SECTION: ARTICLE.

TITLE: New Whines in Old Bottles: Taking Newsgathering Torts Off the Food Lion Shelf

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TEXT:

I. INTRODUCTION

Undercover reporting and aggressive elbowing for position to be where the news is happening have been accepted components of journalism for decades. They have produced memorable news accounts and sometimes prompted legislation to remedy abusive activities by the subjects of the news reports. Upon Sinclair and Nellie Bly have become icons in the history of undercover or anonymous newsgathering. Sinclair posed as a food worker in Chicago meatpacking plants and described the gruesome details of the practices he witnessed in his 1906 novel, The Jungle. The book focused public attention on unsavory and unsafe practices and prompted President Theodore Roosevelt to order an investigation that led to federal legislation. n1 Bly posed as an emotionally troubled woman in order to gain entry to Blackwell's Island Insane Asylum. Her story exposing mistreatment of patients ultimately resulted in additional funding for the agency that supervised the asylum as well as improved sanitary conditions, more palatable food, and the discharge of abusive nurses. n2 In separate investigations, Bly posed as a "wayward female" to investigate the Magdalen Home for Unfortunate Women and as the wife of a patent medicine manufacturer to trap a lobbyist into taking her money and giving it to corrupt New York state legislators. n3


n3 These and other examples were recited in the Feb. 20, 1997, affidavit of Steve Weinberg, former Executive Director of Investigative Reporters and Editors and Associate Professor of Journalism at the University of Missouri School of Journalism in Columbia, Missouri, submitted in connection with Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 6:92CV00592, U.S. District Court for the Middle District of North Carolina, Winston-Salem Division. Food Lion is pending on appeal in the U.S. Court of Appeals for the Fourth Circuit, Nos. 97-2492 and 97-2564. A panel of the Fourth Circuit heard oral argument on the case on June 4, 1998. See also examples listed at note 19, infra.

Legal causes of action to prevent or provide damages resulting from trespass also have a lengthy history in American law. They existed at common law before many states even were states. They are accepted and usually noncontroversial parts of the general law.

These two long-standing elements of American life coexisted for decades with little friction or even interaction. Neither courts nor parties thought one had much to do with the other. Trespass dealt with physical harm done while unlawfully on land, and newsgathering seldom involved physical harm. Courts would summarily dismiss trespass claims directed against newsgathering or, more clearly, against the results of publication or broadcast. n4
Some of that is changing, particularly in the wake of the now-notorious Food Lion case. A too-narrow focus on the elements of trespass, rather than on the purposes of the tort, can produce a final result that leaves plaintiffs with a recovery netting less than the costs of the lawsuit while draining the resources of the news organization. This may be acceptable to wealthy or cynical plaintiffs more interested in a public relations victory than actual damages, but it distorts the legal process, diminishes First Amendment rights, and produces no social benefit.


II. THE EMERGING CONFLICT

In Copeland v. Hubbard Broadcasting, Inc., n6 the Minnesota Court of Appeals found that the undisclosed use of a hidden camera by an undercover journalist whose presence in a home was known to and permitted by the homeowners created a factual issue on the element of consent and therefore permitted plaintiffs' trespass claim to proceed to trial. n7 Copeland I provided some support for a similar conclusion in Food Lion.


n7 The newsroom employee, who was also a university student considering a career as a veterinary technician, asked a veterinarian if she could accompany him on his house calls. The focus of the broadcast was the practices of the veterinarian. The Copelands invited the veterinarian and his "assistant" into their home to examine their pet, where the newsroom employee recorded the veterinarian's activities with a hidden camera. The journalist did not go anywhere in the Copelands' home without their permission, and did not damage anything in the home. The Copelands were not shown in the broadcast, but the broadcast included two brief scenes recorded in their house.

Both Copeland and Food Lion produced only nominal verdicts of $1 on the trespass claims. n8 What apparently motivated the plaintiffs in both cases was not significant damage from the technical trespass, but rather, outrage or umbrage at the broadcast reports that followed the undercover reporting. Because the law protected the contents of the broadcasts, however, the plaintiffs had to pour their complaints about the news media into a different legal vessel (new whines for an old bottle and since Food Lion has given these claims no toity, perhaps we should call them Food Whinin' torts), and the courts unfortunately made trespass available for that purpose.


Are Copeland and Food Lion aberrations or harbingers of new tort liability? It is too early for a definitive answer. At least three judicial approaches are possible: (1) courts could follow Copeland and Food Lion and apply trespass and other torts in a strict fashion to newsgathering activities; (2) courts could create tests, exceptions, and privileges that balance the interests of the public, journalists, and property owners; and (3) courts could completely reject the application of trespass
and similar torts in the context of newsgathering, at least where the newsgathering activity creates no appreciable harm other than the broadcast or publication of the acquired information. n9


Although plaintiffs and their attorneys advocate the first course, n10 raising the cry that the news media have "no special immunity from the application of general laws," n11 this approach should have no long-range future. Legal claims such as trespass and breach of contract are simply too rigid to accommodate the considerations that must come to bear in newsgathering situations. Even the plaintiff's expert in the "broken promise" case of Cohen v. Cowles Media Co. n12 agreed that journalists would not only be justified but morally compelled to break a promise of confidentiality given to a source who then revealed that he or she had put botulism in a public drinking water supply or was about to commit murder. n13 Such considerations led the Minnesota Supreme Court in that case to reject the use of contract law in favor of the more flexible doctrine of promissory estoppel. n14


n14 Cohen v. Cowles Media Co., 457 N.W.2d 199, 203 (Minn. 1990) (imposing a contract theory on the arrangements between reporters and sources would put "an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship," and therefore "a contract cause of action is inappropriate for these particular circumstances").

Critics may decry undercover reporting (especially the use of undercover cameras) as unnecessary stunts, n15 but anonymous or undercover reporting has persisted for centuries because of elementary facets of human nature. Wrongdoers will stonewall with "no comment" or brazenly lie about their activities until and unless confronted with specific evidence to the contrary. Even well-intentioned people may be less candid when they believe that their remarks will be widely disseminated than when they are speaking to a small group of trusted confidants. n16 Yet these same persons usually make little or no effort to protect their comments from being overheard or repeated by nonjournalists. Many journalists who pose as "ordinary people" -- be they casual onlookers, business customers, n17 or employees with no special authority or duties of confidentiality n18 -- see no reason to place themselves at a special disadvantage by assuming an affirmative obligation to disclose their journalistic role. Sooner or later, there will be a "trespass" case in which the newsgathering justification is so clear and overriding that rigid rules of liability for trespass and similar torts will have to bend or break, because it would be simply outrageous to permit a lawsuit to survive past the very earliest
stages when the journalists have revealed that the plaintiffs engaged in election fraud, health care abuses, exploitative employment practices, or violent criminal conduct. n19

n15 Whether particular cases involve "stunts" or "legitimate investigation" often will depend upon individual perspective. Opinions might well differ, for example, with respect to Gloria Steinem's brief but well-known tenure as a Playboy bunny, chronicled in a 1963 article in Show magazine and in her essay collection, Outrageous Acts and Everyday Rebellions (1983).


"During the Revolutionary War and Ratification periods, many of the Founding Fathers and Framers intentionally concealed their identities to comment in the press upon matters of great national importance. . . . They deliberately concealed their identities, among many other reasons, to avoid prosecution for seditious libel, as well as to be more effective advocates. . . . Disclosure of their actual identities would undoubtedly have interfered with their access to information and continuing participation in the process about which they were reporting. . . . In a sense, many of the Framers and Founding Fathers themselves functioned as undercover political reporters, who concealed their identities both to avoid the real threat of reprisal and to be effective in maintaining access to the sources of information which formed the basis for their reports and opinions."

See also McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342-43 and n. 6 (1995); id. at 359-71 (Thomas, J., concurring); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 206 (1985).

n17 See, e.g., Lily Burnam, Pretty Woman, NEW YORK, July 15, 1996, at 28 (report on author's visits to six plastic surgeons who provided "six very different opinions, surgical approaches, and prices"; the writer, a twenty-eight-year-old woman with no serious thought of undergoing plastic surgery, selected the six doctors after combing through magazines and the Yellow Pages).

n18 It is now commonplace for many individuals who do have special authority and access to confidential information to write "tell-all" memoirs once they (but not necessarily their subjects) have moved on to other offices, whether in business or politics. There is no apparent movement to date to sue such authors for fraud, trespass, or similar torts.

n19 Except for the lack of litigation against the journalists' newsgathering techniques, compelling examples already exist. Among those listed in the Weinberg affidavit in Food Lion (see note 3 supra):

1. In 1960 a reporter in Buffalo, New York, won a Pulitzer Prize for a fourteen-part series he wrote after working for three months as a services caseworker in the Erie County Welfare Department. The reporter concealed his actual employment status by referring to his "previous employment" with the Buffalo Evening News and by listing his name as "E. Prett May" rather than his byline "Edgar May."

2. Another Pulitzer Prize went to the Chicago Tribune investigative team that in 1972 uncovered violations of voting procedures in local elections. One reporter "conned his way" into a clerk's job at the Chicago Board of Election Commissioners; over the course of four weeks, he had access to forged signatures on applications for ballots and other documents that demonstrated fraud. Numerous election judges were indicted for election fraud, and pleaded guilty or were convicted.

3. From 1973 to 1975, reporters on an investigative team at the Chicago Tribune concealed their actual identities in order to obtain jobs as nurses' aides and janitors at about twenty Cook County nursing homes. The resulting news story led to
closures of most of the homes by Cook County and Illinois regulators. Another Tribune reporter went undercover as a janitor at Von Sollbrig Memorial Hospital in order to document shoddy health care practices and violations of state law. (4) In 1978 Chicago Sun-Times investigative reporters pretended to be pregnant women and others concealed their identities to obtain jobs at abortion clinics and referral agencies for abortion clinics in order to investigate allegedly unnecessary abortion procedures. Following publication of their story, new laws were passed to regulate out-patient abortion clinics. Some clinics were closed, certain doctors left the state, and one physician was ultimately sent to prison. (5) In 1978 a soundman with the CBS television program 60 Minutes concealed his actual identity to enroll in a cancer clinic at Murrieta Hot Springs, California. The investigation led to the closure of the clinic by the State of California and the owner of the clinic received a prison sentence after being charged with fraud and conspiracy. (6) In 1980 a Chicago Sun-Times reporter posed as a bidder at a bankruptcy sale, as part of an investigation of farm loan fraud. His news stories prompted congressional hearings, caused new regulations to be issued by the U.S. Department of Agriculture, and resulted in the scuttling of several government contracts.
(7) In 1980 a reporter for the Nashville Tennessean posed as a retired member of the military in order to infiltrate the Ku Klux Klan. After his stories appeared, law enforcement officials curtailed Klan activities in the area. Some Klan members were arrested in the act of committing crimes, including an attempted bombing of a crowded synagogue.
(8) In 1988 one black and one white reporter for the Miami Herald posed as potential tenants to test the level of racial discrimination in the Miami real estate market. They reported widespread discrimination despite federal laws.
(9) In 1994 a Wall Street Journal reporter obtained a job in a poultry processing plant. He disclosed his university education and employment at "Dow Jones & Co." but observed that the plant manager, perhaps because of labor shortages and high turnover in the plants, "barely glanced at his job application."
(10) In 1996 a Ms. Magazine reporter exposed inhumane working conditions by obtaining employment as a pieceworker in a New York City sweatshop.

Once courts rejected existing trespass law as too rigid to govern newsgathering situations, they may be tempted to adopt some form of balancing test, or to create special rules, exceptions, and privileges for newsgathering activities. But they should resist that temptation in the context of civil trespass actions. If the harm for which plaintiffs seek recovery is primarily due to the broadcast or publication, the law already has an elaborate set of tests that accommodate public, journalistic, and private interests: those tests have evolved over time in the law of defamation, trade secrets, and invasion of privacy. Those tests should be employed in the context of their own torts, rather than creating new tests and further legal complications. If a newsgatherer's trespass or other improper activity creates significant independent damages, such as breaking property, there is no apparent need for a new privilege or balancing test; the newsgatherer can take appropriate steps to avoid injury or pay the consequences as a cost of doing business under existing law, subject to existing defenses and privileges and limitations on damages. However, if there are no actual or significant damages from the alleged trespass, that tort should not be used as a subterfuge to recover broadcast or publication damages or to engage in litigation as retributive "sport" against the news media.

Legislatures might also act in this area, possibly by creating privileges or defenses for the news media or others acting in the public interest. For example, several states have enacted anti-SLAPP (Strategic Lawsuits Against Public Participation) laws to prevent superficially colorable legal claims from being used as a device to silence speech on public issues. See, e.g., WEST'S ANN. CAL. C.C.P. § 425.16 ("any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"); MINN. STAT. § 554.01 et seq. ("speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action"). Most states that have adopted anti-SLAPP legislation use language similar to the California statute. By expressly protecting "conduct," the Minnesota statute may protect activity, such as nominal trespass claims, that precede or are ancillary to the communication itself. Penelope Canaan and George W. Pring, professors of sociology and law, respectively, coined the phrase "SLAPP suit" to refer to Strategic Lawsuits Against Public Participation. See generally P. CANAAN AND G.W. PRING, SLAPP: GETTING SUED FOR SPEAKING OUT (1996); P. Canaan and G.W. Pring, Strategic Lawsuits Against Public Participation, 35 SOC. PROBS. 506 (1988).
n21 See e.g., L. Barnett, Intrusion and the Investigative Reporter, 71 TEX. L. REV. 433, 449 (1992) ("The qualified common-law privilege espoused by this Note would protect the newsgatherer who employs subterfuge to investigate the work-related activities of those engaged in public business. Under this privilege, a newsgatherer who employs subterfuge will prevail in an intrusion action based on the subterfuge if she can show that she had probable cause to believe that the plaintiff was engaged in illegal, fraudulent, or potentially harmful conduct."); D. McLean, Recognizing the Reporter's Right to Trespass, COMM. AND THE LAW, Oct. 1987, at 31, 41 ("Courts might employ a balancing test for all trespass privacy invasion claims, recognizing that where the claimed trespass was to public or quasi-public property, privacy interests would not weigh heavily in the balance."); Note, Press Passes and Trespasses: Newsgathering on Private Property, 84 COLUM. L. REV. 1298, 1342 (1984) ("Courts can and should strike a balance in newsgathering trespass cases between the press's newsgathering interests and . . . competing interests. Consideration of such factors as the purpose of the reporter's entry, the commitment of the property to public use, the economic value of the right to exclude and the likelihood of public disturbance will achieve a proper accommodation of the interests of the press, of the state, and of private individuals.").

n22 Criminal actions for trespass or similar activity present different considerations. Prosecutorial discretion will act as a check in many situations against legal actions intended solely to punish the press for communicative acts. Where that is insufficient, balancing tests and privileges may be appropriate to protect legitimate newsgathering activity. See, e.g., New Jersey v. Lashinsky, 404 A.2d 1121 (N.J. 1979) (press access to accident scenes subject to reasonable time, place, and manner restrictions); Freedman v. New Jersey State Police, 343 A.2d 148 (N.J. Super. Ct. 1975) (press access to migrant workers on private farms).

n23 Not all states recognize claims for invasion of privacy. See LIBEL DEFENSE RESOURCE CENTER, 50-STATE SURVEY OF MEDIA PRIVACY AND RELATED LAW (1998-1999). Each state presumably has valid policy reasons for whichever choice it has made in this respect. Those who contend that a particular state should recognize claims for invasion of privacy should make their policy arguments directly, rather than trying to create such torts indirectly through misapplication of other causes of action such as trespass.

It may be significant that trespass claims against the press were asserted in Minnesota and North Carolina. As the Minnesota Court of Appeals stated directly in Copeland I, 526 N.W.2d at 406, Minnesota did not recognize any cause of action for invasion of privacy, including the "intrusion" tort. The Minnesota Supreme Court subsequently recognized an "intrusion" tort in Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998). Similarly, although the North Carolina Court of Appeals now has allowed an intrusion claim to proceed, see Miller v. Brooks, 472 S.E.2d 350 (N.C. App. 1996), disc. rev. denied, 345 N.C. 344 (1997), that did not occur until well after Food Lion had started its litigation against ABC. Furthermore, courts treat intrusion as particularly personal claims that are not available to corporate plaintiffs. See In re Medical Lab Management Consultants, 931 F. Supp. 1487, 1493 (D. Ariz. 1996); RESTATEMENT (SECOND) OF TORTS, § 6521 (1977) ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."). Thus, an intrusion tort was not available to the plaintiffs in either Copeland I or Food Lion.

Although the "intrusion" tort allows a plaintiff to pursue a claim even if there is no technical trespass, the tort also offers the news media greater opportunities for defense than in a trespass action, because the "plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source." Shulman v. Group W Prod., Inc., 955 P.2d 469, 490 (Cal. 1998). Moreover, "all the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element. . . . Although . . . the First Amendment does not immunize the press from liability for torts or crimes committed in an effort to gather news . . . , the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may -- as a matter of tort law -- justify an intrusion that would otherwise be considered offensive. . . . Information collecting techniques that may be highly offensive when done for socially unprotected reasons -- for purposes of harassment, blackmail or prurient curiosity, for example -- may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story." 955 P.2d at 493.
Simpler is better, as the Seventh Circuit implicitly recognized in Desnick v. American Broadcasting Cos., Inc., n24 when it held that the law of trespass was not intended to deal with situations of hidden cameras or other acquisitions of information by persons whose presence (although not purpose) on property was known to the owners. The best approach is the third approach: to reject "newsgathering torts" such as fraud, trespass, and the like, altogether, when the harm inflicted arises from the broadcast or publication rather than from the newsgathering activity, even if the broadcast or publication would not have been possible without the newsgathering activity. Copeland I and Food Lion employ an excessively narrow analysis. They fail to recognize that in this context, trespass and other torts are not being used as part of a state's general laws, but are being invoked specifically to deter or punish newsgathering and informing the public. The plaintiffs' true interest (preventing the disclosure of information that was acquired without protest) is not one that the law of trespass protects or should protect. Indeed, the disclosure of information is an activity that the law in many circumstances ignores, protects, rewards, or even requires.

n24 44 F.3d 1345 (7th Cir. 1995).

The use of hidden cameras may provide a technological, factual distinction between these cases and the situation of the gossiping dinner guest, but there is no principled legal distinction. The camera provides a more complete and accurate account of what any person present on the property could see or hear and perhaps makes it more difficult for a speaker to deny what has been said, but it does not transform the information. If the owner's consent is ineffective or voidable when the owner does not anticipate, intend, or permit the further dissemination of information acquired during the supposed trespasser's presence on property, then trespass laws could be used to suppress unwanted speech by almost anyone, for any reason at all.

There is no need to disrupt the traditions either of undercover reporting or of the law of trespass. Neither has to go away, but each should go its own way. The tort of trespass should not be used to punish newsgathering where the only thing obtained during peaceable entry onto property is information whose acquisition is open and obvious to the owner of the property and where the plaintiff's true injury arises from the subsequent use of that information.

III. A CLOSER LOOK AT TRESPASS IN A HYPOTHETICAL CASE

Let's assume that a reporter has been alerted to the possibility that a small company in Minnesota n25 is engaging in activity that endangers the public health or safety. Perhaps the company is unsafely handling food products consumed by the public. Perhaps it is a health care facility that is neglecting its patients, or engaging in aggressive tactics to foist products or services upon customers that they do not need and that pose some risk to their health. Why should the law of trespass restrict the reporter's ability to document the wrongdoing with a hidden camera (assuming, as seems reasonable, that the company would not readily admit to wrongdoing or open its doors to a film crew)? And does Minnesota's law of trespass restrict the reporter's ability to document the wrongdoing with a hidden camera? We can assume that the company would argue that Copeland I establishes that the company has not consented to the use of the hidden camera on its property and this means the reporter has committed trespass. But is the company right?

n25 For the sake of simplicity and consistency, the hypothetical discussion focuses upon the law of a single state. Minnesota law is used for this purpose, partly because the author practices in Minnesota and partly because a Minnesota case, Copeland, is one of the few that have created the possibility of liability under trespass law for the use of hidden cameras. On most of the pertinent points, Minnesota law should be similar to the common law of most other states.

The traditional purpose of trespass law has been to redress situations involving injury to property or interference with the actual use of property. Although the "strict and severe rules of the action of trespass . . . have survived to a considerable extent until quite modern times, and the courts have been slow to modify them," n26 courts should also be slow to apply the law of trespass to new situations or to extend it beyond its intended purpose. Just as the U.S. Supreme Court in the 1960s balked at enforcing trespass laws in order to suppress civil rights demonstrations at sit-ins, n27 Minnesota courts should reject the use of the strict and severe rules of trespass to prevent the acquisition of knowledge or to punish newsgathering activities. n28


The law of trespass historically has been used to vindicate title and ward off claims of adverse possession or prevent continuing trespasses, n29 to recover for physical injury done to real or personal property by the defendant, n30 to recover for the fair value of the defendant's use of property, n31 to recover for the defendant's interference with the plaintiff's activities while the defendant was on the plaintiff's property, n32 to recover for bodily injury or emotional distress caused by the violent or abusive conduct of the defendant while on the plaintiff's property, n33 and similar purposes. n34 But it has not been used to restrict the use of information openly obtained while on property, no matter how that presence happened to occur.

n29 E.g., Currie v. Silvernale, 171 N.W. 782 (Minn. 1919).

n30 E.g., Johnson v. Jensen, 446 N.W.2d 664 (Minn. 1989) (trespassing defendant removed fence and destroyed trees, shrubs, and bushes); Greenwood v. Evergreen Mines Co., 19 N.W.2d 726 (Minn. 1945) (flooding caused by defendant's construction); Clark v. City of Brainerd, 298 N.W. 364 (Minn. 1941) (trespassing defendant removed dirt and caused house wall to sag and crack).

n31 E.g., Korstan v. Poor Richard's, Inc., 188 N.W.2d 415, 417 (Minn. 1971) (proper measure of damages for continuing trespass is the reasonable rental value of the land), Schruck v. Andres, 22 N.W.2d 548, 552 (Minn. 1946) (same); Burgmeier v. Bjur, 533 N.W.2d 67, 71 (Minn. Ct. App.), rev. denied, (Minn. 1995) (mesne profits, for value or benefit derived from wrongful occupation of land).

n32 E.g., Sime v. Jensen, 7 N.W.2d 325 (Minn. 1942) (defendant trespassed on residential property with construction crew, interrupting birthday party); Spencer v. St. Paul & S.C.R.R., 22 Minn. 29, 31 (1875) (homeowners permitted to testify to the effect that defendant's operation of railroad steam engines on their premises had upon the use of their homes, in terms of steam, sparks, and smoke from the train).

n33 E.g., Lesch v. Great Northern Ry., 106 N.W. 955 (Minn. 1905) (wife could recover for fright and anxiety caused by the behavior of defendant's agents as they searched her home in her presence; defendant disturbed the peace and quiet of the home); Mitchell v. Mitchell, 55 N.W. 1134 (Minn. 1893) (widow could recover for emotional distress from violent acts and abusive language of defendant's agents as they searched her home for property allegedly willed to defendant by deceased husband).
n34 See generally 1 HARPER, JAMES & GRAY, THE LAW OF TORTS § 1.8 at 1:38 (3d ed. 1996) (discussing measure of damages).

In attempting to use the law of trespass to attack the existence or contents of a broadcast news report, the company in our hypothetical would be distorting the law of trespass. The company essentially would be arguing that an undisclosed intention to repeat information acquired during the reporter's presence on the company's property destroys consent to the reporter's presence and transforms the reporter into a trespasser. If one were to follow this argument to its logical conclusion, then no one who entered the company's property for any purpose -- be they paid employees, volunteers, patients, customers, delivery persons, repair workers, or casual visitors -- could disclose the company's wrongful activities without its express permission. That permission, of course, would never be granted. This argument fundamentally conflicts with good public policy and established law.

It is conceivable that similar exposures of the company's wrongdoing might be made (1) by a paid employee, unpaid volunteer, customer, or other person reporting to government authorities, (2) by a paid employee, unpaid volunteer, customer, or visitor talking with friends; (3) by a paid employee, unpaid volunteer, customer, or visitor providing information to a journalist; (4) by a newspaper reporter or government investigator or other person who gained access to the company's premises by presenting himself or herself as a potential customer or by becoming a paid employee n35 or an unpaid volunteer and wrote about or otherwise disclosed his or her experiences (but took no pictures); or (5) by a television reporter or government investigator or other person who gained access to the company's premises by presenting himself or herself as a potential customer or by becoming a paid employee or an unpaid volunteer and recorded what he or she saw and heard with a hidden camera.

n35 For the sake of simplicity, assume that the journalist does not cash her paycheck, receives no special training, and performs only routine tasks for the employer.

In the first scenario, Minnesota law not only permits, but protects and encourages, the disclosure of information. For example, one statute provides that "an employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because . . . the employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official." n36 In certain circumstances, Minnesota law even requires disclosure of mistreatment of vulnerable adults, such as mentally disabled or dependent adults. n37 Persons who are not required to report abuse are permitted to report and are protected if they do so. n38 The statutes prohibit any form of retaliation for such reporting to government agencies. n39 Clearly, the company should have no recourse in the law of trespass for disclosure of its own wrongful actions under these circumstances.

n36 MINN. STAT. § 181.932 subd. 1. Similar statutes protecting "whistle-blowers" have been enacted in California, see CAL. LABOR CODE § 1102.5; Florida, see FLA. STAT. §§ 448.101-448.105 (1995); Michigan, see MICH. COMPILLED LAWS § 15.361, MICH. STAT. ANN. § 17.428; New York, see N.Y. LAB. LAW § 740, and other states. Illinois protects whistle-blowers at common law. See Palmateer v. International Harvester Co., 85 Ill.2d 124, 132-33, 421 N.E.2d 876, 880 (1981) (public policy favors citizen crime fighters).

n37 See MINN. STAT. §§ 626.557, 626.5572.

n38 See MINN. STAT. § 626.557 subd. 3(b).
The second and third scenarios involve persons who acquired information during their presence on property for another purpose and who had not formed any intention to disclose information at the time they obtained entry to the property. The company should have no recourse in trespass if customers, visitors, employees, or volunteers disclose their experiences and observations to anyone else, including reporters. There is no precedent for using the law of trespass to impose a duty of confidentiality. "One who invites another to his home or office takes a risk that the visitor may repeat all he hears and observes when he leaves."

See California v. Greenwood, 486 U.S. 35, 41 (1988) ("what a person knowingly exposes to the public, even in his home or office, is not" something that the person can reasonably expect will remain private); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, 41 (Cal. Ct. App.) (participant in group encounter therapy session "was free to report what went on. The limits to her right to report were those involved in the libel counts. Plaintiff has no separate cause of action for the mere reporting."); cert. denied, 444 U.S. 984 (1979); Commonwealth v. Blystone, 549 A.2d 81, 87 (Pa. 1988) (noting "the simple fact that a thing remains secret until it is told to other ears, after which one cannot command its keeping. What was private is now on other lips and can no longer belong to the teller."); aff'd. sub nom. Blystone v. Pennsylvania, 494 U.S. 299 (1990).

Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

The fourth and fifth scenarios involve situations in which a person's reasons for gaining access to property go beyond those known or disclosed to the owner of the property. The law of trespass generally has not become a tool for extorting money damages in such situations. Stores do not sue browsers for wasting the time of store personnel if they do not buy something or for using store space to warm up in winter. Homeowners do not sue Welcome Wagon greeters who pass on information to local businesses. Property owners in such situations do not bring trespass actions against entrants upon the property simply because the owners did not consent to, or do not like, the uses to which the entrants have put the information that they acquired while on the property. If the entrants' use of the information exposes them to civil or criminal liability at all, it is because the use of the information is independently wrongful, as in the cases of the meter reader or housekeeper who uses familiarity with a home to burglarize it at a later time or the business visitor who appropriates trade secrets. The lawful use of information -- whether as a guide to decorating one's own home or in the course of preparing a truthful news report -- creates no independent liability, and should not retroactively create liability for trespass.

Even if the information acquired might constitute a trade secret, the law will not protect that information unless the owner has taken affirmative steps to safeguard it. "Trade secrets" are defined by the Uniform Trade Secrets Act to include "information, including a formula, pattern, computation, program, device, method, technique, or process, that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1(4), UNIFORM TRADE SECRETS ACT, 14 U.L.A. 438 (1990). An argument by the owner that "the defendant learned the secret while she was on my property and I did not consent to her use of that information, so she was a trespasser" would not be enough. See Wilson v. Electro Marine Sys., Inc., 915 F.2d 1110, 1119 (7th Cir. 1990) (plaintiff's "unilateral beliefs" that defendant would not use information he divulged "cannot bind [the defendant]"); Hoffman-LaRoche Inc. v. Yoder, 950 F. Supp. 1348, 1362 (S.D. Ohio 1997) (reasonable security measures that warrant trade secret protection of information include denial of plant access to employees, limiting admittance through buzzer lock system, maintaining files in locked and secure area, restricting use and disclosure of information to outsiders, and placing proprietary markings on information sought to be protected); George S. May International v. International Profit Assoc., 628 N.E.2d 647, 654 (Ill. Ct. App. 1993) (where company disseminated documents to many people accompanied only by broad admonitions regarding trade secrets and no
specific identification of these secrets for its personnel, information was not trade secret because company had not taken reasonable measures to safeguard its secrecy; Electro-Craft Corp. v. Controlled Motion, 332 N.W.2d 890, 901 (Minn. 1983) (more than "intention" to preserve secrets is required -- plaintiff must show that it manifested its intention by making some effort to keep the information secret); Gordon Employment, Inc. v. Jewell, 356 N.W.2d 738, 741 (Minn. Ct. App. 1984) (information could not be considered trade secret when it was kept in an unlocked file, there was no policy on confidentiality, and confidentiality was never discussed between agency and its employees); Precision Moulding & Frame, Inc. v. Simpson Door Co., 888 P.2d 1239, 1243 (Wash. Ct. App. 1995) (where customer could have obtained information simply from observation while visiting plant, seller had not taken reasonable steps to maintain secrecy of information). Nor does information qualify as a trade secret simply because the plaintiff has sought to prevent its disclosure and fears that disclosure would harm its business. See Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) ("potential harm . . . in disclosure of poor management in the past . . . is hardly a trade secret"). Courts should hesitate to use other torts to protect against the disclosure of information that does not qualify as a trade secret. See Bloom v. Hennepin County, 783 F. Supp. 418, 441 (D. Minn. 1992) (refusing to extend law of conversion to protect against unfair use and appropriation of intangible interests, which instead should be protected if at all under laws of unfair competition and trade secrets).

The Fourth Amendment to the U.S. Constitution provides greater protections against government intrusions into personal affairs than are usually available to prevent similar intrusions by private parties. The Fourth Amendment is not limited to technical common law rules of trespass. The Fourth Amendment, however, protects only those expectations of privacy that are "objectively reasonable." There is no objectively reasonable expectation of privacy in information openly made available for acquisition by a third party, whether that third party is a government employee or a private party.


n45 See, e.g., Greenwood, 486 U.S. at 40 (1988) (no reasonable expectation of privacy in trash placed at curbside for pickup); Smith v. Maryland, 442 U.S. 735, 743-44 (1979) ("a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," such as the telephone company); United States v. Miller, 425 U.S. 435, 443 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."); Hoffa v. United States, 385 U.S. 293, 303 (1966) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.").

For example, the Minnesota Supreme Court has held that a law enforcement agent can enter a professional's office as a prospective patient or client without any search warrant and later disclose statements made by the professional to the agent, without violating any expectation of privacy on the professional's part that would be protected by the unreasonable search and seizure provisions of the Fourth Amendment. In State v. Olkon n46 a police officer posed as a prospective client intent upon committing insurance fraud and gained entry to an attorney's office. The attorney accepted representation of the officer under the fictitious name and circumstances reported to the attorney by the officer. In Olkon there was no claim that the officer's entry into the attorney's office constituted trespass or that the attorney had any expectation of privacy in his statements to the "client" (indeed, a transcript of a tape made with a hidden recorder showed that the attorney was extremely concerned that the "client" or others would disclose his role in the insurance fraud being conducted). The Minnesota Supreme Court rejected the attorney-defendant's Fourth Amendment and eavesdropping contentions and allowed the tape recordings of the meeting to be admissible evidence. n47
Accord, State v. Vaughn, 361 N.W.2d 54, 57-58 (Minn. 1985) (upholding admissibility of secretly recorded videotapes of sales of stolen property to undercover officers). In State v. Edrozo, 578 N.W.2d 719 (Minn. 1998), the Minnesota Supreme Court unanimously held that surreptitious tape recording by police of statements made by a suspect to a companion, while both are seated in the rear seat of a marked police car, is not the "functional equivalent" of custodial interrogation and does not violate the suspect's right against compelled self-incrimination. It therefore reversed a trial court order suppressing the tape of the secretly recorded conversation in the police car. The Edrozo court reaffirmed the reasoning of Hoffa v. United States, 385 U.S. 293, 303 (1966) and Illinois v. Perkins, 496 U.S. 292, 296 (1990) (statements made in a jail cellblock to an undercover officer posing as a fellow inmate are not subject to Miranda requirements because the element of coercion is lacking). The court stated:

Edrozo was seated in a police car with [his companion] Easton, speaking voluntarily about his criminal activity. If Easton, or any other listener, had reported Edrozo's words to the police, this appeal would be immediately resolved [against Edrozo] by reference to Hoffa and Perkins. The only distinguishing feature in this case is that Edrozo was unaware that the police would later have access to his statements by means of the hidden tape recorder.

578 N.W.2d at 725-26. In rejecting Edrozo's arguments, the court necessarily rejected the claim that use of a hidden recording device amounted to a "distinguishing feature" sufficient to transform an otherwise lawful activity into wrongful conduct that would entitle the unaware speaker to relief. If the Minnesota Supreme Court found nothing wrong with the police use of a hidden tape recorder unbeknownst to either of the participants in the conversation in Edrozo, there is all the more reason to believe that the court would find nothing wrong with a journalist's undisclosed recording of conversations and activities in which she was a participant -- and in which the plaintiffs knew she was a participant.

In Lewis v. United States, n48 the U.S. Supreme Court held that an investigator who obtained entry to an office under the pretense of paying a social visit could not secretly ransack the office and seize incriminating private papers, but that he could properly gain entry to someone's premises on the pretense of being interested in doing business with that person, where he simply sees, hears, and takes that which the other person contemplated as a necessary part of the expected business. n49 Like that investigator, our hypothetical reporter would simply take with her a record of what the company knew she was seeing and hearing its agents do in the course of their activities on the company's premises.


n49 385 U.S. at 209-10.

Similarly, racial discrimination "testers" may pose as prospective home buyers in order to seek evidence of racial discrimination in housing. The testers do not disclose their true purposes in entering real estate business offices, but the businesses cannot complain that their legitimate privacy interests have been threated. n50 These testers have not committed civil trespass. There is no reason to impose tort liability on government investigators for undercover conduct that presents no problem under the Fourth Amendment. n51 Private parties should have no greater liability than government investigators for such conduct. n52

n50 See, e.g., Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1355 (5th Cir. 1979).
n51 The Fourth Amendment analysis is unchanged whether the legal issue is exclusion of evidence at a criminal trial, as in *State v. Olkon*, 299 N.W.2d 89, 102-03 (Minn. 1980), cert. denied, 449 U.S. 1132 (1981), or a civil claim for damages under 42 U.S.C. § 1983; see, e.g., *Pembaur v. City of Cincinnati*, 882 F.2d 1101, 1102 (6th Cir. 1989), on remand, 743 F. Supp. 446 (S.D. Ohio 1990), aff'd, 947 F.2d 945 (6th Cir. 1991).

n52 Cf. *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 456 (1995) (reasoning that action by union organizer in simultaneously acting in two different capacities would be permissible under common law where similar activity by undercover city detective was permissible); *Kirk v. Louisiana*, 526 So. 2d 225 (La. 1988) (no apparent governmental interest is furthered by permitting law enforcement agencies acting without warrant to record confidential communications without the knowledge and consent of all parties to the communication, while prohibiting the same conduct by private citizens); *Sundheim v. Board of County Comm'rs*, 904 P.2d 1337, 1351 (Colo. App. 1995) (affirming summary judgment for defendant on trespass claim after private investigator gained access to plaintiff's premises by posing as a potential customer: "when an intrusion into a commercial establishment is based upon the nature of the business activities there taking place . . . the business owner may not have a reasonable expectation of privacy in those activities"), aff'd, 926 P.2d 543 (Colo. 1996).

In Desnick v. American Broadcasting Cos., n53 a leading case in this area that arose in Illinois, news reporters posed as prospective patients of an eye care clinic, while surreptitiously videotaping their own personal contacts with the clinic's medical staff. Judge Richard Posner, writing for a unanimous Seventh Circuit panel, upheld dismissal of the clinic owner's trespass claim, holding that the reporters' entry was not invasive in the sense of infringing the kinds of interests protected by civil trespass law. The court pointed to circumstances where consent to entry onto property is deemed effective even though it was procured by a misrepresentation or a misleading omission: "The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." n54

n53 44 F.3d 1345 (7th Cir. 1995).

n54 Id. at 1351.

The court in Desnick reviewed cases concerning fraudulently obtained consent in the trespass and battery contexts. Rhetorically asking what made such consent effective in some cases and not in others, the court answered: "The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property." n55 The court then held:

There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted. . . .

No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation; the testers recorded their own conversations with the [clinic's] physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets, no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. Had the testers been undercover FBI agents, there would have been no violation of the Fourth Amendment, because there would have been no invasion of a legally protected interest in property or privacy. . . . "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. . . . The situation of the defendants' "testers" is analogous. Like testers seeking evidence of violation of anti-discrimination laws, the defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading
omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land. n56

n55 Id. at 1352.

n56 Id. at 1353 (emphasis added: citations omitted).

Desnicks gave no weight to the presence of a hidden recording device, and thus melds consideration of the fourth and fifth scenarios mentioned earlier. However, the Minnesota Court of Appeals in Copeland I did treat the fifth scenario differently, holding that: "Courts in other jurisdictions have recognized trespass as a remedy when broadcasters use secret cameras for newsgathering. . . . Newsgathering does not create a license to trespass or intrude by electronic means into the precincts of another's home or office. . . . Whether a possessor of land has given consent for entry is, when disputed, a fact issue. . . . Viewing the evidence in the light most favorable to the Copelands, . . . there is sufficient evidence to withstand summary judgment." n57

n57 526 N.W.2d at 405 (emphasis added, citations omitted).

Of the authorities cited in Copeland I, only one, Dietemann v. Time, Inc., n58 actually involved the use of secret cameras by persons present on property with the apparent consent of the owner. n59 In Dietemann reporters posed as patients to enter the home office of a clay and herbal therapist who provided "healing" services free of charge. Dietemann cast the distinction between hidden cameras and other disclosures of information in these terms: "One who invites another to his home or office takes a risk that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e.g., in the case of doctors and lawyers." n60

n58 449 F.2d 245 (9th Cir. 1971). Dietemann involved a claim for intrusion under California law, not a claim for trespass. See Shulman v. Group W Prod., Inc., 935 P.2d 469, 469 n.19 (Cal. 1997) ("In Dietemann, . . . reporters for Life Magazine gained consensual access to the home office of a quack doctor, where they secretly photographed him and recorded his remarks as he purportedly diagnosed a medical condition of one of the reporters. . . . The federal court, applying California law, concluded the facts showed an invasion of privacy. . . . Presumably because a peacable entry by consent does not constitute trespass under California law (see 5 WITKIN, SUMMARY OF CAL LAW (9th ed. 1988) Torts, § 607, p. 706), no question of liability for trespass arose in Dietemann.").

n59 Copeland I cited three cases for the proposition that "courts in other jurisdictions have recognized trespass as a remedy when broadcasters use secret cameras for newsgathering." The cases were Miller v. National Broad. Co., 187 Cal. App. 3d 1463, 1480, 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); and Ayeni v. CBS, Inc., 848 F. Supp. 362, 368 (E.D.N.Y. 1994). In Anderson television news crews accompanied a humane society investigator into plaintiffs' home while the investigator executed a search warrant for maltreated animals. The plaintiff asked the television crew to stay out of her house, but they entered and filmed the interior despite these requests. 441 N.Y.S.2d at 222. Plaintiff sought recovery for physical harm done to the property. Id. at 222 n.1. In Ayeni, a television news crew accompanied government agents executing a search warrant at the plaintiffs' apartment. The agents were looking for evidence of credit card fraud allegedly committed by plaintiffs' husband. Mrs. Ayeni, clothed only in a dressing gown, objected to the presence of the camera, and attempted to cover her face and that of her son. 848 F. Supp. at 364-65. No evidence of credit card fraud was found, but the news crew videotaped
agents questioning Mrs. Ayeni about objects in the apartment and about her husband's whereabouts. 848 F. Supp. at 365. Thus, both cases involved claims arising from the disruption contemporaneously caused by open and known filming or other activities of the film crew. In Miller, plaintiff claimed to have been unaware of the presence of the film crew due to confusion while paramedics attended to her husband, who had suffered a heart attack in his bedroom; the film crew used standard equipment rather than hidden cameras, and simply accompanied the paramedics into the apartment, 232 Cal. Rptr. at 674. Thus, none of these cases directly supported the proposition for which they were cited in Copeland I, namely, trespass as a remedy for the use of hidden cameras.

n60 449 F.2d at 248-49.

Logically, however, the addition of a hidden camera or tape recorder does not fundamentally alter the acquisition of information. A "recording made by a participant is nothing more than a more accurate record of what was said" than what could be produced from memory or handwritten notes. n61 Thus, the hypothetical company's officers' only apparent interest in not being recorded without their knowledge is to maintain "plausible deniability," which they cannot do in the face of videotape of their actual words. In other words, they want to be able to lie, or to attack the reporter's credibility concerning events transpiring on the company's premises, without having their tactics undermined by the videotape. That is not an interest that courts should protect. It is, in fact, an interest that the U.S. Supreme Court has rejected repeatedly. In Lopez v. United States, n62 the Court held that a government witness could record any conversation that he could testify about as a direct witness, observing that

this case involves no "eavesdropping" whatever in any proper sense of that word. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. . . . And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances that would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.

Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe . . . fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording. n63

n61 Sullivan v. Gray, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982). See also United States v. White, 401 U.S. 745, 753 (1971) ("An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent."); State v. Reeves, 427 So. 2d 403, 418 (La. 1982) (government did not invade defendant's privacy rights when informer taped conversation with defendant; "Society seeks to foster truth, not to suppress it. The presence of the electronic transmitter has but one effect. Instead of the informant committing the conversation to memory, a machine tapes each and every sentence of the conversation. The machine notes the inflection of the voices and the context in which the remarks are made. . . . Surely, society would not consider reasonable an expectation of privacy which would result in a more inaccurate version of the events in question."); People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1280-81 (Nev. 1995) (entertainer had no privacy claim against animal rights activist who videotaped his backstage treatment of animals, because he had no justifiable expectation of privacy; "The supposed intruder . . . was in a real sense just 'standing there.' By observing Berosini through the eye of his video camera, he was merely doing what other backstage personnel were also permissibly doing.").

Federal and Minnesota law expressly permit conversations to be recorded with the knowledge and consent of only one of the participants. n64 As the Minnesota Supreme Court stated in Olkon: "Because one of the parties to these conversations ... voluntarily consented to the taping of these calls, no warrant was required by either the Federal or state statutes relating to interception and recording of telephone communications, and no Fourth Amendment issue is presented." n65 As someone who was openly present during the conversations and activities she recorded with the hidden camera, the reporter was a "participant" or "party." n66 If the legislative judgment in the specific and carefully considered context of hidden recorders allows such recording with the consent of one party, why should that legislative judgment be usurped by the rigid rules of the law of trespass that were developed for altogether different purposes? n67

n64 See 18 U.S.C. § 2511; MINN. STAT. § 626A.02. Some state statutes do require that all participants in a conversation consent before a recording is made. See, e.g., CAL. PENAL CODE §§ 630-637.5; FLA. STAT. § 934.03(2)(d); MD. CTS. & JUD. PROC. CODE ANN. § 10-402(c)(3) (1995).

n65 290 N.W.2d at 102-03, quoting State v. Bellfield, 275 N.W.2d 577, 578 (Minn. 1978) (other cites omitted). The fact that undercover investigation and surreptitious recording are permissible by law enforcement officers and their agents under the Fourth Amendment is significant in evaluating a claim for civil trespass involving similar kinds of conduct. If an agent of the state may freely enter property and conduct surreptitious video or tape recording of activities there, all without a warrant, a private news producer has all the more justification to engage in similar investigations. Desnick v. American Broadcasting Cos., 44 F.3d at 1353.

n66 See Department of Human Rights v. Spiten, 424 N.W.2d 815, 820 (Minn. Ct. App. 1988) (unlawful interception of communications "requires an unauthorized third party listener"), following Rathbun v. United States, 335 U.S. 107 (1947); cf. Hoffa, 385 U.S. at 302 (government informer "did not enter the [hotel] suite by force or by stealth. He was not a surreptitious eavesdropper. [He] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.").

n67 To the extent that Copeland I, Dietemann, or other cases impose liability on broadcast journalists because of their use of recording devices without the knowledge or consent of all participants to a communication and do not impose similar liability on nonjournalists, the liability so imposed violates the First Amendment. Cf. Florida Star v. B.J.F., 491 U.S. 524, 540 (1989) ("When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant."); id. at 542 (Scalia, J., concurring in this principle).
Our hypothetical case presents nothing more than legitimate undercover investigative reporting. The company cannot claim that the reporter's entry into and conduct on the premises was disruptive to its business, or that the reporter damaged any personal or real property or lessened its value in any way. The company does not claim that its employees or officers were harassed or harmed, or suffered any sort of damage based on the reporter's conduct on the premises. There was nothing, other than the undetected but legal videotaping, that the reporter did any differently than any other persons present on the property, who would have been free to disclose whatever they saw and heard there. The company officials had no expectation of privacy in their conversations in the reporter's presence. The undetected, nonintrusive camera merely recorded what the reporter herself was free to disclose. There should be no trespass claim under these circumstances.

Trespass concepts fit uncomfortably in the realm of claims arising from investigative journalism, because the law of trespass was not intended to provide redress in these situations. In a number of prior instances of plaintiffs asserting trespass in addition to defamation or privacy, the trespass allegations have gradually withered away, treated as inconsequential while the core complaints were addressed directly. n68 Desnick said directly what those cases implicitly represent: plaintiffs should direct their legal claims at the activity that actually resulted in their alleged harm, rather than at peripheral events.


In Copeland and Food Lion, courts allowed trespass claims to survive, and after extended and expensive litigation, plaintiffs recovered nominal compensatory damages of $1 for trespass. n69 Although this may satisfy a wealthy or vengeful plaintiff, the associated litigation costs are more than the press, the courts, or society should have to bear. In contrast, the approach of Dietemann allows recovery of publication-or broadcast-related damages as part of the claim for trespass and thereby transforms trespass into a heavy-handed remedy for plaintiffs who consider themselves wronged by news reports, but this approach abandons traditional concepts of proximate cause and creates enormous First Amendment problems.

n69 The windfall for plaintiffs in Food Lion came from punitive damages. In Minnesota a compensatory award consisting solely of nominal damages will not support a claim for punitive damages. See Meixner v. Bueckslar, 216 Minn. 586, 591, 13 N.W.2d 754, 757 (1944) ("The general rule in this state . . . is that exemplary damages properly may be allowed only when the plaintiff is found entitled to actual or compensatory damages.") (emphasis added); Kohler v. Fletcher, 442 N.W.2d 169, 171 (Minn. Ct. App.) ("Generally, in Minnesota, outside a defamation context, punitive damages are permitted only when actual or compensatory damages are also present."); rev. denied, (Minn. 1989); Weckman v. Theis, 1993 W1, 173863. *2 (Minn. Ct. App.) (in trespass case where court "determined compensatory damages are not recoverable, the issue [of punitive damages] is moot. In cases other than defamation, punitive damages may not be awarded in the absence of the demonstration of a compensable loss.") (unpublished); Lake Mille Lacs Investment, Inc. v. Payne, 401 N.W.2d 387, 390 (Minn. Ct. App.) (trespass plaintiff was entitled to remand for determination of nominal damages, but "without a showing of actual damages, [plaintiff] cannot recover punitive damages"), rev. denied, (Minn. 1987).

Courts should refuse to allow plaintiffs like this hypothetical company to pursue a trespass claim under these circumstances. The hypothetical reporter performed a valuable public service by documenting and exposing wrongful activities. She does not deserve to be the target of retaliatory litigation for trespass.
IV. THE QUESTION OF PROXIMATE CAUSE, OR: WHO HAS A RIGHT TO COMPLAIN ABOUT WRONGDOING?

There is another way to approach this issue of hidden cameras and newsgathering and that is to ask who has the right to complain about supposedly wrongful behavior and how they should be able to complain.

It is useful to examine this issue in a less emotionally charged example of questionable activity: the violation of traffic laws. Assume that a television news crew has learned about a confrontation between animal rights activists and employees of a store that sells fur coats. Racing to the scene of the confrontation, the driver of the news van ignores several red lights, passes a school bus with its stop arm extended, and approaches speeds of seventy miles per hour in a fifty-five mile-per-hour zone. The van reaches the scene of the confrontation and the camera crew goes to work (taping from public property). A few minutes later, the crew videotapes store employees and police wading into a crowd of protesters who have chained themselves together, store employees attack the protesters with clubs, beating them senseless and sending several to the hospital with severe injuries. When this scene is broadcast on the evening news and is picked up nationally, it provokes cries of outrage and a national boycott of the fur store, driving it out of business. The broadcast tape is used to help convict the club wielders for criminal assault. If the driver of the news van had obeyed all traffic laws, the van would have arrived at the confrontation after the clubbing was over.

There is no question that the driver of the news van did some bad things. If police had stopped him on the way to the scene and given him tickets for running the red lights, or speeding, or violating school bus standards, the driver would not and should not argue that his conduct was excusable because he was on his way to gather news. Nor should the First Amendment shield him from civil liability if he crashes his van into another car and kills or injures someone. n70 If he narrowly avoided hitting a pedestrian in the crosswalk or a schoolchild leaving the bus, those people might well have a claim against him for the emotional distress they suffered from their near-miss situation.

n70 One judge commented in dicta that "it would be ludicrous to assume that the First Amendment would protect a reporter who negligently ran over a pedestrian while speeding merely because the reporter was on the way to cover a news story." Risenhoover v. England, 24 Media L. Rep. (BNA) 1705, 1714 (W.D. Tex. 1996). In that situation, the First Amendment has nothing to do with the type of injury the pedestrian has suffered, and no material relationship to the reporter's conduct; the incident is connected to newsgathering not by design, function, or necessity, but merely by happenstance. However, the First Amendment clearly would become relevant if the pedestrian also sued for emotional distress because the report took his picture while lying injured in the roadway and published that picture in the newspaper. Cf. J. Borger, Newsgathering vs. Privacy: Tension Around the First Amendment, 1978 HAMLIN L. REV. 1, 47 ("It should be obvious that the constitutional protection available to a journalist who accompanies policemen to a private residence, and while there photographs the arrest of a public official, is much greater than that available to a journalist who runs a red light and strikes a pedestrian while racing to the scene of that arrest. The first activity is directly related to the compilation of a journalistic report and it produces no real injury distinct from the publication of the photograph. The second activity, however, is quite different. Running a red light is not reasonably related to newsgathering and the pedestrian's personal injuries have nothing to do with the publication or nonpublication of news of the arrest.").

But should any of this improper behavior have anything at all to do with a claim by the fur store that, but for the driver's egregious traffic violations, the news crew would not have arrived in time to tape the activities with the protesters, the footage would not have aired, and the store would still be in business? The answer should be "no." The media engaged in improper, even potentially deadly, behavior. The store was damaged. But there is no reasonable connection between the media misbehavior and the store's damages. n71 The store should be free to criticize the media's excesses in pursuit of the story, or even to suggest that someone should prosecute the driver for traffic violations, but it should not be able to pursue a claim for damages in court against the television station for damages that the store suffered because the camera crew was able to tape the wrongdoing of the store's employees.

n71 See LaBieniec v. Baker, 526 A.2d 1341, 1345 (Conn. App. 1987) (no matter how negligent a party may have been, if the party's negligent act bears no causal relation to injury, it is not actionable); Gammage v. Graham, 221 Ga. App. 383,
The law deals with this concept under the rubric of proximate cause, and it is the reason that Food Lion, after all the sound and fury of its public relations war drifted away, was left with a pittance of actual damages in its suit against ABC. n72 The news crew's early arrival was not, as a matter of law, the proximate cause of the alleged damages that resulted from the broadcast. n73 In the same fashion, in our earlier hypothetical, the reporter's presence on the premises with a hidden camera was not as a matter of law the proximate cause of the alleged damages that resulted from the broadcast. Plaintiffs may argue that the broadcasts would not have occurred, or would not have occurred in the same fashion, "but for" the videotape. That is only the start, not the end, of the necessary inquiry. Philosophically speaking, "but for" the creation of the world, no crime or injury would ever have occurred. n74 But the law stops well short of philosophy in this regard. "Cause in fact" -- "but for" causation -- is not shown if the defendant's negligence did no more than furnish the condition that made the plaintiff's injury possible, n75 or was simply an incidental factor. n76 Furthermore, "but for" causation is only one of the necessary components of legal causation. Although the defendant's conduct must in fact have caused the plaintiff's injury in the sense that the injury would not have occurred without that conduct, the relationship between the conduct and the injury also must be substantial and the conduct must be of such a nature that courts will recognize it as a legal cause of injury. n77 Many courts properly and emphatically reject the mere "but for" theory of causation as too simplistic to support liability. n78

n72 See Food Lion, Inc. v. Capital Cities/ABC Inc., 964 F. Supp. 956 (M.D.N.C. 1997) (damages from subsequent broadcast could not be recovered in action for fraud, trespass, and breach of duty of loyalty, because those actions did not proximately cause the damages).

n73 See Dombeck v. Chicago, Milwaukee, St. Paul & Pacific R.R., 129 N.W.2d 185, 192 (Wis. 1964) (excessive or unlawful speed is not causal merely because it places the actor at a particular place at a particular time); 4 HARPER, JAMES AND GRAY, THE LAW OF TORTS § 20.2 at 92 n.3 (1986); PROSSER AND KEETON ON TORTS § 41, at 264 & n.6 (1984).

n74 See Stewart v. Federated Dep't Stores, Inc., 234 Conn. 597, 662 A.2d 753, 758 (1995) Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 287 (1992) ("Life is too short to pursue every human act to its most remote consequence; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith.") (Scalia, J., concurring in judgment).

n75 See, e.g., Powers v. Latimer, 450 S.E.2d 295, 298 (Ga. App. 1994) (aircraft crash that damaged home was not proximate cause of homeowner's hand and knee injuries that occurred when homeowner tripped over fire hose upon returning home to retrieve clothing several hours after crash); Doe v. Boys Club of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995).

n76 See, e.g., U.S. Underwriters Ins. Inc. v. Liberty Mut. Ins. Co., 80 F.3d 90, 94 (3d Cir. 1996) ("It is a matter of hornbook law that every incidental factor that arguably contributes to an accident is not a 'but for' cause in the legal sense.").

n77 See, e.g., Hilgen v. Sumtall, 47 F.3d 695, 700 (5th Cir. 1995) (under Alabama law, element of causation may be broken into factual or "but for" causation and legal or proximate causation; "factual causation" asks whether
complained-of injury or damage would have occurred "but for" act or omission of party in question, while "proximate causation" or "legal causation" asks whether act or omission of party is of a nature that court of law will recognize it as legal cause of injury; *Bukowski v. Geo. A. Hormel & Co.*, 157 F.R.D. 50, 52 (S.D. Iowa 1994) (under Iowa law, proximate cause consists of two elements: party must be "but for," cause, and party must be substantial factor contributing to the accident); *Gerst v. Marshall*, 549 N.W.2d 810, 813 (Iowa 1996) ("causation" has two components: defendant's conduct must have in fact caused plaintiff's damages, and policy of law must require defendant to be legally responsible for the injury); *Ryland v. Liberty Lloyd's Ins. Co.*, 630 So. 2d 1289, 1302 (La. 1994) (negligence is only actionable when it is both cause in fact and legal cause of injury).


In *Kryzer v. Champlin American Legion*, n79 for example, the Minnesota Supreme Court held that the Champlin American Legion's allegedly illegal sale of alcohol to a woman was, as a matter of law, not the proximate cause of the broken wrist that she later sustained when a Legion employee forcibly ejected her from the premises after she became intoxicated. The complaint brought by her husband was therefore properly dismissed under Rule 12. n80 Thus, under the law of proximate cause as applied in Minnesota, two separate acts (one allegedly wrongful, one allegedly the cause of injury) cannot be consolidated into a single allegedly wrongful event resulting in injury, even when both acts are attributable to a single organization. n81

n79 494 N.W.2d 35 (Minn. 1992).

n80 494 N.W.2d at 37-38.

n81 Cf. *Muehlstedt v. City of Lino Lakes*, 473 N.W.2d 892, 896 (Minn. Ct. App.) (approving verdict form and jury instructions that "required the jury to distinguish the trespass to respondent's trees from trespass to respondent's real estate").

In the typical hidden-camera case, the use of the hidden camera is a separate act from the broadcast, and only the broadcast will have caused any of the alleged damages. n82 The court in *Dietemann v. Capital Cities/ABC Inc.*, 964 F. Supp. 956 (M.D.N.C. 1997) (damages from subsequent broadcast could not be recovered in action for fraud, trespass, and breach of duty of loyalty, because those actions did not proximately cause the damages); *Baugh v. CBS*, 828 F. Supp. 745, 756-57 (N.D. Cal. 1993) ("if [defendants] exceeded the scope of Baugh's consent, they did so by broadcasting the videotape, an act which occurred after they left Baugh's property, and which cannot support a trespass claim"); *Costlow v. Custiano*, 34 A.D.2d 196, 311 N.Y.S.2d 92, 97 (N.Y. App. Div., 4th Dept 1970) (dismissing trespass claim by parents of two children who suffocated in refrigerator at family's residence against journalist who arrived at the scene and photographed the premises and the deceased children; although a
trespasser may be liable for "physical harm done while on the land, irrespective of whether his conduct would be subject to liability were he not a trespasser," damages for injury to reputation and for emotional disturbance that plaintiffs alleged were not a "natural consequence of the trespass" and were "more properly allocated under other categories of liability"; cf. Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969) ("in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate"); Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993) ("a plaintiff fails to state a claim for invaded seclusion if the harm flows from publication rather than the intrusion"), cert. denied, 510 U.S. 1043 (1994); Frome v. Renner, 26 Media L. Rep. 1956 (C.D. Cal. 1997) (physician could not show proximate damages from alleged fraud of person who arranged for appointment as a patient and then criticized plaintiff's methods as "total nonsense" on television broadcast; even though plaintiff claimed that he would not have accepted the person as a patient if he had known his true identity, damages from the broadcast were not the proximate cause of the misrepresentation of identity; the use of a false identity did not affect the basic nature of the relationship, and the broadcast merely served as a forum through which the public could learn about the plaintiff's medical practices), Russell v. American Broadcasting Cos., 23 Media L. Rep. (BNA) 2428, 2434 (N.D. Ill. 1995) (no claim for intrusion where any harm was from publication of a secretly taped conversation and not from the taping itself).

n83 449 F.2d at 250.

n84 Dietemann was a federal diversity case, subject to California law. The question of the measure of plaintiff's damages for intrusion under California law remains an open one. See Shulman v. Group W Prod., Inc., 935 P.2d 469, 496 n.18 (Cal. 1998).

Furthermore, Dietemann's citation-free discussion of the First Amendment in connection with damages conflicts with subsequent decisions of the U.S. Supreme Court. These are not just garden-variety claims for trespass. Without a subsequent television broadcast, it is doubtful that plaintiffs in these cases would have known or cared about the "trespass," much less sued for damages. Because the circumstances of the trespass claim are intertwined with the facts of the broadcasts, courts must carefully scrutinize plaintiffs' trespass claims to ensure that they are not used to evade the First Amendment protection of the broadcasts themselves. n85 As the Seventh Circuit noted in Desnick, news reporting is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort. ... and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast. If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability), ... then the target has no legal remedy even if the investigatory tactics are surreptitious, confrontational, unscrupulous, and ungentlemanly. n86

n85 See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916-17 (1982) ("The presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.").

n86 44 F.3d at 1355 (citations omitted).

The First Amendment precludes plaintiffs from using their trespass claims to recover "broadcast or publication damages." In Cohen v. Cowles Media Co., n87 although the U.S. Supreme Court held that the First Amendment did not preclude plaintiff from pursuing a promissory estoppel claim against newspapers that had identified him as the confidential source of "political dirty trick" information, it stressed that the plaintiff was not "attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim . . . [and was] not seeking
damages for injury to his reputation or his state of mind.” n88 Rather, Cohen sought special economic damages, alleging that he lost his job solely because two newspapers truthfully disclosed his role as a confidential source of political information and his employer disapproved of that role. In contrast, the Court previously had held that plaintiffs seeking damages for injury to reputation or emotional distress based upon the publication or broadcast of information had to establish the elements of a defamation claim, including the constitutionally mandated requirements of proof of falsity and proof of fault. n89


n88 501 U.S. at 671.


When plaintiffs claim no damages apart from those allegedly resulting from the broadcasts, they effectively are seeking defamation-type damages, for which they must prove the elements of a defamation claim. n90 As the U.S. District Court for the District of Minnesota held in a case involving alleged trespass by hidden camera: “The strictures of a claim sounding in defamation would have little meaning if alleging a trespass could enable a Plaintiff to collect damages caused by a publication without proving the publication to be false.” n91 Damages from subsequent broadcasts should not be used to "enhance" damages under claims for trespass.


V. CONCLUSION

Trespass claims should not be used to suppress newsgathering and reporting. The present fad of using trespass claims against the news media deserves a shorter shelf life than pet rocks.