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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JASON O'GRADY et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; APPLE COMPUTER, INC., Real Party in Interest.	H028579 (Santa Clara County Super. Ct. No. CV032178)

Apple Computer, Inc. (Apple), a manufacturer of computer hardware and software, 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 and to the email service provider for one of the publishers. The publishers moved for a protective order to prevent any such discovery. The trial court denied the motion on the ground that the publishers had involved themselves in the unlawful misappropriation of a trade secret. We hold that this was error because (1) the subpoena to the email service provider cannot be enforced consistent with the plain terms of the federal Stored Communications Act (18 U.S.C. §§ 2701-2712); (2) any subpoenas seeking unpublished

In neither of these cases was there any pending effort to obtain discovery from the complaining party. As a result, questions about the propriety of discovery were necessarily hypothetical and academic. Here, Apple has done more than give petitioners cause for "apprehension" about discovery. It has sought and obtained an order authorizing discovery against them. This moved the prospect of discovery out of the realm of the speculative and into the imminent. Apple has never abandoned the power thus acquired. On the contrary, it has impliedly reserved that power by stating that if it obtains the information it seeks from Nfox and Kraft, it "*may* have no need to send discovery directly to Petitioners at all." (Italics added.) As we have held, Apple cannot obtain the information it seeks from Nfox and Kraft. In any event, the mere possibility that it might not exercise the authority it deliberately sought and obtained does not render the dispute too ethereal for adjudication.

Again, one objective of the doctrine of ripeness is to use judicial resources efficiently. We have held that Apple may not obtain the discovery it seeks from Nfox and Kraft without causing them to violate federal law. To now hold that there is no ripe controversy concerning Apple's rights against petitioners would simply produce a multiplicity of proceedings as it returned to the trial court, subpoenaed petitioners directly, and forced them to bring a second motion for a protective order. We discern no reason to reserve half of this controversy for later adjudication.

We conclude that Apple's discovery rights against petitioners are ripe for adjudication.

IV. *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. (*City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1212.) In addition, because it implicates interests in freedom of expression, we review *all* subsidiary issues, including factual ones, independently in light of the whole record. (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1021.) While this standard does not permit an original evaluation of controverted live testimony, it is the equivalent of de novo review where, as here, the trial court decided the case on a paper record fully duplicated, as this one is, before the reviewing court. (*Ibid*.)

B. "Legitimate" Journalism

Apple contends that petitioners failed to carry their burden of showing that they are entitled to invoke the shield. (See *Rancho Publications, supra,* 68 Cal.App.4th at

[18] Apple also notes that the shield has been described as only a defense to a contempt judgment and not a substantive privilege. (See *KSDO v. Superior Court* (1982) 136 Cal.App.3d 375, 379-380; *Rancho Publications, supra,* 68 Cal.App.4th at p. 1543; *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 274.) Apple offers this point, however, only with respect to the subpoenas already served on Nfox and Kraft, not those threatened against petitioners.

p. 1546, quoting *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 806, fn. 20 (*Delaney*), italics omitted [burden is on journalist asserting immunity to " 'prove [that] all the requirements of the shield law have been met' "].) In particular, Apple asserts, petitioners failed to establish that they acquired the information in question while "engag[ing] in legitimate journalistic purposes," or "exercis[ing] judgmental discretion in such activities." (*Rancho Publications*, *supra*, at p. 1545.) 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 journalis[m]." 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 pre-digital 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.

This view is entirely consistent with *Rancho Publications*, *supra*, 68 Cal.App.4th 1538, on which Apple relies heavily. The court there held that the publisher of an "advertorial," i.e., a paid advertisement in the form of editorial content (*id*. at p. 1541, fn. 1), could not claim the newsgatherer's shield where there was no evidence that the publisher had done anything more than *sell space* on its pages to the anonymous originators of an allegedly tortious publication (*id.* at pp. 1545-1546). The court did not find a categorical exemption from the privilege, but held instead that the publisher had

failed to carry its burden of showing that it had acquired the information sought while engaged in activities related to newsgathering. (*Id*. at p. 1546.)Apple's attempt to bring the present case within this holding must fail because there is no basis to conclude, and it does not appear, that petitioners simply opened their Web sites to anonymous tortfeasors, for a fee or otherwise. Rather it appears that petitioners came into possession of, and conveyed to their readers, information those readers would find of considerable interest.

The result in *Rancho Publications* turns on the fact not that the publisher set out source material verbatim, but that it relinquished *any* newsgathering function, sold its editorial prerogatives to another, and acted as nothing more than a paid mouthpiece. This record contains no suggestion that petitioners provided such a service. Rather, like any newspaper or magazine, they operated enterprises whose *raison d'etre* was the dissemination of a particular kind of information to an interested readership. Toward that end, they gathered information by a variety of means including the solicitation of submissions by confidential sources. In no relevant respect do they appear to differ from a reporter or editor for a traditional business-oriented periodical who solicits or otherwise comes into possession of confidential internal information about a company. Disclosure of that information may expose them to liability, but that is not the question immediately of concern; the point here is that such conduct constitutes the gathering and dissemination of news, as that phrase must be understood and applied under our shield law.

C. Covered Persons

Apple contends that petitioners have failed to show that they are among "the types of persons enumerated in the [shield] law." (*Delaney*, *supra*, 50 Cal.3d at p. 805, fn. 17.) 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) "[p]ersons 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 and allied amici. (See pt. II(E), *ante*.) 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, chatroom, 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 theoretical 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 "[t]o 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; one who undertakes the printing or production of copies of such works, and their distribution to the booksellers and other dealers, or to the public. (Without qualification generally understood to mean a *book-publisher* or (in the *U.S.*) also a newspaper proprietor.)" (*Id*. at p. 785, first italics added.) 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."[20] And a legal encyclopedia notes that "[a]s 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, fn. omitted.)

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*.' " ' " (*Resure, Inc. v. Superior Court* (1996) 42 Cal.App.4th 156, 164, quoting *People v. Fair* (1967) 254 Cal.App.2d 890, 893, italics added; see *People v. Williams* (2001) 26 Cal.4th 779, 785.) The term "magazine" was added to Evidence Code section 1070 in 1974, as was "or other periodical publication." (Stats. 1974, ch. 1456, § 2, p. 3184.) 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,

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[19] Oxford English Dictionary (Draft Entry Sept. 2001) <http://dictionary.oed.com/cgi/entry/00305686?single=1&query_type=word&queryword=e-zine&first=1&max_to_show=10> (as of May 23, 2006).

[20] Reitz, ODLIS—Online Dictionary for Library and Information Science, <http://lu.com/odlis/odlis_e.cfm#electronicmagazine> (as of May 23, 2006).

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.' " (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 331, fn. 10; *Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 819.) 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.' " (*Ibid*.) This may seem a tortuous and uncertain route to an inference about legislative intent, grounded as it seems to be in facile abstractions drawn from dubious semantic generalities. (See 2A Singer, Statutory Construction (6th ed. 2000), § 47.18, p. 289, fn. omitted ["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 "person[s] connected with or employed by a radio or television station." (Cal. Const., art. I, § 2, subd. (b); Evid. Code, § 1070, subd. (b).) 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. They consist primary of text, sometimes accompanied by pictures, and perhaps occasionally by multimedia content. Radio consists entirely of sounds, and television consists almost entirely of sounds and pictures. While television could be used to deliver text, it almost never is.

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. (Stats. 1974, ch. 1323, § 2, p. 2877; Stats. 1974, ch. 1456, § 2, p. 3184.) The purpose of the amendment, obviously, was to extend the statute's protections to persons gathering news for these additional publications. (Sen. Com. on Judiciary, Bill Digest of Assem. Bill No. 3148 (1973-1974 Reg. Sess.) hrg. date Apr. 16, 1974, p. 1 ["This bill broadens the scope of the privilege to include individuals connected with a magazine or other periodical"].) A senate committee report explained the bill and its potential effects as follows (see *In re J.W.* (2002) 29 Cal.4th 200, 211 ["To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice"]): "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?" (*Id.* at p. 1.)

It is "technically" debatable whether petitioners' Web sites constitute "periodical publication[s]" within the contemplation of the statute.[21] In its narrowest sense the term

[21] Neither of the parties has directly addressed the question whether petitioners' Web sites may properly be viewed as "periodical publications." Amicus Bear Flag League, an association of "bloggers," comes nearest to the point by citing judicial

"publication" has tended to 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.[22] Thus, even if there were evidence that the Legislature

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authority defining "periodical publication" to mean a publication appearing at regular intervals. (*Houghton v. Payne* (1904) 194 U.S. 88, 96-97 [holding literary series to constitute books and not periodical publications, for purposes of postal regulations, due to lack of "continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them"]; *Fifeld v. American Auto. Ass'n* (D.C. Mont. 1967) 262 F.Supp. 253, 257 [annual tour guide was "book," not "periodical," so as to require notice of claimed defamation to publisher under state law].)

Amicus Bear Flag League asserts that nothing in these definitions "exclude[s] 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. (See Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Blog> (as of May 23, 2006).) The term may now be applied to any Web site sharing some of the characteristics of these early journals. (See *ibid*.) 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." (See Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Webzine> (as of May 23, 2006) ["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.

[22] 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

intended the term "publication" in this narrower sense, it would be far from clear that it does not apply to petitioners' Web sites. Thus the online library science dictionary to which we have previously adverted defines "electronic publication" to include Web sites.[23]

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

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or "smart" paper, permitting the display of text and other content on a device resembling a piece of paper. (See Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Electronic_paper (as of May 23, 2006) ["There are many approaches to electronic paper, with many companies developing technology in this area."].) In a decade or two, a traveler may pull a sheet from his briefcase and use it to retrieve and read that morning's news, then mark up a draft agenda for an upcoming meeting, then work on a crossword puzzle, then resume a novel he was reading the night before. Only a sophist could relish the question whether content so displayed is "printed" matter.

[23] See ODLIS, *supra*, at <http://lu.com/odlis/odlis_e.cfm#elecpublication> (as of May 23, 2006).

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." As we have noted, 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'être. 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.

dictionary defines "periodical" as "[r]ecurring after *more or less* regular periods of time . . . ." (11 Oxford English Dict., *supra*, p. 560, italics added.)

The term "periodical" is also commonly understood to apply to recurring *publications*, most notably magazines. (See 11 Oxford English Dict., *supra*, p. 560.) In the world of publishing, "periodical" refers specifically to a type of "serial" distinguished mainly by its appearance at regular intervals. (See Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 864 ["published with a fixed interval between the issues or numbers"]; American Heritage College Dict. (3d ed. 1997), p. 1016 ["[p]ublished at regular intervals of more than one day"].)[24]

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

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[24] See also ODLIS, *supra*, at <http://lu.com/odlis/odlis_s.cfm#serial> (as of May 23, 2006) [defining "serial" as "[a] publication in any medium issued under the same title in a succession of discrete parts, usually numbered (or dated) and appearing at regular or irregular intervals with no predetermined conclusion."]; *id*. at <http://lu.com/odlis/odlis_p.cfm#periodical> (as of May 23, 2006) ["periodical" as "[a] serial publication . . . issued . . . more than once, generally at regular stated intervals of less than a year"].

In *It's In the Cards, Inc. v. Fuschetto*, *supra*, 535 N.W.2d 11, an intermediate appellate court held that messages posted on a bulletin board system were not a "periodical" for purposes of Wisconsin's law requiring a demand for retraction of allegedly libelous matter. We certainly agree with this holding, though we take issue with some of the court's reasoning, including its refusal to analogize online text to the printed matter constituting pre-digital "periodicals."

"regular intervals." That fact, however, has not kept an online dictionary of library science from referring to such a Web site as a "periodical."[25]

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. (*The New Yorker* (March 6, 2006), p. 93 ["published weekly (except for five combined issues . . .)"].) Similarly, the New York Review of Books is "[p]ublished 20 times a year, biweekly except in January, August, and September, when monthly." (*New York Review of Books* (Feb. 23, 2006), p. 3.)

Given the numerous ambiguities presented by "periodical publication" in this context, its applicability must ultimately depend on the purpose of the statute. (See *McGarity v. Department of Transportation* (1992) 8 Cal.App.4th 677, 682-683 [purpose of statute limiting cross-examination of experts warranted broad construction of "similar publication" and justified its application to crash impact study although it "was apparently not published for mass consumption"].) It seems likely that the Legislature intended the phrase "periodical publication" to include all ongoing, recurring news publications while excluding non-recurring 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. (See Sen. Com. on Judiciary, Bill Digest of Assem. Bill No. 3148 (1973-1974 Reg. Sess.) hrg. date Apr. 16, 1974, p. 1.) If the Legislature was prepared to sweep that broadly, it must have intended that the statute protect publications like petitioners', which differ

[25] ODLIS, *supra*, at <http://lu.com/odlis/odlis_p.cfm#periodical> (as of May 23, 2006) ["Some periodicals are born digital and never issued in print (example: *Slate*)"].

from traditional periodicals only in their tendency, which flows directly from the advanced technology they employ, to continuously update their content.[26]

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.

V. Constitutional Privilege

A. Availability to Online Journalists

Petitioners also assert that the discovery sought by Apple is barred, on the present record, by a conditional privilege arising from the state and federal guarantees of a free press. The gist of the privilege is that a newsgatherer cannot to be compelled to divulge the identities of confidential sources without a showing of need sufficient to overbalance the inhibitory effect of such disclosure upon the free flow of ideas and information which is the core object of our guarantees of free speech and press. This argument raises two subsidiary questions: (1) Is such a privilege available to petitioners? (2) If so, has Apple made a sufficient showing to overcome it?

Because a constitutional privilege is implicated, we must subject the trial court's order to the relatively searching standards of " 'constitutional fact review.' " (*DVD Copy Control Association v. Bunner* (2003) 31 Cal.4th 864, 889 (*Bunner*), quoting *Rankin v. McPherson* (1987) 483 U.S. 378, 385, fn. 8.) " '[W]here a Federal right has been denied as the result of a [factual] finding . . . or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the

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[26] The nearest analogue in traditional print media is probably the specialized looseleaf services familiar to lawyers and, we presume, other professions. We have no occasion to consider whether such publications should be deemed "periodical," but if they are not it is because they are books, which the Legislature pointedly *omitted* from the statute. The device of continuously updating with looseleaf inserts was devised not as a way not of publishing wholly new content in the manner of a magazine, but of keeping an existing *book* current by a means less costly than printing and binding a whole new volume.

Federal question, to analyze the facts,' the reviewing court must independently review these findings. [Citation.] '[F]acts that are germane to' the First Amendment analysis 'must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact.' [Citation.] And 'the reviewing court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " ' [Citations.]" (*Bunner*, *supra*, 31 Cal.4th at pp. 889-890.) We must therefore " 'make an independent examination of the entire record' [citation], and determine whether the evidence in the record supports the factual findings necessary" to sustain the trial court's order denying a protective order. (*Id.* at p. 890.)[27]

The leading exposition of this privilege as applied in this state appears in *Mitchell*, *supra*, 37 Cal.3d 268, a libel action in which the defendant newsmagazine and its reporters sought to avoid compelled disclosure of confidential sources by asserting "a nonstatutory privilege based on the broad protections for freedom of the press enshrined in the United States Constitution and the correlative provision (art. I, § 2, subd. (a)) of the California Constitution." (*Id.* at p. 274.) The court held that "in a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources. The scope of that privilege in each particular case will depend upon the consideration and weighing of a number of interrelated factors." (*Id.* at p. 279.)

Before turning to the relevant factors we must of course decide whether petitioners are reporters, editors, or publishers for purposes of this privilege. Our answer to this question is anticipated by the preceding discussion of the California reporter's shield.

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[27] Although the court spoke in terms of the standard of review applicable to claimed infringements on the *federal* right to free speech, we have little doubt that the same standard applies to infringements of our state constitutional guarantee.

Whereas we there had to construe relatively specific statutory language, we are concerned here with broad constitutional principles. In that light, we can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media. It is established without contradiction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.

Indeed, we do not understand Apple to contend that the constitutional privilege is inapplicable to petitioners. Its argument seems to assume that petitioners are within the zone of the privilege's protection and that the pivotal question is whether the weighing process discussed in *Mitchell* supports disclosure. Similarly, the brief of amici Intel Corporation and Business Software Alliance "assumes (without taking the position) that petitioners qualify in this instance as 'media' and 'reporters.' " Amicus Internet Technology Industry Council (ITIC) does not contest the point either, but contends that our weighing of the relevant factors should be colored by the unique dangers the internet poses to the preservation of trade secrets.[28] We agree with these implied concessions, and with petitioners' arguments, that petitioners are reporters, editors, or publishers entitled to the protections of the constitutional privilege.[29] If their activities and social

[28] ITIC notes that the internet has "contribute[d] to dramatic increases in business productivity. Accordingly, ITIC and its members strongly favor policies that protect the flow of free speech across the Internet." It then goes on to suggest that the supposedly unique hazard posed by the internet to trade secrets warrants special restrictions on the constitutional privilege in this context.

[29] Although the point is not argued, the record may leave some uncertainty as to the role and status of petitioner Bhatia. He is declared by "Kasper Jade" to be the "publisher" of another Macintosh-related Web site and the provider of hosting services, including "systems administration [and] bandwidth allocation," to Apple Insider. We assume, without deciding, that he is a "publisher" of Apple Insider for purposes of the privilege.

function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial.

B. Application of Mitchell Factors

1. Nature of, and Role in, Litigation

We turn then to the balancing process outlined in *Mitchell*. The first factor identified there was "the nature of the litigation and whether the reporter is a party." (*Mitchell*, *supra*, 37 Cal.3d at p. 279.) Discovery is peculiarly appropriate when the reporter is a defendant in a libel action, because successful assertion of the privilege may shield the reporter himself from a liability he ought to bear. (*Ibid*.) This danger arises from the requirement, in many libel cases, that the plaintiff prove the reporter's publication of the challenged statements with knowledge of their falsity or reckless disregard for the truth. (*Id.* at pp. 279-280.) That burden may be impossible to carry if the statements can only be attributed to an unidentified source whose reliability cannot be evaluated. (*Ibid*.) Even in those cases, however, " 'disclosure should by no means be automatic.' " (*Id.* at p. 280, quoting *Zerilli v. Smith* (D.C.Cir. 1981) 656 F.2d 705, 714.)

Here this factor obviously favors nondisclosure. Of course this is not a libel action, but more fundamentally, petitioners are not defendants. If they were defendants, an analogy might be drawn between the requirement of a knowing and reckless falsehood in libel, and the various mental states that may be elements of a claim for violation of the trade secret laws. (See Civ. Code, § 3426.1, subd. (b).) But so long as petitioners are not parties, the validity of such a comparison is academic.

Apple argues that ". . . Petitioners may, in fact, be one or more of the Doe Defendants named in the complaint." This assertion is worse than speculative; it contradicts Apple's own allegations that the Doe defendants are persons unknown to Apple. Petitioner O'Grady, at least, is not unknown to Apple, and was not unknown when the complaint was filed. Moreover Apple has repeatedly accused petitioners, if somewhat obliquely, of misappropriating trade secrets. Thus Apple asserted below that