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PROTECTING NEWS SOURCES: PLAYBOY EXTENDS PUBLISHER'S RIGHTS

When one thinks of Playboy Magazine, images of sensually photographed women, juxtaposed among slick ads and racy jokes, immediately come to mind. Protecting a newsperson's sources is not an idea one usually associates with "The House That Hef Built." But a California court of appeal held in *Playboy Enterprises, Inc. v. Superior Court*[1] that the magazine's publisher is protected against compelled disclosure of undisseminated notes and editorial materials regarding an interview, when the publisher is not a party to the underlying civil action.[2] This protection is derived from section 1070 of the California Evidence Code ("section 1070")[3] and article I, section 2 of the California Constitution ("article I, section 2").[4]

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1. 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984).

2. *Id.* at 29, 210 Cal. Rptr. at 218.

3. CAL. EVID. CODE § 1070 (West 1986). Since the 1974 amendment, § 1070 has provided:

> (a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine or other periodical publication, . . . or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial . . . body having the power to issue subpoenas, for refusing to disclose, in any proceeding . . . the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, *or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving, or processing of information for communication to the public . . . .[¶] (c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.* [emphasis added.]

4. CAL. CONST. art. I § 2. Article I, § 2 was amended June 3, 1980 to include language almost identical to that which appears in § 1070. Article I, § 2 provides [with changes emphasized]:

> (b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, . . . or any person who has been so connected or employed, *shall not* be adjudged in contempt by a judicial . . . body having the power to issue subpoenas, for refusing to disclose [omission] the source of any information procured while so connected or employed for publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving, or processing of information for communication to the public . . . . [¶] (c) As used in this *subdivision*, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

The court refused, however, to allow Playboy Enterprises ("Playboy") the right to claim similar protection for the whereabouts of the freelance writer, Ken Kelley, who conducted the interview in question. Accordingly, Playboy could be subject to contempt proceedings for refusal to obey a court order to disclose the information about the writer.[5] The circumstances surrounding Playboy's request for protection are outlined below.

The September 1982 edition of Playboy Magazine contained the article "Playboy Interview: Cheech and Chong," written by freelance journalist Ken Kelley. The individuals interviewed were Richard "Cheech" Marin and Thomas Chong, better known as the comedy team of Cheech and Chong. The article covered a broad range of topics, including the pair's first movie, "Up In Smoke." Although not addressed in Kelley's article, Marin and Chong sued their former accountants, financial advisors, and business managers, Greene & Reynolds, for breach of contract and breach of fiduciary duty with respect to the film. Specifically, Marin and Chong alleged in their lawsuit that Greene & Reynolds persuaded them to enter into an unfavorable contract with the producers of "Up In Smoke," without discussing Greene & Reynolds's business relationship with, and financial interest in, the film's production company.

In February and March of 1983, Greene & Reynolds served subpoenas re depositions and subpoenas duces tecum on Playboy, commanding the production of specified notes, tapes and records of the article. Greene & Reynolds sought these materials in order to verify the accuracy of contested statements, attributed to Marin in the article. Greene & Reynolds contended that the materials were necessary to impeach the credibility of Marin and to show that Marin and Chong were not defrauded.[6]

The materials subpoenaed included all documents in Playboy's possession relating to the interview; all audio and video recordings which were used in any way as source material for the resulting article; and all documents relating to the researching, writing and editing of the article.[7] Greene & Reynolds also demanded the attendance of Playboy's custodian of records and of a designated representative pursuant to section 2019(a)(6) of the California Code of Civil Procedure.[8] Neither appeared. However, Playboy's counsel voiced objections, later dropped on appeal, to the court's lack of jurisdiction over the officers who resided outside of

5. *Playboy*, 154 Cal. App. 3d at 29, 201 Cal. Rptr. at 218.
6. *Id.* at 18, 201 Cal. Rptr. at 211.
7. *Id.* at 19, 201 Cal. Rptr. at 211-12.
8. CAL. CIV. PROC. CODE 2019(a)(6) (West 1986).

California; counsel also objected, under article I, section 2, to disclosure of the materials.[9] Several court orders later,[10] the Superior Court directed Playboy to produce to Greene & Reynolds the material as subpoenaed.[11]

Playboy petitioned the Court of Appeal for a writ of mandate. The court issued the writ, directing the trial court to vacate its order compelling Playboy to produce the source material requested, and to make a new and different order compelling Playboy to disclose the current office and/or residence addresses and telephone numbers of Ken Kelley.[12] The court relied on California appellate and supreme court case law as well as rules of statutory construction to define the protection intended by article I, section 2.[13] The court stated that "unpublished information," as used in article I, section 2, referred to "factual information that is within the newsperson's knowledge, whether contained in source material or in memory" and "expressly and unequivocally refers to the physical records constituting a newsperson's source material."[14] The court construed the legislative intent as protection of information and source material of undisseminated information, even if related or derivative information has been published.[15]

This broad construction protects "off the record" comments. Compelled production of Playboy's source materials, editorial drafts and working papers was not enforceable by contempt unless Playboy had previously disseminated any of the particular materials to the public.[16]

Greene & Reynolds argued that the information sought had been

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9. *Playboy,* 154 Cal. App. 3d at 19, 201 Cal. Rptr. at 212.

10. Greene & Reynolds caused an order to show cause re failure to appear at deposition to be issued. At a hearing on that order, Greene & Reynolds were ordered to use diligent efforts to locate and depose Ken Kelley concerning his interview of Marin and Chong. Greene & Reynolds were unsuccessful. A second order to show cause was issued on that basis. *Id.* at 19, 201 Cal. Rptr. at 211-12.

11. *Id.* at 19, 201 Cal. Rptr. at 212. The court order read:

> (a) Each and every document (as defined below but specifically including all tapes, cassettes and the like) in its possession or under its control which constitute or memorialize any interview of [Marin and Chong] by Ken Kelley, which document in any way was used in preparing, writing or researching the article . . . ; (b) Each and every document which reflects or relates to the editing of the interview for publication in the article, as well as the writing of the article (as used in this order, "document" is defined to include but not be limited to, any audio or video tapes, cassettes, or rewrites of the article, and any notes or other records of any type reflecting the writing or research of this article) . . . .

12. *Id.* at 29, 201 Cal. Rptr. at 218.

13. *Id.* at 20-22, 201 Cal. Rptr. at 213-14.

14. *Id.* at 21, 201 Cal. Rptr. at 213.

15. *Id.* at 22, 201 Cal. Rptr. at 213-14.

16. *Id.* at 22, 201 Cal. Rptr. at 214. The court also noted that trial courts are relieved of the burden of sorting which facts have already been disseminated.

previously disseminated, as the article was virtually an exact transcription of the tape-recorded interview. They also argued that Playboy had no interest in refusing to disclose the materials to protect "source confidentiality," since the contested statements were directly attributed to Marin in the article.[17]

Greene & Reynolds derived their arguments from *CBS, Inc. v. Superior Court*.[18] That case involved a television broadcast on the dangers of certain drugs, and included a segment about undercover police operations. CBS agreed to conceal the officers' identities until their undercover roles ended. The officers were called as witnesses at the hearing on CBS's motion to quash a subpoena compelling disclosure of their source material in an underlying criminal case. The *CBS* court focused on the protection section 1070 gave to confidential sources and stated that the purpose of agreed confidentiality was lost.[19] The *Playboy* court found no support for so limiting the application of section 1070 and dismissed the argument as being in direct conflict with the statutory interpretation it adopted.[20]

The *Playboy* court similarly dismissed the argument that the California legislature, in adopting article I, section 2 in 1980, ratified the judicial "construction" given to section 1070 by the *CBS* court.[21] Instead, the *Playboy* court recognized that the legislative intent in adopting article I, section 2 was clearly contrary to this construction.[22] Greene & Reynolds failed to see that disclosure of confidential sources is but one protection enumerated by article I, section 2. The court stated that *all* data not itself disseminated to the public is protected against disclosure, whether or not published information based upon this material had been dissemi-

17. *Id.* at 23, 201 Cal. Rptr. at 214.

18. 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978).

19. *Id.* at 250, 149 Cal. Rptr. at 426.

20. *Playboy*, 154 Cal. App. 3d at 23, 201 Cal. Rptr. at 214.

21. *Id.* at 24, 201 Cal. Rptr. at 215. This general rule of construction was stated in Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960): "When legislation has been judicially construed and a subsequent statute on the same or on an analogous subject is framed in the identical language, it will ordinarily be presumed that the legislature intended the language as used in the later enactment would be given a like interpretation." The act before the *Transit Authority* court incorporated "the exact language . . . found in the earlier statutes, and it is unlikely that the same words would have been repeated without any qualification in a later statute in the absence of an intent that they be given the construction previously adopted by the courts." 54 Cal. 2d at 688-89, 355 P.2d at 907, 8 Cal. Rptr. at 3.

22. *Playboy*, 154 Cal. App. 3d at 24, 201 Cal. Rptr. at 215. This exception to the "general rule of construction" was articulated in County of Los Angeles v. Frisbie, 19 Cal. 2d 634, 644, 122 P.2d 526, 532 (1942).

nated.[23] The *Playboy* court also noted that section 1070 was not construed by the *CBS* court; section 1070 was held inapplicable in *CBS* based upon considerations other than statutory language.[24]

Greene & Reynolds argued that the undisseminated materials would merely confirm or amplify the accuracy of Marin's statements in the article, that nothing new would be disclosed in the source materials, and that this would render the constitutional protection inapplicable.[25]

The court found that the material fell squarely within the ambit of article I, section 2 protection, whether the published information was an exact transcription of source material or a summary. By necessity, the court said, published material that confirms, or discredits, undisseminated source material is "related to" or "based upon" unpublished source material.[26]

The *Playboy* court then turned to the issue of competing interests, that is, whether Playboy's constitutional protection must yield to the discovery efforts of Greene & Reynolds. In addressing this issue, the court noted that it was not clear whether Greene & Reynolds had "any cognizable right to discovery of sufficient magnitude to create conflict with article I, section 2 and necessitate a balance of these competing interests."[27]

In *Valley Bank of Nevada v. Superior Court*,[28] the constitutional right to privacy, acknowledged to extend to banking records *absent compulsion by legal process* [emphasis supplied], was balanced against the

23. *Playboy*, 154 Cal. App. 3d at 24, 201 Cal. Rptr. at 214. This position is consistent with the reasoning of Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979). That case involved a newsman's motion to quash a subpoena compelling disclosure of material pertaining to interviews with the prosecution's primary witness in a murder trial. The defendant sought the materials to impeach the witness. The Court of Appeal held that unpublished information was not limited to material that might lead to the disclosure of a newsperson's confidential sources, but encompassed *all* information acquired by the newsperson in his professional capacity which he has not disseminated. *Id.* at 397-98, 153 Cal. Rptr. at 613. However, the newsman's contempt charge was upheld for other reasons relevant only in the context of underlying *criminal* suits. *Id.* at 403, 153 Cal. Rptr. at 615.

24. *CBS*, 85 Cal. App. 3d at 250, 149 Cal. Rptr. at 426. Thus, the *Playboy* court could have dismissed the "general rule of construction" argument (*see supra* note 21) on the basis that Greene & Reynolds's interpretation of § 1070 conflicted with the judicial construction that had *actually* been accepted in California (*see supra* note 23).

25. *Playboy*, 154 Cal. App. 3d at 23, 201 Cal. Rptr. at 215.

26. *Id.* at 23-24, 201 Cal. Rptr. at 215. "[Since article I, § 2] provides protection for all such material, [it] must be deemed reflective of the presumption that a publisher's refusal to disclose is a prima facie demonstration of an interest sufficient to require protection." *Id.* at 24, 201 Cal. Rptr. at 215.

27. *Id.* at 25, 201 Cal. Rptr. at 216.

28. 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).

governmental interest in resolving civil claims.[29] That court held that confidential customer information was potentially discoverable.[30] But the *Playboy* court limited *Valley Bank* to its facts, since a customer's constitutional right to privacy is inherently qualified, while "the constitutional newsperson's protection under article I, section 2 . . . is express in its specific and absolute purpose to shield newspersons for refusal to disclose information or material expressly . . . falling within the scope of its protection."[31]

In examining the scope of section 1070's protection, the *Playboy* court noted that section 1070 did not extend to situations where newspersons are defendants in libel or civil rights violation actions. There, the newsperson could be compelled by the trial court to disclose undisseminated material or information. Accordingly, the reporter is subject to the same discovery actions as other civil litigants.[32] This was the precise set of circumstances surrounding *KSDO v. Superior Court.*[33]

The *KSDO* court balanced the protection of unhindered news gathering against the obligation of citizens to give relevant testimony. The case enumerated criteria to be used when employing this balance.[34] In *dictum*, the *KSDO* court speculated that the criteria might require disclosure by a nonparty newsperson to accommodate discovery.[35] The *Playboy* court believed that this would allow compelled disclosure of undisseminated materials in many cases and would, in effect, vitiate the newsperson's protection. Additionally, since *KSDO* was distinguishable from *Playboy* in two critical aspects—the newsperson in *KSDO* was a party to the civil action, and the newsperson relied only upon the indirect protection of the first amendment rather than the direct protection of article I, section 2—"whatever conclusions were volunteered by the *KSDO* court concerning the level of protection available to nonparty

29. *Id.* at 657, 542 P.2d at 979, 125 Cal. Rptr. at 555.

30. A bank is required, however, to notify the customer of the pendency and nature of the proceedings. This affords the customer an opportunity to protect his interests. *Id.* at 658, 542 P.2d at 980, 125 Cal. Rptr. at 556.

31. *Playboy*, 154 Cal. App. 3d at 26, 201 Cal. Rptr. at 216.

32. *Id.* "Section 1070 . . . provides an immunity from being adjudged in contempt; it does not create a privilege. Thus, the section will not prevent the use of other sanctions for refusal of a newsman to make discovery when he is a party to a civil proceeding." Stats. 1965, c. 299, 1070, Comment, Assembly Comm. on the Judiciary.

33. 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982). However, the reporter in *KSDO* was protected against compelled disclosure under a general first amendment interest in the free flow of information to the public. *Id.* at 386, 186 Cal. Rptr. at 217.

34. *Id.* at 384-85, 186 Cal. Rptr. at 216-17. The criteria were: (1) the nature of the proceeding, (2) the status of the newsperson as a party or nonparty, (3) alternative sources of the information, and (4) the relationship of the information to the heart of the claim.

35. *Id.* at 385, 186 Cal. Rptr. at 217.

newspersons are *obiter dictum*."[36]

The court observed that the legislature's decision to elevate the protection of section 1070 to the constitutional level manifested an intent to afford newspersons the highest level of protection under state law.[37] The court interpreted this as favoring the interests of the press in confidentiality over the state's interest in having civil actions determined upon a full development of material facts. Simply because the legislature did not specifically protect newspersons who are a party to an action, the express protection granted to nonparty newspersons in civil actions cannot be eviscerated by the courts.[38]

The general state interest in full civil discovery is subject to the limitations found in the Evidence Code.[39] These limitations act as privileges. The *Playboy* court reasoned that there must exist similar legislative authority to protect compelled disclosure of information by a newsperson.[40] Thus, article I, section 2 affords protection of equal strength to the limitations of the Evidence Code. Otherwise, section 1070 would have less "dignity than other statutes and . . . the people's further acts in elevating this protection to the state constitutional level [would be rendered] meaningless."[41] The court concluded that the unqualified protection of article I, section 2 did not have to yield to Greene & Reynolds's discovery interest in the context of their underlying civil action.[42]

The court recognized that Greene & Reynolds demonstrated to the trial court unsuccessful yet diligent efforts to locate Ken Kelley. Playboy refused to disclose his whereabouts based on its general policy. This information was not protected by article I, section 2 as Kelley's address was not obtained or prepared in gathering, receiving or processing information for communication to the public. The court held, therefore, that Playboy could be subject to contempt proceedings for refusing to obey an order to disclose this information.[43] The Superior Court was directed to vacate the order compelling Playboy to produce the source materials of "Playboy Interview: Cheech and Chong." Instead, the Superior Court had to issue a new and different order compelling Playboy to disclose the

36. *Playboy*, 154 Cal. App. 3d at 27, 201 Cal. Rptr. at 217. Also, the information sought from the *KSDO* reporter was available from other sources. *KSDO*, 136 Cal. App. 3d at 386, 186 Cal. Rptr. at 217-18.

37. *Playboy*, 154 Cal. App. 3d at 27, 201 Cal. Rptr. at 217-18.

38. *Id.* at 27-28, 201 Cal. Rptr. at 218.

39. *See* CAL. EVID. CODE §§ 900-1060.

40. *Playboy*, 154 Cal. App. 3d at 28, 201 Cal. Rptr. at 218.

41. *Id.*

42. *Id.*

43. *Id.* at 29, 201 Cal. Rptr. at 218.

current office and/or residence addresses and telephone numbers of Ken Kelley.[44]

The *Playboy* court interpreted article I, section 2 consistent with the free press clause of the first amendment. It recognized the necessity of protecting confidential news sources[45] as well as the people's desire to maintain unrestrained journalism.[46] It showed, in the words of the court in *Rosato v. Superior Court,*[47] an "extraordinary and sensitive solicitude for the preservation of a free and untrammeled press as an indispensable guardian of our freedom."[48] The court stood fast against an attempt to invade the realm of an official immunity that the people granted to the magazine publisher.

Simultaneously, the court recognized a need, in limited instances, to reveal source material. It accomplished this by expressly confining application of the decision to those instances where the reporter is a *nonparty* faced with a contempt charge. The court left the judicial door wide open to imposing other sanctions when the reporter is directly involved in the underlying civil litigation. This interpretation of article I, section 2 has since been adopted by the Califonia Supreme Court in *Mitchell v. Superior Court.*[49]

The basis for differentiating between a party reporter and a nonparty reporter, however, is tenuous. Section 1070 does not specifically distinguish the two classes of newspersons. The *Playboy* court drew support from an Assembly committee comment that had been written nineteen years earlier; the comment was never explicitly adopted in subsequent amendments to the statute.[50] Additionally, when the privilege was ele-

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44. *Id.*

45. "Compulsory disclosure of confidential news sources is said to impede first amendment functions in two ways: by drying up sources that are available under the promise of confidentiality or anonymity, and by deterring future investigation and information gathering which rely upon confidential sources." Comment, *The Newsman's Qualified Privilege: An Analytical Approach,* 16 CAL. W.L. REV. 331, 339 (1980).

46. The broad scope of California's shield law and the fact that it has now been embodied in one of the first articles of the state's constitution reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment . . . .

Los Angeles Memorial Coliseum Comm'n v. National Football League, 89 F.R.D. 489, 495 (1981), quoting Baker v. F&F Inv., 470 F.2d 778, 782 (2d Cir. 1972).

47. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975).

48. *Id.* at 212, 124 Cal. Rptr. at 441.

49. 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984). The qualified reporter's privilege was upheld based on a balancing of criteria similar to those employed by the *KSDO* court (*see supra* note 29). *Id.* at 284, 690 P.2d at 635, 208 Cal. Rptr. at 162.

50. Section 1070 has been amended four times since it was first enacted in 1965.

vated to the constitutional level, the legislature failed to embody the distinction in the words of the statute itself.

Speculating about what the court sought to gain by compelling disclosure of Ken Kelley's address and phone number is equally problematic. Arguably, this order will direct Greene & Reynolds to the information that they wished to use in their defense. However, this line of reasoning requires the exclusion of freelance journalists, such as Ken Kelley, from the enumerated classes of newspersons who are protected by section 1070 and article I, section 2. Considering the lack of statutory support for this proposition, as well as the vulnerability to challenges based on equal protection grounds,[51] it is not surprising that the court failed to denote the rationale behind compelling disclosure of Kelley's personal information.[52] Thus, we can only assume that under the *Playboy* holding, Ken Kelley would be able to claim the same immunity from prosecution by "hopping" under the protection of article I, section 2.

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51. Ken Kelley could argue that his fundamental right to freedom of expression has been infringed by excluding him from the protected class of newspersons.

52. This is not to suggest that the information should be constitutionally protected, but instead proposes that the court should have clarified why Greene & Reynolds were entitled to a court order for production of this information.