IN THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT

JASON O'GRADY, MONISH BHATIA, and KASPER JADE, Petitioners, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, Respondent. APPLE COMPUTER, INC. Real Party in Interest.	No. H028579 Santa Clara County Superior Court Case No. 1-04-CV-032178 The Hon. James Kleinberg, Judge Department 14: (408) 882-2250

PETITIONERS AND NON-PARTY JOURNALISTS JASON O'GRADY, MONISH BHATIA, AND KASPER JADE'S REPLY TO APPLE COMPUTER, INC.'S OPPOSITION

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INTRODUCTION

Writ review of the trial court's order is appropriate and necessary, and this proceeding raises issues of central importance for journalists everywhere. Apple Computer, Inc. ("Apple"), in its opposition to the petition of non-party journalists Jason O'Grady, Monish Bhatia, and Kasper Jade for a writ of mandate and/or prohibition ("Petition"), does not dispute that Petitioners lack any remedy by appeal from the trial court's denial of their motion for a protective order. Nor does Apple even address, much less dispute, the case law set forth in the Petition that demonstrates the appropriateness of writ review for discovery orders that permit the disclosure of privileged or confidential information.

The extraordinary outpouring of *amici* who have appeared in support of Petitioners[1] attests to the fundamental importance of the issues raised by the writ petition and the necessity of plenary review by this Court. There can be no doubt that this Court should grant an alternative writ or order to show cause and determine the petition on the merits.

On the merits, Apple cannot and does not show why this Court should disregard the plain language of the Stored Communications Act, 18 U.S.C. § 2701 *et seq*. ("SCA"). Apple does not seriously contest that Petitioners are journalists entitled to invoke the constitutional privilege, nor

[1] *Amici* include the *San Jose Mercury News*, the Hearst Corp. (*San Francisco Chronicle*), the McClatchy Co. (*Sacramento Bee*), the *Los Angeles Times*, the Copley Press (*San Diego Union-Tribune*), Freedom Comm. Inc. (*Orange County Register*), the Associated Press, the Reporters' Committee for Freedom of the Press, the California Newspaper Publishers Association, the California First Amendment Coalition, the Society of Professional Journalists, the Student Press Law Center, the American Civil Liberties Union, The Center for Individual Freedom, The First Amendment Project, Reporters Without Borders, the Media Bloggers Assoc., four law professors, numerous online journalists, NetCoalition and the United States Internet Industry Association.

that the privilege protects email held by third parties. Apple admits that its investigation amounted to no more than informal interviews with employee-suspects and a review of its email server (Opp. at 21).

Instead, Apple trumpets trade secrecy, arguing that this Court must subordinate state and federal constitutional protections for the freedom of the press to Apple's trade secret lawsuit and its discovery seeking evidence to prove its allegations of wrongdoing by the Doe defendants. Apple's position is fallacious. *Every* plaintiff or prosecutor who files a lawsuit alleges wrongdoing by the defendant and seeks discovery in order to obtain evidence to prove the alleged wrongdoing. Apple's proposal would render meaningless the protections for confidential sources upon which a free press depends.

Apple's unsupported intimations of wrongdoing cannot turn the Petitioners into defendants in this lawsuit, when they are not, nor can Apple elevate the protection for a business' trade secrets above constitutional protections for the freedom of the press. The state and federal constitutions, in order to preserve the free flow of information upon which the press depends, prescribe a different and much broader protection against discovery seeking a journalist's unpublished information and confidential sources.

The California reporter's shield grants a reporter the right to refuse to disclose unpublished information and confidential sources without fear of being punished for contempt. Cal. Const., art. I, § 2(b). Apple implicitly acknowledges the power of this protection by attempting to make an end-run around it with a subpoena, not directed to the journalists, but to a journalist's email service provider. However, the privacy protections of the SCA prohibit Apple from obtaining the content of the journalist's communications from an email provider. To effectuate the SCA and the

important policies behind the reporter's shield, this Court must protect the Petitioners from Apple's attempt to do indirectly what it cannot do directly.

The freedom of the press guarantees in the First Amendment to the federal Constitution and the California Constitution's Liberty of Speech clause provide further protection, requiring Apple to overcome the qualified privilege under the test set forth in *Mitchell v. Superior Court*, 37 Cal. 3d 268 (1984). Apple cannot meet the *Mitchell* test because (1) the Petitioners are not parties; (2) the discovery goes beyond the heart of Apple's claim; (3) Apple has not exhausted all other sources; (4) the articles concerned a newsworthy matter; and (5) Apple has shown no *prima facie* claim against Petitioners. For the foregoing reasons, this Court should issue the writ of mandate.

ARGUMENT

I. The Legal And Factual Issues Presented By The Petition Must Be Reviewed *De Novo*

Apple does not dispute that this Court must determine *de novo* the relevant factual and legal issues relating to the constitutional reporter's privilege and the reporter's shield. *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 889-90 (2003); *DVD Copy Control Ass'n., Inc. v. Bunner*, 116 Cal. App. 4th 241, 250, 251-56 (2004). Likewise, the legal issue of the proper construction of the Stored Communications Act must be determined *de novo*.

II. The Plain Language Of The Stored Communications Act Prohibits Nfox from Disclosing Petitioner O'Grady's Emails in Response to Apple's Subpoena

The plain language of the federal Stored Communications Act prohibits electronic communications providers Nfox.com, Inc. and its principal Karl Kraft (collectively "Nfox") from disclosing Petitioner O'Grady's emails to private parties such as Apple: "a person or entity

providing an electronic communication service to the public shall not knowingly divulge to *any person or entity* the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1) (emphasis added). Section 2702 is a "general rule of nondisclosure" prohibiting a service provider from divulging communication contents "to any person other than the addressee or intended recipient," subject only to the express exceptions set forth at 18 U.S.C. § 2702(b). S. Rep. No. 99-541, at 37 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3555, 3591. Those exceptions do not provide for disclosure in response to civil subpoenas, as explained at length in the petition (Pet. at 21-24). And although Section 2703 of the SCA authorizes governmental entities to subpoena email content in some cases (and only with prior notice to the affected subscriber or customer), *see* 18 U.S.C. § 2703 (b)(1)(B), there is no corresponding section allowing such discovery by private parties.

The plain language of the SCA therefore prohibits service providers, such as Nfox from disclosing the contents of the emails of its customers, such as Petitioner O'Grady, to any private party, such as Apple—without any exception for civil subpoenas. In the face of this plain language, however, and without any supporting judicial precedent,[2] legislative

[2] Nothing in *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), suggests that the SCA authorizes the disclosure of communications content in response to a private litigant's civil subpoena. Indeed, Apple wrongly characterizes the *Theofel* opinion as spending "six pages analyzing whether the SCA barred *disclosure* of email communications." (Opp. at 35)(emphasis added).

The narrow issue in *Theofel* was whether the defendants, who knowingly used a subpoena that was so overbroad as to be "'patently unlawful'" to obtain the plaintiffs' private emails, had violated 18 U.S.C. § 2701's prohibition against unauthorized *access* to communications by parties other than the provider. *See Theofel*, 341 F.3d at 1071-72. The *Theofel* court had no occasion to rule on whether the provider in that case violated Section 2702's prohibition against disclosure by responding to

history, or even academic commentary, Apple insists that this court should ignore the federal statute's clear prohibition against Nfox's disclosure of O'Grady's emails, overturn the Internet industry's long-held understanding of the law, and deal an unprecedented blow to electronic privacy.

Apple cannot cite a single precedent holding that the SCA allows private litigants to use civil subpoenas to obtain the content of communications.[3] On the other hand, at least one court has held that the SCA forbids even governmental entities, which are explicitly allowed under Section 2703 to use particular types of subpoenas to compel production of content in some circumstances, from using civil discovery subpoenas to obtain even non-content subscriber information. *See Federal Trade Comm'n v. Netscape Communications Corp*., 196 F.R.D. 559, 561 (N.D. Cal. 2000) ("There is no reason for the court to believe that Congress could not have specifically included discovery subpoenas in the statute had it meant to.")

In fact, the strength of the statute's plain language has allowed electronic communication service providers to routinely and successfully

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defendants' overbroad subpoena. Rather, analyzing the SCA's unauthorized access provisions in light of the common law tort of trespass, the Court concluded that the defendants' knowing use of the invalid subpoena to acquire the provider's mistaken consent constituted an unauthorized access in violation of Section 2701: "Permission to access a stored communication does not constitute valid authorization if it would not defeat a trespass claim in analogous circumstances." *Id.* at 1073. Nevertheless, the court noted the ISP's "legal obligation not to disclose such messages to third parties, *see* 18 U.S.C. § 2702(a)(1)." *Id.* at 984.

[3] Judicial opinions dealing with the propriety of subpoenas for *non-content* subscriber information, however, have been quick to point out that disclosure of content is more strictly regulated. *See Freedman v. America Online, Inc.*, 325 F. Supp. 2d 638, 644 n.3 (E.D. Va. 2004), *In re United States for an Order Pursuant to 18 U.S.C. 2703(d)*, 36 F. Supp. 2d 430, 432 (D. Mass. 1999) and *Jessup-Morgan v. America Online, Inc*., 20 F. Supp. 2d 1105, 1108 (E.D. Mich. 1998).

object to civil litigants' subpoenas seeking contents of electronic communications: members of the U.S. Internet Industry Association, for example, have a uniform practice of objecting to civil subpoenas for content based on the SCA (Br. of Amici Curiae United States Internet Industry Association, et al. ("USIIA Brief"), at 17-18),[4] while the U.S. Internet Service Provider Association's compliance manual explicitly cautions members that there is no apparent exception to the SCA's "stark" prohibition for civil discovery orders on behalf of private parties. *See* The U.S. Internet Service Provider Association, *Electronic Evidence Compliance—A Guide for Internet Service Providers*, 18 BERKELEY TECH. L.J. 945, 965 (2003) ("USISPA Compliance Guide"). In the face of such objections the burden is on the subpoenaing party to move to compel production. *See Monarch Healthcare v. Superior Court*, 78 Cal. App. 4th 1282, 1290 (2000); *see also* Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2000) 8:605.1, p. 8E-61 ("A nonparty served with a 'records only' subpoena may ... merely object to the production ... and put the onus on the proponent to make a motion to compel.") Therefore the lack of case law has a simple explanation: considering the SCA's plain language, no private party has successfully moved to compel.

[4] There is certainly no lack of subpoenas to object to. *See* USISPA Compliance Guide at 964 ("Most ISPs receive discovery requests in civil matters on a routine basis."). Nor is there any lack of incentive for providers to object based on the SCA, considering that compliance with subpoenas for content would severely burden service providers. (USIIA Brief at 18-19.)

Other commentators, both academic[5] and governmental,[6] support industry's understanding that the SCA generally bars disclosure to private parties unless one of Section 2702's express exceptions is satisfied. None of the express exceptions even uses the word "subpoena." Nor does this plain reading of the SCA preempt all civil discovery for emails, or create "a safe harbor for a vast array of illegal activity" as Apple breathlessly warns (Opp. at 35-36). Rather, a private litigant may directly subpoena the relevant customer instead of the service provider; or, if the customer does not have copies of the subpoenaed emails or can no longer access copies held by the provider, the court may (in appropriate circumstances) order the customer to provide consent. *See* USISPA Compliance Guide at 965 (referring to courts' practice in some cases of ordering customers to consent to disclosure). Effective discovery could proceed in either case, while the

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[5] Apple's selective quotation of Orin Kerr's *User's Guide to the Stored Communications Act* omits Professor Kerr's understanding of Section 2702 as a clear barrier to disclosure of content: "§ 2702(a) generally bans disclosure of contents by public providers, as well as the disclosure of noncontent records to any government entities. The statute then provides specific exceptions in which voluntary disclosure is allowed." Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1220 (2003). Professor Kerr later reiterates that providers "ordinarily cannot disclose either content or noncontent information," and that "disclosure is allowed only when an exception applies: in the case of contents, the facts must fit within one of the eight exceptions found in § 2702(b)." *Id.* at 1223.

[6] According to the Department of Justice's manual on electronic searches and seizures, the SCA "forbids both the disclosure of contents to any third party and the disclosure of other records to any governmental entity, unless a statutory exception applies. Section 2702(b) contains exceptions for disclosure of contents…." *See* Computer Crime and Intellectual Property Section, Criminal Division, United States Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (July 2002), *available at* http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.pdf.

customer's ability to challenge the discovery and raise any applicable privileges in a timely manner would be ensured.

As explained above, the SCA's plain language can easily be harmonized with the goals of civil discovery without resort to Apple's unprecedented theory. Nevertheless, Apple presses this Court to ignore Section 2702's clear prohibition and allow the disclosure of email contents in response to a private litigant's civil subpoena. Of course, Apple does not contest that Nfox provides an electronic communication service to the public, or that Nfox's disclosure of the contents of Petitioner Jason O'Grady's stored email communications is governed by Section 2702. Instead, Apple suggests that the provider's exception at Section 2702(b)(5), which allows that "a provider … may divulge the contents of a communication … as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service," might be so broad as to authorize unlimited disclosures in response to any and every subpoena, even the ones that would otherwise violate Section 2702. Apple, however, cites no authority for this circular argument (Opp. at 35).

As an initial matter, the federal SCA's prohibition against disclosure would preempt any state contempt order for failing to comply with a civil subpoena for content. *See* U.S. Const., art. VI, cl. 2. Second, the exception in Section 2702(b)(5) applies only to *incidental* disclosures *necessarily* made by the service provider in the course of rendering service or to protect its own rights or property.

Finally, such a broad construction of this "provider's exception"—a construction that would encompass disclosure in response to any subpoena, court order or warrant that potentially carried a risk of contempt for noncompliance—would render the entire statute's careful regulation of

providers' disclosures irrelevant.[7] "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted). Apple's proposed blanket exception for disclosures in response to any and all subpoenas, even those that are otherwise prohibited by the SCA, would eviscerate the statute's protections, against governmental and private entities alike.

Statutory construction requires a court to ascertain a statute's meaning from its plain text and not "to insert what has been omitted, or to omit what has been inserted." Cal. Code Civ. Proc. § 1858. It is not credible that Congress, which devoted the entirety of Section 2703 to detailing the circumstances under which the government can compel disclosure of communications content, would in contrast choose to create by its silence an exception for civil discovery by private litigants.

This contrast is particularly sharp when considering Congress' particular attention to the issue of subpoenas in Section 2703. In addition to requiring prior notice to affected customers, the statute particularly authorizes the use "of an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena." 18 U.S.C. § 2703(b)(1)(B)(i) (identical language limits subpoenas for non-content records, at § 2703(c)(2)). Subpoenas that are not specifically allowed—e.g., civil discovery subpoenas—are prohibited. *See Federal*

[7] It would also make redundant Apple's construction of Section 2707's good-faith defense, *see* 18 U.S.C. § 2707(e)(1), which Apple argues would allow Nfox's disclosure. As explained in the Petition, however, Section 2707's defense does not independently and prospectively authorize disclosures in violation of Section 2702 (Petition at 24, n.3), nor does it encompass civil subpoenas from private litigants. (USIIA Brief at 11-12.)

Trade Comm'n, 196 F.R.D. at 561 (finding that Section 2703's allowance for "trial subpoenas" did not authorize the FTC's use of a civil discovery subpoena to obtain non-content subscriber information from Netscape).[8] Accepting Apple's argument would render meaningless Section 2703's careful regulation of government access to stored communication, by allowing providers such as Netscape or Nfox to indiscriminately respond to any and every subpoena.

The plain language of the SCA prohibits Nfox from disclosing Petitioner O'Grady's emails in response to Apple's subpoena. Apple has failed to provide any authority to suggest that this court should disregard the statute's plain meaning, on which the Internet industry has relied for eighteen years.

III. The California Reporter's Shield Requires A Protective Order Prohibiting Apple From Subpoenaing Those Who Hold Documents On Behalf Of The Non-Party Journalists.

By subpoenaing Nfox in order to obtain Petitioner journalist O'Grady's documents rather than subpoenaing O'Grady directly, Apple has attempted an end-run around the California reporter's shield. Apple hopes that by doing so it can avoid ever giving O'Grady the opportunity to refuse disclosure and invoke the shield in response to any contempt proceeding. Apple contends that its subterfuge precludes California courts from acting to fulfill the public policies behind the reporter's shield. Instead, a protective order is necessary, requiring a litigant to seek information protected by the shield directly from the reporter rather than from a third party holding the reporter's information on the reporter's behalf.

Apple's proposal that this Court endorse its circumvention of the constitutional reporter's shield has no more merit than would a suggestion

[8] Notably, the court did not allow the subpoena under either Section 2707's good-faith defense or the provider's exception in Section 2702(b)(5).

that the reporter's shield could be circumvented by subpoenaing a reporter's landlord for confidential documents stored by the reporter in a rented office. Instead, this Court should hold that a party subpoenaing a reporter's information held by a third party must subpoena it directly from the reporter so that the reporter can exercise his or her constitutional right to assert the reporter's shield. Any other rule would encourage litigants to circumvent the shield, thereby eroding this important constitutional right. At the same time, endorsing Apple's circumvention of the shield will discourage journalists from using third party services, forcing a choice between the utility of third party providers and their constitutional rights.[9]

Indeed, Congress has already made this policy choice for email. In enacting the SCA, Congress observed that "if persons with records have a choice of maintaining them 'in house' or with a third party, they may be less inclined to go outside if such a move deprives them of legal rights."

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[9] Apple's argument (Opp. at 32) that Petitioners are not protected because they do not publish their "periodical publication[s]," Cal. Const., art. I, § 2(b), in print but online is meritless. The Constitution does not require that publication be in print rather than some other medium, and it was the undisputed evidence below that Petitioners publish periodicals. (Goldstein Decl., ¶ 13-17, 29 (Ex. 21, 318:17 to 319:19, 321:25 to 322:4) (expert opinion concluding that "O'Grady's PowerPage and Apple Insider are online publications that are the electronic equivalent of print publications like newspapers or magazines."))

Likewise, Apple's argument that Petitioners did not gather and publish information about Asteroid for a journalistic purpose (Opp. at 31) is contrary to the undisputed record below. (Goldstein Decl., ¶¶ 31-32 (Ex. 21, 322:12 to 323:3); Gillmor Decl., ¶ 4 (Ex. 19, 149:11-15.)) Similarly, Apple's reliance on *New York Times Co. v. Superior Court*, 51 Cal. 3d 453 (1990), is misplaced. In *New York Times*, the California Supreme Court held, given the procedural posture of the issue before it, that a judgment of contempt was necessary for a newsperson to invoke the shield. The present case is in a different procedural posture. The scope of the protective order statute, Code of Civil Procedure Section 2017(c), is broad enough to capture the public policies reflected in the shield law in advance of a finding of contempt.

H.R. Rep. No. 99- 647, at 26 (1986). Congress also noted "that the nature of modern recordkeeping requires that some level of privacy protection be extended to records about us which are stored outside the home." 132 Cong. Rec. H4039-01 (Oct 2, 1986). This guiding principle was considered particularly important because "[m]any Americans are now using computer services," and "if we fail to protect the records of third-party providers, there will be a tremendous disincentive created against using these services." *Id*. This Court must give effect to Congress' intent, clearly expressed in the SCA's plain language, and ensure that fundamental rights are not waived by using third party services.

IV. When Independently Weighed By This Court, The *Mitchell* Factors Prohibit The Discovery Apple Seeks

A. The Constitutional Reporter's Privilege Applies To Apple's Attempt To Obtain Discovery From Petitioner Non-Party Journalists

Apple asserts that it should gain the advantage of a qualified privilege rather than the absolute bar of the California shield because it directed its subpoena to Nfox and not directly to Petitioner journalist O'Grady. As set forth above, Apple should not be permitted to benefit from the subterfuge of a subpoena seeking disclosure barred by the SCA. Assuming, however, that the qualified standard for the reporters' privilege enunciated in *Mitchell* applies, Apple cannot make the requisite showing necessary to overcome the privilege.

As an initial matter, Apple suggests that the constitutional reporter's privilege[10] does not apply because it is seeking evidence of wrongdoing—

[10] Apple refers to the constitutional privilege as the "Federal Privilege." The constitutional privilege is also based upon the broader Liberty of Speech clause of the California constitution. *Mitchell*, 37 Cal. 3d at 279; *see also Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975) ("[a] protective provision more definitive and inclusive than the First

the misappropriation of alleged trade secrets. "[T]his qualified privilege does not shield a reporter or his sources from discovery into criminal or tortuous misconduct." (Opp. at 3; *see also* Opp. at 17 ("the Federal [reporter's] privilege has no application in this case.")

This is not the law. Apple's theory that a particular statute should surmount the constitutional privilege was rejected in *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). In *Baker*, the reporter's source was a real estate agent who provided information about "racially discriminatory activities on the part of unscrupulous landlords and real estate speculators." While the Second Circuit recognized the strong public policy embodied in the federal civil rights laws, it rejected plaintiff's plea to alter the constitutional privilege's test, explaining "[i]t would be inappropriate for a court to pick and choose in such gross fashion between different acts of Congressional legislation, labeling one 'exceedingly important' and another less so." *Baker* at 783.

Every plaintiff alleges some form of wrongdoing and pursues discovery in order to obtain evidence of that wrongdoing. In *Mitchell*, for example, the plaintiffs were seeking evidence that the reporter-defendants had libeled them; in *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), the plaintiffs were seeking evidence that the reporter's source had defamed them. In each case, the reporter's privilege nonetheless prohibited discovery. To hold that the constitutional reporter's privilege never applied whenever a litigant was seeking evidence of wrongdoing would amount to abolishing the privilege altogether.

That a plaintiff's allegation of a statutory violation cannot overcome the constitutional reporter's privilege was well explained by the Second

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Amendment is contained in our state constitutional guarantee of the right of free speech and press.")

Circuit in *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982). In that case, plaintiffs contended that the privilege did not apply when the confidential sources were alleged to have violated the Sherman Antitrust Act. The court disagreed:

> Although it is true that the Sherman Act represents Congress's strong commitment to fostering a competitive marketplace, enactment of a statute cannot defeat a constitutional provision. … We do not believe that the antitrust laws should receive a preferred position in this context and, accordingly, refuse to depart from the accepted test expounded in *Baker*. Indeed, this case presents a less compelling argument for disclosure than in *Branzburg v. Hayes, supra*, because we are dealing with a civil action rather than questioning by a grand jury.

Petroleum Products, 680 F.2d at 9.

Moreover, the confidential sources at issue in *Petroleum Products* were accused of violating antitrust laws that have parallel criminal provisions. *See* 15 U.S.C. §§ 1, 2. Thus, in a civil case involving a statute with parallel criminal provisions, where the plaintiffs, like Apple, contended that (1) a particular statute trumped the constitution and (2) the privilege would act to cover up wrongdoing, the Second Circuit found the reporter's privilege took precedence.

Relying upon *United Liquor v. Gard,* 88 F.R.D. 123, 126 (D. Ariz. 1980), Apple claims that courts "consistently" (Opp. at 15) do not allow the privilege to shield misconduct by a source. Apple fails to mention not only *Petroleum Products,* but the express rejection of *United Liquor* in *Bischoff v. United States*, 1996 WL 807391, 25 Media L. Rep. 1286 (E.D. Va. 1996):

> This court does not believe itself bound by the reasoning of *United Liquor*. The plaintiffs implicitly suggest that a court may dispense with the balancing of interests when the reporter asserting a qualified privilege is believed to have first-hand evidence about criminal conduct. But this ignores that most of the federal jurisprudence on the reporter's privilege is founded on the *Branzburg* opinion, in which

> reporters' testimony was sought by grand juries, which were inquiring into criminal conduct. … No indictment has been returned or sought against any federal agents in connection with plaintiffs' tax information. This is not a case in which a prosecutor, directly charged with vindicating the public's interests, is seeking a reporter's evidence in order to enforce the criminal laws. This court rejects the plaintiffs' implication that there is no qualified privilege where private parties are seeking redress for an alleged civil wrong that also coincidentally constitutes a crime.

Id. at *2.[11]

Apple also seeks support from *Food Lion v. Capital Cities*, 951 F. Supp. 1211 (M.D.N.C. 1996), in which the court applied the privilege's balancing test but found that discovery sought from the defendants, which was intended to uncover tortious activity, was allowed.[12] On its face, *Food Lion* is distinguishable because the Petitioners are not parties to this litigation. Furthermore, contrary to Apple's mischaracterization (Opp. at 17), the *Food Lion* court did not hold that the constitutional reporter's privilege is inapplicable when a litigant seeks evidence of a journalist's wrongdoing. Rather, the district court applied the constitutional reporter's privilege to the particular facts of the case before it, just as the *United Liquor* court had done.

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[11] Moreover, in *United Liquor*, the trial court applied the reporter's privilege balancing test before finding on the record that the facts favored permitting discovery. By contrast, Apple seeks to have this Court ignore the privilege here. Subsequently, the reporter invoked his Fifth Amendment privilege against self-incrimination and refused discovery on that basis as well; on appeal, the Ninth Circuit affirmed his Fifth Amendment refusal to provide discovery and accordingly found it unnecessary to decide whether the district court had properly applied the reporter's privilege balancing test. *In re Seper*, 705 F.2d 1499, 1502 (9th Cir. 1983).

[12] Apple also neglects to mention the related decision in the same case, in which the court quashed subpoenas under the constitutional reporter's privilege. *Food Lion v. Capitol Cities,* 1996 WL 575946, 24 Media L. Rep. 2431 (M.D.N.C. 1996).

In *Food Lion*, unlike here, the district court found that the plaintiff was not seeking discovery of the identities of confidential sources or information provided by confidential sources, 951 F. Supp. at 1214 & n.3. After performing the balancing required by the reporter's privilege, the court permitted "very limited discovery," *id*. at 1216, of information other than the identities of confidential sources or the information provided by those sources. The court nevertheless recognized that some deposition "answers might contain information which should properly be subject to the newsgathering privilege," and noted that the Magistrate Judge was to sit in on the deposition to guard against the possible disclosure of information properly subject to the privilege. *Id.*

1. Allegations of illegality do not obviate the protections of the First Amendment

The Petitioner journalists are not defendants in this lawsuit, and there is no basis to ever make them so. Indeed, Petitioner's liability is simply not at issue in this writ proceeding, which deals only with the non-party discovery Apple is seeking from them.[13] But Apple attempts to muddy the waters with unsubstantiated implications of illegality. These irrelevant allegations do not destroy the reporter's privilege. *Anti-Defamation League v. Superior Court*, 67 Cal. App. 4th 1072, 1091 (1998) ("We do not believe the alleged unlawfulness of petitioners' information-gathering activities is dispositive of their right to the protection of the First Amendment."); *see also Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 519 (Cal. Ct. App. 1986) ("The First Amendment therefore

[13] While Apple's unsubstantiated allegations have no effect on the issues at hand, for a thorough discussion of the protections for Petitioner's publication, see Brief of *Amici Curiae* Reporter's Committee for Freedom of the Press, et al., pp. 24-36.

bars interference with this traditional function of a free press in seeking out information by asking questions.").

B. Petitioners Are Not Parties

Apple would have this Court regard Petitioners as virtual parties for the purposes of the first factor of the *Mitchell* test.[14] However, the *Mitchell* court's analysis applied to actual parties, not virtual parties. Apple's unwarranted hypothesizing and speculation about Petitioners' potential liability cannot erase the blunt fact that Petitioners are not parties to Apple's lawsuit.

C. The Discovery Sought Goes Beyond The Heart Of Apple's Claim

Apple implicitly concedes that the "heart of the claim" factor requires actual and substantial, not just potential, relevance (Pet. at 33-34); *see also Mitchell*, 37 Cal. 3d at 280; *Wright v. Fred Hutchinson Cancer Research Ctr.*, 206 F.R.D. 679, 682 (W.D. Wash. 2002) (holding actual relevance required). Instead, Apple dodges the point by contending that "there is no non-trade secret information" about Asteroid, even the choice of "Asteroid" as the code name.[15]

Apple's view of trade secrecy is overly broad: "Labeling information as a trade secret or as confidential information does not conclusively establish that the information fits this description." *Thompson*

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[14] Apple wants this Court to treat Petitioners as parties for purposes of discovery, but not allow them the defenses available to defendants – such as filing an Anti-SLAPP motion to strike. An Anti-SLAPP motion would allow a court to test Apple's insinuations against actual evidence before discovery could occur. Cal Code Civ. Proc. § 425.16(g).

[15] Apple's contention about the code name illustrates the overbreadth of its claim. An element of trade secrecy is that the information "derives independent economic value, actual or potential, from not being generally known..." Civil Code, § 3426.1(d)(1). There is no economic value derived from using the code name "Asteroid" over, say, "Meteor."

v. Impaxx, Inc., 113 Cal. App. 4th 1425, 1430 (2003) (citing *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1522 (1997)).

Indeed, it is quite unlikely that all the information about Asteroid is a trade secret.[16] Trade secrets must be information that a company needs to keep secret for their *continued use* in the product. Witkin, SUMMARY OF CALIFORNIA LAW, EQUITY § 103 (citing *Cal Francisco Inv. Corp. v. Vrionis*, 14 Cal. App. 3d 318, 322 (1971) (noting Restatement definition that a "trade secret is a process or device for continuous use in the operation of the business.")).[17]

Furthermore, Apple's discovery request is not limited by time, and would encompass those communications received by Petitioners from people merely commenting on Asteroid after the publication of the articles in question here, based on publicly available information. Nor is the discovery limited to information provided by Apple employees or those who owed a duty of confidentiality to Apple. As such, Apple's proposed discovery goes beyond the heart of the claim and must be narrowed if Apple is to survive the *Mitchell* test.

D. Apple's Alternative Sources Of Evidence Remain Unexhausted

Apple's claims that it exhausted all other avenues of investigation, but its showing falls well short of the standard enunciated in *Mitchell*. First, there is no evidence in the record that Apple's security personnel actually insisted that the employees that they interviewed answer truthfully or face termination, despite Apple's unsupported contention to the contrary

[16] Apple's assertion that Petitioners "do not contest that the Asteroid information" is a trade secret (Opp. at 12) is simply incorrect.
[17] While *Vrionis* was decided under the common law definition of trade secret, "[b]y its adoption of the Uniform Trade Secrets Act, California effectively adopted the common law definition." *Vacco Industries, Inc. v. Van Den Berg*, 5 Cal. App. 4th 34, 50 (1992).

in its Opposition. Even if such a threat were implied, any employee with guilty knowledge of the leak has little incentive to answer truthfully given the likely consequences of a truthful answer. That is why depositions are a significant component of *Mitchell's* exhaustion prong. The failure to answer truthfully in a deposition risks the criminal penalties associated with a later perjury conviction, a much more effective incentive for the employees to tell the truth. But Apple refuses to ask its employee-suspect for the information it seeks under oath in a deposition.

Apple's attempt to distinguish the cases requiring exhaustion fails. Apple's selective quote from *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), omits the prior sentence clarifying the court's reference to interviews:

> At the very least, they could have deposed the four employees who had the greatest knowledge about the logs. It is quite possible that interviewing these four individuals…

Zerilli at 715. As the court noted, "although [appellants] might have uncovered valuable information by questioning the employees who had access to the logs, they did not depose any of these individuals." *Id.* at 709. Thus, the context of the *Zerilli* opinion shows that the "interviews" and "questioning" of which the court wrote was a deposition.[18]

Likewise, Apple's other attempts to distinguish away the exhaustion requirement are meritless. In *Petroleum Products Antitrust Litig., supra,* exhaustion was not met when plaintiffs had not asked anyone under oath for the information they sought from reporters, in the context of a deposition. In *Carushka, Inc. v. Premiere Prods., Inc.*, 17 Med. L. Rep. 2001 (C.D. Cal. 1998), the defendants had actually served discovery on the

[18] Apple's self-serving contention that the court used "interview" interchangeably with "deposition" is especially weak given that the court used the term "interview" only once in the opinion.

plaintiffs, but had not received the information they sought; even so, defendants failed to satisfy the exhaustion requirement. Apple has served no discovery on anyone but the journalists, nor conducted any depositions. Apple's position contradicts the weight of caselaw. *Condit v. National Enquirer*, 289 F. Supp.2d 1175, 1180 (E.D. Cal. 2003) (exhaustion not met when plaintiffs failed to depose alternative sources); *Star Editorial v. U.S. District Court*, 7 F.3d 856, 861 (9th Cir. 1993) (finding privilege overcome only when all non-confidential sources had been deposed); *Rogers v. Home Shopping Network*, 73 F. Supp.2d 1140, 1145-6 (C.D. Cal. 1999) (finding privilege not overcome after deposing all eyewitnesses; "although the Court credits Rogers with having deposed many key individuals, the Court is not convinced that Rogers has deposed *all* those reasonably likely to have knowledge of the alleged incident" (emphasis added)).

Not only has Apple failed to depose any of the employee-suspects, Apple admits that its forensic computer examination was limited to Apple's email servers (Opp. at 21). If an errant Apple employee were to spirit away information about Asteroid, they would likely not use the Apple email server, but would probably have needed to store the file on their local hard drive for a period of time. But Apple did not even bother to look for deleted files on the employees' office computers or perform any other examination of those computers. This is not the "showing that they have exhausted alternative sources of information" that the Constitution requires. *Mitchell*, 37 Cal. 3d at 282.

The foregoing avenues by which Apple might gain crucial information about the Doe defendant employee that was the ultimate source of the leak are basic and obvious. If Apple's claims about of harm from the disclosure of "Asteroid" are sincere, and if Apple's desire to root out the source of its leak is made in good faith, then one would expect Apple to

pursue all avenues of inquiry suggested to it, even if those avenues might undermine its position with respect to this Petition. Petitioners, and, indeed, this Court, should expect no less.

E. The Fourth *Mitchell* Factor is an Override, Operating to Protect Sources from Disclosure Even When Other Factors Are Met.

Apple cannot refute that the fourth *Mitchell* factor, the importance of maintaining confidentiality, can only weigh against disclosure, and never in favor of disclosure. Unable to find case support, Apple asserts that nothing in *Mitchell* contradicts its position (Opp. at 26, n.7). To the contrary, the California Supreme Court held that a court "may refuse to require disclosure *even though* the plaintiff has no other way of obtaining essential information." *Mitchell*, 37 Cal. 3d at 283.

Apple's citation to three inapposite cases that mention "public interest" language in the context of issuing injunctions (Opp. at 25) does not prove Apple's point. Even in those cases, the words "trade secret" were not a magic incantation that prevented all disclosure of the information. Rather, trade secrecy was merely an interest that the court balanced against the public's right to newsworthy information.

The articles at issue are newsworthy publications that discuss the type of information that is the staple of the trade press, the very sort of article that Apple encourages by issuing press releases when it deems the timing right. Apple is only trying to protect its publicity schedule.

F. There is No *Prima Facie* Case Against Petitioners.

The trial court did not find a *prima facie* case against Petitioners, and Apple conceded that it does not have a *prima facie* trade secret misappropriation case against Petitioners themselves (Pl.'s Opp'n Br. at 7:5-6 (Ex. 24, 369:5-6.)) Nevertheless, Apple contends that, in order to protect his right not to disclose his unpublished information and

confidential sources, Petitioner journalist O'Grady must reveal that same unpublished information in a declaration to protect himself from an inference of liability (Opp. at 28). Apple's proposed rule, for which Apple cites no authority, would turn the journalist's privilege on its head. O'Grady cannot be required to submit a declaration revealing the very information protected by the privilege in order to assert the privilege.

Moreover, Apple's position squarely conflicts with Evidence Code Section 913, which states that whenever a "privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege…." O'Grady has asserted a privilege against disclosing unpublished information related to his article, and did not disclose any unpublished information in his supporting declarations. Apple's attempt to raise an adverse inference from that refusal to disclose is entirely inappropriate.

V. There Is Nothing "Advisory" About Petitioners' Request For A Protective Order

Apple created a live controversy with Petitioner non-party journalists at the moment that it obtained from the trial court an order authorizing it to subpoena from them unpublished information relating to its product Asteroid and the identities of the journalists' confidential sources. (*See* Supp. To *Ex Parte* App. For Order (Ex. 7, 65:16-68:17) and Order Granting *Ex Parte* App. for Discovery and Issuance of Commissions (Ex. 8, 71-72)). Having obtained a court order expressly authorizing it to subpoena from Petitioners this constitutionally protected information, Apple is in no position to characterize Petitioners' request for a protective order prohibiting this already-authorized discovery as a request for an

"advisory opinion." To the contrary, the motion for protective order sought relief from an outstanding discovery order of the trial court that immediately and adversely affects Petitioners.

Apple's chief argument against ripeness is that it *might* not issue the further subpoenas the court has already authorized *if* it obtains the content of Petitioner O'Grady's email from Nfox (Opp. at 37). As explained above, the SCA prohibits Nfox from making such a disclosure. Apple is left with no choice but to serve the subpoenas pursuant to the court order it obtained, and has given no indication that it will drop the matter. Thus, there is a sufficient concrete dispute between Apple and the Petitioners. Against the declarations submitted by Petitioners showing immediate harm to their journalistic activities (O'Grady Supp. Decl., ¶ 3 (Ex. 31, 429:4-10); Jade Supp. Decl., ¶¶ 3-5 (Ex. 32, 431:5-17)), Apple offers only speculation as to possible alternative causes of harm. Accordingly, the motion for protective order was and remains ripe for determination. *See Pacific Legal Foundation v. Calif. Coastal Com.*, 33 Cal. 3d 158, 171-73 (1982).

VI. Apple's New Assertions Lack Relevance

A. Apple's New Assertion That Petitioners Published A Copyrighted Design Is Irrelevant

In its Opposition, Apple repeatedly asserts, for the first time, that Petitioners have published its "copyrighted" rendering of Asteroid (*see e.g.* Opp. at 31). This is not a copyright action, and, in any event, copyright actions are within the exclusive jurisdiction of the federal courts. Indeed, Apple would have to first register its copyright before filing a lawsuit. *See* 17 U.S.C. § 411. Furthermore, a fair use of a copyrighted work, such as "news reporting … is not an infringement of copyright." 17 U.S.C. § 107. The copyright status of Apple's alleged trade secrets is irrelevant to the

application of the SCA and the constitutional reporter's privilege and the reporter's shield.

B. Apple's New Assertion That It Is Seeking "The Return Of Stolen Property" Is Irrelevant

Finally, Apple has contrived the novel notion that its subpoenas seek the "return of stolen property." This is not an action for the repossession of property. A non-party subpoena under the Code of Civil Procedure is not a vehicle for acquiring possession of the thing subpoenaed. All it gives to the subpoenaing party is the right to inspect and copy, not the right to seize and exercise dominion over the thing subpoenaed. Cal. Code Civ. Proc. §§ 2020, subds. (a), (d), (e); 2025, subd. (h)(2); *compare* Cal. Code Civ. Proc. § 512.010 *et seq.* (procedures for a writ of possession). Apple's repeated claim that the purpose of its discovery is to obtain the "return of stolen property" is mere rhetorical gloss without legal foundation and is irrelevant to the issues presented by the writ petition.

CONCLUSION

For the reasons stated above, Petitioners respectfully request this Court grant the petition and issue a writ of mandate and/or prohibition directing the trial court to vacate its order denying petitioners' motion for a protective order and issue a new and different order granting the motion for a protective order.

DATED: April 22, 2005 Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c), I certify that this petition contains 7,308 words.

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Kurt B. Opsahl