IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

JOHNS-BYRNE COMPANY, an Illinois Corporation,	)	
Petitioner,	)	The Honorable Michael R. Panter
	)	Motion Calendar "X"
v.	)	
	)	Case No. 2011 L 009161
TECHNOBUFFALO LLC, a California Limited Liability Company, MEDIA TEMPLE INC., a California Corporation, GOOGLE, INC., a Delaware Corporation, and AT&T, INC., a Delaware Corporation,	)	
Respondents.	)	

ORDER

This cause comes to be heard on TechnoBuffalo's Motion to Reconsider the granting of John-Byrne Company's Rule 224 Petition. The court has reviewed the pleadings, briefs and exhibits submitted by each party. For the reasons stated below, the motion to reconsider is granted and the Rule 224 Petition is denied.

In essence, the ability to discover information in a formal way, without actually suing anyone, is extremely important. The right of a lawful business to protect its vital information is also critically important. However, the reporter privilege is deeply ingrained in our culture and has always been jealously guarded, even when, or especially when, it is used for purposes which are less than admirable. TechnoBuffalo is correct that our laws have not found a way to distinguish what they do from the most elevated journalistic traditions, our only access to the shocking revelations and insidious secrets that journalists bring to light. Encouraging and enabling people to violate relationships of trust with their employers and to steal proprietary information may be odious. It may weaken the very industry that TechnoBuffalo depends upon. It may itself be actionable under the statutes and authorities JBC cites. However, as of this writing, it cannot be excluded from the extremely broad protection of the journalistic privilege. Clearly, this Court's opinion is not the last word on this issue.

To restate the facts, this case arises out of the alleged capture, distribution and posting of images of the Motorola Droid Bionic smartphone prior to its public release. The images were captured from a manual being printed by Johns-Byrne Company (JBC). JBC alleges that on August 16, 2011, an unknown individual allegedly captured trade secret images from its manual and submitted them to TechnoBuffalo. JBC alleges TechnoBuffalo received the images and displayed them on its website several weeks before the phone was to be released. The website posting states "an anonymous tipster" provided TechnoBuffalo with information about the

phone, and that images of the phone "fell into our inbox late last night." JBC alleges the other respondents were also involved in distributing the information.

JBC alleges TechnoBuffalo may have information on the identity of the "tipster" who provided the alleged trade-secret images. JBC alleges it has a potential cause of action against that individual for theft of confidential trade secrets and possibly breach of contract. They cite the Economic Espionage Act, 18 U.S.C. § 1832 *et seq.* JBC alleges in its Response to the Motion for Reconsideration that it suffered damages as a result of the theft including removal, at least temporarily, from its client's approved vender list, which cost JBC "significant business" and breached confidentiality to its client. JBC petitions this Court pursuant to Illinois Supreme Court Rule 224 for limited discovery of the communications TechnoBuffalo had in regard to this one posting on their website. The petition requests communications in a seven-day period (August 11-17, 2011) from all named respondents. All other respondents either agreed to comply or did not file objections to the Petition. TechnoBuffalo argues the Illinois reporter's privilege (735 ILCS 5/8-901 *et seq.*) prevents JBC from compelling the disclosure of its confidential source. TechnoBuffalo has never denied it does possess the full identity of the source it seeks to protect. On January 13, 2012, this Court granted JBC's Rule 224 Petition. TechnoBuffalo moved for reconsideration, supplying additional documents, affidavits and website postings.

Since the granting of the Rule 224 Petition, the parties have stipulated that the Court should review the TechnoBuffalo website, quoted in part by both parties. Reviewing the website is disconcerting. The website makes it clear that TechnoBuffalo is inviting conduct which may or may not be legal and is very likely actionable. They solicit employees of tech companies to be "super secret ninjas" to "discover something top secret in your store's inventory" and handover "inside information" to TechnoBuffalo who then disseminates it for their own purposes and who will "take your name to the grave." The relevant page of their website reads:

> "Have some inside information on a brand new device? Discover something top secret in your store's inventory? We want to hear from you! At TechnoBuffalo we always treat our sources like the super secret ninjas they are. If you want your identity kept secret, we will take your name to the grave. If you want your name to be known, we will always give proper credit, and make sure you get the recognition you deserve. Tips and news are the lifeblood of a tech site, and we thank you for keeping us alive."

These solicitations are particularly detrimental to the intellectual property industry so reliant upon employee confidentiality and so sensitive to how and when their new concepts are disclosed. TechnoBuffalo shows full understanding of the subversive conduct they encourage by acknowledging the "super secret" nature of the inside information whose source they will protect "to the grave." Unlike other famous secrets whose sources were protected in order to inform citizens of government corruption and public misconduct, the sole purpose of the TechnoBuffalo solicitation is to promote TechnoBuffalo, without a second thought as to what harm it may cause lawful and productive companies whose stolen information it leaks. Whether JBC actually owned the information or had been entrusted with it does not change the fact it was taken from them by an anonymous tipster and published by TechnoBuffalo. Even the article TechnoBuffalo posted on April 13, 2012, three months after this Court's initial order, describing its supposed

policy to verify leaks, does nothing to cure the problem it creates by causing and spreading the leaks.

TechnoBuffalo maintains it is a "news medium" as defined by the privilege because TechnoBuffalo's website provides articles covering a breadth of technology-related issues and topics through editorial commentary, descriptive "how-to" guides, reviews and updates on new products and immersive video to over one million readers per month. TechnoBuffalo lists various credits and credentials. TechnoBuffalo further maintains that its posting of the article at issue amounts to "reporting" as defined by the privilege. The affidavit of John Rettinger, president of TechnoBuffalo, states that he received the information and photographs regarding the phone and then asked one of his staff members to draft an article using the information and photographs. The article at issue identifies Emily Price as the author. The affidavit further states that all content must be fact-checked by TechnoBuffalo's staff and approved by its Editor-in-Chief, Sean Aune, before it is posted on the website. A review of the article confirms TechnoBuffalo's claim that the article is not a mere transmittal of information received from the tipster, but rather incorporates the information into an article.

JBC asserts that TechnoBuffalo did not act as a "reporter" since it only acquired the information passively rather than by an active investigation. Further, JBC maintains that TechnoBuffalo is not entitled to the privilege because it was not providing news but rather disseminating "hype." TechnoBuffalo argues that the reporter's privilege does not define "news" and therefore such a standard cannot be imputed on the content posted by TechnoBuffalo.

The TechnoBuffalo website is organized into six main sections: 1) "news" 2) "reviews" 3) "videos 4) "user submitted" 5) "in the news" and 6) "giveaways." In addition, there are links on the homepage allowing a visitor to send tips, advertise, and contact the website. The website does not say tipsters are compensated. The "news" section provides very brief postings on the latest in the tech-world, most prominently the release of new technological products and updates on developments in the technology industry. The "reviews" section provides editorial commentary on new products like smartphones and tablet computers. The "user submitted" section posts articles written and submitted by non-employee users of the site. The "in the news" section posts articles from 3rd party news mediums, such as the Buffalo Press, CNBC, and Fox News. The "giveaways" section allows users to win tech products through sweepstakes competitions initiated by TechnoBuffalo.

Illinois Supreme Court Rule 224 provides that a "person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery." Ill. Sup. Ct. R. 224(a)(i). The use of a Rule 224 petition is appropriate in situations where a plaintiff has suffered an injury but does not know the identity of one from whom recovery might be sought. *Gaynor v. Burlington Northern & Santa Fe Railway*, 322 Ill. App. 3d 288 (2001). While Rule 224 is intended to assist a potential plaintiff in seeking redress against a person who may be liable, the rule also requires a petitioner to demonstrate the reason why the proposed discovery seeking the individual's identity is "necessary." *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 14.

The Illinois reporter's privilege set out in 735 ILCS 5/8-901 provides, "No court may compel any person to disclose the source of any information obtained by a reporter except as provided in Part 9 of Article VIII of this Act." The privilege has "evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's first amendment right to freely gather and disseminate information." *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill. 2d 419, 424 (1984). The purpose of the privilege is to assure reporters access to information, thereby encouraging a free press and a well-informed citizenry. *Cukier v. American Med. Ass'n*, 259 Ill. App. 3d 159, 163 (1994); *In re Subpoena Duces Tecum to Arya*, 226 Ill. App. 3d 848, 852, (1992).

The first consideration is whether the TechnoBuffalo website meets the definition of a "news medium." "News medium" is defined as:

> "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing." (735 ILCS 5/8-902).

In *State ex rel. Beeler, Schad and Diamond, P.C. v. Target Corp.*, the court held that the magazine PC-Week, now eWeek, constituted a "news medium" under the Act. 367 Ill. App. 3d 860, 868 (2006). Issues of eWeek are available in electronic form at www.eWeek.com. Though the *Beeler* court's holding was limited to the print form, the Act includes electronic newspapers and periodicals under the definition of "news medium," thereby extending *Beeler* to sites like eWeek.com. 735 ILCS 5/8-902(b). A review of eWeek's website reveals that it is generally equivalent to the TechnoBuffalo website. Though eWeek.com is visibly more extensive than TechnoBuffalo, providing separate sections for blogs and webcasts among other areas, the primary function of eWeek.com and others like TechnoBuffalo is to provide news and reviews for the tech-oriented consumer.

Beeler is distinguishable from the instant case in one regard. While eWeek originally existed in print form before being converted into an electronic form, TechnoBuffalo has always existed in electronic form with no print derivative. Since the print form of eWeek is unquestionably a "periodical," it would be logical to label eWeek.com as an electronic periodical. Nevertheless, the line between what constitutes an online newspaper or periodical and a standard news website remains hazy. Time.com and chicagotribune.com may be called an electronic periodical and newspaper respectively with little argument since both have print derivatives. At the same time, notable websites like thehuffingtonpost.com and salon.com are prominently referred to as an electronic newspaper and periodical respectively, despite the absence of a print derivative. Further, the minimal legislative history of the Act fails to show that the Illinois General Assembly intended the definition of "news medium" to exclude entities who, like TehchnoBuffalo, exist solely in electronic form when it amended the Act in 2001 to include the language "whether in print or electronic form." 735 ILCS 5/8-902(b).

The issue of whether a blog/news site such as TechnoBuffalo is to be treated as a "news medium" is novel and has seldom been dealt with by other states containing shield laws. Two cases in particular stand out. In *O'Grady v. Superior Court,* the court ruled that the meaning of "magazine" and "other periodical publication" in the California shield statute includes blogs. 44 Cal. Rptr. 3d 72, 100 (2006). The court reasoned that "the term 'magazine' is now widely used in reference to websites or other digital publications of the type produced" in this particular case. *Id.* The court further found that, even if a blog does not constitute a "magazine" as defined by the California shield act, it could be classified as "[an]other periodical publication." See *Id.* The court's aim in its ruling was to adopt a flexible interpretation of the state shield law, in an effort to promote the Act's general purpose of protecting "the gathering of news for dissemination to the public." *Id.*

The court in *Too Much Media LLC v. Hale* echoed this understanding that a blog may fall within the spirit of its shield act. 206 N.J. 209, 225 (2011). However, the court was careful to distinguish blogs comprised of personal thoughts, opinions, and impression from blogs containing content acquired from actual news gathering, reaffirming a central consideration shared by many states in regards to their shield laws, including Illinois. That distinction is whether there has been a gathering and dissemination of news to the public. *Id.* at 226, see also *In re Arya,* 226 Ill. App. 3d 848, 852 (1984). "The fundamental interest to be protected is the ability of the news media to maximize 'the free flow of information' to the public." *Id.* The Illinois courts have identified a similar purpose in its shield act: to facilitate the free flow of "complete, unfettered information to the public." *Culkier*, 259 Ill App. 3d at 163, quoting *Arya*, 226 Ill. App. 3d at 852. In the absence of a clear, legislative intent, this Court recognizes that a failure to adopt the utilitarian approach of *O'Grady* and *Too Much Media* will contravene the Act's purpose. Therefore, this Court holds that TechnoBuffalo cannot be excluded as a "news medium" within the meaning of the Act.

Three considerations remain: 1) whether TechnoBuffalo was publishing "news," 2) whether it acquired that "news" from a "source," and 3) whether TechnoBuffalo was acting as a "reporter." The Act does not actually define "news." The word "news" appears in the Act's definition of "source," which states a "source" is "the person or means from or through which the *news* or information was obtained." 735 ILCS 5/8-902(c). JBC asserts that the content of the article at issue, or moreover, any of the content posted on the TechnoBuffalo website, does not amount to legitimate news but is rather mere "commercial hype" and "entertainment." However, these concepts or terms of art are nowhere to be found in the Illinois Act. The Act nowhere states that certain content is news and other content, like the "hype" or "entertainment" asserted by JBS, is not news. The content of the "news" simply is not discussed and is not a factor in determining the application of the privilege under the current language of the Act.

That being said, even if content were to be a factor in determining whether certain information constituted "news," the content of the article at issue qualifies as "news." It is recognized that "in the absence of a statutory definition, a term within a statute must be given its ordinary and popularly understood meaning." *Wauconda Fire Protection District v. Stonewall Orchards, LLP,* 214 Ill. 2d 417, 430 (2005). "News" is defined by www.merriam-webster.com as "a report of recent events" and "previously unknown information." Similarly Dictinary.com defines "news" as "a report of recent events." Under the ordinary meaning of "news," the article at issue

presented a report on recent events, namely the upcoming release of a new Motorola smartphone. It also supplied previously unknown information. As such, TechnoBuffalo's article falls under the broad, plain meaning of "news."

Therefore, JBC's attempt to distinguish "hype" from actual news is unavailing. The Illinois legislature omitted a definition for "news," which may suggest that it intended for "news" to be interpreted broadly (or that it placed little importance on its definition). This is consistent with *Arya,* which found the Act's central aim is to protect the gathering and dissemination of news, regardless of the legitimacy or newsworthiness of the content. *Arya*, 226 Ill. App. 3d at 852. Not only is newsworthiness of content omitted from the Act itself, but other courts have recognized the difficulty in crafting a workable test to distinguish legitimate from illegitimate news. *O'Grady,* 44 Cal. Rptr. 3d 96. In the absence of a statutory definition, this Court must adhere to the term's ordinary meaning and find that the content of the article at issue constituted "news" under the Act.

Even were this court to follow JBC's interpretation, the content of the article at issue would still fall under the Act since "source" is defined as the "the persons or means from or through which the news or information was obtained." 735 ILCS 5/8-902(c). The interpretation of a statute "should not render any of the provisions superfluous or redundant." *Budka v. Bd. of Pub. Safety Comm'rs*, 120 Ill. App. 3d 348, 352 (1983). To avoid any redundancy, "information" must be given a distinct meaning. There is no doubt that TechnoBuffalo acquired "information" regarding the new smartphone when it received the anonymous tip. Accordingly, TechnoBuffalo acquired that "news or information" from a "source," namely the anonymous tipster. Again, as this Court must interpret it, the article meets the broad and expansive requirements of the Act.

JBC finally asserts that TechnoBuffalo's conduct, in receiving the tip and composing the article, does not meet the statutory definition of "reporter" since TechnoBuffalo was not "gathering or investigating news." "Reporter" is defined as:

> "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained." (735 ILCS 5/8-902(a).

According to JBC, the Act requires a news entity to actively seek out and gather the news rather than passively collect it. However, there is no requirement in the statutory language that a reporter must actively seek out the information reported. Rather, the definition of "reporter" is clear. The reporter must be "engaged in the business of collecting, writing, or editing news for publication." 735 ILCS 5/8-902(a). How news is collected—actively, passively or otherwise—is not set out or discussed in the Act. Without any legislative history to indicate otherwise, to "collect" must be taken in its ordinary meaning as "gathering" or "receiving" information in some way. According to Rettinger's affidavit, he *received* the information and photographs from the anonymous tipster and assigned one of his employees to write a draft of the article. Contrary to JBC's assertion, the article was not a mere transmittal of the information received from the tipster. Rather, one of TechnoBuffalo's writers utilized the information to craft an article. A few sentences from the article confirm this: "We've heard a few rumors that the Bionic would be

getting a 4.5" display [...] It looks like Motorola will be offering the same connectivity options for the Bionic that it did for the Atrix [...] The Bionic will have three microphones located in different locations on the device." Rettinger's affidavit further states that TechnoBuffalo fact-checks and edits all of its content prior to posting it and that its Editor-in-Chief must approve all content posted on the website. Although the record does not show what fact-checking may have been utilized here, if any, some journalistic process, at least as encompassed by the Act, took place. This Court is not to consider whether TechnoBuffalo "operates according to the same journalistic standards as 'traditional' media" or whether their methods are ethical or even lawful. This Court is simply to determine whether they fit the definitions of the Act. For these reasons, this Court finds that TechnoBuffalo's conduct, and that of its editors and writers, meets the statutory definition of "reporter."

JBC also argues TechnoBuffalo can be divested of its reporter's privilege under 735 ILCS 5/8-907, which allows a court to divest a reporter of the Act's privilege where the party seeking the sought-after information has shown 1) the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of Illinois or of the Federal government, 2) all other available sources of information have been exhausted and, 3) disclosure of the information sought is essential to the protection of the public interest involved. The Illinois Supreme Court has found that courts must balance "the reporter's first amendment rights against the public interest in the information sought and the practical difficulties in obtaining the information elsewhere." *Culkier*, 259 Ill. App. 3d at 165. Determining whether the standard has been met "cannot be reduced to any precise formula or definition, but rather must depend on the facts of each individual case." *Id.* The divestiture test sets a high threshold. See *Arya*, 266 Ill. App. 3d at 861.

In *Arya*, a television reporter conducted an independent investigation into an armed robbery and triple homicide. *Id.* at 850. During the investigation, the reporter recorded several interviews, one of which contained information about a potential suspect. *Id.* All of the interviewees requested that their identity be shielded and refused to speak to the police. *Id.* The trial court ordered divestiture. *Id.* The appellate court reversed, stating "The legislature intended divestiture of a reporter's privilege to be the last resort to get the sought-after information," and therefore "a petitioner must satisfy the court that its investigation has been sufficiently thorough and comprehensive that further efforts to obtain the sought-after information would not likely be successful." *Id.* at 862.

In light of *Arya*, this Court finds that JBC cannot satisfy the elements of divestiture. As to the first element, JBC contradicts itself. JBC claims the information is not required to be kept secret. However, JBC's own justification for its 224 Petition was that the information published was a trade secret, protected by Illinois law and required to be kept confidential. As to exhausting resources, JBC has not shown it used all available avenues to determine the identity of the tipster. JBC claims it "performed its due diligence and exhausted all other available sources of information," and, if necessary "can go into great detail regarding its comprehensive investigation." However, JBC has not done so. This *was* the moment for JBC to describe its due diligence, i.e. JBC could have shown that it conducted a thorough and comprehensive investigation of its own company employees, since it suspected the tipster to be an insider, and that the investigation was inconclusive. As such, JBC has not offered sufficient evidence of the

elements necessary to meet the high threshold of divestiture. Again, given the sacrosanct nature of the reporter's privilege, JBC's petition, while expressing legitimate concerns, cannot overcome the Act. This Court cannot divest TechnoBuffalo of its reporter's privilege.

In sum, within the present definitions under the Act, this Court must find TechnoBuffalo is a news medium, its employees are reporters, including the employee who wrote the article at issue, and TechnoBuffalo is protected by the Illinois reporter's privilege. As such, it cannot be compelled by a Rule 224 Petition to disclose the source of the information at issue. Therefore, TechnoBuffalo's Motion to Reconsider is granted and JBC's Rule 224 Petition is denied.

IT IS HEREBY ORDERED:

TechnoBuffalo's Motion to Reconsider is GRANTED. Johns-Byrne Company's Rule 224 Petition for Discovery is DENIED.

This matter is set for further case management on August 13, 2012 at 10:45 AM.

ENTER:

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Michael R. Panter, Associate Judge 1990

DATE:

Assoc. Judge Michael Panter

JUL 13 2012

Circuit Court-1990