Santa Clara High Technology Law Journal

Volume 3 | Issue 2 Article 5

January 1987

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TRADE SECRET PRELIMINARY HEARINGS: DOES THE PRESS HAVE A RIGHT TO KNOW?

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I. INTRODUCTION

"James Madison probably did not suppose, on suggesting to the House of Representatives its inclusion in the Bill of Rights, that the right to a public trial would one day conflict with someone's interest in concealing a method for producing a triamino derivative of symmetrical triazine."[1] Nor did Madison probably foresee the similar conflicts that have arisen between holders of trade secret information and members of the press. In fact, since at least twenty states[2] have enacted criminal trade secret statutes,[3] members of the

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1. Stamicarbon v. American Cyanamid Co., 506 F.2d 532, 534 (2d Cir. 1974).

2. States that have passed criminal trade secret statutes or have incorporated trade secrets into their criminal theft statutes include Arkansas (ARKANSAS STAT. ANN. tit 41, § 2207 (1975)), California (Cal. Penal Code § 499c (West 1983)), Colorado (COLO. REV. STAT. tit. 18, § 4408 (1963)), Georgia (GA. CODE ANN. § 26-1809 (1968)), Illinois (ILL. ANN. STAT. ch. 38, § 15-1 (Smith-Hurd 1962)), Indiana (IND. CODE ANN. tit. 35 § 4342 (Burns 1976)), Massachusetts (MASS. GEN. LAWS ANN. ch. 266, § 30 (West 1945)), Michigan (MICH COMP. LAWS ANN. § 752.771 (West 1968)), Minnesota (MINN. STAT. ANN. tit. 40, § 609.52 (West 1967)), New Hampshire (N.H. REV. STAT. ANN. § 637.1 (1971)), New Jersey (N.J. STAT. ANN. tit. 2c, § 202 (West 1978)), New Mexico (N.M. STAT. ANN. ch. 30, § 1624 (1967)), New York (N.Y. PENAL LAW §§ 155.00, 155.30, 165.07 (McKinney 1967)), Ohio (OHIO REV. CODE ANN. tit. 13, § 1333.51 (Page 1967)), Oklahoma (OKLA. STAT. ANN. tit. 21, § 1732 (1968)), Pennsylvania (PA. STAT. ANN. tit. 18, § 3930 (Purdon 1973)), Tennessee (TENN. CODE ANN. § 31126), Washington State (RCW 9A.56.010) and Wisconsin (WIS STAT. ANN. § 943.205 (West 1978)).

3. For example, the California criminal trade secret statute in Penal Code Section 499c(b) (West 1983) states:

> (b) Every person is guilty of theft who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another does any of the following:

press and owners of trade secrets[4] will inevitably clash over whether the press has a constitutional right to attend criminal trade secret preliminary hearings.[5]

A company seeking to protect its trade secrets can either employ the civil courts, or more recently, can use the criminal courts if the company is doing business in a state which has enacted a criminal trade secret statute. Companies prefer criminal prosecution for a variety of reasons. A primary reason is that a search pursuant to a warrant can provide valuable evidence of the violation, and in some instances, stop the crime if the trade secret consists of a physical object. Additionally, a criminal trade secret case is handled by a

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(1) Steals, takes, carries away, or uses without authorization a trade secret.

(2) Fraudulently appropriates any article representing a trade secret entrusted to him.

(3) Having unlawfully obtained access to the article, without authority makes or causes to be made a copy of any article representing a trade secret.

(4) Having obtained access to the article through a relationship of trust and confidence, without authority and in breach of the obligations created by such relationship makes or causes to be made, directly from and in the presence of the article, a copy of any article representing a trade secret.

(c) Every person who promises or offers or gives, or conspires to promise or offer to give, to any present or former agent, employee or servant of another a benefit as an inducement, bribe or reward for conveying, delivering or otherwise making available an article representing a trade secret owned by his or her present or former principal, employer or master, to any person not authorized by such owner to receive or acquire the same and every person who being a present or former agent, employee, or servant, solicits, accepts, receives or takes a benefit as an inducement, bribe or reward for conveying, delivering or otherwise making available an article representing a trade secret owned by his or her present or former principal, employer or master, to any person not authorized by such owner to receive or acquire the same is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars ($5,000), or by both such fine and such imprisonment.

(d) In a prosecution for a violation of this section it shall be no defense that the person so charged, returned or intended to return the article.

4. A trade secret is a formula, pattern, device, or compilation of information which is used in one's business and which gives one an opportunity to obtain advantage over its competitors who do not know or use it. RESTATEMENT OF TORTS § 757 (1934).

Cal. Penal Code § 499c(a)(9) (1983) defines a trade secret as follows:

"Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, computer program or information stored in a computer, information in transit, or improvement which is secret and is not generally available to the public, and which gives one who uses it an advantage over competitors who do not know of or use the trade secret; and a trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

5. During the preliminary hearing the state "is required to produce sufficient evidence to establish that there is probable cause to believe (a) that a crime has been committed, and (b) that the defendant committed it. Black's Law Dictionary 1062 (5th ed. 1979).

public prosecutor rather than a private attorney, which results in lower costs for the victim. Criminal prosecution is also a faster process than civil litigation because there are no depositions, interrogatories, or requests for admissions. The deterrent effect of criminal prosecution is a motivating factor for companies. "The average trade secret thief is no hardened criminal, but rather an educated, career-oriented professional who rationalizes situational thievery. The possibility of prosecution and its consequences, including publicity and unemployment, is more frightening than facing a mere civil suit."[6]

The following hypothetical[7] helps to illustrate how trade secret criminal litigation begins[8] and what may happen once it is under way. The founder of a highly successful electronics company leaves that firm and forms a start-up company. The old firm contacts the public prosecutor, charging that the founder took valuable trade secrets with him and is using them in his new firm.[9] After an investigation by the public prosecutor, the founder is charged with the criminal theft of trade secrets. A local newspaper interested in running a series of articles on the high technology industry sends a reporter to the preliminary hearing who discovers that the hearing has been closed at the request of the defendant and agreed to by the alleged victim.[10] The newspaper then seeks to force the court to open the hearing to the press and the general public.

Both the alleged victim and the defendant fear the conse-

6. Southard, *To Catch a Thief*, 6 CALIF. LAW. 23, 25 (Dec. 1986). Southard, a deputy district attorney in Santa Clara County, California, notes that as an additional deterrent, some employers specifically refer to Section 499c in employee non-disclosure agreements. *See supra* note 3 for the text of Section 499c. *See* Southard's article for a discussion of criminal prosecution in California.

7. The facts in this hypothetical are based on real events that occurred in 1979 in California.

8. In the hypothetical the alleged victim contacted the prosecutor as soon as the new company started business. In some situations the victimized company will conduct its own detailed and lengthy investigation before turning to local law enforcement. An investigation started by IBM through its own security agents of an employee suspected of stealing design secrets from its hard disk drive technology led to that employee's prosecution and conviction. People v. Serrata, 62 Cal. App. 3d 9, 133 Cal. Rptr. 144 (1976).

Other times it is not the victim but a third party who reports trade secret theft to local authorities. For example, an Intel employee approached a National Semiconductor Corporation (NSC) purchasing agent and offered to sell him some trade secrets. NSC alerted the police and participated in the resulting undercover operation. People v. Superior Court (Moore), 104 Cal. App. 3d 1001, 163 Cal. Rptr. 906 (1980), and People v. Gopal, 171 Cal. App. 3d 524, 217 Cal. Rptr. 487 (1985).

9. Ownership of a trade secret does not give the owner monopoly in its use but merely a proprietary right which equity protects against usurption by unfair means. Futurecraft Corp. v. Clary Corp., 205 Cal. App. 2d 279, 283, 23 Cal. Rptr. 198, 207 (1962).

10. The subject matter of a trade secret must be secret and the property right in a trade

quences of opening the preliminary hearing to the press. The alleged victim will lose his trade secret to the entire world if it is disclosed at the hearing when the prosecutor shows what was stolen.[11] Moreover, in presenting a defense, the defendant is also at risk. He may be a holder of the same trade secret, which he acquired by legitimate means or he may be a holder of a different trade secret that produces the same result. Although the defendant could be vindicated at trial, he may lose his valuable trade secret if it is disclosed at the hearing while he is showing that he either acquired it legitimately or developed it on his own. Thus each party risks having his trade secret disclosed and thereby lost if the press is allowed to attend the hearings.[12] Yet, the press has a legitimate interest in reporting interesting news to its readers.

In some instances, a third party may also fear the loss of trade secrets through an open preliminary hearing. For example, in *Stamicarbon v. American Cyanamid Co.*,[13] the U.S. government sued American Cyanamid (Cyanamid), a chemical producer, for violating a consent decree. Two of the competitors who were to testify at the trial were licensees of Stamicarbon and used its secret processes as did Cyanamid. One of the competitors moved that its testimony be received in camera in order to maintain the secrecy required in the licensing agreement. The government agreed to the procedure but Cyanamid objected. Stamicarbon then applied for a preliminary injunction to prevent Cyanamid from disclosing Stamicarbon's trade secrets by requiring receipt of the evidence in camera. Stamicarbon also sued Cyanamid charging the Cyanamid, pursuant to its license agreement with Stamicarbon, had to consent to an in camera procedure.

The court of appeals held that the trial judge did not abuse his discretion when he denied a preliminary injunction on the grounds that it was unlikely that Stamicarbon's secrets would be revealed at

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secret ceases to exist after the secret has become public property through general disclosure. Scharmer v. Carrollton Mfg. Co., 525 F.2d 95, 99 (6th Cir. 1975).

The owner of a trade secret must take precautions to protect the trade secret such as disclosing the trade secret to only those employees, suppliers, licensees and others who need to know and who pledge to keep it secret.

11. "[W]hile protective orders can bind juries, parties and court personnel, it is unclear whether the media are bound in the same way. Such uncertainties have led victims to beg for plea bargains in otherwise strong cases." Southard, *supra* note 6, at 25.

12. The issue of whether a constitutional taking has occurred when a trade secret is lost because of an open proceeding is beyond the scope to this article. However, there is authority for the idea that a trade secret could possibly be a form of property subject to the taking regulation. Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984)

13. Stamicarbon v. American Cyanamid Co., 506 F.2d 532, 536-37 (2d Cir. 1974).

the trial. The court also ruled that the license agreement, which specified that Cyanamid reasonably use best efforts to prevent disclosure of Stamicarbon's trade secrets, did not constitute a waiver by Cyanamid to a public trial.[14]

The law remains unsettled as to whether trade secret preliminary hearings can be closed. The recent United States Supreme Court decision in *Press-Enterprise v. Superior Court* (hereinafter *Press-Enterprise II*) offers guidelines for determining whether preliminary hearings in general should be open.[15] In that case, a California magistrate closed a 41-day preliminary hearing in a widely reported murder case and sealed the transcript. Press-Enterprise Company, a newspaper publisher, sought to have the transcript released. The California Supreme Court held that the preliminary hearing could be closed since the defendant showed a "reasonable likelihood of substantial prejudice" to the defendant's right to a fair and impartial trial.[16] The decision was appealed to the U.S. Supreme Court in *Press-Enterprise II* and was reversed, the Court holding that preliminary hearings of the type conducted in California were required to be open to public and press unless there was an overriding interest articulated in the findings.[17]

Very few reported cases have dealt specifically with the issue of closure of criminal trade secret cases at the pretrial or trial stage. However, the United States Court of Appeals, Second Circuit, did hold in *Stamicarbon* that the trial judge "does have the power at least partially to restrict access to the contempt proceedings when testimony which would reveal Stamicarbon secrets is received."[18]

The focus of this article is whether the press has a constitutional right to attend preliminary hearings in criminal trade secret cases and how a balance can be struck between the First Amendment rights of the press and the property rights of a private party. The authors assert that in limited situations, parts of trade secret preliminary hearings should be closed. This article concludes with suggested guidelines for determining whether such hearings should be closed.

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14. *Id.* at 538.

15. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986).

16. Press-Enterprise Co. v. Superior Court, 37 Cal. 3d 773, 781, 691 P.2d 1026, 1032, 209 Cal. Rptr. 360, 366.

17. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) (hereinafter Press-Enterprise II).

18. Stamicarbon v. American Cyanamid Co., 506 F.2d 532, 541 (2d Cir. 1974).

II. A QUALIFIED CONSTITUTIONAL RIGHT OF ACCESS TO SELECTED JUDICIAL PROCEEDINGS

Throughout our legal history, courts have recognized a number of rights not specifically enumerated in the U.S. Constitution. Many of these rights find their basis in the First Amendment to the U.S. Constitution and are now considered fundamental rights. Among the fundamental rights recognized are the rights to travel, to marry, and to privacy. A relatively recently recognized constitutional right, although not considered fundamental, is the public's qualified right of access to judicial proceedings.[19]

The U.S. Supreme Court recognized the basic right of access in *Richmond Newspapers v. Commonwealth of Virginia*: "[w]e hold the right to attend criminal trials is implicit in the guarantees of the First Amendment."[20] Although the holding garnered only a plurality of the justices in *Richmond*,[21] when the Supreme Court decided *Globe Newspaper Company v. Superior Court* two years later in 1982, a majority of the justices held that the press and public have a constitutional right of access to criminal trials.[22] In *Press Enterprise II* the Supreme Court recently extended this right of access to certain types of preliminary hearings.[23] The general concept behind the right of access to judicial proceedings is the notion of an in-

19. "The countervailing access theory asserts that the public's right to receive and disseminate communications about public affairs implies at least some right to acquire relevant information at the source. It draws on the right to assemble in places and at proceedings traditionally public. It presumes the deterrent effect of public scrutiny on official misconduct. And it emphasizes the unique role of the media in vindicating the right to know." San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 502, 638 P.2d 655, 657, 179 Cal. Rptr. 772, 774 (1982).

20. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 (1980). In Richmond, a newspaper publisher appealed the closing of a murder trial. The Virginia Supreme Court denied the appeal. The U.S. Supreme Court reversed the judgement, holding that the First Amendment guarantees the public a right to attend criminal trials but that the right may be outweighed by an overriding interest articulated in the findings by the trial judge.

21. Justices White and Stevens joined Chief Justice Burger's opinion. Justice Brennan filed a concurring opinion in which Justice Marshall joined. Justices Stewart and Blackmun each filed a concurring opinion. Justice Rehnquist filed a dissenting opinion. *Id.*

22. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604-605, (1982). In Globe, a newspaper publisher challenged an order excluding the general public from the trial of a defendant charged with raping three minor girls. The Massachusetts Supreme Judicial Court construed a Massachusetts statute as requiring under all circumstances the exclusion of the public during a sex offense trial which involved a minor victim. The U.S. Supreme Court held that the statute violated the First Amendment because it required closure without a finding of necessity by the trial judge.

23. In Press-Enterprise II, the Supreme Court held that there was a qualified right of access to preliminary hearings as they are conducted in California. In California an accused person has the right to a preliminary hearing before a neutral magistrate at which the accused has "the right to personally appear at the hearing, to be represented by counsel, to cross-

formed populace. If people are not exposed to the judicial system, they will not understand how it works or have respect for the results achieved. The news media play a critical role in this process by reporting judicial proceedings and publishing stories of interest to the community. Since average citizens will not attend most judicial proceedings because of time and financial constraints, the press serves as their representative in the courtroom and is a means of indirect access to the judiciary. Consequently, the press often seeks admission to criminal trials and hearings perceived as newsworthy.[24] But the courts, for a variety of reasons, will sometimes deny the press access to the proceedings.[25]

A. *To What Judicial Proceedings Does The Qualified Constitutional Right of Access Apply?*

Deciding the proceedings to which the press have a constitutional right of access has been no easy matter for the courts. "Several concerns are to be weighed in deciding whether speech and press freedoms imply the right of access to certain sources of government controlled information. Matters to be examined include the traditional availability of the source to public scrutiny as well as the relative benefits and burdens of recognizing access rights."[26] Although the right to attend legal proceedings is partially determined by the type of the proceeding — i.e., trial, suppression hearing, preliminary hearing, grand jury inquiry — the label of the proceeding does not determine the public's right to attend.[27] Rather, the courts look to the nature of the proceeding and the underlying policies promoted by an open proceeding and balance these policies against the potential harm which might arise from an open proceeding.

1. Criminal trials

A number of policy considerations support the notion of a First Amendment right of access to criminal trials. It is helpful to

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examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2742 (1986).

24. *See, e.g.*, San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982); San Jose Mercury-News v. Municipal Court, petitioner's brief, Docket No. C8296456; Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

25. For example, certain parts of criminal proceedings have been closed to shield rape victims from the trauma and embarrassment of public exposure.

26. San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 509, 638 P.2d 655, 662, 179 Cal. Rptr. 772, 779 (1982).

27. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) (Press-Enterprise II).

identify and evaluate these policy concerns in order to later determine the extent to which these same concerns are applicable to pretrial settings in general and trade secret preliminary hearings in particular. One established policy behind the notion of open access is the tradition of public accessibility to criminal trials.[28] Historically in the U.S. and in England, criminal trials have been open to the public and the press. This tradition dates back to the time before the Norman Conquest and was a fundamental concept which the drafters of the U.S. Constitution supported.[29] Modern courts have agreed "that a presumption of openness is inherent in the very nature of a criminal trial under our system of justice."[30] The U.S. Supreme Court noted this presumption in *Richmond* and concluded that "the right to attend criminal trials is implicit in the guarantee of the First Amendment."[31] The presumption was reiterated by the Court as a critical concern in *Globe*.[32]

Another policy identified by the courts as a basis for upholding the right of access to criminal trials is the encouragement of free exchange of ideas.[33] By attending criminal trials, the public and press can freely exchange ideas and voice their opinions on news of interest to their community. This exchange leads to an informed discussion of government and a general education of the public.[34]

An open trial also fosters a public perception of fairness[35] and ensures that the proceedings will in fact be just. The courts recognize the psychological benefit to the community of an open trial: it serves as an outlet for the emotions of the people and therapeutically satisfies "their natural yearning to see justice done — or even the urge for retribution. . . . [No] community catharsis can occur if justice is 'done in a corner or in any covert manner.' "[36] Access to criminal proceedings also permits public scrutiny of the judicial process and discourages secrecy and bias.[37] It serves as a check and balance on police procedures and tactics.[38]

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28. *Id.* at 2740.

29. *Id.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-70 (1980).

30. *Id.* at 573.

31. *Id.* at 580.

32. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

33. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 584 (1980); U.S. v. Criden, 675 F.2d 550, 556-57 (3d Cir. 1982). For a discussion of Criden, *see infra* note 49.

34. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 584, 595-96 (1980).

35. *Id.* at 569-70; U.S. v. Criden, 675 F.2d 550, 556 (3d Cir. 1982); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

36. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).

37. *Id.* at 569. U.S. v. Criden, 675 F.2d 550, 556 (3d Cir. 1982).

38. U.S. v. Criden, 675 F.2d 550, 557 (3d Cir. 1982).

Generally, open criminal proceedings encourage and "enhance the performance of all involved."[39] Since judge, jury, and all parties and attorneys are in public view, they will do their best to bring about a fair result. Public access also meets the societal objective of discouraging perjury[40] since the witnesses will be within the full view and scrutiny of the press and the public.

2. Pretrial Proceedings

a. A Brief History of the Right to Access

As described above, a qualified right of access exists with respect to criminal trials. Whether a similar right exists in a particular type of pretrial hearing is not clear. Courts disagree on how closely pretrial proceedings resemble a trial and on the social policies fostered by opening such proceedings. Specifically, authorities disagree on how similar a preliminary hearing is to a trial and how important it is in the criminal process.[41] Justice Blackmun's concurring and dissenting opinion in *Gannett Company, Inc. v DePasquale*,[42] while maintaining that suppression hearings were critically important and should be open, expressly distinguished the preliminary hearing by stating, "Such proceedings are not critical to the criminal justice system in the way the suppression-of-evidence hearing is and they are not close equivalents of the trial itself in form."[43] However, the California Supreme Court in *San Jose Mercury-News v Municipal Court* stated that "preliminary hearings are a critical step in the accusatory process"[44] and that "when exclusion of evidence is not at issue the preliminary hearing 'may turn out to be the only judicial proceeding of substantial importance that takes place

39. *Id.* at 556. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 n. 7 (1980).

40. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596-97 (1980); U.S. v. Criden, 675 F.2d 550, 556 (3d Cir. 1982).

41. Justice Stevens in a dissenting opinion joined by Justice Rehnquist in Press-Enterprise II noted that the historical evidence offered for recognizing a right of access to preliminary hearings was far less probative than in prior cases such as Richmond and Globe. "In those cases, a common law tradition of openness at the time the First Amendment was ratified suggested an intention and expectation on the part of the Framers and ratifiers that those proceedings would remain presumptively open. In this case, however, it is uncontroverted that a common law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted and that the Framers and ratifiers of that provision could not have intended such proceedings to remain open." Press-Enterprise Co. v Superior Court, 106 S. Ct. 2735, 2747 (1986).

42. 443 U.S. 368 (1979).

43. *Id.* at 437.

44. San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 510, 638 P.2d at 662, 179 Cal. Rptr. at 779 (1982).

during a criminal prosecution. . . .' "[45]

Historically, there is no common law tradition of public attendance at all pretrial proceedings. While acknowledging that the common law traditions of public attendance at trials were embodied in the Sixth Amendment, the U.S. Supreme Court in *Gannett* found no such tradition in the case of pretrial proceedings. "By the time of adoption of the Constitution, public trials were clearly associated with protection of the defendant, and pretrial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials."[46]

Gannett, a 1979 U.S. Supreme Court case, dealt with a pretrial suppression of evidence proceeding. The Court held that Gannett, a newspaper publisher, was not entitled to a right of access to the pretrial hearing and based its analysis on the Sixth Amendment guarantee of a public trial rather than the First Amendment.[47] Although the majority opinion declined to decide in the abstract whether there was a First Amendment right of access, it concluded that the judge presiding over the suppression hearing had respected any right of access the press might have had under the First Amendment by balancing "the 'constitutional rights of the press and the public' " against the " 'defendant's right to a fair trial.' "[48] Justice Powell, in a concurring opinion, explicitly found that under the First Amendment the press possessed a qualified right of access to pretrial proceedings and this right could be limited by the defendant's right to a fair trial.[49]

Recently, the U.S. Supreme Court in *Press-Enterprise II* con-

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45. *Id.* at 511, 638 P.2d at 662, 179 Cal. Rptr. at 779. In spite of this recognition of the importance of a preliminary hearing, the California Supreme Court in Press-Enterprise Co. v. Superior Court, 37 Cal. 3d 772, 691 P.2d 1026, 209 Cal. Rptr. 360 (1984) held that there is no general right of access to preliminary hearings. The U.S. Supreme Court overturned this California decision in Press-Enterprise II (Press-Enterprise Co. v Superior Court, 106 S. Ct. 2735 (1986)) and held that there is a qualified right of access to preliminary hearings.

46. Gannett Co. v. DePasquale, 443 U.S. 368, 387-88 (1979).

47. The Court stated that the Sixth Amendment right did not extend to the public or the press but only to the defendant. Since the defendant sought to close the hearing, the press or public could not seek access based on his right to a public trial. *Id.*

48. Gannett Co. v. DePasquale, 443 U.S. 368 (1979). The trial court found that "an open proceeding would have a reasonable probability of prejudice to the defendants.' " *Id.* at 392-93. The Gannett majority did not comment on the test the trial court used, i.e., that a reasonable probability of prejudice to a fair trial is enough to overcome the First Amendment right of access. However, the Press-Enterprise II court said that the correct test was the "substantial probability" test, not the "reasonable liklihood" test used by the California Supreme Court. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2743 (1986).

49. Gannett Co. v. DePasquale, 443 U.S. 368, 398 (1979). Several lower courts analyzed the issue from a First Amendment standpoint and reached differing results. The California Supreme Court in San Jose Mercury-News v Municipal Court, 30 Cal. 3d 498, 514,

tinued Powell's line of reasoning and held that there is a qualified right of access to certain preliminary hearings and outlined a constitutional framework for analyzing the issue of closing preliminary hearings.[50] A general analysis of this constitutional framework appears below in part II(b). Part III of this article contains an analysis of how courts might apply this constitutional framework specifically in deciding whether to close trade secret preliminary hearings. Part III also includes a discussion of how courts might consider the closure guidelines of *Stamicarbon*, one of the few reported cases focusing specifically on the protection of a trade secret in preliminary proceedings.

b. A Constitutional Framework For Analyzing Preliminary Hearings

Chief Justice Burger, writing for a 7-2 majority in *Press-Enterprise II*, outlined a two-part test for determining whether a preliminary hearing should be open or closed to the public. The first part of the test requires an analysis of the tradition of accessibility to a particular proceeding as practiced in that state. The second part of the test focuses on the role public access plays in the particular process in question.[51] Although the opinion was based on a preliminary hearing in a murder case, it offers a framework for analyzing all preliminary hearings since the only limiting language turns on how extensive the preliminary hearing is in the particular state.[52]

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638 P.2d 655, 179 Cal.Rptr. 772, (1982), held that the press had no First Amendment right of access to a preliminary hearing.

The U.S. Court of Appeals, Third Circuit, in U.S. v Criden, an ABSCAM criminal prosecution, reached a contrary result and held "the public has a First Amendment right of access to pretrial suppression, due process, and entrapment hearings." U.S. v. Criden, 675 F.2d 550, 554 (3d Cir. 1982). However, the Criden court did not think that "historical analysis is relevant in determining whether there is a First Amendment right of access to pretrial criminal proceedings." It relied on Blackmun's concurring and dissenting opinion in Gannett where he points out that the common law had no equivalent of the modern suppression hearing which was at issue in Gannett and Criden. The court turned its attention to interpreting the First Amendment "in light of current values and conditions" by analyzing the societal policy interests which would be served by open pretrial criminal proceedings. *Id.* at 555. The Criden court in reaching its decision to open preliminary suppression, due process, and entrapment hearings, stated that the societal interests supporting open access to public trials that were articulated in Richmond "are also present in the context of a pretrial criminal proceeding and support a First Amendment right to attend such proceedings." *Id.* at 556.

50. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) (Press-Enterprise II).

51. *Id.*

52. *See* Press-Enterprise v. Superior Court, 106 S. Ct. 2735 (1986) (Press-Enterprise II) for a discussion of the extensive scope of a preliminary hearing in California.

1) The Tradition Of Accessibility To Preliminary Hearings

An analysis of the tradition of accessibility to preliminary hearings must focus on "whether the place and process has been open to the press and general public."[53] Initially, a court must look to the tradition of accessibility in the particular state where the preliminary hearing takes place. The Supreme Court in *Press-Enterprise II* focused on preliminary hearings in California[54] and found a strong tradition of accessibility.[55] The Court also noted that the "vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings."[56]

2) The Role Of Public Access In The Function Of A Preliminary Hearing

The second part of the test outlined in *Press-Enterprise II* focuses on "whether public access plays a significant positive role in the functioning of the particular process in question."[57] This issue requires an in depth analysis of how the particular process, here the preliminary hearing, actually functions in the state in question and what underlying policies the process actually fosters. It is important to note that "the First Amendment question cannot be resolved solely on the label we give the event, i.e., 'trial' or otherwise, particularly where the preliminary hearing functions much like a full scale trial."[58]

The Supreme Court in *Press-Enterprise II* summarized a number of policies promoted by open preliminary hearings: the exchange of ideas and education of the public; the notion of fundamental fairness and therapeutic value of enforcement; the role the public plays in the absence of a jury at a preliminary hearing; and the checks and balances on police procedures.[59] In reviewing these policies, the Court stated: "[w]e have already determined in *Richmond Newspapers, Globe,* and *Press Enterprise I* that public access

53. *Id.* at 2740.

54. *See supra* note 23 for a description of the type of preliminary hearing held in California.

55. Press-Enterprise v. Superior Court, 106 S. Ct. 2735 (1986) (Press-Enterprise II).

56. *Id.* note 3, at 2741.

57. *Id.* at 2740.

58. *Id.* at 9.

59. Other policies mentioned by other courts include discouragement of perjury (Brennan in a concurring opinion in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596-97, (1980)) and deterrence of crime.

to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion."[60]

After applying the two-part test (the tradition of accessibility to the proceeding and the role of public access to the functioning of the proceeding) the Supreme Court held "The qualified first amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California."[61] However, the decision to open a preliminary hearing is not complete after satisfying the two-part test. Rather, the court must then consider whether the particular hearing fits within any of the constitutional limits on the right of access.[62]

B. *Limits On The Constitutional Right Of Access*

There are limits on the First Amendment constitutional right of access. As Justice Brennan noted in *Richmond*, "any privilege of access to government information is subject to a degree of restraint dictated by the nature of information and countervailing interests in security or confidentiality"[63] and "the right of access may be curtailed when there are sufficiently powerful countervailing considerations."[64] The Supreme Court in *Richmond* applied strict scrutiny in its analysis of the public's right to attend criminal trials. "Absent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public."[65] Justice Brennan, writing for the majority, articulated the same standard of scrutiny in *Globe*: "Where, as in the present case, the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest."[66]

The rule in *Press-Enterprise II* requires the trial court to "determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access."[67] This

60. Press-Enterprise v. Superior Court, 106 S. Ct. 2735, 2742 (1986) (Press Enterprise II). *See supra* note 20 for a discussion of Richmond. *See supra* note 22 for a discussion of Globe. *See infra* note 67 for a discussion of Press-Enterprise I.

61. Press-Enterprise v. Superior Court, 106 S. Ct. 2735, 2743 (1986)(Press-Enterprise II).

62. *Id.*

63. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586 (1980).

64. *Id.* at 593, n. 18.

65. *Id.* at 581.

66. Globe Newspaper Co. v Superior Court, 457 U.S. 596, 606-07 (1982).

67. Press-Enterprise v. Superior Court, 106 S. Ct. 2735, 2741 (1986) (Press-Enterprise

requirement mandates a two-part analysis: first, the proceedings cannot be closed unless specific findings demonstrate that "closure is essential to preserve higher values;"[68] and second, the closure must be "narrowly tailored to serve that interest."[69] If the interest asserted is that of a fair trial, it must be shown that there is "substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent."[70] Also, if a fair trial interest is asserted, it must be shown that reasonable alternatives other than closure will not protect the defendant's rights.[71]

III. APPLYING THE *Press-Enterprise II* TEST TO TRADE SECRET PRELIMINARY HEARINGS

Now that we have described a general constitutional framework for determining whether preliminary hearings should be closed, we turn to how this framework could be applied to a criminal trade secret preliminary hearing. This requires an analysis of three issues: (1) the tradition of accessibility in trade secret hearings; (2) the role of public accessibility in the functioning of trade secret hearings; and (3) the limits on the constitutional right of access in trade secret preliminary hearings.

A. *Tradition Of Accessibility To Trade Secret Preliminary Hearings*

Press-Enterprise II requires courts to consider the tradition of accessibility to preliminary hearings in the particular state in question. However, *Press-Enterprise II* focused on a preliminary hearing to determine whether probable cause existed to proceed to trial against a nurse charged with murdering twelve patients. Trade secret crimes do not usually provoke the public concern, outrage or hostility as with violent crimes. Therefore, there is less incentive to open trade secret preliminary hearings to provide an outlet for the

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II). This requirement was also stated in Press-Enterprise v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I).

In Press-Enterprise I a newspaper publisher appealed a trial court's closure of voir dire proceedings at a trial for the rape and murder of a teenage girl. The California Court of Appeal denied the publisher's petition to vacate the order closing the voir dire proceedings, and the California Supreme Court denied the publisher's request for a hearing. The U.S. Supreme Court found that a trial court could not constitutionally close voir dire examination of potential jurors without considering alternatives to closure.

68. Press-Enterprise v. Superior Court, 106 S. Ct. 2735, 2743 (1986) (Press-Enterprise II); Press-Enterprise v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I).

69. Press-Enterprise v. Superior Court, 106 S. Ct. 2735, 2743 (1986).

70. *Id.*

71. *Id.*

public's reactions and emotions. Trade secret litigants should argue that an open preliminary hearing would not serve the purpose of the preliminary hearing as in *Press-Enterprise II* because public interest is much more limited. Additionally, trade secret holders should emphasize the very real potential loss of trade secrets if the preliminary hearing is an open proceeding.

Press-Enterprise II made no exception for the particular subject matter of a preliminary hearing. Since the U.S. Supreme Court decided *Press-Enterprise II* so recently, it is unclear precisely how far the holding will be extended. While a court could easily find that a trade secret preliminary hearing met the first part of the test, the crucial determination comes in the second part of the test where the court must consider the role of public access in the function of preliminary hearings.

B. *Role Of Public Access In The Functioning Of Trade Secret Preliminary Hearings*

Courts agree that open preliminary hearings promote a number of different social policies. Among them are the exchange of ideas and education of the public, the notion of fundamental fairness and the therapeutic value of enforcement, the discouragement of perjury, the role the public plays in the absence of a jury at preliminary hearings, the checks and balances on police procedures, and the deterrence of crime.[72]

One social policy promoted by open preliminary proceedings is that they encourage the exchange of ideas and information. Open trade secret preliminary hearings support this policy because the public will learn more about the business practices of companies in their community and as a result will better understand proper business ethics and norms of behavior.

However, the education of the public may include the education of competitors as to valuable trade secrets. Perhaps the public could be just as well educated on proper business practices by reading news stories summarizing the outcome of the proceedings, including comments by participants, industry observers and teachers of business ethics.

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72. *Id.* at 2742-43. The Press-Enterprise I decision also recognized the value of open proceedings. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise v. Superior Court, 464 U.S. 501, 508 (1984) (Emphasis in original).

Another policy the courts consider is that the presence of the press and public acts as a check on corruption of judicial practices. If they are excluded from the trade secret preliminary hearing, public confidence in the system may wane because the public may believe that the trade secret holder and the prosecutor bartered away justice.

The public also benefits from the therapeutic value of knowing that criminal trade secret theft law is being enforced. However, the *Stamicarbon* court recognized that although a benefit "accrues to the public at large from the publicity of criminal proceedings . . . it must be acknowledged that the marginal benefit of increased public confidence which would accrue from unrestricted access in this case certainly does not counterbalance [plaintiff's] interest in secrecy."[73] Justice Stevens noted in *Richmond* that "the preservation of trade secrets might justify the exclusion of the public from at least some segment of a civil trial."[74] Although, his comment referred to civil trials, this reasoning could be extended to justify the exclusion of the public from some segments of criminal trade secret preliminary hearings.

The notion of discouraging perjury and the role the public plays in the absence of a jury may be important in the trade secret context. An open preliminary hearing affords the public an opportunity to view the proceedings and allows anyone with knowledge of the circumstances to expose perjury as it might arise. On the other hand, because highly technical trade secrets are typically understood only by people with special expertise, the opportunity for perjury to be exposed is outweighed by the probability that trade secrets will be revealed. *Press-Enterprise II* indicated that public attendance at preliminary hearings safeguards against improper judicial application of the law or an overzealous prosecutor.[75] In a trade secret hearing, the court will have to balance these potential benefits against the significant potential loss of trade secrets.

Access of the press to preliminary hearings also serves as a check on police procedures. In investigating trade secret theft the police, because they are not expert in a certain technical area, may use employees of the alleged victim to assist in searches by identifying allegedly stolen trade secrets.[76] This procedure can be abused

73. Stamicarbon v. American Cyanamid Co., 506 F.2d 532, 542 n. 15 (2d Cir. 1974).

74. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 600 n. 5 (1980).

75. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2743 (1986) (Press-Enterprise II).

76. In People v. Superior Court (Moore), 104 Cal. App. 3d 1001, 163 Cal. Rptr. 906 (1980), police officers, who were unable to identify items discribed in a search warrant, were

because it allows the employees, whose feelings and intentions may not be neutral, to rummage through the suspect's property. The employees may be hostile toward the suspect because he left a former employer or because they were not asked to join the suspect's start-up company. Employees may also be interested, for intellectual and other reasons, in learning about the suspect's confidential and proprietary information. The opening of a preliminary trade secret criminal hearing would afford the public the opportunity to scrutinize police conduct in executing the search warrant. The Third Circuit in *U.S. v Criden* recognized the important role that the public plays at pretrial hearings in scrutinizing police conduct: "the pretrial hearing may be the only point in the trial process at which the conduct of law enforcement officers is at issue."[77]

However, even if an open hearing discloses some abusive conduct in carrying out the search warrant, it may further compound the injury to the defendant by disclosing his trade secrets. A closed hearing would protect trade secrets and still allow close scrutiny of police conduct by the defendant and the court.

Open preliminary hearings also serve as a deterrent to crime. If trade secret preliminary hearings were open to the public and reported widely, potential trade secret thieves might see that the law was being enforced. Because most people who appropriate trade secrets do not think of themselves as thieves in a criminal sense, an open preliminary hearing may educate and deter them. However, even if the preliminary hearing is closed while sensitive information is disclosed, the press will still report the salient facts of the case if so inclined.

C. *Limits On The Constitutional Right of Access in Trade Secret Preliminary Hearings*

Press-Enterprise II makes it clear that any right of access to a preliminary hearing is a qualified right. Because the right of access is a First Amendment right, courts can deny access only if an overriding or compelling interest exists and findings show that closure of a trade secret preliminary hearing "is essential to preserve higher values and is narrowly tailored to serve that interest."[78] We now

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accompanied by experts who were employees of the victim company. The experts conducted the search under the direction of the police.

77. 675 F.2d 550, 557 (3d Cir. 1982).

78. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2743 (1986) (Press-Enterprise II); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I).

turn to an analysis of potential compelling interests of trade secret holders that may limit the First Amendment right of the press or public to attend trade secret preliminary hearings.

1. Closure Of A Trade Secret Preliminary Hearing Must Be Essential To Preserve Higher Values

A crucial determination for any court faced with closing a trade secret preliminary hearing is an analysis of the compelling interest at stake in each case. If an open hearing would cause undue prejudice to the defendant's right to a fair trial, courts have little difficulty finding this a compelling interest.[79] However, *Press-Enterprise II* indicates that any defendant, presumably including trade secret defendants, have to show that there is a substantial probability that the defendant's right to a fair trial would be prejudiced and that reasonable alternatives other than closure will not protect the defendant's rights.[80] This can be a difficult task.

Some of the factors the courts consider when determining whether to close a judicial proceeding are "the nature and extent of the publicity a public hearing might generate, its probable effect on the jury pool, the effectiveness of closure as a means of preventing prejudice, and the availability of alternative means."[81] Inflammatory or misleading publicity generated by the press about a trade secret preliminary hearing cannot be nullified in the same way that publicity can be at a trial. The Supreme Court in *Gannett* recognized this problem: "[a]fter the commencement of the trial itself, inadmissible prejudicial information about the defendant can be kept from the jury by a variety of means. When such information is publicized during a pretrial proceeding, however, it may never be altogether kept from potential jurors. Closure of pretrial proceedings is often one of the most effective methods that a trial judge can

79. The Supreme Court said in Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976), that free-speech and fair-trial values have equal importance. As the California Supreme Court noted, balancing these two compelling interests is difficult: "The balance becomes particularly delicate when public access may endanger competing rights of substantially equal import." San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 510, 638 P.2d 655, 662, 179 Cal. Rptr. 772, 779 (1982). However, the same court recognized that restrictions on the right of access are legitimate means of protecting fair-trial rights. Its rationale: "The right to observe is distinct from the right to speak and write about one has seen and heard. Denial of access differs from a prior restraint on publication of known information." *Id.* at 502 n. 3.

80. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) (Press-Enterprise II).

81. San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 512, 638 P.2d 655, 663-54, 179 Cal. Rptr. 772, 781 (1982).

employ to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun."[82]

Inflammatory or misleading publicity is not the only prejudicial effect the press can create in a trade secret preliminary hearing. Even factual, relevant reporting of a major trade secret case may be prejudicial if it produces a jury pool whose members believe that a defendant's guilt has already been determined. Sometimes only the prosecutor presents testimony and evidence at a preliminary hearing. The defendant may not present his side because he does not know what the prosecutor's strategy and evidence are until the preliminary hearing. Also, since the main purpose of the preliminary hearing is to establish probable cause, the defense, if it appears that probable cause has been established, may present little or no evidence. Because of the nature of a preliminary hearing, the press can unintentionally create the conclusion in the minds of the public that the defendant is guilty when it reports what occurred at the proceeding. The public may not appreciate the separate purposes of a preliminary hearing (to establish probable cause) and a trial (to determine guilt or innocence). They may attribute the credibility of a trial to a preliminary hearing or infer from a defendant's silence an admission of guilt.

Courts should also consider whether the economic harm caused by the loss of the trade secret is a potential overriding interest that could limit the public's right to attend a trade secret preliminary hearing. This loss may fall not only on the shoulders of the defendant, but also on the victim or innocent third parties, such as licensors of the trade secret, or even the community as a whole if the loss of the trade secret threatened jobs or economic prosperity. Whether economic harm to the general community or to individual trade secret holders is a compelling interest or not is undecided. If courts eventually do agree that an economic interest can be compelling, they are more likely to accept broad economic harm of the type alluded to in *Pacific Gas and Electric Company v. Public Utilities Commission of California*.[83] There, members of the Supreme Court indicated that the state may have a compelling interest in the regulation of utility rates to avoid widespread economic harm as to a community, rather than economic harm to a specific individual,

82. Gannett Co. v. DePasquale, 443 U.S. 368, 378-79 (1979).

83. In Pacific Gas and Electric Company v. Public Utilities Commission of California, 106 S. Ct. 903, 913 (1986), the U.S. Supreme Court indicated in dicta that an economic interest may rise to a compelling interest. *Id.*

such as a trade secret holder. Consequently, trade secret owners seeking to close the entire hearing should focus on wide-spread economic loss that would effect entire communities, such as plant closings and massive unemployment, rather than specific monetary loss to the trade secret owner. The situations in which courts have favored closed proceedings, such as cases involving trial prejudice, the rape of minors and classified government information, indicate how compelling the government interest must be.

Another potential compelling interest that trade secret litigants should argue is the interest in encouraging the reporting and punishing of crimes.[84] Open trade secret preliminary hearings may discourage a trade secret victim from reporting the theft because the victim fears losing the trade secret in an open hearing. If the crime is not reported, it can not be punished. Courts will probably be receptive to this argument given its strong policy underpinnings.

2. Closure Of A Trade Secret Hearing Must Be Narrowly Tailored

Closure of an entire trade secret proceeding is not warranted if the governmental interest can be protected in a less intrusive manner. The *Stamicarbon* Court suggests several less onerous alternatives[85] to closing criminal trade secret cases to be considered when evaluating less restrictive alternatives to closure. Among the narrower means suggested are: excluding those who have an interest in the trade secret information; restricting attendance to a smaller number of witnesses than normal; putting attendees under oath not to disclose the details of the trade secrets;[86] and holding parts of the proceedings in camera, such as that part of the proceeding dealing with the nature and benefits of the trade secret. Some or all of these alternatives might serve to protect the trade secret owner while assuring the public and press the right of access to the proceedings.

The best balance between the preservation of trade secrets and the basic First Amendment right of access is struck by closing a preliminary hearing only during the portions of testimony pertaining to the actual details of the trade secrets. The court could be

84. In Garrett v. United States, 105 S. Ct. 2407, 2421 (1985), Justice O'Connor in her concurring opinion recognized this interest as a "compelling public interest in punishing crimes."

The majority opinion in Tennessee v. Garner, 105 S. Ct. 1694, 1700 (1985) also recognized the "governmental interests in effective law enforcement."

85. Stamicarbon v. American Cyanamid Co., 506 F.2d 532, 541 (2d Cir. 1974).

86. *See, supra* note 10.

cleared of persons not connected with the parties involved and the trade secret portions of the testimony could be sealed[87] and kept confidential by the parties, the parties' attorneys, and the parties' agents and employees. In addition, any portions of the testimony during the closed session not involving trade secrets could later be disclosed. By closing the hearing for only a brief time and by disclosing the non-confidential parts of the testimony, the court would employ the least restrictive means available to preserve the confidentiality of legitimate and important trade secrets.[88]

To determine which parts of a preliminary hearing should be closed, courts should consider adapting the procedure used in civil trade secret litigation outlined in California's recently enacted Uniform Trade Secret Act.[89] The Act amended the Code of Civil Procedure to require the party alleging misappropriation to "identify the trade secrets with reasonable particularity" prior to commencing discovery.[90] In the criminal trade secrets context, this concept should be adapted to require particular identification of all the trade secrets at stake at an early stage of the proceedings. The court

87. The Press-Enterprise I court suggested a similar procedure for employing the least restrictive means in sensitive voir dire situations. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 512 (1984).

88. The question may arise as to whether the press has a right of access on First Amendment grounds to the trade secrets testified to in the sealed testimony. In a matter of first impression in Standard & Poor's Corporation v. Commodity Exchange, 541 F. Supp. 1273 (S.D.N.Y. 1982), a district court in New York addressed the issue in a civil suit. A trade newspaper service, Commodity News Services (News Services) sought an order unsealing the transcript of the closed portion of a hearing in which Standard & Poor's (S & P) asked for a preliminary injunction to stop Commodity Exchange (Comex) from using S & P's trademarks and trade names. By agreement with the defendant Comex, S&P presented certain trade secret information in a closed session. News Services argued that "constitutional principal [overcame] business confidentiality in this case." *Id.* at 1274. News Services contended "that it had an absolute enforceable right of open access to all that occurred in the administration of this civil case at the time it occurred." *Id.*

Denying News Services' claim, the court stated that "An interference with access to business confidences and trade secrets is not an abridgement of the freedom of speech and of the press protected by the First Amendment." *Id.* at 1275. The court applied the Stamicarbon standard, reasoning that "the overriding interest to be found in business confidences — protected by law as trade secrets — required a temporary reasonably restricted access to the Courtroom of members of the public." *Id.*

By analogy, the same rationale the court used in S & P should be used in determining if transcripts of sealed testimony in trade secret preliminary hearings should be released.

89. Cal. Civ. Code § 3426 (West 1984).

90. "In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code), before commencing discovery relating to the trade secret under Chapter 2 (commencing with Section 1985) or Article 3 (commencing with Section 2016) of Chapter 3 of this title, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders which may be appropriate under Section 3426.5 of the Civil Code." Cal. Civ. Proc. Code § 2036.2 (West).

could then determine the extent of access that should be permitted to a preliminary hearing — that is, whether it should be open completely, partially or not at all. In making the determination, the court should apply the *Stamicarbon* standard: in a trade secret case, limited in camera proceedings are appropriate if a trade secret holder "was likely to suffer irreparable injury, and that protection of its secrets could be achieved with minimal disruption of the criminal proceedings."[91] What is critical about this statement is its limited nature. Irreparable injury must be likely and the in camera proceeding must not disrupt the ends of justice. The *Stamicarbon* court pointed out that the fact situation it faced (a contempt hearing) presented a stronger case for closing the proceeding because the defendant only faced a small monetary fine and "the precarious balance between private claims and the constitutional right to a public trial may be struck more easily when the accused is not faced with the loss of liberty."[92] In states where imprisonment is a potential penalty for criminal trade secret theft, it is even more important to narrowly tailor any closure of trade secret preliminary hearings because of the potential loss of liberty.[93]

IV. CONCLUSION

Prosecutions under criminal trade secret statutes will inevitably lead to clashes between the press claiming a right of access to the preliminary hearing and the trade secret owners, for whom, ironically, the statutes were passed to protect, moving for closure in order to prevent disclosure and loss of trade secrets. Unyielding enforcement of the right of access leads to unfortunate results: theft victims could be forced to choose between having their trade secrets broadcast during criminal proceedings or allowing theft to go unprosecuted. Completely closing trade secret preliminary hearings, on the other hand, conflicts with the First Amendment right of the public and press to attend criminal proceedings. Neither extreme provides an equitable solution. Instead, courts should seek an accommodation between the competing interests in order to protect the trade secret owner while assuring the public and press a qualified right of access to trade secret preliminary hearings.

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91. Stamicarbon v. American Cyanamid Co., 506 F.2d 532, 540 (2d Cir. 1974).

92. *Id.*

93. For example, under California Penal Code Section 499(c) a person convicted of stealing trade secrets can be sentenced to a one-year prison term in the state prison or the county jail. The Moore and Gopal cases (*supra* note 8) "resulted in state prison for one defendent and county jail for two others." Southard, *supra* note 6, at 24.