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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THERAPEUTIC RESEARCH FACULTY,) 2:05-cv-2322-GEB-DAD
)
Plaintiff,)
)
v.) ORDER*
)
NBTY, INC., REXALL SUNDOWN, INC.,)
and LE NATURISTE J.M.B. INC.,)
)
Defendants.)
_____)

Defendants NBTY, Inc. ("NBTY") and Rexall Sundown, Inc. ("Rexall Sundown") (collectively "Defendants") move to dismiss eight of the thirteen claims alleged in Plaintiff's Second Amended Complaint ("Complaint") under Federal Rule of Civil Procedure 12(b)(6).¹ Plaintiff opposes the motion. For the following reasons, Defendants' motion is denied.

BACKGROUND

Plaintiff is an organization that provides analysis of drug therapy information and advice for professionals in the medical

* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

¹ Defendant Le Naturiste has not joined in this Motion.

1 community. (Compl. ¶ 12.) Plaintiff owns copyrights in the Natural
2 Medicines Comprehensive Database (the "Publication") which "includes
3 over 1,100 pharmacist-prepared monographs containing detailed
4 evidence-based information." (Id. ¶¶ 2, 12.) The Publication is
5 available both annually, in a hard copy print edition, and through
6 subscription, in a continually updated online version contained in a
7 passcode-protected area of Plaintiff's website. (Id. ¶ 2.) There are
8 two different types of subscriptions: "[a]n annual single user
9 limited-purpose subscription for Internet access . . . which was made
10 available in April and May 2002 for under \$100" and "site licenses for
11 organizations or corporations with higher usage patterns [which] are
12 sold for many thousand dollars." (Id. ¶ 15.)

13 NBTY purchased a single user subscription to the Publication
14 and thereby entered into a single user license agreement with
15 Plaintiff. (Id. ¶ 3.) The single user license agreement "limits
16 access to 'one and only one person,' either 'accessing information for
17 personal use' or 'for the benefit of an individual patient or as part
18 of an educational exercise.'" (Id. ¶ 5.) In addition,

19 [e]ach . . . [s]ingle [u]ser [l]icense
20 specifically provides that access is limited to
21 the individual employee and that 'under no
22 circumstances may [the employee] permit any person
23 or entity, including [] fellow employees or
24 employer, to use [the employee's] passcodes for
25 the purpose of accessing the site, nor may [the
26 employee] use [his/her] passcodes to access the
27 site for anyone else.'

24 (Id.) Nonetheless, Plaintiff claims that NBTY "shared the
25 confidential username and passcode among many [of its employees] for
26 two-and-a-half years, thereby infringing on [Plaintiff's] rights in
27 the Publication." (Id. ¶ 3.)

28

1 Plaintiff also alleges that NBTY and Rexall Sundown
2 infringed on its rights in the Publication when Rexall Sundown used
3 the confidential username and passcode from NBTY's single user
4 subscription without authorization. (Id.) Finally, Plaintiff claims
5 that NBTY "improperly and deceptively obtained access to the
6 Publication for Le Naturiste employees" under a group license
7 agreement entered into between Plaintiff and NBTY to address the
8 previously alleged violations of the single user license agreement.
9 (Id. ¶¶ 3, 40.) Under the group license agreement, only twelve
10 designated researchers employed by NBTY or Rexall Sundown were
11 permitted to access the Publication. (Id. ¶ 3.)

12 Defendants move to dismiss eight claims: copyright
13 infringement, contributory copyright infringement, vicarious copyright
14 infringement, violation of the Computer Fraud and Abuse Act ("CFAA")
15 (under 18 U.S.C. § 1030), violation of Title II of the Electronic
16 Communications Privacy Act ("ECPA") (under 18 U.S.C. § 2701),
17 violation of the California Comprehensive Data Access and Fraud Act
18 (under section 502 of the California Penal Code), trespass and
19 misappropriation of trade secret. (Mot. at 2.)

20 DISCUSSION

21 Dismissal is appropriate under Rule 12(b)(6) if Plaintiff
22 failed to (1) present a cognizable legal theory, or (2) plead
23 sufficient facts to support a cognizable legal theory. Robertson v.
24 Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984).
25 When considering a motion to dismiss, all material allegations in the
26 Complaint must be accepted as true and construed in the light most
27 favorable to Plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974);
28 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

1 In addition, Plaintiff is given the benefit of every reasonable
2 inference that can be drawn from the allegations in the Complaint.
3 Retail Clerks Int'l Ass'n v. Shermahorn, 373 U.S. 746, 753 n.6 (1963).
4 Accordingly, a motion to dismiss must be denied "unless it appears
5 beyond doubt that [Plaintiff] can prove no set of facts in support of
6 [its] claim which would entitle [it] to relief." Conley v. Gibson,
7 355 U.S. 41, 45-46 (1957).

8 I. Copyright Infringement

9 "A plaintiff must meet two requirements to establish a prima
10 facie case of copyright infringement: (1) ownership of the allegedly
11 infringed material and (2) violation by the alleged infringer of at
12 least one of the exclusive rights granted to copyright holders." LGS
13 Architects, Inc. v. Concordia Homes of Nev., 434 F.3d 1150, 1156 (9th
14 Cir. 1996). Under § 106 of the Copyright Act:

15 [T]he owner of copyright . . . has the exclusive
16 rights to do and to authorize any of the
17 following: (1) to reproduce the copyrighted works
18 in copies or phonorecords; (2) prepare derivative
19 works based on the copyrighted words; (3) to
20 distribute copies or phonorecords of the
21 copyrighted work to the public by sale or other
22 transfer of ownership, or by rental, lease, or
23 lending; (4) in the case of literary, musical,
24 dramatic, and choreographic works, pantomimes, and
25 pictorial, graphic or sculptural works, including the
26 individual images of a motion picture or other
27 audiovisual work, to display the copyrighted work
28 publicly; (6) in the case of sound recordings, to
perform the copyrighted work publicly, by means of
a digital audio transmission.

17 U.S.C. § 106.

27 The parties dispute whether Plaintiff has sufficiently
28 alleged a violation of any of its exclusive rights under § 106 of the

1 Copyright Act. Defendants argue that Plaintiff's contention that its
2 copyrights have been infringed by unauthorized access to the
3 Publication "is not the type of conduct subject to protection by the
4 copyright laws--the allegation simply has nothing to do with
5 Defendants *copying* Plaintiff's work." (Mot. at 3.) Plaintiff
6 responds that the term "copying" is used to describe a violation of
7 any one of the copyright holder's exclusive rights, such as the right
8 to reproduce, display and distribute, and Plaintiff has adequately
9 alleged that Defendant has violated these rights. (Opp'n at 9-10.)

10 Plaintiff alleges in its Complaint that Defendants "have
11 willfully and without [Plaintiff's] permission infringed [its]
12 copyrights by engaging in the systematic, regular and repeated
13 unauthorized access to the Publication" and that Plaintiff "has been
14 irreparably harmed by [D]efendants' unauthorized access to and
15 reproduction of its copyrighted works." (Compl. ¶¶ 48, 49.) In
16 particular, Plaintiff alleges that an "employee pasted text from the
17 Publication into an email and forwarded it to three other employees"
18 who were unauthorized users and that "NBTY employees improperly
19 accessed the Publication for the purpose of preparing [] FDA
20 notifications and maintaining files evidencing support for product
21 labeling" (*Id.* ¶¶ 31, 26.)

22 "The word 'copying' is shorthand for the infringing of any
23 of the copyright owner's exclusive rights, described [in § 106 of the
24 Copyright Act]." *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085,
25 n.3 (9th Cir. 1989). "'[C]opying' for purposes of copyright law
26 occurs when [copyrighted material] is transferred from [the memory of
27 one computer to the other]." *MAI Sys. Corp. v. Peak Computer, Inc.*,
28 991 F.2d 511, 519 (9th Cir. 1993). Plaintiff's claim of "unauthorized

1 access," including allegations regarding pasting of text from the
2 copyrighted work into an email, sending of emails to unauthorized
3 users and improperly accessing the Publication for purposes of
4 preparing FDA notifications, sufficiently alleges a violation of
5 Plaintiff's exclusive rights to display, reproduce and distribute its
6 work protected by the Copyright Act. (Id. ¶¶ 48, 31, 26.)

7 Defendants also argue that "Plaintiff fails to allege that
8 Defendants' allegedly infringing conduct involved Plaintiff's original
9 work" since "[p]urely factual information . . . may not be
10 copyrighted." (Mot. at 4.) Plaintiff alleges in its Complaint that
11 the Publication "includes over 1,100 pharmacist-prepared monographs
12 containing detailed evidence-based information" and that it
13 "constitutes original material authored by Therapeutic Research
14 pursuant to the Copyright Act." (Compl. ¶¶ 12, 16.)

15 "Addressing the threshold of copyrightability . . . , the
16 Supreme Court [has] held that '[t]he sine qua non of copyright[ability]
17 is originality' and that '[o]riginal, as the term is used in
18 copyright, means only that the work was independently created by the
19 author (as opposed to copied from other works), and that it possesses
20 at least some minimal degree of creativity.'" Ets-Hokin v. Skyy
21 Spirits, Inc., 225 F.3d 1068, 1076 (9th Cir. 2000) (quoting Feist
22 Pub'lns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 345 (1991)).
23 "Feist . . . described the requisite degree of creativity as
24 'extremely low, even a slight amount will suffice. The vast majority
25 of works make the grade quite easily, as they possess some creative
26 spark'" Id. Accordingly, given the low threshold of
27 creativity required to create an "original work" and accepting the
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1 allegations in the Complaint as true, Plaintiff has adequately pled
2 that Defendants' conduct infringed its "original work."

3 For the stated reasons, Defendants' Motion to dismiss
4 Plaintiff's copyright infringement claim is denied. Further, since
5 Defendants' move to dismiss Plaintiff's claims for contributory and
6 vicarious copyright infringement for the same reasons discussed above,
7 Defendants' motion to dismiss those claims are also denied. (Mot. at
8 4-5.)

9 II. The CFAA

10 Defendants also seek dismissal of Plaintiff's CFAA claim,
11 arguing that Plaintiff "has not plead the requisite type of economic
12 damages . . . under [the CFAA]" since Plaintiff has not "allege[d]
13 that it has incurred a 'loss' of \$5,000, as contemplated by
14 [subsection (a)(5)(B)(i) of the CFAA, 18 U.S.C. § 1030(a)(5)(B)(i)]"
15 where "loss" refers to damage to a computer. (Id. at 5, 6.)
16 Plaintiff alleges in its Complaint that it "has suffered damage and
17 loss by reason of [Defendants' violations of 18 U.S.C. § 1030(a)(2),
18 (5) and (6)]" and thus it "is entitled to damages, injunctive relief
19 and other equitable relief as provided by 18 U.S.C. § 1030(g)."²

21 ² 18 U.S.C. § 1030 (a)(2), (5) and (6) provide for relief in
22 accordance with § 1030(g) when one:

23 [I]ntentionally accesses a computer without authorization or
24 exceeds such authorized access, and thereby obtains . . .
25 information from any protected computer if the conduct
26 involved an interstate or foreign communication [;]
27 knowingly causes the transmission of a . . . code . . . and
28 as a result of such conduct, intentionally causes damage
without authorization, to a protected computer [;] and
knowingly, and with intent to defraud traffics . . . in any
password or similar information through which a computer may
be accessed without authorization, if . . . such trafficking
affects interstate or foreign commerce

(continued...)

1 (Compl. ¶ 74.) Plaintiff further contends that the access unlawfully
 2 obtained by [] Defendants was valued at materially more than \$5,000
 3 per year" and that given the statutory definitions of "loss" and
 4 "damage," "courts have . . . routinely applied the [CFAA] to losses
 5 that do not involve impairment to a computer, including those arising
 6 from unauthorized access or the infringement of intellectual
 7 property." (Opp'n at 15, 16.)

8 Section 1030(g) states, in relevant part:

9 Any person who suffers damages or loss by reason
 10 of this section may maintain a civil action
 11 against the violator to obtain compensatory
 12 damages and injunctive relief or other equitable
 13 relief. A civil action for violation of this
 14 section may be brought only if the conduct
 involves 1 of the factors set forth in clause (i),
 (ii), (iii), (iv) or (v) of subsection (a)(5)(B).
 Damages for a violation involving any conduct
 described in subsection (a)(5)(b)(i) are limited
 to economic damages.

15 18 U.S.C. § 1030(g). Subsection (a)(5)(B)(i) allows recovery of
 16 damages.³ Id. § 1030(a)(5)(B)(i). Section 1030(e)(8) defines
 17 "damage" as "any impairment to the integrity or availability of data,
 18 a program, a system or information." Id. § 1030(e)(8). See generally
 19 Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc., 119 F.
 20 Supp. 2d 1121, 1126 (W.D. Wash. 2000) (stating "the alleged access and
 21 disclosure of trade secrets" constituted an "impairment to the
 22 integrity of data . . . or information."). The alleged unauthorized
 23

24 ²(...continued)

25 18 U.S.C. § 1030(a)(2)(c); (a)(5)(A)(i); (a)(6)(A).

26 ³ 18 U.S.C. § 1030 (a)(5)(B)(i) provides that "by conduct
 27 described in clause (i), (ii), or (iii) of subparagraph (A), [whoever]
 28 caused . . . (i) loss to 1 or more persons during any 1-year period .
 . . aggregating at least \$5,000 in value . . . shall be punished as
 provided in subsection (c) of this section."

1 access to the Publication and the disclosure of its information may
2 constitute an impairment to the integrity of data or information even
3 though "no data was physically changed or erased." Id.

4 Section 1030(e)(11) defines "loss" as "any reasonable cost
5 to any victim, including the cost of responding to an offense,
6 conducting a damage assessment, and restoring the data, program,
7 system or information to its condition prior to the offense, and any
8 revenue lost, cost incurred, or other consequential damages incurred
9 because of interruption of service." 18 U.S.C. § 1030(e)(11).

10 Plaintiff's loss allegation includes the claim that it suffered loss
11 as a result of Defendants' breach of the single user license
12 agreement. (Compl. ¶¶ 37, 15.) Plaintiff argues "a full corporate
13 license for NBTY and its subsidiaries would cost approximately forty
14 thousand dollars . . . per year," as opposed to under \$100 for "an
15 annual single user limited-purpose subscription for Internet
16 access" (Id. ¶ 15.)

17 Plaintiff's allegations sufficiently state a claim under the
18 CFAA. See generally Charles Schwab & Co. v. Carter, 2005 WL 351929,
19 at *3 (N.D. Ill. Feb. 11, 2005) (stating "several district courts have
20 recognized that damage caused by unauthorized access or access in
21 excess of authorization to a computer system may be redressed under
22 the CFAA.") (internal citations omitted). Therefore, Defendants'
23 motion to dismiss the CFAA claim is denied.

24 III. Electronic Communications Privacy Act ("ECPA")

25 Defendants seek dismissal of Plaintiff's claim under the
26 ECPA. (Mot. at 7.) Plaintiff alleges that Defendants violated Title
27 II of the ECPA, which states in pertinent part:
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1 [W]hoever . . . intentionally accesses without
2 authorization a facility through which an
3 electronic communication service is provided; or .
4 . . . intentionally exceeds an authorization to
5 access that facility; and thereby obtains, alters,
6 or prevents authorized access to a wire or
7 electronic communication while it is in electronic
8 storage in such system shall be punished

9 18 U.S.C. § 2702.

10 Specifically, Plaintiff alleges that Defendants
11 "intentionally access[ed] without authorization, or [] intentionally
12 exceed[ed] an authorization to access, the password-protected areas of
13 [its] Internet web site[;]" obtained "access to electronic
14 communications while such communications were in electronic storage on
15 that web site . . . [;and,] disclos[ed] such communications to third
16 parties [who were] not authorized to receive them [] and []
17 conspir[ed], encourag[ed], aid[ed], abett[ed], and participat[ed] in
18 efforts to do so." (Compl. ¶ 76.)

19 Defendants argue dismissal is appropriate because the
20 claims are barred by an exception prescribed in § 2701(c). Section
21 2701(c) of the ECPA provides, in relevant part, that an exception
22 exists "with respect to conduct authorized (1) by the person or entity
23 providing a wire or electronic communications service; [or] (2) by a
24 user of that service with respect to a communication of or intended
25 for that user." 18 U.S.C. § 2701(c)(1), (2). Defendants argue
26 "[b]ecause [they] were authorized to access the [Publication], the
27 authorization exception to the ECPA is triggered" (Mot. at
28 7.) Plaintiff counters that "the vast majority of [Defendants']
access was *not* authorized, as repeatedly alleged in the Complaint."
(Opp'n at 17.) Defendants neither show how they satisfy the first
exception nor that they come within the ambit of the second exception.

1 Defendants also argue that Plaintiff does not state an ECPA
2 claim because even though "Plaintiff contends that [] Defendants used
3 the [Publication] in excess of the usage permitted under the relevant
4 license agreements, such conduct does not trigger a claim under the
5 ECPA." (Id.) But it is "'evident that the sort of trespasses to
6 which the [ECPA] applies are those in which the trespasser gains
7 access to information . . . which he is not entitled to see'"
8 Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Masuda, 390 F.
9 Supp. 2d 479, 497 (D. Md. 2005) (quoting Educ. Testing Serv. v.
10 Stanley H. Kaplan, Educ. Ctr., Ltd., 965 F. Supp. 731, 740 (D. Md.
11 1997)); see also Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263,
12 1271 (N.D. Cal. 2001) ("[F]or [Plaintiff] to be liable for
13 unauthorized access under the ECPA, it must have gained unauthorized
14 access to a facility through which electronic communications services
15 are provided, (or its access must have exceeded the scope of authority
16 given), it must thereby have accessed electronic communications in
17 storage, and its access must not fall within the exception of
18 subsection (c).") Since Defendants' have not shown that Plaintiff
19 fails to state a claim under the ECPA, this portion of the motion is
20 denied.

21 IV. California Penal Code Section 502 (Comprehensive Computer Data
22 Access and Fraud Act)

23 Defendants seek dismissal of Plaintiff's claim that
24 Defendants violated California Penal Code section 502(c)(2), (3), (6),
25 (7), which provides:

26 [A]ny person who commits any of the following acts
27 is guilty of a public offense: (2) [k]nowingly
28 accesses and without permission takes, copies, or
makes use of any data from a computer, computer
system, or computer network, or takes or copies

1 any supporting documentation, whether existing or
2 residing internal or external a computer, computer
3 system, or computer network[;] (3) [k]nowingly and
4 without permission uses or causes to be used
5 computer services[;] (6) [k]nowingly and without
6 permission provides or assists in providing a
7 means of accessing a computer, computer system, or
8 computer network[;] (7) [k]nowingly and without
9 permission accesses or causes to be accessed any
10 computer, computer system, or computer network.

11 Cal. Penal Code § 502(c)(2), (3), (6) and (7).

12 Plaintiff claims that it "has been injured by these violations . . .
13 and is entitled to damages and attorneys' fees pursuant to California
14 Penal Code § 502(e)." (Compl. ¶ 83).

15 Defendants argue that Plaintiff fails to state a claim under
16 this provision because "Plaintiff's allegations themselves . . .
17 directly refute any claim that Defendant acted 'knowingly and without
18 permission[,]' " since "Plaintiff alleged that Defendants 'purchased'
19 various Site Licenses to access the [Publication], such that any
20 access to [it] by Defendants was with permission, not without." (Mot.
21 at 8.) Plaintiff replies that "[a]s numerous employees of
22 [D]efendants accessed the Publication without any authorization
23 whatsoever, their conduct falls well within the ambit of this statute,
24 and [Plaintiff] has therefore properly stated a claim." (Opp'n at
25 18.) Since the focus of Plaintiff's allegations is on the
26 unauthorized access to the Publication and not the authorized access
27 provided under the license agreements, Defendants' arguments are
28 unavailing.

Defendants shift focus in their Reply from an emphasis on
their permission to access the Publication to whether Plaintiff has
adequately specified the nature of its "injury." (Reply at 8.)
Defendants rely on California Penal Code section 502(e)(1) and

1 (b)(8),⁴ arguing that “[g]iven the statutory requirements [at]
2 issue . . . , [Plaintiff’s] bald representation that an injury has
3 occurred . . . is insufficient to state a claim under Penal Code §
4 502.” (Id.) However, nothing in those statutes supports Defendants’
5 position that Plaintiff’s allegation of “injury” is insufficient.
6 Therefore, Defendants motion to dismiss Plaintiff’s claims under
7 California Penal Code section 502 is denied.

8 V. Common Law Claims

9 A. Trespass

10 Defendants argue that Plaintiff’s trespass claim should be
11 dismissed because it “has not alleged the required damage or
12 impairment to state a legally cognizable cause of action for
13 trespass.” (Opp’n at 9.) Plaintiff alleges in its Complaint that it
14 has suffered “irreparable damages” because “Defendants, without
15 permission . . . or exceeding the scope of such permission, willfully
16 and maliciously entered upon [its] passcode-protected web site.”
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19 ⁴ California Penal Code section 502(e)(1) provides in
pertinent part:

20 [T]he owner . . . of the computer, computer system, computer
21 network, computer program, or data who suffers damage or
22 loss by reason of a violation of any of the provisions of
23 subdivision (c) may bring a civil action against the
24 violator for compensatory damages and injunctive relief or
25 other equitable relief. Compensatory damages shall include
any expenditures reasonably and necessarily incurred by the
owner or lessee to verify that a computer, computer system,
computer network, computer program, or data was or was not
altered, damaged, or deleted by the access.

26 Section 502(b)(8) defines injury as “any alteration, deletion,
27 damage, or destruction of a computer system, computer network,
28 computer program or, data caused by the access, or the denial of
access to the legitimate users of a computer system, network, or
program.”

1 (Compl. ¶¶ 96, 95.) Since Defendants fail to show Plaintiff's
2 allegations are insufficient to state a trespass claim, this portion
3 of their motion is denied.

4 B. Misappropriation of Trade Secret

5 Defendants also seek dismissal of Plaintiff's
6 misappropriation of trade secret claim. Plaintiff alleges that
7 "[w]ithout authorization . . . [D]efendants misappropriated the
8 usernames and passwords and used them for [their] benefit." (Compl.
9 ¶ 102.) Defendants argue that "Plaintiff fails to allege that the
10 information, which Defendants allegedly misappropriated, constitutes a
11 trade secret." (Opp'n at 10.) The Uniform Trade Secrets Act
12 ("UTSA"), adopted by California with minor modifications, "codifies a
13 cause of action for misappropriation of trade secrets." Fas Techs.,
14 Ltd. v. Dainippon Screen MFG., Co., Ltd., 2001 WL 637451, at *3 (N.D.
15 Cal. May 31, 2001); Cal. Civ. Code §§ 3426.2, 3426.3. "To prevail on
16 [this] claim . . . plaintiff must show that (1) the misappropriated
17 information constitutes a trade secret, (2) the defendant "used" the
18 trade secret, and (3) the plaintiff was actually damaged by the
19 misappropriation or the defendant was unjustly enriched by such
20 misappropriation and use." Fas Techs. Ltd., 2001 WL 637451, at *3
21 (internal citations omitted).

22 A "trade secret" is defined as "information, including a
23 formula, pattern, compilation, program, device, method, technique or
24 process, that: (1) [d]erives independent economic value, actual or
25 potential, from not being generally known to the public or to other
26 persons who can obtain economic value from its disclosure or use; and
27 (2) [i]s subject to efforts that are reasonable under the
28 circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d).

1 Defendants argue Plaintiff does not allege "that the username and
2 passcode combination constituted a trade secret" and that even had
3 Plaintiff made such an allegation, "its claim would nevertheless fail
4 because the username-passcode combination 'does not derive independent
5 economic value'-it only provides access to the [Publication], and
6 Defendants had access in print form." (Mot. at 10.)

7 However, Plaintiff has adequately alleged that its username
8 and passcode constitute a "trade secret" under the definition provided
9 in California Civil Code section 3426.1(d). Plaintiff alleges in its
10 Complaint that it "issued a confidential username and passcode [to
11 Defendants under its various license agreements,] and that username
12 and passcode combination was an item of independent economic value".
13 (Compl. ¶¶ 98-100.) Plaintiff also alleges that "[t]he confidential
14 username and passcodes' value is derived from not being generally
15 known to, and not being readily ascertainable by, other persons who
16 can obtain economic value from disclosure or use of the username and
17 passcode." (*Id.* ¶ 101.) Defendants have not shown the insufficiency
18 of these allegations.

19 Defendants also argue that "Plaintiff . . . fails to allege
20 that Defendants were unjustly enriched by any misappropriation of the
21 combination." But Plaintiff could prevail on its claim of
22 misappropriation of trade secrets by showing either damage as a result
23 of the misappropriation or unjust enrichment. See Fas Techs. Ltd.,
24 2001 WL 637451, at *3, ("To prevail on [this] claim . . . plaintiff
25 must that . . . [it] was actually damaged by the misappropriation or
26 the defendant was unjustly enriched . . ."). Plaintiff adequately
27 alleges in its Complaint that it has been damaged by the alleged
28 misappropriation. "Defendants' misappropriation of [Plaintiff's]

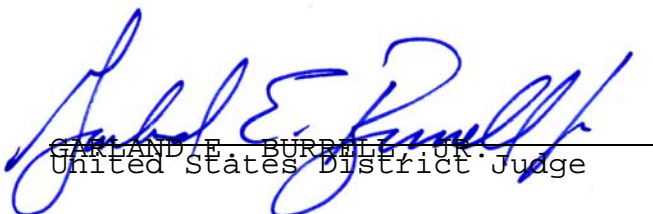
1 confidential usernames and passcodes was willful and malicious and
2 caused irreparable damage to [Plaintiff]." (Compl. ¶ 103.)
3 Accordingly, Defendants' motion to dismiss Plaintiff's claim for
4 misappropriation of trade secret is denied.

5 CONCLUSION

6 For the stated reasons, Defendants' motion to dismiss is
7 denied.

8 IT IS SO ORDERED.

9 Dated: January 25, 2007

10 
11 ~~GARLAND E. BURRILL, JR.~~
12 United States District Judge
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