

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS Cisco Systems, Inc. and Internet Security Systems, Inc.	DEFENDANTS Michael Lynn and Black Hat, Inc.
(b) County of Residence of First Listed Plaintiff <u>Santa Clara</u> (EXCEPT IN U.S. PLAINTIFF CASES)	County of Residence of First Listed <u>Atlanta</u> (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.
(c) Attorney's (Firm Name, Address, and Telephone Number) DLA Piper Rudnick Gray Cay US LLP 2000 University Ave. East Palo Alto, CA 94303	Attorneys (If Known) Jeff McNamara

C05 03043

E-filing ADR JL

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)																
<input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<table style="width:100%; border-collapse: collapse;"> <tr> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td style="text-align: center;">Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1 Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td style="text-align: center;">Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2 Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td style="text-align: center;">Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3 Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>	PTF	DEF	PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1 Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2 Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3 Foreign Nation	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)																		
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V. ORIGIN (Place an "X" in One Box Only)

<input type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
17 U.S.C. § 501 et seq.

Brief description of cause:
Copyright, Misappropriation of Trade Secrets, and Breach of Contract

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE [Signature] DOCKET NUMBER _____

DATE July 27, 2005 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

1 ANDREW P. VALENTINE (Bar No. 162094)
2 GREGORY J. LUNDELL (Bar No. 234941)
3 DLA PIPER RUDNICK GRAY CARY US LLP
4 2000 University Avenue
5 East Palo Alto, CA 94303-2215
6 Tel: 650.833.2000
7 Fax: 650.833.2001

8 Attorneys for Plaintiffs
9 Cisco Systems, Inc. and Internet Security Systems,
10 Inc.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 CISCO SYSTEMS, INC., and
15 INTERNET SECURITY SYSTEMS, INC.

16 Plaintiff,

17 v.

18 MICHAEL LYNN and BLACK HAT,
19 INC.,

20 Defendants.

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ADR ORIGINAL FILED

JUL 27 2005
RICHARD W. WILKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

CASE NO. 05 03043 JL

COMPLAINT FOR MISAPPROPRIATION
OF TRADE SECRETS, COPYRIGHT, AND
BREACH OF CONTRACT

JURY TRIAL DEMANDED

21 Plaintiff Cisco Systems, Inc. ("Cisco") and Internet Security Systems, Inc. ("ISS") alleges
22 as follows:

23 JURISDICTION AND VENUE

24 1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C.
25 §§ 1331, 1338(a). Jurisdiction over the state claims is appropriate under 28 U.S.C. § 1332
26 because the parties are of diverse citizenship and the value of the matter in controversy exceeds
27 the amount of seventy-five thousand dollars (\$75,000), exclusive of interest and costs, and
28 according to supplemental jurisdiction under 28 U.S.C. § 1367.

2. Venue is proper in this district court pursuant to 28 U.S.C. § 1391(a) because,
among other things: (a) Defendants Michael Lynn ("Lynn") and Black Hat, Inc. ("Black Hat") are

1 subject to personal jurisdiction in this District; and (b) the acts alleged herein were intended to
2 and did cause harm in this District.

3 **INTRADISTRICT ASSIGNMENT**

4 3. Intradistrict assignment to the San Jose Division is appropriate as a substantial part
5 of the events which give rise to the claims as alleged herein occurred in the Northern District of
6 California by virtue of plaintiff Cisco performing its research and development at its
7 headquarters, located in Santa Clara County.

8 **PARTIES**

9 4. Plaintiff Cisco is, and at all time herein mentioned was, a California corporation
10 having its principal place of business in Santa Clara, California. Cisco is a significant developer
11 of, among other things, computer networking equipment.

12 5. Plaintiff ISS is, and at all time herein mentioned was, a Delaware corporation
13 having its principal place of business in Atlanta, Georgia. ISS provides security products and
14 services that preemptively protect enterprise organizations against Internet threats.

15 6. Cisco and ISS (collectively, "Plaintiffs") allege on information and belief that
16 defendant Lynn is an individual residing in Georgia. Lynn was formerly a board member of ISS
17 and, in that capacity, transacted sufficient business with Cisco to subject him to personal
18 jurisdiction. Plaintiffs allege on information and belief that Lynn personally participated in
19 and/or, at all material times hereto, had the ability to supervise and control the infringing
20 activities, and derived personal financial benefit from the infringing activities described in this
21 Complaint.

22 7. Plaintiffs allege on information and belief that defendant Black Hat is a
23 Washington corporation with its principal place of business in Seattle, Washington. Black Hat
24 provides trainings and briefings on, among other things, the security of computer network
25 systems. Plaintiffs allege on information and belief that Black Hat transacts business in this
26 judicial district or has sufficient contacts with this district to subject it to personal jurisdiction.
27 Plaintiffs allege on information and belief that Black Hat participated in and/or, at all material
28 times hereto, had the ability to supervise and control the infringing activities, and derived

1 financial benefit from the infringing activities described in this Complaint.

2 **ALLEGATIONS COMMON TO ALL COUNTS**

3 8. Cisco is a leading supplier of computer hardware in the form of network routers
4 and switches. Cisco, through its investment of years of research at a substantial expense, has
5 developed source code, which allows its hardware to function securely and smoothly.

6 9. Cisco's customers rely on the regular operation of its hardware to maintain their
7 computer networks.

8 10. The source code with the Cisco hardware ("Cisco Trade Secrets") represents trade
9 secrets that are maintained in confidence by Cisco employees and others who need to know them
10 but who are entrusted with them according to express and implied agreements. Cisco has at all
11 times taken reasonable steps to protect the Cisco Trade Secrets from being stolen or misused.
12 The Cisco Trade Secrets would be of great value if they became known to Cisco's competition.

13 11. Cisco licensed its hardware containing Cisco Trade Secrets to ISS for a defined
14 use according to an agreement that ISS would not disassemble Cisco's hardware.

15 12. Plaintiffs had planned to make a joint presentation at the upcoming Black Hat
16 USA 2005 training and briefing in Las Vegas on July 27-28, 2005 ("the Black Hat Conference").

17 13. In anticipation of the presentation, Plaintiffs prepared materials for the
18 presentation (the "ISS/Cisco Presentation"). The ISS/Cisco Presentation included a Powerpoint
19 slideshow, a print-out of the slideshow slides, and a compact disk ("CD") containing the
20 slideshow slides. The slideshow slides were marked as copyrighted with all rights reserved. The
21 content of the slides included the source code that comprises the Cisco Trade Secrets, in which
22 Cisco also owns copyrights.

23 14. Cisco, when it realized that the ISS/Cisco Presentation contained Cisco Trade
24 Secrets, asked ISS to withdraw the presentation. ISS agreed and gave Cisco the print-outs of the
25 slides and the CD containing the slides.

26 15. Despite ISS' agreement with Cisco to turn over the print-outs an CDs containing
27 the Cisco Trade Secrets, Lynn kept an electronic copy of the slideshow. He presented the
28 slideshow at the Black Hat Conference on July 27, 2005.

1 permission, authority or license. Lynn and Black Hat have been put on specific notice of
2 Plaintiff's right, but Lynn and Black Hat have refused to cease their infringing activities.

3 25. Upon information and belief, Lynn's and Black Hat's acts constitute past and
4 ongoing infringement of Plaintiff's copyrights under 17 U.S.C. §§ 501 *et seq.*

5 26. Plaintiffs have suffered irreparable harm as a direct and proximate result of Lynn's
6 and Black Hat's wrongful activities and will continue to suffer irreparable injury that cannot
7 adequately be remedied at law unless Lynn and Black Hat and all person and entities acting with
8 them are enjoined from engaging in any further acts of misappropriation.

9 27. Plaintiffs are entitled to recover from Lynn and Black Hat the damages Plaintiffs
10 have sustained and will sustain as a result of Lynn's and Black Hat's wrongful acts as
11 hereinabove alleged. The amount of damages cannot be ascertained at this time. Plaintiffs are
12 further entitled to recover from Lynn and Black Hat the gains, profits and advantages they have
13 obtained as a result of their wrongful acts as hereinabove alleged. Plaintiffs are at present unable
14 to ascertain the full extent of the gains, profits, and advantages Lynn and Black Hat have obtained
15 by reason of their aforesaid acts of copyright infringement. Alternatively, Plaintiffs seek statutory
16 damages for each infringement of each copyright at issue.

17 Wherefore, Plaintiffs pray for relief as set forth below.

18 **SECOND CAUSE OF ACTION**

19 **(Misappropriation of Trade Secrets Under Cal. Civ. Code §§ 3426 *et seq* as to both**
20 **Lynn and Black Hat)**

21 28. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 27,
22 inclusive.

23 29. Over a period of years, and at significant effort and expense, Cisco developed the
24 Cisco Trade Secrets.

25 30. The Cisco Trade Secrets give Cisco a competitive advantage over its existing and
26 potential competitors. Such information derives significant independent economic value from not
27 being generally known by Cisco's competitors, who would obtain economic value from their
28 disclosure.

1 Conference; and (3) threatening to further disseminate the ISS/Cisco Presentation and the Cisco
2 Trade Secrets included therein.

3 39. As a direct and proximate result of Lynn's breach of the Non-disclosure
4 Agreement between ISS and Lynn, ISS has been injured an amount to be proven at trial.

5 WHEREFORE, ISS prays for relief as set forth below.

6
7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs pray for the following relief:

- 9 1. That Lynn and Black Hat, by their conduct, be adjudged and decreed to have
10 committed acts of copyright infringement under 17 U.S.C. §§ 501 *et seq.*;
- 11 2. That the defendants, their directors, officers, agents, servants, employees, and all
12 other persons in active concert or privity or in participation with them, be temporarily,
13 preliminarily, and permanently enjoined from directly or indirectly infringing Cisco's or ISS'
14 copyrights
- 15 3. That Lynn and Black Hat, by their conduct, be adjudged and decreed to have
16 misappropriated Cisco's Trade Secrets under the California Civil Code §§ 3426 *et seq.*;
- 17 4. For temporary, preliminary, and permanent injunctions (a) enjoining all
18 Defendants, their officers, agents, servants, employees, and all persons acting in concert with
19 them or on their behalf, from directly or indirectly using or disclosing the Cisco Trade Secrets, (b)
20 compelling all Defendants, their officers, agents, servants, employees, and all persons acting in
21 concert with them or on their behalf, to return to Plaintiffs all Cisco materials in Lynn's and
22 Black Hat's possession, including, but not limited to, all documents and all information stored in
23 any form of computer or electronic media, and (c) compelling Lynn and Black Hat, their officers,
24 agents, servants, employees, and all persons acting in concert with them or on their behalf, to take
25 reasonable measures to remove any confidential or proprietary Cisco information and any product
26 containing any confidential or proprietary Cisco information from any publicly available source;
- 27 5. For damages in an amount to be proven at trial;
- 28 6. For treble damages pursuant to California Civil Code §§ 3426.3(c) for willful

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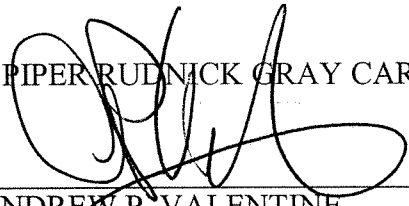
misappropriation of trade secrets;

- 7. For punitive damages;
- 8. For attorneys' fees and costs incurred herein as appropriate; and
- 9. For such other relief that this Court deems just and proper.

Dated: July 27, 2005

DLA PIPER RUDNICK GRAY CARY US LLP

By



ANDREW P. VALENTINE
Attorneys for Plaintiffs
Cisco Systems, Inc.
Internet Security Systems, Inc.

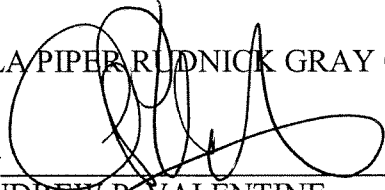
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DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), plaintiffs Cisco and ISS, hereby demands a trial by jury of all issues triable in this action.

Dated: July 27, 2005

DLA PIPER RUDNICK GRAY CARY US LLP

By 
ANDREW P. VALENTINE
GREGORY J. LUNDELL
Attorneys for Plaintiff
CISCO SYSTEMS, INC.

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ORIGINAL FILED

JUL 27 2005

RICHARD W. WHELAN
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 CISCO SYSTEMS, INC., and INTERNET
12 SECURITY SYSTEMS, INC.

13 Plaintiffs,

14 v.

15 MICHAEL LYNN, and individual, and
16 BLACKHAT, INC., a Washington
corporation.

17 Defendants.

18 CASE NO.

19 **PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND FOR ORDER TO SHOW
CAUSE REGARDING PRELIMINARY
INJUNCTION**

Date: July 27, 2005

Time: Ex Parte

Judge: Ex Parte

20 **I. INTRODUCTION**

21 Currently, in Las Vegas, Nevada, Defendant BlackHat, Inc. is hosting an industry
22 conference called the Black Hat USA 2005 Briefings and Training Conference (the "BlackHat
23 Conference".) The conference takes place July 27-28, 2005. Plaintiff Internet Security Services,
24 Inc. ("ISS") was scheduled to make a presentation. The proposed presentation contained
25 information both proprietary to ISS and proprietary to Plaintiff Cisco Systems, Inc.'s ("Cisco").
26 The information proprietary to Cisco is believed by Cisco to have been improperly obtained by a
27 now-former employee of ISS employees (Defendant Michael Lynn) through the improper
28 disassembly of Cisco source code. Lynn's work did not find or discover a new security

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1 vulnerability of the Internet, but rather would disclose a methodology for further seeking potential
2 vulnerabilities.

3 Cisco approached ISS to discuss concerns regarding disclosure of improperly obtained
4 source code information and worked with ISS to propose a joint presentation which would
5 discuss ISS' research and the implications of that research without disclosing proprietary
6 information, consistent with industry procedures for public disclosure of research regarding the
7 Internet and Internet security. ISS agreed. Working with ISS and with the seeming cooperation
8 of the conference organizers (BlackHat), Cisco organized an effort in the late evening of July 25
9 and through the day of July 26 to successfully remove the preexisting presentation from already
10 pre-printed conference materials and to pre-format and reprint compact disks (CDs) containing
11 the presentation. Cisco and ISS paid for this effort. It was time consuming and costly. Black Hat
12 declined to permit Cisco and ISS to jointly present their findings but did agree that Lynn would
13 not present on this subject

14 Just hours ago, Lynn resigned from ISS and informed the Black Hat organizers that he
15 intends to proceed with the presentation. Black Hat informed Cisco that Lynn would be allowed
16 to present on a different subject involving voice telephony over the Internet, although ISS had
17 informed Black Hat that the voice telephony presentation also included information proprietary to
18 ISS. In fact, Lynn did give the presentation which had been deleted from the conference
19 materials. He was not authorized to make the presentation. Both he and Defendant BlackHat
20 were told that he was not authorized to give the presentation. Cisco believes that Lynn is also
21 disclosing ISS and Cisco proprietary information outside of the context of a formal presentation
22 as well.

23 Lynn must be enjoined from making any further presentations, from discussing the
24 contents of the presentation, and from otherwise disclosing ISS and Cisco proprietary
25 information. BlackHat must be enjoined from allowing Lynn to make further presentations and
26 from otherwise distributing or disclosing the presentation or its contents. In addition, Lynn must
27 be enjoined from disclosing information regarding Cisco's source code which he stated at the
28 presentation is in his possession, but which was not included in the presented materials this

1 morning.

2 A Court is entitled to act quickly through a temporary restraining order to prevent
3 immediate and irreparable harm. Accordingly, Cisco and ISS respectfully requests that the Court
4 grant the accompanying narrowly tailored Motion for a Temporary Restraining Order and prevent
5 ISS's and Cisco's proprietary information from being publicly disseminated or further publicly
6 disseminated.

7 Cisco and ISS will be irreparably harmed if the Court does not act immediately.

8 **II. STATEMENT OF FACTS**

9 **A. The Parties.**

10 Plaintiff Cisco, among other things, offers equipment which is used to complete Internet
11 communications..

12 Plaintiff ISS is an internet security company located in Georgia.

13 Defendant Michael Lynn is an individual residing in Georgia. Until this morning, he was
14 an employee of ISS.

15 Defendant Black Hat is a corporation located in Washington state. Among other things,
16 Black Hat organizes and host trade shows and conferences such as the Black Hat USA 2005
17 Briefings and Training Conference identified above.

18 **B. Statement of Facts**

19 Because the urgency of the necessity of this injunction arose this morning, the facts
20 supporting this request are contained more fully in the declaration submitted herewith. In
21 summary:

22 (See Declarations of Peter Allor, Michael Quinn, Michael Caudill, and Andrew
23 Valentine.)

- 24
- 25 • Until this morning, Defendant Lynn was an employee of ISS.
 - 26 • ISS is a company that provides security products and services designed to protect
enterprise organizations against internet threats.
 - 27 • ISS had planned to attend and present materials at the BlackHat Conference in Las Vegas,
Nevada on July 27-28, 2005.
 - 28 • Defendant Lynn prepared the presentation for ISS and was scheduled to be the ISS
presenter.

- 1 • The materials prepared by Mr. Lynn were prepared for ISS. The presentation itself is on
2 ISS PowerPoint slides and clearly identifies "Internet Security Systems." The
3 presentation materials and the information contained therein are owned by ISS and ISS
4 copyright materials.
5 • The presentation also included exploited Cisco source code that Mr. Lynn acquired
6 through disassembly of Cisco's source code.
7 • Cisco's standard End User License Agreement prohibits the disassembly or reverse
8 engineering of its source code.
9 • Some of the slides contain actual copies of the disassembled source code.
10 • Prior to the BlackHat Conference, ISS shared the presentation materials with Plaintiff
11 Cisco Systems, Inc.
12 • Because of the disassembled source code prepared by Mr. Lynn, Cisco raised a concern
13 that it believed the materials included proprietary Cisco information that could only be
14 obtained through disassembly of Cisco source code. Cisco asked ISS not to make the
15 presentation and to withdraw the materials from the conference. ISS agreed and informed
16 BlackHat that it would not be making the presentation and that it did not want the
17 materials distributed to conference attendees.
18 • As part of that agreement between Cisco and ISS, Cisco asked that Mr. Lynn not attend
19 the BlackHat Conference altogether. ISS would not agree with that request, but did agree
20 that Mr. Lynn would not discuss the contents of the material at the BlackHat Conference.
21 ISS confirmed with Mr. Lynn directly his agreement that the material be pulled from the
22 conference. ISS also confirmed that conversation both with Black Hat and with Cisco.
23 • Great effort was expended to withdraw the presentation that includes disassembled Cisco
24 source code and ISS proprietary information. Beginning on Monday evening, July 25,
25 and working throughout the night, ISS joined with Cisco and BlackHat to successfully
26 remove the ISS presentation from the pre-printed BlackHat Conference materials. Cisco,
27 ISS and BlackHat also worked together to reformat and reprint an accompanying compact
28 disk (CD). It was a very time consuming and costly effort.
• Mr. Lynn was specifically told by ISS in no uncertain terms that he was not to disclose
any of the information in the ISS presentation or any other information proprietary to ISS
or Cisco.
• This morning, July 27, 2005, Mr. Lynn resigned as an employee of ISS.
• Shortly thereafter, sources at the BlackHat Conference confirmed that Mr. Lynn has been
discussing the ISS presentation at the BlackHat conference and made a presentation today
disclosing the contents of the ISS presentation, including the disassembled Cisco source
code.
• Defendant Black Hat also had video cameras running during the presentation.
• Mr. Lynn was not authorized to disclose the ISS presentation or the contents therein. Mr.
Lynn signed a non-disclosure agreement (NDA) with ISS and any disclosure of
information contained in the presentation would be a violation of his NDA.
• As an employee or work for hire, the presentation materials also are owned or the lawful
copyright of ISS, not Mr. Lynn.
• ISS specifically informed BlackHat's counsel (Jeff McNamara) that Mr. Lynn was not
authorized to give any presentation that included any topic that Mr. Lynn learned about or
developed as an employee of ISS.

24 **C. Plaintiffs Immediately Notified Defendants of Their Intent to Seek a TRO**

25 Before Mr. Lynn resigned from ISS and there was a belief that BlackHat might distribute
26 ISS's presentation even after it had been informed that the presentation would not be given and
27 the materials were not to be distributed, BlackHat was informed that Cisco would seek a TRO if
28 assurances of non-disclosure were not given. On that basis BlackHat cooperated in the removal of

1 conference materials prepared by Mr. Lynn from documentation that was to be distributed to
2 conference participants.

3 Today, both Mr. Lynn and BlackHat were informed that ISS and Cisco would be jointly
4 seeking temporary injunctive relief.

5 III. LEGAL STANDARDS

6 A. Cisco and ISS Seek and are Entitled to a Narrowly-Tailored TRO and Preliminary 7 Injunction

8 Cisco and ISS seeks a narrowly-tailored TRO and preliminary injunction enjoining
9 Defendants Michael Lynn and BlackHat, Inc. disclosing Cisco or ISS trade secret, copyright or
10 otherwise proprietary information and/or from disclosing information in violation of Mr. Lynn's
11 NDA with ISS.

12 The legal standards for entry of a preliminary injunction or temporary restraining order
13 have been summarized by the Ninth Circuit Court of Appeals as follows:

14 The traditional equitable criteria for granting preliminary injunctive relief are (1) strong
15 likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if the
16 preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)
17 advancement of the public interest (in certain cases). In this circuit, the moving party may meet
18 its burden by demonstrating either (1) a combination of probable success on the merits and the
19 possibility of irreparable injury or (2) that serious questions are raised and the balance of
20 hardships tips sharply in its favor. *White Mountain Apache Tribe v. State of Arizona*, 649 F.2d
21 1274, 1285 (9th Cir. 1981) (quoting *Los Angeles Memorial Coliseum Commission v. National*
22 *Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

23 Here, the evidence is overwhelming. Despite being told not to disclose the information,
24 and despite BlackHat agreeing that it would not facilitate the presentation and in fact cooperating
25 in the removal of materials, Mr. Lynn and BlackHat did so blatantly, understanding the full legal
26 effect of their actions. In any event, the evidence shows that at a minimum that Cisco and ISS are
27 likely to prevail on the merits, that they will be irreparably harmed if the Defendants are not
28 enjoined, and that serious questions are raised sufficient to warrant a TRO given the balance of

1 hardships.

2 **B. To Prevail on a Motion for a TRO Cisco and ISS Must Show That They Are Likely**
3 **to Prevail on Their Claims**

4 To obtain a TRO or preliminary injunction, a plaintiff must show a likelihood of
5 prevailing on the merits. *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983). However, a plaintiff need
6 not show how it will positively prevail on the merits. *Gilder v. P.G.A. Tour, Inc.*, 936 F.2d 417,
7 422 (9th Cir. 1991) (emphasis added). A reasonable probability - "fair chance" of success - is the
8 standard for granting preliminary injunctive relief. *Berda v. Grand Lodge of IAM*, 584 F.2d 308,
9 315 (9th Cir. 1978). Given the overwhelming evidence before this Court, Cisco can demonstrate
10 at a minimum, a reasonable probability of success on the merits.

11 Federal courts apply the substantive laws of the state in which they are located and federal
12 law for procedural matters. *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817;
13 *Gasperini v. Center for Humanities, Inc.* (1996) 518 U.S. 415, 427, 116 S.Ct. 2211, 2219

14 Federal courts in diversity cases operate as another state trial court – by applying the same
15 statutes and are bound by the same case law. This precedent is designed to ensure that results in
16 federal court would be substantially the same as if the case were tried in a State court." *Guaranty*
17 *Trust Co. v. York* (1945) 326 U.S. 99, 109-111, 65 S.Ct. 1464, 1469-1470. Accordingly, this
18 Court should look to the state law in determining whether Cisco and ISS are likely to succeed on
19 the merits of the trade secret misappropriation allegations. Federal law will be applied with
20 respect to the copyright allegations.

21 1. **Actual Misappropriation of Trade Secrets May Be Enjoined**

22 The laws preventing the misappropriation of trade secrets are designed to prevent
23 industrial espionage, and to encourage innovation and development. *Kewanee Oil Co. v. Bicron*
24 *Co.*, 416 U.S. 470, 485-86 (1974). The Uniform Trade Secret Act ("UTSA"), adopted by
25 California, is similarly designed. The UTSA defines a "trade secret" as follows:

26 [I]nformation, including a formula, pattern, compilation, program,
27 device, method, technique, or process that:

28 ///

- 1 (1) Derives independent economic value, actual or potential,
2 from not being generally known to the public or to other persons
3 who can obtain economic value from its disclosure or use; and
4 (2) Is the subject of efforts that are reasonable under the
circumstances to maintain its secrecy.

5 Cal Civ. Code § 3426.1(d).

6 Under the USTA, “misappropriation” of a trade secret occurs either by:

7 (1) Acquisition of a trade secret of another by a person who
8 knows or has reason to know that the trade secret was acquired by
improper means; or

9 (2) Disclosure or use of a trade secret of another without
express or implied consent by a person who:

10 (A) Used improper means to acquire knowledge of the
11 trade secret; or

12 (B) At the time of disclosure or use, knew or had reason
to know that his or her knowledge of the trade secret was:

13 (i) Derived from or through a person who had
14 utilized improper means to acquire it

15 Cal. Civ. Code § 3426.1(b)(1)-(2). “Improper means” is further defined as including
16 “theft bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy,
17 or espionage though electronic or other means.” *Id.* at § 3426.1(a).

18 The Court has power to enjoin threatened or actual misappropriation of trade secrets. *Id.*
19 at § 3426.2.

20 Here, there can be no question that Defendants misappropriated *and disclosed* Cisco’s
21 trade secrets and that these secrets are at risk of further non-recoverable dissemination unless the
22 Court intervenes immediately. Nothing more is required under the USTA to establish
23 misappropriation and empower the Court to enjoin Defendants.

24 **2. Copyright Infringement**

25 Mr. Lynn should be enjoined because he is in violation of the Copyright Act as well. The
26 source code contained within the contents of Mr. Lynn’s original presentation constitutes original
27 work protectable under the Copyright Act. *See* 17 U.S.C. § 101, 102, 501 *et seq.* Furthermore,
28 the presentation materials, which Mr. Lynn is in possession of and presented this morning were

1 created by ISS and Cisco. In fact, the slides bear proper copyright markings and state that ISS
2 intents to reserve all of its rights. Both the source code and the presentation materials are
3 proprietary materials that Mr. Lynn does not have permission to use. Accordingly, Mr. Lynn and
4 BlackHat should be enjoined immediately from further distributing or using the presentation
5 materials or the Cisco source code contained therein. 17 U.S.C. § 502. Mr. Lynn's work product
6 in the course of his employment with ISS belongs to ISS under the terms of his employment
7 agreement he signed with ISS, attached to the Allor Declaration.

8 3. **Breach of the NDA**

9 Mr. Lynn should be enjoined because he has breached and threatened to continue to
10 further breach his NDA with ISS as well.

11 IV. **ARGUMENT**

12 A. **Cisco and ISS Will Suffer Irreparable Harm If the Court Does not Grant an
13 Immediate Injunction**

14 The ISS presentation is owned and the lawful copyright of ISS. Moreover, it contains
15 disassembled course code from Cisco that Cisco and ISS agree should not be disclosed or
16 disseminated. ISS and Cisco have a right to control their proprietary information. To improperly
17 disseminate it will allow others to unfairly compete and will undermine the investment of ISS and
18 Cisco in their respective products.

19 B. **On Balance, the Equities Weight Heavily in Favor of Granting Cisco and ISS the
20 Requested TRO**

21 Mr. Lynn and BlackHat will not be damaged or harmed by not being able to disseminate
22 something they are not entitled to. On the other hand, for the reasons stated above, Cisco and ISS
23 will be damaged by dissemination of the information at issue here. The equities clearly weigh in
24 Cisco and ISS's favor. The wrongful acts of Mr. Lynn and BlackHat should not be tolerated.

25 C. **Only a Nominal TRO Bond (or No Bond At All) Should be Required**

26 Because the relief requested is so narrow, and because there is not cognizable harm to Mr.
27 Lynn or BlackHat for not being able to disclose what they have no right to disclose, there should
28 be no bond requirement or the bond requirement should be nominal.

1 **D. Conclusion**

2 For the foregoing reasons, Cisco and ISS respectfully request a temporary restraining
3 order and preliminary injunction enjoining Defendants Lynn and Black Hat from:

- 4 1. From disclosing, disseminating or discussing the contents of:
- 5 a. The ISS Presentation or any portions thereof.
 - 6 b. From disclosing Cisco source code information obtained as an employee of ISS
7 and/or any Cisco information obtained as a result of disassembly of Cisco source code or
8 otherwise derived from Cisco proprietary information, or from disclosing information derived
9 from that code which would permit others to determine the information or methodologies Mr.
10 Lynn created.
 - 11 c. From copying or distributing video taken from Mr. Lynn's presentation.
- 12 2. And to turn over to counsel for Cisco and ISS (or the court) within 24-hours:
- 13 a. All copies of the ISS presentation or underlying documentation owned by ISS or
14 Cisco used to put together the presentation.
 - 15 b. All copies of the video taken at Mr. Lynn's presentation.
- 16 3. And to confirm within 24-hours and certify with the Court that copies of the ISS
17 Presentation and Video have been turned over to counsel and all electronic copies destroyed.

18 Dated: July 27, 2005

19 DLA PIPER RUDNICK GRAY CARY US LLP

20
21 By 

22 ANDREW P. VALENTINE
23 Attorneys for Plaintiffs
24 Cisco Systems, Inc. and
25 Internet Security Systems, Inc.

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JUL 27 2005

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ADR

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CISCO SYSTEMS, INC. and INTERNET
SECURITY SYSTEMS, INC.,

Plaintiffs,

v.

MICHAEL LYNN and BLACK HAT,
INC.,

Defendants.

CASE NO. **05 03043 JL**

**DECLARATION OF MIKE QUINN IN
SUPPORT OF EX PARTE APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND FOR ORDER TO SHOW
CAUSE REGARDING PRELIMINARY
INJUNCTION**

Date: July 27, 2005
Time: Ex Parte
Judge: Ex Parte

I, Mike Quinn, declare:

1. I am Vice President of Cisco Systems, Inc. I make this declaration of my own personal knowledge and could testify competently thereto if called upon to do so.
2. Prior to the Black Hat USA 2005 Briefings and Training Conference (the "BlackHat Conference") in Las Vegas, Nevada (scheduled for July 27-28, 2005), Internet Security Systems provided me with a presentation they were planning to give. Attached hereto as Exhibit A is the presentation (filed under seal.)
3. Upon review of the presentation, I and others at Cisco noted that there was proprietary Cisco information contained therein. In particular, the presentation appeared to have disassembled source code.

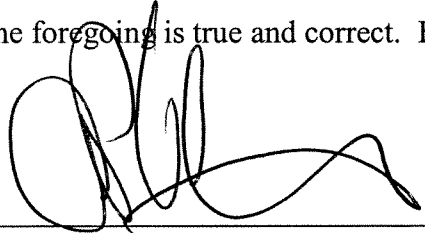
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4. Cisco's standard End License User Agreement prohibits the disassembly or reverse engineering of Cisco source code. Attached hereto as Exhibit B is Cisco's standard EULA.

5. Cisco raised a concern and asked ISS not to make the presentation and to withdraw the materials from the conference. ISS and Cisco considered making a co-presentation with Cisco. Black Hat refused to allow a joint presentation. ISS therefore withdrew the presentation and informed BlackHat and Cisco that it would not be making the presentation and that it did not want the materials distributed to conference attendees. Cisco and ISS worked together (with BlackHat) to ensure that the written materials were removed and the conference CD reformatted and reprinted.

6. The information contained in the presentation is proprietary to Cisco. Cisco takes great care in protecting its proprietary information. The purpose of prohibiting disassembly and reverse engineering is to prevent the very type of thing Mr. Lynn did. Cisco would be irreparably harmed if the information was generally know.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of July, 2005, at Aptos, California.



MIKE QUINN

EXHIBIT A

FILED UNDER SEAL

B



Products & Services

End User License Agreement

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End User License Agreement

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