IN THE UNITED STATES DISTRCIT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, Alexandria Division

RELIGIOUS TECHNOLOGY CENTER
Plaintiff,
v.
ARNALDO PAGLIARINI LERMA,
DIGITAL GATEWAY SYSTEMS,
THE WASHINGTON POST,
MARC FISHER,
and RICHARD LEIBY,
Defendants.

Civil Action No. 95-1107-A
MEMORANDUM OPINION

Before the Court is the Motion for Summary Judgement filed by defendants, The Washington Post, and two of its reporters, Marc Fisher and Richard Leiby (hereinafter referred to collectively as "The Post"). A court may grant summary judgement "only when there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law." Miller v. Leathers, 913 F.2d 1085, 87 (4th Cir. 1990) (citing Fed. R. Civ. p. 56 (c)). In ruling on such motions, the court must construe all facts and all inferences drawn from those facts in favor of the non-moving party. Charbonnagas de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Having performed this analysis, the Court finds that summary judgment should be entered in favor of the defendants.

1. UNDISPUTED FACTS

The essential facts are not in dispute. In 1991, the Church of Scientology sued Steven Fishman, a disguntled former member of the Church of Scientology, in the United States District Court for the Central District of California. Church of Scientology Int'l v. Fishman, No. CV 91-6426. On April 14, 1993, Fishman filed in the open court file what has come to be known as the Fishman Affidavit, to which were attached 69 pages of what the Religious Technology Center ("RTC") describes as various Advanced Technology works, specifically levels OT-I through OT-VII documents. Plaintiff claims that these documents are protected from both unauthorized use and unauthorized disclosure under the copyright laws of the United States and under trade secret laws, respectively.

In California, the RTC moved to seal the Fishman affidavit, arguing that the attached AT documents were trade secrets. That motion was denied and the Ninth Circuit upheld the district court's decision not to seal the file. Church of Scientology Int'l v Fishman, 35 F.3d 570 (9th Cir. 1994). The case was remanded for further proceedings and the district court again declined to seal the file, which remained unsealed until August 15, 1995.

Defendant Arnaldo Lerma, another former Scientologist, obtained a copy of the Fishman affidavit and the attached AT documents. Lerma admits that on July 31 and August 1, 1995, he published the AT documents on the Internet through defendant Digital Gateway Systems ("DGS"), an internet service provider. RTC, which regularly scans the Internet, discovered the publication of documents and on August 11, 1995, warned Lerma to return the AT

documents and not publish them any further. After Lerma refused to cooperate, RTC obtained a Temporary Restraining Order prohibiting Lerma from any further publication of the documents and a seizure warrant which authorized the United States Marshal to seize Lerma's personal computer, floppy disks and any copies of the copyrighted works of L. Ron Hubbard, the author of the AT documents.

During the same time period, on or about August 5 or 6, 1995, Lerma sent a hard copy of the Fishman Affidavit and AT attachments to Richard Leiby, an investigative reporter for the Washington Post. On August 12, 1995, counsel for RTC discovered this disclosure and approached the Post, which was told that the Fishman affidavit might be stolen. In response to the RTC's representations, The Post returned the actual copy which Lerma had given it. However, the Post had by then learned that a copy of the same Fishman affidavit was available in the open court file in the United States District Court for the Central District of California. On August 14, 1995, The Post sent Kathryn Wexler, a news aide stationed in California, to that court to obtain a copy for Wexler, who then mailed it Washington. Although it is undisputed that RTC staff members had been checking that file out and holding it all day to prevent anyone from seeing it, the file was not sealed and obviously was available, upon request, to any member of the public who wished to see it.

The day after the Post obtained its copy of the Fishman affidavit, the RTC applied for a sealing order and the trial judge ordered the file sealed. However, there is no evidence in the record that the judge ordered The Post to reurn the copy made by the Clerk's office or that any kind of restraining order was issued by that court against The Post.

Five days later, on August 19, 1995, The Post published a news article, entitled "Church in Cyberspace: Its Sacred Writ is on the Net. Its Lawyers are on the Case," written by defendant Marc Fisher. In that article, RTC's lawsuit against Lerma and the seizure of his computer equipment was discussed, as was the history of Scientology litigation against its critics and the growing use of the Internet by Scientology dissidents. The article included three brief quotes (totally 46 words) from three of the AT documents. On August 22, 1995, the RTC filed its First Amended Verified Complaint for injunctive Relief and Damages in which it added The Washington Post and its two reporters, Fisher and Leiby, as additional defendants. A Second Amended Verified was later files and is now the subject of this summary judgement motion.

II. THE COPYRIGHT CLAIM

Although the Court has serious reservations about whether the AT documents at issue in this litigation are properly copyrighted, for the purposes of this motion, the Court assumes that the RTC hold properly registered, valid copyrights for the AT documents attached to the Fishman affidavit.

The Post does not deny that it copied the AT dcouments and quoted from them. It argues, however, that this copying and these quotations fall squarely within the "fair use" exception. Thus, the dispositive issue as to the copyright claim is whether or not The Post's use of the AT documents falls within the fair use exception to the copyright law. Under that exception, "the fair use of copyright ... for purpose such as criticism, comment, new reporting ... or research, is not an infringment of copyright." 17 U.S.C.A. & 107 (West Supp. 1995) (emphasis added). As the Supreme Court has held "fair use is a mixed question of law and fact." Harper & Row

Publishers Inc. v Nation Enters, 471 U.S. 539, 560 (1985). In the instant case, the Court finds no material facts in dispute; therefore, the issue can be resolved as a matter of law.

At the outset of its opposition, the RTC argues that because the fair use doctrine is an equitable one, The Post should not be allowed to rely on this defense because of unclean hands. Specifically, the RTC points to the Post's failure to disclose that it had made several copies of the Fishman Affidavit. In an affidavit signed on September 26, 1995, Mary Anne Werner, a Post Vice President and counsel, averred that "only one copy of that [Fishman] declaration has been made." In fact, through discovery RTC learned, and the Post does not dispute, that other copies were made. Wexler admits that she made an additional copy of the materials received from the Clerk's office. She sent that copy to Washington as well to ensure that Washington got a copy. A second copy was created, not my copying the Fishman affidavit which had been obtained in California, but by down loading a copy off the Internet. The Post argues persuasively here that the presence of the AT documents on the Internet was a part of their very news worthiness and that making this copy was an act of legitimate news gathering.

A third copy of the AT documents was generated after Lerma sent a duplicate of the Fishman affidavit to Leiby via e-mail. That e-mail was copied to a disk in response to demands by RTC's counsel on August 22, 1995, that The Post secure any materials it had been sent by Lerma. (Second Werner Decl. && 4-5).

None of these acts of copying strike this Court as unethical behavior and the Court is satisfied from her second declaration that Ms Werner did not mislead the Court or counsel in referring to one copy. In any case, the Court agrees with The Post that the issue of unclean hands is a weak attempt by RTC to avoid the real issue of fair use.

In determining whether the use of a copyrighted work is fair use and therefore not an infringment, the Court must consider four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes;

2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C.A. & 107 (West Supp. 1995). These four statutory factors may not "be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Cambell v. Acuff-Rose Music Inc, 114 S. Ct. 1164, 1170-71 (1994). The interplay of the four factors is recognized elsewhere as well. See, e.g., Sony Corp of America v Universal Studios Inc., 464 U.S. 417, 449-450 (1984) (reproduction of an entire work "does not have its ordinary effect of militating against a finding of fair use" as to

home videotaping of television programs); Harper & Row, Publishers, Inc v. National Enterprises, 471 U.S. 539, 564 (1985) ("[E]ven substantial quotations might qualify for fair use in review of a published work or a news account of a speech" but not in the scoop of a soon-to-be-published memoir). Thus, we may not evaluate any single fair use factor in isolation.

As to the first factor, the purpose and character of the use, there is no evidence in this record that the Post copied the AT documents for any purposes other than news gathering, news reporting and responding to litigation. Although the RTC has argued that The Post harbors some animus towards Scientology, an unbiased observer would conclude that the Church of Scientology and its treatment of critics is a newsworthy subject about which The Post is permitted to investigate and report. There is no evidence that the Post was trying to "scoop" the RTC in quoting the AT documents or trying to avoid payment of a royalty, conduct to which other courts have looked in finding that a media organization violated copyright. Harper & Row Publishers, Inc., vs. Nation Enterprises, 471 U.S. 539 (1985); Iowa State University Foundation, Inc., v. American Broadcasting Co Inc., 463 F. Supp. 902 (S.D.N.Y. 1978).

Under the second factor, the scope of the fair use doctrine is greater with respect to factual works than creative or literary works. Hubbard's works are difficult to classify and courts dealing with this issue have differred in their conclusion. As the Second Circuit stated in New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 158 (2d Cir.), cert. denied, 111 S Ct. 297 (1990) "reasonable people can disagree over how to classify Hubbard's works." However, that court also concluded that the works "deal with Hubbard's life, his views on religion, human relations, the Church, etc. - [and] are more properly viewed as factual or informational." Id at 157. The United States District Court for the Southern District of California is of another view, however. In Bridge Publication, Inc. v. Vien, 827 F. supp. 629, 636 (S.D. Cal. 1993), the court stated that "[t]he undiputed evidence shows that L. Ron Hubbard's works are the product of his creative thought process, and not merely informational."

However, in this litigation the RTC has characterized the AT documents essentially as training materials. Therefore, this Court concludes that despite their obtuse language the AT documents are intended to be informatinal rather than creative and, therefore, that broader fair use approach is appropriate.

To evaluate the third factor, which essentially requires making a qualitative as well as quantitative analysis of the use made of the work, the three quotes need to be read in the context of the article. The first and longest quote is obviously included merely as an example of the obtuse language used in the AT documents. No fair-minded reader could possibly construe this quote otherwise.

Most of the 103 pages of the disputed texts from the Fishman file are instructions for leaders of OT training sessions. They are written in the dense jargon of the church. 'If you do OT IV and he's still in his head. All is not lost, you have other actions you can take. Clusters, Prep-Checks, failed to excercize directions.'

The second quote describes how in "one high level OT session trainees are asked to pick an object 'wrap an energy beam around it' and pull themselves toward the object." The last

quote occurs in the very next sentence which describes how trainees are to "be in the following places - the room, the sky, the moon, the sun." These underlined words comprise the total of the copyrighted materials quoted.

The RTC argues that where quotes, although fragmentary, are of "significant material," even de minimis copying infridges. It then bootstraps this argument by claiming that because Fisher chose to include these three quotes in his article, the quoted language must necessarily be significant. Under this reasoning, no one, let alone a newspaper, could ever quote from copyrighted materials withour fear of being hauled into court for infringement abuse, any quote would be deemed significant. To accept this argument would essentially destroy the fair use doctrine. It also clearly is unsupported by the facts because as discussed above, the three quotes, read in context of the entire article, are offered solely as illustrations of the authors claims about Scientology. They are not intended to offer a complete definition of the Scientology religion or to capture the total essence of what it means to be a Scientologist.

Lastly, we must look at the effect of the Posts's use upon the potential market for or value of the copyrighted work. Although the RTC claims it has demonstrated an enormous effect upon its potential market, a fair view of the record discloses no evidence of any economic exploitation by the Post of RTC's copyrighted material. As The Post cogently argues, no follower of Scientology could possibly be satisfied by these three random fragments quoted in its article so as to bypass the complete regime of indoctrination.

Although both sides have raised numerous additional issues, the essential analysis for the copyright claim comes down to these four factors. Based on this analysis, we find for the defentants. RTC properly argues that the mere existence of a copyrighted work in an open court file does not destroy the owner's property interests in that work. In the same way, the placement of a copyrighted book on a public library shelf does not permit unbridled reproduction by a potential infridger. However, RTC cannot selectively avail itself of only a segment of the copyright law. With preservation of copyright protection invariably comes fair sue exemption, and on that ground the Post's actions are proper.

III. ATTORNEY'S FEES

Because The Post has been found to be the prevailing party on the copyright claim, it qualifies for an award of attorney;s fees and litigation expenses. The RTC opposes such an award. Whether to award such fees is a matter left to the Court's discretion. Fogerty v Fantasy, Inc. - U.S. -, 114 S Ct. 1023, 1033 (1994). In deciding the appropriateness of a fee award, the Court should consider motivation of the plaintiff in bringing the action for copyright infringement and the xtent to which plaintiff's position is reasonable and well-grounded in fact and law.

On the first issue, the Court finds that the motivation of plaintiff in filing this lawsuit against the Post is reprehensible.

Although the RTC brought the complaint under traditional secular concepts of copyright and trade secret law, it has become clear that a much broader motivation prevailed - the stifling of crticism and dissent of the religious practices of Scientology and the destruction of its opponents. L. Ron Hubbard, the founder of Scientology, has been quoted as looking upon law as a tool to [h]arass and discourage rather than to win. The law can be used very easily to

harrass and enough harrassment on somebody who is simply on the thin edge anyway, well knowing that he is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly. (Declaraction of Mary Ann Werner, Attachment A, at C5; see also The Posts's reply brief at p. 24, note 23).

The context and extent in which the Post copies and quoted from the AT documents was so de minimis that this Court finds that no reasonable copyright holder could have in good faith brought a copyright infringement action. Although there are limits beyond which the media may not go, even in the interests of news gathering and reporting, this case does not come anywhere near those limits Therefore, an award of reasonable attorneys' fees is appropriate and granted.

IV. MISAPPROPRIATION CLAIM

To prove misappropriation of a trade secret, the RTC must show (1) that it possed a valid trade secret, (2) that the defendant acquired its trade secret, and (3) that the defendant knew or should have known that the trade secret was acquired by improper means. Trandes Corporation v. Guy F. Atkinson, 996 F 2d 655, 660 (4th Cir. 1993), cert denied, - US -, 114 S Ct 443 (1993).

The Post argues persuasively that the AT documents were no longer trade secrets by the time the Post acquired them. They point to the following undisputed facts. First, the Fishman affidavit had been in a public court file from April 14, 1993 until August 15, 1995, for a total of 28 months. Although RTC has shown that it went to extraordinary efforts to control access to that file by having church members sign the file out and keep it in thier custody at the courthouse, the file nevertheless was an open file, available to the public. The Post was able to obtain a copy of the Fishman affidavit without any difficulty, by merely asking the Clerk of the court to copy it. Thus, having been in the public domain for an extensive period of time, these AT documents cannot be deemed "trade secrets." Kewanee Oil Co. v Bicron Corp., 416 U.S. 470, 484 (1974).

Of even more significance is the undiputed fact that these documents were posted on the internet on July 31 and August 1, 1995. (Lerma Affidavit). On August 11, 1995, this Court entered a Temporary Restraining Order among other orders which directed Lerma to stop disseminating the AT documents. However, that was more than ten days after the documents were posted to the internet, where they remained potentially available to the millions of Internet users around the world.

As other courts who have dealt with similar issues have observed, "posting works to the internet makes them 'generally known'" at least to the relevant people interested in the news group. Religious Technology Center v. Netcom On-Line Communications Services, Inc., No. C. 95-20091 RMW (N.D. Cal.) Slap Opinion entered 9/22/95 at 30. Once a trade secret is posted on the Internet, it is effectively part of the public domain, impossible to retrieve. Although the person who originally posted a trade secret to the internet may be liable for trade secret missappropriation, the party who merely downloads Internet information cannot be liable for missappropriation because there is no misconduct involved in interacted with the internet.

Even if one were to assume that the AT documents are still of trade secrets is not committed by a person who uses or publishes a trade secret unless that person has used unlawful means, or breached some duty created by contract or implied by law resulting from some employment or simliar relationship. (Smith v. Snap-On Tools Corp., 833 F 2d 578, 581 (5th Cir. 1988); Aerospace Am., Inc v. Abatement Tech., Inc., 738 F Supp. 1061, 1071, (E.D. Mich. 1990).

It is the employment of improper means to procure the trade secret, rather than the mere copying or use, which is the basis of [liability] ... Apart from breach of contract, abuse of confidence or impropriety in the means of procurement, trade secrets may be copied freely as devices or processes which are no secret. Trandes Corporation v. Guy F. Atkinson Company, 996 F. 2d at 660, (quoting the Restatement (First of Torts) (emphasis in original). The Trandes court notes that abuse of confidence or impropriety in the means of procurement represented the "essential element" and the "core" of a misappropration claim. Id.

The RTC claims that because The Post was on notice of the the RTC's allegations that the AT documents were stolen and were both trade secrets and unpublished copyrighted works, the Post was under a legal obligation not to copy the documents. This Court knows of no law which required The Post to sit on its hands and do no further investigation into what was obviously becoming a newsworthy event and newsworthy documents. The RTC's allegations are still just allegations. The very court from which the Fishman affidavit was obtained still has under advisement the issue of whether the AT documents are trade secrets. Although the Post was on notice that RTC made certain proprietary claims about these documents, there was nothing illegal or unethical about the Post going to the Clerk's office for a copy of the documents or downloading them from the Internet.

Because there is no evidence that the Post abused any confidence, committed an impropriety, violated any court order or committed any other improper act in gathering information from the court file or downloading information from the Internet, there is no possible liability for the Post in its aquisition of the information. This is true regardless of the documents status as trade secrets. As for disclosure of the information. The Post did nothing more than briefly quote from publically available materials. These acts simply do not approach a trade secret missappropraition, and therefore, summary judgement must be entered for the defendants.

The Clerk is directed to forward copies of this Memorandum Opinion to cousel of record.

Entered this 28th day of November, 1995.

[Signature]
Leonie M. Brinkema
United States District Judge
Alexandria, Virginia

RELIGIOUS TECHNOLOGY CENTER, Plaintiff, v. ARNALDO PAGLIARINA LERMA, DIGITAL GATEWAY SYSTEMS, THE WASHINGTON POST, MARC FISHER, and RICHARD LEIBY, Defendants.

Civil Action No. 95-1107-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

908 F. Supp. 1353; 1995 U.S. Dist. LEXIS 17868; Copy. L Rep. (CCH) P27,499

November 29, 1995, Decided
November 29, 1995, FILED

COUNSEL: [**1] Bruce B. McHale, (Local Counsel) for Religious Technology Center.

Jay Ward Brown, (Counsel for Arnaldo P. Lerma). Michael A. Grow, Esquire, (Counsel for Digital Gateway Systems). John P. Corrado, Esquire, (Local Counsel for The Washington Post, Marc Fisher, and Richard Leiby).

JUDGES: Leonie M. Brinkema, United States District Judge

OPINION BY: Leonie M. Brinkema

OPINION: [*1355] MEMORANDUM OPINION IN SUPPORT OF ORDER OF SEPTEMBER 15 1995 AND AMENDED ORDER OF NOVEMBER 29, 1995

This matter comes before the Court on plaintiff Religious Technology Center's ("RTC") Emergency Motion for Reconsideration and Rehearing of RTC's Motion for Temporary Restraining Order and Preliminary Injunction against defendants The Washington Post, Marc Fisher and Richard Leiby (collectively, “The Post”, plaintiff RTC's Motion for a Preliminary Injunction against defendant Lerma and Digital Gateway System ("DGS") and defendant Lerma's Motion to Vacate the August 11, 1995 Writ of Seizure and Order for Impoundment and to Increase the Amount of Plaintiff's Bond. On September 15, 1995 we denied all of RTC's motions and granted Lerma's motion. The memorandum to support that ruling was deferred.

I. RTC'S EMERGENCY MOTION [**2] FOR RECONSIDERATION AND REHEARING ON RTC'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST DEFENDANTS THE WASHINGTON POST, MARC FISHER AND RICHARD LEIBY

At the outset, we caution counsel that this Court seldom revisits motions upon which it has already ruled. Such an approach fosters efficiency and finality. A reconsideration motion is typically heard only where the Court has "patently misunderstood a party" or where there is a "significant change in the law or facts" of a case. Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D.Va. 1983). Although neither circumstance is present here, the Court has permitted reargument because the RTC claims that the Court's denial of its Temporary Restraining Order has significant First Amendment implications upon which

the RTC had not focused in its first motion. In the Court's view these arguments should have been raised in RTC's oriqinal motion against The Post instead of awaiting this second attack. Nevertheless, in the interests of full consideration of RTC's claims, we granted the rehearing confident that RTC's future pleadings will address all significant legal issues in the first instance.

[**3] A. The Free Exercise Clause

The most potent new issue raised by the RTC concerns the alleged interferenc, that the Court's August 30 Order ("the Order") wreaks upon the free exercise of the Scientology religion. RTC asserts that [*1356] maintenance of the secrecy and confidentiality of the documents in question ("AT documents") represents a fundamental and inviolate tenet of the Scientology religion. Withholding these documents from unprepared or uninitiated observers was of primary importance to founder L. Ron Hubbard and is a belief woven throughout his original writings. Thus, for Scientologists publication of these materials threatens "irreversible alteration of religious beliefs, including compelled annihilation of a core belief - confidentiality of the [AT documents] ." (RTC's brief at p. 17)

The RTC asserts that the Court's Order by permitting The Post limited and specified use of the AT documents "imposes a change in religious belief and practice by judicial fiat. ..[It] dictate[s] to Scientologists how to practice their religion." (RTC's brief at p. 5) The Court thereby places in the hands of The Post "the authority to decide how the Scientology religion is practiced." [**4] (RTC's brief at p. 14) "Publishing is a literal violation of ... the very religious beliefs in question." (RTC's brief at p. 17) The RTC further argues that by denying their request to enjoin The Post and impound all AT documents in The Post's possession, this Court is placing its imprimatur on activity which represents "sacrilege" to the religion and "does violence to everything [Scientologists] believe in ..." (Transcript of September 15, 1995 Hearing at p. 15)

We recognize that the RTC has installed extraordinary measures to maintain the secrecy of its AT documents and that they have zealously pursued any reported leaks of information. However, it is a quantum leap to claim that Scientology's endeavors to enforce the secrecy of these documents thereby prohibits secular organizations from undertaking legally permissible criticism of Scientology including quotes from these documents as long as possession of the documents was achieved lawfully. In their effort to enjoin The Post, the RTC is essentially urging that we permit their religious belief in the secrecy of the AT documents to "trump" significant conflicting constitutional rights. In particular, they ask us to dismiss [**5] the equally valid First Amendment protections of freedom of the press. Furthermore, RTC asks that we allow the Free Exercise Clause to deflate the doctrine of fair use as embodied in the copyright statute, one of the very status laws upon which the RTC has based this lawsuit.

Were they arguing to a religious council placed within a theocratic government, RTC's arguments might prevail. But this Court is a secular branch of a secular democratic government. Our traditional separation of church from the state, combined with the heterogeneity of religious practices in this country compel us to reject the RTC's arguments. "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." Wallace v. Jaffree, 472 U.S. 38, 57, 86 L. Ed. 2d 29, 105 s. Ct.

2479 (1985). In the same vein, RTC may not employ the machinery of this Court to enforce its religious prescriptions against The Post by enjoining otherwise permissible activity.

Ultimately this Court must weigh any religious claims against the overriding necessity of enacting neutral [**6] and general laws to promote the common good. In evaluating the clash of these principles, the judiciary must honor legitimate secular goals. Activities that are otherwise permissible cannot be prohibited on the ground that they offend another individual's religious culture or sensibilities. The Supreme Court stated this point cogently in Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 885, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990):

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to tarry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs ... - permitting him, by virtue of his beliefs, 'to become a law unto himself, - contradicts both constitutional tradition and common sense.

[*1357] (emphasis added) (citations omitted). The opinion concludes:

The rule respondents favor would open the prospect of constitutionally required religious exemptions [**7] from civic obligations of almost every conceivable kind.

Id. at 888-89.

It is well-established that a law satisfies the requirement of the Free Exercise Clause if it is "neutral" and of "general applicability." Church of the Lukurni Babalu Aye, Inc. v. City of Hialeah, 508 u.s. 520, 124 L. Ed. 2d 472, 113 S. Ct. 2217, 2226 et seq. (1993). n1

-Footnotes-

n1 Using the formula detailed in Lukurni Babalu, the Supreme Court has repeatedly upheld other secular activities that conflicted with a petitioner's religious beliefs. See e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988) (permitting government logging and road construction on lands used for religious purposes by Native Americans) Bowen v. Roy, 476 U.S. 693, 90 L. Ed. 2d 735, 106 S. Ct. 2147 (1986) (upholding the assignment of a social security number despite petitioner's claim that it violated religious beliefs).

-End Footnotes-

RTC responds that their claims merit additional weight because the secrecy [**8] of the AT documents is a necessary condition to the operation of Scientology. In other words, dissemination of the confidential materials threatens to decimate the religion as opposed to merely offending Scientologists, consequently, inhibiting their free exercise of their religion. The RTC supports this argument with the affidavits of various Scientologists. Despite these affidavits, it would be inappropriate and beyond our capability to assess the degree of importance which such confidentiality has in the Scientology religion:

It is no more appropriate for judges to determine the "centrality" of religious beliefs ... in the free exercise field, than it would be for them to determine the "importance" of ideas ... in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?

Dept. of Human Resources of Oregon v. Smith, 494 U.S. at 886-87.

The RTC attempts to analogize the Court's Order to "an order compelling a Protestant to dispute the Resurrection, ordering a fundamentalist to read the Bible [non-literally], compelling an observant Jew to eat [**9] pork, or compelling an observant Catholic to have an abortion." (RTC's brief at p. 5) This analogy fails because in each hypothetical the judiciary is forcing an affirmative action upon the religion member. However, the instant case is distinguishable because the Court, by upholding neutral copyright and First Amendment law is not compelling any Scientologist to do anything. Instead, the Order merely permits The Post to utilize the AT documents within the limits of the fair use exception to the copyright law. In effect, all the Order allows is the continued operation of established secular law in the neutral fashion for which it was intended.

B. Spiritual Harm

A second related argument regards the alleged spiritual harm that will befall Scientologists and non-Scientologists alike from reading the AT documents. The RTC claims that premature exposure of the documents to non-Scientologists (and even to Scientologists who have not reached the requisite OT level) will result in "devastating, cataclysmic spiritual harm." (RTC's brief at p. 34) According to the church's dogma, founder L. Ron Hubbard taught that disclosure of these documents to anyone who had not progressed through [**10] the necessary spiritual prerequisites could cause profound spiritual harm to the person prematurely exposed." (Third McShane Declaration, pp 2-3) Non-Scientologists will also be harmed because premature exposure will interfere with their "personal spiritual progress." Id. p. 11.

This argument has no merit. We reside in a country which allows individuals and organizations to confront the risk of harm, spiritual or otherwise, in the face of protected speech. The First Amendment represents a conscious and explicit trade-off which the Founding Fathers made between paternalistic protection from "harmful" thoughts and free access to information. Where statutorily and constitutionally protected speech is [*1358] concerned, our system permits an individual's fate to be sealed by the individual's choices rather than governmental monitoring.

The RTC states that "violations of intellectual property rights are not protected speech within the meaning of the First Amendment." (RTC's brief at p. 23, emphasis in original). However, this Court has already ruled that the excerpts appearing to date in The Post constitute fair use under the copyright statute, and are thus not "violations." We have encountered [**11] no evidence to alter that decision.

In addition to individuals, the RTC also argues that release of the AT documents could wreak destruction on a planetary scale. One Scientologist describes how dissemination of the documents might "let loose a hurricane upon the world through our materials coming into unethical or suppressive or psychiatric hands ... To place this data near such people as

psychiatrists or even states, places them in a position to enslave people ..." (RTC's brief p. 12)

This argument is merely another version of the RTC's first argument. It asks this Court to accept as truth what is a religious belief of Scientologists and to make a finding of irreparable harm based on such acceptance. That is not a proper basis upon which a secular court can base a judicial decision.

For the foregoing reasons, the addition of RTC's free exercise argument does not warrant reversal of our previous denial of the motion for temporary restraining order and preliminary injunction against The Post.

Economic Harm and Prior Restraint

In addition to spiritual harm, RTC's Emergency Motion reargues their position about economic harm from publication of the AT documents. [**12] RTC bases its economic claims upon two types of harm:

1) Competition from rival churches or "splinter groups" which will draw away future parishioners and potential donations (RTC's brief at pp. 24-43); and

2) The "potential loss of new parishioners through ridicule, by taking portions of the materials out of context." (RTC's brief at p. 16)

As to the first claim, no reasonable person could find that The Post's brief quotations from the AT documents could provide sufficient material upon which a rival church could establish a competing organization. As The Post has argued, there is no evidence that it intends any more extensive quotations, and indeed they are under court order to confine their use of the documents to that permitted by fair use. Moreover, The Post is clearly not in the business of setting up religions and is not a competitor of Scientology.

Regarding the RTC's concern about potential loss of new parishioners, this is the price paid in a free society which encourages an open marketplace for ideas. Free speech protections and the fair use exemption to the copyright statute exist to permit open and educated debate on matters of public importance. The [**13] RTC must accept the fact that a frank criticism of Scientology religious tenets may deter some potential parishioners. Harm from legitimate criticism is not actionable under either the First Amendment or the copyright laws. New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 160 (2nd Cir.), cert. denied, 498 U.S. 921, 112 L. Ed. 2d 251, 111 S. Ct. 297 (1990).

Thus, the additional arguments presented by RTC regarding alleged economic harms are unconvincing, and are insufficient to alter the Blackwelder analysis which prompted this Court's denial of their original motion.

No other arguments in the RTC brief merit any further discussion because they either merely repeat previous arguments or express disagreement with our previous ruling. Based on the foregoing, RTC's Emergency Motion for Reconsideration and Rehearing is DENIED.

II. RTC'S MOTION FOR PRELIMINARY INJUNCTION AGAINST LERMA AND DGS AND LERMA'S MOTION TO VACATE THE WRIT OF SEIZURE AND INCREASE THE AMOUNT

OF PLAINTIFF'S BOND

The analysis we made concerning The Post is also relevant to RTC's request for [*1359] preliminary injunction against Lerma and DGS as well. Whether a preliminary injunction [**14] should be issued "is determined by the 'flexible interplay' of four factors: the risk of irreparable harm to the plaintiff if relief is denied, the risk of harm to the defendant if relief is granted, the likelihood of the plaintiff's success on the merits, and the interest of the public." Religious Technology Center v. Lerma, 897 F. Supp. 260 (E.D.Va. 1995) (quoting Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189, 196 (4th Cir. 1977)) ("Order").

Several of the conclusions we reached regarding The Post are applicable to Lerma. First, we find that the RTC has not made a strong showing of irreparable harm if the injunction is not granted. Lerma has agreed to abide by the same court order as has been imposed against The Post. Specifically, he has agreed to be bound by the fair use provisions of the copyright law and he has agreed not to transfer the AT documents to anyone.

Second, the First Amendment's protection of the freedom of the press extends to individuals and groups in addition to commercial news organizations such as The Post. As a result, Lerma would also suffer irreparable harm from the prior restraint which would [**15] result from a grant of the injunction. "Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." Branzburg v. Hayes, 408 U.S. 665, 704, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972).

Rather than publishing in a newspaper, Lerma has used the Internet, which is rapidly evolving into both a universal newspaper and public forum. And although the law has not yet decided how to deal with the Internet, it is certain that this form of communication will retain First Amendment protections. Thus, the method of Lerma's publications and the size of his audience are not reasons for treating him differently from The Post under the Blackwelder test.

Up to this point, therefore, our analysis and conclusions are the same as those we reached in the RTC's case against The Post. However, on the likelihood of success on the merits, the balance tips somewhat more in RTC's favor because of the degree and surrounding circumstances of Lerma's publications on the Internet. This Court earlier held that The Post's limited use of brief quotations amidst extensive original [**16] commentary surrounding a newsworthy event clearly fell within the "fair use" exception of the copyright statute. See Religious Technology Center v. Lerma, 897 F. Supp. 260, (E.D.Va. 1995). Lerma's use of the AT documents is more extensive than The Post's and may not constitute fair use. The RTC provided numerous examples of AT Documents or segments thereof copied from Lerma's computer. These excerpts often constitute much larger quotations from the AT documents than those found in The Post article. See RTC's Under Seal Exhibit Binder from the September 15, 1995 Hearing. They sometimes represent wholesale copying of a distinct segment or bulletin from allegedly copyrighted documents. Most importantly, they appear at times to have been copied without any comment or criticism whatsoever.

Lerma objected to the introduction of these exhibits because a copy had not been provided to counsel before the hearing. Lerma argued that in discovery he had asked for just such a

comparison; he claimed to be at a disadvantage because of surprise. The Court quickly reviewed defendant's discovery requests, found they did not include an explicit request for [**17] this comparison and then reviewed the exhibit. On this preliminary review, we conclude that Lerma's copying and publishing appears more extensive than The Post's and, therefore, that the likelihood of RTC succeeding on the merits of the copyrighted infringement claim is somewhat higher than in its case against The Post.

However, as much as this Court may be concerned about Lerma's use of the AT documents, it is even more troubled by issues raised in Lerma's Motion to Vacate. Lerma argues that the RTC cannot avail itself of the equitable power of the Court because it has unclean hands. Specifically, he attacks: 1) the bona fide intentions of RTC in bringing [*1360] this lawsuit; and 2) the manner in which the RTC has handled the materials seized from his home on August 11, 1995.

When the RTC first approached the Court with its ex parte request for the seizure warrant and Temporary Restraining Order, the dispute was presented as a straight-forward one under copyright and trade secret law. However, the Court is now convinced that the primary motivation of RTC in suing Lerma, DGS and The Post is to stifle criticism of Scientology in general and to harass its critics. As the increasingly [**18] vitriolic rhetoric of its briefs and oral argument now demonstrate, the RTC appears far more concerned about criticism of Scientology than vindication of its secrets. RTC's Emergency Motion for Reconsideration, discussed above, is a clear example of this conduct.

In that motion, the RTC maligns the "incorrect premise that a newspaper has a 'right' to report on the content of, let alone quote from, confidential, unpublished materials." Emergency Motion at p. 33 (emphasis added). This is not an incorrect premise. Whether or not the extent of The Post's or Lerma's quotations exceed fair use, it is beyond dispute that general discussion of and reporting about the "contents" of any work is permissible. The Copyright Act itself provides:

In no case does copyright protection for an original work of authorship extend to any idea system ... concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C.A. @ 102(b). The "idea/expression" distinction in copyright law is a critical balance which allows a flourishing exchange of ideas while still protecting a particular author's expression [**19] of that idea. The RTC's position appears to be an attempt to silence comments about the ideas of Scientology and not just the particular expression of those ideas.

The RTC claims that "The Posts's motivation is not so mild. That its intention in copying the documents from the court file is vicious is underscored by the contents of the article itself." Id. at p. 35. The Post's use of AT Document quotations was quite minimal, as this Court earlier held. The "contents" to which the RTC so vigorously objects, therefore, appear to be adverse discussion and criticism of Scientology and this related litigation. Although the RTC may attempt to argue that "any public interest in obtaining information through media sources ... does not supersede the rights of a copyright owner," Emergency Motion at p. 44, copyright law, the First Arnendrnent, and the fair use doctrine prove this is not always the case.

This theme is also demonstrated at oral argument. There were numerous times when counsel for RTC strayed into issues far beyond the scope of copyright or trade secret law and were more akin to an objection to criticism of Scientology. See e.g., Transcript of September 15, [**20] 1995, p. 12 (RTC is concerned about "broadside attacks on the religious practices of Scientology, broadside attacks on the Scientology and Scientologists"); p. 16 (the reason the AT Documents are being exposed "is to offend [the] sensibility [of Scientologists], to offend [their] conviction[s]. These are spiteful revelations that are being made. These are not being made by anybody in the interest of news."); pp. 20-21 ("The Church of Scientology has to come in here and has to be confronted with the Washington Post claim that it has the right to get those files ... and that their rights are superior. ..to the core of religious convictions and belief of every Scientologist everywhere ..."); p. 24 (that The Post published certain quotes - quotes to which RTC makes no copyright or trade secret claim - in order to "be offensive to Christians everywhere ... it's just a vicious, disgusting attack on Jesus Christ made up for that purpose."); p. 25 (that The Post published some of this "phony" material "to try to cut the lines of Scientology to their co-religionists in the Christian religion around the world. It was a vicious thing to do."); p. 25 (that "the attack on the [**21] religious beliefs and practices of Scientology is absolutely repugnant to the Constitution and ought not to be allowed to stand. [The Post has] mowed down [RTC's] rights with the phony exercise of their own.") pp. 29, 30, 31 (where RTC makes reference to other "attacks" unrelated to any copyright infringement) . [*1361] These repeated excursions into concerns about attacks on Scientology and its followers, excursions which the Court had to reign in, reinforce our earlier mentioned concerns regarding the bona fides of this case. Had the Court been aware of the true motives behind this litigation, it might not have granted the RTC's initial ex parte motions for a Temporary Restraining Order and to permit a seizure of Lerma's property.

The Court's concern is further heightened by the manner in which Lerma's computer files were seized and subsequently searched. There has been extensive briefing and argument by all parties on their varying interpretations of the seizure and search order. Regardless of RTC's attempt to interpret and the wording of the seizure order, it was this Court's understanding that Lerma's property would be turned over to an "independent" computer expert who would [**22] conduct independent searches based upon a limited set of search indicia. At the ex parte hearing the Court expressed concern that the downloading of Lerma's information might reveal personal and confidential information irrelevant to this case. (Transcript of Hearing, August 11, 1995 at pp. 14-15.) This independent review was offered as a safeguard against potential abuse. We are greatly disturbed to learn that the scope of RTC's involvement clearly exceeded our intentions for the search. Specifically, we now know that counsel for RTC determined ex parte what materials would be subject to impoundment based upon judicial authority.

Moreover, Lerma has effectively demonstrated that - as a direct result of the seizure and RTC's involvement in the searching - the RTC has acquired confidential information of great import to them and of secondary (at best) relevance to this litigation.

We decline to find that RTC's participation in the search and seizure rises to the level of a "fraud on the Court" as Lerma might have us believe. However, we do conclude that RTC violated the spirit if not the letter of the seizure writ, and misled the Court as to the way in which the Lerma materials [**23] were maintained and reviewed.

Conclusion

We therefore conclude that this problem of unclean hands on the part of RTC mandates denial of the equitable relief they presently seek against Lerma and DGS. Even without unclean hands, however, the RTC would lose under the Blackwelder test. The RTC is currently undertaking virtually identical litigation in the United States District Court for the District of Colorado involving FACTNet, Lerma's organizational counterpart. That case involves the same issues and some of the same parties facts as the instant action. After three days of hearings on parallel motions filed by the parties in that jurisdiction, and using a balancing test identical to that found in Blackwelder, Judge John L. Kane, Jr. denied RTC's Motion for Preliminary Injunction, granted the defendants' Motion to Vacate the Seizure Order, and ordered immediate return of all the materials. See Religious Technology Center v. F.A.C.T.Net, Inc., 901 F. Supp. 1519, 1995 U.S. Dist. LEXIS 13892, Civil Action No.95-8-2143, slip op. (Sep. 15, 1995). We garner additional support for our conclusion from this decision.

For the reasons mentioned above, RTC's Motion for Preliminary Injunction against defendants [**24] Lerma and Digital Gateway Systems is DENIED and defendant Lerma's Motion to Vacate the Writ of Seizure is GRANTED. Because a stay of this ruling would, in effect, leave Lerma in the same enjoined condition from which the Court has now found he should be released, RTC's Motions for Provisional Stays are DENIED.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 29th day of November, 1995.

Leonie M. Brinkema
United States District Judge
Alexandria, Virginia

RELIGIOUS TECHNOLOGY CENTER, Plaintiff, v. ARNALDO PAGLIARINA LERMA, DIGITAL GATEWAY SYSTEMS, THE WASHINGTON POST, MARC FISHER, and RICHARD LEIBY, Defendants.

Civil Action No. 95-1107-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

897 F. Supp. 260; 1995 U.S. Dist. LEXIS 16799; 36 U.S.P.Q.2D (BNA) 1649

August 30, 1995, Decided
August 30, 1995, FILED

COUNSEL: [**1] For RELIGIOUS TECHNOLOGY CENTER, a California non-profit corporation, plaintiff: Bruce B. McHale, Chamowitz & Chamowitz, Alexandria, VA.

For ARNOLDO PAGLIARINI LERMA, an individual, defendant: Jay Ward Brown, Ross, Dixon & Masback, Washington, D.C. For DIGITAL GATEWAY SYST., a Virginia corporation, defendant: Michael Abbott Grow, Vorys, Sater, Seymour & Pease, Washington, D.C. For THE WASHINGTON POST, a Washington, D.C. corporation, MARC FISHER, an individual, RICHARD LEIBY, an individual, defendants: John Po Corrado, Hazel And Thomas, Alexandria, VA.

JUDGES: Leonie M. Brinkema, United States District Judge

OPINION BY: Leonie M. Brinkema

OPINION: [*261] MEMORANDUM OPINION

This case comes before the Court on plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction; for Impoundment of Infringing Articles; and for Expedited Discovery against the defendants The Washington Post ("the Post"), Marc Fisher, and Richard Leiby (collectively "the Post defendants").

Plaintiff alleges that it holds the license to the copyrights ot the writings of L. Ron Hubbard, the founder of the Church of Scientology. Defendant Lerma is a former church member who plaintiff accuses of infringing its copyright on various Advanced Technology ("AT") documents by posting these documents on the Internet. Defendant Digital Gateway Systems ("DGS") is defendant Lerma's access provider to the Internet. Plaintiff originally filed this action against defendants Lerma and DGS to enjoin the posting of the AT documents on the Internet. On August 11, 1995, this Court entered a Temporary Restraining Order, Order to Show Cause Regarding a Preliminary Injunction, Order for Impoundment, and Order for Expedited Discovery. The Court also ordered the Clerk to issue a writ of [**2] seizure for defendant Lerma's personal computer eiuipment, [*262] floppy disks, and any copies of the copyrighted works of L. Ron Hubbard.

At some point after the seizure, plaintiff learned that defendant Lerma given copies of the AT documents in issue to the Post. When the plaintiff had confronted the Post about these

documents and advised that they might be stolen, the Post voluntarily turned them over to the plaintiff. However, on August 14, 1995, the Post sent a reporter to the Clerk's office of the United States District Court for the Central District of California to copy a public court file which allegedly contained copies of the same AT documents. The documents were contained in the record of a case pending in that jurisdiction and were not then subject to a sealing or protective order. The file was subsequently sealed, however that later sealing is of no moment to the pending motion.

On August 19, 1995, the Post published an article written by defendant Marc Fisher regarding this lawsuit and the seizure of Lerma's computer equipment (hereinafter "the Article"). The Article contained several brief quotations from the AT materials obtained from the California case.

On August 22, [**3] 1995, plaintiff filed a First Amended Verified Complaint For Injunctive Relief and Damages for (1) Copyright Infringement; and (2) Trade Secrets Misappropriation, adding the Post, Fisher, and Leiby as defendants. Along with the First Amended Verified Complaint, plaintiff filed the pending motion seeking to enjoin the Post defendants from copying, disclosing, using, displaying, or reproducing the AT materials obtained from the California case. A hearing was held on August 25, 1995 and the matter was taken under advisement.

I. Balance of Harms

The decision to grant or deny plaintiff's request for interlocutory relief is determined by the "flexible interplay" of four factors: the risk of irreparable harm to the plaintiff if relief is denied, the risk of harm to the defendant if relief is granted, the likelihood of the plaintiff's success on the merits, and the interest of the public. Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co., 550 F.2d 189, 196 (4th Cir. 1977) (citations omitted). The first step in our analysis is to balance the risk of irreparable harm to the plaintiff against the risk of harm to the defendant. Id. at 195.

The harm to the Post [**4] defendants if the plaintiff's motion is granted is self-evident. This lawsuit, and similar actions in other jurisdictions, and the conflict between the Church of Scientology and its critics are newsworthy subjects. These defendants are professional news reporters and publishers, and the relief sought by plaintiff would prohibit them from using the documents at issue in reporting on these matters. Such limitations on their ability to report on the news would clearly work a profound harm on these defendants. Moreover, to the extent that the requested relief would place limitations on the defendants' reporting, it would constitute a prior restraint on expression. Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). There is a strong presumption against the constitutionality of such action. New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 2141, 29 L. Ed. 2d 822 (1971). As a result, the plaintiff "carries a heavy burden of showing justification for the imposition of such a restraint." Id. Plaintiff has not met that burden in this case.

In New York Times Co. v. United States, the United States government sought to enjoin the New York Times [**5] and the Washington Post from publishing a classified study of the government's decision-making process with regard to its policy towards Viet Nam. The classified document, known as the Pentagon Papers, contained military and diplomatic

secrets, the disclosure of which posed a potential threat to national security. See 91 S. Ct. at 2150 (White, J., concurring) ("revelation of these documents will do substantial damage to public interests"). Despite this threat, a plurality of the Court found that the government had failed to overcome the presumption against prior restraint.

Plaintiff argues that dissemination of the AT documents would cause an irreparable injury, namely future copyright infringement and trade secret misappropriation. This is the sole justification plaintiff offers to support [*263] its argument for prior restraint of the press. If a threat to national security was insufficient to warrant a prior restraint in New York Times Co. v. United States, the threat to plaintiff's copyrights and trade secrets is woefully inadequate.

Moreover, plaintiff's arguments to date suggest that the extent to which plaintiff would be harmed by any future copyright infringement or trade secret [**6] misappropriation is at best slight. The documents in question are so esoteric as to require years of training in Scientology to understand them. As a result, the only financial harm that the plaintiff could suffer as a result of any alleged infringement would be if Church followers chose to forsake the Church's elaborate system of instruction in favor of self-administration of the texts. Scientology's status as a religious organization undermines any theory of loss that would depend on its followers' desire to cheat the Church by obtaining these teachings through unauthorized means. Accordingly, this Court fails to recognize any significant risk of financial loss to the plaintiff if the motion is denied.

II. Likelihood of Success on the Merits

Where, as here, the balance of harms favors the defendant, the likelihood of the plaintiff's success on the merits assumes heightened significance. Blackwelder, 550 F.2d at 195 ("The importance of probability of success increases as the probability of irreparable injury diminishes.") Where the likelihood of irreparable injury to the plaintiff is merely "possible," the plaintiff's likelihood of success on the merits can be determinative. [**7] Id. Without opening on the merits of this case, it can fairly be said that plaintiff's success is far from a foregone conclusion.

Plaintiff asserts two claims against the Post defendants: copyright infringement and trade secret misappropriation. As a defense to the copyright infringement claim, defendants argue that plaintiff's allegations are insufficient to state a claim of copyright infringement because the plaintiff has not shown a substantial similarity between the Article and any copyrighted text and because the quotations contained in the Article represent a de minimis use of the allegedly copyrighted works. Furthermore, the Post defendants argue that any copying of the AT documents was within the fair use exception of the Copyright Act. 17 U.S.C.A. @ 107 (West Supp. 1995). While the questions of whether the subject documents are copyright protected and whether defendants' acts constituted a copying will be significant issues in this case, we assume for the purposes of this motion that the Post defendants copied copyrighted materials, and solely address the fair use issue. The fair use doctrine allows the reasonable use of copyrighted materials and is designed to balance [**8] the exclusive rights of the copyright holder with the public's interest in dissemination of information regarding areas of universal concern. See Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 205-206 (2d. Cir. 1979).

Section 107 of the Copyright Act provides: the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C.A @ 107 (West Supp 1995) (emphasis added).

The [**9] purpose of defendants' use of the subject work was two-fold. The Article constituted news reporting, one of the specific uses included in the statute as examples of fair use. The August 14, 1995 copying constituted research for the Article. Defendants argue [*264] that the copying of the California court file should be considered together with the publication of the Article because "news gathering is an essential aspect of news reporting. The Post has gathered a copy of the materials in question and those materials, unquestionably, are news." Memorandum of The Washington Post, Marc Fisher, and Richard Leiby in Opposition to Plaintiff's Motion for a Temporary Restraining Order at 19 (hereinafter "Post Memorandum"). Indeed, the Post's copying of the California court file can easily be viewed as research for the Article and, therefore, as an integral part of that act of news reporting. In addition, an accurate copy of the AT documents was necessary for the Post defendants' ability to accurately report on, and quote from, their contents.

The scope of the fair use doctrine is greater with respect to factual works than creative or literary works. Without having reviewed the AT documents, this [**10] Court is at a disadvantage with regard to classifying them as either factual or expressive. Even courts with fuller records than this have encountered difficulty in classifying Hubbard's writings. As the Second Circuit stated in New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 158 (2d Cir.), cert. denied, 498 U.S. 921, 111 S. Ct. 297, 112 L. Ed. 2d 251 (1990), "reasonable people can disagree over how to classify Hubbard's works." However, that court also concluded that the works "deal with Hubbard's life, his views on religion, human relations, the Church, etc. – [and] are more properly viewed as factual or informational." Id. at 157. The United States District Court for the Southern District of California is of another view, however. In Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 636 (S.D. Cal. 1993), the court stated that "the undisputed evidence shows that L. Ron Hubbard's works are the product of his creative thought process, and not merely information."

In the instant litigation, plaintiff has characterized the AT documents more as informational than as creative fiction. Specifically, the First Amended Verified Complaint describes [**11] Hubbard's writings as "works on applied religious philosophy and spiritual healing technology, including training materials and course manuals of the Scientology religion." Amended Complaint at p 26. Therefore, at this point, this Court adopts the Second Circuit's view, and finds that because the AT documents appear to be factual or

informational the broader view of fair use is appropriate in this case.

Plaintiff argues that the unpublished nature of some of the AT documents militates against a finding of fair use, relying on the Supreme Court's decision in Harper & Row v. Nation Enterprises, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985) to support this argument. In Harper & Row, the defendant published excerpts from an unpublished manuscript of the autobiography of Gerald Ford. The defendant's article was timed to "scoop" a competing publication that had agreed to purchase the exclusive right to print excerpts of the work. The Court noted that the fact that a work is unpublished is a "critical element" of its nature and that "the scope of fair use is narrower with respect to unpublished works." 105 S. Ct. at 2232. The facts of the Harper & Row case differ strikingly [**12] from the case at hand. In the Harper & Row decision the defendant timed publication of its article to deprive the planned publication of its full impact. Here, no such motivation exists. Moreover, the Article contained only minimal excerpts from plaintiff's documents and can in no way be said to have deprived the plaintiff of the right of first publication, on which the Harper & Row decision is largely based. In addition, after the Supreme Court's decision in Harper & Row, Congress amended Section 107 of the Copyright Act to make clear that "the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C.A. @ 107 (West Supp. 1995). Assuming that all of the AT documents at issue are unpublished, the Post defendants' use of those documents does not implicate the concerns expressed by the Court in Harper & Row and therefore their unpublished nature plays a minimal role in this Court's consideration.

[*265] With regard to the amount of the work used, defendants' Article quoted only a minute portion of the AT documents. The August 14, 1995 copying of the California court files involved [**13] a considerably larger amount of the subject works: allegedly 103 pages were copied. However, although a large number of pages were copied, onlya few lines of the documents were quoted in the Article. This Court therefore finds that the sheer quantity of the documents copied does not defeat the Post defendants' claim of fair use.

With respect to the effect of the Post defendants' use on the market value of the AT documents, it is doubtful that the defendants' copying can have a significant negative effect. As mentioned above, the Article contained only scant quotations from the AT documents. Scientologists in search of advanced training could not possibly consider these short quotes as substitutes for the full texts. Furthermore, the affidavits filed in support of plaintiff's complaint and motions provide that part of the Advanced Technology program involves "confidential counselling, or 'auditing' from a trained minister of the Church." McShane Aff. at pp 9-10. Even the confidential levels that do not require auditing involve supervision "on each step to ensure that [the Scientologist] delivers the Advanced Technology to himself currently and that he obtains the exact expected [**14] results from each level." Id. at p 11. Accordingly, the "market" for these writings does not exist independently of the Church's services.

Finally, the plaintiff argues that the Post defendants cannot enjoy the shelter of the fair use doctrine because their acquisition of the subject documents was unlawful. Plaintiff's argument stems from its assertion that, as a result of stringent security measures, any copy of the AT documents existing outside the Church was necessarily at one time stolen. Plaintiff further argues that the unlawful acquisition of copyrighted materials precludes

any fair use defense. See Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832, 843 (Fed. Cir. 1992); n1 Sega Enterprises Ltd. v. Maphia, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (citing Atari Games, 975 F.2d 832 at 843). However, unlike the facts in the cases relied on by plaintiff, the facts in this case are that the Post defendants obtained the documents from a legitimate source. When the Post defendants obtained the copies at issue, the AT documents were contained within the unsealed files of the United States District Court for the Central District of California. As such, they were [**15] available to the general public at the office of the Clerk of the Court.

-Footnotes-

n1 In the Atari case, the defendant misappropriated a copy of the plaintiff's source code by obtaining a copy from the Copyright Office in violation of Copyright Office regulations. The court in that case stated that "to invoke the fair use exception, an individual must possess an authorized copy of a literary work." Atari Games, 975 F.2d at 843 (citing Harper & Row, 105 s. Ct. 2232 (holding that knowing exploitation of purloined manuscript is not compatible with "good faith" and "fair dealings" underpinnings of fair use doctrine)).

-End Footnotes-

Defendants argue that the copying of the AT documents, by the Clerk of the Court on defendants' behalf, cannot be infringement "given the ancient common law right of access to publicly filed court documents and the recognized importance of granting access to such documents to the press," Post Memorandum at is. Indeed, the Supreme Court has explicitly recognized the right of the press to publish [**16] facts contained in public court records. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), the Supreme Court held that the First and Fourteenth Amendments barred a cause of adtion for damages for invasion of privacy for publication of informatiori contained in an open court record. In Cox, a reporter employed by the defendant included the name of a deceased rape victim in a news report of the trial of her alleged attackers. The father of the victim sued the broadcast company for invasion of privacy, relying in part on a state statute making it a misdemeanor for any news media to publish the name of any rape victim. The Supreme Court, relying on the "special protected nature of accurate reports of judicial proceedings" and the inclusion of the information in the public record, found that the defendant's actions were constitutionally protected. 95 S. Ct. at 1044-47. In so holding, the Court stated:

[*266] By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned [**17] with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.

Id. at 1046

Plaintiff argues that the Post defendants had no right of access to the AT documents in the California court file because those documents were never relevant to that litigation and had been dumped into the record merely for the purpose of improperly making them available to the public. Plaintiff's argument neglects the fact that at the time that the Post

obtained copies of those documents from the public court records, no sealing order was in place. In fact the plaintiff had moved the district court to seal the file and the court had denied that request.

When the district court refused to seal the file, plaintiff appealed that decision to the Ninth Circuit which reversed the district court in an unpublished opinion on August 30, 1994. The Ninth Circuit remanded the case with instructions to the lower court to determine whether the disputed documents contain trade secrets or were irrelevant to any of the issues in the case. In reaching their decision, the Ninth Circuit recognized the tension between the public's right [**18] of access to judicial records and the supervisory power of the court to ensure that its files not become "vehicle[s] for improper purposes." Church of Scientology Int'l v. Fishman, 1994 U.S. App. LEXIS 23848, No.94-55443 (9th Cir. Aug. 30, 1994). However, despite these concerns, the court's opinion did not direct the lower court to seal the file, which remained open to the public until after the Post copied the documents. Given the well recognized public right of access to court records and these facts, there is little likelihood that the plaintiff will prevail on the argument that the Post had no right of access to the AT documents in the court file on August 14, 1995.

Our discussion of the fair use doctrine must be understood in the context of the pending motion. We do not here rule on the merits of plaintiff's claim, nor on the Post defendants' response. Rather, at this preliminary stage of the proceedings the analysis favors the defendants, ruling out a finding that plaintiff has shown a likelihood of success on the merits sufficient to overcome the likelihood of harm to the defendants.

The likelihood of success 0£ the plaintiff's trade secret misappropriation claim is at least as uncertain as the [**19] copyright claim. To prevail on a trade secret misappropriation claim, the plaintiff must prove that the AT documents are indeed trade secrets. In Virginia, a "trade secret" is defined as information that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and ... is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Va. Code Ann @ 59.1-336 (Michie 1992).

Unquestionably, the plaintiff has taken extraordinary measures to try to maintain the secrecy of the AT texts. Plaintiff and the Church of Scientology employ numerous and elaborate security measures to prevent church members from removing the texts from the Church. In addition, while the California court file remained unsealed, Church members conducted a daily vigil in which they signed out the file and retained it until the Clerk's office closed. Despite these efforts, the AT documents have escaped into the public domain and onto the Internet. Significantly, the record in this case indicates that defendant [**20] Lerma is not the only source of AT documents' on the Internet. Accordingly, for the purposes of this motion, it would seem that plaintiff cannot establish that the AT documents are "not generally known." Additionally, plaintiff has not demonstrated that the AT documents provide plaintiff with any economic advantage over any competitors.

III. The Public Interest

The final consideration dictated by the Blackwelder opinion is the public interest. [*267] This factor weighs heavily in favor of denying the plaintiff's motion. The public interest lies with the unfettered ability of the Post to report on the news. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 2825, 65 L. Ed. 2d 973 (1980) (stating that print and electronic media are the public's chief source of information about trials and that media coverage of legal proceedings contributes to public understanding of the rule of law) (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 2816, 49 L. Ed. 2d 683 (1976) (Brennan, J., concurring in judgment)).

IV. Conclusion

Having performed the analysis required under Blackwelder, this Court concludes that the plaintiff's Motion [**21] for a Temporary Retraining Order and a Preliminary Injunction; for Impoundment of Infringing Articles; and for Expedited Discovery against the Post defendants must be denied. The balance of harms is heavily tilted towards the defendants, and the plaintiff's likelihood of success on the merits is insufficient to right the scale. Finally, the public interest and the constitutional presumption against prior restraint weigh heavily against the plaintiff. For these reasons, plaintiff's motion is DENIED.

Defendants must maintain the status quo as to the possession of the AT documents and may make fair use thereof. However, defendants are prohibited from making additional copies of the AT documents and distributing or transferring the documents. Should the defendants incorporate or attach any of the AT documents to their papers in this action, such filings must be made under seal.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 30th day of August, 1995.

Leonie M. Brinkema
United States District Judge Alexandria, Virginia

ORDER

For the reasons stated in the accompanying Memorandum Opinion, plaintiff's Motion for a Temporary Retraining Order [**22] and a Preliminary Injunction; for Impoundment of Infringing Articles; and for Expedited Discovery against the defendants The Washington Post, Marc Fisher, and Richard Leiby are DENIED and it is hereby

ORDERED that defendants must maintain the status quo as to the possession of the Advanced Technology documents and may make fair use thereof. Defendants are prohibited from making additional copies of the documents and distributing or transferring the documents and it is further

ORDERED that should the defendants incorporate or attach any of the Advanced Technology documents to their papers in this action, such filings must be made under seal.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 30th day of August, 1995

Leonie M. Brinkema
United States District Judge
Alexandria, Virginia