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# Protecting Trade Secrets and Confidential Information from Media Disclosure: Removing the Reporter's Shield

John M. Tkacik Jr.

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# PROTECTING TRADE SECRETS AND CONFIDENTIAL INFORMATION FROM MEDIA DISCLOSURE: REMOVING THE REPORTER'S SHIELD<sup>1</sup>

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## I. INTRODUCTION

Ohio maintains a high interest in protecting business against the misappropriation of proprietary information and property. This is evidenced by the enactment of two statutes within the criminal code, one dealing with the conversion of trade secrets<sup>2</sup> and the other dealing with the breach of confidence by employees.<sup>3</sup> The protection afforded to businesses by these statutes, however, may be ineffective when the information is disclosed through the media, where laws protecting sources and supporting freedom of the press challenge the effectiveness of these two statutes. This issue was recently

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<sup>1</sup>The author wishes to dedicate this article to the memory of John M. Tkacik.

<sup>2</sup>OHIO REV. CODE ANN. § 1333.51 (Baldwin 1991).

<sup>3</sup>OHIO REV. CODE ANN. § 1333.81 (Baldwin 1991).

brought to the forefront by *The Wall Street Journal's* reporting of confidential information concerning Ohio's corporate giant, Procter & Gamble (P & G).<sup>4</sup>

In the P & G example, two separate articles appeared in *The Wall Street Journal* concerning the company. The first article reported the forced resignation of P & G's executive vice president in charge of its food division.<sup>5</sup> The second article appeared the next day reporting the possible sale of portions of P & G's food and beverage division.<sup>6</sup> Although representatives of P & G confirmed the earlier story and denied the latter, both publications disturbed P & G's management. It was not the veracity of the stories that upset P & G but rather that both articles contained corporate confidential information that the newspaper could have obtained only through a member or former member of the organization.<sup>7</sup>

P & G's management, aware that confidential information had been disclosed outside the company, conducted an internal investigation to determine the source of the newspaper's information.<sup>8</sup> The internal investigation proved unsuccessful. P & G had recourse, however, under either of the two Ohio statutes which make it a crime for employees to disclose a company's trade secrets or its confidential information.<sup>9</sup> An investigation ensued following P & G's request for a police inquiry. The police investigation included a subpoena to Cincinnati Bell, Inc., for all telephone records within the area in order to ascertain the individual(s) who contacted the author of *The Wall Street Journal* articles.<sup>10</sup> Although the purpose of the investigation was to

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<sup>4</sup>Procter & Gamble's revenues exceeded \$24 billion in 1991, placing the company 22nd among the U.S. corporations (first in Ohio) for total revenue. *Dun's Business Rankings*, DUN'S MARKETING SERVICES, INC., 126, 657 (1991). P & G employs over 89,000 people, ranking 57th in that category. *Id.* at 657.

<sup>5</sup>Alecia Swasy, *Procter & Gamble Food Executive is Forced Out*, WALL ST. J., June 10, 1991, at B5.

<sup>6</sup>Alecia Swasy, *P & G May Soon Peddle Something New: Pieces of Its Food and Beverage Division*, WALL ST. J., June 11, 1991, at B1.

<sup>7</sup>Telephone Interview with Terry Loftus, Company Spokesperson for Procter & Gamble (January 7, 1992).

<sup>8</sup>P & G's information was first disclosed in February, 1991. The disclosure continued and some information leaked directly to competitors. Initially, management pursued an internal investigation concerned that an external investigation would alert their competitors to specific information. The failure of the internal investigation and the consistent disclosure of confidential information forced management's decision to pursue criminal action. *Id.*

<sup>9</sup>See OHIO REV. CODE ANN. §§ 1333.51, 1333.81 (Baldwin 1991).

<sup>10</sup>See Swasy, *supra* note 6. See also Martin Dickson, *The Time to Come Clean*, FINANCIAL TIMES, September 10, 1991, at 114. This investigation was conducted in an attempt to determine whether Ohio's criminal code had been violated. At the time the investigation was terminated, there had been no active involvement or acceptance of this matter by the Hamilton County Prosecutor's Office. It is uncertain whether the prosecutor's office would have accepted this case had P & G insisted on pursuing the matter. Telephone

discover the informant's identity, the media viewed it as an attack on their ability to disseminate information to the public. P & G became the target of negative publicity.<sup>11</sup> The media focused on the issue that P & G used its influence to order an investigation that included the violation of a person's right to privacy as well as infringing on the freedom of the press as guaranteed by the First Amendment. On the other hand, P & G's management felt they had a fiduciary duty to the shareholders in pursuing an investigation.

P & G, unable to locate the individual responsible for the disclosures, terminated its efforts and publicly admitted that management had made an error in judgment by requesting the inquiry.<sup>12</sup> Since P & G relies on the media to promote its products, one can argue that the pressure exerted by the media forced P & G to terminate the investigation. Thus, this incident involved the struggle between a company's legal right to protect delicate confidential information, and the rights of the media under statutes and the Constitution.

This Note will address the problem facing businesses in Ohio when the laws protecting trade secrets and confidential information come into direct conflict with laws protecting the media. Part II of this Note will discuss the concept and various legal definitions attributed to trade secrets and confidential proprietary information. Parts III and IV will discuss trade secrets, confidential information and the related remedies available to companies, with emphasis on the statutes under Ohio's criminal code. This Note will then focus on the protection afforded the media by both an Ohio shield statute<sup>13</sup> which protects confidential sources, and the U.S. Constitution which protects freedom of the press.<sup>14</sup> Finally, this Note will suggest that a company can pursue legal recourse for obtaining the identity of informants directly from the media, through the use of a grand jury subpoena, since newsmen are not entitled to an absolute testimonial privilege.<sup>15</sup>

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interview with Terry Gaines, Assistant Prosecutor for Hamilton County Prosecutor's Office (January 26, 1992).

<sup>11</sup>See, e.g., Rita Ciolli & Dottie Enrico, *P & G Tries to Plug (News) Leak*, *NEWSDAY*, August 13, 1991, at 17 ("we fear Procter & Gamble is trying to intimidate current and former employees from talking to reporters"); Randall Rothenberg, *Employee Phone Records Examined in Company's Search for News Leaks*, *N. Y. TIMES*, August 13, 1991, at A13 ("Procter & Gamble appears to be saying, this information you acquire while an employee is ours and you don't have the right to disclose it . . . if this becomes a broad-based theory, it becomes a huge club to beat people to stop them from saying what you don't want them to say"). Procter & Gamble's annual advertising expenditure exceeds 1.5 billion dollars in its effort to promote its product line within the competitive consumer goods market. The company has established an employment policy that is based on strict adherence to confidentiality in P & G's attempt to maintain a competitive edge in the market and its integrity throughout the industry. Swasy, *supra* note 6.

<sup>12</sup>See Dickson, *supra* note 10.

<sup>13</sup>OHIO REV. CODE ANN. § 2739.12 (Baldwin 1991).

<sup>14</sup>U.S. CONST. amend. I.

<sup>15</sup>In cases where news reporters have been compelled to disclose confidential information, the media contends that the U.S. Constitution as well as individual state

## II. WHAT ARE TRADE SECRETS AND CONFIDENTIAL INFORMATION?

### A. Corporate Property and Confidential Relationship

A company relies on different types of property in order to succeed and survive in the world of business. In order to withstand the challenges, and maintain a competitive edge within the industry, a company must make every effort to protect its property from misappropriation. Most would identify business property as an item that has physical existence or that can be readily observed. This class of property, referred to as tangible property, can easily be ascertained by running a checklist of the company's assets. Tangible property includes such items as buildings, machinery, equipment and inventory. A company will generally utilize a system of checks and balances to prevent loss of this type of property, although the physical nature of the property may by itself prevent loss. Many organizations may also depend on intellectual property such as patents and copyrights. Intellectual property, classified as intangible property because it lacks physical characteristics, also appears as an asset on a company's balance sheet. This class of property has been granted protection under federal statutes but the statutes require that a company maintain proper compliance with the law in order to protect against the misappropriation of its interest.<sup>16</sup>

Trade secrets and confidential information lack concrete definitions<sup>17</sup> but this does not lessen their recognition as business property.<sup>18</sup> Both are similar to intellectual property because they also lack physical existence and, therefore,

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shield statutes provide an absolute testimonial privilege protecting the reporter against such disclosure. The United States Supreme Court, however, has failed to recognize a testimonial privilege arising from the First Amendment. *See infra* notes 128-34 and accompanying text. Ohio case law indicates that the government's failure to satisfy an informal balancing test will entitle the reporter to a conditional privilege. *See infra* notes 144-54 and accompanying text.

<sup>16</sup>*See* 17 U.S.C. § 101-917 (Law. Co-op. 1991) (copyrights); 35 U.S.C. § 1-376 (Law. Co-op 1991) (patents). Copyrights and patents have been granted federal protection under the U.S. Constitution. This protection originates in Article I, section 8, clause 8 which states that Congress has the power "to promote the Progress of Science and Useful Arts; by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries." *See generally* ARTHUR H. SEIDEL, WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADE SECRETS AND EMPLOYMENT AGREEMENTS § 2.01(a) (1984).

<sup>17</sup>Although it would appear that identifying certain classes of property and ideas as confidential would be readily apparent, the reality is that trade secrets and confidential information can be very complex. The applicable laws are complicated by the fact that the subject matter involved may not always fit perfectly within the nebulous definition of trade secrets or confidential information. The RESTATEMENT OF TORTS § 757, cmt. b (1939) states that it is impossible to provide an exact definition of a trade secret. Secrecy is the essential element needed for classifying subject matter as a trade secret. *Id.* The *Restatement* lists six factors that are used by the courts for determining the existence of a trade secret. *See infra* note 38 and accompanying text.

<sup>18</sup>*See infra* notes 69-71 and accompanying text.

are classified as intangibles. This is the extent of any similarity, however, as trade secrets and confidential information are not found on a company's balance sheets. In addition, this property is not protected under federal law because it normally does not meet the statutory requirements for intellectual property.<sup>19</sup> The lack of federal protection does not lessen the value that companies place on trade secrets and confidential information. Both remain an integral part of the organization. Due to their lack of physical characteristics, however, trade secrets and confidential information remain very difficult to protect. Federal action may be available under a more general law<sup>20</sup> but protecting the property is a task that generally remains with the states.<sup>21</sup>

Employees obtain trade secrets and confidential information while in a confidential relationship with their employers.<sup>22</sup> The employer's reliance on the confidential relationship to protect the subject matter distinguishes trade secrets and confidential information from the above-mentioned property of an organization.<sup>23</sup> Another distinguishing factor consists of the individual's

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<sup>19</sup>Since there is no precise method for determining whether property will be afforded protection as a patent, it is difficult for the property owner to distinguish between patents and trade secrets. Although patentable property is usually novel and more specific than a trade secret, the final determination is made by the U.S. Patent Office. In order to obtain a patent, an application containing a full description of the property must be filed with the Patent Office. Many inventors, fearing rejection of their application, elect protection under the state's trade secret law thus avoiding the disclosure of their secret. Other inventors will choose trade secret protection because they cannot afford the high costs that accompany the patent process. See JAMES H.A. POOLEY, *TRADE SECRETS A GUIDE TO PROTECTING PROPRIETARY INFORMATION*, 14-37 (1989). Trade secrets and confidential information, although lacking physical existence, have been recognized as property by the United States Supreme Court. See *infra* notes 69-71 and accompanying text.

<sup>20</sup>Stanley S. Arkin, *Trade Secret Abuse and Criminal Law*, in *TRADE SECRET LITIGATION* 155, 159 (Practising Law Institute, 1985).

<sup>21</sup>Unless Congress takes an active role regulating trade secrets, the United States Supreme Court has stated that trade secret legislation will be left to the discretion of the states. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 493 (1974).

<sup>22</sup>See *infra* notes 53-54 and accompanying text. A trade secret can be disclosed to parties outside the employment relationship without a company losing its protection of the trade secret. In order to maintain trade secret status, the party to whom the disclosure is made must be obligated to maintain its secrecy. See *infra* notes 35-36 and accompanying text.

<sup>23</sup>Unlike intellectual property, trade secrets and confidential information are not disclosed to the public. The employer must rely on the employees to maintain the secrecy of information obtained during the working relationship. Patent and copyright laws, however, provide the holder with a legal monopoly for a period of years in exchange for public disclosure. The purpose of the patent and copyright laws are to encourage innovation and the expression of ideas without depriving the value of the patent or copyright to its holder. Patent law awards the holder of the patent with exclusive rights to protectable property whereas copyright law protects the expression of ideas such as the material in books, drawings and blueprints. See generally J. POOLEY, *supra* note 19, at 14-19.

ability to misappropriate trade secrets and confidential information with ease since the individual can easily transmit orally the secrets and information to persons outside the company. Contrary to the saying that "talk is cheap," divulging trade secrets and confidential information can lead to substantial deprivation to the company since the very existence of this property is destroyed upon the loss of the secret.<sup>24</sup>

Trade secrets and confidential information possess value for an organization because the holder of the property can attain a substantial competitive edge within the respective industry.<sup>25</sup> This property consists of subject matter that relates to a company's technology or its proprietary business information such as customer lists, financial reports or business plans.<sup>26</sup> There is protection under trade secret laws for technological property that will not meet the strict requirements of federal patent law, or for a party who has no interest in pursuing a patent.<sup>27</sup> It follows that trade secret laws are designed to encourage the development and innovation of new ideas and inventions by protecting property which may not be patentable nor fall into another statutory protective classification.<sup>28</sup>

### B. Trade Secrets

Trade secret law, derived from common law, developed slowly in the United States. It is believed that the first trade secret case to face the courts was *Vickery v. Welch*,<sup>29</sup> which appeared before the Massachusetts Supreme Court in 1837. It was not until 1889, 52 years later, that the United States Supreme Court confronted its first trade secret case in *Fowle v. Park*.<sup>30</sup> The law continued to develop but the courts still unsuccessfully defined trade secrets, thus leaving the boundaries of the legal concept limitless.<sup>31</sup> In 1939, after the lapse of another 50 years, the *Restatement of Torts* was published and with it came the first attempt to reconcile the misguided and undefined area of trade secrets. It was the *Restatement* which united the common law concepts and became the

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<sup>24</sup>See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); RESTATEMENT OF TORTS § 757, cmt. c (1939).

<sup>25</sup>See 467 U.S. at 1011-12; *Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 484 N.E.2d 280, 285 (Ohio Ct. App. 1985); See generally J. POOLEY, *supra* note 19, at 21.

<sup>26</sup>See J. POOLEY, *supra* note 19, at 6-7.

<sup>27</sup>Property may meet the requirements of a patent but the owner feels more secure seeking protection under trade secret laws rather than federal patent law. See J. POOLEY, *supra* note 19. (the owner cannot afford the high costs associated with the patent process and fears the loss of information if the patent is rejected).

<sup>28</sup>*Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 485 (1974).

<sup>29</sup>36 Mass. 523 (1837); MELVIN F. JAGER, TRADE SECRETS LAW § 2.02 (1991).

<sup>30</sup>131 U.S. 88 (1889); M. JAGER, *supra* note 29, at § 2.03.

<sup>31</sup>See M. JAGER, *supra* note 29, at § 3.01.

centerpiece for trade secret cases.<sup>32</sup> The *Restatement* defined trade secrets as all business information kept secret, not limited to a single event but "continuously used in the business."<sup>33</sup>

The one prerequisite that must be established before subject matter will qualify as a trade secret under the *Restatement* is the presence of the element of secrecy.<sup>34</sup> Although the *Restatement* requires the presence of a substantial amount of secrecy the courts have determined that total secrecy is not required. In *Kewanee Oil Co. v. Bicron Corp.*,<sup>35</sup> Chief Justice Burger of the United States Supreme Court declared "this necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another in confidence, and under an implied obligation not to use or disclose it."<sup>36</sup> A company's failure to maintain a substantial amount of secrecy will disqualify the subject matter for treatment as a trade secret.

The complexity of trade secret law was indicated by the *Restatement's* authors who acknowledged that there was no precise definition that could attach to the term.<sup>37</sup> In an attempt to clarify the concept of trade secrets, the *Restatement* provided the following criteria to aid in the evaluation of whether one's property qualifies as a trade secret:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business;
- (3) the extent of measures taken by him to guard the secrecy of the information;
- (4) the value of the information to him and his competitors;
- (5) the amount of effort or money expended by him in developing the information;
- (6) the ease or

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<sup>32</sup>*Id.*

<sup>33</sup>The *Restatement* defines a trade secret as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

RESTATEMENT OF TORTS § 757, cmt. b (1939).

<sup>34</sup>*Id.* Although a company maintains secrecy to preserve the trade secret, the subject matter will not be protected if it is obtained by parties outside the company through lawful means. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 490 (1974). Trade secrets can be obtained legally through the use of another party's independent invention, reverse engineering and discovery under a license issued by the owner of the trade secret. See UNIF. TRADE SECRETS ACT, Cmt. 14 U.L.A. 438 (1992).

<sup>35</sup>416 U.S. 470 (1974).

<sup>36</sup>*Id.* at 475 (quoting *Cincinnati Bell Foundry Co. v. Dodds*, 10 Ohio Dec. Reprint 154, 156 (1887)).

<sup>37</sup>See *supra* note 17.



difficulty with which the information could be properly acquired or duplicated by others.<sup>38</sup>

The *Restatement's* six-factor checklist remains a significant barometer utilized by the courts in determining the existence of trade secrets.<sup>39</sup>

The courts did not hesitate to recognize and cite the *Restatement*.<sup>40</sup> The *Restatement* succeeded so well in establishing a foundation for trade secret law that the subject was omitted by the framers of the *Restatement (Second) of Torts*.<sup>41</sup> This was not the overall opinion of scholars in the area of trade secrets, who strongly believed that it was an error to exclude the subject from the *Restatement (Second) of Torts*.<sup>42</sup> In response to the uneasiness experienced by those in the area of trade secrets, a codification of the basic common law principles resulted in the *Uniform Trade Secrets Act (U.T.S.A.)*.<sup>43</sup>

Since its approval by the American Bar Association in 1980, the U.T.S.A. has met with much success, and by 1992, had been adopted as law in 37 states.<sup>44</sup> The U.T.S.A. provides the following definition of trade secrets which the individual states may modify:

Trade secret means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>45</sup>

The U.T.S.A. resulted in two major deviations from the *Restatement*. First, where the *Restatement* required the property to be "continuously used in one's business,"<sup>46</sup> the U.T.S.A. extended protection to property not currently used as a trade secret, or under circumstances where the owner only retained potential value in the items.<sup>47</sup> Thus, under the U.T.S.A., subject matter remaining in the developmental stage will be protected as trade secrets. Second, the U.T.S.A.

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<sup>38</sup>RESTATEMENT OF TORTS § 757, cmt. b (1939).

<sup>39</sup>See M. JAGER, *supra* note 29, § 3.01.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at § 3.04. See also UNIF. TRADE SECRETS ACT, Prefatory Note, 14 U.L.A. 434 (1992).

<sup>43</sup>See UNIF. TRADE SECRETS ACT, Prefatory Note, 14 U.L.A. 434 (1992).

<sup>44</sup>See *Id.* at 78-86 (Supp. 1992) for a listing of the states adopting the U.S.T.A. and their respective statutory citations.

<sup>45</sup>*Id.* at § 1, cl. 4, 14 U.L.A. 438.

<sup>46</sup>RESTATEMENT OF TORTS § 757, cmt. b (1939).

<sup>47</sup>See UNIF. TRADE SECRETS ACT, Cmt. 14 U.L.A. 439 (1992).

required that secrecy be maintained by using reasonable efforts dictated by the circumstances. In cases where property was previously presumed to be secret, the U.T.S.A. shifted the burden on the holder of the trade secret to prove the use of reasonable care in protecting the information from disclosure.<sup>48</sup>

### III. LEGAL REMEDIES PROTECTING AGAINST THE LOSS OF TRADE SECRETS

The *Restatement* and the *Uniform Trade Secrets Act* provide a mechanism for determining the existence of a trade secret. Once property has been classified as a trade secret, the owner must determine how he or she will protect the property and obtain relief in the event of a loss. The trade secret holder who suffers a loss due to misappropriation is presented with various legal remedies.<sup>49</sup> As described by one court, trade secret law is a composition of the agency, contract, tort and property theories of law.<sup>50</sup> These four aspects of trade secrets are discussed below with respect to legal remedies for protecting against loss.

Trade secrets are generally obtained while individuals are involved in an employer-employee relationship. The *Restatement (Second) of Agency* suggests that this type of relationship falls within the auspices of agency law.<sup>51</sup> The underlying principle of agency law is the existence of a confidential relationship, thereby placing a fiduciary duty on the agent.<sup>52</sup> Consequently, the

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<sup>48</sup>*Id.*

<sup>49</sup>A plaintiff should seek equitable relief by obtaining an injunction that will restrict the defendant's use of the trade secret. David Bender, *Trade Secrets: Planning for Litigation*, in TRADE SECRET LITIGATION, 95, 106-07 (Practising Law Institute, 1985). A company should also file for a temporary restraining order since the delays associated with the issuance of an injunction can lead to irreparable injury. Dean A. Olds & Jeffrey A. Handelman, *Trade Secret Litigation: The Plaintiff's Perspective*, in TRADE SECRET LITIGATION, 193, 207 (Practising Law Institute, 1985). Following an injunction, a civil court can provide the plaintiff with damages for any loss in the trade secret's value. *Id.* at 208-09. Charges may also be brought against the wrongdoer in criminal court, thus acting as a deterrent for similar acts in the future. Bender, *supra*, at 98-99.

<sup>50</sup>*Engineered Mechanical Servs. v. Langlois*, 464 So. 2d 329, 333 (La. Ct. App. 1984).

<sup>51</sup>The employment relationship, a form of the master-servant relationship, is recognized under the agency principles of the *Restatement (Second) of Agency*. See RESTATEMENT (SECOND) OF AGENCY § 2 and cmt. a (1958). Agency Law creates the legal relationship between the parties, it does not supply the remedy. Any wrongdoing by the agent allows the principal to pursue: "(1) an action in breach of contract, (2) an action in tort for harm and (3) an action for the value of the benefit taken." HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 70 at 125 (1979). See notes 57-75 and accompanying text for a discussion of the various remedies.

<sup>52</sup>REUSCHLEIN et al., *supra* note 51, at § 4, at 10-11 (1979). Although the term "fiduciary" has been applied to various legal relationships, there exists no precise definition for the term. Fiduciary duty, for purposes of agency law, implies that the employee "is under a duty to act solely and entirely for the benefit of his principal in every matter connected with his agency." *Id.* at § 67, at 121.

employee, as an agent, owes a duty of loyalty to his employer.<sup>53</sup> Agency law, however, is not limited to the employer-employee relationship and may exist between independent parties.<sup>54</sup>

More specifically, an agent owes a duty "[n]ot to use or communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties of an agent."<sup>55</sup> The purpose is to encourage the free flow of information between employer and employee. Agency law also recognizes the information or trade secret as property belonging to the principal and demands that nondisclosure continue following the termination of the agency relationship.<sup>56</sup>

Contract law theory affords another avenue for trade secret litigation. More trade secret cases are tried under the contract theory of law since evidence of the written contract can provide adequate support for the plaintiff.<sup>57</sup> Where a contract is not physically in existence, the courts may imply a contract based on the facts and circumstances.<sup>58</sup>

Another type of contract theory that protects trade secrets is the quasi-contract which arises from the confidential relationship between parties. The courts base their findings on an implied understanding to form a contract.<sup>59</sup> The rationale is that the quasi-contract prevents the unjust

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<sup>53</sup>RESTATEMENT (SECOND) OF AGENCY, *supra* note 51, at § 387. An agent is under a duty to act for the sole benefit of the principal. *Id.* at cmt. b. The duty of loyalty prohibits the employee from using information obtained during the agency relationship to take unfair advantage of his position as an agent. *Id.* See also, *Space Aero Products Co. v. R.E. Darling Co.*, 208 A.2d 74 (Md. 1965) (holding that former employees owed a duty of trust and fidelity pertaining to employer's trade secret).

<sup>54</sup>An agency relationship arises out of the principal's manifestation to the agent that the agent will act on behalf of and under the control of the principal. The agent's acceptance to act for the principal creates the legal relationship. Determining whether a principal-agent relationship exists requires an evaluation of the facts and circumstances surrounding the agreement. RESTATEMENT (SECOND) OF AGENCY, *supra* note 51, at § 1, cmt. a.

<sup>55</sup>*Id.* at § 395. Trade secrets acquired by employees during the course of employment should not be used to the employer's detriment. See REUSCHLEIN et al., *supra* note 51, at § 68 at 123.

<sup>56</sup>RESTATEMENT (SECOND) OF AGENCY, *supra* note 51, at § 396, cmt. g. See, e.g., *Space Aero Products Co. v. R.E. Darling*, 208 A.2d 74 (Md. 1965) (former employees violated confidential relationship).

<sup>57</sup>See M. JAGER, *supra* note 29, at § 4.01[1].

<sup>58</sup>*Id.*

<sup>59</sup>Although the quasi-contract (implied-in-law) does not fit within the definition of a contract, contract theory provides the courts with an appropriate remedy. Quasi-contract theory is a method, based on fairness, by which the courts can reallocate losses and gains between the parties involved. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1-12, at 19-20 (3rd ed. 1987). An example of the implied-in-law contract is the at-will employment relationship where an employee is hired without a contract. The lack of an employment contract does not bar an employer from obtaining relief against the employee who breaches the confidential relationship.

enrichment of one party resulting from the absence of an actual contract to support an agreement. In order to succeed under the quasi-contract theory, the plaintiff must prove the existence of a confidential relationship and that there were limits placed on the disclosure of information acquired during that relationship.<sup>60</sup>

Some courts limit liability to the terms of the contract, however, leaving the plaintiff with no claim for additional liability under the other theories of trade secret law.<sup>61</sup> The contract theory, like agency law, is not limited to the employment relationship. It may also apply when the information is disclosed to a third party with the understanding that the parties will maintain confidentiality.<sup>62</sup> If permission to use the trade secret coincides with the contract, its use may cease upon termination of the agreement.<sup>63</sup>

Relief is also available to the holder of a trade secret under tort law. The *Restatement* provides that liability results if the "disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him."<sup>64</sup> Under the tort theory, the focus shifts to the confidential relationship with less significance placed on the subject matter. As stated by the Supreme Court in *E.I. Du Pont de Nemours Co. v. Masland*,<sup>65</sup> "the property may be denied, but the confidence cannot be."<sup>66</sup> It follows that the existence of a confidential relationship becomes a prerequisite for advancing a claim under tort law. The plaintiff may also seek redress in civil court by advancing a claim of unfair

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It is the confidential relationship that establishes the implied contract between the parties. See M. JAGER, *supra* note 29, at § 4.01[1].

<sup>60</sup>See, M. JAGER, *supra* note 29, at § 4.01[1].

<sup>61</sup>Courts maintain strict adherence to the terms of the contract thus preventing additional relief under common law or state trade secret statutes if not stated in the language of the contract. *Id.*

<sup>62</sup>See *supra* note 59 & accompanying text.

<sup>63</sup>See M. JAGER, *supra* note 29, at § 4.01[1].

<sup>64</sup>RESTATEMENT OF TORTS § 757(b) (1939).

<sup>65</sup>244 U.S. 100 (1917).

<sup>66</sup>*Id.* at 102. See also, *Space Aero Products Co. v. R.E. Darling Co.* 208 A.2d 74 (Md. 1965); *General Aniline & Film Corp. v. Frantz*, 272 N.Y.S.2d 600 (N.Y. Sup. Ct. 1966). In *Space Aero*, Darling filed action seeking an injunction restricting former employees from manufacturing oxygen tubes. The court found that the tubes required a special design that qualified for protection as a trade secret. The *Space Aero* Court distinguished the tort and property theories of trade secret law. The court recognized trade secrets as property when the subject matter, such as diagrams or blue prints, can be physically acquired by the wrongdoer. 208 A.2d at 87. The court determined that the property concept is not applicable when the trade secret consists of confidential information. In this situation, the wrongdoer must obtain the trade secret through communications with an employee who legally has possession of the trade secret. Thus, this set of facts provides a remedy for the employee's breach of confidence under the tort theory of law. *Id.*

competition when the information is utilized in a way that violates the relationship, thus causing an adverse effect on the owner.<sup>67</sup>

Property theory affords another means of relief under trade secret law. The struggle between the property and tort theories has led to the confusion in trade secret law. The debate, which appears evident from the decisions found in the United States Supreme Court, has persisted as to whether the remedy for trade secret violations should be determined as a misappropriation under property law or as a breach of the confidential relationship under tort law. Justice Holmes stated in *Masland* that the focus of trade secret law should be on the confidential relationship, not the subject matter.<sup>68</sup> In a later United States Supreme Court case, *Ruckelshaus v. Monsanto Co.*,<sup>69</sup> Justice Blackmun claimed that trade secrets, like other intangibles, should be considered property for purposes of protection under the Fifth Amendment Takings Clause.<sup>70</sup> The Supreme Court later recognized the property theory in *Carpenter v. United States*<sup>71</sup> where a conviction for violations of the Federal Wire and Mail Fraud Statutes was supported by classifying the confidential information as property.<sup>72</sup> Ironically, in *Carpenter*, *The Wall Street Journal* claimed its reporter had violated a fiduciary duty by disclosing confidential information belonging to the Journal.

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<sup>67</sup> See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, 1023 (5th ed. 1984).

<sup>68</sup> 244 U.S. at 102.

<sup>69</sup> 467 U.S. 986 (1984). The appellee in *Monsanto* was the developer of pesticides. Monsanto argued that information submitted on an application, required by federal law, consisted of trade secrets that would be valuable to appellee's competitor. It was appellee's contention that trade secrets, although intangible in nature, had the characteristics of tangible property thus the federal provisions violated the Fifth Amendment Takings Clause. The Court held that trade secrets, recognized as an intangible property right under state law, were protected under the Takings Clause. *Id.* at 1003.

<sup>70</sup> *Id.* at 1003-04.

<sup>71</sup> 484 U.S. 19 (1987).

<sup>72</sup> *Id.* at 26-28. The petitioner in *Carpenter* was a reporter with *The Wall Street Journal*. Petitioner obtained confidential information which was to be used for his column in the *Journal*. As a scheme to profit from the market's reaction to his column, the reporter disclosed the information to third parties prior to the column's release. The Court stated that "[c]onfidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit." *Id.* at 26. The *Carpenter* Court did not address the issue of whether the information disclosed met the characteristics of a trade secret. The result, however, reinforces the position that proprietary information is recognized as property despite its intangible nature. Since trade secrets were classified as property by the *Monsanto* Court, *Carpenter* indicates that trade secret protection will be available under 18 U.S.C. § 341 (Law. Co-op. 1991) (mail fraud) and 18 U.S.C. § 1343 (Law. Co-op. 1991) (wire fraud). See also Stanley S. Arkin, *supra* note 20, at 164. Procter & Gamble may have pursued action under the federal wire fraud statute. This note is limited to the legal protection afforded by Ohio's criminal code, therefore, it does not address the criminal action available under federal statutes.

Shifting the classification of trade secrets and confidential information into a concept of property has led to the use of criminal sanctions for misappropriation. Prior to the *Monsanto* decision, opponents argued that trade secrets could not be stolen because of their intangible nature.<sup>73</sup> *Monsanto* answered the earlier arguments by classifying trade secrets as property belonging to the holder.<sup>74</sup> In a criminal action for the misappropriation of trade secrets, the elements focused on by the courts are the intentional misappropriation of the property and the owners strict adherence to the secrecy requirement.<sup>75</sup>

A party whose trade secret has been misappropriated must evaluate all facts relative to the circumstances before proceeding through the criminal system. The following advantages should be considered and may support the owner's decision to pursue criminal action. First, a conviction in criminal court may lead to the incarceration of the wrongdoer which can act as a deterrent for future violations.<sup>76</sup> Second, since the responsibility of prosecuting the wrongdoer rests with the government, the holder of the trade secret will expend less in legal fees.<sup>77</sup> Third, a favorable decision may lead to a successful action in civil court where damages can be awarded to the owner for any loss resulting from the misappropriation. Finally, criminal investigators have access to more information through the use of search warrants and subpoenas.<sup>78</sup> The ability to use search warrants and subpoenas provides the prosecutor with a greater opportunity for discovering significant facts as well as determining the identity of the wrongdoer.<sup>79</sup>

In view of the above facts, one might wonder why a party would not advance a case through the criminal process. Certainly, it would seem beneficial for the

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<sup>73</sup> See generally M. JAGER, *supra* note 29, at § 4.01.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See J. POOLEY, *supra* note 19, at 213-16.

<sup>77</sup> *Id.*

<sup>78</sup> The use of search warrants and subpoenas enables quicker access to records and documents. Obtaining the same records in a civil action requires a court order before the requested information must be produced. Acquiring the court order can be a time-consuming process that provides the wrongdoer an opportunity to destroy or alter important information. *Id.*

<sup>79</sup> See David Bender, *supra* note 49, at 106. An internal investigation was initially undertaken in the P & G incident. After P & G's investigation proved to be unsuccessful, the case was placed with local police who were able to obtain a subpoena through the prosecutor's office. The subpoena permitted investigators to search through the local telephone company's records. Telephone interview with Terry Gaines, Assistant Prosecutor for Hamilton County Prosecutor's Office (January 26, 1992). The use of the subpoena allowed investigators to view over 40 million calls made from over 650,000 telephone lines within the Cincinnati area in an attempt to locate the source of the telephone calls to *The Wall Street Journal*. See *Scope of Phone Probe Grows*, USA TODAY, August 15, 1991, at 1A.

owner, suffering from a misappropriated secret or disclosed confidential information, to file criminal charges which would place responsibility with government. Unfortunately, the disadvantages that accompany the criminal case may outweigh the benefits received.

As soon as the case is placed with the government, the holder of the trade secret no longer maintains control. Once the charges are filed, responsibility shifts to the prosecutor who must determine any subsequent action.<sup>80</sup> Cases placed within the criminal court may find less success since the burden of proof is a higher standard than in civil cases. Obtaining a favorable verdict requires the prosecutor to overcome the challenge of proving guilt beyond a reasonable doubt.

The following three disadvantages may be the most critical reasons why a party should proceed cautiously into the criminal process. First, the criminal case will proceed in the public courts which presents the possibility that the information being protected will be disclosed during the criminal process.<sup>81</sup> Second, a defeat at the criminal level may lead to lawsuits by the other parties, who may now have criminal action against the party filing the original charges.<sup>82</sup> Finally, the greatest drawback arising from trade secret litigation in the criminal courts might be the bad publicity that accompanies the case.<sup>83</sup>

The last factor, the negative publicity, was evidently instrumental in P & G's decision to terminate its investigation. P & G's purpose for the investigation was to determine the individual responsible for disclosing its confidential information. However, *The Wall Street Journal* believed it had to consider its own interest, the dissemination of news to the public.<sup>84</sup> The problem facing P & G was compounded because other members of the media, not just *The Wall Street Journal*, took offense to the action. For P & G, a company that depends on favorable advertising throughout the various media networks to promote its

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<sup>80</sup>See J. POOLEY, *supra* note 19, at 216-17.

<sup>81</sup>*Id.* at 219.

<sup>82</sup>See David Bender, *supra* note 49, at 100-01. Parties involved in the P & G investigation considered pursuing legal action against the Ohio corporation. See Dickson, *supra* note 10, at I-14.

<sup>83</sup>See David Bender, *supra* note 49, at 100. See also *supra* note 11 discussing P & G's reliance on favorable advertising in order to promote its products.

<sup>84</sup>Two articles were published in *The Wall Street Journal* based on information that the management of P & G intended to remain confidential. A successful investigation would have discovered the source of the disclosure thus leaving the newspaper without a future informant. The newspaper was also concerned that investigations, such as the one conducted for P & G, are a violation of the First Amendment's freedom of the press clause. However, the right to protect sources, professed as absolute by the media, has not been recognized as a First Amendment right by the United States Supreme Court. See *infra* notes 128-34 and accompanying text. Ohio case law indicates that its state shield statute entitles the reporter to protect sources under a conditional privilege. See *infra* notes 144-54 and accompanying text.

products, the poor publicity proved too great a burden to overcome.<sup>85</sup> In order to protect its interest in publishing articles, the media was able to use its influence to immobilize the company's efforts, thereby deterring P & G from using the legal system to protect its property rights.

#### IV. CRIMINAL PROTECTION WITHIN OHIO

##### A. Trade Secrets

Ohio has recognized the conversion of trade secrets as a violation under its criminal code since 1967.<sup>86</sup> Although 37 states have adopted trade secret laws to follow the *Uniform Trade Secrets Act*,<sup>87</sup> Ohio's failure to adopt the U.T.S.A. indicates the legislature's satisfaction with its own statute. Ohio's reluctance to adopt the U.T.S.A. does not make the state any less restrictive or more lenient in its treatment of trade secret violations. On the contrary, Ohio's legal history regarding trade secrets may afford the state the distinction as being the "trade secrets capitol of the United States."<sup>88</sup>

In addition to enacting a criminal statute that provides a third degree felony charge for trade secret violations,<sup>89</sup> Ohio has been the origin of two leading cases relating to trade secrets:<sup>90</sup> *B.F. Goodrich Co. v. Wohlgemuth*<sup>91</sup> and *Kewanee Oil Co. v. Bicron Corp.*<sup>92</sup> The *B.F. Goodrich* Court recognized the possibility that individuals, who obtained positions with a competitor of their former employer, could disclose the trade secrets of their former employer to the new employer. *Kewanee Oil* is a case that renewed the United States Supreme Court's involvement in the area of trade secrets.<sup>93</sup> The question facing the *Kewanee Oil* Court was whether state protection of trade secrets is preempted by United States Patent Law. Chief Justice Burger recognized the importance of trade secret law in his majority opinion by stating that its purpose is the promotion of innovative ideas not entirely protected by patent law.<sup>94</sup> The *Kewanee Oil*

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<sup>85</sup>Throughout the investigation, the media portrayed P & G as a powerful corporation using its influence to abuse the legal system. *See supra* note 11.

<sup>86</sup>OHIO REV. CODE ANN. § 1333.51 (Baldwin 1991).

<sup>87</sup>*See supra* UNIF. TRADE SECRETS ACT, 14 U.L.A. 434 at 78-86 (Supp. 1992).

<sup>88</sup>M. JAGER, *supra* note 29, at § OH-01.

<sup>89</sup>OHIO REV. CODE ANN. § 1333.99(E) (Baldwin 1991).

<sup>90</sup>M. JAGER, *supra* note 29, at § OH-01.

<sup>91</sup>192 N.E.2d 99 (Ohio 1963).

<sup>92</sup>416 U.S. 470 (1974).

<sup>93</sup>*See generally* M. JAGER, *supra* note 29, at § OH-01.

<sup>94</sup>416 U.S. at 485.



Court left the regulation and protection of trade secrets with the states by holding that there existed no conflict with the federal patent laws.<sup>95</sup>

Ohio's trade secret statute was placed into the criminal code as an instrument "[t]o maintain standards of commercial ethics and the encouragement of invention, as well as the protection of the substantial investment of employers in their proprietary information."<sup>96</sup> The criminal statute affords a very broad interpretation of trade secrets that encompasses a significant amount of business property.<sup>97</sup> The statutory language indicates this by using the terminology "any business plans, financial information", which infers that all business information intended to remain secret will be protected under the statute. Since there is no provision that requires a company to distinguish between property and information for purposes of trade secret classification, the language of the statute provides much flexibility for businesses attempting to obtain protection under the code.

In order to comply with Ohio's statute, a company must meet two requirements. First, the company must show that the element of secrecy surrounds the subject matter. A company meets this requirement by proving that the information is unknown within the respective industry and outside the general knowledge of the public.<sup>98</sup> Second, the company must prove that

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<sup>95</sup>*Id.* at 492-93.

<sup>96</sup>*Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 492 N.E.2d 814, 820 (Ohio 1986).

<sup>97</sup>A trade secret is defined under Ohio's code as:

[t]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or any telephone numbers, which has not been published or disseminated, or otherwise become a matter of general public knowledge. Such scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or telephone numbers is presumed to be secret when the owner thereof takes measures designed to prevent it, in the ordinary course of business, from being available to persons other than those selected by the owner to have access thereto for limited purposes.

OHIO REV. CODE ANN. § 1333.51(A)(3) (Baldwin 1991). Once it is determined that a trade secret exists, Revised Code § 1333.51(4)(B) states the following violation: "[n]o person shall, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with intent to convert a trade secret to his own use or the use of another, obtain possession of or access to an article representing a trade secret." *Id.*

<sup>98</sup>*See Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 484 N.E.2d 280, 284 (Ohio App. 1985). The purpose of the secrecy requirement is twofold. First, a company must prove the element of secrecy exists in order to qualify its property for trade secret consideration. The degree to which the information is known to parties outside the company affects the property's status as a trade secret. Second, the secrecy requirement assists the courts in deciding cases where an employee leaves a company to work for a competitor of the former employer. The former company initiates legal action against both the former employee and the competing business by claiming a loss resulting from disclosure. The court must determine whether the employee possesses information qualifying as a trade secret to the former employer. Information that is readily known

precautions were taken to protect the secret. A strict reading of the code suggests a presumption that a trade secret exists when secrecy is maintained. In *Water Management, Inc. v. Stayanchi*,<sup>99</sup> the Ohio Supreme Court determined that the statute places the burden of proving the existence of secrecy on the party possessing the property. The *Stayanchi* Court stated that a trade secret cannot be presumed unless the owner took action to preserve the secret.<sup>100</sup> A company's compliance with the protection requirement is determined by an evaluation of the facts based on a standard of reasonableness.<sup>101</sup>

Ohio courts are not limited to the criminal code in defining trade secrets for purposes of civil cases. In *Kewanee Oil v. Bicron Corp.*,<sup>102</sup> the United States Supreme Court stated that Ohio "[a]dopted the widely relied-upon definition of a trade secret"<sup>103</sup> as found in the *Restatement of Torts*. In a later case, *Wiebold Studio v. Old World Restorations*,<sup>104</sup> the Ohio Supreme Court provided support for this contention by stating that Ohio's statute applies to the criminal offense and cannot be interpreted "[a]s a complete statement of the Ohio law of trade secrets."<sup>105</sup> The Ohio Supreme Court eventually recognized the *Restatement's* definition of trade secrets in *Valvo Cincinnati, Inc. v. N & D Machining Service, Inc.*,<sup>106</sup> thereby complementing Ohio's criminal code. In effect, the Ohio Supreme Court's adoption of the *Restatement* provides two definitions of trade secrets which can be utilized by the courts in civil cases.

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or used throughout the industry and information that is determined to be general knowledge will not qualify for treatment as a trade secret. Trade secret status will not be awarded unless it is established that the company's information, or use of the information, is unique within the respective industry. See, e.g., *Valvo Cincinnati, Inc. v. N. & D. Machining Serv., Inc.*, 492 N.E.2d 814 (Ohio 1986); *Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 484 N.E.2d 280 (Ohio 1985).

<sup>99</sup>472 N.E.2d 715 (Ohio 1984).

<sup>100</sup>*Id.* at 717. See, e.g., *Valvo Cincinnati, Inc. v. N. & D. Machining Serv., Inc.*, 492 N.E.2d 814 (Ohio 1986). In *Valvo Cincinnati*, the appellee brought action seeking an injunctive order terminating appellant's use of a special glue applicator. Valvo Cincinnati took protective measures by providing adequate locking devices, screening all visitors, utilizing a shredder on all drawings and requiring key employees to sign non-disclosure agreements. The court held that, "under the circumstances, the company took reasonable precautions to protect the secrecy of its information." *Id.* at 819.

<sup>101</sup>*Id.*

<sup>102</sup>416 U.S. 470 (1973).

<sup>103</sup>*Id.* at 474.

<sup>104</sup>484 N.E.2d 284 (Ohio 1985).

<sup>105</sup>*Id.* at 288. But see *Maier & Assoc. v. Seifert*, No. CA-8646 1991 Ohio App. LEXIS 6354 (Ohio Ct. App. Dec. 21, 1991). (using Revised Code § 1333.51(A)(3) in determining the existence of a trade secret for a claim of tortious interference).

<sup>106</sup>492 N.E.2d 814 (Ohio 1986).

### B. Confidential Information Under Ohio's Catch-All Code

If any doubts remained concerning whether the interests of business, especially confidential information, should be protected in Ohio, they were answered by another criminal statute enacted in 1974, Revised Code section 1333.81.<sup>107</sup> Section 1333.81 is essentially a "catch-all" provision that includes any confidential proprietary information not meeting the classification of a trade secret under Revised Code section 1333.51. Section 1333.81 provides that "no employee of another, who in the course and within the scope of his employment receives any confidential matter or information shall knowingly, without the consent of his employer, furnish or disclose such matter or information to any person not privileged to acquire it."<sup>108</sup> An employee found violating this section can be charged with a misdemeanor of the first degree.<sup>109</sup>

One may infer from section 1333.81 that it was the intention of the framers to place a high value on the confidential relationship between the employer and employee. A company's confidential information is also recognized as protectable, intangible property despite its lack of monetary value.<sup>110</sup> Enactment of section 1333.81 into the criminal code, as a supplement to trade secret law, strengthens the position that Ohio respects the agency relationship created within the business and that the state intends to protect against the loss of intangible property resulting from a breach of that relationship.<sup>111</sup>

It remains unclear as to how much information the framers intended to protect by placing section 1333.81 into the criminal code. Reviewing this statute's prior history may provide a better understanding of the statute's purpose. Section 1333.81 replaced an earlier statute, Revised Code section 2923.29.<sup>112</sup> Section 2923.29 prohibited any person from disclosing "all or any portion of any matter taken by him"<sup>113</sup> while employed as a stenographer,

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<sup>107</sup>OHIO REV. CODE ANN. § 1333.81 (Baldwin 1991).

<sup>108</sup>*Id.*

<sup>109</sup>OHIO REV. CODE ANN. § 1333.99(F) (Baldwin 1991).

<sup>110</sup>Confidential information is recognized as an intangible property right belonging to its holder. *Carpenter v. United States*, 484 U.S. 19 (1987). It is the owner's right to the exclusive use of the confidential information that makes it valuable as property. *Id.* at 26-27.

<sup>111</sup>Although Revised Code § 1333.81 provides relief in criminal court, damages are available in civil court for breach of the confidential relationship. *See supra* notes 59 and 67 and accompanying text. By placing this statute within the criminal code, Ohio lawmakers have provided the employer with an additional remedy. The code closely resembles the language describing the agent's duties in § 395 of the RESTATEMENT (SECOND) OF AGENCY (1958). *See supra* notes 55 and 108 and accompanying text.

<sup>112</sup>OHIO REV. CODE ANN. § 2923.29 (Anderson 1954).

<sup>113</sup>*Id.*

without the consent of the employer.<sup>114</sup> A stenographer who divulged information, without the permission of the employer, would be in violation of Revised Code Section 2923.29.

In its proposal to the 1974 criminal code, the Technical Committee of the Ohio General Assembly believed that every employee "owes at least minimal loyalty to his employer, and should be criminally liable for an improper breach of his employer's confidence."<sup>115</sup> The 1974 code adopted the proposal and expanded criminal liability to include all employees. The inclusion of all employees into Revised Code section 1333.81, supplemented by the statute's legislative history, suggests that the framers' intent was to create a statute requiring all employees to maintain strict adherence to the agency relationship arising within the work place. The courts have stated that section 1333.81 is limited to describing criminal offenses and has no effect on action taken in civil cases.<sup>116</sup>

In summary, Ohio maintains two criminal statutes that allow employers to protect their proprietary business property. Revised Code section 1333.51(A)(1) provides a broad interpretation of trade secrets in order to shield a business from any loss due to employee misappropriation. Revised Code section 1333.81 supplements the trade secret law by safeguarding the loss of information acquired during the course of the confidential working relationship. Thus, information not meeting the trade secret definition as stated in Revised Code section 1333.51(A)(1) can be established as protected property under an interpretation of Revised Code section 1333.81. Enactment of both statutes into the criminal code supports the conclusion that Ohio places a high value on protecting both the proprietary property and the confidential employment relationship found within a business.

Under the Procter & Gamble scenario, if the company pursued criminal action, the prosecutor's office could choose between either statute in their attempt to locate the individual responsible for disclosing P & G's confidential business information. The question remains whether confidential information such as the forced resignation of a key executive and the sale of various divisions or food groups,<sup>117</sup> are the type of information meant to be protected as trade secrets under the criminal code.<sup>118</sup> Ohio's statute, however, provides

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<sup>114</sup>Revised Code § 2923.29 provided the following testimonial exception: any person employed as a stenographer, called as a witness regarding employment matters, was directed to testify. *Id.*

<sup>115</sup>*Proposed Criminal Code*, OHIO LEGISLATIVE SERVICE COMMISSION, at 7 (1971). Although the current section number within the code is § 1333.81, the proposed code number was § 1333.71.

<sup>116</sup>*Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 484 N.E.2d 280, 288 (Ohio 1985).

<sup>117</sup>*See supra* notes 5-6 and accompanying text.

<sup>118</sup>The P & G investigation was terminated before it was determined whether action would have been brought under Ohio's trade secret statute. One element often considered by the courts in determining a trade secret is whether the subject matter provides the owner with an advantage over competitors in the industry. See

a very broad definition of trade secrets that may have included the unauthorized disclosure of P & G's information.

Revised Code section 1333.81 affords recourse and would have provided an available remedy despite a finding that the information was not protected under trade secret law. Evidence existed indicating that one of the statutes had been violated. P & G encountered the problem of locating the individual responsible for disclosing the information. Management, by searching private telephone records, chose to pursue an investigation which targeted the public sector. It was the scope of this search that placed P & G under the scrutiny of the media and which eventually led to the termination of the investigation. Issuance of a grand jury subpoena requiring the author of the articles to name the informant provides a more effective alternative for locating the sources of disclosure.<sup>119</sup> By choosing this course of action, the company's investigation would have excluded private citizens and dispossessed the media of an ally in their attack on P & G.<sup>120</sup>

Although more favorable results may have emanated from the grand jury, a direct inquiry of *The Wall Street Journal* through the use of a grand jury subpoena may not have proved an easy task. Under a grand jury subpoena, *The Wall Street Journal* would most likely counter with an argument that news reporters possess an absolute privilege under the U.S. Constitution and that state laws exist protecting reporters from disclosing their confidential informants. The basis of the media's argument is that freedom of the press, as guaranteed under the First Amendment, affords an implied absolute privilege to members of the media.<sup>121</sup> The contention that newsmen are protected by an absolute privilege is also supported by the enactment of statutes found within various

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Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984); Wiebold Studio, Inc. v. Old World Restorations, Inc. 484 N.E.2d 280, 285 (Ohio 1985). See generally J. POOLEY, *supra* note 19, at 21. REVISED CODE § 1333.51(A)(3) does not require that a trade secret provide the owner with a competitive advantage. P & G would have been presented with a greater task of establishing that the information disclosed to *The Wall Street Journal* qualified as trade secrets if the existence of a competitive advantage was a requirement. See *supra* notes 5-6 and accompanying text. P & G's disclosed information included the resignation of a key officer and the sale of certain food and beverage divisions.

<sup>119</sup>A grand jury subpoena would have compelled the news reporter to disclose the confidential informants. The value of the grand jury's role and its ability to subpoena has been described as follows: "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government and the grand jury plays an important, constitutionally mandated role in this process." *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

<sup>120</sup>The scope of the investigation included the search of over 650,000 telephone lines in southern Ohio. See *Scope of Phone Probe Grows*, USA TODAY, August 15, 1991, at 1A. P & G was confronted with the media's claims that the company had invaded the privacy of individuals and infringed on the freedom of the press. An inquiry of the news reporter, through the use of the grand jury subpoena, would have excluded the investigation of private citizens, thus leaving the media with an apathetic reader.

<sup>121</sup>The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

states referred to as "shield laws".<sup>122</sup> However, neither the U.S. Constitution or Ohio's shield statute provide the media with an absolute privilege.

## V. PROTECTING THE REPORTER'S CONFIDENTIAL SOURCES

### A. No Absolute Privilege Under the First Amendment

The media, while protecting their interest in the dissemination of the news, can always assert a freedom of the press defense.<sup>123</sup> Although some protection has been extended to the media under the First Amendment, the courts are unwilling to grant an absolute right.<sup>124</sup> Reporters contend that protecting the news gathering process necessitates the recognition of an absolute privilege in order to conceal confidential sources and information.<sup>125</sup> This argument is advanced in an attempt to avoid the disclosure of informants when reporters are required to respond to a grand jury subpoena. The reporters claim that any detriment to the assembly and dissemination of the news will be a handicap to

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<sup>122</sup>Shield laws, enacted by states, provide news reporters with a privilege that protects confidential informants. The scope of the privilege is determined by the court's interpretation of their respective state's statute. See Charles S. Plumb, Note, *The Protection of Confidential News Sources: Enhancing the Utility of Ohio's Shield Law*, 42 OHIO ST. L. J. 1039, 1045 (1981).

<sup>123</sup>Freedom of the press is an argument used by the media to avoid grand jury subpoenas in an effort to protect confidential sources from disclosure. See *Branzburg v. Hayes*, 408 U.S. 665 (1972). However, the freedom of the press argument was also used by the media as a defense in a case that involved the media's breach of confidence. See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). In *Cohen*, the plaintiff exchanged information with the reporter based on a promise that the reporter would not reveal the name of his source. The plaintiff sought damages under the theory of promissory estoppel following the reporter's disclosure of the informant's name in breach of their agreement. Although the reporters claimed that the case did not involve a First Amendment issue, they argued that enforcement of the reporter's promise was barred by the First Amendment. *Id.* at 2517. The United States Supreme Court held that the First Amendment does not grant the media an immunity from the general laws of a state. *Id.* at 2518-19. Thus, the theory of promissory estoppel was applicable to the press. *Id.* See also *Ruzika v. Conde Nast Publications*, 939 F.2d 578 (8th Cir. 1991).

<sup>124</sup>The courts have consistently placed limits on the extent of the media's rights inferred from the First Amendment. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (a protective order preventing the dissemination of information obtained during discovery does not violate the First Amendment); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (limiting news reporter's access to prison inmates to the same restrictions as the general public); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding newsmen not entitled to protection against compelled disclosure of confidential sources); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (reversing state court conviction based on trial court's failure to control media). "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1964).

<sup>125</sup>Newspersons argue that the compelled disclosure of confidential informants interferes with their First Amendment responsibility. The rationale is that compelled disclosure deters sources from revealing newsworthy information which will harm the free flow of information needed to properly disseminate the news. See *Branzburg* 408 U.S. at 679-80; see Plumb, *supra* note 122, at 1047-48.

their First Amendment guarantee.<sup>126</sup> Thus, the media argues that anything less than an absolute right will hamper its effectiveness because informants will be discouraged from providing newsworthy information.<sup>127</sup>

The courts, refusing to accept this argument, have declared that reporters are not immune from grand jury subpoenas. In *Branzburg v. Hayes*<sup>128</sup> the United States Supreme Court was given the opportunity to settle the issue of whether the First Amendment shielded the reporter from disclosing confidential sources.<sup>129</sup> The *Branzburg* majority held that the First Amendment guarantee of freedom of speech and press is not violated by requiring reporters to testify before federal or state grand juries.<sup>130</sup> As a result of the decision, the First Amendment does not entitle newsmen to an absolute privilege. Justice White, in his majority opinion, stated that an absolute right was never recognized under common law and has never been a constitutional protection.<sup>131</sup> Initially, the Court emphasized the important role played by the grand jury in the administration of criminal justice, and their authority to subpoena, as necessary in fulfillment of that role.<sup>132</sup> The Court determined that reporters, like all citizens, have a duty to respond to grand jury subpoenas.

The High Court asserted that the prosecution of crimes resulted in the deterrence of future criminal conduct, and thus took precedence over the public's interest in being informed about future crimes.<sup>133</sup> Justice White stated that burdens placed on the press caused by the pursuit of criminal or civil justice cannot always be invalidated under the First Amendment.<sup>134</sup> The *Branzburg* opinion imposes a responsibility on all citizens to cooperate during the investigation of crimes thus allowing no immunity for the media. The Supreme Court's refusal to grant the reporter's testimonial privilege places the

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<sup>126</sup>408 U.S. at 679-80.

<sup>127</sup>The news reporter is concerned that confidential informants will be afraid to reveal information due to repercussions at the loss of their anonymity. Justice Douglas, in his *Branzburg* dissent, described it best by stating that "A reporter is no better than his source of information." *Id.* at 722.

<sup>128</sup>408 U.S. 665 (1972).

<sup>129</sup>*Branzburg v. Hayes* was the consolidation of three cases granted certiorari by the United States Supreme Court. The issue was whether the First Amendment permits news reporters, under a grand jury subpoena, to refuse disclosing confidential informants. *Caldwell v. United States* 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App. 1970), *cert. granted*, 402 U.S. 942 (1970); *In re Pappas*, 266 N.E.2d 297 (Mass. 1971), *cert. granted*, 402 U.S. 942 (1971).

<sup>130</sup>408 U.S. at 665.

<sup>131</sup>*Id.* at 684-85.

<sup>132</sup>*Id.* at 687-88.

<sup>133</sup>*Id.* at 695-97.

<sup>134</sup>*Id.* at 682.

fundamental concern on the pursuit of justice and the prevention of crime, rather than on the reporting of it.

Justice Stewart outlined a three-part balancing test in his dissenting opinion. The balancing test would only apply following a reporter's motion to quash the subpoena.<sup>135</sup> The government's failure to meet the test would entitle the news reporter to a testimonial privilege.<sup>136</sup> Under Justice Stewart's balancing test:

The government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>137</sup>

Some courts, refusing to accept the *Branzburg* decision, have relied on Justice Stewart's three-prong balancing test in order to provide a conditional privilege for the media.<sup>138</sup> The purpose of the informal balancing test, as construed by these courts, is to insure that an element of good faith is present on any attempt to force the revelation of a reporter's sources.<sup>139</sup> Thus, the proposal of the informal balancing test responded to the concern that the disallowance of the testimonial privilege would lead to the harassment of the press.

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<sup>135</sup> Along with a motion to quash the subpoena, the reporter must prove the existence of a confidential relationship that would establish the basis for the protection. *Branzburg*, 408 U.S. at 743.

<sup>136</sup> The informal balancing test is not new to the courts. An informal balancing test was first applied in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958). See *Plumb*, *supra* note 122, at 1039-41. The test presented in *Garland* was "[w]hether the interest served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom." *Id.* at 548. Although the reporter's privilege argued for in *Branzburg* has never been recognized as absolute under the First Amendment, some courts have been willing to allow a qualified privilege. See *Plumb*, *supra* note 122, at 1039-41.

<sup>137</sup> 408 U.S. 665, 743 (1972).

<sup>138</sup> See generally *National Broadcasting Co. v. Ct. of Common Pleas*, 556 N.E.2d 1120, 1126-27 (Ohio 1990). Courts following Justice Stewart's balancing test may have misconstrued Justice Powell's concurring opinion in *Branzburg*. Justice Powell suggested a balancing between the interests of the reporter and those of the litigant. He was the fifth vote in the *Branzburg* majority opinion, thus his failure to join the dissenting opinion indicates his disagreement with Justice Stewart's balancing test. *Id.* at 1127.

<sup>139</sup> Courts applying a balancing test look for a legitimate purpose behind the issuance of a subpoena. See *Branzburg*, 408 U.S. at 709-10; *National Broadcasting*, 556 N.E.2d at 1127. The *Branzburg* Court responded to the good faith argument by stating that reporters are not without recourse since grand juries are subject to judicial control and are limited by the First and Fifth Amendments. 408 U.S. at 707-08.



*B. Ohio's Shield Statute Provides Conditional Privilege*

The *Branzburg* decision did not bar the states from initiating action that would protect reporters from the compelled disclosure of sources. State legislatures responded immediately by enacting laws, referred to as "state shield" statutes, that shield the news reporter from identifying informants.<sup>140</sup> The shield statutes were aimed at improving the flow of valuable information to the media by shielding the source of otherwise unobtainable information.<sup>141</sup> Reporters previously used this same rationale under their First Amendment argument, a rationale which was rejected by the *Branzburg* Court.

Ohio's shield law, enacted in 1954, was in effect 18 years prior to the *Branzburg* decision. Revised Code section 2739.12 provides the testimonial privilege for reporters.<sup>142</sup> A strict reading of the code suggests that Ohio provides the reporter with an absolute privilege to shield informants.<sup>143</sup> The courts, however, have interpreted the statute as supporting a conditional privilege.

The extent of the reporter's privilege under Ohio's shield statute was challenged by the defendant in *In Re McAuley*.<sup>144</sup> Although the court failed to address the issue of whether section 2739.12 provided the newsperson with an absolute privilege, the opinion suggests that reporters are entitled to a conditional privilege under the Ohio law.<sup>145</sup> In *McAuley*, the defendant in a California criminal trial instituted proceedings to compel an Ohio reporter to testify as a necessary witness. The Ohio court applied the informal balancing test proposed by Justice Stewart's dissenting opinion in *Branzburg* and determined that the defendant had not overcome his burden of establishing the relevancy of the reporter's testimony.<sup>146</sup>

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<sup>140</sup>See generally Plumb, *supra* note 122, at 1045.

<sup>141</sup>*Id.* at 1309.

<sup>142</sup>OHIO REV. CODE ANN. § 2739.12 (Baldwin 1991).

<sup>143</sup>Revised Code section 2739.12 states the following protection for news reporters:

No person engaged in the work of, or connected with, or employed by any newspaper or by any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

OHIO REV. CODE ANN. § 2739.12 (Baldwin 1991).

<sup>144</sup>408 N.E.2d 697 (Ohio Ct. App. 1979).

<sup>145</sup>See generally Plumb, *supra* note 122, at 1054 -1055.

<sup>146</sup>408 N.E.2d at 707.

The result in *McAuley* strongly supports the proposition that Ohio does not recognize an absolute privilege for the media. First, the opinion concentrates on the applicable case law, placing primary emphasis on the United States Supreme Court's opinion in *Branzburg v. Hayes*.<sup>147</sup> The court's reliance on *Branzburg* and reluctance to focus on Ohio's shield statute may indicate their dissatisfaction with the statutory language of the code.<sup>148</sup> Next, the court characterized the reporter's privilege as conditional, balancing the privilege against the defendant's Sixth Amendment right in a criminal trial.<sup>149</sup> The use of a balancing test prior to granting the testimonial privilege signifies the court's acknowledgment of a conditional privilege. Finally, the court concluded that the trial court erred in granting an absolute privilege to the news reporter under both the Ohio law and the First Amendment.<sup>150</sup>

The *McAuley* court was later criticized by the Ohio Supreme Court in *National Broadcasting Co. v. Ct. of Common Pleas*.<sup>151</sup> In *National Broadcasting*, a court order was issued to a television station in order to preserve the news and commentary tapes relevant to an upcoming trial. Relators argued that the court order was issued in anticipation of a subpoena duces tecum which would violate their qualified privilege as reporters. The *National Broadcasting* majority disagreed with the *McAuley* court's use of the three-part balancing test advocated by Justice Stewart in his *Branzburg* dissent.<sup>152</sup> The *National Broadcasting* court could not justify the appropriateness of employing a balancing test that was rejected by the United States Supreme Court.<sup>153</sup>

The *National Broadcasting* court, however, had no need to discuss the limits, if any, of the reporter's privilege under the shield statute. Although the court rejected the relators' argument that section 2739.12 protects reporters from disclosing information, the relators had not been served with a subpoena and

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<sup>147</sup>408 U.S. 665 (1972).

<sup>148</sup>The *McAuley* court emphasized the *Branzburg* opinion and the reporter's rights under the First Amendment. *McAuley*, however, followed the *Branzburg* dissent by applying the three-part balancing test. The Court had the opportunity to address the issue regarding the extent of the testimonial privilege under Ohio's shield law but the opinion failed to resolve the issue. See Plumb, *supra* note 122, at 1056-57.

<sup>149</sup>408 N.E.2d at 709.

<sup>150</sup>*Id.* at 710.

<sup>151</sup>556 N.E.2d 1120 (Ohio 1990).

<sup>152</sup>*Id.* at 1127.

<sup>153</sup>The reporters in *Branzburg* argued that the compelled disclosure of informants would be a violation of the First Amendment unless: (1) the government proved it had a compelling interest in the information, (2) the information was relevant to the case, and (3) the information was unavailable from other sources. *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972). The United States Supreme Court's refusal to grant a reporter's privilege was a rejection of this test. The test presented by the *Branzburg* dissent coincides with the reporter's argument, which has been accepted by some courts. See *supra* note 137 and accompanying text.

thus were not entitled to a hearing under the reporter's shield statute.<sup>154</sup> In addition, Revised Code section 2739.12 prevents compelled disclosure of sources, not information, which would have made the statute inapplicable under the facts in *National Broadcasting*.<sup>155</sup>

Since *McAuley* and *National Broadcasting* failed to specifically resolve the issue relating to the extent of the media's privilege, it remains unclear how the Ohio courts will interpret Revised Code section 2739.12.<sup>156</sup> The *McAuley* opinion supports a conditional privilege based on the three-part balancing test promulgated by the *Branzburg* dissent. *McAuley's* use of the test, however, was criticized by the Ohio Supreme Court in *National Broadcasting*. Implications from the two cases indicate that under the appropriate circumstances, Ohio courts will adopt the *Branzburg* decision.<sup>157</sup> It is very likely that the privilege will perish once the state shield law is placed in conflict with an individual's right under the U.S. Constitution. As stated by the *McAuley* Court, "[w]henver there is a conflict between a statute and a constitutional provision, the statute must fall."<sup>158</sup>

How does the reporter's privilege affect companies, such as Procter & Gamble, who attempt to seek criminal action under the Ohio statutes that protect trade secrets and prosecute employees for their breach of confidence? Are there limitations to the shield law that allow the company an opportunity to defend its interest? Currently, case law indicates that Ohio's shield statute limits the media to a qualified privilege. The reporter's privilege is available if the government fails to satisfy the three-prong balancing test that was outlined by the *Branzburg* dissent and adopted by the *McAuley* Court.<sup>159</sup> It is an

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<sup>154</sup>The protective order was issued to preserve the news and commentary tapes related to an alleged murder. Relators argued that the Court anticipated the issuance of a subpoena duces tecum, thus the protective order was issued. The Court noted that the relators never alleged that confidential sources would be disclosed when the news tapes are eventually obtained through the subpoena. *National Broadcasting Co. v. Ct. of Common Pleas*, 556 N.E.2d 1120, 1127 (Ohio 1990).

<sup>155</sup>The material, subject to the court order in *National Broadcasting*, related to information and was not alleged to have contained reporter's sources. Revised Code section 2739.12 protects confidential sources, not information obtained by the reporter. See OHIO REV. CODE ANN. § 2739.12 (Baldwin 1991).

<sup>156</sup>It is the role of the courts to interpret the statutory language of the shield statute, thus case law will determine the extent of the testimonial privilege. See *Plumb*, *supra* note 122, at 1045-46.

<sup>157</sup>An Ohio court is likely to abandon the reporter's privilege when a defendant's constitutional rights are at issue. This may occur when the defendant's rights under the Fifth or Sixth Amendment conflict with the reporter's testimonial privilege. The Fifth Amendment entitles the defendant to due process of the law. Under the Sixth Amendment, the defendant is entitled "to have compulsory process for obtaining witnesses in his favor." See generally *Plumb*, *supra* note 122, at 1040.

<sup>158</sup>*In Re McAuley* 408 N.E.2d 697, 708 (Ohio App. 1979).

<sup>159</sup>*Id.*

examination of the facts in light of the balancing test that gives companies recourse in battling the protection afforded the media under the shield statute.

Applying the facts relative to the P & G incident demonstrates how the test is applied. The first prong of the test requires proof that a relevant connection exist between the violation and the information. P & G's confidential information was published in a national newspaper. As a result of the publication, it was discovered that an employee had breached his employer's confidence in violation of Ohio's criminal code. Since the publication can be linked to the employee's breach, a relevant connection exists and the first prong has been satisfied.

To satisfy the second prong the government must show that there are no alternatives available, less burdensome on First Amendment rights, in obtaining the information from the reporter. In P & G for instance, one option available was the review of records of telephone calls made from the Cincinnati area to *The Wall Street Journal* and to the author of the articles. The government would have the choice between viewing over 650,000 telephone lines or issuing a subpoena to the news reporter in determining the name of the informant. The first alternative comes close to invading the private lives of citizens, while the second challenges a flexible privilege afforded newsmen. Since the United States Supreme Court has failed to recognize the testimonial privilege under the First Amendment, the harm to the reporter appears less destructive than the search through the telephone records of numerous private individuals. Arguably there existed no viable alternative and thus, the government would have been successful under the second prong of the test.

Finally, the government must show that disclosure of the information serves a compelling interest. Analysis under this prong should place the issue in proper perspective and settle the confrontation existing between the media's privilege and a company's remedy under the criminal code. A company attempts to protect certain proprietary information because the loss of this information can have a detrimental effect on the business. Ohio recognizes the value of the protected information by providing relief for the unlawful disclosure of a company's proprietary information. As a result, the company's loss of information, as well as the company's right to take legal action under the code, provides the compelling interest that satisfies the third prong. Thus the government would satisfy the test, and the reporter would not be entitled to the testimonial privilege.

## VI. CONCLUSION

Trade secrets and confidential information play a very important role in the continuing operation of a business. The Ohio Legislature recognized their value by affording protection to each under separate statutes within the criminal code.<sup>160</sup> These statutes protect a company against loss resulting from the misappropriation of trade secrets and confidential proprietary information

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<sup>160</sup>OHIO REV. CODE ANN. § 2739.12 (Baldwin 1991).

by employees. The protection provided under both statutes is illusory to a business, however, if the violator is permitted to remain anonymous.

Locating the guilty individual can be a difficult task for most companies. This task is more critical but further complicated when the disclosure is made to a member of the media which may result in the publication of the confidential information. A company's inability to determine the identity of the wrongdoer can lead to the continued publication of valuable corporate information that can seriously threaten the existence of the business.

The Ohio criminal statutes should afford a company the opportunity to locate the wrongdoer which would terminate the improper disclosure of confidential proprietary information to the media. The identity of the guilty party can be determined through the issuance of a grand jury subpoena, compelling disclosure of the news reporter's informant. Limited protection has been granted to the media, however, which may provide an aegis to protect the identity of their informants.

*Branzburg v. Hayes*<sup>161</sup> held that the First Amendment does not grant a testimonial privilege to reporters. Although the Ohio courts have failed to adopt the *Branzburg* decision, the legislature provides a shield statute which grants protection to the media if the government fails to meet a three-prong balancing test.<sup>162</sup> The shield statute, in effect, directly conflicts with the protection afforded a company's trade secrets and confidential information. Application of the three-prong balancing test should defeat the media's conditional privilege, thus sustaining a company's efforts to protect proprietary information.

Although the outcome would be favorable to the company, the use of a balancing test is not appropriate since it does not address the real issue surrounding a company's proprietary information. Trade secrets and confidential information are communicated to employees during the course of their confidential employment relationship. It is this relationship that requires protection. To allow the disclosure of valuable proprietary information to the media will destroy the confidence within that relationship. It was not the intent of the Ohio General Assembly to provide statutes which make it a crime for employees to disclose confidential information to competitors but permit disclosure of that same information to news reporters. A company's interest in protecting confidential information and trade secrets cannot be sacrificed by allowing an informant to remain anonymous through the use of the reporters' testimonial privilege. A shield for the media provides an opportunity for employees to disclose trade secrets and confidential information to competitors through the media which undermines the company's vested interest in protecting essentially confidential information. Unless the shield is removed,

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<sup>161</sup>408 U.S. 665 (1972).

<sup>162</sup>See *supra* notes 142-50 and accompanying text.

the reporter's privilege will continue to protect the breach of confidence by employees, thus taking the employee out of the employment relationship.

JOHN M. TKACIK, JR.

