APPLE COMPUTER, INC. V. DOES: AN UNSATISFYING RESOLUTION TO THE CONFLICT BETWEEN TRADE SECRET LAW, JOURNALIST'S PRIVILEGE, & BLOGGING

By Tori Praul

Apple Computer is known for two things: remarkable innovation and devoted fans. Jason O'Grady, Nick Ciarelli, and Kasper Jade are three of these fans. As a testament to their passion for Apple products, these individuals publish online news magazines devoted to providing information about upcoming products.[1] The sources of this information are not known since the websites solicit tips anonymously.[2] However, individuals with access to product development specifications, such as Apple employees, are the likely sources of many of the proprietary leaks that occasionally appear on the sites.

Under California law, unreleased confidential business information qualifies as a trade secret, and knowing dissemination of such information may constitute misappropriation.[3] Taking hold of this doctrine, Apple Computer decided to sue a number of unknown (Doe) defendants for trade

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1. *See* Think Secret—Apple Mac Insider News, http://www.thinksecret.com (last visited Feb. 6, 2006) (Publisher Nick Ciarelli uses the pseudonym, Nick dePlume, for correspondence related to the website.); O'Grady's Power Page—Your Mobile Technology Destination, http://www.powerpage.org (last visited Feb. 6, 2006) (Jason O'Grady publishes this website); AppleInsider, http://www.appleinsider.com (last visited Feb. 6, 2006) (Kasper Jade is the pseudonym used by the owner of AppleInsider, who also performs reporting and editorial functions). Monish Bhatia, who publishes the Mac News Network and provides a hosting service to several sites, including AppleInsider, is an additional non-party journalist involved in the suit. *See generally* Electronic Frontier Foundation, Apple v. Does Case Summary, http://www.eff.org/Censorship/Apple_v_Does/case_summary.pdf (last visited Feb. 6, 2006).

2. *See* Think Secret, Anonymous Email Form, http://www.thinksecret.com/contact (last visited Feb. 6, 2006).

3. 1 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.01 (2005).

secret misappropriation, thus commencing *Apple Computer, Inc. v. Does*.[4] In doing so, Apple sought information from the e-mail service provider of O'Grady's website. In response, the website operators sought a protective order based on California's shield law and the journalist's privilege granted under the First Amendment to protect the confidentiality of their communications.[5] Therefore, this case raised two important questions. First, does the journalist's privilege apply to the disclosure of trade secrets? And second, do the online informants in the *Apple* litigation qualify as journalists for the purpose of the privilege? The answers to these questions have widespread implications for the future of the journalist's privilege since evolving technology allows non-traditional media entities unprecedented opportunities to disseminate information.

In *Apple v. Does*, the journalist privilege and trade secret law became intertwined and produced complex legal questions. The rise of the internet has important implications for both of these two areas of law. In a time when an employee can anonymously release information to a substantial audience, businesses are faced with the growing challenge of maintaining secrets. Along these same lines, when any individual is able to provide articles, opinions, and criticisms by simply publishing a website, issues of categorizing and imposing standards of conduct on non-traditional publishers become difficult.

Bloggers like O'Grady envision themselves as journalists, entitled to the same privileges as traditional reporters. Many commentators expected the court in *Apple v. Does* to directly address this contention.[6] Yet, they were sadly disappointed. The court instead skirted the issue of whether the website operators qualified as journalists and focused on whether the journalist's privilege applies in cases of trade secret misappropriation. The court held that the information failed to qualify for protection regardless of the bloggers' status as reporters. In doing so, the court avoided ruling on an important and timely matter—one that will likely arise again in the near future.

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4. Complaint, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Dec. 13, 2004) [hereinafter Apple Complaint]. *See generally* Electronic Frontier Foundation (EFF), *Apple v. Does* Case Summary, http://www.eff.org/Censorship/Apple_v_Does/case_summary.pdf (last visited Mar. 9, 2006).

5. Notice of and Motion by Non-Party Journalists for Protective Order, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Feb. 14, 2005).

6. *See generally* Declan McCullagh, *Apple's Subpoenas Challenged in Court*, CNET NEWS.COM (Feb. 14, 2005), http://news.com.com/Appels+subpoenas+challenged+in+court/2100-1030_3-5576037.html; Eric Bangeman, *Apple News Sites Challenge Subpoenas*, ARS TECHNICA (Feb. 14, 2005), http://arstechnica.com/news.ars/post/20050214-4613.html.

In addition to its refusal to define journalists, the court offered weak reasoning for its holding. The court failed to consider the crucial distinction between civil and criminal cases in the journalist's privilege cases. Further, the court misconstrued the consideration of the public interest surrounding the free flow of information, which weighs heavily in favor of maintaining confidentiality. The court's ad-hoc reasoning and misapplication of tests illustrates the need to develop a standard that gets at the substance of the issue.

This Note will shed light on the historical context of this topic, examine the issues implicated when trade secret law and journalism clash, and propose a standard for evaluating future cases of this nature. Part I provides a legal primer on both the journalist's privilege and trade secrets. Part II examines the *Apple v. Does* decision, outlining the rationale underlying the court's holding. Part III considers the current state of journalism and the need for evolution of the journalist's privilege, concluding that rather than focusing on the nature information or the means of its dissemination, courts should consider the information-gathering process and the intent of publishers when drawing the line between trade secret protection and journalistic freedom.

I. LEGAL BACKGROUND

A. Journalist's Privilege

The issue of privilege has garnered much attention from the media and public in the last year. The jailing of Judith Miller on charges of contempt for refusing to disclose the source of sensitive information alerted the public, courts, and Congress to potential problems with the federal privilege.[7] Less than six months after the D.C. Circuit held that neither the First Amendment nor common law protected sources in the context of a grand jury proceeding, members of Congress proposed the Free Flow of Information Act to create a federal shield law.[8] The purpose of the legislation was to create clear standards for federally compelled disclosure of information from the news media.[9] Currently, federal privilege is rooted in the First Amendment and common law, while reporters are statutorily protected in many states by shield laws.[10]

7. *See In re* Grand Jury Subpoena (Miller), 397 F.3d 964 (D.C. Cir. 2005).
8. H.R. 3323, 109th Cong. (2005).
9. *Id.*
10. *See generally* THE REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, THE REPORTER'S PRIVILEGE (2002), *available at* http://www.rcfp.org/cgi-local/privilege/contents.cgi?f=browse (summarizing applicable state and federal laws).

1. Federal Privilege and State Shield Laws

Attempts to claim a privilege of confidentiality predate the founding of the American Republic. In 1735, John Peter Zenger, the publisher of the first politically independent newspaper in North America, was indicted for seditious libel when he published satirical attacks against a governor.[11] Although he was not the author of the disputed articles, his name was attached to them as publisher. After refusing to name the source of his information and spending nine months in jail, a jury returned a verdict of not guilty and Zenger was released.[12]

Despite this long history, it was not until 1848 that a court directly addressed the issue of privilege, jailing a reporter for contempt when he refused to disclose the source of secret documents.[13] In the years that followed, courts generally rejected the concept of privilege, favoring the flow of evidence at trial over the unencumbered dissemination of information to the public.[14] In contrast, the American Newspaper Guild Code of Ethics acknowledged the importance of maintaining source confidentiality as early as 1934, providing that "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies."[15]

Courts did not recognize the existence of such a privilege until the late 1950s. *Garland v. Torre*[16] marked the first attempt of a journalist to use the First Amendment to protect the disclosure of information. The actress Judy Garland sued CBS for defamation based on statements published in a column written by Marie Torre.[17] Ms. Garland, however, did not know the identity of the informant and therefore deposed Ms. Torre to discover the source of the comments.[18] Ms. Torre refused to disclose the identity, asserting that the right to refuse disclosure of confidential information was guaranteed by the First Amendment. Although the court ultimately determined that the information in question was not protected, *Garland* was the first decision to recognize that compelled disclosure of a journalist's

11. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 1.3-.4 (3d ed. 2005).

12. *Id.*; *see also* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law,* Branzburg v. Hayes, *and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 817 (1984).

13. *Ex parte* Nugent, 18 F. Cas. 471 (D.C. Cir. 1848).

14. *See* Marcus, *supra* note 12, at 818-19.

15. Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 452 (2002).

16. 259 F.2d 545 (2d Cir. 1958).

17. *Id.* at 545.

18. *Id.*

sources could abridge the First Amendment guarantee of freedom of the press.[19]

The Supreme Court's 1972 decision in *Branzburg v. Hayes*[20] marked an important development in the doctrine of journalist's privilege and the last time that the Court considered the constitutionality of the privilege. Holding that a reporter may be compelled to testify in grand jury trials, the court explained that "the Constitution does not . . . exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task."[21] The majority emphasized the inherent secrecy of grand jury proceedings as a distinguishing characteristic from other court proceedings.[22] Justice Powell's concurrence stressed the limited nature of the holding, stating that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[23]

In the years following *Branzburg*, courts have interpreted the decision as establishing a qualified privilege.[24] Because the Court's analysis was confined to the duty of journalists in grand jury proceedings, most courts recognize the limited nature of the holding and have treated claims of privilege as requiring case-by-case analysis in "balancing freedom of the press against compelling and overriding public interest in the information being sought."[25] Subsequent to the *Branzburg* decision, virtually every court confronted with the issue of the journalist's privilege in civil actions has recognized the need for a balancing approach that emphasizes the particular facts of each case.[26]

The political turmoil that characterized the 1960s and 1970s and the media's attempts to report on controversial topics such as the Vietnam

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19. *Id.* at 548.
20. 408 U.S. 665 (1972).
21. *Id.* at 691.
22. *Id.* at 695.
23. *Id.* at 710 (Powell, J., concurring).
24. *See* SMOLLA, *supra* note 11, § 25.26; *see also* Marcus, *supra* note 12, at 836-39.
25. Zelenka v. State, 266 N.W.2d 279, 287 (Wis. 1978).
26. *See, e.g.*, *In re* Petroleum Products Antitrust Litig., 680 F.2d 5 (2d Cir. 1982); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Gulliver's Periodicals Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197 (N.D. Ill. 1978); Senear v. Daily Journal-Am., 641 P.2d 1180 (Wash. 1982); Caldero v. Tribune Pub. Co., 562 P.2d 791 (Idaho 1977); *see also* Marcus, *supra* note 12, at 856-59 (discussing court interpretations of the *Branzburg* holding).

War led to tension between the government and journalists.[27] The growing numbers of subpoenas issued to the media during the Nixon administration and the push for protection of journalists that refused to disclose their sources illustrated this heated conflict.[28] This conflict was further demonstrated by the Justice Department's issuance of *Guidelines for Subpoenas of the News Media*, which encouraged negotiation between lawyers and reporters and advised limited use of subpoenas, requiring that the Attorney General eventually approve all subpoenas issued to journalists.[29]

States also responded in force, enacting shield laws to protect journalists from charges of contempt for refusing to disclose sensitive information obtained during the newsgathering process.[30] Prior to *Branzburg*, nineteen states had legislated privileges.[31] Since the opinion, nearly every state has enacted some sort of rule to address claims of news media privilege.[32] These laws vary in their scope of protection. Some provide for the disclosure of sources and information in certain situations.[33] Others protect disclosure of sources under all circumstances, but allow disclosure of information.[34] Still others provide an absolute privilege for both the infor-

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27. *See* Kraig L. Baker, Comment, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739, 745 (1994).

28. *See* Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1179-83 (1984).

29. The Guidelines were first announced in a speech by the Attorney General and then in Department of Justice Memo. No. 692 (Sept. 2, 1970). They state:

> The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice

See Branzburg v. Hayes, 408 U.S. 665, 707 n.41. They also state: "The Department of Justice does not consider the press an investigative arm of the government. Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." *See id.* These guidelines were later codified and formally adopted by the Department of Justice as 28 C.F.R. § 50.10 (2003), which specifically state that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." *Id.*

30. Campagnolo, *supra* note 15, at 448-51.

31. *Id.* at 448.

32. *Id.* at 449. The author notes in footnote eighteen that "Mississippi, Utah, and Wyoming have no statutory or decisional law on reporter's privileges." *Id.*

33. *Id.* at 450.

34. *Id.*

mation and source.[35] The common characteristic of these laws is that they are generally more protective than the privilege offered through the state and federal constitutions.[36] Because actions brought in state court usually depend on state law, these shield laws are most often the basis upon which claims of privilege are examined.[37]

2. California Law

The California Legislature passed its first shield law in 1935,[38] which protected newspersons from being adjudged in contempt for refusing to disclose sources.[39] In 1965, the legislature transferred the privilege sections from the California Code of Civil Procedure to the Evidence Code § 1070. Section 1070(a) provides as follows:

> A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.[40]

Interpretation of the protections afforded by these provisions is mixed. Some decisions have held that § 1070 and the state constitution confer an

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35. *Id.*

36. *See* The Reporter's Committee for Freedom of the Press, The Reporter's Privilege Compendium: An Introduction, http://www.rcfp.org/cgi-local/privilege/item.cgi?i=intro (last visited Feb. 27, 2006).

37. *See* The Reporter's Committee for Freedom of the Press, The Reporter's Privilege Compendium: Q & A, http://www.rcfp.org/cgi-local/privilege/item.cgi?i=questions (last visited Feb. 27, 2006).

38. 1935 Cal. Stat. 1608-10.

39. *See* KSDO v. Superior Court, 136 Cal. App. 3d 375, 380 (Ct. App. 1982) (discussing evolution of California Shield Law).

40. CAL. EVID. CODE § 1070(a) (2005). Section 1070(b) provides protection for television and radio news reporters as well. Californians further expressed their interest in protecting the free flow of information from the news media to the public when they passed Proposition 5, titled "Freedom of Press," in 1980. The passage of this proposition amended article I, section 2 of the California Constitution to include nearly identical language as § 1070.

absolute protection against forced disclosure, whereas others confine the language only to contempt.[41]

California follows the test established by the California Supreme Court in *Mitchell v. Superior Court*[42] to evaluate whether civil claims override privilege in a given case. In determining whether a "newsperson has a privilege to refuse to reveal confidential sources or information obtained from those sources," the court set out five factors to consider: (1) "the nature of the litigation and whether the reporter is a party"; (2) "the relevance of the information sought to plaintiff's cause of action"; (3) the concern that "discovery should be denied unless the plaintiff has exhausted all alternative sources of obtaining the needed information"; (4) "the importance of protecting confidentiality in the case at hand"; and (5) in cases of defamation, the fact that a court may require a showing of a prima facie case.[43]

The court recognized that "[s]ince contempt is generally the only effective remedy against a non-party witness, the California enactments grant such witnesses virtually absolute protection against compelled disclosure."[44] When faced with a subpoena for confidential information, a journalist has the option of producing the materials or fighting the request. A judge may then order the journalist to disclose materials for in camera inspection to determine their relevance. If the journalist chooses to oppose

41. *Compare In re* Willon, 47 Cal. App. 4th 1080, 1091 (Ct. App. 1996) ("[O]n its face, article I, sec. 2b does appear to provide absolute protection to those engaged in the newsgathering process . . . in civil proceedings the provision has been construed to provide 'the highest possible level of protection' from disclosure of materials sought by a civil litigant.") (citing Playboy Enters., Inc. v. Superior Court, 154 Cal. App. 3d 14, 27-8 (1984), *and* Mitchell v. Superior Court, 37 Cal. 3d 268, 274 (1984), *and* New York Times Co. v. Superior Court, 51 Cal. 3d 453, 456 (1990)), *with KSDO*, 136 Cal. App. 3d at 383 ("It is an immunity from contempt, not a privilege against disclosure.").

42. 37 Cal. 3d 268 (1984).

43. *Id.* at 279-83. Circuit courts follow a similar three-part balancing test set out in Justice Stewart's dissent in *Branzburg*: (1) Is the information relevant to the case? In civil actions, judges often require a showing of more than mere relevance or materiality—the information must go "to the heart of the plaintiff's claim." (2) Can the information be obtained by alternative means? Most courts adhere to the rule that a party requesting data must show that "he has exhausted every reasonable alternative source of information." (3) Is there a compelling interest in obtaining the information sought? This criterion is generally used on an ad hoc basis to balance the interests served in dissemination of information against the maintenance of the confidential relationship. Marcus, *supra* note 12, at 856-59; *Branzburg v. Hayes*, 408 U.S. 665, 713 n.1 (Stewart, J., dissenting).

44. *Mitchell*, 37 Cal. 3d at 274.

such an order, the court's only available action is to charge the reporter with contempt, which may result in a fine or imprisonment.[45]

Mitchell also distinguished *Branzburg*, explaining that the criminal nature of a grand jury proceeding is much different than ordinary civil litigation.[46] In so holding, the *Mitchell* court looked to *Baker v. F & F Investment* and clarified that:

> the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* . . . . [S]urely in civil cases, courts must recognize that the public interest in a non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.[47]

The balancing of interests in evaluating claims of privilege in civil and criminal cases has been markedly different—criminal cases consider the public's interest in enforcement of the law and guaranteeing a fair trial for defendants, whereas in civil cases the interest centers around fairness to private litigants.[48] The distinction relies on the essentially public interest in the First Amendment and the predominantly private interest of the civil litigant.[49] As a result, courts often find for the journalist in civil cases because the interest in the free flow of information outweighs the interest in a private claim.

B. Trade Secret Law

Trade secret law is in apparent conflict with First Amendment doctrine. Trade secret law focuses on preventing disclosure rather than allowing information to flow freely. The purpose of trade secret law is to encourage innovation by protecting the proprietary information of businesses.[50] Unlike modern patent, copyright, and trademark law, trade se-

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45. *See generally* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE REPORTER'S PRIVILEGE (2002), *available at* http://www.rcfp.org/privilege.

46. *Mitchell*, 37 Cal. 3d at 278.

47. *Id.* at 277 (citing Baker v. F & F Inv., 470 F.2d 778, 784-85 (2d Cir. 1972)).

48. *Id.*

49. *Id.*

50. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) ("The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law."); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. a, b (1995) ("[T]he law of trade secrets thus reflects the accommodation of numerous interests, including the trade secret owner's claim to protection against the defendant's bad faith or improper conduct . . . and the interest of the public in encouraging innovation and in securing the benefits of vigorous competition.").

crets are governed primarily by state law.[51] Trade secret is further distinct from other categories of intellectual property in that it is rooted in property, contract, and tort law.[52] The doctrine evolved on the state level from a common law tort to its modern statutory form in a somewhat ad hoc fashion.[53] Variation exists among the states, but trade secret law is generally unified in the *Restatement (First) of Torts* and the Uniform Trade Secrets Act (UTSA).[54] Forty-five states now adhere to the UTSA or a modified version of it, including California.[55] These laws provide trade secret owners with avenues to protect their proprietary information and offer remedies in cases of misappropriation.

While enforcement of confidentiality requirements is key to protecting trade secrets, it is by no means absolute. Exceptions to the doctrine are allowed if a criminal act is involved or if disclosure would be in the public interest.[56] The *Restatement (Second) of Agency* allows disclosure of confidential information "in the protection of a superior interest."[57] In addition, the *Restatement of Torts* also provides that disclosure of another's trade secret may be granted in order to promote a public interest.[58] Because the basic principles of common law trade secret protection are codified in the UTSA, the exceptions under tort and agency law are also incorporated.[59]

1. Civil Provisions in California

Codified in Civil Code §§ 3426-3426.11, California's modified version of the UTSA defines "misappropriation" as follows:

> (b) "Misappropriation" means:
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> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

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51. 3 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 13.02[2] (2005). For a discussion of various characterizations of trade secret in case law, see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. b (1995).

52. ARTHUR H. SEIDEL, WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADE SECRETS AND EMPLOYMENT AGREEMENTS 1.01 (1995).

53. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. b.

54. UNIF. TRADE SECRETS ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 14. U.L.A. 529, 529 (2005).

55. *Id.*

56. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When Is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM. & ENT. L.J. 357, 386-89 (1993).

57. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1957).

58. RESTATEMENT OF TORTS § 757 cmt. d (1939).

59. UNIF. TRADE SECRETS ACT, Prefatory Note (1985), 14. U.L.A. at 531.

> (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
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> (A) Used improper means to acquire knowledge of the trade secret; or
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> (B) At the same time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
>
> (i) Derived from or through a person who had utilized improper means to acquire it;
>
> (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[60]

The statute defines a trade secret as any information that "derives independent economic value . . . from not being generally known to the public or other persons who can obtain economic value from its disclosure or use," provided that the information is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[61]

2. Criminal Provisions in California

California also provides statutory criminal protection of trade secrets in Penal Code § 499(c). While providing an identical definition for trade secret, the statute differs from the UTSA in defining misappropriation as theft in certain situations:

> (b) every person is guilty of theft who, with intent to deprive or withhold the control of a trade secret from its owner, or with an intent to appropriate a trade secret to his or her own use or to the use of another, does any of the following:
>
> (1) Steals, takes, carries away, or uses without authorization, a trade secret.
>
> (2) Fraudulently appropriates any article representing a trade secret entrusted to him or her.

60. CAL. CIV. CODE § 3426.1(b) (2005).
61. *Id.* § 3426.1(d).

> (3) Having unlawfully obtained access to the article, without authority makes or causes to be made a copy of any article representing a trade secret.
>
> (c) [Any of the above acts] shall be punished by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars ($5,000), or by both that fine and imprisonment.[62]

In addition to such an act, the prosecution of trade secret theft under the Penal Code requires: (1) existence of a trade secret with particularity; (2) efforts to maintain that information as a trade secret were undertaken by the trade secret owner; and (3) intent on the part of the defendant to actually "appropriate."[63]

Despite the existence of criminal penalties for trade secret misappropriation, such cases are rarely prosecuted since courts are reluctant to treat intellectual property as the equivalent of other forms of property.[64] Moreover, civil remedies are often sufficient to address misappropriation, obviating the need for criminal prosecution for trade secret misappropriation. Those prosecutions that do occur typically involve surveillance operations initiated by police after being alerted by owners of potential theft.[65] These cases are vastly different from the situation before the court in *Apple v. Does*.

II. *APPLE COMPUTER, INC. V. DOES*

A. Procedural History

PowerPage and AppleInsider are websites devoted to publishing information about Apple products.[66] During the month of November 2004, a number of articles were posted on these two sites detailing upcoming and unannounced Apple products. Along with technical specifications of the

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62. CAL. PENAL CODE § 499(c) (2005).

63. 3 MILGRIM, *supra* note 51, § 12.06[1][c] n.36.

64. *See id.* § 12.06[1] n.6 ("When intellectual property is introduced, that often is seen to add a dimension, particularly where high technology is also in play, which tends to discourage prosecutors.").

65. *See generally* People v. Gopal, 171 Cal. App. 3d 524 (Ct. App. 1985) (representatives of company contacted police and participated in sting operation to catch Gopal selling proprietary information); People v. Dolbeer, 214 Cal. App. 2d 619 (Ct. App. 1963) (placing defendant under police surveillance upon notification from the trade secret owner).

66. *See* O'Grady's PowerPage, Your Mobile Technology Destination, http://www.powerpage.org (last visited Feb. 27, 2007); AppleInsider, Apple Insider News & Rumors, http://www.appleinsider.com (last visited Feb. 27, 2007).

product "Asteroid,"[67] an exact replica of a drawing found on an Apple slide was also published.[68] Given the nature of the information, Apple assumed that its own employees were likely the source of the disclosure.[69] Apple questioned the twenty-six employees that had access to the slides in question to no avail.[70]

In response to these posts, Apple filed a complaint in Superior Court of California in Santa Clara County, alleging misappropriation of trade secrets by several Doe defendants.[71] The complaint sought injunctive relief and damages.[72] At the same time, Apple filed an ex parte application to subpoena AppleInsider and PowerPage for discovery of all documents, including e-mails "relating to the identity of any person that supplied information relating to the product."[73] Although Apple never served the websites with subpoenas, on February 4, 2005, Apple served PowerPage's e-mail service provider, Nfox, with a subpoena for discovery of the same information.[74] Nfox did not object to the subpoenas and ten days later, on February 14, 2005, the website operators filed for a protective order to prevent discovery of their e-mail communications.[75] Upon denial of the motion for protective order, the operators filed a petition with the Califor-

67. "Asteroid" was the codename of a FireWire audio interface for GarageBand, Apple's music-creation software. *See* Posting of Barb Dybwad to TUAW.com, http://www.tuaw.com/2004/11/23/codename-asteroid-apple-develops-firewire-audio-interface-for (Nov. 23, 2004, 5:14 PM).

68. Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178, at 6 (Cal. Super. Ct. Mar. 11, 2005) (order denying motion for protective order).

69. Redacted Declaration of Robin Zonic, In Support of Apple's Opposition to EFF's Motion for Protective Order at 2, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Sept. 9, 2005) [hereinafter Zonic Declaration]; Redacted Declaration of Al Ortiz, Jr., In Support of Apple's Opposition to EFF's Motion for Protective Order at 2-3, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Sept. 9, 2005) [hereinafter Ortiz Declaration].

70. Zonic Declaration, *supra* note 69, at 9; Ortiz Declaration, *supra* note 69, at 3.

71. Apple Complaint, *supra* note 4.

72. *Id.*

73. Supplement to *Ex Parte* Application for an Order for Issuance of Commission and Granting Leave to Serve Subpoenas at 3, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Dec. 14, 2004).

74. Notice of Deposition of Nfox.com, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Feb. 4, 2005).

75. Notice of Motion for Protective Order, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Feb. 14, 2005).

nia Court of Appeal for a writ of mandate to overturn the Superior Court decision.[76]

B. Court's Analysis

The Superior Court's analysis of petitioners' motion for protective order limited the issue to one of discovery—Apple needed to know the identities of the Doe defendants in order to pursue a cause of action for misappropriation, and e-mails sent to the website operators could possibly provide this information. Noting that balance is essential in evaluating a claim with such competing interests, the court emphasized the fact that California allows broad discovery and provides for protections of intellectual property in both civil and criminal law.[77] The court first considered the trade secret issue and found that Apple made out a prima facie case for misappropriation.[78] Also, determining that Apple had made adequate efforts at internal discovery, the court held that external discovery was necessary to identify the individual defendants.[79] The court then evaluated whether the journalist's privilege precluded such discovery from the publishers of the Apple product information.[80]

1. Trade Secret Misappropriation

The court first evaluated whether the articles revealing information about the Apple products constituted a violation of trade secret law. To do so, it looked to the California Uniform Trade Secrets Act (CUTSA), Civil Code §§ 3426-3426.11 and—despite the fact that no criminal charges were filed—California Penal Code § 499(c). The court found that the information disclosed by the Does was a trade secret because it constituted confidential product information not yet released to the public. Further, because acquisition of a trade secret by a person who knows or has reason to know that it was acquired by improper means qualifies as misappropriation, the court determined that Apple had made a prima facie case for violation of trade secret law.[81] Explaining that the statutes "reflect this state's strong commitment to the protection of proprietary business information . . . and support a compelling interest of disclosure which may, in the

76. Petitioners and Non-Party Journalists Jason O'Grady et al., Petition for Writ of Mandate and/or Prohibition, O'Grady v. Superior Court, No. H028579 (Cal. Ct. App. Mar. 22, 2005).

77. Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178, at 6 (Cal. Super. Ct. Mar. 11, 2005) (order denying motion for protective order).

78. *Id.* at 4-6.

79. *Id.* at 4.

80. *Id.* at 7-11.

81. *Id.* at 4-6.

proper civil case, outweigh First Amendment rights," the court concluded that such factors weighed against the motion for protective order.[82]

2. Journalists and Privilege

Next, the court analyzed whether privilege protected the movants from disclosing their sources by focusing on three inquiries: Are the authors journalists? If so, does the need for discovery outweigh the federal privilege? Finally, are movants protected under California's shield law?

In analyzing the movants' claim to protection as journalists under the First Amendment and California's reporter's shield law, the court addressed briefly the question of whether bloggers qualified as journalists.[83] Acknowledging the difficulty of defining "journalist" as the variety of media expands, the court offered no firm opinion on which category best described the movants.[84]

The difficulty in determining the scope of "journalists" failed to present a problem in this case since the court found that "even if the movants are journalists, this is not the equivalent of a free pass . . . [t]he journalist's privilege is not absolute" and journalists cannot refuse to disclose crime-related information.[85] Because the court determined that this case constituted trade secret misappropriation and California provides criminal penalties for such acts, the court treated this as a criminal case. In support of this stance, the court quoted *Branzburg*, which stated that "[t]he preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection."[86] According to this analysis, the court apparently reasoned that because movants published information they knew or should have known was a trade secret, they were engaging in criminal activity and, thus, not protected as journalists.

The court's analysis of whether the interest in discovery outweighed the federal privilege rested on the standard articulated in *Mitchell v. Superior Court* for evaluating the competing interests in civil actions.[87] Upon analysis of the five factors, the court determined that it would be impossible for Apple to move forward without knowledge of the identity of the defendants, and that movants failed to show the public interest in disclo-

82. *Id.* at 6.
83. *Id.* at 8-9.
84. *Id.* at 8.
85. *Id.* at 9.
86. Branzburg v. Hayes, 408 U.S. 665, 691 (1972).
87. 37 Cal. 3d 268 (1984).

sure of the trade secrets. Therefore, discovery was both appropriate and necessary.[88]

A third question posed to the court was whether movants were protected by the California shield law. Because this action was brought in state court, California law dictates whether the movants are protected from revealing their sources. In analyzing O'Grady's claim to protection, the court noted that the law is often misconstrued to provide more widespread protection than it should.[89] Quoting California Evidence Code § 1070(a) and § 1070(b), the court held that California's law offers limited protection by simply creating an immunity for journalists from being held in contempt for refusing to disclose the identity of their sources.[90] According to the court, whether O'Grady qualified as a journalist was irrelevant in evaluating this issue because "no license is conferred to anyone to violate valid criminal laws."[91] As with many other forms of privilege, such as attorney-client or doctor-patient, the court explained, exceptions are made in cases involving criminal conduct.[92] This determination, coupled with the fact that trade secret misappropriation is a criminal offense in California that is not protected by the shield law, led the court to determine that O'Grady was not protected from disclosing the contents of the e-mails in question.[93]

III. DISCUSSION

The *Apple v. Does* court was faced with the challenge of determining not only whether the journalist's privilege applies in a case of alleged trade secret misappropriation, but also whether the website operators qualified as journalists for this purpose. The court avoided answering the latter question and instead focused on the interplay between privilege and trade secret law. Regardless of whether the court reached the proper conclusion, the decision relied on muddled reasoning and misapplication of precedent to determine that the website operators were not protected from disclosing confidential information. This case illustrates the complications that arise from the changing nature of journalism and a need for the law to account for this evolution in its treatment of such issues.

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88. Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178, at 9-10 (Cal. Super. Ct. Mar. 11, 2005) (order denying motion for protective order).

89. *Id.* at 10.

90. *Id.*

91. *Id.* at 11.

92. *Id.*

93. *Id.* at 13.

A. Critique of the *Apple* Decision

1. *The Court Wrongly Applied Branzburg to a Civil Matter*

The reliance on *Branzburg* in analyzing this case was a misapplication of a criminal standard to a civil action. The *Branzburg* Court dealt with the very limited question of whether reporters called to testify before a grand jury should be required to divulge sources in furtherance of an investigation.[94] Holding that the First Amendment does not exempt journalists from performing their duty as citizens to aid such criminal investigations, the Court established one scenario under which reporters may be required to break from the confidential relationship.[95] Nonetheless, Justice Powell's concurrence is often cited in support of the concept of journalist's privilege.[96] While explaining that grand jury investigations are unique in nature and therefore subject to different standards, he noted situations in which a reporter may not be required to disclose confidential information:

> If the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.[97]

Subsequent holdings have consistently recognized the limited application of this decision. For example, in *Zerilli v. Smith*, the D.C. Circuit held that "in civil cases, where the public interest in effective criminal law enforcement is absent, *Branzburg* is not controlling."[98] Because most civil actions do not implicate the constitutional rights of other individuals, courts have not been hesitant to side with the media.[99]

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94. Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

95. *Id.* at 697.

96. *Id.* at 709-10 (Powell, J., concurring).

97. *Id.* at 710 (Powell, J., concurring).

98. 656 F.2d 705, 711 (D.C. Cir. 1981); *see also* Mazzella v. Philadelphia Newspapers, Inc., 479 F. Supp. 523, 526 (E.D.N.Y. 1979) ("interests that (civil) litigants have in forcing disclosure are typically not as compelling"); Gilbert v. Allied Chem. Corp., 411 F. Supp. 505, 510 (E.D. Va. 1976) (in civil cases the interests in disclosure are "much less weighty than those involved in criminal proceedings").

99. *See* Marcus, *supra* note 12, at 851.

The court in *Apple v. Does* erred in applying the standard articulated in *Branzburg* to the particular set of facts before it. Unlike the *Apple* case, *Branzburg* did not contemplate the theoretical possibility of criminal prosecution but instead answered specific questions brought before the Court. By applying *Branzburg*, the court portrayed the *Apple* case as a criminal one rather than focusing on the true nature of the proceeding—a private action to protect intellectual property rights.[100] In doing so, it failed to acknowledge the public interest in maintaining the confidentiality of the reporter-source relationship, affording greater weight to Apple's private interest in protecting proprietary information. Although there is a compelling interest in enforcing trade secret law, infringing upon the journalist's privilege by requiring the disclosure of confidential information was questionable in this case.

2. The Court Misconstrued the Factors Set Out in Mitchell

Mitchell v. Superior Court established the test for balancing the interests between discovery in a civil suit and the journalist's privilege of confidentiality.[101] In *Apple*, the court's analysis of the five-factor test found that the overall balance favored disclosure of the confidential information. In doing so, the court correctly evaluated factors two and five but misconstrued the requirements set out in factors one, three, and four. Had the court properly applied the test, the balance likely would have weighed against disclosure.

a) Factor One: Is the Reporter a Party?

The first *Mitchell* factor states that less protection is afforded to cases where the entity asserting the privilege is a party to the suit.[102] This is a necessary safeguard to prevent the use of such a privilege to protect oneself from the legal ramifications of allegedly illegal acts. However, the court's analysis glossed over the question of whether the journalists in question were parties to the suit, finding that this factor likely weighed in favor of disclosure. Apple argued, and the court agreed, that because the website operators *may* be members of the Doe group, and because Apple maintains the option to pursue action against them in the future, the court

100. Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178, at 8-9 (Cal. Super. Ct. Mar. 11, 2005) (order denying motion for protective order). ("Reporters and their sources do not have a license to violate criminal laws such as Penal Code § 499c . . . [and] journalists cannot refuse to disclose information when it relates to a crime.").

101. Mitchell v. Superior Court, 37 Cal. 3d 268 (1984).

102. *Id.* at 279.

should treat them as parties.[103] However, the website operators had yet to be named as parties to either a civil or criminal action for misappropriation of Apple's trade secrets. By treating the website operators as parties, the court failed to properly balance this consideration. Had the true standard been applied, this factor likely would have weighed against disclosure.

b) Factor Three: Have All Other Sources of Information Been Exhausted?

The third factor set out in *Mitchell* requires that discovery be denied unless all alternative sources of obtaining the necessary information have been exhausted. The court stated that "[c]ompulsory disclosure of sources is the 'last resort,' permissible only when the party seeking disclosure has no other practical means of obtaining the information."[104] In the current case, Apple by no means met the requirement for exhausting all alternative sources of information. In fact, Apple's investigation was limited to simply questioning the twenty-six employees that had access to the trade secrets.[105]

Merely interviewing employees, however, does not qualify as an adequate effort to obtain the information. Case law has demonstrated on several occasions that the party seeking the information faces a high burden, and that resorting to abridgement of the confidentiality privilege should be avoided unless absolutely necessary.[106] Faced with the question of whether compelled disclosure was appropriate in a case where the requesting party had not deposed individuals likely to have relevant information, the court in *Zerilli* held that "[a]ppellants cannot escape their obligation to exhaust alternative sources simply because they feared that deposing . . . employees would be time-consuming, costly, and unproductive."[107] Along these same lines, the Second Circuit in *In re Petroleum Products Antitrust Regulation* required the parties to conduct further depositions before requesting confidential information.[108]

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103. Plaintiff Apple Computer, Inc.'s Opposition to Motion for Protective Order at 6-7, Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178 (Cal. Super. Ct. Feb. 25, 2005).

104. *Mitchell*, 37 Cal. 3d at 282.

105. Zonic Declaration, *supra* note 69, at 9.

106. *See, e.g.*, Baker v. F & F Invest., 470 F.2d at 784 (2d Cir. 1972); Gilbert v. Allied Chem. Corp., 411 F. Supp. 505 (E.D. Va. 1976); KSDO v. Superior Court, 136 Cal. App. 3d 375 (Ct. App. 1982); Senear v. Daily Journal-Am., 641 P.2d 1180 (Wash. 1982); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

107. *Zerilli*, 656 F.2d at 715.

108. *In re* Petroleum Products Antitrust Litig., 680 F.2d 5, 8 (2d Cir. 1982).

Apple argued that questioning employees about the leak was sufficient to meet the requirement set out in *Zerilli* because the employees were at risk of being terminated if found to be untruthful.[109] This claim does not hold water. Deposition of a witness under oath—exposing her to legal repercussions for perjury—is much more likely to elicit the truth than a mere interview. The court's finding in the current case that Apple's efforts were adequate to meet this requirement was mistaken.

c) Factor Four: What is the Public Interest in Protecting Confidentiality?

The court's analysis of the fourth *Mitchell* factor was an egregious mischaracterization of the requirements and purpose of that test. *Mitchell* examined the public interest in protecting the confidentiality of sources in a given case.[110] Instead, the California Superior Court interpreted this factor as "the public good served by protecting the misappropriation of trade secrets."[111] Such portrayal is contrary to the actual test. By defining the public interest as protecting misappropriation rather than protecting the free flow of information, the court failed to adequately consider this question. In fact, the court did not consider any factors other than Apple's rights; therefore ignoring *Mitchell*'s call for a balancing of interests.

The court focused on whether the public interest was served by revealing Apple trade secrets, yet the proper test is whether the public is served by ensuring continued existence of the privilege of confidentiality. Stating that "an *interested public* is not the same as the *public interest*"[112] and that "movants are doing nothing more than feeding the public's insatiable desire for information,"[113] the court simply wrote off the notion that privilege might apply in this case.

3. The Court Misread the California Shield Law

Californians voiced their interest in protecting journalists from compelled disclosure of confidential information when they amended the state constitution to include such a provision.[114] California's shield law is now

109. Real Party in Interest Apple Computer, Inc.'s Response to Briefs of Amici Curiae at 21, O'Grady v. Superior Court, No. H028579 (Cal. Ct. App. Apr. 7, 2005).

110. *Mitchell*, 37 Cal. 3d at 282-83 ("[T]he court should consider the importance of protecting confidentiality in the case at hand.").

111. Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178, at 9-10 (Cal. Super. Ct. Mar. 11, 2005) (order denying motion for protective order).

112. *Id.* at 12.

113. *Id.*

114. Proposition 5, passed in 1980, states:

codified in both the Evidence Code as well as the California Constitution and protects journalists from being adjudged in contempt for "refusing to disclose any unpublished information."[115]

The *Apple* court's analysis focused on the limitations rather than the protections granted by a shield law. Holding that the shield law offers only the limited protection from being found in contempt, the court failed to acknowledge the significance of such protection.[116] *Mitchell*, along with other cases, has recognized that contempt is the only effective remedy against non-party witnesses; thus, California law, in effect, grants an absolute protection.[117]

The court's focus on the potential for, rather than absence of, criminal prosecution confused the issue once again. From this standpoint, the court argued that the shield law does not allow any person to violate criminal laws.[118] Although this statement is true, it fails to address the real question of whether California law protects a third-party journalist from compelled disclosure as part of a civil suit. The action in question was not a criminal proceeding against the website operators, but a civil suit against unnamed defendants in which a third-party internet service provider was subpoenaed for private information.[119]

B. Journalism Today

1. Trade Secrets, the Internet, and the Journalist's Privilege

The rationale behind the journalist's privilege is simple: ensuring confidentiality of sources encourages the dissemination of important informa-

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> A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for reusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

CAL. CONST. art. I § 2(b)

115. CAL. EVID. CODE § 1070 (2005); CAL. CONST. art. I § 2(b).

116. Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178, at 10-11 (Cal. Super. Ct. Mar. 11, 2005) (order denying motion for protective order).

117. *Mitchell*, 37 Cal. 3d at 274.

118. Apple Computer, Inc. v. Doe No. 1, No. 1-04-CV-032178, at 11 (Cal. Super. Ct. Mar. 11, 2005) (order denying motion for protective order).

119. *Id.* at 2-4.

tion, thereby creating a more informed society.[120] Blackstone recognized the importance of this concept at English common law and argued that "liberty of the press is indeed essential to the nature of a free state."[121] The interaction between this protection and criminal law raises difficult questions about competing values that form the basis of our system. On one hand, the privilege may, at times, hinder investigations by preventing discovery of critical information. However, the existence of such an exception may, at other times, be crucial in furthering the policing function of the press and the enlightenment of the public. Whereas a finding that no privilege exists may aid in solving an immediate crime by providing short-term information gain, in the long term, repeated denial of the privilege would likely result in fewer sources coming forward to work with the press and, thus, fewer crimes being solved overall.

The degree to which claims of trade secret misappropriation should alter the traditional application of the privilege depends largely on the type of legal action involved and the importance of discovering the information in question. For example, criminal prosecution for trade secret misappropriation is arguably of greater public importance than a private action seeking damages because it serves the larger function of preventing public harm. Despite the interest in protecting proprietary information, trade secret law must comport with First Amendment doctrine. Yet the California Superior Court failed to recognize this distinction in its analysis of *Apple v. Does*.

2. *The Difficulty of Defining "Journalists"*

With expanding communications media and the accessibility of the internet, the opportunities to make one's voice heard abound. In an age when any person can write and publish an article, a standard must be established to determine which rules should govern such publications. The flawed and seemingly ad hoc reasoning behind the California Superior Court's holding indicates a hesitancy to address this question. Although purportedly an issue of furthering the public interest in protecting trade secrets, the effort of the court to stretch current law in order to find in favor of disclosure may imply a different rationale.

One possible reason for such a finding would be to avoid the question of whether bloggers qualify as journalists and whether they are, thus, able to claim the privilege. By simply finding that privilege did not apply in the current case, the court easily avoided this issue. Had the court found that

120. Marcus, *supra* note 12, at 815-16.

121. SMOLLA, *supra* note 11, § 1.5.

privilege may apply in such a case, it would have then been forced to rule on whether privilege applies to the parties in question. The implications of this question reach much further than the limited holding that disclosure was appropriate in the *Apple* case.

Previous courts have grappled with the definition of journalist and generally found that the applicability of privilege hinges on the intent at the outset of the information gathering process.[122] For example, the Second Circuit denied the privilege to the author of an unpublished manuscript about a high-profile attempted murder case after she failed to show intent to disseminate the information to the public at the inception of the process.[123] Following the same reasoning, the Ninth Circuit held that privilege applied to the author of an investigative book, since the information was gathered with the intent to publish.[124]

Had the *Apple* court addressed the question, it likely would have employed one of three basic approaches. First, the court could have focused on who is gathering the information and whether the individual is associated with an established news media organization. Another approach is to consider what product the individual will likely produce from the information-gathering process. Considering whether it is news of political interest, criminal activity, or mere gossip would provide some metric for measuring whether such activity qualifies as journalism. A third approach focuses on the process and intent of the information gathering. Of these three considerations, the intent-based test yields the fairest results.

By considering who is gathering the information, courts would likely favor media conglomerates over smaller publications. Such a distinction is unfair and incompatible with one of the key purposes of journalism—to offer opposing viewpoints to the public. Expanding mediums of communicating information offer a new context for evaluation of these questions. A test that favors major media companies discourages representation of the full host of ideas and criticisms that help to shape an informed citizenry. The proliferation of internet journalism has changed the traditional mold that defines the "who," so considering only the credentials of the information gatherer simply begs the question.

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122. *See* von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987) (establishing that the test is whether person seeking to invoke privilege had "the intent to use material—sought, gathered, or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process"); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1995) (holding that the author of an investigative book had standing to invoke journalist's privilege).

123. *von Bulow*, 811 F.2d at 145-46.

124. *Shoen*, 5 F.3d at 1294.

The same type of problem arises in focusing on the product of the information-gathering process. Evaluation of the type of news produced is, by its very nature, a subjective analysis. The implications of relying on such an analysis could lead to unfair treatment of publications based on the type of information they report. Information that may not seem important in one instance may be critical in others. Furthermore, subjective analysis of what constitutes newsworthy information should not be left in the hands of courts.

Because of the problems presented by these first two approaches, a focus on the purpose behind the gathering of information is a far more appropriate method to ensure fair treatment of entities claiming to be journalists. Not only is this approach the most compatible with the core principles of journalism, it also furthers the public interest in maintaining the free flow of information. By adhering to a standard that examines the reason an entity obtained information, courts wield an objective tool of analysis that will allow them to make judgments without becoming distracted by considerations of whether the product is newsworthy or whether the source is reputable.

The growing community of bloggers presents a striking example of the difficulties inherent in creating such definitions. One of the problems of expanding the definition of journalism is the lack of mechanisms to ensure ethical behavior and adherence to a certain level of professionalism. The codes of ethics and community standards that characterize traditional journalism go far in regulating the conduct of the profession. However, as the class of journalists expands the continued efficacy of these norms may come into question.

IV. CONCLUSION

Apple Computer, Inc. v. Does illustrates the growing difficulties posed for both trade secret law and journalism by the proliferation of internet communication. In hearing this case, the court passed on the opportunity to answer the questions raised by these conflicts. However, these issues will undoubtedly persist and become more prevalent, eventually forcing courts or legislatures to create standards for dealing with similar situations. In doing so, courts should consider the purpose behind the journalist's privilege and hesitate before deeming certain practices unworthy based on the medium through which they are performed. Defining a standard that reaches beyond traditional conceptions of journalism will prove crucial to address the changing nature of communication in today's increasingly wired society.