford presented substantial evidence to support the claim that the defendant violated the Michigan Uniform Trade Secrets Act. However, a preliminary injunction restraining the defendant's publication of these trade secrets was denied on the grounds that it would constitute an invalid prior restraint of speech in violation of the First Amendment.

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[8] *DVD Copy Control Ass'n v. McLaughlin*, No. CV 786804, 2000 WL 48512 (Super. Ct. Cal. 2000).

[9] *DVD Copy Control Ass'n v. McLaughlin*, No. CV 786804, 2000 WL 48512 (Super. Ct. Cal. 2000).

[10] *Ford Motor Co. v. Lane*, 68 F. Supp. 2d 745, 52 U.S.P.Q.2d 1354 (E.D. Mich. 1999).