

Apple v. Does Case Summary

Why This Case is Important

The Electronic Frontier Foundation (EFF) opposes Apple's discovery against three online journalists because journalists of all stripes rely upon the ability to protect sources and unpublished information to acquire information and communicate it to the public.

Factual Background

EFF represents non-party journalists Jason O'Grady, Monish Bhatia and Kasper Jade. Attorneys Thomas Moore III and Richard Wiebe are assisting as *pro bono* co-counsel to the journalists.

Jason O'Grady is a journalist who owns and operates **O'Grady's PowerPage**, an online news magazine that provides its readers with news and information about Apple Macintosh compatible software and hardware products. A popular source of news reports, feature stories and editorials for Apple Macintosh users, over the last two years, PowerPage has averaged over 300,000 unique visits per month. On November 19, 2004, O'Grady wrote an article for PowerPage discussing a rumored new product from Apple called "Asteroid," with two follow-up articles on November 22 and 23. PowerPage published a fourth article by a contributing reporter on November 26.

Monish Bhatia is the publisher of the Mac News Network and provides hosting service to a number of different sites, including **Apple Insider**, an online news magazine that provides its readers with a collection of articles, editorials, stories, pictures, and other features about Macintosh software and hardware products.

Kasper Jade is the pseudonym of the owner of Apple Insider who also performs reporting and editorial functions. Apple Insider received over 438,000 unique visitors in July 2004, the last month for which figures are currently available. On November 23, 2004, Apple Insider published an article written by Jade entitled *Apple developing FireWire audio interface for GarageBand* that discussed the Asteroid product.

Nfox.com, Inc. is a Nevada corporation that provides email services to PowerPage, with its email servers physically located in Texas

Legal Background

On December 13, 2004, Apple filed *Apple Computer v. Doe No. 1 et al* in Santa Clara County Superior Court (Case No. 1-04-CV-032178), a lawsuit alleging trade secret misappropriation against unknown (Doe) defendants. Apple simultaneously filed an *Ex Parte* Application seeking subpoenas to PowerPage, Apple Insider, and Think Secret.¹ Neither the online news sites nor their reporters are defendants in this lawsuit.

For each of these online Apple news sites, Apple sought discovery requiring each to produce all documents relating "to an unreleased Apple product code named 'Asteroid'" and information leading to the identity of "any individual or individuals who have knowledge regarding the posts on its site disclosing information ... and individuals who received and/or edited information related to the Product." Apple threatened to serve subpoenas on the sites, but never did.

On February 4, 2005, Apple instead served subpoenas on PowerPage's email service provider Nfox, seeking essentially the same information.

On February 14, 2005, the non-party journalists filed a motion for protective order, seeking to protect the journalists' confidential sources and unpublished information under the reporter's shield embodied in both Article I, Section 2(b) of the California Constitution and in California Evidence Code Section 1070, as well as the reporter's privilege under the First Amendment. The motion was supported by expert declarations from UC Berkeley journalism professor Thomas Goldstein and journalist Dan Gillmor.

The motion was heard on March 4, 2005, before the Honorable Judge James Kleinberg. The court took the motion was under submission.

If the motion is denied, the non-party journalists plan to petition the California Court of Appeal (Sixth District) for a writ staying discovery.

For More Information

Contact EFF Staff Attorneys **Kurt Opsahl** (kurt@eff.org) or **Kevin Bankston** (bankston@eff.org) or see:

- www.eff.org/Censorship/Apple_v_Does/
- www.powerpage.org
- www.appleinsider.com

¹ Apple has sued Think Secret directly in a separate lawsuit. The site and its creator are represented by Terry Gross of Gross & Belski, LLP.