

# Chapter 14

## Eavesdropping, Wiretapping & Hidden Cameras

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### A. Introduction

With advances in electronic technology and the inherent obstacles to investigative reporting, it has become routine for reporters to gather news with hidden cameras, surreptitious recording devices and other surveillance equipment. The mere fact that such activity may be routine newsgathering and result in truthful publication, however, will not necessarily cloak it with First Amendment immunity from civil or criminal liability.<sup>1</sup> Indeed, in an oft-quoted passage, the Ninth Circuit Court of Appeals stated that

[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.<sup>2</sup>

While newsgathering is entitled to some measure of protection,<sup>3</sup> that protection, despite its constitutional dimension, remains either so trivialized or ill-defined by the courts as to render it of minimal assistance in contesting criminal or civil liability.<sup>4</sup> As a result, serious pitfalls await the reporter using these newsgathering techniques who is unfamiliar with the state and federal law governing his or her conduct. This chapter will survey the constitutional provisions, state and federal statutes, and common law tort theories that a newsgathering organization must consider before engaging in these methods of surveillance.

### B. The Fourth Amendment and State Action

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures by government agents or state actors.<sup>5</sup> The United States Supreme Court has held that the Fourth Amendment reaches searches and seizures achieved via electronic surveillance, even without a physical intrusion into a constitutionally protected area.<sup>6</sup> Fourth Amendment liability will not attach, however, if one party to a conversation consents to its recording or other interception.<sup>7</sup>

Because the Fourth Amendment circumscribes only government action, private wiretapping and other electronic surveillance ordinarily is beyond the reach of that constitutional provision. Members of the private news media, however, can be subject to civil liability under 42 U.S.C. § 1983<sup>8</sup> for violating a person's federal constitutional rights if they act under color of state law.<sup>9</sup> Section 1983's statutory requirement of action "under color of state law," has been construed as identical to the "state action" requirement of the Fourteenth Amendment.<sup>10</sup> In *Lugar v. Edmondson Oil*, the Supreme Court laid out two components to the § 1983 "state action" requirement: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State, or by a rule of conduct imposed by the state or by a person for whom the State is responsible"; and (2) "the party charged with the deprivation must be someone who may fairly be said to be a state actor."<sup>11</sup>

The distinction between private and state action is often elusive, and apparent inconsistencies in the Supreme Court's jurisprudence in this area have created much confusion.<sup>12</sup> Indeed, courts admit that the state action analysis borders on an *ad hoc* inquiry by proclaiming that the issue of whether a private individual is a state actor is a factual inquiry which turns on the particular circumstances of each case.<sup>13</sup> The Supreme Court's jurisprudence, while intentionally avoiding a definitive articulation of the state action analysis, nonetheless indicates that three theories<sup>14</sup> are to be considered in determining whether a private party can fairly be said to be a state actor under *Lugar*'s second prong:<sup>15</sup> (1) the joint participation theory;<sup>16</sup> (2) the symbiotic relationship theory;<sup>17</sup> and (3) the nexus theory.<sup>18</sup>

The most likely theory by which a media organization could be held to be a state actor is the joint participation theory. The focus of this test is whether the private party acted as a "willful participant in joint action with the State or its agents."<sup>19</sup> Applying this "joint action" test, the Eighth Circuit has held that to survive a motion for summary judgment, a plaintiff seeking to hold a private party liable under § 1983 must adduce evidence from which reasonable jurors could conclude that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor as to an

unconstitutional goal or purpose.<sup>20</sup> This view is consistent with the view of other federal courts of appeals.<sup>21</sup>

In *Parker v. Clarke*,<sup>22</sup> for example, the court applied the joint participation test to a media defendant in a Fourth Amendment based § 1983 claim and determined that there was no state action. The plaintiffs in *Parker* alleged that a KSDK television news crew invaded their privacy when they entered plaintiffs' residence with police officials and filmed the officials' execution of a valid search warrant inside the house.<sup>23</sup> The news crew was engaged in a ride-along with the police officers and when, in the course of that ride-along, the police determined to execute the search warrant, the news crew followed them inside the house and filmed the search.<sup>24</sup> Once inside, the police executed the search warrant and the news crew gathered news about that police activity.<sup>25</sup> Neither assisted the other in performing their respective duties.<sup>26</sup> On these facts, the court held that the plaintiffs satisfied neither prong of the state action test. The first prong was not satisfied because, "[a]t most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant."<sup>27</sup> Nor was the second prong satisfied because "[t]he passivity of [KSDK's spontaneous decision to follow the police inside the house and film the search] demonstrates the absence of any affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which plaintiffs now challenge."<sup>28</sup>

Outside the § 1983 context, courts employ a somewhat different Fourth Amendment state action analysis. In deciding a motion to suppress evidence, the Supreme Court has held that the Fourth Amendment "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'"<sup>29</sup> Lower courts have fashioned from this principle a two-part test to determine when a search by a private person becomes government action subject to the constraints of the Fourth Amendment: "1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends."<sup>30</sup> At least one court has looked to this line of decisions in determining whether a plaintiff has satisfied the "under color of law" requirement in a *Bivens* action against a media defendant.<sup>31</sup> As a result, and because *Bivens* and § 1983 state action analysis are analogous,<sup>32</sup> *Jacobsen* and its progeny may prove to further influence the development of the state action analysis in Fourth Amendment based civil claims against private persons.

Whatever the precise contours of the state action analysis, courts have been reluctant to find media defendants to be state actors.<sup>33</sup> Indeed, some courts have acknowledged that the state action analysis should be even more exacting when applied to a media defendant.<sup>34</sup> In contrast, at least one court has held journalists to be state actors when they transmitted their conversations with a so-called "quack" doctor inside his home to officers in a police car parked outside the residence.<sup>35</sup> At least six other courts, including three Missouri federal courts, have recognized the legal viability of claims alleging that reporters violated constitutional rights, although none of the confronted claims asserted illegal search or seizure.<sup>36</sup> Thus, while lack of state action ordinarily will preclude Fourth Amendment claims against the media, the possibility of constitutional liability should not be dismissed as illusory or academic.

These decisions counsel that media organizations risk constitutional litigation when they coordinate their surreptitious electronic newsgathering efforts with federal, state or local law enforcement officials. If reporters cross the fine line between chronicling law enforcement activities and actually participating in them, or that between cultivating police contacts and engaging in concerted activity, or otherwise meld their private surveillance with that of government officials, they could face civil liability for violating the Fourth Amendment.

The following section covers major federal and state wiretapping provisions. Its focus is on fundamental concepts of the statutory schemes to provide media organizations and other interested parties with an appreciation of their potential liability under state and federal statutory law in connection with surreptitious electronic recording and eavesdropping activities. Cases dealing specifically with the media are addressed in the accompanying endnotes.

## **C. Federal Statutes**

### **1. Omnibus Crime Control and Safe Streets Act of 1968**

#### **a. Introduction**

The principal federal wiretapping statute was originally enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III").<sup>37</sup> The amendments contained in the Electronic Communications Privacy Act of 1986 (ECPA) made significant changes to several sections of Title III.<sup>38</sup> The statute is now referred to as Title III, the ECPA, or the Federal Wiretap Act.<sup>39</sup> Section 2511 of Title III creates criminal liability for those who intentionally intercept a wire, oral, or electronic communication, or intentionally disclose the contents of the interception.<sup>40</sup> Section 2520(a) provides for a civil cause of action by "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used."<sup>41</sup>

Most courts have held that each interception, use, and disclosure of the contents of any communication intercepted in violation of Title III creates a separate cause of action.<sup>42</sup> Title III also prohibits the use of the contents of any communication derived in violation of § 2511 as evidence in any proceeding.<sup>43</sup>

## **b. Definitions**

### **i. Wire and Electronic Communications**

Title III defines “wire communication” as a transfer of the human voice made “in whole or in part...by the aid of wire, cable, or other like connection between the point of origin and the point of reception.”<sup>44</sup> This definition includes the transmitted portion of a cordless phone conversation.<sup>45</sup> Protection of “electronic communications” was added in the 1986 amendments, which brought cellular telephones, electronic pagers, electronic mail, and electronic bulletin boards within the definition of wire communication and the coverage of Title III.<sup>46</sup>

### **ii. Oral Communication**

“Oral communication” is defined as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”<sup>47</sup> As a result, a conversation or communication that is not carried by wire or any other electronic means is subject to an important restriction. Unlike a wire communication, an oral communication will not be brought within the protection of Title III unless the participants have a justified expectation of privacy.<sup>48</sup> In *United States v. Clark*, the Eighth Circuit Court of Appeals stated that “the inquiry is 1) whether the defendant manifested a subjective expectation of privacy, and 2) if so, whether society is prepared to recognize that expectation as reasonable.”<sup>49</sup> Therefore, there is both a subjective and objective component to the expectation of privacy requirement for oral communications.<sup>50</sup>

### **iii. Intercept**

Title III broadly defines “intercept” as the “aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device” while circumscribing its reach by exempting “any telephone” furnished to a subscriber for connection to a provider of wire or electronic communication, from the type of devices that can intercept communications.<sup>51</sup> This exception precludes civil or criminal liability under Title III when an individual uses an extension phone to listen to a conversation or other communication.<sup>52</sup> Despite the so-called extension phone exception, the Eighth Circuit has ruled that it is unlawful to attach a recorder or other device to an extension phone.<sup>53</sup> Another exception inherent in the statutory construction of Title III is that the communication must be intercepted during the transmission. Therefore, stored electronic communications, such as received e-mail or voicemail, cannot be intercepted.<sup>54</sup>

## **c. General Exceptions**

### **i. Consent**

The most significant exception to Title III relates to consent of a party to the communication. Section 2511(2)(d) makes it lawful for “a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent” to the interception.<sup>55</sup> Therefore, even if a party to a conversation records a conversation without revealing this information to the other participants, there is no criminal or civil liability under Title III.<sup>56</sup> The exception, however, is subject to an important limitation: it will not apply if the communication is intercepted “for the purpose of committing any criminal or tortious act.”<sup>57</sup>

### **ii. Acting Under Color of Law**

Title III also provides an exception for anyone who is acting under color of law and is a party to the communication or has obtained prior consent of one of the parties.<sup>58</sup> This section allows federal and state officials to record the communications of informants and other individuals who cooperate with government agencies.<sup>59</sup> For this exception, there is no limitation regarding interception for the purpose of committing a criminal or tortious act.<sup>60</sup>

### **iii. Common Carrier**

Section 2511(2)(a) includes an exception for providers of electronic communication service. Employees of these providers are not liable for interceptions of communications if the activity is “necessary...to the rendition of...service or to the protection of the rights or property of the provider of that service.”<sup>61</sup> Courts have held that this exception applies when telephone companies monitor calls as part of an investigation of fraud or misuse of phone lines.<sup>62</sup>

#### **d. Spousal Immunity**

A number of the civil actions under Title III have involved domestic or marital disputes and claims that spousal wiretapping is exempt from the statute.<sup>63</sup> Although the circuits are split on this issue, in *Kempf v. Kempf*, the Eighth Circuit Court of Appeals rejected these exemption claims and held that “the conduct of a spouse in wiretapping the telephone communications of the other spouse within the marital home, falls within [Title III’s] purview.”<sup>64</sup>

#### **e. Statutory Defenses**

Section 2520(d) includes a statutory defense of good faith reliance on:

- (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;
- (2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or
- (3) a good faith determination that section 2511(3) or 2511(2)(i) of this title permitted the conduct complained of .<sup>65</sup>

There have been few reported cases dealing with § 2520(d). In *Rice v. Rice*, the Eighth Circuit Court of Appeals ruled that the good faith defense for reliance on § 2511(3) only applies to “conduct of persons or entities providing an electronic communication service to the public.”<sup>66</sup> The most commonly litigated issue under this section deals with claims of reliance on mistake of law. In *Reynolds v. Spears*, the Eighth Circuit briefly dealt with this issue, stating that even though the defendant consulted a law enforcement officer who advised him incorrectly that he was not violating Title III, such a circumstance was not a defense. In addition, the First, Fifth, Sixth, and Tenth Circuits have also held that a defendant’s mistaken belief that a statutory exception applies does not provide a defense.<sup>67</sup>

#### **f. Damages in Civil Actions**

Section 2520 of Title III provides for recovery of damages in civil actions brought for violation of § 2511.<sup>68</sup> Title III provides that courts “may assess as damages whichever is the greater of” the sum of “actual damages suffered by the plaintiff and any profits made by the violator”, or “statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.” (emphasis added).<sup>69</sup> The Eighth Circuit Court of Appeals has held that this provision gives judges the discretion to decline to award statutory damages.<sup>70</sup> Courts have applied several factors in determining whether or not to award damages. These include consideration of the actual damage suffered by the plaintiff, whether the violation was *de minimis*, the financial burden on the defendant, and the purpose of imposing the award.<sup>71</sup>

Punitive damages and attorney fees are also available under Title III. Section 2520(b)(2) provides for “punitive damages in appropriate cases.”<sup>72</sup> To recover punitive damages in the Eighth Circuit, a plaintiff must prove “a wanton, reckless or malicious violation.”<sup>73</sup> Section 2520(b)(3) allows for “a reasonable attorney’s fee and other litigation costs reasonably incurred.”<sup>74</sup> An award of attorney fees is within the discretion of the district court.<sup>75</sup> If a court chooses to award attorney fees, however, certain standards apply. In *Bess v. Bess*, the Eighth Circuit Court of Appeals held that “at a minimum, an appropriate fee... should account for the hours reasonably expended on the successful pursuit of damages . . .”<sup>76</sup> The court also stated that it is within the district court’s discretion to “exclude time spent in unsuccessfully seeking” statutory or punitive damages.<sup>77</sup>

#### **g. Statute of Limitations**

Title III includes a two-year statute of limitations in civil cases. Section 2520(e) states that “a civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.”<sup>78</sup>

#### **h. State Law Tort Claims Brought with Title III Claims**

In the past, plaintiffs have attempted to bring invasion of privacy tort claims along with their claims for violation of Title III.<sup>79</sup> Usually these claims assert that the same acts which allegedly violated Title III also give rise to a common law claim for invasion of privacy.<sup>80</sup> While there is no case law directly on point in Missouri, it is likely that these type of claims would use the facts involving interception to demonstrate a *prima facie* claim for “intrusion upon seclusion,” and the facts regarding disclosure to support a “publication of private facts” claim.

#### **i. Title III as a Basis for Prior Restraint of the Press**

Although the Eighth Circuit has not dealt with this issue, both the First and Sixth Circuits have held that violations of Title III do not support prior restraint of the press in their exercise of First Amendment rights.<sup>81</sup>

## **2. Section 605 Federal Communications Act (47 U.S.C. 605<sup>82</sup>)**

### **a. Introduction**

Section 605 of the Communications Act of 1934 prohibits the use and disclosure of non-public radio transmissions and creates criminal and civil liability for violation of its provisions.<sup>83</sup> While this statute governed wire communications prior to the passage of Title III, all language concerning wires has been removed by amendment, except for a provision regarding regulation of communications personnel.<sup>84</sup> Radio transmissions include the messages sent by cordless phones, some types of cellular phones, pagers, and messages sent by fire, police, and other emergency agencies over the airwaves.<sup>85</sup> While several circuits (including the Eighth) have held that oral communications sent by radio transmissions are covered by § 605, they have applied the expectation of privacy requirement from Title III to its provisions.<sup>86</sup> Cases interpreting the meaning of “interception” parallel those of Title III.<sup>87</sup> Similar to Title III, interception of a communication by one of the parties or by someone who has gained consent of the parties is not unlawful.<sup>88</sup>

### **b. Civil Causes of Action for Violations That Fall Within the Scope of Both Title III and Section 605**

Violations of section 605 that deal with wiretapping or bugging also fall within the parameters of Title III. There is no consensus, however, that an interception that falls under Title III also gives rise to a cause of action under § 605. In *United States v. Davis*, the Eighth Circuit Court of Appeals held that a defendant could be prosecuted under both Title III and section 605(a).<sup>89</sup> The court stated that “[w]hen two statutes cover the same conduct there is no implicit repeal of the earlier statute” and “the legislative intent to repeal must be manifest in the ‘positive repugnancy between the provisions.’”<sup>90</sup> Coupled with the Court of Appeals’ extension of Title III’s expectation of privacy requirement to § 605 in *Tyler v. Berodt*, it appears that a civil action for violation of both statutes may be brought in the Eighth Circuit.

The Eleventh Circuit, however, has held explicitly that passage of Title III has precluded any remedy under section 605 for violations which also fall within the more recent statute. In *Watkins v. L.M. Berry & Co.*, an employee of a sales company brought suit against her employer for the interception and use (in firing her) of private conversations held while at work.<sup>91</sup> The Eleventh Circuit Court of Appeals affirmed dismissal of the § 605 claim and ruled that any private remedy that exists under this section “is superseded by the remedy provided by section 2520 of title III.”<sup>92</sup> The legislative history appears to favor the Eleventh Circuit view. According to the Senate Report accompanying the legislation, “the regulation of wire or oral communications in the future is to be governed” by Title III.<sup>93</sup>

### **c. Damages in Civil Actions**

Section 605(e) creates a civil cause of action for violation of 605(a) and sets the appropriate damages.<sup>94</sup> These include: (1) an injunction if the court deems it reasonable, (2) an election by the aggrieved party of either (a) the actual damages and any profits attributable to the violation or (b) statutory damages of \$1,000-\$10,000 for each violation, and (3) costs and attorney’s fees, if the aggrieved party prevails.<sup>95</sup>

## **3. Foreign Intelligence Surveillance Act**

In 1978, Congress enacted Foreign Intelligence Surveillance Act (“FISA”).<sup>96</sup> Originally, FISA allowed the President, through the Attorney General, to authorize electronic surveillance without a court order to acquire foreign intelligence as long as there was “no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party.”<sup>97</sup> However, in the aftermath of the September 11 terrorist attacks, a presidential order was signed allowing the monitoring of “international telephone calls and international email messages of hundreds, perhaps thousands, of people in the United States.”<sup>98</sup> Officials from the National Security Agency (N.S.A.) reported that the N.S.A. eavesdrops without warrants on up to 500 people in the United States at any given time on people who are linked, even indirectly, to suspected terrorists.<sup>99</sup> Recently, the House and Senate passed measures providing immunity to telephone companies that took part in the eavesdropping program, as long as the company received a legitimate request from the government directing their participation in the program.<sup>100</sup>

Disclosure of this wiretapping program prompted many to question whether the media had violated federal law. Gabriel Schoenfeld, senior editor of *Commentary* magazine specifically questioned “whether in the aftermath of September 11, we as a nation can afford to permit the reporters and editors of great newspapers to become the unelected authority that determines for us all what is a legitimate secret and what is not.”<sup>101</sup> Schoenfeld’s position is therefore that the media should never publish military secrets in wartime.<sup>102</sup> However, the Ninth Circuit Court of Appeals has rejected a summary approach to the issue of military secrets. In *Al-Haramain Islamic Foundation Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007), the plaintiffs sought damages and declaratory relief alleging the government engaged in electronic surveillance of plaintiff’s private telephone, email and other electronic communications without probable cause. The government claimed the state secrets privilege.

The Ninth Circuit did not recognize such a privilege, however, stating that the Executive Branch's voluntary disclosure of wiretapping and warrantless surveillance program precluded them from later claiming the state secrets privilege.

#### **D. Federal Administrative Regulations**

Two major federal regulations apply to this area and may subject entities which are licensed by the Federal Communications Commission (FCC) to sanctions. Penalties for violation of these regulations can include revocation of FCC broadcast licenses,<sup>103</sup> forfeiture penalties,<sup>104</sup> and fines.<sup>105</sup> Violations of FCC regulations do not give rise to a private cause of action because the primary jurisdiction for enforcement is with the Commission.<sup>106</sup>

##### **1. 47 C.F.R. § 2.701: Prohibition Against Use of a Radio Device for Eavesdropping**

This regulation prohibits any person from using certain devices to overhear or record private conversations.<sup>107</sup> An exception exists for law enforcement officers acting under lawful authority.<sup>108</sup>

##### **2. 47 C.F.R. § 73.1206: Broadcast of Telephone Conversations**

Section 73.1206 requires an entity licensed by the FCC to provide notice to any party whom it intends to record for broadcast.<sup>109</sup> Such notice is not necessary, however, when the recorded party is aware or may be presumed to be aware from the circumstances that the conversation will be broadcast.<sup>110</sup>

#### **E. Missouri Wiretap Act**

In response to growing concerns about drug trafficking and rising crime rates, Missouri enacted what has become known as the "Missouri Wiretap Act" ("Missouri Act") in 1989.<sup>111</sup> The provisions are codified at §§ 542.400-542.424.<sup>112</sup> Since 1989, the Missouri Act has only been amended once in 2002 to allow broader authorization for law enforcement officials to combat terrorism.<sup>113</sup> The Missouri Act was modeled after Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and tracks many of its provisions. For example, the Missouri Act adopted Title III's requirement of a reasonable expectation of privacy in oral communications.<sup>114</sup>

There are, however, important differences between the Missouri Act and Title III. Unlike Title III, the Missouri Act explicitly includes the recording "by one spouse of another spouse" in the definition of "interception."<sup>115</sup> The civil damages section of the Missouri Act, codified at § 542.418(2), generally mirrors the provisions of Title III. Similar to Title III, the Missouri Act creates both criminal and civil causes of actions for violation of its provisions. However, § 542.418(2) only authorizes a private right of action for persons "whose wire communication" have been intercepted, disclosed, or used in violation of the Missouri Act.<sup>116</sup> Thus, there is no civil liability for interception of "oral communications." Further, with regard to punitive damages, the Missouri Act appears to have a more relaxed standard. Section 542.418(2)(b) requires a plaintiff to demonstrate a "willful or intentional violation" of its provisions.<sup>117</sup> As noted *supra*, the Eighth Circuit Court of Appeals has held that a plaintiff suing under Title III must prove "a wanton, reckless or malicious violation" to recover punitive damages.<sup>118</sup>

Judges do not appear to have discretion to refuse to award statutory damages to a successful plaintiff. The Missouri Act provides that a successful plaintiff "shall . . . [b]e entitled to recover" the statutory damages.<sup>119</sup> Despite the plain language, it is not clear how the change from "shall" to "may", included in the 1986 amendments to Title III, will affect judicial interpretation of the Missouri provision. When analyzing this issue, however, two additional points should be considered. First, Missouri enacted its wiretapping statute, and the mandatory statutory damages provision contained therein, in 1989 -- three years after the federal statute was amended to afford courts discretion in determining whether statutory damages are warranted. Second, Title III's legislative history indicates that federal law preempts state law only to the extent it provides for less stringent wiretap standards than the federal act, but not where state law imposes more restrictive standards.<sup>120</sup> These considerations suggest that courts do not have discretion over whether to award statutory damages under the Missouri Act. The only other major difference between the Missouri Act and Title III deals with the consent exception in the criminal context. While Title III states that interception of any type of communication is lawful if either party consents, the Missouri Act only provides an exception for consent with regard to wire communications.<sup>121</sup> Thus, if someone intercepts an oral communication, consent will not present a defense to a criminal charge under the Missouri Act.<sup>122</sup> Because of the lack of case law interpreting the Missouri Act, it is not clear how courts will interpret this provision.

In *State v. King*, a defendant appealed his conviction for possessing a controlled substance.<sup>123</sup> He claimed that a syringe containing methamphetamine should have been suppressed because it was obtained in violation of the Missouri Act.<sup>124</sup> The defendant's neighbor was listening to her police scanner and heard the defendant discussing a drug deal on a cordless phone.<sup>125</sup> The neighbor called the police who responded and found a syringe on defendant's person.<sup>126</sup> The Missouri Court of Appeals noted that it could not locate any cases construing the Missouri Act and looked to cases interpreting Title III.<sup>127</sup> At the time this case was decided, Title III specifically excluded cordless phone conversations from the definition of wire

communication.<sup>128</sup> Therefore, the court concluded that the conversation on a cordless phone was an “oral communication” and thus subject to the expectation of privacy limitation included in both Title III and the Missouri Act.<sup>129</sup> Ultimately, the court affirmed the conviction, relying on cases decided under Title III had ruled that as a matter of law, participants in cordless phone conversations have no expectation of privacy.<sup>130</sup>

On the other hand, a case that illustrates how the Missouri Act applies to cell phone usage is *Lee v. Lee*.<sup>131</sup> In 1995, Dennis Lee and Darla Lee were engaged in a divorce proceeding.<sup>132</sup> Finding that cell phone conversations were not protected as wire communications under the Missouri Act, the trial court admitted recordings of Darla’s cell phone conversations with another man.<sup>133</sup> The Missouri Court of Appeals disagreed, finding that the plain text of the statute protected cell phone users as long as the other caller used a regular wired telephone.<sup>134</sup> Thus, the recordings should not have been admitted as evidence under the Missouri Act’s prohibitions on admitting into evidence interceptions that violate its own terms.<sup>135</sup>

## **F. State Common Law**

State common law also imposes limits on newsgathering. Again, the press is not shielded by the First Amendment from civil or criminal liability under laws of general applicability.<sup>136</sup> Consequently, wiretapping, eavesdropping and filming with hidden cameras can also subject media organizations to various state common law tort claims, including invasion of privacy.<sup>137</sup> Consequently, state tort law also must be considered before engaging in undercover investigation and surreptitious electronic newsgathering.

The case of *Food Lion v. Capital Cities/ABC, Inc.* illustrates the creative and increasingly common approach whereby the targets of undercover investigative reporting have sought to impose liability on newsgathering organizations under tort theories that seemingly are devoid of First Amendment obstacles to defamation liability. In *Food Lion*, the plaintiff alleged that *PrimeTime Live*, as part of an undercover investigation, falsified employment applications to enable its reporters to gain access to and film with hidden cameras the non-public aspects of Food Lion’s operations.<sup>138</sup> Rather than sue for defamation based on the resulting news story, Food Lion sued Capital Cities/ABC, Inc. for state tort law<sup>139</sup> violations of intentional misrepresentation, deceit, fraud, negligent supervision, trespass and breach of fiduciary duty, all based on *PrimeTime Live*’s newsgathering methods. Food Lion also alleged that ABC violated North Carolina’s unfair and deceptive trade practices statute.<sup>140</sup>

The fact that courts have recognized such causes of action does not mean that plaintiffs can dodge the requirements for establishing a libel or defamation claim by artful pleading. On the contrary, courts generally will not permit a plaintiff to recover reputational or publication damages pursuant to a tortious newsgathering claim without first negotiating the First Amendment obstacles to recovering such damages.<sup>141</sup> Despite this significant remedial restriction, newsgathering tort claims have become increasingly more common. Therefore, this section will survey Missouri law regarding the various state law tort claims asserted in *Food Lion* and in other recent cases in which plaintiffs have contended that a media representative’s newsgathering was tortious.

### **1. Trespass**

To prevail on a trespass claim in Missouri, a plaintiff must plead and prove a direct physical interference with the person or property of another.<sup>142</sup> Consent, whether express or implied, is a complete defense to an action for trespass.<sup>143</sup> While no Missouri court has recognized trespass as a remedy when representatives of the media obtain hidden camera footage, courts in other jurisdictions have sanctioned trespass as a cognizable claim to redress injuries sustained as a result of unauthorized or surreptitious filming by members of the broadcast media.<sup>144</sup>

In *Food Lion*, the court discussed the elements of and defenses to a trespass claim based on hidden camera newsgathering. In arguing that Food Lion had consented to ABC’s entry onto Food Lion property by hiring ABC employees to work there, ABC relied extensively on *Desnick v. American Broadcasting Co.*<sup>145</sup> In *Desnick*, *PrimeTime Live* reporters took hidden camera footage of the plaintiff’s eye clinic operations while posing as patients of the clinic.<sup>146</sup> The Seventh Circuit upheld the district court’s dismissal of the plaintiff’s trespass claim based on these allegations, reasoning that the ABC employees posing as patients, despite gaining access to the clinic without disclosing their true intentions, did not invade “any of the specific interests that the tort of trespass seeks to protect.”<sup>147</sup> More specifically, a trespassory invasion was not committed because the eye clinic was a business establishment open to the public and its activities were not disrupted by *PrimeTime Live*’s undercover investigation and concealed filming.<sup>148</sup> The reporters did not tape any private conversations or steal the clinic’s trade secrets.<sup>149</sup> Thus, despite plaintiff’s allegations of the undercover reporters’ misrepresentations or misleading omissions, the court held that the claim of trespass was not cognizable.<sup>150</sup>

In denying ABC’s motion for summary judgment, the *Food Lion* court first rejected ABC’s claim that the First Amendment barred Food Lion’s trespass claim.<sup>151</sup> The court then found *Desnick* distinct and summary judgment unwarranted because the ABC employees’ alleged fraud, unlike that of the phony eye patients in *Desnick*, enabled them to gain access to the private precincts of Food Lion’s operations and, akin to trade secret theft, steal or “tak[e] ... images which would have

been unavailable absent misrepresentations which provided entry into restricted portions of Food Lion stores ....”<sup>152</sup> The court alternatively found that even if Food Lion had consented to ABC’s entry, a jury question remained as to whether the ABC employees posing as Food Lion workers had exceeded that consent by thereafter engaging in wrongful conduct; *i.e.*, “recording undercover footage,” or otherwise acting outside the scope of Food Lion’s consent.<sup>153</sup> It should be noted that reputational and emotional damage are not recoverable in an action for trespass.<sup>154</sup> Punitive damages, however, are available.<sup>155</sup>

## **2. Invasion of Privacy: The Tort of Intrusion**

Missouri recognizes the privacy tort of intrusion upon seclusion.<sup>156</sup> To prevail on such a claim, a plaintiff must plead and prove the following elements: (1) the existence of a secret and private subject matter; (2) a right possessed by plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter by defendant through some method objectionable to the reasonable man.<sup>157</sup> While no Missouri state court has done so,<sup>158</sup> at least one federal court sitting in Missouri has addressed this tort in the newsgathering context.<sup>159</sup> In addition, other jurisdictions have expressly recognized it as an appropriate vehicle to vindicate the privacy interests implicated by surreptitious recording or filming.<sup>160</sup> In *W.C.H. of Waverly v. Meridith Corp.*, the court granted summary judgment against a corporate plaintiff on its claim for intrusion upon seclusion.<sup>161</sup> In that case, the plaintiff, a hospital which operated an alcohol and drug rehabilitation center, alleged that a television station and its reporter had “intruded upon the seclusion of its business” when the reporter gained access to the center by posing as an alcoholic in the course of an undercover investigative report.<sup>162</sup> The court rejected this claim because, under Missouri law, the right of privacy is an individual right that does not extend to corporations.<sup>163</sup>

No such infirmity handicapped the individual plaintiffs in *Wolfson v. Lewis*,<sup>164</sup> in which the court reached the merits of the plaintiffs’ intrusion claim and discussed the contours of that tort as it applies to newsgathering via electronic surveillance. The Wolfsons, the daughter and son-in-law of Leonard Abramson, the chairman and chief executive officer of U.S. Healthcare, sought to enjoin the newsgathering activities of reporters for the television news program *Inside Edition*.<sup>165</sup> The Wolfsons were high ranking officers of U.S. Healthcare.<sup>166</sup> The reporters, Lewis and Wilson, were working on an expose on the high salaries being paid to U.S. Healthcare executives.<sup>167</sup> After being rebuffed by U.S. Healthcare in their efforts to obtain an on-camera interview of Mr. Abramson or any other executive, the reporters “developed and began to implement a plan to engage in surreptitious surveillance of the” plaintiffs.<sup>168</sup> In an effort to obtain an ambush interview of the Wolfsons, Lewis and Wilson stationed themselves outside the Wolfsons’ home for several days and followed them in a van with blackened windows. As a result, the Wolfsons and their small children claimed they were forced to flee to the Abramson family vacation home in Florida in an attempt to seclude themselves and avoid the reporters’ surveillance.<sup>169</sup> Undeterred, the reporters followed the Wolfsons and camped outside the vacation home in a boat anchored in a waterway adjoining the residence. From the boat, Lewis and Wilson used a video camera and a ‘shotgun mike’ to film and record the images and sounds at the Abramson home.<sup>170</sup>

On these facts, the court granted the Wolfsons’ request for a preliminary injunction. While the court’s ruling hinges primarily on the reporters’ “persistent course” of *Galella*-like hounding and harassing newsgathering and other aggravating circumstances,<sup>171</sup> it proceeds in part from Wilson’s and Lewis’s use of electronic surveillance and recording, which the court described as “physical and *sensory* invasions.”<sup>172</sup> After first noting that the tort of intrusion “does not apply to matters which occur in a public place or a place otherwise open to the public eye,”<sup>173</sup> the court nonetheless found it likely that “a jury would find that Mr. Wilson’s and Mr. Lewis’s use of the ‘shotgun mike’ under the circumstances outlined here was an unreasonable intrusion upon the Wolfson’s seclusion.”<sup>174</sup> In so doing, the court rejected the reporters’ argument that their conduct constituted routine newsgathering that was entitled to First Amendment protection. The court reached this conclusion because of the “likelihood that a jury could determine that Mr. Wilson and Mr. Lewis harassed and invaded the Wolfsons’ privacy not, as defendants claim, for the legitimate purpose of gathering and broadcasting the news, but to try and obtain entertaining background for their T.V. expose ....”<sup>175</sup> With this comment, the court perhaps betrayed a prejudice, shared by at least one other court, against tabloid television journalism which it perceived as somehow less noble and thus less deserving of constitutional protection.<sup>176</sup> Given the occasional judicial reluctance to entertain First Amendment privilege defenses from practitioners of this journalistic style, particular care should be exercised when using electronic surveillance in pursuit of a tabloid style story. Still, the *Wolfson* court suggested that it might be solicitous of a First Amendment defense when an intrusion occurs in the course of gathering the news.

The case law is scarce with respect to damages for intrusion because most cases are disposed of on liability grounds. In at least one case, however, the court indicated that when the harm to the plaintiff flows from publication, and not from the filming or recording itself, the element of damage is not satisfied and the intrusion claim fails.<sup>177</sup>

### **3. Fraud or Misrepresentation**

To sustain a claim of fraudulent misrepresentation under Missouri law, a plaintiff must plead and prove the following nine (9) elements: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, or his ignorance of its truth, (5) the speaker's intent that it should be acted on by the person in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the representation being true, (8) his right to rely thereon, and (9) the hearer's consequent and proximately caused injury.<sup>178</sup> Failure to establish any one of these elements is fatal to a fraud claim.<sup>179</sup>

While no Missouri state court has confronted a fraud claim predicated on allegedly wrongful newsgathering, the court in *W.C.H.* addressed and recognized the viability of such a claim.<sup>180</sup> There, the plaintiff hospital asserted a fraud claim based on the reporter's posing as an alcoholic to gain entry into the hospital.<sup>181</sup> While the court did not discuss the fraud claim in detail, it nonetheless rejected the defendant's motion for summary judgment and allowed the plaintiff to proceed to trial on that claim.<sup>182</sup> In their motion, the defendants argued that the plaintiff suffered no damage because "plaintiff did not deviate from its normal routine when it responded to defendant's undercover investigation."<sup>183</sup> The *W.C.H.* court rejected this argument because its resolution turned on genuine issues of material fact.<sup>184</sup> However, such an argument has proved fruitful on an appropriate factual record in defending a fraud claim based on an undercover investigation.<sup>185</sup>

### **4. Intentional Infliction of Emotional Distress**

To state a claim for intentional infliction of emotional distress in Missouri, a plaintiff must plead and prove "extreme and outrageous conduct by a defendant who intentionally or recklessly causes severe emotional distress that results in bodily harm."<sup>186</sup> No Missouri case, however, has explored the applicability of an emotional distress claim to undercover investigative reporting, surreptitious filming or eavesdropping.

In *Medical Laboratory Management Consultants v. ABC*,<sup>187</sup> the plaintiff corporation brought a claim for intentional infliction of emotional distress based on *PrimeTime Live*'s undercover, hidden-camera newsgathering. Citing *Desnick*<sup>188</sup> the court held that "conduct found not to be actionable by a federal court in a like context cannot, as a matter of law, be deemed 'outrageous' here."<sup>189</sup> On that basis, the court therefore granted ABC summary judgment as to the plaintiff's emotional distress claim. It should also be noted that, while not addressed by the court in *Medical Laboratory*, an emotional distress claim likely is not available to a corporation.<sup>190</sup>

### **5. Tortious Interference with Contractual Relations**

To state a claim for tortious interference with contract or business expectancy in Missouri, a plaintiff must plead and prove the following elements: (1) a contract or valid business relationship or business expectancy; (2) defendant's knowledge of the contract or expectancy; (3) intentional interference by the defendant inducing or causing a breach of the contract or expectancy; (4) absence of justification; and (5) damages.<sup>191</sup> Absence of justification is "the absence of any legal right on a defendant's part to take the actions about which plaintiff complains."<sup>192</sup> No Missouri court has examined the application of this tort to surreptitious newsgathering.

A media organization is most likely to be faced with a claim for tortious interference when, in the course of an undercover investigation, it persuades an employee of a suspected corporate wrongdoer to carry a hidden camera or microphone to record surreptitiously the corporation's actions.<sup>193</sup> If the employee has entered into a confidentiality agreement with her employer, the corporation may claim that the media organization tortiously interfered with that agreement by inducing its breach to obtain confidential corporate information.<sup>194</sup>

One approach to defending such a claim is to attack the validity of the underlying contract; *i.e.*, the confidentiality agreement. This defense asserts that a confidentiality agreement that operates to prevent an employee from disclosing corporate crimes or other corporate conduct injurious to the public health, safety and welfare is unenforceable because it violates public policy.<sup>195</sup> Another defense available to a media defendant is that its conduct in speaking with the employee is justified as an exercise of the constitutional right to gather news. Such an argument can be particularly compelling in Missouri, where it is the plaintiff's burden to prove absence of justification.<sup>196</sup>

Even if the plaintiff cannot show that the media defendant's actions are not justified, the plaintiff still can sustain his claim if he can demonstrate that the interference was accomplished by wrongful means.<sup>197</sup> Wrongful means, for purposes of tortious interference under Missouri law, are those means which are independently wrongful, such as "misrepresentation of facts, threats, violence, defamation and restraint of trade."<sup>198</sup> Of these, misrepresentation and defamation are potentially the most troubling for a media defendant seeking to persuade an employee to wear a hidden microphone or camera. Because such wrongful conduct could override the newsgathering justification for the interference, an undercover investigative reporter must exercise acute care in making his or her sales pitch to the potential employee informer to avoid overstating the abuses of his employer or mischaracterizing the nature of the undercover investigation.

Moreover, at least one court has found that an offer to indemnify the party induced to breach the contract constitutes

wrongful means.<sup>199</sup> Such authority may have been of particular concern to CBS's lawyers in the Brown & Williamson matter because CBS had agreed to indemnify the former employee for any claims brought against him by his former employer. Nonetheless, it seems doubtful that an offer to indemnify would constitute wrongful means under Missouri law, in that such an offer would appear unlikely to qualify as an independently wrongful act.

## **6. Unlawful Disclosure of Trade Secrets**

In *Federal Beef Processors, Inc. v. CBS, Inc.*,<sup>200</sup> the plaintiff, a target of a *48 Hours* hidden camera undercover investigation, filed a claim for violation of South Dakota's version of the Uniform Trade Secrets Act. In that case, a Federal Beef employee had worn a hidden camera to work to document abuses by his employer of federal meat packing regulations. The employee provided the tape to CBS. In its trade secrets claim, Federal Beef alleged that publishing videotape of the interior of Federal Beef's meat packing plant would result in public dissemination of Federal's confidential and proprietary meat packing practices and processes. The court preliminarily enjoined the publication of the videotape.<sup>201</sup>

Missouri has adopted the Uniform Trade Secrets Act.<sup>202</sup> Under the Act, a person is entitled to injunctive relief<sup>203</sup> or damages<sup>204</sup> or both for misappropriation of a trade secret. The Act defines "trade secret" as

information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique or process, that

(a) 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

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Act's definition of "misappropriation" is lengthy,<sup>205</sup> suffice it to say for present purposes that on an appropriate record the definition appears to encompass at least facially the acquisition of a trade secret through use of a hidden camera or microphone and subsequent disclosure of that trade secret by anyone who so acquired it.<sup>206</sup> The crux of the statutory violation is use of improper means to acquire the trade secret, or knowledge.<sup>207</sup> "Improper means" is defined to "include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."<sup>208</sup> As such, surreptitious newsgathering activities that constitute such improper means by which a trade secret is misappropriated may be subject to sanctions under this statutory scheme.

## **7. Claims for Pre-Publication Injunctive Relief: Prior Restraints**

In at least two cases, plaintiffs have attempted to enjoin publication of information that allegedly was obtained by reporters in violation of state tort law or court order. This kind of injunctive relief imposes a prior restraint upon speech, the paradigmatic First Amendment violation.<sup>209</sup> A prior restraint faces judicial review "bearing a heavy presumption against its constitutional validity."<sup>210</sup> Notwithstanding this heavy presumption against prior restraints, at least four district courts have imposed prior restraints upon publication because of their concern about the manner in which the information sought to be published was obtained.<sup>211</sup>

In *Federal Beef*, the plaintiff successfully obtained a preliminary injunction preventing the publication of a news story containing information that the plaintiff alleged had been acquired by CBS in violation of state tort law. The Supreme Court<sup>212</sup> stayed the injunction because it was an impermissible prior restraint.<sup>213</sup> The Court held that "[i]f CBS has breached its state law obligation, the First Amendment requires that Federal remedy its harms through a damages proceeding rather than through suppression of protected speech."<sup>214</sup>

In *Proctor & Gamble Co. v. Bankers Trust Co.*,<sup>215</sup> the court restrained McGraw-Hill Companies, Inc., the publisher of *Business Week* magazine, from publishing a story that included information that had been gleaned from documents filed in federal court subject to a protective order. The information was not obtained through surreptitious electronic newsgathering, but rather from a source at the law firm that represented Bankers Trust in the lawsuit. The district court imposed a temporary restraining order precluding *Business Week* from running the story. McGraw-Hill sought an emergency stay of that order from the Sixth Circuit Justice, Justice Stevens. In an unusual development, Justice Stevens denied McGraw-Hill's request to stay the restraining order and instead remanded the case to the lower court for a fact-finding hearing on the matter to determine the manner by which McGraw-Hill obtained the information.<sup>216</sup> After the hearing, the district court held that *Business Week* could not "use the confidential materials that it obtained unlawfully" in violation of the protective order. McGraw-Hill appealed. The Sixth Circuit reversed and vacated the TRO as an impermissible prior restraint.<sup>217</sup>

These cases at once illustrate both the virtual impossibility of ultimately preventing publication of a story that contains allegedly wrongfully obtained information and the possibility of exploiting unsavory media newsgathering conduct to convince a lower court to grant temporary relief imposing such a prior restraint. Nonetheless, the ultimate judicial resolutions in *Federal Beef* and *Proctor & Gamble* provide ample precedent to repel any attempt to restrain publication of a story containing information gathered through surreptitious newsgathering.

## ENDNOTES

1. *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir. 1969) (“[T]he intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for the purpose of liability that should make no difference.”).

2. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). *See also Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”); *Davis v. Schuchat*, 510 F.2d 731 (D. D.C. 1975) (holding that the First Amendment does not immunize reporter from liability for slander committed during newsgathering).

3. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Desnick v. American Broadcasting Co.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (holding First Amendment protection available “regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast.”); *United States v. Sanusi*, 813 F.Supp. 149, 152-56 (E.D. N.Y. 1992) (comprising of an excellent discussion of newsgathering privilege and limits thereon); Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996).

4. *See e.g., Risenhoover v. England*, 936 F.Supp. 392, 403-05 (W.D. Tex. 1996) (finding no First Amendment newsgathering privilege); *Stahl v. State*, 665 P.2d 839 (Okla. 1983) (refusing to invoke First Amendment to limit application of criminal trespass statute to reporter defendant’s newsgathering). *But see, Allen v. Combined Communications Corp.*, 7 MEDIA L. RPTR. 2417, 2418-20 (D. Colo. 1981) (holding the state’s interest in undisturbed possession of property as expressed in state trespass law must be balanced against media’s First Amendment right to gather news); Thomas J. Goger, Annotation, *First Amendment as Immunizing Newsman From Liability For Tortious Conduct While Gathering News*, 28 A.L.R. FED. 904 (1976). *Lee v. Dep’t of Justice*, 401 F.Supp.2d 123 (D. D.C. 2005) (finding qualified privilege for reporters in civil cases).

5. U.S. CONST., amend. IV.

6. *Katz v. United States*, 389 U.S. 347, 353 (1967) (finding FBI agents’ bugging the outside of a public telephone booth without a search warrant had violated the Fourth Amendment).

7. *See United States v. White*, 401 U.S. 745, 747 (1971); *Osborn v. United States*, 385 U.S. 323, 331 (1966); *Benford v. American Broadcasting Cos.*, 502 F.Supp. 1159, 1161-62 (D. Md. 1980).

8. 42 U.S.C. § 1983 makes it unlawful for any person acting “under color of any statute, ordinance, regulation, custom, or usage of any State or Territory,” to deprive another of rights secured by the Constitution and laws of the United States. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 927 (1982). In addition to traditional Fourth Amendment claims based on unlawful search and seizure, § 1983 plaintiffs may also assert that the reporter’s intrusion violated their constitutional right to privacy secured by the Fourteenth Amendment. Such claims, however, have met with minimal success. *See e.g., Parker v. Clarke*, 905 F.Supp. 638, 645 (E.D. Mo. 1995) (“where ‘the Fourth Amendment provides an explicit textual source of constitutional protection against [a particular sort] of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing those claims.” (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989))), *aff’d in part, rev’d in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996).

9. *See Lugar*, 457 U.S. at 931; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *United States v. Price*, 383 U.S. 787, 795 (1966).

10. *Lugar*, 457 U.S. at 929.

11. *Id.* at 937.

12. *Edmonson v. Leesville Concrete Co. Inc.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting) (“Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency” and have engendered “confusion.”).

13. *Lugar*, 457 U.S. at 939.

14. A fourth theory, the public function theory, finds state action when the state delegates to a private party a function “traditionally exclusively reserved to the state.” *Edmonson*, 500 U.S. at 640 (O’Connor, J., dissenting).

15. *Id.* at 620; *Lugar*, 457 U.S. at 939. With regard to *Lugar*’s first prong, the test is most often satisfied by pleading and proof that the private party invoked a state law or rule of conduct to achieve the constitutional deprivation. For example, in *Lugar*, the plaintiff alleged that the defendant invoked a pre-judgment attachment statute to deprive him of his property without due process of law. *Id.* at 940-42. The court noted, however, that private *misuse* of a state statute or other legal procedures will not satisfy the first prong of the analysis. *Id.* at 940. Most state action litigation, however, revolves around *Lugar*’s second prong.

16. The precise contours of the joint participation tests are delineated by *Adickes*, in which the Supreme Court “held that the private party’s joint participation with a state official in a conspiracy to discriminate would constitute...action ‘under color’ of law for purposes of [§ 1983].” *Lugar*, 457 U.S. at 931 (citing *Adickes*, 398 U.S. at 152); *see also Price*, 383 U.S. at 795 (holding that the under color of law requirement is satisfied where it was alleged that private party acted in “willful concert with state officers”).

17. Under the symbiotic relationship theory, state action is present if the state “has so far insinuated itself into a position of interdependence” with a private party that “it must be recognized as a joint participant in the challenged activity.” *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). The symbiotic relationship theory has been limited by the Supreme Court and its validity questioned by lower federal courts. *See, e.g. American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999) (“[P]rivately owned enterprises providing services that the State would necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*.”); *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 20 (1st Cir. 1999) (deferring the determination of the extent to which the *Burton* symbiotic relationship theory “remains good law” since “the parameters of what constitutes state action may change depending on the nature of the right involved.”)

18. Under this theory, private conduct can constitute state action when the “[State] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

19. *Parker*, 905 F.Supp. at 642 (citing *United States v. Price*, 383 U.S. 787, 794 (1966)). *Accord Mershon v. Beasley*, 994 F.2d 449, 451 (8th Cir. 1993) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

20. *Mershon*, 994 F.2d at 451; *White v. Walsh*, 649 F.2d 560, 562 (8th Cir. 1981); *cf. McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 75-6 (8th Cir. 1976) (*Bivens* action).

21. *See e.g. Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991).

22. *Parker v. Clarke*, 905 F.Supp. at 642.

23. *Id.* at 640.

24. *Id.* at 640-41.
25. *Id.*
26. *Id.* at 642.
27. *Id.* Although it was not discussed by the court, it should be noted that the plaintiffs' allegations that the police and media defendants misused the search warrant, would appear to be insufficient as a matter of law to satisfy the first prong of *Lugar*. See n. 15, *supra*.
28. *Parker*, 905 F. Supp. at 642. *Accord*, *Brunette v. Humane Society of Ventura County*, 294 F.3d 1205, 1213 (9th Cir. 2002) ("During the search, the Media's actions were its own; they were not "state actions" directed by or jointly conceived, facilitated or performed by the Humane Society. Because the Media was not a state actor during the search, it cannot be held liable under §1983.") *But cf.* *Wilson v. Layne*, 526 U.S. 603, 614 (1999) ("[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.")
29. *United States v. Jacobson*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)).
30. *United States v. Leffall*, 82 F.3d 343, 347 (10th Cir. 1996) (quoting *Pleasant v. Lovell* 876 F.2d 787, 797 (10th Cir. 1989)).
31. See *Berger v. Cable News Network, Inc.*, 24 MEDIA L.REP. 1757, 1759 (D. Mont. 1996) (finding that "[w]hen a private party, such as CNN is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under *Bivens*).
32. *Lewis v. Jacks*, 486 F.3d 1025, 1029 (8th Cir. 2007); *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 197 n.15 (11th Cir. 2003).
33. *Mullins v. Bookman*, 23 MEDIA L.REP. 2374 (D. Ga. 1995) (holding no § 1983 state action under joint participation test when prison officials allowed media defendants to enter prison and escorted them around the facility but were not "involved in the production, editing or content of the broadcast at issue.") (emphasis added); *Moncrief v. Hanton*, 10 MEDIA L. REP. 1620 (N.D. Ohio 1984) (no state action where newsmen took photos inside plaintiffs' home during the execution of a search warrant); *Jones v. Taibbi*, 508 F.Supp. 1069, 1072-74 n.6, 10 (D. Mass, 1981), *cert. denied*, 454 U.S. 1085 (1981) (noting generally that "[a]ttempts to charge the media with state action have generally met with a cool reception in the courts," and holding that a television news reporter was not a state actor where he did not control police decision to arrest plaintiff and police were not involved in his decision to cover or telecast the story). *Cf.*, *Berger*, 24 Media L.Rep. at 1759 ("acting under color of law" requirement for *Bivens* action not fulfilled where members of news media are present at search in furtherance of their own newsgathering purposes) (citing *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982); *Conradt v. NBC Universal*, 536 F.Supp.2d 380, 390 (S.D. N.Y. 2008) (finding a fair issue existed as to the reasonableness of the police officers' and media's actions in executing a search warrant in unnecessarily dramatic fashion for the purpose of producing footage for a reality TV show).
34. *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) ( § 1983 state action test more stringent when it involves newsgathering and publication, which is "private conduct that itself is the subject of constitutional protection"); *Zerilli v. Evening News Ass'n.*, 628 F.2d 217, 223-24 (D.C. Cir. 1980) (affirming dismissal of Fourth Amendment based *Bivens* action against private newspaper in view of "special factors counseling hesitation," including concern that imposing liability on newspaper "for uncovering and publishing information that it deem[ed] newsworthy" would undermine "the values served by a free and vigilant press").
35. *Dietemann v. Time, Inc.*, 84 F.Supp. 925, 930-31 (C.D. Cal. 1968) (finding state action based on concerted activity).
36. See *Buckey v. County of Los Angeles*, 968 F.2d 791, 793 (9th Cir. 1992) (recognizing the viability of a § 1983 claim against a media defendant who allegedly wrongfully conspired with local police to sensationalize a news story); *McNally*, 532 F.2d at 76 (assuming, without deciding, that *Bivens* action is available against private media defendant who conspired with state officials); *Lewis v. News-Press Gazette Co.*, 782 F.Supp. 1338, 1345 (Mo. App. W.D., 1992) (holding that complaint stated a § 1983 claim when it was alleged that newspaper conspired with local officials); *Scheetz v. Morning Call, Inc.*, 747 F.Supp. 1515, 1519-21. (E.D. Pa. 1990) (finding a § 1983 claim available when newspaper conspires with state official to publish a story); *Phaby v. KSD-KSD-TV, Inc.*, 476 F.Supp. 1051, 1053 (E.D. Mo. 1979) (denying motion to dismiss complaint against private television station when plaintiff alleged that station conspired with local sheriff to terminate plaintiff's employment because of his political activities); *Bergman v. Stein*, 404 F.Supp. 287, 298 (S.D. N.Y. 1975) (recognizing § 1983 claim against a newspaper that allegedly conspired with a state actor).
37. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (2006). After September 11, 2001, terror attacks on the Pentagon and World Trade Center, Congress amended Title III under the USA PATRIOT Act of 2001. Pub. L. No. 107-56 (2001). In 2006, the House of Representatives made permanent most of the major provisions of the 2001 law. Sheryl Gay Stolberg, *Patriot Act Revisions Pass House, Sending Measure to President*, N.Y. TIMES, Mar. 8, 2006, at A20.
38. Electronic Communications Privacy Act of 1986, 18 § U.S.C. §§ 2510-2520 (2006). *Bess v. Bess* 929 F.2d 1332, 1334 (8th Cir. 1991).
39. *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457, 460 (5th Cir. 1994).
40. 18 U.S.C. § 2511(1)(a)-(b) (2006).
41. 18 U.S.C. § 2520(a) (2006). See *Abraham v. County of Greenville, S.C.*, 237 F.3d 386, 389 (4th Cir. 2001); *Angel v. Williams*, 12 F.3d 786, 789 (8th Cir. 1993); *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007) ("Those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment free speech right to disclose that information."). *But cf.* *Bartnicki v. Vopper*, 200 F.3d 109, 129 (3d Cir. 1999) *aff'd*, 532 U.S. 514 (holding media defendants not liable for use of an illegally intercepted tape from an unknown source stating that the Wiretap Acts "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged interception")
42. *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1991) (finding a civil action under Title III for disclosure of intercepted communications); *Dunn v. Blue Ridge Tel. Co.*, 868 F.2d 1578, 1582 (11th Cir. 1989) ("Each interception creates a discrete cause of action under section 2520"), *vacated because the case was settled*, 888 F.2d 731 (11th Cir. 1989); *Bess*, 929 F.2d at 1334 (noting that the use of intercepted contents of the communication represents a violation of section 2511). *But cf.* *Desilets v. Walmart Stores, Inc.*, 171 F.3d 711, 715 (1st Cir. 1999) ("[T]he number of days of violation determines the amount of a liquidated damages award, and not the number of discrete violations on any given day, nor the different types of violations that might occur.").
43. 18 U.S.C. § 2515 (2006). See *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015, 1019 (8th Cir. 1993) ("One of the significant protections Title III gives to private conversations is a sweeping exclusionary rule."). For a discussion of how this section is applied in criminal cases, see *United States v. Lucht*, 18 F.3d 541, 547-48 (8th Cir. 1994).
44. 18 U.S.C. § 2510(1), (10) (2006).
45. Title III was amended in 1986 to exclude cordless phone transmissions from the definition of wire communications. 18 U.S.C. § 2510(1) (1986). See *Tyler v. Berodt*, 877 F.2d 705 (1989) (noting that the emerging view was that cordless phone conversations were not wire communications even

before the 1986 Amendment). This exclusion was eliminated by the 1994 Amendments to Title III. 18 U.S.C. § 2510(1) (1994). The House of Report stated that the “protections of the Electronic Communications Privacy Act of 1986 are extended to cordless phones...” H.R. Rep. 103-827, at 10, 17-18, 30 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3490. *See McKamey v. Roach*, 55 F.3d 1236, 1238-39 (6th Cir. 1995) (explaining statutory change and holding that pre-1994 cordless transmissions are not wire communications and thus cannot be intercepted).

46. 18 U.S.C. § 2511(1)(a) (2006). S.Rep. No. 99-541 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3555, 3562-65. *Shubert v. Metrophone, Inc.*, 898 F.2d 401, 405 (3d Cir. 1990) (noting that Congress intended the 1986 Amendment to cover cellular communications).

47. 18 U.S.C. § 2510(2) (2006). This definition “does not include any electronic communication.” *Id.*

48. *Holman v. Central Arkansas Broadcasting*, 610 F.2d 542, 544-45 (8th Cir. 1979) (affirming summary judgment for defendant radio station when recording was of plaintiff’s outburst in a jail because there was no reasonable expectation of privacy); *Caldarola v. County of Westchester*, 343 F.3d 570, (2d Cir. 2003) (affirming summary judgment for defendant county where even though county violated Fourth Amendment and implicated privacy rights by disseminating videotape of former officer being arrested for receiving disability benefits fraudulently to media, those rights were outweighed by a legitimate government purpose).

49. *United States v. Clark*, 22 F.3d 799, 801 (8th Cir. 1994); *See also, Kee v. City of Rowlett*, 247 F.3d 206, 213-15 (5th Cir. 2001) (outlining factors guiding analysis of a “reasonable expectation of privacy afforded to oral communications in the eavesdropping and wiretap contexts” as “(1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.”)

50. *Holman*, 610 F.2d at 545 n.3 (noting that “[t]he person’s subjective intent...is not necessarily the controlling factor”).

51. 18 U.S.C. §§ 2510(4), 2510(5)(a)(i) (2006).

52. 18 U.S.C. §§ 2510(5)(a)(i) (2006); *Anonymous v. Anonymous*, 558 F.2d 677, 678-79 (2d Cir. 1977) (finding eavesdropping on a conversation from an extension phone in one’s own apartment is not actionable); *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 420 (5th Cir. 1980) (holding that when an employee’s supervisor has particular suspicions about confidential information being disclosed to a business competitor, has warned the employee not to disclose such information, has reason to believe that the employee is continuing to disclose such an information, and knows that a particular phone call is with an agent of the competitor, it is within the ordinary course of business to listen in on an extension phone for at least so long as the call involves the type of information he fears is being disclosed). *But cf. Platt v. Platt*, 951 F.2d 159, 160 (8th Cir. 1992) (reversing dismissal of claim arising from a spouse listening in on a conversation between the other spouse and their child from an extension phone).

53. *Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992) (rejecting the 11th Circuit view “that an extension telephone is exempt equipment under § 2510(5)(a)(i) when a recording device is attached to the extension to record calls for later listening”).

54. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 § 209(1)(A) (amending 18 U.S.C. § 2510(1) by removing stored electronic communications from definition of wire communications. In 2006, the House of Representatives made permanent most of the major provisions of the 2001 law. Sheryl Gay Stolberg, *Patriot Act Revisions Pass House, Sending Measure to President*, N.Y. TIMES, Mar. 8, 2006, at A20.) *See also O’Brien v. O’Brien*, 899 So.2d 1133, 1136 (Fla. App. 2005), *reh’ing denied* (holding wife liable under ECPA for installing computer spyware on her husband’s computer which intercepted communications contemporaneously with transmission, “The federal courts have consistently held that electronic communications, to be intercepted, must be acquired contemporaneously with transmission and that electronic communications are not intercepted within the meaning of the Federal Wiretap Act if they are received from storage.”); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002) (denying liability to defendant airline for accessing plaintiff employee’s password protected website stating, “When Congress passed the USA PATRIOT Act, it was aware of the narrow definition courts had given the term “intercept” with respect to electronic communications, but chose not to change or modify that definition.”); *U.S. v. Steiger*, 318 F.3d 1039, 1047-50 (11th Cir. 2003) (holding that a voluntary informant who “penetrated [a criminal defendant’s] computer by using a ‘Trojan Horse’ virus that enabled him to discover and download files stored on [defendant’s] hard drive” had not intercepted an electronic communication in violation of Title III. The court went on to recognize that “Under the narrow reading of the Wiretap Act we adopt...very few seizures of electronic communications from computers will constitute ‘interceptions.’”).

55. 18 U.S.C. § 2511(2)(d) (2006). *See Deal*, 980 F.2d at 1157 (holding that prior consent makes the interception lawful, but knowledge of an extension in defendant’s home and prior warning that calls may be monitored do not constitute consent).

A similar issue arises when parents tape the conversations of their minor children. At least one plaintiff has claimed that a parent can consent for a minor whose conversation has been recorded. *Platt*, 951 F.2d at 160 (remanding for consideration of the parental consent issue). For more cases dealing with this issue, *see Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994) (ruling that under telephone extension exception parents may record the telephone conversations of their minor children); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991) (holding that Title III does not apply when a minor child sues parent for interceptions made within the family home); *Pollack v. Pollack*, 154 F.3d 601, 611 (6th Cir. 1998) (“As long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child...the guardian may vicariously consent on behalf of the child to the recording.”); *Babb v. Eagleton*, 2007 WL 3308817 at \*5 (N.D. Okla. 2007) (recognizing a form of parental immunity from suit under Title III exists if (1) a minor child is a party to the recorded conversation, (2) it is the minor child, rather than a third party, who has brought suit under Title III, and (3) the conversations were recorded in an effort to “supervise” the minor children.”) *But cf. Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991) (not addressing the parental recording of a minor issue, but emphasizing that “there is no more reason to permit husbands and wives to perpetrate these evils upon each other with impunity than there is to permit them legally to commit any crimes against each other.”)

56. For a discussion of this exception and more information concerning how Title III affects the media *see* REX S. HEINKE, *MEDIA LAW* 204-207 (BNA Books 1994).

57. 18 U.S.C. 2511(2)(d) (2006). As originally enacted, Title III included “injurious” along with criminal and tortious in the limitation to the consent exception. The term was removed, however, by the ECPA in 1986. 18 U.S.C. § 2511(2)(d) (2006). For cases where the media attempted to use section 2511(2)(d) as a defense and had to contend with claims that the broadcast motive was injurious, *see Brown v. American Broadcasting Co.*, 704 F.2d 1296, 1305 (4th Cir. 1983); *Benford v. American Broadcasting Co.*, 502 F.Supp. 1159, 1162-63 (D.Md. 1980); and *Boddie v. American Broadcasting Co.*, 731 F.2d 333, 338 (6th Cir. 1984). *See also United States v. Phillips*, 540 F.2d 319, 324-25 (8th Cir. 1976) (discussion of section 2511(d) before passage of the ECPA when the term “injurious” was removed from this limitation).

For cases holding that “undercover” reporting and recording does not amount to criminal or tortious purposes, *see Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1353-54 (7th Cir. 1995) (holding that entry of reporters into eye clinic while posing as patients was not done for the

purpose of committing a criminal, tortious, or injurious acts, even if resulting broadcast may have been defamatory); *Russell v. American Broadcasting Company, Inc.*, 23 MEDIA L. REP. 2428, 2430-31 (N.D. Ill. 1995) (*PrimeTime Live* employee posed as job seeker and gained employment at a retail grocery store; court held that the recording and eventual broadcast of conversations and video within the store was not done with a criminal or tortious purpose). *But see Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 25 MEDIA L. REP. 1724 (D.Ariz. 1997) (interpreting *Desnick* narrowly and denying defendant's motion to dismiss based on the proposition that surreptitious reporting can be done for both legitimate and tortious purposes); *W.C.H. of Waverly v. Meridith Corp.*, 13 MEDIA L. REP. 1648, 1650 (W.D.M.O. 1986) (denying summary judgment on wiretapping claim because plaintiff had alleged facts and tort claims in its complaint which, if proved, may establish a tortious or injurious purpose); *Sanders v. American Broadcasting Company*, 20 Cal.4th 907, 911 (Cal. 1999) (holding journalist who secretly videotaped conversations with coworkers while posing as an employee of a psychic marketing company liable, stating "where the other elements of the intrusion tort are proven the cause of action is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears.")

58. 18 U.S.C. § 2511(2)(c) (2005). *Thomas v. Pearl*, 998 F.2d 447, 451 (7th Cir. 1993) (holding that: (1) for action to be under color of law under Title III, there must be "some logical and reasonable connection between the government worker's job description and eavesdropping" and (2) college basketball coach at a state university did not satisfy this standard).

59. *United States v. Rich*, 518 F.2d 980, 985 (8th Cir. 1975) (Drug Enforcement Agency's recording of informant's conversation is covered by section 2511(c) when informant consents).

60. *Id.* See also HEINKE, *supra* note 56, at 207.

61. 18 U.S.C. § 2511(2)(a)(i) (2006).

62. *United States v. Harvey*, 540 F.2d 1345, 1350 (8th Cir. 1976) (holding that a telephone company that has reasonable grounds to suspect that a customer is illegally avoiding long-distance charges may monitor the calls and make recordings); *United States v. Ross*, 713 F.2d 389, 392 (8th Cir. 1983) (holding that telephone company employee who checked line for excessive noise and overheard comments about shipments of dynamite falls within § 2511(2)(i)). See also *In the Matter of the Application of the United States for an Order Authorizing the Roving Interception of Oral Communications*, 349 F.3d 1132, 1146 (9th Cir. 2002) (holding that the district court could properly issue an order allowing an operator of an on-board driver assistance system to intercept oral communications within the vehicle).

63. *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Platt v. Platt*, 951 F.2d 159 (8th Cir. 1989); *Bess v. Bess*, 929 F.2d 1332 (8th Cir. 1991).

64. *Kempf*, 868 F.2d at 973; see also *Pritchard v. Pritchard* 732 F.2d 372, 374 (4th Cir. 1984) (holding that spousal wiretapping is covered by Title III since no exception was carved out for this type of electronic surveillance); *Glazner v. Glazner*, 347 F.3d 1212, 1221 (11th Cir. 2003) (overruling former Fifth Circuit decision in *Simpson v. Simpson*, *infra*, finding no implied marital exception to Title III for interspousal wiretapping); *United States v. Wuliger*, 981 F.2d 1497, 1507 (6th Cir. 1992) ("The unlawfulness of interspousal wiretapping has been a settled point of law in this Circuit" since the statute "clearly expresses a blanket prohibition on all electronic surveillance"). *Contra Simpson v. Simpson*, 490 F.2d 803, 810 (Former 5th Cir. 1974) (holding that statute did not create a cause of action in favor of a former wife, whose conversations from marital home were intercepted by former husband using a wiretap); *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2nd Cir. 1977) (ruling that taping of conversation between ex-wife and her son by ex-husband did not give rise to a violation of Title III).

65. 18 U.S.C. § 2520(d) (2006).

66. *Rice v. Rice*, 951 F.2d 942, 944 (8th Cir. 1991).

67. *Reynolds v. Spears*, 93 F.3d 428, 436 (8th Cir. 1996).

68. *Williams v. Poulos*, 11 F.3d 271, 285 (1st Cir. 1993) (finding no defense existed where defendant mistakenly believed that the business extension and consent exceptions applied); *Peavy v. WFAA-TV*, 221 F.3d 158, 178 (5th Cir. 2000) (rejecting an ignorance or mistake of law defense for disclosure of communications illegally intercepted); *Heggy v. Heggy*, 944 F.2d 1537, 1541-42 (10th Cir. 1991) (excluding defendant's offered testimony on why he misunderstood wiretapping law because reliance on mistake of law is not listed among section 2520(d) defenses); *Wuliger*, 981 F.2d at 1507-08 (finding defendant attorney who relied on the Ohio Code of Professional Responsibility in making his decision to use tapes recorded in violation of Title III by client was not entitled to a defense under section 2520(d)).

69. 18 U.S.C. § 2520 (2006).

70. 18 U.S.C. § 2520(c)(2)(A-B) (2006).

71. Before passage of the ECPA, the damages section of Title III provided that a successful plaintiff "shall be entitled to recover" the statutory damages. The ECPA amended this section and substituted "may" for "shall." Since the change, courts almost uniformly have held that the court has discretion in awarding damages. *Reynolds*, 93 F.3d at 433. See also, *Morford v. City of Omaha*, 98 F.3d 398, 401 (8th Cir. 1996) (affirming district court denial of plaintiff's request for statutory damages where police officer was testing a wiretap by tapping into phone lines to ensure adequate sound quality).

72. *Reynolds*, 93 F.3d at 436 (refusing to award damages because plaintiffs suffered no actual damages and defendant was retired and had little or no earning power); *Morford*, 98 F.3d at 400-01 (denying award for statutory damages because there were no actual damages and the violation was for only ninety seconds); *Nalley v. Nalley*, 53 F.3d 649, 653-54 (4th Cir. 1995) (relying on the facts that (1) defendant's violation was *de minimis* as there was no financial loss to plaintiffs and no profit made by defendant, and (2) making the award would serve no purpose under the circumstances); *Shaver v. Shaver*, 799 F.Supp. 576, 580 (E.D. N.C. 1992) (relying on the following factors: taping of conversations on only two days considered *de minimis*, defendant is unemployed and does not own any significant property, and there is no useful purpose in imposing the award).

73. 18 U.S.C. § 2520(b)(2) (2006).

74. *Bess v. Bess*, 929 F.2d 1332, 1335 (8th Cir. 1991) (affirming magistrate judge's refusal to award punitive damages when husband installed a tape recorder to a telephone line in the marital residence because he believed phone messages left for him were being withheld).

75. 18 U.S.C. § 2520(b)(3) (2006).

76. *Morford*, 98 F.3d at 401; see also *Reynolds*, 93 F.3d at 436.

77. *Bess*, 929 F.2d at 1335.

78. *Id.*

79. 18 U.S.C. § 2520(e) (2006). *Bess*, 929 F.2d at 1334 (“The Electronic Communications Privacy Act of 1986 largely recodified section 2520...It enacted a two-year statute of limitations where none previously existed”); *Andes v. Knox*, 905 F.2d 188, 189 (8th Cir. 1990) (“Under Section 2520(e), the cause of action accrues when the claimant has a reasonable opportunity to discover the violation, not when she discovers the true identity of the violator or all of the violators”); *Reynolds v. Spears*, 93 F.3d 428 (8th Cir. 1996) (finding that close relationships of plaintiffs as sister-in-law and niece of others filing suit under Title III provided plaintiffs reasonable opportunity to discover any violation of their rights within two years).

80. See e.g. *Rice v. Rice*, 951 F.2d 942, 943 (8th Cir. 1991); *Andes v. Albano*, 853 S.W.2d 936 (Mo. 1983) (en banc).

81. *Rice*, 951 F.2d at 943 (action filed in federal court for violation of Title III and tortious invasion of privacy); *Newell v. State Farm Fire and Casualty*, 901 S.W.2d 133, 134 (Mo.App. W.D. 1995) (Missouri Court of Appeals case concerning an insured’s suit against insurer for refusal to provide legal defense and involving the underlying facts in *Rice*); *Andes*, 853 S.W.2d at 939 (plaintiff filed suit for invasion of privacy in state court after her Title III action was dismissed as time barred by the United States Court of Appeals for the Eighth Circuit).

82. *In the Matter of Providence Journal Company*, 820 F.2d 1342, 1349-50 (1st Cir. 1986) (holding that district court injunction of publication of unlawfully obtained Federal Bureau of Investigation wiretap information is not supported by Title III); *In re King World Productions, Inc.*, 898 F.2d 56, 59 (“While § 2511 proscribes certain conduct, it in no way provides for a prior restraint of the press in their exercise of first amendment rights even if the press’s conduct clearly violates § 2511.”).

83. This statutory provision was amended by the Cable Communications Act of 1984 and redesignated as § 705(a). However, the provision remains codified at 47 U.S.C. § 605. This situation has caused confusion. As one commenter noted: “[T]he former Section 605 of the Communications Act, now officially Section 705(a) of the Act is now codified at 47 U.S.C. § 605(a).” Lauritz S. Helland, *Section 705(a) in the Modern Communications World: A response to Di Geronimo*, 40 FED. COM. L.J. 115 n.1 (1988). As most courts continue to refer to the provision as section 605, this chapter will follow suit.

84. 47 U.S.C. § 605 (a), (e) (2006).

85. *Helland*, *supra* note 83, at 116 n.9 (“Section 803 of the Omnibus Crime Control and Safe streets Act of 1968 amended Section 605 to delete references to wire communications from all but the first clause...”). Thus, section 605 bars communications personnel from divulging or publishing the “existence, contents, substance, purport, effect, or meaning” of any wire or radio communication. 47 U.S.C. § 605(a) (2006).

86. Patricia M. Worthy, *The Impact of New and Emerging Telecommunications Technologies: A Call to the Rescue of the Attorney-Client Privilege*, 39 How. L.J. 437, 438 n. 5 (1996). See also, HEINKE, *supra* note 56, at 207 (citing *United States v. Fuller*, 202 F.Supp. 356, 356-57 (N.D. Cal. 1962)).

87. *Tyler v. Berodt*, 877 F.2d 705, 707 (8th Cir. 1989) (“The requirement of a privacy expectation also applies to claims under the Communications Act.”); *Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 540 (5th Cir. 1987) (“We conclude that section 605 makes unlawful the interception and divulgement of an “oral” radio communication only if the speaker held a subjective expectation of privacy that was justifiable under the circumstances.”); *United States v. Rose*, 669 F.2d 23, 26-27 (1st Cir. 1982) (holding that use of the words “[e]xcept as authorized by [the wiretap act]” incorporated the Wiretap Act expectation of privacy limitation for oral communications into § 605).

88. For more guidance on this issue, see B. Finberg, Annotation, *What Constitutes an “Interception” of a Telephone or Similar Communication Forbidden by the Federal Communications Act [47 USCS § 605] or Similar State Statutes*, 9 A.L.R. 3d 423 (1966).

89. *Rathburn v. United States*, 355 U.S. 107 (1957); *United States v. McGuire*, 381 F.2d 306, 314 (2d Cir. 1967) (interpreting *Rathburn* broadly to prevent liability under section 605 when one of the parties consents to the interception); *Harris v. United States*, 400 F.2d 264 (5th Cir. 1968) (“Recorded conversations made with consent of one party are admissible under 47 U.S.C. 605.”); *United States v. American Realtor & Standard Sanitary Corp.* 278 F.Supp. 241, 253 (W.D. Pa. 1967) (holding that where one party to a communication consents there can be no interception under 605).

90. *United States v. Davis*, 978 F.2d 415, 420 (8th Cir. 1992).

91. *Id.*

92. *Watkins v. L.M. Berry & Company*, 704 F.2d 577, 579 (11th Cir. 1989).

93. *Id.* at 580.

94. S. Rep. 90-1097, at 2196 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2196.

95. 47 U.S.C. § 605(e) (2006).

96. *Mayfield v. Gonzales*, 2005 WL 1801679 at \*14 (D. Or. 2005).

97. 50 U.S.C. § 1802(a)(1)(B) (2006).

98. James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

99. *Id.*

100. Eric Lichtblau, *Deal is Struck to Overhaul Wiretap Law*, N.Y. TIMES, Jun. 20, 2008, at A1.

101. Robert A. Sedler, *The Media and National Security*, 53 WAYNE L. REV. 1025, 1032 (2007).

102. *Id.* at 1032-33. However as Professor Sedler points out in his article, the media disclosure incited public criticism which in turn became the impetus for not only the administration’s promise to seek more warrants from the FISA court but also legislative change in Congress expanding the authority of the government to seek warrants. *Id.* at 1033.

103. 47 U.S.C. § 605(e)(3)(B),(C) (2006).

104. 47 U.S.C. § 312(a)(4) (authorizing revocation of license “for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter, or any rule regulation of the Commission...”).

105. 47 U.S.C. § 503(b)(2)(A) (providing that broadcast station licensees can be liable for up to \$25,000 for each violation of FCC regulations and a maximum \$250,000 overall).

106. 47 U.S.C. § 502 (imposing a fine of up to \$500 for “each and every day” in violation of the regulations).

107. *Boddie v. American Broadcasting Cos., Inc.*, 731 F.2d 333, 339 (6th Cir. 1984) (affirming district court’s dismissal of plaintiff’s claim under FCC regulations prohibiting eavesdropping, because the “primary jurisdiction for the enforcement of the regulations was vested in the Commission”).

108. 47 C.F.R. § 2.701(a). The devices covered are those that are required to be licensed by section 301 of the Communications Act. *Id.* For a case interpreting the requirement that the conversation be “private” for 2.701(a) to apply, see *Brooks v. American Broadcasting Cos., Inc.*, 737 F.Supp. 431, 437 (N.D. Ohio 1990) (holding that a conversation that took place on a public street in the open could not be private).

109. 47 C.F.R. § 73.1206 (1970). This regulation essentially states strict-liability, as a violation, “occurs when the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission’s rules...[and] does not include a determination of purpose or intent.” *Vazquez-Santos v. El Mundo Broadcasting Corp.*, 283 F.Supp.2d 561, 568 (D. P.R. 2003).

110. *Id.* The regulation states that the awareness “is presumed to exist only when the other party to the call is associated with the station (such as [an] employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.” *Id.* In his work on media law, Rex Heinke notes that “this restriction is easily evaded by showing verbatim transcripts from the tape on screen while they are read by a news person.” HEINKE, *supra* note 56, at 208.

111. *Phillips v. American Motorist Ins., Co.*, 996 S.W. 2d 584, 588 n.4 (Mo.App. W.D. 1999); *see also* James R. Wyrsh & Anthony P. Nugent, Jr., *Missouri’s New Wiretap Law*, 48 J.MO. BAR 21 (1992).

112. MO. REV. STAT. §§ 542.400-542.424 (2007).

113. MO. REV. STAT. § 542.404(1) (2007) (authorizing orders if there is probable cause that interception may provide evidence of the felonies of distribution of a controlled substance, felony murder, arson, kidnapping, or a terrorist threat).

114. MO. REV. STAT. § 542.400(8) (2007). *See State v. King*, 873 S.W.2d 905, 908 (Mo.App. S.D. 1994) (stating that “an oral communication is defined as ‘any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.’”).

115. MO. REV. STAT. § 542.400(6) (2007). Several federal circuits have come to the same conclusion, even though there is no mention of spousal wiretapping in the statute. *See supra* note 64.

116. MO. REV. STAT. § 542.418(2) (2007).

117. MO. REV. STAT. § 542.418(2)(2)(b) (2007).

118. *Bess v. Bess*, 929 F.2d 1332, 1335 (8th Cir. 1991).

119. MO. REV. STAT. § 542.418(2)(2) (2007).

120. Wyrsh & Nugent, *supra* note 104, at 21 (citing JAMES CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (1977)).

121. 18 U.S.C. § 2511(2)(d) (2006). Mo. Rev. Stat. § 542.402(2)(3) (2007). Note that the exception for those acting under law in Missouri applies to both oral and wire communications. Mo. Rev. Stat. § 542.402(2)(2). *See e.g. State v. Barrett*, 41 S.W.3d 561, 564-65 (Mo.App. S.D. 2001) (finding that consent by a minor effective to lawfully record a wire communication).

122. Recall that interception of oral communications does not give rise to civil liability under the Missouri Act. For more information on this issue and the Missouri Act generally, see Wyrsh & Nugent, *supra* note 111.

123. *State v. King*, 873 S.W. 2d 905, 907 (Mo.App. S.D. 1994).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 909.

128. *See supra* note 45.

129. *King*, 873 S.W.2d at 909.

130. *Id.* *See also supra* note 45. The majority of federal and state cases hold that cordless telephone users have no reasonable expectation of privacy because such conversations can be easily picked up on radios, other cordless phones, or widely available commercial scanners. *See Price v. Turner*, 260 F.3d 1144, 1148 (9th Cir. 2001) (holding that cordless phones are readily susceptible to interception and thus transmissions are not protected by the Wiretap Act); *McKamey v. Roach*, 55 F.3d 1236, 1239-40 (6th Cir. 1995) (scanner used to intercept cordless telephone conversation); *United States v. Smith*, 978 F.2d 171, 180-81 (5th Cir. 1992) (radio scanner to listen to cordless telephone conversation); *Tyler v. Berodt*, 877 F.2d 705, 706 (8th Cir. 1989) (cordless telephone used to listen to another cordless telephone conversation); *United States v. Carr*, 805 F. Supp 1266, 1271 (E.D. N.C. 1992) (radio scanner used to listen to cordless telephone conversations); *Edwards v. Bardwell*, 632 F. Supp. 584, 589 (M. D. La. 1986) (radio scanner used to listen to car telephone conversation); *King*, 873 S.W.2d 905, 909 (Mo. App. 1994) (radio scanner used to listen to cordless telephone conversations); *State v. Delaurier*, 488 A.2d 688, 694 (R. I. 1985) (standard AM radio used to listen to cordless telephone conversations); *State v. Howard*, 679 P.2d 197, 206 (Kan. 1984) (AM/FM radio used to listen to cordless telephone conversations).

131. *Lee v. Lee*, 967 S.W.2d 82 (Mo.App. W.D. 1998).

132. *Id.* at 84.

133. *Id.*

134. *Id.* at 85. *See also* MO. REV. STAT. § 542.400(12) (defining wire communication made *in whole or in part* through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection) (emphasis added).

135. *Lee*. 967 S.W.2d at 85. *See also* MO. REV. STAT. § 542.418 (limiting disclosure of wire communications to civil actions brought under the Missouri Act); MO. REV. STAT. 542.420 (“Whenever any wire communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court...if the disclosure of that information would be in violation of the [Missouri Act]).

136. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

137. For a discussion of the elements of and issues common to all privacy claims, Mark Sableman, *Journalists’ Right of Privacy Primer* in MISSOURI BAR MEDIA LAW HANDBOOK ch. 3 (1997). In sharp contrast to the tort of intrusion, the other privacy torts of public disclosure of private facts, false light, and misappropriation of name or likeness each turn, in varying degrees, on the element of publication. *See* Restatement (Second) of Torts, § 652B, comment b; *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 718 (4th Cir. 1991), *cert. denied*, 501 U.S. 1212 (1991) (intrusion requires some affirmative act aside from publication); *Harris v. Easton Publishing*, 483 A.2d 1377, 1383-84 (Pa. Super. Ct. 1984) (intrusion claim does not depend on publication of private matter); William E. Lee, *Privacy Intrusions While Gathering News: An Accommodation of Competing Interests*, 64 IOWA L. REV. 1243, 1256 (1979) (“Intrusion addresses not the information that is obtained but the *manner* in which it is obtained, and it is clear that publication is not necessary to maintain an intrusion action.”) (emphasis in original). Accordingly, these other privacy torts will not be addressed here where the focus is not on tort liability that flows from publication, but rather on liability that flows from the newsgathering itself.

138. *Food Lion, Inc. v. Capital Cities/ ABC, Inc.*, 887 F.Supp. 811, 813-16 (M.D.N.C. 1995).

139. Food Lion also alleged violations of federal wiretapping laws, the Copyright Act and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* (2006). The trial court dismissed all of these claims. *Food Lion*, 887 F.Supp. at 824. *See also World of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118, 124 (5th Cir. 1996) (affirming dismissal of plaintiff’s RICO claims based on ABC’s undercover investigation).

140. N.C. GEN. STAT. § 75-1.1 (2007). Missouri's analog to North Carolina's unfair and deceptive trade practices statute is set forth at MO. REV. STAT. § 407.010 *et seq.* (2006). The private right action available under Missouri's statute, in contradiction to the North Carolina act, is available only to consumers, not to business enterprises. MO. REV. STAT. § 407.025(1) (only persons "who purchase[] or lease[] goods or services primarily for personal, family or household purposes" have standing to invoke the statute's civil remedies).
141. See *Cohen*, 501 U.S. at 671 (noting that plaintiff was not "attempting to use a promissory estoppel claim to avoid the strict requirements for establishing a libel or defamation claim"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (when public figures seek damages for intentional infliction of emotional distress for a satirical publication, they must establish falsity of publication and actual malice); *Food Lion*, 887 F. Supp. at 823-34 (finding that since lawsuit did not allege falsity of publication and actual malice, plaintiff was able to recover only non-reputational or non-publication damages); *Baugh v. CBS, Inc.*, 828 F.Supp. 745, 756 n.5 (N.D. Cal. 1993) (plaintiffs cannot circumvent constitutional free speech protections by recasting privacy claims as other common law torts); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273-74 (7th Cir. 1983).
142. *Hansen v. Gary Naugle Const. Co.*, 801 S.W.2d 71, 74 (Mo. 1990) (en banc).
143. *Boling Concrete Const. Co., Inc. v. Townsend*, 686 S.W.2d 842, 843 (Mo.App. E.D. 1985); see also *Reeves v. Fox Television Network*, 983 F.Supp. 703 (N.D. Ohio 1997) (finding that plaintiff's failure to ask film crew to leave constituted consent without duress, notwithstanding police intent to arrest plaintiff).
144. See e.g., *Brunette v. Humane Soc'y*, 40 Fed. Appx. 594, 596-97 (9th Cir. 2002); *Food Lion v. Capital Cities/ABC Inc.*, 887 F.Supp. 811, 820 (M.D. N.C. 1995) (applying North Carolina law); *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 405 (Minn. Ct. App. 1995); *Baugh v. CBS, Inc.*, 828 F.Supp. 745 (N.D. Cal. 1993) (applying California law); *Miller v. National Broadcasting Co.*, 187 Cal.App.3d 1463, 1480-81, 232 Cal.Rptr. 668 (Cal. Ct. App. 1986); *Anderson v. WROC-TV*, 109 Misc.2d 904, 441 N.Y.S.2d 220, 223 (N.Y. App. Div. 1981) (applying New York law); *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 840-42, 3 Kan.App.2d 461 (Kan. Ct. App. 1979); but cf. *Marich v. MGM/UA Telecommunications, Inc.*, 113 Cal. App. 4th 415, 424 (Cal. Ct. App. 2003) (finding that mistake of fact could be an affirmative defense to a privacy action). For a comprehensive discussion of trespass as it applies to newsgathering generally, see Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890 (1990); Kent R. Middleton, *Journalists, Trespass and Officials: Closing the Door on Florida Publishing Co. v. Fletcher*, 16 PEPP. L. REV. 259 (1989); David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM.L.REV. 1298 (1984); see also, Annotation, Jeffrey F. Ghent, *Uninvited Entry Into Another's Living Quarters As Invasion of Privacy*, 56 ALR3d 434 (1974).
145. *Desnick v. American Broadcasting Co.*, 44 F.3d 1345 (7th Cir. 1995).
146. *Id.* at 1348.
147. *Id.* at 1352; see also *Baugh v. CBS, Inc.*, 828 F.Supp. 745, 757 (N.D. Cal. 1993) (finding that consent, even when fraudulently induced, bars trespass and intrusion claim, although the alleged misrepresentations may support a fraud claim). But cf. *Turnbull v. American Broadcasting Co.*, 2004 U.S. Dist. Lexis 24351, 2004 WL 2924590 (C.D. Cal. Mar. 7, 2004) (finding that scope of consent in employment agreement could limit privilege to enter property).
148. *Desnick*, 44 F.3d at 1352.
149. *Id.* at 1353. See *infra*, § 18.F.6.
150. *Desnick*, 44 F.3d at 1352-53. In addition, the court suggested that it might be solicitous of an argument that the tort of trespass is inapposite in the newsgathering context because the tort was not designed as a vehicle to mask wrongdoing.
151. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F.Supp. 1217, 1224 (M.D. N.C. 1996). See also, *Le Mistral v. Columbia Broadcasting Sys.*, 61 A.D.2d 491, 493-94, 402 N.Y.S.2d 815 (1st Dept. 1978) (First Amendment no bar to trespass action where camera crew entered plaintiff's restaurant and filmed interior after being directed to leave).
152. *Food Lion*, 951 F.Supp. at 1223.
153. *Id.* at 1234; see also, *Morton v. Crider*, 126 S.W.3d 803, 806 (Mo.App. S.D. 2004) ("Entering land with consent or license and exceeding the scope of that consent or license constitutes a trespass.").
154. *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 97 (N.Y. Ct. App. 1970); RESTATEMENT (SECOND) OF TORTS § 162 (1965).
155. *Wheeler v. Community Federal Sav. & Loan*, 702 S.W.2d 83, 88 (Mo. Ct. App. 1985) (affirming award of punitive damages for trespass claim).
156. *Sofka v. Thal*, 622 S.W.2d 502, 510 (Mo. 1983).
157. *St. Anthony's Med. Ctr. v. H.S.H.*, 974 S.W.2d 606, 609-10 (Mo.App. E.D. 1998) (elements of claim); *Brown v. Mullarkey*, 632 S.W.2d 507, 509 (Mo.App. E.D. 1982); *Engman v. Southwestern Bell Tell. Co.*, 591 S.W.2d 78, 81 (Mo.App. W.D. 1979); *Corcoran v. Southwestern Bell Tel. Co.*, 572 S.W.2d 212, 214 (Mo.App. W.D. 1978); RESTATEMENT (SECOND) OF TORTS § 652B (1965).
158. *Barber v. Time*, 159 S.W.2d 291 (Mo. 1942). Upon closer inspection, *Barber* is more appropriately considered a disclosure of private facts case. Nonetheless, the court's decision that the plaintiff had "made a jury case" on her claim for invasion of privacy was animated in part by evidence that the reporter had taken plaintiff's "picture surreptitiously while she was voicing her protests against any publicity" and the fact that her picture was taken while she lay in the hospital bed, which the court considered to be a private place. *Id.* at 295. Consequently, *Barber* does address in some small measure the tort of intrusion.
159. *W.C.H. of Waverly v. Meridith Corp.*, 13 MEDIA L.REP. 1648 (W.D. Mo. 1986).
160. See e.g., *McCall v. Courier-Journal*, 6 MEDIA L.REP. 1112 (Ky. Ct. App. 1980); *Cassidy v. American Broadcasting Co.*, 377 N.E.2d 126 (Ill. Ct. App. 1978). See generally, Edward L. Raymond, Annotation, *Intrusion By Newsgathering Entity as Invasion of Right of Privacy*, 69 A.L.R.4th 1059 (1989); Phillip E. Hassman, Annotation, *Taking Unauthorized Photographs as Invasion of Privacy*, 86 A.L.R.3d 374 (1978); J.D. Emerich, Annotation, *Investigations and Surveillance, Shadowing and Trailing as Invasion of Right of Privacy*, 13 A.L.R.3d 1025 (1967).
161. *W.C.H. of Waverly*, 13 MEDIA L.REP. at 1650.
162. *Id.*
163. *Id.* See also, *Medical Laboratory Management Consultants v. American Broadcasting Co.*, 306 F.3d 806, 814 (9th Cir. 2002) (applying Arizona law and affirming the dismissal of a claim based on a hidden camera investigation because a corporation has no right of privacy) (citing RESTATEMENT (SECOND) OF TORTS, § 652 (1965)); *Southern Air Transport, Inc. v. American Broadcast Co.*, 670 F.Supp. 38, 42 (D. D.C. 1987) (stating that a corporation has no right of privacy when applying New Jersey law).
164. *Wolfson v. Lewis*, 924 F.Supp. 1413 (E.D. Pa. 1996).

165. *Id.* at 1415.
166. *Id.*
167. *Id.*
168. *Id.* at 1423.
169. *Id.* at 1427.
170. *Id.* at 1428.
171. Shortly before the *Inside Edition* surveillance began Mr. Abramson received threats against himself and his family. *Id.* at 1422-23. Moreover, Mrs. Wolfson was pregnant, a fact which U.S. Healthcare personnel, in their pleas that the surveillance be stopped, had communicated to the reporters. *Id.* at 1427
172. *Id.* at 1413 (emphasis added).
173. *Id.* at 1419. See also RESTATEMENT (SECOND) OF TORTS § 652B, comment c; *Mojica Escobar v. Roca*, 926 F.Supp. 30, 35 (D. P.R. 1996) (finding a surreptitious photograph taken from public road not an intrusion); *Russell v. ABC, Inc.*, 23 MED.L.RPTR. 2428 (N.D. Ill. 1995) (recording of conversation between plaintiff and co-employee at plaintiff's place of business not intrusion into a private place); *Marks v. King Broadcasting*, 96 Wash.2d 473, 635 P.2d 1081 (Wash. 1981) (taking unauthorized photograph of object that could be seen from public vantage point did not constitute intrusion); *Cassidy v. ABC*, 377 N.E.2d 126 (Ill. Ct. App. 1978) (rejecting intrusion claim because photograph taken of subject while at public business). But see, *Sanders v. American Broadcasting Companies*, 20 Cal. 4th 907, 923 (Cal. 1999) (finding that the expectation of privacy in the workplace depends on the identity of the intruder and the means of intrusion); *Huskey v. NBC*, 632 F.Supp. 1282, 1287-88 (N.D. Ill. 1986) (visibility to some people does not strip person of right to remain secluded from others); *Stessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685 (Iowa 1987) (reversing dismissal of plaintiff's invasion of privacy claim and remanding, because woman eating in a private dining room of a public restaurant, may have been in a private place for intrusion purposes); Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. LAW REV. 989 (1995) (arguing that, with today's technology and journalistic methods, tort of "public intrusion" should be available under certain circumstances).
174. *Wolfson*, 924 F.Supp. at 1434.
175. *Id.* at 1432.
176. *Id.* See also, *Ayeni v. Mottola*, 35 F.3d 680, 687 92d Cir. 1994) (although not addressing First Amendment privilege directly, criticizing *Street Stories* piece for turning a "private home [into] a soundstage for law enforcement theatricals" in the course of chronicling a Secret service criminal investigation). But see, *Veilleux v. NBC*, 206 F.3d 92, 127 (1st Cir. 2000) (finding that the First Amendment is concerned with speech itself, not the tone or tastefulness of journalism that disseminates it); *Desnick v. American Broadcasting Co.*, 44 F.3d 1335, 1355 (7th Cir. 1995) ("Today's 'tabloid' style investigative television reportage...is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation.") (citations omitted).
177. *Russell v. American Broadcasting Company, Inc.*, 23 MEDIA L. REP. 2428, 2430-31 (N.D. Ill. 1995).
178. *Sofka v. Thal*, 662 S.W.2d 502, 506 (Mo. 1983); *Dorsch v. Family Med., Inc.*, 159 S.W.3d 424, 430-31 (Mo.App. W.D. 2005) (requiring the nine elements of a fraud claim to be strictly proven as pleaded).
179. *Trimble v. Pracna*, 167 S.W.3d 706, 712 (Mo. 2005 ) (en banc).
180. *W.C.H. of Waverly v. Meridith Corp.*, 13 MEDIA L.REP. 1648 (W.D. Mo. 1986). See also, *Medical Laboratory Management Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182, 1202-03 (D. Ariz. 1998), judgment affirmed by *Medical Laboratory Management Consultants v. ABC*, 306 F.3d 806 (9th Cir. 2002), (disagreeing with *Desnick* and finding that fraudulently induced consent is ineffective); *New Jersey v. Cantor*, 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987) (upholding criminal conviction for impersonating public official of reporter who posed as someone "from the morgue"). But cf. *Desnick*, 44 F.3d at 1354-55 (rejecting plaintiffs' promissory fraud claim based on the *Prime Time Live* reporters' promises "that the broadcast segment would be fair and balanced and that [they] would not use 'ambush interviews' or undercover surveillance tactics" in producing the story. In *Desnick*, the plaintiffs did not bring a fraud claim based on the reporter's alleged misrepresentation of posing as patients to gain access to the eye clinic; instead, those allegations formed the basis of plaintiffs' trespass claim, which the court rejected.); *Hornberger v. ABC, Inc.*, 799 A.2d 566, 597 (N.J. Super. Ct. 2002) (distinguishing standard between civil and criminal fraud cases).
181. *W.C.H. of Waverly*, 13 Media L.Rep. at 1649.
182. *Id.* at 1649-50.
183. *Id.* at 1649.
184. *Id.* at 1649-50.
185. *Food Lion Inc., v. Capital Cities/ABC, Inc.*, 946 F.Supp. 420 (M.D. N.C. 1996) (holding that Food Lion could not recover lost profits, lost sales and other losses related to *Prime Time Live*'s publication of its news story pursuant to fraud claim because plaintiff's conduct which formed the subject of the expose was an intervening cause).
186. *Gibson v. Brewer*, 952 S.W.2d 239, 249 (Mo. 1997) (en banc) (citing *K.G. v. R.T.R.*, 918 S.W.2d 795, 799 (Mo. 1996) (en banc)).
187. *Medical Laboratory Management Consultants v. ABC*, 931 F.Supp. 1487 (D. Ariz. 1996).
188. See *supra*, note 141.
189. *Medical Lab. Mgmt. Consultants*, 931 F.Supp. at 1494.
190. As discussed above, a corporation has no right to privacy. See *supra*, note 163 and accompanying text. In this context, a court has stated that "[a] corporation cannot be offended." *Southern Air Transport, Inc.*, 670 F.Supp. 38, 42 (D. D.C. 1987). If a corporation has no right to privacy and is incapable of being offended, it is difficult to imagine how a corporation ever could satisfy the requisite element of an emotional distress claim that it has suffered medically diagnosable, severe emotional distress.
191. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc) (elements of a claim); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. 1993) (en banc); *Hensen v. Truman Med. Ctr.*, 62 S.W.3d 549, 552-53 (Mo.App. W.D. 2001); *Central Bank of Lake of the Ozarks v. Shackelford*, 896 S.W.2d 948, 954 (Mo.App. S.D. 1995).
192. *Howard v. Youngman*, 81 S.W.3d 101, 115 (Mo.App. E.D. 2002) (citing *SSM Health Care, Inc. v. Deen*, 890 S.W.2d 343, 346 (Mo.App. E.D. 1994)).

193. See generally, Sandra S. Baron, et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027 (1996). Courts generally have not been solicitous of plaintiffs' attempts to claim the publication of a news story interfered with their contractual or customer relations. See e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273-74 (7th Cir. 1983). But see, *Buller v. Pulitzer Pub. Co.*, 684 S.W.2d 473, 479-80 (Mo.App. E.D. 1984) (holding that defamation plaintiffs also stated a claim for tortious interference with customer relations based on a news story that allegedly caused reputational harm).

194. Although not involving surreptitious electronic surveillance issues, a potential tortious interference claim by Brown & Williamson Tobacco Corporation convinced CBS, Inc. that it should not air a *60 Minutes* story featuring an interview with former corporate executive of the tobacco maker who had allegedly spoken to CBS reporters in violation of his confidentiality agreement with his former employer. See, Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069, 1069-70 (1996).

195. See Baron, *supra* note 193 at 1031-37; *First National Ins. Co. of America v. Clark*, 899 S.W.2d 520 (Mo. 1995) (en banc) (finding contractual provisions that are contrary to public policy of Missouri as expressed by legislature are unenforceable).

196. *Capobianco v. Pulitzer Pub. Co.*, 812 S.W.2d 852, 860 (Mo.App. E.D. 1991) (holding that defendants had a right to print story to meet their legitimate business interest of publishing the news and therefore cannot be held liable for alleged intentional interference with a business expectancy).

197. *Community Title Co. v. Roosevelt Federal Sav. and Loan Ass'n*, 796 S.W.2d 369, 372 (Mo. 1990) (en banc) ("It is not justification to knowingly procure the breach of a contract where the defendant acts with an improper purpose and seeks not only to further his own interests, but in doing so employs improper means.")

198. *SSM Healthcare, Inc. v. Deen*, 890 S.W.2d 343, 346 (Mo.App. E.D. 1994).

199. *Edward Vantine Studios, Inc. v. Fraternal Composite Service, Inc.*, 373 N.W.2d 512, 515 (Iowa Ct. App. 1985) (finding tortious interference when defendant photographer induced fraternity and sorority students to breach contract with competing photographer by offering to indemnify them for any claims brought by competing photographer). But see, *Hursey Porter & Associates v. Bounds*, No. 93C-01-091, 1994 WL 762670 at \*14 (Del. Super. Ct., Dec. 2, 1994) (holding that an indemnification agreement is not improper when it was a necessary means to protect defendant's competitive interest).

200. *Federal Beef Processors, Inc. v. CBS, Inc.*, 858 F.Supp. 125 (D. S.D. 1994). This case was filed in state court and later removed to federal court after the state court granted the plaintiff's motion to preliminarily enjoin the publication. See also, *Medical Laboratory Management Consultants v. ABC*, 25 MEDIA L.REP. 1724 (D. Ariz. 1997) (Plaintiffs brought a claim for theft of trade secrets after *Prime Time Live* employees secretly recorded conversations with the operator of a medical laboratory and gained access to plaintiffs' facility by claiming to be individuals interested in medical testing facilities).

201. The United States Supreme Court ultimately stayed the injunction as an impermissible prior restraint. For a discussion of the propriety of this injunctive relief, see *infra* § 18.F.7.

202. MO. REV. STAT. §§ 417.450 *et seq.* (2006).

203. MO. REV. STAT. § 417.455. A plaintiff's ability to obtain injunctive relief enjoining publication of a story containing allegedly wrongfully obtained information is discussed *infra* § 18.F.7.

204. The Act allows for both actual and punitive damages. See, MO. REV. STAT. § 417.457.

205. See, MO. REV. STAT. § 417.453(2).

206. The Act would also impose liability upon anyone who discloses a trade secret who knows or has reason to know that it was acquired by improper means. See, MO. REV. STAT. § 417.453(2)(b)c.ii.

207. See, MO. REV. STAT. § 417.453(2)(a). The Act provides that whether a person has such knowledge is determined under a reasonable person standard, such that if a person has reason to know, then the statutory requirement is satisfied.

208. MO. REV. STAT. § 417.453(1).

209. *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("In determining the extent of the constitutional protection [of the First Amendment], it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."). See also, *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971).

210. *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

211. See *In re King World Productions*, 898 F.2d 56 (6th Cir. 1990) (reversing district court); *In the matter of Providence Journal Company*, 820 F.2d 1342 (1st Cir. 1986) (reversing district court). *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F.Supp 186 (S.D. Ohio 1995); *Federal Beef Processors, Inc. v. CBS, Inc.*, 858 F.Supp 125 (D. S.D. 1994).

212. CBS sought an emergency stay from Justice Blackmun, sitting as Circuit Justice for the Eighth Circuit which encompasses the South Dakota state court that granted injunctive relief. *CBS, Inc. v. Davis*, 510 U.S. 1315 (1984).

213. *Id.* at 1317-18.

214. *Id.* at 1318.

215. *Procter & Gamble v. Bankers Trust Co.*, 900 F.Supp. 186 (S.D. Ohio 1995).

216. *McGraw-Hill Cos. v. Procter & Gamble Co.*, 515 U.S. 1309, 1311 (1995) ("the manner in which [McGraw-Hill] came into possession of the information it seeks to publish may have a bearing on its right to do so."). It should be noted that with this statement Justice Stevens suggested that the validity of this proposition was implicitly acknowledged by McGraw-Hill's arguments; he did not state it as principle of law. See *id.* Nonetheless, by not summarily rejecting the proposition as constitutionally untenable, his opinion suggests that it may be countenanced by the United States Supreme Court. See also, *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (declining to resolve the First Amendment issue of whether, "in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well"); *Scheetz v. Morning Call, Inc.*, 747 F.Supp. 1515, 1522-25 (E.D. Pa. 1990) (no absolute First Amendment right to publish unlawfully obtained information).

218. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996).