

The Free Flow of (Digital) Information: The Apple Computer Case

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Justice Potter Stewart's resonant opinion in *Branzburg v. Hayes* asserts that "the reporter's constitutional relationship with his source stems from the broad societal interest in a full and free flow of information to the public." 408 U.S. 665, 725 (1972). Although Stewart was writing in dissent, similarly strong statements recognizing the importance of available information to a free people can be found in the majority opinions of other Supreme Court cases, as well as in the words of figures as significant as James Madison. *Id.*, at 723. In support of that value, courts and legislatures have created and applied legal rules to protect the transmission of information to the public. Technology and social practices change the way that information travels to the public, and such changes require that the rules be revisited, revised, and possibly extended.

In *O'Grady v. Superior Court of Santa Clara County (Apple Computer Inc.)*, 139 Cal. App. 4th 1423 (2006), a California state appeals court extended conditional First Amendment protection to the confidentiality claims of a Web publisher accused of revealing trade secrets of the Apple Computer company. The decision arose from an interlocutory appeal of a denied discovery motion filed on behalf of Jason O'Grady, publisher of O'Grady's *PowerPage*, a Web page devoted to Macintosh products and services. In November 2004, *PowerPage* published several articles detailing rumored features of a new Apple product called Q97, or "Asteroid," an audio interface for Apple's digital music software GarageBand. The articles appearing on *PowerPage* and *Apple Insider*, another site devoted to Apple news, described the features and included artists' renditions of the proposed product as well as some background on the product's development and marketing strategy. Shortly thereafter, attorneys for Apple requested that O'Grady remove the stories and references to Asteroid, which they described as proprietary trade secrets, and disclose the sources of that information. Apple submitted an internal electronic presentation file marked "Confidential," an alleged primary source of the stories.

On December 13, 2004, Apple filed a complaint against a number of "Does," unidentified defendants who had allegedly breached confidentiality agreements to disseminate the information appearing in the stories. Apple caused the host of *PowerPage*'s e-mail account, Nfox.com, to be served with subpoenas in February 2005 seeking the identity of the unknown defendants. In response, O'Grady and two other petitioners affiliated with the online publications sought a protective order to prevent enforcement of the subpoenas and further discovery requests, citing several state and federal grounds protecting the digital communications from disclosure.

In a sixty-nine-page decision for the Sixth Appellate District of California, Judge P. J. Rushing directed the lower court to grant the requested order. The judge sided with the petitioners on questions of federal and state law. After resolving sev-

eral threshold issues, Judge Rushing concluded that the subpoenas served upon *PowerPage's* e-mail service provider cannot be enforced without violating the federal Stored Communications Act, which prohibits the disclosure of stored digital information, such as e-mail, outside of certain enumerated exceptions. Furthermore, the appeals court ruled that the lower court should have issued the protective order to the petitioners based on the California reporter's shield and the privilege against compulsory disclosure of confidential sources found in the First Amendment.

The question of whether the Constitution protects a reporter's privilege against disclosure of confidential sources has received considerable public attention recently, albeit in a very different context, due to the jailing of *New York Times* reporter Judith Miller for failure to comply with a grand-jury subpoena. Despite the Supreme Court's clear decision against the existence of an unconditional privilege in *Branzburg*, many lower courts have since construed the majority opinion and Justice Lewis Powell's fifth-vote concurrence to recognize a qualified First Amendment privilege for the purposes of news gathering outside of the context of grand juries. Different circuits have developed privileges of varying breadth, but the Ninth Circuit's is among the broadest related to civil discovery. See *Farr v. Pitchess*, 522 F.2d 464 (1973).

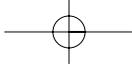
Beyond the federal guarantee, most states have legislated some form of reporter's shield protection. California provides for a reporter's shield in its constitution and evidence code. *O'Grady* at 1456. Thus, in spite of the U.S. Supreme Court's rejection of a First Amendment privilege for members of the press in the narrow case of a criminal-grand-jury subpoena, the existence of such a privilege in civil proceedings has considerable support in federal and state law. California state courts recognized and applied a test governing access to that privilege in *Mitchell v. Superior Court*, 37 Cal.3d 268 (1984).

For the state reporter's shield and the federal constitutional privilege to be relevant in the present case, however, the appeals court had to answer the vital question of whether *O'Grady* and his fellow petitioners are entitled to invoke the privilege. Apple contended that the petitioners were not eligible for either the state or the federal privilege because they were not engaged in legitimate journalism, nor were they among the group of persons covered by the state shield or federal privilege; Apple also argued that the Web pages in question were not covered publications. Rather than discuss what is or is not legitimate journalism, Judge Rushing characterized the shield law and the First Amendment as protecting "the gathering and dissemination of news," which is identified "not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the mimetic marketplace." *O'Grady*, at 1457 (emphasis in original). Apple argued that because the petitioners chose to reproduce some of the materials verbatim, the publication lacked sufficient editorial oversight to qualify for protection, but the appeals court declared that the availability of digital media and hyperlinking made such presentation more feasible and potentially valuable than the more heavily edited dissemination to which physical print media are limited.

The California shield 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). Perhaps the most significant issue before the court was whether a Web page falls within the class of “periodical publication[s]” covered by the law. Noting that Web technology permits publication on a near-constant basis, rather than at regular intervals, Judge Rushing construed the California statute to include within the definition “all ongoing, recurring news publications while excluding nonrecurring publications such as books, pamphlets, flyers, and monographs.” *O’Grady*, at 1466. Such a definition, however, threatens to confirm Justice White’s warning in *Branzburg* that “almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he forced to make disclosures.” *Branzburg*, at 705.

As *O’Grady* was found to qualify for the state reporter’s shield, the appeals court had no difficulty concluding that he and the other petitioners qualify for the First Amendment privilege as well. Nevertheless, applying *Mitchell*, Apple’s request for disclosure might still be warranted if its need for the information outweighed the interest in confidentiality. The factors identified in *Mitchell* include the role of the reporter in the litigation, the importance of the information to the plaintiff’s cause of action, the unavailability of other sources for the information, and the importance of confidentiality in the case. The strength of the plaintiff’s prima facie case was also to be considered. The appeals court concluded on the basis of these factors that while the information sought by Apple was clearly central to its claim of trade-secret misappropriation and the prima facie case that an unknown party disclosed trade secrets in violation of a confidentiality agreement, both weighing in favor of requiring disclosure of the sources, the other factors favored *O’Grady*’s claim of privilege. Of particular importance is the appeals court’s conclusion that the information contained in the disputed articles, information deemed trade secrets by Apple, relates more to the company’s market-entry decisions than to any proprietary technology. The “journalistic” nature of the disclosure in the articles was found to weigh more heavily in favor of extending confidentiality than in favor of Apple’s pursuit of those responsible for disclosing that information.

Justice White’s expressed concern in *Branzburg* over the difficulty of limiting the applicability of a reporter’s privilege hovers over the California appeals decision. Given that the court declined to address the question of what “legitimate journalism” is, the conclusion that *O’Grady* and *PowerPage* qualify for the reporter’s protection appeared to rest either on the intent of the petitioners to act as journalists or on the potential “newsworthiness” of the stories based on their confidential sources. Nevertheless, Judge Rushing’s opinion clearly sympathizes with Justice Stewart’s opinion in *Branzburg*, quoted above, in placing substantial weight on “the deeply rooted constitutional right to share and acquire information.” *O’Grady*, at 1476. Extending the availability of a reporter’s privilege to Internet publishers and publica-



tions may be a valid and necessary recognition of changes in the way that valuable information is disseminated in the digital age, but it threatens to impose substantial burdens on the courts that must contend with its contours. Balancing tests typically require more-searching review of facts and law than categorical exclusions, and exercise of the privilege itself may have significant effects on the reach of civil discovery. In addition, the ease with which digitally represented information can be forwarded and spread threatens to multiply contentions over discovery issues. **jsj**

