# PIC SHELL WORKING

#### Im going to cut it down more this is the first draft

#### First, federal case law shows that bloggers are subject to reporter protection laws and can use this right to withhold the identity of trade secret leakers.

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The Apple litigation arose when Jason O’Grady, owner and publisher of ―O’Grady’s Power Page ‖ (a self-described online news magazine focused on information about Apple computers, hardware and software since 1995) and another website, ―Apple Insider‖ (described by someone known as Kasper Jade – a pseudonym – in much the same terms as O’Grady described PowerPage) beginning on November 4, 2004 published several articles about a rumored new, then-secret Apple product.27 The secret product related to Apple’s GarageBand application and digital audio recordings. The articles included drawings, details and technical information. They continued to appear, with more and more information and speculation, for several weeks on both sites. Apple concluded that much of the information had come from one of its own confidential electronic presentation files. The company demanded that the sites remove the references to the product because that information constituted trade secrets owned by Apple and published without its authorization.28 Apple filed its complaint against ―Doe 1, an unknown individual,‖ and ―Does 2-25,‖ who Apple ―described as unidentified persons or entities‖ that had misappropriated and distributed confidential information about an unreleased product. Apple also sought court orders allowing it to serve subpoenas on various websites, including the two discussed above as well as others, for the ―true identities of the persons who leaked the information.29 A few days later, O’Grady, ―Kasper Jade‖ and another person identified as a publisher of the ―MacNewsNetwork ‖ that hosts AppleInsider and other sites moved for protective orders. They successfully asserted that the reporter’s privilege under California law, and the First Amendment, protected their confidential sources; and, under the federal Stored Communications Act30 they argued that the subpoenas issued against a company that had hosted email accounts for PowerPage were illegal because they called for illegal disclosure of communications by demanding the identity of senders of emails with key words related to the leaks.31 Aside from losing the reporter’s privilege argument and cement[ed]ing the likely status of many bloggers as protected journalists under various state shield laws, Apple also managed to generate negative publicity and a negative ruling under the federal law that protects stored email communications as confidential. News media organizations jumped in the case on the side of the blogs and anonymous sources or speakers.32 Other bloggers and news organizations wrote negative articles. Perhaps, Apple thought any publicity was good publicity for a new product, but no credible argument was made to that effect at the time. More significantly, the case made clear that one cannot under federal law obtain access to confidential, stored electronic communications (e.g., e-mails) as a means of identifying the culprits. Apple argued that the federal law protecting stored emails from disclosure was not meant to apply in the context of civil litigation and attempts to identify people who misappropriated trade secrets. The court disagreed and did so in part because it concluded Congress meant to deny both government and private interests access to information that it could not have obtained before the digital age: It bears emphasis that the discovery sought here is theoretically possible only because of the ease with which digital data is replicated, stored, and left behind on various servers involved in its delivery, after which it may be retrieved and examined by anyone with the appropriate ―privileges‖ under a host system's security settings. Traditional communications rarely afforded any comparable possibility of discovery. After a letter was delivered, all tangible evidence of the communication remained in the sole possession and control of the recipient or, if the sender retained a copy, the parties. A telephone conversation was even less likely to be discoverable from a third party: in addition to its intrinsic privacy, it was as ephemeral as a conversation on a street corner; no facsimile of it existed unless a party recorded it—itself an illegal act in some jurisdictions, including California. If an employee wished to disclose his employer's trade secrets in the days before digital communications, he would have to either convey the secret orally, or cause the delivery, by mail or otherwise, of written documents. In the case of oral communications there would be no facsimile to discover; in the case of written communication, the original and any copies would remain in the hands of the recipient, and perhaps the sender, unless destroyed or otherwise disposed of. In order to obtain them, a civil litigant in Apple's position would have had to identify the parties to the communication and seek copies directly from them. Only in unusual circumstances would there be any third party from whom such discovery might be sought. Given these inherent traits of the traditional media of private communication, it would be far from irrational for Congress to conclude that one seeking disclosure of the contents of e-mail, like one seeking old-fashioned written correspondence, should direct his or her effort to the parties to the communication and not to a third party who served only as a medium and neutral repository for the message. Nor is such a regime as restrictive as Apple would make it sound. Copies may still be sought from the intermediary if the discovery can be brought within one of the statutory exceptions— most obviously, a disclosure with the consent of a party to the communication.33 In other words, the court made clear that it would not allow Apple to use digital communications technology to achieve what Apple could not have achieved in the days before e-mail. Furthermore, the court ruled that even mere identification of the names or account information related to the senders of the emails that included the key words would breach the law’s confidentiality requirements.34 Apple thus lost the case at its very core.

#### And the ability for companies to protect trade secrets from anonymous disclosure online is uniquely important, its key to global econ growth and for preventing a wave of litigation which makes doing the aff impossible.

Matthew Bloom, Vancouver Attorney and Graduate from Yale Law School, Subpoenaed Sources and the Internet: A Test for When Bloggers Should Reveal Who Misappropriated a Trade Secret, pub 2006 in Yale Law & Policy Review, Vol. 24, No. 2 (Spring, 2006), pp. 471-483, ///AHS PB

Without clear precedent, a variety of trends suggest that clashes between the First Amendment and trade secret protections will not subside but will become more common. First, as the global economy has become more information-based, trade secrets more often are used to protect information (increasingly with speech implications), as opposed to tangible inventions. Second, while just a few decades ago trade secret law was considered a relatively weak form of protection when balanced against competing interests, today courts like the Bunner court increasingly find that trade secrets provide strong legal protections.63 Perhaps related to the strengthening of trade secret protections, there has developed "a heightened awareness of the benefits of vigorous protection of intellectual property assets which seems to have induced firms to claim a broader range of non-public information as trade secrets."64 As a result of these trends, it appears that trade secret developers are beginning to use trade secrets to protect less important information.65 The traditional treatment of trade secrets, which does not distinguish between more valuable trade secrets and those that are less so, does not pose a barrier to the above described trends because firms' high-priced legal counsel can frame many things that the firm does as having the potential to derive an economic benefit from being kept secret. Thus, firms can simply label much of what they do as a "trade secret” This practice is problematic in situations like the Apple Computer scenario [second] Where trade secrets clash with the right of journalistic privilege, as any journalist who uncovers information that a firm does not want the public to know about faces a costly and burdensome legal threat. Further, in the absence of clear precedent, such lawsuits are relatively likely to proceed to even more costly trials because judges are able to balance competing interests in any way they see fit and the parties involved are less likely to feel comfortable relying on set outcomes. While ultimately judges may rule for either side depending on how they balance the competing First Amendment and trade secret interests at stake, the threat of costly litigation will jeopardize the public's right to fair and accurate reporting through journalists' use of confidential sources. Courts must find a new solution.

#### Thus the Counterplan: In the United States, reporters ought to have the right to protect the identity of confidential sources except in for in cases concerning the digital disclosure of trade secrets by bloggers, where a court using the case by case 3 step process established by the counterplan has ruled that the individual blogger has a legal responsibility to disclose the sources identity. To clarify the counterplan does the aff in all cases except for when a judge rules a blogger in an trade secrets case needs to give up their source. ( IM GOING TO CONSOLIDATE/MAKE IT LESS WORDY WHEN I WRITE THE ACTUAL TAG)

Matthew Bloom, Vancouver Attorney and Graduate from Yale Law School, Subpoenaed Sources and the Internet: A Test for When Bloggers Should Reveal Who Misappropriated a Trade Secret, pub 2006 in Yale Law & Policy Review, Vol. 24, No. 2 (Spring, 2006), pp. 471-483, ///AHS PB

The definition of "trade secret" appears to allow room for courts to distinguish between these cases based on the information that each trade secret seeks to protect. The Uniform Trade Secrets Act defines a trade secret as: information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. As is clear from this definition, all trade secrets share three elements: 1) the information must be unknown to the public; 2) the holder of the information must derive an economic benefit because the information is secret; and 3) the holder must take reasonable efforts to keep the information secret. The third element must remain as is: One should not recover damages or obtain an injunction for publicized information if he or she did not try to protect the trade secret in the first place. But courts can implement a two-part test in relation to the first and second elements, respectively: 1) Is the trade secret unique (i.e., is the same or substantially similar information not already on the market)? 2) In calculating the company's losses because of publication of the trade secret, is the economic damage to the company minor or severe? Based on these questions, courts can devise a continuum to distinguish the "strong" trade secrets from the "weak" ones and determine when a trade secret is important enough to trump a journalist's First Amendment privilege. Despite potential gray areas, such a continuum seems well-suited to ensure that truly valuable information remains protected, but also that the public's interest in fair and accurate reporting is not jeopardized vis-a-vis courts protecting "weak" trade secrets. Applying this test to the quintessential "strong" trade secret, the formula for Coca-Cola, demonstrates this point. Coca Cola's formula is unique and the economic damage to the company would be severe if the secret were published. Based on this test, if Coca-Cola's formula were ever illegally revealed to a journalist, its trade secret protections would trump any shield protections that might otherwise allow the publishing journalist to conceal the source. Critics may seek to attack this approach from an economic efficiency standpoint by claiming that the test, in reducing the protections afforded by less valuable trade secrets, will diminish creativity.68 They may also claim that this test would hinder firms' prospects of receiving returns on secret information by mitigating the harmful effects of free riding, and that the test would permit inefficient disclosure of less valuable secrets. The proposed test, however, is efficient. It would have the strategic effect of forcing firms to look introspectively at their information at an early juncture, to question whether their information is unique, and to question whether publication of the trade secret would result in severe economic loss to the firm. If the information [it] is unique and the economic loss would be severe, then the firm would, for the first time, be able to rely on the fact that its information is protected against First Amendment claims. Employees would refrain from disclosing the trade secret to journalists because they would know that the journalists cannot conceal the[ir] identities of the employee-sources. This scenario eliminates inefficiencies associated with trade secret misappropriation, and it reduces those transaction costs associated with litigation related to disclosure of valuable trade secrets.