

S134873

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**HEBREW ACADEMY OF SAN FRANCISCO, et al.,**  
*Plaintiffs and Appellants,*

*vs.*

**RICHARD N. GOLDMAN, et al.,**  
*Defendants and Respondents.*

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AFTER A DECISION BY THE COURT OF APPEAL  
FIRST APPELLATE DISTRICT, DIVISION TWO  
CASE No. A106618

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**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF  
AEONIX PUBLISHING GROUP; THE AMERICAN ASSOCIATION OF LAW LIBRARIES; THE  
AMERICAN SOCIETY FOR INFORMATION SCIENCE AND TECHNOLOGY; THE  
ASSOCIATION FOR DOCUMENTARY EDITING; THE ASSOCIATION OF RESEARCH  
LIBRARIES; BAY AREA INDEPENDENT PUBLISHERS ASSOCIATION; THE INDEPENDENT  
BOOK PUBLISHERS ASSOCIATION; THE MEDICAL LIBRARY ASSOCIATION; THE  
NATIONAL COALITION FOR HISTORY; NESTLÉ USA, INC.; THE ORAL HISTORY  
ASSOCIATION; THE SMALL PRESS CENTER; THE SOCIETY OF AMERICAN ARCHIVISTS;  
THE SOUTHERN CALIFORNIA ASSOCIATION OF LAW LIBRARIES; AND THE SPECIAL  
LIBRARIES ASSOCIATION IN SUPPORT OF DEFENDANTS RICHARD N. GOLDMAN, ET AL.**

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AMERICAN SOCIETY FOR INFORMATION SCIENCE AND TECHNOLOGY; THE ASSOCIATION FOR  
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THE SOCIETY OF AMERICAN ARCHIVISTS; THE SOUTHERN CALIFORNIA ASSOCIATION OF LAW  
LIBRARIES; AND THE SPECIAL LIBRARIES ASSOCIATION**

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**APPLICATION FOR LEAVE TO FILE AMICI CURIAE  
BRIEF**

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Pursuant to California Rules of Court, rule 29.1(f), Aeonix Publishing Group, the American Association of Law Libraries, the American Society for Information Science and Technology, the Association for Documentary Editing, the Association of Research Libraries, Bay Area Independent Publisher's Association, the Independent Book Publishers Association; the Medical Library Association, the National Coalition for History, Nestlé USA, the Oral History Association; the Small Press Center, the Society of American Archivists, the Southern California Association of Law Libraries, and the Special Libraries Association request permission to file the attached amici curiae brief in support of defendants Richard N. Goldman et al.

Aeonix Publishing Group (APG) is a book design and production service providing assistance to authors who wish to self publish. The principal, Pete Masterson, has assisted in the publication of more than 100 books produced by small publishers over the past 8 years.

The American Association of Law Libraries (AALL) is a not-for-profit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

Since 1937, the American Society for Information Science and Technology (ASIS&T) has been the society for information professionals leading the search for new and better theories, techniques, and technologies to improve access to information. ASIS&T counts among its membership some 4,000 information specialists from such fields as computer science, linguistics, management, librarianship, engineering, law, medicine, chemistry, and education. These individuals share a common interest in improving the ways society stores, retrieves, analyzes, manages, archives and disseminates information.

The Association for Documentary Editing (ADE) is an international organization of approximately 400 members. The ADE is committed to making the papers of important individuals and groups accessible to all audiences through print, microfilm, and electronic editions. The organization encompasses (1) literary editors, who are publishing authoritative editions of the books and essays of authors such as Mark Twain and Willa Cutler; and (2) historical editors, who are producing annotated collections of the correspondence, speeches, and diaries of leaders from the realms of politics, science, social reform, and the arts. The ADE's objective is to encourage excellence in documentary editing by providing means of cooperation and

exchange of information among those concerned with documentary editing and by promoting a broader understanding of the principles and values underlying its practice.

The Association of Research Libraries (ARL) is a not-for-profit association of 123 research libraries in North America. ARL's mission is to influence the changing environment of scholarly communication and the policies that affect research libraries and the communities they serve.

Bay Area Independent Publishers Association (BAIPA) is a 501(c)(6) nonprofit organization devoted to elevating the art of publishing. BAIPA acts as a liaison, clearing house, guide, and cheering section for those who wish to pursue independent publishing. The association has approximately 200 paid members.

The Independent Book Publishers Association (IBPA) is a trade association representing more than 4,100 publishers across the United States and Canada. Many of IBPA's members are small, independent publishers who publish short-run and print-on-demand works in hardcover, paperback, and electronic form, including works concerning controversial topics that more mainstream publishers have not acquired. IBPA believes that were the Supreme Court to adopt the rationale of the Court of Appeal, it could potentially burden the First Amendment rights of its members and bear directly on the ability of its members to publish important works in limited quantities without fear of litigation.

The Medical Library Association (MLA) is a not-for-profit educational organization of more than 900 institutions and 3,800 individual members in the health sciences information field committed to educating health information professionals, supporting health information research, promoting access to the world's health sciences information, and working to ensure that the best health information is available to all.

The National Coalition for History (NCH) is a coalition of over seventy history and archive organizations and serves as a central educational/advocacy outreach office for these professions. The coalition encourages the study and appreciation of history and archives and promotes cooperation between the historical and archival professions and their partners.

Nestlé USA is a part of Nestlé S.A. in Vevey, Switzerland – the world's largest food company. Nestlé USA is also the appellant in *Christoff v. Nestlé USA, Inc.*, No. B182880 (appeal pending), a case involving the Uniform Single Publication Act's (USPA) application to an image published on a "Taster's Choice" coffee jar label, in which the trial court applied the discovery rule rather than the USPA.

The Oral History Association (OHA), established in 1966, seeks to bring together all persons interested in oral history as a way of collecting human memories. With an international membership, the OHA serves a broad and diverse audience. Local historians, librarians, archivists, students, journalists, teachers, and academic scholars from many fields have found that the OHA provides both professional guidance and a collegial environment for sharing information. In addition to fostering communication among its members, the OHA encourages standards of excellence in the collection, preservation, dissemination and uses of oral testimony. To guide and advise those concerned with oral documentation, the OHA has established a set of goals, guidelines, and evaluation standards for oral history interviews.

The Small Press Center (SPC) is an educational program of the General Society of Mechanics and Tradesmen, a 501(c)(3) organization. The SPC's members publish hardcover, paperback and electronic books in every genre, computer software, and electronic products. The SPC's members include smaller and non-profit publishers, university presses, Internet publishers, and print-on-demand publishers, whose very existence depends upon the free

exercise of rights guaranteed by the First Amendment. The SPC believes that the failure of the Court of Appeal to apply the USPA, without regard to the media in which the work is published, will make its members a magnet for libel litigation and burden their First Amendment rights.

The Society of American Archivists (SAA) provides services to, and represents the professional interests of, more than 4,500 individual archivists and institutions as they work to identify, preserve, and ensure access to the nation's historical record.

The Southern California Association of Law Libraries (SCALL) is a local chapter of the American Association of Law Libraries. SCALL is a not-for-profit educational organization with over 350 members in Southern California. SCALL's mission is to promote and enhance the value of law libraries to the legal community, to foster the profession of law librarianship, to provide leadership in the field of legal information and information policy, and to foster a spirit of cooperation among the members of the profession.

The Special Libraries Association (SLA) is a not-for-profit, educational organization serving more than 12,000 members of the information profession, including corporate, academic, and government information specialists.

The information, library, and archive associations (AALL, ASIS&T, ADE, ARL, MLA, NCH, OHA, SAA, SCALL, and SLA) are organizations whose members engage in practices such as preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation's youth, lending books, creating works, and facilitating better technologically adapted schools. The publishing organizations (APG, BAIPA, IBPA and SPC) are involved in the publication of a variety of materials, many of which are non-mass media works targeted to small audiences. Nestlé USA is involved in a pending appeal involving questions

regarding the scope of the USPA and the application of the discovery rule in cases governed by the USPA. Each of these organizations and entities has an interest in ensuring that (1) the USPA is given its intended broad reading so that it applies to all publications, not just “mass media” publications; and (2) that the discovery rule is not used to circumvent the intended protections of the USPA.

As counsel for APG, AALL, ASIS&T, ADE, ARL, BAIPA, IBPA, MLA, NCH, Nestlé USA, OHA, SPC, SAA, SCALL, and SLA, we have reviewed the briefs on the merits filed in this case and believe this court will

benefit from additional briefing. We therefore request that this court accept for filing the accompanying amici curiae brief in support of defendants.

Dated: March 15, 2006

Respectfully submitted,

**HORVITZ & LEVY LLP**  
JOHN A. TAYLOR, JR.  
JEREMY B. ROSEN

By \_\_\_\_\_  
Jeremy B. Rosen

Attorneys for Amici Curiae  
**AEONIX PUBLISHING GROUP; THE AMERICAN ASSOCIATION OF LAW LIBRARIES; THE AMERICAN SOCIETY FOR INFORMATION SCIENCE AND TECHNOLOGY; THE ASSOCIATION FOR DOCUMENTARY EDITING; THE ASSOCIATION OF RESEARCH LIBRARIES; BAY AREA INDEPENDENT PUBLISHERS ASSOCIATION; THE INDEPENDENT BOOK PUBLISHERS ASSOCIATION; THE MEDICAL LIBRARY ASSOCIATION; THE NATIONAL COALITION FOR HISTORY; NESTLÉ USA, INC.; THE ORAL HISTORY ASSOCIATION; THE SMALL PRESS CENTER; THE SOCIETY OF AMERICAN ARCHIVISTS; THE SOUTHERN CALIFORNIA ASSOCIATION OF LAW LIBRARIES; AND THE SPECIAL LIBRARIES ASSOCIATION**

## AMICI CURIAE BRIEF

### INTRODUCTION

The vast majority of the tens of millions of materials published annually, like the oral history of a Bay Area Jewish leader at issue in this case, reach the attention of only a small number of people. The important question presented here is whether all publishers of such materials will continue to benefit from the protections afforded by the Uniform Single Publication Act (USPA) (Civ. Code, § 3425.1 et seq.), or whether, as the Court of Appeal held, the USPA’s protections should be constricted to cover only a small number of “mass media” publications.

The Court of Appeal’s decision is contrary to the plain language of the USPA, which provides that it protects “*any* single publication.” (Civ. Code, § 3425.3, emphasis added.) It is also contrary to the understanding of the Legislature – which enacted the USPA at a time when no Internet or other computer search tools were available, and nobody could know the content of the vast majority of publications – yet did not provide for any distribution or other public awareness threshold to qualify a publication for coverage under the USPA.

The Court of Appeal also fundamentally misunderstood the extent to which the publication in this case is accessible to the public – as shown below, the Goldman oral history could readily have been located by the plaintiff, Rabbi Lipner, had he tried to search for it, just as it *was* readily found by a researcher writing his biography. As we also show, the Goldman oral history is much easier to locate than the books at issue in *Shively v. Bozanich* (2003) 31 Cal.4th 1230 and *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, where the USPA was held to apply.

Nor does the Court of Appeal opinion provide any meaningful way to impose a “mass media” limitation on the USPA that rationally distinguishes among the millions of publications in existence, the vast majority of which are published by small publishers, are read by a very small audience, and are as difficult to find and locate as the Goldman oral history. Even were this court looking to narrow the USPA, there is simply no fair and workable means to do so.

Finally, the Court of Appeal failed to appreciate the chilling effect its decision would have on libraries, archives, the publishers and writers of non-mass media works, and the general public. If the Court of Appeal’s rationale were to remain law, thousands of libraries and archives will be subject to grave uncertainty as to the millions of volumes in their special collections that will suddenly be open season for litigation. Smaller publishers and lesser known authors will similarly be at risk. Archives, libraries, small publishers and writers who have not yet achieved a mass audience, including the historians who create oral histories, do not have the resources to withstand this risk and would have little choice but to limit their work. This would be a grave loss for the public because significant aspects of the historical record could be lost forever, including life histories of ordinary people and under-represented cultures, personal recollections and eye-witness details of the great events of our times, and other limited but important publications reflecting the warp and weave of our cultural tapestry.

## FACTUAL AND PROCEDURAL BACKGROUND

**A. Richard Goldman and Rabbi Lipner are both prominent members of the San Francisco Jewish community.**

Rabbi Lipner has been the subject of numerous press accounts relating to his position as head of Hebrew Academy, a prominent Orthodox Jewish religious day school for grades K-12 located in San Francisco. (E.g., 2 AA 678-730.)

Richard Goldman was president of the Jewish Community Federation of San Francisco, the Peninsula, Marin and Sonoma counties from 1981-1982. (1 AA 262.) Goldman has been a prominent local businessman who has also been very active in numerous charitable and Jewish causes, as well as in local government. (1 AA 262, 264.)

**B. The Goldman oral history is published in 1993 and placed in two major universities' libraries, one major public library, and two other archives. It is cataloged on numerous databases available world-wide on the Internet.**

In 1990, the San Francisco Jewish Community Federation provided money to fund the creation of an oral history about past presidents of the local Jewish Community Federation, including Goldman. (1 AA 261-262.) The interviews for this Jewish Community Federation Leadership Oral History Project were conducted by employees of the University of California at Berkeley's Bancroft Library's Regional Oral History Office. (1 AA 264.)

Goldman was interviewed during the project, and made a number of hand-written corrections to the transcript of his interview. (1 AA 286-287.)

The Goldman oral history was published in 1993 when the edited written transcript was placed in the Bancroft Library and the Charles E. Young Research Library at UCLA. (2 AA 360, 428-553; cf. 1 AA 286-287 & 2 AA 501-502.) In addition, written copies of the oral history transcript were acquired by the New York Public Library and by two archives, the Jewish Community Federation Library and Temple Emanu-El in San Francisco. (2 AA 360-361.)

The Goldman oral history is cataloged on two library databases available world-wide over the Internet: (1) the Online Computer Library Center (OCLC) and (2) the Research Libraries Information Network (RLIN). (2 AA 359.) It is also included and described in an online catalog prepared by the Bancroft Library Oral History Office, which lists all of the oral histories that were collected at Bancroft. (2 AA 640-658.) This catalog is accessible over the Internet through the Library's website. (2 AA 649.) Finally, the Goldman oral history is included in the University of California's catalogues, MELVYL and GLADIS/Pathfinder, which are also accessible on the Internet. (2 AA 359.) The oral history itself includes a detailed table of contents and index. (2 AA 436-438, 622-623.)

**C. The Goldman oral history is readily located by a researcher planning a book about Rabbi Lipner.**

In 2001, Miriam Real, a researcher planning to write a book about Rabbi Lipner, located the Goldman oral history using the various finding aids available to her. (1 AA 199.) Real determined that certain of the oral histories on San Francisco Jewish life might contain "potentially useful transcripts" for her book. (*Ibid.*) After requesting copies of certain transcripts based on their card catalog entries, she then "reviewed the indices for

references to subjects that might be useful to the history [she] was contemplating.” (*Ibid.*) That research process led her to the pertinent pages of the Goldman oral history at issue in this lawsuit. (*Ibid.*) Real thereafter forwarded the oral history to Rabbi Lipner. (*Ibid.*)

**D. Plaintiffs file suit nearly 10 years after the oral history’s publication. The superior court dismisses the suit on the basis of the statute of limitations.**

In the Goldman oral history, Goldman expressed some negative opinions about Rabbi Lipner and the Hebrew Academy. (2 AA 501-502.) Based on those opinions, they filed suit in 2002 against Goldman; the Jewish Community Federation of San Francisco, the Peninsula, Marin and Sonoma Counties; the San Francisco Jewish Community Endowment Fund; and the Regents of the University of California. (1 AA 1-7.) The trial court granted defendants’ motion for summary judgment on the basis that the action was barred by the statute of limitations because the oral history was published in 1993 and that plaintiffs were not entitled to any tolling of the statute based on the “rule of discovery.” (1 AA 341.)<sup>1/</sup>

**E. The Court of Appeal reverses the judgment and this court grants review.**

In reversing the judgment, the Court of Appeal held that the USPA was intended to apply only to mass media publications, and does not apply to

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<sup>1/</sup> The Regents filed an anti-SLAPP motion and were dismissed earlier in the case, an order which plaintiffs apparently never appealed. (See 1 AA 109-110, 349-350.)

plaintiffs' claims because Goldman's oral history could be found only in a limited number of places. The Court of Appeal reasoned that "[n]o case holds, and the purpose of the single-publication rule does not suggest, that a communication not published in a book, newspaper or magazine and not directed to a mass readership is subject to the rule simply because it is held in a library or otherwise theoretically 'available' to a member of the public who may know of its existence." (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 399, review granted Aug. 24, 2005, No. S134873 (*Hebrew Academy*).)

In reaching its conclusion, the court minimized the importance of Internet cataloging of the oral history: "[N]one of the references to the Goldman oral history on these Internet databases and catalogues make any mention of Rabbi Lipner or the Hebrew Academy. . . . Had Rabbi Lipner been aware of and consulted the databases and online catalogues just described, he would not have learned the factual basis for his defamation claim, nor anything that might have justified a suspicion of injury warranting further investigation. [¶] Most significantly, no online database or catalogue and no Internet Web site brought to our attention, has ever reproduced the Goldman oral history or any portion of the transcript." (*Hebrew Academy, supra*, 129 Cal.App.4th at p. 400.)

The Court of Appeal further held that the discovery rule, rather than the single publication rule, should apply where a publication is available to the public, but is difficult to locate. The court found that the "factual basis for appellants' libel claims was so hidden from public view that reasonable diligence would not have led to its discovery within the statutory period," and held that "the law's expectation that reasonable diligence will result in timely discovery of the basis for a libel claim comes into play only when the basis for

the claim has been widely distributed in the public record or otherwise the subject of publicity.” (*Hebrew Academy, supra*, 129 Cal.App.4th at p. 403.)

The court also noted that “it is of particular significance that oral histories are not primarily designed for immediate public attention. . . . Oral histories, which are invariably preserved in archives . . . rarely receive any significant amount of public attention until and unless they are used by an historian or journalist as source material for a book, magazine, newspaper, radio or television program or some other form of mass communication. The Goldman oral history has never been used for any such purpose.” (*Hebrew Academy, supra*, 129 Cal.App.4th at p. 403.)

Finally, the Court of Appeal held that none of the policies embraced by the USPA were implicated by the failure to apply it here. The court reasoned that defendants “have not shown they are in need of protection from a multiplicity of suits, or from a continuous tolling of the statute of limitations, or from the application of diverse laws to a single event, which are the problems the [single publication] rule was designed to solve.” (*Hebrew Academy, supra*, 129 Cal.App.4th at p. 400.) Moreover, the court also found that “[a]pplication of the discovery rule in appropriate cases does not frustrate the policies that underlie the applicable statute of limitations.” (*Id.* at p. 404.)

This court granted review.

## ARGUMENT

### I.

**UNDER ITS PLAIN LANGUAGE, THE USPA IS NOT LIMITED TO MASS MEDIA PUBLICATIONS, AND APPLIES TO PUBLISHED ORAL HISTORIES SUCH AS GOLDMAN'S.**

- A. The single publication rule applies to “any” publication, not just to “books, newspapers and magazines” or publications directed to a “mass readership.”**

The Court of Appeal held that the USPA has no application to publications “not directed to a mass readership” or to “a communication not published in a book, newspaper or magazine.” (*Hebrew Academy, supra*, Cal.App.4th at p. 399.) Plaintiffs now urge this court to affirm the Court of Appeal and hold that the USPA applies only to “mass media publications.” (E.g., ABOM 1.) The text of the USPA contains no such limitation, which is contrary to the plain meaning of the statutory language.

The USPA was proposed by the National Conference of Commissioners on Uniform State Laws and thereafter adopted in many states, including California in 1955. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246; *Belli v. Roberts Brothers Furs* (1966) 240 Cal.App.2d 284, 287; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 538, p. 791; Civ. Code, § 3425.1 et seq.) “Its purpose is to make uniform the law of those jurisdictions that adopt it.” (*Belli*, at p. 287; see Civ. Code, § 3425.2.) Civil Code section 3425.3, the USPA’s main section, provides that “[n]o person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any

other tort founded upon any single publication or exhibition or utterance . . . .”<sup>2/</sup>

““[I]n construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language.””  
(*In re Hoddinott* (1996) 12 Cal.4th 992, 1002; see also *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381 [same]; *Trope v. Katz* (1995) 11 Cal.4th 274, 280 [“Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history”]; *In re Miller* (1947) 31 Cal.2d 191, 199 [“Words may not be inserted in a statute under the guise of interpretation”].)

Here, plaintiffs and the Court of Appeal seek to add a “mass media” limitation to the USPA that would render it inapplicable to non-mass media publications. Yet the Legislature did not include any such “mass media” qualifier in the USPA. Indeed, the statutory language strongly suggests the opposite, since the USPA applies to “*any single* publication or exhibition or utterance. . . or *any one* presentation . . . or *any one* broadcast . . . or *any one* exhibition. . . .” (Civ. Code, § 3425.3, emphases added.) If the Legislature had intended to limit the USPA only to certain publications meeting the criteria

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<sup>2/</sup> Civil Code section 3425.3 provides in full:  
No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

of a “mass media” publication, or some other threshold level of distribution, the Legislature could readily have included such a limitation. It did not do so.

Put another way, the Court of Appeal’s interpretation of the USPA contradicts the plain reading of the statute. The USPA applies to “any single publication.” If a “mass media” judicial gloss is imposed to limit the scope of the USPA, then it would no longer apply to “any” publication, but only to “some” publications. The word “any” would be written out of the statute, contrary to legislative intent.

The Court of Appeal’s conclusion that the USPA is limited to communications in a “book, newspaper or magazine” also runs afoul of usual principles of statutory interpretation. This court has explained the doctrines of ejusdem generis (of the same kind) and noscitur a sociis (known by its associates): “when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.” (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012; see also *Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460, 472, quoting 2A Sutherland, *Statutory Construction* (5th ed. 1992) § 47.18, p. 200.) Thus, “a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list.” (*Moore*, at p. 1012.) The doctrine applies where a general reference is followed by specific enumerations. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7.)

Here, the USPA provides for a single cause of action for any tort “founded upon any single publication or exhibition or utterance, *such as* one issue of a newspaper or book or magazine or any one presentation to an

audience or any one broadcast over radio or television or any one exhibition of a motion picture.” (Civ. Code, § 3425.3, emphasis added.) Under ejusdem generis principles, the USPA’s list of “newspaper, book and magazine” is merely an illustrative list and other similar publications will also be covered by the USPA. Moreover, by its terms, the listing of newspapers, books and magazines are simply examples of the kind of publications that are covered because they are preceded by the term “such as.” The phrase “such as” is defined as “of the type about to be mentioned.” (Compact Oxford English Dictionary (2d ed. 2003) p. 1149.)

As we next explain, a published oral history shares the characteristics of newspapers, books and magazines that warrant the USPA’s protection.

#### **B. The USPA applies to the Goldman oral history.**

An oral history has been defined as: “(1) a tape-recorded interview, or interviews, in question-and-answer format; [¶] (2) conducted by an interviewer who has some, and preferably the more the better, knowledge of the subject to be discussed; [¶] (3) with a knowledgeable interviewee, someone who knows whereof he or she speaks from personal participation or observation . . . ; [¶] (4) on subjects of historical interest . . . [and] [¶] (5) accessible, eventually, in tapes and/or transcripts to a broad spectrum of researchers.” (Baum, *The Expanding Role of the Librarian in Oral History* in *Oral History: An Interdisciplinary Anthology* (Dunaway & Baum edits., 1996) p. 324.)

An oral history is generally considered to be the typed manuscript produced from the interviews, rather than the tapes themselves: “The prevailing practice is to persuade the oral author . . . to verify the result [of the tape transcriptions], correcting the text for clarity and accuracy rather than for style. *The edited transcript – completely retyped by some programs, by others*

*left with the handwritten changes – then becomes the true end product.* Indexed and cataloged, the final version takes its place in an oral history repository.” (Starr, *Oral History* in *Oral History: An Interdisciplinary Anthology*, *supra*, at p. 42, emphasis added.)

It cannot be disputed that the Goldman oral history has been “published” in the legal sense. In order to bring this defamation claim in the first place, Rabbi Lipner has necessarily acknowledged that the Goldman oral history constitutes “a false and unprivileged *publication* by writing, printing, picture, effigy, or other fixed representation to the eye.” (Civ. Code, § 45, emphasis added; see also 1 AA 4 [Lipner’s complaint alleges that defendants “republished the above statements in written form”].) As this court has explained, “in general a cause of action in tort accrues at the time of injury, and a cause of action for defamation accrues at the time the defamatory statement is ‘published’ (using the term ‘published’ in its technical sense.) [Citations.] [¶] As noted, in defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. [Citations.] As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues) when the book or newspaper is first generally distributed to the public.” (*Shively*, *supra*, 31 Cal.4th at pp. 1246-1247.)

Since the Goldman oral history necessarily qualifies as a “publication,” the only remaining question is whether an oral history qualifies as the type of “publication” the Legislature intended to protect under the USPA. This court has already suggested that the bright-line test for excluding a publication from the USPA’s protection through application of the discovery rule is whether “the defamatory statement is hidden from view as, for example, in a personnel file that generally cannot be inspected by the plaintiff.” (*Shively*, *supra*, 31 Cal.4th at p. 1249.) The rationale for excluding that narrow class of

publications is that “[t]he plaintiff's inability to discover the libel when it first was ‘published’ and placed in a confidential file would render unjust any holding that the cause of action accrued and the period of limitations commenced when the writing was placed in the file.” (*Ibid.*)

The Goldman oral history does not fall within this narrow exclusion because, like books, magazines and periodicals (the examples provided by the Legislature of the type of publications falling within the scope of the USPA) it is available to the public and not like a confidential personnel file that is hidden from public inspection. In fact, the Goldman oral history is cataloged on numerous library databases available world-wide on the Internet and can be reviewed by any member of the public at two University libraries, one major public library and two archives. (2 AA 358-361.) This public accessibility is confirmed by the fact that a researcher interested in Rabbi Lipner was able to obtain a copy in the course of her research for a planned book. (1 AA 199.) Thus, because the oral history is as “accessible to plaintiff to the same degree as it was accessible to every other member of the public,” it qualifies as a publication protected by the USPA. (*Shively, supra*, 31 Cal.4th at p. 1253.)

Furthermore, the written transcripts of oral histories that are deposited in libraries and archives are exactly like books, magazines and periodicals in that oral histories are permanent records prepared by an author and editor and published in writing for use by the public. Moreover, even the raw audio tapes of oral histories are like other publications expressly covered by the USPA, such as a radio or television broadcast, a speech to an audience, or the single exhibition of a movie. And, like the authors of books, magazines and periodicals, those who “author” oral histories would be subject to multiple lawsuits and open-ended liability absent the protections afforded by the USPA.

This court need go no further in its analysis. Because oral histories are protected under the plain language of the USPA, the size of their readership

is irrelevant. The Court of Appeal therefore erred in holding the Goldman oral history is not entitled to protection under the USPA.

## II.

### THE USPA'S HISTORICAL CONTEXT DEMONSTRATES THE LEGISLATURE DID NOT INTEND TO LIMIT ITS APPLICATION TO MASS MEDIA PUBLICATIONS.

#### A. In interpreting the USPA, this court should consider circumstances under which it was enacted.

“Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. . . . Both the legislative history of the statute and the *wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.*” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386, emphasis added; see also *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [“the wider historical circumstances of [a statute’s] enactment are legitimate and valuable aids in divining the statutory purpose”]; *Watson Land Co. v. Shell Oil Co.* (2005) 130 Cal.App.4th 69, 77 [same].) “The court in construing an act . . . will look, if necessary, to the public history of the times in which it was passed.” (*Aldridge v. Williams* (1845) 44 U.S. 9, 9 [11 L.Ed. 469]; see also *id.* at p. 9, fn 3 [“the history and the circumstances under which

the statute is passed will be considered”]; Scalia, *A Matter of Interpretation* (1997) p. 30 [same].)

Here, the Court of Appeal declined to apply the USPA to the Goldman oral history based on a concern that it was only “theoretically ‘available’ to a member of the public” because of the small number of copies made and the few libraries that housed it. (*Hebrew Academy, supra*, 129 Cal.App.4th at p. 399.) The court further reasoned that the USPA should not apply because “[h]ad Rabbi Lipner been aware of and consulted the databases and online catalogues [that referenced the Goldman oral history], he would not have learned the factual basis for his defamation claim, nor anything that might have justified a suspicion of injury warranting further investigation.” (*Id.* at p. 400.)

But in interpreting the USPA, the Court of Appeal utterly failed to consider its historical context. As explained below, when the Legislature enacted the USPA, there were no online databases or catalogs at all. Consequently there were millions of publications in existence that could equally be described as only “theoretically ‘available’ to a member of the public” – yet the Legislature did not limit the USPA only to publications achieving a certain threshold level of public awareness. As we explain, the Court of Appeal erred in belatedly engrafting such a limitation onto the USPA.

**B. At the time the USPA was enacted, there were many *millions* of identifiable publications available to the public.**

The underlying assumption of the Court of Appeal’s decision is that the Legislature intended the USPA to apply only where a publication’s distribution is sufficiently wide that a member of the public should reasonably be on notice of the publication and its content. That the Legislature intended no such limitation is established by the milieu in which the USPA was enacted.

During the 1950's, the decade in which the USPA was passed, there were 357 different book publishers in the United States (Quantity of Publishers by Year (2004) Book Industry Statistics <<http://www.parapublishing.com/sites/para/resources/statistics.cfm>> [as of Mar. 6, 2006].), and 124,675 new books were published (Oda, *Growth and Change in Trade Book Publishing: What I Learned from the Numbers in Scholarly Publishing* (Abel & Newlin edits., 2002) p. 65; see also Feldman, *Best and Worst of Times: The Changing Business of Trade Books, 1975-2002* (2003) p. 9 [11,022 new books published in 1950 and 16,554 new books published in 1960 and showing a steady increase during each year in between]). In 1954 alone, 704 million books were sold. (American Library Annual for 1956-1957 (Wright edit., 1957) p. 88; see also American Library Annual for 1955-1956 (Wright edit., 1956) p. 83 [766.4 million books sold in 1952 compared to 487.2 million in 1947].) Moreover, at that time (as today) the vast majority of books were not best sellers. (See Vaughan, *Growth and Change in Trade Publishing: What I Learned at the Library* in *Scholarly Publishing, supra*, at pp. 48-50, 60.)

Thus, even librarians had difficulty keeping up with the approximately 230 new books published *each week* to determine which ones should be added to their collections. (E.g., Bennett, *The Current Bookmarket* (Apr. 1955) vol. 3, No. 4 *Libr. Trends* 376, 384.) A major University such as Yale had more than 2.7 million volumes in its library system at that time. (See Henderson, *The Growth of Printed Literature in the Twentieth Century* in *Scholarly Publishing, supra*, at p. 2; see also Vosper, *Resources of University Libraries* (July 1952) vol. 1, No. 1 *Libr. Trends* 58, 67 [in 1952 there were 14 university libraries containing over 1 million volumes whereas in 1920 there were only 14 university libraries with over 250,000 volumes].) Moreover, there were

over 6,000 public libraries in the United States. (See Dean, *Development of Public Libraries in Scholarly Publishing*, *supra*, at p. 181.)

Thus, when the USPA was enacted, there were an overwhelming number of books in circulation and there was no publicly available source for tracking existing and new books – much less for searching their content. These facts establish that it was impossible for any person to be aware of the content of any but a very small percentage of the books being published contemporaneously, much less those already on library shelves.

Moreover, books were not the only type of publication available to the public. One periodicals directory available in 1956 contained “complete details on over *16,000 periodicals* – local, national, foreign – all classified by subject and indexed by title and subject.” (Publishers’ Weekly (Dec. 30, 1957) p. 75, emphasis added.) In 1950, there were *1,700* different newspapers published around the country read by 58 million people. (Wallach, *Newspapers Since 1945* in *Perspectives on American Book History* (Casper et al. edits., 2002) p. 425.) The number of individual articles in those newspapers and other periodicals ran into the millions. (E.g., Wellisch, *Abstracting and Indexing Services* in *Encyclopedia of Library History* (Wiegand & Davis, Jr. edits., 1994) p. 4 [One such periodical index service limited to library and information science journals contained 615,000 abstracts in 1957]; Henderson, *The Growth of Printed Literature in the Twentieth Century* in *Scholarly Publishing*, *supra*, at pp. 10-11 [the *Engineering Index* alone contained one million records].) Without the computerized databases and boolean search tools available today, it would have been impossible for anyone to unearth a reference to a particular person or subject among the millions of articles published in magazines, journals and newspapers.

Against this backdrop, the Legislature must have been aware that its newly enacted USPA would apply to books, articles, and other publications

that the vast majority of people would never read, and who therefore would never be on any actual notice of their content. Had this result been of concern to the Legislature, it could easily have limited the USPA to publications achieving some minimal threshold of general public awareness. It did not do so.

**C. The vast quantity of publications available at the time the USPA was enacted were difficult to access and locate.**

From 1880 until 1980, library card catalogs provided the predominant technology for finding published materials. (Coyle, *Catalogs, Card – and Other Anachronisms* (2005) vol. 31, No. 1, J. of Acad. Librarianship 60, 60.) To find a book on a particular subject, a person had to manually search the subject headings or classification codes in the card catalog of an individual library. (Meadow et al., *Text Information Retrieval Systems* (2d ed. 2000) pp. 21-24.)

Card catalogs were organized in alphabetical order by author, title and main subject. (Coyle, *Catalogs, Card – and Other Anachronisms, supra*, vol. 31, No. 1, J. of Acad. Librarianship at p. 60; see also Dalrymple, *Bibliographic Control, Organization of Information, and Search Strategies* in *Reference and Information Services* (Bopp & Smith edits., 2001) p. 71.) The usual medium for a card catalog was the 5 x 3 inch card, which set the limit for the amount of information and headings that could be included for each record. (Fattahi, *A comparison between the online catalog and the card catalog: some considerations for redesigning bibliographic standards* (1995) vol. 11, No. 3, *Systems & Services* 28, 29.) Further, each individual library's card catalog displayed only the holdings of that particular library, thus imposing a major limitation on the card catalog's use. (Dalrymple, *Bibliographic Control,*

*Organization of Information, and Search Strategies* in Reference and Information Services, *supra*, at p. 70; see also Fattahi, *A comparison between the online catalog and the card catalog: some considerations for redesigning bibliographic standards*, *supra*, vol. 11, No. 3, OCLC Systems & Services at p. 34 [Card catalogs are a “strictly localized medium with many physical restrictions to its use”].)

For most books, only two or three subject headings were created. (Dalrymple, *Bibliographic Control, Organization of Information, and Search Strategies* in Reference and Information Services, *supra*, at p. 71.) The subject headings usually were derived from established subject heading lists such as the one published by the Library of Congress. (*Ibid.*) The use of standardized subject heading lists ensured that the terminology and headings remained consistent between libraries. (*Ibid.*) But these limitations also ensured that only the most basic and general subjects of any particular book could be listed on its card. Thus, no card could list all of the items referenced in a book’s table of contents and index, let alone every person mentioned in the book itself.

To locate periodicals or newspaper articles, users searched hard copy periodical indexes. In the 1950’s, indexes and abstracts for periodicals and journals became more widespread, with 300 such services in existence. (Wellisch, *Abstracting and Indexing Services* in Encyclopedia of Library History, *supra*, at p. 4; see also Katz, *Cuneiform to Computer: A History of Reference Sources* (1998) p. 343 [number of indexes increased from 100 in 1940’s to over 5,000 in 1990’s].) Searching all of the hard copy periodical indexes would be virtually impossible by itself. Locating references to a particular person or subject among all of the hard copy articles that were referenced in each of the indexes would be harder still.

In sum, when the Legislature enacted the USPA, it knew that there was a virtually unlimited supply of publications and that it would necessarily be extraordinarily difficult to find and locate a reference to a particular person or subject in any of them. Nonetheless, the Legislature drafted the USPA broadly, without any limitation tied to the size or scope of the publication's distribution.

### III.

#### **THE COURT OF APPEAL'S OPINION IS BASED ON THE FALSE ASSUMPTION THAT PUBLICATIONS LIKE THE GOLDMAN ORAL HISTORY ARE DIFFICULT TO LOCATE.**

##### **A. Even if "mass audience" availability were the appropriate test for application of the USPA, that test would be met here.**

For the reasons explained above, the Court of Appeal erred in assuming that the application of the USPA turns on whether the publication in question is available to a "mass audience." But even if that were the test, it is easily met here. The Court of Appeal simply failed to understand the ease with which the Goldman oral history can be located using modern research tools – tools that were not available when the USPA was enacted, and which make the Goldman oral history more accessible to the public today than were the vast majority of publications in the 1950's.

In this regard, the Court of Appeal inexplicably gave short shrift to defendants' argument that the Goldman oral history is not only available to the public in at least three major libraries, but is also cataloged on numerous databases available on the Internet. (*Hebrew Academy, supra*, 129

Cal.App.4th at pp. 399-401.) The court found that the on-line cataloging of the Goldman oral history on the OCLC and RLIN databases, which include the collections of thousands of libraries all over the world, as well as its cataloging on the on-line University of California MELVYL and GLADIS/Pathfinder databases, were *all* insufficient to warrant the protection of the USPA. The court's reason: they did not "reproduce[] the Goldman oral history or any portion of the transcript." (*Id.* at p. 400.)

The Court of Appeal's opinion simply ignores the transformation of modern finding aids. At the time the USPA was enacted, there was no Internet database of any kind and the public had to rely on individual libraries' card catalogs which, as discussed above, contained extremely limited descriptions of content. (*Ante*, pp. 25-27.) Thus, the Court of Appeal's implication that a publication of limited distribution must be available for full text searching on the Internet before the USPA applies makes no sense at all. Moreover, in the years since the enactment of the USPA, the technology of finding aids has moved well beyond the traditional card catalog. We detail the history of that changing technology below, to show that this movement toward on-line catalogs has revolutionized the public's ability to access information and refutes the misguided assumptions about Internet research that underlie the Court of Appeal's opinion.

**B. In the years since the passage of the USPA, new technologies have vastly improved our ability to locate publications.**

**1. Online catalogs have slowly replaced card catalogs.**

By about 1980, the combination of the Machine Readable Cataloging (MARC) format and increased computing power allowed the placement of card catalog data into a database which could be searched electronically. (Coyle, *Catalogs, Card – and Other Anachronisms*, *supra*, vol. 31, No. 1, J. of Acad. Librarianship at p. 60; see also Cochrane & Markey, *Catalog Use Studies – Since the Introduction of Online Interactive Catalogs: Impact on Design for Subject Access* in *Redesign of Catalogs and Indexes for Improved Online Subject Access: Selected Papers of Pauline Cochrane* (1985) pp. 159-160; Dalrymple, *Bibliographic Control, Organization of Information, and Search Strategies* in *Reference and Information Services*, *supra*, at p. 71.) The conversion from traditional card catalogs to more detailed on-line catalogs has been a tremendously expensive and labor and time-consuming process. (See Bradshaw & Wagner, *A Common Ground: Communication and Alliance between Cataloger and Curator for Improved Access to Rare Books and Special Collections* (Nov. 2000) vol. 61, No. 6, *College & Research Libr.* 525, 525-534.)

The MARC format is similar to the card catalog in that the information includes author, title and main subjects. (Coyle, *Catalogs, Card – and Other Anachronisms*, *supra*, vol. 31, No. 1, J. of Acad. Librarianship at pp. 60-61.) But MARC records can include much more subject matter information than traditional card catalogs because they are not limited to 3 x 5 cards. (Dalrymple, *Bibliographic Control, Organization of Information, and Search Strategies* in *Reference and Information Services*, *supra*, at p. 71.) Thus, an

online catalog “permit[s] a fuller level of description; more data elements may be included in the description and many more data elements may be assigned as access points for retrieval.” (Fattahi, *A comparison between the online catalog and the card catalog: some considerations for redesigning bibliographic standards, supra*, vol. 11, No. 3, OCLC Systems & Services at p. 29.)

Where a card catalog user can retrieve only one card at a time, an electronic database search can yield an entire set of records. (Coyle, *Catalogs, Card – and Other Anachronisms, supra*, vol. 31, No. 1, J. of Acad. Librarianship at p. 61.) Moreover, “bibliographic records can be searched, retrieved, and displayed in online catalogs in ways and forms not possible in manual systems,” such as keyword searching. (Fattahi, *A comparison between the online catalog and the card catalog: some considerations for redesigning bibliographic standards, supra*, vol. 11, No. 3, OCLC Systems & Services at pp. 32-33.) And an online catalog can be searched not only at different locations in the library but by multiple users simultaneously, and unlike a card catalog it can also be searched online *outside* the library. (*Id.* at p. 34.)

Finally, the MARC format facilitated the sharing of bibliographic information *between* libraries. (Carpenter, *Catalogs and Cataloging in Encyclopedia of Library History* (Wiegand & Davis edits., 1994) p. 116.) Consequently, the public now has access to *numerous* libraries’ catalogs via the Internet. (See Bradshaw & Wagner, *A Common Ground: Communication and Alliance between Cataloger and Curator for Improved Access to Rare Books and Special Collections, supra*, vol. 61, No. 6, College & Research Libr. at pp. 525-534.) “Library networks have played a critical role in creating access to collections. The growth and development of these networks, local and national, and even international, have made possible the volume growth of ILL [inter-library loan] activity. Once online bibliographic records were

available through the creation and adoption of machine-readable records, library networks grew at a rapid rate.” (Wiley, *Access-Related Reference Services* in *Reference and Information Services*, *supra*, at p. 157.)

**2. The OCLC and RLIN databases have revolutionized the ability to access published information.**

The Court of Appeal’s opinion acknowledges that the Goldman oral history is included in both the OCLC and RLIN databases, but discounts that inclusion on the ground that the databases do not include the full text of the oral history. (*Hebrew Academy*, *supra*, 129 Cal.App.4th at p. 400.) The Court of Appeal fails to appreciate the revolution in research brought about by those two databases, and the extent to which they provided notice to the public regarding the content of the Goldman oral history.

“Begun in 1967, the Online Computer Library Center (OCLC) [also referred to as WorldCat] provided, as of 2000, bibliographic records and holdings information for more than 36,000 libraries in 74 countries. . . . Although the numbers obviously change daily, by 2000, the database contained more than 43 million records for books, serials, audiovisual materials, maps, archives/manuscripts, sound recordings, music scores, and computer files.” (Penka, *Bibliographic Sources* in *Reference and Information Services*, *supra*, at p. 487, emphasis added; see also Wiley, *Access-Related Reference Services* in *Reference and Information Services*, *supra*, at p. 158; Helfer, *OCLC’s march into the 21st Century* (Feb. 2002) vol. 10, No. 2, *Searcher* 66, 68 [OCLC includes over 800 million holdings listings].)

“Through WorldCat, users have access to much of the record of human history, culture, and research without the labor and inconvenience of moving from one library or card catalog to another. Students, faculty and researchers

from around the world conduct more than 800,000 searches in WorldCat daily. WorldCat . . . has become the key to worldwide library collections and an engine for sharing knowledge.” (Alford, *WorldCat is a remarkable achievement in librarianship*, OCLC Newsletter (May/June 2001) p. 33.)

OCLC’s WorldCat database is no longer based on the MARC format, but on an internal XML metadata scheme that accepts nearly any type of metadata and can include more additional information.<sup>3/</sup> (Tennant, *Not Your Mother’s Union Catalog* (Apr. 15, 2003) vol. 128, No. 7, Libr. J. 28, 28; see also *OCLC Unveils Research Results, Enhancements to WorldCat* (Nov. 2001) vol. 18, No. 10, Info. Today 32, 32.) This new system permits the use of some full text components and the ability to catalog portions of the Web. (Wilson, *A Bibliographic Odyssey*, OCLC Newsletter, *supra*, at pp. 39-41.)

The RLIN database, which also includes the Goldman oral history, is important as well. It is “a database of bibliographic records for materials in major research library collections. This critical database provides access to a wealth of unique research material essential for graduate students and scholars. A user friendly interface, Eureka, makes searching the database easy.” (Wiley, *Access-Related Reference Services in Reference and Information Services*, *supra*, at p. 159.) The RLIN database contains more than 105 million items held by its member libraries. (Penka, *Bibliographic Sources*, in *Reference and Information Services*, *supra*, at p. 487.)

“For most bibliographic quests, a search of OCLC or RLIN is the first order of business. The speed, ease of searching, and depth and breadth of coverage makes searching the bibliographic utilities the first choice in almost all cases.” (Penka, *Bibliographic Sources* in *Reference and Information*

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<sup>3/</sup> The MARC system is subject to limitations on the specificity and number of information fields. (E.g., Rowly & Farrow, *Organizing Knowledge: An Introduction to Managing Access to Information* (3d ed. 2000) pp. 85-89.)

Services, *supra*, at p. 488.) “Clearly, our 30-year investment in automation has paid off; patrons have greater access to greater quantities of information from a dazzling array of media – from printed books and magazines to their electronic counterparts – than ever before.” (Cox et al., *Access denied: the discarding of library history* (Apr. 1998) vol. 29, No. 4, *American Libr.* 57, 61.) “OCLC and RLIN offer access to the closest thing we have to online national bibliographies in the United States.” (Wiley, *Access-Related Reference Services* in *Reference and Information Services*, *supra*, at p. 158.)

### **C. Oral histories are now readily available to the public.**

The Court of Appeal found that the discovery rule, rather than the single publication rule, should apply to oral histories because “[i]t is of particular significance that oral histories are not primarily designed for immediate public attention.” (*Hebrew Academy*, *supra*, 129 Cal.App.4th at p. 403.) This reasoning demonstrates fundamental misconceptions regarding the utility and importance of oral histories and their cataloging.

Oral history as an organized activity dates to 1948 when an “Oral History Project” was started at Columbia University. (Starr, *Oral History* in *Oral History: An Interdisciplinary Anthology*, *supra*, at p. 40.) Oral history remained a lethargic enterprise in the 1950’s, and did not begin to take off in a significant way until the 1960’s. (*Id.* at pp. 44-49.) By 1975 there were over 300 oral history centers around the United States. (*Id.* at p. 50.)

Each year, an increasing number of new books are published that draw upon oral histories, including many that draw upon recent oral histories. (Baum, *The Expanding Role of the Librarian* in *Oral History: An Interdisciplinary Anthology*, *supra*, at pp. 324-325, 331.) Thus, contrary to the Court of Appeal’s opinion, there is no reason that a published oral history is

more likely to remain unread than the millions of other publications that are distributed to small audiences.

Indeed, “[i]n the second half of the twentieth century, oral history – ‘the interviewing of eye-witness participants in the events of the past for the purposes of historical reconstruction’ – has had a significant impact upon contemporary history as practised in many countries. . . . Through oral history interviews, working-class men and women, indigenous peoples or members of cultural minorities, amongst others, have inscribed their experiences on the historical record, and offered their own interpretations of history. More specifically, interviews have documented particular aspects of historical experience which tend to be missing from other sources, such as personal relations, domestic work or family life, and they have resonated with the subjective or personal meanings of lived experience. [Fn. omitted.]” (The Oral History Reader (Perks & Thomson edits., 1998) p. ix.)

“Oral histories are most often cataloged by name of the interviewee, individually or as part of a larger collection. . . . [¶] The most common finding aid is a simple, alphabetical list of all the individual interviews within a collection by name of interviewee, whether in a publication, an in-house document, a card catalog, or online. In addition to the name of the interviewee and the date of the interview, the list might include a biographical sketch of the interviewee and identify key subjects and individuals discussed.” (Ritchie, *Doing Oral History: A Practical Guide* (2d ed. 2003) pp. 162-164.)

The Goldman oral history was cataloged with such a finding aid, which included the name of the interviewee, the date of the interview, a biographical sketch of the interviewee, and identification of the key subjects discussed. (2 AA 649.) As discussed more fully in the next section, that finding aid (and others) for the Goldman oral history made it readily accessible to the public generally and to Rabbi Lipner specifically.

**D. The Goldman oral history was readily accessible to the public generally and to Rabbi Lipner specifically.**

**1. The Goldman oral history was cataloged with a number of different finding aids.**

In holding that the discovery rule rather than the single publication rule should apply to plaintiffs' claims, the Court of Appeal assumed that the Goldman oral history is not easy to locate. (See *Hebrew Academy, supra*, 129 Cal.app.4th at pp. 402-403.) But the Court of Appeal's opinion ignores the availability and efficacy of modern research tools and establishes a rule that, if applied evenly, would mean that the USPA would no longer apply to most publications.

In the on-line OCLC database, the Goldman oral history is cataloged with a subject reference to the "Jewish Community Federation of San Francisco." (2 AA 626.) In the University of California's online MELVYL Catalog, the subjects of the oral history include, among other topics, "Jewish Community Federation of San Francisco," "Jews – California – San Francisco Bay Area," and "Jews – Charities." (2 AA 632-633.) In the University of California's online GLADIS database, the oral history is described the same way. (2 AA 634, 636.) The OCLC, MELVYL, and GLADIS databases also each identify the source of the oral history as the Bancroft Library Regional Oral History Office. (2 AA 626, 632, 634.)

The Bancroft Library Regional Oral History Office website includes a catalog containing all of the oral histories that are included in the Jewish Community Federation Leadership oral history project. (E.g., 2 AA 647-658.) The project itself is described as "interviews record[ing] the recent history of the Jewish Welfare Federation, and philanthropy spearheaded by the

Federation during the past half-century.” (2 AA 647.) The specific listing for the Goldman oral history in the catalog indicates one of the subjects discussed in the oral history is Goldman’s “opposition to Jewish day schools.” (2 AA 649.)

The Goldman oral history itself includes both a table of contents and an index. (2 AA 436-438, 622-623) The table of contents lists “Hebrew Academy” as being discussed starting on page 40. (2 AA 436.) The index lists “Hebrew Academy” as being discussed on pages 40-41 and “Lipner, Rabbi Pinchas” as also being discussed on pages 40-41. (2 AA 622-623.) Pages 40 and 41 are the two pages alleged to contain defamatory statements by plaintiffs. (E.g., 2 AA 501-502.)

**2. Rabbi Lipner could have readily located the Goldman oral history using the various Internet research tools available to the general public.<sup>4/</sup>**

Had Rabbi Lipner tried to locate books about himself, he could have readily found the Goldman oral history. Admittedly, if he had searched under his own name in OCLC, he would have come up with no records. (App. 1.) Likewise, had he searched for “Hebrew Academy” or “Hebrew Academy San Francisco,” he would have found only four publications that related to his school, none of which would be helpful. (App. 2.) But the next logical research strategy would be to broaden the search to include “San Francisco Jewish Community,” since both Rabbi Lipner and the Hebrew Academy are prominent in that community. That search results in 154 results, including the Goldman oral history, as well as the oral histories for 21 other former

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<sup>4/</sup> An appendix to this brief shows the search results described in sections 2 and 3.

presidents of the Jewish Federation, which are part of the same oral history project performed by the Regional Oral History Office at the Bancroft Library. (App. 3.)

From this point, there are a number of research paths that could easily have led Rabbi Lipner to the offending pages of the Goldman oral history. First, Rabbi Lipner could have gone directly to the Goldman oral history and quickly found the relevant pages either by looking at the table of contents, which refers to “Hebrew Academy,” or to the index in the back, which refers both to Rabbi Lipner and to Hebrew Academy. (See 2 AA 436, 622-623.)

Second, Rabbi Lipner could have seen from the search results that there was a major oral history project of local Jewish leaders, and done an additional search for “Bancroft Library Regional Oral History Project” – which would have led him directly to the oral history project catalog. (App. 4.) That catalog specifically identifies Goldman as having talked about his opposition to Jewish day schools. (2 AA 649.) And since Hebrew Academy is a prominent Jewish Day School in San Francisco (e.g., 2 AA 678-679), it would have been logical to look at the Goldman oral history, which would have readily led him to the offending pages – again, through either the table of contents or the index (2 AA 436, 622-623).

Third, Rabbi Lipner could have found the Bancroft Oral History Catalog through a search on the Internet-based Online Archive of California. A search for “San Francisco Jewish History” would result in 9 “hits,” the first of which is for the Bancroft Library Regional Oral History Office Catalogue II covering 1980-1997. (App. 5.) That catalog is available on the Bancroft Library’s website, and again leads directly to the Goldman oral history. (E.g., 2 AA 649.)

All these various research paths to the comments about Rabbi Lipner and Hebrew Academy in the Goldman oral history are not merely hypothetical

“reverse engineering.” The ease with which the Goldman oral history could be found using modern research tools is best demonstrated by the fact that it was actually located by a researcher preparing a book on Rabbi Lipner. (1 AA 199.)

**3. It was easier for Rabbi Lipner to locate the Goldman oral history than for the plaintiffs to find the offending books in previous cases where the USPA has been applied.**

The comparative ease with which the Goldman oral history could be found by Rabbi Lipner can be further explored by examining how the plaintiffs in prior reported California decisions might have fared had they sought to locate offending books that discussed them. Two such individuals are the named plaintiffs in defamation cases that were resolved in defendants’ favor through application of the USPA, *Shively v. Bozanich, supra*, 31 Cal.4th 1230 (*Shively*) and *Johnson v. Harcourt, Brace, Jovanovich, Inc., supra*, 43 Cal.App.3d 880 (*Johnson*).

In *Shively, supra*, 31 Cal.4th 1230, this court applied the USPA to a book, *A Problem of Evidence*, where only 33,000 copies were shipped to the entire country, with 7,000 shipped to California in 1996. (*Id.* at pp. 1238, 1240.) The book allegedly defamed Jill Shively, who was a witness during a grand jury proceeding for OJ Simpson. (*Id.* at p. 1238.)

Plaintiffs describe the allegedly defamatory book in *Shively* as being a “mass media type of publication.” (ABOM 1.) The Court of Appeal agreed, noting that “the plaintiff in *Shively* was a potential witness in a high-profile murder case whose complaint contained causes of action for defamation against the author of a book and other defendants for the allegedly libelous

statement in the book that she was a felony probationer. . . . [¶] . . . More than a year prior to the filing of the complaint, 33,000 copies of the book had been shipped for distribution, and thousands were available for sale in California. . . . [T]he defamation was published in a widely distributed book and not hidden from view . . .” (*Hebrew Academy, supra*, 129 Cal.App.4th at p. 401.) But the Court of Appeal’s analysis does not withstand a closer examination of the realities of book publishing.

*A Problem of Evidence* was one of the more than 100,000 new books to be released in 1996. (See U.S. Book Production (2005) <<http://www.bookwire.com/bookwire/decadebookproduction.html>> [as of Mar.6, 2006].) It was also one of the more than 3,000 books with law-related themes to be released that year. (*Ibid.*) An OCLC search for “Jill Shively” yields no hits. (App. 6.) Because Shively was well known only to the extent of her involvement in the O.J. Simpson case, it makes sense for anyone conducting research about Shively to search OCLC for “O.J. Simpson” – which yields an overwhelming 869 hits, including *A Problem of Evidence*. (App. 7.)<sup>5/</sup>

The OCLC listing for *A Problem of Evidence* lists the title, the author and the following subjects: “Trials (Murder) – California – Los Angeles. Criminal investigation – California – History. Evidence, Criminal – California – History. [¶] . . . Simpson, O.J., 1947 – Trials, litigation, etc.” (App. 8.) Jill Shively’s name is not included in the on-line catalog listing for the book. (See *ibid.*) Moreover, there is nothing in this OCLC entry to distinguish *A Problem of Evidence* from the hundreds of other books on the topic of the Simpson

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<sup>5/</sup> A search on Amazon for “O.J. Simpson” results in 272 books. (Search conducted on <<http://www.Amazon.com>> on February 26, 2006.) A search on Google for “O.J. Simpson” yields 1,900,000 results. (Search conducted on <<http://www.Google.com>> on February 26, 2006.)

trial. (E.g., App. 7 & App. 8.) Thus, a Shively researcher would need to physically look at each of these books to see which, if any, mentions her name.

To further complicate matters, unlike the Goldman oral history, *A Problem of Evidence* itself includes no index, and its table of contents does not mention either Jill Shively's name or the grand jury proceedings in which her involvement in the O.J. Simpson trial occurred. (See Bosco, *A Problem of Evidence* (1996).) Thus, the only way for a Shively researcher to locate her name in the book would be to pick it up and read it cover to cover. Shively would therefore have had to weed through many more publications than Rabbi Lipner to find any mention of herself, as the offending book itself offers no clues that she is mentioned in it.

In *Johnson, supra*, 43 Cal.App.3d 880, the Court of Appeal applied the USPA to a college textbook, *From Thought to Theme: A Rhetoric and Reader for College English*, published in 1965, which mentioned plaintiff Douglas Johnson in one of the articles reprinted in the text. (*Id.* at pp. 882-883, 896.) In 1961, Johnson was a janitor who found a sack containing \$240,000 cash, which he returned. (*Id.* at p. 883.) He was given a \$10,000 reward by Brinks, which had lost the money, and was featured in a number of articles. (*Ibid.*) One of those articles was later republished in *From Thought to Theme (ibid.)*, which was one of approximately 30,000 new books published in 1965 (Feldman, *Best and Worst of Times: The Changing Business of Trade Books, 1975-2002, supra*, at p. 9). The Table of Contents and index refer to the name of the article and its author, but do not mention Johnson's name. (From *Thought to Theme: A Rhetoric and Reader for College English* (Smith & Liedlich edits., 1965) pp. 276-279; *id.* at pp. x & 397.)<sup>6/</sup>

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<sup>6/</sup> The article about Johnson was entitled "Unexpected Rewards of Virtue," by Fred J. Cook, and is one of many readings in the second half of the textbook that are followed by questions and exercises for use in a college English class. (From *Thought to Theme: A Rhetoric and Reader for College*

An examination of the OCLC entry for *From Thought to Theme* provides the authors and title of the book, along with the following subjects: “English language – Rhetoric. College readers.” (App. 9.) It does not mention plaintiff Douglas Johnson at all. Moreover, Mr. Johnson’s profession as a janitor (*Johnson, supra*, 43 Cal.App.3d at p. 883) suggests it might be unlikely he would personally come into contact with a college textbook.

A search of OCLC for “Douglas Johnson” generates 618 results, none of which seem to be relevant to Mr. Johnson and none of which identifies the pertinent book. (App. 10.) There does not appear to be *any* logical search term that would have led him to finding this book. Moreover, in 1965, the technology of finding aids was not nearly as advanced as it is today, making Johnson’s quest to locate the book even more unlikely to have borne fruit.

In sum, if the Court of Appeal’s rationale in this case were correct, the holdings in *Shively* and *Johnson* would need to be revisited. The plaintiffs in those cases would have had similar if not substantially greater difficulty than Rabbi Lipner in locating the offending books about themselves.

#### IV.

#### **PLAINTIFFS OFFER NO WORKABLE DEFINITION OF A “MASS MEDIA” PUBLICATION, AND NONE EXISTS.**

The Court of Appeal assumes that a line can be drawn so that only publications “directed to a mass readership” are protected by the USPA, and all others are subject to the discovery rule. In their brief in this court, plaintiffs refer frequently to “mass media” publications. But neither plaintiffs nor the Court of Appeal have defined the term or provided any workable test for

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English, *supra*, at pp. 276-279; see also *id.* at pp. 221-395.)

determining which publications fall on which side of the definition. Even were this court inclined to attempt today to set some “mass media” limit on the USPA, there is no way to distinguish those publications that qualify and those that do not. This court should therefore hold that the USPA applies, as it has in the past, to all publications that are available to the public.

The relevant academic literature defines “mass media” as “communication from a single point to a large number of points, or from a single source to an audience that includes many people.” (Grossberg et al., *Media Making: Mass Media in a Popular Culture* (1998) p. 8; see also Biagi *Media/Impact: An Introduction to Mass Media* (7th ed. 2005) p. 7 [same].) Under this definition, it would be easy to say that the “Harry Potter” books, which have sold over 250 million copies (Majendie, *Harry Potter sales reach 250 million worldwide* (Nov. 17, 2003) San Diego Union Tribune <<http://www.signonsandiego.com/news/features/20031117-0400-arts-potter.html>> [as of Mar. 7, 2006].), constitute mass media publications. But what about other books? Since 1776, 22 million book titles have been published in the United States. (Books in Print, *supra*, Book Industry Statistics <<http://www.parapublishing.com/sites/para/resources/statistics.cfm>> [as of Mar. 6, 2006].) In 2004, there were 2.8 million separate books in print. (*Ibid.*; see also Oda, *Growth and Change in Trade Book Publishing: What I learned from the Numbers* in *Scholarly Publishing, supra*, at p. 64 [As of 1990, there were more than 1.5 million distinct book titles in print].) In 2004 there were over 180,000 new books published.<sup>7/</sup> (U.S. Book Production, *supra*,

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<sup>7/</sup> One reason there are so many books published is the number of book publishers. Today there are over 86,000 book publishers in the United States compared to 12,000 in 1980. (Book Industry Statistics, *supra*, <<http://www.parapublishing.com/sites/para/resources/statistics.cfm>> [as of Mar. 6, 2006]; see also *U.S. Book Production Reaches New High of 195,000 Titles in 2004: Fiction Soars* (May 24, 2005) <[http://www.bowker.com/press/bowker/2005\\_0524\\_bowker.htm](http://www.bowker.com/press/bowker/2005_0524_bowker.htm)> [as of Mar.

<<http://www.bookwire.com/bookwire/decadebookproduction.html>> [as of Mar.6, 2006].)

Nonetheless, the *average* initial print run for a book is only 5,000 copies. (Smaller Publishers and Self-Publishers, *supra*, Book Industry Statistics <<http://www.parapublishing.com/sites/para/resources/statistics.cfm>> [as of Mar. 6, 2006].) The *average* first novel sells only 4,000 copies. (*Best and Worst of Times: Best Books vs. Bestsellers in a Changing Business* (Dec. 4, 2002) <[http://www.columbia.edu/cu/najp/events/bestworst/book\\_trans.pdf](http://www.columbia.edu/cu/najp/events/bestworst/book_trans.pdf)> [as of Mar. 7, 2006] p. 14.) Thus, other than the small number of best-sellers, the vast majority of books released each year are essentially tied in terms of unit sales. (E.g., Goolsbee, *How Rankings Rate*, N.Y. Times (Apr. 12, 2004); Vane, *Bad Times for Best Sellers*, Austin American-Statesman (Dec. 22, 2002) K5.) For example, the purchase of *one* copy on Amazon of a World Bank technical paper on the regulatory environment in Bulgaria raised its sales rank from 2.5 million to 1.5 million, meaning that a single sale pushed it ahead of *one million* other books. (Goolsbee, *How Rankings Rate*, N.Y. Times (Apr. 12, 2004).)

In 1994, for example, over 70 percent of total fiction sales were accounted for by *five* authors: John Grisham, Tom Clancy, Danielle Steel, Michael Crichton, and Stephen King. (Sorensen, *Bestseller Lists and Product Variety: The Case of Book Sales* (Oct. 2005) p. 7.) Sales of individual books by those five authors can range from nearly 6 million copies to over 20 million copies. (Feldman, *Best and Worst of Times: The Changing Business of Trade Books, 1975-2002*, *supra*, at p. 15.) Indeed, even looking only at the top 1,217 selling fiction books in a six month period, the top 12 account for 25 percent of total sales, the top 43 account for 50 percent, and the top 205 account for 84 percent of total sales. (Sorensen, *Bestseller Lists and Product Variety: The*

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6, 2006].)

*Case of Book Sales, supra*, at p. 10.) Thus, the hundreds of thousands of books outside the top 205 bestsellers account for only 16 percent of total sales.

Furthermore, there are 15,000 stores in the United States that carry books for sale. (Bookstores, *supra*, Book Industry Statistics <<http://www.parapublishing.com/sites/para/resources/statistics.cfm>> [as of Mar. 6, 2006].) As of 2002, there were 404 Borders stores. (*Ibid.*) A single Borders or Barnes & Noble store contains 130,000 to 140,000 different titles in stock, which makes it overwhelming for any customer browsing for a book to read. (*Best and Worst of Times: Best Books vs. Bestsellers in a Changing Business, supra*, <[http://www.columbia.edu/cu/najp/events/bestworst/book\\_trans.pdf](http://www.columbia.edu/cu/najp/events/bestworst/book_trans.pdf)> [as of Mar. 7, 2006] p. 12.)

Moreover, when periodicals are added to the equation, the information explosion becomes even more pronounced. Today there are about 1,500 daily newspapers and 18,000 magazines published in the United States. (Biagi, *Media/Impact: An Introduction to Mass Media, supra*, at pp. 9-10.) In 1963 there were more than 1,500 periodical and journal indexes, in 1980 there were about 2,500, and in 1988 there were more than 4,000. (Wellisch, *Abstracting and Indexing Services* in *Encyclopedia of Library History, supra*, at p. 4.) Each of these indexes contains many millions of records. (See, e.g., *ibid.* [One such service for library and information science journals had 8 million abstracts in 1988]; Henderson, *The Growth of Printed Literature in the Twentieth Century* in *Scholarly Publishing, supra*, at p. 5 [In 1970, there were 624,000 records in the *Physics Abstracts*, and by 1995 there were 2,852,000 records]; *id.* at p. 7 [In 1995 alone, scientists used 13.7 million articles and technical reports]; *id.* at p. 9 [1995 search of the MEDLINE database for articles on whiplash-associated disorders found over 10,000]; *id.* at pp. 10-11 [by the 1980's there were two million records in the *Engineering Index*].)

Except for a handful of best-sellers, then, very few publications ever come to the attention of the general public. For the remaining publications, how many copies are sufficient to qualify as a “mass media” publication? Should geographic proximity of the publication to the plaintiff be required? If not, why not? Neither the Court of Appeal nor plaintiffs explain how their mass media limitation could ever be applied consistently and equitably. In fact, there is simply no way to create any fair and workable test for determining which of the millions and millions of articles are or are not covered by the USPA. Accordingly, unless the USPA is limited to the small handful of best-selling books released each year, the USPA must be applied equally to the remaining millions of books that are all unlikely to be read by more than a very small number of people. To hold otherwise would utterly eviscerate the USPA.

## V.

### **FAILURE TO APPLY THE USPA AND THE APPLICATION OF THE DISCOVERY RULE TO THIS CASE WOULD THWART IMPORTANT PUBLIC POLICIES.**

#### **A. The USPA was intended to limit the time during which liability can be assessed for a publication.**

The Court of Appeal’s most serious error was its apparent belief that the failure to apply the USPA and the application of the discovery rule in this case is somehow consistent with the policy behind the USPA. (*Hebrew Academy, supra*, 129 Cal.App.4th at pp. 400, 404.)

Before the single publication rule was adopted, each sale or delivery of a copy of a newspaper or book containing a defamation constituted a separate publication of the defamation to a new audience, giving rise to a separate cause of action, and subjecting “the publishers of books and newspapers to lawsuits stating hundreds, thousands, or even millions of causes of action for a single issue of a periodical or edition of a book.” (*Shively, supra*, 31 Cal.4th at pp. 1243-1244.) Under the common law “[t]he statute of limitations could be tolled indefinitely, perhaps forever.” (*Ibid.*) The single publication rule was fashioned by the courts, and then adopted by statute in California, “to avoid *both* the multiplicity *and* the staleness of claims permitted by the [common law] rule . . . .” (*Id.* at p. 1245.)

Thus, “[u]nder the single publication rule, with respect to the statute of limitations, publication generally is said to occur on the ‘first general distribution of the publication to the public,’” no matter how many copies of the publication are subsequently distributed. (*Shively, supra*, 31 Cal.4th at p. 1245.) Where the single publication rule applies, “the cause of action accrues and the period of limitations commences, *regardless* of when the plaintiff secured a copy or became aware of the publication.” (*Id.* at pp. 1245-1246.) Moreover, where the single publication rule is applicable, a plaintiff cannot invoke the “discovery rule” to toll the limitations period, because “[i]nquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule.” (*Id.* at p. 1251.)

**B. Failure to provide protection to defendants here will pose grave risks to oral historians, libraries, archives, and others similarly situated by exposing them to unending liability exposure.**

The person who gathers an oral history and publishes it in an archive can be liable for defamation as a primary publisher to the same extent as the person who is the subject of the oral history itself. (E.g., Smolla, *Law of Defamation* (2d ed. 2005) Defamatory Meaning, § 4:92, pp. 4-140.14 to 4-140.16; see also *id.* at § 4:87, pp. 4-140.4.2 to 4-140.4.3 [collecting cases on liability for republication showing that “[e]ach republication is a new tort subjecting the repeater to liability independent of the original publisher: The law deems the repeater to ‘adopt as his own’ the defamatory statement”]; Neuenschwander, *Oral History and the Law* (2002) pp. 18-19.) A library or archive can also be liable for the defamatory content in materials contained within its collection as a secondary publisher “if, but only if, he knows or has reason to know of its defamatory character.” (Rest.2d Torts, § 581, subd. (1).)

Were this court to affirm the Court of Appeal’s opinion, each library and archive in the United States would be under a continuing risk of liability for all publications in its special collections catalog, no matter how long ago they were published or added to the collection. In order to avoid such liability, libraries would be required to spend substantial resources in carefully reviewing every page in their special collections. This would most certainly limit the materials that could be added to the collections. Publishers and authors of oral histories or other non-mass media publications would similarly be affected by the increase in the number of lawsuits they could face if they lost the protection of the USPA and were exposed to open-ended tort liability.

“Fear of large verdicts in damage suits . . . must inevitably cause publishers to ‘steer wider of the unlawful zone,’ [citations] and thus ‘create the danger that the legitimate utterance will be penalized.’” (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 389 [87 S.Ct. 534, 17 L.Ed.2d 456].) Indeed, such a situation “runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press . . . [and] may lead to intolerable self-censorship.” (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

Furthermore, even if a lawsuit is ultimately thrown out, the potential oral historian, library or archive will need to think twice about exposing themselves to potential liability. (Ritchie, *Doing Oral History: A Practical Guide*, *supra*, pp. 78-79 [for an oral historian, “even the threat of a libel suit can be unpleasant. . . . [¶] . . . ‘You could probably win a libel suit in court, but you wouldn’t want to see the legal bills that would be the result’”]; Neuenschwander, *Oral History and the Law*, *supra*, at pp. 17-23 [explaining various scenarios in which oral historians are at risk from defamation lawsuits].)

In sum, the purpose of the USPA is to limit the time period in which lawsuits can be brought against authors, publishers, libraries, archives and other potential defamation defendants. If the Court of Appeal’s rationale were adopted, the time period to file such suits would be extended for a potentially unlimited time. This added uncertainty will cause all such entities or individuals, especially those with more limited resources, to think twice about publishing at all, or to engage in severe self-censorship.

**C. Oral histories provide an essential service in the preservation of world cultures.**

Affirming the rationale of the Court of Appeal could also impose a chilling effect on future oral histories because of the uncertainty and risk of unending litigation exposure. “Memory is the core of oral history, from which meaning can be extracted and preserved. Simply put, oral history collects memories and personal commentaries of historical significance through recorded interviews. An oral history interview generally consists of a well-prepared interviewer questioning an interviewee and recording their exchange in audio or video format. Recordings of the interview are transcribed, summarized, or indexed and then placed in a library or archives. These interviews may be used for research or excerpted in a publication, radio or video documentary, museum exhibition, dramatization or other form of public presentation. (Ritchie, *Doing Oral History: A Practical Guide*, *supra*, at p. 19.) Oral history is about asking questions. . . . That is the reason for doing oral history: to ask questions that have not been asked, and to collect the reminiscences that otherwise would be lost. (*Id.* at p. 46.) A community can be defined loosely as a group of people who share a common identity, whether based on location, racial or ethnic group, religion, organizational affiliation or occupation. . . . Oral historians have helped to broaden traditional notions of what constitutes a community’s history by looking not only at its political and institutional structures, but at its economic development and the ethnic and occupational composition of its population.” (*Id.* at p. 223.)

Since the 1940's, oral histories have become an important form of archived materials. (Bradsher, *An Introduction to Archives in Managing Archives and Archival Institutions* (1988) p. 12.) Oral history "is usually an academic process of inquiry into memories of living people who have direct experience of the recent past" and are necessary to "remedy deficiencies in written records." (Moss, *Oral History in Managing Archives and Archival Institutions, supra*, at p. 150.)

Oral history projects are vital in preserving the history of groups who do not have a written tradition. For example, in the early 1900's, the Bancroft Library embarked on an ambitious state-wide oral history project to collect the life histories of numerous African-Americans whose stories would otherwise have been lost to history. (See, e.g., Beasley, *Negro Trailblazers of California* (1919); see also Fineberg, 'Voices of Civil Rights': *Library Joins National Campaign to Collect Oral Histories* (Oct. 2004) vol. 63, No. 10, *Libr. of Congress Info. Bull.* 204, 204 [Library of Congress participates in Voices of Civil Rights Project which is "'collect[ing] the stories of ordinary people who lived through extraordinary times'" and "'creat[ing] the largest archive of civil rights stories in the world'"].)

"Much of the literature about Native American cultures has been written by non-native outsiders, and many native groups have little published material by tribal members. One way that communities can address this . . . is a collection of transcriptions of interviews with elders of the [tribes] about what daily life was like during their younger years. . . . [S]uch projects help [libraries] ensure that Native American voices are given shelf space." (Hurley, *Oral Tradition and Tribal College Libraries: Problems and Promise* (Mar. 2002) vol. 18, No. 1, *Alki* 19, 19.)

Other projects have preserved critical information about entire groups that would otherwise be lost. (E.g., *The Voice of the Veteran: Congress*

*Establishes Oral History Project* (Dec. 2000) vol. 59, No. 12, Libr. of Congress Info. Bull. 287, 287 [“folk histories of our everyday war heroes from every corner of the nation”]; *Stories of Sacrifice: Veteran History Project Highlights POW Experiences* (Oct. 2004) vol. 63, No. 10, Libr. of Congress Info. Bull. 206, 206 [oral history of former POWs]; Jones-Randall, *The Evolution of an Oral History Project* (Mar. 1992) vol. 12, Computers in Libr. 49, 49-50 [history of local farming community (Weston, Mass)]; Baranowski, *Reconnecting the Past Through Oral History* (Mar./Apr. 2004) vol. 43, No. 2, Pub. Libr. 109, 109-112. [“effort to document and preserve information about the city of Perrysburg (Ohio) and its citizens”]; Hoog, *Ordinary People, Extraordinary Events: Folklife Center Sponsors Documentary Project* (Sept. 2002) vol. 61, No. 9, Libr. of Congress Info. Bull. 173, 173-175 [oral history of ordinary people caught up in events of September 11, 2001]; Hauck, *A Library Oral History Project at Whitworth College* (Dec. 2002) vol. 18, No. 3, Alki 8, 8-9 [oral history of Japanese-Americans including those who were interned during WW II]; Walmsley, *Life history interviews with people with learning disabilities* in *The Oral History Reader*, *supra*, at pp. 126-138 [people with mental handicaps]; Bozzoli, *Interviewing the Women of Phokeng* in *The Oral History Reader*, *supra*, at pp. 145-154 [women in South African village]; White, *Marking Absences: Holocaust testimony and history* in *The Oral History Reader*, *supra*, at pp. 172-181 [survivors of the Holocaust]; Westerman, *Central American refugee testimonies and performed life histories in the Sanctuary movement* in *The Oral History Reader*, *supra*, at pp. 224-233 [members of Sanctuary Movement]; Sherbakova, *The Gulag in memory* in *The Oral History Reader*, *supra*, at pp. 235-245 [survivors of Soviet gulags]; Kakar, *Leprosy in India:*

*The intervention of oral history* in *The Oral History Reader*, *supra*, at pp. 258-268 [leprosy victims in India].)<sup>8/</sup>

Archives play a significant role in a community because they can preserve the record of an entire culture or community for future generations. (E.g., Bastian, *Owning Memory: How a Caribbean Community Lost Its Archives and Found Its History* (2003) pp. 76-87.)

A rule that exposes oral historians and the archives who house their work to increased risks of liability threatens the willingness to conduct such important work. Indeed, the very purpose of the USPA is to establish such breathing space for writers and publishers. The Court of Appeal failed to recognize either that important public policy or the extent to which its holding undermines it. This court should correct that error by affirming the USPA's protection of oral histories such as the one at issue in this case.

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<sup>8/</sup> Small publishers would similarly be in jeopardy if they were left unprotected by the USPA. A media textbook gives examples of topics explored by just a few recent small presses: "*Bicycle Technology: Technical Aspects of the Modern Bicycle* by Rob Van der Plas, published by Bicycle Books; *Nine-in-One, Grr! Grr!*, a Hmong folktale by Blia Xiong and Cathy Spagnoli, published by Children's Book Press; *Warning! Dating May be Hazardous to Your Health* by Claudette McShane, published by Mother Courage Press; or *48 Instant Letters You Can Send to Save the Earth* by Write for Action, published by Conari Press." (Biagi, *Media/Impact: An Introduction to Mass Media*, *supra*, at p. 45.)

## CONCLUSION

For the following reasons, and for the reasons set forth by Goldman's briefs on the merits, the Court of Appeal's opinion should be reversed.

Dated: March 15, 2006

Respectfully submitted,

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