

CASE NO. H028579

**IN THE COURT OF APPEALS OF
THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

JASON O'GRADY, MONISH BHATIA, and KASPER JADE,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA,
Respondent,

APPLE COMPUTER, INC.
Real Party in Interest.

On Writ Review from Santa Clara County Superior Court
Case No. 04-CV-032178, the Hon. James Kleinberg, Judge

**APPLICATION TO FILE BRIEF AMICUS CURIAE AND PROPOSED
BRIEF OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL
IN SUPPORT OF REAL PARTY IN INTEREST APPLE COMPUTER, INC.**

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APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 13(c), amicus curiae Information Technology Industry Council (ITI) respectfully applies to the Honorable Presiding Justice of the Sixth District Court of Appeal for leave to file the attached brief in support of Real Party in Interest Apple Computer, Inc.

Amicus ITI is a trade association that represents leading American providers of information technology products and services such as Accenture, Agilent Technologies, Apple, Applied Materials, Cisco Systems, Dell, eBay, Hewlett-Packard, IBM, Oracle, Panasonic, Sony, and Sun Microsystems. ITI members employ more than 1.2 million individuals in the United States and have aggregate annual revenues of more than \$600 billion. ITI members are also responsible for more than 16% of the industrial-funded research and development in the United States, as well as half of all information technology and engineering research. One of ITI's missions is to foster technological innovation by ensuring that decisions affecting the information technology sector are made with an accurate understanding and appreciation of this rapidly developing area. Accordingly, in matters implicating information technology, ITI frequently offers testimony before Congress and submits amicus briefs to the United States Supreme Court and lower courts of appeals.

This case raises issues concerning the protection of trade secrets that may affect the continued development of information technology. In this ever changing field, companies that introduce new products often only have a short period of time before their rivals bring out similar products or develop the next generation of technological innovation that renders older products obsolete. As a consequence, information technology companies are only willing to invest millions (and, sometimes, hundreds of millions) of dollars in developing new products if they can be reasonably certain that their efforts will be kept secret until their products are brought to market. Unauthorized disclosure and dissemination of design drawings and technical specifications, as occurred in this case, undermines this certainty and therefore threatens the technological innovation that ITI seeks to foster.

Although other amici supporting Apple's position have ably described the importance of trade secrets to the breathtaking innovation that has characterized the information technology industry and its consequent contributions to society, they have not explained the significance of these technological developments to the free speech issues raised in this case and, in particular, the First Amendment interests supporting the decision below. Because these considerations should help the Court analyze petitioners' arguments under the First Amendment and analogous provisions in the California Constitution, ITI believes its brief will assist the Court in deciding this matter.

BRIEF OF AMICUS CURIAE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

The question before this Court is whether individuals who disseminated stolen trade secrets, verbatim and without analysis or commentary, to a potentially worldwide audience over the revolutionary medium of the Internet, may claim the mantle of journalist privilege and prevent the owner of those secrets from obtaining leads concerning their theft. Petitioners and their amici are right to observe that this case implicates free speech interests. They are right to suggest that a free press plays a vital role in ferreting out wrongdoing and ensuring transparency both in government and in business. And they are right to suggest that, in order to report on matters of public importance, journalists must sometimes rely on confidential sources and may sometimes be entitled to keep those sources confidential. But petitioners and their amici are wrong to suggest that these vital First Amendment interests are imperiled by the trial court's decision below properly denying a protective order that would prevent the discovery sought in this case.

The threat posed by the ruling below to *legitimate* First Amendment interests has been greatly exaggerated by petitioners and their amici. This case does not involve any whistleblower seeking to reveal government or corporate waste, criminality, or fraud. It involves no journalistic liaisons with secret informants who wish to reveal wrongdoing by corporate or government officials, but might be

silenced by fear of retaliation if exposed. It involves no muckraker risking detection and jeopardy by going underground to gain first-hand experience uncovering a story of abuse or exploitation that would otherwise go untold. Rather, this case involves individuals allegedly complicit after the fact in a simple theft, through the global dissemination of stolen trade secrets that largely destroyed the value of those secrets the instant they were transmitted. The free speech interest in protecting such individuals is limited because the First Amendment is not a shield for fences, nor a device for laundering to the public stolen property that happens to consist of speech.

The lower court correctly reasoned that the issue here should be resolved, not by reference to vague generalities, but through a flexible balancing test that takes into account the particular facts and evolving technologies at issue, as in *Mitchell v. Superior Court* (1984) 37 Cal. 3d 268, 279-84. See Order after Hearing, March 11, 2005, slip op. at 9-10. The court correctly undertook to weigh the interests favoring protection of trade secrets and discovery against the interests favoring journalistic privilege in the particular factual context of this case, rather than treating the privilege as categorical or absolute. Even if reviewed de novo, that balance was correctly struck in this case in favor of discovery and against the

claim of privilege. As this amicus brief will suggest, the technological context in which this case arises makes the correctness of that judgment all the more clear.¹

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED A FLEXIBLE, CASE-SPECIFIC BALANCING TEST WEIGHING JOURNALISTIC PRIVILEGE AGAINST THE PROTECTION OF TRADE SECRETS

Some First Amendment principles are inflexible and do not change with new technologies. For example, the government may not censor speech on the basis of its political viewpoint whether it is expressed on papyrus or in computer code. But the protection of the confidentiality of journalistic sources is not so absolute and invariant. To the contrary, the speech interest in protecting the confidentiality of sources is evaluated under a flexible balancing test that properly takes into account evolving technological contexts.²

Both the United States Supreme Court and California's Supreme Court have recognized that a flexible test should be applied in these circumstances. In

¹ This amicus brief will focus on the defenses asserted by petitioner under the free speech clauses of the United States and California Constitutions, and it will not address the Stored Communications Act or California shield law defenses, which are likewise not addressed by the petitioners' press amici (*see* Brief of Reporters' Committee for the Freedom of the Press at 12 n.7). This brief will assume that the free speech protections of the federal and state constitutions are similar for purpose of this case and (for purposes of argument) that the free speech interests of petitioners are similar to those of traditional journalists and can be extended vicariously to their e-mail service provider, which is the actual and acquiescent target of the discovery here.

² Indeed, this level of scrutiny may be overly generous because, as the United States Supreme Court has held, the First Amendment interest in permitting the dissemination of particular words and representations protected by content neutral intellectual property laws that encourage speech is attenuated. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574-75 (1977) (noting that the First Amendment "no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner").

Branzburg v. Hayes, 408 U.S. 665 (1972), the U.S. Supreme Court rejected a claim of First Amendment privilege by newspaper reporters seeking to shield the identity of their sources from compulsion in grand jury testimony. However, Justice Powell recognized in his concurring opinion that such a claim of privilege “should be judged on its facts” by balancing on a case-by-case basis “societal interests” and “freedom of the press.” *Id.* at 710. In *Mitchell v. Superior Court*, 37 Cal. 3d 268, *supra*, the Supreme Court of California similarly adopted a qualified reporters’ privilege in civil discovery matters, and like Justice Powell in *Branzburg*, emphasized that “[t]he scope of that privilege in each particular case will depend upon the consideration and weighing of a number of interrelated factors,” *id.* at 279, including the availability of “*practical* means of obtaining the information” besides the compelled civil discovery of the identity of confidential sources, *id.* at 282 (emphasis added).³

Such a balancing test, focusing on the *practical* aspects of the litigants’ and journalists’ competing interests, properly takes into account the particular features

³ *Mitchell* enumerated five factors: whether the journalist is a party or implicated in wrongdoing, whether discovery goes to the heart of the claim, whether other sources of information have been exhausted, how great the public importance of the speech at issue is, and whether a prima facie case of underlying wrongdoing has been made out. 37 Cal. 3d at 279-82. The trial court duly considered and weighed each factor in light of extensive evidence, finding that taken in totality these factors favor discovery. See Order After Hearing, at 9-10. Because the trial court found that Apple made a prima facie showing of misappropriation, this is *not* a case in which a mere *allegation* of wrongdoing is the basis for discovery—in which case the free speech questions may be more serious—and there is no serious question here that the discovery goes to the heart of the claim. Thus, the free speech question before this Court turns principally on the other three factors, particularly the exhaustion of alternative sources, the factor on which the press amici place greatest emphasis. See Brief of Reporters’ Committee for Freedom of the Press at 18-24.

of evolving technologies. Consideration of the new opportunities and dangers posed by changing technologies is common in other areas of First Amendment law. For example, in *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), Justice Breyer’s pivotal opinion, which upheld some but not other federal regulations of sexually explicit speech on cable television, warned against approaches that “import law developed in very different contexts into a new and changing environment.” *Id.* at 740. Such approaches, Justice Breyer observed, “lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.” *Id.*

The U.S. Supreme Court similarly recognized the need to consider the technological context of the case before it in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In that case, the Court considered whether an illegally intercepted cellular telephone conversation involving threatened union violence could be broadcast over the radio. Although the Court struck a balance in favor of speech over privacy, *see id.* at 534-35, the concurring opinion of Justice Breyer, joined by Justice O’Connor, emphasized that the balance might well be struck differently in a different case involving a different technological environment:

[T]he Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual’s interest in basic personal privacy. Clandestine and pervasive invasions of privacy, unlike the simple theft of documents from a bedroom, are

genuine possibilities as a result of continuously advancing technologies. Eavesdropping on ordinary cellular phone conversations in the street (which many callers seem to tolerate) is a very different matter from eavesdropping on encrypted cellular phone conversations or those carried on in the bedroom. But the technologies that allow the former may come to permit the latter. And statutes that may seem less important in the former context may turn out to have greater importance in the latter.

Id. at 541 (Breyer, J., concurring). The opinion therefore warned that courts “should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility.” *Id.* Likewise, *judicial* flexibility taking into account new technological threats and challenges is appropriate in striking the proper balance between promoting free speech and protecting trade secrets here.

II. THE OPPORTUNITIES AND DANGERS OF INTERNET TECHNOLOGY FAVOR DISCOVERY IN THIS CASE

In considering the technological context of this case, the Court should take into account both the opportunities and the dangers associated with the Internet. As Justice Stevens has recognized, the Internet is a technological platform allowing for robust, uninhibited, and highly decentralized discourse among individuals: “[i]t provides relatively unlimited, low-cost capacity for communication of all kinds, [including] not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Although there is an

obvious First Amendment interest in protecting these features, they also make trade secrets more fragile and in need of protection. Moreover, if individuals are permitted to disseminate trade secrets over the Internet without a reasonable threat of detection, employers may be forced to impose restrictions that deny the promise of the Internet to their employees, thereby constricting free speech as well as productivity.

The Internet permits easy, broad, and instantaneous communication of even the most technical material. Because the barriers to entry are low, the Internet permits virtually anyone with an Internet connection to distribute information without traditional media's intermediaries filtering, editing and steering the information disseminated. Moreover, Internet communications reach beyond any street corner, metropolitan daily newspaper's subscription area, radius of a radio transmitter, factory gates, or other spatially bounded audience. An Internet speaker reaches anyone with access to the Internet, which in this day and age is virtually the entire globe. The Internet also eliminates the delays in publication characteristic of existing print and broadcast media because, over the Internet, information may reach a mass audience in nearly real time, as quickly as it is available. Finally, the information distributed in this way can be complex and technical. While it may have been difficult in the past to accurately reproduce and distribute technical blueprints and engineering drawings, perfect copies of such

materials can now be made quickly made using digital technology and distributed throughout the Internet.

These features of Internet communication not only create new speaking opportunities for bloggers, but also create new competitive opportunities and advantages for businesses such as those run by ITI's member companies. The Internet has transformed business operations by facilitating communication via greater access to information. Such communication has dramatically globalized business through the Internet's features of speed, ubiquity, and decentralization. Not surprisingly, such communication also contributes to dramatic increases in business productivity. Accordingly, ITI and its members strongly favor policies that protect the flow of free speech over the Internet.

On the other hand, the very ease with which information flows instantly and ubiquitously over the Internet creates new dangers for trade secrets. The Internet dramatically lowers the cost of trade secret theft and dissemination. It is far easier to illicitly e-mail to oneself or one's accomplices a highly confidential drawing, design, or set of technical specifications for a technology company's product today than it was, say, to hide in one's clothing the blueprints and engineering drawings for a Model-T Ford back in the 1920s and then transfer those same blueprints and drawings by hand to live conspirators over at a rival auto plant. Today, those documents can be digitally copied and disseminated with the touch of a button over

the Internet. The Internet also makes trade secrets more fragile because of the speed with which they can be distributed. While a stolen blueprint may have helped only a single competitor in the 1920s, today through the virtually costless transmission of trade secrets by willing bloggers, sensitive economic information that may have cost millions of dollars to create can be distributed worldwide to anyone who might be interested, thereby destroying the value of a trade secret in an instant. The danger posed by such transmissions obviously poses a danger of a whole different magnitude than local dissemination in bounded physical space.

Petitioners and their amici ignore these changing technological realities in suggesting, incorrectly, that Apple should have done more to exhaust alternative routes to detection and capture of the trade secret thieves in this case before resorting to the civil discovery challenged here. It was perfectly reasonable for Apple to conduct an internal investigation in which relevant employees were identified, their workplace computers were subject to forensic analysis, and experienced investigators interviewed them. This is not a situation in which the primary suspects were third parties who could only be examined through depositions. Even more important, companies should not be faced with a Hobson's choice between effectively losing enforceability of trade secret protection or remaining free to utilize key productivity-enhancing technologies that depend upon the relatively frictionless flow of commercial information among

their employees, customers and contractors. The technology that has been invented, developed and deployed by ITI's member companies would be gravely hampered were those companies required to slow down, wall in, comb through, or otherwise insert virtual checkpoints or blockades into this relatively flat medium as the price of enforcing trade secret protection. The balancing test appropriately relied upon by the court below thus properly adapted relevant free speech limits to reflect changing economic and technological reality.

In sum, it should be remembered that in this case, there are speech interests on both sides. Giving too great a privilege to bloggers to resist, or to insist that their commercial agents resist, civil discovery designed to obtain the identity of trade secret thieves, might lead to new restrictions on speech in the workplace that inhibit the free flow of information, decreasing speech along with commercial efficiency. In the high-tech workplace, the danger posed by trade secret theft is much higher than in past production contexts. Accordingly, the burden on companies proposed by petitioners and their amici is not only economically prohibitive; it also would come at a high price to free speech values because it would require building internal safeguards that impede and decrease communication, or create a chilling effect on employee speech through the threat of company-wide dragnets.

As Justice Breyer stressed in his concurrence in *Bartnicki*, a balance between privacy and speech must balance speech on both sides, for privacy, like trade secrecy, creates conditions in which speech may flourish. Just as privacy makes many forms of communication possible, without trade secrets, much invention and its expression would be chilled from the outset. Accordingly, as Justice Breyer suggested, it is correct to ask whether privacy (or here, trade secret) laws “strike a reasonable balance between their speech-restricting and their speech-enhancing consequences.” 532 U.S. at 536 (Breyer, J., concurring). Amici respectfully submit that, given the relevant features of Internet technology that bear on this case, the trial court struck that balance reasonably, and constitutionally, in the ruling denying the protective order sought by petitioners below.

CONCLUSION

The pending petition should be denied.

Dated: May 11, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c), and in reliance upon the word count feature of the software used, I certify that this amicus brief contains 3,149 words, exclusive of those materials not required to be counted under Rule 14(c)(3).

Dated: May 11, 2005



Robert W. Stone

PROOF OF SERVICE BY MAIL

I, Evelyn Solorzano, declare under penalty of perjury under the law of the United States of American that the following is true and correct:

I am employed in the City of Redwood Shores, County of San Mateo, State of California. I am a citizen of the United States, over the age of eighteen (18) years of age, and not a party to or interested in the within-entitled action. My business address is at the law firm Quinn Emanuel Urquhart Oliver & Hedges, LLP, 555 Twin Dolphin Drive, Suite 560, Redwood Shores, CA 94065.

On May 11, 2005, I caused an original and four (4) copies of the Application to File Brief Amicus Curiae and Proposed Brief of the Information Technology Industry Council in Support of Real Party in Interest Apple Computer, Inc. to be hand delivered to the clerk of the Court of Appeals, Sixth Appellate District. I also enclosed four (4) true and correct copies of the brief in an envelope addressed to the Clerk of the Supreme Court, 350 McAllister Street, San Francisco, California 94102, and placed that envelope for collection and mailing with the United States Post Office following ordinary business procedures. Finally, with respect to the following counsel, I enclosed one copy of the brief in an envelope and placed that envelope for collection and mailing with the United States Post Office following ordinary business procedures:

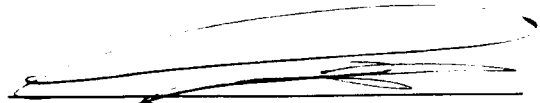
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I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above and, in particular, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

Executed on May 11, 2005, at Redwood City, California.

A handwritten signature in black ink, appearing to read 'Evelyn Solorzano', written over a horizontal line.

Evelyn Solorzano