

Case No.: H028579

IN THE COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Jackson O'Grady, *et al.*,

Petitioners,

vs.

Superior Court of the State of California, County of Santa Clara,

Respondent,

Apple Computer, Inc.

Real Party in Interest

Appeal from the Superior Court of Santa Clara County,
Hon. James Kleinberg (Case No. 1-04-CV-032178)

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND
PROPOSED AMICUS BRIEF OF BEAR FLAG LEAGUE**
(for Petitioners in Part and Real Party in Interest in Part)

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APPLICATION TO FILE AMICUS CURIAE BRIEF AND
STATEMENT OF INTEREST OF AMICUS CURIAE

A. Introduction.

Pursuant to California Rule of Court 13(c)(1), the Bear Flag League (“League”) respectfully requests leave to file its proposed *amicus curiae* brief.¹ The League is an unincorporated association of current and former residents of the State of California who operate and/or contribute to 80 separate weblogs,² also known as “Blogs.” The League was formed in July 2003 in order to collaborate and publish articles concerning California culture, current events, legal issues and politics for the reading public.

B. The League’s Interest in These Proceedings

The League members are all Bloggers. The League members rely on both confidential and non-confidential sources of information for use in preparing news articles for dissemination to the general public. In some instances, a League member merely provides its readers with internet hyperlinks from the Blog to a group of news articles regarding a particular topic. However, in many instances, League members interview confidential and non-confidential sources for use in

¹ Pursuant to California Rule of Court 13(c)(3), the League has elected to combine its application with its proposed brief.

² A complete list of the association’s membership is attached to this application and brief as Exhibit “A” and may also be found at www.BearFlagLeague.com.

original writings on their Blogs.³ In this latter respect, the League members' activities are properly characterized as the gathering and reporting of news.⁴

The League members are similarly situated to the Petitioners. As publishers of online magazines who may rely, in part, on confidential sources, any one of the League members could be faced with responding to the type of discovery sought or planned by the Real Party in Interest, Apple Computer, Inc. ("Apple.") The League members will likely in the future need to invoke the federal qualified privilege arising from the First Amendment of the United States Constitution and/or the reporter's shield arising from the California Constitution and Evidence Code. Moreover, the resolution of the instant proceeding will directly impact the League members' ability to gather and report on news. An order by this Court denying the writ sought by Petitioners on its merits would have a chilling effect on the League members' ability to gather information from anonymous or confidential sources. On the other hand, an order by this Court denying the writ on the grounds of ripeness would ensure that the issue of whether

³ A well-publicized example of a Blog using confidential sources to report on a major news story concerns the Blog known as "Captain's Quarters" found at www.captainsquartersblog.com. Captain's Quarters has garnered national attention for reporting on a major political scandal involving the Canadian liberal party. Captain's Quarters relied on confidential sources who supplied it with information in the face of a Canadian government imposed news blackout. *See A Blog Written From Minneapolis Rattles Canada's Liberal Party*, Clifford Krauss, New York Times, April 6, 2005. This is the very same type of news gathering and reporting activity that the League routinely engages in on a daily basis.

⁴ Admittedly, as is the case with most Bloggers, many League members use their Blogs periodically to express opinion, commentary or items of a personal nature.

Bloggers can invoke the federal qualified privilege or California’s reporter’s shield is decided based on a fully developed record. For the all of these reasons, the League has a substantial interest in the present matter.

C. The Need for Further Briefing.

The Respondent Superior Court assumed for purposes of the challenged order issued below that “Bloggers” are journalists and, therefore, theoretically protected by the qualified journalists’ privilege under federal law and the absolute reporter’s shield privilege under California law. Further briefing is needed on the applicability of these constitutional and statutory protections to Bloggers who perform the same function as traditionally defined print and broadcast journalists. The opposition brief submitted by Apple does not even mention the word “Blogger” and the briefs by Petitioners only briefly touch on the issue.

For the foregoing reasons, the League respectfully requests that the Court grant leave to file the proposed *amicus curiae* brief below.

However, the primary activity of the League’s Bloggers is to gather and report news from both confidential and non-confidential sources.

LEGAL DISCUSSION

“Freedom of the press, or, to be more precise, the benefit of freedom of the press, belongs to everyone - to the citizen as well as the publisher... The crux is not the publisher’s ‘freedom to print;’ it is, rather, the citizen’s ‘right to know’.”⁵

I.

SUMMARY OF ARGUMENT

The constitutional protections provided to journalists do not apply to all Bloggers. There are quite a few Bloggers who are neither news gatherers nor news reporters. However, those Bloggers engaged in newsgathering activities with the intent to disseminate news to the public are entitled to the same level of protection afforded to traditional journalists. Hence, the League supports the Petitioners. See Part II below. The League likewise believes that the Federal Stored Communications Act should preclude Apple from issuing subpoenas to Petitioners’ internet service providers. See Part III below. To ascertain the proper balancing of the competing interests of free dissemination of information and protection from false information, the Court should follow the example of the Communications Decency Act and protect the disseminator while imposing the risk of liability on the source. See Part IV below.

The League, however, concurs with Apple, that this case is *not* ripe for review with respect to the ability of Bloggers to raise the federal qualified

⁵ *Arthur Hays Sulzberger*, American Newspaper Publisher, Convocation Speech for 2004 Elijah Parish Lovejoy Award at Colby College.

privilege or California's reporter's shield. Quite frankly, without actual subpoenas served on actual Bloggers, the Respondent Superior Court and this Court have an inadequate record with which to make a determination of which protections, if any, apply to Bloggers. The ripeness doctrine exists in order to avoid a waste of judicial resources resolving hypothetical situations that may never come to pass. With respect to the present dispute, this Court might issue an opinion regarding the scope of permissible discovery directed to Petitioners in their capacity as non-parties. Following remand, it is entirely possible that subpoenas are never served on Petitioners. Alternatively, it is possible that the non-party Petitioners will, following this Court's disposition, become parties under Apple's theory of misappropriation of trade secrets. In that event, the standards applicable to the federal privilege would no longer be confined to the scope of permissible *discovery* directed to a non-party. Instead, the court below will be faced with issues concerning the scope of discovery as well as constitutional limits of liability facing Petitioners as parties.⁶ Unless and until these issues are given time to ripen, this Court's resources would be wasted on adjudicating hypothetical issues that may never come to pass or whose factual premises may change dramatically.

To the extent that Petitioners are seeking relief from a protective order that, on its face, does not apply to subpoenas that have yet to be served, this Court

⁶ Under *Mitchell v. Superior Court*, 37 Cal. 3d 268 (1984), whether the individual responding to discovery is a party or is a non-party is a factor in balancing the competing interests of the right to conduct discovery and the privileges afforded to members of the press.

should deny the relief requested by Petitioners. However, to the extent that the Petitioners are seeking relief as to the actual subpoenas issued to their internet service providers, the League supports the relief requested by Petitioners as set forth in more detail below. Finally, in the event this Court finds that an actual, justiciable controversy exists, the Court should not focus on the fact the Petitioners published online rather than in print or over the airwaves, in determining the propriety of Petitioners' acts.

II.

BLOGGERS WHO GATHER INFORMATION WITH THE INTENT OF DISSEMINATING NEWS TO THE PUBLIC ELECTRONICALLY ARE ENTITLED TO THE SAME CONSTITUTIONAL AND STATUTORY PROTECTIONS AS TRADITIONAL PRINT AND BROADCAST JOURNALISTS

A. California's Absolute "Reporter's Shield" Immunizes Bloggers Engaged in Journalistic Activities from the Court's Contempt Powers

Since 1980, California's constitution⁷ has conferred absolute immunity from the contempt power of the court for refusing to divulge confidential sources. *In re Willon*, 47 Cal. App. 4th 1080, 1090 (1996).

⁷ Prior to 1980, the reporter's shield was only codified in statutes. *In re Willon*, 47 Cal. App. 4th 1080, 1090 (1996).

“On its face, article I, section 2(b) [of the California Constitution] does appear to provide *absolute protection to those engaged in the newsgathering process*; it is couched in clear mandatory language without qualification. Indeed, in civil proceedings the provision has been construed to provide ‘the highest possible level of protection’ from disclosure of materials sought by a civil litigant.”

Id. at 1091 (1996) (emphasis added).

On its face, the Respondent Superior Court’s order below did not address any subpoenas served on any Bloggers. However, other language in the trial court’s order suggests that the Respondent Superior Court adjudicated that, because of the character of the information posted on the websites, the Petitioners have no right to assert either the federal privilege or California reporter’s shield to protect their confidential sources of information. For this reason, the League addresses the question of whether a Blogger should be entitled to invoke the same protections afforded to traditional print and broadcast journalists.

The trial court’s order below swept aside a Blogger’s right to invoke federal and California constitutional protections with one phrase: “...there is no license conferred on anyone to violate valid criminal laws.” March 11, 2005 Order, p. 11. No such license was sought by Petitioners below. They did not seek an order immunizing them from civil or criminal liability. Petitioners merely sought to exclude their confidential sources from the scope of permissible discovery by Apple.

The trial court, in concluding that Petitioners had no license to violate criminal law, cited *DVD Copy Control Ass’n Inc. v. Bunner*, 31 Cal. 4th 864 (2003)

