JASON O'GRADY et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; APPLE COMPUTER, INC., Real Party in Interest.

COURT OF APPEAL OF CALIFORNIA

44 Cal. Rptr. 3d 72 (2006)

RUSHING, P. J.--Apple Computer, Inc. (Apple) brought this action alleging that persons unknown caused the wrongful publication on the World Wide Web of Apple's secret plans to release a device that would facilitate the creation of digital live sound recordings on Apple computers. In an effort to identify the source of the disclosures, Apple sought and obtained authority to issue civil subpoenas to the publishers of the Web sites where the information appeared. The publishers moved for a protective order to prevent any such discovery. The trial court denied the motion. We hold that this was error because any subpoenas seeking unpublished information from petitioners would be unenforceable through contempt proceedings in light of the California reporter's shield. Accordingly, we will issue a writ of mandate directing the trial court to grant the motion for a protective order.

Factual and Procedural Background

Petitioner Jason O'Grady declared below that he owns and operates O'Grady's PowerPage, an online news magazine devoted to news and information about Apple Macintosh computers and compatible software and hardware. PowerPage has its principal place of business in Abington, Pennsylvania, and has been published daily since 1995. O'Grady acts as its publisher and one of nine editors and reporters. Since 2002 the site has occupied its present address on the World Wide Web, where it publishes 15 to 20 items per week. The Web site receives an average of 300,000 unique visits per month.

Under the pseudonym “Kasper Jade,” a person identifying himself as primary publisher, editor and reporter for Apple Insider declared that Apple Insider is an online news magazine devoted to Apple Macintosh computers and related products. [2] He identified petitioner Monish Bhatia as the publisher of Mac News Network, which provides hosting services to a number of Web sites, including Apple Insider. Apple Insider has published daily or near-daily technology news at the same web address since 1998 at an average rate of seven to 15 articles per week. In July 2004, it received 438,000 unique visitors.

Over a period of several days in November 2004, PowerPage and Apple Insider published several articles concerning a rumored new Apple product known as Asteroid or Q97. The first article appeared on PowerPage on November 19, 2004, with O'Grady's byline. On the following Monday, PowerPage published an article entitled Apple's Asteroid Breakout Box Part II: Product Details, also with O'Grady's byline. It gave additional product details and also included a concept drawing. On November 23, 2004, PowerPage ran another article by O'Grady addressing Asteroid's integration into GarageBand. Also on November 23, 2004, an article appeared on the Apple Insider site, authored by Kasper Jade, titled “Apple developing FireWire audio interface for GarageBand.” On November 26, 2004, PowerPage ran Part IV of its series on Asteroid.

According to declarations later filed by Apple investigators, much of the published information appears to have originated in an electronic presentation file generated by Apple and conspicuously marked as “Apple Need-to-Know Confidential.” Various parts of the file are closely paraphrased,

and in some cases echoed verbatim, in the articles, particularly the PowerPage articles. However, those articles also contained information not attributed by Apple to the presentation file.

On or about December 8, 2004, O'Grady received an email from an attorney for Apple who referred to the appearance on PowerPage of references to an unreleased Apple product, namely Asteroid. He demanded that O'Grady remove all references to this product. He asserted, “The information in these posts constitutes trade secrets that you have published without Apple’s authorization. It appears that you may be engaged in a practice of soliciting and disseminating such trade secrets. Apple also demands that you provide all information available to you regarding the sources for the posting identified above.”

On December 13, 2004, Apple filed a complaint against Doe 1, an unknown individual, and Does 2-25, whom it described as unidentified persons or entities. The gist of the claim was that one or more unidentified persons, presumably the defendants, had misappropriated a trade secret by posting technical details and images of an undisclosed future Apple product on publicly accessible areas of the Internet. This information, alleged Apple, could have been obtained only through a breach of an Apple confidentiality agreement. Apple alleged that the unauthorized use and distribution of the information constituted a violation of California's trade secret statute.

Along with the complaint Apple filed an ex parte application for orders empowering it to serve Subpoenas on Powerpage.org, Appleinsider.com, and any Internet service providers or other persons or entities identified in the information and testimony produced by Powerpage.org and Appleinsider.com. The stated basis for the application was that the true identities of the defendants cannot be ascertained without these subpoenas. The trial court granted the application for discovery, authorizing Apple to serve subpoenas on Powerpage.com and Appleinsider.com for documents that may lead to the identification of the proper defendant or defendants in this action.

On February 14, 2005, petitioners Monish Bhatia, Jason O'Grady, and Kasper Jade moved for a protective order to prevent the discovery sought by Apple on the grounds that their sources and unpublished information were protected under the reporter's shield embodied in both Article I, section 2(b) of the California Constitution and in California Evidence Code Section 1070. In support of the motion, O'Grady and Jade each declared that he had received information about Asteroid contained in my article from a confidential source or sources.

Apple opposed the motion on the grounds that (1) the newsgatherer's privilege does not apply to trade secret misappropriation; (2) if the privilege applies, it is overcome by Apple's compelling need for the information; (3) the reporter's shield provides only an immunity from contempt, not a ground for opposing discovery; and (4) petitioners are not protected by the California shield law.

The court denied petitioners' motion for a protective order. Petitioners brought this proceeding to compel the trial court to set aside its denial of the motion for protective order.

Discussion

California Reporter's Shield

A. *Introduction*

Article I, section 2, subdivision (b), of the California Constitution provides, “A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication ... shall not be adjudged in contempt ... for refusing 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 any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Evidence Code section 1070, subdivision (a), is to substantially the same effect. Petitioners assert that these provisions, sometimes known as the California reporter's shield, preclude compelled disclosure of their sources or any other unpublished material in their possession. Apple argues that petitioners may not avail themselves of the shield because (1) they were not engaged in legitimate journalistic activities when they acquired the offending information; and (2) they are not among the classes of persons protected by the statute. [18]

Since this controversy turns on questions of statutory interpretation, it is subject to review entirely independent of the trial court's ruling. In addition, because it implicates interests in freedom of expression, we review *all* subsidiary issues independently in light of the whole record.

B. *Legitimate Journalism*

Apple contends that petitioners failed to carry their burden of showing that they are entitled to invoke the shield. In particular, Apple asserts, petitioners failed to establish that they acquired the information in question while engaging in legitimate journalistic purposes, or exercising judgmental discretion in such activities. According to Apple, petitioners were engaged not in legitimate journalism or news, but only in trade secret misappropriation and copyright violations. The trial court seemed to adopt this view, writing that Mr. O'Grady took the information and turned around and put it on the PowerPage site with essentially no added value.

We decline the implicit invitation to embroil ourselves in questions of what constitutes legitimate journalism. The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here. We can think of no workable test or principle that would distinguish legitimate from illegitimate news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.

Nor does Apple supply any colorable ground for declaring petitioners' activities not to be legitimate newsgathering and dissemination. Apple asserts that petitioners merely reprinted verbatim copies of Apple's internal information while exercising no editorial oversight at all. But this characterization, if accepted, furnishes no basis for denying petitioners the protection of the statute. A reporter who uncovers newsworthy documents cannot rationally be denied the protection of the law because the publication for which he works chooses to publish facsimiles of the documents rather than editorial summaries. The shield exists not only to protect editors but equally if not more to protect newsgatherers. The primacy Apple would grant to editorial function cannot be justified by any rationale known to us.

Moreover, an absence of editorial judgment cannot be inferred merely from the fact that some source material is published verbatim. It may once have been unusual to reproduce source materials at length, but that fact appears attributable to the constraints of predigital publishing technology, which compelled an editor to decide how to use the limited space afforded by a particular publication. This required decisions not only about what information to include but about how to compress source materials to fit. In short, editors were forced to summarize, paraphrase, and rewrite because there was not room on their pages to do otherwise.

Digital communication and storage, especially when coupled with hypertext linking, make it possible to present readers with an unlimited amount of information in connection with a given

subject, story, or report. The only real constraint now is time--the publisher's and the reader's. From the reader's perspective, the ideal presentation probably consists of a top-level summary with the ability to drill down to source materials through hypertext links. The decision whether to take this approach, or to present original information at the top level of an article, is itself an occasion for editorial judgment. Courts ought not to cling too fiercely to traditional preconceptions, especially when they may operate to discourage the seemingly salutary practice of providing readers with source materials rather than subjecting them to the editors' own spin on a story.

C. *Covered Persons*

Apple contends that petitioners have failed to show that they are among the types of persons enumerated in the shield law. The law extends to a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication.(Cal. Const., art. I, § 2, subd. (b).) In seeking to place petitioners outside this description, Apple does not address the actual language of the statute. It simply asserts that (1) the shield law has been repeatedly amended to include new forms of media, but has never been enlarged to cover posting information on a website; (2) persons who post such information ... are not members of any professional community governed by ethical and professional standards; and (3) if Petitioners' arguments were accepted, anyone with a computer and Internet access could claim protection under the California Shield and conceal his own misconduct.

These arguments all rest on the dismissive characterization of petitioners' conduct as posting information on a website. We have already noted the pervasive misuse of the verb post by Apple. Here they compound the problem by conflating what occurred here--the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site's operators--with the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chat room, bulletin board system, or discussion group. Posting of the latter type, where it involves confidential or otherwise actionable information, may indeed constitute something other than the publication of news. But posting of the former type appears conceptually indistinguishable from publishing a newspaper, and we see no basis for treating it differently.

Beyond casting aspersions on the legitimacy of petitioners' enterprise, Apple offers no cogent reason to conclude that they fall outside the shield law's protection. Certainly it makes no attempt to ground an argument in the language of the law, which, we reiterate, extends to every publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication.(Cal. Const., art. I, § 2, subd. (b).) We can think of no reason to doubt that the operator of a public Web site is a publisher for purposes of this language; the primary and core meaning of to publish is to make publicly or generally known; to declare or report openly or publicly; to announce; to tell or noise abroad; also, to propagate, disseminate (a creed or system).(12 Oxford English Dict. (2d ed. 1989) pp. 784-785.) Of course the term publisher also possesses a somewhat narrower sense: One whose business is the issuing of books, newspapers, music, engravings, *or the like*, as the agent of the author or owner. News-oriented Web sites like petitioners' are surely like a newspaper or magazine for these purposes. Moreover, even if petitioners' status as publishers is debatable, O'Grady and Jade have flatly declared that they are also editors and reporters, and Apple offers no basis to question that characterization.

D. *Covered Publications*

We come now to the difficult issue, which is whether the phrase newspaper, magazine, or other periodical publication(Cal. Const., art. I, § 2, subd. (b)) applies to Web sites such as petitioners'.

Again, Apple offers little if any argument concerning the construction to be given this language, beyond the general notion that it should not extend to petitioners.

As potentially applicable here, the phrase, newspaper, magazine, or other periodical publication (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070, subd. (a)) is ambiguous. The term newspaper presents little difficulty; it has always meant, and continues to mean, a regularly appearing publication printed on large format, inexpensive paper. The term magazine is more difficult. Petitioners describe their own sites as magazines, and Apple offers no reason to take issue with that characterization. The term magazine is now widely used in reference to Web sites or other digital publications of the type produced by petitioners. Thus a draft entry in the Oxford English Dictionary defines e-zine as a magazine published in electronic form on a computer network, esp. the Internet. Although most strongly associated with special-interest fanzines only available online, *e-zine* has been widely applied: to regularly updated general-interest web sites, to electronic counterparts of print titles (general and specialist), and to subscription-only e-mail newsletters.[19] Similarly, an online dictionary of library science defines electronic magazine as [a] digital version of a print magazine, or a magazine-like electronic publication with no print counterpart (*example*: *Slate*), made available via the Web, e-mail, or other means of Internet access. And a legal encyclopedia notes that as with newspapers, the nature of magazines has changed because of the internet. Magazines may be published solely on the internet, or as electronic adjuncts of a print magazine.(58 Am.Jur.2d (2002) Newspapers, Periodicals, and Press Associations, § 5, p. 11.

Of course, in construing an ambiguous statute, courts will attempt to ascertain the Legislature's purpose by taking its words ' 'in the sense in which they were understood *at the time the statute was enacted*.' ' The term magazine was added to Evidence Code section 1070 in 1974, as was or other periodical publication. Presumably the Legislature was not prescient enough to have consciously intended to include digital magazines within the sweep of the term. By the same token, however, it cannot have meant to *ex*clude them. It could not advert to them at all because they did not yet exist and the potential for their existence is not likely to have come within its contemplation.

However, even were we to decide--which we do not--that Web sites such as petitioners' cannot properly be considered magazines for purposes of the shield law, we would still have to address the question whether they fall within the phrase other periodical publications. That phrase is obviously intended to extend the reach of the statute beyond the things enumerated (newspapers and magazines). The question is how to delineate the class of *unspecified* things thus included within the sweep of the law.

The canon of interpretation known as *ejusdem generis* is supposedly suited to just such questions. Under this doctrine, 'where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.' The doctrine is said to rest on the supposition that 'if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.' (See 2A Singer, Statutory Construction (6th ed. 2000), § 47.18, p. 289 [The doctrine of ejusdem generis calls for more than merely an abstract exercise in semantics and formal logic. It rests on practical insights about everyday language usage ... . The problem is to determine what unmentioned particulars are sufficiently like those mentioned to be made subject to the act's provisions by force of the general reference. In most instances there is a wide range of ways in which classes could be defined, any one of which would embrace all of the members in an enumeration. Germaneness to the subject and purpose of the statute, viewed in terms of legislative

intent or meaning to others, is the basis for determining which among various semantically correct definitions of the class should be given effect].

The rule of *ejusdem generis* assumes that the general term chosen by the Legislature conveys a relatively unrestricted sense. Sometimes this is so; sometimes it is not. The rule also supposes that the operative characteristics of the enumerated things may be readily discerned from the face of the statute, but that is not necessarily the case. With or without *ejusdem generis*, the real intent of an inclusive or expansive clause must ordinarily be derived from the statutory context and, if necessary, other permissible indicia of intent. *Ejusdem generis*, with its emphasis on abstract semantical suppositions, may do more to obscure than disclose the intended scope of the clause.

Here it might be suggested that the shield law only applies to periodical publications *in print*, because that was a common feature of newspapers and magazines at the time the law was enacted. Yet there is no apparent link between the core purpose of the law, which is to shield the gathering of news for dissemination to the public, and the characteristic of appearing in traditional print, on traditional paper. Indeed, the shield law manifests a clear intention *not* to limit its reach to print publications by also protecting persons connected with or employed by a radio or television station. Apple alludes to the absence of any similar explicit extension to digital publications such as petitioners', but this consideration is far from compelling. No one would say that the evening news on television, or an hourly news report on radio, is a newspaper, magazine, or other periodical publication. The broadcast media represent a radical departure from the preexisting paradigm for news sources. Because no one thought of those media as publications, an explicit extension was necessary to ensure their inclusion. Petitioners' Web sites are not only publications under various sources we have noted but also bear far closer resemblance to traditional print media than do television and radio.

For these reasons the explicit inclusion of television and radio in the shield law does not imply an exclusion of digital media such as petitioners'. As we have noted, the electorate cannot have intended to exclude those media because they did not exist when the law was enacted. The surest guide to the applicability of the law is thus its purpose and history.

As we have noted, the words magazine, or other periodical publication were added to the shield law in 1974. The purpose of the amendment, obviously, was to extend the statute's protections to persons gathering news for these additional publications. A senate committee report explained the bill and its potential effects as follows: One effect of this bill is to clear up one ambiguity in existing law and create another. The word, 'newspaper' is not defined in the existing statute. As a result it is not clear whether the law covers periodic newsletters and other such publications. Under this bill these kinds of publications would clearly be covered. If they are technically not newspapers, they are at least periodical publications. On the other hand, it is not clear how far the words 'magazine, or other periodical publication' will stretch. For instance, would it cover legislators' occasional newsletters?(Sen. Com. on Judiciary, Bill Digest of Assem. Bill No. 3148 (1973-1974 Reg. Sess.), *supra*, at p. 1.)

It is technically debatable whether petitioners' Web sites constitute periodical publications within the contemplation of the statute.[1] In its narrowest sense the term publication has tended to

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[1]Neither of the parties has directly addressed the question whether petitioners' Web sites may properly be viewed as periodical publications. Amicus curiae Bear Flag League, an association of bloggers, comes nearest to the point by citing judicial authority defining periodical publication to mean a publication appearing at regular intervals.

carry the connotation of printed matter. But petitioners' Web sites are highly analogous to printed publications: they consist predominantly of text on pages which the reader opens, reads at his own pace, and closes. The chief distinction between these pages and those of traditional print media is that the reader generally gains access to their content not by taking physical possession of sheets of paper bearing ink, but by retrieving electromagnetic impulses that cause images to appear on an electronic display.[2] Thus, even if there were evidence that the Legislature intended the term publication in this narrower sense, it would be far from clear that it does not apply to petitioners' Web sites.

In several important respects, petitioners' websites more nearly resemble traditional printed publications than they do the older electronic media commonly distinguished from printed matter by the generic term broadcasting. Radio cannot convey anything resembling printed matter, and while television can convey text it only does so incidentally, as captions or subtitles for the pictures (mostly moving) which are its raison d'etre. Moreover, the recipient of broadcast content was, traditionally, almost entirely passive. He did not read, but listened or watched. He might change stations or channels, or adjust the sound or the picture, but he could not navigate within a given presentation--could not skip to the next program or go back to the previous one. It is not surprising that these media were not brought within the term publication, which had always been applied to media that were textual, persistent, and redistributable. In these respects broadcasting more nearly resembled ephemeral productions such as plays, lectures, and concerts, whereas petitioners' Web sites have much more in common with traditional publications than they do with broadcasting.

Ambiguities also attend the term periodical as a modifier of publication in the present context. In general usage the adjective periodical is roughly synonymous with recurring or repeating. Although it sometimes connotes a degree of regularity, it may also be applied where the recurrence lacks an inflexible frequency. Thus a leading dictionary defines periodical as recurring after *more or less* regular periods of time ... .(11 Oxford English Dict., *supra*, p. 560, italics added.)

Amicus curiae Bear Flag League asserts that nothing in these definitions excludes Bloggers who publish (i.e. post) fairly regularly. However, we have avoided the term blog here because of its rapidly evolving and currently amorphous meaning. It was apparently derived from we blog, a whimsical deconstruction of weblog, a compounding of web log, which originally described a kind of online public diary in which an early web user would provide links to, and commentary on, interesting Web sites he or she had discovered. The term may now be applied to any Web site sharing some of the characteristics of these early journals. It is at least arguable that PowerPage and Apple Insider, by virtue of their multiple staff members and other factors, are less properly considered blogs than they are e-magazines, ezines, or webzines. A distinguishing characteristic from blogs is that webzines bypass the strict adherence to the reverse-chronological format; the front page is mostly clickable headlines and is laid out either manually on a periodic basis, or automatically based on the story type. However, the meanings ultimately to be given these neologisms, as well as their prospects for survival, remain unsettled.

[2]Even this distinction is permeable. A Web page may readily become printed matter by sending it to the printer typically attached to a reader's computer. The distinction may be still further blurred in the near future by the development of electronic or smartpaper, permitting the display of text and other content on a device resembling a piece of paper.

The term periodical is also commonly understood to apply to recurring *publications*, most notably magazines. In the world of publishing, periodical refers specifically to a type of serial distinguished mainly by its appearance at regular intervals.

It does not appear that petitioners' Web sites are published in distinct issues at regular, stated, or fixed intervals. Rather, individual articles are added as and when they become ready for publication, so that the home page at a given time may include links to articles posted over the preceding several days. This kind of constant updating is characteristic of online publications but is difficult to characterize as publication at regular intervals. That fact, however, has not kept an online dictionary of library science from referring to such a Web site as a periodical.

Moreover, many familiar print publications universally viewed as periodicals(or periodical publications do not appear with absolute regularity. The New Yorker Magazine is considered a periodical and a magazine (a subset of periodicals) even though it publishes 47, not 52, issues a year. Similarly, the New York Review of Books is published 20 times a year, biweekly except in January, August, and September, when monthly.

Given the numerous ambiguities presented by periodical publication in this context, its applicability must ultimately depend on the purpose of the statute. It seems likely that the Legislature intended the phrase periodical publication to include all ongoing, recurring news publications while excluding nonrecurring publications such as books, pamphlets, flyers, and monographs. The Legislature was aware that the inclusion of this language could extend the statute's protections to something as occasional as a legislator's newsletter. If the Legislature was prepared to sweep that broadly, it must have intended that the statute protect publications like petitioners', which differ from traditional periodicals only in their tendency, which flows directly from the advanced technology they employ, to continuously update their content.

We conclude that petitioners are entitled to the protection of the shield law, which precludes punishing as contempt a refusal by them to disclose unpublished information.