IN THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT

JASON D. O'GRADY, MONISH BHATIA AND KASPER JADE, Petitioners and Appellants, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, Respondents APPLE COMPUTER, INC. Real Party in Interest.	Court of Appeal No. H028579 Trial Judge: Hon. James Kleinberg Santa Clara County Superior Court Trial Court Case No. 1-04-CV-032178

BRIEF OF AMICUS CURIAE:

JACK M. BALKIN, THE CENTER FOR INDIVIDUAL FREEDOM, JULIAN DIBBELL, FEEDSTER, INC., THE FIRST AMENDMENT PROJECT, A. MICHAEL FROOMKIN, GAWKER MEDIA, INC., GOTHAMIST, LLC, GROKLAW, HAPPY MUTANTS, LLC, BEN HAMMERSLEY, JOICHI ITO, JOEL JOHNSON, KIMBERLY A. KRALOWEC, LAWMEME, REBECCA MACKINNON, JOSHUA MICAH MARSHALL, THE MEDIA BLOGGERS ASSOCIATION, MARKOS MOULITSAS, REPORTERS WITHOUT BORDERS, GLENN HARLAN REYNOLDS, PETER ROJAS, JAY ROSEN, SCOTT ROSENBERG, DOC SEARLS, SILICON VALLEY WATCHER, KEVIN SITES AND EUGENE VOLOKH

IN SUPPORT OF PETITIONERS

Lauren Gelman, Esq.
Center for Internet and Society
Stanford Law School
559 Nathan Abbott Way
Stanford, CA. 94305-8610

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

MISCELLANEOUS

SUMMARY OF THE ARGUMENT

"The First Amendment guarantees a free press primarily because of the important role it can play as 'a vital source of public information.'" *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274 (Cal. 1984) (internal citations omitted). In order to facilitate the performance of this "important role" and ensure that the "press' function as a vital source of information" is not impaired, the California Supreme Court has recognized that members of the press enjoy a qualified privilege to withhold disclosure of the identity of confidential sources. *Id*. at 275, 279.

To serve this important purpose, this "newsgatherers' privilege" should be interpreted to allow for a multitude of "vital sources of information." *Grosjean v. American Press Co*., 297 U.S. 233, 250 (1936). The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943).

That the reporters seeking to protect their confidential sources in this appeal use the Internet as their medium of communication to the public thus should have no effect on whether they are entitled to the protection the newsgatherers' privilege. Indeed, neither party here disputes for the purposes of this appeal that the Petitioners are of the class entitled to claim the privilege.[1]

Amici curiae file this brief to assure this Court that considering Petitioners as newsgatherers is correct. The applicability of the newsgatherers' privilege is determined not by the reporter's formal status as a "professional journalist," but rather by the reporter's functional conduct in gathering information with the purpose of disseminating widely to the public. Amici are providers of news and

[1] The trial court likewise assumed for the purposes of its ruling that Petitioners were entitled to the privilege.

information in an online medium, including some self-described as “bloggers,” and have illustrated to this Court that some of the most important news gathering and reporting today occurs on the Internet. See Statement of Interest of Amici Curiae, supra. The medium though which reporters communicate is simply unrelated to the Constitutional mandate of the protecting the free flow of information and the freedom of the press. Although their medium of communication differs from the daily newspaper delivered to one’s doorstep, those who produce news websites and weblogs perform the exact same function as their print colleagues. In fact, a reporter often writes for both a print newspaper and a weblog. It would make little sense to have the newsgatherers' privilege apply to reporting done for one medium but not for the other.

The Ninth Circuit adopted a functional test that properly focuses on newsgathering activities as the threshold for applying the privilege in *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Under the functional test, the court asks whether the reporter had “the intent to use materials—sought, gathered, or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process.” If both prongs are met, the privilege is applied. This two-pronged analysis goes to the heart of the newsgathering and reporting process and keeps courts out of the constitutionally nettlesome question of who is a “legitimate” journalist. California courts should apply the same test.

Amici do not argue that all those who communicate on the Internet, or all bloggers, enjoy the newsgatherer’s privilege. Rather, amici urge the Court to find that those who publish on the Internet, including weblogs, may invoke the protection of the newsgatherer’s privilege when they are performing a reporting and dissemination function.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE FREEDOM OF THE PRESS AND MANDATES AN INTENT- BASED FUNCTIONAL TEST FOR DETERMINING WHO IS COVERED UNDER THE QUALIFIED JOURNALISTS PRIVILEGE

A. The Free Press Protections Mandate a Newsgatherers' Privilege to Protect Sources' Identities

The First Amendment of the federal Constitution and the California constitutional protection of freedom of the press both recognize the role a free press plays in democratic discourse. U.S. CONST. AMEND. I and Cal. Const., art. I, § 2.[2] They guarantee a free press "primarily because of the important role it can play as 'a vital source of public information.'" *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274 (1984) (internal citations omitted).

The journalist's privilege allows reporters to promise confidentiality to sources who otherwise would not speak to them, and is a necessary corollary to the freedom of the press. "Compelling a reporter to disclose the identity of a source may significantly interfere with [the] newsgathering ability." *Id*. at 275. As the D.C. Circuit concluded,

> Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.

Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981).

---

[2] The California freedom of press clause is broader than the federal First Amendment. See *Wilson v. Superior Court,* 13 Cal.3d 652, 658 (1975), ("[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press.")

Courts have recognized that the privilege protects a source's identity from discovery even if it interferes with other judicial proceedings. "[S]ociety's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

The California Supreme Court has recognized a qualified newsgatherer's privilege in civil actions that allows "a reporter, editor or publisher" to withhold disclosure of the identity of confidential sources. *Mitchell* at 279. "Compelling a reporter to disclose the identity of a source may significantly interfere with [the] news gathering ability." *Id*. at 275; *see also Baker v. F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1972) ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis.")

B. The Court Should Adopt an Intent-Based Functional Test to Determine Who is a Journalist

The "press" to which the First Amendment and California constitution guarantees freedom is not limited to the professional, corporate media. The Framers of our Constitution would not tolerate such a limitation: the patriot pamphleteers had no corporate affiliations, no professional societies, no journalism degrees. Thus, the press must include individual publishers with no editors, professional affiliations, special education or license.

In *Lovell v. City of Griffin*, the U.S. Supreme Court understood this principle, adopting an inclusive definition of "press" in questioning whether a statute regulating distribution of certain types of literature was constitutional under the First Amendment. *Lovell v. City of Griffin*, 303 US 444 (1935). The Court held that "[T]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic

weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id*. at 452.

Deciding which newsgatherers should be eligible for the protection of the Constitutional privilege based on their job titles, employment status or medium of expression inevitably excludes too many whose work is journalism. As the Supreme Court noted in its seminal case on the newsgatherer's privilege, "Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

This Court should thus adopt the test applied by the Ninth Circuit to determine whether a reporter may invoke the newsgatherer's privilege. In *Shoen v. Shoen* 5 F.3d 1289 (9th Cir. 1993), the Ninth Circuit adopted an intent-based functional test first articulated by the Second Circuit in *von Bulow v. von Bulow*, 811 F. 2d 136 (2d Cir. 1987), which asks whether "the person seeking to invoke the privilege had the intent to use materials—sought, gathered, or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process." *Shoen* at 1293. (internal quotations omitted). This test looks at the functional elements of the interaction between the reporter and source, and the reporter's intent when she collected the information.

In applying the test, the *Shoen* Court found that a reporter could invoke the privilege regardless of the medium in which she publishes. "The journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. Investigative book authors, like more conventional reporters, have historically played a vital role in bringing to light 'newsworthy' facts on topical and controversial matters of great public importance." *Shoen* at 1292. The Court noted the particular impact of such

writers at the beginning of the nineteenth century, when "muckraking authors such as Lincoln Steffens and Upton Sinclair exposed widespread corruption and abuse in American life." *Id*.

The Court found "no principled basis for denying the protection of the journalist's privilege to investigative book authors while granting it to more traditional print and broadcast journalists." *Id* at 1293. The *Shoen* Court also addressed the fact that reporter's frequently publish in a variety of media in adopting a functional test. "Indeed, it would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic." *Id.* The court concluded, "[w]hat makes journalism journalism is not its format but its content." *Id*.

A functional intent-based test promotes First Amendment discourse by promoting certainty. Journalists whose purposes comport with the requirements of *Shoen* are able to promise sources confidentiality, and do not shy away from reporting stories that requires such promises. "A lot of big news stories might never come to light without information from people who don't want to reveal themselves publicly. So reporters promise to keep their identities secret, and the next thing you know you're reading Deep Throat's revelations about Watergate. It's a very good bargain." *ABCs of Bullying*, *Newsday*, Feb. 11, 1995, at A18; *see also Democratic Nat'l Committee v. McCord*, 356 F.Supp. 1394 (D.D.C. 1973), (denying motion to compel Washington Post reporters to reveal the identity of sources who supplied information concerning the Watergate burglary). The benefits of a "free press" are dissipated where the big news stories are lost because sources fear retaliation.

C. Online Publishers May Invoke the Newsgatherers' Privilege When They Meet the *Shoen* Test

Like the mimeograph before it, the Internet, in conjunction with weblogging software, lowers the barriers to reporting erected by older publishing technologies. The U.S. Supreme Court recognized this in *Reno v. American Civil Liberties Union*, 521 U.S. 844, (1997), finding that the First Amendment applies to the Internet: when one publishes news on the Internet that would be protected by the First Amendment in print, there is no reason to deny her the same protections. "[T]o recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible [with] fundamental first amendment principle[s]." *Nizam-Aldine v. City of Oakland*, 7 Cal. App. 4th 364, 374 (Cal. 1996) (rejecting the distinction between protections for media and non-media speakers in a defamation action).

Federal courts have likewise applied the Constitutional privilege to those acting as journalists. In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977), the appellee argued that a documentary filmmaker was "not a genuine reporter entitled to the privilege, implying a lack of ability," and the trial court found "he did not regularly engage in obtaining, writing, reviewing, editing[,] or otherwise preparing news." *Id*. at 436-437. The Tenth Circuit nevertheless applied the reporter's privilege, noting, "[t]he Supreme Court has not limited the privilege to newspaper reporting." *Id*. at 437 (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)); *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (extending the privilege to the pre-publication manuscripts of an academic); *Summit Tech., Inc. v Healthcare Capital Group, Inc.*, 141 F.R.D. 381 (D. Mass. 1992) (reporter's privilege applied to the report of an independent researcher and analyst hired by an institutional investor); *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993) (students are protected by the reporter's privilege); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 85 (E.D.N.Y.

1975) (CEO of technical medical newsletter is protected by the reporter's privilege).

The trial court properly considered the Petitioners to be newsgatherers entitled to assert the privilege, even thought they report on the Internet. Obviously, not all web publishers, or webloggers, are journalists, and therefore not all web publishers will qualify for the privilege under a functional intent-based test. But those who meet the test that is used for print publications should qualify for the journalist's privilege no matter what media they publish on.

II. CONCLUSION

For the reasons stated above, Amici Curiae respectfully urge this Court to adopt a functional intent-based test to determine that Petitioner journalists are entitled to claim the newsgatherers' privilege.

DATED: April 11, 2005

Respectfully submitted,

/s/

Lauren Gelman, Esq.
Center for Internet and Society
Stanford Law School
559 Nathan Abbott Way
Stanford, CA. 94305-8610

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c), I certify that this brief contains 2,272 words.

/s/

Lauren Gelman, Esq.
Center for Internet and Society
Stanford Law School
559 Nathan Abbott Way
Stanford, CA. 94305-8610

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I, Judy Gielniak, the undersigned, do hereby state:

I am over eighteen years of age and not a party to the instant proceedings. My business address is : Stanford Law School, 559 Nathan Abbott Way, Stanford, California 94305.

On April 11, 2005, I caused to be served the within:

BRIEF OF AMICUS CURIAE:

JACK M. BALKIN, THE CENTER FOR INDIVIDUAL FREEDOM, JULIAN DIBBELL, FEEDSTER, INC., THE FIRST AMENDMENT PROJECT, A. MICHAEL FROOMKIN, GAWKER MEDIA, INC., GOTHAMIST, LLC, GROKLAW, HAPPY MUTANTS, LLC, BEN HAMMERSLEY, JOICHI ITO, JOEL JOHNSON, KIMBERLY A. KRALOWEC, LAWMEME, REBECCA MACKINNON, JOSHUA MICAH MARSHALL, THE MEDIA BLOGGERS ASSOCIATION, MARKOS MOULITSAS, REPORTERS WITHOUT BORDERS, GLENN HARLAN REYNOLDS, PETER ROJAS, JAY ROSEN, SCOTT ROSENBERG, DOC SEARLS, SILICON VALLEY WATCHER, KEVIN SITES AND EUGENE VOLOKH

IN SUPPORT OF PETITIONERS

on the parties indicated by depositing a true copy thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the Government of the United State at Palo Alto, California, to each person listed below, addressed as follows:

Thomas E. Moore III
Tomlinson Zisko LLP
200 Page Mill Road, 2nd Floor
Palo Alto, CA 94306

Kurt B. Opsahl
Kevin S. Bankston
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

Richard R. Wiebe
425 California Street, Suite 2025
San Francisco, CA 94104
Attorneys for Petitioners Jason O'Grady, Monish Bhatia and Kasper Jade

George A. Riley, Esq.
David A. Eberhart, Esq.
O'Melveny & Myers LLP
Embarcadero Center West
275 Battery Street
San Francisco, CA 94111
Attorneys for Real Party in Interest Apple Computer, Inc.

Nfox.com, Inc.
C/o Charles F. Catania
3187 East Rochelle Avenue
Las Vegas, NV 89121
Registered Agent for Nfox.com, Inc.

Honorable James Kleinberg
Santa Clara County Superior Court
Department 14
191 North First Street
San Jose, CA 95113
(Via hand delivery pursuant to Cal. R. App. Pro. 40.1, and Cal. R. App. Pro. 44(b)(2).)

Executed on April 11, 2005 at Stanford, California. I declare under penalty of perjury that the foregoing is true and correct.

/s/
JUDY GIELNIAK