[US] Publishers Score “Hat Trick” Against Apple

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Edward Samuels
New York

In November 2004, the online news magazines PowerPage and Apple Insider published detailed information about Apple Computer’s forthcoming release of a “new FireWire breakout box for GarageBand” to facilitate the digital recording of live audio performances. In December 2004, Apple brought suit in California state court, alleging that certain unnamed defendants, presumably some of its own employees, had disclosed its trade secrets in violation of their confidentiality agreements. Though the online magazines were not named as defendants in the suit, Apple obtained permission to serve sweeping civil subpoenas against the publishers and the email service provider of one of the publishers, requiring the disclosure of all documents that might lead to the identification of the “proper defendants” in the lawsuit. These documents included, among other things, emails sent to and from PowerPage that contained the word “Asteroid”, the code name for the new Apple product.

In an opinion that alarmed many legal observers, the district court denied the publishers’ motion for a protective order against disclosure of the emails or their sources. In a resounding defeat for Apple, the appellate court on 26 May 2006, reversed the district court, decisively supporting publishers on each of their three major arguments.

The appellate court held that (1) the subpoena to the email service provider was barred by the plain terms of the federal Stored Communications Act, protecting “the contents of a communication while in electronic storage” by a service provider. While there are specific exceptions set forth in the Act, the court held that they did not include the “implied” exception for civil discovery sought by Apple. (2) The subpoenas were unenforceable under California’s shield law, protecting publishers and reporters against disclosure of confidential sources. (3) The subpoenas were also barred by the journalists’ constitutional privilege. While that privilege is not absolute, the court considered the five factors identified in the California case of Mitchell v. Superior Court, 37 Cal.3d 268 (1984), and found that the factors overwhelmingly weighed against Apple.

Some of the early reaction to the case overstates its applicability, suggesting, for example, that it protects casual “bloggers” as well as more serious journalists. It is true that the court “decline[d] the implicit invitation to embroil ourselves in questions of what constitutes ‘legitimate journalis[m].’” But the court conceded

that “the deposit of information, opinion, or fabrication by a casual visitor to an open forum” “may indeed constitute something other than the publication of news”; and it avoided the term “blog” because of “its rapidly evolving and currently amorphous meaning.”

In weighing the Mitchell factors, the court seemed unimpressed by the degree of harm allegedly resulting from disclosure of the particular trade secret at the heart of the case, where “no proprietary technology was exposed or compromised”. Perhaps the protection of a more valuable trade secret, or patent or copyright, might affect the weighing of the factors.

In the case before it, the court decisively aligned itself with the privacy and public interest concerns raised by the petitioners, and set the hurdle quite high for any plaintiff, like Apple, who attempts too broad a discovery of confidential information.

O’Grady v. Superior Court of Santa Clara County; Apple Computer, Inc., Real Party in Interest, No. H028579, Ct. App. Calif., 6th App. Dist., 26 May 2006

http://www.eff.org/Censorship/Apple_v_Does/H028579.pdf