RECENT DEVELOPMENT

MEDIA ORGANIZATIONS' EXPOSURE TO LIABILITY UNDER THE FEDERAL WIRETAPPING ACT: THE *MEDICAL LABORATORY MANAGEMENT CONSULTANTS* CASE*

I. INTRODUCTION

Although reporters have used hidden cameras as early as 1928,[1] the recent proliferation of video and recording technology has made the use of surreptitious reporting methods common place among media entities.[2] Miniature video cameras and tape recorders have made it possible for reporters to obtain and preserve forms of information previously beyond the reach of investigative reporting and the general public.[3] While the Supreme Court has recognized that some protection for news-gathering is needed to prevent the freedom of the press from becoming "eviscerated,"[4] this protection has not been clearly defined by the Court.[5] As a result, media defendants have been held liable under several different theories for using intrusive news-gathering techniques.[6]

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1. *See* Steven Perry, *Hidden Cameras, New Technology, and the Law*, 14 COMM. LAW. 3, 1 (Fall 1996). Perry recounts how in 1928, a *New York Daily News* photographer strapped a small camera to his ankle and used it to snap a picture of an execution at the Sing Sing prison.

2. *See* Paul McMasters, *It Didn't Have to Come to This*, QUILL, Mar. 1997, at 18, 19. Journalists have used hidden cameras and recording devices to uncover illegal conditions at boarding institutions in Texas, day care facilities in Louisiana, and a veterans hospital in Ohio. *See id.* at 19. In addition, hidden cameras have helped expose security lapses at airports and discrimination by landlords and real estate agents. *See id.*

3. *See id.*

4. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

5. *See infra* note 74.

6. *See* Anderson v. WROC-TV, 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981) (trespass); Dietemann v. Time, Inc,. 449 F.2d 245 (9th Cir. 1971) (invasion of privacy); Davis v. Schuchat, 510 F.2d 731 (D.C.Cir. 1975) (slander committed during news-gathering).

In a recent highly publicized case, *Food Lion v. Capital Cities/ABC, Inc.*, a supermarket chain brought statutory and common law claims against the ABC news program *PrimeTime Live* for trespass, wiretapping, and several other tort claims. *See* 887 F. Supp. 811, 812 (M.D.N.C. 1995). Food Lion did not sue for defamation or libel, and never denied repackaging old meat and selling rat-gnawed cheese and bleach-washed fish. *See* Scott Andron, *Food Lion versus ABC*, QUILL, Mar. 1997,

Under Title III of the Federal Wiretapping Act,[7] an individual who tapes a conversation between herself and another person does not expose herself to liability even if she does not reveal her actions.[8] This exception, however, is subject to a limitation: it does not apply if the communication is intercepted for the purpose of committing a crime or tort.[9]

In *Medical Laboratory Management Consultants v. ABC*, Inc., the plaintiffs brought a federal wiretapping claim against the ABC television network for actions committed by employees of the *PrimeTime Live* news program.[10] The news program was investigating the frequency of errors in pap smear testing.[11] ABC employees posed as individuals interested in opening their own testing facilities and used hidden cameras to record conversations with the owner of the laboratory and others working in a medical testing facility.[12] The resulting broadcast concluded that overworked employees at some laboratories make frequent errors.[13]

The plaintiffs, owners of the laboratory, brought several claims against ABC, including defamation, trespass, intrusion upon private conversations, theft of trade secrets, and violation of Title III.[14] Relying on the legislative history of section 2511(2)(d) and *Desnick* v. *American Broadcasting Cos.*,[15] the defendants filed a motion to dismiss.[16] The United States District Court

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at 15. Nonetheless, the jury awarded Food Lion more than $5.5 million, even though they suffered only $1,402 in actual damages. *See* John Seigenthaler & David L. Hudson, Jr., *Going Undercover: The Public's Need to Know Should be More Important*, QUILL, Mar. 1997, at 17. The punitive damages award was later reduced to $315,000. *See* Greg Braxton, *Refocusing on Hidden-Camera Debate Television: KCBS series about restaurants' sanitary practices refuels discussion over the legality of how footage is obtained*, L.A. TIMES, Nov. 20, 1997, at F50.

7. 18 U.S.C. §§ 2510-2520 (1994).

8. *See* 18 U.S.C. § 2511(2)(d) (1994).

9. *See id.* § 2511(2)(d) states:

> It shall not be unlawful under this chapter 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 has given prior consent to such interception unless such communication is intercepted *for the purpose of committing any criminal or tortious act* in violation of the Constitution or laws of the United States or any State.

18 U.S.C. § 2511(2)(d) (1994) (emphasis added).

10. Medical Lab. Management Consultants v. ABC, Inc., 25 Media L. Rep. (BNA) 1724 (D.C. Ariz. 1997).

11. *See id.* at 1725.

12. *See id.* The recorded conversations included information concerning the plaintiff's testing practices and a discussion of the pap smear lab technicians' workloads. *See id.* at 1725.

13. *See PrimeTime Live* (ABC television broadcast, May 19, 1994). The broadcast included interviews with pap smear technicians and employees. These individuals claimed that the increasing number of errors in pap smear testing are largely attributable to oppressive work conditions. *See id.*

14. *See Medical Lab.*, 25 Media L. Rep. at 1725.

15. *See infra* notes 38-50 and accompanying text.

16. Defendant's Motion to Dismiss Seventh Claim for Relief (Eavesdropping) at 4, 5, Medical Lab. Management Consultants v. ABC, Inc., 25 Media L. Rep. (BNA) 1724 (D.C. Ariz. 1997) (No.

for the District of Arizona denied the motion, holding that plaintiffs need only to plead that defendants had specifically intended to commit torts to survive a motion to dismiss.[17]

II. THE FEDERAL WIRETAPPING ACT AND THE "ONE-PARTY CONSENT" EXCEPTION

In 1968, a federal wiretapping statute was enacted under Title III of the Omnibus Crime Control and Safe Streets Act.[18] Significant amendments to the Omnibus Crime Control and Safe Streets Act were adopted in 1986 (the current codification will hereinafter be referred to as "Title III").[19] Sections 2511 and 2520 of Title III create criminal and civil liability for those who intentionally intercept[20] a wire,[21] oral,[22] or electronic[23] communication.[24]

95-0294).

17. *See Medical Lab.*, 25 Media L. Rep. at 1727.

18. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520 (1968). Many states have adopted wiretap statutes modeled after the federal act. *See, e.g.*, CAL. PENAL CODE §§ 631-32 (West Supp. 1990); FLA. STAT. ANN. §§ 934.02-.28 (West Supp. 1990); GA. CODE ANN. § 16-11-62 (1988); 720 ILL. COMP. STAT. 5/14-9 (West 1993); MD. CODE ANN., CTS. & JUD. PROC. §§ 10-402 to 10-414 (1989); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1990); MICH. COMP. LAWS ANN. §§ 750.539(a)-539(i) (West 1968 & Supp. 1990); MO. REV. STAT. §§ 542.400-542.424 (1989); MONT. CODE ANN. § 45-8-213 (1989); N.H. REV. STAT. ANN. §§ 570-A:1-:11 (1986 & Supp. 1990); OR. REV. STAT. §§ 165.535-.545 (1989); 18 PA. CONS. STAT. ANN. §§ 5703-28 (Purdon Supp. 1988); VA. CODE §§ 19.2-61 to 19.2-70.3 (1983 & Supp. 1990); WASH. REV. CODE ANN. §§ 9.73.030-.250 (1988 & Supp. 1990).

The federal act's legislative history indicates that these state statutes are preempted to the extent they are less stringent than the federal act. More restrictive state laws, however, are not preempted. *See* James R. Wyrsch and Anthony P. Nugent, Jr., *Missouri's New Wiretap Law*, 48 J. MO. BAR. 21 (1992) (citing J. Carr, THE LAW OF ELECTRONIC SURVEILLANCE (1977)).

In addition to the growing number of state statutes covering wiretapping, § 605 of the Federal Communications Act and several Federal Communications Commission regulations affect this area of law. See 47 U.S.C. § 605 (1994) (this provision is now § 705(a) of the Federal Communications Act but still codified at 47 U.S.C. § 605); *see also* Lauritz S. Helland, *Section 705(a) in the Modern Communications World: A Response to Di Geronimo*, 40 FED. COM. L.J. 115 (1988);

19. S. REP. NO. 99-541, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3571.

20. Interception includes the act of taping or recording. It is defined by Title III 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." 18 U.S.C. § 2510(4) (1994).

21. "Wire communication" is defined by the statute 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." 18 U.S.C. § 2510(1), (10) (1994). This definition includes the transmitted portion of a cordless telephone conversation. See 18 U.S.C. § 2510(1) (1994) (eliminating a 1986 exclusion of cordless telephone conversations); *see also* H.R. REP. NO. 103-827, at 10, 17-18, 30 (1994) (stating the "protections of the Electronic Communications Privacy Act of 1986 are extended to cordless phones"), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3490; *see also* 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).

22. Only certain oral communications are covered by Title III. The statute defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such

Title III also contains an important exception for "one-party consent" of the recording. Under section 2511(2)(d), it is legal to intercept a communication if the person doing so is also a party to the communication or has the consent of one of the parties.[25] For example, if an individual tapes a conversation between herself and another person, she does not expose herself to liability under Title III.[26] This exception, however, does not apply if the "communication is intercepted for the purpose of committing any criminal or tortuous act. . . ."[27]

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communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2) (1994). Accordingly, unlike a wire communication, the participants in an oral communication must have a justified expectation of privacy before it is covered by Title III. *See* Holman v. Central Ark. Broad. Co., 610 F.2d 542, 544-45 (8th Cir. 1979) (affirming summary judgment for defendant radio station when recording was of plaintiff's outburst in jail because there was no reasonable expectation of privacy); *see also* Angel v. Williams, 12 F.3d 786, 791 (8th Cir. 1993) (holding that police officers whose conversations were recorded during an incident at a city jail did not have an objectively reasonable expectation of privacy). Determination of this issue involves an inquiry into "whether the defendant manifested a subjective expectation of privacy, and . . . if so, whether society is prepared to recognize that expectation as reasonable." United States v. Clark, 22 F.3d 799, 801 (8th Cir. 1994).

23. Coverage of "electronic communications" was added in 1986. Electronic communications include cellular telephones, electronic pagers, electronic mail, and electronic bulletin boards. *See* 18 U.S.C. § 2511(1)(a) (1994); *see also* 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 (3rd Cir. 1990) (noting that Congress intended the 1986 amendment to cover cellular communications).

24. 18 U.S.C. §§ 2511, 2520 (1994). Section 2511 specifically covers any individual who:

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; or
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication . . .

18 U.S.C. §§ 2511(1)(a), (b) (1994).

Title III also provides for recovery of damages in civil actions brought for violation of 18 U.S.C. § 2511. Under § 2520 of Title III, courts "may" award the plaintiff the larger of (1) the actual damages suffered along with the profits made by the defendant, or (2) the greater of $100 per each day of violation or $10,000. *See* 18 U.S.C. § 2520 (1994).

Before passage of the 1986 amendments to Title III, § 2520 stated that plaintiffs "shall . . . be entitled to recover" damages. *See* 18 U.S.C. § 2520(a) (1982). The amendments substituted "may" for "shall," and since 1986 courts have almost uniformly held that trial judges have discretion in awarding damages. *See* Reynolds v. Spears, 93 F.3d 428, 435 (8th Cir. 1992) (saying judges have discretion to decline to award statutory damages under § 2520(c)(2)(B)); Nalley v. Nalley, 53 F.3d 649, 653-54 (4th Cir. 1995) (refusing to award statutory damages because the plaintiff suffered no financial loss and the tape revealed that defendant's husband was having an affair); Shaver v. Shaver, 799 F. Supp. 576, 580 (E.D.N.C. 1992) (holding that there is no useful purpose in imposing a financial penalty).

25. *See* 18 U.S.C. § 2511(2)(d) (1994).

26. This example applies with equal force to the consent situation. Thus, if an individual obtains the consent of one or more parties to a conversation, she does not expose herself to liability even if none of the other participants consent or have knowledge of the recording. *See* Berger v. CNN, Inc., 24 Media L. Rep. 1757, 1760 (D.C. Mont. 1996) ("The statute specifically provides that it is not unlawful to intercept oral communication where one of the parties has given prior consent.").

27. 18 U.S.C. § 2511(2)(d) (1994). A similar exception exists for an interception committed by an individual acting under "color of law":

III. *BODDIE V. AMERICAN BROADCASTING COMPANIES* AND LEGISLATIVE HISTORY

An analysis of the legislative history of section 2511(2)(d) is essential to understanding its proper reach. Congress amended section 2511(2)(d) in 1986, largely because of the Sixth Circuit Court of Appeals decision, *Boddie v. American Broadcasting Cos.*[28] As originally enacted, the limitation to the "one-party consent" exception applied when the actor intercepted the communication for criminal, tortious, or *injurious* purposes.[29] In *Boddie,* a reporter from the *20/20* television program secretly recorded his conversation with an alleged participant in a judicial scandal.[30] The participant subsequently brought a Title III claim and several tort claims.[31] Although a jury found for the defendant on all the tort claims, the plaintiff argued that the recording could still amount to an "injurious act."[32] The Sixth Circuit Court of Appeals agreed and remanded the case for determination of whether the

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> It shall not be unlawful under this chapter for a *person acting under color of law* to intercept a wire, oral, or electronic communication, where such a person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c) (1994) (emphasis added). This provision allows federal and state officials to record the communications of informants and other individuals who cooperate with government agencies. *See* Thomas v. Pearl, 998 F.2d 447, 451 (7th Cir. 1993) (holding that there must be "some reasonable and logical connection between the government worker's job description and the eavesdropping" before this exception can apply). For the "color of law" exception, there is no limitation concerning interception for the purpose of committing a criminal or tortuous act. 18 U.S.C. § 2511(2)(c). *See generally* United States v. Rich, 518 F.2d 980, 985 (8th Cir. 1975) (holding Drug Enforcement Agency's recording of informant's conversation is covered by § 2511(2)(c) when informant consents).

In *Benford v. American Broadcasting Cos.,* the defendant news organization ("ABC") asserted the "color of law" exception as a defense to a Title III claim. *See* 502 F. Supp. 1159 (D. Md. 1980). In *Benford,* a congressional committee allowed an ABC reporter to accompany committee staff members during their investigations and secretly tape certain meetings. *See id.* at 1160-61. The court explained that in order for the exception to apply, "ABC would at least have to show that its only purpose in taping the meeting was to aid the congressional subcommittee." *Id.* at 1162; *see also* REX S. HEINKE, MEDIA LAW 207 (1994). Because ABC could not make such a showing, the court held that § 2511(2)(d) did not apply. *See Benford,* 502 F. Supp. at 1162. Accordingly, this exception appears narrow and unlikely to provide protection for routine undercover reporting.

28. 731 F.2d 333 (6th Cir. 1984).

29. *See* 18 U.S.C. § 2511(2)(d) (1968).

30. *See Boddie,* 731 F.2d at 335. The news program was inquiring into allegations that an Ohio judge "regularly granted leniency to criminal defendants in exchange for sex." *Id.* at 335. The recording that gave rise to the suit concerned an exchange with Sandra Boddie, an alleged participant in the scandal. *See id.*

31. *See id.* Boddie brought suit against Geraldo Rivera, the correspondent for the report, Charles C. Thompson, the executive producer of the report, and ABC. *See id.*

32. *Id.* at 336. Boddie alleged in the third count of her complaint that the "defendant's purpose was 'to cause the Plaintiff insult and injury.'" *Id.* at 338.

recording was injurious.[33]

The legislators thought that the Sixth Circuit's interpretation of "injurious" was overly broad and would allow frivolous suits against the media and other defendants.[34] Therefore, in response to *Boddie*, Congress amended Title III and removed the term "injurious" from section 2511(2)(d) in 1986.[35] The legislators also condemned "attempts by parties to chill the exercise of First Amendment rights through the use of civil remedies" under Title III.[36] They stressed that they did not intend for section 2511(2)(d) to become "a stumbling block in the path" of journalists who record their own conversations.[37]

IV. POST-1986 CASE LAW APPLYING SECTION 2511(2)(D)

In order to understand how Title III has affected the media after the 1986 amendments, it is necessary to examine recent cases dealing with section 2511(2)(d). The competing interests involved in undercover reporting were addressed in a well-reasoned Seventh Circuit opinion, *Desnick v. American Broadcasting Cos.*[38] *Desnick* involved investigative reporting by *PrimeTime Live* into a chain of cataract surgery clinics called Desnick Eye Centers.[39] The program sent seven of its employees with hidden cameras into one Desnick Eye Center to pose as patients and record what occurred during examinations conducted by Eye Center doctors.[40]

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33. *See id.* at 339. The court explained that the statute does not define "injurious act" and that determination of whether the defendant's purpose was injurious "raises questions of fact for the jury." *Id.* at 338; *see also* Brown v. American Broad. Cos., 704 F.2d 1296 (4th Cir. 1983) (ABC news employees secretly taped staged meeting of congressional investigators and an insurance salesman; court remanded case for determination of whether reporter had an injurious purpose); W.C.H. of Waverly v. Meredith Corp., 13 Media L. Rep. 1648, 1650 (W.D. Mo. 1986) (defendant's motion for summary judgment denied because the facts alleged by plaintiff could not prove that television station acted with an injurious purpose).

34. *See* S. REP. NO. 99-541, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3571.

35. *See id.* In the Senate Report that accompanied the bill amending § 2511(2)(d), the legislators referred to *Boddie* as an example of the "most troubling" misconstruction of Title III by federal courts. *Id.*

36. *Id.*

37. *Id.* In the same passage, the report stated that suits under Title III were improper "if the interception was made in the ordinary course of responsible news-gathering activities" and that "[s]uch a threat is inconsistent with the guarantees of the First Amendment." *Id.*

38. 44 F.3d 1345 (7th Cir. 1995).

39. *See id.* at 1347-48. *PrimeTime Live* was investigating whether doctors would recommend surgery for Medicare patients who did not need surgery simply because Medicare would pay for the procedure. *See id.*

40. *See id.* Doctors recommended surgery for four out of five "patients" covered by Medicare. The two individuals not eligible for Medicare "were told they didn't need cataract surgery." *Id.* at 1348.

The owner of the chain of eye clinics and the two doctors who conducted the examinations on the test patients brought claims for defamation, trespass, invasion of privacy, federal and state wiretapping violations, and fraud.[41] The district court dismissed all of the claims and the plaintiffs appealed to the Seventh Circuit Court of Appeals.[42] In an opinion authored by Judge Posner, the Seventh Circuit reversed the defamation claim but affirmed the dismissal of all other claims.[43]

In dealing with the claims connected to news-gathering such as trespass, invasion of privacy, and wiretapping, the court explained that, in a number of contexts, otherwise fraudulent or tortious entries into private property are not considered illegal because they are necessary or simply harmless.[44] Examples included the restaurant critic who pretends to be a regular patron, and a customer in a retail store who claims to be interested in certain merchandise but is really only browsing.[45] The court noted that these examples can be contrasted with situations where a competitor gains entry into a business firm's private premises in an effort to steal trade secrets.[46] According to the court, the key to differentiating between these situations is examining the harm experienced by the plaintiff.[47] Applying this approach to the facts, the court stated that there was no theft of trade secrets, "no disruption of decorum, [or] peace and quiet," and no recording of private conversations (because the individual doing the recording was a participant).[48]

After noting that the recording caused little or no harm, the court emphasized the need for First Amendment protection of news-gathering.[49] Posner explained that the methods involved in investigative reporting, even though often offensive and sometimes defamatory, "[are] entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation" and are "entitled to them regardless of the name of the tort."[50] While the court did not state it explicitly, this approach appeared to be a balancing test, weighing the harm caused and the First Amendment

41. *See id.* at 1349, 1351.
42. Desnick v. Capital Cities/ABC, Inc. 851 F. Supp. 303 (N.D. Ill. 1994).
43. *See Desnick*, 44 F.3d at 1351, 1352-55.
44. *See id.* at 1351.
45. *See id.*
46. *See id.* at 1353.
47. *See id.*
48. *Id.* The court also noted that there was no theft or distracting demonstrations involved. *See id.*
49. *See id.* at 1355.
50. *Id.* The court also stated: "Today's 'tabloid' style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market." *Id.* (citation omitted).

protection of news-gathering.

In *Russell v. American Broadcasting Co., PrimeTime Live* sent an ABC employee to secure a job at a retail grocery store.[51] The employee used a hidden camera and microphone to record conversations with her manager concerning the store's seafood selling techniques.[52] These conversation were eventually broadcast during the *PrimeTime Live* program.[53]

The manager then brought an action for violation of Title III, invasion of privacy, and intrusion upon seclusion.[54] The court relied upon *Desnick* in rejecting the plaintiff's claim that the recording was done for tortious purposes.[55] According to the court, "*Desnick* instructs that the critical question under section 2511(2)(d) is *why* the communication was intercepted, not *how* the recording was ultimately used."[56] Therefore, key to their determination was that the plaintiff did not "claim that defendants intended to commit . . . torts when they made the recordings."[57]

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51. 23 Media L. Rep. (BNA) 2428, 2429 (N.D. Ill. 1995).

52. *See id.* During these conversations the manager told the employee "always to tell customers that the fish is today fresh" and that "fish too old to be sold as 'fresh' can still be cooked and then sold." *Id.*

53. *See id.*

54. *See id.* at 2429-29. Intrusion upon seclusion is one of the four subcategories of the right to privacy. The other subcategories include a right of publicity, unreasonable publicity of a person's private life, and false light privacy. *See* DONALD E. LIVELY, MODERN COMMUNICATIONS LAW 114 (1991). The tort of "intrusion upon seclusion" or "intrusion" concerns the "invasion of a legally protected zone of privacy, such as a home or office." *Id.* at 117. While the elements of intrusion vary among jurisdictions, they usually involve an effort to obtain private subject matter "through some method objectionable to the reasonable man." Dietemann v. Time, Inc., 449 F.2d 245, 247 (9th Cir. 1971) (reporter gained access to home using "subterfuge"); Brown v. Mullarkery, 632 S.W.2d 507, 510 (Mo. Ct. App. 1982) (setting out elements of intrusion claim); *see also* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117, at 849-69 (5th ed. 1984).

55. *See Russell*, 23 Media L. Rep. at 2431; *see also* Berger v. CNN, Inc., 24 Media L. Rep. (BNA) 1757, 1760 (D.C. Mont. 1996) (no Title III liability because "recordings were made for the purpose of producing a news story and for the defendants' commercial gain.").

56. *Russell*, 23 Media L. Rep. at 2431.

57. *Id.* The plaintiff's complaint stated that the purpose of the recording was to "expose sanitation problems in the commercial fish industry." *Id.*; *see also* Copeland v. Hubbard Broad. 526 N.W.2d 402 (Minn. Ct. App. 1995). In *Copeland*, an employee of a local Minnesota television news program accompanied a veterinarian on a visit to a pet owner's home and used a hidden camera to film the encounter. *See id.* at 404. After the report was broadcast showing the plaintiff's home, they brought an action for trespass. *See id.* They attempted to amend their complaint to add a wiretapping claim but were denied and appealed. *See id.*

In refusing to allow the plaintiffs to add a wiretapping claim, the court noted that the plaintiffs failed to meet their burden of showing "that the communication was intercepted for criminal or tortious purposes." *Id.* at 406. In addition, the court rejected the argument that because the recording may have been part of a trespass, it was done for the purpose of committing a tortious act. *See id.* Finally, the court explained that "[t]he evidence is undisputed that KSTP intercepted the communication for commercial purposes and not for the purpose of committing trespass." *Id.*

V. A NARROW APPROACH TO THE "ONE-PARTY CONSENT" EXCEPTION: THE *MEDICAL LABORATORY MANAGEMENT CONSULTANTS* DECISION

A. The Court's Analysis

In *Medical Laboratory Management Consultants v. ABC*,[58] the district court employed a strict plain language reading of section 2511(2)(d) and a narrow interpretation of *Desnick*. The only issue, according to the court, was whether the plaintiff's claim that the defendants "specifically intended" to commit tortious acts constituted a claim of tortious "purpose."[59]

The court looked to *Black's Law Dictionary* in determining that "specifically intended" has essentially the same meaning as "for the purpose of" committing tortious acts.[60] The court explained:

> [U]nder a plain language interpretation, Plaintiffs' allegation that Defendants "specifically intended" to commit torts and injurious acts could be construed to satisfy the . . . requirement that the defendant intercept communications "for the purpose of committing criminal or tortuous acts."[61]

According to the court, because nothing more is called for in the statute, the plaintiffs met their burden by simply stating that *PrimeTime Live* "intended to commit torts" including invasion of privacy and theft of trade secrets.[62]

The court interpreted *Desnick* to support this holding. Specifically, the court stated that if any of the harms mentioned in *Desnick* were present in the case at bar, *Desnick* is distinguishable.[63] The *Medical Laboratory Management Consultants* court said that *Desnick* actually favored the plaintiffs because the *Desnick* court mentioned theft of trade secrets as a potential harm.[64] The court did not address the language in *Desnick*

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58. 25 Media L. Rep. (BNA) 1724 (D.C. Ariz. 1997).

59. *Id.* at 1725-26.

60. *Id.* at 1727.

61. *Id.* (emphasis omitted) According to the court:

> *Black's Law Dictionary* defines "purposely" as an act that is "willed, is the product of conscious design, *intent* or plan that is to be done, and is done with awareness of probable consequences." "Specific intent" is defined as the "mental *purpose* to accomplish an act prohibited by law." Thus, according to *Black's Law Dictionary*, the phrases of "specific intent" and "for the purpose of" may reasonably interpreted as synonymous."

Id. at 1727 (citing *Black's Law Dictionary* 1236, 1399 (6th ed. 1990)) (citation omitted).

62. *Medical Lab.*, 25 Media L. Rep. at 1727-28.

63. *See id.* at 1727.

64. *See id.* In distinguishing *Desnick*, the court also explained that the *Desnick* plaintiffs had conceded that ABC's purpose in making the recording "was to determine whether or not" the

concerning the First Amendment protection that must be afforded to news-gathering.[65] It simply stated that a plain language reading of section 2511(2)(d) necessitates a conclusion that regardless of whether there is a legitimate news-gathering purpose, the existence of any tortious purpose negates the one-party consent exception.[66]

B. Critique of the Court's Analysis

The narrow analysis of section 2511(2)(d) in the *Medical Laboratory Management Consultants* decision cannot be reconciled with the legislative intent demonstrated by the 1986 amendments to Title III and the First Amendment balancing necessary to protect news-gathering. The major flaws in the *Medical Laboratory Management Consultants* decision result from what the court did not discuss in its opinion. The court did not refer to the Senate Report language that accompanied passage of the 1986 amendments to Title III and did not consider the First Amendment implications of the news-gathering activities at issue in the case.

The Senate Report accompanying the 1986 amendments underscored Congress's intent to provide protection for legitimate news-gathering techniques. Although the amendment only involved removal of the word "injurious" from section 2511(2)(d), the change indicated a broader message. The legislators stressed the importance of permitting journalists to tape their own conversations during news-gathering efforts.[67] They explained that "if the interception was made in the ordinary course of responsible news-gathering activities" it deserved legal protection, and that "[s]uch a threat [of misuse of section 2511(2)(d)] is inconsistent with the guarantees of the First Amendment."[68]

Despite Congress's efforts, plaintiffs have circumvented the enhanced protection of news-gathering under Title III.[69] *Desnick* appeared to narrow the ability of a plaintiff to bring a Title III claim when there are legitimate news-gathering purposes. The *Medical Laboratory Management Consultant* plaintiffs, however, survived a motion to dismiss merely by adding a claim

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physicians "would recommend unnecessary medical treatment to patients, not to commit a tort or crime." *Id.* at 1726. Because the *Medical Lab.* plaintiffs had not made this type of concession, the court concluded that *Desnick* was not controlling. *See id.* at 1726-27.

65. *See id.* at 1724-1728.

66. *See id.* at 1728.

67. *See supra* note 38 and accompanying text.

68. S. REP. NO. 99-541, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3571.

69. *See, e.g., Medical Lab.*, 25 Media L. Rep. at 1726-28.

that ABC reporters made recordings to steal trade secrets.[70] According to the *Medical Laboratory Management Consultants* decision, even if the overriding purpose of the news-gathering is legitimate, any minor tortious purpose, such as trespass, imposes liability on the news organization.[71] This trend in Title III jurisprudence is wholly inconsistent with the congressional intent embodied in the Senate Report accompanying the 1986 amendment to section 2511(2)(d). The report language and change in the statute demonstrates Congress's belief that as long as the predominate purpose is legitimate, some minor evidence of tortuous or criminal purposes should not create Title III liability.[72]

In addition to ignoring the legislative history, the *Medical Laboratory Management Consultants* decision failed to address the First Amendment protection that must be afforded to news-gathering. Although the *Desnick* court did discuss the First Amendment and appeared to apply a de facto balancing test,[73] neither decision gave news-gathering its proper First Amendment consideration. First Amendment protection of news-gathering should exist and is necessary to safeguard a vigorous debate on crucial issues of public interest.

A growing number of lower courts and commentators have correctly concluded that despite the apparent view of the current Supreme Court,[74] First Amendment protection of publication must be extended to news-gathering.[75] In *New York Times v. Sullivan*, the Supreme Court stressed the "profound national commitment to the principle that debate on public issues

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70. *See id.* at 1727.

71. See id. at 1728. The court stated:

> The statute does not provide that secretly recording a conversation would not be illegal if it were motivated simultaneously by a legitimate objective and a criminal purpose. If Congress intended the statute to mean for the "sole" purpose of committing a crime or tort, it would have included the word "sole".

Id. (emphasis added).

72. *See supra* note 38 and accompanying text.

73. Desnick v. American Broad. Cos., 44 F.3d at 1345, 1355 (7th Cir. 1995).

74. The Supreme Court has focused First Amendment protections on publication and dissemination rather than news-gathering. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); *see also* Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 3 (1982).

75. It is important to note for practitioners that presently this is clearly the minority view. *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (damages allowed for publication after reporters promised not to print); Branzburg v. Hayes, 408 U.S. 665 (1972); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 192-93 (1946) (media not immune from the Fair Labor Standards Act); Associated Press v. United States, 326 U.S. 1 (1945); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) ("[P]ublisher of a newspaper has no special immunity from the application of general laws" and "has no special privilege to invade the rights and liberties of others."; media must obey National Labor Relations Act); Dietemann v. Time, Inc. 449 F.2d 245 (9th Cir. 1971) (no First Amendment protection for invasion of privacy committed during news-gathering).

should be uninhibited, robust, and wide-open."[76] This commitment provided the basis for the First Amendment protection afforded to publication.[77] Simple logic demands that protection for publication be extended to news-gathering.[78] It is important to note that the First Amendment does not just provide "freedom of speech."[79] The First Amendment expressly covers "freedom of speech" and freedom "of the press."[80] The Supreme Court's sole emphasis on publication, however, does not give effect to a meaningful definition of freedom of the press. In In re *Mack*, a state court judge explained that "[f]reedom of the press means freedom to gather news, write it, publish it, and circulate it."[81] This definition of "freedom of the press" recognizes the crucial link between news-gathering and publication.[82] In *Allen v. Combined Communications*, a Colorado district court also recognized the connection.[83] In *Allen*, the court dismissed claims of trespass

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76. *Sullivan*, 376 U.S. 254, 270 (1964).

77. *See id.*

78. In *Cohen*, the Court asserted it is "beyond dispute" that "the publisher of a newspaper has no special immunity from the application of general laws" and "no special privilege to invade the liberties of others." 501 U.S. at 670. While this statement may seem reasonable and persuasive on its face, it is neither accurate nor consistent with other First Amendment protections.

In *Sullivan*, the Court held that public officials cannot recover damages for a defamatory falsehood relating to official conduct unless they prove the statement was published with "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280. Thus, the *Sullivan* Court required a heightened standard to effectuate the "freedom of the press" clause in the First Amendment. In *Gertz v. Robert Welch, Inc.*, the Court went further and held that the First Amendment protection of the press prevents states from imposing a strict liability standard in *any* libel action as long as the suit involves a matter of "public interest." *See* 418 U.S. 323 (1974). Finally, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that the defamation analysis must balance "the State's interest in compensating [plaintiffs] for injury to their reputation against the First Amendment interest in protecting this type of expression." 472 U.S. 749, 757 (1985). The press does receive special treatment when the torts of defamation and libel are involved and this treatment should be extended to news-gathering.

79. U.S. CONST. amend. I.

80. *Id.*

81. *In re* Mack, 126 A.2d 679, 689 (Pa. 1956).

82. In a recent article that proposed some level of constitutional protection for news-gathering, Professor Paul A. Lebel summarized the essential connection between news-gathering and publication. *See* Paul A. Lebel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious News-gathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996). Lebel explained:

> [D]ebate about public issues should be constantly reinvigorated with new information and fresh ideas. To deter the acquisition of new information by the threat of civil or criminal liability raises the same constitutional problem as deterrence of the publication of information that may turn out to be false and defamatory or invasive of privacy . . . Because the inventory of the storehouse of facts that inform the "speech that matters" must continually be replenished and expanded, . . . how that process occurs cannot plausibly or responsibly be treated as a matter of constitutional indifference.

Id. at 1152.

83. 7 Media L. Rep. 2417 (BNA) (Dist. Colo. 1981). In *Allen*, a television news reporter gained

brought against a reporter and stated that "it would seem prudent to take cognizance of the changing state of the newsman's art and open the umbrella of the First Amendment to all these activities which are necessary to the publication of the news story."[84]

VI. PROPOSAL

In order to limit the reach of Title III to its proper scope and insulate media defendants from frivolous suits, two steps must be taken. First, a heightened standard of pleading is needed for Title III claims against the media. Under one possible standard, a plaintiff bringing a Title III claim against a media organization whose reporter otherwise qualifies for the "one-party consent" exception, must *plead particularized facts that could reasonably overcome a presumption that the predominate purpose of the interception was legitimate news-gathering.*[85]

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access to a livery stable without consent of the owners of the property. *See id.* at 2417. The plaintiffs brought a claim for trespass and the television station countered with a motion to dismiss. *See id.*

84. *Id.* at 2419. The *Allen* court noted that the Supreme Court had not recognized a First Amendment privilege for news-gathering. *See id.* at 2418-19. However, the Colorado District Court did not end its inquiry with the prevailing view. *See id.* at 2419. Instead, the court explained that the "problem . . . has been the tendency of courts to distinguish between news gathering and news publication." *See id.* at 2419. According to the court, these distinctions "blur and disappear" when analyzed closely. *Id.* In order to rectify this problem, the court employed a two part test. *See id.* at 2420. Under the test, the state must first demonstrate it is "acting pursuant to a compelling interest." *Id.* Then the court will examine whether the "state's activity bears a substantial relationship to that interest." *Id.* Such a test was deemed necessary to prevent a "chilling effect" from occurring "whenever there is a substantial risk of liability for activities necessary to acquisition of the story." *Id.*

A similar approach was followed by a dissenting Oklahoma Criminal Appeals Court judge in *Stahl v. State*, 665 P.2d 839 (Okla. Crim. App.1983) (Brett, J., dissenting). *Stahl* involved news coverage of a demonstration at a nuclear power plant site in Rogers County, Oklahoma. *See id.* at 840. While the plant was being built, the grounds were closed to members of the press and the public with the exception of a public viewing area near the center of the site. *See id.* at 843. However, during excavation of the site, 339 demonstrators crossed the fence and entered a restricted area. *See id.* Nine reporters followed the demonstrators "to observe and report the events that transpired." *Id.* The state of Oklahoma brought criminal trespass charges against many of the demonstrators including the nine reporters. *See id.* at 839-40.

In a brief opinion, the court's majority concluded that the First Amendment does not apply to news-gathering. *See id.* at 841-42. In a dissenting opinion, however, Judge Brett argued that the Oklahoma Constitution's Freedom of the Press Clause provides protection for news-gathering. *See id.* at 842-49. Judge Brett noted that many federal courts had applied a balancing test when facing cases involving the press' publication rights. *See id.* at 846. Following this interpretation and applying it to Oklahoma law, Judge Brett stated:

> I would hold that our State Constitution gives protection for the rights of the press to reasonable access to gather news and any restraint on this right, including but not limited to enforcement of a criminal trespass statute, requires that the State show a relatively greater consideration that must be exercised in the public interest. A balancing of these opposing interests is thus mandated.

Second, an express First Amendment balancing test must be applied in cases where wiretapping claims are brought against media defendants under section 2511(2)(d). Expanding upon the *Desnick* decision, such a test would balance the importance of the news-gathering activity and the type of restraint used against the governmental interest that tends to infringe upon First Amendment rights.[86] The heightened pleading standard and balancing test would provide a compromise between the preservation of liability for real tortious or criminal acts committed under the guise of news-gathering and the protection of legitimate news-gathering that should not be chilled by improper use of wiretapping laws.[87]

V. CONCLUSION

The preservation of a "robust," "wide-open"[88] national debate is simply too important to allow narrow approaches to wiretapping statutes such as the one employed in the *Medical Laboratory Management Consultants* decision. On the other hand, taping or recording for the express purpose of committing crimes or torts cannot be tolerated. The heightened standard and balancing

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Id. Applying a balancing test, Judge Brett concluded that the criminal trespass convictions should be reversed. *See id.* at 849.

85. *See e.g.*, Aronson v. Lewis, 473 A.2d 805 (Del. 1984). In *Aronson*, the Delaware Supreme Court approved a heightened pleading standard in the context of shareholder derivative suits. *See id.* at 814. Under Delaware corporation law, in order for a shareholder to initiate a derivative suit, she must demand that the board of directors file the action on behalf of the corporation. *See* CHARLES R. O'KELLEY, JR. & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 461 (2d ed. 1996). If the board refuses to sue, the shareholder may not do so on her own. *See id.* This structure makes it difficult for a shareholder to bring derivative litigation, as most boards of directors are reluctant to file suit. *See id.* at 461-62. The only way for a shareholder to avoid making demand is to claim that it would be futile to do so. *See id.* In *Aronson*, the court held that demand will not be considered futile unless the plaintiff shareholder can plead particularized facts which create a reasonable doubt that "(1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814.

The *Allen* court adopted a heightened pleading standard for trespass cases involving news-gathering. The standard called for the plaintiff bringing a trespass suit related to news-gathering to plead two matters in addition to the elements of a trespass: "1) that the reporter knew that he/she was committing a trespass or committed the trespass in reckless disregard of that fact; or 2) that the Plaintiff suffered damage as a result of the trespass." *Allen*, 7 Media L. Rep. at 2420.

86. *See generally Allen*, 7 Media L. Rep. at 2417-21.

87. This proposal is not designed to immunize the press from Title III liability. If a media organization is actually trying to use its investigative reporting to steal trade secrets or commit other serious crimes or torts, a plaintiff can bring a claim by producing real evidence at the outset. The First Amendment protection due to news-gathering, however, should prevent fishing expeditions brought on by discovery and other phases of pre-trial litigation. In addition, the balancing test will allow careful consideration of both the First Amendment and important state law tort rights.

88. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

test would ensure that the public is served by effective reporting into areas of public interest and protect legitimate claims brought by plaintiffs.

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