

**IN THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT**

JASON D. O'GRADY, MONISH
BHATIA AND KASPER JADE,

Petitioners and Appellants,

vs.

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

Respondents

APPLE COMPUTER, INC.

Real Party in Interest.

Court of Appeal No. H028579

Trial Judge: Hon. James Kleinberg
Santa Clara County Superior Court
Trial Court Case No. 1-04-CV-032178

**APPLICATION TO FILE AN AMICI CURIAE BRIEF
IN SUPPORT OF APPELLANTS AND STATEMENT OF INTEREST OF
AMICI CURIAE**

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**APPLICATION TO FILE AN AMICI CURIAE BRIEF
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TO THE HONORABLE PRESIDING JUSTICE, SIXTH DISTRICT
COURT OF APPEAL:

Pursuant to California Rule of Court 13, subdivision (c), amici curiae Jack M. Balkin, The Center for Individual Freedom, Julian Dibbell, Feedster, Inc., The First Amendment Project, A. Michael Froomkin, Gawker Media, Inc., Gothamist, LLC, Groklaw, Happy Mutants, LLC, Ben Hammersley, Joichi Ito, Joel Johnson, Kimberly A. Kralowec, LawMeme, Rebecca MacKinnon, Joshua Micah Marshall, The Media Bloggers Association, Markos Moulitsas, Reporters Without Borders, Glenn Harlan Reynolds, Peter Rojas, Jay Rosen, Scott Rosenberg, Doc Searls, Silicon Valley Watcher, Kevin Sites and Eugene Volokh respectfully request permission to file the accompanying brief amici curiae in support of Petitioners. Specifically, amici urge the court to adopt a functional test to determine who qualifies for the newsgatherers' privilege, recognized by both the federal and California Constitutions.

Amici are organizations that protect journalist's press freedoms, the creator of a tool that allows Internet users to easily search online news publications, and dozens of "webloggers"¹ who publish on the Internet. They range from journalists with many years of established media experience who have chosen to publish some of their reporting online, to individuals with particular expertise who

¹ A website that displays in chronological order the postings by one or more individuals and usually has links to comments on specific postings. *The American Heritage Dictionary of the English Language*, Houghton Mifflin Company (Fourth Edition 2004). Surveys by the Pew Internet & American Life Project determined that "8 million American adults say they have created blogs; blog readership jumped 58% in 2004 and now stands at 27% of internet users." *The State of Blogging*, available at < http://www.pewinternet.org/PPF/r/144/report_display.asp (last visited April 10, 2005).

are able to share their special insight into the news because weblogging software enables easy publishing. They share a strong interest in assuring that online publishers share the same First Amendment protections as those who publish in traditional media.

This amicus brief will assist the Court by illustrating the valuable reporting done on the Internet, and thus the importance of adopting a functional test for the newsgatherers' privilege that does not discriminate between reporters, regardless of the medium in which they publish. Amici write to urge the court to adopt a test that will not impede journalist's use of the Internet to report news by limiting their constitutional protections when they publish there.

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School, and the Director of Yale's Information Society Project. He founded and is the coauthor of Balkinization, a weblog devoted to discussion of constitutional law and politics.

The Center for Individual Freedom is a non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including free speech rights, free press rights, privacy rights, and the freedom of association.

Julian Dibbell is a contributing editor at Wired magazine and the author of Play Money, a weblog documenting his yearlong experiment in buying and selling virtual online-game artifacts for profit. Dibbell also co-moderates the collaborative weblog Terra Nova, which brings together legal scholars, sociologists, economists, historians, game developers, and other experts to discuss the social and cultural questions posed by massively multiplayer online games.

Feedster, Inc. offers a free tool that makes it easy for Internet users to search weblogs for news of interest. Feedster's Internet search engine provides access to mainstream information providers, as well as millions of individually-maintained weblogs, by harvesting a technology called Really Simple Syndication

(RSS) that allows publishers to push regular updates of their content over online "feeds" available to Internet users. Feedster indexes over six million of these feeds, adding tens of thousands of new ones every day.

The First Amendment Project ("FAP") is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

A. Michael Froomkin is a Professor of Law at the University of Miami School of Law, where he teaches and writes about Internet law and privacy. He runs Discourse.net, a personal weblog that gets about 2,000 unique visitors per weekday, and many additional readers via its RSS feed. He is also the co-founder and co-editor of ICANNWatch, a Weblog devoted to monitoring the activities of the Internet Corporation for Assigned Names and Numbers.

Gawker Media, Inc. is a New York City-based online publishing house with a stable of popular, high-quality news and opinion weblogs, ranging from consumer technology news (Gizmodo.com) to New York City media coverage (Gawker.com) to Washington, DC insider news (Wonkette.com). Original reporting on Gawker Media weblogs often leads or influences mainstream media reportage, and the reporters for Gawker Media's twelve weblogs routinely rely on confidential sources when covering their news beats.

Gothamist, LLC, publishes a network of websites in ten cities throughout the United States, Canada, and the U.K. These sites include Gothamist.com, SFist.com, and DCist.com. Together, these sites receive more than three million visitor sessions per month. Gothamist's city sites report dozens of stories each week, often breaking news that later gets picked up by major newspapers and news organizations. The company is based in New York City.

Groklaw is published by Pamela Jones, a journalist with a paralegal background, and is recognized as the primary source of legal news on the SCO litigation. It represents an attempt to apply Open Source principles to legal research, with 8500 active members who help to collect evidence and research facts relevant to the SCO law suits, and it receives between 2 1/2 million and 5 million hits a week, depending on the news of the day.

Happy Mutants, LLC, are publishers of Boing Boing one of the most popular weblogs in the world. Boing Boing enjoys 200-300 thousand unique readers a day and about 1.5 million unique readers per month. It is co-written by four professional writers (all on the masthead at Wired Magazine) and managed by the founder of the Industry Standard Magazine.

Ben Hammersley writes the weblog Ben Hammersley's Dangerous Precedent, for which he has reported from Iran, Pakistan, Afghanistan, and most of Europe. He is also a national newspaper journalist in the UK, reporting for The Guardian.

Joichi Ito is an entrepreneur and a board member of numerous non-profits and Japanese government committees. He has had columns in a variety of media including the Daily Yomiuri (a Japanese newspaper) and a number of magazines. Joi Ito's Web is a weblog run by Joichi Ito focused on global policy and technology issues and receives approximately 150,000 unique visitors a month.

Joel Johnson is a freelance journalist and weblogger living in New York. He is the editor of Gizmodo.com, the award winning gadgets weblog.

Kimberly A. Kralowec is a California attorney and the author of the weblog The UCL Practitioner, which reports on legal developments surrounding California's Unfair Competition Law (Bus. & Prof. Code sections 17200 et seq.).

LawMeme is Yale Law School's student-produced law and technology weblog. Its members train each other in researching legal stories and in writing them up clearly. LawMeme's coverage has been recognized as the most

authoritative source for information on multiple topics, from international spam laws to search engine liability to its live coverage of major technology law conferences.

Rebecca MacKinnon is a journalist, media consultant and weblogger. Now based in Cambridge, Massachusetts, she is a former CNN correspondent and Bureau Chief in Beijing and Tokyo, with over a decade of experience covering news across Asia. MacKinnon is co-founder of "Global Voices," a weblog-oriented global citizens' media project. She is also founder and co-author of Nkzone, a weblog on North Korea and Rconversation, a weblog on global media and technology.

Joshua Micah Marshall has published Talking Points Memo, a weblog about politics, culture and foreign affairs since 2000. He is also a Contributing Writer for the Washington Monthly and a columnist for The Hill. His articles have appeared in numerous magazines and newspapers such as The American Prospect, The Atlantic Monthly, The Boston Globe, The Financial Times, Foreign Affairs, The Los Angeles Times, The New Republic, The New Yorker, The New York Post, The New York Times, Salon and Slate.

The Media Bloggers Association ("MBA") is a non-partisan organization that includes independent/amateur bloggers, professional bloggers and professional writers who operate their own personal weblogs, as well as blogs that focus on the development of media blogging, citizen journalism, and related endeavors. Media bloggers play a valuable role by holding media organizations accountable for their reporting, commenting on the current and future state of the media, supplementing local media coverage, and reporting on the media industry. To support this role, MBA encourages continuing education for its members and supports the emerging citizen journalism movement.

Markos Moulitsas publishes the a weblog Daily Kos, which receives around 400,000 daily visits, and has been featured in hundreds of mainstream

media outlets. Daily Kos is frequently cited by mainstream media outlets for its reporting on a wide host of issues. Mr. Moulitsas has spoken at over a dozen media and technology conferences, and presented on this new medium to the entire Senate Democratic caucus.

Reporters Without Borders defends imprisoned journalists and press freedom throughout the world, as well as the right to inform the public and to be informed, in accordance with Article 19 of the Universal Declaration of Human Rights. Reporters Without Borders has nine national sections (in Austria, Belgium, France, Germany, Italy, Spain, Sweden, Switzerland, and the United Kingdom), representatives in Abidjan, Bangkok, Buenos Aires, Istanbul, Montreal, Moscow, New York, Tokyo and Washington and more than a hundred correspondents worldwide.

Glenn Harlan Reynolds is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee. He publishes Instapundit.com, and writes for MSNBC, TechCentralStation.com, and *The Wall Street Journal*, among other publications.

Peter Rojas is the editor and co-founder of Engadget.com, a gadgets and consumer electronics weblog with a monthly readership of over three million. Engadget, is a gadgets and consumer electronics weblog with a readership of about three million.

Jay Rosen teaches Journalism at New York University, where has been on the faculty since 1986. From 1999 to 2005 he served as chair of the Department. Rosen is the founder and author of PressThink, a weblog about journalism and its many ordeals, which he introduced in September 2003. In 1999, Yale University Press published his book, "What Are Journalists For?" which was about the rise of the civic journalism movement. Professor Rosen has written and spoke frequently about civic journalism.

Scott Rosenberg started the weblogs program for Salon.com, which has published original journalism on the Web since 1995. He has published his own weblog, "Scott Rosenberg's Links & Comment," since 2002. A founder and former managing editor for Salon, currently on book leave, Rosenberg began his career in journalism at the *Boston Phoenix* and spent nine years at the *San Francisco Examiner* as theater and movie critic and technology columnist. His writing for the *Examiner* won the George Jean Nathan Award for Theater Criticism in 1989.

Doc Searls writes Doc Searls Weblog. He is the Senior Editor of Linux Journal, the premier Linux monthly and one of the world's leading technology magazines and also runs the new Doc Searls' IT Garage, an online journal published by Linux Journal's parent company.

Silicon Valley Watcher is a weblog founded by former Financial Times reporter Tom Foremski and operated by a small staff of journalists, copyeditors and technical experts. On a daily and weekly basis, Silicon Valley Watcher reports on stories and issues of importance to the technology community.

Kevin Sites is a pioneering, multi-media journalist who often works as a one-man unit, using portable, digital technology to report, write, edit and transmit his stories from conflict areas around the world. Most recently, as a non-embedded correspondent for CNN, Sites provided viewers with independent reports from the frontlines of Northern Iraq. Sites's war weblog, kevin sites.net, utilized text, digital images and audio to provide readers with a more intimate behind-the-scenes look at the people of Iraq, the war and how it was being covered. The site received millions of visits, and continues to draw an active readership.

Eugene Volokh is Professor of Law at UCLA School of Law, where he teaches and writes about First Amendment law. He is also the founder and coauthor of The Volokh Conspiracy, a weblog that gets about 10,000 unique visitors per weekday.

Amici come together to urge this court to hold that Internet publishers, including webbloggers who are engaged in the reporting and dissemination functions a journalist performs, may invoke the protection of the journalists' privilege on equal footing with traditional reporters and news organizations. Though neither Apple nor the Superior Court directly challenged Petitioner's ability to claim the constitutional news reporter's privilege on the basis of publishing medium, the danger that such a ruling may be forthcoming has already created a chilling effect on online journalism.

For example, For example, Amicus SiliconValleyWatcher (SVW) is an online publication founded by a former Financial Times reporter. It has a small staff of journalists and technical experts, and reports about technology and business in Silicon Valley, including, naturally, Apple Computer Inc. Since the Superior Court's decision, they have had to rethink how they cover certain stories. For example, SVW obtained information from sources outside of Apple that the company had signed an agreement to purchase a substantial amount of chips. This information was important because of the products that could be built using these chips. SVW delayed running this story for several days because they were concerned, given the Superior Court's ruling, that they would be compelled to reveal their source or would themselves be accused of disseminating a trade secret. After consulting *pro bono* counsel, they published the story several days later than they ordinarily would have. However, they chose to change its treatment in the headline and lead paragraphs to focus on the British chip design firm rather than Apple.² They changed the story to avoid having to litigate to protect their source. As journalists publishing on the Web, they are concerned the Superior Court's ruling gives them less protection under the Federal privilege and the California

² Silicon Valley Watcher Weblog, Scoop! Brit chip designers score coup as Apple picks chips for next gen mobile multimedia device...the m-Pod?, available at <http://www.siliconvalleywatcher.com/mt/archives/2005/04/_siliconvalleyw.php> (last visited April 10, 2005).

Shield than that enjoyed by their print and broadcast peers— and thus weakens the public's interest in a dynamic and diverse media landscape.

Amicus Julian Dibbell is a freelance journalist who is on the masthead of Wired Magazine and has published in numerous other print publications. For one year he reported on his weblog Play Money investigations of the online gaming industry and how players were buying and selling game pieces on Internet auction sites.³ He relied on anonymous sources in his reporting, including players who were involved in this 'underground economy' and would not have been willing to talk to him on the record. Mr. Dibbell wrote an article on this topic for Wired Magazine prior to reporting on his weblog, and has a contract to write a book on his experience. He is concerned that, without the adoption of a functional test, courts will not allow him to honor promises of confidentiality that he made to sources he used for his reporting published on his weblog. He is considering withholding web publication in the future if it will affect his ability to promise confidentiality to his sources.

Amicus Markos Moulitsas publishes the extremely popular political news weblog DailyKos.com where he has relied on confidential sources to publish (among other things) a strategy report⁴ written by Republican pollster Frank Luntz about the 2006 mid-term election, a leaked poll⁵ on the Pennsylvania senate race, (including notice that Democrats feared Senator Paul Sarbanes would retire, months before he actually retired) and information on why many Senate Democrats joined Republicans in voting for the Bankruptcy Bill on March 8,

³ Play Money Weblog, Post-Game, available at <<http://www.juliandibbell.com/playmoney/>> (last visited April 10, 2005).

⁴ Daily Kos Weblog, Frank Luntz strategy report, available at <<http://www.dailykos.com/story/2005/2/23/3244/72156>> (last visited April 10, 2005).

⁵ Daily Kos Weblog, Casey Jr. top candidate for PA Senate race; roundup, available at <<http://www.dailykos.com/story/2005/1/13/141727/397>> (last visited April 10, 2005).

2005, based on an anonymous Congressional staffer.⁶ Major media organizations also rely similar documents and confidential tips when reporting on political news. Mr. Moulitsas is concerned that if online publishers are treated differently than print publishers, he will no longer be able to rely on these types of sources in his political reporting.

Amicus Kevin Sites is an Edward R. Murrow Award winning journalist who has worked in local, cable and network news, including ABC's This Week with David Brinkley and NBC's Nightly News with Tom Brokaw. He has also published many articles in newspapers and magazines and was the author of a monthly media column for the New Times alternative weekly. He uses portable, digital technology to report, write, edit and transmit his stories from conflict areas around the world. During the Iraq War, while an embedded correspondent for CNN, he published updates on his weblog, kevin sites.net, using text, digital images and audio give his readers a more intimate behind-the-scenes look at the people of Iraq, the war and how it was being covered.⁷ The site received millions of visits, and continues to draw an active readership. Mr. Sites believes he is likely to increase the amount of reporting he publishes using the Internet, however he will not be able to do so if he cannot promise sources confidentiality for materials he publishes on the web.

Citizen's should not be deterred from taking advantage of the Internet's potential to transform anyone into a town crier, as recognized by the United States Supreme Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844, (1997). The Internet and weblogging tools remove the intermediaries that traditionally

⁶ Daily Kos Weblog, Why did Dems support bankruptcy bill?, available at <<http://www.dailykos.com/story/2005/3/9/185841/7193> (last visited April 10, 2005).

⁷ Kevin Sites Weblog, Paradise Lost, available at: <http://www.kevinsites.net/2004_12_26_archive.html#110436685268779983> (last visited April 10, 2005).

acted as a bar against citizens' direct participation in the reporting process, making it extremely simple for anyone to publish information directly to the Internet. Most weblog technologies allow a person to post content on their weblog from any computer with an Internet connection. This represents a dramatic and valuable increase in the amount of speech produced by and available to citizens around the globe.

Amici write to urge the court to adopt a test that will not impede journalist's use of the Internet to report news, by limiting their constitutional protections when they publish there. They ask that this Court to find that people who publish in online news sources are subject to the same constitutional protections under the reporter's shield as reporters who publish in traditional media, and urge this Court to adopt the functional test articulated in *Shoen v. Shoen*, 5 F. 3d 1289, 1293 (9th, 1993) which asks whether the reporter had "the intent to use materials—sought, gathered, or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process."

For the aforementioned reasons, Applicants respectfully request leave to file the attached brief *amici curiae*.

Respectfully submitted April 11, 2005,

/s/

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CERTIFICATE OF SERVICE

I, Judy Gielniak, the undersigned, do hereby state:

I am over eighteen years of age and not a party to the instant proceedings.
My business address is : Stanford Law School, 559 Nathan Abbott Way, Stanford,
California 94305.

On April 11, 2005, I caused to be served the within:

**APPLICATION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF
APPELLANTS AND STATEMENT OF INTEREST OF AMICI CURIAE**

on the parties indicated by depositing a true copy thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the Government of the United State at Palo Alto, California, to each person listed below, addressed as follows:

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44(b)(2).)

Executed on April 11, 2005 at Stanford, California. I declare under penalty
of perjury that the foregoing is true and correct.

/s/
JUDY GIELNIAK

**IN THE COURT OF APPEAL
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APPLE COMPUTER, INC.

Real Party in Interest.

Court of Appeal No. H028579

Trial Judge: Hon. James Kleinberg
Santa Clara County Superior Court
Trial Court Case No. 1-04-CV-032178

BRIEF OF AMICUS CURIAE:

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PROJECT, A. MICHAEL FROOMKIN, GAWKER MEDIA, INC.,
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IN SUPPORT OF PETITIONERS

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STATUTES

U.S. Const. Amend, I3
Cal. Const. Art. I, §23

MISCELLANEOUS

ABCs of Bullying, Newsday, Feb. 11, 1995, at A186

SUMMARY OF THE ARGUMENT

“The First Amendment guarantees a free press primarily because of the important role it can play as ‘a vital source of public information.’” *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274 (Cal. 1984) (internal citations omitted). In order to facilitate the performance of this “important role” and ensure that the “press’ function as a vital source of information” is not impaired, the California Supreme Court has recognized that members of the press enjoy a qualified privilege to withhold disclosure of the identity of confidential sources. *Id.* at 275, 279.

To serve this important purpose, this “newsgatherers’ privilege” should be interpreted to allow for a multitude of “vital sources of information.” *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943).

That the reporters seeking to protect their confidential sources in this appeal use the Internet as their medium of communication to the public thus should have no effect on whether they are entitled to the protection the newsgatherers’ privilege. Indeed, neither party here disputes for the purposes of this appeal that the Petitioners are of the class entitled to claim the privilege.¹

Amici curiae file this brief to assure this Court that considering Petitioners as newsgatherers is correct. The applicability of the newsgatherers’ privilege is determined not by the reporter’s formal status as a “professional journalist,” but rather by the reporter’s functional conduct in gathering information with the purpose of disseminating widely to the public. Amici are providers of news and

¹ The trial court likewise assumed for the purposes of its ruling that Petitioners were entitled to the privilege.

information in an online medium, including some self-described as “bloggers,” and have illustrated to this Court that some of the most important news gathering and reporting today occurs on the Internet. See Statement of Interest of Amici Curiae, *supra*. The medium though which reporters communicate is simply unrelated to the Constitutional mandate of the protecting the free flow of information and the freedom of the press. Although their medium of communication differs from the daily newspaper delivered to one’s doorstep, those who produce news websites and weblogs perform the exact same function as their print colleagues. In fact, a reporter often writes for both a print newspaper and a weblog. It would make little sense to have the newsgatherers' privilege apply to reporting done for one medium but not for the other.

The Ninth Circuit adopted a functional test that properly focuses on newsgathering activities as the threshold for applying the privilege in *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Under the functional test, the court asks whether the reporter had “the intent to use materials—sought, gathered, or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process.” If both prongs are met, the privilege is applied. This two-pronged analysis goes to the heart of the newsgathering and reporting process and keeps courts out of the constitutionally nettlesome question of who is a “legitimate” journalist. California courts should apply the same test.

Amici do not argue that all those who communicate on the Internet, or all bloggers, enjoy the newsgatherer’s privilege. Rather, amici urge the Court to find that those who publish on the Internet, including weblogs, may invoke the protection of the newsgatherer’s privilege when they are performing a reporting and dissemination function.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE FREEDOM OF THE PRESS AND MANDATES AN INTENT- BASED FUNCTIONAL TEST FOR DETERMINING WHO IS COVERED UNDER THE QUALIFIED JOURNALISTS PRIVILEGE

A. The Free Press Protections Mandate a Newsgatherers' Privilege to Protect Sources' Identities

The First Amendment of the federal Constitution and the California constitutional protection of freedom of the press both recognize the role a free press plays in democratic discourse. U.S. CONST. AMEND. I and Cal. Const., art. I, § 2.² They guarantee a free press “primarily because of the important role it can play as ‘a vital source of public information.’” *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274 (1984) (internal citations omitted).

The journalist’s privilege allows reporters to promise confidentiality to sources who otherwise would not speak to them, and is a necessary corollary to the freedom of the press. “Compelling a reporter to disclose the identity of a source may significantly interfere with [the] newsgathering ability.” *Id.* at 275. As the D.C. Circuit concluded,

Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.

Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981).

² The California freedom of press clause is broader than the federal First Amendment. See *Wilson v. Superior Court*, 13 Cal.3d 652, 658 (1975), (“[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press.”)

Courts have recognized that the privilege protects a source’s identity from discovery even if it interferes with other judicial proceedings. “[S]ociety’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.” *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

The California Supreme Court has recognized a qualified newsgatherer’s privilege in civil actions that allows “a reporter, editor or publisher” to withhold disclosure of the identity of confidential sources. *Mitchell* at 279. “Compelling a reporter to disclose the identity of a source may significantly interfere with [the] news gathering ability.” *Id.* at 275; *see also Baker v. F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1972) (“Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis.”)

B. The Court Should Adopt an Intent-Based Functional Test to Determine Who is a Journalist

The “press” to which the First Amendment and California constitution guarantees freedom is not limited to the professional, corporate media. The Framers of our Constitution would not tolerate such a limitation: the patriot pamphleteers had no corporate affiliations, no professional societies, no journalism degrees. Thus, the press must include individual publishers with no editors, professional affiliations, special education or license.

In *Lovell v. City of Griffin*, the U.S. Supreme Court understood this principle, adopting an inclusive definition of “press” in questioning whether a statute regulating distribution of certain types of literature was constitutional under the First Amendment. *Lovell v. City of Griffin*, 303 US 444 (1935). The Court held that “[T]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic

weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” *Id.* at 452.

Deciding which newsgatherers should be eligible for the protection of the Constitutional privilege based on their job titles, employment status or medium of expression inevitably excludes too many whose work is journalism. As the Supreme Court noted in its seminal case on the newsgatherer’s privilege, “Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.” *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

This Court should thus adopt the test applied by the Ninth Circuit to determine whether a reporter may invoke the newsgatherer’s privilege. In *Shoen v. Shoen* 5 F.3d 1289 (9th Cir. 1993), the Ninth Circuit adopted an intent-based functional test first articulated by the Second Circuit in *von Bulow v. von Bulow*, 811 F. 2d 136 (2d Cir. 1987), which asks whether “the person seeking to invoke the privilege had the intent to use materials—sought, gathered, or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process.” *Shoen* at 1293. (internal quotations omitted). This test looks at the functional elements of the interaction between the reporter and source, and the reporter’s intent when she collected the information.

In applying the test, the *Shoen* Court found that a reporter could invoke the privilege regardless of the medium in which she publishes. “The journalist’s privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. Investigative book authors, like more conventional reporters, have historically played a vital role in bringing to light ‘newsworthy’ facts on topical and controversial matters of great public importance.” *Shoen* at 1292. The Court noted the particular impact of such

writers at the beginning of the nineteenth century, when “muckraking authors such as Lincoln Steffens and Upton Sinclair exposed widespread corruption and abuse in American life.” *Id.*

The Court found “no principled basis for denying the protection of the journalist’s privilege to investigative book authors while granting it to more traditional print and broadcast journalists.” *Id.* at 1293. The *Shoen* Court also addressed the fact that reporter’s frequently publish in a variety of media in adopting a functional test. “Indeed, it would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic.” *Id.* The court concluded, “[w]hat makes journalism journalism is not its format but its content.” *Id.*

A functional intent-based test promotes First Amendment discourse by promoting certainty. Journalists whose purposes comport with the requirements of *Shoen* are able to promise sources confidentiality, and do not shy away from reporting stories that requires such promises. “A lot of big news stories might never come to light without information from people who don't want to reveal themselves publicly. So reporters promise to keep their identities secret, and the next thing you know you're reading Deep Throat's revelations about Watergate. It's a very good bargain.” *ABCs of Bullying, Newsday*, Feb. 11, 1995, at A18; *see also Democratic Nat’l Committee v. McCord*, 356 F.Supp. 1394 (D.D.C. 1973), (denying motion to compel Washington Post reporters to reveal the identity of sources who supplied information concerning the Watergate burglary). The benefits of a “free press” are dissipated where the big news stories are lost because sources fear retaliation.

C. Online Publishers May Invoke the Newsgatherers' Privilege When They Meet the *Shoen* Test

Like the mimeograph before it, the Internet, in conjunction with weblogging software, lowers the barriers to reporting erected by older publishing technologies. The U.S. Supreme Court recognized this in *Reno v. American Civil Liberties Union*, 521 U.S. 844, (1997), finding that the First Amendment applies to the Internet: when one publishes news on the Internet that would be protected by the First Amendment in print, there is no reason to deny her the same protections. “[T]o recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible [with] fundamental first amendment principle[s].” *Nizam-Aldine v. City of Oakland*, 7 Cal. App. 4th 364, 374 (Cal. 1996) (rejecting the distinction between protections for media and non-media speakers in a defamation action).

Federal courts have likewise applied the Constitutional privilege to those acting as journalists. In *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977), the appellee argued that a documentary filmmaker was “not a genuine reporter entitled to the privilege, implying a lack of ability,” and the trial court found “he did not regularly engage in obtaining, writing, reviewing, editing[,] or otherwise preparing news.” *Id.* at 436-437. The Tenth Circuit nevertheless applied the reporter’s privilege, noting, “[t]he Supreme Court has not limited the privilege to newspaper reporting.” *Id.* at 437 (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)); *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (extending the privilege to the pre-publication manuscripts of an academic); *Summit Tech., Inc. v Healthcare Capital Group, Inc.*, 141 F.R.D. 381 (D. Mass. 1992) (reporter's privilege applied to the report of an independent researcher and analyst hired by an institutional investor); *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993) (students are protected by the reporter's privilege); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 85 (E.D.N.Y.

1975) (CEO of technical medical newsletter is protected by the reporter's privilege).

The trial court properly considered the Petitioners to be newsgatherers entitled to assert the privilege, even though they report on the Internet. Obviously, not all web publishers, or bloggers, are journalists, and therefore not all web publishers will qualify for the privilege under a functional intent-based test. But those who meet the test that is used for print publications should qualify for the journalist's privilege no matter what media they publish on.

II. CONCLUSION

For the reasons stated above, Amici Curiae respectfully urge this Court to adopt a functional intent-based test to determine that Petitioner journalists are entitled to claim the newsgatherers' privilege.

DATED: April 11, 2005

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c), I certify that this brief contains
2,272 words.

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CERTIFICATE OF SERVICE

I, Judy Gielniak, the undersigned, do hereby state:

I am over eighteen years of age and not a party to the instant proceedings.
My business address is : Stanford Law School, 559 Nathan Abbott Way, Stanford,
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On April 11, 2005, I caused to be served the within:

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IN SUPPORT OF PETITIONERS

on the parties indicated by depositing a true copy thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the Government of the United State at Palo Alto, California, to each person listed below, addressed as follows:

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Executed on April 11, 2005 at Stanford, California. I declare under penalty
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